AB 1950: LENGTH OF FELONY AND MISDEMEANOR PROBATION

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TABLE OF CONTENTS

Assembly Bill No. 1950 (2019-2020 Reg. Sess.) (AB 1950) amends Penal Code section 1203a[1] to set the maximum term of probation for most misdemeanor crimes at one year. It also amends section 1203.1 to set the maximum term of probation for most felonies at two years.

I. MISDEMEANOR OFFENSES

Prior to the enactment of AB 1950, section 1203a specified the maximum term of probation for a misdemeanor offense was three years, but if the maximum sentence was greater than three years, it could be up to the maximum term of imprisonment. Effective January 1, 2021, section 1203a, subdivision (a), provides, in relevant part: "The court may suspend the imposition or execution of the sentence and make and enforce the terms of probation for a period not to exceed one year." The amendment deleted the court's authority to set the term of probation based on the maximum sentence and set the maximum term at one year.

Exceptions to new limit

Section 1203a, subdivision (b), provides: "The one-year probation limit in subdivision (a) shall not apply to any offense that includes specific probation lengths within its provisions." The length can be expressed as a "maximum" or "minimum" term. Appendix I is a list of the crimes that specify a length of probation if the court grants probation. Section 273a, child endangerment, for example, specifies a person convicted of the crime who is granted probation is subject to a "mandatory minimum period of probation of 48 months." (§ 273a, subd. (c)(1).) Except for certain DUI offenses,[2] all the statutes listed in Appendix I express the term of probation by reference to a "minimum term" without designating a specific maximum term. Prior to the enactment of AB 1950, section 1203a specified the maximum term was three years, or if the maximum sentence was longer than three years, up to the maximum sentence. Since the Legislature expressly repealed a calculation of the maximum term of probation based on the maximum sentence and given the overarching intent of the Legislature to reduce the length of probation, it is unlikely the court has the authority to fix the length of probation for an excluded offense based on the maximum sentence.[3] Where the excluded crime has no designated maximum term of probation, likely the proper maximum term is the minimum term of probation specified in the statute to the extent it exceeds the one-year limit now imposed by

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] Vehicle Code section 23600, subdivision (b)(1), specifies the term of probation in most DUI cases shall be not less than three nor more than five years. (See discussion of DUI offenses, *infra*.)

[3] Compare the treatment of misdemeanor crimes where the "maximum sentence" authorization was completely removed from section 1203a, with the treatment of felonies where the use of the "maximum sentence" still is permitted for certain crimes under section 1203.1(l)(1), *infra*.

section 1203a, subdivision (a). Accordingly, as noted in Appendix I, for most excluded misdemeanor offenses, the maximum term of probation is three years, which is also the minimum term. If the crime specifies a maximum term of probation, as in the case of certain DUI offenses, the maximum term would be as designated in the statute.

Nothing in the amended statute prohibits the court from initially granting probation for up to one year, then imposing up to the maximum custody sentence based on a violation of probation.

II. FELONY OFFENSES

A. The basic rule

Prior to the enactment of AB 1950, section 1203.1, subdivision (a), specified the maximum term of probation for a felony offense was "for a period of time not exceeding the maximum possible term of the sentence." If the maximum possible term of the sentence was five years or less, the period of probation could be up to five years. Effective January 1, 2021, section 1203.1, subdivision (a), with certain exceptions, provides: "The court . . . in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding two years . . . ." As with misdemeanor crimes, AB 1950 deleted the ability of the court to fix the maximum term of probation for most felony offenses based on the maximum possible sentence for the defendant's crimes.

B. Exceptions to the basic rule

Section 1203.1, subdivision (l), provides the two-year limit on the term of probation shall not apply to the following offenses:

1. Any violent felony offense listed in section 667.5, subdivision (c). (§ 1203.1, subd. (l)(1).) See Appendix II for a complete list of "violent" offenses excluded from the new probation limits.
2. Any felony offense "that includes specific probation lengths within its provisions." (§ 1203.1, subd. (l)(1).) See Appendix I for a complete list of crimes that specify a minimum or maximum term of probation. As with misdemeanor offenses, the length of probation may be expressed either as a "minimum" or "maximum" term.
3. Any felony conviction of section 487, subd. (b)(3) [theft by servant, agent, or employee], if the total value of the property taken exceeds $25,000. (§ 1203.1, subd. (l)(2).)
4. Any felony conviction of section 503 [embezzlement], if the total value of the property taken exceeds $25,000. (§ 1203.1, subd. (l)(2).)
5. Any felony violation of section 532a [false financial statements], if the total value of the property taken exceeds $25,000. (§ 1203.1, subd. (l)(2).)

For crimes listed in paragraphs (1) and (2), the maximum term of probation is the maximum possible term of the sentence. (§ 1203.1, subd. (l)(1).) Unlike excluded misdemeanors which retain the pre-AB 1950 term of probation, an excluded felony under these provisions has a maximum term of probation fixed at the maximum term of the sentence for the crime. Even as to offenses that specify a probation period, it now appears the maximum term of probation is the maximum sentence that may be imposed, not the term specified for the crime.

People v. Schulz (2021) 66 Cal.App.5th 887 (*Schulz*), holds the proper interpretation of section 1203.1, subdivision (l)(1), is to apply the exclusion separately to "violent felonies" and "crimes that include specific probation lengths." "The statute excludes '[*a*]*n offense* listed in subdivision (c) of Section 667.5 *and an offense* that includes specific probation lengths within its provisions." [Citation; italics in original.] 'It is a settled principle of statutory construction that courts should "strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous[,]" ' and '[w]e harmonize statutory provisions, if possible, giving each provision full effect.' [Citations.] If we were to adopt defendant's interpretation [that the offense must be both a violent felony and have a specified term of probation], it would render the second usage of the term 'an offense' superfluous, or a surplusage. Such a result is to be avoided to the extent possible and doing so here is neither contrary to legislative intent nor absurd in result. [Citations.]" (*Schulz*, *supra*, 66 Cal.App.5th at p. 897.)

A defendant convicted of both exempt and non-exempt crimes, who's probation expires after two years because of the application of AB 1950, may be continued on probation for an offense exempt from the two-year limit under section 1203.1, subdivision (l)(1). (*People v. Arrequin* (2022) 79 Cal.App.5th 787.)

For the crimes listed in paragraphs (3), (4) and (5), the maximum term of probation is three years. (§ 1203.1, subd. (l)(2).) For a complete list of all excluded offenses and the maximum terms of probation, see Appendix I and II.

"Maximum possible term of the sentence"

Section 1203.1, subdivision (l)(1), provides as to persons convicted of a violent felony listed in section 667.5, subdivision (c), or a crime where specific lengths of probation are included in its terms, imposition of sentence "may continue for a period of time not exceeding the maximum possible term of the sentence. . . ." The phrase "maximum possible term of the sentence" is not further defined by section 1203.1. In earlier iterations of section 1203.1 the maximum term of probation, identified as the "maximum time fixed by law," meant the maximum term of imprisonment in the state prison. (*People v. Rojas* (1963) 216 Cal.App.2d 819, 829.) As observed by the Supreme Court in *People v. Lippner* (1933) 219 Cal. 395, 404: "The words, 'maximum possible term of such sentence,' have been held to mean the maximum possible term of sentence which may be imposed by the court for the offense of which the defendant has been found guilty, or to which he has pleaded guilty. [Citation.]" Presumably the

phrase now includes the maximum sentence under section 1170, subdivision (h), for crimes subject to the Realignment Law.

People v. Kite (2023) 87 Cal.App.5th 986 (*Kite*), defines "maximum possible term of the sentence" for the purposes of section 1203.1, subdivision (l)(1). "Under California law, a defendant who is convicted of multiple felonies 'is subject to a single grant of felony probation based on the suspended imposition of his *aggregate* sentence, rather than separate grants of probation for each of the ... discrete offenses.' [Citation] (Italics added [by *Kite*].) '[O]ur sentencing laws calculate an aggregate term based on the relationship between offenses.' [Citations].) Thus, the statutory phrase 'the maximum possible term of the sentence'—as used in former section 1203.1, subdivision (a) governing the length of probation—'refer[s] to the aggregate sentence rather than the term imposed on a particular offense.' [Citations.] ([calculating maximum period of probation under section 1203.1 by reference to the maximum aggregate term of imprisonment that could have been imposed].) [¶] For the reasons we have already discussed, we conclude that this statutory phrase carries the same meaning in what is now section 1203.1, subdivision (l)(1). 'Accordingly, the plain meaning of [this provision] is that the maximum term of probation for a qualified case will be the maximum aggregate term of imprisonment based on all of the admitted or proven crimes and enhancements: the upper term of the base term constituting the principal term (plus any count-specific conduct enhancements), any subordinate terms imposed consecutively (plus one-third of any count-specific conduct enhancements), plus any applicable status enhancements.' [Citation.] 'Stated differently, defendants convicted of multiple counts, any one of which excludes them from AB 1950 and who are subject to the "maximum sentence" period of probation, will have the status of an excluded defendant for the entire case, regardless of the number of counts and regardless of whether some of the counts are crimes which otherwise would be subject to limited terms of probation under AB 1950.' [Citation.]" (*Kite*, *supra*, 87 Cal.App.5th at p. 208.)

If the court strikes any enhancements under section 1385, subdivision (a), likely the term of punishment for such enhancements cannot be included in the calculation of the maximum sentence. If it is the existence of an enhancement that makes the crime a violent felony under section 667.5, subdivision (c), and the court strikes the enhancement, likely the crime will no longer be excluded from the new probation limits.

Application of the foregoing rule is illustrated by the following example:

- The defendant is convicted of two counts of violating section 245, subdivision (a)(1) [assault with a deadly weapon other than a firearm]. Count I is committed with the infliction of GBI [enhancement of three years under section 12022.7, subd. (a), making the crime a violent felony under section 667.5, subd. (c)(8)]; Count II is committed while out on bail for Count I [enhancement of two years under section 12022.1, subd. (b)].

- The maximum sentence and the maximum term of probation for the case would be:

a. Count I: § 245(a)(1) – upper term of 4 years, plus GBI enhancement of 3 years, for a total of 7 years, the principal term.
b. Count II: § 245(a)(1) – subordinate and consecutive term of 1 year.
c. Status enhancement: § 12022.1(b) – 2 years.
d. Maximum aggregate term of imprisonment and maximum term of probation: 10 years.

III. DOMESTIC VIOLENCE OFFENSES

Care must be taken in the application of the new statute to crimes of domestic violence. Section 1203.097, subdivision (a), for example, provides in relevant part: "If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code,[4] the terms of probation shall include all of the following: (1) A minimum period of probation of 36 months, which may include a period of summary probation as appropriate." Because of section 1203.097, a conviction of a crime where the victim is listed in Family Code section 6211 is an offense "that includes [a] specific probation length[] within its provisions" for the purposes of the exception under section 1203.1, subdivision (l)(1).[5] The underlying crime, however, may not normally carry a minimum probationary term. For example, probation for a violation of section 245, subdivision (a)(4) [assault by means of force likely to produce great bodily injury], does not normally have a minimum term of probation – which means felony probation is limited to two years. But if the victim is a person included in Family Code section 6211, section 1203.1, subdivision (l)(1), provides an exception to the new limits established by AB 1950. If the crime is a misdemeanor, the limits of AB 1950 are not applicable (§ 1203a, subd. (b)) – the maximum term will be the minimum term to the extent it exceeds one year; if there is a designated maximum term, that will be the maximum term. If the crime is a felony, the maximum term of probation will be the maximum sentence that may be imposed. (§ 1202.1, subd. (l)(1).)

People v. Forester (2022) 78 Cal.App.5th 447 (*Forester*), holds stalking of a person listed in Family Code, section 6211, is a domestic violence offense. Accordingly, the offense comes within section 1203.097, subdivision (a), specifying a minimum term of probation. The exclusion under section 1203.1, subdivision (l)(1) applies; probation is not limited to two years. (*Forester*, *supra*, 78 Cal.App.5th at pp. 457-458.) Generally in accord with *Forester* is *People v.*

[4] Family Code section 6211 provides: "'Domestic violence' is abuse perpetrated against any of the following persons: (a) A spouse or former spouse. (b) A cohabitant or former cohabitant, as defined in [Family Code] Section 6209. (c) A person with whom the respondent is having or has had a dating or engagement relationship. (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with [Family Code] Section 7600) of Division 12). (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected. (f) Any other person related by consanguinity or affinity within the second degree."

[5] The fact that the specification of the length of probation is expressed in a different code section than the crime itself does not appear material. The Penal Code frequently separates the punishment provisions from the crime. (See, *e.g.*, burglary – the crime is identified in sections 459 and 460, but the punishment is contained in section 461. But there is no doubt the sections operate in tandem to define the crime and its consequences.)

Rodriguez (2022) 79 Cal.App.5th 637, 644-645 [two-year limit on probation not applicable to a conviction under section 245, subdivision (a)(1), where the victim was the defendant's girlfriend].

Pleading and proof of status under Family Code § 6211

It is unclear whether the victim's status under Family Code, section 6211 must be pled and proved to trigger the exception under section 1203.1, subdivision (l)(1). Likely a separate pleading and proof is not required if the elements of the underlying criminal offense specify a victim listed in Family Code, section 6211. A violation of section 273.5, subdivision (a), for example, prohibits the infliction of corporal injury resulting in a traumatic condition upon designated victims, all of whom are listed in Family Code, section 6211 – conviction of any violation of section 273.5 automatically establishes the exception under section 1203.1, subdivision (l)(1). Such a circumstance is different from a crime that may be committed against persons not listed in the Family Code, such as with a violation of section 245, discussed above. Likely the victim's status must be pled and proved in such a circumstance, or at least in some manner established on the record.

The obligation to plead and prove a fact that increases a person's punishment was discussed by the U.S. Supreme Court in the seminal case of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). As observed in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the court defined "statutory maximum" to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, 542 U.S. at p. 303.) Applying *Apprendi* and *Blakely* to a felony violation of section 245, subdivision (a)(4), without additional facts having been proved, the "statutory maximum" for probation is two years – that is the maximum term that may be imposed based on a conviction of section 245, subdivision (a)(4), *without the addition of any other facts*. It is only with the *additional* fact that the victim is listed in Family Code section 6211 does the maximum become four years.

The application of *Apprendi* to terms of probation has received little appellate attention in California. In *People v. Benitez* (2005) 127 Cal.App.4th 1274 (*Benitez*), which discussed issues related to eligibility for probation, the court found *Blakely* inapplicable because probation was not punishment. "Finding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court. [Citation.] Because a defendant's eligibility for probation results in a *reduction* rather than an increase in the sentence prescribed for his offenses, it is not subject to the rule of *Blakely.* [Citations.]" (*Benitez*, *supra*, 127 Cal.App.4th at p. 1278; italics in original.) *People v. Quinn* (2021) 59 Cal.App.5th 874, *People v. Sims* (2021) 59 Cal.App.5th 943, and *People v. Burton* (2021) 58 Cal.App.5th Supp 1 (see discussion, *infra*), identified many adverse consequences of being on a long-term grant of probation. These decisions, at least for the purposes of determining retroactivity based on the application of *Estrada*, expressly rejected the contention that

probation was not punishment. It may be argued, therefore, that the increase in the length of probation over a particular lesser statutory maximum if certain facts are established is a penal consequence contemplated by *Apprendi* and *Blakely*.

Until this issue is resolved by an appellate court, the best practice is to identify the victim in the context of Family Code section 6211 in the course of taking a plea when a factual statement of the circumstances of the crime may be given, and include such a finding on a verdict if the case is submitted to a jury. For the court to review the record to determine the victim's status likely is judicial factfinding expressly rejected by our Supreme Court in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*). As observed by the court: "[W]e now hold that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Gallardo*, *supra*, 4 Cal.5th at p. 136.)

IV. DRIVING UNDER THE INFLUENCE

The application of AB 1950 to DUI offenses will depend on whether the conviction is for a misdemeanor or felony offense.

A. Misdemeanor DUI offenses

Section 1203a, subdivision (b), provides: "The one-year probation limit in subdivision (a) shall not apply to any offense that includes specific probation lengths within its provisions." The conditions of probation for a person convicted of a misdemeanor violation of Vehicle Code sections 23152 or 23153 must include, "[n]otwithstanding section 1203a of the Penal Code, a period of probation [of] not less than three nor more than five years. . . ." (Veh. Code, § 23600, subd. (b)(1).) Since Vehicle Code section 23600 includes a specific length of probation within its provisions, persons convicted of misdemeanor DUI offenses who are granted probation are excluded from the new limits of AB 1950. They shall be subject to a minimum term of three and a maximum term of five years of probation.

B. Felony DUI offenses

Like a misdemeanor offense, the term of probation for a felony DUI offense is specified in Vehicle Code section 23600, subdivision (b)(1): "Notwithstanding Section 1203a of the Penal Code, a period of probation not less than three nor more than five years; provided, however, that if the maximum sentence provided for the offense may exceed five years in the state

prison, the period during which the sentence may be suspended and terms of probation enforced may be for a longer period than three years but may not exceed the maximum time for which sentence of imprisonment may be pronounced." Unlike the reference to section 1203a for misdemeanors, section 23600 makes no corresponding reference to section 1203.1 for felonies. However, the reference to a maximum sentence of more than five years in state prison clearly contemplates Vehicle Code section 23600 is applicable to felony DUI convictions.

The first phrase of Vehicle Code section 23600, subdivision (b)(1), "[n]otwithstanding Section 1203a of the Penal Code, a period of probation not less than three nor more than five years," likely applies to both felony and misdemeanor dispositions. It applies to misdemeanors because of the express reference to section 1203a. It also likely applies to DUI felonies punishable by a term of less than five years in state prison. To say the first phrase of Vehicle Code section 23600, subdivision (b)(1), does not apply to felony DUI offenses punishable by less than five years would mean such offenses would not be subject to the special conditions of probation listed in Vehicle Code section 23600, such that the ordinary felony probation maximum of two years would apply. That would mean most felony DUI offenses would have a maximum probation term of two years *without* special conditions, but all misdemeanor DUI offenses would have a maximum term of five years *with* special conditions. Such an interpretation produces an absurd result and should be rejected when there is an appropriate alternative interpretation that is consistent with the intent of the Legislature. (See *People v. Moore* (2004) 118 Cal.App.5th 74, 77-78.)

Since most felony DUI offenses are punishable by a prison term of 16 months, two, or three years,[6] the maximum term of probation under section 1203.1, subdivision (l)(1), is three years. However, if the defendant is convicted of felony DUI with injury, with two or more specified priors within 10 years, the state prison term is two, three, or four years, making the maximum term of probation four years. (Veh. Code, § 23566, subd. (a).) Unlike excluded misdemeanors which retain the pre-AB 1950 term of probation, an excluded felony under section 1203.1, subdivision (l)(1), has a maximum term of probation fixed at the maximum term of the sentence for the crime. Although prior to AB 1950 felony DUI had a maximum term of probation of five years or the maximum sentence, whichever was greater, after the enactment of AB 1950 the maximum term of probation for most felony DUI offenses is three years. Such an interpretation admittedly produces an anomalous result: probation for misdemeanor DUI can be two years longer than most felony DUI crimes. But there is no escaping the plain meaning of the statutes: excluded *misdemeanors* continue to use the pre-AB 1950 term of probation; excluded *felonies* use the maximum sentence as the limit on the term of probation.

People v. Schulz (2021) 66 Cal.App.5th 887 (*Schulz*), concluded the provisions of Vehicle Code, section 23600, subdivision (b)(1), contained a specific length of probation and thus the designated crimes were excluded from the two-year probation limit of AB 1950 by section 1203.1, subdivision (l)(1). (*Schulz*, *supra*, 66 Cal.App.5th at p. 899.) In affirming the defendant's

[6] Such offenses include DUI with three or more prior convictions within 10 years (Veh. Code, § 23550, subd. (a)) and DUI causing bodily injury (Veh. Code, § 23554).

conviction, *Schulz* affirmed without discussion the five year probationary term imposed by the trial court. Since the specific length of probation imposed by the court was not at issue in the case, the appellate court did not address the application of section 1203.1, subdivision (l)(1), fixing the maximum term of probation based on the maximum possible sentence. The defendant was convicted of felony violations of Vehicle Code, sections 23153, subdivisions (a) and (b), with an enhancement for injuring three victims under Vehicle Code, section 23558. The defendant's maximum possible sentence, therefore, was six years. *Schulz* should not be read as *limiting* the probationary period to five years.

Vehicular manslaughter while intoxicated

Section 191.5, subdivision (a), makes criminal the unlawful killing of a person in the driving of a vehicle "where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code. . . ." Punishment for such a violation is 4, 6, or 10 years in state prison if committed with gross negligence; it is 16 months, 2, or 4 years if committed without gross negligence. (§ 191.5, subd. (c).) However, if the defendant has been convicted of designated prior alcohol driving offenses, the punishment becomes 15 years to life. (§ 191.5, subd. (d).) It is unclear whether convictions under section 191.5 will be subject to the exclusion of section 1203.1, subdivision (l)(1).

The exception to AB 1950's standard length of probation is set, if at all, by Vehicle Code section 23600, subdivision (b). That section provides, in relevant part, "If any person is convicted of a violation of Section 23152 or 23153, and is granted probation, the terms and conditions of probation shall include . . . a period of probation not less than three nor more than five years . . ." Based on the specific language of section 23600, it could be argued that when the Legislature lists only Vehicle Code sections 23152 and 23153, the enhanced probation term is limited to convictions for those specific offenses. But it doesn't make sense that if the defendant is convicted of an ordinary DUI, he will receive up to three or four years of probation, but if he kills someone in the course of committing a DUI offense, he will have a probation limit of only two years. Such a result is absurd. The clear intent of the Legislature is to allow an extra period of probation for DUI-related offenses.

These statutes can be reconciled in a way that makes sense. As is apparent from section 191.5, subdivision (a), an element of the crime is that the driving violated the DUI law: "[W]here the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code . . . ." In other words, to be convicted of a violation of section 191.5, subdivision (a), the defendant must violate one of the lesser DUI crimes while committing the offense. Indeed, Vehicle Code section 23153 is a necessarily included offense to a violation of section 191.5, subdivision (a). (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1468.) Because a violation of Vehicle Code sections 23140, 23152, or 23153 must occur for there to be a conviction under section 191.5, subdivision (a), it can be said the defendant has been "convicted" of these lesser sections for the purposes of Vehicle Code section 23600, subdivision (b)(1). Under such circumstances, a person convicted under section 191.5, subdivision (a), would have a probation period of up to 4 or 10 years, or life, depending on the circumstances of the offense.

In *Bowden v. Superior Court* (2022) 82 Cal.App.5th 735 (*Bowden*), the defendant entered a negotiated plea to vehicular manslaughter with a probationary term of five years. *Bowden* holds the defendant is entitled to a probation term of two years under AB 1950, even though it is shorter than the term for a violation of Vehicle Code, section 23253 or 23152, lesser included offenses. (*Bowden*, *supra*, 82 Cal.App.5th at pp. 743-745.) The court held further that *Samps* does not apply; the court and People are not entitled to withdraw from the plea agreement. (*Ibid*., at pp. 745-747.)

V. WHEN A CASE HAS A MIX OF PROBATION PERIODS

A defendant may be convicted in a single case of multiple offenses with differing limits on the maximum period of probation. For example, a defendant could be convicted of the unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a), a felony, with a two-year maximum period of probation. The defendant also could be convicted in the same proceeding of driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a), a misdemeanor, with a five-year maximum period of probation. If the court places the defendant on probation, it will be under a single grant for the entire case regardless of the number of counts. (*People v. Cole* (2020) 50 Cal.App.5th 715.) Historically courts have treated probation for multiple counts as a single period, not multiple consecutive periods. (See *People v. Blume* (1960) 183 Cal.App.2d 474; *Fayad v. Superior Court* (1957) 153 Cal.App.2d 79.) The court should not be required to parse between felonies and misdemeanors and various lengths of probation. It seems likely the court will be permitted to select a term of probation for the entire case up to the longest authorized for any single conviction, whether the longest term is for a felony or a misdemeanor.

In *People v. Saxton* (2021) 68 Cal.App.5th 428 (*Saxton*), the defendant was convicted of both a misdemeanor exempt from AB 1950 and felony included in the new probation limitations. The court affirmed the three-year term of probation based on the misdemeanor violation. (*Saxton*, *supra*, 68 Cal.App.5th at p. 432.) Because one of the violations was for a felony, the court was required to impose "formal" probation. (*Ibid*.) But if the defendant violates probation in it's third year, the defendant may only suffer misdemeanor consequences. (*Saxton*, *supra*, 68 Cal.App.5th at p. 433.)

VI. EFFECTIVE DATE OF AB 1950

A. Application to crimes on or after January 1, 2021

Unquestionably the changes made by AB 1950 will apply to all crimes committed on or after January 1, 2021, the effective date of the legislation.

B. Application to crimes not final prior to January 1, 2021

The new limits on probation terms will apply to all cases not final as of January 1, 2021. *People v. Quinn* (2021) 59 Cal.App.5th 874 (*Quinn*), addresses the application of *In re Estrada* (1965) 63

Cal.2d 740 (*Estrada*), to cases not final as of the effective date of AB 1950 on January 1, 2021. The Attorney General argued *Estrada* had no application to AB 1950 because probation is not considered punishment. In rejecting the argument, *Quinn* relied extensively on the holding in *People v. Burton* (2020) 58 Cal.App.5th Supp.1 (*Burton*). As observed by *Quinn*: "[T]he Los Angeles County Superior Court appellate department found that in the *Estrada* context, probation amounted to punishment. The court observed, 'It is unquestionable the reduction of the maximum amount of time a person may be placed on probation ... inures greatly to the benefit of many persons subject to supervision. At any time a person is on probation, the court has the authority to revoke probation and sentence the person to jail, and a probation violation may even be based on violating court rules that do not amount to new crimes. [Citation.] The longer a person is on probation, the potential for the person to be incarcerated due to a violation increases accordingly. The possibility of incarceration due to being on probation for periods longer than a year based on minor probation violations was relied on by the Legislature in enacting the provision lowering the maximum probationary period. [Citation.] [¶] Moreover, while a person is on probation, the individual may lawfully be ordered to comply with numerous and varied conditions, including, as in this case, ordering the person to provide prosecutors a list of properties they own. In other situations, they may be subject to search and seizure by law enforcement with or without a warrant [citation], submitting urine samples for narcotics use monitoring [citation], and regularly interrupting persons' work and schooling and traveling to court for progress reports. In addition, when a court's orders are violated, courts have power to increase a probationer's supervision and intensify restrictions by modifying probation conditions. [Citation.] The longer the length of probation, the greater the encroachment on a probationer's interest in living free from government intrusion.' [Footnote omitted; citation.] The court acknowledged that in other contexts probation is not viewed as punishment but concluded that those cases were not controlling for the purpose of determining retroactivity. The court explained, 'It has been noted, a "[g]rant of probation is, of course, qualitatively different from such traditional forms of punishment as fines or imprisonment. Probation is neither 'punishment' [citation] nor a criminal 'judgment' [citation]. Instead, courts deem probation an act of clemency in lieu of punishment [citations], and its primary purpose is rehabilitative in nature [citation]." [Citations.] [¶] But, although probation is not considered "punishment" for specified purposes, the presumption of legislative intent in *Estrada* is not confined to only situations when jail and prison sentences are directly decreased due to new laws. A court may presume an intent to broadly apply laws even when they "merely [make] a reduced punishment possible." [Citation.] The Legislature in this instance clearly contemplated that reducing the amount of time probation can last was significantly beneficial to persons on probation, and that concomitantly, being on probation for longer than a year was detrimental "rather than being rehabilitative." As previously noted, "a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible" [citation], not solely to changes that reduce "punishment" as defined in contexts different than assessing whether *Estrada* is applicable.' [Citation].) [¶] We consider the reasoning in *Burton* persuasive. We add that since the Legislature has determined that the rehabilitative function of probation does not extend beyond two years, any additional period of probation can only be regarded as punitive, and therefore within the scope of *Estrada*. Moreover, even if Assembly Bill No. 1950 is not entitled to a *presumption* of retroactivity, the

'ameliorative nature' of the amendment 'places it squarely within the spirit of the *Estrada* rule.' [Citation.] The amendment applies retroactively because of the 'clear indication' of the Legislature's intent that it do so. [Citation.]" (*Quinn*, *supra*, 59 Cal.App.5th at pp. 882-883; italics in original.)

Substantially in accord with *Quinn* is *People v. Sims* (2021) 59 Cal.App.5th 943 (*Sims*). In rejecting the Attorney General's argument that probation was not punishment thus barring the application of *Estrada*, *Sims* observed: "There is no dispute that the longer a probationer remains on probation, the more likely it is he or she will be found to be in violation of a probation condition. There also is no dispute that the longer a probationer remains on probation, the more likely it is he or she will be sentenced to prison for a probation violation. Assembly Bill No. 1950 does not guarantee that a probationer will abide by his or her probation conditions and, as a result, avoid imprisonment. However, by limiting the duration of felony probation terms, Assembly Bill No. 1950 ensures that at least some probationers who otherwise would have been imprisoned for probation violations will remain violation-free and avoid incarceration. Like the laws at issue in [*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299] and [*People v. Frahs* (2020) 9 Cal.5th 618], Assembly Bill No. 1950 thus ameliorates possible punishment for a class of persons—felony probationers. In the absence of a contrary indication, we must apply the *Estrada* presumption and presume the Legislature intended its ' "ameliorative change[ ] to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." ' [Citation.]" (*Sims*, *supra*, 59 Cal.App.5th at p. 960.)

Substantially in accord with *Quinn*, *Sims*, and *Burton* with respect to retroactivity under *Estrada* is *People v. Lord* (2021) 64 Cal.App.5th 241, *People v. Schulz* (2021) 66 Cal.App.5th 887, 894-895, and *People v. Scarano* (2022) 74 Cal.App.5th 993.

C. Application to cases that are final prior to January 1, 2021

Whether AB 1950 applies to cases final as of January 1, 2021 is not entirely clear. *Quinn*, *Sims*, and *Burton* were pending appeal when AB 1950 was enacted and thus were not final when the new law became effective on January 1, 2021. It is the lack of finality that triggers *Estrada's* application. "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage *provided the judgment convicting the defendant of the act is not final.* This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, *supra*, at 63 Cal.2d at p. 745; italics added.) As observed in *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465-1466: "Under [*Estrada*], a legislative amendment that lessens criminal punishment is

presumed to apply to all cases *not yet final* (the Legislature deeming its former penalty too severe), unless there is a 'saving clause' providing for prospective application. [Citation.] ['The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies'] [citation].) A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired. [Citation.])" (Italics in original.)

A straight-forward application of *Estrada* and *Smith* suggests AB 1950 will have no bearing on cases final as of January 1, 2021. Under such an interpretation these older cases would retain their original length and conditions of probation unless the court elects to modify them under the authority granted by section 1203.2, subdivision (b)(1). (See *Quinn*, *supra*, 59 Cal.App.5th at p. 885, fn. 6 ["Nothing herein precludes defendant from moving the trial court to modify the conditions of her probation in light of the reduced term of probation."].) The defendant could be prosecuted for violations of supervision that occurred within the original probation period, unaffected by the new limits established by AB 1950. The issue is not whether the court has the authority to terminate probation in conformance with the new limits set by AB 1950 – clearly the court *does* have such authority under section 1203.2, subdivision (b)(1) – rather the issue is whether the court *must* grant an early termination and whether existing grants of probation terminate by operation of law after expiration of the new term as established by AB 1950.

The legislative history of AB 1950 supports the conclusion the Legislature intended its provisions to apply to all existing grants of probation, regardless of when probation was granted and regardless of whether the judgment was final as of January 1, 2021. As observed in *Sims*: "[T]he legislative history for Assembly Bill No. 1950 suggests the Legislature harbored strong concerns that probationers—including probationers whose cases are pending on appeal—face unwarranted risks of incarceration due to the lengths of their probation terms. For instance, the Assembly and Senate Committees on Public Safety quoted the following statement from Assembly Bill No. 1950's author in their bill reports: ' "[A] large portion of people violate probation and end up incarcerated as a result.... 20 percent of prison admissions in California are the result of supervised probation violations, accounting for the estimated $2 billion spent annually by the state to incarcerate people for supervision violations. Eight percent of people incarcerated in a California prison are behind bars for supervised probation violations. Most violations are 'technical' and minor in nature, such as missing a drug rehab appointment or socializing with a friend who has a criminal record. [¶] 'Probation - originally meant to reduce recidivism–has instead become a pipeline for reentry into the carceral system.... A shorter term of probation, allowing for an increased emphasis on services, should lead to improved outcomes for both people on misdemeanor and felony probation while reducing the number of people on probation returning to incarceration.' [Citations.] [defendants 'on probation for extended periods of time are less likely to be successful because even minor or technical violations of the law may result in a violation of probation'].) [¶] The Assembly Public Safety Report went on to cite a publication suggesting ' "probation can actually increase the probability of future incarceration—a phenomenon labeled 'back-end net-widening[.]' " ' [Citation.] It added that some scholars believe ' "enhanced restrictions and

monitoring of probation set probationers up to fail, with mandatory meetings, home visits, regular drug testing, and program compliance incompatible with the instability of probationers' everyday lives. In addition, the enhanced monitoring by probation officers (and in some cases, law enforcement as well) makes the detection of minor violations and offenses more likely." ' (*Ibid.*) According to the Assembly Public Safety Report, '[i]f the fact that an individual is on probation can increase the likelihood that they will be taken back into custody for a probation violation that does not necessarily involve new criminal conduct, then shortening the period of supervision is a potential avenue to decrease individuals' involvement in the criminal justice system for minor infractions.' (*Ibid.*) [¶] While these legislative materials do not speak directly to the issue of retroactivity, they suggest the Legislature viewed Assembly Bill No. 1950 as an ameliorative change to the criminal law that would ensure that many probationers avoid imprisonment. Presumably, the Legislature was aware such ameliorative changes apply retroactively under the *Estrada* presumption. [Citation.] There is no indication in the law's text or legislative materials that the Legislature intended to alter the default *Estrada* presumption. This omission suggests the Legislature had no such intent." (*Sims*, *supra*, 59 Cal.App.5th at pp. 961-963.) While the foregoing discussion was in the context of determining whether *Estrada* applied to the case, the gravamen of the Legislature's concerns applies equally to persons whose cases were final as of January 1, 2021.

While appeal from an order granting probation is subject to the same requirements for appeal of any other judgment entered in a criminal case (See *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421), the nature of probation is markedly different than a final judgment to state prison or to county jail under section 1170, subdivision (h), or to county jail for a misdemeanor after denial of probation. Once entered and absent judicial error, judgments denying probation and sending a defendant to state prison or to county jail are non-modifiable by the court except under the limited circumstances of section 1170, subdivision (d)(1). Orders granting probation, on the other hand, are always subject to modification: "Upon its own motion or upon the petition of the supervised person, the probation . . . officer, or the district attorney, the court may modify, revoke, or terminate supervision of the person pursuant to this subdivision. . . ." (§ 1203.2, subd. (b)(1).) With any new violation of probation or material change in circumstances, even though the original order granting probation is final, the court will be called upon to make a *current determination* whether it is appropriate to continue the defendant on probation, or permanently revoke probation and impose a final sentence to prison or county jail. Under such circumstances and in consideration of the concerns raised by the Legislature it is illogical that the court could enter a new order after January 1, 2021, reinstating or continuing a person on a probation term expressly rejected by the Legislature.

Indeed, it may be argued that due to the unique nature of the grant of probation, the defendant remains subject to an active and non-final criminal proceeding throughout the entire period of probation unless the court terminates probation and enters a final judgment to state prison or county jail. Such was the effect of *People v. Chavez* (2018) 4 Cal.5th 771 (*Chavez*), as discussed in *People v. McKenzie* (2020) 9 Cal.5th 40 (*McKenzie*). *McKenzie* considered the application of *Estrada* to a legislative change that occurred long after the defendant's judgment of probation became final. In its analysis, *McKenzie* discussed *Chavez*: "In [*Chavez*], four years

after successfully completing probation, the defendant asked the trial court to dismiss his action and expunge his record in furtherance of justice under Penal Code section 1385. [Citation.] We concluded that the trial court could not dismiss the action under that statute because there was no longer an action to dismiss: the criminal action had ended when the defendant's probation had expired. [Citation.] [¶] In the course of so holding, we noted that '[u]nder well-established case law, a court may exercise its dismissal power under [Penal Code] section 1385 at any time before judgment is pronounced — but not after judgment is final.' [Citation.] At the same time, however, we expressly rejected the argument that in such cases, the 'criminal action terminates' when 'the court orders a grant of probation.' [Citation.] We therefore concluded that Penal Code section 1385's dismissal 'power may be exercised until judgment is pronounced or when the power to pronounce judgment runs out.' [Citation.] As particularly relevant here, we explained that the 'criminal action' — and thus the trial court's jurisdiction to impose a final judgment — 'continues into and throughout the period of probation' and expires only 'when th[e] [probation] period ends.' [Citation.] *Chavez* thus confirms that a criminal proceeding ends only once probation ends if no judgment has issued in the case." (*McKenzie*, *supra*, 9 Cal.5th at pp. 46-47.)

Merely because a case appears outside the scope of *Estrada*, does not mean the Legislature did not intend the new limits to apply to persons currently on probation and who are subject to the adverse consequences of extended periods of probation as identified in *Quinn, Sims* and *Burton*. In a different context, our Supreme Court observed: "[R]ejection of the People's argument [that *Estrada* applies only to statutory changes that reduce punishment, but not entirely eliminate it,] is consistent with our discussion in *Estrada* and subsequent decisions of 'legislative intent,' i.e., whether 'the Legislature intend[ed] the old or new statute to apply.' (*Estrada*, *supra*, 63 Cal.2d at p. 744.) *We find no basis to conclude that the Legislature intended the old statute imposing punishment to apply to those on probation simply because they may no longer appeal from orders granting probation as to which there was no ground for appeal.* On the other hand, as we have explained, 'an amendment eliminating criminal sanctions is [itself] a sufficient declaration of the Legislature's intent to bar all punishment for the conduct so decriminalized.' [Citation.]" (*People v. McKenzie* (2020) 9 Cal.5th 40, 51; italics added.)

Based on the forgoing, it may be argued the Legislature intended AB 1950 to apply to any existing grant of probation, even though the appeal period on the original sentence has expired. Accordingly, it is likely AB 1950, by operation of law, has amended existing terms of probation in accordance with the new limits for all included crimes, without the need of the court to specifically order the modified terms. Persons on probation for excluded crimes will have terms of probation as specified in sections 1203a, subdivision (b), and 1203.1, subdivision (l). While it may not be necessary for probation departments or the courts to calendar all existing probation cases for amendment of the length of probation, unless the circumstances discussed in *People v. Leiva* (2013) 56 Cal.4th 498 (*Leiva*) apply (see discussion, *infra*), no further adverse action should be taken in cases where the term of probation has run longer than authorized by AB 1950. If a defendant requests an order terminating probation because of the changes made by AB 1950, it seems appropriate to grant such relief.

Administrative termination of probation

Although AB 1950 may terminate probation by operation of law, the best practice may be to develop a process within the county justice system to permit a more formalized summary disposition of cases that are qualified for termination under the new limits. Several courts have created a petition or review procedure for defendants potentially affected by AB 1950. The procedure starts either with a petition filed on behalf of the defendant, or with the creation of a list of potential cases from the county data base. The petition or list is circulated among the relevant justice partners. If there is no dispute over termination, a stipulation is prepared, processed by the court as a chambers matter, and is entered in the defendant's file and the county data base. The stipulation avoids the need for a hearing and allows the processing of the termination administratively. If there is no agreement on termination of a particular case, the matter would be resolved by the court after hearing. Such a formalized review procedure assures that if a defendant's probation status is thereafter checked by law enforcement, the correct status will be reflected in the county's data base.

Notice to the defendant

Courts adopting an administrative procedure for properly recording the termination of probation likely are not *required* to give notice of the termination to the defendant either before or after the administrative action.[7] The termination is occurring by operation of law, not because of the exercise of discretion by the court. Notice is not given when probation expires on its own terms; it seems unlikely notice must be given when it expires because of the enactment of AB 1950. If there is a dispute over the eligibility for early termination such that the court must hold a hearing to resolve the issue, likely the court must give notice to the defendant and provide an opportunity to obtain counsel and appear.

Although the court may not be *required* to give notice of termination to the defendant, the better practice, if reasonably possible with the county's data base, is to give notice to the defendant at the last known address. Such a notice has the effect of advising the defendant of their new status – something they likely would not learn otherwise. Such a notice also may signal to the defendant that it is time to pursue relief under section 1203.4.

D. Cases in warrant status as of January 1, 2021

It is unlikely the court and probation departments have any duty to actively review and recall warrants issued prior to January 1, 2021, for a violation of probation. It is accepted procedure that courts summarily revoke probation contemporaneously with the issuance of either a bench or arrest warrant based on a violation of probation. Such action is intended to freeze the defendant's status on probation for the purpose of later prosecution of any alleged violation of

[7] Eligible persons on active supervision by probation undoubtedly will be advised of the termination in the ordinary course of communication between the probation officer and defendant.

probation. As made clear in *Leiva*, the tolling language in section 1203.2, subdivision (a)[8], was adopted by the Legislature to preserve the court's jurisdiction to adjudicate violations that occur within the original term of probation, even though the original period of probation has expired. "[W]e conclude summary revocation of probation preserves the trial court's authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period. As noted, the purpose of the formal proceedings 'is not to revoke probation, as the revocation has occurred as a matter of law; rather, the purpose is to give the defendant an opportunity to require the prosecution *to prove the alleged violation occurred and justifies revocation.*' [Citation.] We therefore agree with the court in ([*People v. Tapia* (2001) 91 Cal.App.4th 738,] that 'the [authority] retained by the court is to decide *whether* there has been a violation during the period of probation and, if so, *whether* to reinstate or terminate probation.' (*Tapia*, *supra*, 91 Cal.App.4th at pp. 741–742.) [Footnote omitted.] Accordingly, a trial court can find a violation of probation and then reinstate and extend the terms of probation 'if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation.' (*Tapia, supra,* 91 Cal.App.4th at p. 741.) This result fairly gives the defendant, if he prevails at the formal violation hearing, the benefit of the finding that there was no violation of probation during the probationary period. [Footnote omitted.] [¶] On the other hand, if the prosecution, at the formal violation hearing held after probation normally would have expired, is able to prove that the defendant did violate probation before the expiration of the probationary period, a new term of probation may be imposed by virtue of section 1203.2, subdivision (e), and section 1203.3. This result fairly gives the prosecution, if it prevails at the formal violation hearing, the benefit of the finding that there was a violation of probation during the probationary period." (*Leiva*, *supra*, 56 Cal.4th at pp. 515-516; italics in original.)

Based on *Leiva*, it appears likely the court and probation will be able to pursue violations of probation occurring within the original grant of probation or authorized extensions up to the maximum permitted term, and where the court summarily revoked probation while the probation term was in effect. This will be so even if the original period of probation has expired as of the defendant's return on the warrant, and even if the violation occurred during a period of probation which would have exceeded the limits of probation established by AB 1950 had its language been then in effect. To apply AB 1950 in a manner that bars prosecution of violations of supervision occurring within the original term of probation, including violations occurring in a period no longer authorized, likely is contrary to *Leiva* and would give the statute a retroactive application not authorized by the legislation. In the absence of contrary intent expressed by the Legislature, statutory changes to the Penal Code are presumed to be prospective and not retroactive. (*Estrada*, *supra*, 63 Cal.2d at p. 746.) It is also important to stress that when probation was summarily revoked and the warrant was issued, such actions were authorized and valid under then-existing law.

[8] Section 1203.2, subdivision (a), provides, in relevant part: "The revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period."

Potential response to cases in warrant status

If the court finds a violation of probation after the defendant's return on a warrant, likely the court will have one or more of the following potential options:

1. The court could reinstate the defendant on the existing terms of probation, provided there is time remaining on the term of probation under the standards established by AB 1950. *If the court so expressly orders*, the time during which probation was tolled because of the summarily revocation could be added to the probationary period. As observed in *People v. Braud* (2020) 56 Cal.App.5th 962, 969-970 (*Braud*): "Although tolling for a summary revocation does not *automatically* extend a probation period, when a court reaches the second step of the revocation process—the formal hearing on the violation—*Leiva* says that the court may choose to extend the probation period: 'a trial court can find a violation of probation and then *reinstate and extend* the terms of probation.' [Citation; italics oiginal.] Similarly, *People v. Tapia* (2001) 91 Cal.App.4th 738, which *Leiva* cites with approval, explained that 'the period of tolling *can be tacked on to the probationary period* if probation is reinstated.' [Citations; italics original.] In a footnote, *Leiva* also disapproved another appellate court's contrary conclusion 'that "if probation is reinstated the period of revocation cannot be counted in calculating the expiration date." ' (*Leiva,* [citation], disapproving *People v. DePaul* (1982) 137 Cal.App.3d 409.) In short, when the violation and reinstatement both occur during the probationary period, *Leiva* indicates a court may extend it by adding the tolled period of revocation." (*People v. Johnson* (2018) 29 Cal.App.5th 1041, 1050 (*Johnson*); italics in original.)

   The extension, however, likely will be limited such that the total length of *active* supervision should not exceed the maximum term authorized by AB 1950. As observed in *Johnson*: "In sum, we believe that a reasonable reading of *Leiva* compels the conclusion that the length of the supervisory period is not automatically extended when [supervision] is reinstituted after revocation, although a trial court may choose to extend the original expiration date for [supervision] *within the maximum statutory period*." (*Johnson*, *supra*, 29 Cal.App.5th at p. 1050; italics added.)

   Kuhnel v. Superior Court (People) (2022) 75 Cal.App.5th 726 (*Kuhnel*), is consistent with *Leiva*. In *Kuhnel* the defendant was placed on three years of misdemeanor probation on November 17, 2016. In October 2017 she violated her probation; the trial court summarily revoked her probation on December 11, 2017. Finding that *Leiva*, "points [them] in the right direction," *Kuhnel* held the violation and revocation of probation all occurred within the original grant of probation and were valid at that time; the trial court had jurisdiction to proceed on the violation. The court further found that although AB 1950 was retroactive, nothing in *Estrada* compelled a different result.

   Similarly, *People v. Faial* (2022) 75 Cal.App.5th 738 (*Faial*), upheld the defendant's sentence to state prison based on a probation violation occurring within the original

period of probation and prior to the effective date of AB 1950. Defendant was placed on four years of probation on May 4, 2017. He violated probation on May 15, 2019. He was sentenced to prison on a suspended term in November 2019. Defendant sought the retroactive application of AB 1950 to bar prosecution of the violation. The appellate court found the violation and subsequent revocation to be within the original grant of probation and prior to the effective date of AB 1950; the defendant could be prosecuted for the violation. The court expressly rejected the application of *People v. Superior Court (Lara)*(2018) 4 Cal.5th 299, and *People v. Frahs* (2020) 9 Cal.5th 618.

The application of the foregoing rule may be illustrated by the following example:

- A defendant was sentenced prior to January 1, 2021 to a felony term of probation of three years.
- After one year on probation, defendant violated its terms, probation was summarily revoked, and a warrant was issued for the defendant's arrest.
- The warrant was executed six months later (after January 1, 2021).
- At sentencing on the violation, the court could reinstate the defendant on the remaining period of probation and exercise its discretion to extend the probationary term for the period defendant was in warrant status, but the total term on active probation is limited to a maximum of two years (six months more) to comply with AB 1950. Alternatively, the court could order that the six months during which the defendant was in warrant status does not apply against the remaining probation term – in this way the defendant will have a full year of active supervision remaining on his reinstated probation. Such an order has the effect of "extending" the term of probation to account for the time lost while the defendant was in warrant status, but the total length of active probation has been adjusted to meet the limits set by AB 1950.

While the court has the authority to "extend" the probationary period for the time when the defendant was in warrant status, the court does not have the authority to extend the probationary period by imposing an entirely new term of two years. Such authority appears limited to the circumstances of sections 1203.2, subdivision (e), and 1203.3 when the original term of probation expires before the violation can be adjudicated. (See discussion of *Leiva* and sections 1203.2, subd. (e), and 1203.3, *infra*.)

Reinstatement could occur with or without a modification of the conditions of probation, including the imposition of a new custody sanction.

2. The court could reinstate on probation, impose a custody sanction, after which probation would terminate without imposition of judgment pursuant to section 1203.3.

3. The court could permanently revoke probation and impose judgment to state prison or county jail for a term authorized for the underlying crime. Such a disposition also is

available when the violation occurs prior to expiration of the term of probation, but the adjudication of the violation occurs after its expiration. (See discussion of *Leiva*, *infra*.)

4. If the original probationary period has expired as of the date of the violation hearing, the court could set aside the order of revocation and again place the defendant on a new term of probation in accordance with sections 1203.2, subdivision (e), and 1203.3.[9] (*Leiva*, *supra*, 56 Cal.4th at pp. 515-516.) The maximum term of the new grant of probation, however, would be as set by AB 1950. Because it is an entirely new grant of probation, neither the time served on probation under the original grant of probation, nor the time during which probation was summarily revoked would be charged against the new period of probation.

   Leiva also likely applies if the probation period has been terminated by operation of law due to the enactment of AB 1950. The following example is illustrative:

   - Prior to January 1, 2021 a defendant was sentenced to felony probation for three years.
   - After 30 months of probation, the defendant violates, probation is summarily revoked, and a warrant is issued for the defendant's arrest.
   - The defendant is arrested nine months later; the arrest occurs after January 1, 2021. As of the defendant's sentencing on the violation, the original term of probation expired because of the new limits set by AB 1950. But in accordance with *Leiva*, the violation still may be prosecuted because of the tolling effect of section 1203.2, subdivision (a). The court may impose a new two-year term of probation in accordance with sections 1202.2, subdivision (e), and 1203.3.

VII. EXTENSION OF TERM OF PROBATION

Under the law prior to the enactment of AB 1950, the court could extend a grant of probation up to the authorized limit. For example, if a defendant was placed on felony probation for a period of three years, but violated a condition of probation, including the failure to pay restitution, the court could extend the probationary term for up to an additional two years, for a total probationary term of five years. With the enactment of AB 1950, the court may still extend the term of probation so long as the total term of probation does not exceed the new limits. If a defendant is granted felony probation for three years, has served two years and then violated, except for the limited circumstances discussed in *Leiva*, *supra*, the court does not have the power to extend the probationary period any further. Nothing in the legislation expressly authorizes the extension of probation beyond the new probation limits.[10] In extending the

[9] Section 1203.2, subdivision (e), provides, in relevant part: "If an order setting aside . . . the revocation of probation . . . is made after the expiration of the probationary period, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction."

[10] The court will have the authority to extend probation up to the maximum term of the sentence or other specified terms for the excluded offenses.

term of probation the court would be exercising discretion expressly removed by the Legislature.

As observed in *Braud* and *Johnson* (discussed, *supra*), there is a limited right to extend probation to account for the period when defendant's probation has been summarily revoked. But the total term of active probation, absent the tolling period or any exception to the new terms, must not exceed the limits set by AB 1950.

Generally, the term of probation may not be extended beyond what is provided in section 1203a and 1203.1. A very limited exception is provided by section 1203.2(e) ["If an order setting aside the judgment, the revocation of probation, or both is made after the expiration of the probationary period, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction." see also *People v. Jackson*, 134 Cal. App. 4th 929, 36 Cal. Rptr. 3d 477 (2d Dist. 2005), reh'g denied, (Dec. 27, 2005) and as modified, (Jan. 5, 2006).] Although courts may extend probation within the maximum period, there is no authority to extend probation beyond the statutory maximum, even for the purposes of recovering restitution. (*People v. Medeiros*, 25 Cal. App. 4th 1260, 1266–1267, 31 Cal. Rptr. 2d 83 (6th Dist. 1994).)

A court is not permitted to extend probation beyond the statutory period, even if consented to or requested by the defendant. However, if the defendant does make such a request and the court erroneously grants it, the defendant is estopped from challenging the condition on appeal. (*People v. Jackson*, 134 Cal. App. 4th 929, 932–933, 36 Cal. Rptr. 3d 477 (2d Dist. 2005), reh'g denied, (Dec. 27, 2005) and as modified, (Jan. 5, 2006); *People v. Gilchrist*, 133 Cal. App. 3d 38, 44, 183 Cal. Rptr. 709 (3d Dist. 1982); *In re Bolley*, 129 Cal. App. 3d 555, 557, 181 Cal. Rptr. 111 (3d Dist. 1982).) Where "the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. [Citations.] Whether he shall be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when 'To hold otherwise would permit the parties to trifle with the courts.' [Citation.]" (*In re Griffin*, 67 Cal. 2d 343, 347–348, 62 Cal. Rptr. 1, 431 P.2d 625 (1967).)

People v. Ornelas (2023) 87 Cal.App.5th 1305 (*Ornelas*), discusses the ability of the court to account for the time the defendant is at large on a violation of probation where the probation is revoked and reinstated during the original two-year term. "[I]n passing AB 1950, the Legislature intended that when a warrant was issued and probation was revoked during the initial two-year term, if probation was later reinstated, the period during which the defendant was on warrant status could be tacked on to the probationary period. Notably, summary revocation does not *automatically* extend the probationary period. Rather, at a formal revocation hearing, if the trial court finds a violation, it has discretion to reinstate and extend the probationary term to account for the period of revocation. [Citations.] [discussing cases, including *Leiva*, that 'conclude[ ] a trial court has discretion to extend the expiration date when

supervision is revoked and reinstated; it just does not happen automatically'].) In Ornelas's case, the trial court exercised its discretion to extend the expiration date, while ensuring that the time Ornelas was supervised by the probation department was not greater than the two-year maximum term of felony probation set forth in section 1203.1, subdivision (a). This was not error." (*Ornelas*, *supra*, 87 Cal.App.5th at p. 388, italics original.)

VIII. IMPOSITION OF CUSTODY AS CONDITION OF PROBATION

Nothing in AB 1950 changed the ability of the court to impose custody as a condition of probation. Section 1203.1, subdivision (a), provides, in relevant part: "The court . . . in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law for the case." The statutory scheme and traditional practice contemplate that if the court grants probation, the defendant usually receives a term in the jail of up to one year as a condition of probation. Section 1203.1, subdivision (a), however, permits the application of a term of custody as a condition of probation which could significantly exceed the period of probation itself.

IX. MISCELLANEOUS ISSUES

A. Effect of plea bargain

It is not clear what effect a plea bargain will have on the application of AB 1950 where the terms of the plea require a length of probation longer than is now authorized. The appellate courts unanimously agree *In re Estrada* (1965) 63 Cal.2d 740, applies to AB 1950, making the new limits applicable to all cases not final as of the effective date of the new statute. The courts disagree, however, on what happens to the plea bargain. The conflicting opinions center on the application of two cases: *People v. Stamps* (2020) 9 Cal.5th 685 (*Stamps*), and *People v. France* (2020) 58 Cal.App.5th 714 (*France*). *Stamps* holds a court may not unilaterally modify a plea agreement after acceptance. *Stamps* involved the newly granted authority of the court to strike certain enhancements, a matter of judicial discretion. The Supreme Court held the trial court was not permitted to strike the enhancements without giving the prosecution an opportunity to withdraw from the plea agreement. In *France* the prosecution was not allowed to withdraw from a plea bargain where the Legislature made certain enhancements illegal, which mandated striking of the enhancements. *France* has been granted review. *People v. Stewart* (2021) 62 Cal.App.5th 1065 (*Stewart*), summarizes the key distinction between *Stamps* and *France*: " For the *France* majority, the critical factor distinguishing *Stamps* was that Senate Bill 1393, at issue in *Stamps*, gave the trial court *discretion* to strike an enhancement while Senate Bill 136 'reduc[ed] sentences directly by significantly narrowing the scope of an enhancement.' [Citation.] Under Senate Bill 1393, 'it is ultimately a trial court that chooses whether an enhancement is eliminated—meaning that [the change in law] directly implicates the prohibition on a trial court's ability to unilaterally modify an agreed-upon sentence.' [Citation.] In Senate Bill 136, by contrast, 'the Legislature itself has mandated the

striking of affected prison priors by making the enhancement portion of France's sentence illegal.' [Citation.] (*Stewart*, *supra*, 62 Cal.App.5th at pp. 1075-1076.)

In upholding the right of the trial court to unilaterally change the length of the defendant's probation term from three years to two years, *Stewart* relied on the reasoning in *France*. *Stewart* upheld the reduction in the term of probation without giving the prosecution an opportunity to withdraw from the plea agreement. "As applied to the issues in the present case, we find the analysis of the *France* majority more persuasive. As the majority explained, *Stamps* addressed a situation in which the new law gave the trial court discretion to strike an enhancement but did not require it to do so, thus placing directly in the trial court's hands the decision whether to alter a term of the plea bargain. *Stamps* therefore had no occasion to consider the effect on a plea bargain of retroactive application of a law through which the Legislature directly affected a plea bargain by rendering one of its terms invalid. Where the ameliorative change in law is mandatory, the question is not whether the Legislature intended to allow the trial court to alter the terms of a plea bargain but whether the Legislature intended to, in effect, do so directly. As stated in *Doe v. Harris* (2013) 57 Cal.4th 64, 70 (*Doe*), 'the Legislature, for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement.' '[T]he general rule in California is that the plea agreement will be " 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy....' " [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.' [Citation.]" (*Stewart*, *supra*, 62 Cal.App.5th at p. 1077.) *Stewart* has been granted review. Generally in accord with *Stewart* is *People v. Butler* (2022) 75 Cal.App.5th 216.

Following the *Stewart* and *Butler* lines of reasoning, *People v. Flores* (2022) 77 Cal.App.5th 420 (*Flores*) (granted review), concludes the remedy is to apply the new term of probation directly, without remand to the trial court to give the People an opportunity to withdraw from the plea agreement. "Assembly Bill 1950 'reflects [the Legislature's] categorical determination that a shorter term of probation is sufficient for the purpose of rehabilitation.' [Citation.] Given that the majority of all criminal cases are resolved by plea, applying Assembly Bill 1950 only in a minority subset of cases would frustrate the Legislature's intent to advance specific social and financial public policy goals through the reduction of probation terms, and it would do so in most cases. [Citation.] These financial and social goals were *the* driver for the legislation rather than a benefit merely incidental to a separate primary purpose. Applying Assembly Bill 1950 to all cases not yet final on review except for those specifically excluded by the Legislature effectuates legislative intent. [Citation.] A contrary interpretation that excludes application in cases in which probation was a term of the plea bargain plainly and directly thwarts legislative intent. [Citation.] [allowing prosecutor 'to withdraw from the plea agreement ... would frustrate legislative intent']; [citation]." (*Flores*, *supra*, 77 Cal.App.5th at p. 446.) *Flores* has been granted review.

A different view was taken in a split decision by *People v. Scarano* (2022) 74 Cal.App.5th 993 (*Scarano*) (granted review). The majority followed the reasoning in *Stamps*, primarily because of the discretion exercised by the trial court in approving a plea agreement. "[W]we conclude that the trial court's sentencing discretion and discretion to withdraw its consent from a plea agreement (unless limited by the Legislature) are separate reasons for applying the *Stamps* remedy. In Assembly Bill 1950, the Legislature displayed no intent to change the component of section 1192.5 that gives trial courts the authority to withdraw consent from plea agreements. This judicial authority is also long-standing law. [¶] Section 1192.5—the very provision the *Stamps* court relied upon in establishing its remedy—gives the trial court discretion to withdraw consent from a plea agreement. The *Stamps* court was careful to point this out. (See *Stamps, supra*, 9 Cal.5th at p. 706 ['courts have broad discretion to withdraw their approval of negotiated pleas'].) Indeed, '[t]he court's authority to withdraw its approval of a plea agreement has been described as "near-plenary." ' [Citations.] As we have previously noted, and as the *Stamps* court has acknowledged, ' "[g]enerally, a trial court may exercise its discretion to withdraw approval of a plea bargain because: (1) it believes the agreement is 'unfair' [citation]; (2) new facts have come to light; (3) the court has become more fully informed about the case; or (4) when, after further consideration, *the court concludes that the agreement is* " '*not in the best interests of society*' " ' [citation].' " [citation], italics added, quoting [citation] [¶] This discretion to approve agreements, and if appropriate withdraw consent, is critical to the administration of justice. . . . [¶] Even though defendant has not shown anything in Assembly Bill 1950 or its legislative history suggesting legislative intent to deprive trial courts of the discretion to withdraw consent to an agreement they had approved and instead require appellate courts to impose a new sentence without remanding for resentencing, defendant asks us to skip remand and simply order that the term of his probation be reduced. Were we to do that, defendant would have effectively whittled down his sentence without allowing the trial court to determine whether the reduced sentence furthers the interests of society." (*Scarano*, *supra*, 74 Cal.App.5th at p. 1008.) *Scarano* has been granted review.

In fashioning a remedy, *Scarano* concluded: "This case should be remanded for resentencing. At that time, the trial court may or may not conclude that the plea agreement, sans three years of supervised probation with a search condition, drug rehabilitation programming, and drug testing is in the interests of society. Because the Legislature has not indicated otherwise, the trial court maintains the discretion to make this decision. If the court does not withdraw its consent, it must give the prosecution the opportunity to withdraw from the plea agreement. Should the court or prosecution withdraw consent, the trial court must ' " 'restore the parties to the status quo ante.' " ' [Citation.] In this context, 'ante' must mean before the plea, meaning the dismissed counts and possibly the strike allegation would be restored." (*Scarano*, *supra*, 74 Cal.App.5th at p. 1014.) *Scarano* also held the new sentence is not capped by the length of the originally negotiated term. (*Scarano*, *supra*, 74 Cal.App.5th at pp.1014-1015, granted review.)

In *Bowden v. Superior Court* (2022) 82 Cal.App.5th 735 (*Bowden*), the defendant entered a negotiated plea to vehicular manslaughter with a probationary term of five years. *Bowden*

holds the defendant is entitled to a probation term of two years under AB 1950, even though it is shorter than the term for a violation of Vehicle Code, section 23253 or 23152, lesser included offenses. (*Bowden*, *supra*, 82 Cal.App.5th at pp. 743-745.) The court held further that *Samps* does not apply; the court and People are not entitled to withdraw from the plea agreement. (*Ibid*., at pp. 745-747.)

People v. Qualkinbush (2022) 79 Cal.App.5th 879, 894, holds the defendant's plea agreement waived any objections to the length of probation under AB 1950.

B. Setting restitution after probation has expired

Section 1202.46 may offer limited relief to a victim if the amount of restitution had not been fixed at sentencing. Section 1202.46 provides: "Notwithstanding Section 1170, when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4."

In *People v. Moreno* (2003) 108 Cal.App.4th 1 (*Moreno*), the trial court had not addressed the defendant's obligation to reimburse the state Victims of Crime Program for the damages paid out because of the defendant's crime. The defendant was sentenced to prison without probation. While the case was pending appeal, the probation officer successfully requested a restitution order for crime program. As observed by *Moreno*: "[N]otwithstanding a trial court's failure to retain jurisdiction to impose or modify a restitution order, the second part of section 1202.46 permits the prosecutor, *at any time,* to request correction of a sentence that is *invalid* because, as in the present case, the court at the initial sentencing had neither ordered restitution nor found 'compelling and extraordinary reasons' for ordering less than full restitution. The victim too may make such a request, or the trial court may act on its own motion. It follows that the court is not barred from correcting the invalid sentence simply because the prosecutor failed to object when it was imposed. An invalid or unauthorized sentence is subject to correction whenever it comes to the court's attention." (*Moreno*, *supra* 108 Cal.App.4th at p. 10; italics original.)

Where the court has ordered victim restitution, but reserves jurisdiction to determine the amount at a later date, the court may fix the amount of restitution even though probation has expired. (*People v. Zuniga* (2022) 79 Cal.App.5th 870 (*Zuniga*) [probation expired with the enactment of AB 1950 prior to setting of the amount of restitution].) (See also *People v. Bufford* (2007) 146 Cal.App.4th 966 [section 1202.46 applied even after the defendant fully served the

sentence].) Generally in accord with *Zuniga* is *People v. McCune* (2022) 81 Cal.App.5th 648, granted review.

While section 1202.46 may permit the fixing of restitution after probation has expired, the court has no authority to enforce the order beyond the ministerial act of entering a civil judgment. (*Zuniga*, *supra*, 79 Cal.App.5th at pp. 877-888.) No reported decision has suggested section 1202.46 somehow resurrects probation to permit the court to impose sanctions if restitution is not paid.

C. Term of probation with excess taking under section 186.11, subdivision (h)(1)(B)

If the defendant is convicted of two or more felonies under the circumstances provided in section 186.11, subdivision (a), commonly known as the "aggravated white collar crime enhancement," the court must order the defendant to make full restitution as a condition of probation. (§ 186.11, subd. (h)(1)(B).) "Notwithstanding any other provision of law, the court may order that the period of probation continue for up to 10 years or until full restitution is made to the victim, whichever is earlier." (*Ibid.*) The authorization of a 10-year term likely constitutes a felony offense "that includes specific probation lengths within its provisions" for the purposes of section 1203.1, subdivision (l)(1). In most circumstances, crimes coming under the exception provided by section 1203.1, subdivision (l)(1), will have a maximum term of probation determined according to the maximum sentence for the crime. However, because the provisions of section 186.11, subdivision (h)(1)(B), apply "notwithstanding any other provision of law," the maximum period of probation is 10 years.

Specification of offense as misdemeanor

If at the time of sentencing the court specifies the defendant's criminal offense as a misdemeanor under section 17, there is little doubt that the maximum period of probation will be the same as a sentence imposed on a straight misdemeanor. The rule is less clear when the offense is originally sentenced as a felony, but later reduced to a misdemeanor under section 17, subdivision (b)(3). While no reported case appears to have addressed the issue, likely the maximum period of probation will be the same as if the crime had originally been sentenced as a misdemeanor. Section 17, subdivision (b), designates the circumstances under which a "wobbler" offense may be specified as a misdemeanor. If it is so specified, subdivision (b), states that the offense "is a misdemeanor for all purposes." Presumably such purposes would include the determination of the authorized length of probation. The court should credit the defendant with any period served while on felony probation against any remaining period of misdemeanor probation.

X. STRATEGIES FOR CASE MANAGEMENT AFTER ENACTMENT OF AB 1950

Courts, particularly those with active collaborative court programs, have responded in various ways to the reduction of the probation term caused by the enactment of AB 1950. The

following is a discussion of some of the responses either enacted or being considered by courts to best manage offenders who will be participating in long term treatment programs as a condition of probation.

A. Compress programs into new time limits. Several courts are working with providers to redesign existing treatment programs to allow completion within the new limits of probation. A part of this approach is to redefine "success." Rather than consider "success" as staying in a program for designated phases for blocks of time, "success" will be viewed as accomplishing certain specific milestones, not limited by specific time periods. Some courts are using clinicians on the court calendar to respond to treatment issues more quickly. Probation officers are shifting more to a treatment and support approach, rather than a strict accountability approach. Finally, the shorter time forces the criminal justice system to place greater emphasis on things that will help a defendant succeed, such as employment or housing.

B. Create an expedited management system for screening out defendants eligible for early termination. Several courts have worked cooperatively with other justice partners to quickly identify defendants who are eligible for early termination of probation because of the new time limits. A list or petition is prepared from the county's criminal data base identifying those on probation where the term has ended by operation of law and/or persons who soon will be eligible for termination. The list or petition is circulated to the justice partners to determine if there is any objection to termination. If there is no objection, the necessary orders are prepared administratively without the need for a court hearing. A copy of the order terminating probation is entered in the defendant's file and into the county data base. Although probation may have terminated by operation of law, unless the court adopts a formalized procedure for termination, there is no way to assure the county's data base will accurately reflect the defendant's true status on probation if checked by law enforcement.

If there is a dispute over the right to termination of probation, the matter would be calendared for resolution by the court. If a defendant is not selected for early termination by stipulation, the defendant nevertheless may petition the court on his or her own motion.

See Appendix III and IV for petition and order forms developed by the Orange County Superior Court for termination of formal and informal probation because of the limits imposed by AB 1950.

C. Delay sentencing while defendant waits for admission to a program. At least one court has developed the practice of postponing the defendant's sentencing to account for at least some of the delay caused by the wait for a space in a program. With the defendant's consent, the placement on probation is delayed for a period of time so that probation is not running while the defendant is not in treatment. During this period the defendant can be placed on terms and conditions of release until full terms of probation

can be imposed at sentencing. In some cases the sentencing is delayed for a short period of time during which the program assesses the defendant's suitability; if deemed unsuitable, the defendant can be returned to the sentencing court without loss of probation supervision time.

D. Leverage diversion programs. At least two courts are considering a disposition where the defendant is first placed on diversion pursuant to provisions such as sections 1000.5 [drug court], 1000.8 ["Back on Track" drug offenders], or 1001.21 [persons with developmental disability]. Assuming the availability of funding, similar consideration might be given to a program under section 1210 [Proposition 36 – drugs]. While on diversion the defendant would be monitored under terms appropriate for the defendant's circumstances. If the defendant completes all requirements of diversion, the case is dismissed. If the defendant fails to satisfactorily complete diversion, the case will shift to probation under the new time limits.

E. Voluntarily extend treatment services beyond the authorized length of probation. At least two courts secure the agreement of the defendant to participate in treatment services beyond the expiration of probation. Such an agreement will depend on the ability and willingness of treatment programs to offer services to persons who are not on probation.

F. Limited waiver of the limits of probation. Some courts are considering asking defendants to voluntarily extend the term of probation beyond the limits of AB 1950. Such an approach would be on a case-by-case basis where the defendant reaches the end of the probation period but is in violation of its terms and the court is considering the imposition of sentence or giving the defendant an additional opportunity to complete probation. The request for a waiver of the statutory limits of probation, however, should be considered in light of *People v. Gilchrist* (1982) 133 Cal.App.3d 38 (*Gilchrist*), which holds a court may not extend probation beyond the statutory maximum, even with the defendant's consent. "We have recently held '[t]he power of the court with regard to probation is strictly statutory, and the court cannot impose a condition of probation which extends beyond the maximum statutory period of probation.' (*In re Bolley* (1982) 129 Cal.App.3d 555, 557, citing *In re Acosta* (1944) 65 Cal.App.2d 63, 64.) If defendant's period of probation was five years' maximum, any attempt by the . . . court to extend probation beyond that period would be null and void even had he consented. (*In re Bolley*, *supra.*, at p. 557.) Defendant's consent could not authorize an act which was beyond the trial court's statutory power." (*Gilchrist*, *supra*, 133 Cal.App.3d at p. 44.)

G. Delay ruling of section 1203.4 relief in exchange for longer participation in treatment. One court delays relief under section 1203.4 if the defendant needs further participation in treatment. Under this approach, if a defendant successfully completes probation, he or she will be granted relief under section 1203.4 in the ordinary course. However, if the defendant has not been entirely successful on probation and appears to need further time in treatment, the court will agree with defendant that if treatment is

extended for an indicated period of time, and if there are no violations, the court will grant the relief under section 1203.4. Probation ends at the required time, but the relief under section 1203.4 is delayed in exchange for the additional treatment.

APPENDIX I: CRIMES EXCLUDED FROM THE ONE-YEAR OR TWO-YEAR LIMIT ON PROBATION DUE TO SPECIFIC PROBATION LENGTHS (Pen. Code, §§ 1203a(b), 1203.1(l)(1))

Code Section	Crime	Specific Probation Length	Max. probation term (felonies only)	Authority for Exception
PENAL CODE				
136.1(a), (b) (M)	Witness intimidation	Max./Min. of 36 months		If § 1203.097 applies[11]
136.1(a), (b) (F)	Witness intimidation	Min. of 36 months	3 years	If § 1203.097 applies
136.1(c) (F)	Witness intimidation - prevent testimony with threat of violence or force	Min. of 36 months	4 years	If § 1203.097 applies
140 (M)	Witness intimidation – use of force or threat of force or violence	Max./Min. of 36 months		If § 1203.097 applies
140 (F)	Witness intimidation – use of force or threat of force or violence	Min. of 36 months	4 years	If § 1203.097 applies
166(c) (M)	Violation of protective or stay away order	Max./Min. of 36 months		§ 166(e)(1); § 1203.097
166(d)(1) (M)	Persons restricted from purchasing, receiving, owning, or possessing firearm by court order	Max./Min. of 36 months		§ 29825(c); § 1203.097
166(d)(1) (F)	Persons restricted from purchasing, receiving, owning, or possessing firearm by court order	Min. of 36 months	3 years	§ 29825(c); § 1203.097
186.11(h)(1)(B)	Theft of property in excess of $100,000	Max. 10 yrs or full paymt of restitution,	10 years	§ 186.11(h)(1)(B)[12]

[11] If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the minimum period of probation is 36 months. (§ 1203.097(a)(1).)

[12] 10 year maximum term applies "notwithstanding any other law." (§ 186.11(h)(1)(B).)

		whichever is less		
243(e)(1) (M)	Simple battery on spouse, cohabitant, or fellow parent	Max./Min. of 36 months		§ 1203.097
245(a)(1) (M)	Assault with a deadly weapon other than firearm	Max./Min. of 36 months		If § 1203.097 applies
245(a)(1) (F)	Assault with a deadly weapon other than firearm	Min. of 36 months	4 years	If § 1203.097 applies
245(a)(4) (M)	Assault by any means of force likely to produce great bodily injury	Max./Min. of 36 months		If § 1203.097 applies
245(a)(4) (F)	Assault by any means of force likely to produce great bodily injury	Min. of 36 months	4 years	If § 1203.097 applies
272	Contributing to delinquency of minor	Max. of 5 years		§ 272(a)(1)
273a(a) (M)	Child abuse likely to produce great bodily harm or death	Max./Min. of 48 months		§ 273a(c)(1)
273a(a) (F)	Child abuse likely to produce great bodily harm or death	Min. of 48 months	6 years	§ 273d(c)(1)
273a(b) (M)	Child abuse	Max./Min. of 48 months		§ 273a(c)(1)
273d(a) (M)	Inflicting physical punishment on child	Max./Min. of 36 months		§ 273d(c)(1)
273d(a) (F)	Inflicting physical punishment on child	Min. of 36 months	6 years	§ 273d(c)(1)
273.5 (M)	Inflicting injury on spouse, cohabitant, or fellow parent resulting in traumatic condition	Max./Min. of 36 months		§ 273.5(g); § 1203.097
273.5 (F)	Inflicting injury on spouse, cohabitant, or fellow parent resulting in traumatic condition	Min. of 36 months	4 years	§ 273.5(g); § 1203.097
273.6 (M)	Violation of protective or stay away order	Max./Min. of 36 months		§ 273.6(h); § 1203.097
278 (M)	Child abduction	Max./Min. of 36 months		If § 1203.097 applies

278 (F)	Child abduction	Min. of 36 months	4 years	If § 1203.097 applies
278.5 (M)	Child abduction in violation of custody order	Max./Min. of 36 months		If § 1203.097 applies
278.5 (F)	Child abduction in violation of custody order	Min. of 36 months	3 years	If § 1203.097 applies
368 (M)	Elder/dependent adult abuse	Max./Min. of 36 months		If § 1203.097 applies
368 (F)	Elder/dependent adult abuse	Min. of 36 months	4 years	If § 1203.097 applies
422 (M)	Criminal threats	Max./Min. of 36 months		If § 1203.097 applies
422 (F)	Criminal threats	Min. of 36 months	3 years	If § 1203.097 applies
502(c)(1)-(2), (4)-(5) (M)	Unauthorized computer access	Max./Not less than 3 years[13]		§ 1203.047
502(c)(1)-(2), (4)-(5) (F)	Unauthorized computer access	Not less than 3 years[14]	3 years	§ 1203.047
502(c)(3), (6), (7), (8) (felony only)	Unauthorized computer access	Not less than 3 years[15]	3 years	§ 1203.047
502.7(b) (M)	Telephone fraud	Max./Not less than 3 years[16]		§ 1203.047
502.7(b) (F)	Telephone fraud	Not less than 3 years[17]	3 years	§ 1203.047
594 (M)	Vandalism	Max./Min. of 36 months		If § 1203.097 applies
594 (F)	Vandalism	Min. of 36 months	3 years	If § 1203.097 applies
602.5	Trespassing	Up to 3 yrs		§ 602.5(c)

[13] Except in unusual cases where the ends of justice would be better served by a shorter period (§ 1203.047).
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.

647(j)(4) (M)	Intentional and nonconsensual distribution of the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in a sexual act	Max./Min. of 36 months		If § 1203.097 applies
646.9(a) (M)	Stalking	Max./Min. of 36 months		If § 1203.097 applies
646.9(a) (F)	Stalking	Min. of 36 months	3 years	If § 1203.097 applies
646.9(b) (F)	Stalking in violation of court order	Min. of 36 months	4 years	If § 1203.097 applies
653m (M)	Telephone or electronic communication with intent to annoy or harass	Max./Min. of 36 months		If § 1203.097 applies
29825(a), (b) (M)	Persons restricted from purchasing, receiving, owning, or possessing firearm by court order	Max./Min. of 36 months		§ 29825(c); § 1203.097
29825(a), (b) (F)	Persons restricted from purchasing, receiving, owning, or possessing firearm by court order	Min. of 36 months	3 years	§ 29825(c); § 1203.097
HEALTH & SAFETY CODE				
11550(a) (M)	Use or under the influence of a controlled substance	Max. 5 years		§ 11550(a)
VEHICLE CODE				
23152 (M)	Driving under the influence	Not less than 3 nor more than 5 years		§ 23600(b)(1)
23152 (F)	Driving under the influence	3 years, unless max sentence exceeds 5 years state prison; then up to max sentence	3 years, unless max sentence exceeds 5 years state prison; then up to max sentence	§ 23600(b)(1)

23153 (M)	Driving under the influence causing injury	Not less than 3 nor more than 5 years		§ 23600(b)(1)
23153 (F)	Driving under the influence causing injury	3 years, unless max sentence exceeds 5 years state prison; then up to max sentence	3 years, unless max sentence exceeds 5 years state prison; then up to max sentence	§ 23600(b)(1)

APPENDIX II: CRIMES EXCLUDED FROM THE TWO-YEAR LIMIT ON PROBATION DUE TO INCLUSION IN PENAL CODE SECTION 667.5(c) OR SECTION 1203.1(l)(2)

Code Section	Crime	Maximum Probation Term	Authority for Exception
PENAL CODE			
37	Treason	Life	§ 667.5(c)(7); § 1203.1(l)(1)
128	Perjury resulting in execution of innocent person	Life	§ 667.5(c)(7); § 1203.1(l)(1)
136.1/186.22	Intimidation of witness if a felony violation of § 186.22	§ 186.22(4)(A) (c): 7 years - life	§ 667.5(c)(20); § 1203.1(l)(1)
187	Murder	§ 190(a): first degree, 25 years-life; second degree, 15 years-life; § 190(b): 25 years-life; § 190(d): 20 years-life	§ 667.5(c)(1), (7); § 1203.1(l)(1)
187/664	Attempted murder	§ 664(a): 9 years; § 664(f): 15-life	§ 667.5(c)(7), (12); § 1203.1(l)(1)
191.5(d)	Vehicular manslaughter with designated prior	Life	§ 667.5(c)(7); 1203.1(l)(1)
192(a)	Voluntary manslaughter	11 years	§ 667.5(c)(1); § 1203.1(l)(1)
203	Mayhem	8 years	§ 667.5(c)(2); § 1203.1(l)(1)
205	Aggravated mayhem	Life	§ 667.5(c)(2), (7); §1203.1(l)(1)
206	Torture	Life	§ 667.5(c)(7); § 1203.1(l)(1)
207	Kidnapping	8 years; 11 years if victim under 14	§ 667.5(c)(14); § 1203.1(l)(1)
209	Kidnapping for gain or robbery	Life	§ 667.5(c)(7), (14)
209.5	Kidnapping in course of carjacking	Life	§ 667.5(c)(7), (14);

			§ 1203.1(l)(1)
211	Robbery	1st degree under § 213(a)(1)(A): 9 years; 1st degree under § 213(a)(1)(B): 6 years; 2nd degree: 5 years	§ 667.5(c)(9); § 1203.1(l)(1)
215	Carjacking	9 years	§ 667.5(c)(17); § 1203.1(l)(1)
217.1(b)	Attempted murder of government official	15-life	§ 667.5(c)(7), (12); § 1203.1(l)(1)
218	Train wrecking	Life	§ 667.5(c)(7); § 1203.1(l)(1)
219	Train derailing	Life	§ 667.5(c)(7); § 1203.1(l)(1)
220	Assault with intent to commit mayhem, rape, sodomy, or oral copulation	§ 220(a)(1): 6 years; § 220 (a)(2): 9 years; § 220(b): life	§ 667.5(c)(7), (15); § 1203.1(l)(1)
236.1(c)(2)	Causing minor to engage in commercial sex act – with force or fear	§ 236.1(c)(2): with force or fear, 15-life	§ 667.5(c)(7); § 1203.1(l)(1)
262(a)(1), (4)	Spousal rape	8 years	§ 667.5(c)(3); § 1203.1(l)(1)
273ab	Assault on child with GBI resulting in death	§ 273ab(a): 25-life; § 273ab(b): life	§ 667.5(c)(7); § 1203.1(l)(1)
286(c)(1)	Sodomy with person under 14 and more than 10 years younger	8 years	§ 667.5(c)(4); § 1203.1(l)(1)
287(c)(1)	Oral copulation with person under 14 and more than 10 years younger	8 years	§ 667.5(c)(5); § 1203.1(l)(1)
288(a) and (b)	Lewd act on child under 14	8 years	§ 667.5(c)(6); § 1203.1(l)(1)
288.5	Continuous sexual abuse of a child	16 years	§ 667.5(c)(16); § 1203.1(l)(1)
289(j)	Sexual penetration by foreign object of a child under the age of 14	8 years	§ 667.5(c)(11); § 1203.1(l)(1)
451(a), (b)	Arson	§ 451(a): 9 years; § 451(b): 8 years	§ 667.5(c)(10); § 1203.1(l)(1)

451.5	Aggravated arson	Life	§ 667.5(c)(7)
459-460(a)	Residential burglary with person other than accomplice present	6 years	§ 667.5(c)(21)
487(b)(3)	Theft by employee or agent [if the total value of the property taken exceeds $25,000]	3 years	§ 1203.1(l)(2)
503	Theft by embezzlement [if the total value of the property taken exceeds $25,000]	3 years	§ 1203.1(l)(2)
518	Extortion [if in violation of Penal Code section 186.22]	§ 186.22(4)(A)(c) : 7 years-life	§ 667.5(c)(7), (19); § 1203.1(l)(1)
532a	False financial statement [if the total value of the property taken exceeds $25,000]	3 years	§ 1203.1(l)(2)
11418(b)	Possession, use, or manufacture of weapon of mass destruction	12 years	§ 667.5(c)(23); § 1203.1(l)(1)
11418(c)	Possession, use, or manufacture of weapon of mass destruction	6 years	§ 667.5(c)(23); § 1203.1(l)(1)
12022.3(a)	Sex offense with use of firearm or deadly weapon	10 years	§ 667.5(c)(8); § 1203.1(l)(1)
12022.5(a)	Use of firearm	10 years	§ 667.5(c)(8); § 1203.1(l)(1)
12022.53	Use or discharge of firearm in specified felonies	§ 12022.53(b): 10 years; § 12022.53(c): 20 years; § 12022.53(d): 25-life	§ 667.5(c)(22); § 1203.1(l)(1)
12022.55	Discharging firearm from vehicle	10 years	§ 667.5(c)(8); § 1203.1(l)(1)
12022.7	Personal infliction of GBI	§ 12022.7(a): 3 years; § 12022.7(b)-(e): 5 years	§ 667.5(c)(8); § 1203.1(l)(1)
12022.9	Personal infliction of GBI resulting in termination of pregnancy	5 years	§ 667.5(c)(8); § 1203.1(l)(1)
18745	Exploding destructive device with intent to murder	Life	§ 667.5(c)(7), (13); § 1203.1(l)(1)
18750	Exploding destructive device causing injury	9 years	§ 667.5(c)(13); § 1203.1(l)(1)

18755	Exploding destructive device causing mayhem or GBI	§ 18755(b): Life	§ 667.5(c)(7), (13); § 1203.1(l)(1)
MIL. & VET. CODE			
1670	Sabotage resulting in death or GBI	§ 1672(a): life	§ 667.5(c)(7); § 1203.1(l)(1)
1671	Making defects or omitting defects resulting in death or GBI	§ 1672(a): life	§ 667.5(c)(7); § 1203.1(l)(1)

APPENDIX III: SAMPLE PETITION FOR TERMINATION OF FORMAL PROBATION

Orange County Probation Department P.O. Box 10260 Santa Ana, CA 92711-0260	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE JUSTICE CENTER: ☐ Central – 700 Civic Center Drive West, Santa Ana, CA 92701-4045 ☐ Harbor – 4601 Jamboree Road, Newport Beach, CA 92660-2595 ☐ North – 1275 North Berkeley Avenue, Fullerton, CA 92832-1258 ☐ West – 8141 13th Street, Westminster, CA 92683-4593	
People of the State of California vs. Defendant:	
PETITION FOR TERMINATION OF FORMAL PROBATION, NOTICE OF HEARING AND COURT ORDER (PENAL CODE §§1203a, 1203.1)	**Case Number:**

The defendant is currently on ☐ Felony formal probation ☐ Misdemeanor formal probation

☐ **No Hearing Required, Order Terminating Probation Requested**

There is: ☐ no restitution obligation in this matter; **OR** ☐ an order setting the amount of restitution has already been entered by the court; **OR** ☐ at the time of this petition no victim claims for restitution have been filed with or substantiated by Probation.

Probation requests that the court enter an order terminating the defendant's probation pursuant to Penal Code sections 1203a and/or 1203.1 without further hearing.

☐ The People agree.

☐ **No Hearing Required, Order Determining Restitution Amount and Terminating Probation Requested**

There is a restitution obligation in this matter. The defendant has stipulated to the amount of restitution as determined by Probation and as indicated on the attached exhibit. Probation requests that the court enter an order for restitution as indicated on the attached exhibit. If the court enters an order establishing restitution as indicated, the court may thereafter enter an order terminating the defendant's probation pursuant to Penal Code sections 1203a and 1203.1 without further hearing. Otherwise a hearing is requested.

☐ The People agree.

☐ **Hearing Requested.**

☐ Probation requests a hearing for an order determining the amount of restitution owed.

☐ The People request a hearing: ☐ for an order determining the amount of restitution owed; ☐ regarding the defendant's eligibility to be terminated from probation pursuant to Penal Code sections 1203a and/or 1203.1; ☐ other: _____.

Date: _____ _____ _____

Type or Print Name – Attorney for People | Signature of Attorney representing the People

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COURT ORDER

☐ The Court hereby orders probation terminated.

☐ The Court hereby orders restitution as provided in the attached order(s) for restitution.

☐ The matter is hereby set on _____ for a ☐ restitution hearing and/or ☐ a hearing regarding termination of probation pursuant to Penal Code Sections 1203a and/or 1203.1. in Dept _____ at _____.

Date: _____ _____

Judge of the Superior Court

Optional Use
Form #
Created 12/31/2020

PETITION FOR TERMINATION OF FORMAL PROBATION / NOTICE OF HEARING / COURT ORDER PURSUANT TO PC 1203a, 1203.1

APPENDIX IV: SAMPLE PETITION FOR TERMINATION OF INFORMAL PROBATION

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, Address, Telephone No., Email*) ATTORNEY FOR *(NAME)*: Bar No.:	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE JUSTICE CENTER: ☐ Central – 700 Civic Center Drive West, Santa Ana, CA 92701-4045 ☐ Harbor – 4601 Jamboree Road, Newport Beach, CA 92660-2595 ☐ North – 1275 North Berkeley Avenue, Fullerton, CA 92832-1258 ☐ West – 8141 13th Street, Westminster, CA 92683-4593	
People of the State of California vs. Defendant:	
PETITION FOR TERMINATION OF INFORMAL PROBATION, NOTICE OF HEARING AND COURT ORDER (PENAL CODE §§1203a, 1203.1)	**Case Number:**

I am the ☐ Defendant ☐ Attorney for defendant in the above-entitled action.

Petitioner declares:

The defendant was charged with a crime that qualifies for relief pursuant to Penal Code §§ 1203a and 1203.1 and for which defendant was placed on informal probation. Accordingly, defendant requests that the court enter an order terminating the defendant's probation pursuant to Penal Code sections 1203a and/or 1203.1 without further hearing.

Date: _____ _____ _____
Type or Print Name Signature of Petitioner

Peoples response:

☐ The People agree.

☐ The People request a hearing: ☐ for an order determining the amount of restitution owed; ☐ regarding the defendant's eligibility to be terminated from probation pursuant to Penal Code sections 1203a and/or 1203.1; ☐ other: _____.

Date: _____ _____ _____
Type or Print Name Signature of Attorney for People

COURT ORDER

☐ The Court hereby orders probation terminated.

☐ The matter is hereby set on _____ for a ☐ restitution hearing and/or ☐ a hearing regarding termination of probation pursuant to Penal Code Sections 1203a and/or 1203.1. in Dept _____ at _____.

Date: _____ _____
Judge of the Superior Court

Optional Use
Form #
Created 01/07/2020

PETITION FOR TERMINATION OF INFORMAL PROBATION / NOTICE OF HEARING / COURT ORDER PURSUANT TO PC 1203a, 1203.1