

Invitation to Comment

Title	Criminal Procedure: Sentencing on Revocation of Probation (amend Cal. Rules of Court, rule 4.435)
Summary	The proposed amendments to rule 4.435 of the California Rules of Court delete an outdated reference and add language, including an advisory committee comment, to clarify that a judge may consider any conduct occurring before the last reinstatement of probation when sentencing a probationer to prison upon termination of probation.
Source	Criminal Law Advisory Committee Justice Steven Z. Perren, Chair
Staff	Arturo Castro, Committee Counsel, 415-865-7702, arturo.castro@jud.ca.gov

Rule 4.435(b)(1) currently provides that when a judge decides to sentence a probationer to prison upon termination of probation, the length of the sentence “must be based on circumstances existing *at the time probation was granted, and subsequent events may not be considered* in selecting the base term” (Italics added.) The rule also contains the following advisory committee comment: “The restriction of subdivision (b)(1) is based on *In re Rodriguez* (1975) 14 Cal.3d 639, 652: ‘The primary term must reflect the circumstances existing at the time of the offense.’”

Recent case law has clarified that when probation is revoked and later reinstated, the court may consider any conduct occurring before the last reinstatement, including conduct occurring *after* the original grant of probation, when imposing a later prison sentence. (*People v. Black* (2009) 176 Cal.App.4th 145, 151.) In addition, *In re Rodriguez* predates and is inapplicable to current determinate sentencing laws. (*People v. Harris* (1990) 226 Cal.App.3d 141, 146.)

To eliminate confusion and update the rule, the proposed amendments delete the reference to *Rodriguez* and add language to the rule, including an advisory committee comment, to clarify that a judge may consider any conduct occurring before the last reinstatement of probation when sentencing a probationer to prison upon termination of probation.

Rule 4.435 of the California Rules of Court would be amended effective January 1, 2011, to read:

1
2 **Rule 4.435. Sentencing on revocation of probation**

3
4 (a) ***

5
6 (b) On revocation and termination of probation under section 1203.2, when the
7 sentencing judge determines that the defendant will be committed to prison:

8
9 (1) If the imposition of sentence was previously suspended, the judge must
10 impose judgment and sentence after considering any findings
11 previously made and hearing and determining the matters enumerated
12 in rule 4.433(c).

13
14 The length of the sentence must be based on circumstances existing at
15 the time probation was last granted, and subsequent or reinstated.
16 Events after the most recent reinstatement may not be considered in
17 selecting the base term or in deciding whether to strike the additional
18 punishment for enhancements charged and found.

19
20 (2) ***

21
22
23 **Advisory Committee Comment**

24
25 Subdivision (a) makes it clear that there is no change in the court's power, on finding cause to
26 revoke and terminate probation under section 1203.2(a), to continue the defendant on probation.

27
28 ~~The restriction of subdivision (b)(1) is based on *In re Rodriguez* (1975) 14 Cal.3d 639, 652:~~
29 ~~"[T]he primary term must reflect the circumstances existing at the time of the offense."~~

30
31 A judge imposing a prison sentence on revocation of probation will have the power granted by
32 section 1170(d) to recall the commitment on his or her own motion within 120 days after the date
33 of commitment, and the power under section 1203.2(e) to set aside the revocation of probation,
34 for good cause, within 30 days after the court has notice that execution of the sentence has
35 commenced.

36
37 Preprobation Conduct. Consideration of conduct occurring after the granting of probation should
38 be distinguished from consideration of preprobation conduct that is discovered after the granting
39 of an order of probation and before sentencing following a revocation and termination of
40 probation. If the preprobation conduct affects or nullifies a determination made at the time
41 probation was granted, the preprobation conduct may properly be considered at sentencing
42 following revocation and termination of probation. (See *People v. Griffith* (1984) 153 Cal.App.3d
43 796, 801.)

44
45 Postprobation Conduct. Subdivision (b) clarifies that when an original grant of probation is
46 revoked and reinstated, the court may consider any conduct occurring before the last

1 reinstatement of probation when sentencing the probationer to prison upon termination of
2 probation. (See *People v. Black* (2009) 176 Cal.App.4th 145, 150–151, affirming *People v.*
3 *Harris* (1990) 226 Cal.App.3d 141, 147.)
4

Item SPR10-23 Response Form

Title: **Criminal Procedure: Sentencing on Revocation of Probation** (amend Cal. Rules of Court, rule 4.435)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 18, 2010

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.