

**CONDITIONS OF PROBATION
&
NON-CONTESTED PROBATION REVOCATION CASES
Materials & Presentation by Brad Bristow, CCAP Staff Attorney**

I. Conditions of Probation

A. Typical Challenges on Appeal

1. Conditions that are not reasonably related to the offense committed or the defendant's rehabilitation. These challenges are usually fact-specific and have been held to require a challenge at the time of sentencing to preserve for appeal.

Examples:

- *People v. Keller* (1978) 76 Cal.App.3d 827 [condition permitting search for narcotics when the defendant had no recent history of narcotics problems]
- *In re Martinez* (1978) 86 Cal.App.3d 577 [condition permitting search for weapons when defendant convicted only of theft and had no history of possessing weapons]
- *In re Bushman* (1970) 1 Cal.3d 767 [condition that the defendant seek psychiatric care and defendant was not shown to need care]

2. Blatantly unconstitutional conditions

- *In re White* (1979) 97 Cal.App.3d 141 [banishment from an entire portion of a city]
- *People v. Zaring* (1992) 8 Cal.App.4th 362 [order that defendant not become pregnant]
- *People v. Bauer* (1989) 211 Cal.App.3d 937 [probation officer approval of residence]

3. Overbroad or vague conditions

That probationer "not associate with anyone disapproved of by probation" is unconstitutionally vague, unless the term "known to be" is added before "disapproved." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890-892.).

Similarly, gang conditions should define “gang” in the terms of Penal Code section 186.22, and restrictions of staying away from gang members or not wearing gang indicia should proscribe only “knowing” conduct. (*People v. Lopez* (1998) 66 Cal.App.4th 615.)

4. Payment of certain fees as conditions of probation is unauthorized. (*People v. Hart* (1998) 65 Cal.App.4th 902 [probation costs and attorneys fees].)

B. Failure to Object

1. Appellate courts will find forfeiture in situation where the objection is not oppressive, especially where the appropriateness of the condition requires factual determination.

2. But where a constitutional question is clearly a question of law that can be resolved without further development of the facts are not forfeited. (*In re Sheena K.*, *supra*, 40 Cal.App.4th at 886-892.)

C. Modification in the Trial Court?

Consider advantages of seeking modification of the condition in the trial court. This may be more successful and expedient than an appellate contention of ineffective assistance of trial counsel or a request to the appellate court to address the issue despite the waiver, per *People v. Williams*, *supra*, 17 Cal.4th 148.

II. **Issues Arising in the Uncontested Probation Revocation Case**

A. Right to a Contested Hearing

1. As due process applies (*Black v. Romano* (1985) 471 U.S. 606; *People v. Vickers* (1972) 8 Cal.3d 451), the question arises as to whether adequate advisements were given before the admission was obtained. (*In re la Croix* (1974) 12 Cal.3d 146.) But a full *Boykin/Tahl* advisement is not required. (*People v. Clark* (1996) 51 Cal.App.4th 575, 582-583.)

2. Is the sentence inconsistent with a “stayed execution” sentence imposed at the

time of the grant of probation in violation of *People v. Howard* (1997) 16 Cal.4th 1081, 1087?

3. Does the sentence violate the original plea bargain or the agreement made at the time of the admission of the probation violation? But note that some in cases the original promise was fully satisfied by a grant of probation at the outset. (*People v. Hopson* (1993) 13 Cal.App.4th 122, and cases therein cited; contra, *People v. Alkire* (1981) 122 Cal.App.4th 119.)

4. What if court imposes a new or greater fine at the time of probation? To the extent that the fine is increased, it is a violation of Double Jeopardy. (*People v. Jones* (1994) 24 Cal.App.4th 1780, relying on *People v. Henderson* (1963) 60 Cal.2d 482.) To the extent a fine is imposed rather than recognized as already existing, a second fine is unauthorized and subject to striking. (*People v. Chambers* (1998) 65 Cal.App.4th 819; *People v. Arata* (2004) 118 Cal.App.4th 195.)