

SIXTH DISTRICT APPELLATE PROGRAM

A NON-PROFIT CORPORATION

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Date: November 18, 2020

From: Patrick McKenna, Executive Director
Sixth District Appellate Program

To: In-District Indigent Defense Agencies

Re: Assembly Bill No. 1950 (Probation: Length of Terms)
Written by Lori A. Quick, Staff Attorney

Assembly Bill No. 1950 was approved by Governor Gavin Newsom on September 30, 2020 and will become effective on January 1, 2021. The bill restricts the period of probation to no longer than one year in misdemeanor cases and no more than two years in felony cases unless otherwise specified. To that end, the bill amends Penal Code section 1203a and Penal Code section 1203.1 to reflect those changes.

It is important to note that there are exceptions. With respect to misdemeanors, Penal Code section 1203a, subdivision (b) as amended states “The one-year probation limit in subdivision (a) shall not apply to any offense that includes specific probation lengths within its provisions.” For example, a defendant convicted of misdemeanor driving under the influence can still be placed on probation for a period of three to five years. (See Veh. Code, sec. 23600, subd. (b)(1).) Similarly in felony cases, the two year limit on term of probation will not apply if the particular statute under which the defendant is convicted provides for a different term.

In addition to exceptions for felony offenses of statutes which specify a term of probation other than two years, the amended version of Penal Code section 1203.1 sets forth exceptions. As of January 1, 2021, Penal Code section 1203.1, subdivision (m) will exclude from the two year probation limitation violent felonies within the meaning of

Penal Code section 667.5, subdivision (c) and certain theft offenses. Specifically, it states that the two year limitation does not apply to:

(1) An offense listed in subdivision (c) of Section 667.5 and an offense that includes specific probation lengths within its provisions. For these offenses, the court, or judge thereof, 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 the maximum possible term of the sentence and under conditions as it shall determine. All other provisions of subdivision (a) shall apply.

(2) A felony conviction for paragraph (3) of subdivision (b) of Section 487, Section 503, and Section 532a, if the total value of the property taken exceeds \$25,000. For these offenses, the court, or judge thereof, 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 three years, and upon those terms and conditions as it shall determine. All other provisions of subdivision (a) shall apply.

It appears that the amendments to sections 1203a and 1203.1 will apply to all eligible defendants whose cases are not final as of January 1, 2021. If a defendant has an ongoing appeal, this change in the law should apply to his or her case.

Defense counsel in superior courts should be aware of this change in the law to advocate for two year terms of probation for clients to whose offenses the amended statutes are applicable. Make sure that prosecutors and judges are aware that if a qualifying defendant is placed on probation for more than one year in misdemeanors and two years in felonies, a notice of appeal will be filed and the length of the probationary term will have to be reduced after January 1, 2021.

Notices of appeal should normally be filed in every case in which terms of probation greater than one year in misdemeanors and two years in felonies are imposed, and where the statute of which the defendant was convicted does not fall within one of the exceptions in Penal Code section 1203.1, subdivision (m).

In plea cases, counsel should be aware of the effect of *People v. Stamps* (2020) 9 Cal.5th 685. Under *Stamps*, if on appeal the judgment is reversed and a term of probation longer than one year in a misdemeanor or two years in a felony is ordered reduced by the Court of Appeal, the superior court may withdraw its prior approval of the plea agreement. (*Stamps, supra*, 9 Cal.5th at p. 708.) This is so because the imposition of a lesser term of probation may “lead the parties to reevaluate what constitutes a fair disposition of the case.” (*Id.*, at p. 709.) For this reason, if a defendant has received a very favorable disposition, he or she may opt to forego an appeal rather than risk losing

the benefits of the plea bargain. On the other hand, if the length of probation is not a bargained for condition, it might be possible to argue on appeal that a reduction of the term of probation does not unravel the plea bargain. Thus, counsel should avoid agreeing to a specific length for a probationary term.

Attached to this memo is a sample notice of appeal that can serve as a model for attorneys who file notices of appeal in felony cases in order to avail their clients of the ameliorative benefits of AB 1950. Please note:

In guilty plea cases, counsel should mark only Box 2(a)(1): [“this appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea (Cal. Rules of Court, rule 8.340(b).)] Pursuant to *Stamps, supra*, 9 Cal.5th at p. 698, no certificate of probable cause is required where the defendant is not seeking to set aside the plea, but instead “seeks relief because the law subsequently change to his potential benefit. His appeal, then, does not attack the plea itself and does not require a certificate of probable cause.” *Please note the attached sample notice of appeal assumes a situation in which a certificate of probable cause should be requested.*

In some jurisdictions waivers of appellate rights are common. These waivers may be interpreted by the Court of Appeal as having waived this issue, even if counsel has obtained a certificate of probable cause. In these cases, a notice of appeal should be filed and a certificate of probable cause sought. Counsel should check both Box 2(a)(1) and 2(a)(4). If possible appellate counsel will argue that the issue was not forfeited by the waiver. The attached sample notice of appeal includes language that can be used in requesting a certificate.

For convictions after a court or jury trial, counsel should simply mark Box 2(b)(1) [“This appeal is after a jury or court trial. (Pen. Code, sec. 1237(a).)] This will preserve the issue related to AB 1950.

SDAP is available to assist any offices or attorneys who have questions, including holding training sessions if requested. We are committed to working with all indigent defense agencies in the Sixth District to ensure the most zealous advocacy possible for our clients.