APPELLATE PRACTICE MANUAL

5th Ed. Rev 2026

FOREWORD

The Appellate Defenders, Inc., Appellate Practice Manual is designed to assist appointed attorneys representing criminal, juvenile delinquency and dependency, and other indigent parties on appeal in California. It addresses common matters often encountered in appellate practice and gives attorneys a guide through each phase of the entire process.

The manual discusses a wide variety of topics in law and procedure, practice, ethics, and policy. The manual has eight chapters:[1]

Chapter 1 – basic information for appointed counsel
Chapter 2 – what can be appealed and how to get an appeal started
Chapter 3 – record completion, extensions, release on appeal
Chapter 4 – issue spotting and selection
Chapter 5 – briefing
Chapter 6 – oral argument
Chapter 7 – decisions by reviewing courts and processes after decision
Chapter 8 – California writs

The manual is the product of many years of effort. Using various sources – articles from the 1993 ADI manual, drafts written for the manual, briefs, and much original research – Executive Director Elaine Alexander and Senior Staff Attorney Howard Cohen did the primary writing (and multiple rewrites) and editing. Each chapter was reviewed by one or more ADI staff attorneys in detail. Other staff attorneys reviewed the entire manual for correctness of substance and consistency. Law clerks and attorneys checked all citations repeatedly. At least once or more each year, Ms. Alexander and Mr. Cohen have made updates.

In 2016 the Second Edition was published. An expansion of scope, the second edition newly covered dependency, as well as criminal and delinquency appeals.

In 2023, an extensive review was undertaken, by successor Executive Director Lynelle Hee, Mr. Cohen, and a team chaired by him: Mr. Arthur Martin, Ms. Siri Shetty, Ms. Pauline Villanueva, Ms. Elena Min, and Ms. Savannah Montanez. This Third Edition was published for Chapters 1 through 8 (Chapter 9 has been discontinued).

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[1] Chapter 9 was discontinued in 2023.

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In 2026, the Fifth Edition of the manual was released. Chapter 4, Appendix A was expanded to address post-judgment appeals thanks to the work of staff attorneys Anna Jauregui-Law, Deanna Lopas, Howard Cohen, Robert Hernandez, Siri Shetty, and William Melcher. To improve readability, external links to general appellate resources such as the ADI website, the Court of Appeal, etc., have been removed.

The manual is on the public ADI website.[1] *The most up to date version will always be the one online.*

We believe the ADI Appellate Practice Manual is a product of great quality and usability. We hope it will be consulted regularly and routinely by new and experienced appellate practitioners alike, and that it will be a truly valuable resource to them.

[1] https://www.adi-sandiego.com

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1 CHAPTER ONE

THE ABC'S OF PANEL MEMBERSHIP: BASIC INFORMATION FOR APPOINTED COUNSEL

1.1 Introduction

The California system of appointed appellate counsel is unique in using nonprofit corporations (projects) to oversee members of the private bar (panels) in the handling of indigent appeals. Each district of the Court of Appeal contracts with a project, as authorized by rule 8.300(e),[2] to discharge the court's constitutional or statutory duty to provide effective assistance of counsel to those entitled to appointed counsel.[3] The project manages the district's panel and assists the court in the administration of the system. The system delivers high-quality representation to as many as 10,000 or more clients a year in a remarkably flexible and cost-effective way. Started in 1983 by Appellate Defenders, Inc., which serves the Fourth Appellate District, the system quickly moved to all six Court of Appeal districts and the California Supreme Court.

This chapter outlines in broad terms the role of counsel appointed to represent indigent clients under the project-panel system. It addresses the relationship between the panel attorney and the project, the duties of counsel during a typical appeal, client relations, the use of associate counsel, classification of counsel and cases and the matching of counsel to specific cases, and compensation for appointed representation.

This manual is purely descriptive and does not create rights or obligations of any kind. The project or the judiciary may revise, delete, or supplement any policy, practice, or procedure at any time in their sole discretion, with or without notice.

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[2] All future references to a rule are to the California Rules of Court.

[3]The projects are the First District Appellate Project, the California Appellate Project-Los Angeles (Second District), the Central California Appellate Program (Third and Fifth Districts), Appellate Defenders, Inc. (Fourth District), and the Sixth District Appellate Program. The California Appellate Project-San Francisco serves the California Supreme Court in death penalty cases.

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1.2 Relationship between panel and project

1.2.1 Project-panel system

As previously mentioned, each Court of Appeal district has a contract with a project (a non-profit corporation created for the purpose of serving indigents on appeal) to administer the system of appointed counsel. Each project is run by an executive director and has a staff of experienced appellate attorneys and support staff.

The project in turn runs a panel of, typically, several hundred private attorneys. Attorneys must apply to the panel and be admitted by the project. Besides admission decisions, the project classifies panel attorneys by their qualifications. These attorneys are selected by the project on a case-by-case basis to receive appointment offers. Each case is evaluated for likely complexity, and the project matches it with an attorney with the appropriate background and record of performance. The court formally appoints the recommended attorney. Project staff attorneys evaluate all work, periodically review and revise panel attorneys' levels, and remove certain attorneys from the panel. They assist attorneys in their handling of individual cases and provide such resource help as manuals, briefbanks, trainings, newsletters, and websites.

Under the supervision of the judiciary, the project recommends compensation for the panel attorney in each case, using judicially established guidelines. Payment is made by the Judicial Council of California from a fund appropriated by the Legislature. The judiciary performs quarterly audits of the projects' recommendations through the Appellate Indigent Defense Oversight Advisory Committee, which consists of justices from each district, several project representatives, a panel attorney, and a civil appellate attorney.

In addition to administering the panel, the project assists the court, the Judicial Council of California judicial services, the Appellate Indigent Defense Oversight Advisory Committee, and other parts of the judiciary; provides advice about appellate issues to trial counsel; and helps with problems in filing notices of appeal. Its staff attorneys also directly represent clients.

Panel attorneys are responsible for becoming and remaining familiar with project policies and requirements. These are promulgated by websites, email, and other readily accessible means.

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Panel membership

The appointed counsel panel provides quality representation to indigent clients by using attorneys in private practice working with the assistance, administrative support, and oversight of a project such as ADI. Panel membership is not intended to, and does not, create any contractual rights or any employment relationship with the project, the Court of Appeal, or any other part of the judiciary. It does not guarantee a member a particular number of cases, or any case at all, or continuing panel membership. The project and the judiciary have full authority and sole discretion to determine the number and kind of cases, if any, offered to individual attorneys and to remove attorneys from the panel at any time, with or without cause and with or without notice.

The Appellate Indigent Defense Oversight Advisory Committee has decreed that attorneys who reside out of state must be independent. The projects can request special permission to maintain or admit an out of state assisted attorney to the panel.

Conflicts interfering with panel membership

The projects' policies on conflicts are similar, though not necessarily identical. In general, because a panel attorney is in private practice and is not an employee of the project, the attorney may engage in other kinds of practice, provided the work does not create a conflict of interest. ADI treats it as a conflict work of any kind with a *prosecuting agency or law enforcement* (or civil equivalent such as county counsel) or a *court*. It does not matter what cases the work might entail, whether the attorney is paid, or what the geographical area is.

A panel attorney may, for example, practice criminal defense, dependency defense, civil trial work, and accept retained appeals. Similarly, a panel attorney may do motion work for a criminal defense attorney or a dependency attorney representing parents or children or a civil attorney. ADI would regard as a conflict, however, the same work for a district attorney, police, or county counsel office (even one out of state); serving in the judiciary in any capacity or jurisdiction; employment as a regular instructor for a court or a law enforcement agency.[4] Although this bright-line policy goes beyond the ethical requirements of the State Bar, ADI uses it to protect its cases from even being challenged for the appearance of possible conflicting loyalties.

[4]This list is illustrative and is not intended to be exhaustive.

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ADI also uses a strong presumption that an attorney who handled trial proceedings in a given case should not be appointed on the appeal. (See *People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-1255.)

Differences with staff attorney; ultimate responsibility for case

The appointed attorney is the sole counsel of record in ADI cases and has full, final, and personal responsibility for handling them. The attorney continues to bear this responsibility when delegating work to associate counsel or law clerks (see § 1.5 Responsible use of associate counsel and law clerks, et seq, *post*) or when consulting with a project staff attorney.

The project provides assistance and advice from experienced and highly trained appellate attorneys. Appointed counsel should follow the project attorney's guidance unless counsel has a strong reason, based on the best interests of the client, to reject it.

If a difference of opinion arises between appointed counsel and a project staff attorney on the best way to handle a case, appointed counsel should listen to and give considerable weight to the staff attorney's opinion. If the differences persist, the appointed attorney can ask the staff attorney to get a second opinion from another staff attorney or to refer the question to the project executive director. Ultimately the appointed attorney, as counsel of record, must follow their own professional judgment.

Steps to take when attorney is unable to handle responsibilities of case

Panel attorneys, as counsel of record, must ensure their cases are covered when they are unavailable. If the attorney is unable, for a variety of reasons, to handle the basic responsibilities of the case in the long term, the attorney must notify the project about being relieved. The project is happy to work with attorneys in such a situation to find substitute counsel. This protects the client and the attorney's own reputation with the project and the court.

Duty to keep informed and in contact, to maintain active state bar membership

Panel attorneys are responsible for reviewing information and resources the project makes available. They must maintain a valid e-mail address. In the Fourth District, case offers and news alerts are sent to the panel via e-mail.

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Attorneys are responsible for keeping the project, the Judicial Council services, all courts in which they have active cases, and all current clients informed of any changes in contact information. (Attorneys must notify the project and Judicial Council services with the Attorney Information Sheet and STD 204 form. For changes in tax identification information, the change of address form itself does not constitute adequate notice: it must be also accompanied by an IRS Form W-9.)

Appointed counsel must maintain active California State Bar membership throughout the life of any court-appointed appeal. They must notify the project if their active status changes, including temporary suspensions for failure to pay dues or certify MCLE compliance.

Professional liability insurance

Each project provides professional liability coverage for panel attorneys' work on that project's cases. A copy of the relevant provision of that policy is available on request. Renewal of such coverage and payment of any deductible are within the project's sole discretion.

To safeguard coverage, it is essential that appointed counsel notify the project of any suit, threat of suit, or facts that might lead to suit. The project must report this information to the carrier immediately. A delay in communicating may result in refusal of coverage by the underwriter.

1.2.2 Assisted cases

If a case is designated as assisted, the record will be sent to the project.[5] In dependency fast-track cases, the panel attorney and the project staff attorney each get a copy of the record, so that they can work simultaneously. (Cal. Rules of Court, rule 8.416(c)(2)(B).) The assisting staff attorney will review key parts of the transcripts and may provide a list of potential issues, cautionary advice on matters that might be troublesome, sample briefing if available, and suggestions on how to approach the case.

Appointed counsel will read the record and draft an opening brief, consulting with the project staff attorney at various times. Counsel must submit a draft brief to the staff attorney. The draft should represent a finished product so the project attorney can provide substantive suggestions, if needed. In some

[5] If the superior court mails the record directly to counsel, notify the assigned staff attorney so arrangements can be made to get a copy to the project.

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cases, the staff attorney will want to see one or more revised drafts before the final brief is filed.

After the opening brief is filed, appointed counsel and the project attorney will consult on such matters as the respondent's brief, a reply brief, oral argument, and a petition for rehearing and review. The staff attorney evaluates appointed counsel's work and recommends compensation.

The Appellant Indigent Defense Oversight Advisory Committee has adopted a policy that severely restricts the use of associate counsel in assisted cases. (See § 1.5 Responsible use of associate counsel and law clerks, et seq., *post*.)

1.2.3 Independent cases

If the case is independent, appointed counsel should receive documents from the project's file when counsel is appointed. Appointed counsel is encouraged to consult with the assigned project attorney about issues arising in the case. As with assisted cases, the staff attorney evaluates the work and recommends compensation.

1.2.4 "Modified" assisted or independent cases

Some assisted cases are denominated "modified assisted." While the project staff attorney will still review drafts of the opening brief, the staff attorney may review only limited portions. The case remains formally "assisted" and is paid at that rate.

Some independent cases are denominated "modified independent." They are formally "independent" and are paid at that rate, but some staff attorney involvement is contemplated, such as review of a draft of the opening brief or parts of the record. This classification is used for training attorneys for complex and serious cases.

1.3 Typical responsibilities of appointed counsel

Counsel typically will have the responsibilities described in the following sections when handling an appointed appeal.

1.3.1 Administration of office and files

Efficient internal office organization is essential. Counsel must keep orderly files where the relevant materials such as filings and correspondence can

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be found, where counsel's thoughts about the case and work product are maintained, and where accurate time records (to the nearest 0.1 hour) are kept.

Effective calendaring is imperative. Counsel should monitor filings, due dates, and court actions through the court website, register for automatic email notification in all their cases, and visit the site periodically to track case activity for which no e-mail notification is available.[6]

1.3.2 Initial contact with client and trial counsel

Communication with the client is covered extensively in § 1.4 Client relations, et seq., *post*. Generally, counsel must contact the client upon getting the case and must promptly answer letters. Soliciting the client's suggestions on the appeal is an integral part of the competent investigation of an appeal. The client may be aware of matters outside the record and often can shed valuable light on issues.

Trial counsel likewise can offer valuable insights into potential issues. Trial counsel can provide impressions of the case (e.g., the victim's demeanor on the stand, the judge's attitude) and can alert the appellate attorney to matters outside the record (e.g., motions made that have not been transcribed, jurors' statements about the case, and potential adverse consequences from appealing).[7]

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[6]Caveat: If a concurrent writ petition is filed and the Court of Appeal assigns that proceeding a new number, counsel must register for e-mail notification under that number, as well as the appeal number. The same is true for dependency cases where the parent has a previous appeal pending.

[7]It is essential to solicit trial counsel's explanation if the appellate attorney thinks ineffective assistance of counsel might be an issue. ADI policy also requires appointed counsel to consult with the ADI attorney before raising or investigating ineffective assistance of counsel, regardless of whether the issue is being considered for the direct appeal or for a habeas corpus investigation. Consultation with ADI facilitates proper handling of the critical first contact with trial counsel. In criminal cases, the requirement does not apply for a "fallback" IAC argument ("No objection was required, but if it was, counsel was ineffective for not raising it").

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1.3.3 Record review and completion; correction of notice of appeal problems

Transcripts

Counsel must review the transcripts meticulously. (See § 4.3 Reviewing the record for issues.) It is helpful to make careful notes as to relevant facts and possible issues. The record belongs to the client and normally will be sent to them when the appeal is over. (This subject is covered more fully in § 1.4.4 Client Records, et seq., *post*.) In addition, it could be lodged or introduced as an exhibit in a future collateral proceeding. For electronic copies, ADI encourages counsel to keep a "clean" copy of the transcripts available to print and send to the client.

Counsel also is responsible for ensuring an adequate appellate record, for the purpose of identifying and documenting all potential issues. (See *People v. Barton* (1979) 21 Cal.3d 513, 519-520; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394.) The topic of record correction and completion is covered extensively in § 3.2.6 Correcting/completing and augmenting record after it is filed in reviewing court, see also § 4.3.1 Ensuring adequate record.

Some courts specify additions to the normal record through local rules or miscellaneous orders. These rules and orders are generally available on the court website.

Superior court file and exhibits

Record review may require inspection of the superior court file and exhibits. Such a step might be important if either the client or trial counsel has referred to events not in the transcripts. The superior court file may contain documents not in the transcripts, such as pretrial motions, letters of recommendation submitted at sentencing, communications about or from the client, and orders made after judgment. Many counties now make superior court files available online. Confidential records, such as juvenile cases, are not publicly available. (See Welf. & Inst. Code, § 827.)

Appointed counsel should review exhibits where necessary. Counsel should make copies of relevant documents and arrange for transmission to the Court of Appeal of any exhibits the court should inspect.[8] (Cal. Rules of Court, rules 8.224, 8.320(e), 8.407(f).) If reviewing an audio or video recording, counsel should take

[8]Some courts provide forms for requesting transmission of exhibits.

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appropriate equipment. Exhibits are part of the record, and so briefs may cite exhibits as well as a transcript. (Cal. Rules of Court, rules 8.320(e), 8.407(f).) Specific Fourth Appellate District exhibits information is available on the ADI website: Fourth District Resources page & the Exhibit Review Procedures article.

Long-distance travel by an appointed attorney to the superior court may be unnecessary. Counsel should first see if trial counsel can provide copies of missing documents or provide other information. If counsel's office is far from the county where the case was tried, a project staff attorney or other staff member might be able to review the file and exhibits on behalf of counsel, but this service is not available in all counties or projects. The assigned staff attorney is the best source of information on local practice.

Notice of appeal problems

Normally the project handles notice of appeal problems, such as untimeliness or inadequacy in form or content, before appointment of counsel. Occasionally the problem surfaces later, however, and appointed counsel may face the responsibility of correcting it. Counsel should consult the assigned staff attorney. (See § 2.7 Procedural steps for getting criminal or delinquency appeal started, et seq.)

If counsel determines there are multiple notices of appeal from the same proceedings, counsel should discuss with the project whether the appointment orders cover all necessary aspects of the case and whether consolidation might be appropriate.[9]

1.3.4 Remedies in trial court

On occasion, counsel should or must seek a remedy in the trial court, as a precondition to, or alternative to, raising an issue in the appellate court. These trial court remedies are exceptions to the general rule that the filing of a valid notice of appeal vests jurisdiction in the appellate court and divests the trial court of jurisdiction until issuance of the remittitur. (*People v. Perez* (1979) 23 Cal.3d 545, 554; *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 8-10.) Allowing the trial court to correct its own errors instead of invoking the whole appellate

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[9]In a dependency case, for example, a parent may appeal from the termination hearing and separately from the denial of a Welfare and Institutions Code section 388 motion ordered on a different day from the termination hearing.

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process promotes judicial economy. It is often more expeditious – an important consideration in time-sensitive cases (see § 1.3.14 Protecting the client in time-sensitive cases, *post*).

The principle that the trial court loses jurisdiction pending appeal does not apply to juvenile cases because the juvenile court retains ongoing jurisdiction during the appeal. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 259-261; *In re Omar R.* (2003) 105 Cal.App.4th 1434, 1439; *In re Natasha A.* (1996) 42 Cal.App.4th 28; *In re Katherine R.* (1970) 6 Cal.App.3d 354, 356-357; see Code Civ. Proc., § 917.7.) For this reason, appellate counsel should be in contact with trial counsel throughout the appeal to determine whether proceedings in the trial court have changed the posture of the appeal significantly. Theoretically, under rule 8.410(b)(2), the juvenile court clerk should notify the Court of Appeal and parties when the court issues an amended order or makes a further order. (See also Cal. Rules of Court, rule 8.340(a).)

As to criminal cases, an example of a statutorily required initial resort to the trial court is Penal Code section 1237.1, which requires a motion in the trial court to correct clerical errors in custody or conduct credits before raising that issue as the only one on appeal, and section 1237.2, applying the same requirement to fines, fees, and similar monetary assessments. (See § 2.1.3 Limitations on right to appeal.)

Other examples of trial court remedies available during appeal include release pending appeal (Cal. Rules of Court, rule 8.312; chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal"), correction of clerical error (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1473), correction of an unauthorized sentence (*People v. Karaman* (1992) 4 Cal.4th 335, 349, fn. 15; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424), recall of a sentence within 120 days of judgment (Pen. Code, § 1172.1; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1836), modification of probation conditions (*In re Osslo* (1958) 51 Cal.2d 371, 380-381), and vacation of a void, not merely voidable, judgment (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434).

Under former Penal Code section 1170, subdivision (d), a trial court's jurisdiction to recall and resentence a defendant within 120 days of judgment remained, notwithstanding whether an appeal was taken within those 120 days. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1836.) Now, a trial court may recall and resentence "at any time if the applicable sentencing laws at the time of original sentencing are subsequently changed by new statutory authority or case law." (§ 1172.1, subd. (a)(1).) Thus, the occasions of recall and resentencing may arise with more

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frequency than when jurisdiction was limited to 120 days from judgment. Still, the reasoning of *Dix* and *Portillo* hold true. Similarly, if resentencing is mandated after sentencing such as under section 1172.75, the trial court has jurisdiction, notwithstanding a pending appeal. (E.g., *People v. Velasco* (2023) 97 Cal.App.5th 663.)

For certain motions, the preferred approach may be to ask trial counsel to make the motion in trial court. However, for other issues, such as correction of fines or credits, it may be more appropriate for appellate counsel to handle the motion. Consider the remedy or remedies sought to help assess whether it is more appropriate for trial or appellate counsel to make the motion.

1.3.5 Selection of issues

Issue selection begins with a comprehensive, non-selective list of potential issues and proceeds through a gradual winnowing process to the final selection. Often the choice of issues will depend on further record review, research, consultation with other attorneys, and consideration of such matters as the relative strength and scope of the issues, strategic factors, the client's expressed concerns, and potential adverse consequences. (See chapter 4, "On the Hunt: The Science and Art of Issue Spotting and Selection" for an extensive discussion of the issue selection process; see also ADI's article on To Brief or Not To Brief: Marginal Issues.)

Appellate counsel has no constitutional duty to raise every non-frivolous issue requested by the client. (*Davila v. Davis* (2017) 582 U.S. 521; *Jones v. Barnes* (1983) 463 U.S. 745.) If the client insists on raising issues that, in counsel's professional judgment, would have no reasonable chance of success or would detract from stronger issues, counsel may consult with the assigned staff attorney. In the end, counsel's responsibility is to handle the case according to counsel's best professional judgment, and issue selection is one of the most critical decisions appellate counsel makes.

Procedures for situations in which counsel can find no arguable issues are discussed in § 1.3.12 Representation when there are no arguable issues (Wende-Anders-Sade C. Filings) et seq., Representation When There Are No Arguable Issues (Wende-Anders-Sade C. Filings), *post*, and more extensively in § 4.5 What to do when counsel cannot find any issues, et seq.

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1.3.6 Preparation of the opening brief

This topic is covered extensively in chapter 5, "Effective Written Advocacy: Briefing." Very summarily, brief preparation requires several steps: drafting the statement of case and statement of facts, researching, drafting the arguments, and filing the final version as required by the California Rules of Court.

A copy of the brief must be sent to the client, unless the client has specifically requested otherwise.[10] It is important at that time to explain the omission of any issues in which the client has expressed an interest or that were heavily litigated at trial. This kind of communication is vital to foster good relations and helps forestall ineffective assistance of appellate counsel or malpractice claims.

Special care must be exercised in juvenile and other confidential cases to follow rules for the title of the case, names used in the brief, names and addresses on the proof of service, returning the record at the end of the case, etc. The anonymity of the parties must be maintained. (See Seiser & Kumli on California Juvenile Courts Practice and Procedure (2018) §2.190(12).) The ADI website has guidance on confidential records to help navigate the multiple protections counsel must observe in handling these cases.

If there are multiple appellants in a case, coordination among counsel with clients taking compatible positions is encouraged, for the sake of economy and quality. Joinders may be filed in such instances. (Cal. Rules of Court, rule 8.200(a)(5).) However, joinder must be done thoughtfully. Many issues require individualized argument applying the law to the case. Counsel must identify which specific points or arguments are joined. *Do not use generic, boilerplate language*, such as "counsel joins other parties' points to the extent they may benefit my client." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335.)

1.3.7 Later filings

After the opening brief is filed, the next major responsibilities are to review the respondent's brief when it is filed and decide how to reply – normally in the

[10]Some types of cases, such as child molest, may endanger the client's personal security, especially within an institutional setting. We recommend checking with the client before sending documents revealing facts about the case or client into an environment where they might not be secure.

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form of a reply brief. Counsel representing a non-appealing minor submits a filing on behalf of the child after the respondent's brief.

Respondent's Brief

Service of the respondent's brief in both criminal and dependency cases is done through TrueFiling. The client's copy will normally need to be printed by appellate counsel using the electronic service copy. The respondent's brief may be sent immediately to the client with an explanatory cover letter or sent with the reply brief, so that the client sees counsel's reply right away. In either case, counsel should reassure the client that the respondent's brief is simply an argument, not a decision, and that counsel has answered respondent's arguments.

Reply Brief

ADI takes the position that *in most cases counsel should file a reply brief*. It will usually be the last document filed by the parties and, unlike oral argument, will be considered before the opinion is drafted. It is a chance to answer the opposing party's contentions and authorities, deal with procedural obstacles such as waiver, cite new legal developments, bolster the arguments, communicate confidence, and avoid the appearance of conceding. (See § 5.4 Appellant's reply brief, non-appealing minor's brief, and supplemental brief , et seq.) In those rare cases in which a reply brief is not filed, appointed counsel should explain the reasons to the client and consult with the assigned staff attorney.

Non-appealing minor's filing

If appellate counsel has been appointed for a non-appealing dependency minor, the child's brief or letter brief is due 10 days after the respondent's brief is filed. (Cal. Rules of Court, rule 8.412(b)(4).) The filing states the minor's position.

ADI has developed guidelines for determining a position, preparing a filing, and handling other responsibilities. (See § 5.4.2 Non-appealing minor's brief , et seq.)

1.3.8 Oral argument

Oral argument is covered extensively in chapter 6, "Effective Use of the Spoken Word on Appeal: Oral Argument." If appointed counsel has never argued before the Court of Appeal or has questions about how to approach a particular

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case, it is advisable to consult with the project staff attorney. In occasional cases, especially for those in the Supreme Court, a moot court practice session might be available.

1.3.9 The court's decision; advice to the client

The court's decision is covered extensively in § 7.3 Stare decisis, publication, and citability, et seq. and § 7.4 Disposition and post-decision processes in Court of Appeal, et seq. Counsel should review the opinion carefully.

Prompt communication with the client is essential. If the client has lost, it is important to explain whether counsel plans further action. If the decision is not to pursue the case further, the client must be told of the right to petition for review in pro per and be given the applicable rules and deadlines. If the client has won, counsel should explain what it means and what to expect next. The client's first questions will usually be "When am I going back to court, what will happen, and will you still be my attorney?" When there are ongoing trial court proceedings – as with juvenile cases – counsel should explain how the appeal affects those proceedings.

If the outcome is mixed – a victory in part and a loss in part – counsel should evaluate whether a petition for review on the losing issue(s) is called for and advise the client accordingly but should leave it up to the client to decide whether to proceed, since doing so could risk losing the partial victory already in hand.[11]

It is helpful to send a copy of the opinion to trial counsel, especially if the case is to be remanded or if the case is reversed because of ineffective assistance of counsel. (See Bus. & Prof. Code, §§ 6068, subd. (o)(7) [duty of attorney to self-report to State Bar a reversal of judgment based on the attorney's "grossly incompetent" representation], 6086.7 [duty of court to report reversal or modification based on misconduct or incompetence of counsel].)

[11]Even if opposing counsel does not file a petition for review, rule 8.504(c) allows opposing counsel to file an answer to the client's petition, raising additional issues to be considered in the event review is granted. If review is denied, however, the additional issues will not be considered; a petition for review is necessary if counsel wishes the court to review the client's own issues *regardless* of whether the opponent's petition is granted.

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1.3.10 Post-decision responsibilities

Petitions for rehearing, review, and certiorari are covered in § 7.4.3 Rehearing, et seq., § 7.5 Petitions for review in the California Supreme Court, et seq., and § 7.7 Certiorari in the United States Supreme Court, et seq.

Rehearing

If the decision is adverse to the client, appointed counsel has only 15 days after the opinion is filed to petition for rehearing, asking the Court of Appeal to reconsider.[12] (Cal. Rules of Court, rule 8.268(b)(1).) A rehearing petition should be used to call the court's attention to material problems, errors, or omissions in its decision and not merely to reargue positions with which the court disagrees. A rehearing petition is required by Supreme Court policy if the party intends to seek Supreme Court review on the grounds of a material factual or legal error or omission in the Court of Appeal opinion. (Cal. Rules of Court, rule 8.500(c)(2).) If the attorney does not intend to file a petition for review but the client wants to continue in pro per, the attorney should preserve it for the client by seeking to cure the error or omission; such a correction is a legitimate ground for rehearing, and as a practical matter, few clients would be able to prepare a petition for rehearing within jurisdictional time limits.[13]

A petition for rehearing may be used to correct factual errors in the opinion. It is important that the opinion accurately reflects the facts and issues. (See, e.g., *People v. Woodell* (1998) 17 Cal.4th 448 [appellate opinion in prior case considered as evidence of underlying fact stated in opinion].) This occurs frequently in dependency cases, because they tend to be heavily fact intensive.

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[12]The presiding justice may grant relief from failure to file a timely petition for rehearing until the 30th day after the filing of the opinion. (Cal. Rules of Court, rule 8.268(b)(4).) The court also may grant rehearing on its own motion during this period. (Cal. Rules of Court, rule 8.268(a).) A late petition with a persuasive explanation *might* be considered, but counsel should not count on that possibility.

[13]Some courts take the position that clients represented by counsel have no standing to file in pro per and refuse to accept a petition for rehearing submitted by the client. A procedural way around that problem, if the client wants to file in pro per, would be for counsel to ask to be relieved right after the decision not to proceed further is made.

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Petitions for rehearing are covered more comprehensively in § 7.4.3 Rehearing, et seq.

Review

A petition for review asking the California Supreme Court to take jurisdiction of the case should be considered when the case involves an area of broad importance or an area where lower courts are in conflict. (See § 7.5, Petitions for Review in the California Supreme Court, et seq.) It is not appropriate simply because counsel disagrees with the Court of Appeal decision, although in a rare case the interests of justice may require correcting a glaring error. A petition for review is necessary if future federal review is a serious possibility. (See Cal. Rules of Court, rule 8.508, on petitions filed solely to exhaust state remedies.) In an assisted case, the possibility of petitioning for review should be discussed with the assisting project staff attorney.

If counsel decides not to petition for review, the client should be informed of this decision and told how to do so in pro per. (See § 1.4.6 Post-decision responsibilities , *post*.)

Certiorari

Petitioning for certiorari to the Supreme Court of the United States is relatively uncommon. It requires a substantial issue of federal law, properly preserved and presented to the state courts, including the California Supreme Court. Considerations are, first, the chances of getting certiorari granted and, second, the chances of prevailing on the merits if it is granted.

Counsel considering a possible certiorari petition should discuss it with the assigned project staff attorney. At ADI, the attorney must get the executive director's preapproval before doing any work on a certiorari petition for which compensation is expected.

1.3.11 Investigation of collateral matters and petitions for writ of habeas corpus

The appeal itself is bound by the four corners of the record, and appellate counsel has no duty to search actively for every off-record claim that might conceivably be developed. (*In re Clark* (1993) 5 Cal.4th 750, 783-784, fn. 20.) However, appointed counsel should be alert to the possibility of issues not reflected in the record.

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When counsel has reason to believe that significant facts in support of such issues exist outside the record, counsel should discuss them with the assigned project attorney before proceeding further to any appreciable extent. In some districts, counsel must get court preapproval for an expansion of the appointment to cover writ investigation and preparation. (For a comprehensive discussion of writs, see chapter 8, "Putting on the Writs: California Extraordinary Remedies.") Preapproval of unusual expenses such as investigators or experts must be given by the project, the project director, or the court, depending on the district, the project, and the amount. Funding for these costs is provided in the form of reimbursement to appointed counsel.

The most common off-record claim is ineffective assistance of trial counsel, and as noted in § 1.3.2 Initial contact with client and trial counsel, *ante*, it is important for appointed counsel to discuss such a claim with the project attorney. (ADI *requires* advance consultation with the project attorney.) If the claim has no arguable merit, appellate counsel will not want to tarnish the trial attorney's reputation – and counsel's own – by raising it. If the claim does have merit, appellate counsel will have to exercise caution at every step to preserve and document the claim for the benefit of the client.

1.3.12 Representation when there are no arguable issues (*Wende-Anders-Sade C.* Filings)

An "arguable issue" is one that, in counsel's professional opinion, has a reasonable potential for success and that, if resolved favorably to the client, will result in a reversal or modification of the judgment. (*People v. Johnson* (1981) 123 Cal.App.3d 106.) This matter is explored in an article on the ADI website, To Brief or Not To Brief. Appointed counsel who has found no arguable issues after a diligent search must follow a specific procedure – called *Wende-Anders* or

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Delgadillo[14] in criminal and delinquency[15] cases or *Sade C.* in dependency cases – whether the appointment is designated as assisted or independent. Depending on whether the case is criminal or civil, the court may have certain responsibilities, as well. These procedures are described in more detail in § 4.5 What to do when counsel cannot find any issues, et seq. A summary follows here.

Preliminary steps

The *Wende-Delgadillo-Sade C.* procedure requires counsel to ensure the record is complete and to review the complete record thoroughly. Before any no-issues brief or letter brief is filed, and before any case is abandoned or dismissed for lack of issues, all counsel (assisted or independent) must discuss the case with the assigned project attorney, usually provide the record, and get the project attorney's "second opinion" and approval to proceed on a no-issues track. The panel attorney should provide the staff attorney, along with the record, a draft *Wende-Sade C.* brief or letter brief, a memo on issues considered and rejected and why, plus any contacts with the client, trial counsel, or others that might shed light on potential issues.

If the project attorney agrees that the case is appropriate for no-issues treatment, appointed counsel must write to the client about the assessment and procedures, including advice about applicable timelines and any right to file a pro per brief or letter or to request that counsel be relieved.

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[14]No-issue briefs in most criminal and delinquency appeals follow the procedures set forth in *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. In the context of no-issue briefs following the denial of a Penal Code section 1172.6 petition at the prima facie stage, the California Supreme Court has held there is no right to independent review by the court. (*People v. Delgadillo* (2022) 14 Cal.5th 216.)

In dependency appeals, the procedure is set forth in *In re Sade C.* (1996) 13 Cal.4th 952. (See also *In re Phoenix H.* (2009) 47 Cal.4th 835, 843 [discussing contents of *Sade C.* briefs].) Similar but not identical procedures apply to LPS conservatorship cases. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544.)

[15]*In re Kevin S.* (2003) 113 Cal.App.4th 97 held *Wende-Anders* applies to delinquency appeals. Most appellate courts have assumed that without discussion.

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If an extension of time is needed for the project to perform its record review, counsel should not mention the *Wende-Delgadillo-Sade C.* review in the extension request because such a comment tends to disparage any merits issues later raised.

If counsel believes an arguable issue exists but pursuing it would not be in the client's best interests, counsel cannot properly file a *Wende-Delgadillo-Sade C.* brief or letter brief. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 677.) A client-authorized motion to dismiss, client waiver of the issue, or other remedies are required.

In fast-track cases, the time frames require counsel to notify the client very quickly – usually, before the project review – of a potential *Sade C.* situation, so that the client can prepare a pro per filing, if desired, for submission at the time of the brief or letter brief. Counsel should be aware the court is highly likely to reject the filing.

No-issues brief or letter brief

Unless the client chooses to abandon the case, counsel will need to file a *Wende-Anders* or *Delgadillo* brief in a criminal or delinquency case or a *Sade C.* brief or letter brief in a dependency case.[16] This filing has several purposes:

- It summarizes the proceedings and facts fully, with citations to the transcripts.

- In districts that prefer or at least permit inclusion of unbriefed issues, the filing may describe issues raised at trial and others suggested by the record, as well as related authorities the court should consider.[17] An unbriefed issue should not specifically urge that issue as a ground for

[16]The letter brief format is required for dependency cases in all three divisions of the Fourth Appellate District. Regardless of format, the contents of the dependency no-issues filing must conform to the requirements of *In re Phoenix H.* (2009) 47 Cal.4th 835, 843.

[17]ADI encourages inclusion of issues. (See *People v. Kent* (2015) 229 Cal.App.4th 293.) That strong preference is not a requirement, however. Legal issues and authorities need not be included if counsel concludes the client's interests would best be served by omitting them. (See *Smith v. Robbins* (2000) 528 U.S. 259.)

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reversal but also should not argue against the issue; a neutral description is the objective. (See § 4.5.3 Wende-Anders-Delgadillo-Sade C. filing, et seq., for detailed guidance.)

- In criminal and delinquency cases, the filing reminds the court of its constitutional duty to read the record; in dependency, conservatorship, and similar cases (including denials of Penal Code section 1172.6 petitions at the prima facie stage), it must acknowledge this review is not legally required but then should suggest the court review the record in the exercise of its discretion.

Because the client has no *right* to file a pro per brief in a dependency case (*In re Phoenix H.* (2009) 47 Cal.4th 835) and the court almost always denies any extension for such a filing, practicality suggests such a brief be submitted along with the *Sade C.* filing. The court need not accept it (and usually does not), but at least it gives the client a shot at showing "good cause . . . that an arguable issue does, in fact, exist." (*Id.* at p. 844.)

Sending record to client

Counsel normally should send the record to the client before or upon filing the no-issue brief or letter brief, so that the client can file a pro per brief or letter, if one is permitted and desired. In dependency cases, counsel must check the confidentiality provisions of Welfare and Institutions Code section 827 before sending the record. Some clients, such as relative and de facto parents, are entitled to only a very limited record or no record. Alternatively, if counsel believes there is a reasonable possibility the court will order supplemental briefing by counsel and the client has expressed no interest in filing a pro per brief, counsel may retain the record and tell the client it is available on request. Counsel may make a copy of some or all the record for future reference.[18] (See also *In re Phoenix H.* (2009) 47 Cal.4th 835.)

[18]A modest amount of copying for counsel's use in the event the court orders supplemental briefing is compensable. Any substantial copying, however, requires specific justification and should be cleared with the project.

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Court's responsibilities

First criminal or delinquency appeal as of right

When a *Wende-Anders* brief is filed in a first criminal or delinquency appeal as of right, the Court of Appeal must conduct its own review of the entire record to determine whether there are any arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442.) It also must offer the appellant an opportunity to file a pro per brief. (See *People v. Feggans* (1967) 67 Cal.2d 444, 447-448.) While the former is not required when a *Delgadillo* brief is filed, the client still has the right to file a pro per brief, and the court must consider any arguments pertaining to Penal Code section 1172.6 and issue a written opinion. (*People v. Delgadillo* (2022) 14 Cal.5th 216.)

If the court discovers an arguable issue, it must order counsel to brief the issue. (*Penson v. Ohio* (1988) 488 U.S. 75, 81, 83-84.) It may appoint new counsel for that purpose, but almost never does since original counsel does not routinely seek to withdraw when making a no-issues filing. If the court finds no arguable issues, it will affirm the judgment or dismiss the appeal.

The court must issue a written, reasoned opinion if the defendant files a pro per brief. (*People v. Kelly* (2006) 40 Cal.4th 106.)

Other appointed appeals

In civil appointed cases, the court's duties are more limited. The court is not required to review the record, for example, in LPS conservatorship (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529), dependency (*In re Sade C.* (1996) 13 Cal.4th 952), mentally disordered offender (*People v. Taylor* (2008) 160 Cal.App.4th 304), and sexually violent predator (*People v. Kisling* (2015) 239 Cal.App.4th 288) cases, and appeals from such post-judgment orders as denial of a motion to set aside a plea because of invalid immigration advice (*People v. Serrano* (2012) 211 Cal.App.4th 496).

In dependency cases, the court does not have to provide an opportunity to file a pro per brief in a dependency appeal, because those cases are so time sensitive. (*In re Phoenix H.* (2009) 47 Cal.4th 835.) It must do so, however, in civil commitment cases (e.g., *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529 [LPS]; see also *People v. Taylor* (2008) 160 Cal.App.4th 304 [mentally disordered offender appeal]) and arguably other non-criminal, non-dependency appointed appeals.

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If the defendant files a pro per brief in a non-criminal case, the court arguably has a duty to file a written decision under *People v. Kelly* (2006) 40 Cal.4th 106. That duty is based on article VI, section 14, of the California Constitution, providing a decision determining a "cause" must be in writing with reasons stated – a requirement that applies to civil as well as criminal cases. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232.)

1.3.13 Representation when the client might suffer adverse consequences from appealing

On occasion a client may face the prospect of receiving an increased sentence or other adverse result from pursuing an appeal. For example, the lower court may have imposed an unauthorized sentence in the defendant's favor, or the remedy for an error might be withdrawal of an advantageous plea bargain. Counsel must be alert to the possibility of such adverse consequences in every case. If counsel believes there is a potential adverse consequence, they must advise the client and allow the client to decide whether to proceed with the appeal. This topic is discussed in § 4.6 Adverse consequences: Potential risks of appealing, et seq.

In dependency cases, the court may have offered the client reunification services where they were not warranted or erroneously found a father to be presumed. Dependency clients may also have been involved in criminal proceedings, and the two cases may interact in negative ways. Or certain actions in the dependency case may trigger retaliatory conduct by agencies, foster parents, etc. Close contact with trial counsel and the client will aid counsel in identifying and dealing with such situations appropriately.

Decisions about abandoning or pursuing an appeal belong ultimately to the client. It is important for appointed counsel to consult with a project attorney before advising the client about filing an abandonment or motion to dismiss because of possible adverse consequences. Counsel should have the client sign and return a written acknowledgment that the client has been advised of the potential benefits and risks of the various options and that the decision whether to pursue the appeal is the client's own.

1.3.14 Protecting the client in time-sensitive cases

One important responsibility of appointed counsel is to safeguard the possibility of meaningful relief for the client in time-sensitive cases and avoid the possibility the client might end up serving "dead" time – custody in excess of the

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lawful sentence – in the event of a favorable result on appeal. Counsel must always keep in mind that, if the client fails to benefit from any remedy ultimately awarded on appeal, the whole effort might prove meaningless.[19] As a preliminary step during the initial review of the case following appointment, especially when the sentence is relatively short, appellate counsel should determine the client's expected release date and calculate how that might be affected by a favorable ruling on appeal.

All dependency cases by nature are time sensitive. The case will be continuing at the trial level. Extensions of time are disfavored and should be requested only when genuinely necessary. (Cal. Rules of Court, rule 8.412(e).) A heavy workload is generally not a sufficient reason.

Appellate counsel can seek release pending appeal, on bail or other terms, or assist the client or trial counsel in doing so. (Cal. Const., art. I, § 12; Pen. Code, §§ 1272 & 1272.1; Cal. Rules of Court, rule 8.312.) This topic is treated in depth in § 3.4, Release Pending Appeal, et seq. The possibility of release pending decision is also available on habeas corpus. (Pen. Code, § 1476.)

A motion to expedite the appeal and a motion for calendar preference can be filed if the circumstances warrant it. (See Cal. Rules of Court, rules 8.54, 8.240.) In such cases it is important to avoid asking for extensions of time and to oppose extensions of time by other parties. There may be situations in which even an expedited appeal may not be sufficient. In such cases, counsel may consider filing a writ of mandate. (See § 8.5.2 Mandate, prohibition, and certiorari.)

If the need to reverse is indisputable, the court may reverse without going through the usual briefing processes. One procedure is a motion for summary reversal. (*People v. Geitner* (1982) 139 Cal.App.3d 252 [court erroneously assured defendant he could appeal issue of voluntariness of statement under

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[19]If the defendant ends up serving "dead" time, the period of parole should be reduced by the excess time of imprisonment. (E.g., *People v. London* (1988) 206 Cal.App.3d 896, 911, fn. 8; *In re Ballard* (1981) 115 Cal.App.3d 647, 650; cf. *In re Lira* (2013) 58 Cal.4th 573 [no credit against parole for custody between Governor's erroneous reversal of earlier grant of parole and eventual release on parole]; *People v. Espinoza* (2014) 226 Cal.App.4th 635 [no credit toward post-release community supervision after grant of Prop. 36 resentencing under Pen. Code, § 1170.126].) Counsel should ask the Court of Appeal to note this fact in its disposition. (E.g., *In re Phelon* (2005) 132 Cal.App.4th 1214, 1221-1222, overruled on other grounds in *People v. Duff* (2010) 50 Cal.4th 787, 801, fn. 2; *In re Pope* (2010) 50 Cal.4th 777, 785, fn. 3.)

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Fifth Amendment after guilty plea]; *People v. Browning* (1978) 79 Cal.App.3d 320, 322-324 [*Allen*[20] instruction given jury had been found reversible per se by the California Supreme Court].) The opportunity for oral argument must be provided. (*Browning, supra*, at p. 322; see also Pen. Code, § 1253; *People v. Brigham* (1979) 25 Cal.3d 283, 289.)

Similarly, if opposing counsel concedes that reversible error occurred, it may be possible for the parties to stipulate to a reversal. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, as limited by Code Civ. Proc., § 128, subd. (a)(8).) *People v. Barraza* (1994) 30 Cal.App.4th 114 expressed doubt that section applies to criminal cases. *In re Rashad H.* (2000) 78 Cal.App.4th 376 applied it to a dependency case.[21] If a given client in either a criminal or juvenile proceeding could benefit from the procedure, ADI would support submitting a stipulation to the court, making the showings specified in Code of Civil Procedure section 128, after appropriate consultation with the project.

Counsel should be cautious about these remedies. Summary or stipulated reversal on a particular issue might waive, for purposes of retrial and a subsequent appeal, issues that might have been resolved on the first appeal. If retrial and another appeal are likely or the defendant has substantial issues other than the one requiring reversal, counsel should consider alternatives to summary or stipulated reversal.

As noted in section 1.3.4 Remedies in trial court, *ante*, with certain limited exceptions, the general rule is that the filing of a valid notice of appeal vests jurisdiction in the appellate court and *divests* the trial court of jurisdiction until issuance of the remittitur. (*People v. Perez* (1979) 23 Cal.3d 545, 556; *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 8-10.) But during the appeal, events may arise that require superior court action, rather than appellate court remedy. In *People v. Awad* (2015) 238 Cal.App.4th 215, 225, the court

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[20]*Allen v. United States* (1896) 164 U.S. 492 (instruction to deadlocked jury, urging minority jurors to give weight to majority's views, found prejudicial per se error and ordered not to be given in California in *People v. Gainer* (1977) 19 Cal.3d 835, 852).

[21]*In re Joshua G.* (2005) 129 Cal.App.4th 189 declined to apply section 128, subdivision (a)(8) under the facts of the case, but stated: "There is nothing in the statutory scheme or the California Rules of Court preventing the appellate courts from using the stipulated reversal procedure and nothing in this opinion should be read to foreclose the appellate court from accepting stipulated reversals." (*Id.* at p. 198, fn. 8.)

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issued a stay of the appeal, remanding the matter to the trial court to consider and rule on appellant's Proposition 47 petition. (See also *People v. Braxton* (2004) 34 Cal.4th 798, 818-819 [limited remand appropriate under Pen. Code, § 1260 to allow trial court to resolve one or more factual issues affecting validity of the judgment but distinct from issues submitted to the jury, or for the exercise of any discretion that is vested by law in the trial court].) This procedure allows the defendant to gain the benefit of early relief and likely promotes judicial economy by having the issue resolved below.

If appropriate, a writ petition can be filed in addition to or in lieu of a brief. The petition would state a prompt disposition is required in the interests of justice and an adequate remedy cannot be provided by appeal. (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305; *In re Duran* (1974) 38 Cal.App.3d. 632, 635; Cal. Rules of Court, rules 8.380, 8.384, 8.485 et seq.)

In a writ case, after receiving a favorable opinion in the Court of Appeal, counsel might ask the court to order early finality as to the Court of Appeal to prevent mootness, frustration of relief, etc. (Cal. Rules of Court, rules 8.387(b)(3)(A), 8.490(b)(3); e.g., *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 184; *In re Phelon* (2005) 132 Cal.App.4th 1214, 1222, overruled on other grounds in *People v. Duff* (2010) 50 Cal.4th 787, 801, fn. 2; *In re Pope* (2010) 50 Cal.4th 777, 785, fn. 3.)[22]

The Supreme Court may order early finality of one of its decisions. (Cal. Rules of Court, rule 8.532(b)(1)(A).)

Counsel may also seek immediate issuance of the remittitur via stipulation of the parties under rule 8.272(c)(1). The Supreme Court may order immediate issuance on stipulation or for good cause. (Cal. Rules of Court, rule 8.540(c)(1).)

Counsel should always make certain, especially in time-sensitive cases, that custodial officials know about any relief granted (such as a favorable decision on appeal, the grant of a writ, or the issuance of an order for release) and that they act on it. Occasionally a case falls through the cracks – as when paperwork gets lost, a court omits to inform the prison, or the prison itself delays acting.

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[22]Finality as to the Court of Appeal does not end an appeal: the Supreme Court still has rule time to grant review. (See *Ng v. Superior Court* (1992) 4 Cal.4th 29; Cal. Rules of Court, rule 8.512(b) & (c).)

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1.3.15 Requests to be relieved

Sometimes an attorney is unable to handle a case to which the attorney has been appointed. A new job with incompatible responsibilities, a conflict of interest not discovered when the appointment began, personal or family illness, and many other factors may interfere with representation. In such a situation, it is important that counsel take appropriate action as soon as possible. A request to be relieved is usually the best resolution for both the client and the attorney. ADI does not count such a request as a negative factor in the attorney's record, but on the contrary sees it as a responsible and professional way of dealing with a difficult situation. Attorneys should call the project for guidance on how to do this.

Occasionally, appointed attorneys have been told that the client or the client's family has retained an attorney and that a substitution of counsel needs to be filed. When this happens, it is important that the appointed attorney *contacts the ADI staff attorney before* signing any substitution agreement, sending the records to the other attorney, or assuming the new attorney will take care of such needed steps as an augmentation or extension request. The court wants ADI to verify the arrangement before acting on it.

1.3.16 Handling situations in which appeal is subject to potential termination because of jurisdictional defects, non-appealability, mootness, death or escape of client, etc.

An appeal is subject to dismissal – i.e., termination before a decision on the merits – if basic requirements are lacking, such as jurisdiction, standing, or appealability, or if it can no longer materially affect the client's interests, as when, for example, it has become moot because of developments in the lower court or changes in the underlying situation, or the client has died or escaped. To ensure the attorney responds appropriately and does not end up doing non-compensable work, it is vital to notify the project immediately upon learning of the situation and to cease doing anything but urgent work on the case (such as an extension request to avoid default).

The project will help assess what if any action would be appropriate. The steps to be taken will depend greatly on the situation. They might include notifying the court and/or proceeding until the court orders otherwise,

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abandoning, moving for abatement[23] or dismissal, or seeking permission to continue the litigation despite the situation.[24]

These topics are covered in more detail in § 2.1.3 Limitations on right to appeal, et seq., and § 4.4.1 Reviewability, et seq.

1.4 Client relations

An essential component of appellate advocacy is client relations. It starts with counsel's first communication with the client. The approach taken by counsel at the outset and throughout the appeal may make a world of difference in the success of the appeal or, at the very minimum, the rapport counsel enjoys with the client. This section serves as a guide for establishing and maintaining good client relations and for handling the various circumstances that may arise during the appeal.

1.4.1 Communications

Throughout the appeal, the attorney must keep the client reasonably informed of significant developments and promptly respond to inquiries and requests from the client. Samples of initial and follow-up letters are in § 1.9 Appendix B et seq., *post*. (Adapted from letters provided courtesy of panel attorney David Y. Stanley.)

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[23]The death of the client during the pendency of the appeal permanently abates the proceedings. The appellate court normally should remand to the lower court with instructions to enter an order to that effect. (*In re Sheena K.* (2007) 40 Cal.4th 875, 893 [juvenile delinquency appeal]; *People v. Anzalone* (1999) 19 Cal.4th 1074 [MDO appeal]; *In re Jackson* (1985) 39 Cal.3d 464, 480 [parole review]; *People v. Dail* (1943) 22 Cal.2d 642, 659; *People v. De St. Maurice* (1913) 166 Cal. 201, 202; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1587; *People v. Alexander* (1929) 101 Cal.App. 394, 396.)

On occasion, however, a motion for dismissal may be preferred. (E.g., *In re A.Z.* (2010) 190 Cal.App.4th 1177 [dismissal provides final resolution for the child to proceed to adoption].)

[24]The court might elect to proceed with a moot or quasi-moot case, if the issues are important and an opinion would provide guidance in similar cases: public interest can be considered. (*In re William M.* (1970) 3 Cal.3d 16, 23-25.)

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The ethical principles governing client communications are set out in Business and Professions Code section 6068 and rule 1.4(a)(3) of the California Rules of Professional Conduct. Section 6068 provides, in relevant part:

> It is the duty of an attorney
>
> (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.
>
> (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct . . . .

Rule 1.4(a)(3) states a lawyer must:

> keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed . . . .

Client communications should begin promptly when the attorney is first appointed to the case. As part of the goal to maintain good client relations over the course of the appeal, the initial contact letter should anticipate and deflect problems.[25] Early in the appointment process ADI sends clients a paper entitled *Understanding Your Appeal*. (See § 1.8 Appendix A Understanding Your Appeal, *post*.) It explains what an appeal is, who will represent the defendant, what happens during an appeal, and how the defendant can find out more about the appeal. The attorney's initial letter should reinforce this information. Making early contact is especially important in dependency cases, which often are fast-track.

In addition to informing the client of the appointment, the letter should explain counsel's role, the appellate process, the likelihood of substantial delay between filings, and the differences between a trial and an appeal. It should inform the client of what is and is not permitted in appeals: for example, the

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[25]Sample introduction letters are available at Appendix B to this chapter. FDAP and SDAP also have sample letters, including Spanish and Vietnamese translations.

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client needs to understand that the brief cannot cite matters outside the record and that the facts must be stated in the light most favorable to the judgment. Counsel most likely will not be traveling for a prison visit because the nature of appeals makes in-person contact unnecessary and because such travel is not compensable except under unusual circumstances. Counsel will need to keep possession of the transcripts during the appeal. The letter should also explain the importance of keeping attorney-client communications confidential and of refraining from discussion of the case with fellow inmates, prison staff, or others.

For some courts, minor's counsel may be expected to visit the minor at least once. Counsel should seek preapproval for long-distance travel.

Significant developments

The client is entitled to be informed of all significant developments. (Bus. & Prof. Code, § 6068, subd. (m); Cal. Rules Prof. Conduct, rule 1.4(a).)

What is a "significant" development is situation-specific and generally depends on the surrounding facts and circumstances, as well as the client's expectations. (Cal. Rules Prof. Conduct, rule 1.4(a), Comment [1].) Certainly, the requirement includes providing copies of all briefs and petitions, significant motions, the opinion, and other court rulings on significant matters.[26] The client *must* know of potential adverse consequences from the appeal and any other matters requiring the client's participation or decision. The attorney must respond to reasonable requests for information.

The duty to communicate about other occurrences during an appeal depends on the nature of the case, the issues raised, the client's level of involvement, the time-sensitiveness of the proceedings, what the client has asked for, what counsel has agreed to do, and numerous other factors.

If the client is very engaged or hostile, it is advisable to err on the side of self-protective communication. This includes advising the client of decisions *not* to do something, such as filing a reply brief, requesting oral argument, or seeking rehearing. A good precaution is to give notice an adequate time *before* taking the action, so that the client has an opportunity for input. (That does not mean the

[26]An exception would be when the client expressly asks not to get such documents because, for example, their security might be jeopardized if fellow inmates learned the facts of the offense. Counsel should at least advise the client of the fact of filing and the general content, to the extent possible within the constraints of the client's situation.

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client has power to dictate the decision; only that the client has a chance to express an opinion.[27])

For *any* client, a decision not to petition for review should generally be communicated because the client may want to file in pro per.

Frequency

The frequency of communication is a function of the significant developments of the case and the need to respond to client inquiries. In addition to communications necessitated by significant developments, updates at reasonable intervals may be advisable during long periods of delay.

Method of communication

Appointed counsel needs to consider both efficiency and effectiveness in choosing a method of communication. Most of the time this means written communication, but telephone calls and in-person visits are also possible.

Written correspondence

Because most criminal clients are incarcerated and other kinds of communication are difficult, written correspondence is by far the most common. This method has the advantages of efficiency and creation of a permanent record of communication. Counsel should inform the client of the likelihood that communication will be by letter and advise that, to ensure confidentiality, letters and envelopes should be labeled "Attorney-Client Confidential Communication." (It is also good practice for the client to include the title "Attorney at Law" in addressing the envelope.)

It is a good idea to check the client's current address before sending any correspondence, especially if it concerns time-sensitive or other important matters. Addresses tend to change with some frequency for clients. The ADI website, Locating Clients page, includes links to common locating resources.

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[27]"Counsel 'is in charge of the case' and the defendant 'surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics.'" (*In re Barnett* (2003) 31 Cal.4th 466, 472, citing *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) See § 1.4.3 Decision Making Authority et seq., *post*, as between the client and the attorney.

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The client should be reminded that California Department of Corrections and Rehabilitation regulations require the following for the processing of *outgoing* confidential correspondence: (1) the letter and the envelope must be addressed to the attorney by name; (2) the inmate's name and the address of the facility must be included in the return address appearing on the outside of the envelope; and (3) the word "confidential" must appear on the face of the envelope. (Cal. Code Regs., tit. 15, §§ 3141, subd. (c), 3142; see also Pen. Code, § 2601, subd. (b) [prisoner's civil rights include confidential correspondence with attorney].)

Counsel should additionally be aware of the requirements for *incoming* confidential mail: counsel's letter must bear *counsel's* name or title, return address, and office name. (Cal. Code Regs., tit. 15, § 3143.) Incoming correspondence bearing only a department, agency, or law firm return address, without any reference to the name or title of the individual attorney, will be processed as non-confidential correspondence. (*Ibid.*) Although a notice or request for confidentiality is not required on the envelope (*ibid.*), the better practice is to identify the envelope as "Attorney-Client Confidential Communication."

Both the attorney and the client must ensure confidential legal mail is not used for transmission of information and materials unrelated to the case. Failure to observe this restriction is considered an abuse of the right and could result in discipline**.** (Cal. Code Regs., tit. 15, § 3141, subd. (b).)

Communication with out of custody clients may be more difficult because many clients are homeless, living in shelters, living temporarily with friends and relatives, or are in drug treatment; many frequently move. Diligence in attempting to reach the client can entail using contact information from such sources as the appellate record, relatives, the trial attorney, and social media. Email or texting increasingly may be useful.[28]

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[28]It is important to take reasonable precautions to protect confidentiality when communicating with clients through electronic means. (Cf. Cal. Evid. Code, § 917, subd. (b).) Before sending e-mails with confidential information, counsel should confirm the client is the only person with access to the account. Emails should include a disclaimer. The client should also be cautioned about using public wi-fi and computers. It is advisable to seek a return receipt or a response from the client, to ensure the client has received and opened the e-mail.

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Telephone calls

Counsel should inform the client that collect calls are allowed; however, telephone calls should be limited to what is reasonably necessary. Confidential matters should not be discussed in recorded, non-confidential telephone calls. (See Cal. Code Regs., tit. 15, § 3282, subds. (e) & (i).) Counsel should remind clients as necessary that telephone calls are recorded and not confidential.

The regulations do permit counsel to make special arrangements for a confidential call:

> If staff designated by the institution head determine that an incoming call concerns an emergency or confidential matter, the caller's name and telephone number shall be obtained and the inmate promptly notified of the situation. The inmate shall be permitted to place an emergency or confidential call either collect or by providing for the toll to be deducted from the inmate's trust account. A confidential call shall not be made on an inmate telephone and shall not be monitored or recorded.

(Cal. Code Regs., tit. 15, § 3282 (g).) The designee of the institution may be the litigation coordinator of the prison facility where the client is located. Sometimes the client's counselor is cooperative in arranging and facilitating such calls. Counsel should contact the specific institution to determine their policies for arranging confidential client phone calls.

In prearranging for a confidential call, counsel may use California Department of Corrections and Rehabilitation form CDCR 106-A. Counsel should make clear it is to be "confidential, unmonitored, and not recorded." The request must be in writing on letterhead**.** (Cal. Code Regs., tit. 15, § 3282, subd. (g)(1).) Generally, "[t]he date, time, duration, and place where the inmate will make or receive the call, and manner of the call are within the discretion of the institution head . . . ." (*Ibid.*) The request should explain why the matter cannot be dealt with by mail or personal visit. (Cf. Cal. Code Regs., tit. 15, § 3282, subd. (g)(2).)

If the attorney-client communication privilege is not violated, a confidential call may be denied where the institution head, or their designee, determines that normal legal mail or attorney visits were appropriate means of communication and were not reasonably utilized by the inmate or attorney. (*Ibid.*) Some institutions may impose a fee to defray the cost of having a staff member visually monitor the client during the call. Institutions may also have differing time frames for scheduling the confidential call, so if counsel needs to

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speak to the client regarding a time-sensitive matter, counsel is encouraged to contact the institution as soon as reasonably possible.

Out of custody clients may frequently change phone numbers and may not have regular access to a telephone. Counsel may want to obtain a stable emergency contact number from the client.

Visits

Non-local client visits are usually not necessary in the context of appeals and are not compensable. Exceptions may arise in special circumstances, such as when a personal interview is a necessary part of a habeas corpus investigation or when telephonic and written contacts have not been successful in achieving the required level of communication. Generally, to be compensable, client visits (except local ones) must be preapproved by the project or the court.

Dependency minor's counsel may be expected to visit the minor at least once in some courts. Counsel should seek preapproval for long-distance travel, however.

Literacy and language

Many indigent clients have limited education. The attorney should write simply and clearly and avoid using legal terms unless they are necessary and their meaning is explained. If there is a language difference, a translator should be used to translate letters of reasonable length. Briefs cannot be translated verbatim; instead, a summary of the principal points raised in the briefs can be translated.

Family communications

If the client's family communicates with counsel, counsel should respond promptly. The content of communication with family and others must be limited to matters of public knowledge (such as due dates, procedures, etc.), not strategy or potentially confidential information, unless the client gives specific written permission. Before obtaining such permission, counsel should advise the client about potential waiver of confidentiality.

In juvenile and other cases with confidential records, counsel should ascertain the family member is entitled to see the records. (See Welf. & Inst. Code, § 827.) The client may not be the holder of the privilege of confidentiality and so may not be able to waive it.

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Only a de minimis amount of family contact (e.g., about an hour) is compensable if it is merely for purposes of reassurance. More time is compensable if it is reasonably necessary for the handling of the case, such as to investigate a habeas corpus petition, to facilitate communication with the client, or to translate. Counsel should inform the family about these limitations and about the confidentiality of attorney-client communications.

1.4.2 Clients with special challenges

Most attorneys at one point or another have a client who has specific challenges and requires more assistance. Sometimes, the underlying cause is the client's lack of understanding and mistrust of the legal system. One of the most important tools for managing this type of client is communication. The attorney needs to keep the client informed, to show respect, to explain the issues and decisions, and to respond to the client on a timely basis.

It helps in initial contacts with the client to explain the appellate process and counsel's role. Early in the appointment process ADI sends clients a memo entitled *Understanding Your Appeal*. (See § 1.8 Appendix A Understanding Your Appeal, *post*.) It explains what an appeal is, who will represent the defendant, what happens during an appeal, and how the defendant can find out more about the appeal. This document can be referenced, sent a second time, or paraphrased in counsel's attempts to help the client's understanding.

Counsel needs to tailor the approach to the specific client. There are, for example, clients who have language or literacy barriers, mental or developmental disabilities, prolific writers, and occasionally threatening clients.

Mentally ill or developmentally disabled clients

For clients who are mentally ill or developmentally disabled, clear, simple, and patient communication may suffice to ensure the client adequately understands and participates in the proceedings. If the case requires the client to make significant decisions, such as whether to abandon or proceed with the appeal, counsel should evaluate the client's capacity for such decisions, perhaps by contacting family members, trial counsel, doctors, or others who have known the client or by making a personal visit. If counsel is unsure whether the client can make a knowing and intelligent choice, the project should be contacted about such possibilities as a formal evaluation or guardian ad litem.

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Prolific clients

A prolific or obsessive communicator requires patience and invariable respect for the client's concerns – but also firmness. More letters or phone calls than normal are to be expected, and to some extent counsel must make allowances for the client's need for reassurance and a sense of control. However, counsel cannot let the client take over the case, much less counsel's entire practice, and eventually may need to set limits, such as one letter or one phone call a month. The limit-setting should be balanced by faithful communication at the times promised.

When the client demands various non-arguable issues be raised, making a special effort to show the attorney's interest in and respect for the client's concerns could prevent an irremediable rupture in the relationship. Counsel can provide a legal analysis with citations to support the rejection of the issues. If the client is exceedingly distrustful, photocopying rather than paraphrasing the relevant authority can reassure the client the attorney is accurately representing the law. If the client rejects the analysis and threatens to file a motion insisting the attorney be relieved, a complaint with the bar, a petition alleging ineffective assistance of appellate counsel, or a malpractice suit, *the project must be informed*.[29] It will evaluate the situation and may offer to intervene as a mediator.

Threats against physical safety

If a client makes a threat against the physical safety of appointed counsel and/or others, the attorney should contact the project. Together, the project and counsel can sort out the facts (e.g., the seriousness of the threat and the ability to carry it out) and review ethical considerations.

Business and Professions Code section 6068, subdivision (e) imposes a duty on the attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client," with the exception that it allows but does not require disclosure when the attorney reasonably believes it is necessary to prevent a criminal act that threatens serious physical

[29]As noted in § 1.2.1 Project-Panel System, *ante*, ADI provides professional liability coverage for panel attorneys' work on ADI cases. To safeguard coverage, it is essential that any suit, threat of suit, or facts that might lead to suit be reported to the carrier via ADI immediately.

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harm to a person. (See also Evid. Code, § 956.5 [same exception for lawyer-client testimonial privilege]; *People v. Dang* (2001) 93 Cal.App.4th 1293, 1299; *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 151-160 [minor entitled to appointment of a defense-team psychologist who would respect defense counsel's duty of confidentiality, despite Child Abuse and Neglect Reporting Act and rule of *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 on duty to report patient's serious threat of violence to another]; see also *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 314 [duty of confidentiality under Bus. & Prof. Code, § 6068, subd. (e) is modified by various exceptions to attorney-client privilege in the Evid. Code (citing *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 478)]; see *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1189-1192.)

In addition to researching these applicable principles, counsel can consult the State Bar's and county bar associations' ethics opinions and hotlines.

1.4.3 Decision-making authority

Attorney's authority

Appellate counsel is the decision-maker on issue selection and strategy. "When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant." (*People v. Carpenter* (1997) 15 Cal.4th 312, 376; see also *Jones v. Barnes* (1983) 463 U.S. 745, 751-754 [no federal constitutional duty for appellate counsel to raise every available non-frivolous issue, even if client wants them to be raised]; *People v. Welch* (1999) 20 Cal.4th 701, 728-729 [defendant does not have right to present defense of own choosing but merely right to adequate and competent defense]; *In re Horton* (1991) 54 Cal.3d 82, 95 [defense counsel has complete control of defense strategies and tactics].)

Although appointed counsel has both the authority and the responsibility to make these decisions, maintaining good client relations requires that counsel treat the client's opinions with respect.

Client's authority

The client defines the basic goals of the appeal. Rule 1.2(a) of the California Rules of Professional Conduct provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation." The client decides such fundamental matters as whether to pursue or abandon the appeal (for example,

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because there are no arguable issues or appealing involves risks of adverse consequences). (See *Jones v. Barnes* (1983) 463 U.S. 745, 751 ["the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"]; *In re Josiah Z.* (2005) 36 Cal.4th 664, 680-681; see also *Garza v. Idaho* (2019) 586 U.S. 232 [counsel must file notice of appeal on request even if defendant waived right to appeal as part of plea bargain]; *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [client, not counsel, responsible for deciding to abandon appeal]; *In re Martin* (1962) 58 Cal.2d 133 [counsel not permitted to abandon appeal without client's consent by letting it be dismissed under former rule 17, now rule 8.360(c)(5) of Cal. Rules of Court];[30] *In re Alma B.* (1994) 21 Cal.App.4th 1037 [counsel not permitted to appeal without client's consent]; Cal. Rules of Prof. Conduct, rule 1.2 [lawyer must follow client's direction as to objectives of appeal].)

The client also decides what issues should be waived because of their potential detriment to the client. For example, the client might want to forego issues that could highlight an error in their favor or that might require another appearance in court because leaving prison could result in the loss of a beneficial prison placement or job. If there is an issue regarding the legality of a guilty plea, the client determines whether to attack the plea and thereby potentially lose its benefits as well as its burdens. (See §§ 2.1.4 Advisability of appealing, and Preliminary Caveat for counsel: need to warn client about consequences of challenging the plea, and § 4.6 Adverse consequences: Potential risks of appealing, et seq.) Similarly, the client should be advised of such risks at resentencing based on new laws, if the resentencing could potentially invalidate the plea agreement. (See *People v. Stamps* (2020) 9 Cal.5th 685, 787 [where a trial court chooses to exercise its discretion to modify a defendant's sentence and impose a lesser sentence than contemplated by the plea agreement, the prosecutor is entitled to withdraw from the agreement].)

[30]Rule 8.360(c)(5)(A)(ii) now provides that if appellate counsel for an appealing defendant is court-appointed, substitution of counsel, rather than dismissal of the appeal, is the appropriate remedy. (Cal. Rules of Court, rule 8.360(c)(5)(A)(ii).)

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Pro per briefs by represented clients

If the client wants to file a pro per brief, counsel should explain that a party in a criminal case does not have the right to act as co-counsel, to file a brief while represented by appellate counsel, or to represent himself or herself. (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 163-164 [no constitutional right to self-representation on direct appeal]; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163 [no right to act as co-counsel if represented by counsel].)[31]

If the client submits a pro per brief, the Court of Appeal usually will decline to accept it and will forward the brief to appointed counsel for a decision on whether to raise the client's issue. The attorney should not simply "adopt" the pro per brief. If counsel decides to submit the issue to the court, counsel should properly argue the issue and present it in a supplemental brief. If the issue does not have merit, counsel should return the brief to the client, explaining the reasons for the rejection by the court and for counsel's conclusion the issue does not have merit. Counsel may also write to the court and state, "I have reviewed the brief and will not be filing supplemental briefing. I have returned the brief to the client with an explanation of the court's policy."

In such a situation the project may be able to help "mediate" by giving counsel a second opinion and explaining to the client why the issue is not arguable. If that is unsuccessful, counsel can advise the client about requesting a new attorney on appeal or on filing a pro per habeas corpus petition. At the same time counsel must admonish the client about such dangers as the successive petitions rule, possible waiver of attorney-client confidentiality (by alleging ineffective assistance of counsel), disclosure of damaging information in a motion or petition, undercutting counsel's efforts by attacking counsel or the arguments in the brief, and other pitfalls of self-representation.

1.4.4 Client records

Counsel has ethical duties with respect to client records, both the appellate transcripts and the materials in the case file. It is important to understand these duties and handle them carefully.

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[31]An exception is the right to file a pro per supplemental brief after appointed counsel files a no-issue brief under *People v. Wende* (1979) 25 Cal.3d 436, 440 or *People v. Delgadillo* (2022) 14 Cal.5th 216. This right does not apply to dependency appeals. (*In re Phoenix H.* (2009) 47 Cal.4th 835.)

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Transcripts

Although ADI has found no explicit authority stating that appellate court transcripts are the client's property and part of the attorney's file, ADI has always taken the "safe" position that they are and that the client is entitled to them on request at the end of the case. If the attorney does not give them to the client after the case ends, the attorney must retain them for the life of the client in criminal cases and for a substantial period after the subject child (or youngest child, if there are several) attains majority in a dependency case.[32] (See Cal. State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 2001-157 [duty to retain file in criminal case for life of client unless provided to client or client consents to other disposition].)

Possession during appeal

During the appeal, it is possible a client might request a copy of the transcripts. The attorney should explain that there is only one copy, and the client is not entitled to them while represented by counsel because counsel needs them. If the client is insistent, however, and the record is small, making a copy may be reasonable. If the record is large, counsel can offer to send a summary of the transcripts or relevant excerpts. If that is not satisfactory, counsel can suggest that the client or the client's family or friends provide payment for the photocopying costs. But counsel should not relinquish possession of the record while the case is still being actively litigated, unless counsel has access to another copy (e.g., a scanned version).

An exception arises when counsel files a no-issue brief under *People v. Wende* (1979) 25 Cal.3d 436, 440; *People v. Delgadillo* (2022) 14 Cal.5th 216; or *In re Sade C.* (1996) 13 Cal.4th 952. Counsel normally should send the record to the client upon filing such a brief, in case the client wishes to take advantage of the opportunity to file a pro per brief. Such an opportunity is required in non-dependency cases. (See § Sending record to client, *ante*.)

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[32]Superior court document retention policies may be a guide to counsel in determining how long is a reasonable period after the child attains majority. Written policies for at least some counties may be viewed on the court website.

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Disposition after appeal

Early in the case counsel should make written arrangements with the client for the disposition of the record when the appeal is over. The transcripts normally should either be (a) retained by the attorney, (b) sent to the client or their designee, or (c) otherwise disposed of in accordance with the client's instructions.

It is usually not feasible for attorneys to retain hard copies of transcripts, because a seasoned appellate attorney will have hundreds of cases over the years. Sending them to the client and asking for client instructions on some other disposition, such as destruction or transmission to a third party, are alternatives. If the attorney has obtained the reporter's transcript in computer-readable form, storage is not a concern and retaining the record with notice to the client that it is available at any time on request is probably the most practical way of complying with ethical obligations. Attorneys who received records in computer-readable form will be reimbursed for sending the client a paper copy only when the client has expressly requested it in that form.

In cases with confidential records, counsel should use care to dispose of them in a way that does not compromise their confidentiality. See ADI's web page on confidential records. (See also following § Sensitive and confidential materials.)

The usual options may not be feasible when the client is an infant or young minor in a dependency appeal. In such a case, counsel cannot send the record to the client when the child's caretaker is not entitled to access to it, because doing so violates confidentiality. It may be possible to send the record to the child's guardian ad litem, which is often trial counsel. Or, if counsel can verify that the documents and reporter's transcripts will be obtainable from court archives during the minority of the child, counsel may destroy them, while informing the client or the client's caretaker the attorney will pay for any costs of retrieval. Because such costs rarely occur and are not large, that approach is far less costly than storing increasing quantities of documents over the years.

When sending them to the client, counsel should always make it clear this is the client's only copy, and the client has the responsibility of safeguarding it. If it is lost, the client must pay the state for a replacement.[33]

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[33]The court can assist in obtaining copies of records. See "Records Retrieval" on each district's Practices and Procedures page.

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Sensitive and confidential materials

There may be circumstances (e.g., many child molestation cases) when the client does not want the record coming into an institutional setting, where privacy is limited.[34] In such a situation, counsel should ask for written directions on whether to send it to a third party or destroy it. Counsel who fails to send the record to the client or arrange for its disposal may have an ethical obligation to keep it.

Sometimes material that is not supposed to be in the record is inadvertently included. For example, by law the transcripts must not include the names, addresses, or telephone numbers of sworn jurors; jurors must be referred to by an identifying number.[35] (Code Civ. Proc., § 237, subd. (a)(2); Cal. Rules of Court, rule 8.332(b).) Other examples might be confidential juvenile records (see, generally, Welf. & Inst. Code, § 827; Cal. Rules of Court, rule 8.401(b)) and confidential transcripts (Cal. Rules of Court, rule 8.47). Examples in dependency appeals might be contact information for confidential foster parents or a parent or the psychological evaluation of the other parent. Upon discovering material that counsel is not supposed to see, counsel should stop reading that part of the transcript immediately and notify the Court of Appeal and the project. The court may order return of the records, redaction, or other corrective action. *Under no circumstances should counsel send such material to clients or other people without specific authorization from the court or project.*

If the material is appropriate for counsel to review, but not the client, counsel may personally redact the transcript, if practical, to send it to the client, completely covering the confidential information and ensuring it is not readable by any methods. If the changes are more extensive, counsel may ask the court to

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[34]In such cases, counsel should be careful about *all* communications during the appeal, including contents of letters, briefs, etc. The client may ask that nothing revealing the nature of the crime be sent to prison. Other methods of communication may then have to be arranged.

[35]The information for unsworn jurors (such as those excused) must not be sealed unless the court finds compelling reason to do so (Code Civ. Proc., § 237, subd. (a)(1); Cal. Rules of Court, rule 8.332(c)), but by policy unsworn jurors should be identified only by first name and initial.

If access to juror identification information is required to handle the case, counsel may apply to the trial court under Code of Civil Procedure section 237, subdivisions (b)-(d). (See *People v. Johnson* (2013) 222 Cal.App.4th 486.)

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order the court clerk to prepare a proper copy. If the record is in electronic form, having the clerk do the corrections may be the only alternative.

Office file

If the client wants counsel's office file, the client is entitled to it. California Rules of Professional Conduct, rule 1.16(e)(1) provides: subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not . . . .[36]

Contents of file

The file to be turned over to the client on request includes all correspondence and filings. The attorney's work product materials – written notes, impressions, thoughts, etc. – may also belong to the client and if so, must be delivered to the client or a successor attorney on request. (See *Eddy v. Fields* (2004) 121 Cal.App.4th 1543, 1548, and *Metro- Goldwyn-Mayer, Inc. v. Superior Court* (1994) 25 Cal.App.4th 242, 246-248 [describing conflicting lines of authority]; *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950; Code Civ. Proc., § 2018; Cal. Rules Prof. Conduct, rule 1.4, Comment [4].)

Copies of cases, statutes, etc., are not work product because they are in the public domain. Claims materials are not produced for the client's benefit; they are extrinsic to the attorney-client relationship and so need not be turned over.

Sending file to client

If the client requests the file during the appeal, counsel can send it right away, or if the original is needed to represent the client, can offer to send a copy immediately and provide the original at the end of the case.

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[36]Counsel can make a copy of the file, at their expense, and retain those copies. (See Cal. Rules Prof. Conduct, rule 1.16, Comment [6].) This is highly advisable in most cases, for the attorney's own protection.

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At the conclusion of the case, if the file is sent to the client, counsel should warn the client that it is the original, that the client has the responsibility to preserve it, and that if they lose the material, they may be responsible for the costs of additional copies. Counsel does not have to send the client copies of documents already sent. Nevertheless, it is often good for client relations to do so, provided the extra copying is modest in scope.

Storing file if not sent to client

If the original file is not sent to the client or the client has not given written instructions on its disposition, in criminal cases it is the attorney's responsibility to store it for the life of the client. (Cal. State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 2001-157 ["client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive"].) It may prove useful in the event there is a post-appeal claims audit or post-appeal habeas corpus proceedings. The file may be stored in counsel's office or in an off-site storage facility.

In dependency cases, counsel should keep the files at least for a substantial period after the subject child (or youngest child, if there are several) has reached majority.[37] Counsel should ensure these confidential files are in a secure location, where unauthorized persons cannot get access.

1.4.5 Client custody issues

Counsel occasionally must face issues of whether the client should seek to be released, where the client is incarcerated, and other custody matters.

Release pending appeal/avoiding excess time in custody

Occasionally, the attorney may face the matter of seeking the client's release pending appeal. The client may request the attorney do so, or counsel may conclude release pending appeal is necessary to safeguard the possibility of meaningful relief for the client and avoid the possibility the client might end up serving "dead" time – custody in excess of the lawful sentence – in the event of a

[37]Superior court document retention policies may be a guide to counsel in determining how long is a reasonable period after the child attains majority. Written policies for at least some counties may be viewed on the court website.

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favorable result on appeal.[38] These matters are discussed in detail in § 3.4 Release pending appeal, et seq. The possibility of release pending decision is also available on habeas corpus. (Pen. Code, § 1476.)

Compassionate release

If the client is terminally ill, counsel should consider pursuing a compassionate release. Seeking early release under this program is sensible only if there is a place for the client to go, such as family or an alternative care facility.

The procedure for compassionate release is governed by Penal Code section 1170, subdivision (e)(1)-(6) and the title 15 of the California Code of Regulations, starting at section 3076. It does not apply to a defendant who is sentenced to death or a term of life without the possibility of parole. (Pen. Code, § 1170, subd. (e)(2)(B).)

Upon the recommendation of the Director of the Department of Corrections and Rehabilitation and/or the Board of Parole Hearings, a court may recall the prisoner's sentence if (1) the prisoner has an incurable condition likely to produce death within six months and (2) release or treatment would not pose a threat to public safety. (Pen. Code, § 1170, subd. (e)(1) & (2)(A) & (B).) The prisoner, their family, or a designee may make the request for consideration of recall and resentencing by contacting the chief medical officer at the prison or the Director of the Department of Corrections and Rehabilitation. (Pen. Code, § 1170, subd. (e)(4).)

The defendant may appeal an order denying compassionate resentencing as an order after judgment affecting their substantial rights. (*People v. Loper* (2015) 60 Cal.4th 1155 [rejecting previous line of decisions implying the fact the defendant has no right to make a motion deprives the defendant of standing to appeal its denial]; see § Terms and conditions of probation, et seq.)

Prison placement and other matters not directly related to the appeal

Sometimes the client asks for assistance dealing with matters other than the appeal, such as prison conditions, prison placement, or a particular medical problem. These communications promote the attorney-client relationship but because they are not directly related to the handling of the appeal, they may not

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[38]If the defendant ends up serving "dead" time, the period of parole should be reduced by the excess time of imprisonment. (E.g., *People v. London* (1988) 206 Cal.App.3d 896, 911, fn. 8; *In re Ballard* (1981) 115 Cal.App.3d 647, 650.)

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be compensable beyond a de minimis amount. Counsel should consult the assigned staff attorney if the time spent exceeds a de minimis amount to ensure that counsel doesn't spend uncompensated time on the case.

Counsel can provide information on the general governing principles. For example, a client may want to be housed in a prison near home. Counsel can refer the client to Penal Code section 5068, which recognizes that maintaining family and community relationships reduces recidivism and provides that placement should be nearest the prisoner's home, unless other classification factors make such placement unreasonable. The client can inform the reception center, the counselor, and classification committee of their desire and can provide them with information verifying family ties, such as the probation report and letters from family. Hardship, such as an elderly or ill parent who is unable to travel far, can be a basis upon which to seek placement. The client should be told that although custodial authorities may consider these factors, they will still give priority to custody and safety-based concerns. Additional resources are available on the ADI website, Client & Family Resources page.

1.4.6 Post-decision responsibilities

As discussed in § 1.3.10 Post-decision responsibilities, *ante*, when the opinion is received counsel must analyze it, decide what if anything counsel will do next, and then explain the situation to the client.

Rehearing and review

Rehearing

If the opinion is unfavorable, counsel should inform the client about the petition for rehearing and review process. It is important to write promptly because of the tight time requirements: 15-day limit for petitions for rehearing (Cal. Rules of Court, rule 8.268(b)(1)) and the requirement that petitions for review be filed within 10 days after finality as to the Court of Appeal (Cal. Rules of Court, rule 8.500(e)(1)).

Pro per petitions for rehearing are usually not feasible, given the short deadlines and typical slowness of prison mail.[39] In addition, the court may refuse

[39]The presiding justice may grant relief from failure to file a timely petition for rehearing until the 30th day after the filing of the opinion. (Cal. Rules of Court, rule 8.268(b)(4).) The court also may grant rehearing on its own motion

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to file a pro per petition filed by a client currently represented by counsel in that court. Thus, counsel should give the benefit of the doubt to filing the petition if the client may want or need to do so and if there is an appropriate basis for such. Petitions for rehearing are covered more comprehensively in § 7.4.3 Rehearing, et seq.

Review

Counsel should petition for review if in counsel's judgment there are grounds under rule 8.500(b), and the client is reasonably likely to benefit from it. Counsel should also petition if there is a reasonably viable and properly preserved federal issue the client wants to pursue. (See Cal. Rules of Court, rule 8.508 [abbreviated petition for review solely to exhaust state remedies].) If counsel decides not to file a petition for review, counsel should provide the client with information on how to proceed in pro per. This may include a sample petition, the due dates, the addresses for the courts and parties to be served, and the number of copies required.

Petitions for review are covered more comprehensively in § 7.5 Petitions for review in the California Supreme Court, et seq.)

Federal filings

An appointment in the California Court of Appeal may include a petition for certiorari in the United States Supreme Court in appropriate cases. Certiorari is compensable but is considered an exceptional step and at ADI requires the executive director's preapproval.

Federal habeas corpus is not compensable under the state appointment, although counsel may choose to "ghost-write" a pro per federal petition for writ of habeas corpus to be filed by the client or seek an appointment from the federal court.

The client should be informed about seeking relief in federal courts if the client has a substantial federal issue or has expressed interest in pursuing one. The client needs to know the grounds for certiorari and/or habeas corpus, the deadlines for filing, state exhaustion requirements, the restriction against

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during this period. (Cal. Rules of Court, rule 8.268(a).) Although a belated petition accompanied by a good explanation of why it is late may possibly be considered, no one should rely on this if a timely petition is feasible.

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successive petitions, etc. Counsel can provide forms, addresses, and other information.

Federal habeas corpus is noted, and certiorari is discussed more comprehensively in § 7.7 Certiorari in the United States Supreme Court, et seq.

Post-appeal contacts with clients

Sometimes after an appeal a client may ask for help relating to the appeal or other areas. Counsel should give the client the respect of a timely reply. The authority to act under the appellate appointment is usually over, but counsel can inform the client about such resources as legal books maintained by the prison law library, prisoner rights organizations, and innocence projects. (See, the ADI website, Client and Family Resources page.) Counsel can also provide habeas corpus forms and instructions on filing them.

1.5 Responsible use of associate counsel and law clerks

The Appellate Indigent Defense Advisory Oversight Committee (AIDOAC) has promulgated a statewide policy regarding the use of associate counsel. The AIDOAC formulation is below, any special ADI interpretations or Fourth District rules on the subject are marked clearly.

AIDOAC Policy on Use of Associate Counsel

(section numbers added to conform to ADI Appellate Practice Manual system)

The AIDOAC guidelines are based on principles articulated by the California Supreme Court and Courts of Appeal and reflect the appellate projects' standards for assessing the performance of appointed counsel. They are based, as well, on the broad ethical responsibilities of attorneys, recognizing that the failure adequately to supervise the work of subordinate attorney or non-attorney employees or agents is a failure to act competently on behalf of a client. (See Rules Prof. Conduct, rule 1.1 and related annotations.)

Special considerations:

- *Court- or project-specific requirements:* Individual courts or projects may have additional or more specific requirements. Counsel must consult with the applicable project for such requirements.

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- *Limitation for assisted cases:* AIDOAC has determined that attorneys in assisted cases may not use associate counsel, except with prior approval of the project executive director upon a showing of extraordinary circumstances.

A. Basic Principle of Personal Responsibility

The attorney of record at all times has complete, final, and personal responsibility for the case. It is acceptable for the attorney in an independent case to employ others to *assist* in any of the attorney's functions. The attorney personally, however, is fully accountable for what has or has not been done on the case. The projects use a detailed, comprehensive method of evaluating attorneys' performance and selecting them for particular cases. The projects' quality controls would be undercut if attorneys were to allow others, not subject to this system, to take over important aspects of a case. The projects examine every category for which associate counsel or law clerk time is claimed, to determine whether appointed counsel has been sufficiently engaged to fulfill expectations.

The projects expect the quality of an attorney's work at all stages to reflect their own experience and other personal qualifications. This policy of personal accountability applies not only to final filed documents, but also to preliminary drafts, if any, submitted to the projects and discussion of cases with a project staff attorney. Appointed counsel must be prepared to communicate personally with the project on all substantive, legal, strategic, ethical, and other important matters related to the case. Drafts and communications must conform to what is reasonably expected of attorneys at the experience level of appointed counsel.

Over-delegation may negatively affect the project's evaluation of appointed counsel's performance. Any substandard work produced by associates will damage the standing of the panel attorney personally.

B. Specific Responsibilities of Appointed Counsel

The appointed counsel is responsible for the following tasks, among any others the handling of a case may require: reviewing the entire record, completing it, and selecting issues; filing appropriate briefs, motions, applications, and other pleadings; reviewing all filings; making any

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personal appearances that adequate representation might require, including oral argument; and ensuring prompt, proper, and thorough communication with the client, the project, counsel for all parties, trial counsel as necessary, and the court. In performing these tasks, counsel must also ensure all applicable deadlines are met. To expand on some of these areas:

1. Reviewing the entire record, completing it, and selecting issues

   Review of the entire record for issue selection and mastery of essential facts is an especially critical aspect of representation. Counsel must ensure the record is adequate for performing this task and complete it if necessary. While associate counsel may assist in record completion and review by performing such functions as taking notes on the transcript or writing a summary of the case and facts, ultimate delegation of this supremely important responsibility to another is unacceptable. The time appointed counsel spends personally reviewing the record must be adequate to assure *all* potential issues in the record have been spotted and considered. Counsel must also be familiar with the details of the record to understand nuances of fact that might affect the assessment and drafting of arguments.

2. Filing appropriate briefs and other pleadings

   The opening brief is usually the pivotal document in an appeal, and counsel must put substantial personal effort into filing a product of appropriate quality. It is the attorney's own responsibility to confirm that the facts are stated appropriately, in accordance with appellate standards, and are supported by accurate citations to the record; to ensure all appropriate authorities have been considered and all citations are accurate and up to date; and to see that the document is proper and complete in both form and substance, complies with all requirements of the Rules of Court, accurately states all facts and law, and is argued intelligibly, coherently, grammatically, and persuasively. Similar responsibilities apply to reply briefs, petitions for rehearing or review, motions and applications, and any other filing.

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3. Reviewing all filings by others

   Other aspects of representation also require close personal attention. Decisions about reply briefs, oral argument, rehearing and review, etc., cannot be made properly unless appointed counsel reviews such filings as the respondent's brief and the opinion, plus any co-appellant's briefing, court orders, and any other filing that may affect counsel's exercise of judgment.

4. Making personal appearances

   Personal appearances (such as oral arguments) require special care, because supervising another's work in a courtroom is essentially impossible. Unless advance arrangements have been made, the projects and the courts expect appointed counsel to make all appearances personally. The panel attorney must consult with the project before using associate counsel at oral argument. The court may have to pre-approve the appearance of associate counsel, as well. In certain circumstances, the court or project may also require the client's consent. Requirements may vary from one court and project to another.[40]

5. Engaging in proper communication with the client, court, project, and others

   Counsel is personally responsible for ensuring prompt, proper, and thorough communication with the client, the court, the project, counsel for all parties, trial counsel as necessary, and any other person or entity the needs of the case may require. Counsel must fully comply with the ethical requirements of adequate client communication, including providing copies of significant documents and keeping the client informed of significant developments in the case. (Bus. & Prof. Code, § 6068, subds. (m) & (n); rule 1.4(a)(3), Cal. Rules Prof. Conduct.)

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[40]ADI note: Our courts specifically expect counsel to discuss oral argument by associate counsel with ADI ahead of time and get the court's preapproval, as well.

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C. Compensation

Appointed counsel must report on all compensation claims any usage of associate counsel and indicate how much of that counsel's time is included in the hours claimed. These principles apply:

Meaning of "associate counsel": Associate counsel must have been an active member of the California State Bar at the time the services were performed for that individual's time to be billable as "counsel" time. If that was not the case, the time is billable only as law clerk or paralegal time – an expense not to exceed $25 per hour.

Compensable costs of associate counsel: A claim with associate counsel time will be judged under the same guidelines and standards of reasonableness as those applicable to single-attorney claims. The use of associate counsel does not increase the time payable for any service performed.

Claiming associate counsel's time: Associate counsel time is reported as a part of appointed counsel's time for any specific task. Associate counsel time included in the claim is then itemized in the associate counsel attachment, which must state the name and California State Bar number of the associate counsel. These special rules apply:

- Counsel must first claim all of their own billable time and only then add any associate counsel time deemed billable on top of that: It is essential for the project to know how much time appointed counsel personally spent on the case, in order to assess counsel's compliance with these associate counsel policies. Counsel must not cut their own time in order to claim associate counsel time: doing so will understate appointed counsel's own involvement and cause the project, AIDOAC, or court to question whether counsel exercised appropriate control over the case.

- In the attachment for itemizing associate counsel's time, the hours shown must be only those actually claimed (as opposed to those spent): In determining how much time appointed counsel personally spent on each function, the projects take the total hours reported for each function and subtract the itemized hours for associate counsel. That calculation requires that the itemized hours be only those actually

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included in the hours claimed. If counsel wishes to state unclaimed associate counsel time to show the extent of work performed on the case or give the attorney due credit, the comments are the appropriate place, not the itemization chart.

— End of AIDOAC Policy Statement —

1.6 Classification and matching of cases and attorneys

1.6.1 Case screening and classification

Under a statewide system approved by the judiciary, defendants' appeals in criminal and juvenile delinquency cases are classified as follows:

A: Sentence of less than 5 years for trials, less than 10 years for pleas.
B: Sentence of at least 5 but less than 10 years for trials, at least 10 but less than 20 years for pleas.
C: Sentence of at least 10 but less than 20 years for trials, at least 20 but less than 30 years for pleas.
D: Sentence of 20 years or more for trials, 30 years or more for pleas, or any with life maximum.
E: Life without possibility of parole.

Special classifications for other types of appeals in criminal cases or quasi-criminal cases include People's appeals, habeas corpus, and Sexually Violent Predator cases. Juvenile dependency, family law, conservatorship, paternity, sterilization, and other civil cases requiring court-appointed counsel are classified by the type of proceeding.

1.6.2 Attorney screening and classification

The attorneys on the panel are separated into two specialty groups – criminal and juvenile dependency. Within each specialty area, the attorneys are divided into groups based on their qualifications, using statewide level 1 through 5 classifications.

1.6.3 Attorney ranks

The general framework within which attorneys are classified, and appointment decisions are made is shown in the following chart:

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CRITERIA FOR ATTORNEY CLASSIFICATIONS

Level 1. Attorneys who are fairly new to the panel and need substantial assistance.

- *Expected work product*: Must demonstrate promising writing, research, and analytical skills and make steady progress toward skills required of higher classifications.

- *Typical ADI cases*: Class A or B cases on an assisted basis.

Level 2. Attorneys with some relevant experience who need some but reduced assistance in cases and whose work indicates the ability to handle cases somewhat more difficult than the simplest.

- *Expected work product*: Must produce work of at least standard quality, requiring little assistance to perform basic duties. As a general policy, attorneys at this level must demonstrate reasonable progress toward handling independent cases.

- *Typical ADI cases*: Class A or B cases on a modified assisted basis.

Level 3. Attorneys with a moderate amount of relevant experience, whose work indicates ability to handle cases of intermediate complexity on an independent basis.

- *Expected work product*: Must consistently produce work of at least good to very good quality, requiring assistance only to perform more complex duties.

- *Typical ADI cases*: Classes A through C on an independent basis.

Level 4. Attorneys of superior qualifications and considerable relevant experience, whose work indicates ability to handle complex cases on an independent basis.

- *Expected work product*: Must consistently produce work of at least very good quality, requiring assistance only to perform very difficult and complex duties.

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- *Typical ADI cases*: Classes A through D on an independent basis.

Level 5. Attorneys with the highest qualifications and extensive relevant experience, whose work indicates ability to handle the most complex cases on an independent basis.

- *Expected work product*: Must produce work of consistently very good to excellent quality, requiring assistance only at highly sophisticated levels.

Typical ADI cases: Cases of all classes on an independent basis.

These are general principles, not rigid rules, and are constantly evolving. They vary from project to project and over time.

1.6.4 Determination of rank

When an attorney's application to the panel is accepted, the initial classification depends not only on experience (which is of course an important factor), but also on more qualitative measures such as training and education, class rank and academic honors, writing ability, and commitment to indigent appeals.

After admission, the project evaluates the attorney's work on each individual case. The project uses an evaluation form assessing overall performance and itemizing specific factors that go into the overall assessment. The evaluations form a cumulative record of performance. The statewide evaluation process system is described in § 1.6.11 Evaluations of attorney performance, et seq., *post*.

Each attorney's ranking is reviewed on an ongoing basis as the record of evaluations and other factors change. The project may move the attorney's rank up or down, increase or decrease or suspend offers, remove the attorney from the panel, put them on probation, or take other steps as circumstances require.

1.6.5 Selection of an attorney for a particular case

The matching process – selection of an attorney for a case – begins after the case is screened and classified. The following discussion generally describes the matching process at ADI; other projects may use different procedures.

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1.6.6 Assisted vs. Independent decision

One fundamental decision is whether the case is to be "assisted" or "independent." Sometimes a hybrid category is used, such as "modified-assisted" (for an assisted case requiring less assistance than usual) or "modified independent" (for an independent case requiring more assistance than usual). This decision is affected by factors such as caseload, staff attorney resources, training needs, costs, and the availability of qualified attorneys. Assisted cases are usually assigned to attorneys with less experience on the panel. Independent cases are generally assigned to the three highest rankings according to the level of complexity, giving the more complicated cases to the more highly qualified attorneys. (ADI tries not to use the highest ranked attorneys for the simplest cases, to assure they remain available for the most difficult cases.)

1.6.7 Choice of attorney rotation

Another step is to choose the appropriate rotation from which to select the attorney. The combination of the case classification and the type of representation (assisted or independent) indicate which attorney qualifications levels – level 1, 2, 3, 4, or 5 – are eligible under the standards. Geographic locale is often one consideration, although often it is not, as well.

Within each rotation, the attorneys are listed roughly in order of last offer, so that those whose last offer was longest ago tend to be near the front. Other factors, however, may affect the attorney's place in the rotation, including quality of recent work, time difficulties, request not to get an offer for a certain time, request for new appointment, and so on.

1.6.8 Choice of individual attorney within rotation

The appointment is offered to the first individual in the rotation who is highly suitable for the case. The judgment of suitability takes account of the attorney's preferences, number of unbriefed cases outstanding, timeliness, general quality of work, probable availability, special areas of strength or weakness, recent performance, client preferences, and numerous other factors.

1.6.9 Special request for appointment outside the normal rotation

Attorneys ready for a new case offer may use the form requesting an appointment outside the normal rotation. (See ADI website, Panel Forms.) ADI cannot guarantee to honor such requests, since the suitability of the attorney for a

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particular case remains the most important factor, and ADI must consider fairness to all attorneys in offering cases.

1.6.10 Offer of case

The attorney selected for a case is contacted. If the attorney declines or cannot be reached reasonably promptly, ADI repeats the selection process. When an attorney has accepted, ADI sends a recommendation for the appointment to the court.

Because of the many factors considered in making the selection, ADI cannot make any representations about how many case offers an attorney may receive, or whether an attorney will continue to receive any appointments at all.

1.6.11 Evaluations of attorney performance

The assigned project staff attorney evaluates every case handled by a panel attorney. The following categories, approved by the judiciary for statewide use, are considered:

Issues – selection and definition

Identifies standard issues

Identifies standard issues which would be apparent to an attorney having knowledge of the record and a reasonable awareness of existing procedural and substantive law.

Identifies subtle issues

Shows depth of insight and analytical skill in identifying and developing issues. Identifies issues that are not obvious and perceives their implications.

Identifies current issues

Identifies current issues which would be apparent to an attorney having knowledge of the record and familiarity with recent trends and the cases then pending in the appellate courts of California and the United States.

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Evaluates issues properly

Exercises sound judgment in determining the merit of each issue and treating each issue according to its merits. Gives each issue its share of the brief, but no more. Arranges issues in the brief in an appropriate order. Eliminates issues that are only marginally arguable if they detract from the remaining issues or the tone of the brief as a whole.

Defines issues clearly

Demonstrates competency in framing each issue. Defines the scope of the issue. Clearly understands and phrases the exact question to be decided by the court. Uses effective argument headings.

Research

Performs thorough research

Thoroughly researches all relevant aspects of each potential issue, becoming familiar with the law on related issues or "sub-issues" when necessary. Finds the most recent cases. Shows resourcefulness and knowledge of available materials.

Selects appropriate authority

Cites adequate authority for the principles relied upon, neither string-citing unnecessarily nor making statements without support. Whenever possible uses cases which are factually on point as well as legally relevant. Takes account of adverse authority.

Cites authority accurately

Cites and quotes legal authorities accurately; does not intentionally or negligently misrepresent the facts or law contained in authorities.

Checks current validity of authority

Researches later history of cases. Does not cite cases which have been overruled or depublished. Generally, if a published opinion of a Court of Appeal has been granted review, pending review and filing of the Supreme Court's

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opinion and unless otherwise ordered by the Supreme Court, the opinion may be cited for potentially persuasive value only and has no binding or precedential effect. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

Argumentation

Organizes argument

Presents position in a coherent manner. States facts, sets forth legal principles and authorities, argues, and summarizes in a logical, orderly progression. Keeps objective of argument in mind; does not ramble or dwell on marginal matters.

Covers all points essential to position

Is aware of and addresses all points logically or legally necessary to the argument. Applies law to facts. Argues prejudice. Anticipates and discusses failure-to-object and waiver or forfeiture issues.

Handles authority skillfully

Analyzes authorities accurately and perceives their implications. Argues from analogy and distinguishes or challenges adverse authority skillfully.

Demonstrates proficiency in advocacy skills

Shows confidence in position. Presents strong arguments forcefully, weak ones credibly. Takes controversial stand where necessary. Maintains appropriate tone and balance. Handles facts sympathetic to opposition capably, without adopting defensive or insensitive posture.

Is consistently professional in manner

Maintains decorum without being pompous or overly formal. Is respectful to the court and opposing counsel. Concentrates on merits and refrains from personal attacks.

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Style and form

Writes fluently

Shows mastery of written language. Presents ideas clearly and concisely. Avoids legalisms.

Uses correct grammar, diction, spelling, capitalization, and punctuation

Demonstrates command of the structure and formal elements of the English language. Does not detract from professional image by displays of carelessness and illiteracy. Proofreads carefully.

Presents statement of the case properly

Summarizes only those procedural facts relevant to the appeal itself or the specific issues to be decided. Cites to record.

Presents statement of facts properly

Summarizes in the statement of facts only those facts supported by the record. Adequately cites to the record. Is scrupulous in presenting the facts accurately and in the light most favorable to the respondent. Clearly separates and labels the defense evidence. Writes the pertinent facts in narrative form, not a witness-by-witness account.

Uses correct citation form

Uses correct citation form for both legal authorities and the appellate record.

Follows rules and good practice on form and technical aspects of pleadings

Follows prescribed format and formal requirements as to typing, binding, copying, and distributing of briefs and other pleadings. Gives briefs neat, orderly, professional appearance.

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Responsibility

Makes sure record is adequate

Reviews the trial exhibits and the superior court file whenever necessary. Augments the record as needed.

Makes use of opportunities for reply briefs and/or oral argument

Orally argues or files a reply brief whenever necessary. Bases the decision to request or waive oral argument upon the appropriateness of argument, not upon convenience.

Is reliable and cooperative in working with project

Promptly answers letters and returns phone calls. Keeps appointments. Meets informal interim deadlines within a reasonable time. Accepts reasonable recommendations and suggestions unless in conflict with the attorney's duty to the client or the attorney's professional judgment.

Observes deadlines

Files all motions, briefs, and petitions on or before the date due, requesting extensions of time if, but only if, necessary.

Relationship with client

Communicates reliably

Writes to the client soon after appointment, answers correspondence, and provides the client with copies of all filings. When the court's opinion is issued, promptly advises the client; explains how to file their own petitions if the attorney sees no merit in proceeding further.

Faithfully pursues client's interests

Selects issues to maximize effectiveness of appeal for client. Acts zealously and conscientiously in fulfilling obligation to client, regardless of perceived reward or detriment to attorney.

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1.6.12 Feedback to attorneys

An accurate and realistic understanding of one's own strengths and weakness is critical to development of the necessary skills. Accordingly, attorneys always may obtain information on how they are doing at ADI.

Panel attorneys may ask the assigned staff attorney for informal feedback on their performance in specific cases. Staff attorneys in turn are encouraged to provide such feedback whenever they think it would benefit the panel attorney.

At ADI, formal written feedback in any given case is also available, in the form of a verbatim copy of the staff attorney's narrative evaluation and overall assessment. It will be provided on request whenever the panel attorney submits the Request for Evaluation of Work form with the opening brief served on ADI.

In addition to case-specific feedback, attorneys may ask for an *overall* assessment and panel status report at any time. Although at ADI only the executive director is authorized to provide this information, attorneys may make their request in any way comfortable to them – directly to the executive director or through a staff attorney or the ADI panel liaison ("Panel Liaison").

We strongly encourage attorneys to take advantage of these opportunities to improve their performance, track their panel status, and head off any problems before they become big.

1.7 Compensation of appointed counsel

1.7.1 Standards for assessing claims

Services

The judiciary has promulgated guidelines to assure the reasonableness of compensation. The guidelines offer a prima facie measure of reasonableness for the time to be spent on various functions in the "ordinary" case (not significantly more or less complex than most). The ultimate standard is always reasonableness, which may or may not correspond to the guidelines in a given situation.

The projects have produced a Statewide Compensation Claims Manual.[41] It "codifies" the ways the Appellate Indigent Defense Oversight Advisory

[41] https://capcentral.org/claims/claims_manual/

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Committee, the Judicial Council of California services, and the projects have interpreted the guidelines over the years in particular situations.

Counsel are required to keep time records to the nearest one-tenth of an hour and may be required to produce them on request. Only *actual* time may be claimed. The claim must never be premised solely on the guidelines (for example, by simply dividing the record length by the guidelines' pages per hour) or an estimate ("I know I spent at least *X* hours on this").

While claims in excess of the guidelines may be reasonable, appointed counsel has the burden of showing why the time was reasonably needed in the particular case. These claims should be supported by written justification, preferably submitted with the claim to avoid delays. Indeed, whenever the necessity for any time claimed is not evident from the face of the filings (for example, research that did not yield any cases), counsel would be well advised to include an explanation with the claim.

Payment may be different from the guidelines. A lower payment is often recommended, for example, when the case was relatively simple and straightforward as compared with the "typical" case that is the model for the guidelines, or when the quality of work was substandard. It may also be higher than guidelines if the case was exceptionally challenging or counsel produced work of unusually high quality that was of notable benefit to the client, the court, or the law. The ultimate test is "*reasonableness*" – what an experienced appellate attorney would find reasonably necessary for handling the case appropriately. This is an individualized judgment for each case.

Expenses

Like services, all expenses are reviewed against the guidelines and ultimately are subject to a general test of reasonableness. The guidelines are the "actual cost" for postage and telephone expenses, if the postage and telephone expenses are reasonable under the circumstances.[42] Ordinary use of computerized legal research (Lexis, Westlaw, etc.) is considered overhead and is not compensable, but special circumstances, such as the need to search sources not within commonly available subscription plans, may warrant payment; consultation with the project before such use is advised. All extraordinary expenses will be considered on a case-by-case basis and should be adequately

[42]Extraordinary delivery expenses are reimbursable only when the unavoidable needs of the case – not counsel – require their use.

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explained. Some, such as experts,[43] require project director or court preapproval to assure compensability.

1.7.2 Submitting claims

Timing

Counsel may file a compensation claim at three times for most cases: an interim claim after the opening brief is filed, a supplemental interim claim after the respondent's brief and reply brief are filed, and a final claim after the opinion is filed or whenever services are concluded. Early interim claims may be submitted before the filing of the opening brief when: (1) the record length exceeds 1,500 pages, or (2) where counsel has been waiting for an augmented or corrected record for longer than 90 days. For these types of early interim claim, counsel will only be compensated for time spent on record review (line 2). Additional supplemental claims may be allowed with the approval of the project executive director and Judicial Council services, in cases with unusually long delays causing hardship for the panel attorney.

Counsel is encouraged to submit claims as soon as they are permitted. Filing a final claim waives payment for reasonably foreseeable services performed after submission of the claim, such as reading the opinion or communicating with the client. If the court orders supplemental briefing, an additional claim may be filed.

Interim claims in *Wende/Anders*, *Delgadillo*, and *Sade C.* no-issue cases are not permitted; final claims may be filed after the time the court sets for filing a pro per brief has expired.

A final claim needs to be filed within six months of the opinion. Appointed counsel should file a final claim even if it is for a relatively small amount of money. Judicial statistics are in large part based on final claims. Failure to file claims in cases with low hourly totals distorts those statistics and may hurt efforts to improve compensation for appointed attorneys. In addition, the Judicial Council requires the projects to submit "administrative" final claims for those considerably past due, to clear the books and pay the 5% holdback from the interim; these include no time past the interim and so may result in waiver of payment for such services.

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[43]At ADI, moderate translator expenses (i.e., $200 or less) do not require preapproval.

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ADI sends counsel who have not already submitted a final claim a reminder approximately 60 days after the remittitur issues. If the file has been sent to storage and is necessary to process the claim, counsel will need to cover any necessary costs of retrieving the closed file. Counsel should call the project about the current applicable fee; claims submitted without this payment will not be processed.

Form and content of claim

ADI claims must be submitted through the panel portal.[44] Check with other projects about the proper procedures in their cases. As discussed in § 1.5 Responsible use of associate counsel and law clerks, *ante*, the use of others to assist in the appeal must not reflect over-delegation.[45]

1.7.3 Procedures for reviewing claims

Project's recommendation

Attorneys should check with the applicable project about the procedures in that office. ADI policy and goal is to process claims expeditiously upon receipt – within 10 working days if there are no unusual problems or complexities. Claims are initially processed by support staff at ADI, then reviewed by a staff attorney.

The staff attorney will evaluate the number and complexity of the issues, both briefed and unbriefed. Using the guidelines and other measures of reasonableness applicable to the case, the staff attorney will calculate a recommendation for payment.

The recommendation takes into consideration the overall quality of the work. Even if the claim is within the usual guidelines and would otherwise be reasonable, a reduction may be recommended if the work is evaluated as substandard. Conversely, higher payment may be recommended if the extra time

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[44] https://cms.adi-sandiego.com

[45] To be compensable as attorney time, work must be done by a person then an active member of the California State Bar. If the assistant does not qualify in this regard, the time may be claimed only as law clerk time, an expense. Thus, work by persons who are, at the time of the work, members of another state's bar but not California's, or persons who have passed the California bar exam but not yet been admitted, may be claimed only as law clerk time.

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was required by the nature of the case or resulted in exceptionally high-quality work.

The staff attorney will notify an attorney if there is a proposed cut of more than five hours that is also 10% or more of the total hours claimed. The panel attorney is given an opportunity to discuss the proposed cuts with the staff attorney. If the project provided notification during a previous claim and the same proposed cut applies to the current claim, the project will not repeat the notification. The interim claim holdback does not count as a cut.

The staff attorney's recommendation is reviewed by at least one other staff attorney at the interim and at the final stage. This review is done to ensure fairness and objectivity, compliance with policies, and uniformity and consistency in ADI recommendations.

Transmission to Judicial Council Services

The project's recommendation is sent to the Judicial Council Services for review and approval. The office reviews every claim over $10,000 and a random sampling of smaller cases. (See Statewide Compensation Claims Manual, Appendix A: *Demystifying JCS/ACS and AIDOAC Reviews*.) Once authorized by the office, claims are sent to accounting for issuance of the check. This process is becoming increasingly expeditious as the steps are automated.

Holdback at interim stage

Interim claims are paid at 95% of the recommended hours and 100% of the recommended expenses. The final payment is for all approved hours and expenses not compensated at the interim stage.

Payment for cases not completed

Sometimes an attorney is relieved before completion of the case. Compensation in that situation depends in part on whether the reason was beyond counsel's control (such as serious illness or the client's retaining counsel) or within counsel's control (such as accepting conflicting employment). Also relevant is whether the relieved attorney filed any briefs or motions or produced a work product, such as a draft statement of facts or research notes on the issues, which were helpful to successor counsel. Recommendations may vary from no compensation at all (e.g., no draft of anything yet written or counsel relieved because of excessive delay) to full compensation (e.g., complete and usable work product or unavoidable need for new counsel).

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AIDOAC audits

The compensation process is overseen by the Judicial Council's Appellate Indigent Counsel Oversight Advisory Committee. Every quarter, as part of its functions, the committee audits a number of final claims from the preceding quarter. *The claims are chosen at random*. If AIDOAC determines the project claim recommendation was too high or low, it will order an adjustment. Thus, counsel should always keep in mind that payment for a particular case is not necessarily final until the audit period for the following quarter is closed. (See Statewide Compensation Claims Manual, Appendix A: *Demystifying JCS/ACS and AIDOAC Reviews*.)

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1.8 Appendix A: Understanding your Appeal

Letter Appellate Defenders, Inc., sends to new clients in criminal cases. A very similar letter is sent to clients in dependency cases.

UNDERSTANDING YOUR APPEAL: INFORMATION FOR DEFENDANTS

This information letter will help explain what an appeal is all about. It answers some of the questions most often asked by our clients. Your individual attorney will help you understand your own case.

"WHAT IS AN APPEAL?"

An appeal is **not** a new trial. The purpose of an appeal is to check over the proceedings in the trial court to see if they followed the law.

An appeal can deal only with matters shown in the *transcripts*. The transcripts include: (1) the papers in the trial court files; and (2) a court reporter's word-for-word record of what happened in the courtroom. The Court of Appeal cannot consider facts outside of the transcripts. It hears no witnesses and takes no new evidence.

The Court of Appeal has **no power** to decide questions of *fact*, such as whether you are guilty or innocent, or whether a certain witness was lying, or what a particular piece of evidence proves. It has no power to say what sentence you should get, among those allowed by law. Decisions like those are only for the jury or trial judge, and the Court of Appeal cannot change them.

The Court of Appeal deals with *legal* questions. It decides whether the trial court proceedings followed the law. For example, it might decide whether certain evidence was correctly admitted, or whether the jury was properly instructed, or whether the trial judge gave adequate reasons for choosing a particular sentence, and other questions of those types.

If the Court of Appeal finds that the proceedings were conducted correctly, the judgment is "affirmed," and your conviction and sentence will not change.

If the Court of Appeal finds some important mistake was made in the trial court, your case will probably be "reversed" (in part or in full) and sent back to the trial court for a new trial, a new sentencing, or some other proceeding to correct the mistake. Some mistakes can be corrected by the Court of Appeal itself, without sending the case back.

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"WHO WILL REPRESENT ME ON APPEAL?"

Appellate Defenders, Inc., is a firm of criminal defense attorneys. All are very experienced in criminal appeals. The firm helps to manage criminal cases in the Fourth District Court of Appeal.

In every case requiring appointment of an attorney on appeal, Appellate Defenders either handles the case itself or finds a private attorney to handle the case.

Your case has been given to an attorney with appropriate qualifications after having been checked for length, difficulty, and seriousness of penalty.

If a private attorney has been selected, an Appellate Defenders staff attorney will be available to assist the private attorney at every stage of the appeal.

"WHAT CAN I EXPECT TO HAPPEN DURING THE APPEAL?"

The usual steps in an appeal include:

(1) Preparation of the Transcripts. The trial court clerk and reporter began preparing the transcripts in your case after the notice of appeal was filed. It is hard to guess how long it will take them. Sometimes the transcripts are done in less than a month, and sometimes they take six months or more, especially if the trial was long.

(2) The Appellant's Opening Brief. After the transcripts are filed, your attorney will study them and decide what issues should be presented to the Court of Appeal. These issues will be set out in the appellant's opening brief.

The brief will normally have several parts. First, it will describe the trial court procedures in a section called "Statement of the Case." Then it will describe the prosecution's evidence in a section called "Statement of Facts." (The brief may, of course, describe the *defense* evidence, too. But by strict rule, the *prosecution's* evidence must be presented as the "facts.")

The next part of the brief will be the "argument." In this part your lawyer will show how the trial court proceedings did not follow the law and will argue why you should be given a new trial, another sentence, or some other relief.

The opening brief is due 40 days after the transcripts are filed. In most cases, however, one or more 30-day extensions of time are needed.

(3) The Respondent's Brief. About two to three months after the appellant's opening brief is filed, the Attorney General will file the prosecution's answer, called the "respondent's brief." In it, the Attorney General will usually argue something along the lines of: no mistakes were made in the trial court; or any

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mistakes were unimportant and did not hurt you; or a particular issue cannot be raised on appeal; or something else in answer to your arguments. This is just the prosecution's argument and is *not* the Court of Appeal's decision.

(4) The Appellant's Reply Brief. In this brief, your lawyer will have a chance to answer the arguments made in the Attorney General's brief. It is due 20 days after the Attorney General's brief is filed. The appellant's reply brief is optional and will be filed only if your lawyer thinks it will help.

(5) Oral Argument. Usually within a month or two after all the briefs are filed, the Court of Appeal will give both sides a chance to ask for oral argument. In oral argument, the lawyers for both sides go to court and argue in person. It usually takes only a few minutes. You will not be there.

Oral argument is not held in every case. Your lawyer will ask for it only if he or she believes something needs to be said that was not already said in the briefs.

(6) The Opinion. The Court of Appeal will give its decision in a written "opinion." The opinion explains why the court decided each issue as it did.

The opinion will be filed sometime after oral argument is held or waived. It may be only a few days later, or as much as three months later.

Three judges of the Court of Appeal will decide your case. They will read the briefs, look at the transcripts, and hear oral argument (if it has been requested). Then they will vote. It takes at least two judges voting the same way to reach a decision. One of the judges writes the opinion. One or both of the other judges may write separate opinions if they disagree with something the first judge said.

(7) Petition for Rehearing. If the decision is against you in some way, your lawyer may decide to file a petition for rehearing asking the Court of Appeal to reconsider. The Attorney General may also file a petition for rehearing if the decision is against the prosecution. The petitions are due 15 days after the opinion is filed. Very few are granted.

(8) Petition for Review in the California Supreme Court. Another possible step to take, if you lose in the Court of Appeal, is to file a petition for review. In it, your lawyer would ask the California Supreme Court to reach its own decision on one or more of the issues raised in the Court of Appeal. Your lawyer will file the petition if he or she believes there is a reasonable chance of having it granted. The Attorney General may also petition for review if the prosecution has lost in the Court of Appeal.

The petition must be filed no earlier than 30 days, and no later than 40 days, after the Court of Appeal's opinion is filed. If the petition is denied, the

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decision of the Court of Appeal is left standing and becomes "final." Very few petitions are actually granted.

(9) Other Matters

Many other motions and papers can be filed in an appeal. Your lawyer will file them in your case if they are necessary. You will get copies of all the briefs, the opinion, any petitions filed, and all other important papers.

In a few cases known as "People's appeals," the *prosecution* will be appealing, asking the Court of Appeal to change some ruling of the trial court. In People's appeals, the prosecution will be the "appellant" and file the appellant's opening and reply briefs. The defendant will be the "respondent" and will file the respondent's brief.

As you might be able to tell, most appeals take about a year from the time the notice of appeal is filed until the time the decision of the Court of Appeal becomes final. Of course, your case may be shorter or longer, depending on how long the transcripts are, how many issues are raised, and many other things.

"HOW CAN I FIND OUT MORE ABOUT MY APPEAL?"

This letter is intended only to give you a general idea what to expect in your appeal. Your own case may be different from the "usual" case in some way or another. Your attorney will explain what is happening in your case and will try to answer any questions you may have.

While your attorney should regularly keep you informed of what is going on, please keep in mind there are restrictions on the attorney's time. The attorney needs to spend most of his or her time preparing briefs and otherwise representing you. The Court of Appeal has adopted guidelines for the time to be allowed for client communication. Your attorney will get most of the information pertaining to your case from the transcripts. Please be patient and let your attorney put the time spent on your case to the best use on your behalf.

— APPELLATE DEFENDERS, INC.

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1.9 Appendix B Sample Client Letters

(Most adapted from letters provided courtesy of panel attorney David Y. Stanley)

Initial Contact Letter
Letter Notifying Client of Probable No-Issue Brief (*Wende-Anders* only)
Letter Notifying Client of Probable No-issue Brief (*Sade C.* only)
Letter to Accompany Appellant's Opening Brief
Letter to Accompany Respondent's Brief and Appellant's Reply Brief
Letter re: Setting of Oral Argument
Post-Oral Argument Letter
Letter to Accompany Opinion -- (if counsel has decided not to take further action)
Letter to Accompany Opinion -- (if counsel intends to file a petition for review)
Letter to Accompany Petition for Review
Letter After Denial of Petition for Review

ALL LETTERS SHOULD BE PROMINENTLY MARKED "CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION" ON BOTH THE ENVELOPE AND THE LETTER. ADAPTATIONS TO THE INDIVIDUAL CASE WILL OF COURSE ALWAYS BE REQUIRED.

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1.9.1 Initial contact letter

I am the attorney who will be handling your case under appointment by the Court of Appeal. Because the transcripts on appeal have not yet been prepared, I know very little about your case at this time. I will give you my assessment of the case as soon as I have read the transcripts.

You may have received from Appellate Defenders, Inc., some general information about how cases are handled in the Court of Appeal. Please let me know at any time if you have any questions about the process.

An appeal is very different from a trial court proceeding. It is not a new trial but a review of the trial court proceedings to ensure they were conducted according to law. For that reason, the appeals court does not decide guilt or innocence or other factual questions from scratch. The court's authority in an appeal is limited to matters in the "record," which includes a clerk's transcript of documents from the [superior/juvenile] court's file and a reporter's transcript of testimony and other oral proceedings in the [superior/ juvenile] court. We are not permitted to introduce new evidence or witnesses. However, if you believe something important may not be in the transcripts, please let me know about that; sometimes information outside the record can be the basis for relief other than by appeal.

[Additional proceedings may be held in juvenile court over the duration of the appeal. However, I am only appointed to represent you on appeal and I will not be able to advise you about your juvenile court case. Please keep me informed of any decisions the court makes as they may influence how I approach the arguments in your appeal.]

Appeals take a considerable amount of time to complete, and the major events in the case often are separated by periods of months. The most important step will be the filing of an opening brief, in which I will set forth all the issues to be raised on your behalf, as well as the procedural history and the facts of the case. The [Attorney General/County Counsel] will then file a respondent's brief, and I will file a reply brief if that will help your case. [Mention other briefs if there are additional parties.] After the briefing is complete, the court will begin to work on the case. I will have an opportunity to go to court for an oral argument if I think it is important, although often I find the best approach is to let the case be decided on the briefs alone, without oral argument. Your case will be decided by a panel of three Court of Appeal justices, and the decision will be in the form of a written opinion.

I will keep you advised of all major events in the case and send you copies of the briefs and the court's decision. Some of my clients prefer not to receive

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such materials because of privacy or other concerns. If that is the case with you, let me know; I will not send them and will discuss the case with you only in general terms. If you would like for me to send the briefs and the court's opinion to someone else, please send me the name and address of that person.

When the appeal is completed, I will send you the transcripts unless you have told me to send them to someone else or destroy them. Only one set of transcripts is made for the defense, and of course I will need to keep them during the appeal to handle your case properly. Once the appeal is over, the transcripts will become your property permanently.

You and I have an attorney-client relationship that makes our communications privileged, or confidential, under California law.[46] However, what you say to other people may well be used in later proceedings, and so I urge you not to discuss your case with anyone other than me, including those closest to you. You may call me collect if there is something too urgent to deal with in writing.[47] Under the standard practice in these cases, I will not be visiting you for an in-person interview, unless your case presents very unusual circumstances.

I invite you to write to me whenever you have questions or comments about your case, and I will respond promptly. Also, please keep me advised if your address or other contact information changes, so that we can be in touch on short notice if necessary. I look forward to working on your behalf and hope to be able to help you.

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[46]Note to attorney: *for incarcerated clients, add:* To ensure confidentiality, be sure to write "legal mail" on the outside of the envelopes you send to me, along with using "lawyer" or "attorney" as part of my address.

[47]Note to attorney: *for incarcerated clients, add*: Unless special advance arrangements are made, however, calls from jails and prisons are monitored and we therefore cannot discuss confidential matters on the telephone.

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1.9.2 Letter notifying client of probable no issue brief (*Wende-Anders* only) [48]

I have completed my review of the record in your case and have examined the applicable law. Unfortunately, the record did not disclose any arguable issues. The following explains my analysis of your case.

Analysis

[Insert analysis: include relevant procedural background and facts, address issue(s) examined, including any desired by the client, and include legal authorities for the client's understanding.]

Consult with Other Attorney(s)

[Set forth communication with trial attorney for their input on issues.]

In addition, in cases where a court-appointed appellate attorney concludes the record does not present an arguable issue, court policy requires a second attorney to review and analyze the record to determine if there are any issues to raise on your behalf. Another experienced appellate attorney, a staff attorney from Appellate Defenders, Inc., reviewed your case and the case law and concluded there are no potentially arguable issues to raise on appeal.

My brief

I am happy to answer any questions you have regarding the above assessment and to consider any issues you bring to my attention. I have enclosed your transcripts to help you: *[Describe transcripts. If the client has requested that transcripts not be sent, then this will need to be tailored.]*

My brief is currently due for filing in the Court of Appeal on *[date]. [If applicable, add: I can request an extension of time to provide you time to review your record and to permit further communications between us.]*

Unless I change my assessment, I will file a Wende[49] brief. It sets forth the background of the case, facts, and lists the issues I examined for the Court of Appeal to consider. It requests the court to undertake its duty to independently review the record to determine whether there are any potential issues to raise on your behalf. This essentially provides you with a third review of the record and a third opinion.

Your brief, if you wish to file one

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[48] This sample letter is only intended for *Wende-Anders* briefs. It is not intended for no-issue briefs filed pursuant to *People v. Delgadillo* (2022) 14 Cal.5th 216.

[49] *People v. Wende* (1979) 25 Cal.3d 436.

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When counsel files a *Wende* brief, the court permits you, by court order, to file in a specified period your own supplemental brief in which you can raise the claims of error you want the court to consider. If you need additional time, you may ask the court, but any additional time is up to the court.

Your claims must be based on the record. The claims cannot be based on anything that is not contained in the record and are limited to the basis of the appeal, as set forth in your notice of appeal. *[Describe any limitations.]* It is important for you to state clearly to the Court of Appeal your reason or reasons for seeking *[set forth the remedy requested]*.

Your supplemental brief need not be formally prepared, as the court understands you have limited resources. You can write a letter to the court and describe it at the beginning as your "Supplemental *Wende* Brief" and include your Court of Appeal No.*[number]*. You also can make a request to the court to have me relieved as your attorney if that is what you want.

The supplemental brief is filed in the Court of Appeal at the below address. It is important to deliver the mail to the prison official no later than the due date and ensure that the official signs and dates the back of the envelope confirming receipt. Although the law recognizes timely filing upon receipt by the prison official, it is recommended that the brief be mailed sufficiently in advance of the due date to avoid any problems.

California Court of Appeal
Fourth Appellate District, Division [*number*]
[address]

A copy of the supplemental brief should be mailed to me at the address above and to the Attorney General. The Attorney General's address is:

Attorney General
600 W. Broadway St., Ste. 1800
P.O. Box 85266
San Diego, CA 92101

After a supplemental *Wende* brief is filed in the Court of Appeal or the time period has passed, the Court of Appeal will review the record. If it finds a potential issue, it will let me know and direct me to brief it. If the court does not find any arguable issue, then it will affirm your conviction and sentence.

Please let me know if you have any questions or wish for me to consider other issues for the appeal. Please respond by *[date]*. If I do not hear from you by that date, I will proceed with filing the *Wende* brief.

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1.9.3 Letter notifying client of no issue brief (*Sade c.* Only)

As you know, I have been appointed as your appellate attorney for this appeal. I reviewed the record in your case and unfortunately, I am unable to identify any legally arguable issue to raise in the appeal. Court policy requires a second attorney to review the record, and I have asked a staff attorney at Appellate Defenders, Inc., (ADI) to conduct the review.

[Insert analysis of the issues considered and why they cannot be raised in this appeal either here or in another letter/email to the client.]

Because the ADI attorney and I did not find any arguable issue after this additional review, I will file a *Sade C.* letter brief. That title refers to the California Supreme Court case of *In re Sade C.* (1996) 13 Cal.4th 952, which determined how to deal with dependency appeals in which counsel cannot find any arguable issues. Another important Supreme Court case on the topic of no-issue briefs is *In re Phoenix H.* (2009) 47 Cal.4th 835.

In my letter brief, I will ask the Court to permit you to file your own supplemental brief if you choose. The Court of Appeal has the discretion to grant or deny this request. The point of your own brief would be to persuade the court there is an arguable issue or issues it should consider. If the court agrees there is such an issue, it will order me, as your attorney, to brief it. This means writing an argument, supported by statutory and case law, to demonstrate the trial court made an error in its decision.

If you are interested in filing a supplemental brief of your own, please let me know right away so that I can assist you. It may be in the form of a letter, and it is important to file it at the same time as I file my *Sade C.* letter brief, because the Court's general policy is to dismiss the appeal when it receives a *Sade C.* letter brief. The *Sade C.* letter brief is due *[date].* I must receive your supplemental brief by *[date - a few days before the AOB due date]* so that I may file it with my brief.

I have included the record on appeal and a copy of my *Sade C.* letter brief to help you with preparing your own. You must include the case number *[case number]* on all documents. I know this is not the outcome you were hoping for. I am available to discuss this matter if you have any questions.

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1.9.4 Letter to accompany appellant's opening brief

Enclosed is your copy of our opening brief, which is now being filed with the Court of Appeal. When you read it, please keep in mind that the rules on appeal require that we present the statement of facts as the jury found the facts to be; we are not allowed to present the facts from your point of view.

[Explain issues raised.]

The next step will be a respondent's brief filed by the [Attorney General for the prosecution/ county counsel for the social services agency]. Their brief will be due in 30 days, but they may receive one or two 30-day[50] extensions. I will keep you posted on the due date. After I have read the respondent's brief, I will decide whether to file a reply brief on your behalf. I will send you a copy of the respondent's brief and our reply brief if I file one.

That will conclude the briefing stage of the case. The court will then study the briefs and process the case in the normal manner, which generally takes several months before the case is either set for oral argument or submitted for decision on the briefs.

In the meantime, please let me know if you have any questions.

[50]Note to attorney: In fast-track or other urgent cases, this number may be modified as applicable.

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1.9.5 Letter to accompany respondent's brief/appellant's reply brief

Enclosed you will find a copy of our reply brief, which is being filed today with the Court of Appeal, as well as a copy of the respondent's brief filed by the [Attorney General for the prosecution/ county counsel for the social services agency].

[Describe any particularly important points in these briefs.]

This is the end of the briefing phase of your case. The court will now study the briefs and process the case in the normal manner, which can take several months before the case is either set for oral argument or submitted for decision on the briefs. I will keep you posted as the case progresses and will let you know about any oral argument that might take place. Unlike proceedings in the trial court, if oral argument is scheduled, you do not need to attend.

The next major filing will be the court's decision, which will be in the form of a written opinion. I will send you a copy of it, as well as a letter explaining the potential next steps.

Please let me know if you have any questions.

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1.9.6 Letter re setting of oral argument

I have just been notified by the court that oral argument in your case is scheduled for the *[date]* calendar.

Oral argument is a court hearing in which the lawyers for the opposing sides present their positions to a panel of three judges. During argument the judges often ask questions of the lawyers to clarify the issues in the case.

[*For incarcerated clients:* You will not be brought to court for oral argument.] If [you or] your friends or family members might want to attend, please let me know so that I can provide a preview, because an appellate oral argument can seem very strange to persons who have never seen one or had the procedure explained to them. I can provide directions, as well. Alternatively, the oral argument may be available to view live on the Court of Appeal's website.

The judges do not announce their decision at the argument. The decision may not come until several weeks, up to three months, after the argument. The decision will be in the form of a written opinion, and of course I will send you a copy as soon as I receive it from the court.

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1.9.7 Post-oral argument letter[51]

The oral argument in your case occurred on schedule yesterday. *[Describe if significant developments occurred at argument.]*

When the court announces its decision, it will be in the form of a written opinion. Whether we will take any further action will depend on the decision and my judgment as to the likely benefits to you of such action. I will give you my assessment of the situation in a letter accompanying your copy of the opinion.

In the meantime, all we can do is wait a little longer. It likely will be at least several days, and possibly several weeks, before we get the opinion. Best wishes.

[51]Optional. This letter should be sent if any significant developments occurred, or if the client has shown special interest in oral argument, or if counsel has promised a report.

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1.9.8 Letter to accompany adverse opinion if counsel has decided not to take further action

I am sorry to have to tell you that the Court of Appeal has rejected our arguments and affirmed [your conviction/the juvenile court's findings] by an opinion filed *[date]*. A copy is enclosed.

[Summarize court's rulings on issues.]

After thoroughly studying the court's opinion and reviewing your case once again, I have decided not to pursue your case further, by way of a petition for rehearing in the Court of Appeal[52] and/or a petition for review in the California Supreme Court. While I regret the result, I believe the Court of Appeal has decided the case in such a manner that any further appellate efforts would not be useful. This decision was made after a careful evaluation of all possibilities.

Even though in my professional opinion your case does not present issues that the Court of Appeal will reconsider or the California Supreme Court will review, you have the option of pursuing your case further on your own by filing a petition for review in the California Supreme Court. Instructions on what to file are enclosed.[53] The petition is due *[date]*.

[If a federal issue was raised in the Court of Appeal and the client might want to take it to federal court, add this:] We raised federal issue(s) in your appeal. *[Describe issue(s)]*. After the state appeal is over, you may want the

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[52]Note to attorney: Usually a pro per petition for rehearing is not a realistic option because of the short time frame and the typical delays in prison mail. If such a petition is needed under rule 8.500(c)(2) – because the Court of Appeal opinion misstated or omitted an issue or matter of law or fact, and the client likely wants to petition for review on the issue – *counsel* should file the petition for rehearing, even if counsel does not intend to petition for review. If the client is to file a pro per petition for rehearing, this letter should be modified accordingly and include a due date. The Court of Appeal may require counsel to withdraw before it allows a pro per petition for rehearing.

[53]Note to attorney: A petition for review information sheet is on the ADI website. It is also useful to enclose a short sample petition. Counsel may modify the information sheet to apply instead to an exhaustion petition for review under rule 8.508, if that is the only reason for the petition. Note that *counsel* should file an exhaustion petition if there is a substantial, well-preserved federal issue; this is an independent justification, aside from the likelihood of success on review. See § 7.5 Petitions for Review in the California Supreme Court.)

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United States Supreme Court [or a federal district court] to review these issue(s). BUT: You must first file a petition for review including the issue(s) in the California Supreme Court. If you do not ask the California Supreme Court to review the issue(s) first, the federal courts will refuse to hear your case. Once your petition for review to the California Supreme Court is denied, then you can go to federal court. You can petition for certiorari to the United States Supreme Court,[54] or file a habeas corpus petition in federal district court,[55] or both. Please let me know if you decide to take either action. I will give you sample forms and let you know about such important matters as calculating deadlines, putting all known issues into one single petition.

I am sending the transcripts to you separately. They are now yours to keep. Please remember that they are your only copy. If they are lost, you will not be able to get replacements, except at your own cost, from the state. *[Modify this language if alternative arrangements have been made.]*

I am pleased to have had the opportunity to represent you and am sorry my efforts to help you were unsuccessful. I offer you my very best wishes.

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[54]Note to attorney: Certiorari is discussed in § 7.7 Certiorari in the United States Supreme Court et seq., The United States Supreme Court web page on Rules and Guidance, under Guides for Counsel, has a Guide to Filing In Forma Pauperis Cases (PDF) at https://www.supremecourt.gov/casehand/guideforIFPcases2019.pdf.

[55]Note to attorney: Some federal habeas corpus forms are on the ADI website. Some habeas corpus references may be found in § Federal Habeas Corpus as Additional or Alternative Remedy.

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1.9.9 Letter to accompany adverse opinion (if counsel intends to file petition for review)

I am sorry to have to tell you that the Court of Appeal has rejected our arguments and affirmed your conviction by an opinion dated *[date]*. A copy is enclosed.

[Summarize court's rulings on issues. If petition for rehearing was filed, state grounds and result.]

I believe it is worthwhile to file a petition for review in the California Supreme Court, asking the court to take over your case and consider *[name issue(s)]*. I will be filing a petition no later than *[date]*. I will send you a copy of the petition and let you know the Supreme Court's decision, which likely will be several weeks from the time the petition is filed.

Again, I am sorry that the Court of Appeal disagreed with our arguments. We must hope for the best in the Supreme Court. Best wishes.

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1.9.10 Letter to accompany petition for review

Enclosed is your copy of our petition for review, which is being filed with the California Supreme Court.

[Describe issue(s) raised. If an exhaustion petition under California Rules of Court, rule 8.508 is being filed, describe its purpose.]

Because its resources are so limited, usually the Supreme Court will grant review only if an issue in the case significantly affects the public or applies to many other cases, or if the Courts of Appeal have divided on the issue. I think your case meets that standard, but it is important to understand that in the large majority of cases review is denied. *[This paragraph is unnecessary if an exhaustion petition under California Rules of Court, rule 8.508 is being filed.]*

I will let you know when the Supreme Court makes a decision. That will likely take one or two months or so. Best wishes.

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1.9.11 Letter after denial of petition for review

I am sorry to have to tell you that the California Supreme Court has denied our petition for review in your case. Enclosed is a copy of that order, which was filed *[date]*. This is very disappointing. I thought the issue(s) in your case were strong and might interest the Supreme Court. But as I explained earlier, in the large majority of cases, even those with important issues, review is denied because the court does not have enough resources to take all deserving cases. Unfortunately, the Supreme Court is the highest court in California, and that means your California appeal is done. *[Modify this paragraph if an exhaustion petition for review under California Rules of Court, rule 8.508 was filed.]*

[If a federal issue was raised in the Court of Appeal and the client might want to take it to federal court, add this:] We raised federal issue(s) in the Court of Appeal and the California Supreme Court. *[Describe issue(s)]*. Now that your state appeal is over, it is possible to ask the federal courts to review these issues. This can be done by petitioning for certiorari in the United States Supreme Court,[56] or by filing a habeas corpus petition in federal district court,[57] or both. Please let me know if you decide to take either action. I will give you sample forms and let you know about such important matters as calculating deadlines, including all known issues in one petition, and giving the California state courts a chance to decide the issues first.

I am pleased to have had the opportunity to represent you and am sorry my efforts to help you were unsuccessful. I offer you my very best wishes.

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[56]Note to attorney: Certiorari is discussed in § 7.7 et seq. The United States Supreme Court has a guide for pro per petitioners: https://www.supremecourt.gov/casehand/guideforIFPcases2019.pdf.

[57]Note to attorney: Some federal habeas corpus forms are on the ADI website. Some habeas corpus references may be found at § Federal Habeas Corpus as Additional or Alternative Remedy.

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2 CHAPTER TWO

FIRST THINGS FIRST: WHAT CAN BE APPEALED AND WHAT IT TAKES TO GET AN APPEAL STARTED

PART ONE: GENERAL

2.1 Introduction

This chapter examines the scope of appellate review in criminal and juvenile cases - what judgments and orders are appealable, who can appeal, and what issues can be raised in various kinds of appeals. It will also review the nuts and bolts of getting an appeal started – what has to be filed, where, and when, and what can be done if the process goes astray.

This section, PART ONE: GENERAL, addresses issues common to all cases – the source of the right to appeal, limitations on appealing, and the advisability of appealing.

PART TWO of this chapter addresses scope of appeals in criminal and delinquency cases by both defendants and the People and the peculiarities of notice of appeal requirements.

PART THREE addresses appeals in dependency cases.

2.1.1 Basic authority governing the right to appeal and appellate jurisdiction

The right to appeal is governed primarily by state law. In California, various statutes provide authority for appeals. Certain limits on appeals are imposed by both statute and common law. The California Rules of Court govern the timing and process of appealing.

Constitutions

There is no constitutional right of appeal. The federal Constitution does not require a state to provide appellate courts or a right to appellate review at all. (*Griffin v. Illinois* (1956) 351 U.S. 12, 18.) The same is true of the California Constitution; the state right of appeal is statutory. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 668; see *Powers v. City of Richmond* (1995) 10 Cal.4th

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85, 105-108 (plur. opn. of Kennard, J.); *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 587.)

Article VI of section 11 of the California Constitution defines appellate jurisdiction:

> (a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. . . .
>
> (b) Except as provided in subdivision (a), the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute.

As a practical matter, that means cases that are charged solely as misdemeanors are appealed to the appellate division of the superior court, whereas those that are charged as felonies are appealed to the Court of Appeal, even if the conviction is only for a misdemeanor. (Cal. Rules of Court, rule 8.304(a)(2) [definition of "felony" for purposes of appellate jurisdiction].) When at a preliminary examination, all felony charges in the felony complaint are either not bound over or are reduced, leaving only misdemeanors, the resulting case is a misdemeanor case, and appellate jurisdiction will be in the appellate division of the superior court. (*People v. Nickerson* (2005) 128 Cal.App.4th 33.)

Statutes

Criminal cases

Penal Code section 1237, subdivision (a) governs a criminal defendant's right to appeal after a trial or other contested proceeding. (See § 2.2 Appeal by a criminal defendant after trial, *post*.)

Appeals by a defendant from an order after judgment affecting the defendant's substantial rights are governed by Penal Code section 1237, subdivision (b). (See § 2.4 Appeal by the defendant from order after judgment, *post*.)

Penal Code section 1237.1 addresses appeals based solely on presentence custody credits issues, requiring the issues to be presented first to the trial court. (See § Credits and fees or fines issues – Penal Code sections 1237.1 and 1237.2,

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post.) Section 1237.2 similarly requires recourse to the trial court first for appeals involving only fines, fees, and related issues. Penal Code section 1237.5 deals with guilty plea appeals and requires a certificate of probable cause to challenge the validity of the plea. (See § 2.3 Appeal by a criminal defendant after guilty plea , et seq., *post*.) Sentencing issues are not included in this requirement, unless the sentence is inherent in the plea agreement. (*People v. Ward* (1967) 66 Cal.2d 571, 574-576; cf. *People v. Panizzon* (1996) 13 Cal.4th 68, 74-75; see § Attacks on sentence, et seq., *post*.) Also excepted from the certificate of probable cause requirement are Fourth Amendment search or seizure issues in a guilty plea, which are expressly permitted by Penal Code section 1538.5, subdivision (m). (See § 2.3.4 Exception to waiver: Fourth Amendment suppression issues, Exception to Waiver: Fourth Amendment Suppression Issues, et seq., *post*.)

Grounds for appeal by the People are enumerated in Penal Code section 1238 for criminal cases. (See § 2.6 People's appeals and issues raised by the People , et seq., *post*.)

In cases charged as a felony, appeals go the Court of Appeal. Those charged as a misdemeanor go to the appellate division of the superior court. (Pen. Code, § 1235.) A "felony case" is one in which at least one felony is charged (Pen. Code, § 691; Cal. Rules of Court, rule 8.304(a)(2)), regardless of outcome. (*People v. Lynall* (2015) 233 Cal.App.4th 1102; *People v. Morales* (2014) 224 Cal.App.4th 1587; *People v. Nickerson* (2005) 128 Cal.App.4th 33).[58] An appeal filed in the wrong court may be transferred under certain circumstances. (See § 2.5.4 Transfers, *post*.)

Juvenile delinquency cases

Welfare and Institutions Code section 800, subdivision (a) provides the basic authority for appeal by a minor from a delinquency dispositional order initiated under Welfare and Institutions Code section 601 or 602 and any subsequent order. (See § 2.5 Appeal by minor after delinquency finding, et seq., *post*.)

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[58]When at a preliminary examination, all felony charges in the felony complaint are either not bound over or are reduced, leaving only misdemeanors, the resulting case is a misdemeanor case, and appellate jurisdiction will be in the appellate division of the superior court. (*People v. Nickerson*, *supra*, 128 Cal.App.4th 33.)

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A parent's right to appeal from orders directly affecting the parent's interests, such as a restitution order making the parent liable, is recognized by case law as based on Code of Civil Procedure section 904.1, subdivision (a)(1). (See § 2.5 Appeal by minor after delinquency finding, Appeal by Minor After Delinquency Finding, and footnote on anomalous case of *In re Almalik S.* (1998) 68 Cal.App.4th 851.*)* Appeals by the People in delinquency cases are governed by Welfare and Institutions Code section 800, subdivision (b). (See § 2.6 People's appeals and issues raised by the People , et seq., *post*.)

Juvenile dependency cases

In juvenile dependency cases, Welfare and Institutions Code section 395 grants the right to appeal a disposition in proceedings under section 300 et seq. and subsequent orders. Exceptions include an order setting a permanent plan hearing under section 366.26 or a post-termination of parental rights order changing a child's placement under section 366.28, both of which require a writ petition instead of an appeal. (See Cal. Rules of Court, rule 8.450 et seq.) Family Code section 7800 appeals are governed by sections 7894 and 7895. Dependency appeals are discussed in 2.8 PART THREE, et seq., *post*.

Other appointed cases

Miscellaneous provisions of the Penal Code, Welfare and Institutions Code, Code of Civil Procedure, and others are applicable to other appointed appeals. These include civil commitments such as LPS conservatorship, sexually violent predator, mentally disordered offender, not guilty by reason of insanity, extended detention of youthful offender, paternity, special proceedings (e.g., Pen. Code, § 1368), some writs, certain civil proceedings, sterilization, emancipation, etc. In some areas the right to appeal is inferred by case law, rather than stated explicitly by statute or rule.

Rules

The primary provisions governing criminal appeals in the Court of Appeal are found in rule 8.300 et seq. Rules 8.304, 8.308, 8.312, and 8.316 concern taking and abandoning an appeal. Rules 8.320, 8.324, 8.328, 8.332, 8.336, 8.340, 8.344, and 8.346 deal with the record on appeal. Rule 8.360 addresses briefing; it incorporates specified provisions of rules 8.60, 8.200, 8.204, and 8.216. By cross-reference in rule 8.366, rules 8.252 through 8.276 govern hearing and decision in the Court of Appeal.

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Juvenile appeals are under rules 8.405 and 8.406 (filing the appeal), 8.407-8.409 and 8.416(b)-(c) (record), 8.410 and 8.416(d) (augmenting / correcting the record), 8.411 (abandoning), 8.412 and 8.416(e)-(g) (briefing), 8.470 and 8.416(h) (hearing and decision in the Court of Appeal), and 8.472 (hearing and decision in the Supreme Court). (See also rule 5.585 et seq.) Parts of these rules incorporate by reference certain other rules on the processes in reviewing courts.

Proceedings in the California Supreme Court in non-capital cases are governed by rule 8.500 et seq. Petitions for review are under rules 8.500 through 8.512. Proceedings after a grant of review are subject to rules 8.516 to 8.544. Rule 8.552 governs transfers before decision to the Supreme Court from the Court of Appeal.

2.1.2 Priority on appeal

The appellate courts are statutorily required to give preference to certain appeals in processing and deciding their caseload "preference" or "priority." And rule 8.240 allows courts to give individual cases "calendar preference" (expedited appeal) on a showing of good cause.[59] These terms refer to the order in which the cases are considered and decided by the court, as well as the probable availability of extensions of time, the speed of setting oral argument, etc.

Most of the cases that the projects and the appointed counsel system deal with have statutory priority:

- *Criminal:* As a case "in which the people of the state are parties," a criminal appeal has priority over other categories of cases. (Code Civ. Proc., § 44.)

- *Delinquency:* Welfare and Institutions Code section 800, subdivision (a), provides a juvenile delinquency appeal has "precedence over all other cases in the court to which the appeal is taken."

- *Dependency:* Welfare and Institutions Code section 395, subdivision (a)(1) gives juvenile dependency appeals precedence over all other

[59]The rules permit the making of individualized decisions as to priority, but they do not and may not reorder the statutory priorities in any fundamental way. (See Cal. Const., art.VI, § 6(d) [rules must be consistent with statute].)

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appeals; Code of Civil Procedure section 45 does the same for appeals from orders freeing a minor from parental custody or control.

The fact criminal and juvenile cases have "priority" does not mean courts may hear *only* those cases. Statutory priorities are general principles for ordering a court's business, not rigid, absolute ruleset for assigning an exact numerical "score" to each case. There is room for individualized judicial judgment (e.g., Cal. Rules of Court, rule 8.240). In *People v. Engram* (2010) 50 Cal.4th 1131, the Supreme Court rejected the contention that priority for criminal cases requires converting every civil and specialized courtroom into one dedicated to hearing criminal causes. The judiciary has the inherent power to "control the disposition of the causes on its docket." This is a constitutionally based authority; under principles of separation of powers, statute may not so completely infringe on this authority as to supplant altogether a court's discretion effectively to handle its fundamental responsibilities. (*Id.* at pp. 1148-1149.)

Limitations on right to appealAn issue may not be reviewable on appeal because the appellate court has no power to review the decision or, if it has the power, almost always declines to exercise it.

Jurisdiction

The appellate court may lack jurisdiction. For example, a valid notice of appeal may never have been filed; appeal prerequisites such as a certificate of probable cause (Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.304(b)(1)) may not have been met; or the judgment or order appealed from may not be appealable as a matter of law.

Mootness and ripeness

Usually, the court will decline to exercise its discretionary reviewing power if a case is moot or is not yet ripe for decision. A case is moot if its resolution is not binding on or otherwise affects the parties to the litigation. It is not ripe unless "'the controversy . . . [is] definite and concrete, touching the legal relations of parties having adverse legal interests . . . [and] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171.) If a controversy is moot or unripe, a decision would effectively be an advisory opinion, which ordinarily is outside both the proper functions and jurisdiction of

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an appellate court. (*Id.* at p. 170; see also *People v. Slayton* (2001) 26 Cal.4th 1076, 1084; *Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.)[60]

A California court may exercise discretion to decide a moot case if it involves issues of serious public concern that would otherwise elude resolution.[61] (*California State Personnel v. California State Employees Association* (2006) 36 Cal.4th 758, 763, fn. 1; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1186; *In re W.M.* (1970) 3 Cal.3d 16, 23-25 [detention of juvenile before jurisdictional hearing]; *In re Newbern* (1961) 55 Cal.2d 500, 505 [contact with bondsman]; *In re Fluery* (1967) 67 Cal.2d 600, 601 [credits for time in jail].) Similarly, the ripeness doctrine does not prevent courts from "resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

Review by writ

Certain pretrial issues, those affecting whether the trial should proceed at all, and some decisions needing expedited decision may require a writ petition.

A notable example in dependency proceedings is a court decision to end reunification efforts and set a hearing to determine a permanency plan for the child. At this point the dominant consideration is permanent stability for the

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[60]A case is not necessarily moot because the course of current litigation will not be affected. If the defendant may suffer collateral consequences, including stigma, or future legal disabilities, etc., the case is not moot. (*People v. Feagley* (1975) 14 Cal.3d 338, 345, superseded by statute on a different ground as stated by *Hudec v. Superior Court* (2015) 60 Cal.4th 815; *People v. Nolan* (2002) 95 Cal.App.4th 1210, 1213 [even if defendant not subject to further punishment, appeal is opportunity to erase stigma of criminality].) In contrast, federal courts may adjudicate only actual, ongoing cases or controversies. This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. (*Lewis v. Continental Bank Corp.* (1990) 494 U.S. 472, 477-478.)

[61]In the federal system, in contrast, because of the "case or controversy" requirement of article III, section 2 of the United States Constitution, mootness as to the individual litigants defeats jurisdiction. (*Massachusetts v. E.P.A.* (2007) 549 U.S. 497.)

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child. An appeal from the decision to set a hearing would prolong the uncertainty for many months, and so Welfare and Institutions Code section 366.26 requires any challenge to the decision to be made initially by writ. This procedure is governed by rules 8.450-8.452. A similar requirement applies to proceedings challenging a post-termination order affecting the child's placement. (Welf. & Inst. Code, § 366.28; rules 8.454-8.456.)

In criminal proceedings, the sufficiency of the evidence at the preliminary hearing to support the information is reviewable only by pretrial writ. (Pen. Code, §§ 995, 999a.) Examples of other criminal statutory writs include Penal Code sections 279.6, 871.6, 1238, subdivision (d), 1511, 1512, and 4011.8. (See § 8.5.4 Statutory writs et seq.)

Some issues are reviewable by either pretrial writ or appeal from a final judgment, but under different standards. While error may be sufficient to justify issuance of certain pretrial writs, appeals require a showing that the error prejudiced the outcome of the trial. Defects at the preliminary hearing, for example, cannot be reviewed after judgment unless the defendant demonstrates how they affected the trial. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) Denial of a speedy trial is similarly reviewable after judgment only on a showing of prejudice to the outcome of the case.[62] (*People v. Martinez* (2000) 22 Cal.4th 750, 766-769 [state constitutional right to speedy trial and statutory right to speedy trial under Pen. Code, § 1382].)

Standing

Lack of standing may also preclude the court from considering an argument. For example, in a search or seizure situation, or an issue involving self-incrimination, the appellant lacks standing to raise an issue regarding the violation of someone else's rights. (*In re Lance W.* (1985) 37 Cal.3d 873, 881-882; see also *In re P.R.* (2015) 236 Cal.App.4th 936.) Another example, in a dependency case: "A parent's appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child's placement only if the placement order's reversal advances the parent's argument against terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 238.)

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[62]In contrast to the standard on appeal, a Penal Code section 1382 violation entitles the defendant to *pretrial* dismissal regardless of prejudice. (*People v. Anderson* (2001) 25 Cal.4th 543, 604-605; *People v. Martinez* (2000) 22 Cal.4th 750, 769.)

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Forfeiture or waiver

Probably the most common reason for the Court of Appeal to decline to decide a particular issue is failure to raise it in the lower court. Usually, if the lower court has not had a chance to consider the issue or the opposing party has not had a fair chance to introduce evidence on the subject, the issue will not be considered on appeal. The objection must state the ground on which it is based, to give the trial court an opportunity to correct any error. (*In re E.A.* (2012) 209 Cal.App.4th 787.)

Counsel may consider ways around forfeiture or waiver[63] obstacles, such as arguing: the issue was obvious to all parties and the trial court, even without a formal objection; the issue was raised indirectly or substantially, even if not exactly as formulated on appeal; raising it would have been futile in light of other rulings by the trial court; the issue implicates fundamental due process; trial counsel rendered ineffective assistance in failing to raise it; or the law has since changed. (See more detailed description and authorities in § Addressing questions of potential waiver or forfeiture.)

Motions requiring renewal at later stage

Certain motions have to be renewed at a specified point to be preserved for appeal. Pretrial motions in limine, for example, may have to be renewed at trial. (*People v. Morris* (1991) 53 Cal.3d 152, 189-190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Search and seizure motions made at the preliminary hearing must be renewed in the trial court under Penal Code section 1538.5, subdivision (m). (See further discussion of this requirement in § 2.3.5 Need to make or renew motion after information filed et seq.)

Invited error

Invited error is another reason for a court to reject an argument other than on the merits. In such a situation counsel by their explicit words or actions has solicited some type of action that is legally incorrect. To constitute invited error,

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[63]Technically, "waiver" refers to an explicit and intentional relinquishment of a right, while "forfeiture" refers to loss of entitlement to raise an issue on appeal because of failure to follow procedures required to preserve it. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) The distinction was largely ignored in older opinions, which used "waiver" for both meanings.

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the action must have resulted from an intentional tactical decision. (*People v. Marshall* (1990) 50 Cal.3d 907, 931; see, e.g., *In re G.P.* (2014) 227 Cal.App.4th 1180, 1193.)

Credits and fines or fees issues – Penal Code sections 1237.1 and 1237.2

Other limitations are imposed by Penal Code section 1237.1, which applies to issues based on the calculation of credits, and section 1237.2, which applies to fines, fees, and other monetary assessments. Both require an application to the trial court for correction of the alleged errors before the issue may be raised as the sole issue on appeal. The requirements do not apply to juvenile cases. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.) The application may be made informally.

Fugitive dismissal doctrine

Another limitation, derived from common law, applies when the defendant absconds while an appeal is pending. An appeal by a fugitive is subject to discretionary dismissal. One theory underlying this doctrine is that the court no longer has control over the person to make its judgment effective. (*People v. Fuhr* (1926) 198 Cal. 593, 594; *People v. Redinger* (1880) 55 Cal. 290, 298; *People v. Buffalo* (1975) 49 Cal.App.3d 838, 839 [giving defendant 30 days to surrender]; cf. *People v. Mutch* (1971) 4 Cal.3d 389, 399 [defendant fled during appeal, but was recaptured the same day; dismissal rule held inapplicable]; *People v. Puluc-Sique* (2010) 182 Cal.App.4th 894 [deported defendant not fugitive].)

The fugitive dismissal doctrine applies to juvenile proceedings. (*In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1229 [dependency]; cf. *In re Claudia S.* (2005) 131 Cal.App.4th 236 [distinguishing *Kamelia S.*; mother left before dependency petition was even filed].)

The court has discretion to reinstate the appeal. (See *People v. Clark* (1927) 201 Cal. 474, 477-478 [refusing to reinstate appeal a year after it was dismissed; power to reinstate "should only be exercised in those cases where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong upon the appellant"];[64] *People v. Kang* (2003) 107 Cal.App.4th 43, 47 [defendant escaped before sentencing; appeal filed in absentia was dismissed, then reinstated after his recapture two years later].)

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[64]Before dismissing, the court in *Clark* decided the case on its merits because it had been fully briefed before the escape.

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Federal due process and equal protection do not require a state to give the defendant a particular time to surrender, to reinstate the appeal after he is recaptured, or to treat defendants who escape before appealing the same as those who escape after appealing. (*Estelle v. Dorrough* (1975) 420 U.S. 534, 537-539; *Allen v. Georgia* (1897) 166 U.S. 138, 142; see also *Molinaro v. New Jersey* (1970) 396 U.S. 365, 366, and *Bohanan v. Nebraska* (1887) 125 U.S. 692 [dismissals by Supreme Court during certiorari proceedings after state judgments]; cf. *Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 249 [striking down Eleventh Circuit rule mandating automatic dismissal of appeals filed *after* defendant recaptured; there must be some reasonable nexus between defendant's conduct and appellate process].)

Previous resolution of matter

The appellate court will not usually consider an issue on its merits if it has already been resolved in a binding form, as under the doctrines of res judicata, collateral estoppel, and law of the case. Under law of the case, for example, the appellate court's decision on a question of law governs in all subsequent proceedings in that case – even if on a second appeal the Court of Appeal believes it should have decided differently the first time; some exceptions apply, as when there is a contrary supervening decision by the California Supreme Court. These doctrines are treated in more detail in § Prior proceedings involving the same offenses as bar to current litigation.

2.1.3 Standard of review: Degree of deference to findings below

Standards of review involve the various degrees of deference the appellate court will give the findings and rulings in the lower court. In assessing the viability of potential appellate issues, counsel must weigh whether and to what extent the appellate court will reconsider decisions made in the proceedings below.

Abuse of discretion

A high degree of deference to the decision below is given under the "abuse of discretion" standard. The reviewing court asks whether the trial court's decision was one a reasonable court could have made or whether it exceeded the

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bounds of reason.[65] It does not ask what the appellate court would have decided, or what the trial court perhaps should have decided. It asks whether any reasonable decision-maker *could* have made the decision.

The abuse of discretion standard is often applied to issues involving judgment calls, such as sentencing, disposition, withdrawal of the plea, evidentiary rulings, motions for new trial, and *Marsden*[66] and *Faretta*[67] motions.[68]

Part of the reason for using a deferential standard like abuse of discretion is that the trial court is in a position far superior to that of a reviewing court in making judgment calls, because the trial court observes the proceedings firsthand and can assess more precisely such multiple intangible factors as witness credibility and interpersonal dynamics that must go into the decision-making process. Another reason is to avoid routinely second-guessing the trial court's decisions and possibly undermining its authority in presiding over courtroom proceedings. Still another is to conserve appellate court resources.

Although the appellate court's deference to the decision below is high under the abuse of discretion standard, it is not absolute. (*People v. Grimes* (2016) 1 Cal.5th 698, 712, fn. 4 [standard "is not designed to insulate legal errors from appellate review"]; *People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 742 [when "trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion"].) All exercises of discretion must be guided by legal principles and policies, not arbitrariness or caprice. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977; e.g., *People v. Jacobs* (2015) 156 Cal.App.4th 728, 736-737 [test is whether "reasonable basis for the action" is shown]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519.) A trial court abuses its

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[65]A heightened abuse of discretion standard is used in assessing the dismissal of a juror for inability to perform – the more stringent "demonstrable reality" test. (*People v. Armstrong* (2016) 1 Cal.5th 432, 450; *People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

[66]*People v. Marsden* (1970) 2 Cal.3d 118 (motion to remove appointed trial counsel because of defective performance).

[67]*Faretta v. California* (1975) 422 U.S. 806 (right to self-representation at trial).

[68]A decision by a trial court based on an error of law is an abuse of discretion. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737,746.)

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discretion if *no* reasonable decision-maker could have made that decision under the circumstances.

Substantial evidence

A similar standard, applicable to factual findings, is the "substantial evidence" test, which is used when assessing sufficiency of the evidence to support the verdict or rulings on motions. Like the abuse of discretion test, it asks whether a reasonable decision maker could have reached the conclusions it did. Specifically, the substantial evidence test asks whether a reasonable trier of fact could have made the factual determinations actually made in the case, given the applicable burden of proof. It requires evidence that is reasonable, credible, and of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

If the issue is sufficiency of the evidence to sustain a conviction in a criminal case, the question for the appellate court is whether a reasonable trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt in light of all the evidence.[69] (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Different burdens of proof, such as "clear and convincing evidence" and "preponderance of the evidence," apply in different contexts. (E.g., *In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423, and *In re Angelia P.* (1981) 28 Cal.3d 908, 924 [clear and convincing in termination of parental rights case]; *People v. Lucas* (2014) 60 Cal.4th 153, 262, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53 fn. 19, and *People v. Arriaga* (2014) 58 Cal.4th 950, 961 [preponderance standard on certain collateral matters in criminal proceeding]; see *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1082, conc. opn. of Brown, J. [evidence sufficient under preponderance standard, but not under clear and convincing one].)[70] The substantial evidence test varies accordingly.

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[69]The evidence must be viewed in a light most favorable to the verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

[70]In non-judicial contexts, standards may be more deferential. For example, courts use the "some evidence" standard in reviewing parole decisions by the Governor or Board of Parole Hearings. (*In re Shaputis* (2011) 53 Cal.4th 192, 210; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) In contrast to judicial decisions, there is no definitive "burden of proof" governing these highly discretionary executive and administrative decisions; rather the courts intervene only to prevent arbitrary or capricious action in violation of due process. (*Ibid.*)

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This standard, like the abuse of discretion one, is deferential to the decision maker below. Part of the reason is practical – the jurors or other trier of fact see the witnesses and evidence in person and can weigh it more precisely than an appellate court looking at a cold record. In addition, in cases tried by a jury, because juries bring into the courtroom community values and collective common sense, they are given an institutional role as primary trier of fact. To preserve their authority and ensure reasonable finality of the judgment, their decisions are subject only to deferential substantial evidence review in the appellate courts. Another reason is to conserve appellate court resources. (See *People v. Louis* (1986) 42 Cal.3d 969, 985-986, disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.)

De novo

In some circumstances the reviewing court will not defer at all to the lower court but will reach an independent decision; this standard is called "de novo" review. It applies primarily to questions of law. It is used, for example, with respect to issues involving statutory construction (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Rells* (2000) 22 Cal.4th 860, 870; *In re Dakota J.* (2015) 242 Cal.4th 619, 627-628); the legal correctness of instructions (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570); voluntariness of a statement if facts are undisputed (*People v. Maury* (2003) 30 Cal.4th 342, 404); and legal conclusions about facts (*People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [prosecution's due diligence in locating witness]).

The theory here is that an appellate court is institutionally in a superior position to decide a question of law. Its judges occupy higher office than trial judges and usually have more experience in the law; appellate decisions are collective; and the Court of Appeal's fundamental processes are intrinsically deliberative. (See *People v. Louis* (1986) 42 Cal.3d 969, 986, disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.) A decision maker resolving purely legal questions does not gain any advantage by personal presence in the courtroom; indeed, there is an advantage to distance.

Another policy reason not to give trial judges the primary role in determining legal matters is that, while fact-finding and running a courtroom are case-specific roles, the law is supposed to mean the same no matter where in the jurisdiction it is being applied. Assigning trial judges the final say on the law, with only deferential review, would almost certainly fragment legal interpretation and introduce inconsistency and unpredictability into the system.

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Mixed standards

Mixed standards of review apply when the issue involves questions of both fact and law. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1264, fn. 8; *People v. Louis* (1986) 42 Cal.3d 969, 984-988, disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9; *Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1539.) The appellate court must (1) determine what "historical facts" have been established, under a deferential substantial evidence standard, (2) determine the applicable legal principles, a de novo question, and (3) reach a legal conclusion about those facts, usually under a de novo standard of review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459 [suggestiveness of pretrial lineup]; *People v. Butler* (2003) 31 Cal.4th 1119, 1127 [probable cause for involuntary HIV testing]; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597 [reasonableness of detention].)

An example of such an approach is the legality of a detention or search. First considering what findings of fact the trial court made (for example, what information the officer had before taking action), the appellate court determines whether those findings were supported by substantial evidence – i.e., whether a reasonable trier of fact could have made the findings by a preponderance of the evidence. The appellate court then decides independently and de novo whether, given those facts, the officer's conduct was reasonable under Fourth Amendment standards. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

Sometimes a decision involving a nominally mixed issue may be characterized as "predominately" one of law or fact, and the standard of review will be applied accordingly. (E.g., *People v. Ault* (2004) 33 Cal.4th 1250, 1264-1272 [if trial court grants new trial, its finding of prejudice from juror misconduct is to be reviewed deferentially]; but see *People v. Nesler* (1997) 16 Cal.4th 561, 582-583 [finding of no prejudice from juror misconduct reviewed de novo]; *People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [prosecution's due diligence in locating witness is primarily question of law]; see *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 [de novo review is appropriate standard for mixed question of fact and law that implicates constitutional right, here, effective assistance of counsel].)

2.1.4 Standard of prejudice

An error is not reversible unless it is prejudicial. Although a few types of errors automatically call for reversal (see § Prejudicial per se, *post*), an issue

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otherwise will not be successful on appeal unless counsel can demonstrate to the court not only that there was error but also that it affected the outcome of the proceedings. (Cal. Const., art. VI, § 13; Pen. Code, §§ 1258, 1404; Evid. Code, §§ 353, 354.) In assessing this critical question, counsel must take account of the applicable standard of prejudice, asking, "What likelihood of prejudice must be shown to get a reversal or other relief?" Counsel must then weigh the facts of the case in light of this standard, asking, "Can a reasonable argument be made that the error was prejudicial?"

Prejudicial per se

The standard most favorable to the appellant is prejudicial or reversible per se. Prejudicial per se errors automatically require reversal. They involve "structural error" – violation of certain rights fundamental to the integrity of the proceedings. Such error is an intrinsic miscarriage of justice and requires reversal without a showing that the outcome would have been different in the absence of the violation. A harmless error analysis is unnecessary because prejudice is presumed by operation of law. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Rose v. Clark* (1986) 478 U.S. 570, 577-578.)

Examples of prejudicial per se errors include:

- Complete lack of counsel at a criminal trial[71] (*Gideon v. Wainwright* (1963) 372 U.S. 335) or representation by an attorney who has resigned from the State Bar with disciplinary charges pending (*In re Johnson* (1992) 1 Cal.4th 689, 694; *People v. Vigil* (2008) 169

[71]Failure to provide counsel on appeal to brief an arguable issue is also reversible per se. (*Penson v. Ohio* (1988) 488 U.S. 75.) Placing severe restrictions on attorney-client communication *may* be reversible per se as the equivalent of denying counsel altogether. (See *People v. Hernandez* (2012) 53 Cal.4th 1095, 1111 ["not all unwarranted interference with a client's ability to consult with counsel justifies a presumption of prejudice, requiring per se reversal. Where, as here, the interference prevents counsel from consulting with a client about a specific piece of evidence, a presumption of prejudice is not justified; the error is reversible only upon a showing of prejudice, as would be the case if prosecutorial misconduct suppressed the evidence altogether"].)

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Cal.App.4th 8).[72]Denial of retained counsel of choice (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140).

- Biased judge (*Tumey v. Ohio* (1927) 273 U.S. 510) or juror (*People v. Nesler* (1997) 16 Cal.4th 561, 579]).[73]

- Denial of the right to self-representation at a criminal trial (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, fn. 8; see *Faretta v. California* (1975) 422 U.S. 806; cf. *People v. Tena* (2007) 156 Cal.App.4th 598 [any error in denying *Faretta* request at preliminary hearing subject to harmless error rule when defendant later accepted counsel][74]).

- Material misinstruction on the reasonable doubt standard (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; see *People v. Cruz* (2016) 2 Cal.App.5th 1178).

- Discrimination in the selection of a jury (*Batson v. Kentucky* (1986) 476 U.S. 79, 100) or grand jury (*Vasquez v. Hillery* (1986) 474 U.S. 254).

- Defendant's lack of competence to stand trial (*People v. Stankewitz* (1982) 32 Cal.3d 80, 94; see *Pate v. Robinson* (1966) 383 U.S. 375,

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[72]Not all kinds of suspensions from practice result in absence of counsel within the meaning of article I, section 15 of the California Constitution. (*Vigil*, at p. 533.)

[73]In contrast, the right to an unbiased prosecutor under Penal Code section 1424 is not structural error but is judged under the test of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Vasquez* (2006) 39 Cal.4th 47, 66-71.)

[74]In *People v. Burgener* (2009) 46 Cal.4th 231, 243-245, the court noted but did not decide the standard of prejudice for a *Faretta* waiver not made knowingly and intelligently. It reviewed decisions in the lower California courts, which are split, and in the federal circuits, which generally use reversible per se; in this case, the error was reversible even under *Chapman v. California* (1967) 386 U.S. 18. (Cf. *People v. Williams* (2003) 110 Cal.App.4th 1577, 1588 [right to counsel and thus to self-representation in Mentally Disordered Offender proceeding is statutory, subject to harmless error test].)

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378; cf. *In re James F.* (2008) 42 Cal.4th 901 [in dependency case, incompetent parent made to appear through guardian ad litem; due process error in procedure for appointing guardian is not structural error, but one subject to harmless error analysis]; *People v. Shiga* (2016) 6 Cal.App.5th 22 [failure to exercise discretion re inquiry into competence and *Faretta* capability is structural]).

- Denial of a jury trial (*People v. Ernst* (1994) 8 Cal.4th 441, 448-449; see *Rose v. Clark* (1986) 478 U.S. 570, 578; cf. *Washington v. Recueno* (2006) 548 U.S. 212 [*Blakely*[75] error in denying jury trial as to sentencing factors subject to *Chapman*[76] review]; *People v. Mil* (2012) 53 Cal.4th 400 [omission of two or more elements of offense in instruction does not automatically make error reversible per se]).[77]

- Denial of a public trial (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9; *People v. Baldwin* (2006) 142 Cal.App.4th 1416).

- Denial of defendant's right to be present at trial, when his absence was not attributable to his own voluntary conduct (see *People v. Ramos* (2016) 5 Cal.App.5th 897 [court erred in excluding self-represented defendant from courtroom because of disruptive conduct, with no standby counsel to represent him during his absence]; *Riggins v. Nevada* (1992) 465 U.S. 127, 137 [administration of psychotropic medication against defendant's will during trial: "whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative"]; *Frantz v. Hazey* (9th Cir. 2008) 513 F.3d 1002 [self-represented defendant, presence at in-chambers substantive discussion]).

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[75] *Blakely v. Washington* (2004) 542 U.S. 296.

[76] *Chapman v. California* (1967) 386 U.S. 18; see § Reversible Unless Lack Of Prejudice Is Shown Beyond A Reasonable Doubt (Chapman), *post*.

[77] Good faith error by trial court in denying defendant's peremptory challenge to a juror is not federal constitutional error. (*Rivera v. Illinois* (2009) 556 U.S. 148, 157.)

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- Denial of defendant's right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers defendant best defense (*McCoy v. Louisiana* (2018) 584 U.S. 414).

- Absence of a juror during rendering of verdict and polling (*People v. Traugott* (2010) 184 Cal.App.4th 492).

- Denial of transcript of previous trial (*People v. Hosner* (1975) 15 Cal.3d 60.)

In some of these situations, the error pervades the entire proceedings and establishing prejudice would be inherently speculative – for example, lack of counsel, defendant's lack of competence, reasonable doubt instruction, and lack of an impartial judge. In others, the right involved is based on fundamental values extrinsic to the accuracy of trial outcomes – for example, discrimination in selection of jurors, right to counsel of choice or self-representation, and public trial. The right to a jury falls into both categories.

Reversible unless lack of prejudice is shown beyond a reasonable doubt (*Chapman*)

The standard of prejudice next most favorable to the appellant is that of *Chapman v. California* (1967) 386 U.S. 18, which held violations of most federal constitutional rights[78] require reversal unless the prosecution can prove beyond a reasonable doubt that the violation did not affect the result. *Chapman* error is distinctive in its source (the federal Constitution), in placing the burden of proof on the beneficiary of the error (such as the state or county), and in creating a high standard for showing harmlessness (beyond a reasonable doubt). It applies in dependency as well as criminal cases. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 134.)

[78]Exceptions to the applicability of *Chapman* for federal constitutional errors are those that are reversible per se (§ Prejudicial per se, *ante*) and those governed by specialized "boutique" tests, such as ineffective assistance of counsel issues, prosecutorial suppression of evidence, and conflicts of interest on the part of defense counsel (§ Not Reversible Unless the Appellant Shows It is reasonably Probable the Error Affected the Outcome (Watson) et seq., *post*).

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Some examples of this type of error were enumerated in *Rose v. Clark* (1986) 478 U.S. 570, 577-578:

> [*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684] (failure to permit cross-examination concerning witness bias); *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (*per curiam*) (denial of right to be present at trial); *United States v. Hasting*, 461 U.S. 499, 508-509 (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment). See also *Hopper v. Evans*, 456 U.S. 605, 613-614 (1982) (citing *Chapman* and finding no prejudice from trial court's failure to give lesser included offense instruction).[79]

Other examples of *Chapman* error are:

- Introduction of an out-of-court statement of a non-testifying codefendant (*Brown v. United States* (1973) 411 U.S. 223, 231-232);

- Prosecutorial misconduct in commenting on a defendant's failure to testify (*Chapman v. California* (1967) 386 U.S. 18);

- Introduction of an involuntary confession (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310);

[79]*Hopper* found no facts to support instruction on a lesser included offense and thus concluded that an Alabama statute forbidding such instruction in capital cases, invalidated in *Beck v. Alabama* (1980) 447 U.S. 625, did not prejudice the defendant within the meaning of *Chapman*.

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- Failure to instruct directly on reasonable doubt (*People v. Aranda* (2012) 55 Cal.4th 342[80]; *People v. Vann* (1971) 12 Cal.3d 220, 227-228; *People v. Flores* (2007) 147 Cal.App.4th 199);

- Omission of an element in instructing on an offense (*Neder v. United States* (1999) 527 U.S. 1, 9-12, 16; *People v. Mil* (2012) 53 Cal.4th 400 [omission of two or more elements of offense in instruction does not automatically make error reversible per se]; *People v. Merritt* (2017) 2 Cal.5th 819 [failure to instruct on crime of conviction, if defendant conceded it had been committed, but contended another perpetrator was responsible]; *People v. Flood* (1998) 18 Cal.4th 470, 502-503)[81];

- Instructing the jury that malice should be presumed in the absence of contrary evidence (*Rose v. Clark* (1986) 478 U.S. 570);

- Misstating a potential theory of conviction (*Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866-867);

- Instructing on improper theory of criminal liability (*Hedgpeth v. Pulido* (2008) 555 U.S. 57); presenting two theories to the jury, one correct, one incorrect (*People v. Aledamat* (2019) 8 Cal.5th 1);

- Unjustifiably requiring defendant to wear shackles visible to the jury (*Deck v. Missouri* (2005) 544 U.S. 622, 635; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 742);

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[80]If the jury is instructed on the requirement for reasonable doubt, but reasonable doubt is not defined, the omission is state error tested under the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818.

[81]The California Supreme Court in *Flood* did not decide whether in some instances an instructional omission might be "the equivalent of failing to submit the entire case to the jury – an error that clearly would be a 'structural' rather than a 'trial' error" (18 Cal.4th at p. 503); *Mil* held the omission of more than one element is not automatically reversible, but must be evaluated for the significance of the error in context (53 Cal.4th 400).

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- Failure of counsel to object to closure of courtroom during jury selection (*Weaver v. Massachusetts* (2017) 582 U.S. 286);

- Error in failing to submit a sentencing factor to a jury (*Washington v. Recueno* (2006) 548 U.S. 212); *Blakely v. Washington* (2004) 542 U.S. 296).

(See also list of *Chapman* cases in *Arizona v. Fulminante*, at pp. 306-307.)[82]

In dependency cases, *Chapman* has been applied to alleged due process errors, such as excluding relevant evidence. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 134).

Not reversible unless the appellant shows it is reasonably probable the error affected the outcome (*Watson*)

The most common standard of prejudice, and the one least favorable to the appellant, is found in *People v. Watson* (1956) 46 Cal.2d 818. This standard puts the burden on the appellant to show it is reasonably probable the error affected the outcome of the case. The *Watson* standard is applied to virtually all errors based on statutory, common-law, or state constitutional violations except those implicating fundamental rights and affecting the basic integrity of the proceedings.

"Reasonably probable" does not mean the appellant must show the error more likely than not the error affected the outcome. "Probable" in this context does not mean a more than 50% chance, "but merely *a reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8

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[82]An undetermined issue is what standard applies for a *Faretta v. California* (1975) 422 U.S. 806 waiver not made knowingly and intelligently. In *People v. Burgener* (2009) 46 Cal.4th 231, 243-245, the court reviewed decisions in the lower California courts, which are split between the per se and *Chapman* standard, and in the federal circuits, which generally use reversible per se; in this case, the error was reversible even under *Chapman v. California* (1967) 386 U.S. 18.

Good faith error by trial court in denying defendant's peremptory challenge to a juror is not federal constitutional error and is therefore not governed by *Chapman*. (*Rivera v. Illinois* (2009) 556 U.S. 148.)

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Cal.4th 704, 715, italics original; *People v. Watson* (1956) 46 Cal.2d 818, 837 [if probabilities of prejudice and harmlessness are equally balanced, appellant has necessarily shown miscarriage of justice]; see also *People v. Wilkins* (2013) 56 Cal.4th 333, 351; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051; *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 918.)

Just a few examples of error governed by the *Watson* test are error in admitting evidence that was irrelevant or violated Evidence Code section 352, error affecting expert testimony, many forms of prosecutorial misconduct, denial of a *Pitchess* motion[83] or motion for a physical lineup,[84] and ordinary instructional error.[85]

In summary: (1) remind the court to apply the correct *College Hospital*[86] "reasonable chance" test rather than the bare "reasonably probable" one, which too readily calls to mind the incorrect and more onerous "more likely than not" standard; (2) argue prejudice concretely, in terms of the facts of the case, rather than merely stating a conclusion (see § Arguing prejudice et seq., *post*); and (3) define the "more favorable outcome" optimally, considering more easily demonstrable possibilities than an outright acquittal, such as a hung jury or conviction of a lesser offense.[87]

"Boutique" tests of prejudice

Certain kinds of errors are governed by specialized tests unique to that area. Common examples are ineffective assistance of counsel, suppression of material favorable evidence by the prosecution, defense counsel conflict of interest, and juror misconduct.

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[83]*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534; Pen. Code, §§ 832.7 & 832.8; Evid. Code, §§ 1043-1045; see *Warrick v. Superior Court* (2005) 35 Cal.4th 1011; *People v. Mooc* (2001) 26 Cal.4th 1216; *People v. Hustead* (1999) 74 Cal.App.4th 410, 415-423.

[84]*Evans v. Superior Court* (1974) 11 Cal.3d 617; see *People v. Mena* (2012) 54 Cal.4th 146, 169-171.)

[85]*People v. Davis* (2013) 217 Cal.App.4th 1484.

[86]*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.

[87]E.g., *People v. Hendrix* (2022) 13 Cal.5th 933, 948, fn. 6 (a hung jury is a "more favorable" outcome for purposes of harmless error review.).

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Ineffective assistance of counsel

Ineffective assistance of counsel is judged by *Strickland v. Washington* (1984) 466 U.S. 668, 694, which held that unreasonably deficient performance by counsel is reversible only if the defendant shows a "reasonable probability" a different result would have occurred without the error.[88] (E.g., *Lee v. United States* (2017) 582 U.S. 357 [when defendant claims counsel's deficient performance deprived him of trial by causing him to plead guilty, defendant can show prejudice by demonstrating "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"].) A reasonable probability is defined as a probability sufficient to affect "the reliability of the result" (*Strickland v. Washington, supra,* 466 U.S. at p. 693) or, in other words, to undermine "confidence in the outcome" (*Id.* at p. 694).[89] It does not mean more likely than not and does not authorize use of a preponderance of the evidence standard. (*Id.* at pp. 693-694; see also *Woodford v. Visciotti* (2002) 537 U.S. 19, 23-24.)

To assess prejudice from trial counsel's failure to investigate properly, for example, the court must compare the evidence that was presented to the jury with that which could have been presented had counsel acted appropriately. (*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1133.)

Prosecutorial suppression of evidence

The prosecution has a duty to disclose evidence only if the evidence is (1) favorable to the defense and (2) material on guilt or punishment. (*United States v. Bagley* (1985) 473 U.S. 667, 674; *In re Sassounian* (1995) 9 Cal.4th 535, 543-545; see *Turner v. United States* (2017) 582 U.S. 313; *Brady v. Maryland* (1963) 373 U.S. 83.) Materiality in turn depends on whether there is a "reasonable

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[88]The *Strickland* "reasonable probability" standard is similar in phrasing and meaning to the *Watson* "reasonably probable" standard. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051; cf. *People v. Howard* (1987) 190 Cal.App.3d 41, 47-48, fn. 4.)

[89]*Strickland* "specifically rejected the proposition that the defendant had to prove more likely than not that the outcome would be altered. . . ." (*Woodford v. Visciotti* (2002) 537 U.S. 19, 22; *Strickland*, at p. 693; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; see *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

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probability" that, if the evidence had been disclosed to the defense, the result would have been different. (*Bagley*, at p. 678; *Sassounian,* at p. 544.) A reasonable probability is one sufficient to undermine confidence in the outcome. (*Bagley,* at p. 685; *Sassounian,* at p. 544.) Since failure to disclose is not error at all unless it is reasonably likely to have affected the outcome – i.e., to have been prejudicial – a determination of error is necessarily a determination of prejudice. (*Sassounian*, at p. 545, fn. 7.)

Defense counsel conflict of interest

Conflicts of interest include such situations as representing multiple parties in the same proceeding (*People v. Mroczko* (1983) 35 Cal.3d 86), having pecuniary interests adverse to the defendant (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612), having a past attorney-client relationship with a current witness (*Leverson v. Superior Court* (1983) 34 Cal.3d 530), and having personal legal interests that could conflict with the defendant's (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129). The trial court must undertake an inquiry if it knows or reasonably should know of the conflict. (*Mickens v. Taylor* (2002) 535 U.S. 162, 168-169; *Wood v. Georgia* (1981) 450 U.S. 261, 273; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 347-349.) With some exceptions, representation by conflicted counsel is analyzed under the principles of *Strickland v. Washington* (1984) 466 U.S. 668, 694, on ineffective assistance of counsel, which requires a defendant to show counsel's deficient performance and a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different. (*People v. Doolin* (2009) 45 Cal.4th 390, 417.[90])

Except when the attorney was forced to represent concurrent conflicting interests over objection (*Holloway v. Arkansas* (1978) 435 U.S. 475, 490-491), to satisfy the deficient performance requirement the defendant must show the

[90]*Doolin* harmonized the California and federal standards. Formerly, the Court had held the California Constitution imposes a more rigorous standard than the federal one, requiring reversal for even a potential conflict if the record supports "informed speculation" that the defendant's right to effective representation was prejudicially affected by the conflict. (E.g., *People v. Rundle* (2008) 43 Cal.4th 76, 174-175; *People v. Clark* (1993) 5 Cal.4th 950, 995; see also *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1014; *People v. Mroczko* (1983) 35 Cal.3d 86, 105; see cases overruled on this point in *Doolin*, 45 Cal.4th at p. 421, fn. 22.)

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conflict actually affected the adequacy of counsel's representation, in the sense of causing counsel not to represent the defendant as vigorously as he or she might have without the conflict, "as opposed to a mere theoretical division of loyalties." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171; see also *Wood v. Georgia* (1981) 450 U.S. 261, 272; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 347-350; *People v. Doolin* (2009) 45 Cal.4th 390, 417-418; *United States v. Rodrigues* (9th Cir. 2003) 347 F.3d 818, 820, 823-824.)

As to the prejudice prong of the test, prejudice is presumed if counsel actively represented co-defendants with conflicting interests at the same time. (*People v. Doolin* (2009) 45 Cal.4th 390, 418.) Reversal is automatic if the attorney had such a conflict and made a timely objection to the conflicted representation. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 488.) The United States Supreme Court has left open the question whether successive representation of clients with conflicting interests is subject to the presumption of prejudice. (*Mickens v. Taylor* (2002) 535 U.S. 162, 176; cf. *Doolin*, 45 Cal.4th at p. 420 [presumption limited to concurrent representation of conflicting interests]; *Houston Schomig* (9th Cir. 2008) 533 F.3d 1076, 1083 [evidentiary hearing ordered to determine whether alleged successive representation conflict adversely affected counsel's performance and, if so, whether that deficiency affected "the result of the proceeding"].) In other situations, the presumption of prejudice is inapplicable, and the defendant must "demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Doolin*, 45 Cal.4th at pp. 429-430, quoting *Mickens*, 535 U.S. at p. 166, in turn quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Juror misconduct

Juror misconduct involving receipt of information about the case from outside sources requires reversal if there appears a substantial likelihood of juror bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) Bias may be found in two ways: (1) the extraneous material is inherently prejudicial – i.e., in itself substantially likely to have influenced a juror; or (2) under the circumstances of the case, the court determines that it is substantially likely a juror was *actually* biased against the defendant. If there is a substantial likelihood that a juror was actually biased, reversal is required even though the court is convinced an unbiased jury would have reached the same verdict. "[A] biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler* (1997) 16 Cal.4th 561, 579; see

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People v. Solorio (2017) 17 Cal.App.5th 398 [prosecution failed to rebut presumption of prejudice from jurors' discussion of why defendant did not testify, when topic came up several times during deliberations].)

Cumulative error

Even if the prejudice from one error might not by itself justify reversal, counsel may still be able to argue for reversal on the ground the errors were collectively or cumulatively prejudicial. (See *People v. Hill* (1998) 17 Cal.4th 800, 844; *People v. Criscione* (1981) 125 Cal.App.3d 275, 293; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *People v. Kent* (1981) 125 Cal.App.3d 207, 217-218; *People v. Williams* (1971) 22 Cal.App.3d 34, 58.)

If any of the errors to be considered in aggregation presents a federal constitutional question, then the cumulative error argument also presents a federal question to be reviewed for prejudice under the *Chapman* standard. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117; *United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6; see also *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220.)

Arguing prejudice

Prejudice can be assessed in a number of ways, depending on the nature of the error, its relationship to the facts as presented at trial, the theories of the defense and prosecution, and any evidence of its actual effect on the jury. (See § Not reversible unless the appellant shows it is reasonably probable the error affected the outcome (Watson), *ante*.)

Errors inherently carrying a high probability of prejudice

Some kinds of error are inherently likely to cause prejudice – for example, comments by persons in authority such as judges or prosecutors, instructions, confessions, and evidence of other crimes or gang affiliation. While they generally do not automatically require reversal, they heighten the probability of prejudice and warrant especially close scrutiny. Examples include:

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- *Statements by judges*: "[J]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Lee* (1979) 92 Cal.App.3d 707, 715-716.)[91]

- *Statements by prosecutors*: As a public official charged with representing the general interest and attaining justice, a prosecutor may have special stature in the eyes of the jury, and so their misstatements may carry significant weight.[92]

- *Instructions*: Instructions are inevitably crucial in leading jurors (who are for the most part unschooled in the law) to a conclusion. (See *People v. Clair* (1992) 2 Cal.4th 629, 663 ["jurors treat the court's instructions as a statement of the law by a judge"].)[93]

- *Confessions*: The defendant's own words inevitably carry heavy weight before a jury; it is difficult to ignore a confession or substantial admission of guilt.[94]

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[91]See *People v. Brock* (1967) 66 Cal.2d 645, 649, 654-655; *People v. Morse*(1964) 60 Cal.2d 631, 650; *People v. Perkins* (2003) 109 Cal.App.4th 1562; *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1172-1173, 1174-1175.

[92]See *People v. Guerrero* (1976) 16 Cal.3d 719, 730; *People v. Thomas* (1992) 2 Cal.4th 489, 529; *People v. Donaldson* (2001) 93 Cal.App.4th 916, 932; *People v. Deasee* (1993) 19 Cal.App.4th 374, 383-386; *People v. Johnson* (1981) 123 Cal.App.3d 103, 106; *People v. Buchtel* (1963) 221 Cal.App.2d 397, 403; *People v. Carr* (1958) 163 Cal.App.2d 568, 575-576; see *Dean v. Hocker* (9th Cir. 1969) 409 F.2d 319, 322.

[93]There are special tests for prejudice when instructions are conflicting (*LeMons v. Regents* (1978) 21 Cal.3d 869, 878; *People v. Rhoden* (1972) 6 Cal.3d 519, 520; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1014) or ambiguous (*Clair*, at p. 663; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72), or when a cautionary instruction may be required (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268; *People v. Lopez* (1975) 47 Cal.App.3d 8, 14).

[94]See *Arizona v. Fulminante* (1991) 499 U.S. 279, 296; *People v. Spencer* (1967) 66 Cal.2d 158, 169; see also *People v. Smith* (1995) 31 Cal.App.4th 1185, 1193-1194.

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- *Evidence of other crimes or gang affiliation*: The fact that the defendant has committed other crimes or has criminal affiliations, such as gang membership, might sway a jury to convict, regardless of the evidence on the current charge, if they think: "He did it before and so probably did it this time," or "He's a bad person who should be punished, even if not guilty now," or "He's a menace to society and should be taken off the streets."[95]

Prominence of error

An error may be prejudicial because it played a prominent role in the case. In contrast, prejudice will be more difficult to establish when the error was relatively trivial, involved tangential or uncontested matters, or happened only once and without particular emphasis. Factors include:

- *Centrality to issues*: The error may have directly affected the key issue in the case, such as identity or mental state. It may have filled a substantial gap in the prosecution's or county's case or damaged the heart of the defense.[96]

- *Emphasis given error*: An error may have been repeated or exploited or given special emphasis by the prosecutor or county during argument.[97] As the Supreme Court has put it: "'There is no reason

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[95]See *People v Williams* (1997) 16 Cal.4th 153, 191, and *People v. Ramirez* (2016) 244 Cal.App.4th 800 (gang affiliation); *People v Ewoldt* (1994) 7 Cal.4th 380, 404 (uncharged offenses); *People v. Rolon* (1967) 66 Cal.2d 690, 694, *People v. Hendrix* (2013) 214 Cal.App.4th 216, *People v. Allen* (1978) 77 Cal.App.3d 924, 935, *People v. Stinson* (1963) 214 Cal.App.2d 476, 482, and *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 (prior offenses).

[96]See *People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Moore* (1954) 43 Cal.2d 517, 530-531; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1294-1295; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 455-456; *People v. Hatchett* (1944) 63 Cal.App.2d 144, 152.

[97]See *People v. Louis* (1986) 42 Cal.3d 969, 995; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Diaz* (2015) 227 Cal.App.4th 362, 382-385.

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why we should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it.'"[98]

- *Jury's focus in an area related to error*: The jury may have asked for rereading of testimony or instructions or asked questions related to the area of the error. When the jury gives signs that the matters affected by the error are the very ones it considers troublesome or important, prejudice can often be inferred.[99]

Closeness of the case

One of the most crucial factors is whether the case was closely balanced or relatively lopsided. Indicators of the closeness of a case include:

- *Evidence*: A case in which the state or county case is weak or the defense is strong may well be affected by an error.[100] Conversely, in a one-sided case heavily weighted against the defense, convincing a court of prejudice is difficult even under *Chapman*.

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[98]*People v. Powell* (1967) 67 Cal.2d 32, 56-57, quoting *People v. Cruz* (1964) 61 Cal.2d 861, 868.

[99]See *People v. Williams* (1976) 16 Cal.3d 663, 669; *People v. Diaz* (2015) 227 Cal.App.4th 362, 382-385; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 352 and *People v. Spry* (1997) 58 Cal.App.4th 1345, 1371-1372, disapproved on other grounds in *People v. Martin* (2001) 25 Cal. 4th 1180, 1192; *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal. 4th 434, 452; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1294-1295; *People v. Steele* (1989) 210 Cal.App.3d 67, 74; *People v. Martinez* (1984) 157 Cal.App.3d 660, 670.

[100]See, e.g., *People v. Wagner* (1975) 13 Cal.3d 612, 621; *People v. Collins* (1968) 68 Cal.2d 319, 332-333; *People v. Moore* (1954) 43 Cal.2d 517, 530-531 (closely balanced evidence, erroneous jury instructions on matters vital to defense); *People v. Weatherford* (1945) 27 Cal.2d 401, 403; *People v. Pearch* (1991) 229 Cal. App. 3d 1282, 1294-1295; *People v. Allen* (1978) 77 Cal.App.3d 924, 935 (close contest of credibility); see also *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498 (key prosecution evidence of questionable credibility, whereas defense was strong); *People v. Roberts* (1967) 256 Cal.App.2d 488.

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- *Length of jury deliberations*: Lengthy deliberations often are interpreted to mean the jury was struggling with the issues and considered the case a close one.[101] On the other hand, a short deliberation time can indicate probable prejudice, if without the error the evidence would have seemed sufficiently close to have required substantial deliberation time.[102] Whether the deliberations were exceptionally long or short depends of course on the complexity of the case.

- *Partial acquittal*: The jury's refusal to convict on some counts may indicate a close case. As one court has said: "In view of the verdict's reflecting the jury's selective belief in the evidence [by acquitting appellant on two of three counts], we cannot conclude otherwise than that the [error] . . . was prejudicial."[103]

Other signs of a close case may be jury questions and reports of a deadlock. (*People v. Diaz* (2015) 227 Cal.App.4th 362, 382-385.)

Evidence linking error to verdict

The court may find prejudice if there is evidence of a causal connection between the verdict and the error:

- *Proximity*: If the verdict was rendered in close proximity to the error, prejudice may be inferred. For example, if the court gave an erroneous instruction during difficult jury deliberations and a guilty

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[101]*In re Martin* (1987) 44 Cal.3d 1, 51 (22 hours over five days); *People v. Rucker* (1980) 26 Cal.3d 368, 391 (nine hours); *People v. Woodard* (1979) 23 Cal.3d 329, 341 (six hours); *People v. Anderson* (1978) 20 Cal.3d 647, 651 (several days); *People v. Collins* (1968) 68 Cal.2d 319, 332 (eight hours); *People v. Steele* (1989) 210 Cal.App.3d 67, 74 (four days of deliberation); *People v. Fuentes* (1986) 183 Cal.App.3d 444, 455- 56 (nine days).

[102]See, e.g., *People v. Markus* (1978) 82 Cal.App.3d 477, 482, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027, 1040.

[103]*People v. Epps* (1981) 122 Cal.App.3d 691, 698*;* see also *People v. Washington* (1958) 163 Cal.App.2d 833, 846; see also *People v. Steele* (1989) 10 Cal.App.3d 67, 74.

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verdict followed almost immediately, it may be reasonable to conclude the error affected the result.[104]

- *Comparative results*: The fact a prior proceeding or another count without the error had a more favorable result is another factor suggesting prejudice.[105]

2.1.5 Appellate tests and presumptions

Another important factor to be weighed in assessing the strength of a potential issue on appeal is who has the burden of persuasion on a given question and how the appellate court will view evidence that is in conflict or is absent from the record.

General principles of review

Most presumptions and principles on appeal favor the respondent. For example, the judgment is presumed to be correct. Accordingly:

- Conflict and silence in the record are resolved in favor of the decision below. (*People v. Woods* (1999) 21 Cal.4th 668, 673; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

- An appellate court will presume the trial court had adequate reasons for a decision unless the record affirmatively shows otherwise. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *People v. Golliver* (1990) 219 Cal.App.3d 1612, 1620.) There is an exception when the law requires reasons to be stated explicitly. (*In re Manzy*

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[104]See *People v. Williams* (1976) 16 Cal.3d 663, 669; *People v. Thompson* (1987) 195 Cal.App.3d 244, 252-253; *People v. Markus* (1978) 82 Cal.App.3d 477, 482, disapproved on other grounds in *People v. Montoya* (1994) 7 Cal.4th 1027, 1040.

[105]See *People v. Diaz* (2015) 227 Cal.App.4th 362, 382-385; *People v. Brooks* (1979) 88 Cal.App.3d 180, 188; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.

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W. (1997) 14 Cal.4th 1199, 1210-1211 [remanding where law required court to declare whether offense was felony or misdemeanor].)

- The trial court is presumed to have known and followed the law. (*People v. Braxton* (2004) 34 Cal.4th 798, 814; *People v. Stowell* (2003) 31 Cal.4th 1107, 1114; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *In re Justin B.* (1999) 69 Cal.App.4th 879, 888; *People v. Torres* (1950) 98 Cal.App.2d 189, 192.) Exceptions are made when the law is unsettled or conflicted, or when the record affirmatively shows the judge was confused. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944-946; *People v. Jeffers* (1987) 43 Cal.3d 984, 1000-1001.)

- The evidence is viewed in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

- Under the "right result, wrong reason" principle, even if the court gave legally incorrect reasons for a decision such as admitting or excluding evidence, no error will be found if legally correct reasons would require the same result. (*People v. Smithey* (1999) 20 Cal.4th 936, 972; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18- 19.)

- The jury is presumed to have followed the instructions if they are correct and consistent. (*People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Rich* (1988) 45 Cal.3d 1036, 1090; cf. *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.)

- Judges, clerks, and court reporters are presumed to have performed their duty. (*People v. Wader* (1993) 5 Cal.4th 610, 661; *People v. Ward* (1953) 118 Cal.App.2d 604, 608; see Evid. Code, § 664.)

- For most errors, the burden is on the appellant to show prejudice – i.e., to prove the error actually affected the result. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

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Viewing the evidence

How the court views the evidence depends on what the issue is. On most sufficiency of the evidence issues, the court will look at the evidence in the light most favorable to the prevailing party, assuming those credibility decisions and those inferences that support the judgment.

Other tests of the evidence may be used for other issues. For example, when the issue is whether it was proper to give an instruction on imperfect self-defense, which reduces murder to voluntary manslaughter by negating malice, the standard is whether there was evidence of imperfect self-defense sufficient to "deserve consideration by the jury" – meaning a reasonable jury could properly have found a reasonable doubt as to malice from the evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

2.1.6 Final selection of issues

Once the reasonably arguable issues are identified and evaluated, the question remains whether these issues should ultimately be included in the appellant's opening brief. It might be in the client's best interests to omit some of these issues (or even abandon the appeal), for several reasons.

Selectivity versus inclusiveness

An attorney's duty to raise arguable issues has long been the subject of debate. Some experienced attorneys insist an appellate attorney has a duty to raise every arguable or non-frivolous issue; they argue, the attorney must give the client a chance to prevail, even against the odds, by at least raising the issues – after all, the attorney is not infallible in judging issues, and occasionally "lightning strikes." Failure to raise an issue on an appeal may forfeit it in later appeals if there are follow-up proceedings. (E.g., *People v. Senior* (1995) 33 Cal.App.4th 531; cf. *People v. Rosas* (2010) 191 Cal.App.4th 107.)

Other attorneys take the position that inclusion of too many issues distracts the court and undermines stronger issues in the case. They contend that often one of the greatest benefits appellate counsel can give the client is counsel's experience in knowing what issues *not* to raise. The United States Supreme Court in *Jones v. Barnes* (1983) 463 U.S. 745, 751-754, took this side and held there is no federal constitutional duty to raise every non-frivolous issue, even if the client wants them to be raised:

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> One of the first tests of a discriminating advocate is to select the question, or questions, that he will present . . . . Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one.

(*Id.* at p. 752, internal quotation marks omitted; see also *Davila v. Davis* (2017) 582 U.S. 521 ["Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed. . . . Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court"].[106])

This manual favors the selective approach. Counsel should consider the overall strategic impact of each issue. They might ask: Will the issue strengthen the probability the client will get meaningful relief, or will it drag stronger ones down to the "lowest common denominator," thus diminishing the client's chances? Are there so many issues that the court will become irritated or weary of reading the brief and turn to the opponent's brief for illumination? Will the good points get lost in the maze of "all but the kitchen sink"?

Context

The question of whether to include weak issues is relative, depending on other issues in the case. If there are a number of much stronger ones, the argument for selective omission is usually quite persuasive. If all of the issues are fairly weak, there may or may not be a reason to exclude some. If there are *no* other issues, a weak but arguable one should be briefed. This is especially true in

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[106]A commonsense qualification to the "comparative strength" test, understood as the likelihood of success, is the scope of relief to be obtained if it succeeds. A slam-dunk winner that will take one year off a 250-year sentence of course should be raised, but the relief will probably be trivial in context. Counsel should think long and hard about shunning a longer shot (but still reasonable) issue that might result, for example, in a finding the confession was inadmissible and thus the whole conviction should be nullified. The two issues cannot be seen as commensurate for purposes of assessing their strength.

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non-criminal cases, where omitting weak issues does not earn the client the right to court review of the record, but merely guarantees virtually automatic dismissal of the appeal. This matter is explored in an ADI memo on arguability, "To Brief or Not To Brief." (See also § Independent review of record, *post*.)

Potential for adverse consequences

Another reason not to raise an issue might be that it would call attention to an error in the defendant's favor. Often pursuing a particular issue, or even the appeal itself, makes it more likely the error will be noticed and corrected. If the client could get a more burdensome disposition by pursuing the issue or the appeal, counsel should advise the client of the possibility of abandonment. (See § 4.6 Adverse consequences: Potential risks of appealing et seq., *post*, on adverse consequences and § 4.8 Appendix B et seq.; see also Cal. Rules of Court, rules 8.316, 8.411 [voluntary abandonment of appeal].)

Practical benefit from remedy

An issue may appropriately be omitted if the client does not want the remedy it would provide or would not benefit from the remedy. For example, returning to court for a new sentencing or hearing may not be beneficial to the client. While in court the client may lose a favored placement or good job in prison or earn fewer credits – and frequently just end up with the same result as before the remand.

In dependency cases, the client may not want the remedy argued for. For example, the client may not want the child to be placed with a particular relative, or an alleged father may not wish to be declared the presumed father if doing so might introduce the possibility of child support obligations.

To prevent an "unwanted remedy," appellate counsel should first check with trial counsel to determine how likely it is the client will end up in a better position from reversal and then advise the client what might reasonably be expected. The decision as to the ultimate remedy to be sought is the client's.

2.1.7 Advisability of appealing

Counsel must evaluate not only the availability of appeal, but also the advisability of pursuing appellate remedies. While usually appealing can only benefit the client, sometimes it carries serious downside risks. For instance, if the client entered into a beneficial plea bargain in the trial court, it may be highly

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inadvisable to challenge the validity of the plea on appeal because withdrawing the plea means loss of the negotiated benefits.[107] If a sentence lower than that authorized by law was imposed, the appeal increases the chance the error will be detected and remedied to the client's detriment. (E.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *People v. Serrato* (1973) 9 Cal.3d 753, 763-764, dictum on unrelated point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *In re Birdwell* (1996) 50 Cal.App.4th 926, 930.) New charges could be added on retrial, and there may be non-penal consequences that are more onerous than the original punishment.

In dependency cases, some results favorable to the client (such as an offer of reunification services or visitation, or a judgment of presumed fatherhood) may have been unauthorized and would be subject to correction on appeal. Matters brought up in the dependency appeal may be used against the client in any concurrent criminal proceeding.

Appellate counsel should always be vigilant, therefore, to spot potential downsides and to advise the client about them. (See, e.g., *People v. Richardson* (2021) 65 Cal.App.5th 360, 371 [invalidating unauthorized plea bargain favorable to defendant as part of *Wende* review].) Counsel should help the client assess (a) the magnitude and likelihood of potential benefits from appealing, (b) the magnitude and likelihood of potential risks, and (c) the likelihood the adverse result might occur even in the absence of appeal.[108]

The topic of adverse consequences on appeal is explored in detail in § 4.6 Adverse consequences: Potential risks of appealing et seq. (See also § Preliminary

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[107]Although counsel normally should ask the Court of Appeal to remand the case for an *opportunity* to withdraw the plea, instead of voiding the plea directly (e.g., *People v. Franklin* (1995) 36 Cal.App.4th 1351, 1358), before seeking such an opportunity appellate counsel should explore with the client and trial counsel the ramifications of such decision.

[108]An unauthorized sentence, for example, may be corrected at any time. (*People v. Serrato* (1973) 9 Cal.3d 753, 764, dictum on unrelated point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Massengale* (1970) 10 Cal.App.3d689, 693.) The Department of Corrections and Rehabilitation, the prosecutor, or the trial court conceivably could find the error even in the absence of an appeal. An unauthorized sentence, for example, may be corrected at any time *if* the court otherwise has jurisdiction or via habeas corpus.

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caveat for counsel: Need to warn client about consequences of challenging the plea, *post*.)

PART TWO: CRIMINAL AND DELINQUENCY APPEALS[109]

2.2 Appeal by a criminal defendant after trial

Criminal defendants have a broad right to appeal from a final judgment after trial. Penal Code section 1237, subdivision (a) is the basic statutory authority conferring on criminal defendants the right to appeal from a final judgment after trial. It provides that an appeal may be taken by a defendant "[from a final judgment of conviction except as provided in Sections 1237.1, 1237.2, and 1237.5." The statute defines a final judgment:

> A sentence, an order granting probation, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section.

The judgment is construed as the sentence, broadly defined in Penal Code section 1237, subdivision (a), quoted above.

As pointed out in § Criminal cases, *ante*, some issues in criminal cases are reviewable by either pretrial writ or appeal from a final judgment, but under different standards. While error may be sufficient to justify issuance of certain pretrial writs, appeals require a showing that the error prejudiced the outcome of the trial. Examples listed in § Criminal cases include defects at the preliminary hearing, denial of a speedy trial, and denial of a defendant's motion for a physical lineup.

In criminal cases, orders made before and during trial are not appealable separately,[110] but may be reviewed on an appeal from the judgment. Relief by writ

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[109]PART ONE covers the general law of appealability. PART THREE covers juvenile dependency appeals.

[110]An exception to the rule against interlocutory appeals is the recusal of the district attorney. (Pen. Code, § 1238, subd. (a)(11), 1424, subd. (a)(1); e.g., *People v. Vasquez* (2006) 39 Cal.4th 47.) Another exception is an appeal from an

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may be available to challenge an interlocutory ruling on a proper showing that appeal would not be an adequate remedy. An order denying a motion for a new trial is not a final judgment and is not separately appealable; however, the order is reviewable on appeal from the judgment. (See *People v. Jenkins* (1970) 3 Cal.App.3d 529, 531, fn. 1.) Orders suspending criminal proceedings because of present incompetence to stand trial (Pen. Code, § 1368) are independently appealable as special proceedings within the meaning of Code of Civil Procedure section 904.1, subdivision (a)(1). (*People v. Fields* (1965) 62 Cal.2d 538, 540.) Orders finding the defendant competent and declining to suspend criminal proceedings are nonappealable, interlocutory rulings and may be reviewed on appeal only from a final judgment in the underlying criminal proceeding. (*People v. Mickle* (1991) 54 Cal.3d 140, 180-181.)

The defendant must timely appeal from an order granting probation or commitment in lieu of sentence as listed in section 1237 to obtain review of the proceedings occurring before the order. These matters are not reviewable after subsequent orders affecting the probation or commitment or after a judgment imposed later. Likewise, the defendant must appeal at the time probation is granted to obtain review of the sentence itself if judgment was imposed but execution suspended. (See § 2.4.1 Orders related to probation et seq., *post*.)

A vast array of issues can be raised on an appeal following judgment imposed after a jury trial if they are shown on the record and were timely preserved by proper objection or other procedural prerequisite. Examples include jurisdiction, double jeopardy, statute of limitations, jury selection, denial of counsel or the right to self-representation, admission or exclusion of evidence, jury instructions, prosecutorial misconduct, and sentencing.

2.3 Appeal by a criminal defendant after guilty plea

Guilty plea appeals are a different breed from appeals after trial.[111] The scope of issues is limited both substantively and procedurally.

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order transferring a juvenile to criminal court. (Welf. & Inst. Code, § 801, subd. (a).)

[111]This section applies to pleas of nolo contendere, admitted probation violations, and admissions to enhancements, as well as pleas of guilty. (See Pen. Code, § 1237.5; *People v. Perry* (1984) 162 Cal.App.3d 1147, 1151.)

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2.3.1 General: Waiver of most issues and procedural limitations

The right to appeal after a guilty plea is severely restricted. Most issues are deemed waived by the plea, since the defendant has admitted guilt and agreed to submit to judgment without trial and all its procedural requirements. (See § 2.7.6 Appendix to Part Two: Common issues waived by guilty plea.) Thus, all issues going to guilt or innocence including affirmative defenses, most pretrial evidentiary rulings, and most procedural defects before the plea are waived. (*People v. Kanawha* (1977) 19 Cal.3d 1, 9; *People v. Benweed* (1985) 173 Cal.App.3d 828, 832; see *People v. Maultsby* (2012) 53 Cal.4th 296, 302 [issues going to determination of guilt or innocence are not cognizable on appeal, regardless of application of Pen. Code, 1237.5].)

In addition to substantive limitations, an appeal challenging the validity of a guilty plea is procedurally restricted under Penal Code section 1237.5, which requires a certificate of probable cause (a) to initiate the appeal if the validity of the plea is the only issue or (b) to raise an issue concerning the validity of the plea if the appeal is initiated on grounds that do not require a certificate. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.) This topic is covered more thoroughly in § Notice of appeal and certificate of probable cause after guilty plea et seq., *post*.)

2.3.2 Exception to general limitations: "Slow plea"

These limitations do not apply if the defendant entered a "slow plea" instead of a guilty plea. This procedure involves a court trial submitted by stipulation on the preliminary hearing transcript or other matters of record, upon agreement between the prosecution and defense as to the charges and/or sentence. Since a trial on the merits formally takes place, the judgment is reviewable as one after trial, not after a plea. (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 603-604; *People v. Levey* (1973) 8 Cal.3d 648; *In re Mosley* (1970) 1 Cal.3d 913, 926.)

A slow plea preserves usual appellate issues for review. (*People v. Martin* (1973) 9 Cal.3d 687, 693-694 [insufficiency of evidence preserved]; see also *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 603-604 [fact that case was submitted "in no way alters or circumscribes [the right to appeal the judgment] or affects the scope of available appellate review"]. A certificate of probable cause is not required. (*People v. Tran* (1984) 152 Cal.App.3d 680, 685, fn. 7.)

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2.3.3 Exception to waiver: Matters arising after entry of the plea

Attacks on sentence

Sentence not incorporated into plea agreement

In *People v. Ward* (1967) 66 Cal.2d 571, 574-576, the California Supreme Court concluded the Legislature did not intend in enacting Penal Code section 1237.5 to abrogate the long-standing policy that a guilty plea does not automatically acquiesce in decisions made *after* its entry, as opposed to matters explicitly incorporated in or necessarily implied by the plea agreement. Thus, a challenge to a sentence left open by the plea agreement is not intrinsically inconsistent with the plea and can be raised without attacking the plea itself. (See also *People v. Lloyd* (1998) 17 Cal.4th 658, 663-664; see § Negotiated sentence limitations, *post*, on stipulated sentences and related exceptions.)

If the sentence is not part of the bargain and any required objection has been made, a broad range of sentencing errors can be raised. These might include, to give only a few examples, improper probation conditions, abuse of discretion in choosing a base term or imposing consecutive sentences, failure to stay a term as required by Penal Code section 654, a contested determination of the degree of an offense (*People v. Ward* (1967) 66 Cal.2d 571, 574), or a challenge to mandatory sex offender registration on an equal protection violation ground (*People v. Ruffin* (2011) 200 Cal.App.4th 669). On the other hand, a legislative change in a statutory consequence of the conviction such as a registration requirement, noted in the plea agreement but not made an explicit term thereof can be applied to the defendant without violating the agreement. (*Doe v. Harris* (2013) 57 Cal.4th 64; but see *People v. Stamps* (2020) 9 Cal.5th 685, 707-708 [although ameliorative legislation applied to defendant's case notwithstanding plea bargain, the prosecutor remained entitled upon remand to withdraw assent to agreement if court favorably exercised discretion under new law].)

Negotiated sentence limitations

The rationale behind the general proposition that sentences, and other post-plea matters can be reviewed on appeal after a guilty plea assumes the defendant by pleading has not automatically accepted the sentence and the prosecution has not relied on a particular sentence as part of the consideration for the plea bargain. But if a specific sentence has been negotiated and is

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stipulated in the plea agreement or necessarily implied by it, this rationale is inapplicable.

People v. Hester (2000) 22 Cal.4th 290 held a defendant waives the right to attack an unauthorized sentence by accepting it as part of a plea bargain. This situation creates an exception to the general proposition that an unauthorized sentence is deemed an act in excess of the trial court's jurisdiction and can be raised at any time:

> Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.

(*Id.* at p. 295, emphasis original; see also *People v. Cuevas* (2008) 44 Cal.4th 374 [when plea negotiation results in dismissal or reduction of charges and defendant agrees maximum possible sentence for remaining charges is a specified time, certificate of probable cause required to contest sentence under Pen. Code, § 654]; *People v. Shelton* (2006) 37 Cal.4th 759, 766-767 [attack on trial court's authority to impose maximum sentence specified in bargain is attack on plea, requiring certificate of probable cause]; *People v. Panizzon* (1996) 13 Cal.4th 68, 78 [certificate of probable cause required when attacking stipulated sentence as cruel and unusual punishment]; *People v. Rushing* (2008) 168 Cal.App.4th 354 [certificate of probable cause necessary where maximum sentence under Three Strikes was a possibility of the plea bargain and was imposed]; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1428 [defendant estopped from challenging increase of previously imposed but unexecuted sentence when part of bargain to reinstate probation]; *In re Lino B.* (2006) 138 Cal.App.4th 1474 [minor estopped from challenging probation term longer than statutory maximum when term was part of negotiated disposition]; *People v. Flood* (2003) 108 Cal.App.4th 504, 508; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123; see § Bargained-for sentences and convictions unauthorized by law or unconstitutional, *post*, and § 2.7.6 Appendix to Part Two: Common issues waived by guilty plea, bullet on whether a cruel and unusual punishment argument is waived by a negotiated sentence.)

When a plea bargain sets a maximum sentence, the defendant does not automatically accept that sentence or any lesser one as appropriate and reserves

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the right to challenge the terms actually imposed and the reasons for them. This challenge is not an attack on the plea bargain itself. (*People v. Buttram* (2003) 30 Cal.4th 773, 777, disapproving *People v. Stewart* (2001) 89 Cal.App.4th 1209, and approving *People v. Cole* (2001) 88 Cal.App.4th 850 [abuse of discretion in not dismissing strike reviewable because possibility of such dismissal was anticipated in plea bargain provision that trial court would consider dismissal].)[112]

However, an attack on the trial court's *authority* to impose the lid is an attack on the plea. (*People v. Shelton, supra,* 37 Cal.4th at p. 766 [defendant claimed imposing negotiated lid would violate Pen. Code, § 654].) Likewise, in asserting that Penal Code section 654 requires the trial court to stay certain counts, "defendant is not challenging the court's exercise of sentencing discretion but attacking its authority to impose consecutive terms for these counts." (*People v. Cuevas* (2008) 44 Cal.4th 374; see also *People v. Jones* (2013) 217 Cal.App.4th 735, 743-746 [Pen. Code, § 654 inapplicable to any sentence, specified or within a "lid," agreed upon as part of a plea bargain].)

In *People v. Young* (2000) 77 Cal.App.4th 827, 829, cited with approval in *People v. Shelton, supra,* 37 Cal.4th at p. 771, the bargain provided a maximum of 25 years to life imprisonment and an opportunity to request dismissal of priors. On appeal the court held the defendant's challenge to his 25 years to life sentence as cruel and unusual punishment was an attack on the plea itself within the meaning of *People v. Panizzon* (1996) 13 Cal.4th 68.

No certificate of probable cause is required if the defendant's challenge is based on a newly enacted law applied retroactively and deemed incorporated into the plea bargain. (*People v. Stamps* (2020) 9 Cal.5th 685; *People v. Baldivia* (2018) 28 Cal.App.5th 1071; *People v. Hurlic* (2018) 25 Cal.App.5th 1071.)

Credits issue and fines or fees issue limitation

As mentioned in § Credits and fees or fines issues – Penal Code sections 1237.1 and 1237.2, *ante*, if the calculation of presentence custody credits is the sole issue on appeal, Penal Code section 1237.1 requires the issue first have been presented to the trial court for correction. Section 1237.2 imposes the same requirement for issues concerning fines, fees, and similar monetary assessments.

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[112]The *Cole* court did not reach the merits of issues concerning cruel and unusual punishment and withdrawal of the plea because of the lack of a certificate of probable cause. (*People v. Cole, supra,* at pp. 867-869.)

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Procedural defects in hearing motion to withdraw plea

The failure to provide the defendant with a proper hearing on a motion to withdraw a plea or to use proper standards in evaluating the motion, regardless of whether the motion relates to pre- or post-plea issues, is reviewable after a guilty plea. (See Pen. Code, § 1018; *People v. Johnson* (2009) 47 Cal.4th 668.) Raising such an issue requires a certificate of probable cause. (*Id.* at pp. 681-683; see also *People v. Emery* (2006) 140 Cal.App.4th 560, 565.) Issues concerning the underlying merits of a motion to withdraw also are reviewable and require a certificate of probable cause. (§ 2.3.6 Exception to waiver: issues going to the validity of the plea et seq., *post*.)

Non-compliance with terms of bargain by People or Court

Issues arising when the prosecutor or court fails to comply with the terms of the plea agreement are not waived by a guilty plea, since they were not contemplated when the agreement was made.

Remedies

Normally there are two possible remedies for breach of the bargain – withdrawal of the plea or specific enforcement of the bargain. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861; *People v. Kanawha* (1977) 19 Cal.3d 1, 15.)

Withdrawal of the plea is the appropriate remedy when specific performance would limit the judge's sentencing discretion in light of new information or changed circumstances. (*People v. Mancheno, supra*, 32 Cal.3d at p. 861; see *People v. Kanawha*, *supra*, 19 Cal.3d at pp. 13-14; see also Pen. Code, § 1192.5 [defendant cannot be given a more severe sentence than that specified in the plea without being offered a chance to withdraw the plea].)

Specific performance is appropriate when it implements the parties' reasonable expectations without binding the trial judge to an unreasonable disposition. (*People v. Mancheno, supra,* 32 Cal.3d at p. 861; see *Santobello v. New York* (1971) 404 U.S. 257, 262-263; see also *People v. Kanawha, supra*, 19 Cal.3d at pp. 13-14; *Amin v. Superior Court (People)* (2015) 237 Cal.App.4th 1392 [People's mistake in skimming police report instead of carefully reading it before accepting plea to misdemeanor charges that resolved "all incidents referenced in police report" did not invalidate agreement and permit prosecution for felony child molestations mentioned in report]; *People v. Arata* (2007) 151 Cal.App.4th

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778; *People v. Toscano* (2004) 124 Cal.App.4th 340 [remanding for enforcement of plea agreement provision that permitted defendant to file a motion to strike a prior conviction]; *People v. Leroy* (1984) 155 Cal.App.3d 602, 606- 607 [enforcement of term recommending concurrent sentence]; *People v. Newton* (1974) 42 Cal.App.3d 292, 298-299.)

It may not be appropriate when the original term of the plea bargain was invalid because it was inconsistent with law. (*People v. Brown* (2007) 147 Cal.App.4th 1213 [prosecution may not reduce or waive victim's right to restitution as term of plea bargain]; *People v. Preciado* (1978) 78 Cal.App.3d 144, 147-149 [prosecutor could not promise that a specific judge who did not take the plea would nevertheless impose the sentence].)

Certificate of probable cause

A certificate of probable cause is not required to raise violation of the plea bargain as an issue on appeal. Such an issue is not considered an attack on the plea, even though the remedy may be an opportunity to withdraw the plea. (See *People v. Johnson* (2009) 47 Cal.4th 668, 679, fn. 5; *In re Harrell* (1970) 2 Cal.3d 675, 706; *People v. Delles* (1968) 69 Cal.2d 906, 909-910; *People v. Brown* (2007) 147 Cal.App.4th 1213.)

Prejudice

Violation of a plea bargain is not subject to harmless error analysis because it is assumed that any violation of the bargain resulted in detriment to the defendant. (*People v. Walker* (1991) 54 Cal.3d 1013, 1026, disapproved of on another ground, *People v. Villalobos* (2012) 54 Cal.4th 177, 183; *People v. Mancheno, supra*, 32 Cal.3d at p. 865; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 858.) However, only a punishment "significantly greater than that bargained for" violates the plea bargain. (*Walker*, at p. 1027.) If the deviation from the bargain is de minimis, withdrawal of the plea may be inappropriate. (*Id.* at p.1024.)

2.3.4 Exception to waiver: Fourth Amendment suppression issues

Statutory authorization to appeal

Appellate review of a Fourth Amendment search and seizure suppression issue after a guilty plea is expressly authorized by Penal Code section 1538.5, subdivision (m), which provides in part:

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A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty.

Policy basis

The policy behind this provision is one of judicial economy. Exclusion of illegally obtained evidence does not go to underlying factual guilt or innocence, but rather to the People's ability to prove it. If the only contested issue is the suppression motion and the defendant is willing to admit factual guilt, it would be a waste of resources to require a full trial as a prerequisite to reviewing the suppression motion on appeal.

Type of issues preserved

Section 1538.5, subdivision (m) applies only to Fourth Amendment issues. It does not authorize appeals after a guilty plea on efforts to suppress evidence on other grounds, such as violation of the privilege against self-incrimination under the Fifth Amendment. Such issues are waived as a matter of law with the entry of a guilty plea, as are most other evidentiary issues (see § 2.7.6 Appendix to Part Two: Common issues waived by guilty plea). (*People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 733-734, disapproved on another ground in *People v. Crittenden* (1994) 9 Cal.4th 83, 129-130; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 958-959; *People v. Brown* (1981) 119 Cal.App.3d 116, 124.)

However, an extrajudicial statement of the defendant obtained by exploiting the fruits of an illegal search or seizure is inadmissible under the Fourth Amendment (e.g., *United States v. Crews* (1980) 445 U.S. 463, 470, fn. 14 and accompanying text) and thus would be reviewable.

A motion to unseal an affidavit used to obtain a search warrant, if made as part of a suppression motion, is appealable under Penal Code section 1538.5, subdivision (m). (*People v. Hobbs* (1994) 7 Cal.4th 948, 957; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1285.)[113]

[113]One cautionary note: in reaching their conclusions both *Hobbs* and *Seibel* noted that the People had not objected below to the propriety of using a Penal Code section 1538.5 motion as a vehicle for raising a discovery issue.

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2.3.5 Need to make or renew motion after information filed

Section 1538.5, subdivision (m) prescribes procedural requisites for raising and preserving a suppression issue:

> The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for . . . the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the suppression of evidence.

"Proceedings" As Used In Section 1538.5, Subdivision (m)

The last sentence has been interpreted to mean that the motion must be made during the proceedings in which judgment was imposed. If an information is filed, a new "proceeding" commences, and a suppression motion made and denied during the preliminary hearing must be renewed after the filing of the information, or the issue will not be appealable. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897.)

Lilienthal was decided when municipal and superior courts were separate. Even under "unified superior courts," where municipal courts no longer exist, the *Lilienthal* rationale applies: the motion must be made in the proceeding where judgment is rendered. A judge of the unified court sits as a magistrate in a preliminary hearing, and once an information is filed, the trial judge assumes jurisdiction. (*People v. Garrido* (2005) 127 Cal.App.4th 359, 364; *People v. Hoffman* (2001) 88 Cal.App.4th 1, 3; *People v. Hart* (1999) 74 Cal.App.4th 479, 485-486; see Cal. Const., art. VI, § 23, subd. (c)(7); see also *People v. Hinds* (2003) 108 Cal.App.4th 897, 900.)

If a plea is entered under Penal Code section 859a before a judge sitting as a magistrate and then the case is certified to the superior court for judgment, either formally or implicitly, the motion to suppress cannot be renewed, and

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(*People v. Hobbs, supra*, 7 Cal.4th at p. 957; *People v. Seibel*, *supra*, 219 Cal.App.3d at p. 1285.)

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appellate review of the search and seizure decision is foreclosed. (*People v. Richardson* (2007) 156 Cal.App.4th 574, 591.)

Method of renewing

A motion to suppress made during the preliminary hearing is renewable by means of a Penal Code section 1538.5 motion. It may also be renewed by means of a section 995 motion to dismiss,[114] arguing the unlawfulness of holding the defendant to answer based on evidence seized in violation of the Fourth Amendment. (See Pen. Code, § 1538.5, subd. (m); see also *People v. Lilienthal, supra,* 22 Cal.3d at p. 896; cf. *People v. Richardson* (2007) 156 Cal.App.4th 574 [no renewal of motion possible if certified plea procedure of Pen. Code, § 859a is used].)

When a magistrate grants a defendant's motion to suppress evidence, but a superior court judge reinstates the complaint under Penal Code section 871.5, a defendant need not make another suppression motion before the superior court to challenge the validity of the search on appeal. (*People v. Gutierrez* (2004) 124 Cal.App.4th 1481, 1483 ["Once the door has been shut on defendant, he is not required to knock again. He need not perform a useless act"].)

2.3.6 Exception to waiver: issues going to the validity of the plea

Once a defendant has entered a plea of guilty with the approval of the court, the plea agreement is one to which all parties are bound, and the defendant is deemed to have waived the former absolute right to a trial and its concomitant procedural protections. The plea may be withdrawn only in the discretion of the trial court on a showing of good cause (Pen. Code, § 1018) or attacked on appeal (after issuance of a certificate of probable cause) on constitutional, jurisdictional, or other grounds going to the legality of the proceedings (Pen. Code, § 1237.5). Simple "buyer's remorse" – wanting to go to trial after all or to renegotiate the terms of the bargain – does not create an automatic entitlement to withdraw the plea. (*In re Brown* (1973) 9 Cal.3d 679, 686, disapproved on another ground by *People v. Mendez* (1999) 19 Cal.4th 1084, 1098; *People v. Knight* (1987) 194 Cal.App.3d 337, 344; *People v. Hunt* (1985) 174 Cal.App.3d 95, 103 [defendant's reluctance in accepting plea bargain is not the same as an involuntary plea].)

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[114]If a motion under section 1538.5 has been made and denied, a defendant may still re-raise the issue in a motion to set aside the information under section 995. (*People v. Kidd* (2019) 36 Cal.App.5th 12, 17.)

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Strategic considerations and procedural restrictions come into play when attacking a guilty plea on appeal, as will be discussed in the following sections.

Despite these constraints, several bases for attacking the validity of the plea might be asserted on appeal.[115] Discussed below is the cognizability of such issues as:

- *the entry of the plea* – e.g., whether the defendant was denied the right to effective representation by counsel, or to self-representation in making the plea; whether the trial court gave incomplete or incorrect advice about the plea, the rights given up by it, and its consequences; and whether the defendant was incompetent or acting under duress when entering the plea;

- *the validity of the proceedings as a whole* – e.g., lack of jurisdiction, prior proceedings or adjudications involving the same or related offenses that might act as a bar to the current litigation, flaws in the initiation of the proceedings, and the expiration of the statute of limitations; and

- *the substance of the plea* – e.g., unauthorized or unconstitutional sentences, pleas to non-existent crimes, and terms of the bargain in violation of public policy.

Preliminary caveat for counsel: Need to warn client about consequences of challenging the plea

As noted in § Advisability of appealing, *ante*, a successful challenge to the plea erases, not only the unwanted burdens of the plea bargain, but also any benefit the client received as part of it. Dismissed charges can be reinstated; higher sentences can be imposed. (See *People v. Collins* (1978) 21 Cal.3d 208, 214-215; see § 4.6.3 Sentence after withdrawal of guilty plea as exception to Henderson rule.) It is therefore crucial the client be fully advised what charges and sentences they might be facing upon withdrawal of the plea. Commonly clients do not at first understand the potential drawbacks when they urge

[115]On occasion the People may attack the validity of the plea. (E.g., *People v. Clancey* (2013) 56 Cal.4th 562.)

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attacking the plea; after they learn what might happen, they may decide not to attack the plea.

Appellate counsel can help the client evaluate the risks and benefits of withdrawing the plea. Sometimes the client received little if any benefit from the bargain, while at other times exposure to exceedingly heavy sentences was averted. Consultation with trial counsel is often critical, to give insight into why the plea was negotiated as it was and to assess the likelihood of a better or more severe outcome upon withdrawal of the plea.

As with any decision involving potential adverse consequences, if the client elects to attack the guilty plea, it is advisable to obtain written permission before proceeding. An advisory letter to the client, with a statement to be returned to the attorney acknowledging the potential adverse consequences and explicitly accepting the risks, protects both the client (by spelling out the risks and underscoring the seriousness of the decision) and the attorney.

2.3.7 Procedural standards and requirements in attacking plea

Adequate appellate record

To attack the plea on appeal, the facts establishing the illegality of the plea must be shown on the face of the appellate record. Those facts may be in the transcript of proceedings at the time the plea is taken, as when the defendant is given erroneous or incomplete advice that would preclude a knowing and intelligent waiver of rights. They may also be established at a hearing on a motion to withdraw the plea under Penal Code section 1018.

If the illegality is not on the face of the appellate record, a petition for writ of habeas corpus, *coram nobis*, or *coram vobis* (either independent of or collateral to the appeal) will usually be the appropriate vehicle for attacking the plea. (See § 2.4.4 Other post-judgment rulings et seq., *post*, and § 8.1.1 Uses of habeas corpus often encountered in criminal and juvenile appellate practice et seq. and § 8.5.1 Writs of error coram nobis and error coram vobis et seq.; Appeals and Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2005) §§ 2.172(A)-2.237, pp. 515-582.)

Motion to withdraw plea

Often an attack on the validity of the plea on appeal will require that a motion to withdraw the plea has been made in the trial court, since otherwise the necessary facts will not be in the appellate record. Abuse of discretion in denying

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a motion to withdraw a guilty plea is reviewable on appeal. (*People v. Francis* (1954) 42 Cal.2d 335, 338; *People v. Griggs* (1941) 17 Cal.2d 621, 624.)

A motion to withdraw a plea is made under Penal Code section 1018, which provides in part:

> On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may . . . , for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. This section shall be liberally construed to effect these objects and to promote justice.

In a motion to withdraw a plea, the defendant carries the burden of proof and must show by clear and convincing evidence there is good cause to withdraw the plea. (*People v. Wharton* (1991) 53 Cal.3d 522, 585; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456, citing *People v. Cruz* (1974) 12 Cal.3d 562, 566.) Good cause exists when the defendant was operating under mistake, ignorance, or inadvertence, when the exercise of free judgment was overcome, or when other factors acted to deprive the defendant unlawfully of the right to a trial on the merits. (*Nance,* at p. 1456, citing *Cruz,* at p. 566, and *People v. Barteau* (1970) 10 Cal.App.3d 483, 486; *People v. Goodrum* (1991) 228 Cal.App.3d 397, 400-401.) Various grounds are explored in this section, including issues involving the entry of the plea, the validity of the proceedings, and the terms of the plea bargain.

A ruling on a motion to withdraw a guilty plea will not be disturbed on appeal unless the trial court abused its discretion. (*People v. Nance* (1991) 1 Cal.App.4th at p. 1456, citing *In re Brown* (1973) 9 Cal.3d 679, 685, disapproved on another ground by *People v. Mendez* (1999) 19 Cal.4th 1084, 1098; *People v. Knight* (1987) 194 Cal.App.3d 337, 344.) The presumption of innocence and reasonable doubt standards do not apply to motions to withdraw a plea because the defendant has already admitted guilt. (E.g., *People v. Perry* (1963) 220 Cal.App.2d 841, 844.)

Certain specialized forms of a motion to withdraw a plea are provided by statute. One example is Penal Code section 1016.5, which requires pre-plea advice of immigration consequences and allows the defendant to move to vacate the judgment if the trial court failed to do so. (See *People v. Patterson* (2017) 2 Cal.5th 885, 895-896 [receipt of advisement under § 1016.5 does not bar noncitizen defendant from seeking to withdraw guilty plea for good cause on ground defendant was ignorant guilty plea would render him deportable]; *People v. Totari* (2002) 28 Cal.4th 876, 879, 887 [denial of § 1016.5 motion is appealable

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order].) Another example is Penal Code section 1473.6, which allows a person no longer in physical or constructive custody to challenge the judgment, if there is newly discovered evidence of fraud or perjury or misconduct by a government official. (See *People v. Germany* (2005) 133 Cal.App.4th 784, 787, fn. 2 [order denying such a challenge is appealable].) Still another is section 1473.7, which allows a person no longer imprisoned or restrained to move to vacate a conviction or sentence because of (a) error prejudicing the defendant's understanding of immigration consequences of the plea, (b) newly discovered evidence of actual innocence. (*People v. Rodriguez* (2021) 68 Cal.App.5th 301, 307, fn. 5 [recognizing that denial of petition is an appealable post-judgment order]), or (c) a violation of the Racial Justice Act.

Certificate of probable cause

Arguing the denial of a motion to withdraw a plea on the merits, ineffective assistance of counsel in a hearing on the motion or otherwise attacking the validity of the plea on appeal requires the defendant to obtain a certificate of probable cause. (*People v. Johnson* (2009) 47 Cal.4th 668.) Penal Code section 1237.5 provides:

> No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

Certificates of probable cause are discussed in more detail in § Notice of appeal and certificate of probable cause after guilty plea et seq. *post*.

Validity issues concerning the entry of the plea

The validity of a plea may be attacked on appeal on the grounds that the circumstances of its entry violated the defendant's rights.

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Violation of right to effective assistance of counsel

The defendant has the right to effective representation in negotiating and entering a plea. The validity of the plea may be affected if counsel did not give accurate and material advice on the potential consequences of either going to trial or pleading guilty. (*Lafler v. Cooper* (2012) 566 U.S. 156 [because of counsel's defective advice, defendant rejected plea bargain, went to trial, and received harsher sentence; remedy is to order state to reoffer plea agreement]; *Missouri v. Frye* (2012) 566 U.S. 134 [ineffectiveness shown when counsel failed to communicate plea offer and it lapsed; defendant pled guilty on more severe terms; defendant must show reasonable probability that he would have accepted lapsed offer, that prosecution would have adhered to agreement, and that trial court would have accepted it]; *Padilla v. Kentucky* (2010) 559 U.S. 356 [trial counsel has an affirmative obligation to understand and explain immigration consequences of any guilty plea]; *In re Resendiz* (2001) 25 Cal.4th 230, 240 [trial counsel's inaccurate advice regarding immigration consequences could, depending on the circumstances, constitute ineffective assistance of counsel]; *In re Alvernaz* (1992) 2 Cal.4th 924, 928 [failing to advise defendant fully of risks at trial, causing defendant to reject plea bargain that would have been approved by trial court];[116] *People v. Huynh* (1991) 229 Cal.App.3d 1067,1083-1084 [inaccurate advice about parole eligibility date].)

Other examples of infringement on the right to effective assistance of counsel in entering a guilty plea include trial court interference with a defendant's right to hire an attorney of their own choice,[117] undue influence on a defendant to accept a plea bargain because counsel obviously is not prepared to proceed to trial,[118] and counsel's failure to determine that an enhancement the prosecutor was offering to dismiss as part of the bargain was in fact invalid.[119] (See also cases listed in *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 542.)

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[116]The California Supreme Court denied relief on the basis that *Alvernaz* had not demonstrated that he would have accepted the offer. (*In re Alvernaz, supra*, 2 Cal.4th at p. 945.) In a subsequent federal habeas corpus *Alvernaz* prevailed. (*Alvernaz v. Ratelle* (S.D. Cal. 1993) 831 F.Supp. 790.)

[117]*People v. Holland* (1978) 23 Cal.3d 77, 89, disapproved on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1098.

[118]*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142.

[119]*People v. McCary* (1985) 166 Cal.App.3d 1, 8-12.

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Ineffective assistance of counsel affecting the entry of the plea must be raised on habeas corpus if the necessary facts are not in the record. (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

Inadequate advice on constitutional and other rights

Before accepting the plea, the trial court has a federal constitutional duty to advise the defendant of the constitutional rights to a jury and confrontation of witnesses and the privilege against self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242-243; *In re Tahl* (1969) 1 Cal.3d 122, 130-131, disapproved on another ground in *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 305-306 [misdemeanor defendants may plead guilty through counsel with an adequately documented showing they knowingly and intelligently waived constitutional rights]; see *People v. Howard* (1992) 1 Cal.4th 1132, 1178 [whether failure to advise invalidates plea to be determined under totality of circumstances].) A waiver of constitutional rights not knowingly, intelligently, properly, or competently made may be appealed. (*People v. Ribero* (1971) 4 Cal.3d 55, 63, citing to *People v. Navarro* (1966) 243 Cal.App.2d 755, 758.)

A defendant also must be told of specific constitutional protections waived by an admission of the truth of an allegation of prior felony convictions and of those penalties and other sanctions imposed as a consequence of a true finding on the allegation. (*People v. Cross* (2015) 61 Cal.4th 164; *In re Yurko* (1974) 10 Cal.3d 857.)

Inadequate advice on consequences of plea

The court must also advise the defendant of the direct consequences of the plea, and failure to do so may invalidate the plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1354-1355 [defendant must be advised of direct rather than collateral consequences; collateral consequence is one that does not "inexorably follow" from conviction].)

A number of direct consequences are enumerated in *In re Resendiz* (2001) 25 Cal.4th 230, 243, fn. 7, overruled on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356.[120] They include the range of punishment (see *Bunnell v.*

[120] *Padilla* held that, as a matter of federal law, counsel has an affirmative obligation to advise the defendant when an offense to which defendant pleads guilty would result in removal from the country. *Resendiz* had limited its holding on ineffective assistance of counsel to actual misadvice.

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Superior Court (1975) 13 Cal.3d 592, 605), a mandatory parole term (see *In re Moser* (1993) 6 Cal.4th 342, 351-352), registration requirements for sex offenders (see *People v. McClellan* (1993) 6 Cal.4th 367, 376), and alternative dispositions such as commitment to the California Rehabilitation Center (*Bunnell,* at p. 605).

The court has no duty to advise the defendant of indirect or collateral consequences of the plea. These include limitations on parole eligibility factors or good time or work time credits (*People v. Barella* (1999) 20 Cal.4th 261, 271-272), the possibility the conviction could be used in the future to enhance punishment (*In re Resendiz* (2001) 25 Cal.4th 230, 243, fn. 7; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457), and the possibility that a conviction can serve to revoke an existing probationary grant (*Resendiz*, at p. 243, fn. 7; *People v. Martinez* (1975) 46 Cal.App.3d 736, 745).

Penal Code section 1016.5 requires that, before accepting a plea of guilty or nolo contendere, the trial court must advise a defendant who is not a United States citizen of immigration consequences. The statute allows the defendant to move to vacate the judgment if the trial court failed to do so. In *People v. Totari* (2002) 28 Cal.4th 876, 879, the Supreme Court held the denial of a motion to vacate a plea 13 years after judgment was imposed is an appealable order. (See also *People v. Zamudio* (2000) 23 Cal.4th 183, 203-204.) A trial court's failure to advise a defendant of the adverse immigration consequences of a plea is prejudicial if it is reasonably probable the defendant would not have pled guilty if properly advised; relief does not require proof defendant would have obtained a more favorable outcome at trial. (*People v. Martinez* (2013) 57 Cal.4th 555, 559.)

Erroneous advice on appealability of issue

Sometimes a court may tell the defendant a given issue can be appealed after a guilty plea and even that the court will issue a certificate of probable cause for the issue, when by law the plea forecloses appeal. Obtaining a certificate of probable cause cannot make an issue that has been waived by a plea cognizable on appeal. (E.g., *People v. DeVaughn* (1977) 18 Cal.3d 889, 896 [*Miranda*[121] issue]; *People v. Padfield* (1982) 136 Cal.App.3d 218, 227, fn. 7 and accompanying text [statute of limitations, when accusatory pleading alleged statute had been tolled].)

In such cases, the defendant is entitled on request to withdraw the plea. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896 [trial court assured defendant

[121]*Miranda v. Arizona* (1966) 384 U.S. 436.

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Miranda issue could be raised]; *People v. Coleman* (1977) 72 Cal.App.3d 287, 292-293 [motion to disclose informant's identity]; *People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575 [Pen. Code, § 995 order]; *People v. Benweed* (1985) 173 Cal.App.3d 828, 833 [*Hitch*[122] motion]; *People v. Geitner* (1982) 139 Cal.App.3d 252, 255 [admissibility of defendant's extrajudicial statement].)

However, mere acquiescence by the court in the defendant's expressed intention to appeal does not necessarily imply the plea was conditioned on such a promise. (*People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1361.) If the defendant was given no assurance of appealability, there may be no entitlement to withdraw the plea. (*People v. Collins* (2004) 115 Cal.App.4th 137, 148-149; *People v. Krotter* (1984) 162 Cal.App.3d 643, 649; *People v. Shults* (1984) 151 Cal.App.3d 714, 720, fn. 2.)

Involuntariness of plea or incompetence of defendant

Several issues concerning the defendant's mental state at the time of entering the plea may be raised in attacking the validity of the plea. Such issues might include coercion, incompetence within the meaning of Penal Code section 1368, or the defendant's being under the influence of drugs or otherwise mentally disabled.

If the defendant entered the plea because of undue influence, duress, or fraud, the plea may be set aside. (E.g., *In re Vargas* (2000) 83 Cal.App.4th 1125, 1141-1143 [claim that counsel was unprepared and coerced defendant into accepting plea].) Undue influence or duress is not established simply because the defendant has changed their mind (*In re Brown* (1973) 9 Cal.3d 679, 686, disapproved on another ground by *People v. Mendez* (1999) 19 Cal.4th 1084, 1098; *People v. Knight* (1987) 194 Cal.App.3d 337, 344) or because the defendant reluctantly accepted the plea and later decided to withdraw it (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103). The claim the defendant's family pressured them into taking the plea is insufficient to constitute duress. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) False expectations of lenient treatment, even when based on counsel's advice, are also insufficient. (*Mendieta v. Municipal Court* (1980) 109 Cal.App.3d 290, 294.) Under certain circumstances, a "package-deal" plea bargain can be considered coercive, and so the trial court must scrutinize such a plea carefully. (*In re Ibarra* (1983) 34 Cal.3d 277, 283-284, 287.)

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[122]*People v. Hitch* (1974) 12 Cal.3d 641[sanctions for destruction of evidence].

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The defendant's mental competence at the time of the plea also may be raised on appeal if a certificate of probable cause has been granted. (*People v. Laudermilk* (1967) 67 Cal.2d 272, 282; see *People v. Panizzon* (1996) 13 Cal.4th 68, 76; see, e.g., *People v. Jackson* (2019) 22 Cal.App.5th 374, 393-394 [reversing judgment where substantial evidence did not support finding that defendant was competent to plead guilty].) If there is substantial evidence raising a doubt of the defendant's competence, accepting a guilty plea or entering judgment without having conducted a hearing on present competence is fundamental error. (*Laudermilk*, at p. 282; cf. *In re Downs* (1970) 3 Cal.3d 694, 700-701 [doctor testified defendant was given a number of medications, but they did not impair his ability to understand consequences of his actions].) However, substantial evidence means more than mere bizarre statements or actions, statements of defense counsel that defendant is not cooperating with the defense, or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal with little reference to the defendant's ability to assist in the defense. (*Laudermilk,* at p. 285.)

Validity issues concerning the proceedings as a whole

Although a plea of guilty waives most errors occurring before its entry, those affecting the jurisdiction, constitutionality, or legality of the proceedings may be preserved. (*People v. Kanawha* (1977) 19 Cal.3d 1, 9; *People v. Robinson* (1997) 56 Cal.App.4th 363, 369-370; *People v. Turner* (1985) 171 Cal.App.3d 116, 127-128.)

The fact the issue is cognizable on appeal does not obviate the need to observe the usual procedural prerequisites for preserving issues, such as objecting in the trial court, entering a specific plea when required such as once in jeopardy (*People v. Belcher* (1974) 11 Cal.3d 91, 96), or obtaining a certificate of probable cause (*People v. Jerome* (1984) 160 Cal.App.3d 1087, 1094-1095).

Jurisdictional defects

Fundamental jurisdictional defects are not waived by the plea. Such defects render the proceedings void and can be corrected at any time. Examples of such defects include:

- Statute of limitations, where expiration is shown on the face of the accusatory pleading (*People v. Chadd* (1981) 28 Cal.3d 739, 756-758 (plur. opn. by Mosk, J.));

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- Conviction and sentence under non-existent law (*People v. Collins* (1978) 21 Cal.3d 208, 214 [repealed statute] and *People v. Bean* (1989) 213 Cal.App.3d 639, 645-646 [no statute covering conduct]; *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1704 [plea to penalty provision, not a substantive offense]; *People v. Soriano* (1992) 4 Cal.App.4th 781, 784-785, and *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1093 [pleading to offense that is "legal impossibility"]);

- Erroneous denial of right to self-representation (*People v. Robinson* (1997) 56 Cal.App.4th 363, 369-370; see *People v. Marlow* (2004) 34 Cal.4th 131, 146-147);

- Resentencing defendant after sentence had already been imposed (*People v. Scott* (1984) 150 Cal.App.3d 910, 915).

"Less fundamental" jurisdictional issues may be waived by a guilty plea. Some examples include:

- Unlawful sentence to which the parties have stipulated (*People v. Hester* (2000) 22 Cal.4th 290, 295);

- Expiration of statute of limitations when the issue is expressly waived in plea bargaining (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 372-373; cf. *People v. Chadd* (1981) 28 Cal.3d 739, 757 [issue not waived merely by failure to assert it before pleading guilty]);

- Violation of right to speedy trial, even when guilty plea is entered after erroneous denial of motion to dismiss on speedy trial grounds (*People v. Egbert* (1997) 59 Cal.App.4th 503, 511, fn. 3 and accompanying text);

- Improper venue or "territorial jurisdiction" within the state – e.g., denial of a change of venue or objection to territorial jurisdiction (*People v. Krotter* (1984) 162 Cal.App.3d 643, 648).

Prior proceedings involving the same offenses as bar to current litigation

A guilty plea does not waive some issues alleging that the current proceedings could not lawfully have taken place in light of previous proceedings involving the same or closely related charges. These issues involve such legal

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doctrines as multiple prosecutions (Pen. Code, § 654), collateral estoppel, res judicata, and double jeopardy. (See also *People v. Castillo* (2010) 49 Cal.4th 145 [judicial estoppel precludes court from sentencing SVP committee to indeterminate term after People stipulated to two-year term]; § Law of the case.)

Penal Code section 654, subdivision (a) provides that, if an act is punishable under more than one statute, "an acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." It requires a single prosecution for offenses based on the same conduct. (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 824; see also *People v. Lohbauer* (1981) 29 Cal.3d 364, 373.) Because the issue goes, not to guilt or innocence, but to the right of the state to try the defendant for the offenses, it concerns the legality of the proceedings and is appealable with a certificate of probable cause if properly raised in the trial court. (*People v. Turner* (1985) 171 Cal.App.3d 116, 123, 127-128.)

The same reasoning applies to claims of res judicata and collateral estoppel, a doctrine precluding, under specified circumstances, re-litigation of claims already resolved in another proceeding involving the party against whom the doctrine is being asserted.[123] The doctrine does not involve guilt or innocence but rather seeks to avoid repetitive litigation, conserve judicial resources, and prevent inconsistent decisions, and in fact may be asserted by a guilty party. Thus, the issue is not waived by a guilty plea but is appealable within the meaning of Penal Code section 1237.5. (*People v. Meyer* (1986) 183 Cal.App.3d 1150, 1158-1159.)

A claim of double jeopardy based on a prior conviction or acquittal of the same offense also can be raised after a guilty plea, because it challenges the right of the state to bring the proceeding at all. (*Menna v. New York* (1975) 423 U.S.

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[123]The doctrine of res judicata gives conclusive effect to a former judgment in later litigation involving the same cause of action – an effect known as claim preclusion. A corollary to the doctrine is collateral estoppel, which applies to later litigation based on a different cause of action and gives conclusive effect to the prior resolution of issues litigated in that case. The prerequisite elements for both are: (1) the claim or issue raised in the present action is identical to one litigated in a prior proceeding, (2) the prior proceeding resulted in a final judgment on the merits, and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 253; *People v. Meyer* (1986) 183 Cal.App.3d 1150, 1158-1159, 1164-1165.)

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61, 62; see also *Blackledge v. Perry* (1974) 417 U.S. 21, 30; cf. *Jellum v. Cup*p (1973) 475 F.2d 829, 830, citing *Ex parte Siebold* (1879) 100 U.S. 371, 377 [a defendant convicted by plea "may still challenge the constitutionality of the statute under which he was sentenced"].) However, a double jeopardy claim based on a contention of improper multiple convictions challenges the nature of the underlying offense, which is admitted by a guilty plea, and is therefore waived. (*United States v. Broce* (1989) 488 U.S. 563, 575-576 [guilty plea waives double jeopardy-based claim that crime charged in indictment was only one, not multiple conspiracies].)

Flaws in the initiation of the proceedings

On appeal after a guilty plea the defendant may argue certain improprieties in the initiation of the case if proper objection was made and a certificate of probable cause has been granted. For example, *People v. Cella* (1981) 114 Cal.App.3d 905, 912, 916, footnote 6, held cognizable on appeal after a guilty plea an issue involving dismissal of the indictment because of a violation of the Interstate (or Interjurisdictional) Agreement on Detainers (Pen. Code, § 1389, art. IV, subd. (e)). The court noted that because such a violation vitiates the indictment and the prosecution is precluded from proceeding further, the plea does not waive the contention on appeal. (*Cella*, at p. 915, fn. 5; see also *People v. Reyes* (1979) 98 Cal.App.3d 524, 530-532.) Similarly, the denial of a motion for dismissal under Penal Code section 1381, which allows a California prisoner to demand a speedy trial of other pending California charges,[124] survives a guilty or no contest plea. (*People v. Gutierrez* (1994) 30 Cal.App.4th 105, 108.)

In contrast, the typical constitutionally based speedy trial claim is waived by a guilty plea because it is based on the premise the passage of time has frustrated the defendant's ability to defend, and such an issue is removed by a plea of guilty. (*People v. Gutierrez* (1994) 30 Cal.App.4th 105, 108.) In *People v. Black* (2004) 116 Cal.App.4th 103, 111-112**,** when a federal district court's earlier habeas corpus order gave the state 60 days to retry the defendant, the state court held the defendant's no contest plea at the retrial precluded an argument that the retrial had begun beyond the deadline.

An eligible defendant can assert the right to pretrial diversion after a guilty plea. (*People v. Padfield* (1982) 136 Cal.App.3d 218, 228; see Pen. Code, § 1001 et

[124]See also Penal Code section 1389 [analogous provision for out-of-state prisoners].

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seq.) But contrast *People v. Braden* (2023) 14 Cal.5h 791, which held that a mental health diversion motion must be made before jeopardy attached, i.e., before jury trial begins or a guilty plea is entered.

Statute of limitations

If the expiration of the statute of limitations is shown as a matter of law on the face of the pleading, the issue can be raised on appeal after a guilty plea.[125] (*People v. Chadd* (1981) 28 Cal.3d 739, 757.) However, when the pleading alleges tolling or seeks to invoke the "discovery" rule for starting the limitation period,[126] the question is an evidentiary one waived by the plea. (*People v. Padfield* (1982) 136 Cal.App.3d 218, 226.)

Validity issues concerning the substance of the plea

Although for the most part issues attacking the substance of the plea are non-cognizable on appeal because waived by the plea, at least some issues challenging plea terms as unconstitutional, illegal, void, or contrary to public policy may be preserved.

Bargained-for sentences and convictions unauthorized by law or unconstitutional

Unconstitutional terms of plea bargains such as banishment from the country or state may invalidate a plea. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 393.)

However, the general principle that unlawful sentences are beyond a court's power and can be corrected at any time is usually not applied when the sentence was agreed to as part of a guilty plea bargain. The rationale behind this

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[125]A certificate of probable cause is required. (*People v. Smith* (1985) 171 Cal.App.3d 997, 1000-1001.)

[126]Under the discovery rule, the limitation period for specified offenses begins when the offense is discovered. (E.g., Pen. Code, §§ 801.5, 803, subds. (c) & (e), 803.5.) To plead this rule, the information should allege facts showing when, how, and by whom the offense was first discovered; lack of knowledge before then; and the reason why it was not discovered earlier. (*People v. Zamora* (1976) 18 Cal.3d 538, 564-565, fn. 26*; People v. Lopez* (1997) 52 Cal.App.4th 233, 245.)

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policy is that defendants who have received the benefit of their bargain have waived any right to complain about it. As the Supreme Court has put it, defendants should not be allowed to "trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295; see also *People v. Chatmon* (2005) 129 Cal.App.4th 771, 773; cf. *People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1016-1017 [defendant may challenge enhancement of which he was never notified or charged and to which he did not admit or plead].)

The principle behind *Hester* arguably might not extend to sentences that are so defective as to be unconstitutional. Appellate courts have refused to consider cruel and unusual punishment arguments directed at sentences to which the defendant expressly or implicitly agreed in pleading guilty if the defendant (a) failed to obtain a certificate of probable cause (*People v. Panizzon* (1996) 13 Cal.4th 68, 89; *People v. Cole* (2001) 88 Cal.App.4th 850, 867-869; *People v. Young* (2000) 77 Cal.App.4th 827, 832,[127] or (b) explicitly waived the right to appeal (*Panizzon*, at p. 89; *People v. Foster* (2002) 101 Cal.App.4th 247, 250-252), or (c) raised an argument dependent on facts that were not developed because of the guilty plea (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1634-1638, *People v. Hunt* (1985) 174 Cal.App.3d 95, 107-110; *People v. Sabados* (1984) 160 Cal.App.3d 691, 694-696). However, it is not wholly clear whether a cruel and unusual punishment argument could be considered if the defendant does have a certificate of probable cause, has not waived an appeal, and raises an argument not specific to the facts of the case.

Bargain attempting to confer fundamental jurisdiction

A plea bargain cannot confer fundamental jurisdiction on the court, and a term of the bargain purporting to do so can be attacked on appeal. In *People v. Scott* (1984) 150 Cal.App.3d 910, 915, the trial court acted in excess of its jurisdiction in attempting to resentence the defendant after sentence had already been imposed; although the defendant had agreed to this possibility as part of the plea bargain, the issue was appealable.

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[127]*Young* was cited with approval in *People v. Shelton*, *supra*, 37 Cal.4th at p. 771, on the certificate requirement. In *People v. Buttram*, *supra*, 30 Cal.4th at pp. 789-790, the Supreme Court expressly declined to decide whether a certificate of probable cause would be necessary to attack a stipulated maximum sentence on the grounds that it was unconstitutional as cruel and unusual.

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Terms of bargain contrary to public policy

General contract law principles, including principles of public policy, apply when interpreting the terms of a plea bargain. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 344; *People v. Haney* (1989) 207 Cal.App.3d 1034, 1037; *People v. Alvarez* (1982) 127 Cal.App.3d 629, 633.) When the object of a contract is against public policy, courts will not compel performance. (*Moran v. Harris* (1982) 131 Cal.App.3d 913, 918.) The same principle applies in the criminal plea bargain context. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 392 [term of bargain requiring to leave state before sentencing is void as violation of public policy]; see *People v. Nelson* (1987) 194 Cal.App.3d 77, 79 [implicitly suggesting "public policy or statutory or decisional or constitutional principle[s]" might preclude enforcement of a bargain]; cf. cases in § Bargained-for sentences and convictions unauthorized by law or unconstitutional, *ante*, on unauthorized or unconstitutional sentences and convictions.)

For example, specific enforcement of a negotiated provision that the offense falls outside the Mentally Disordered Offender law (Pen. Code, § 2960) would violate public policy because it would undermine the MDO law and release a defendant who poses a potential danger to society. (*People v. Renfro* (2004) 125 Cal.App.4th 223, 228, 231, 233.)[128] Similarly, the duty to register as a sex offender under Penal Code section 290, subdivision (a), cannot be avoided through a plea bargain. (*People v. McClellan* (1993) 6 Cal.4th 367, 380; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871; *In re Stier* (2007) 152 Cal.App.4th 63, 77-79.) *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 392, invalidated a plea bargain requiring the defendant to leave the state, on the ground it was a violation of public policy to send California felons into other states, so as to "'make other states a dumping ground for our criminals.'" The term also violated public policy by requiring defendant to commit another felony – fleeing the jurisdiction to avoid sentencing. (*Id.* at p. 393.)

In contrast, *People v. Castillo* (2010) 49 Cal.4th 145, 158-159 held the doctrine of judicial estoppel precluded the court from sentencing a Sexually Violent Predator Act committee to an indeterminate term after the People had stipulated to a two-year term. (However, the committee would be subject to an

[128]The court did not foreclose the possibility that a habeas corpus writ seeking to withdraw the plea might be available. (*Renfro*, at p. 233.)

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indeterminate term at any recommitment hearing after the two-year term expired.)

Plea to a legally invalid count or non-existent crime

In general, a plea to an offense that does not exist or is legally impossible is void, and the invalidity of the plea can be raised on appeal. In *People v. Collins* (1978) 21 Cal.3d 208, for example, the defendant pleaded guilty to and was sentenced for a crime repealed by the Legislature after the plea but before final judgment; the court found the plea was invalid and therefore had to be withdrawn.[129] (*Id.* at p. 213.) Similarly, in *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1704, the defendant pleaded guilty to Penal Code section 422.7, which is a penalty provision and not an offense in and of itself; the court called the plea a "legal nullity" requiring reversal. (See also *People v. King* (2007) 151 Cal.App.4th 1304 [obligation to register as sexual offender premised solely on condition of probation for non-registrable offense]; *People v. Soriano* (1992) 4 Cal.App.4th 781, 784-785 [forged death certificate not legally an instrument under Pen. Code, § 115]; *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1093 [offense of oral copulation with minor under 14 years old is "legal impossibility" when victim was age 15].)

2.4 Appeal by the defendant from order after judgment

Penal Code section 1237, subdivision (b) provides that a defendant may appeal "[from any order made after judgment affecting the substantial rights of the party." Common appeals under this subdivision include an order revising or refusing to revise probation conditions, early termination of probation, a contested probation revocation, an order fixing restitution amounts, resentencing, and adjustment in the calculation of credits.

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[129]The *Collins* court also held (1) the previously dismissed charges must be allowed to be reinstated because the People would otherwise be denied the benefit of the bargain (*Collins*, at pp. 214-215), but (2) since the plea was invalid by operation of law and not by the defendant's repudiation of the bargain, the sentence could not exceed that bargained for (*id.* at pp. 216-217; see also *People v. Stamps* (2020) 9 Cal.5th 685, 707-708; cf. *Harris v. Superior Court* (2016) 1 Cal.5th 984.)

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People v. Loper (2015) 60 Cal.4th 1155 and *Teal v. Superior Court* (2014) 60 Cal.4th 595 articulated an expansive view of "any order made after judgment affecting the substantial rights of the party." (Pen. Code, § 1237, subd. (b).) *Loper* rejected the argument that the defendant must have standing to make the motion whose denial is being appealed. *Teal* rejected the argument that the right to appeal depends on the underlying merits of the motion or petition. These holdings remove obstacles to appeal often invoked in previous cases.

On the other hand, the trial court's refusal to reconsider a matter over which it no longer has jurisdiction is not appealable as an order after judgment affecting the defendant's substantial rights. (*People v. Turrin* (2009) 176 Cal.App.4th 1200 [dismissing appeal from order declining to modify restitution fine, made after defendant began execution of sentence; trial court had no jurisdiction to rule on merits of motion];[130] see also *People v. Pritchett* (1993) 20 Cal.App.4th 190, *People v. Chlad* (1992) 6 Cal.App.4th 1719, and *People v. Gainer* (1982) 133 Cal.App.3d 636 [court lacked jurisdiction to recall sentence under former Pen. Code, § 1170, subd. (d); denial of recall was not appealable], all distinguished in *People v. Loper* (2015) 60 Cal.4th 1155.)

2.4.1 Orders related to probation

An order granting probation is considered a "judgment" for purposes of appeal under Penal Code section 1237, subdivision (a), and orders made after the grant of probation are appealable under Penal Code section 1237, subdivision (b), as orders after judgment affecting the substantial rights of the defendant. (See also Pen. Code, § 1238, subd. (a)(5) [appeal by People from post-probation orders].)

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[130] *Turrin* states in dicta that an order affecting *victim restitution* (as opposed to a restitution fine) is appealable under Penal Code section 1202.42, subdivision (d), which can be read as granting jurisdiction to issue a "further order of the court" on this matter. (*People v. Turrin*, *supra*, 176 Cal.App.4th 1200, 1206; see also *People v. Denham* (2014) 222 Cal.App.4th 1210, 1213-1214 [court declined to treat notice of appeal from judgment as premature notice of later victim restitution order; order was separately appealable and required separate notice of appeal].)

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Terms and conditions of probation

An order denying the defendant's motion to modify the conditions of probation or imposing more severe conditions after revocation and reinstatement is appealable as an order after judgment. (*In re Bine* (1957) 47 Cal.2d 814, 817; *People v. Romero* (1991) 235 Cal.App.3d 1423, 1425-1426.)

Revocation

A decision to revoke probation is not itself an appealable order, but it may be reviewed on appeal from the disposition after revocation.[131] (*People v. Robinson* (1954) 43 Cal.2d 143, 145; *People v. Sem* (2014) 229 Cal.App.4th 1176, 1186.)

Review of matters occurring before probation grant

An appeal after judgment may not review matters, such as trial proceedings, which occurred before the original judgment. Those matters are appealable at the time of the grant (Pen. Code, § 1237, subd. (a)) and must be raised then, if they are to be reviewed at all. (*People v. Glaser* (1965) 238 Cal.App.2d 819, 821, citing to *People v. Howerton* (1953) 40 Cal.2d 217, 219, disapproved on other grounds by *People v. Barnum* (2003) 29 Cal.4th 1210, 1218–1219.)

Review of sentence

If probation was granted by suspending *imposition* of sentence, an appeal from the sentencing after revocation of probation can review the sentence. (*People v. Robinson* (1954) 43 Cal.2d 143, 145.)

However, if judgment initially was imposed and *execution* was suspended, an appeal from revocation of probation cannot reach the sentence because the trial court has no authority to order execution of a sentence other than the one previously imposed. (See Pen. Code, § 1203.2, subd. (c); *People v. Howard* (1997)

[131]If the defendant admits the probation violation, then under Penal Code section 1237.5 the decision to revoke probation cannot be appealed without the issuance of a certificate of probable cause.

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16 Cal.4th 1081, 1088.) Thus, the sentence must be appealed at the time of the original grant of probation if it is to be reviewed.

Orders after grant of probation affecting underlying conviction

An order refusing to permit withdrawal of the plea and dismissal of the charges under Penal Code section 1203.4 after the successful conclusion of probation is appealable as an order after judgment affecting the substantial rights of the defendant. (*People v. Romero* (1991) 235 Cal.App.3d 1423, 1425-1426.)

Analogously, the People may appeal reduction of a "wobbler" to a misdemeanor under Penal Code section 17, subdivision (b) as an "order after judgment." (Pen. Code, § 1238, subd. (a)(5); *People v. Douglas* (1999) 20 Cal.4th 85, 88.) Presumably a defendant may appeal the denial of such a reduction. (See *Douglas*, at p. 91.)

2.4.2 Resentencing

Although ordinarily a trial court loses jurisdiction after the judgment becomes final, in some circumstances it may resentence, or the terms of confinement may be altered. As a general rule, the new sentence is appealable. The right to appeal a refusal to resentence or grant other relief has a less certain footing, but the California Supreme Court has signaled that it views such rulings as appealable orders after judgment, affecting the defendant's substantial rights. (*People v. Loper* (2015) 60 Cal.4th 1155 [denial of compassionate release under Pen. Code, § 1170, subd. (e) is appealable; reviewing other areas where a statute or other law authorizes alteration of a previously imposed sentence; *Teal v. Superior Court* (2014) 60 Cal.4th 595 [defendant may appeal denial of resentencing under Pen. Code, § 1170.126 on ground the defendant was ineligible].)

Correction of unauthorized sentence

An order vacating an unauthorized sentence and imposing a new sentence can be appealed as an order after judgment or as imposition of a new judgment. A sentence is unauthorized if it could not lawfully be imposed under any circumstance in the particular case. Such a sentence is considered beyond the jurisdiction of the court and, unless waived by stipulation as part of a plea bargain (see § Negotiated sentence limitations, *ante*), can be corrected at any time if the court has jurisdiction or by way of habeas corpus. (*In re G.C.* (2020) 8 Cal.5th 1119, 1130 [unauthorized sentence does not become irremediable when

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judgment becomes final, even after affirmance on appeal, but court must have jurisdiction over the judgment]; see also *People v. Boyd* (2024) 103 Cal.App.5th 56; *People v. King* (2022) 77 Cal.App.5th 629.)

An unauthorized sentence may be detected after judgment by the prosecution, defense, probation department, Department of Corrections and Rehabilitation, the trial court, the appellate court, or in other ways. (See *People v. Purata* (1996) 42 Cal.App.4th 489, 498; *People v. Chagolla* (1983) 144 Cal.App.3d 422, 434.) Unauthorized sentences in the defendant's favor are discussed extensively in § 4.6.2 Unauthorized sentence as exception to Henderson rule, et seq.

Although juvenile proceedings do not result in "convictions" and juvenile confinements are not "sentences," the unauthorized sentence doctrine applies to juvenile dispositions. (See *People v. G.C.* (2020) 8 Cal.5th 1119, 1123, fn. 3 citing *In re Sheena K.* (2007) 40 Cal.4th 875].)

Sentence recall under Penal Code section 1172.1(a)(1)

A defendant has a right to appeal a resentencing under Penal Code section 1172.1, subdivision (a)(1) (formerly numbered 1170, subdivision (d)(1)), which provides that the trial court may recall the sentence and resentence the defendant, in the same manner as if judgment had never been imposed, within 120 days of judgment on its own motion or recommendation of the secretary, Board of Parole Hearings, county correctional administrator, the district attorney of the county in which the defendant was sentenced, or the Attorney General if the Department of Justice prosecuted the case. At the resentencing the trial court must follow all the procedures and rules attendant to sentencing. Under the full sentencing rule, and under the recall provisions of section 1172.1, a resentencing court "has jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall." (*People v. Buycks* (2018) 5 Cal.5th 857, 893, emphasis original; cf. *People v. Humphrey* (2020) 44 Cal.App.5th 371, 379-380 [clerical correction of abstract of judgment not the equivalent of recall of judgment].) If error occurs, the defendant may appeal from the new judgment. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442, 463.)

Section 1172.1 (a)(1) does not confer standing on a defendant to initiate a motion to recall a sentence. A defendant is not entitled to seek relief, and a court need not respond to the request. In this situation, a trial court's order declining to act on the petition is not an appealable order. Because a reviewing court lacks jurisdiction to consider the appeal, the appeal will be dismissed. (Pen. Code, § 1172.1, subd. (c); *People v. Faustinos* (2025) 109 Cal.App.5th 687, 692.)

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Resentencing under other laws

For the most part, resentencing under a statutory provision or refusal to resentence is appealable. *People v. Loper* (2015) 60 Cal.4th 1155, found denial of compassionate release under Penal Code section 1170, subdivision (e) to be appealable. *Teal v. Superior Court* (2014) 60 Cal.4th 595 found denial of resentencing under Penal Code section 1170.126 on eligibility grounds to be appealable. Both *Loper* and *Teal* surveyed decisions on resentencing and other post-judgment rulings and gave an expansive reading to the concept of "any order made after judgment affecting the substantial rights of the party." (E.g., *People v. Herrera* (1982) 127 Cal.App.3d 590 [recall to correct disparate sentence under Pen. Code, § 1170, subd. (f)], overruled on other grounds but approved on appealability holding in *People v. Martin* (1986) 42 Cal.3d 437, 446, 450]; see § 2.4.4 Other post-judgment rulings, *post*.)

Sentencing after remand

If the defendant previously appealed and the case was remanded for new proceedings, the imposition of a new judgment is appealable. The reviewability of particular issues depends on the scope of the remand. (*People v. Murphy* (2001) 88 Cal.App.4th 392, 394-397 [new appeal after remand to consider dismissing a strike and to address a cruel and unusual punishment contention cannot raise other sentencing issues]; *People v. Smyers* (1969) 2 Cal.App.3d 666, 667-668 [new appeal after remand for re-arraignment and sentencing cannot raise issues arising at first trial]; but see *People v. Hargis* (2019) 33 Cal.App.5th 199, 207-208 [recognizing that limited remand for *Franklin* hearing did not preclude trial court from applying ameliorative legislation enacted before judgment became final].)

2.4.3 Credits calculations and fines or fees

An issue as to the correct calculation of pre-sentence custody credits or the assessments of fines, fees, and related monetary matters may be raised on an appeal from the judgment or on an appeal from a post-judgment order concerning these matters. (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1557; *People v. Fares* (1993) 16 Cal.App.4th 954, 958.)

Reviewability of a credits or fines/fees issue on appeal is, however, subject to the procedural limitation that question must be presented on motion to the trial court if that is the sole ground for appeal. (Pen. Code, §§ 1237.1, 1237.2.)

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This limitation applies only when the credits or fines/fees issue is the *sole* issue on appeal and seeks to correct minor ministerial corrections, such as mathematical error, not legal error. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420; accord, *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270; cf. *People v. Mendez* (1999) 19 Cal.4th 1084, 1101 [distinguishing *Acosta* and declining to pass on its result or reasoning].) The requirement does not apply to juvenile cases. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.)

An informal letter to the trial court, service on the People, under section 1237.1 or 1237.2 is sufficient procedurally to get the relief by the express terms of those statutes.

2.4.4 Other post-judgment rulings

People v. Loper (2015) 60 Cal.4th 1155 and *Teal v. Superior Court* (2014) 60 Cal.4th 595 articulate an expansive view of "any order made after judgment affecting the substantial rights of the party." (Pen. Code, § 1237, subd. (b).) *Loper* rejects the argument that the defendant must have standing to make the motion whose denial is being appealed. *Teal* rejects the argument that the right to appeal depends on the underlying merits of the motion or petition. These holdings remove obstacles to appeal often invoked in previous cases.

A number of post-judgment rulings have been found appealable. Some of the most common are discussed in § Quasi-appeal From judgment et seq., *post*. In addition to those and sentence recalls discussed in §§ Sentence recall under Penal Code section 1172.1(a)(1) and Resentencing under other laws, *ante*, *People v. Loper* (2015) 60 Cal.4th 1155, in finding denial of compassionate release under Penal Code section 1170, subdivision (e) to be appealable, and *Teal v. Superior Court* (2014) 60 Cal.4th 595, finding denial of resentencing under Penal Code section 1170.126 on eligibility grounds to be appealable, surveyed a number of decisions on resentencing and other post-judgment rulings. (E.g., *People v. Connor* (2004) 115 Cal.App.4th 669, 682 [order granting newspaper's request to make contents of defendant's probation report public]; *People v. Sword* (1994) 29 Cal.App.4th 614, 618 fn. 2 [denial of outpatient status after confinement under a not guilty by reason of insanity finding]; *People v. Coleman* (1978) 86 Cal.App.3d 746, 750 [denial of application for release on ground of restored sanity].)

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Quasi-appeal from judgment

An appeal seeking review of a ruling after judgment that would bypass or duplicate an appeal from the judgment is not appealable, even though it is literally an order after judgment affecting the substantial rights of the defendant. For example, many motions to vacate or correct the judgment, petitions for writ of error *coram nobis*, habeas corpus petitions, are actually attacks on the judgment and raise issues that would have been cognizable on a timely appeal from the judgment. (See *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981, citing *People v. Thomas* (1959) 52 Cal.2d 521, 527.) In such a situation, as a matter of policy the courts generally decline to entertain the appeal from the order. (*Gallardo*, at pp. 980-981.)

However, in some limited situations an appeal from such an order will be considered, since the limitation is not a jurisdictional one. (*People v. Banks* (1959) 53 Cal.2d 370, 380.) Examples might be when the record on appeal would not have shown the error and when the judgment is void. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 981.)

Ruling on writ petition

Denial of a petition for writ of error *coram nobis* is generally appealable unless, as discussed in § Quasi-appeal from judgment, the underlying action was a quasi-appeal raising issues that would have been cognizable on a timely appeal from the judgment. (See *People v. Allenthorp* (1966) 64 Cal.2d 679, 683; *People v. Forest* (2017) 16 Cal.App.5th 1099, 1108; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 982 ; *People v. Goodrum* (1991) 228 Cal.App.3d 397, 401, fn.5; see also § Appeal of coram nobis denial.)

In similar circumstances, denial of a petition for a writ of mandate or prohibition in the superior court challenging an aspect of the judgment may be appealable as an order after judgment. (Pen. Code, § 1237, subd. (b); see also *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409-1410 [order granting or denying mandate constitutes final judgment under Code Civ. Proc., § 904.1, subd. (a)(1)].)

Because Penal Code section 1506 fails to enumerate denial of a petition for writ of habeas corpus among the appealable orders in those proceedings, it is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; see *People v. Gallardo*

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(2000) 77 Cal.App.4th 971, 986.[132]) The remedy is to file a new petition for writ of habeas corpus in the Court of Appeal. (See § Filing in Court of Appeal after superior court decision et seq.) In contrast, the *grant* of habeas corpus relief is appealable by the People under section 1506.

Other aspects of writs are discussed in detail in chapter 8, "Putting on the Writs: California Extraordinary Remedies."

Penal Code section 1016.5 motion

A post-judgment motion to vacate the judgment under Penal Code section 1016.5 because of inadequate advice by the court on immigration consequences is appealable under Penal Code section 1237, subdivision (b). (*People v. Totari* (2002) 28 Cal.4th 876, 879; see also *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 197-198; see *People v. Arriaga* (2014) 58 Cal.4th 950 [no certificate of probable cause is required to appeal the denial of a Pen. Code, § 1016.5 motion].)

Penal Code section 1473.6 or 1473.7 motion

A motion to vacate the judgment under Penal Code section 1473.6 (which allows a person no longer in physical or constructive custody to challenge the judgment, if there is newly discovered evidence of fraud or perjury or misconduct by a government official) is appealable. (*People v. Germany* (2005) 133 Cal.App.4th 784, 787, fn. 2; e.g., *People v. Wagner* (2016) 2 Cal.App.5th 774.)

The grant or denial of a motion to vacate the conviction or sentence under Penal Code section 1473.7 (which allows a person no longer imprisoned or restrained to move to vacate a conviction or sentence either because of (a) error prejudicing the defendant's understanding of immigration consequences of the plea, (b) newly discovered evidence of actual innocence), or (c) a violation of the Racial Justice Act is appealable as an order after judgment. (Pen. Code, §§ 1237, subd. (b); 1473.7, subd. (g); *People v. Singh* (2022) 81 Cal.App.5th 147, 153; *People v. Rodriguez* (2021) 68 Cal.App.5th 301, 307, fn.5.

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[132]One of the appellants in *Gallardo* sought post-judgment relief based on a claim counsel had misled him as to immigration consequences. The court concluded that claim was nonappealable because it raised only ineffective assistance of counsel, which requires habeas corpus, not *coram nobis*. (*Id.* at pp. 979-980, 987-989, and 988, fn. 9.)

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2.5 Appeal by minor after delinquency finding

Welfare and Institutions Code section 800, subdivision (a) provides for a broad right to appeal after disposition of a juvenile delinquency adjudication under section 601 or 602 of that code:

> A judgment in a proceeding under Section 601 or 602 may be appealed from, by the minor, in the same manner as any final judgment, and any subsequent order may be appealed from, by the minor, as from an order after judgment.

A judgment entered by a referee is appealable when rehearing proceedings under sections 252-254 are complete or the time for initiating them has passed. A ruling on a motion to suppress under section 700.1 is reviewable on appeal even if judgment is based on an admission to the allegations of the petition. (§ 800 (a); *Derrick J. v. Superior Court* (1983) 146 Cal.App.3d 748, 751.) Section 800 gives the appeal priority over all other proceedings in the Court of Appeal.

A parent's right to appeal from orders affecting the parent's own interests, such as a restitution order making the parent liable, is recognized by case law as based on Code of Civil Procedure section 904.1, subdivision (a)(1). A parent's right to appeal the general judgment against the minor is not wholly resolved.[133]

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[133]*In re Almalik S.* (1998) 68 Cal.App.4th 851, 854, held that the insertion of the words"by the minor" into subdivision (a) of section 800 in 1993 eliminated the previous right to appeal by a parent deprived of physical custody of the child by the judgment. (Cal. Rules of Court, former rule 1435(a).) The court acknowledged that the purpose of the amendment, as shown by its legislative history, was to provide for a People's appeal in a delinquency proceeding (*Almalik S.*, at p. 854, fn. 1), but did not consider the point that "by the minor" arguably was intended only to distinguish a minor's appeal from a People's appeal, not to eliminate a parent's existing right to appeal. *Almalik S.* also did not address the due process implications of permitting child custodial decisions affecting the parent's own rights to be made without a right of parental appeal. Courts have found a right of parents to appeal a money judgment holding them liable for the acts of their child. (*In re Michael S.* (2007) 147 Cal.App.4th 1443, and *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017, 1021 [upholding parent's standing to appeal money judgment against parent for delinquent acts of child].) *Michael S.* questioned the correctness of *Almalik S.* to the extent it suggests a

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2.5.1 Judgment

The *dispositional* order is the judgment. The jurisdictional order finding that the minor comes under Welfare and Institutions Code section 601 or 602 is not separately appealable but may be reviewed on appeal from the disposition. (*In re James J.* (1986) 187 Cal.App.3d 1339; *In re Melvin S.* (1976) 59 Cal.App.3d 898, 900.)

A ruling on a search and seizure suppression motion is reviewable on appeal after an admission. (Welf. & Inst. Code, §§ 700.1, 800, subd. (a), ¶ 2; see Pen. Code, § 1538.5, subd. (m) [analogous provision for criminal cases].)

A juvenile court can convert an unfulfilled restitution order to an appealable civil judgment when it terminates deferred entry of judgment probation. (*In re J.G.* (2019) 6 Cal.5th 867, 878.)

2.5.2 Pre-judgment orders

A finding by the juvenile court under Welfare and Institutions Code section 707 that a juvenile is or is not fit to be tried in juvenile court is appealable, subject to immediate review through an interlocutory appeal, upon timely filing of a notice of appeal within 30 days of the order. (§ 801, subd. (a).) Upon request of the minor, the superior court must stay the criminal court proceedings. (*Ibid.*)[134]

The minor cannot appeal a deferred entry of judgment by the juvenile court; review is by mandate. (*In re Mario C.* (2004) 124 Cal.App.4th 1303, 1308-1309; see *G.C. v. Superior Court* (2010) 183 Cal.App.4th 371, 374; *Terry v. Superior Court* (1999) 73 Cal.App.4th 661, 663.) Nor can a minor appeal from a restitution order imposed as a condition of a deferred entry of judgment. (*In re T.C.* (2012) 210 Cal.App.4th 1430, 1433.)

A minor also cannot appeal a program of informal supervision under Welfare and Institutions Code section 654.2, because the order by its nature takes

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parent has no right to appeal from a delinquency order that affects their own interests. (*Michael S.*, at pp. 1450-1451 and fn. 4.) Unpublished case law supports that position, as well. Thus, counsel should not allow *Almalik S.* to be a barrier to a parent's appeal from a juvenile adjudication.

[134]The standard of review for a finding of fitness or unfitness is an abuse of discretion. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 680; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 718.) The juvenile court's findings required under the criteria affecting fitness are findings of fact. (*Jones*, at p. 680.)

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place before adjudication and so there is no "judgment" from which to appeal. (*In re Rikki J.* (2005) 128 Cal.App.4th 783, 788-789.)[135] Nor can a minor appeal from a restitution order imposed after the grant of informal supervision. (*In re M.T.* (2019) 43 Cal.App.5th 947, 954.)

2.5.3 Inapplicability of special procedural requirements for criminal appeals

Certificate of probable cause

Penal Code section 1237.5's requirement of a certificate of probable cause for certain appeals following a guilty plea does not apply to juvenile cases based on an admission. (*In re Joseph B.* (1983) 34 Cal.3d 952, 955.)

Custody credits and fines or fees

Penal Code section 1237.1's procedural limitation on the reviewability of credits issues does not apply to juvenile cases. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.) The same interpretation likely applies to issues involving fees or fines under Penal Code section 1237.2.

2.5.4 Transfers

If the case was transferred from one county to another, the notice of appeal must be filed in the county where the dispositional order (which is the "judgment") was made.[136] (See Welf. & Inst. Code, §§ 750 et seq., 800; *In re Judson W.* (1986) 185 Cal.App.3d 838, 842, fn. 3; *In re Carlos B.* (2000) 76

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[135]In *Rikki J.*, the court conditioned the informal supervision upon the minor's admission of guilt. (128 Cal.App.4th at p. 788.) The Court of Appeal issued a writ of mandate vacating the admission because the admission constituted an adjudication, while the Welfare and Institutions Code section 654.2 informal supervision program is a pre-adjudication proceeding. (*Id.* at p. 792.)

[136]The transfer order is itself appealable. (See *In re Jon N.* (1986) 179 Cal.App.3d 156 [construing analogous provisions for dependency cases in Welf. & Inst. Code, § 375 et seq. and the predecessor to Cal. Rules of Court, current rule 5.610(h)].)

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Cal.App.4th 50; see also *In re J. C.* (2002) 104 Cal.App.4th 984 [dependency transfers].)

An appeal filed in the wrong court may be transferred under certain circumstances. (Gov. Code, § 68915; *People v. Nickerson* (2005) 128 Cal.App.4th 33, 39-40 [transfer of misdemeanor case from Court of Appeal to appellate division of superior court]; Cal. Rules of Court, rule 10.1000 [transfer of case between Courts of Appeal].)

2.6 People's appeals and issues raised by the People

People's appeals are much more circumscribed than defendants' appeals. First, the constitutional limitations of double jeopardy prevent review of many decisions favoring the defendant (including acquittals, even if rendered after a gravely flawed trial). (See *United States v. DiFrancesco* (1980) 449 U.S. 117.)

Policy considerations also require limits on People's appeals. As explained in *People v. Williams* (2005) 35 Cal.4th 817, 822-823:

> The prosecution in a criminal case has no right to appeal except as provided by statute . . . . The restriction on the People's right to appeal . . . is a substantive limitation on review of trial court determinations in criminal trials . . . . Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors . . . . Courts must respect the limits on review imposed by the Legislature although the People may thereby suffer a wrong without a remedy . . . .

(Citations and internal quotation marks omitted.)

2.6.1 People's appeals in criminal cases

General authority for People to appeal

There is no general right for the prosecution to appeal an adverse judgment. Penal Code section 1238, subdivision (a) enumerates the grounds for a People's appeal. These include:

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(1) An order setting aside all or any portion of the indictment, information, or complaint.[137]

(2) An order sustaining a demurrer to all or any portion of the indictment, accusation, or information.

(3) An order granting a new trial.[138]

(4) An order arresting judgment.

(5) An order made after judgment, affecting the substantial rights of the people.[139]

(6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense.[140]

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[137]See *People v. Alice* (2007) 41 Cal.4th 668, 680; *People v. Chapman* (1984) 36 Cal.3d 98, 105, fn. 3, disapproved of on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867; *People v. McClaurin* (2006) 137 Cal.App.4th 241, 247-248.

[138]See *People v. Ford* (1988) 45 Cal.3d 431, 435; *People v. Chavez* (1996) 44 Cal.App.4th 1144, 1148; cf. *People v. DeLouize* (2004) 32 Cal.4th 1223, 1227.

[139]See *People v. Douglas* (1999) 20 Cal.4th 85, 89-92. See also *People v. Montellano* (2019) 39 Cal.App.5th 148, 151 [trial court's post-judgment order finding defendant eligible for resentencing under Penal Code section 1170.126 did not affect the substantial rights of the People by altering the underlying judgment, its enforcement, or the defendant's relationship to it, unless and until defendant was resentenced; order was not appealable by the People]; contra *People v. Ramirez* (2019) 35 Cal.App.5th 55, 62 [trial court's Prop. 57 transfer order for juvenile court to determine eligibility for juvenile disposition is appealable under section 1238, subdivision (a)(5), as an order made after judgment, affecting the substantial rights of the People, as the underlying judgment remained intact].)

[140]See *People v. Williams* (2005) 35 Cal.4th 817, 824; *People v. Statum* (2002) 28 Cal.4th 682, 688-689; *People v. Serrato* (1973) 9 Cal.3d 753, 762, fn. 7, dictum on unrelated point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1305.

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(7) An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code [e.g., pursuant to § 1538.5].[141]

(8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.[142]

(9) An order denying the motion of the people to reinstate the complaint or a portion thereof pursuant to Section 871.5.[143]

(10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, "unlawful sentence" means

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[141]See *People v. Chapman* (1984) 36 Cal.3d 98, 105, fn. 3, disapproved of on other grounds *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867; *People v. Bonds* (1999) 70 Cal.App.4th 732, 734; *People v. Yarbrough* (1991) 227 Cal.App.3d 1650, 1653.

[142]See *People v. Chacon* (2007) 40 Cal.4th 558, 564; *People v. Smith* (1983) 33 Cal.3d 596, 600-602; *People v. Saibu* (2022) 81 Cal.App.5th 709, 732-733; *People v. Pedroza* (2014) 231 Cal.App.4th 635, 647; *People v. Heslington* (2011) 195 Cal.App.4th 947, 955; see also Penal Code section 1238, subdivision (b): "If . . . the people prosecute an appeal to decision, or any review of such decision, it shall be binding upon them and they shall be prohibited from refiling the case which was appealed."

[143]See *People v. Williams* (2005) 35 Cal.4th 817, 824; *People v. Matelski* (2000) 82 Cal.App.4th 837, 843-844.

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> the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction.[144]
>
> (11) An order recusing the district attorney pursuant to Section 1424.[145]

Other, more specialized statutory provisions giving the People a right to appeal include Penal Code section 1473.7, subdivision (f) (grant of motion to vacate judgment or sentence because of prejudicial error affecting understanding of immigration consequences of plea or because of new evidence of actual innocence) or section 1506 (grant of habeas corpus).

Appeal after grant of probation

The People may not appeal a grant of probation but must seek review by writ instead. (Pen. Code, § 1238, subd. (d).) This includes, "appeals that, in substance, attack a probation order, even if the order explicitly appealed from may be characterized as falling within one of the authorizing provisions of subdivision (a). Thus, if the People seek, in substance, reversal of the probation order, the appeal is barred by subdivision (d) however they may attempt to label the order appealed from." (*People v. Douglas* (1999) 20 Cal.4th 85, 93; see also *People v. Alice* (2007) 41 Cal.4th 668, 682-683.)

The prohibition on appealing a grant of probation does not mean all aspects of a case in which a defendant is placed on probation may be reviewed by writ petition alone. It is only when the People effectively mount a direct threat to the defendant's probation that the appeal prohibition in Penal Code section 1238, subdivision (d) comes into play. (*People v. Douglas* (1999) 20 Cal.4th 85, 96 [People may appeal order reducing felony charge to misdemeanor, even though defendant granted probation]; see also *In re Jeffrey H.* (2011) 196 Cal.App.4th 1052, 1058 [appropriate for People to appeal order dismissing one count, adding another, and allowing juvenile to admit new allegation as part of plea bargain].)

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[144]See *People v. Williams* (1998) 17 Cal.4th 148, 157; *People v. Labora* (2010) 190 Cal.App.4th 907, 913; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1284.

[145]See, e.g., *People v. Eubanks* (1996) 14 Cal.4th 580.

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Prosecution issues raised in defendant's appeal

Under Penal Code section 1252, the Court of Appeal must consider and pass on all rulings of the trial court adverse to the state at the request of the Attorney General.[146] In addition, the People may point out an unauthorized sentence or clerical error, which may be corrected at any time if the court has jurisdiction. (This possibility raises the potential for adverse consequences from appealing. See § 4.6.2 Unauthorized sentence as exception to Henderson rule et seq.; cf. § County Counsel appeals, *post*, on dependency appeals.)

Issues likely to appear on remand

This provision is intended to allow decisions on issues likely to recur if the case is remanded. (E.g., *People v. Smith* (1983) 34 Cal.3d 251, 269, 272 [claim of error in excluding certain prosecution evidence under Pen. Code, §1538.5 properly raised by People in event of retrial]; *People v. Dykes* (1966) 243 Cal.App.2d 572, 576 [same].)

Issues supporting affirmance

The People also may obtain review of rulings adverse to the prosecution for the purpose of securing affirmance of the judgment. (*People v. Braeseke* (1979) 25 Cal.3d 691, 698-701, vacated and remanded *sub nom. California v. Braeseke* (1980) 446 U.S. 932, reiterated *People v. Braeseke* (1980) 28 Cal.3d 86; cf. *People v. Aragon* (1992) 11 Cal.App.4th 749, 765-766, fn. 7, and accompanying text [court considered respondent's contention but rejected it because not properly preserved below]; *People v. Reagan* (1982) 128 Cal.App.3d 92, 96, fn. 2 [trial court ruled search warrant was illegal, but subsequent line-up untainted by illegality; when defendant appealed ruling on taint, People entitled to argue search warrant was legally sufficient].)

Limits to Penal Code section 1252 review

Section 1252 is not intended to give the People a general right to appeal under the umbrella of a defendant's appeal. Its purpose is limited to matters

[146]The People's right to appeal under section 1252 extends only to trial rulings, not rulings by a magistrate on an issue not raised at trial. (*People v. Villalobos* (1966) 245 Cal.App.2d 561, 565, fn. 5.)

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brought up as a result of the defendant's appeal. (See §§ Issues likely to appear on remand and Issues supporting affirmance, *ante*.)

In *People v. Burke* (1956) 47 Cal.2d 45, 54, dicta on other matter disapproved in *People v. Sidener* (1962) 58 Cal.2d 645, 647), a defendant's appeal raising a search issue, the Supreme Court refused to consider a claim by the People that the trial court erred in striking a prior conviction allegation because the People could have appealed under Penal Code section 1238 but failed to do so. (*Burke,* at p. 54; see also *People v. James* (1985) 170 Cal.App.3d 164, 167 [People's failure to appeal precluded assertion under section 1252 that trial court had improperly stayed prior serious felony five-year enhancement];[147] *People v. Zelver* (1955) 135 Cal.App.2d 226, 236-237.)

In *People v. Fond* (1999) 71 Cal.App.4th 127, 133-134, the trial court imposed a sentence lower than that authorized by statute, finding the statutory term would constitute cruel and unusual punishment under the facts of the case. On the defendant's appeal, the People attempted to argue the sentence was void as unauthorized. The appellate court held the People waived the argument by failing to appeal. The sentence was not facially "unauthorized," because it was based on constitutional considerations. It was not subject to correction in the absence of a People's appeal.

2.6.2 People's appeals in delinquency cases

The provisions of Welfare and Institutions Code section 800, subdivision (b), delineating the scope of a People's appeal in a juvenile delinquency case, are similar to those of Penal Code section 1238, the criminal case equivalent:

> (b) An appeal may be taken by the people from any of the following:
>
> (1) A ruling on a motion to suppress pursuant to Section 700.1 even if the judgment is a dismissal of the petition or any count or counts of the

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[147]The People contended that the trial court's action was unauthorized and thus could be raised at any time, but the appellate court did not address the contention, concluding that the issue had not "appropriately" been brought to the attention of the appellate court.(*People v. James*, *supra*, 170 Cal.App.3d at p. 167, fn. 1; cf. *People v. Crooks* (1997) 55 Cal.App.4th 797, 811 [disagreeing with *James, supra*, and concluding that any means may be used to call the error to the court's attention]; see § 4.6.2 Unauthorized Sentence as Exception to Henderson Rule, et seq.)

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petition. However, no appeal by the people shall lie as to any count which, if the people are successful, will be the basis for further proceedings subjecting any person to double jeopardy.

(2) An order made after judgment entered pursuant to Section 777 or 785

(3) An order modifying the jurisdictional finding by reducing the degree of the offense or modifying the offense to a lesser offense.[148]

(4) An order or judgment dismissing or otherwise terminating the action before the minor has been placed in jeopardy, or where the minor has waived jeopardy. If, pursuant to this paragraph, the people prosecute an appeal of the decision or any review of that decision, it shall be binding upon the people and they shall be prohibited from refiling the case which was appealed.[149]

(5) The imposition of an unlawful order at a dispositional hearing, whether or not the court suspends the execution of the disposition.

(c) Nothing contained in this section shall be construed to authorize an appeal from an order granting probation. Instead, the people may seek appellate review of any grant of probation, whether or not the court imposes disposition, by means of a petition for a writ of mandate or prohibition which is filed within 60 days after probation is granted. The review of any grant of probation shall include review of any order underlying the grant of probation.

(*In re Jeffrey H.* (2011) 196 Cal.App.4th 1052, 1057; see *In re Ricardo C.* (2013) 220 Cal.App.4th 688, 696-697; *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 590.)

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[148]*In re K.W.* (2020) 54 Cal.App.5th 467, 472.

[149]This provision encompasses an order sustaining a demurrer to Penal Code section 12022.1 allegations. (*In re Rottanak K.* (1995) 37 Cal.App.4th 260, 269, 272) It does not cover an order sealing juvenile records. (*People v. Superior Court (Manual G.)* (2002) 104 Cal.App.4th 915, 922)

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2.7 Procedural steps for getting criminal or delinquency appeal started

2.7.1 Advice to defendant by court

Under rules 4.305 and 4.470, except after a guilty or nolo contendere plea or an admitted probation violation, at the time of sentencing the superior court must advise a criminal defendant of the right to appeal and the right to court-appointed appellate counsel for indigents. In contested juvenile proceedings the juvenile court must provide similar advice to the minor and to a parent, guardian, or adult relative if they are present and may have a right to appeal.[150] (Rule 5.590(a).)

2.7.2 Responsibilities of trial counsel as to initiating appeal

Trial counsel has specific statutory and constitutional duties with respect to appeals. These include evaluating the possibility of appeal, advising the client about appealing, and filing an appeal when the client directs or, if the client is indigent, when counsel believes arguably meritorious grounds exist. (Pen. Code, § 1240.1; see also *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 479-480.) That duty includes taking all steps necessary to secure adequate appellate review, including a certificate of probable cause in applicable cases. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 389-390, 396 [right to effective assistance of counsel in complying with procedures needed to perfect appeal, such as Kentucky law requiring filing of "statement of appeal" in addition to brief]; *People v. Ribero* (1971) 4 Cal.3d 55, 66 ["counsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by section 1237.5"]; cf. *In re Chavez* (2003) 30 Cal.4th 643, 657 [request for CPC *is* a notice of appeal and subject to same principles on timeliness].)

Duties under Penal Code section 1240.1

Section 1240.1 specifically provides that in a criminal, juvenile, or civil commitment case trial counsel must, if the client is indigent:

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[150]See § 2.5 Appeal by Minor after a Delinquency Finding, *ante*, and accompanying footnote on a parent's right to appeal in a delinquency case.

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- advise the client whether arguably meritorious grounds for appeal exist and inform the client to consult another attorney on the possibility of an ineffective assistance of counsel issue (subd. (a));

- file a notice of appeal if either (a) counsel believes there are arguably meritorious issues, and the client would benefit from appeal or (b) the client asks counsel to appeal (subd. (b), ¶ 1);

- assist in identifying issues and parts of the record relevant to the appeal (subd. (b), ¶ 2); and if the client is indigent, assist the client in requesting appointment of appellate counsel (subd. (b), ¶ 3).

Advising defendant about appeal

The statutory duty under Penal Code section 1240.1, subdivision (a) to advise the defendant about appealing includes counseling the defendant on the existence of appellate issues and the need to consult another attorney about the possibility of ineffective assistance of counsel. This is somewhat different from the analogous constitutional duty, which is "advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes." (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 478; see § Filing appeal if defendant requests, *post*).

Filing notice of appeal on request

Under Penal Code section 1240.1, subdivision (b) trial counsel must file a notice of appeal if the defendant requests. This duty is also of constitutional magnitude. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477; see § Filing appeal if defendant requests, *post*). Counsel's duty to file a notice of appeal does not preclude a client's doing so in pro per. (Pen. Code, § 1240.1, subd. (d).)

Filing notice of appeal without defendant request

Although normally the decision to appeal is the client's rather than the attorney's (see following paragraph), trial counsel has an independent duty to file a notice of appeal if counsel believes there are reasonably arguable issues and need not first obtain the client's affirmative authorization or instruction to do

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so.[151] (Pen. Code, § 1240.1, subd. (b), ¶ 1; *Guillermo G. v. Superior Court* (1995) 33 Cal.App.4th 1168, 1173-1174 [dicta].[152])

This provision does not compel counsel to file a notice of appeal over the client's actual *opposition* to it, however, and after counsel has filed a notice of appeal, the client continues to have the ultimate decision whether to pursue the appeal or abandon it. (See *Jones v. Barnes* (1983) 463 U.S. 745, 751 ["the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"]; *In re Josiah Z.* (2005) 36 Cal.4th 664, 680-681 [decision not to be made by counsel, but by client or their guardian ad litem if minor client is too young]; see *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [client, not counsel, responsible for abandoning appeal]; *In re Martin* (1962) 58 Cal.2d 133, 137 [counsel not permitted to abandon appeal without client's consent by letting it be dismissed for failure to file an opening brief under Cal. Rules of Court, rule 8.220, then rule 17];[153]*In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043 [filing appeal requires client's consent in dependency case]; Cal. Rules of Prof. Conduct, rule 1.2(a) [client directs objectives of appeal].)

Trial counsel representation on appeal

Filing a notice of appeal does not mean trial counsel is undertaking to represent the defendant on appeal. (Pen. Code, § 1240.1, subd. (b), ¶ 2.) Indeed, representation by trial counsel on appeal is discouraged. One reason is the ethical problem involved in identifying and arguing one's own ineffective assistance of counsel issues. (*People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-1255 ["there is an inherent conflict when appointed trial counsel in a criminal case is also

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[151]Counsel's duty to file a notice of appeal does not preclude a client's doing so in pro per. (§ 1240.1, subd. (d).)

[152]*Guillermo G.* was construing a dependency notice of intent to file a writ petition under Welfare and Institutions Code section 366.26, subdivision (l). It held the Penal Code section 1240.1 duty to seek review when there are arguable issues applies only in delinquency and criminal appeals and not in dependency writs. (See also *In re Alma B.* (1994) 21 Cal.App.4th 1037 [dependency appeals].)

[153]Rule 8.360(c)(5)(A)(ii) now provides that if appellate counsel for an appealing defendant is court-appointed, substitution of counsel, rather than dismissal of the appeal,is the appropriate remedy.

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appointed to act as counsel on appeal"].)[154] Another is that trial counsel often lack the perspective and skills necessary for effective appellate advocacy. (*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 408-410; *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449-1450.)

Federal constitutional duties

The United States Constitution imposes specific duties on trial counsel with respect to filing an appeal and advising the defendant about appeal.

Filing appeal if defendant requests

A lawyer who disregards specific instructions from the client to file a notice of appeal is constitutionally ineffective. (See *Garza v. Idaho* (2019) 586 U.S. 232, 242; *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477; see also *Peguero v. United States* (1999) 526 U.S. 23, 28, and *Rodriquez v. United States* (1969) 395 U.S. 327, 329-330 [if counsel fails to file requested appeal, defendant entitled to new appeal without showing appeal likely has merit]; *United States v. Poindexter* (4th Cir. 2007) 492 F.3d 263, 268-269 and *Campusano v. United States* (2d Cir. 2006) 442 F.3d 770, 771-772 [counsel must file appeal at defendant's request even if defendant has waived right to appeal].)

Advising defendant about appeal

Roe v. Flores-Ortega (2000) 528 U.S. 470, 480, held counsel has a federal constitutional duty to advise the defendant about an appeal when there is a reasonable ground for thinking either (1) a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) the defendant reasonably demonstrated an interest in appealing. The duty of consultation means "advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes." (*Id.* at p. 478.) Prejudice is established from failure to advise when there is a reasonable probability the defendant would have appealed if advised about the right. (*Id.* at p. 484; *Padilla v. Kentucky* (2010) 559 U.S. 356 [as a matter of federal law, counsel has an obligation to advise defendant that offense to which defendant pleads guilty would result in removal from the

[154] Division Two of the Fourth District has issued a miscellaneous order stating trial counsel normally will not be appointed on appeal.

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country].) The presumption of prejudice for failing to file a notice of appeal on request, as recognized in *Flores-Ortega*, applies regardless of whether a defendant has signed an appeal waiver. (*Garza v. Idaho* (2019) 586 U.S. 232 [139 S.Ct. 738, 747, 203 L.Ed.2d 77].)

2.7.3 Notice of appeal

Court in which to file

A notice of appeal must be filed in the superior court where judgment was entered. (Cal. Rules of Court, rule 8.304(a)(1).) The notice need not specify the appellate court; the Court of Appeal is assumed to be the one in the district where the superior court is located. (Rule 8.304(a)(4).)

An appeal filed in the wrong court may be transferred under certain circumstances. (Gov. Code, § 68915; *People v. Nickerson* (2005) 128 Cal.App.4th 33, 39-40 [transfer of misdemeanor case from Court of Appeal to appellate division of superior court]; Cal. Rules of Court, rule 10.1000.)

Signature

Rule 8.304(a)(3) provides: "If the defendant appeals, the defendant or the defendant's attorney must sign the notice of appeal."[155]

Contents of notice of appeal following trial

Rule 8.304 prescribes the contents of a notice of appeal after trial. Rule 8.304(a)(4) provides:

> Except [for appeals after guilty or nolo contendere pleas or admissions of probation violation] . . . , the notice is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

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[155]An authorized agent of the defendant may be sufficient. (E.g., *In re Hutlin's Estate* (1947) 29 Cal.2d 825, 831-832; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 853-854; *Ehret v. Ichioka* (1967) 247 Cal.App.2d 637, 641.)

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The notice of appeal need not be in any particular format, but use of standardized forms is encouraged, to ensure sufficiency, accuracy, and completeness.

Notice of appeal and certificate of probable cause after guilty plea

In an appeal after a guilty plea, the procedures are stricter and more complicated. The theory is that the defendant's plea acknowledges guilt and the state's right to impose punishment, and so only in limited circumstances should further issues be considered. In such an appeal, the notice of appeal must conform to the requirements of rule 8.304(b), which implements Penal Code section 1237.5.[156] As amended January 1, 2022, Rule 8.304(b) (1)-(3) provides:

(1) Appeal requiring a certificate of probable cause

(A) Appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation on grounds that affect the validity of the plea or admission, the defendant must file in that superior court -- with the notice of appeal required by (a) -- the written statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

(B) Within 20 days after the defendant files a written statement under Penal Code section 1237.5, the superior court must sign and file either a certificate of probable cause or an order denying the certificate.

(2) Appeal not requiring a certificate of probable cause

To appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation on grounds that do not affect the validity of the plea or admission, the defendant need not file the written statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. No certificate of probable cause is required for an appeal based on or from:

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[156]Section 1237.5 applies only when the defendant pleads guilty to the underlying charge; admissions of enhancements do not require a certificate of probable cause. (*People v. Maultsby* (2012) 53 Cal.4th 296,304-305.)

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(A) The denial of a motion to suppress evidence under Penal Code section 1538.5;

(B) The sentence or other matters occurring after the plea or admission that do not affect the validity of the plea or admission; or

(C) An appealable order for which, by law, no certificate of probable cause is required.

(3) Appeal without a certificate of probable cause
If the defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies a certificate of probable cause, the appeal will be limited to issues that do not require a certificate of probable cause.

Under amended Rule 8.304 (b), if a notice of appeal indicates only a challenge to the validity of the plea, and the certificate of probable cause is denied, the notice of appeal will still be operative, but the appeal will be limited to issues that do not affect the validity of the plea.

For purposes of analyzing the procedures for appealing from a judgment based on a guilty plea, it is useful to distinguish three kinds of guilty plea appeals:

- *Certificate appeals* – those that challenge the validity of the plea and require a certificate of probable cause to raise such issues.

- *Noncertificate appeals* – those that raise only issues not requiring a certificate of probable cause.

- *"Mixed" certificate and noncertificate appeals* – those involving both certificate and noncertificate grounds.

Certificate appeals

The requirement of a certificate of probable cause for appeals challenging the validity of a guilty plea is set forth in Penal Code section 1237.5 and rule 8.304(b). (See §§ Negotiated sentence limitations and 2.3.6 Exception to waiver: Issues going to the validity of the plea et seq., *ante*, for discussion of what kinds of claims challenge the plea.) A certificate of probable cause is a document issued by the trial court certifying that at least one non-frivolous basis exists for

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challenging the validity of the plea.[157] (*People v. Ribero* (1971) 4 Cal.3d 55, 62.) The trial judge should issue the certificate wherever there is an honest difference of opinion about the issue. (*Id.* at p. 63, fn. 4.) Signing the certificate does not mean the trial court believes the contention is probably meritorious. (*Ibid.*)

One purpose of the certificate requirement is to screen out certain frivolous issues, even if the appeal itself is going forward, so that the Court of Appeal does not need to spend its time disposing of them on the merits. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095.)

Once the certificate is granted, under California law the defendant may raise any cognizable issue not waived by the plea and is not restricted to the issues identified in the certificate. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1174.) For example, if the court grants a certificate on the issue of whether the defendant entered the plea under duress, the defendant may also attack the plea on the ground of inaccurate advice about the constitutional rights waived by the plea. However, the mistaken issuance of a certificate of probable cause purporting to certify an issue waived by the plea cannot make the issue appealable (see § Erroneous advice on appealability of issue, *ante*; *People v. DeVaughn* (1977) 18 Cal.3d 889, 896), although withdrawal of the plea is a potential remedy.

Noncertificate appeals

A certificate of probable cause is not required where the notice of appeal seeks review of: (a) post-plea matters such as sentencing that do not implicate a challenge to the validity of the plea; or (b) an issue seeking suppression of evidence on search and seizure grounds. (Pen. Code, § 1538.5, subd. (m); *People v. Jones* (1995) 10 Cal.4th 1102, 1108, dictum on another point disapproved in *In re Chavez* (2003) 30 Cal.4th 643, 656; *People v. Kaanehe, supra*, 19 Cal.3d at p. 8; *People v. Ward* (1967) 66 Cal.2d 571, 574-576; see *People v. Arriaga* (2014) 58 Cal.4th 950, 960 [no certificate of probable cause is required to appeal the denial of a Pen. Code, § 1016.5 motion].)

Any noncertificate issue can be raised if the appeal is otherwise operative; it is not necessary that the particular issue to be raised has been specified in the notice of appeal. (*People v. Jones* (1995) 10 Cal.4th 1102, 1112-1113, dictum on

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[157]An appeal based on the ineffective assistance of counsel on a motion to withdraw a plea (Pen. Code, § 1018) requires a certificate of probable cause. (*People v. Johnson* (2009) 47 Cal.4th 668, 679.)

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another point disapproved in *In re Chavez* (2003) 30 Cal.4th 643, 656.) Thus, if a suppression issue was the sole ground listed in the notice of appeal, a properly preserved sentencing issue may nevertheless be raised – and vice versa. (*Ibid.*)

Mixed appeals

If the appeal has both certificate and noncertificate grounds, the appeal will proceed without a certificate of probable cause but will be limited to issues that do not affect the validity of the plea. (Rule 8.304(b)(4).) The defendant can raise any noncertificate issues, including issues based on grounds other than those mentioned in the notice of appeal. (*People v. Jones* (1995) 10 Cal.4th 1102, 1112-1113, dictum on another point disapproved in *In re Chavez* (2003) 30 Cal.4th 643, 656.)

Unless a certificate of probable cause is timely obtained as prescribed in rule 8.304(b), however, the defendant cannot raise issues challenging the validity of the plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088; see also *People v. Thurman* (2007) 157 Cal.App.4th 36 [same, in context of some counts admitted and others taken to trial]; cf. *People v. Maultsby* (2012) 53 Cal.4th 296, 302-303 [where defendant tried by jury on underlying charge but admitted enhancement, certificate of probable cause not required to claim defendant was not given complete advisements before admission].) If a certificate of probable cause has been granted, any preserved ground for challenging the validity of the plea is cognizable on appeal, even if not mentioned in the certificate or the request for it. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1180.)

2.7.4 Time frames

Notice of Appeal

Under rule 8.308(a) which sets the general time limit for criminal and delinquency appeals, a notice of appeal must be filed no later than 60 days after the judgment or order appealed from. This time limit is jurisdictional – that is, the Court of Appeal has no power to hear the case if the filing is not timely.[158] (*In re Jordan* (1992) 4 Cal.4th 116, 121.)

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[158]Certain remedies are available for defendants whose late filings are attributable to causes beyond their own control. (See § 2.7.5 Remedies for Untimely or Defective Filing of Notice of Appeal and Failure to Obtain Certificate of Probable Cause, *post*.)

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After any party files a notice of appeal, the time for any other party to appeal from the same judgment or order is extended until 30 days after the superior court clerk mails notification of the first appeal. (Cal. Rules of Court, rule 308(b).)

Certificate of Probable Cause

Under rule 8.304(b)(1)(A) a request for certificate of probable cause must be filed with the notice of appeal.[159] The request must be timely filed that is, no later than 60 days after the judgment or order appealed from. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099.) Like the deadline for the notice of appeal, this limit is jurisdictional.[160] (*Id.* at p. 1094; see also *In re Chavez* (2003) 30 Cal.4th 643, 650.) *Mendez* disapproved of earlier, more lenient constructions of these requirements allowing a request to be filed later if the appeal was otherwise operative. (*Mendez*, at p. 1098.)

The trial court must rule on a certificate of probable cause request within 20 days. (Cal. Rules of Court, rule 8.304(b)(1) (B).) If the court denies the request, the defendant must either seek a writ of mandate to compel issuance of the certificate (§ Mandate from denial of certificate of probable cause, *post*) or forfeit any issues going to the validity of the plea (§§ Certificate appeals, Mixed appeals, *ante*).

Filing date

The notice of appeal is filed when the superior court clerk receives it. (Cal. Rules of Court, rules 8.308(a), 8.25(b) (1).) This time may not be extended, nor may relief from default for failure to file a timely notice of appeal be granted. (*In re Chavez* (2003) 30 Cal.4th 643, 652-653; Cal. Rules of Court, rule 8.60(d).)

An exception to the requirement that the superior court clerk must receive the notice of appeal on or before the due date is the "prison mailing" rule. Under rule

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[159]Although rule 8.304(b)(1)(A) says the request for a certificate of probable cause must be filed "with" the notice of appeal, it is sufficient if it is filed at a different time, provided it is within the 60-day limit. (*Drake v. Superior Court (People)* (2009) 175 Cal.App.4th 1462, 1467.)

[160]Certain remedies are available for defendants whose late filings are attributable to causes beyond their own control. (See § 2.7.5 Remedies for Untimely or Defective Filing of Notice of Appeal and Failure to Obtain Certificate of Probable Cause, *post*.)

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8.25(b)(5), a notice of appeal from a custodial institution is deemed timely filed if it was mailed or delivered to custodial officials within 60 days of judgment, even if not delivered to the superior court until later. (*In re Jordan* (1992) 4 Cal.4th 116, 130.) This rule acknowledges the reality that prison mailing practices are (a) unreliable and notoriously subject to delay and (b) outside the control of inmates. The superior court clerk must retain in the court file the envelope in which the notice was mailed. (Rule 8.25(b)(5).) The same provisions apply to juvenile appeals. (Rule 8.25(b)(5); see *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106.)

2.7.5 Remedies for untimely or defective filing of notice of appeal and failure to obtain certificate of probable cause

Failure to file a proper and timely notice of appeal, or obtain a certificate of probable cause when required, deprives the appellate court of jurisdiction and is not subject to ordinary relief from default. (See *In re Chavez* (2003) 30 Cal.4th 643, 652-653; Cal. Rules of Court, rule 8.60(d).) Nevertheless, under some circumstances a notice of appeal may be fixed, or an appeal may be allowed despite jurisdictional failure.

Application to amend notice of appeal

If the notice of appeal is timely but defective and the defect can be corrected, the defendant may move to amend the notice of appeal.

If the sentence was stipulated as part of the plea agreement, "sentencing" could not be grounds for amending the notice, unless the defendant can show good cause that non-stipulated parts of the sentence, such as restitution or credits remain. (See *People v. Panizzon* (1996) 13 Cal.4th 68; see also *People v. McEwan* (2007) 147 Cal.App.4th 173.)

The defendant obviously cannot state the appeal is based on the denial of a suppression motion if there was no such motion.

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Constructive filing doctrine

The constructive filing doctrine is a judicially created way of granting relief to defendants who have acted diligently in seeking an appeal and yet, through no fault of their own, have failed to meet the filing requirements.[161]

The constructive filing doctrine has been recognized in juvenile dependency cases involving termination of parental rights. (*In re A.R.* (2021) 11 Cal.5th 234.)

Reasonable reliance on counsel to file: Benoit

In re Benoit (1973) 10 Cal.3d 72, 80, held that if before the time for filing an appeal has expired, the defendant asks trial counsel to file a notice of appeal, and trial counsel fails to do so, the defendant's timely request to trial counsel may be deemed a constructive filing of the notice of appeal – it will be treated as if it had actually been filed on time. (See also *People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1063 [approving motion as substitute for *Benoit* habeas corpus].) Counsel's failings will not be imputed to the defendant. (E.g., *In re Fountain* (1977) 74 Cal.App.3d 715, 718 [counsel retained to file notice of appeal had obligation to file timely and adequate notice].)

Benoit would logically apply to failure of counsel to file a declaration requesting a certificate of probable cause. (See *People v. Ribero* (1971) 4 Cal.3d 55, 66 ["counsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by section 1237.5"]; *People v. Buttram, supra*, 30 Cal.4th at p. 779 [noting grant of constructive filing to obtain certificate of probable cause]; *People v. Duncan* (2003) 112 Cal.App.4th 744, 746, fn. 2 [granting unopposed request to amend notice of appeal to comply with certificate of probable cause requirement]; cf. *In re Chavez* (2003) 30 Cal.4th 643 [declining to decide whether *Benoit* applies].) (See § Remedy for failure to obtain timely certificate of probable cause, *post*.)

Constructive filing relief requires diligence by the defendant in pursuing the right to appeal. (*In re Benoit* (1973) 10 Cal.3d 72, 86.)

The constructive filing doctrine does not apply when the defendant has not reasonably relied on counsel to file an appeal. (*In re Chavez* (2003) 30 Cal.4th 643, 658 [defendant had not asked trial counsel to appeal, and another attorney

[161]The doctrine of constructive filing can also be invoked to determine a writ petition was timely filed. (*In re Antilia* (2009) 176 Cal.App.4th 622, 630.)

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defendant contacted had not agreed to file notice of appeal]; *People v. Aguilar* (2003) 112 Cal.App.4th 111, 116 [no indication counsel agreed to file a notice of appeal, and no showing of diligence].)

Other constructive filing

A prisoner may constructively file a notice of appeal by placing it in the prison mail system within the time limit, even if the clerk of the court receives it after the time expires. (*In re Jordan* (1992) 4 Cal.4th 116, 130; *In re Slobodion* (1947) 30 Cal.2d 362, 367.) The "prison delivery" rule now applies to all documents filed by a prisoner or patient from a custodial institution. (Cal. Rules of Court, rule 8.25(b)(5);[162] see also *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106 [civil complaint]; *In re Antilia* (2009) 176 Cal.App.4th 622 [statutory writ].)

The constructive filing doctrine also extends to prisoners who show diligence but do not file the notice of appeal on time because they relied on conduct or representations of prison officials that lulled them into a false sense of security. (*In re Benoit* (1973) 10 Cal.3d at p. 83; *People v. Head* (1956) 46 Cal.2d 886, 887-889 [defendant left signed notice of appeal with prison officials, who assured him it would be "taken care of"]; *People v. Calloway* (1954) 127 Cal.App.2d 504, 506-507 [defendant in quarantine during filing period].)

A defendant who is personally ignorant of the right to appeal must show diligence once learning of it. (*Castro v. Superior Court* (1974) 40 Cal.App.3d 614, 621, fn. 9, and accompanying text [upon failure of trial court to notify defendant of appellate rights, burden on the People to disprove defendant's ignorance; People may also argue waiver based on lack of diligence].) This principle extends to minors. (*In re Arthur N.* (1974) 36 Cal.App.3d 935, 941.)

A defendant must show that the circumstances prevented the defendant from filing of a notice of appeal. (*In re Gary R.* (1976) 56 Cal.App.3d 850, 853 [minor appellant's assertion that instructions about right to appeal could be confusing were unconvincing where appellant did not specifically show he was confused].

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[162]Rule 8.25(b)(5) requires the superior court clerk to retain in the case file the envelope in which the notice of appeal was sent. In practice, clerks sometimes forget to do this. As a backup, counsel may ask for a copy of the applicable prison mail log to prove timely delivery to prison officials.

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Procedures

Typically, a request for relief under *Benoit* is made by habeas corpus petition or motion in the Court of Appeal. Either is appropriate. (*People v. Zarazua* (2009) 179 Cal.App.4th 1054.) Courts differ as to the preferred method; counsel should contact the district appellate project for guidance. Regardless of the vehicle used to seek relief, the document's title should state that it seeks constructive filing of a notice of appeal.

Ineffective assistance of counsel

If failure to file an appeal was caused by ineffective assistance in a constitutional sense (see § Federal constitutional duties, *ante*), late filing relief can be sought by habeas corpus or by motion, depending on the practices of the court. Ineffective assistance of counsel is shown when counsel fails to file a notice of appeal on request. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477; *Rodriquez v. United States* (1969) 395 U.S. 327; see also *Peguero v. United States* (1999) 526 U.S. 23, 28.) It also is shown when the trial attorney failed to advise the defendant about appealing and a reasonable defendant would have wanted to appeal, or the defendant had expressed interest in appealing; prejudice is established if there is a reasonable probability the defendant would have appealed if advised about the right. The presumption of prejudice for failing to file a notice of appeal on request, as recognized in *Flores-Ortega*, applies regardless of whether a defendant has signed an appeal waiver. (*Garza v. Idaho* (2019) 586 U.S. 232, 242 [139 S.Ct. 738, 203 L.Ed.2d 77].)

Mandate from denial of certificate of probable cause

If a request for a certificate of probable cause was improperly denied, the remedy is a petition for writ of mandate to the Court of Appeal. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1180; *In re Brown* (1973) 9 Cal.3d 679, 683, disapproved on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1098; *Lara v. Superior Court* (1982)133 Cal.App.3d 436, 440-442.) Penal Code section 1237.5 requires the trial court to certify any arguably meritorious appeal to the appellate courts, and the court abuses its discretion if it denies a certificate when the defendant's request presents any appellate issue not clearly frivolous and vexatious. (*People v. Holland* (1978) 23 Cal.3d 77, 84; *Lara,* at pp. 440-441)

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Remedy for failure to obtain timely certificate of probable cause

People v. Mendez (1999) 19 Cal.4th 1084, 1088, held a request for a certificate of probable cause must be filed within 60 days. (Construing Cal. Rules of Court, former rule 31(a) [now 8.308(a)] & 31(d) [now 8.304(b)(1)].) If a certificate of probable cause is needed and was not timely sought, it is unclear what remedies might be available.

In re Chavez (2003) 30 Cal.4th 643, 647, held a motion for relief from default under former rule 45(e) (current rule 8.60(d)) is not an appropriate remedy, since that rule specifically allows for relief from default for failure to comply with the rules "except the failure to give timely notice of appeal." (*Id.* at pp. 652, 657.) *Chavez* involved an appeal based solely on a ground for which a certificate is required, and therefore the appeal was never operative. It did not address a "mixed" appeal situation, in which the notice of appeal states at least one noncertificate issue and thus creates an operative appeal without a certificate. *Chavez*'s analysis is consistent with the jurisdictional character of the notice of appeal time limits, as reflected in rule 8.60(d), precluding motions for relief from failure to file a timely notice. In a "mixed" situation, arguably, lack of a certificate is not a jurisdictional defect but only a procedural barrier to an attack on the plea, and an ordinary motion for relief would be appropriate. Nevertheless, after *Chavez*, rule 45(e) (now rule 8.60(d)) was amended to state expressly that a motion for relief from default is not a remedy to seek an otherwise late certificate of probable cause.

Another possible avenue of relief in both "pure" certificate and "mixed" appeals is habeas corpus. *Chavez* itself rejected a constructive filing contention on the grounds the defendant had not satisfied *Benoit*'s requirements; the court declined to consider whether *Benoit* applies at all to late requests for a certificate of probable cause. (*In re Chavez*, *supra*, 30 Cal.4th at p. 658, fn. 7.) Nevertheless, *Benoit* logically would appear applicable to failure of counsel to file a declaration requesting a certificate of probable cause, and habeas corpus is an appropriate mode of seeking *Benoit* relief. The defendant has a constitutional right to effective assistance of counsel in filing a notice of appeal; that right would logically include taking steps essential to perfect the appeal, such as filing a timely request for a certificate of probable cause. (See *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477 [duty to advise defendant about appealing and to file notice of appeal at defendant's request]; *Evitts v. Lucey* (1985) 469 U.S. 387, 389-390, 396 [right to effective assistance of counsel in perfecting appeal, such as

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Kentucky law requiring filing of "statement of appeal"];[163]*In re Benoit* (1973) 10 Cal.3d 72, 87-88; Pen. Code, § 1240.1, subd. (b) [statutory duty]; *People v. Ribero* (1971) 4 Cal.3d 55, 66 ["counsel's obligation to assist in filing the notice of appeal necessarily encompasses assistance with the statement required by section 1237.5"]; see also *People v. Buttram, supra,* 30 Cal.4th at p. 779 [noting grant of constructive filing to obtain certificate of probable cause]; cf. *People v. Duncan* (2003) 112 Cal.App.4th 744, 746, fn. 2 [granting unopposed request to amend notice of appeal to comply with certificate of probable cause requirement].)

2.7.6 Appendix to Part Two: Common issues waived by guilty plea

- Insufficiency of the evidence at the preliminary hearing or before a grand jury or lack of a factual basis for the plea. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1363-1372; *People v. Batista* (1988) 201 Cal.App.3d 1288, 1292; *People v. Pinon* (1979) 96 Cal.App.3d 904, 909-910; *People v. Meals* (1975) 49 Cal.App.3d 702, 706-707.)

- Illegal arrest. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896.)

- Discovery violations, such as failure to disclose the identity of an informant. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42; *People v. Castro* (1974) 42 Cal.App.3d 960, 963; see also *People v. Duval* (1990) 221 Cal.App.3d 1105, 1114; but contrast *People v. Hobbs* (1994) 7 Cal.4th 948, 955-957 [challenge to sealing of a search warrant affidavit appealable pursuant to Pen. Code, § 1538.5, subd. (m)] and *People v. Moore* (2003) 105 Cal.App.4th 94 [denial of motion to obtain discovery of prison records cognizable on appeal].)

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[163] In *Evitts v. Lucey*, the parties did not dispute the district court's finding of ineffective assistance of counsel. Only the question of whether a criminal defendant has a constitutional right to effective assistance of counsel on appeal was before the Supreme Court. (*Evitts,* at p. 392.) The court expressed no opinion about the standards of ineffectiveness applied by the lower courts, which "diverge widely." (*Id.* at p. 398, fn. 9.)

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- Failure to hold a hearing on mental competence before taking plea (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100; *People v. Hodges* (2009) 174 Cal.App.4th 1096, 1104-1105.)

- Refusal to grant a continuance. (*People v. Kaanehe, supra*, 19 Cal.3d at pp. 8-9.)

- Denial of motion to sever counts. (*People v. Haven* (1980) 107 Cal.App.3d 983, 985-986.)

- Denial of motion to sever defendants. (*People v. Sanchez* (1982) 131 Cal.App.3d 323, 335.)

- Challenge to pretrial lineup or an unduly suggestive pretrial identification. (*People v. Mink* (1985) 173 Cal.App.3d 766, 769-770; *People v. Stearns* (1973) 35 Cal.App.3d 304, 306.)

- Argument that alleged conduct does not violate statutory proscription. (*People v. Suite* (1980) 101 Cal.App.3d 680, 689 [contention that devices possessed were neither destructive nor explosive within meaning of a statute not appealable].)

- Invalid conviction used as part of a subsequent charge. (*People v. LaJocies* (1981) 119 Cal.App.3d 947, 956-958 [challenge on constitutional grounds to prior felony underlying current ex-felon in possession of a firearm not appealable following guilty plea to the latter].)

- In limine evidentiary rulings. (*People v. Shults* (1984) 151 Cal.App.3d 714, 719- 720.)

- Double jeopardy claim, unless "facially duplicative" of earlier charge for which defendant was convicted and sentenced. (*United States v. Broce* (1989) 488 U.S. 563, 565, 575-576 [guilty pleas to two indictments alleging two conspiracies precludes contention that only one conspiracy existed and that double jeopardy bars sentencing on second count]; see *Menna v. New York* (1975) 423 U.S. 61, 62, *Blackledge v. Perry* (1974) 417 U.S. 21, 30, and *People v. Plies* (1981) 121 Cal.App.3d 676, 681, disapproved on another ground in *People v. Crowson* (1983) 33 Cal.3d

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623, 632, fn. 10 [claim of double jeopardy based on a prior conviction or acquittal of the same offense can be raised after guilty plea, because it challenges right of state to bring the proceeding at all].)

- Statute of limitations, if the issue is a question of fact, such as tolling, rather than a matter of law. (*People v. Padfield* (1982) 136 Cal.App.3d 218, 224-227 [guilty plea admitted the sufficiency of evidence that statute of limitations had been tolled]; cf. *People v. Chadd* (1981) 28 Cal.3d 739, 756 [if expiration of statute shown as matter of law on face of the pleading, issue can be raised on appeal after guilty plea].)

- Lack of a speedy trial. (*People v. Aguilar* (1998) 61 Cal.App.4th 615, 617, 619; see also *People v. Hayton* (1979) 95 Cal.App.3d 413, 419 [contention that preliminary hearing was continued beyond the statutory 10-day period without good cause also waived]; compare *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, 812 [speedy trial claim not waived by plea of guilty to misdemeanor complaint] with *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357-1360 [characterizing reasoning of *Avila* as "absurd" and refusing to apply it beyond its facts] and *People v. Stittsworth* (1990) 218 Cal.App.3d 837, 840-841 [*Avila* rule not applicable where original charges were felonies and became misdemeanors by virtue of the plea].)

- Denial of a change of venue/objection to territorial jurisdiction. (*People v. Krotter* (1984) 162 Cal.App.3d 643, 648.)[164]

- Extradition issues. (*People v. Witherow* (1983) 142 Cal.App.3d 485, 490.)

- Denial of a motion for dismissal or sanctions following the destruction of evidence. (*People v. McNabb* (1991) 228 Cal.App.3d 462, 470-471; *People v. Halstead* (1985) 175 Cal.App.3d 772, 781-782; *People v. Benweed* (1985) 173 Cal.App.3d 828, 832; but compare *People v. Aguilar* (1985) 165 Cal.App.3d 221, 224 [denial of motion to suppress

[164]"Territorial jurisdiction," in the sense of "venue," is a non-fundamental, waivable, form of jurisdiction. (*People v. Klockman* (1997) 59 Cal.App.4th 621, 626-627.)

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evidence related to a container of contraband where the container had been lost or destroyed is appealable pursuant to § 1538.5, subd. (m)], with *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1576 [concluding *Aguilar* is contrary to the weight of authority].)

- Entrapment defenses. (*People v. McNabb* (1991) 228 Cal.App.3d 462, 471; *People v. Bonwit* (1985) 173 Cal.App.3d 828, 832.)

- Illegally obtained confessions, not the result of an unlawful search or seizure. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896; *In re John B.* (1989) 215 Cal.App.3d 477, 483 [motion to suppress confessions in juvenile court waived by admission].)

- Denial of a *Marsden* motion, at least when no contention is made that the plea was not intelligently and voluntarily made or that the advice from counsel concerning the plea was inappropriate. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786; cf. *People v. Armijo* (2017) 10 Cal.App.5th 1171, 1180-1181 [pre-plea denial of *Marsden* hearing remains cognizable.)

- Cruel and unusual punishment arguments directed at sentences to which the defendant expressly or implicitly agreed in pleading guilty – at least if (a) the defendant fails to obtain a certificate of probable cause or (b) the defendant has explicitly waived the right to appeal at all. (*People v. Shelton, supra*, 37 Cal.4th at p. 771; *People v. Panizzon* (1996) 13 Cal.4th 68, 89; see also *People v. Foster* (2002) 101 Cal.App.4th 247, 250-252; *People v. Cole* (2001) 88 Cal.App.4th 850, 867-869; *People v. Young* (2000) 77 Cal.App.4th 827, 829, 832.) It is not wholly clear whether these arguments could be considered if the defendant does have a certificate of probable cause and has not waived an appeal.)

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PART THREE: DEPENDENCY APPEALS[165]

2.8 Dependency appeals

2.8.1 Appealable judgments and orders

Juvenile dependency proceedings

As pointed out in PART ONE: GENERAL, Welfare and Institutions Code section 395 grants the right to appeal disposition orders and findings in dependency proceedings under section 300 et seq. and subsequent orders. Subdivision (a)(1) provides:

> A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment. However, that order or judgment shall not be stayed by the appeal, unless, pending the appeal, suitable provision is made for the maintenance, care, and custody of the person alleged or found to come within the provisions of Section 300, and unless the provision is approved by an order of the juvenile court. The appeal shall have precedence over all other cases in the court to which the appeal is taken.

Juvenile dependency proceedings under Welfare and Institutions Code section 300 commence with the filing of the petition, and the first hearings include the detention and jurisdictional hearings. The first appealable decision, however, is the one at which the dispositional order – or judgment – is made.[166] (*In re T.W.* (2011) 197 Cal.App.4th 723, 729.) Earlier orders, including jurisdictional findings, are not separately appealable but may be reviewed on an appeal from the judgment, meaning the disposition.[167] (*Ibid.*)

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[165]PART ONE covers the general law of appealability. PART TWO covers criminal and delinquency appeals.

[166]One exception is the ability to appeal from a court's order asserting jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. (Cal. Fam. Code, § 3454.)

[167]It is possible to challenge issues at the detention hearing by a writ of mandate. (See § Dispositional Order, *post*; *Los Angeles County Dept. of Children*

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Subsequent orders, such as those at review hearings and proceedings under Welfare and Institutions Code section 388, are appealable as orders after judgment. (*In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705; *In re K.C.* (2011) 52 Cal.4th 231, 234-235.)

A significant exception to the appealability of post-judgment orders is an order setting a permanent plan hearing or selection and implementation hearing under Welfare and Institutions Code section 366.26 or a post-termination of parental rights order changing a child's placement under section 366.28, both of which require a writ petition instead of an appeal. (See Cal. Rules of Court, rule 8.450 et seq., and § Dependency cases, *ante*.)

Dependency appeals, like delinquency appeals, are governed by rules 8.405 and 8.406 (filing the appeal), 8.407-8.409 and 8.416(b)-(c) (record), 8.410 and 8.416(d) (augmenting / correcting the record), 8.411 (abandoning), 8.412 and 8.416(e)-(g) (briefing), 8.470 and 8.416(h) (hearing and decision in the Court of Appeal), and 8.472 (hearing and decision in the Supreme Court). (See also Cal. Rules of Court, rule 5.585 et seq.) Many dependency appeals are fast-track under rule 8.416, and extensions of time require an exceptional showing of good cause under rule 8.416(f).

Family Code section 7800 appeals

Family Code section 7800 appeals are governed by sections 7894 and 7895. (See § 2.9.3 Special issues with Family Code appeals, *post*.)

2.8.2 Reviewability considerations

The right to appeal is limited by the need for (i) standing by the party wishing to appeal and (ii) a justiciable controversy. Whether a matter is justiciable depends on whether the sole issue for appeal is moot, ripe for appeal, waived, or forfeited. Typically, only issues raised at the hearing being appealed are reviewable.

Standing

A threshold question before an appeal can proceed is whether a party has standing to appeal. Issues of standing are usually caught by the court or the

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& Family Services v. Superior Court (2008) 162 Cal.App.4th 1408 [dismissal of petition].)

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project before appointment. However, attorneys should verify the party has standing before proceeding with the appeal. If a question about standing arises, the attorney should contact the project immediately to discuss whether the appeal may proceed and what procedures must be taken by the attorney, if any. What determines standing varies by party. For most issues and for the majority of the dependency proceedings, parents, minors, and the County have standing. The nuances affecting each of these parties are discussed below, as well as standing for other parties who may wish to appeal.

Parents

A party must be aggrieved by an order to appeal from it. (Code Civ. Proc., § 902; *In re Crystal J.* (2001) 92 Cal.App.4th 186, 189.) Juvenile dependency cases involve governmental involvement with, and potential oversight of, a family because of health or safety concerns. (Welf. & Inst. Code, §§ 300 et seq.) A parent has a constitutional right to custody and care of one's child. (*Stanley v. Illinois* (1972) 405 U.S. 645, 658.) Thus, unless and until a parent's rights have been terminated, the parent generally has standing to appeal from orders made at dependency proceedings involving the parent's children. (*In re K.C.* (2011) 52 Cal.4th 231, 236, citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) However, parents may not have standing to appeal from the section 366.26 hearing to challenge the court's denial of a relative placement request if it does not advance the parents' argument against termination of parental rights. (*In re K.C.*, *supra*, 52 Cal.4th at p. 238). Also, alleged fathers, who are not biological or presumed, may not have standing. (*In re Joseph G.* (2000) 83 Cal.App.4th 712.)

Parents generally may not challenge an order that affects solely another party's right. (See *In re S.A.* (2010) 182 Cal.App.4th 1128 [parents lack standing to challenge the competency of the child's attorney]; but see *In re L.Y.L.* (2002) 101 Cal.App.4th 942 [parent may challenge sibling visitation order because the sibling relationship has substantial consequences on the parent's interest in the parent-child relationship] and *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339 [non-Native American parent has standing to assert ICWA violation on appeal].) A parent nevertheless may benefit from another party's appeal and file a brief in support of that party's position.

De facto parents and relatives

Parties other than the parents may also be aggrieved by an order and have standing to appeal. (Code Civ. Proc., § 902; *In re Crystal J.* (2001) 92

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Cal.App.4th 186, 189.) For instance, de facto parents also have an interest in the companionship, care, custody, and management of the child. (*In re B.G.* (1974) 11 Cal.3d 679, 692.) De facto parents may appeal orders affecting their placement rights as to the child. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 953.)

Relatives have standing to appeal from orders relating to the relative placement preference statute. (Welf. & Inst. Code, § 361.3; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035.) For purposes of this statute, "relative" includes an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of these persons even if the marriage was terminated by death or dissolution. (Welf. & Inst. Code, § 361.3, subd. (c)(2).) Therefore, a grandparent with or without de facto parent status can appeal from the denial of a placement request as a relative caretaker under this statute. (See *Cesar V., supra,* 91 Cal.App.4th at pp.1034-1035.) Counsel should note that appealing de facto parents and relatives are not automatically entitled to receive the full appellate record.[168] (Welf. & Inst. Code, § 827.)

Minors

On occasion, the minor files an appeal. In the role of appellant, the child must have appointed counsel for the appeal. (Welf. & Inst. Code, § 395, subd. (b)(1); Cal. Rules of Court, rule 8.403(b).)[169] Non-appealing minors are not automatically appointed counsel on appeal. (Welf. & Inst. Code, § 395(b)(1); Cal. Rules of Court, rule 8.403(b).) The minor's trial attorney or guardian ad litem may file a request showing that the child's best interests cannot be protected without the appointment of separate counsel on appeal. (Welf. & Inst. Code, § 317; Cal. Rules of Court, rules 5.661(c) & 8.403(b)(2).) Although the Court of Appeal has discretion to appoint counsel automatically (*In re Zeth S.* (2003) 31 Cal.4th 396, 415), for reasons of economy, generally, the Court of Appeal presumes county counsel will address the child's best interests in its response.

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[168]For guidance on obtaining the record on appeal in such cases, see the Non-Party Records article available on our website.

[169]Unless the parent is also appealing, the parent typically acts as a respondent in a minor's appeal. The court has discretion whether to appoint counsel for a respondent parent. (*In re Bryce C.* (1995) 12 Cal.4th 226, 234.)

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ADI offers guidance on representing a dependency minor on appeal. (See ADI guidelines for minor's counsel; § 5.4.2 Non-appealing minor's brief et seq.].) Appellate counsel must consult with the minor's guardian ad litem, which is usually the minor's trial counsel.

County Counsel appeals

In contrast to Penal Code section 1238, on People's appeals (see § 2.6 People's appeals and issues raised by the People et seq., *ante*) and Welfare and Institutions Code section 800, subdivision (b) on delinquency appeals, there is no general authority specifically governing the County's right to appeal or identifying the grounds that may be appealed. Instead, Welfare and Institutions Code section 395 controls appeals filed by the County, just as it controls appeals by any other party to the dependency proceeding. Typically, the parent is the respondent in a County appeal.

If the County wants to raise an issue, it must file an appeal. If an opposing party has already appealed, the County's case becomes a "cross-appeal." The general rule that a respondent cannot raise a new issue of its own in a respondent's brief applies to the County, as it applies to a parent responding to a county counsel appeal. (Cf. Pen. Code, § 1252, at § Prosecution issues raised in defendant's appeal, et seq., *ante*.)

Mootness and ripeness

An appeal will usually be dismissed by the court if it is moot or not yet ripe for review. Certain events may make the appeal moot in dependency cases, such as the return of custody of the child to a parent, the child's reaching the age of majority (unless the court has extended jurisdiction to age 21), or the death of the appealing parent or child. (*In re N.S.* (2016) 245 Cal.App.4th 53, 61; *In re A.Z.* (2010) 190 Cal.App.4th 1177, 1180-1181.) A case is not necessarily moot, however, just because the course of the current litigation will not be affected by a decision if the party may suffer collateral consequences, such as jeopardizing a parent's interests in a subsequent proceeding. (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.) And even if it is moot, in some situations the court may decide the case anyway– for example, if the issue is one of continuing public interest and capable of repetition, yet evading review. (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1498-1499.) See § Mootness and ripeness, *ante*, for a general discussion of mootness and ripeness. Appellate counsel must maintain ongoing contact with trial counsel throughout the appeal to see whether circumstances have changed;

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this is especially so if the appeal was taken from the early stages of a dependency case. Appellate counsel also has a duty to bring to the appellate court's attention post-appeal decisions by the juvenile court that affect the appellate court's ability to provide relief. (*In re N.S., supra,* 245 Cal.App.4th at p. 57.)

Waiver and forfeiture

Likely the most common reason for loss of appellate reviewability is waiver or forfeiture – failure to preserve the issue properly at an earlier stage of the proceeding. This topic is addressed in § Addressing questions of potential waiver or forfeiture, *post*.

Waiver

Waiver is an intentional abandonment of a known right. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) A parent may waive their right to appeal by negotiated settlement, in which a parent may waive the right to appeal the sufficiency of the evidence. (*In re N.M.* (2011) 197 Cal.App.4th 159, 168.) Also, specific issues may be waived. This occurs most often by submitting on the agency's *recommendations* – an action that waives the right to challenge orders made in accordance with those recommendations. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) Attorneys should note the difference between submitting on the *recommendation* and submitting on the social worker's *reports*. The latter does not forfeit the right to appeal an adverse order, unless a specific objection was required and not made. (*In re T.V.* (2013) 217 Cal.App.4th 126, 136.)

Forfeiture

Dependency appeals are limited by issues forfeited in the juvenile court. Forfeiture differs from waiver in that it is not an intentional relinquishment of a right but a passive loss of a right based on inaction. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) An issue is forfeited if it was not timely asserted at trial. (*In re Paul W.* (2007) 151 Cal.App.4th 37, 58.)

Another procedural requirement subject to forfeiture rules is that an issue must be raised on appeal at the first opportunity. If the order arose at a hearing from which there was an available appeal, it must be raised on appeal at that time. The issue cannot not be raised in appeals from subsequent hearings. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.)

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Exceptions to waiver and forfeiture

An attorney should not automatically assume a waived or forfeited issue cannot be addressed on appeal but should research whether the issue falls under an exception. (See § Addressing questions of potential waiver or forfeiture.) The Court of Appeal has inherent discretion to review an otherwise forfeited issue. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) For example, if the appeal raises a question of law, forfeiture may not apply. (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313-1314.) Or if it involves sufficiency of evidence. (*People v. Butler* (2003) 31 Cal.4th 1119, 1128; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153-1154.) Or an objection may have been futile because of prior rulings in the case. Or there may have been an unanticipated change in the law. (See *In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) When the issue implicates the child's permanence and stability, the court has exercised its discretion to excuse the waived or forfeited issue. (*Ibid.*) Also, claims under the Indian Child Welfare Act and the Uniform Child Custody Jurisdiction and Enforcement Act can be raised at any time during the proceedings. (See *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1195-1197; *In re A.C.* (2005) 130 Cal.App.4th 854, 860; see also Welf. & Inst. Code, § 224.4 [tribe's right to intervene at any time].)

Policy considerations may dictate overlooking waiver or forfeiture. One such circumstance may occur when precluding review would amount to a miscarriage of justice or due process violation. (*In re A.C.* (2008) 166 Cal.App.4th 146, 155-156; *In re T.G.* (2013) 215 Cal.App.4th 1, 13-14.) Also, if trial counsel's failure to raise the issue prejudiced the client, an argument for ineffective assistance of counsel may be possible. (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1079-1080; see § 8.4.7 Dependency and family law applications, *post*.) Waiver amounting to passive acquiescence may not apply when constitutional rights are implicated. (*In re Laura H.* (1992) 8 Cal.App.4th 1689, 1695-1696.)

Reviewability by hearing

Once it has been established that a party has standing to appeal and the hearing is appealable, the appellate attorney may address only those issues that are reviewable from the appealed hearing. What is reviewable on appeal depends on the type of hearing appealed and the issues raised in that hearing. (See § Waiver and forfeiture et seq., *ante*.) Once a disposition or post-disposition order is final and binding, it is not appealable from a later appealable order. (*In re T.G.* (2015) 242 Cal.App.4th 976, 984.) If an issue is not raised on the first appeal for

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which it is ripe, it is waived for future appeals. (See a more detailed discussion of potential issues in dependency appeals in § 4.9 Appendix C, et seq. which includes a checklist of some common issues raised in dependency appeals.)

At any otherwise appealable hearing, if the court decides not to offer future reunification services and instead sets a permanent plan hearing under Welfare and Institutions Code section 366.26, the ruling is not directly appealable but must be reviewed by writ under rules 8.450-8.452. (Welf. & Inst. Code, § 366.26, subd. (*l*).) All findings and orders made at the hearing setting the section 366.26 hearing must be reviewed by writ. (*Ibid.*; *In re Amber U.* (1992) 3 Cal.App.4th 871, 881 [based on former subdivision].)

Dispositional order

The first appealable hearing is the one at which the dispositional order is made. (*In re T.W.* (2011) 197 Cal.App.4th 723, 729.) An appeal from the disposition orders may address issues from the detention and jurisdictional hearings, which were not separately appealable.

At the detention hearing, or initial petition hearing, the court reviews the county's evidence for a prima facie showing that the child or children come under Welfare and Institutions Code section 300. (Welf. & Inst. Code, § 319.) The court orders the child detained or releases the child from custody back to the parents. (Welf. & Inst. Code, § 319.) Issues on appeal from the detention hearing are limited. Because such matters are time sensitive, issues from the detention hearing often are best reviewed by writ of mandate, petition for rehearing, or demurrer. (See Code Civ. Proc., § 430.1; Welf. & Inst. Code, § 252; Cal. Rules of Court, rule 8.486; see also, § 8.5.2 Mandate, prohibition, and certiorari et seq.)

At the jurisdictional hearing, the court determines whether the allegations identified in the petition are true and whether the petition can be sustained. (Welf. & Inst. Code, § 355.) This hearing focuses on the sufficiency of the evidence as to each allegation, as described in Welfare and Institutions Code section 300.

The disposition orders commence after the court finds a child is a person described by Welfare and Institutions Code section 300. (Welf. & Inst. Code, § 358.) Those orders may be made on the same day as the jurisdictional hearing or after. The disposition orders determine the child's placement while under the court's jurisdiction and can include placement in a foster home, with a non-custodial parent, or with a parent with specific conditions for the child's safety. (Welf. & Inst. Code, § 361.)

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Status review hearings

Following the dispositional order and depending on the circumstances of the case, there may be as many as four status review hearings when the child is in out-of-home placement. (See Welf. & Inst. Code, § 361.5.) Each review hearing is set for six months after the prior hearing. The initial six-month status review hearing must be held six months after disposition, but no later than 12 months after the date the child entered foster care. (Welf. & Inst. Code, § 366.21, subd. (e); Cal. Rules of Court, rule 5.710.) The 12-month review hearing, also known as the permanency hearing, is held six months after the initial review hearing. (Welf. & Inst. Code, § 366.21, subd. (f); Cal. Rules of Court, rule 5.715.) There also may be an 18-month and even a 24-month review hearing in qualifying cases. (Welf. & Inst. Code, §§ 366.21, subd. (g), 366.22, subds. (a) & (b), 366.25, subd.(a)(1); Cal. Rules of Court, rules 5.720, 5.722(a).)

When the child remains in the custody of their parents, the case is also reviewed at least every six months. (Welf. & Inst. Code, § 364.) The court shall terminate jurisdiction unless the child welfare agency establishes by a preponderance of the evidence that conditions still exist which justified assumption of initial jurisdiction and that supervision is still necessary. (Welf. & Inst. Code, § 364, subd. (c).)

Only issues raised at the review hearing being appealed can be addressed on appeal. Issues regarding detention, jurisdiction, and disposition and other earlier matters are not addressed unless extraordinary circumstances exist. (See § Waiver and forfeiture et seq., *ante*; *In re Albert A.* (2016) 243 Cal.App.4th 1220, 1240 [inadequate notice of prior writ rights]; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-723 [same].) Counsel should consult with the project attorney to determine whether an exception to this otherwise straightforward rule may apply.

Hearings on section 388 petition and other motions

A common motion in juvenile dependency proceedings is a petition to change a court order because of changed circumstances under Welfare and Institutions Code section 388. When such a petition is denied, the order is appealable under Welfare and Institutions Code section 395 if the party had standing to file the request. The official form for the petition is Judicial Council JV-180. Sometimes denials of section 388 petitions are appealed by de facto parents and relatives who have requested placement of the child in their care. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035; but see *In re*

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K.C. (2011) 52 Cal.4th 231, 238 [parent does not have standing to appeal relative placement issue unless appeal would help avoid termination of parental rights].)

A section 388 petition may be filed either concurrently with or close in time to another major hearing, such as the termination of parental rights hearing or a review hearing. Because the same circumstances exist at the time of the petition as at the other hearing, these matters are also often consolidated into one appeal.

Rulings on other motions are also appealable under Welfare and Institutions Code section 395. If the ruling occurred in the context of another proceeding, such as a review or section 366.26 hearing, counsel should investigate whether separate notices of appeal need to be filed and whether the appeals should be consolidated. If the notice of appeal lists only the section 366.26 hearing as the hearing appealed from, counsel may consider amending the notice of appeal to add the section 388 petition to the list of orders appealed from.

Termination of reunification services

Orders terminating services to both parents typically are not appealed directly because they usually occur at the same hearing setting the Welfare and Institutions Code section 366.26 selection and implementation hearing. (See Cal. Rules of Court, rule 8.450 et seq.) In that case, review must proceed by writ. (Welf. & Inst. Code, § 366.26, subd. (*l*); rules 8.450 et seq.) These orders are appealable, however, if that hearing is not set; this might occur, for example, when services for one parent are terminated, but not as to the other parent. Or after a petition for extraordinary writ review was filed and summarily denied. (Welf. & Inst. Code, § 366.26, subd. (*l*).) An appeal from the termination of services focuses on the quality of services provided and actions of the appellant at the time of that hearing. New evidence cannot be used in an appeal. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 413.)

Termination of parental rights

The hearing at which parental rights are terminated, and concomitant orders are made may be appealed under Welfare and Institutions Code section 395. (E.g., *Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399, 405.)

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Post-permanency proceedings

Post-permanency planning hearings occur every six months so long as a child is a dependent of the juvenile court. (Welf. & Inst. Code, § 366.3.) Possible permanency plans include adoption, guardianship, tribal customary adoption, or another planned permanent living arrangement with a foster parent or relative caregiver. Transition to independent living is another possible permanent plan. (See Welf. & Inst Code, § 366.26, subds. (b), (c)(4).)

Nonminor dependents

Extended dependency jurisdiction past age 18 may be the subject of appeals. (Welf. & Inst. Code, §§ 303, 366.3, subd. (d), 391; *In re Shannon M.* (2013) 221 Cal.App.4th 282, 293.) Extended dependency jurisdiction ends automatically when the dependent reaches the age of 21, although the court may terminate jurisdiction before that time. (Welf. & Inst. Code, § 303.) The court's termination of jurisdiction before age 21 may give rise to appellate issues. (E.g., *In re H.C.* (2017) 17 Cal.App.5th 1261; *In re Aaron S.* (2015) 235 Cal.App.4th 507.)

If the dependent chooses to stay in foster care as a nonminor dependent, services may also continue for their parents if their rights were not terminated before the dependent reached the age of majority, *i.e.*, 18 years of age. (Welf. & Inst. Code, § 361.6.)

A post-termination order changing a child's placement must be reviewed by writ, not appeal. (Welf. & Inst. Code, § 366.28; Cal. Rules of Court, rule 8.454 et seq.) See § 2.9.2 Writ petition to review orders at hearing setting section 366.26 proceeding or at post-termination child placement hearing et seq., *post*.

2.9 Procedural steps for getting the dependency review process started

2.9.1 Appeal

This section addresses the specific requirements pertaining to dependency appeals. For a general discussion of notice of appeal filing procedures, see § 2.7.3 Notice of appeal, *ante*.

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What orders can be appealed

Appealable judgments and orders are discussed in § 2.8.1 Appealable judgments and orders et seq., *ante*. A judgment in a dependency proceeding at which a dispositional order is made under Welfare and Institutions Code section 300 may be appealed in the same manner as any final judgment. (Welf. & Inst. Code, § 395.) Any subsequent order may also be appealed as an order after judgment. (*Ibid.*)

An appeal cannot be filed from the preliminary proceedings before disposition, such as the detention hearing or the jurisdictional hearing. (*In re T.W.* (2011) 197 Cal.App.4th 723, 729.) Orders from these proceedings may be reviewed on appeal from the disposition. If immediate review of such preliminary orders is necessary, a traditional writ of mandate is often the most appropriate means to contest the orders made at a detention hearing. (See § Dispositional order, *ante*.)

Who can file notice of appeal

The notice of appeal may be filed by the appellant or by their trial counsel. (Cal. Rules of Court, rule 8.405(a)(1).) The appellant must sign the notice or authorize the trial attorney to sign on their behalf. (Cal. Rules of Court, rule 8.405(a)(2); *In re Asia L.* (2003) 107 Cal.App.4th 498, 505; see § Signature, *ante*.)[170]

In the majority of appeals from dependency cases, the party appealing is the parent. But other parties may have standing to appeal, including the minor, County, de facto parent, grandparent, and other relatives. On occasion, a cross-appeal may be filed, and then each appellant would also act as a respondent.

For minors, the notice of appeal must be signed by the child or by the child's CAPTA guardian ad litem. (Cal. Rules of Court, rules 5.661(b), 8.405(a)(1).)

[170]If the appellate attorney discovers an error in the notice of appeal, it is important to consult the project, which generally addresses notice of appeal problems before appointment, because it may be necessary to file an amended notice of appeal.

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Where to file notice of appeal

The notice of appeal from a dependency proceeding must be filed in the juvenile court in which the order being appealed was made. (Cal. Rules of Court, rule 8.405(a)(1).)

When to file notice of appeal

A notice of appeal must be filed from an appealable matter within 60 days of the judgment or, in matters heard by a referee not acting as a temporary judge within 60 days after the referee's order becomes final. (Cal. Rules of Court, rule 8.406(a).) The order of a referee generally becomes final 10 calendar days after service of a copy of the order and findings on the parties. (Cal. Rules of Court, rule 5.540(c).) A filing (including a notice of appeal) by a person in a custodial setting is timely if delivered by the due date to an authorized official of the institution. (Cal. Rules of Court, rule 8.25(b)(5); *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106; see § Filing date, *ante*.)

The California Supreme Court has recognized the need for an exception to timeliness rule if a notice of appeal was not timely filed because of the trial attorney's negligence or the juvenile court's failure to advise parties of their right to appeal. (See *In re Benoit* (1973) 10 Cal.3d 72; *In re A.R.* (2021) 11 Cal.5th 234; § Constructive filing doctrine [Reasonable reliance on counsel to file: *Benoit*], *ante*.) Because of the inherent delay involved in *Benoit/A.R.* procedures, however, this equitable exception is applied only on rare occasions in dependency proceedings.[171] (*In re A.R., supra,* 11 Cal.5th at pp. 251-253 [trial counsel's failure to timely file appeal and claimant's promptness and diligence in pursuing appeal].) Thus, every effort must be made to file a timely notice of appeal. If the appellate attorney discovers the notice of appeal was not timely filed, the attorney must contact the project immediately.

[171]Delay avoidance is of primary importance in dependency cases. (See *In re A.R., supra,* 11 Cal.5th at p. 249.) The child is getting older, and proceedings are continuing in the juvenile court even as the appeal goes forward. Although appeals look at former hearings as static events, the underlying situation is dynamic and ever-changing. (See *In re Zeth S.* (2003) 31 Cal.4th 396.)

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Content of notice of appeal

The notice of appeal must identify the particular judgment or order being appealed. (Cal. Rules of Court, rule 8.405(a).) Although the court must liberally construe the notice of appeal (rule 8.405(a)(3)), counsel should provide as much information as possible to identify the hearing being appealed, including all findings and orders appealed and the date(s) of the hearing(s) being appealed.

It is best practice to use a standard form for dependency appeals. In the Fourth District, ADI's notice of appeal form is much preferred. Use of the Judicial Council form JV-800 is encouraged where the project or court has not specified a preference. In any event, it is best practice to include the date(s) of the hearing being appealed, the specific orders being appealed if known, appellant's relation to the child (e.g., mother, father, grandparent, de facto parent, etc.), appellant's contact information, appellant's trial counsel and whether appointed or retained, and a request for appointed counsel on appeal, with any financial information the Court of Appeal may require.

Appellate counsel should consult with the project about notice of appeal problems.

2.9.2 Writ petition to review orders at hearing setting section 366.26 proceeding or at post-termination child placement hearing

Statutory writ requirement

Welfare and Institutions Code sections 366.26, subdivision (*l*) and 366.28 mandate that an order setting a permanency plan hearing or post-termination placement of a child, respectively, is not appealable unless a writ petition under rules 8.450-8.452 or 8.454-8.456 has been timely filed and the issues to be reviewed were not decided on the merits. (See also Cal. Rules of Court, rule 8.403(b).

This section discusses the procedures to get the writ started. The petition itself is explored more fully in chapter 8, "Putting on the Writs: California Extraordinary Remedies."

Counsel or the client must file a notice of intent to file a writ petition in order to start the process. (Cal. Rules of Court, rules 8.450(c), 8.454(c).) The notice activates preparation of the normal record and the process of appointing counsel, if requested.

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Who may file notice of intent

Normally, the notice of intent is signed by trial counsel for the petitioner or by the client in pro per. (Cal. Rules of Court, rules 8.450(c), 8.454(c).) A notice of intent to file writ petition must be timely filed. (See rules 8.450(e)(4), 8.454(e).) The use of the Judicial Council forms JV-820 and JV-822 is encouraged to ensure a complete and proper notice of intent is filed.

When to file notice of intent

From hearing setting section 366.26 hearing

If the party was present, a notice of intent to file writ petition from a hearing setting the permanency plan hearing is timely filed within seven days after the date of the order setting the hearing. (Cal. Rules of Court, rule 8.450(e)(4)(A).) If the party was notified only by mail, the notice must be filed within 12 days after the date the clerk mailed the notification. (Cal. Rules of Court, rule 8.450(e)(4)(B).) If the party was mailed the notice to an address outside California but within the United States, the notice must be filed within 17 days after the date the notification was mailed. (Cal. Rules of Court, rule 8.450(e)(4)(C).) And if the notification was mailed to an address outside the United States, the notice must be filed within 27 days of the date the notification was mailed. (Cal. Rules of Court, rule 8.450(e)(4)(D).) Extensions for an order of a referee and based on the prison delivery rule also apply. (Cal. Rules of Court, rules 8.25(b)95), 8.450(e)(4)(E); *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106; see § Filing date, *ante*.)

From post-termination child placement order

When an order designating placement of a dependent child after termination of parental rights is to be reviewed, a notice of intent to file writ petition must be filed within seven days after the order. (Cal. Rules of Court, rule 8.454(e)(4).) If the order was made by a referee, then the notice must be filed within seven days after the order becomes final under rule 5.540(c). (Cal. Rules of Court, rule 8.454(e)(4).) If the party was notified of the order only by mail, the notice of intent must be filed within 12 days of the date the notification was mailed. (Cal. Rules of Court, rule 8.454(e)(5).) Extensions for an order of a referee and based on the prison delivery rule also apply. (Cal. Rules of Court,

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rules 8.25(b)95), 8.450(e)(4)(E); *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106; see § Filing date, *ante*.)

2.9.3 Special issues with Family Code appeals

Appeals from private terminations of parental rights

After orders affecting parental rights are made at superior court, the orders cannot be set aside, changed, or modified by the superior court but must be reviewed by appeal. (Fam. Code, § 7894.)

Termination of parental rights in stepparent adoptions

A Family Code, section 7600 et seq. matter (termination of parental rights in stepparent adoptions) may be appealed in the same manner as an order of the juvenile court declaring a person to be a ward of the juvenile court. (Fam. Code, § 7669, subd. (a).) Before such adoption can occur, the rights of the non-relinquishing birth parent not judicially deprived of custody and control of the child must be terminated. (See Fam. Code, § 8606.) Typical appeals from these proceedings are filed by a birth parent who did not consent to an adoption by a stepparent and whose rights were terminated so that the adoption proceeding could proceed. There is a separate procedure to terminate the rights of an alleged father. (See Fam. Code, §§ 7662 et seq.) An alleged father may appeal the order dispensing with his consent for adoption. (Fam. Code, § 7669, subd. (a).)

If a presumed parent with parental rights refused to give the required consent or withdrew consent, a Petition to Free the Child from Custody and Control is usually filed. (See Fam. Code, § 7800 et seq.) If it is not granted and the requirements under Family Code section 8604 are not met, the adoption petition must be dismissed. (Fam. Code, § 9006, subd. (b); see also § Appeals from proceedings freeing child from parental custody and control], *post*.)

Appeals from proceedings freeing child from parental custody and control

A proceeding for declaration of freedom from parental control and custody under Family Code section 7800 et seq. is appealable under section 7894. The Court of Appeal must appoint counsel for the indigent appellant appealing from a judgment freeing a child who is a dependent child of the juvenile court from parental custody and control. (Fam. Code, § 7895, subds. (a) & (b).)

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Appeals involving issues of parentage/paternity

The Uniform Parentage Act defines the legal relationship existing between a child and their natural or adoptive parents. (Fam. Code, § 7600 et seq.) There are four main types of parents: presumed parents, biological parents, alleged parents, and quasi-presumed or *Kelsey S.* parents. (See Fam. Code §§ 7635, 7550-7558; 7611, subd. (d); *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849 [constitutional right of biological father to establish himself as a quasi-presumed father if he "promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise"].) Each type of parent has different rights and responsibilities.

The most expansive rights belong to presumed parents. (*In re Zacharia D.* (1993) 6 Cal.4th 435.) Therefore, it is important for the appellate attorney representing a father to verify the status of the father in the trial court. The attorney should review the record for all evidence pertaining to the various types of fathers and check whether the father's status was properly found. (See 4.9 Parentage determinations.)

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3 CHAPTER THREE

PRE-BRIEFING RESPONSIBILITIES: RECORD COMPLETION, EXTENSIONS OF TIME, RELEASE ON APPEAL

3.1 Introduction

This chapter addresses three critical responsibilities of appellate counsel before the opening brief is filed. First, counsel must ensure the record is complete. Second, when it is not possible to complete research and briefing in the time permitted, counsel must seek one or more extensions. Third, if the client wants and is eligible for bail or other form of release pending appeal, counsel should investigate that possibility and take needed action.

Many of the procedures discussed in this chapter require a motion. ADI provides guidance on motions on its website.

3.2 Ensuring an adequate record

Appellate counsel has the responsibility to ensure a complete record to permit identification of all arguable issues and provide the necessary factual foundation for the issues raised. (*People v. Barton* (1978) 21 Cal.3d 513, 518-520; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Harris* (1993) 19 Cal.App.4th 709, 714; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394.)

3.2.1 Overview

Rule 8.320 describes the "normal record" on appeal in a criminal case – that is, the record to be prepared automatically by the superior court. Rule 8.407 is the juvenile counterpart. The normal record consists of the documents admitted into evidence and transcripts of oral proceedings typically needed in most appeals.

Occasionally, the prepared record lacks something that under the rules should be in the normal record. Sometimes the normal record as defined in the rules does not include the material necessary to argue an issue and needs either a pre-certification request for additional record (usually the task of trial counsel) or post-certification augmentation. Sometimes part of a record may have been lost or destroyed. Occasionally the appellate court's personal inspection of an exhibit is needed. When it is important for the court to consider matters occurring

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outside of the present proceedings, such as past appeals in the case, a motion for judicial notice (Cal. Rules of Court, rule 8.252(a)) or very occasionally for new evidence on appeal (rule 8.252(c); Code Civ. Proc., § 909; cf. *In re Zeth S.* (2003) 31 Cal.4th 396) may be required.[172]

Although rules 8.336(h) and 8.409(c) state that ensuring prompt preparation of the record is the responsibility of the Court of Appeal rather than counsel, to protect the client counsel should monitor the process and call attention to delays so prolonged as to suggest the case may have slipped through the cracks.

Throughout the appeal, especially in juvenile cases, appellate counsel should stay in touch with trial counsel. Proceedings in the trial court may take place that affect the scope and nature of the appeal. Trial counsel may also be able to provide documents not in the record that appellate counsel should consider.

3.2.2 Normal record in criminal case

Under rule 8.320(a) the normal record in a criminal appeal by the defendant (or in a People's appeal from the granting of a new trial) consists of the clerk's transcript and the reporter's transcripts. Juvenile records are treated in § 3.2.3 Normal record in juvenile case, et seq., *post*.)

Normal clerk's transcript

The clerk's transcript is a compilation of selected documents in the case. Rule 8.320(b) specifies the contents of the normal clerk's transcript in a criminal appeal.

In appeals from orders other than a motion for new trial or a judgment based on a demurrer, a more limited normal clerk's transcript is prescribed. (Cal. Rules of Court, rule 8.320(d).) Limited appeals include orders after judgment affecting a party's substantial rights in criminal cases, such as revocation or modification of probation (both contested and uncontested), resentencing, denials of statutory petitions (e.g., Proposition 47, Pen. Code, § 1016.5), and writ petitions. (See § 2.4 Appeal by the defendant from order after judgment et seq.)

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[172]As with all motions, it must be a separately filed document, not part of a brief or petition. (Rule 8.252(a)(1); see also rule 8.54.)

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Normal reporter's transcript

The reporter's transcript is a verbatim record of selected oral proceedings in the superior court. Rule 8.320(c) specifies the contents of the normal reporter's transcript in a criminal appeal.

In appeals from orders other than a motion for new trial or a judgment based on a demurrer, a more limited normal reporter's transcript is prescribed. (Cal. Rules of Court, rule 8.320(d); see § Normal clerk's transcript, *ante*, for examples of such proceedings.)

Exhibits

Under rules 8.320(e) and 8.407(e), the record also includes any exhibit admitted in evidence or refused or lodged; thus, counsel may refer to any exhibit in briefing. Unless an exhibit is in the clerk's transcript, however, the court will not have physical access to it. If counsel wants the court to examine an exhibit, it may be transmitted on request under rules 8.224. § 3.2.7 Getting exhibits before the reviewing court, *post*, treats this topic. Fourth District, Division Two, however, has a different practice. When the record is filed, the notice advises counsel that the court-provided form must be served and filed with the party's brief seeking early transmission of any exhibit not included in the Clerk's Transcript.

3.2.3 Normal record in juvenile case

Under rule 8.407, the normal record in a juvenile appeal, delinquency or dependency, consists of the clerk's transcript and the reporter's transcript.[173] In fast-track cases, the record will be electronic in most counties.[174] (Cal. Rules of Court, rule 8.416(c)(2)(B).) Minor's counsel will receive a separate copy. (*Ibid.*)

Normal reporter's transcript

Rule 8.407(b) prescribes the contents of the reporter's transcript in a juvenile appeal.

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[173]Local rules and court miscellaneous orders may add materials to the normal record as prescribed by the California Rules of Court.

[174] Imperial County will send counsel a CD.

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Exhibits

Rule 8.407(e) provides for exhibits to be transferred to the Court of Appeal under rule 8.224. § 3.2.7 Getting exhibits before the reviewing court, *post*, treats this topic. Detailed guidance for Fourth District variations on this procedure is set forth on the ADI Fourth District practice pages.

3.2.4 Confidential matters in records

Some matters of record are to be handled confidentially, by special procedures. The ADI website offers more extensive guidance on confidential records. These procedures may apply even if the confidential matter is part of the normal record. Counsel should be aware of these matters and the way they are to be handled. (See generally Cal. Rules of Court, rules 8.45-8.47; see also rule 8.74(a)(4).) Counsel should also guard against disclosure of this material in publicly filed briefs. (See § Observe the confidentiality of certain records and respect the privacy of participants.)

Juvenile records

Welfare and Institutions Code section 827 makes juvenile delinquency and dependency records accessible only to the parties and their attorneys and enumerated others, and section 676 makes court hearings confidential, except in specified circumstances.[175] Rule 8.401 makes appellate records and briefs accessible only to the court, parties, appellate projects, and others designated by the court. It also requires additional steps to protect confidentiality, such as the use of first name and last initial, or just initials.

Some materials may be protected still further, such as psychological reports applicable to only one parent, to which other parties are denied access. The caregiver's address is confidential unless the juvenile court or the caregiver authorized it to be released. (Welf. & Inst. Code, § 308 (subd. (a).) Counsel must redact the address[176] so that it is not readable before sending the record to the

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[175]By virtue of its relationship with counsel, the project, such as ADI, is treated as counsel. Accordingly, two divisions of the Fourth District have issued orders giving ADI access to juvenile files: Division One Misc. Order No. 112812 and Division Two Misc. Orders,No. 15-4.

[176]Caregiver addresses are often found on orders regarding the parents' educational rights, and on proofs of service.

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client. Similarly, counsel should redact social security numbers. (Cal. Rules of Court, rule 1.201(a)(1).)

Marsden and related transcripts

A *Marsden*[177] transcript will be sent initially only to the Court of Appeal and the defendant's counsel. (Rule 8.45(d)(2).) If the opening brief raises a *Marsden* issue, the respondent may request a copy of the transcripts under rule 8.47(b)(2)(B). When applicable, the defendant may oppose the request on the grounds that the transcript contains irrelevant confidential material, citing the pages and line numbers where that material is found. (Rule 8.47(b)(2)(C).) If the defendant files no opposition, the clerk must send the record to the respondent. (Rule 8.47(b)(2)(D).)

Courts occasionally use *Marsden*-like procedures for similar defense motions requiring protection against premature disclosure of defense material, such as a defense request for expert funds. *Marsden* issues may be raised in juvenile proceedings, as well. (See *In re M.P.* (2013) 217 Cal.App.4th 441, 455.) More guidance is available on ADI's confidential records page.

Other confidential records and in camera proceedings from which one or more parties were excluded in the superior court

Except for a probation report or records pertaining to a confidential informant, transcripts and documents related to other kinds of in camera proceedings from which one party or more parties were excluded are transmitted only to the reviewing court and any party who had access in the superior court. (Cal. Rules of Court, rule 8.45(d)(2).) An example might be a *Pitchess* motion[178] or a diagnostic report under Penal Code section 1203.03. The parties on appeal

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[177] *People v. Marsden* (1970) 2 Cal.3d 118 (motion to remove appointed counsel because of failure to provide effective assistance).

[178] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531: defense motion for disclosure of complaints of misconduct made against an officer, when potentially relevant to the defense. (Evid. Code, §§ 1043-1047; Pen. Code, §§ 832.5, 832.7, 832.8; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1227.)

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will receive an index of the proceedings showing the date and persons present, but not the substance of the matter.[179] (Rule 8.45(c).)

A record pertaining to a motion for disclosure of a confidential informant is sent to the reviewing court only, even though the People had access to it below. (Rule 8.45(d)(3); see Evid. Code, §§ 1041, 1042.)

A probation report is sent to the reviewing court, the People, and counsel for the defendant who is the subject of the report. (Rule 8.45(d)(4); see Pen. Code, § 1203.05.[180])

Sealed records

Sealed records are those made confidential by court order on a case-by-case basis, rather than by law. (Rules 8.45(b)(3), 8.46(a), 2.550-2.551.) The records may be closed to public inspection or to inspection by other parties, as well. (Rule 8.45(b)(3).)

The court making the order must weigh the need for confidentiality against the public's First Amendment right to access to court records, according to criteria set out in rule 2.550(d) and *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. (See also Code Civ. Proc., § 124.)

Records sealed in the trial court remain sealed on appeal unless the reviewing court orders otherwise. (Cal. Rules of Court, rule 8.46(b)(1).)

Records not sealed by the trial court may be sealed on order of the appellate court under rule 8.46(d), which prescribes the procedures for obtaining a sealing order, lodging a record conditionally under seal, making an order, and dealing with the records. A sealing order must state the findings required by rule 2.550(d) and comply with rule 2.550(e). If the court denies the motion to seal, the document is returned unless within 10 days the party asks that it be filed. (Rule 8.46(d)(7).)

Matters in briefs and other publicly filed documents must not disclose the contents of the sealed records. (Cal. Rules of Court, rule 8.46(f).) The general procedure is to file a public redacted document and an unredacted, complete

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[179]The defendant, not the court, is responsible for augmenting the record to include those confidential records. (*People v. Rodriguez* (2011) 193 Cal.App.4th 360.) The augmented record goes only to the court.

[180]An exception to the general rule of access on appeal to those who had access below is necessary in this situation, because a probation report is public until 60 days after sentencing. (Pen. Code, § 1203.05.)

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version. The documents must be labeled as required in rule 8.46(f)(2) [record already sealed] or (f)(3) [record lodged conditionally under seal].)

Unsealing a record is governed by rule 8.46(f). The party seeking unsealing makes a motion to the reviewing court, showing why sealing is no longer justified under rule 2.550.

Improper inclusion of identification information and other confidential matters in record

Sometimes material that is not supposed to be in the record is inadvertently included. For example, by law the transcripts must not include the names, addresses, or telephone numbers of sworn jurors; jurors must be referred to by an identifying number.[181] (Code Civ. Proc., § 237, subd. (a)(2); Cal. Rules of Court, rule 8.332(b).) Other examples might be confidential juvenile records (see, generally, Welf. & Inst. Code, § 827; rule 8.401) and confidential transcripts (rules 8.45, 8.47). These records might include social security numbers (rule 1.201(a)(1)) or psychological evaluations of a non-client parent and addresses of confidential caregivers in juvenile dependency cases (Welf. and Inst. Code § 308). This information must be redacted before transcripts are given to clients.

Upon discovering material that counsel may not be entitled to see, counsel should stop reading that part of the transcript immediately and notify the Court of Appeal and ADI. The court may order return of the records, redaction, or other corrective action. *Under no circumstances should counsel send such material to clients or other people without specific authorization from the court or project.*

If the material is appropriate for counsel to review, but not the client, counsel may redact the transcript to send it to the client, completely covering the confidential information, if practical. If the changes are more extensive, counsel may ask the court to order the court clerk to prepare a proper copy. If the record is in electronic form, having the clerk do the corrections may be the only alternative.

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[181]The information for unsworn jurors (such as those excused) must not be sealed unless the court finds compelling reason to do so (Code Civ. Proc., § 237, subd. (a)(1); rule 8.332(c)), but by policy unsworn jurors should be identified only by first name and initial. If access to juror identification information is required to handle the case, counsel may apply to the trial court under Code of Civil Procedure section 237, subdivisions (b) - (d).

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3.2.5 Request for additions to record before it is filed in reviewing court

Rule 8.324 prescribes procedures for requesting materials not in the normal record, if the record has not yet been certified and transmitted to the reviewing court.[182] Ordinarily, trial counsel should make such a request in the superior court when filing a notice of appeal or as soon thereafter as possible, but in practice trial counsel seldom do so.

Rule 8.324(b) provides:

> Either the People or the defendant may apply to the superior court for inclusion in the record of any of the following items:
>
> (1) In the clerk's transcript: any written defense motion granted in whole or in part or any written motion by the People, with supporting and opposing memoranda and attachments;
> (2) In the reporter's transcript:
> (A) The voir dire examination of jurors;
> (B) Any opening statement; and
> (C) The oral proceedings on motions other than those listed in rule 8.320(c).

Rule 8.407(c) analogous provisions for requesting additional records in the juvenile court before the record is filed in juvenile appeals.

3.2.6 Correcting/completing and augmenting record after it is filed in reviewing court

Counsel has the responsibility of reviewing all relevant parts of the filed record and ensuring the record is adequate to support all issues raised. If the record delivered to counsel is inadequate in any respects, counsel must act either to correct or augment it for the materials needed. "Correction" or "completion" is used when parts of the normal record are missing from the filed record.

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[182]California Rules of Court, rule 8.340 prescribes procedures for changes to the record after it is filed in the reviewing court. (See § 3.2.6 Correcting/Completing and Augmenting Record After It Is Filed in Reviewing Court et seq., *post*, on corrections and augmentations, and § 3.2.7 Getting Exhibits Before the Reviewing Court, *post*, on exhibits.)

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"Augmentation" is used when counsel needs material that is not a prescribed part of the normal record.

Counsel should make review of the record and its completion an *early* priority, because courts may be disinclined to delay the case well into the briefing and/or decisional process to add to the record. Some courts have local rules or miscellaneous orders setting deadlines for these requests. (See § Timing of request, *post*.) To give themselves time for this responsibility, counsel should *always* monitor their cases on the court website and sign up immediately for automatic email notification of developments, including the filing of the record.

Correcting omissions from normal record

Appellate counsel in reviewing the record may notice that matters required by rule 8.320(b) or (c) are not included. Rule 8.340(b) provides in relevant part:

> If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or order requires to be included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for a court order, the clerk must promptly send the document or transcript-as an augmentation of the record-to all those who are listed under (a)(1) [the reviewing court, the probation officer, the defendant, defendant's appellate counsel, and the Attorney General and/or district attorney].

Similar provisions apply to juvenile appeals. (Cal. Rules of Court, rules 8.410(a), 8.416(d)(1).)

Examples of often omitted materials

Any matter prescribed for the normal clerk's transcript or reporter's transcript may occasionally be omitted. Certain items, however, are more often overlooked, and counsel should be especially alert for them.

One example is the written transcript of any electronic recording provided to the trial court under rule 2.1040[183] which is a required part of the clerk's

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[183]Rule 2.1040 requires a party offering an electronic recording at trial to provide a written transcript of the recording, unless the trial judge orders

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transcript. (Rule 8.320(b)(11).) Another example is any packet of records offered to prove prior convictions under Penal Code section 969b. (Rule 8.320(b)(13)(C).) If these materials were before the superior court but are missing from the appellate record, counsel should request them by means of a rule 8.340(b) letter. Another frequently forgotten item is the record covering developments during the appeal. (See §§ Records of proceedings that occur during appeal and Changes in judgment or other new orders made after record is certified, *post*.)

Correction procedure

In criminal or non-fast-track juvenile cases, if seeking *only* to correct an omission in the normal record (not also to augment), counsel should send a letter to the superior court clerk specifically referring to rule 8.340(b) or 8.410(a) and stating what portions of the normal clerk's and/or reporter's transcripts are missing. The letter should describe the missing portions as specifically as possible, including dates, names of reporters, titles of documents, etc. The appeals section of the superior court will prepare and transmit the missing portion of the normal record upon receipt of counsel's letter. In the Fourth Appellate District, counsel should send a copy of the letter to ADI and the Court of Appeal.

Correction in fast-track juvenile cases is governed by rule 8.416(d). Some courts may prefer corrections be handled by augmentation, rather than standard correction processes. Division One of the Fourth Appellate District has a form for notifying the Court of Appeal of missing items from the transcripts in fast-track dependency cases.

If seeking *both* correction of the normal record and augmentation to include materials not in the normal record (see §§ Concurrent request for extension of time, 3.3.3 Extensions pending augmentation or correction of the record, *post*), counsel must follow local court practices. In the Fourth Appellate District, counsel should include all requests in the application for augmentation filed in the Court of Appeal; a separate letter under rule 8.340(b) or 8.410(a) is not necessary or preferred.

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otherwise. If a transcript of a recording was not provided to the superior court under rule 2.1040, counsel should consult with the assigned staff attorney on how to proceed.

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Most courts grant an extension request until a certain number of days after the filing of the corrected record. In the Fourth Appellate District, criminal cases, counsel should serve the Court of Appeal with a copy of the rule 8.340(b) letter. (See Local Rule 2 [If the party serves the Court of Appeal with the rule 8.340(b) letter "the deadline for filing the party's brief shall be automatically extended by 15 days from the date the omitted part of the record is filed. . . ")

Augmenting the record after it is filed in reviewing court

Augmentation is used to obtain materials not in the normal record after the record is certified and transmitted to the reviewing court. This process is governed by rule 8.155(a). (Rules 8.340(c), 8.410(b)(1), 8.416(d); see also *People v. Gaston* (1978) 20 Cal.3d 476, 482-484, *People v. Silva* (1978) 20 Cal.3d 489, 492-493, and *People v. Barton* (1978) 21 Cal.3d 513, 518-520.) Requests for additional record should be submitted to the Court of Appeal, not the superior court, once the record has been filed.[184]A sample augmentation request is on ADI's forms and samples page.

Timing of request

Requests to augment or complete the record should be filed as soon as possible after receiving the record and determining that the additional material is needed – almost always before the original opening brief due date. The general expectation is that a request should be filed within 40 days of the filing of the record or the appointment in criminal cases and within 15 days in fast-track dependency cases. (Cal. Rules of Court, rule 8.416(d)(2).)

Identification of materials in request

In identifying the documents or reporter's transcript sought, counsel should not just ask for "materials relevant to [a particular issue]" or use other such generalities. The exact record needed should be described with enough detail (dates and nature of proceedings, titles and filing dates of documents, etc.)

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[184]Rules 8.324 and 8.407(c) of the California Rules of Court govern additions to the normal record *before* it is certified in criminal and delinquency matters. (See § 3.2.5 Request For Additions To Record Before It Is Filed In Reviewing Court, *ante*.)

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that the reporter or clerk will not have to guess. (See Cal. Rules of Court, rules 8.340, 8.410, 8.155.)

For augmentation of the clerk's transcript, if the material is not lengthy, counsel may obtain a copy of the document from the superior court clerk, attach the copy to the request to augment, and ask the Court of Appeal to order the copy be made part of the record without preparation of a formal supplemental clerk's transcript. (Cal. Rules of Court, rule 8.155(a)(2).)[185]A copy of the augmentation material must be included with the copy of the augmentation request served on opposing counsel. If the augmentation documents are so extensive that a supplemental clerk's transcript will be required, each item should be described as specifically as possible, including the title of the document and the date it was filed. (See rules 8.340, 8.410, 8.155.)

A request to augment the reporter's transcript must describe the nature of the oral proceedings. The date, time, judge's name, and reporter's name (with CCSR number if available) should be provided, along with a citation to the portion of the clerk's transcript and/or reporter's transcript that refers to the requested proceeding. (See Cal. Rules of Court, rules 8.130(a)(4), 8.155(a)(3).)

Explanation of need for materials

The request must include a brief statement of why the augmentation is necessary or relevant to the appeal. (See Cal. Rules of Court, rules 8.155, 8.50, 8.54, 8.340,8.410; *People v. Hagan* (1962) 203 Cal.App.2d 34, 39-40 [defendant not entitled to augmentation of record in absence of showing of good cause].) It should describe the general issue to which the augmented record relates and demonstrate, with references to the present record when available, that the material to be augmented was before the superior court judge. For example, a request might refer to court minutes showing denial of a challenge to a juror for cause in seeking augmentation of the reporter's transcript to include the jury voir dire.

Concurrent request for extension of time

If a supplemental transcript will have to be prepared, delay in filing the brief can be anticipated. Counsel's request to augment the record should therefore include or be accompanied by a request to extend time to "30 days after

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[185]The rule does not require the copy to be certified by the superior court clerk,although counsel can ask for a certified copy.

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the supplemental record is filed"; court policy may vary on whether the requests should be separate or combined. If the requests are combined, the *title* of the combined document should clearly indicate both types of requests. (See also § Correction procedure, *ante*, and § 3.3.3 Extensions pending augmentation or correction of the record, *post*.)

Formal requirements

An augmentation request must comply with rule 8.54 pertaining to motions. The formal requirements for such requests are outlined in ADI's filing rules summary – including such matters as content, service, filing, any deadlines or formal policies, and oppositions.

Changes in judgment or other new orders made after record is certified

In a criminal case, if, during the pendency of the appeal and after the record is certified, the trial court amends or recalls the judgment or makes any new order in the case (such as an order affecting the sentence or probation), the superior court clerk must send copies of the amended abstract of judgment or new order and related proceedings, to the reviewing court and the parties as an augmentation of the record on appeal. (Cal. Rules of Court, rule 8.340(a).) Appellate counsel should keep in close touch with the client and trial counsel to find about such developments. (Although rule 8.340(a) speaks of the additional record as an "augmentation," the requirement of adding it to the appellate record is automatic, without court order. A rule 8.340(b) correction request, as opposed to a rule 8.340(d) augment request, should therefore be sufficient to request the material.

In juvenile cases, the lower court must notify the reviewing court of the change. (Cal. Rules of Court, rule 8.410(b)(2).) A motion for augmentation would be required.

3.2.7 Getting exhibits before the reviewing court

Exhibits are part of the record under rules 8.320(e) and 8.407(f) and therefore need not be augmented into the record. Unless an exhibit is included in the clerk's transcript, however, the court will not have physical access to it. If counsel wants the court to see it, the exhibit must affirmatively be brought before the court.

Counsel has a professional responsibility to view exhibits that are potentially critical to the appeal. ADI can help out-of-county attorneys in

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obtaining copies of exhibits. Contact your assigned staff attorney to make a request. (Specific Fourth Appellate District exhibits information is available on the ADI website, Fourth District Resources page & the Exhibit Review Procedures article.)

Attachment to brief

A copy of some exhibits may be obtained from trial counsel. Certain exhibits, typically documentary exhibits on letter size paper, may be copied by the clerk if necessary. Copies of exhibits may be attached to a brief if the attachments do not exceed a total of 10 pages, but the presiding justice may permit a longer attachment for good cause. (Cal. Rules of Court, rule 8.204(d).) Exhibits incapable of being copied must be transmitted under rule 8.224. (See § Transmission under rule 8.224, *post*.)

Transmission under rule 8.224

Counsel may request an exhibit be transmitted to the court under rule 8.224, which describes the formal method to have exhibits transmitted to the Court of Appeal. (Cal. Rules of Court, rules 8.320(e), 8.407(f).) The court may also order transmission on its own under rule 8.224. Some courts may prefer other times and methods of transmission; the assigned staff attorney can inform counsel of local variations. An example is the Fourth Appellate District, Division Two, which prescribes its own procedures and provides a form.

3.2.8 Agreed and settled statements and motion for new trial

Agreed statement

Agreed statements are used, by mutual consent of the parties, in lieu of a normal record or part of the record. They are permitted by rules 8.344 and 8.407(d) (e.g., *People v. One 1964 Chevrolet Corvette Convertible* (1969) 274 Cal.App.2d 720) but are rare. An agreed statement must conform to rule 8.134, which prescribes contents and procedures, except for the special filing requirement set out in rule 8.344.

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Settled statement

Settled statements replace unavailable parts of the record. The procedures for obtaining a settled statement are set forth in rule 8.346 (see also rule 8.407(d)):

> (a) Application
>
> As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed.
>
> (b) Order and proposed statement
>
> The judge must rule on the application within five days after it is filed. If the judge grants the application, the parties must comply with the relevant provisions of rule 8.137, but the applicant must deliver a proposed statement to the judge for settlement within 30 days after it is ordered, unless the reviewing court extends the time.
>
> (c) Serving and filing the settled statement
>
> The applicant must prepare, serve, and file in superior court an original and three copies of the settled statement.

A settled statement is used to ensure the record on appeal conforms to the actual proceedings in the trial court. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585; see also *People v. Pinholster* (1990)1 Cal.4th 865, 922, disapproved of on other grounds *People v. Williams* (2010) 49 Cal.4th 405, 459 [settled statement of unreported bench conferences between court and counsel].) It may not be used to change the evidence – e.g., to improve on the quality of a sound recording introduced below. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440-441 [request to settle the record with respect to the contents of the video and audiotapes played to jury not proper where court had access to exhibits and contents not part of "oral proceedings" to the court]; see also *People v. Tuilaepa, supra*, at p. 585 [settlement, augmentation, and correction process does not allow

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parties to create proceedings, make records, or litigate issues they neglected to pursue earlier].)

The settlement process is typically initiated in the superior court. Rules 8.137 and 8.346, as outlined above, govern. (See also rule 8.407(d) (juvenile rule), which refers to rules 8.344 and 8.346.)

But an alternative route is available in the Court of Appeal: a party may move to have the record *corrected* under rule 8.340(c) or 8.410(b)(1), as provided under rule 8.155(c)(1) & (2). The correction can be also done by stipulation. (Rule 8.155(c)(1).) Under rule 8.155(c)(2), the reviewing court may order the superior court to settle disputes about omissions or errors in the record.

Motion for new trial under Penal Code section 1181, subdivision (9)

The use of a settled statement is typically confined to the loss of a comparatively small portion of the reporter's transcript of matters heard before the trial court alone. The loss of a significant portion of the record could be cause for filing in the reviewing court a motion for new trial under Penal Code section 1181, subdivision 9. (*In re Stephen B.* (1979) 25 Cal.3d 1; see *People v. Cervantes* (2007)150 Cal.App.4th 1117.) If the appeal can be resolved fairly without the transcript, a new trial is not in order. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1381-1382; *People v. Pinholster* (1992) 1 Cal.4th 865, 921-922, and cases cited, disapproved of on other grounds *People v. Williams* (2010) 49 Cal.4th 405, 459.)

3.3 Requests for extension of time

Requests for extension of time in criminal and juvenile appeals are governed by rules 8.50, 8.60, 8.63, 8.360(c)(4), 8.412(c), and 8.416(f). Extensions are used primarily for the appellant's opening brief and respondent's brief and sometimes for the reply brief. They are not available for petitions for rehearing or review, although the last-gasp measure of relief from default can be sought. (Rules 8.268(b)(4) & (c), 8.500(e)(2).) In some courts, counsel on a fast-track case may be required to waive default time provided by rule 8.416(g) to obtain an extension.

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3.3.1 Number of extensions

In most criminal cases, one or two 30-day[186] extensions for filing the appellant's opening brief are fairly routinely granted. The courts may entertain more than two extensions, especially in very long record cases, but counsel must specify with particularity the need for additional time. (See § 3.3.2 Grounds for extension, *post*.) Extensions are stricter in juvenile cases, especially fast-track dependency appeals under rule 8.416.

If an extension has not been granted and no opening brief is filed by the due date, in a criminal, delinquency, or non-fast-track dependency case, the court will issue a notice that if the brief is not filed within 30 days and counsel is appointed, new counsel may be appointed or, if counsel is not appointed, the case may be dismissed. (Cal. Rules of Court, rules 8.360(c)(5)(A), 8.412(d)(1).) In practice, an order relieving counsel for failure to file a brief is "without compensation," at least in the Fourth District; the issuance of such an order puts the attorney's panel status in severe jeopardy and likely terminates it.

In fast-track cases, the "grace" period is 15 days (Cal. Rules of Court, rule 8.416(g)). Some courts may require that any extension of time waive some or all of this period (see § 3.3.2 Grounds for extension, *post*).

If the late brief is the respondent's, the notice will say the case may be decided on the basis of the record, the appellant's opening brief, and argument by the appellant. (Cal. Rules of Court, rules 8.360(c)(5)(B), 8.412(d)(1)(B).)

The court may impose the specified sanction at the appropriate time. (Cal. Rules of Court, rules 8.360(c)(6), 8.412(d)(2).)

3.3.2 Grounds for extension

Extensions of time will be granted only upon a showing of good cause in criminal, delinquency, and non-fast-track dependency cases. (Cal. Rules of Court, rules 8.60, 8.63, 8.360(c), 8.412(c).) In juvenile fast-track cases, extensions require an "exceptional showing of good cause" (rule 8.416(f); Code Civ. Proc., § 45); some courts may require counsel to waive all or part of the 15-day "grace" period under rule 8.416(g) (see § 3.3.1 Number of extensions, *ante*) as a condition of getting an extension of time on the brief.

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[186]On occasion, when counsel knows that 30-day extensions will be inadequate because, for example, the case has a very long record, extensions may be requested in larger increments.

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Acceptable reasons for requiring more time are illustrated in rule 8.63(b). Such reasons include work on other appointed appeals (case names and numbers, deadlines, previous extensions, etc., should be listed), facts about the current case like record length (including time needed to review additional record for possible motion to augment or for judicial notice), the number and complexity of issues as well as specifying the issues, illness of counsel or personal emergency, and other matters that as a practical matter preclude timely filing without undue impairment of quality. A general "press of business" excuse is not acceptable. (Rule 8.63(b)(9).)

Considerably heightened standards apply to dependency fast-track cases under rule 8.416(f), and stronger reasons are needed to establish the "exceptional showing of good cause" required by rule 8.416(f) and statute (see Code Civ. Proc., § 45).

Counsel must not give as an excuse that a *Wende-Anders* or *Delgadillo* or *Sade C.* brief[187] is contemplated or that ADI is reviewing the record for that purpose. Such a statement tends to disparage any merits issues ultimately raised. Similarly, if counsel needs time to explain to the client potential adverse consequences from pursuing the appeal, the existence and nature of such consequences should not be mentioned. Other prejudicial matters might include time spent looking for a fugitive client (could lead to dismissal of appeal); difficulties in dealing with client (could disparage client); and numerous other situations. Counsel should describe the need for more time in generalities that would not work to the client's detriment. If it is unavoidably necessary to provide some details to support the amount of time required for a potentially prejudicial matter, contact the assigned staff attorney for guidance.

In all extension requests counsel should advise the court in simple terms of the progress made toward preparation of the brief. Counsel should use discretion regarding illnesses or other personal circumstances.

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[187]A *Wende-Anders* or *Delgadillo* brief is filed when counsel can find no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436; see also *People v. Delgadillo* (2022) 14 Cal.5th 216; *Anders v. California* (1967) 386 U.S. 738; *In re Sade C.* (1996) 13 Cal.4th 952.) Such briefs are discussed in more detail in §§ 1.3.12 Representation When There Are No Arguable Issues (Wende-Anders-Sade C. Filings) et seq. and 4.5 What to do When Counsel Cannot Find Any Issues et seq.

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3.3.3 Extensions pending augmentation or correction of the record

If an augmentation may delay the brief, the augment request may be accompanied by an extension request to, for example, "30 days after the supplemental record is filed." Court policy may vary on whether the requests should be separate or combined. If the requests are combined, the title of the combined document should clearly indicate both types of requests. (See §§ Concurrent request for extension of time, *ante*.)

Because a rule 8.340(b) or 8.410(b)(1) letter request is directed to the superior court and no action is required by the appellate court, a rule 8.340(b) or 8.410(b)(1) letter request cannot be combined with a request to extend time. Most courts grant an extension request until a certain number of days after the filing of the corrected record. In the Fourth Appellate District, criminal cases, counsel should serve the Court of Appeal with a copy of the rule 8.340(b) letter. (See Local Rule 2 [If the party serves the Court of Appeal with the rule 8.340(b) letter "the deadline for filing the party's brief shall be automatically extended by 15 days from the date the omitted part of the record is filed. . . ")

3.3.4 Contents and form of extension request

The official Judicial Council form CR-126 is the preferred format for extension requests in the Fourth Appellate District. Counsel should be sure to conform to the requirements of rule 8.74 for electronic filings. Counsel should also always monitor the Court of Appeal website for the order.

3.4 Release pending appeal

The California Constitution provides for the right to bail subject to specified exceptions. (Cal. Const., art. I, § 12.) The applicable statutory provisions for release pending appeal are Penal Code sections 1272 and 1272.1, discussed in § 3.4.1 Standards et seq., *post*.) Proceedings in the appellate court after unsuccessful application in the trial court are governed by rule 8.312. Release pending decision may also be available via habeas corpus. (Pen. Code, § 1476.)

Although release pending appeal is not common, under some circumstances appellate counsel may have an obligation to seek it or assist the client or trial counsel in doing so. Indeed, in some cases it may be crucial to preserve even the possibility of meaningful appellate relief. (See § 1.3.14 Protecting the client in time-sensitive cases et seq. on methods of ensuring timely relief.)

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Money bail is one possible method to effect release on appeal. The courts may impose alternative conditions to assure a defendant's presence at all necessary proceedings. (*In re Pipinos* (1982) 33 Cal.3d 189, 192, fn. 1.)

Release pending appeal may also be sought when the client is ordered to serve time in county jail as a condition of probation. (*People v. McNiff* (1976) 57 Cal.App.3d 201, 205.)

3.4.1 Standards

Eligibility for release

Penal Code section 1272 governs eligibility for release pending appeal:

> After conviction of an offense not punishable with death . . . , a defendant who has made application for probation or who has appealed may be admitted to bail:
>
> 1. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing a fine only.
>
> 2. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing imprisonment in cases of misdemeanors.
>
> 3. As a matter of discretion in all other cases, except that a person convicted of an offense subject to this subdivision, who makes a motion for release on bail subsequent to a sentencing hearing, shall provide notice of the hearing in the bail motion to the prosecuting attorney at least five court days prior to the hearing.

Release pending appeal is thus at the discretion of the court in most felony cases. (Pen. Code, § 1272, subd. 3.)

There are exceptions to the eligibility provisions of these sections. For example, convicted felons who have been placed on a "parole hold" are not entitled to release pending appeal even though the alleged offense triggering the hold is a bailable offense, because the Board of Parole Hearings has exclusive jurisdiction over parolees. (Pen. Code, §§ 3040, 5077; *In re Law* (1973) 10 Cal.3d 21, 24-25; see also *In re Fain* (1983) 145 Cal.App.3d 540, 548.) Juvenile offenders

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also are not entitled to release pending appeal on the theory that juvenile court procedures contain adequate substitutes for bail. (Welf. & Inst. Code, § 628 et seq.; *In re Talbott* (1988) 206 Cal.App.3d 1290, 1293; *Aubry v. Gadbois* (1975) 50 Cal.App.3d 470, 473-475.)

Considerations for court in exercising discretion whether to grant release pending appeal

In *In re Podesto* (1976) 15 Cal.3d 921, 933, the California Supreme Court held that in exercising its discretion whether to grant release pending appeal, the superior court "may consider (1) the likelihood of the defendant's flight, (2) the potential danger to society posed by the defendant's release, and (3) the frivolousness or lack of diligence in defendant's prosecution of his appeal." Penal Code section 1272.1 incorporates the standards set out in *Podesto* and *In re Pipinos* (1982) 33 Cal.3d 189.

Penal Code section 1272.1 also requires the court to include a brief statement of reasons in support of its order granting or denying a motion for release pending appeal, so that an appellate court can determine whether discretion was properly exercised. (See *In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) "The statement need only include the basis for the order with sufficient specificity to permit meaningful review." (Pen. Code, § 1272.1, subd. (c).) *In re Podesto* (1976) 15 Cal.3d 921 and *In re Pipinos* (1982) 33 Cal.3d 189 provide guidance in interpreting this requirement. (See, e.g., *In re Hernandez* (1991) 231 Cal.App.3d 1260, 1262.)

Defendant is not likely to flee

Subdivision (a) of Penal Code section 1272.1 codifies the first *Podesto* requirement. The defendant must show by clear and convincing evidence that they are not likely to flee while released.

In determining whether the defendant is likely to flee the court must consider such factors as:

- The ties of the defendant to the community, including employment, duration of residence, family attachments, and property holdings. (Pen. Code, § 1272.1, subd. (a)(1).)

- The defendant's record of appearance at past court hearings or of flight to avoid prosecution. (Pen. Code, § 1272.1, subd. (a)(2).)

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- The severity of the sentence. (Pen. Code, § 1272.1, subd. (a)(3).)

Defendant poses no danger

Under subdivision (b) of Penal Code section 1272.1, the defendant must show by clear and convincing evidence that the release would not present a danger to any other person or to the community. In evaluating this matter, the court must consider, among other factors, whether the crime for which the defendant was convicted was a violent felony as defined under Penal Code section 667.5, subdivision (c).[188]

Appeal is good-faith and substantial

The defendant must demonstrate the appeal is not for the purpose of delay and raises a substantial legal question which, if decided in the defendant's favor, is likely to result in a reversal. (Pen. Code, § 1272.1, subd. (c).) Under subdivision (c) a "substantial legal question" is defined as "a close question, one of more substance than would be necessary to a finding that it was not frivolous." (See, e.g., *People v. McGuire* (1993) 14 Cal.App.4th 687, 702-703 [superior court acted within its discretion when it determined appeal presented a substantial legal question].) In making this assessment, the court is not required to determine whether it committed error. (Pen. Code, § 1272.1, subd. (c).)

3.4.2 Procedures

Initial application in superior court

A motion for release pending appeal or for a reduction of bail on appeal must be made to the superior court. (Cal. Rules of Court, rule 8.312(b).) If the motion is made after the sentencing hearing, the defendant must provide notice

[188]Conviction of a violent felony is only one factor the court may use to determine whether the defendant poses a danger to the safety of others or the community. (*In re Hernandez* (1991) 231 Cal.App.3d 1260, 1261-1264 [writ petition seeking bail pending appeal denied where defendant, convicted of possessing for sale of controlled substances and maintaining place where drugs were sold, did not show by clear and convincing evidence she was not a danger to community].)

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to the prosecution at least five court days before the bail hearing. (Pen. Code, § 1272, subd. 3.)

In most cases, trial counsel is in the best position to make the motion in the superior court. Trial counsel is most familiar with the facts of the case as well as other matters, such as whether the trial court might be favorably disposed to grant a motion for release pending appeal. Also, trial counsel will most likely be geographically close to the trial court.

However, the appellate attorney may be helpful in providing an opinion that a "substantial legal question" may be presented on appeal. If a motion for release pending appeal is clearly indicated and trial counsel will not or cannot make the motion, appellate counsel should file the motion in the superior court. (Appellate counsel should consult with the project attorney if personal appearances are necessary and counsel's office is geographically distant from the trial court.) A sample bail motion for filing in the superior court is on ADI's forms and samples page.

Application in the appellate court

If dissatisfied with the superior court's decision on the request for release pending appeal, the defendant may apply to the Court of Appeal. It must include a showing that the defendant sought relief in the superior court, and the court unjustifiably denied the application or set bail so high as to amount to denial of the motion. (Rule 8.312(b); see *People v. Remijio* (1968) 259 Cal.App.2d 12, 13 [high bail was denial of due process].) The application must be served on the district attorney and Attorney General. (Cal. Rules of Court, rule 8.312(c).) Normally an application for release pending appeal is made by motion (a sample motion is on ADI's forms and samples page). But a petition for writ of habeas corpus can also serve that function. (E.g., *In re Pipinos* (1982) 33 Cal.3d 189, 196-197; see § 8.4.2 Release pending appeal.)

When the decision to grant release pending appeal is matter of discretion (Pen. Code, § 1272, subd. 3), that decision is reviewed under an abuse of discretion standard. (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107; *In re Hernandez* (1991) 231 Cal.App.3d 1260, 1262, 1264.)

The reviewing court may grant temporary release pending its ruling on the application for release during appeal. (Cal. Rules of Court, rule 8.312(d); e.g., *In re Fishman* (1952) 109 Cal.App.2d 632, 633.)

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3.4.3 Considerations in deciding whether to seek release pending appeal

Determining whether an application for release pending appeal is appropriate is not a mechanical process but requires sound professional judgment. Considerations include the legal merits of the motion and the underlying appeal and the client's individual circumstances and wishes.

One factor is the likelihood of success in seeking release, given the statutory criteria and the facts in the particular case. Another is the likelihood of relief on the appeal itself.

Counsel must also consider the date the client is likely to be released from custody.[189] One of the main reasons for seeking release on appeal is to safeguard the possibility of meaningful relief for the client in time-sensitive cases and avoid the possibility the client might end up serving "dead" time – custody in excess of the lawful sentence – in the event of a favorable result on appeal. This might happen, for example, if the sentence is short, a reduction in sentence is probable, or substantial additional credits may be ordered.[190]

If counsel determines release might be appropriate, counsel should consult with the client and explain the possible benefits and liabilities of seeking release. The client may want to post a bond or ask counsel to seek release on other conditions. (See, e.g., *In re Podesto* (1976)15 Cal.3d 921, 925, fn. 1.)

Release pending appeal is not necessarily desirable in every situation, even if it is theoretically available. If the chances for relief are not strong, the client is often well advised to continue serving the term of imprisonment pending appeal, rather than facing the financial burden of posting bail or the disruption of returning to confinement after affirmance of the judgment on appeal. The decision to seek release should be made by the *client*, after full and informed consideration of the matter.

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[189]As a preliminary step during the initial review of the case following appointment,especially when the sentence is relatively short, appellate counsel should determine the client's expected release date and calculate how that might be affected by a favorable ruling on appeal.

[190]If counsel determines the case might indeed be time-sensitive, several options can be considered, in addition to or instead of release pending appeal. This topic is covered in § 1.3.14 Protecting the Client in Time Sensitive Cases et seq.

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4 CHAPTER FOUR

ON THE HUNT: THE SCIENCE AND ART OF ISSUE SPOTTING AND SELECTION

4.1 Introduction

Issue spotting is probably *the* most important function of lawyering in criminal appeals. An attorney may perform a masterful job of research, analysis, and briefing, but if an issue that would win for the client is overlooked, the attorney has probably rendered legally ineffective assistance. Appellate counsel must therefore work assiduously to develop strong issue-spotting skills and in every case must put maximum effort into ensuring all potential issues have been identified and properly evaluated.

Counsel also has a duty to spot "negative" issues – those that could put the client in a worse position after the appeal than before. Sometimes helping the client avoid the adverse consequence trap is the most valuable service appellate counsel can offer.

4.2 The fundamentals

4.2.1 Approaching the case

Finding issues on appeal is both a science and an art. Entering the scientist's laboratory, the appellate lawyer must focus a microscope on the minutest suspicious detail, analytically dissect the facts and law, and question everything that happened or did not happen. Moving to the artist's studio, the lawyer must engage all their capacity for creativity and sensitivity, seeing apparently mundane or discouraging matters from new, imaginative perspectives. Like both the scientist and the artist, counsel on the hunt for issues will find an observant eye, a curious and relentlessly inquiring mind, and sheer perseverance to be absolute prerequisites.

It is best to start with the basics. First, the obvious – the issues litigated below. Then – counsel should question, question, and question some more. If something in the record, either a factual matter or a point of law, seems puzzling, unfair, or otherwise not quite right, counsel should pursue it until satisfied. Not knowing an answer is an easily solved problem. Not asking the right question can lead to disaster.

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4.2.2 Going to the source

The participants at trial – the client and trial counsel – are potentially crucial sources of issues. Even if they do not formulate an issue in terms that can be raised on appeal, their suggestions may raise a red flag.

Trial counsel

Appellate counsel should ask the trial attorney for input on the most significant, unusual, or especially troubling aspects of the proceedings. Not everything that happens in a trial is in the record, nor does the record fully reflect the flavor and subtleties of the proceedings. Trial counsel may also be able to call the appellate attorney's attention to missing parts of the record. If ineffective assistance of the trial attorney is a potential issue, it is mandatory to contact trial counsel.[191] (It may not be advisable to allude to that possibility at the initial contact, to elicit cooperation on other issues.)

Client

Counsel should ascertain what the client expects to accomplish from the appeal and allow the client to participate appropriately in the decision-making process. Although counsel makes the final selection among potential issues, the client needs to decide the basic objectives of the appeal. (See § 1.4.3 Decision-making authority et seq. on decision-making authority of attorney and client.) Counsel must also explain any potential adverse consequences and determine whether the client wants to proceed. (See § 4.6 Adverse consequences: Potential risks of appealing, et seq., *post*.)

4.2.3 Knowing the legal landscape

Experience with appellate issues is one of the most important components of strong issue-spotting skills. This requirement of course poses a difficulty for the newer attorney, but the attorney can cope by working closely with staff

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[191]Discussion with the assigned ADI staff attorney is also required, regardless of whether the issue is being for considered for the direct appeal or for a habeas corpus investigation. This requirement does not apply for a brief "fallback" IAC argument ("No objection was required, and if it was, counsel was ineffective for not raising it").

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attorneys, networking with more experienced panel attorneys, and developing a finely tuned awareness of what is going on in the legal world – in the Legislature and in the California and federal courts. Indeed, the most experienced lawyers must do the same.

Legal resources

To keep abreast of changes and develop a deeper understanding of the law, counsel must be attuned to and diligently use the many legal resources available. An indispensable practice is reading new appellate opinions regularly – not just for the holdings, but especially for their underlying analysis. Another way is to keep track of recently enacted and pending legislation. Articles and treatises provide a source of "cutting edge" issues and in-depth critical analysis of the law. Project websites and newsletters may publish "kudos" – recent winning issues. Numerous printed publications are excellent tools for broadening and sharpening knowledge of the law.

Potentially important pending cases

Tracking cases pending before the United States and California Supreme Courts is an important duty. The California Supreme Court has a list, and CCAP maintains its own list of both courts. These resources can be reached through the ADI website.

Networking with colleagues

It is critical for attorneys of all experience levels to confer with colleagues about cases and issues whenever the opportunity arises. This practice will help avoid the need to reinvent the wheel, will provide ideas for new issues or new slants on old ones, and will serve as a reality check on issues that just won't fly.

Personal reference resource

Many outstanding appellate attorneys keep a notebook, a checklist, or some other type of reference system for saving cases, ideas, articles, and other sources of potential issues. The process of writing things down reinforces the information in the mind, and the written format allows counsel to retrieve it efficiently later. § 4.7 et seq., appendix A, enumerates some commonly raised appellate issues that can serve as a starting point or supplement to counsel's own lists.

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4.3 Reviewing the record for issues

The most critical source of issues in any case is by far the appellate transcript. Except for occasional investigations into potential writs, the search for issues on appeal generally begins and ends with the record. Counsel therefore must scrutinize the record meticulously.

4.3.1 Ensuring adequate record

Without a complete record counsel will not be able to make the necessary search for issues on appeal. It is appellate counsel's constitutional responsibility to ensure a complete record. (See *People v. Barton* (1978) 21 Cal.3d 513, 519-520; *People v. Harris* (1993) 19 Cal.App.4th 709, 714.)

Augmentation and correction

The record should be augmented, if necessary (Cal. Rules of Court, rules 8.155, 8.340(d)), and any omission from the normal record should be corrected (rule 8.340(b)). For greater detail, see § 3.2.6 Correcting/completing and augmenting record after it is filed in reviewing court, et seq.

Superior court records

In some instances, it will be important to review the superior court file or exhibits. Sometimes the original transcripts will have gaps, or references will be made to documents, tapes, physical evidence, and other items not in the transcripts. Occasionally vital information turns up that is omitted from or not even suggested in the normal record. If counsel's office is far from the county where the case was tried, a project staff attorney or other staff member may be able to review the file and exhibits on behalf of counsel or obtain them electronically from the county clerk, *but* not all projects or counties offer this service. The assigned staff attorney is the best source of information on local practice.

Proceedings not in transcripts

Counsel should be alert for proceedings not in the transcripts, such as bench or in- chambers conferences. Sometimes counsel can find out what happened by calling trial counsel or the court reporter. If the proceeding is potentially significant to the appeal, counsel should attempt to incorporate it into

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the record. If a reporter's transcript cannot be prepared, counsel may seek to prepare a settled or agreed statement. (Cal. Rules of Court, rules 8.134, 8.137, 8.344, 8.346.)

When a substantial portion of the proceedings is not available, because, for example, the reporter's notes have been lost, a motion to vacate the judgment may be in order. (See Pen. Code, § 1181, subd. 9.)

Improper material in record

Counsel should also be alert for materials not supposed to be in the record. (See ADI's web page on confidential records, § Improper inclusion of identification information and other confidential matters in record.)

4.3.2 Initial review of the record

The initial reading of the record will give a comprehensive picture of the contours of the appeal. It is wise to set aside an uninterrupted block of time to give the record undivided attention. This will help counsel develop a sense of the proceedings as a whole and facilitate timely completion of the record if necessary. It may be helpful to write up and organize the rough transcript notes while everything is still fresh in mind.

Clerk's transcript

Counsel should ordinarily begin reviewing the record by reading the clerk's transcript, looking for total continuity to ensure critical pieces are not missing. It is important to determine what happened to every allegation, every motion, and every party. Reviewing the Clerk's Transcript first may have an additional advantage. If during the course of trial, a count or enhancement was dismissed or found not true, or defendant was acquitted on some count(s), it would be a clue that to not necessarily dwell on those aspects in reviewing the Reporter's Transcript. (That is not to say those portions of the Reporter's Transcript may be ignored altogether, but rather copious noted may be unnecessary.) If something enters the picture that is puzzling or incomplete or dubious, it should be added to the list of questions to be investigated.

Reporter's transcript

Counsel should then read the reporter's transcript, taking concise notes with page references. The overall evidentiary picture can be filled in as counsel

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goes through direct, cross, redirect, and recross testimony. Counsel should scrutinize any motions, noting the arguments made on both sides, the evidence offered, and the disposition and reasoning offered by the court. It is important to review every significant objection and its disposition and to record any matters that apparently should have been objected to but were not.

4.3.3 Spotting potential issues

While reading the record, counsel should compile a list of potential issues. At the first stage counsel should strive to be over-inclusive – anything counsel cannot positively reject should be on the list. The search for issues begins with a wide-open, creative, anything-goes approach; only later is critical judgment applied to sort out the arguable issues from those to be discarded.

Issues litigated at trial

Working with the obvious is a productive initial approach. This means looking for "flagged" issues, such as objections, motions, and rejected instructions. Flagged issues are an exceedingly important screening device. First, a party generally may not raise issues on appeal if they were not raised in the proceedings below. Second and conversely, failure to raise on appeal a meritorious issue litigated below may give rise to an allegation of ineffective assistance of appellate counsel.

Jury instructions

Special scrutiny is called for in reviewing those parts of the proceedings where most errors generally are made and those parts where the standards of review and prejudice are most favorable to the appellant. In cases tried to a jury, one of these areas is the instructions.[192] Counsel should inspect jury instructions minutely – in several different ways.

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[192]Many instructional errors can be raised despite lack of objection in the trial court. (See Pen. Code, § 1259: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.")

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Court's selection of instructions to be given

First, counsel should compare written instructions from which the judge was reading, and any rejected ones, with standard approved instructions such as CALCRIM.[193] It is helpful to use checklists of sua sponte and other important instructions to ensure the correct ones were selected.

Oral rendition of instructions

Second, counsel must analyze the oral instructions in the reporter's transcript to make sure that they correspond with the printed ones and that the law *as stated to the jury* was complete and correct in light of the facts of the case. What the court actually said – not what it intended to say – is how the jury was "instructed." The court might have misread the text at some point or have improvised.[194] (See *People v. Silva* (1978) 20 Cal.3d 489, 493; *People v. Gloria* (1975) 47 Cal.App.3d 1, 6.)

Printed instructions sent into jury room

Third, counsel needs to review any printed instructions sent into the jury room, if available. (See Pen. Code, §§ 1093, subd. (f), 1137.) Sometimes they are redacted improperly or contain irrelevant, prejudicial, or legally incorrect information. In the event of a conflict between oral and printed instructions given

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[193]California Criminal Jury Instructions, officially approved by the Judicial Council. Their use is "strongly encouraged." (Cal. Rules of Court, rule 2.1050(f.) If an alternative is used, it should be "accurate, brief, understandable, impartial, and free from argument." The CALCRIM User's Guide expressly cautions that "[t]he CALJIC and CALCRIM instructions should never be used together," (*People v. Ramirez* (2021) 10 Cal.5th 983, 1007-1008, citing Jud. Council of Cal. Crim. Jury Instns. (2020) Guide for Using Jud. Council of Cal.Crim. Jury Instns., p. xxii, italics original.) Still, "the trial court may modify any proposed instruction to meet the needs of a specific trial, so long as the instruction given properly states the law and does not create confusion." (*People v. Beltran* (2013) 56 Cal.4th 935, 943, fn. 6.)

[194]The oral instructions as they appear in the reporter's transcript are not necessarily a precise record of what the judge said. (See *People v. Huggins* (2006) 38 Cal.4th 175, 189-194.)

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the jury, the latter govern. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Thus, an error in the printed instructions may well be prejudicial.

Reasonable doubt

While it very rarely happens, judges have been known to omit any instruction on reasonable doubt or to improvise incorrectly in explaining it. (E.g., *Cage v. Louisiana* (1990) 498 U.S. 39; *People v. Aranda* (2012) 55 Cal.4th 342; *People v. Vann* (1974) 12 Cal.3d 220; *People v. Flores* (2007) 147 Cal.App.4th 199; *People v. Elguera* (1992) 8 Cal.App.4th 1214; cf. *Victor v. Nebraska* (1994) 511 U.S. 1, 5; *People v. Brown* (2004) 33 Cal.4th 382, 392; *People v. Mayo* (2006) 140 Cal.App.4th 535, 543-544.)

Since failure to explain reasonable doubt properly can be reversible per se, counsel should always make sure adequate instruction was given. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [incorrect reasonable doubt instruction]; cf. *People v. Aranda* (2012) 55 Cal.4th 342 [omission of instruction altogether is subject to harmless error analysis under *Chapman*[195]]; *People v. Mayo* (2006) 140 Cal.App.4th 535 [omission of CALJIC No. 2.90 not federal constitutional error when other instructions repeatedly stated jury must find every element beyond a reasonable doubt].)

Response to jury request for additional instruction

An area of exceeding importance is the trial court's handling of a jury question or request for additional instruction. The jury's query signals it is focusing on that area, and so an erroneous response is likely to be found prejudicial. (See *People v. Atkins* (2019) 31 Cal.App.5th 963, 980-981; *People v. Fleming* (2018) 27 Cal.App.5th 754; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 253.)

Counsel should analyze the content of the court's answer for correctness, responsiveness, and understandability. It is also critical to review the procedure used – e.g., whether the answer was provided in open court and whether the client and counsel were present and were given a chance for prior input. (*People v. Dagnino* (1978) 80 Cal.App.3d 981 [counsel's presence at reinstruction

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[195]*Chapman v. California* (1967) 386 U.S. 18; see § Reversible Unless Lack Of Prejudice Is Shown Beyond A Reasonable Doubt (Chapman), *post*.

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required unless waived]; see also *People v. Avila* (2006) 38 Cal.4th 491, 613-614 [communications must be in open court].)

Sentencing

In a criminal case, counsel should look very closely at sentencing, a complicated area fraught with potential for error. The sentence imposed should be checked against the statute in effect at the time of the crime. Issues involving such matters as enhancements, consecutive sentences, Penal Code section 654, strikes, credits, fines or fees, and probation conditions – to name only a few – need to be considered. Attorneys are encouraged to consult with ADI if they are not extensively familiar with the law of sentencing.

Uncommon but "big" issues

Counsel should be on the alert for errors that are unusual but occur occasionally – some can be of momentous importance when they do occur. For example, if the client was convicted of a crime committed a considerable time ago, it is advisable to check for statute of limitations or ex post facto issues and to ascertain whether the law has changed in the client's favor since the crime. Jurisdictional and venue questions can arise in unusual proceedings or events involving multiple counties, as when a minor is transferred from one county to another. Prior proceedings in the same case may suggest the need to scrutinize for collateral estoppel, res judicata, double jeopardy, multiple prosecution, and similar issues.

Recent and potential changes in the law

Counsel should be alert to relevant issues opened up by recent developments in the law, such as new decisions and grants of review or certiorari in the California or United States Supreme Court. These issues often can be raised on the client's behalf, even at later stages of an appeal. If a change in the law occurred after trial, the appellate court usually will find it unnecessary to have raised the point below. The subject of taking advantage of favorable changes in the law is treated extensively on the ADI website, which includes a web page following important recent changes and analyzing their potential effect.

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Checklist

Appendix A lists a number of issues commonly raised on criminal appeals. and can serve as the starting point for a checklist. Appendix C offers a list of common dependency issues, and Appendix D does the same for delinquency appeals. It should go without saying that each attorney must (1) modify and supplement the list as experience and legal changes dictate and (2) confirm and update the issue and its underlying authorities every time the issue is raised.

Issues that may hurt the client

A special problem in issue spotting is adverse consequences. Counsel should look not only for errors against the client, but for favorable ones, too. If a favorable error resulted in an unauthorized sentence or other unlawful disposition, the client may face additional time. (See § 4.6 Adverse consequences: Potential risks of appealing et seq., *post*, on adverse consequences.) Often pursuing an appeal will make it more likely the error will be noticed and corrected. (E.g., *People v. Ingram* (1995) 40 Cal.App.4th 1397 [sentence increased from 27 years to life to 61 years to life because of unauthorized sentence discovered on appeal], disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8.)

4.4 Assessment and selection of issues

After counsel has compiled a list of all possible issues to be considered on appeal, the winnowing process begins. During the review and elimination process, counsel should annotate the list of potential issues, assessing each in writing and explaining why issues are retained or rejected. This method will systematically cover all possible issues. It will also document counsel's handling of the issues; if there is later occasion to review the file, counsel will have a record of what issues were considered and why they were or were not raised.

Those issues obviously not supported by the facts after the record review is complete or by the law after quick research, or any so trivial a prejudicial error argument would essentially be impossible, can be discarded early.

A more searching analysis will be needed for the remaining issues. Evaluating an issue requires assessing not only its legal merits, but also its reviewability, the standard of review, the standard of prejudice, and other rules, principles, and presumptions governing appellate review.

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ADI articles offer a multi-perspective view of the issue-selection process. The article, To Brief or Not to Brief, explores the tension between the need to advocate zealously on the client's behalf and the attorney's duty as an officer of the court to refrain from pursuing frivolous claims. It reviews the standards set out below for assessing arguability. (See also, ADI Manual, § 2.1.3 [Limitations on right to appeal]).What to do when counsel cannot find any issues

Appointed counsel who has found no arguable issues after a diligent search must follow a specific procedure – *Wende*, *Anders*, *Delgadillo*, *Sade. C.*[196] – regardless of whether the appointment is designated as assisted or independent. Depending on whether the case is criminal or civil, the court may have certain responsibilities, as well.

No-issue appeals have been addressed with some frequency by both the United States Supreme Court[197] and California Supreme Court.[198] The courts have a constitutional duty to provide effective counsel on appeal in criminal cases (see *Evitts v. Lucey* (1985) 469 U.S. 387; *Douglas v. California* (1963) 372 U.S. 353), and therefore counsel's failure to assert any issues poses problems, not only for the client and counsel, but also for the court.

4.4.1 What is meant by an "arguable" issue

An "arguable issue" is one that, in counsel's professional opinion, has a reasonable potential for success and that, if resolved favorably to the client, will result in a reversal or modification of the judgment. (*People v. Johnson* (1981) 123 Cal.App.3d 106.) This matter is explored in an ADI memo on arguability, "To Brief or Not To Brief," as well in the earlier passages of this chapter.

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[196]*People v. Wende* (1979) 25 Cal.3d 436, *Anders v. California* (1967) 386 U.S. 738, *People v. Delgadillo* (2022) 14 Cal.5tth 216, and *In re Sade C.* (1996) 13 Cal.4th 952.

[197]E.g., *Anders v. California* (1967) 386 U.S. 738; see also *Smith v. Robbins* (2000) 528 U.S. 259; *Austin v. United States* (1994) 513 U.S. 5; *Penson v. Ohio* (1989) 488 U.S. 75; *McCoy v. Wisconsin* (1988) 486 U.S. 429; *Pennsylvania v. Finley* (1987) 481 U.S. 551; *Jones v. Barnes* (1983) 463 U.S. 745.

[198]*People v. Delgadillo* (2022) 14 Cal.5tth 216; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436; *People v. Feggans* (1967) 67 Cal.2d 444; see also *In re Phoenix H.* (2009) 47 Cal.4th 835, *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544; *In re Sade C.* (1996) 13 Cal.4th 952.

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The ultimate test for an arguable issue is whether a reviewing court could reasonably accept the argument and find the client entitled to some kind of relief, in light of (a) relevant law, (b) the facts in the case, and (c) applicable appellate standards for reviewing judgments. If no reviewing court could reasonably do so, the issue is frivolous. *All* of these conditions for arguability must be satisfied.

Note that the test is whether an appellate court *could reasonably* accept the argument – not whether it actually *will* do so. An appellate attorney must be an assertive advocate. Assertive advocacy asks, "How can I make this issue work?" rather than, "Might the court reject this?" There are potential responses to almost every issue – very few are obvious candidates for a concession from the opposing party. The question is whether those responses are truly insurmountable, in which case the issue is frivolous, or whether they mean there are alternative reasonable outcomes to the case. The job of an appellant's attorney is to present the court with arguments it could reasonably accept and use their best skills to persuade it to accept them; it is not to decide ahead of time whether the court will or should accept them. Keeping this model in mind will facilitate assertive issue selection and help distinguish counsel's role from that of the court.

Counsel should also understand that the first prong of the test – support within the relevant law – does not mean counsel necessarily must give up when confronted with either an absence of authority or actual adverse authority. If there is no law to support the position, the brief may say so and offer credible reasons why the law should be as counsel urges. If the law is adverse, the argument must acknowledge that fact and may urge the law should be changed, provided there are plausible grounds to support the contention, based on cognizable legal principles, logic, and/or policy. (E.g., *People v. Feggans* (1967) 67 Cal.2d 444, 447 ["counsel serves both the court and his client by advocating changes in the law if argument can be made supporting change"].) If there is adverse Court of Appeal authority but the Supreme Court has not yet reached the issue, if the Supreme Court has given signals it is reconsidering a legal rule, or if there is a reasonable possibility of federal relief, it may well be appropriate to raise the issue, if counsel acknowledges the contrary law.

4.4.2 Pre-briefing procedure

The inability to find arguable issues triggers special pre-briefing procedures, as well as special responsibilities on the part of appellate counsel. Specifically, counsel must double check all possible sources of issues and must obtain a second opinion and approval from the appellate project. The client must

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be told and advised of the possibility of filing a pro per brief or letter. The brief must follow special rules for no-merit filings.

Completion and additional review of record

Counsel should ensure the record is complete before concluding a case may not have any arguable issues and before asking the project for a review. If the case still appears to lack issues, it often may be profitable for counsel to review the record again, eliminating nothing from consideration. A new issue may emerge, or a credible way of reformulating an issue previously rejected may appear. (See ADI's practice article, "To Brief or Not to Brief," on the topic of criteria for arguable and frivolous issues and ways of converting a borderline issue into a credible one.)

Project approval

Under the California project-panel system and judicial policy, approval by the assigned project staff attorney is required before any attorney, assisted or independent, makes a no-issue filing. Counsel must submit a complete draft *Wende-Anders* or *Delgadillo* brief or *Sade C.* letter brief or brief[199] (see § 4.5.3 Wende-Anders-Delgadillo-Sade C. filing et seq., *post*) to the project attorney and, in most situations, tender the record for further review.[200] The attorney must detail the issues considered and rejected and give reasons.

Abandonment in lieu of no-issues filing

After appointed counsel and the project attorney have determined that no arguable issue exists, abandoning the appeal in lieu of filing a no-issues brief may be the preferred alternative, especially if there is any risk of an adverse consequence. (See § 4.6 et seq., *post*.) It bears repeating (see § Client's authority, *ante*), however, that it is solely the client's decision whether to abandon or

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[199]The letter brief format is required in all three divisions of the Fourth Appellate District for *Sade C.* cases. Other districts may have different expectations, so counsel must consult the project for guidance. Regardless of format, the contents must conform to the requirements of *In re Phoenix H.* (2009) 47 Cal.4th 835, 843.

[200]In fast-track dependency cases, the project normally gets its own copy of the record. (Cal. Rules of Court, rule 8.416(c)(2)(B).)

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continue to pursue an appeal. For example, an appellant may desire to prolong an appeal to take advantage of ameliorative legislation which may become effective before finality of the appeal.

Under the Rules of Court, the abandonment may be signed by either appellant or the attorney of record. (Rules 8.316(a), 8.411(a)) [except in Welf. & Inst. Code § 300 proceeding in which the child is the appellant, it must be authorized by the child or, if incapable of authorization, by the child's guardian ad litem]).) Appellate Defenders, Inc.'s preferred policy is for both appellant and counsel to sign an abandonment. If counsel chooses to sign alone, at a minimum, counsel is strongly advised to have first obtained in writing appellant's confirmation that appellant has been advised and chooses to abandon. Counsel must, of course, retain that written confirmation in counsel's file. Under no circumstance should counsel file an abandonment based solely on the oral representation of appellant or appellant's representative.

4.4.3 *Wende-Anders-Delgadillo-Sade C.* Filing

Anders v. California (1967) 386 U.S. 738 held counsel must file not just a simple letter saying there are no issues, but a brief outlining the facts and identifying the possible issues in the case. (See also *People v. Feggans* (1967) 67 Cal.2d 444.) The California Supreme Court interpreted *Anders* in *People v. Wende* (1979) 25 Cal.3d 436, and concluded counsel must set forth the facts in the case but need not (1) explicitly state counsel has been unable to find issues or (2) ask to withdraw. (*Wende*, *supra*, 25 Cal.3d at p. 442.) Some courts permit or require the brief be in letter form. Counsel should check the court policy to determine the appropriate form of filing.

Facts

The statements of case and facts should be relatively thorough. This gives the court guidance in its own review of the record. It also documents counsel's efforts – an important matter for the court, the project, the client, and counsel's own protection. These considerations apply in dependency cases, as well, even though the court is not required to review the record.

Description of issues

A question of some disagreement is whether a no-issue filing should describe the issues counsel considered. *Anders v. California* (1967) 386 U.S. 738, 744-745, held counsel must file a "brief referring to anything in the record that

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might arguably support the appeal" and pointed out such a brief would "induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." In *Smith v. Robbins* (2000) 528 U.S. 259, however, the United States Supreme Court held listing possible issues is not invariably required by the Constitution, if other safeguards are in place.

Some courts have strong preferences one way or the other as to the listing of issues and counsel should naturally heed those. Some courts indifferently leave the matter to counsel's discretion, while still others are not clear one way or another. (See, e.g., *People v. Kent* (2014) 229 Cal.App.4th 293 [Fourth Dist., Div. 3: encouraging listing of issues and disagreeing with since-withdrawn opinion from another panel of same court criticizing that practice].)

For the most part, ADI encourages counsel to list issues and applicable authorities. It is a way of stimulating and organizing counsel's thoughts, suggesting issues to the Court of Appeal it might not otherwise consider, and demonstrating counsel's efforts to the court, the project, and the client. In non-criminal cases, this policy becomes a nearly absolute requirement, because the court will not read the record unless counsel gives it a reason to; a failure to list issues deprives the client of even that slim opportunity to snatch the case away from virtually certain dismissal.

Such a listing, however, must be done properly. Counsel must not argue the merit or lack of merit of any issue listed but must neutrally describe the issues considered and any relevant authority, without urging any conclusions. For example, if the brief urges *relief* because of the issue, it contradicts the characterization of the case as a no-merit one. Conversely, if it affirmatively argues the issue should be *rejected*, counsel is impermissibly arguing against the client.

Withdrawal of counsel

It is not necessary for counsel who finds no arguable issues to seek leave to withdraw as long as counsel does not describe the appeal as frivolous. (*People v. Wende* (1979) 25 Cal.3d 436, 442.) Indeed, counsel should *not* do so. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544 ["[i]f appointed counsel . . . finds no arguable issues, counsel need not and should not file a motion to withdraw"].) Counsel should inform the client of the right to request the court

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relieve counsel if the client so wishes.[201] (*Id.* at p. 536; see § Declaration of counsel, *post*.)

Sending record to client

Counsel may and normally should send the record to the client before or as soon as the brief is filed so the client can file a pro per brief or letter, if permitted and desired. In a *Delgadillo* context (*People v. Delgadillo* (2022) 14 Cal.5th 216) it is especially important for counsel to make the record available to the client because the appeal is subject to dismissal without review if the client does not submit her or his own supplemental brief. (Counsel should consider whether any parts of the record are not legally available to the client and redact or withhold those parts.) Alternatively, if counsel believes there is a reasonable possibility counsel will need the record – e.g., the court may order supplemental briefing by counsel – and the client has expressed a lack of interest in filing a pro per brief, counsel may retain the record and tell the client it is available on request. Counsel may make a copy of some of the record[202] or maintain an electronic copy[203] for future reference.

Declaration of counsel

The brief should include counsel's declaration that the client has been informed of the nature of the brief, any right to file a pro per brief, the opportunity for access to the record, and the right to ask that counsel be relieved.[204] (See *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 536.)

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[201]The purpose of relieving counsel would ostensibly be to leave the client in pro per and so situated to file a pro per brief. But except for dependency cases, the client has a right to file such a brief when counsel has filed a no-issue brief. (See § Pro per brief, *post*.)

[202]A modest amount of copying for counsel's use in the event the court orders supplemental briefing is compensable. Any substantial copying, however, requires specific justification and should be cleared with ADI.

[203]ADI encourages counsel to maintain a "clean" electronic copy of the record where possible. (See § 1.3.3 Record Review and Completion; Correction of Notice of Appeal Problems.)

[204]The purpose of relieving counsel would ostensibly be to leave the client in pro per and so situated to file a pro per brief. But, except for dependency cases,

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4.4.4 Appellate court responsibilities

Independent review of record

Wende held that, in a first criminal or delinquency[205] appeal of right, *Anders* requires the appellate court to review the entire appellate record independently to confirm the lack of arguable issues before disposing of the case. (*People v. Wende* (1979) 25 Cal.3d 436, 440-442; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 110-111.) The California Supreme Court has held this duty does not apply in appeals stemming from the denial of Penal Code section 1172.6 petitions at the prima facie stage. (*People v. Delgadillo* (2022) 14 Cal.5th 216.) However, counsel should request independent review as an exercise of the court's discretion.

This duty does not apply to non-criminal cases, such as LPS conservatorships (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529) or proceedings in dependency cases (*In re Sade C.* (1996) 13 Cal.4th 952), mentally disordered offender matters (*People v. Taylor* (2008) 160 Cal.App.4th 304), not guilty by reason of insanity civil commitments (*People v. Martinez* (2016) 246 Cal.App.4th 1226), sexually violent predator proceedings (*People v. Kisling* (2015) 239 Cal.App.4th 288), and competency matters (*People v. Blanchard* (2019) 43 Cal.App.5th 1020). Nor does it apply to appeals from post-judgment orders such as motions to set aside a plea because of invalid immigration advice (*People v. Serrano* (2012) 211 Cal.App.4th 496).

Pro per brief

In a first criminal or delinquency appeal as of right or a civil commitment proceeding, the court must give the appellant an opportunity to file a pro per brief. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529 [LPS]; *People v. Wende* (1979) 25 Cal.3d 436, 440; *People v. Feggans* (1967) 67 Cal.2d 444, 447; *People v. Kisling* (2015) 239 Cal.App.4th 288, 292 [sexually violent predator];

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the client has a right to file such a brief, anyway, when counsel has filed a no-issue brief. (See § Pro Per Brief, *post*.)

[205] *In re Kevin S.* (2003) 113 Cal.App.4th 97 held *Wende-Anders* applies to delinquency appeals. Most appellate courts have assumed that without discussion.

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People v. Taylor (2008) 160 Cal.App.4th 304 [mentally disordered offender]; see also *People v. Kelly* (2006) 40 Cal.4th 106, 120.)

In an appeal from the denial of a Penal Code section 1172.6 petition at the prima facie stage, the court likewise must give the appellant an opportunity to file a pro per brief. (*People v. Delgadillo* (2022) 14 Cal.5th 216.) Moreover, the appellate court, in rendering that opportunity, should send, with a copy of counsel's brief, notice to the defendant informing the defendant of the right to file a supplemental letter or brief and that if no letter or brief is filed within 30 days, the court may dismiss the matter. (*Ibid.*)

This duty does not apply in a juvenile dependency case. (*In re Phoenix H.* (2009) 47 Cal.4th 835.) The court will normally give the client a deadline; counsel should monitor this and ask for an extension of time on the client's behalf when reasonably necessary.

Briefing by counsel of arguable issue that court finds

If, in its review of the record or consideration of any pro per brief filed, the court finds an arguable issue, the court must request *counsel* to brief it and may not decide the case without the benefit of such briefing. (*Penson v. Ohio* (1989) 488 U.S. 75, 81-83.) This duty is at a constitutional level for cases in which the party has a constitutional right to counsel on appeal. If the right to appointed counsel is based on statute instead, the duty to seek briefing by counsel is presumably implicit in the statute. If for some reason counsel had been permitted to withdraw or counsel is disabled from arguing the issue,[206] new counsel must be appointed to do the briefing. (*Ibid.*)

Decision

In a criminal or delinquency appeal, after conducting a *Wende* review and finding no issues, the court normally issues a written opinion. Under some circumstances it may dismiss the appeal instead. (See *People v. Delgadillo* (2022) 14 Cal.5th 216 [court may dismiss appeal from prima facie denial of Penal Code section 1172.6 petition if no issues are raised and no supplemental brief is filed].) In dependency appeals, dismissal upon receipt of a *Sade C.* filing is common. (*In*

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[206]Counsel may become disabled from briefing an issue by characterizing it as frivolous. (See *People v. Wende* (1979) 25 Cal.3d 436, 442.) ADI policy is that counsel must not characterize issues as having or lacking merit but should simply describe them in a neutral manner. (See § Description of issues, *ante*.)

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re Sade C. (1996) 13 Cal.4th 952, 994.) The theory of dismissal is essentially that the appellant has abandoned the appeal by failing to assert any claims. (*Ibid.*)

If the client has filed a pro per brief in a first criminal appeal of right, the court *must* issue a written opinion with reasons given. (*People v. Kelly* (2006) 40 Cal.4th 106; but see *People v. Delgadillo* (2022) 14 Cal.5th 216 [requiring a court to evaluate arguments raised in a supplemental brief and issue a written opinion only if pro per supplemental brief filed on Pen. Code, § 1172.6 issues].) Although normally the court need not respond to a client's pro per brief if the client is represented by counsel (*People v. Clark* (1992) 3 Cal.4th 41, 173), in a *Wende* situation the pro per brief has greater status. For one thing, counsel has expressly failed to advocate relief for the client; for another, the pro per brief is a matter of right and not subject to the court's discretion.[207] (*Kelly*, *supra*, 40 Cal.4th at p. 120.) If a pro per brief is filed, the Court of Appeal opinion must set out the facts, procedural history, convictions, and sentence, and it must describe the contentions, stating briefly why they are being rejected. (*Id.* at p. 124.) In other words, it must satisfy the state constitutional requirement that decisions determining causes must be "in writing with reasons stated." (Cal. Const., art. VI, § 14.)

Such a decision serves several functions besides fulfilling the state constitutional requirement of a written opinion. It provides guidance to the parties and other courts in subsequent litigation; it promotes careful consideration of the case; it conserves judicial resources by making a record of what has been decided and, possibly, persuading the defendant of the futility of further litigation. (*People v. Kelly* (2006) 40 Cal.4th 106, 120-121.)

The duty to produce a written opinion in a no-issue case with a pro per brief arguably applies in a non-criminal case, as well, under *People v. Kelly* (2006) 40 Cal.4th 106. Article VI, section 14, of the California Constitution applies to civil as well as criminal cases. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232.)

4.4.5 Choice between brief on the merits and no-issue treatment

In cases where there is no other issue, the question arises whether counsel should raise a weak issue (a "*Wende* buster") or simply file a *Wende-Anders* or *Delgadillo* brief. The practice article, "To Brief or Not to Brief" discusses the

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[207]The pro per brief is not a right in the dependency context. (*In re Phoenix H.* (2009) 47 Cal.4th 835.)

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criteria for arguable and frivolous issues and ways of converting a borderline issue into a credible one.

Sure loser

If the issue is a sure loser, it is generally best to opt for the no-issue approach. Often counsel, engaged in understandable wishful thinking, will judge an issue as arguable, though weak, when it is in fact frivolous. But in a criminal or delinquency case, that approach deprives the client of the right to the court's review of the record. Counsel can list the "loser" issue among the *Anders* issues and give the court a chance at least to consider it. The project will give counsel the benefit of a second opinion on the matter.

An exception is when the issue, though a sure loser in the state courts, is being preserved for later federal review. (For federal review and necessary exhaustion in general, see §§ Review, 7.5.4 Abbreviated petition to exhaust state remedies, 7.7 Certiorari in the United States Supreme Court et seq.; 5.2.11 Federalization et seq.; Exhausting State Remedies article, ADI website.) If there is a reasonable possibility of federal relief, the issue should be raised in a regular brief, not a *Wende* brief. Counsel should acknowledge the unfavorable California law and any effect of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Counsel can then state forthrightly that the issue is being raised to preserve it for federal review. Counsel should be sure to petition for review to exhaust state remedies properly.[208]

There is no tactical advantage to the no-issue brief if the court is not going to read the record, as is true in most non-criminal cases (except delinquency appeals) and prima facie denials of Penal Code section 1172.6 petitions (see *People v. Delgadillo* (2022) 14 Cal.5th 216). Counsel should then give the benefit of any doubt to raising the issue. But if there is no doubt, counsel's ethical duty is to refrain from asserting frivolous claims.

Weak but not frivolous issue

If the issue is just weak but not frivolous or a sure loser, counsel should include it and file a regular brief on the merits. When counsel files a no-issue brief, counsel certifies, as the client's advocate and as an officer of the court, that

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[208]An exhaustion petition for review under California Rules of Court, rule 8.508, is sufficient for preservation purposes. (See § 7.5.4 Abbreviated Petition to Exhaust State Remedies.)

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there is nothing to argue. If that turns out not to be true, the court may conclude counsel carelessly overlooked or misjudged the issue or intentionally mischaracterized the case.

This rule is especially strong in cases where there is no right to a court review of the record and hence no strategic advantage to the client from filing a no-issue brief, such as non-criminal cases and prima facie denials of Penal Code section 1172.6 petitions (see *People v. Delgadillo* (2022) 14 Cal.5th 216).

Meritorious but trivial issue

For the same reasons that a weak but non-frivolous issue should be briefed, counsel also should file a brief on the merits when the only issue is not weak at all – in fact, it may be completely meritorious – but is trivial in that it will give little if any practical benefit to the defendant, at least at present. Examples of possibly inconsequential error might be minor clerical inaccuracies in the record and imposition of a concurrent term that should have been stayed under Penal Code section 654.

Counsel should first try to correct the error in the trial court, if possible. Beyond that, counsel should either raise the issue in a substantive brief or else get the client's written waiver of it and file a legitimate no-issue brief.

4.5 Adverse consequences: Potential risks of appealing

An appellant's attorney not only must wield the familiar sword attacking reversible error, but also must carry a shield, ensuring at the very least the appeal will "do no harm." Although double jeopardy and due process principles generally prevent penalizing the exercise of the right to appeal, in certain cases the defendant may be worse off because an appeal was pursued or because it was "successful."

Adverse effects from appealing can include such perils as an increased sentence,[209] reinstatement of dismissed charges, or the addition of more serious charges on remand. They also can entail non-penal consequences that may be more onerous than the original disposition. Some of the adverse effects may be minor, others, catastrophic.

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[209]See § 4.8 et seq., Appendix B, listing common examples of unauthorized sentences – mistakes in the defendant's favor that can be corrected at any time.

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In dependency cases, adverse consequences tend to be more limited. Some results favorable to the client may have been unauthorized and would be subject to correction on appeal – for example, a finding of presumed fatherhood or an offer of reunification services. Some matters brought up in the dependency appeal may be used against the client in any concurrent criminal proceeding. A non-legal consequence could be alienating the social worker or foster parents, resulting in decreased visitation or even its denial altogether.

Thus, a crucial aspect of issue spotting and selection is identifying errors in the client's *favor*, assessing how a particular issue or remedy might backfire, and when necessary advising the client whether to pursue the appeal. Failure to do so can be a serious breach of the attorney's responsibilities to the client. Proper advice can save both the client and the attorney. (See *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [no ineffective assistance of appellate counsel for proceeding with appeal when counsel informed defendant of possible consequences and defendant decided to pursue appeal].)

4.5.1 General California rule against greater sentence after appeal: *People v. Henderson*

Generally, under California law, after a successful appeal a defendant may not receive a greater sentence on those charges for which the defendant was convicted in the first trial. *People v. Henderson* (1963) 60 Cal.2d 482, 495-497, established that California double jeopardy and due process principles generally forbid such an increased sentence.

Henderson was based primarily on the rationale that allowing a greater sentence after appeal would unduly burden the right to appeal and deter challenges to erroneous judgments. (*Id.* at p. 497; see also *People v. Collins* (1978) 21 Cal.3d 208, 216-217; *In re Ferguson* (1965) 233 Cal.App.2d 79, 82.)

The *Henderson* rule applies in many contexts, such as:

- When the defendant is originally sentenced to life, retrial may not result in a death sentence, even if new factors justifying death are presented at the second trial. (*People v. Henderson* (1963) 60 Cal.2d 482, 497 ["defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right"].)

- A defendant who originally receives concurrent sentences may not receive a greater sentence through consecutive sentences on retrial

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after a successful appeal. (*People v. Ali* (1967) 66 Cal.2d 277, 281-282.)[210]

- A defendant may not receive an increased statutory restitution fine on retrial after a successful appeal.[211] (*People v. Hanson* (2000) 23 Cal.4th 355, 363; see also *People v. Thompson* (1998) 61 Cal.App.4th 1269, 1276; *People v. Jones* (1994) 24 Cal.App.4th 1780, 1785.)

- When a defendant is granted probation at the first trial, a denial of probation at retrial is warranted only when the court affirmatively states for the record new facts that would have warranted denial or revocation of probation in the first instance. (*People v. Thornton* (1971) 14 Cal.App.3d 324, 326-327.)

- A minor who has successfully challenged a juvenile court adjudication cannot be retried as an adult in criminal proceedings. (*In re David B.* (1977) 68 Cal.App.3d 931, 936, cited favorably in *In re Bower* (1985) 38 Cal.3d 865, 876.)

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[210]In *People v. Utter* (1973) 34 Cal.App.3d 366, 369, the court did permit imposition of consecutive terms on retrial, but only because it was not for the same offenses and the new sentence was not higher than the initial sentence; in fact, the court noted the defendant would be eligible for parole earlier than under the original sentence.

[211]Restitution *fines* must be distinguished from restitution orders designed to compensate victims for their losses and restitution ordered as a condition of probation. (See Pen. Code, §§ 1202.4, 1203.1, 1203.1k; Welf. & Inst. Code, § 730.6 [juvenile proceedings]; compare *People v. Hanson* (2000) 23 Cal.4th 355 [restitution fine cannot be increased on retrial after appeal] with *People v. Harvest* (2000) 84 Cal.App.4th 641 [victim restitution is not punishment for *Henderson* double jeopardy purposes and can be imposed for first time on resentencing after appeal]; see also *People v. Daniels* (2012) 208 Cal.App.4th 29 [increase in one component of monetary sentence will not render punishment more severe if another component is reduced by equal amount; *Henderson* requires only that the aggregate monetary sentence, not each component thereof, be no more than that originally imposed].)

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- The *Henderson* rule applies when a challenge to a judgment after trial is by habeas corpus, as well as appeal. (*In re Ferguson* (1965) 233 Cal.App.2d 79.) (Cf. § 4.6.3 Sentence after withdrawal of guilty plea as exception to Henderson rule, *post*, on pleas.)

4.5.2 Unauthorized sentence as exception to *Henderson* rule

An unauthorized sentence – one not permitted by law – is an exception to the *Henderson* prohibition against an increased sentence following an appeal. Such a sentence is subject to judicial correction at any time, if the court has jurisdiction or by means of habeas corpus, with or without an appeal.[212] (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1120; *People v. Massengale* (1970) 10 Cal.App.3d 689, 693; see also *In re Renfrow* (2008) 164 Cal.App.4th 1251 [on revocation of probation, court must correct previously imposed sentence if it was unauthorized].) Correction of such a sentence is not a penalty for exercising the right to appeal, since the correction could be done at any time and would be required even if the defendant had not appealed. Thus, the proscription against a higher sentence after appeal laid down in *People v. Henderson* (1963) 60 Cal.2d 482 does not apply.[213] (*Massengale*, at p. 693.)

Risk to defendant from appealing

If an unauthorized sentence is discovered on appeal, imposition of a proper judgment, even a more severe one, is permitted and indeed required.[214] (*People v.*

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[212]Clerical errors can also be corrected at any time. Examples include failure to record a matter accurately in the minutes or abstract (*In re Candelario* (1970) 3 Cal.3d 702, 705; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385-390) and miswording of a jury verdict (*People v. Trotter* (1992) 7 Cal.App.4th 363, 369-370).

[213]If the original aggregate sentence was authorized but that sentence was structured in an unauthorized manner, the new aggregate sentence may not be increased. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311-1312; see also *People v. Torres* (2008) 163 Cal.App.4th 1420, 1432-1433 [following *Mustafaa*].)

[214]In federal appeals, an unauthorized sentence may not be increased unless the government appeals or cross-appeals. (*Greenlaw v. United States* (2008) 554 U.S. 237.)

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Serrato (1973) 9 Cal.3d 753, 764, dictum on unrelated point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

Pursuing an appeal poses the risk that an erroneously lenient sentence that would otherwise go undetected will be discovered and corrected to a more severe one. The court may notice the error. The Attorney General may also find the error and seek correction; even if the prosecution did not object to an unauthorized sentence in the lower court, it may raise the issue on a defendant's appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354; see, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 852-853 [Court of Appeal corrected the failure to impose a matching parole revocation fine even though the People failed to object at sentencing]; *People v. Vizcarra* (2015) 236 Cal.App.4th 422 [the People argued, and the Court of Appeal agreed, the trial court imposed an unauthorized sentence by failing to (1) impose a then-mandatory five-year prior serious felony enhancement and (2) double a term under the Three Strikes law].)[215]

Appellate counsel must be alert to this possibility and advise the client if a potential problem is spotted. (See § 4.6.7 Counsel's responsibilities regarding potential adverse consequences et seq., *post*, on measures to take.)

Nature of unauthorized sentences

An unauthorized sentence is the "imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction." (Pen. Code,§ 1238, subd. (a)(10).) A sentence is unauthorized if it could not lawfully be imposed under any circumstance in the case. (*People v. Scott* (1994) 9 Cal.4th 331, 354; cf. *People v. Fond* (1999) 71 Cal.App.4th 127, 133-134 [sentence lower than that permitted by statute not "unauthorized" if, for fact-specific reasons, trial court found statutory term would be cruel and unusual punishment].) A sentence not authorized by law exceeds the jurisdiction of the

[215]In contrast, the prosecution's failure to object to a *discretionary* sentencing choice forfeits the right to appeal the issue. (*People v. Tillman* (2000) 22 Cal.4th 300, 303 [failure to impose restitution fine and parole revocation fine forfeited by prosecution's failure to object because trial court has discretion not to impose those fines in certain cases]; *People v. Burnett* (2004) 116 Cal.App.4th 257, 261 [failure to impose sex offender fine pursuant to Pen. Code, § 290.3 not unauthorized because not mandatory if judge finds defendant unable to pay].)

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court. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1120; *In re Birdwell* (1996) 50 Cal.App.4th 926, 930.)

Examples of unauthorized sentences in the defendant's favor include a sentence other than the alternatives specified in the governing statute, failure to pronounce judgment after a valid conviction, failure to impose a mandatory enhancement or fine or fee, one-third midterm when a fully consecutive sentence is mandated, probation when prohibited by statute, incarceration in county jail when that is not a statutory option, an erroneous stay under Penal Code section 654, and credits not allowed by law. A more complete list with examples from case law is compiled in § 4.8 Appendix B et seq., *post*.)

Exceptions

On occasion a statutorily unauthorized sentence may not be challenged or corrected on appeal.

Limits on prosecution's right to challenge unauthorized sentence on appeal

If the unauthorized sentence is a term of a plea bargain, the prosecution may be estopped from challenging it: an agreement to a given sentence generally forfeits the right to argue it is unauthorized.[216]

The doctrine of forfeiture may likewise bar the prosecution from challenging a statutorily unauthorized sentence on a defendant's appeal if the People should have appealed. (See *People v. Fond* (1999) 71 Cal.App.4th 127, 133-134 [by failing to appeal, People forfeited fact-specific attack on trial court's

[216]On the flip side, a defendant may not complain that a sentence negotiated as part of a plea bargain is harsher than that allowed by statute: "[D]efendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295 [defendant may not complain negotiated sentence violates Pen. Code, § 654]; see also *People v. Harris* (1991) 227 Cal.App.3d 1223, 1227 [defendant may waive mandated custody credit to receive other sentencing considerations].) Similarly, the defendant may not argue the sentence is more lenient than allowed by law as a ground for withdrawing the plea. (*People v. Beebe* (1989) 216 Cal.App.3d 927, 932-936 [defendant estopped from challenging term of plea bargain calling for unauthorized reduction of non-wobbler felony to misdemeanor].)

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determination that statutory sentence was cruel and unusual punishment];[217] see § Limits to Penal Code section 1252 review.)

Remaining potential for adverse consequences

The potential for adverse consequences remains even if the prosecution has no right to challenge an unauthorized sentence: the court has the discretion to correct the sentence on its own initiative. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [court raised and corrected sentencing error in People's appeal, despite People's forfeiture of right to raise issue on appeal by failing to object in trial court]; *People v. Beebe* (1989) 216 Cal.App.3d 927, 935 [applying estoppel based on plea bargain, but warning "appellate courts cannot be expected to apply this doctrine in every case in which . . . [the plea] exceeds the court's jurisdiction"]; see also § Validity issues concerning the substance of the plea et seq. on terms of plea bargain void as unauthorized or contrary to public policy.)

4.5.3 Sentence after withdrawal of guilty plea as exception to *Henderson* rule

A defendant who successfully attacks the validity of a guilty plea on appeal and seeks to withdraw the plea generally may receive a higher sentence than the original. (*People v. Serrato* (1973) 9 Cal.3d 753, 764-765, dictum on unrelated point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) The order vacating the conviction nullifies post-plea proceedings, returning the defendant to the pre-plea position.

Loss of benefits of plea bargain

Renouncing the plea bargain means renouncing its benefits as well as its burdens. The sentence on the count to which the defendant pleaded guilty can be increased upon conviction, and any counts dismissed because of the bargain can be reinstated. (*People v. Hill* (1974) 12 Cal.3d 731, 769, overruled on another

[217]The *Fond* court held the sentence was not facially "unauthorized," because it was based on constitutional considerations. Thus, it was not subject to correction at any time in the absence of appeal.

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point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, fn. 5; *People v. Aragon* (1992) 11 Cal.App.4th 749, 756- 757.[218]

Possibility court may void bargain on own initiative

Even if the defendant does not directly attack the plea on appeal, it is possible (although not common) for the reviewing court to determine the plea bargain is void and vacate it on its own initiative. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [court has authority to correct sentencing error itself, even if parties cannot].) An example might be a term of the bargain that contains an unauthorized sentence or violates public policy.[219] (See *People v. Renfro* (2004) 125 Cal.App.4th 223, 228, 231, 233 [negotiated provision that offense falls outside the Mentally Disordered Offender law, Pen. Code, § 2960, would violate public policy because it would undermine that law and release a defendant who poses potential danger to society]; cf. *People v. Castillo* (2010) 49 Cal.4th 145 [Attorney General bound by stipulation of district attorney to two-year SVP term].)

Argument alleging breach of plea bargain

An argument that the prosecution or trial court repudiated or violated the plea agreement can risk an increased sentence because a frequent remedy for such an error is vacating the plea bargain. Normally there are two possible remedies for breach of the bargain – withdrawal of the plea or specific enforcement of the bargain. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861;[220] *People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) While specific performance

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[218]An unusual exception was *People v. Collins* (1978) 21 Cal.3d 208, 214-217, in which the crime to which the defendant had pled guilty was repealed before sentencing. The Supreme Court vacated the plea because the trial court had no jurisdiction to impose sentence for a non-existent crime. However, the court ordered that on remand the sentence could not be greater than the original; since the plea had been invalidated by operation of law, not renounced by the defendant, he was entitled to retain the benefit of the bargain.

[219]These topics are discussed further in § Validity Issues Concerning the Substance of the Plea et seq. on plea bargains requiring unauthorized sentence or violating public policy.)

[220]To repudiate the bargain, the prosecution need only violate one term of the plea. The harmless error doctrine does not apply because it is assumed that

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would not be an adverse consequence, withdrawal of the plea would open the door to the possibility of an increased sentence.

Specific performance is appropriate when it implements the parties' reasonable expectations without binding the trial judge to an unreasonable disposition. (*People v. Mancheno* (1982) 32 Cal.3d 855, 861.) Withdrawal of the plea is the appropriate remedy when specific performance would limit the judge's sentencing discretion in light of new information or changed circumstances. (*Ibid.*; see *People v. Kaanehe, supra*, 19 Cal.3d at pp. 13-14; see also Pen. Code, § 1192.5, subd. (b) [defendant cannot be given a more severe sentence than that specified in the plea without being offered a chance to withdraw the plea]; but see *Doe v. Harris, supra*, 57 Cal.4th at p. 73 [plea agreement reference to a statutory consequence of conviction (e.g., a registration requirement) is not an implied promise that any subsequent legislative changes to that statutory consequence will not apply to the defendant].) Non-compliance with terms of bargain by People or Court et seq. further explores the topic of non-compliance with the plea bargain.

4.5.4 Added charges after appeal as possible exception to *Henderson* rule

Remand for a new trial conceivably could result in a greater sentence if at retrial it gives the prosecution a reason or occasion to add other charges that are not barred by such legal impediments as a twice-dismissed count, expiration of the statute of limitations, or speedy trial violation.

If there appears to be the potential for additional charges, counsel should consult with trial counsel and the assigned ADI staff attorney.

Additional charges initially not tried or retried because of original conviction

Reversal on appeal may give the prosecution an incentive to file charges – or to retry charges originally mistried – that it would not otherwise have filed if its "bird in the hand," the first conviction, had remained.

For example, the prosecution may initially decide against pursuing a charge because the defendant has already suffered a conviction for a crime carrying a heavy sentence. It might change its mind, however, if that conviction is reversed on appeal. The defendant then may face, not only retrial on the reversed

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any violation of the bargain resulted in detriment to the defendant. (*Mancheno*, at p. 865; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 858.)

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charge, but prosecution on the charge originally not pursued. (See *People v. Villanueva* (2011) 196 Cal.App.4th 411, 422 [greater sentence on retrial of mistried firearm enhancement allegations after reversal on appeal is permissible]; *People v. Bolton* (2011) 192 Cal.App.4th 541, 549 [no prohibition against increased aggregate sentences following successful appeal when new sentence "is based on additional criminal convictions that were not at issue in the successful appeal and on which the defendant could have been retried without violating double jeopardy"]; *Arnold v. Superior Court* (1971) 16 Cal.App.3d 984 [assault charge originally dismissed at prosecution's request under Pen. Code, § 1385 after mistrial, because defendant serving murder sentence; when conviction was reversed on appeal and retrial ended in acquittal, assault charge was properly refiled];[221] *People v. Dontanville* (1970) 10 Cal.App.3d 783 [sex offense that came to light during first murder trial was properly charged for first time after murder retrial ended in acquittal].)

Henderson arguably does not prevent this result because the prosecution had the right to try the additional charge regardless of whether there was an appeal – the charge is not a penalty for appealing. The defendant might still be able to allege vindictive prosecution, if the facts warrant it. (See § 4.6.6 Federal limitations on greater sentences after appeal et seq., *post*; e.g., *People v. Puentes* (2010) 190 Cal.App.4th 1480 [mistried felony charge originally dismissed in interests of justice after sentence on misdemeanor, which was later reversed; reinstatement of felony charge on remand was presumptively vindictive].)

Counsel should also consider that Penal Code section 1382 entitles a defendant to a retrial of mistried allegations within 60 days, and a dismissal of such charges unless good cause to the contrary is shown. The defendant must move for dismissal to invoke this right. Good cause may be shown by the pendency of appellate proceedings, *if* they potentially affect the count to be retried. (*People v. Villanueva* (2011) 196 Cal.App.4th 411, 423-424.)

Removal of *Kellett* barrier

Conceivably reversal could remove an obstacle that would otherwise have barred new charges under Penal Code sections 654 and 954 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827, which requires a single prosecution for all offenses in which the same act or course of conduct played a significant

[221]The Ninth Circuit upheld this decision in *Arnold v. McCarthy* (9th Cir. 1978) 566 F.2d 1377.

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part. A conviction and sentence are a bar to subsequent prosecution of any offense omitted in the initial proceedings. (*Kellett*, at p. 827.) If the conviction and sentence no longer exist, the previously unfiled charges possibly could be tried along with the older, reversed one, thereby potentially increasing the punishment. (See *People v. Brown* (1973) 35 Cal.App.3d 317, 322-323 [no *Kellett* barrier to adding charges at retrial after mistrial].)

4.5.5 Non-penal dispositions as exceptions to *Henderson* rule

If a consequence of a successful appeal or appellate issue is not "punishment" under double jeopardy principles, the proscription of *People v. Henderson* (1963) 60 Cal.2d 482, against greater sentences after appeal does not apply, even though the subsequent disposition may be more onerous to the defendant than the original one.

Victim restitution

One area for concern over non-penal adverse consequences is compensatory victim restitution. In *People v. Harvest* (2000) 84 Cal.App.4th 641, at resentencing after an appeal, the trial court for the first time imposed victim restitution of $36,301. The Court of Appeal upheld the restitution order, concluding compensatory victim restitution "is not punishment and is therefore not constitutionally barred." (*Id.* at p. 645.) The court distinguished *People v. Hanson* (2000) 23 Cal.4th 355, which held restitution *fines* are punishment within the meaning of the double jeopardy doctrine.

Confinement upon finding of incompetence to stand trial

If the conviction is reversed for a new hearing on competence to stand trial under Penal Code section 1367 et seq. and the defendant is found incompetent on remand, the resulting commitment can be as long as the shorter of two years or the maximum sentence for the most serious crime charged – a period that may be longer than the original prison sentence. (*Id.*, § 1370, subd. (c)(1).)[222]

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[222]Principles of due process and equal protection prohibit indefinite confinement of a person found unable to stand trial and impose certain procedural and substantive requirements. (*Jackson v. Indiana* (1972) 406 U.S. 715; *In re Davis* (1973) 8 Cal.3d 798.)

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Confinement upon finding of not guilty by reason of insanity

A longer potential confinement than a straight prison sentence and restricted credits may result if, on remand, the defendant could be found not guilty by reason of insanity (Pen. Code, § 1026 et seq.[223]) or committed to a secure youth treatment facility as a youthful offender (Welf. & Inst. Code, § 875[224]).

Loss of attorney-client confidentiality

Another possible non-penal adverse consequence, encountered often in habeas corpus cases alleging ineffective assistance of counsel, is suspension of the attorney-client privilege and concomitant compromise of confidentiality. In responding to the allegations in the writ proceedings, the former trial counsel may divulge damaging communications from the client and other information obtained during their relationship. (Evid. Code, § 958; *People v. Ledesma* (2006) 39 Cal.4th 641, 690-691; *People v. Dang* (2001) 93 Cal.App.4th 1293, 1299; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 314; *People v. Morris* (1971) 20 Cal.App.3d 659, 663-664, overruled on other grounds in *People v. Duran* (1976) 16 Cal.3d 282, 292; see also *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1189-1192; *People v. Pope* (1979) 23 Cal.3d 412, 440 (dis. opn. of Mosk, J.); cf. Bus. & Prof. Code, § 6068, subd. (e).)

While the confidential evidence produced at that hearing will be privileged in a later retrial, as a matter of judicially declared use immunity (*People v. Ledesma* (2006) 39 Cal.4th 641, 691-695), that privilege can be waived by the defendant's actions at the retrial (*id.* at pp. 695-696). In any case, the disclosure

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[223]The maximum period of commitment is the longest prison term that could have been imposed. (Pen. Code, § 1026.5, subd. (a); see *People v. Tilbury* (1991) 54 Cal.3d 56, 63; *People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1237.) The commitment may be extended beyond this time. (Pen. Code, § 1026.5, subd. (b).) It is civil in nature. (*People v. Angeletakis* (1992) 5 Cal.App.4th 963, 967-971, disapproved on another point in *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828, fn. 3.)

[224]The commitment may not exceed the middle term of imprisonment that could be imposed on an adult convicted of the same offense or offenses. (Welf. & Inst. Code, § 875, subd. (b)(1)(C).)

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of secret information may pose problems for the defendant apart from its later use as evidence.

Personal detriment

Even if no *legal* adverse consequences might occur, the client personally may lose out after "winning" on appeal. Real life does not always follow legal logic. For example, sometimes it may not be to a defendant's personal and practical benefit to get a new sentencing proceeding. The same sentence may be virtually foreordained, given the facts and the judge, while having to leave prison for court may cost the client a favored job or location within the institution, or cause disruption in activities and relationships.

To prevent an "unwanted remedy," appellate counsel should contact trial counsel when needed to get a feel for probable outcomes on remand, then consult with the client about the practical considerations. In the end, as with potential legal consequences, the client decides whether to seek a particular remedy or pursue the appeal at all. (See § Client's authority, *ante*, on the client's role in decision making.)

4.5.6 Federal limitations on greater sentences after appeal

Federal double jeopardy provisions do not prohibit a greater sentence after appeal. The federal right to due process, however, does protect against vindictive prosecution. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 725, overruled on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794, 798-803.) Vindictiveness against a defendant, by either a trial judge or a prosecutor, for successfully attacking the first conviction violates fundamental due process because fear of ending up worse after an appeal could deter the defendant from seeking review of a conviction. (*Pearce,* at p. 725.)

A defendant must object at resentencing on grounds of vindictiveness or risk waiving the issue. (*People v. Williams* (1998) 61 Cal.App.4th 649, 654-656.)

Statement of reasons for greater sentence

To protect against an inference of vindictiveness, the trial court must articulate reasons for a more severe sentence. The reasons must be based on "objective information concerning identifiable conduct on the part of the defendant" that took place after the original sentencing. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 726.) The facts on which the increased sentence is

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based must be put on the record, "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (*Ibid.*)

Presumption of vindictiveness

If adequate objective justification for the higher sentence is not provided, a presumption of vindictiveness may arise. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 726; see also *Blackledge v. Perry* (1974) 417 U.S. 21, 27; *United States v. Goodwin* (1982) 457 U.S. 368, 374; e.g., *People v. Puentes* (2010) 190 Cal.App.4th 1480 [mistried felony charge originally dismissed in interests of justice after sentence on misdemeanor, which was later reversed; reinstatement of felony charge on remand was vindictive]; but see *Alabama v. Smith* (1989) 490 U.S. 794, 803 [no basis for presumption when second sentence imposed after trial is heavier than first sentence following guilty plea, overruling *Simpson v. Rice*, companion case decided in *Pearce*].)

If the presumption does not arise or is rebutted, the defendant must affirmatively prove actual vindictiveness. (*Wasman v. United States* (1984) 468 U.S. 559, 569.)

How presumption may be rebutted

In order to rebut the presumption of vindictiveness, the prosecution has the burden of demonstrating "(1) the increase in charge was justified by some objective change in circumstances or in the state of evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*In re Bower* (1985) 38 Cal.3d 865, 879.)

The presumption of vindictiveness has been found rebutted when there was an intervening conviction for another offense, even if the offense was committed before the original sentencing (*Wasman v. United States* (1984) 468 U.S. 559, 571-572), and when new information was discovered about the crime or the defendant during the new trial (*Texas v. McCullough* (1986) 475 U.S. 134, 141-144; cf. *Nulph v. Cook* (9th Cir. 2003) 333 F.3d 1052, 1062 [after successful challenge to sentence, state applied different calculation method, drastically increasing sentence beyond what it had originally determined would be excessive]).

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When presumption does not apply

The presumption of vindictiveness is limited and does not apply in all cases. (See, e.g., *Alabama v. Smith* (1989) 490 U.S. 794, 803 [no presumption when first sentence followed guilty plea and second followed a trial; overruling *Simpson v. Rice*, companion case decided in *Pearce*]; *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 26-28 [second sentence imposed by jury with no knowledge of first]; *Colten v. Kentucky* (1972) 407 U.S. 104, 116-117 [greater sentence was imposed by a second court in two-tier trial system]; *People v. Williams* (1998) 61 Cal.App.4th 649, 658-660 [no presumption where defendant's appeal was unsuccessful, People's appeal succeeded, and new sentence one year longer than original but still within terms of plea bargain].)

4.5.7 Counsel's responsibilities regarding potential adverse consequences

Counsel has a duty to advise the client and to seek direction from the client after identifying potential adverse consequences from pursuing a particular issue or the appeal in general. The advice involves:

Weighing the magnitude and likelihood of potential benefits from the appeal against the magnitude and likelihood of risk

The assessment of potential benefit from the appeal includes such questions as: What relief is possible from pursuing the appeal? Given the substantive law, the applicable standards of review and prejudice, and the facts of this case, what are the chances of such relief?

The potential downside calculation includes such factors as: How much additional time or what other burdens would the client face from the adverse consequence? Is the law clear on this point, or is there an arguable contrary position? How evident is the error on the face of the record? How has the court handled such errors in the past?

If there are issues offering a strong chance of significant relief, it may be worthwhile risking a minor adverse consequence. The reverse could be true if issues are weak or would have minimal effect on the ultimate disposition and the adverse consequence is substantial.

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Consider the possibility the error would be discovered and corrected even if the appeal were dismissed

The client may suffer the adverse consequence even without appealing. Errors may be detected and corrected through other mechanisms than appeal. If the consequence is probably going to occur, anyway, there is little point to giving up the appeal. However, making such a prediction is hazardous and uncertain at best.

An unauthorized sentence, for example, may come to the attention of the trial court or prosecution in later proceedings involving the same client or others, in review of files, or in a wholly unanticipated and haphazard way. The California Department of Corrections and Rehabilitation regularly reviews inmate sentence records, and it reports errors, including recently discovered unauthorized sentences, to the trial court.[225] It is helpful to review the superior court file and obtain a copy of the most current prison records on the client's sentence, to see if the error has already been corrected – in which case the appeal poses no additional risk.[226]

Leaving the ultimate decision to the client

Counsel must assess these factors thoroughly and offer the client the best possible professional judgment. Since the assessment can be highly speculative, however, the decision necessarily entails rolling the dice. In the end, the *client* must serve the time or suffer any other consequence, and so the *client* must decide.

Indeed, the ultimate decision whether to pursue an appeal is always the client's. (*Jones v. Barnes* (1983) 463 U.S. 745, 751 ["the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an

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[225]The department's detection rate is erratic. An unauthorized sentence may well be noticed when it is apparent on the face of sentencing documents, such as the abstract of judgment and probation report, which routinely go to the department. On the other hand, the department may not discover an error if the invalidity of the sentence depends on facts not observable in such records.

[226]In making any contact with the court, any law enforcement agencies, or the department, counsel should not divulge that the purpose is to see whether an unauthorized sentence has been corrected.

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appeal"]; see also *In re Josiah Z.* (2005) 36 Cal.4th 664, 671-672 [appellate counsel may move to dismiss an appeal only upon authorization from the child or guardian ad litem]; *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [client, not counsel, responsible for deciding not to pursue appeal]; *In re Martin* (1962) 58 Cal.2d 133, 136-137 [counsel not permitted to give up right to appeal without client's consent by letting it be dismissed under Cal. Rules of Court, rule 8.360(c)(5) & (6)]; *In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043 [appeal without client's consent]; see generally Cal. Rules of Prof. Conduct, Rule 1.2(a).)

Counsel should advise the client of the relative risks and benefits, then have the client send a decision in writing. It is helpful to provide a form with check boxes for continuing or dismissing the appeal. (See § Abandonment in lieu of no-issues filing, *ante*.) Counsel should remind the client that an attorney has no authority to dismiss an appeal without the client's consent; if the client fails to respond, counsel must proceed with the appeal.

4.6 Appendix A: Checklist of some common issues raised on criminal appeals

The following non-exhaustive list includes some general issues to check as part of counsel's regular review of the record.

NOTE: The issues and citations are just a starting point for research. The law changes frequently, and so the checklist and law must be continuously reviewed and updated.

4.6.1 Charge

Confirm that the crime for which the defendant was convicted was adequately charged or is a lesser included offense of the crime charged (see *People v. Toro* (1989) 47 Cal.3d 966, dictum on unrelated point disapproved in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; see also *People v. Bailey* (2012) 54 Cal.4th 740; *People v. Macias* (2018) 26 Cal.App.5th 957; *People v. Hamernik* (2016) 1 Cal.App.5th 412) or is an attempt of the charged offense if specific intent was found (Pen. Code, § 1159; *People v. Fontenot* (2019) 8 Cal.5th 57).

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4.6.2 Demurrer

Review any demurrer filed and the basis for the ruling on it. (See Pen. Code, § 1002 et seq.; *People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1191-1192; *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1176-1177.)

4.6.3 Statute

Check the statute under which the defendant was convicted.

- Does the wording of the statute at the time the offense was committed literally cover the conduct in question; was it intended to do so? (*See Fiore v. White* (2001) 531 U.S. 225.)

- Were ameliorative amendments to the statute enacted after the crime? (See *Bell v. Maryland* (1964) 378 U.S. 226, 230; *People v. Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 63 Cal.2d 740; see also *Fiore v. White* (2001) 531 U.S. 225 [later state Supreme Court decision establishing defendant's conduct did not violate statute requires defendant be freed]; cf. *People v. Brown* (2012) 54 Cal.4th 314; *People v. Floyd* (2003) 31 Cal.4th 179; see *People v. McKenzie* (2020) 9 Cal.5th 40 [defendant could take advantage of ameliorative amendments that took effect while he was appealing from subsequent revocation of his probation and imposition of sentence, despite failure to file appeal from original grant of probation with imposition of sentence suspended].)

- Is there a federal law that might preempt the provisions of the state statute under which the defendant was convicted or state law which similar preempts a local ordinance? (*Arizona v. United States* (2012) 567 U.S. 387; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751; *People v. Stevens* (1995) 34 Cal.App.4th 56, 58-59, 61-62; *In re Rudolfo A.* (1980) 110 Cal.App.3d 845, 849-853.)

- Was the defendant convicted under a general statute when a more specific one covers his conduct? (*In re Williamson* (1954) 43 Cal.2d 651, 654-655; see also *People v. Murphy* (2011) 52 Cal.4th 81, 86 [if general statute covers same

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conduct as special statute, court infers Legislature intended conduct to be prosecuted exclusively under special statute].)

- Was the statute under which the defendant was punished unconstitutionally enacted? (*People v. Armogeda* (2015) 233 Cal.App.4th 428 [Legislature could not amend a voter-enacted law in a way inconsistent with the terms and intent of that law].)

- Is the statute unconstitutionally vague? (E.g., *Johnson v. United States* (2015) 576 U.S. 591 ["violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another," impermissibly vague, denies fair notice and due process].)

4.6.4 Pleadings and proof

Look for adequate specificity in the information regarding the date of the offense, property at issue, etc. Is it clear what conduct was at issue? (*People v. Mancebo* (2002) 27 Cal.4th 735, 743 [failure to plead multiple victim circumstance precluded imposition of indeterminate terms]; *People v. Arias* (2010) 182 Cal.App.4th 1009 [failure to plead attempted murder was deliberate and premeditated required life sentence be reduced to that for unpremeditated attempted murder].) Do charges make clear that defendant will be subject to an increased sentence if certain findings are made? (See *People v. Sawyers* (2017) 15 Cal.App.5th 713; *People v. Wilford* (2017) 12 Cal.App.5th 827.) Check for material variances between the pleading and the evidence at trial. Did the trial court properly allow any amendments to the information? (*People v. Lettice* (2013) 221 Cal.App.4th 139 [court must be aware of and exercise its discretion].) Check for material variance between evidence produced at trial and evidence produced at preliminary hearing to prove any count. (E.g., *People v. Graff* (2009) 170 Cal.App.4th 345.) If defendant waived preliminary hearing, did the prosecution improperly amend the information? (Pen. Code, § 1009; *People v. Mora-Duran* (2020) 45 Cal.App.5th 589.)

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4.6.5 Subject matter, personal, and territorial jurisdiction

Confirm proper jurisdiction existed. Usually this is a non-issue, but it crops up in the occasional case and can be significant when it does occur. (E.g., *In re Steven R.* (2015) 241 Cal.App.4th 812.)

4.6.6 Personal presence

Was defendant personally present at all proceedings in which their appearance was necessary to prevent interference with the opportunity for effective cross-examination and at any stage critical to the outcome and where the defendant's presence would contribute to the fairness of the procedure? (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15; see, e.g., *Kentucky v. Stincer* (1987) 482 U.S. 730, 744–745, fn. 17; *People v. Butler* (2009) 46 Cal.4th 847, 861; see also Pen. Code, §§ 977, 1043). Resentencing on remand is also a critical stage. (*People v. Cutting* (2019) 42 Cal.App.5th 344, 348.)

4.6.7 Change of venue

Look for motions seeking a change of venue, usually because of prejudicial pretrial publicity. (*People v. Dennis* (1998) 17 Cal.4th 468, 523-524; *People v. Williams* (1989) 48 Cal.3d 1112, 1124-1132.)

4.6.8 Statute of limitations

Investigate this issue when the crime was committed a substantial time before it was prosecuted. It has gained special vigor since the decision of the United States Supreme Court in *Stogner v. California* (2003) 539 U.S. 607. The relevant limitations periods are set out in Penal Code sections 799 to 805. (See also *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 370-377 [defendant can waive statute of limitations to plead guilty to lesser included offenses]; *People v. Chadd* (1981) 28 Cal.3d 739, 756-757; *People v. Simmons* (2012) 210 Cal.App.4th 778; *People v. Lynch* (2010) 182 Cal.App.4th 1262; *People v. Le* (2000) 82 Cal.App.4th 1352, 1356-1362; *People v. Lopez* (1997) 52 Cal.App.4th 233, 244-252.) Be aware that the statute may have run as to lesser offenses, even if it has not as to greater charges. (E.g., *People v. Beasley* (2003) 105 Cal.App.4th 1078; compare *People v. Meza* (2019) 38 Cal.App.5th 821 [general consent to prosecutor's packet of instructions does not forfeit statute of limitations objection] with

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People v. Stanfill (1999) 76 Cal.App.4th 1137 [acquiescence to time-barred lesser included offense instructions forfeits statute of limitations objection].)

4.6.9 Bars to re-litigation

Inquire whether some part of the case was litigated in another proceeding. The doctrines of res judicata, collateral estoppel, law of the case, or rule of consistency might apply. (See generally *People v. Mena* (2012) 54 Cal.4th 146; *People v. Barragan* (2004) 32 Cal.4th 236, 250; *People v. Quarterman* (2012) 202 Cal.App.4th 1280 [collateral estoppel prevents prosecution from initiating second probation violation proceeding on same ground following failure to sustain burden of proof at first proceeding]; *People v. Howie* (1995) 41 Cal.App.4th 729, 735-736 [court determination that prior is invalid collaterally estops later court from imposing sentence based on that prior]; but see *People v. Neely* (1999) 70 Cal.App.4th 767, 782-783 [issue forfeited if no objection made].)

4.6.10 Multiple prosecutions and convictions

Review potential issues involving multiple prosecutions and convictions, including double jeopardy problems. Double jeopardy principles and related statutory provisions are multifaceted. (See *People v. Massie* (1998) 19 Cal.4th 550, 563-565.) Some examples include:

- Had the case previously been dismissed under Penal Code section 1387 (see also Pen. Code, § 1387.1)? (*People v. Salcido* (2008) 166 Cal.App.4th 1303.)[227]
- Was there legal necessity to justify an earlier mistrial? (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-714; *Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511.)

[227]Once a court dismisses an entire case, it loses subject matter jurisdiction; unless procured by fraud, dismissal cannot be vacated, even upon stipulation by the parties. (*People v. Hampton* (2019) 41 Cal. App.5th 840.)

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- Did the prosecutor deliberately provoke a mistrial in the first proceeding? (*People v. Batts* (2003) 30 Cal.4th 660.)

- Had the defendant previously been convicted or acquitted of the present charge or an offense included within it? (E.g., *Evans v. Michigan* (2013) 568 U.S. 313 [midtrial directed verdict and dismissal, based on trial court's mistake as to element of offense, was "acquittal" for double jeopardy purposes]; *People v. Fields* (1996) 13 Cal.4th 289, 299-302 [acceptance of guilty verdict on lesser included offense precludes retrial on greater]; *Stone v. Superior Court* (1982) 31 Cal.3d 503 [court must accept partial verdict of acquittal as to charged greater offense when jury has expressly indicated it has acquitted on that offense but has deadlocked on uncharged lesser included offenses][228]; *People v. Pedroza* (2014) 231 Cal.App.4th 635 [double jeopardy principles may apply, barring retrial when trial court finds insufficient evidence as matter of law; but order of acquittal is appealable]; *Brown v. Superior Court (People)* (2010) 187 Cal.App.4th 1511 [when jury acquitted of some charges but hung on others, at retrial, prosecutor had duty of showing renewed charges were based on different conduct and charges from those on which the jury had reached a verdict]*; People v. Sullivan* (2013) 217 Cal.App.4th 242 [where jury has reached a verdict on a substantive count, but is hung on an enhancement, the court should take the verdict on the count and declare a mistrial as to the enhancement; to discharge the jury without a verdict on the count is tantamount to an acquittal and double jeopardy is implicated].)

- Before the current proceeding, did a court find insufficient evidence to support the conviction? (*Burks v. United States* (1978) 437 U.S. 1, 18, and *People v. Hatch* (2000) 22 Cal.4th

[228]*Blueford v. Arkansas* (2012) 566 U.S. 599 held a statement by the jury of a preliminary vote does not constitute acquittal for federal jeopardy purposes. *Stone* reached a different conclusion as to the California Constitution, and *People v. Aranda* (2019) 6 Cal.5th 1077 held *Stone* survives *Blueford*.

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260, 271-272 [U.S. and California Constitutions preclude retrial if trial court determines evidence was insufficient to support conviction as a matter of law, but not if court exercised its power to weigh evidence or its discretion to dismiss].)

- Was there a previous appeal in the case? (See *People v. Henderson* (1963) 60 Cal.2d 482, 495-497 [California double jeopardy and due process principles generally forbid imposition of a greater sentence on retrial or resentencing on the same charges after a successful appeal]; see § 4.6.1 General California rule against greater sentence after appeal: People v. Henderson et seq., *ante*.)

- Was the defendant improperly convicted of both a greater offense and a lesser included one (*People v. Aranda* (2019) 6 Cal.5th 1077, 1099, and cases cited therein)? Or was the defendant improperly convicted of different forms of the same offense for the same conduct (*People v. Aguayo* (2022,) 13 Cal.5th 974 [assault with deadly weapon & assault with force likely produce great bodily injury]; *People v. Vidana* (2016) 1 Cal.5th 632 [grand theft by larceny and embezzlement]; cf. *People v. White* (2017) 2 Cal.5th 349 [defendant may properly be convicted of both rape of an intoxicated person and rape of an unconscious person for single act of intercourse])?

- Had the defendant previously been prosecuted for a factually related offense? Penal Code sections 654 and 954 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827, require a single prosecution for all offenses in which the same act or course of conduct played a significant part. (Compare/contrast *People v. Goolsby* (2015) 62 Cal.4th 360; *People v. Massie* (1998) 19 Cal.4th 550, 563-565; *People v. Linville* (2018) 27 Cal.App.5th 919; *People v. Ochoa* (2016) 248 Cal.App.4th 15; *Barriga v. Superior Court* (2012) 206 Cal.App.4th 739*; In re Witcraft* (2011) 201 Cal.App.4th 659; *People v. Williams* (1997) 56 Cal.App.4th 927, 932-934; cf. *People v. Valli* (2010) 187 Cal.App.4th 786 [*Kellett* bar not violated when defendant prosecuted for evasive driving, which had been used as

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evidence of consciousness of guilt in prior murder trial in which he was acquitted].)

4.6.11 Speedy trial

Determine whether Penal Code sections 1381 and 1389 demands were made and whether the issue of speedy trial on statutory or constitutional grounds was raised below. Pay special attention to whether prejudice on appeal can be shown. (See *Betterman v. Montana* (2016) 578 U.S. 437; *Barker v. Wingo* (1972) 407 U.S. 514, 530; *People v. Wagner* (2009) 45 Cal.4th 1039; *People v. Harrison* (2005) 35 Cal.4th 208, 225-227; *People v. Catlin* (2001) 26 Cal.4th 81, 107-111.) Also look for prejudicially prolonged pre-charging delaying, which can violate due process. (*United States v. Lovasco* (1977) 431 U.S. 783, 789; see *People v. Nelson* (2008) 43 Cal.4th 1242, 1249 et. seq; *People v. Booth* (2016) 3 Cal.App.5th 1284.)

4.6.12 Severance and consolidation

Review motions regarding improper joinder of offenses and defendants. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1314-1317; *People v. Morganti* (1996) 43 Cal.App.4th 643, 671-675.) Was failure to sever counts an abuse of discretion? (*Bradford*, at pp. 1314-1317; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048-1049.) Did the joinder satisfy the criteria of Penal Code section 954? Did the court's ruling deny the defendant a fair trial? (*People v. Grant* (2003) 113 Cal.App.4th 579, 583-584.)

4.6.13 Discovery

Consider issues regarding the information disclosed, or not disclosed, to the defendant or prosecution. For example:

- Failure of district attorney to disclose favorable information. (*Kyles v. Whitley* (1995) 514 U. S. 419, 435, 437-438; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-58; *United States v. Bagley* (1985) 473 U.S. 667; *Brady v. Maryland* (1963) 373 U.S. 83; *In re Sassounian* (1995) 9 Cal.4th 535; *People v. Garcia* (2000) 84 Cal.App.4th 316, 329-330; cf. *People v. Wilson* (2013) 216 Cal.App.4th 342 [trial court knew

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of allegation that witness had recanted but failed to inform parties].)

- Suppression or destruction of physical or demonstrative evidence. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [in absence of bad faith, failure to preserve potentially favorable evidence does not deny due process]; *California v. Trombetta* (1984) 467 U.S. 479, 485-489; *People v. Cooper* (1991) 53 Cal.3d 771, 810-812 [expressly adopting *Youngblood* and *Trombetta*]; see also *People v. Alvarez* (2014) 229 Cal.App.4th 761 [failure to preserve potentially exculpatory evidence].)

- Prosecution or defense failure to comply with discovery order in timely fashion. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1750, 1753-1754; see Pen. Code, § 1054 et seq.)

- *Pitchess* and other motions for previous citizen complaints made against an officer and for other types of governmental information. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534; Pen. Code, §§ 832.7 & 832.8; Evid. Code, §§ 1043-1045; see *Warrick v. Superior Court* (2005) 35 Cal.4th 1011; *People v. Mooc* (2001) 26 Cal.4th 1216; *Sisson v. Superior Court* (2013) 216 Cal.App.4th 24; *People v. Hustead* (1999) 74 Cal.App.4th 410, 415-423.)

- Failure to disclose informants. (Evid. Code, § 1041; *People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1736; *People v. Luera* (2001) 86 Cal.App.4th 513, 525-526.)

4.6.14 Competence to stand trial

Examine Penal Code section 1368 issues regarding the defendant's competency to stand trial.

- CAVEAT: Be cautious in this area; the client may not *want* the remedies such an issue might offer. (See § 4.6.5 Non-penal dispositions as exceptions to Henderson rule, *ante*, on non-penal adverse consequences.)

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- Was there substantial evidence of incompetence before the court, or did the court express doubt about the defendant's competence, so that section 1368 proceedings should have been held? (*People v. Rodas* (2018) 6 Cal.5th 219; *People v. Lightsey* (2012) 54 Cal.4th 668; *People v. Koontz* (2002) 27 Cal.4th 1041, 1064; *People v. Marks* (1988) 45 Cal.3d 1335, 1340-1344; see *Drope v. Missouri* (1975) 420 U.S. 162; *Pate v. Robinson* (1966) 383 U.S. 375; cf. *Moore v. Superior Court (People)* (2010) 50 Cal.4th 802 [defendant in SVP proceeding does not have due process right to be tried or civilly committed only while mentally competent]; *In re Bryan E.* (2014) 231 Cal.App.4th 385 [competence in juvenile proceedings governed by Welf. & Inst. Code, § 709]; see also *United States v. Gillenwater* (9th Cir. 2013) 717 F.3d 1070 [defendant has constitutional right to testify at competency hearing; counsel may not waive it].)

- Consider also the remedy of a retrospective competency hearing. (*People v. Rodas* (2018) 6 Cal.5th 219; *People v. Lightsey* (2012) 54 Cal.4th 668, 710-711; *People v. Ary* (2011) 51 Cal.4th 510, 520, fn. 3.)

4.6.15 Admonitions and waivers of rights

Check all pleas of guilty, admissions of priors, waivers of jury trial, and submission on the preliminary hearing transcript.

- Was the defendant specifically admonished on the constitutional rights to a right to jury trial, to confrontation, against self-incrimination?[229] Do both the advisement and the defendant's personal waiver appear explicitly on the record? (See *People v. Sivongxxay* (2017) 3 Cal.5th 151; *People v. Wright* (1987) 43 Cal.3d 487, 493-495; see *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *People v. Howard* (1992) 1 Cal.4th 1132, 1178-1179 [prejudice from failure to give explicit

[229]See § Inadequate Advice On Constitutional And Other Rights of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

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admonitions judged by totality of circumstances indicating voluntary and intelligent plea][230]; *In re Tahl* (1969) 1 Cal.3d 122, 130-133.[231])

- Was the defendant adequately advised of the consequences of the plea?[232] (*Padilla v. Kentucky* (2010) 559 U.S. 356, 359; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) If the defendant is not a citizen, did the trial court advise that conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization; did trial counsel provide accurate and affirmative advice about and defend against the immigration consequences? (Pen. Code, §§ 1016.3, 1016.5.)

- Did the trial court honor the defendant's right to enter a plea of his or own choice or put on a defense, despite counsel's disagreement with the decision? (*McCoy v. Louisiana* (May 14, 2018, No. 16–8255) 584 U.S. 414 [defendant has right to insist that counsel refrain from admitting guilt, even when counsel's view is confessing guilt offers best outcome; it is the defendant's prerogative, not counsel's, to decide on objective of defense]; *People v. Frierson* (1985) 39 Cal.3d 803 [right to defense at guilt phase]; *People v. Rogers* (1961) 56 Cal.2d 301 [right to enter plea personally]; Pen. Code, § 1018 [plea to be made personally by defendant]; cf. *People v. Alfaro* (2007) 41 Cal.4th 1277, 1298-1300; *People v. Chadd* (1981) 28 Cal.3d 739 [no right to plead guilty to capital offense without counsel's consent, as required by Pen. Code, § 1018]; see also Cal. Rules of Court, rule 5.778(d), requiring an admission by a child to be made personally, but admission or no contest plea

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[230]See *People v. Farwell* (2018) 5 Cal.5th 295 [*Howard* applies to "silent" record].

[231]*Mills v. Mun. Court for San Diego Judicial Dist.* (1973) 10 Cal.3d 288, 306, which held a misdemeanor defendant may plead guilty through counsel, disapproved any implication in *Tahl* inconsistent with this holding.

[232]See § Inadequate Advice On Consequences Of Plea.

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must be with consent by counsel (*In re Alonzo J.* (2014) 58 Cal.4th 924, 935 et seq.).)

- Were defendant's pleas consistent? (*People v. John* (2019) 36 Cal.App.5th 168 [pleas of guilty and not guilty by reason of insanity irreconcilable; plea bargain encompassing both unauthorized].)

- Did the court properly find a factual basis for the plea? (Pen. Code, § 1192.5; see *People v. Palmer* (2013) 58 Cal.4th 110.)

- Did the trial court inform the defendant before the plea that its approval is not binding, that the court may withdraw its approval later, and that, if it does, "the defendant shall be permitted to withdraw his plea if he desires to do so . . . "? (Pen. Code, § 1192.5; *People v. Cruz* (1988) 44 Cal.3d 1247.)

- Was the defendant adequately advised of the consequences of a plea under *People v. Vargas* (1990) 223 Cal.App.3d 1107, providing for a specified sentence if the defendant appeared for sentencing and a greater one if the defendant did not? Was the evidence sufficient to prove any alleged violation of a *Vargas* condition?

- Was the defendant advised of the right to a jury trial on civil commitment and did the defendant personally waive it? (Cal. Const., art. I, § 16; *People v. Blackburn* (2015) 61 Cal.4th 1113 [MDO commitment extension]; *People v. Tran* (2015) 61 Cal.4th 1160 [NGI recommitment].)

4.6.16 Representation

Review possible denials of infringements on the right to counsel or the right to self-representation at any stage. For example:

- Right to self-representation.

  - General right to self-representation at trial. (*Faretta v. California* (1975) 422 U.S. 806, 818; see *People v. Butler* (2009) 47 Cal.4th 814; *People v. Burgener*

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(2009) 46 Cal.4th 231, 243 [where trial court fails to advise of associated dangers and disadvantages of self-representation, defendant's waiver of counsel not knowing or intelligent]; *People v. Lawrence* (2009) 46 Cal.4th 186; *People v. Marshall* (1996) 13 Cal.4th 799, 827-828*; People v. Horton* (1995) 11 Cal.4th 1068, 1107-1111; *People v. Miller* (2007) 153 Cal.App.4th 1015; *People v. Robinson* (1997) 56 Cal.App.4th 363, 369-370; *People v. Truman* (1992) 6 Cal.App.4th 1816, 1821-1824; cf. *People v. Williams* (2003) 110 Cal.App.4th 1577, 1588, 1591 [right to counsel and thus to self-representation in Mentally Disordered Offender proceeding is statutory; but once state has given such right, it is protected by due process principles].)

Error in giving incomplete advisal is subject to harmless-error [*Chapman*] review, while no warning is subject to reversal per se. (Compare, e.g., *People v. Bush* (2017) 7 Cal.App.5th 457, 475, with, e.g., *People v. Hall* (1990) 218 Cal.App.3d 1102, 1108–1109.)

- Standard for ability to represent self. (*Indiana v. Edwards* (2008) 554 U.S. 164 [state law may constitutionally require higher standard of competence to represent self than to stand trial]; cf. *People v. Johnson* (2012) 53 Cal.4th 519 [California courts may deny self-representation to mentally ill defendant who has been found competent to stand trial but is unable to present a basic defense by self, if permitted by *Faretta*[233]]; *People v. Gardner* (2014) 231 Cal.App.4th 945.)

[233]Under *Johnson*, the test for self-representation is higher than competence to stand trial. It asks whether the defendant suffers from a severe mental illness to the point that the defendant cannot carry out the basic tasks needed to present the defense without the help of counsel, but this standard must be applied cautiously. (53 Cal.4th at pp. 530-531.)

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- Right to enter a plea of own choice or put on a defense, despite counsel's disagreement with the decision: see § Admonitions and waivers of rights, *ante*.

- Right to counsel after choosing self-representation. (*People v. Bauer* (2012) 212 Cal.App.4th 150 [right to advisement of right to counsel at probation revocation hearing after representing self at time guilty plea entered]; cf. *Marshall v. Rodgers* (2013) 569 U.S. 58 [state court determination that right to counsel was not violated by denying petitioner's request for counsel to help file new trial motion was not contrary to or unreasonable application of federal law after defendant had waived counsel on three occasions].)

- Right to counsel at all critical stages of proceedings. (*United States v. Wade* (1967) 388 U.S. 218 [post-indictment lineup conducted for identification purposes]; *People v. Ayala* (2000) 24 Cal.4th 243 [*Batson-Wheeler* type of motion]; *People v. Young* (2017) 17 Cal.App.5th 451 [excusal of juror without sufficient information he was unable to perform duties].)

- Right to retained counsel of choice. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140; *Wheat v. United States* (1988) 486 U.S. 153, 159-163; *People v. Ortiz* (1990) 51 Cal.3d 975, 983; *People v. Crovedi* (1966) 65 Cal.2d 199; *People v. Williams* (2021) 61 Cal.App.5th 627 [trial court erred in permitting expedience to take precedence over defendant's right to counsel of his choice]; *People v. Baylis* (2006) 139 Cal.App.4th 1054).

- Substitution of counsel.

  - Duty of the court to make an inquiry when the defendant complains of ineffective assistance of appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-125; cf. *Smith v. Superior Court* (1968) 68 Cal.2d 547 [inappropriate removal of appointed counsel]; *People v. Sanchez* (2011) 53 Cal.4th 80 [when defendant seeks to withdraw plea on basis of ineffective

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assistance of counsel, proper remedy is *Marsden* hearing, not appointment of temporary successor counsel to investigate]; *People v. Hill* (2013) 219 Cal.App.4th 646 [*Marsden* applicable in SVPA proceedings].)

- Right to discharge retained counsel without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983; *People v. Lara* (2001) 86 Cal.App.4th 139, 153-164 [motion to discharge retained counsel must be granted if timely and is not subject to *Marsden* standards for replacement of appointed counsel].)

- Ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668; see also *Padilla v. Kentucky* (2010) 559 U.S. 356.)

- Conflicts of interest.[234] These come in many forms (see *People v. Bonin* (1989) 47 Cal.3d 808, 833-836), including:

  - Counsel's representation of a co-defendant or witness. (*Wheat v. United States* (1988) 486 U.S. 153, 159-163; *People v. Jones* (2004) 33 Cal.4th 234; *People v. Mroczko* (1983) 35 Cal.3d 86, 115-116; *People v. Baylis* (2006) 139 Cal.App.4th 1054; *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 897-899.)

[234]California Rules of Professional Conduct, rule 1.7 allows for representation by a conflicted attorney if the defendant consents in writing after full disclosure. However, it is doubtful that a client can ever waive the duty to practice competently; if the conflict is fundamental, the consent may be ineffectual. (*Wheat v. United States* (1988) 486 U.S. 153, 159-163; *People v. Jones* (2004) 33 Cal.4th 234; *In re A.C.* (2000) 80 Cal.App.4th 994; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893; San Diego County Bar Association Committee on Legal Ethics, Opinion No. 1995-1, section 4; Los Angeles County Bar Association Formal Opinion No. 471.)

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- Counsel's accepting a new position with a prosecuting agency without disclosing it to the client. (*People v. Marshall* (1987) 196 Cal.App.3d 1253, 1256-1259.)

- Arguing counsel's own ineffectiveness. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1139; *People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-55; *In re Fountain* (1977) 74 Cal.App.3d 715, 719.)

- Entering into a contract to write a book about the case. (*People v. Bonin* (1989) 47 Cal.3d 808, 836.)

4.6.17 Jury selection

Issues in this area might include challenges to jurors and the exercise of peremptory challenges by either the prosecutor or the defense attorney. (*Foster v. Chatman* (2016) 578 U.S. 488; *Johnson v. California* (2005) 545 U.S. 162; *Powers v. Ohio* (1991) 499 U.S. 400, 402; *Batson v. Kentucky* (1986) 476 U.S. 79.) Substitution of a juror ordered or denied at any time during trial or deliberations is also potentially important. (E.g., *People v. Garcia* (2012) 204 Cal.App.4th 542.) See *People v. Gutierrez* (2017) 2 Cal.5th 1150, on the constitutional duties of counsel, trial courts, and appellate courts. Did prosecutor's reasons or trial court's ruling violate Code of Civil Procedure section 231.7? (E.g, *People v. Barnes* (2024) 107 Cal.App.5th 560; *People v. Uriostegui* (2024) 101 Cal.App.5th 271.)

4.6.18 Trial process and conditions

- Fair and impartial judge. (*Gray v. Mississippi* (1987) 481 U.S. 648; *Tumey v. Ohio* (1927) 273 U.S. 510; *People v. Freeman* (2010) 47 Cal.4th 993; *People v. Sturm* (2006) 37 Cal.4th 1218; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Brown* (1993) 6 Cal.4th 322, 333.)

- Fair and impartial jury. (*Irvin v. Dowd* (1961) 366 U.S. 717 [change of venue]; *People v. Nesler* (1997) 16 Cal.4th 561, 578 [outside influence on juror]; see also *Godoy v. Spearman* (9th Cir., 2017) 861 F.3d 956 en banc.) Also see Code of Civil Procedure section 231.7; e.g., *People v. Barnes* (2024) 107

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Cal.App.5th 560; *People v. Uriostegui* (2024) 101 Cal.App.5th 271.

- Public trial. (*Waller v. Georgia* (1984) 467 U.S. 39; *People v. Woodward* (1992) 4 Cal.4th 376; *People v. Baldwin* (2006) 142 Cal.App.4th 1416.)

- Presence of defendant. (*Riggins v. Nevada* (1992) 504 U.S. 127, 137; *People v. Rodriguez* (1998) 17 Cal.4th 253, 260; *People v. Freeman* (1994) 8 Cal.4th 450, 488-480.)

- Shackling or jail garb. (*Deck v. Missouri* (2005) 544 U.S. 622; *Estelle v. Williams* (1976) 425 U.S. 501; *People v. Mar* (2002) 28 Cal.4th 1201; *People v. Cox* (1991) 53 Cal.3d 618, 651, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390; *People v. Duran* (1976) 16 Cal.3d 282.)

- Ability to present defense, access to compulsory process. (*Ake v. Oklahoma* (1985) 470 U.S. 68 [appointment of experts for defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [cross-examination of person who repudiated confession to crime defendant accused of]; *People v. Treadway* (2010) 182 Cal.App.4th 562 [plea agreement between prosecutor and co-defendant forbidding co-defendant from testifying at defendant's trial denied right to compulsory process and due process right to present a defense].)

- Waiver of jury trial. (Cal. Const., art. I, § 16; *People v. Blackburn* (2015) 61 Cal.4th 1113 [mentally disordered offender commitment extension]; *People v. Tran* (2015) 61 Cal.4th 1160 [not guilty by reason of insanity recommitment].)

- Right not to be compelled to testify. (*Allen v. Illinois* (1986) 478 U.S. 364, 368-375 [no Fifth Amendment right not to testify in a civil commitment as sexually dangerous person]; *Hudec v Superior Court* (2015) 60 Cal.4th 815 [defendant has right not to testify in NGI recommitment proceeding per Pen. Code, § 1026.5, subd. (b)(7)]; *People v. Dunley* (2016) 60 Cal.4th 815 [same, mentally disordered offender]; *People v.*

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Curlee (2015) 237 Cal.App.4th 709, 716-722 [sexually violent predator proceeding].)

4.6.19 Motions

Review motions that were made and consider whether others should have been made or opposed. Be sure the trial court's ruling is supported by the record. (See *People v. Perez* (2015) 233 Cal.App.4th 736.) The possibilities are many, but some common motions to be on the alert for include:

- Motions in limine.
- Penal Code section 1385 motion to dismiss, including Three Strikes issues. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)
- Defense request for continuance. (*People v. Mickey* (1991) 54 Cal.3d 612, 660-661.)
- Penal Code section 1538.5 motion to suppress evidence on Fourth Amendment search and seizure grounds. Make sure trial counsel appropriately moved to suppress and scrutinize the court's reasoning in denying the motion. (Pen. Code, § 1538.5, subd. (m); *People v. Camacho* (2000) 23 Cal.4th 824, 829-837; *People v. Robles* (2000) 23 Cal.4th 789, 794-795.) (Note: a section 1538.5 motion made and denied at the preliminary hearing must be renewed after the filing of the information such as by a renewed section 1538.5 motion or section 995 motion; see *People v. Lilienthal*, *supra*, 22 Cal.3d at p. 896.)
- Motion to suppress the defendant's extrajudicial statements as involuntary or as violative of *Miranda*.[235] (U.S. Const.,

[235]A confession issue is not preserved if the defendant pleads guilty. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896; cf. Pen. Code, § 1538.5, subd. (m) [search and seizure issue].) However, if the trial court induced a plea by representing that the issue is appealable, the plea itself can be challenged.

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amends. V, XIV; Cal. Const., art. I, § 15; Evid. Code, §§ 402-405, 1220*; Miranda v. Arizona* (1966) 384 U.S. 436; but see *United States v. Patane* (2004) 542 U.S. 630, 637, 639-640 [failure to give *Miranda* warning does not require exclusion of physical evidence that is fruit of voluntary statement].)[236]

- Defense motion for a physical lineup. (*Evans v. Superior Court (People)* (1974) 11 Cal.3d 617.)

- Prosecution motion for mental examination of defendant. (*Sharp v. Superior Court* (2012) 54 Cal.4th 168, 171.)

- Motion for pre-trial diversion (e.g., drug abuse (§ 1000 et seq.), cognitive development disabilities (§ 1001.20 et seq.), mental health (§ 1001.36). Note: as to the latter at least, upon a guilty plea, a certificate of probable cause is necessary. (*People v. Braden* (2023) 14 Cal.5th 791.)

- Motion for mistrial. (*People v. Silva* (2001) 25 Cal.4th 345, 372-374.)

- Motion for judgment of acquittal. (Pen. Code, §§ 1118, 1118.1; *People v. Belton* (1979) 23 Cal.3d 516, 520-521; *People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.) A motion for acquittal is a red flag for a possible insufficiency of the evidence issue.

- Motion for new trial. (Pen. Code, § 1181; see, *post*, § 4.7.26 Motion for a new trial (Pen. Code, § 1181) .) If made at the close of the People's case-in-chief, the sufficiency of evidence is tested as it stood at that point. (*People v. Belton* (1979) 23

(*DeVaughn*, at p. 896.) If the plea was induced by counsel's erroneous advice as to appealability, ineffective assistance of counsel may be argued.

[236]Error in admitting a confession is prejudicial unless it proved harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166-1167.)

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Cal.3d 516, 519-523.) Defendant need state nor may the court require specific grounds. (*Ibid*.)

4.6.20 Evidentiary errors

Reflect on each piece of evidence that was introduced against or by the defendant, especially any that was contested, and note whether a timely objection was made (see Evid. Code, § 353). Why was the evidence introduced? Should it have been excluded or included or limited? Just a few among the many possible areas of evidentiary issues might be:

- Evidence Code section 352: Did the prejudicial effect outweigh the probative value? (*People v. Lewis* (2001) 25 Cal.4th 610, 641-642*; People v. Anderson* (2001) 25 Cal.4th 543, 591-593; *People v. Williams* (2018) 23 Cal.App.5th 396; *People v. Jandres* (2014) 226 Cal.App.4th 340.)

- Exclusion of exculpatory and impeachment evidence offered by the defense. (*Davis v. Alaska* (1974) 415 U.S. 308; *Slovik v. Yates* (9th Cir. 2009) 556 F.3d 747.)

- Exclusion of defense evidence of possible third-party culpability. (*Holmes v. South Carolina* (2006) 547 U.S. 319; *People v. Robinson* (2005) 37 Cal.4th 592, 625-626; *People v. Hall* (1986) 41 Cal.3d 826, 833; see Evid. Code, § 352.)

- Evidence of similar conduct on the part of defendant other than the specific conduct for which he is on trial. (See Evid. Code, §§ 1101, 1108, 1109; *People v. Kipp* (1998) 18 Cal.4th 349, 369-373; *People v. Miller* (2000) 81 Cal.App.4th 1427, 1447-1449; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922; *People v. Ewoldt* (1994) 7 Cal.4th 380; *People v. Lopez* (2011) 198 Cal.App.4th 698, 713-714.)

- Improper coercion of witnesses. (*People v. Williams* (2010) 49 Cal.4th 405, 452–454; *People v. Boyer* (2006) 38 Cal.4th 412, 444.)

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- Admission of defendant's prior convictions for purpose of impeachment. (See *People v. Vera* (1999) 69 Cal.App.4th 1100, 1103; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1435-1436.) In order to raise the issue on appeal, the defendant must testify and actually be impeached. (*People v. Collins* (1986) 42 Cal.3d 378, 383-385.)

- Privileges that were claimed or that should have been claimed, such as the privilege against self-incrimination or the marital, attorney-client, physician/psychotherapist-patient, clergy-penitent privileges. (Evid. Code, § 900 et seq.)

- Hearsay and confrontation issues. (Evid. Code, § 1200 et seq.; *Crawford v. Washington* (2004) 541 U.S. 36, 53-54; see *Williams v. Illinois* (2012) 567 U.S. 50; *Bullcoming v. New Mexico* (2011) 564 U.S. 647; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Whorton v. Bockting* (2007) 549 U.S. 406; *Davis v. Washington* (2006) 547 U.S. 813; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284 [cross-examination of person who repudiated confession to crime defendant accused of]; see also *People v. Sanchez* (2016) 63 Cal.4th 665; *People v. Dungo* (2012) 55 Cal.4th 608, *People v. Lopez* (2012) 55 Cal.4th 569; see generally *People v. Hopson* (2017) 3 Cal.5th 424.)

- Foundational requirements and prerequisites for the admissibility of evidence. (E.g., Evid. Code, §§ 400 et seq. [preliminary facts], 700 et seq. [competence of witnesses], 1222, subd. (b) and 1223, subd. (b) [certain admissions].)

- Extrajudicial statement of non-testifying co-defendant. (E.g., *Bruton v. United States* (1968) 391 U.S. 123, 125, 132; *People v. Aranda* (1965) 63 Cal.2d 518, 526-527.)

- Accomplices' testimony. (Pen. Code, § 1111; CALCRIM Nos. 334, 335 & Annotations; CALJIC No. 3.10 et seq. & Annotations.)

- Expert witnesses, opinion testimony, and scientific evidence. (Evid. Code, §§ 720 et seq., 800 et seq.; *People v. Sanchez*

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(2016) 63 Cal.4th 665; *People v. Julian* (2019) 34 Cal.App.5th 878 [expert opinion re statistical probabilities of false abuse allegations, improper]; *People v. Perez* (2017) 18 Cal.App.5th 598 [gang-related matters]; *People v. Cortes* (2011) 192 Cal.App.4th 873.)

- Writings. (Evid. Code, § 1400 et seq.)

- "Testimony" through repeated leading questions without meaningful witness responses. (*People v. Murillo* (2014) 231 Cal.App.4th 448.)

4.6.21 Prosecutorial misconduct/error

Consider whether the prosecutor may have committed misconduct/error. This issue often arises in final argument but also occurs in examination of witnesses and other facets of the trial. (Note: if an objection was required and none was made, a complementary ineffective assistance of counsel argument, on appeal or by habeas, may be necessary.) Examples include:

- Interference with right to testify or present defense. (*In re Martin* (1987) 44 Cal.3d 1, 30 [arresting or threatening defense witnesses]; *People v. Force* (2019) 39 Cal.App.5th 506 [suggesting potential perjury prosecution if defendant were to testify].)

- Comment on defendant's post-arrest silence after *Miranda* warnings given. (*Doyle v. Ohio* (1976) 426 U.S. 610, 619-620.)

- Comment on defendant's failure to testify or to present evidence. (*Griffin v. California* (1965) 380 U.S. 609, 613-615; *People v. Woods* (2006) 146 Cal.App.4th 106, 114.)

- Referring to facts not in evidence, misstating evidence, or vouching for witnesses. (*People v. Rodriguez* (2020) 9 Cal.5th 474; *People v. Hill* (1998) 17 Cal.4th 800, 819-820, 823; *People v. Woods* (2006) 146 Cal.App.4th 106, 113, 115-116.)

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- Derogatory treatment of defendant and counsel. (*People v. Hill* (1998) 17 Cal.4th 800, 819-820, 832-834; *People v. Woods* (2006) 146 Cal.App.4th 106, 113, 116-117.)

- Appeals to passion or prejudice. (*People v. Vance* (2010) 188 Cal.App.4th 1182 [invocation of "Golden Rule," asking the jury to put themselves in shoes of victim]; cf. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1056-1058.)

- Deliberately provoking mistrial. (*People v. Batts* (2003) 30 Cal.4th 660.)

- Urging jurors to preserve civil order, deter future lawbreaking, "send a message" about a current crisis, or accomplish some goal unrelated to the defendant's own guilt or innocence. (*United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252; cf. *People v. Martinez* (2010) 47 Cal.4th 911, 965-966 [no misconduct in imploring jury to send a message to the community to "restore the confidence and the trust" in system when determining whether to impose capital punishment].)

- Mischaracterizing the law. (*People v. Centeno* (2015) 60 Cal.4th 659 [inaccurate characterization of reasonable doubt and use of misleading visual aids]; *People v. Lloyd* (2015) 236 Cal.App.4th 49, 52 [diminishing reasonable doubt standard in reference to proffered defense].)

- Withholding immunity with the deliberate intention of distorting the factfinding process in an egregious, unfair, deceptive, or reprehensible way. (See *People v. Masters* (2016) 62 Cal.4th 1019, 1051-1053.)

4.6.22 Jury instructions

Scrutinize the instructions with particular care. (See § Jury instructions et seq. of this chapter, *ante*.) Instructional error is one

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of the most fruitful areas and one of the most successful on appeal.[237] Counsel's review should include the written instructions selected to be given, those rejected, the judge's oral rendition, any printed version sent into the jury room, and any given in response to a jury query.

- Did the instructions fully and accurately state the basic elements of the offenses? Were any elements affected by retroactive legislation? (*In re Estrada* (1965) 63 Cal.2d 740.)

- Did the instructions fully and accurately state the intent and conduct requirements for various participants, such as perpetrators and aider-abettors? (*People v. Johnson* (2016) 62 Cal.4th 600; *People v. McCoy* (2001) 25 Cal.4th 1111.)

- Did the instructions properly set forth the applicable burdens of proof, especially the most fundamental one, proof of guilt beyond a reasonable doubt?

- Were any instructions misleading or confusing? Were technical terms defined?

- Were all applicable sua sponte instructions given?

- Any uncertainty about whether the evidence is sufficient to warrant an instruction should be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935.)

- Were appropriate unanimity instructions (e.g., CALCRIM Nos. 3500-3502) given?

- Was there evidence to support the giving of each instruction?

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[237]Many instructional errors can be raised despite lack of objection in the trial court. (See Pen. Code, § 1259: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.")

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- Were special instructions required? Examples might be cautionary instructions, limiting instructions, and instructions relating to accomplices (Pen. Code, § 1111; *People v. Davis* (2005) 36 Cal.4th 510, 547), expert witnesses, and corpus delicti requirements (e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1180).

- Were appropriate instructions on lesser included offenses given? (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007-1008; *People v. Waidla* (2000) 22 Cal.4th 690, 733-734; see *People v. Breverman* (1998) 19 Cal.4th 142, 154-163; cf. *People v. Bailey* (2012) 54 Cal.4th 740.)

- Did the trial court properly instruct on how to return a verdict when there are greater and lesser charges? (*People v. Marshall* (1996) 13 Cal.4th 799; *People v. Fields* (1996) 13 Cal.4th 289; *People v. Kurtzman* (1988) 46 Cal.3d 322; *Stone v. Superior Court* (1982) 31 Cal.3d 503; see *People v. Olivas* (2016) 248 Cal.App.4th 758; CALCRIM Nos. 3517-3519.)

- Did the instructions adequately put forth the defense theory of the case?

- Were instructions given over defense objection? (See *People v. Mendez* (2018) 21 Cal.App.5th 654 [considering consequences of verdict and treatment options]; *People v. Jo* (2017) 15 Cal.App.5th 1128 [inconsistent affirmative defense].) Were defense instructions refused?

- Did the court respond appropriately – in terms of both procedure and substance – to any jury questions during deliberations? (See *People v. Fleming* (2018) 27 Cal.App.5th 754 [when jury asks question during deliberation, a technically correct statement of law in response that does not correctly instruct on the subject of query, requires reversal]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 et seq. [jury's request for clarification is signal jury believes are this is critical issue; trial court must treat seriously].)

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4.6.23 Jury deliberations

Look for any jury notes and the answers given, as well as discussions among the parties on the appropriate response. Look for other unusual occurrences during jury deliberations, such as juror misconduct (e.g., *Remmer v. United States* (1954) 347 U.S. 227) and check with trial counsel. Examine any substitution of one or more jurors during deliberations. Were these matters raised in a motion for a new trial? (See *People v. Nelson* (2016) 1 Cal.5th 513, 560 et seq. [questions invading deliberative process]; *People v. Johnson* (2013) 222 Cal.App.4th 486 [remand for release of jurors' identifying information where declaration established jurors' hearsay that they considered defendant's failure to testify in reaching guilty verdict]; see also *People v. Solorio* (2017) 17 Cal.App.5th 398 [prosecution failed to rebut presumption of prejudice from jurors' discussion of why defendant did not testify, when topic came up several times during deliberations].)

4.6.24 Rendering of verdict

Were the correct procedures for receiving and recording a verdict observed? Did the jury follow the rules on lesser included offenses, alternative verdicts, degrees, enhancements, etc.? Did the judge properly handle any irregularities or ambiguity in the way the verdicts were returned? Was the jury polled correctly? Were all the jurors present? (E.g., *People v. Bailey* (2018) 27 Cal.App.5th 376; *People v. Brown* (2016) 247 Cal.App.4th 211; *People v. Garcia* (2012) 204 Cal.App.4th 542.)

4.6.25 Sufficiency of the evidence

Review the evidence on which the conviction rested to determine whether it meets constitutional and statutory requirements.

- Could a reasonable trier of fact find each element of each offense proven beyond a reasonable doubt? (*Jackson v. Virginia* (1979) 443 U.S. 307, 315 [subjective state of near certitude]; *People v. Mayfield* (1997) 14 Cal.4th 668, 767-769.)

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- Did the trial court improperly refuse to acquit at the close of the prosecution's case?[238] (Pen. Code, §§ 1118, 1118.1; see *People v. Hatch* (2000) 22 Cal.4th 260, 268; *People v. Belton* (1979) 23 Cal.3d 516, 520-521; *People v. Lines* (1975) 13 Cal.3d 500, 505; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 729-732; *People v. Valerio* (1970) 13 Cal.App.3d 912, 919-920.) The test is whether, given "'the evidence [at the time of the motion], including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'" (*Lines*, at p. 505.)

- Were special evidentiary standards met – for example, corroboration of an accomplice's testimony under Penal Code section 1111 and corpus delicti requirements (e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161 [evidence independent of defendant's statements required for conviction])?

4.6.26 Motion for a new trial (Pen. Code, § 1181)

Scrutinize the motion, its factual and legal grounds, and the reasons for the court's ruling. This is often a valuable clue to major issues in the case.

- If one ground was that the verdict was against the weight of the evidence under Penal Code section 1181, subdivision 6, determine whether the court used the correct standard. A weight of the evidence question tends to be confused with the question of legal insufficiency. The former is easier for the defendant to show. (See *People v. Robarge* (1953) 41 Cal.2d 628; *People v. Watts* (2018) 22 Cal.App.5th 102, 110 et seq.)

- If the trial court reduced the offense under Penal Code section 1181, subdivision 6, make sure the lesser offense is in fact included in the crime of which the jury convicted the defendant. (See *People v. Bailey* (2012) 54 Cal.4th 740 [court

[238]To raise the issue on appeal, the defendant must have made a motion under Penal Code section 1118 or 1118.1 (court and jury trial, respectively). (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.)

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may not reduce jury verdict of escape to attempted escape, because latter has an element – specific intent – the former does not have].)

- Ineffective assistance of counsel as non-statutory ground. (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.)

4.6.27 Sentencing

Analyze every aspect of the sentence and the sentencing procedures meticulously. Errors in sentencing are quite common. A few issues of the many possible issues to investigate include:

- Did the sentence comply with statutory and rule provisions as to selection of prison vs. probation; the lower, middle, or upper term; concurrent vs. consecutive sentences; enhancements (Pen. Code, § 1170 et seq.; Cal. Rules of Court, rule 4.401 et seq.); Three Strikes sentences (Pen. Code, §§ 667, 1170.12); conditions of probation; restitution orders; and Penal Code section 654 applications? (See *People v. Ahmed* (2011) 53 Cal.4th 156 [how multiple enhancements interact when they are attached to one offense].)

- Did the court abuse its discretion in making any of these decisions? Was the court aware of the breadth of its sentencing discretion?

- Has the statutory punishment changed, or the severity of the offense decreased since the time the offense was committed?

  - If it has been increased, the defendant cannot receive a greater sentence than it was at the time of the commission of the offense. (*Calder v. Bull* (1798) 3 U.S. 386, 390-391 [describing ex post facto law]; see also *Peugh v. United States* (2013) 569 U.S. 530 [imposing new, longer guideline sentence promulgated after date of offense is ex post facto violation]; *Collins v. Youngblood* (1990) 497 U.S. 37, 41-42; but see *People v. Alford* (2007) 42 Cal.4th 749 [court security fee

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imposed under Pen. Code, § 1465.8 is not criminal penalty and does not violate prohibition against ex post facto laws].)

- If it has been reduced, the defendant normally should get the benefit of the change. (See *Bell v. Maryland* (1964) 378 U.S. 226, 230; *People v. Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 63 Cal.2d 740; cf. *People v. Floyd* (2003) 31 Cal.4th 179 [savings clause precluded retroactivity].)

- Has the judgment been vacated? The California Supreme Court has explained, once a court determines on habeas review that a defendant is entitled to resentencing, "the result is vacatur of the original sentence, whereupon the trial court may impose any appropriate sentence." (*People v. Padilla* (2022) 13 Cal.5th 152, 163.) Thus, when a judgment is vacated, it no longer is final, and defendant is entitled to retroactive application of substantive statutory changes and all recent ameliorative sentencing legislation. (*People v. Duenas* (2025) 111 Cal.App.5th 553, review granted July 30, 2025, No. S291631.)

- Were the correct procedures used at sentencing?

  - In a guilty plea case, did the judge who took the plea also impose the sentence? (*K.R. v. Superior Court (People)* (2017) 3 Cal.5th 295*; People v. Arbuckle* (1978) 22 Cal.3d 749.)

  - Was the proceeding timely? (Pen. Code, § 1381; *People v. Wagner* (2009) 45 Cal.4th 1039, 1056.)

  - Did the trial court provide all required statements of reasons?

  - Was counsel present?

  - Did the defendant have a chance to address the court? (See Pen. Code, §§ 1200, 1201; compare *People v. Evans*

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(2008) 44 Cal.4th 590 [statutory right must be exercised before judgment is imposed, be under oath, and be subject to cross-examination].)

- Did the court state that it had read the probation officer's report?

- Did the procedures comply with *Apprendi v. New Jersey* (2000) 530 U.S. 466 and progeny? (See, e.g., *People v. Gallardo* (2017) 4 Cal.5th 120; see also *Descamps v. United States* (2013) 570 U.S. 254; but see *In re Milton* (2022) 13 Cal.5th 893, 911 [*Gallardo* announced new procedural rule, not retroactive to final judgments, hence, not retroactive on collateral review, without exception].)

- Did the sentence violate the constitutional prohibition against cruel and unusual punishment?

- If the offense was committed when the defendant was a juvenile and the sentence was equivalent to life without possibility of parole, was there a chance for the defense to present evidence on the mitigating factors of youth for an eventual youthful offender parole hearing? (*People v. Franklin* (2016) 63 Cal.4th 261.) Offenders with final convictions must file a motion in the trial court, rather than habeas petition, for that purpose. (*In re Cook* (2019) 7 Cal.5th 439, 446; Pen. Code, § 1203.01.) If the defendant is not eligible for such a hearing, does the sentence constitute cruel and unusual punishment? (*People v. Contreras* (2018) 4 Cal.5th 349.)

4.6.28 Correspondence of charge, conviction, and sentence

Compare the information, jury verdict, oral pronouncement of judgment, and abstract of judgment. Do they all correspond?

4.6.29 Custody credits

Recheck all custody credits awarded. Multiple offenses, whether in the same or different proceedings (Pen. Code, § 669), parole or probation holds and revocations, and a variety of statutory

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provisions often make computation of credits confusing.[239] (E.g., *People v. Brown* (2012) 54 Cal.4th 314.) Penal Code section 1237.1 requires an application in the trial court for correction of presentence custody credits as a prerequisite to raising the issue as the sole one on appeal.[240]

4.6.30 Fines and fees

- Confirm that all fines, fees, and similar monetary assessments have been imposed correctly. This area is a frequent source of error because it is changing rapidly. It is also a source of frequent adverse consequences because trial courts easily overlook mandatory monetary assessments.[241]

- Penal Code section 1237.2 requires an application in the trial court for correction of such assessments as a prerequisite to raising the issue as the sole one on appeal.

- Determine whether the court considered the defendant's ability to pay. (*People v. Duenas* (2019) 30 Cal.App.5th 1157.)

- Keep in mind any retroactive ameliorative legislation. (E.g., *People v. Greeley* (2021) 70 Cal.App.5th 609, 626-627; see also Pen. Code, § 1465.9.)

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[239]See further discussion in § Credits and fines or fees issues – Penal Code sections 1237.1 and 1237.2 , *ante*, and §§ Credits and fees or fines issues – Penal Code sections 1237.1 and 1237.2, Credits issue and fines or fees issue limitation, and 2.4.3 Credits calculations and fines or fees.

[240]The requirement applies only to minor ministerial corrections, such as mathematical error, not legal error; a legal issue regarding custody credits may be raised as a single issue without first seeking correction in the superior court. (*People v. Delgado* (2012) 210 Cal.App.4th 761.)

[241]The Central California Appellate Program website has a useful fines chart that can assist counsel. https://www.capcentral.org/criminal/crim_fines.asp

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- Was notice given of the amount sought? (*People v. Foster* (1993) 14 Cal.App.4th 939, 944, superseded by statute on another ground as noted in *People v. Sexton* (1995) 33 Cal.App.4th 64.)

- Was defendant present? If not, see Penal Code sections 977, 1193.

- Was the evidence substantial to support the award, both as to cause and amount? (E.g., *People v. Trout-Lacy* (2019) 43 Cal.App.5th 369, 374; *People v. Sy* (2014) 223 Cal.App.4th 44, 63.) Was the victim's economic loss incurred as a direct result of the defendant's criminal behavior? (Pen. Code, § 1202.4; *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1508.) For noneconomic damages, was there evidence that the particular victim personally incurred a loss? (*People v. Gomez* (2023) 97 Cal.App.5th 111.)

- Did the trial court make a clear statement of the calculation method? (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664.) Did the trial court take into account the time value of money in considering a lump sum payment versus a series of fractional payments spread out over time? (*People v. Pangan* (2013) 213 Cal.App.4th 574, 581; but see *People v. Arce* (2014) 226 Cal.App.4th 924, 930.)

- Did the trial court have jurisdiction to modify the restitution amount? (See, e.g., *People v. Waters* (2015) 241 Cal.App.4th 822; *Hilton v. Superior Court* (2014) 224 Cal.App.4th 47 [trial court did not have jurisdiction to modify defendant's probation to impose additional restitution after defendant's probationary term had expired].)

- Was a separate notice of appeal filed if the restitution hearing was post-judgment? (*People v. Denham* (2014) 222 Cal.App.4th 1210.) If not, and more than 60 days have passed since the order, a petition or motion seeking *In re Benoit* (1973) 10 Cal.3d 72 relief may be necessary.

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4.6.32 Disclosure of juror information (Code of Civil Procedure section 237).

Did the trial court properly disallow disclosure of jurors' information upon defendant's motion? (*People v. Zamora* (2022) 73 Cal.App.5th 1084, 1091 [in response to protests of six jurors, evidence offered by defendant did not show good cause for disclosure of any juror identifying information, including the other six jurors who did not protest]; *People v. Russell* (2017) 9 Cal.App.5th 1050, 1059 [whether juror's non-responsiveness supports finding that juror objected to disclosure; such a finding is a factual determination; trial court must consider totality of circumstances; reviewing court must give deference to trial court's findings if supported by evidence]; *People v. Johnson* (2015) 242 Cal.App.4th 1155, 1158 [in deciding whether to hold hearing on motion for disclosure of jurors' identifying information, trial court must assume that declarations supporting motion are credible]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990, 991 [absent satisfactory, preliminary showing of possible juror misconduct, strong public interest in integrity of jury system and juror's right to privacy outweigh countervailing public interest served by disclosure of juror information; standard of review for denial of a petition for release of juror information is abuse of discretion].)

4.6.33 Post-judgment favorable consequences

In assessing the past offenses in an appeal, has there been any change in the law by which a petition may effect an ameliorative outlook: for instance, a conviction for murder, attempted murder, or manslaughter based on a now-invalid theory of liability (*People v. Wilson* (2023) 14 Cal.5th 839; Pen. Code, § 1172.6); alleged participation in criminal street gang (Pen. Code, § 186.22, subd. (a)), when the defendant did not act with any other member of their own gang (*People v. Rodriguez* (2012) 55 Cal.4th 1125), or definitions of "criminal street gang" and "pattern of criminal activity" before they were narrowed (*People v. Tran* (2022) 13 Cal.5th 1169); whether the past offense is a certain theft- and drug-related offense now reclassified under Proposition 47 (*People v. Page* (2017) 3 Cal.5th 1175; Pen. Code, § 1170.18); whether age was a pertinent factor in the

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past offense (*People v. Hardin* (2024) [a defendant's youthful age at the time of an offense has been recognized as a relevant consideration in numerous areas of criminal law].)

The above is just illustrative. Ameliorative legislation is too numerous to fully list (e.g., Pen. Code, §§ 745; 1172.1; 1172.6; 1172.75, etc.) Counsel must be vigilant to keep apprised of legislative changes and the cases construing them.

See also, *Doe v. Harris*, *supra*, 57 Cal.4th at pp. 73-74, punctuation omitted: "For the reasons we have explained, the general rule in California is that a plea agreement is '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.] It follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending their conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law."

4.6.34 Recall/resentencing (Penal Code section 1172.1)

- After formal recall of prior sentence (by trial court within 120 days of commitment or at any time if the applicable sentencing laws at the time of original sentencing are subsequently changed by new statutory authority or case law, or at any time upon the recommendation of those specified in the statute (Pen. Code, § 1172.1, subd. (a)(1)), did the trial court resentence the defendant in the same manner as if he or she had not previously been sentenced, following all the required sentencing procedures, applying any changes in law that reduce sentences or provide for judicial discretion to eliminate disparity of sentences and to promote uniformity of sentencing (see subd. (a)(2); *People v. Cepeda* (2021) 70 Cal.App.5th 456)? Did the court exercise full discretion? (Subd. (a)(3); *People v. Monroe* (2022) 85 Cal.App.5th 393, 395-396 [trial court was authorized to strike firearm and

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serious-felony enhancements].) Did the court calculate defendant's custody credits upon resentencing (*People v. Buckhalter* (2001) 26 Cal.4th 20; Pen. Code, § 2900.1)?

- Did the court provide adequate notice, appoint counsel, and accord the presumption favoring recall and resentencing? (Pen. Code, § 1172.1, subd. (b); but see *People v. Braggs* (2022) 85 Cal.App.5th 809 [presumption favors only recall & resentencing, not particular sentence recommended].)

4.6.35 Modification of probation (Penal Code section 1203.3)

Section 1203.3, subdivision (a) generally provides that a court may, at any time when the ends of justice are served and the good conduct and reform of probationer warrant, terminate probation. When those circumstances were met, did the court improperly deny early termination? (*People v. Killion* (2018) 24 Cal.App.5th 337 [statute providing minimum term of probation for domestic violence related offenses did not circumscribe trial court's authority to terminate probation early].)

4.6.36 Revocation of probation/parole/or post-release community supervision (PRCS)

Penal Code section 1203.2, which governs revocation of supervision, applies to probation, mandatory supervision, post release community supervision, and parole. (See also Penal Code section 1203.3 [court's authority to revoke, modify, or change order of probation/mandatory supervision or terminate probation].)

- If a violation of probation was admitted, was the probationer properly advised of their rights? (*In re Reno* (2012) 55 Cal.4th 428, 515, fn. 39; *People v. Bauer* (2012) 212 Cal.App.4th 150 [revocation of probation and imposition of sentence reversed where trial court failed to inform defendant of right to counsel at probation revocation].) If the probationer contested the violation, was the hearing conducted in accordance with due process? (*Gagnon v. Scarpelli* (1973) 411 U.S. 778; *Morrissey v. Brewer* (1972) 408 U.S. 471; see also *People v. DeLeon* (2017) 3 Cal.5th 640 [*Morrissey* preliminary hearing

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requirement applied to parole revocation proceedings conducted in superior court]; but see *People v. Byron* (2016) 246 Cal.App.4th 1009 [procedural differences between parole revocation and revocation of PRCS do not violate due process rights].)

- Extent of trial court authority? (*People v. Ruiz* (2020) 59 Cal.App.5th 372 [where CDCR mistakenly released inmate on parole rather than on PRCS, then violated him, but opposed his motion of lack of jurisdiction based on prohibition of transfer from parole to PRCS, upon trial court's denial of inmate motion, *held*: application of bar to challenge to admittedly erroneous placement under parole supervision violated due process; *People v. Wiley* (2019) 36 Cal.App.5th 1063 [trial court does not have authority under Pen. Code, § 1385 to dismiss a parole revocation petition in furtherance of justice]; *People v. Garcia* (2018) 22 Cal.App.5th 1061 [court lacks authority to run period of confinement for PRCS violation consecutively to determinate sentence in another criminal case].)

- Is the evidence sufficient to support the findings that defendant violated the conditions of supervision? (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848 [review on appeal of finding of probation violation based on substantial evidence test].)

- Were any conditions of parole/PRCS supervision unconstitutionally vague or overbroad? (E.g., *People v. Austin* (2019) 36 Cal.App.5th 778; *People v. Navarro* (2016) 244 Cal.App.4th 1294.)

- Did the trial court abuse its discretion in admitting hearsay evidence that was untrustworthy and unsubstantiated? (*People v. Gray* (2023) 15 Cal.5th 152 [*Arreola* balancing test allows trial courts to examine government's showing of good cause, and to weigh defendant's confrontation rights against government's countervailing interests; it is a comprehensive, holistic approach, no single factor is dispositive]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1152–1153 *People v. Maki*

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(1985) 39 Cal.3d 707, 715, 716–717; see also *People v. Liggins* (2020) 53 Cal.App.5th 55, 69 [due process required showing of declarant's unavailability or good cause for admission of statements in lieu of live testimony].)

- Did the trial court have authority to adjudicate a violation of supervision under Penal Code section 1203.2, subdivision (a), at a time after court-imposed probation would have expired? (*People v. Leiva* (2013) 56 Cal.4th 498 [in context of summary revocation of probation, tolling provision of Pen. Code, § 1203.2, subd. (a), preserves trial court's authority to adjudicate, in subsequent formal probation violation hearing, whether probationer violated probation during probationary period, but not after its expiration].)

- Was there a change in circumstances to support a court's order extending or modifying supervision? (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095, citing *In re Clark* (1959) 51 Cal.2d 838, 840 [change in circumstances required before court has jurisdiction to extend or modify probation; order modifying terms of probation based upon same facts as original order granting probation is in excess of court jurisdiction because it lacks supporting factual basis].)

- If probation was not reinstated and judgment was imposed, was sentence based on circumstances existing at time probation was originally granted, i.e., subsequent events may not be considered? (Cal. Rules of Court, rule 4.435(b)(1).)

- Was length of PRCS properly calculated? (*People v. Johnson* (2018) 29 Cal.App.5th 1041 [when PRCS was revoked and then reinstated, length of supervision not automatically extended].)

- Was demand for revocation timely heard? (*People v. Murdock* (2018) 25 Cal.App.5th 429 [failure to bring defendant to county of parole to resolve PRCS revocation matter within reasonable time after defendant made demand constituted violation of due process; defendant suffered prejudice as PRCS continued to be tolled and he was deprived of concurrent sentencing].)

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4.6.37 Request for sentencing by probationer sentenced to prison in another case (Penal Code section 1203.2a)

When a probationer who has been confined in prison on another offense notifies the court that granted probation, did the court take proper and timely action? (*In re Mancillas* (2016) 2 Cal.App.5th 896 [when defendant has been released on probation with execution of sentence suspended and court is subsequently properly notified that defendant is confined in prison, court shall lose jurisdiction over defendant if it does not issue commitment within 60 days of notification]). If imposition of sentence was suspended, jurisdiction is lost after 30 days after notification.

4.6.38 Motions to vacate judgment by a person no longer in custody (Penal Code sections 1473.6, 1473.7)

- Was there newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to their innocence; that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment; misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. (Pen. Code, § 1473.6.)

- The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence; newly discovered evidence of actual innocence exists requiring as a matter of law or in the interests of justice; conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of subdivision Penal Code section 745, subdivision (a). (Pen. Code, § 1473.7.)

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- Where a petitioner's adverse immigration consequences predate January 1, 2017, a court assessing the timeliness of a section 1473.7 motion must determine when the petitioner would have had reason to seek legal help or otherwise investigate new forms of postconviction relief, and evaluate diligence from that point forward, considering all the circumstances. (*People v. Alatorre* (2021) 70 Cal.App.5th 747.)

- A section 1473.7 motion is also available to contest a Racial Justice Act violation; a disclosure motion (Pen. Code, § 745, subd. (d)) made be made in preparation for the motion (Pen. Code, § 1473.7, subd. (e)).

- Relief under section 1473.7 includes "an order vacating (1) the initial conviction, (2) the sentence imposed for the initial conviction, (3) a subsequent admission of a probation violation, and (4) the additional incarceration imposed for a probation violation." (*People v. Carillo* (2024) 101 Cal.App.5th 1, 28.)

- The standard of review is independent review. (*People v. Vivar* (2021) 11 Cal.5th 510.)

4.6.39 NGI recommitment procedures (Penal Code section 1026.2).

Those petitioning for conditional release under Penal Code section 1026.2 are entitled to "the substantial procedural safeguards associated with trials, including, among other things, the right to counsel, to a detached and neutral judicial officer, to present evidence, and to cross-examine adverse witnesses." (*People v. Tilbury* (1991) 54 Cal.3d 56, 69.) Did the trial court follow correct procedures? (E.g., *People v. Tran* (2015) 61 Cal.4th 1160 [trial court must advise NGI defendant personally of right to jury trial and, before holding bench trial, must obtain personal waiver of that right from defendant unless the court finds substantial evidence that defendant lacks capacity to make knowing and voluntary waiver, in which case defense counsel controls waiver decision; *People v. Endsley* (2016) 248 Cal.App.4th 110 [once defendant initiates petition for conditional release, Pen. Code, § 1026.2, subd. (*l*) requires court, not defendant, to obtain recommendation regarding

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appropriateness of conditional release]; see also *People v. Endsley* (2018) 28 Cal.App.5th 93 [court erred in denying defendant's request to testify remotely by telephone to avoid being transferred from state hospital; court denied defendant equal protection by denying him due process right to appointment of independent expert].) The holding of *People v. Sanchez* (2016) 63 Cal.4th 665, substantially limiting, expert testimony with respect to case-specific hearsay evidence, applies. (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501.)

[*Note*: The *Wende* procedure does not apply in the section 1026.2 context, so likely the *Delgadillo* process does; see *People v. Sundberg* (2023) 88 Cal.App.5th 441.)

4.6.40 Juvenile record sealing (Welf. & Inst. Code, §§ 781, 782, 786).

Historically, Welfare and Institutions Code section 781 guided when the juvenile court could seal certain records on past juvenile delinquency proceedings. That statute imposes a 5-year waiting period or alternatively requires the person to attain 18 years of age. While that section still exists, the Legislature enacted broader sealing procedures in section 786, which directs when the juvenile court *must* dismiss a petition and seal the juvenile court records relating to that dismissed petition, and what agency still maintains access to these now-sealed records. This sealing procedure is not constrained by the 5-year waiting period or by age, as was the section 781 procedure. The Judicial Branch of California website includes a helpful discussion of sealing juvenile records (https://selfhelp.courts.ca.gov/juvenile-justice/seal-record).

- Circumstances Requiring Sealing of Juvenile Records and Scope of Relief

  Section 786 mandates the juvenile court dismiss a juvenile petition and seal all juvenile records in the custody of the juvenile court pertaining to that dismissed petition when the minor satisfactorily completes (1) an informal supervision program under section 654.2, or (2) probation under section 725, or (3) probation for any offense. In addition, the statute

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provides that the arrest upon which the judgment was deferred must be deemed to have not occurred. (§ 786, subd. (a).)

- *Records to be sealed:* The records to be sealed include those in the custody of law enforcement agencies, the probation department, and the Department of Justice. (§ 786, subd. (a).)

- *Notice of right to nondisclosure:* Both the minor and minors counsel are to receive notice of the right to nondisclosure of the arrest and proceedings. (§ 786, subd. (a).)

- *Right to state that arrest and proceedings never occurred*: Because the arrest and proceedings in the case are deemed to have not occurred, the person who was the subject of the petition can respond to any inquiry by employers, educational institutions and anyone else that the arrest and proceedings never occurred. (§ 786, subd. (b).)

- *No limitations on arrests that can be deemed not to have occurred*: Section 786 applies to all petitions that are dismissed under subdivision (a), regardless of the disposition. (§ 786, subd. (b).)

- *What constitutes satisfactory completion of program*: A minor satisfactorily completes the program or supervision when the minor has no new finding of wardship, felony conviction, or misdemeanor involving moral turpitude and has substantially complied with the reasonable orders of such supervision or probation that are in the minor's capacity to perform. (§ 786, subd. (c)(1).) The minor's failure to complete restitution does not constitute unsatisfactory completion. (§ 786, subd. (c)(2).) The court cannot seal or dismiss a petition where a minor over 14 committed a section 707, subdivision (b) offense. (§ 786, subd. (d).)

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- *Scope of cases in which relief is possible*: Section 786 provides that if a person who has been alleged to be a ward of the juvenile court has their petition dismissed by the court, or if the petition is not sustained by the court after an adjudication hearing, the court shall order sealed all records pertaining to the dismissed petition. (§ 786, subd. (e).) The sealing of records is mandated if the juvenile satisfactorily completes (1) an informal supervision program under section 654.2, or (2) probation under section 725, or (3) probation for any offense. (§ 786, subd. (a).)

- Note, however, that while section 782 generally provides authority to the court to dismiss a wardship petition, or to set aside the findings and dismiss the petition, dismissal pursuant to this section after the juvenile was declared a ward does not alone constitute a sealing of records as defined in section 781 or 786. (§ 782, subds. (a), (e); see § 781, subd. (a)(1)(D)(i) [limitations on sealing records relating to an offense listed in subdivision (b) of section 707 that was committed after attaining 14 years of age].)

- Under section 786, the court may also order sealed prior petitions that have been sustained against the minor, if they are eligible for sealing and the minor has satisfactorily completed the ordered program. (§ 786, subd. (f)(1).) The court further has the power to seal relevant public agency records, not in the custody of a law enforcement-related agency. (§ 786, subd. (f)(2).)

- *Access to sealed records*: Section 786, subdivision (g), and section 787 identify which entities may access, inspect and utilize data from the sealed records. For example, sealed records may be viewed by the prosecuting agency or probation department, to determine section 654.3 eligibility (§ 786, subd. (g)(1)(A)); by the court, to evaluate jurisdiction under section 388, subdivision (e) (§ 786, subd. (g)(1)(B)); by

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the probation department, to address proper future disposition (§ 786, subd. (g)(1)(C)); by the prosecuting attorney, to assess proper disposition (§ 786, subd. (g)(1)(D)) or decide whether to initiate section 707 proceedings (§ 786, subd. (g)(1)(E)). The person whose record has been sealed may also petition the court to view the sealed records. (§ 786, subd. (g)(1)(F).) Sealed records can also be viewed for specific data collecting. (§ 786, subds. (g)(1)(G) and (h); § 787.) Finally, sealed records cannot bar victim restitution enforcement. (§ 786, subd. (h).)

- Petitioning to Seal Records

Welfare and Institutions Code section 781 details the procedures for petitioning to seal juvenile records. In brief summary, if a petition was filed to adjudge a person a delinquent ward, the person may, five years after termination of jurisdiction or at any time after 18 years of age, petition the court to seal the records, including records of arrest, in the custody of court, probation, and any other agencies as alleged. After a noticed hearing, if the court finds that since termination, the person has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it shall order all records sealed. (§ 781, subd. (a)(1)(A).) Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed. (*Ibid.*) If a ward was subject to the registration requirements as a sex offender, the order shall also provide relief from the registration requirement. (§ 781, subd. (a)(1)(C).) An unfulfilled order of restitution that has been converted to a civil judgment and outstanding restitution fines and court-ordered fees shall not be a bar to sealing. (§ 781, subd. (a)(1)(F)(2).) A petition to seal records relating to

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an offense listed in section 707, subdivision (b) that was committed after the person was 14 years and resulted in the adjudication of wardship may only be filed or considered by the court under specified circumstances. (§ 781, subd. (a)(1)(D).)

Welfare and Institutions Code section 782 deals with dismissal of a petition or setting aside findings. In brief summary, the juvenile court in which a petition was filed may dismiss the petition, or may set aside the findings and dismiss the petition, if the court finds that the interests of justice and the welfare of the person require that dismissal, or if it finds that they are not in need of treatment or rehabilitation. (§ 782, subd. (a)(1).) The court has jurisdiction to do so regardless of whether the person is, at the time of the order, a ward or dependent child of the court, i.e., the court has authority to exercise discretion at any time after the filing of the petition. (*Ibid*.)

When exercising its discretion at the time the court terminates jurisdiction or at any time thereafter, the court shall consider and afford great weight to evidence offered by a person to prove mitigating circumstances are present, including, but not limited to, satisfactory completion of a term of probation, that rehabilitation has been attained to the satisfaction of the court, that dismissal of the petition would not endanger public safety, or that the underlying offense was connected to mental illness, prior victimization, or childhood trauma. Proof of the presence of one or more mitigating circumstances weighs greatly in favor of dismissing the petition. (§ 782, subd. (a)(2)(A).) But the great weight standard shall not be applicable in cases where an individual has been convicted in criminal court of a serious or violent felony. (§ 782, subd. (a)(2)(E).) The absence of the great weight standard shall not affect the court's general authority. (§ 782, subd. (a)(2)(G).) The court has authority to exercise discretion regardless of

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whether a petition was sustained at trial, by admission or plea agreement. Dismissal of a petition or setting aside of the findings and dismissal of a petition, after the person was declared a ward, does not alone constitute a sealing of records as defined in section 781 or 786 (informal probation).

- *In re A.B.* (2023) 94 Cal.App.5th 82 [juvenile court erred by concluding it lacked authority to seal additional records after entry of initial sealing order under Welf. & Inst. Code, § 781].

- *In re Dean W.* (2017) 16 Cal.App.5th 970 [ward's right to have all juvenile records sealed includes acknowledgment of dangerousness of DUI; but juvenile court retains discretion to order whether records already transmitted to DMV remain sealed].

- *In re David T.* (2017) 13 Cal.App.5th 866 [once juvenile court set aside robbery finding and dismissed petition pursuant to Welf. & Inst. Code, § 782, it erred in concluding § 781 precluded sealing related records]; but see *In re Taylor C.* (2024) 101 Cal.App.5th 492 [dismissal of a petition under section 782 does not release a person from the sealing limitations contained in section 781].

- *In re G.F.* (2017) 12 Cal.App.5th 1 [Welf. & Inst. Code, § 786 is intended to apply to minors who successfully complete informal program of supervision after delinquency petition has been filed; prosecutor cannot deprive minor of the right to have records sealed by prematurely dismissing a juvenile petition before the minor has an opportunity to complete the program].

- *In re A.V.* (2017) 11 Cal.App.5th 697 [if court finds ward in substantial compliance so that ward has satisfactorily completed probation, court must dismiss the petition and seal the ward's records; in accordance with the statute, court cannot apply one standard of probation

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compliance to support dismissal of petition and then require different standard to support sealing of records]**.**

- *In re Joshua R.* (2017) 7 Cal.App.5th 864 [substantive Pen. Code section 29820 addressing future firearm ownership for minors and apparent in his situation conflicts with the Welf. & Inst. Code section 786, subd. (b) requiring juvenile court to seal records upon the successful completion of probation may be harmonized; DOJ may be allowed to maintain firearm form until minor turns 30, while remainder of record must be sealed]; but see *In re Dean W.* (2017) 16 Cal.App.5th 970 [distinguishing *Joshua R.* in the context of a *Watson* advisement issued pursuant to Vehicle Code section 23593].

- *In re James H.* (2007) 154 Cal.App.4th 1078 [when petition was filed to declare prisoner SVP and BPH sought prisoner's sealed juvenile records, trial court had no authority to release sealed records].

- See also *In re Jhonny S.* (2022) 85 Cal.App.5th 282 [when Board of Juvenile Hearings grants honorable discharge, Welf. & Inst. Code, § 1179, subd. (d) requires juvenile court to grant petition to dismiss and ameliorative consequences which result].

4.6.41 "Expungement" (Penal Code sections 1203.4/1203.4a)

"Relief under Penal Code section 1203.4 is often referred to as 'expungement' of the conviction but that term is not technically correct. [Citation.] 'A grant of relief under section 1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of his conviction. . . .' [Citation.]" (*People v. Parker* (2013) 217 Cal.App.4th 498, 500–501, internal punctuation omitted.) Dismissal of a complaint upon a petitioner's successful completion of probation did not constitute vacation of conviction entitling sealing of arrest records; and petitioner's ineligibility for sealing of arrest records did not

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constitute penalty or disability resulting from offense. (*People v. E.B.* (2020) 51 Cal.App.5th 47.)

- When a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which the interest of justice of justice require, did the court err or abuse its discretion in not permitting the defendant to withdraw a plea of guilty or plea of nolo contendere and enter a plea of not guilty (or, if they have been convicted after a plea of not guilty, not setting aside the verdict of guilty) and dismiss the accusations or information against the defendant? (Pen. Code, § 1203.4, subd. (a)(1) but see exceptions in subds. (b), (c); see also Pen. Code, § 1203.4a [similar provision for misdemeanants not granted probation]; *People v. Maya* (2020) 9 Cal.5th 239 [a person convicted of a misdemeanor may have lived honest and upright life even if that person has been in custody since completing sentence imposed for the misdemeanor].)

- The court shall thereupon dismiss the accusations or information against the defendant and except as noted below, the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which they have been convicted. (Pen. Code, § 1203.4, subd. (a)(1).) Exceptions include Vehicle Code 13555 provisions (Pen. Code, § 1203.4, subd. (a)(1)), and own, possess, or have custody or control of a firearm or to prevent conviction of certain firearm offenses (subd. (a)(2)), prevent prohibition from holding public office as a result of particular convictions (subd. (a)(3)) and does not release the defendant from the terms and conditions of an unexpired criminal protective order from particular offenses (subd. (a)(4)).

- The provision does not apply to convictions for Vehicle Code section 42002.1 or for various sex offenses. (Pen. Code, § 1203.4, subd. (b).) But "expungement" relief is available for convictions of attempting to commit those offenses. (*People v. Marinelli* (2014) 225 Cal.App.4th 1.)

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- A restitution fine is a "penalty or disability" from which the successful probationer is released when relief under Penal Code section 1203.4 is granted. (*People v. Guillen* (2013) 218 Cal.App.4th 975; compare *People v. Seymour* (2015) 239 Cal.App.4th 1418 [defendant's failure to fully pay victim restitution did not authorize trial court to deny relief "from all penalties and disabilities" after early discharge from probation, but termination of probation did not terminate restitution order as civil obligation]; see also *People v. Allen* (2019) 41 Cal.App.5th 312 [denying expungement based on outstanding victim restitution obligation did not violate due process or equal protection]; cf. *People v. Daffeh* (2024) 104 Cal.App.5th 790 [expungement required where prosecutor did not raise victim's claim of restitution to the trial court and defendant was never ordered to pay restitution during the term of probation].)

4.6.42 Sealing adult records/factual innocence (Penal Code sections 851.8, 851.85, 851.86, and 851.91)

There are various statutes pertaining to sealing adult records, each lengthy, complex, and addressing different contexts. The main statutes are sections 851.8 (Sealing and destruction of arrest records; determination of factual innocence), 851.85 (Motion to seal records on acquittal if person appears to judge to be factually innocent; rights of defendant under order), 851.86 (Motion to seal records on acquittal if person appears to judge to be factually innocent; rights of defendant under order), and 851.91 (Sealing of arrest records where arrest does not result in conviction; petition requirements and forms; basis for granting petition; hearing; effect of successful petition).

- Did trial court properly consider whether record exonerated defendant? (*People v. Adair* (2003) 29 Cal.4th 895, 909 [record must exonerate, not merely raise substantial question as to guilt; *id.* at p. 897 [for standard of review, although appellate court should defer to trial court's factual findings to extent supported by substantial evidence, it must independently examine record to determine whether

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defendant has established that no reasonable cause exists to believe they committed offense].)

- Petition may be filed up to two years from date of arrest or filing of accusatory pleading, whichever is later; time restrictions on filing for relief may be waived upon a showing of good cause by defendant and in absence of prejudice; trial court has broad discretion to determine whether good cause exists. (*People v. O'Day* (2022) 85 Cal.App.5th 426, 433.)

- Section 851.91 is limited to granting petitioner relief by way of sealing person's arrest record and court records related to an arrest; trial court correctly denied petition where petitioner was asked to appear in court in response to prosecutor letter but was never arrested in connection with underlying offenses. (*People v. Hadim* (2022) 82 Cal.App.5th Supp. 39.)

- While defendant gained relief under Proposition 36 such that his arrest and conviction are deemed never to have occurred for most purposes, that is not equivalent of having been arrested but never convicted; hence, there is no eligibility to seal arrest record under § 851.91. (*People v. D.C.* (2020) 54 Cal.App.5th 727.)

- Dismissal after defendant successfully completes probation (§ 1203.4, subd. (a)(1)), does not expunge defendant's conviction with regard to a defendant's filing a petition for a finding of factual innocence; defendant who pleads guilty is statutorily precluded from a finding of factual innocence because conviction has occurred as result of guilty plea. (*People v. Mazumder* (2019) 34 Cal.App.5th 732.)

- "Whether there is no reasonable cause to arrest in the first place is an objective question measured by an external standard. Even a magistrate's order discharging a defendant after a preliminary hearing does not establish his or her factual innocence, because it still might be the case that another person of ordinary care and prudence could view the evidence differently and have some suspicion of the defendant's guilt. Showing that one had a viable substantive

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defense is not enough." (*People v. Forest* (2017) 16 Cal.App.5th 1099, 1110, internal punctuation and citations omitted.)

- Where defendant was found NGI, while not convicted of charged offenses, neither was he acquitted, charges were not dismissed, and he was not factually innocent. (*People v. Gerold* (2009) 174 Cal.App.4th 781.)

- When conviction reversed on appeal for insufficiency of evidence, defendant may seek relief under § 851.8. (*People v. McCann* (2006) 141 Cal.App.4th 347.)

- Trial court erred in refusing to consider the proffered evidence; trial court must consider material, relevant and reliable evidence petitioner seeks to present before it can apply requisite "objective legal standard" to determine whether reasonable cause exists to believe petitioner committed offense. (*People v. Chagoyan* (2003) 107 Cal.App.4th 810.)

- Was the petition filed in the proper court? (§ 851.8, subd. (p) .)

4.6.43 Termination of mandated minimum sex offender registration period (Pen. Code, § 290.5)

Penal Code section 290.5 sets forth the process of petitioning and matters to be considered at hearing, if any, and minimum time to re-petition for the various tiers (see § 290) offenders.

- Did the court properly grant/deny a petition to terminate? (*People v. Manzoor* (2023) 95 Cal.App.5th 548, republished with additional material at *People v. Manzoor* (2023) 316 Cal.Rptr.3d 78 [even after an offense may be reduced to a misdemeanor, Pen. Code, § 17, subd. (e) bars courts from granting sex offender registration relief when defendant was found guilty of offense for which lifetime registration is required; amendments to § 290 do not reflect legislative intent to create exception]; *People v. Franco* (2024) 99 Cal.App.5th 184, *People v. Smyth* (2024) 99 Cal.App.5th 22, *People v. Thai* (2023) 90 Cal.App.5th 427 [insufficient evidence supported

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the trial court's conclusion community safety would be appreciably increased by requiring defendant to continue to register for five years; prosecution failed its burden to produce evidence establishing that terminating registration requirement considerably raised threat to society because 64-year-old defendant was currently likely to reoffend]; *Legg v. Department of Justice* (2022) 81 Cal.App.5th 504 [petitioner, convicted of committing lewd act upon 14- or 15-year-old child and more than 10 years older (§ 288, subd. (c)(1)), subject to lifetime sex offender registration requirement was not similarly situated to persons violating § 288, subd. (a), not subject to lifetime requirement; where meaningful distinction between offenses for equal protection purposes permitted rational basis analysis, no denial of equal protection found].)

- Special considerations for juveniles: *In re Derrick B.* (2006) 39 Cal.4th 535 [juvenile court does not have the authority to impose discretionary sex offender registration on juvenile offenders as it does with adult offenders; *In re T.O.* (2022) 84 Cal.App.5th 252 [mandatory sex offender registration requirement applies only to minor committed to [former] DJJ]; *People v. I.B.* (2024) 104 Cal.App.5th 702 [although juveniles convicted of same offenses after juvenile realignment were not subject to registration, lifetime registration for juveniles committed to former DJJ before its closure did not violate Equal Protection].

- Consider applications of evidentiary privileges: *Whitehair v. Superior Court of San Diego County* (2023) 93 Cal.App.5th Supp. 1 [tier one sex offender who meets requirements for termination (§ 290, subd. (e)) and is not on probation, has not waived psychotherapist-patient privilege when the district attorney requests hearing and subpoenas petitioner's records to present evidence regarding whether community safety would be significantly enhanced by requiring continued registration].

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4.6.44 Rehabilitation/pardon (Penal Code section 4852.01 et seq.)

- A person convicted of a crime may request a Governor's pardon through two statutory avenues: (1) a pardon application filed directly with the Governor (Pen. Code, § 4800 et seq.) and (2) a petition for certificate of rehabilitation filed in the superior court (Pen. Code, § 4852.01 et seq.). (*People v. Ansell* (2001) 25 Cal.4th 868).) The latter petition, if granted, becomes both an automatic application for a full pardon by the Governor and a judicial recommendation of such. (§ 4852.16; *Ansell*.) A person convicted of a crime becomes eligible for a certificate of rehabilitation after the successful completion of their sentence and the expiration of an additional period of rehabilitation. (§§ 4852.03, subd. (a), 4852.06.) The person must show he or she is living an "honest and upright life," conducting "himself or herself with sobriety and industry," exhibiting a "good moral character," and conforming to and obeying the "laws of the land." (§ 4852.05; see *Ansell*.)

- Part 3, Title 6, Chapter 3.5 of the Penal Code (§ 4852.01-4852.22) governs rehabilitation and pardon. With exceptions to follow, a person convicted of a felony may file a petition for a certificate of rehabilitation and pardon pursuant to the provisions of the chapter. A person convicted of a misdemeanor violation of any sex offense specified in section 290, or a felony violation of any sex offense specified in section 290 who is granted probation, the accusatory pleading of which has been dismissed pursuant to section 1203.4, may file a petition for certificate of rehabilitation and pardon if the petitioner has not been incarcerated since the dismissal of the accusatory pleading, is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years' residence in California prior to the filing of the petition. The provisions do not apply to persons serving a mandatory life parole, persons committed under death sentences, persons convicted of certain specified sex offenses, or persons in military service. Notwithstanding any other law, the Governor has the right to pardon a person convicted of

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those specified sex offenses, if there are extraordinary circumstances.

- Probationers whose convictions have been dismissed are not eligible. (*People v. Chatman* (2018) 4 Cal.5th 277, 282 [while former probationers and former prisoners are both eligible, once former probationers receive the benefit of having their convictions dismissed under section 1203.4, section 4852.01 renders them ineligible for a certificate of rehabilitation if they are subsequently incarcerated, while former prisoners, whether subsequently incarcerated or not, face no such restriction. "The scheme at issue is subject to neither heightened nor intermediate scrutiny, . . . [the statute's] eligibility criteria survive rational basis review"].)

4.7 Appendix B: Examples of unauthorized sentences

Listed below are illustrations of unauthorized sentences in the defendant's favor that might result in an increased sentence if discovered in an appeal. Counsel should consider developing a supplemental checklist and adding to it as new examples of unauthorized sentences arise.

- ❑ Either dismiss a charge or fail to impose sentence upon which the defendant was convicted. (*People v. Taylor* (1971) 15 Cal.App.3d 349, 352-353 & fn. 2.)

- ❑ Sentence on uncharged lesser offense without the defendant's consent. (*People v. Serrato* (1973) 9 Cal.3d 753, 762-763, overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Cabral* (1975) 51 Cal.App.3d 707, 716-718.)

- ❑ Sentence not specified in the applicable statute. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 44, fn. 2 (prison term other than one of statutory alternatives), disapproved on another point in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12; *People v. Superior Court (Buckbee)* (1931) 116 Cal.App. 412, 413-414, 416 [county jail rather than state prison sentence].)

- ❑ Probation granted although prohibited by law. (Penal Code section 1203.06 et seq.; *People v. Brown* (1959) 172 Cal.App.2d 30, 35; *In re Martin* (1947) 82 Cal.App.2d 16, 18.)

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- ❑ Mandatory consecutive sentence error

    - ▫ Concurrent sentence when the law mandates it be consecutive: *People v. Miles* (1996) 43 Cal.App.4th 364, 367-371 (Three Strikes scheme); *People v. Garrett* (1991) 231 Cal.App.3d 1524, 1528 (two-year "on-bail" enhancement under Pen. Code, § 12022.1); cf. *People v. Scott* (1993) 17 Cal.App.4th 1383, 1384 (escape).

    - ▫ Imposing one-third the middle term instead of mandatory full consecutive sentence: *People v. Pelayo* (1999) 69 Cal.App.4th 115, 122-125 (violent sex offenses); *People v. Crooks* (1997) 55 Cal.App.4th 797, 800-801, 810-811 (arming enhancement for violation of Pen. Code, § 261, subd. (a)(2)); *People v. Miles* (1996) 43 Cal.App.4th 364, 367-371 (two robbery victims under Three Strikes law, Pen. Code, § 667(e)(2)(A) & (B)).

- ❑ Failure to sentence on enhancement

  Failure to strike or impose sentence for an enhancement found to be true: *People v. Bradley* (1998) 64 Cal.App.4th 386, 390-392 (failure to impose or strike prior prison term enhancement); *People v. Irvin* (1991) 230 Cal.App.3d 180, 191-192 (same); *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589 (Health & Saf. Code, § 11370.4 enhancement improperly stayed rather than imposed or stricken).[242]

- ❑ Dismissing penalty in violation of statute

  Direct violations of a statutory mandate in dismissing an allegation (such as a strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) might be found unauthorized and thus correctable on a defendant's appeal.

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[242]Counsel may argue that in such a situation the defendant is entitled to remand to request dismissal of the enhancement (see *Bradley*, at p. 392; *Irvin*, at pp. 192-193; *Cattaneo*, at pp. 1589-1590), but this argument may not prevail (see *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521, 1523).

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- An example is dismissal of a strike solely for purposes of plea bargaining in violation of Penal Code sections 667, subdivision (g) and 1170.12, subdivision (e).

- On the other hand, the court's exercise of discretion in dismissing an allegation under Penal Code section 1385 is arguably not reviewable on the merits unless the People appeal in their own right, although counsel should advise the client of the possibility the court might find otherwise.[243] (See *People v. Ramos* (1996) 47 Cal.App.4th 432, 434-435 [People's appeal], disapproved on other grounds in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

❑ Penal Code section 654 error

- Erroneous stay of execution of sentence: *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Price* (1986) 184 Cal.App.3d 1405, 1411 (erroneous stay of weapons enhancement under Pen. Code, § 654).

❑ Failure to impose mandatory fines or fees

- *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 (state and county penalties); *People v. Smith* (2001) 24 Cal.4th 849, 853 (Pen. Code,§ 1202.45 parole revocation fine); *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413 (laboratory analysis fee and penalty assessments); *People v. Denman* (2015) 218 Cal.App.4th 800, 816 (aggravated white collar crime fine under Pen. Code, § 186.11, subd. (c)); cf. *People v. Montes*

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[243] *People v. Williams* (1998) 17 Cal.4th 148, 162-164, which found the dismissal of a strike to be an abuse of discretion under the facts of that case, was a People's appeal. (See also *People v. Smith* (2001) 24 Cal.4th 849, 852-853 [sentence not unauthorized if error not correctable without considering factual issues on the record or remanding for additional findings]; *People v. Scott* (1994) 9 Cal.4th 331, 354-355 [discretionary sentencing decisions imposed in "procedurally or factually flawed manner" forfeited by failure to object].)

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(2021) 70 Cal.App.5th 35, 48-49 (Pen. Code, § 1202.45 parole revocation imposed on LWOP defendant).

- If the fine or fee can lawfully not be imposed under some circumstances, failure to impose it is not unauthorized: *People v. Tillman* (2000) 22 Cal.4th 300, 303 (restitution and parole revocation fines under Pen. Code,§§ 1202.4 and 1202.45 forfeited by prosecution's failure to object because trial court has discretion not to impose them in certain cases); *People v. Burnett* (2004) 116 Cal.App.4th 257, 260-263 (failure to impose sex offender fine under Pen. Code, § 290.3 not unauthorized because not mandatory if judge finds defendant unable to pay).

- ❑ Mistake in awarding custody credits

  - Miscalculating presentence custody credits in the defendant's favor: *People v. Guillen* (1994) 25 Cal.App.4th 756, 764 (issue raised by government on defendant's appeal; Court of Appeal modified abstract of judgment to reflect 950 rather than 984 days of presentence credit); see also *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192-1193; *People v. Shabazz* (1985) 175 Cal.App.3d 468, 473-474.

  - Awarding conduct credits if the law mandates more restricted credits, such as the 15 percent limitation for violent felonies under Penal Code section 2933.1: see *People v. Duff* (2010) 50 Cal.4th 787 and *In re Pope* (2010) 50 Cal.4th 777 (pre-sentence and post-sentence worktime and conduct credit limitation of Pen. Code, §§ 2933.2 and 2933.1 apply even if term for qualifying offense is stayed); *People v. Daniels* (2003) 106 Cal.App.4th 736 (15 percent limit applies to time spent in jail as condition of probation where probation is later revoked and prison sentence imposed); *People v. Caceres* (1997) 52 Cal.App.4th 106 (15 percent limit for violent felonies preempts Pen. Code, § 4019 presentence credits and 20 percent post-sentence credit limit for defendants sentenced under Three Strikes law); cf. *People v. Thomas* (1999) 21 Cal.4th 1122 (15 percent limit applies only when current conviction is itself punishable by life imprisonment).

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- ❑ Failure to impose mandatory conditions of probation
    - ▫ Failing to impose terms mandated by Penal Code section 1203.097: *People v. Cates* (2009) 170 Cal.App.4th 545.

4.8 Appendix C: Checklist of some common issues raised on dependency appeals

The following list includes some general issues to check as part of counsel's regular review of the record.

NOTE: The issues and citations are just a starting point for research. The law changes frequently, and so the checklist and law must be continuously reviewed and updated.

4.8.1 General: Timeliness of petition and hearings

Determine whether the petition was timely filed and the hearings were timely held. Each of the hearings has its own timeline set out by statute:

- ▫ File petition. (Welf. & Inst. Code, §§ 290.1, 290.2, 313, subd. (a), 338.)
- ▫ Detention hearing. (Welf. & Inst. Code, § 315; Cal. Rules of Court, rule 5.670.)
- ▫ Jurisdiction hearing. (Welf. & Inst. Code, § 334.)
- ▫ Disposition hearing. (Welf. & Inst. Code, §§ 352, subd. (b), 358; *Renee v. Superior Court* (1999) 76 Cal.App.4th 187, 197.)
- ▫ Six-month review hearing. (Welf. & Inst. Code § 366.21, subd (e).)
- ▫ 12-month review hearing. (Welf. & Inst. Code, §366.21, subd. (f); Cal. Rules of Court, rule 5.715.)
- ▫ 18-month review hearing. (Welf. & Inst. Code, §§ 366.21, subd. (g)(1), 366.22.)

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- Section 366.26 hearing. (Welf. & Inst. Code, §§ 366.21, subds. (f), (g)(4), 366.22, subd. (a)(3).)

- Supplemental petition. (Welf. & Inst. Code, § 387; Cal. Rules of Court, rule 5.565(b).)

- Subsequent petition. (Welf. & Inst. Code, § 342; Cal. Rules of Court, rule 5.565(b).)

- Modification petition. (Welf. & Inst. Code, § 388; Cal. Rules of Court, rule 5.570(f).)

4.8.2 General: Potential issues for every hearing

- Parentage – alleged, biological/natural, presumed, *Kelsey S.* parents. (Fam. Code, § 7611; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 [*Kelsey S.* parent]; *In re M.Z.* (2016) 5 Cal.App.5th 53, 66-68 [lack of an existing parent-child relationship for a third parent finding]; *Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1144-1150 [insufficient evidence to establish *Kelsey S.* fatherhood]; *In re Paul H.* (2003) 111 Cal.App.4th 753, 760 [rights of alleged father].) See 4.9.11 Parentage determinations, *post*, for details.

- Indian Child Welfare Act[244] (25 U.S.C. §§ 1901 et seq.; Welf. & Inst. Code, §§ 224 et seq.; Cal. Rules of Court, rules 5.480 et seq.; *In re Isaiah W.* (2016) 1 Cal.5th 1; *In re W.B.* (2012) 55 Cal.4th 30, 48 et seq.) See 4.9.12 ICWA issues, *post*, for details.

- Dual jurisdiction (Welf. & Inst. Code, §§ 241.1, 601 or 602 plus dependency provisions; *In re J.S.* (2016) 6 Cal.App.5th 414,

[244]Because the federal statute uses the term "Indian," ADI does the same in this manual for consistency as the courts have in its decisions, although ADI recognizes the terms "Native American" and "indigenous" are preferred. (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 739, fn. 1.)

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419-422 [where dual status for a minor is appropriate]; *In re W.B.* (2012) 55 Cal.4th 30, 46-47).

- Termination of jurisdiction and family court orders (exit orders). (Welf. & Inst. Code, §§ 361.2, subd. (b)(1), 366.3, subd. (a); *In re Ethan J.* (2015) 236 Cal.App.4th 654, 660-662 [termination of jurisdiction after placement with legal guardian improper where child refused to visit mother and court knew visitation order would not be followed]; *In re John W.* (1996) 41 Cal.App.4th 961, 970-973 [exit order precluding modification of custody order was erroneous].)

- Guardian ad litem appointments for parents – usually mental illness, development delay; sometimes parents are minors. (Code of Civ. Proc., § 372; *In re James F.* (2008) 42 Cal.4th 901; *In re Esmeralda S.* (2008) 165 Cal.App.4th 84.)

- De facto parents – rights, standing to appeal. (Cal. Rules of Court, rule 5.534(a); *In re Vincent M.* (2008) 161 Cal.App.4th 943, 952-953; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1193-1199.)

- Placement issues with relative – standing to appeal. (*In re Isaiah S.* (2016) 5 Cal.App.5th 428; *In re K.C.* (2011) 52 Cal.4th 231 [father whose rights had been terminated not entitled to appeal placement order]; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023; but see *In re Esperanza C.* (2008) 165 Cal.App.4th 1042.)

- Ineffective assistance of counsel – e.g., forfeited issue or inappropriately submitted evidence. Often requires habeas corpus rather than appeal. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 462-467.)

- Social worker's report. (Welf. & Inst. Code, § 355 [admissibility of certain hearsay]; *In re M.B.* (2011) 201 Cal.App.4th 1057; Cal. Rules of Court, rule 5.708 [items to be included in social worker's reports].)

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- Children who reach the age of majority during the case – non-minor dependents. (Welf. & Inst. Code, § 303; *In re David B.* (2017) 12 Cal.App.5th 633 [appeal was moot because jurisdiction terminated after child turned 18 years old]; *In re Aaron S.* (2015) 235 Cal.App.4th 507 [jurisdiction terminated where 19-year-old did not meet the requirements for non-minor dependent status].) See 4.9.13 Non-minor dependents, *post*, for details.

- Continuance requests. (Welf. & Inst. Code, § 352; Cal. Rules of Court, rule 5.550(a); *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604-605.)

- Waiver and forfeiture. Possible forfeiture occurs when trial counsel "submits on the agency's recommendations" instead of submitting on "the agency's reports." (*In re Richard K.* (1994) 25 Cal.App.4th 580, 588-590.)

4.8.3 Detention hearing

The detention hearing's purpose is "to determine whether the minor shall be further detained" or released from custody. (Welf. & Inst. Code, § 315; see also *Los Angeles County Dept. of Children and Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408, 1416.)

- Proper notice. (Welf. & Inst. Code, §§ 290.1, 290.2.)

- Basis for detention. At the detention hearing after the filing of the petition, the juvenile court must release the child to the parents unless a prima facie showing has been made that the child comes within section 300. (Welf. & Inst. Code, § 319; see *Los Angeles County Dept. of Children and Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408.)

- But note regarding pre-disposition orders. An order made before the disposition orders (see 4.9.5 Dispositional hearing, *post*) cannot be appealed. (*In re James J.* (1986) 187 Cal.App.3d 1339, 1342.) Thus, matters at the detention hearing are not separately appealable. They may be reviewed

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by writ or on appeal from the disposition. (Welf. & Inst. Code, § 395; see *In re Rashad B.* (1999) 76 Cal.App.4th 442, 447-450.)

4.8.4 Jurisdictional hearing

At the jurisdictional hearing, court must determine whether the minor is a person described by Welfare and Institutions Code section 300 and thus within the juvenile court's jurisdiction.

- An order made before the disposition orders (see 4.9.5 Dispositional hearing, *post*) cannot be appealed. (*In re James J.* (1986) 187 Cal.App.3d 1339, 1342.) Thus, the jurisdictional findings are not separately appealable. They may be reviewed on appeal from the disposition. (Welf. & Inst. Code, § 395.)

- Determine whether proper notice was given to the correct parties. (Welf. & Inst. Code, § 291; see also *In re Jorge G.* (2008) 164 Cal.App.4th 125 [Hague Service Convention applied to incarcerated parents in Mexico]; *In re Alyssa F.* (2003) 112 Cal.App.4th 846 [same for father residing in Mexico].)

- Subject matter jurisdiction can be raised at any time, even after termination of parental rights. (*In re Aiden L.* (2017) 16 Cal.App.5th 508.)

  - Was more than one state or another country involved? If more than one state is involved, check for compliance with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). (Fam. Code, §§ 3400-3465.)

  - Is California the child's home state? If California is the child's home state under the UCCJEA, then California has jurisdiction to make a child custody determination. (Fam. Code, § 3421; see also *In re Baby Boy M.* (2006) 141 Cal.App.4th 588, 598-600 [insufficient evidence to show California was home state]; *In re A.C.* (2017) 13 Cal.App.5th 661, 672-673 [juvenile court's efforts to

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contact Mexico were sufficient]; *In re R.L.* (2016) 4 Cal.App.5th 125, 140-141 [temporary hospital stay alone insufficient to confer jurisdiction]; *In re A.M.* (2014) 224 Cal.App.4th 593, 599; *In re Jorge G.* (2008) 164 Cal.App.4th 125, 131-133.) The UCCJEA applies to international custody disputes including Mexico. (Fam. Code, § 3405.)

- Sufficiency of pleading. A dependency petition must contain a concise statement of facts to support the conclusion that the child is a person within the definition of each of the sections and subdivisions alleged. (Welf. & Inst. Code, § 332, subd. (f); but see *In re David H.* (2008) 165 Cal.App.4th 1626, 1640 [a parent can forfeit a challenge regarding the sufficiency of the petition].) The juvenile court may order the agency to file a dependency petition. (*In re M.C.* (2011) 199 Cal.App.4th 784.)

- Sufficiency of evidence. Jurisdictional findings must be proven by a preponderance of the evidence, and the agency bears the burden of proof. (Welf. & Inst. Code, § 355, subd. (a).)

  Examples of allegations under Welfare and Institutions Code section 300:

  - Jurisdiction over a child can be assumed based on allegations against only one parent. (*In re James C.* (2002) 104 Cal.App.4th 470, 482.)

  - Subdivision (a) - serious physical harm: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." Reasonable and age-appropriate spanking to the buttocks permitted if there is no serious physical injury. (*In re D.M.* (2015) 242 Cal.App.4th 634; but see *In re Mariah T.* (2008) 159 Cal.App.4th 428.)

  - Subdivision (b)(1) - failure to protect: The agency must demonstrate three elements: (1) an omission in providing care for the child; (2) causation; and (3)

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serious risk of physical harm or illness to the minor, or a substantial risk thereof. (*In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; see *In re R.T.* (2017) 3 Cal.5th 622 [parental culpability not required when unruly teenager is at risk of harm from her own rebellious conduct].)

- Subdivision (b)(2) - commercial sexual exploitation: The child was commercially sexually exploited, and the child's parents were unable to protect them. (But see *In re M.V.* (2014) 225 Cal.App.4th 1495.)

- Subdivision (c) - serious emotional damage: Child suffered, or at risk of suffering, serious emotional damage due to parent or guardian's conduct or failure to provide for care. This requires a showing of severe abuse by the parent or that the parent is incapable of providing adequate care. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329-330; but see *In re Alexander K.* (1993) 14 Cal.App.4th 549, 556-561.)

- Subdivision (d) - sexual abuse: Child suffered, or at risk of suffering, sexual abuse because of parent or guardian's conduct or failure to protect. (*In re I.J.* (2013) 56 Cal.4th 766; *In re Karen R.* (2001) 95 Cal.App.4th 84.)

- Subdivision (e) - severe physical abuse of child under 5 years: A child under five years of age suffered severe physical abuse by a parent, or by a person the parent reasonably should have known was physically abusing the child. Circumstantial evidence may support a finding. (*K.F. v. Superior Court* (2014) 224 Cal.App.4th 1369, 1382; *In re E.H.* (2003) 108 Cal.App.4th 659, 669-670.)

- Subdivision (f) - death of another child: The parent has caused the death of another child through abuse or neglect. (*In re Z.G.* (2016) 5 Cal.App.5th 705, 715-720, disapproved on other ground in *Conservatorship of*

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O.B. (2020) 9 Cal.5th 989; *In re A.M.* (2010) 187 Cal.App.4th 1380, 1387-1390.)

- Subdivision (g) - abandonment or failure to provide for a child: This provision applies if: (i) the child has been left without any provision for support; (ii) physical custody of the child has been voluntarily surrendered and the child is not reclaimed within 14 days; (iii) a parent is incarcerated or institutionalized and cannot arrange for the child's care; or (iv) the relative or adult custodian with whom the child was left is unwilling or unable to provide care or support for the child and the parent's whereabouts are unknown after reasonable efforts to locate the parent. (§ 300, subd. (g).) The circumstances must be present at the time of the jurisdictional hearing. (*In re Aaron S.* (1991) 228 Cal.App.3d 202, 208-212.) It does not require a willful intent to abandon. (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1128-1129.) A petition under subdivision (g) was properly sustained when an incarcerated father showed no interest in the welfare of his children. (*In re James C.* (2002) 104 Cal.App.4th 470, 484; but see *In re Isayah C.* (2004) 118 Cal.App.4th 684, 695-699 [incarcerated parent had relatives available to care for child].)

- Subdivision (h) - freed for adoption: The allegation that a child was freed for adoption by the parent is rarely found in original petitions and occurs only when a legal orphan is removed from prospective adoptive parents. (But see *In re Jayden M.* (2014) 228 Cal.App.4th 1452 [child removed from relatives on eve of termination of parental rights].)

- Subdivision (i) - act of cruelty: A child was subjected to an act of cruelty. A finding the parent intended to harm is not required: it is enough that the parent intended the act itself. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1012, 1017.)

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- Subdivision (j) - abuse or neglect of sibling: A child's sibling was abused or neglected as defined under subdivisions (a), (b), (d), (e), or (i) and substantial risk of same to child. (*In re R.V.* (2012) 208 Cal.App.4th 837, 846.)

- Rebuttal presumption. (Welf. & Inst. Code § 355.1, subds. (a), (c), (d).) If the agency plans to rely on Welfare and Institutions Code section 355.1 to provide a presumption affecting the production of evidence, then the parents are entitled to notice of the agency's plan to rely on such presumption(s), which includes pleading section 355.1 in the petition. (*In re A.S.* (2011) 202 Cal.App.4th 237, 243, disapproved on another ground in *Conservatorship of O.B.* (2020) 9 Cal.5th 989; but see *In re D.P.* (2014) 225 Cal.App.4th 898, 904 [specific reference to statute not required where statutory language referenced].)

4.8.5 Dispositional hearing

Although the jurisdictional and dispositional hearings are often held together, the disposition occurs after the court takes jurisdiction and finds the petition true. At the disposition hearing, the court must decide whether to declare the child a dependent and, if the child is declared a dependent, whether to keep the child with their parents or place the child elsewhere. (Welf. & Inst. Code, §§ 360, subd. (d) & 361.)

- Proper notice to the correct parties. (Welf. & Inst. Code, § 291.)

- Placement

  - Was removal proper? The court must remove the child from the parent's custody if clear and convincing evidence establishes that continued custody would pose "a substantial danger to the physical health, safety, protection, or physical or emotional well-being" of the child. (Welf. & Inst. Code, § 361, subd. (c)(1); *In re A.E.* (2014) 228 Cal.App.4th 820, 825-827.) Other

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circumstances may also support removal. (Welf. & Inst. Code, §361, subd. (c)(2)-(5).)

- Was there a reasonable alternative to removing the child from the parent(s)? (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809-810.)

- Was a non-custodial parent available? (Welf. & Inst. Code, § 361.2, subd. (a).) Did a non-custodial parent request placement? If so, was that parent denied placement? (Welf. & Inst. Code, § 361.2.) The court must place the child with a non-custodial parent unless it finds such a placement is detrimental. (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262.) Factors that may be considered include a child's wishes, sibling bonds, and relationship with noncustodial parent. (*In re K.B.* (2015) 239 Cal.App.4th 972, 979, 979; *In re Abram L.* (2013) 219 Cal.App.4th 452, 460 [insufficient evidence of detriment although 14- and 15-year-old brothers did not wish to be placed with noncustodial parent with whom they had no relationship]; but see *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1425-1426 [detriment to move 8- and 10-year old children to Ohio with father because of strong relationship with half siblings and desire to remain in California].)

- Was placement with relatives possible? (Welf. & Inst. Code, §§ 361.2, subd. (e)(2), 361.3, subd. (a).) Did the social worker ask about relatives? Were relatives assessed by the agency? (Welf. & Inst. Code, § 361.3.) Relatives are defined by statute. (Welf. & Inst. Code, § 361.3, subd. (c)(2); *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1059 [juvenile court has jurisdiction to review agency's denial of a criminal exemption for relative placement for an abuse of discretion].) Relative placement preference continues through disposition, and according to some courts, throughout reunification, and the agency is required to investigate relative placement even if a new placement is not required. (*In*

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re Joseph T., Jr. (2008) 163 Cal.App.4th 787, 793.) Was placement with relatives possible? (Welf. & Inst. Code, §§ 361.2, subd. (e)(2), & 361.3, subd. (a).) Did the social worker ask about relatives? (Welf. & Inst. Code, § 309.) Were relatives assessed by the agency? (Welf. & Inst. Code, §§ 301, subd. (d)(1), & 361.3.)

- If placement is out of state, was placement compliant with the Interstate Compact on the Placement of Children (ICPC)? (Fam. Code, § 7900 et seq.) If the child is placed with a non-custodial parent living out of state, an approved ICPC evaluation is not required. (*In re A.J.* (2013) 214 Cal.App.4th 525, 541; *In re Z.K.* (2011) 201 Cal.App.4th 51, 66; but see *In re Suhey G.* (2013) 221 Cal.App.4th 732, 742.)

- If siblings, were they placed together? (Welf. & Inst. Code, § 306.5.)

- Reunification plan

  - Was the reunification plan sufficiently tailored to remedy the alleged problem? (Welf. & Inst. Code, § 16507; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1241; *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 420.)

  - Was there sufficient evidence to require the parent to comply with each component of the reunification plan? (Welf. & Inst. Code, § 362, subds. (c) & (d); *In re A.E.* (2008) 168 Cal.App.4th 1, 5 [services for non-offending parent because he did not understand gravity of underlying abuse]; *In re Christopher H.* (1996) 50

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Cal.App.4th 1001, 1006; compare with *In re Jasmin C.* (2003) 106 Cal.App.4th 177, 181-182.)[245]

- Were time limits appropriate? (Welf. & Inst. Code, § 361.5, subd. (a).) Twelve months of reunification services if a child was age three or older, and six months if a child was younger than three. (§ 361.5(a).) Time limits for reunification services begin when the child is removed from both parents. (*In re A.C.* (2008) 169 Cal.App.4th 636, 649.)

- Denial of reunification services

  - Did the agency notify parents of possibility that reunification efforts would be bypassed? (Welf. & Inst. Code, § 358, subd. (a)(3).)

  - Was the court permitted to deny reunification services under Welfare and Institutions Code section 361.5, subdivision (b)? (Welf. & Inst. Code, § 361.5, subd. (b).)

  - Did sufficient evidence support the court's finding that one of the subdivisions of section 361.5, subdivision (b) applied? (*K.F. v. Superior* Court (2014) 224 Cal.App.4th 1369, 1386-1387; *In re D.F.* (2009) 172 Cal.App.4th 538, 545-546; but see *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 599.) Bypass provisions can apply to custodial or non-custodial parents. (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 54.)

  - Was clear and convincing evidence presented that, despite the eligibility of a bypass provision, reunification services were in the best interest of the child? (§361.5 subd. (c)(2).)

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[245]A parent may not be held in contempt for failing to comply with reunification services and court's orders. (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1237-1238.)

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- Visitation

  - Was visitation properly ordered? Visits must be ordered unless detriment appears. (Welf & Inst. Code, § 362.1; *In re T.M.* (2016) 4 Cal.App.5th 1214, 1219-1221; *In re C.C.* (2009) 172 Cal.App.4th 1481, 1491-1492.)

  - Juvenile court may not delegate whether visitation shall occur to any party or nonjudicial official. (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1123 [improper delegation to mother]; *In re S.H.* (2003) 111 Cal.App.4th 310, 319 [same to child]; but see *In re Sofia M.* (2018) 24 Cal.App.5th 1038, 1046-1047; *In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1358.)

4.8.6 Welfare and Institutions code section 388 petition

The purpose of a section 388 petition is to request a hearing to modify or set aside a previous court order because of changed circumstances or new evidence. (Welf. & Inst. Code, § 388, subd. (a).)

A section 388 petition may be filed by a parent or anyone who has an interest in the dependent child.

- Was the petition timely filed? The petition may be filed at any time during the case. (Welf. & Inst. Code, § 388, subd. (a).) But a parent must file a section 388 petition prior to termination of parental rights at the section 366.26 hearing. (*In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1806.)

- Did the court make a prima facie finding on the petition? The court may summarily deny the petition ex parte petition without a hearing if the petition fails to state a change of circumstances/new evidence and it does not appear the requested modification will promote the best interest of the child. (Welf. & Inst. Code, § 388, subd. (c); *In re Anthony W.* (2001) 87 Cal.App.4th 246; *In re Kimberly F.* (1997) 56 Cal.App.4th 519.)

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- Did the petition make the required showings that: (a) there is a change in circumstances or new evidence and (b) the child's best interests would be served by a modification? (Welf. & Inst. Code, § 388, subd. (a); *In re J.C.* (2014) 226 Cal.App.4th 503, 525.)

  - Was the burden of proof met? It is the petitioner's burden, as the moving party, to show there is new evidence or changed circumstances and that the proposed change is in the child's best interests. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1083.)

  - Were specific facts offered? The allegations of the petition may not be conclusory but must be specific and factually describe the evidence. (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800.)

  - Was the petition liberally construed? The section 388 petition must be liberally construed in favor of granting a hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.)

  - Was the proposed modification in the best interests of the child? The court must order an evidentiary hearing on the merits of a petition if it appears the best interests of the child may be promoted by the proposed change in order. (Welf. & Inst. Code, § 388, subd. (d); *In re Lesly G.* (2008) 162 Cal.App.4th 904, 914 [error for court to refuse to take evidence or testimony for § 388 petition]; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672; but see *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [no due process violation although no cross-examination of social workers, because the court did not rely on social workers' information, but rather paucity of evidence from parents].)

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- Did the court abuse its discretion in denying a section 388 petition after an evidentiary hearing?
    - Was the proposed modification in the best interests of the child? The court must assess whether the child's best interest will be served by the proposed modification. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519.)
    - Did the trial court apply the proper burden of proof for the section 388 petition? (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1194.)
- Consider whether the trial attorney committed ineffective assistance of counsel for failing to file a section 388 petition on the parent's behalf. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396; but see *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 225 [trial attorney not required to make futile motion].)

4.8.7 Review hearings

The court must review the family's situation at least every six months intervals and determine whether to maintain or modify the dependency, including return of the child to the parent. (Welf. & Inst. Code, §§ 364, 366; *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 304-305.) There is a statutory presumption the child will be returned to parental custody unless the court finds the child's return would create "a substantial risk of detriment to the physical or emotional well-being" of the child. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242.)

A decision made at a review hearing is normally appealable (Welf. & Inst. Code, § 395), unless the court decides to discontinue reunification efforts and set the case for a permanent plan hearing under section 366.26. If so, the decision must be reviewed by writ under California Rules of Court, rules 8.450-8.452.

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- Verify notice was proper. (Welf. & Inst. Code, §§ 292, 293; Cal. Rules of Court, rule 5.534 (h); *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 105-110.)

- Confirm filing of requisite social worker's report. (Welf. & Inst. Code, § 364, subd. (b); 366.21, subd. (c); Cal. Rules of Court, rule 5.708(b).)

- Consider sufficiency of evidence of detriment to support continued out-of-home placement of the child. (Welf. & Inst. Code, § 366.21, subds. (e), (f), 366.22, subd. (a)(1); *In re E.D.* (2013) 217 Cal.App.4th 960.)

- Consider whether reasonable services were offered. Did the social services agency do more than simply provide a list of referrals with little assistance? (*In re J.P.* (2017) 14 Cal.App.5th 616, 625-626 [reunification services must be provided in a language the parent understands]; *In re A.G.* (2017) 12 Cal.App.5th 994, 1002-1003 [error to not provide any court-ordered services to father who was deported to Mexico]; *In re J.E.* (2016) 3 Cal.App.5th 557, 566-567 [reunification services were insufficient because not tailored to the needs of the family]; *In re Taylor J.* (2014) 223 Cal.App.4th 1446, 1452 [providing list of service providers with little regard for distance, cost, or types of services offered is not reasonable services]; *Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, 1347 [agency cannot tell mother she is enrolled in proper programs for year and at last minute use its mistake to terminate services]; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 973 [referral to unavailable therapist insufficient].)

- Consider placement of child. Where was the child placed? Was a relative or non-relative extended family member considered for placement? (Welf. & Inst. Code, § 361.3; *In re Sarah S.* (1996) 43 Cal.App.4th 274; but see *In re J.Y.* (2022) 76 Cal.App.5th 473, 484 [relatives identified late in the case may not be entitled to placement].)

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- Consider sibling(s). If there are siblings, were they placed together? (Welf. & Inst. Code, § 306.5; 16002, subd. (b); *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 642.)

- Review the record for visitation issues. Did visits occur? Were the children available for visits? Did the parents request additional visits? Did the agency facilitate visits? (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 972-974 [visits with father]; but see *In re Luke H.* (2013) 221 Cal.App.4th 1082, 1091 [nondependent sibling visits].)

- Consider whether sufficient evidence supports the continuation or termination of reunification services? (Welf. & Inst. Code, § 361.5.) Did the parent make progress in court-ordered services? (Welf. & Inst. Code, §§ 366.21, 366.22.) Was there a substantial probability of return to the parent by the next review hearing? (Welf. & Inst. Code § 366.21, subd. (e)(1).)

4.8.8 Subsequent petition

A Welfare and Institutions Code section 342 subsequent petition is used for children who are already dependents when there are "new facts or circumstances" that bring them within a category of section 300 "other than those under which the original petition was sustained." (Welf. & Inst. Code, § 342; *In re A.B.* (2014) 225 Cal.App.4th 1358, 1364.)

- Verify notice was proper. (Welf. & Inst. Code, § 297, subd. (a); Cal. Rules of Court, rule 5.565(c).)

- Determine sufficiency of evidence. Were the court's findings supported by substantial evidence? (*In re A.B.* (2014) 225 Cal.App.4th 1358, 1363.)

- Verify there were additional grounds for jurisdiction. (Welf. & Inst. Code, § 342.) Were the facts and circumstances in the petition different from the sustained allegations in the original petition?

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4.8.9 Supplemental petition

A Welfare and Institutions Code section 387 supplemental petition is used to change the placement of a dependent child from the physical custody of a parent, guardian, relative, or friend to a more restrictive level of court-ordered care. (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1161.)

- Verify notice was proper. (Welf. & Inst. Code, § 297, subd. (b); Cal. Rules of Court, rule 5.565(c).)
- Determine whether the petition alleges facts establishing by a preponderance of the evidence that a previous disposition order was ineffective. (*In re F.S.* (2016) 243 Cal.App.4th 799, 808, disapproved on another ground in *Conservatorship of O.B.* (2020) 9 Cal.5th 989.)
- Consider whether due process issue(s) existed. Did the proceedings conform to due process? (See *In re Daniel C.H.* (1990) 220 Cal.App.3d 814, 832-837.)
- Determine whether clear and convincing evidence established that the child's current placement was not effective in protecting the child, so that the child may be removed from parental custody to a more restrictive level of placement. (Welf. & Inst. Code, §§ 361, subd. (c), 387; *In re T.W.* (2013) 214 Cal.App.4th 1154, 1167-1168.)

4.8.10 Welfare and Institutions Code section 366.26 hearing

The permanency plan, or selection and implementation hearing, under Welfare and Institutions Code section 366.26 occurs after the court has determined to discontinue reunification efforts. Section 366.26 sets out the order of legal preference for the permanent plans. Termination of parental rights and adoption are preferred. (Welf. & Inst. Code, § 366.26, subd. (b)(1).) In order to terminate parental rights, the court must find that: (1) there is clear and convincing evidence that the minor will be adopted; and (2) there has been a previous determination that reunification services will be terminated. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242,

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249-250.)

To satisfy due process, the previous determination to end reunification efforts because of parental unfitness or detriment in returning the child to the parent must have been by clear and convincing evidence. (*In re Frank R.* (2011) 192 Cal.App.4th 532, 538-539; *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1211; *In re P.A.* (2007) 155 Cal.App.4th 1197, 1211; *In re Gladys L.* (2006) 141 Cal.App.4th 845, 848; see *In re Z.K.* (2011) 201 Cal.App.4th 51, 65-70 [in absence of evidence of detriment, non-offending, non-custodial mother was entitled to custody of her child and termination of her parental rights violated due process]; see *In re D.H.* (2017) 14 Cal.App.5th 719, 730-736.)

- Setting of .26 hearing. Did the court give proper advisement of the writ requirement at the referral hearing? (Welf. & Inst. Code, § 366.26, subd. (l)(3)(A); Cal. Rules of Court, rule 5.590(b).)

  - This is an issue only if proper notice was *not* provided. If there was inadequate advisement, the parent may raise the merits of the order setting a section 366.26 hearing, including a reasonable services issue, on the appeal. (*In re Hannah D.* (2017) 9 Cal.App.5th 662, 680-682 [writ required although no oral writ advisement given because written notice was given]; *In re X.Z.* (2013) 221 Cal.App.4th 1243, 1250-51 [court's lack of advisement of writ deadline did not excuse near 15-month delay in challenging orders]; but see *In re A.O.* (2015) 242 Cal.App.4th 145, 149 [failure to timely file writ excused by lack of writ advisement]; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-724 [same where good cause shown].)

  - Were the parents present at the referral hearing? Were the parents represented? (Welf. & Inst. Code § 317.)

  - If the child is over 10 years old, was he/she notified of the right to attend the section 366.26 hearing? (Welf. &

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Inst. Code, §§ 349, subd. (a), 366.26, subd. (h)(2); *In re Desiree M.* (2010) 181 Cal.App.4th 329, 335.)

- Proper notice. Did the social worker provide proper notice of the section 366.26 hearing? (Welf. & Inst. Code, § 294.)

- Adoptability

  - Did the court make an adoptability finding by clear and convincing evidence as is required? (Welf. & Inst. Code, § 366.26, subd. (c)(1); *In re R.C.* (2008) 169 Cal.App.4th 486, 491; *In re Carl R., Jr.* (2005) 128 Cal.App.4th 1051, 1060.)

  - The court may find general adoptability – the child's age, physical condition, and emotional state make it likely a family will be willing to adopt – or specific adoptability – a prospective adoptive family has expressed interest or willingness. (See *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153-1154; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

- Exceptions to termination of parental rights (Welf. & Inst. Code, § 366.26, subd. (c).)

  - Did the parent request application of an exception? If no request is made in trial court, was the exception forfeited? (*In re P.C.* (2006) 137 Cal.App.4th 279, 287-288.)

  - Is there a relative available, capable, and willing to be the child's legal guardian? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A); *In re K.H.* (2011) 201 Cal.App.4th 406, 414.)

  - Is the parental relationship such a benefit to child that it would be detrimental to the child to lose? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) Parent must have had regular visitation, a relationship beneficial to the child must exist, and termination of parental rights

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would be detrimental to the child. (*In re Caden C.* (2021) 11 Cal.5th 614, 631-633.) Factors that can be considered and should not be relied upon are listed in *In re Caden C., supra,* and discussed in its progeny.

- Did the child (aged 12 or older) object to termination? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(ii); see *In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1334.)

- Was the child placed in a residential treatment facility? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(iii); *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1352.)

- Is the child's current foster family unable or unwilling to adopt due to exceptional circumstance? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(iv); *In re Carl R., Jr.* (2005) 128 Cal.App.4th 1051, 1068-1069.)

- Will the termination of parental rights cause a substantial interference with a sibling relationship? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(v); *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Use a two-prong test – how strong the existing bond between the siblings is and whether termination will interfere with the sibling relationship. In the process the court must consider the child's need for a permanent placement versus the importance of the sibling relationship. *(In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952; see *In re I.R.* (2014) 226 Cal.App.4th 201, 213-215 [sibling exception did not apply when minors' levels of maturity were not adequately advanced to be able to experience more than the simplest level of sibling bond with infant sister].)

- If the child is an Indian child, would termination not be in the child's best interest? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1322.)

- Were reasonable efforts made to prevent termination and did the court make a finding about whether

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reasonable services were offered or provided at each hearing as required? (Welf. & Inst. Code, § 366.26, subd. (c)(2)(A); *In re T.M.* (2009) 175 Cal.App.4th 1166, 1171.)

- Was the permanent plan appropriate?
  - Adoption. (See generally *In re Carl R., Jr.* (2005) 128 Cal.App.4th 1051.)
  - Guardianship. (See generally *In re R.N.* (2009) 178 Cal.App.4th 557.)
  - Long-term foster care (planned permanent living arrangement). (See generally *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882; *In re Ramone R.* (2005) 132 Cal.App.4th 1339.)
  - Tribal customary adoption. (See generally 25 U.S.C. 1911 et seq.; Welf. & Inst. Code, § 366.24*; In re H.R.* (2012) 208 Cal.App.4th 751, 758.)

4.8.11 Parentage determinations

- Early inquiry. Did the agency and the juvenile court ask about parentage at the earliest possible time, starting at detention? (Welf. & Inst. Code, § 316.2; Cal. Rules of Court, rule 5.635(a), (b); *In re Paul H.* (2008) 111 Cal.App.4th 753, 760.)
- Notice to possible parent. Was a possible parent notified of the dependency case and their rights to change their parentage status with Judicial Council form JV-505? (Welf. & Inst. Code, § 316.2, subd. (b); but see *In re Marcos G.* (2010) 182 Cal.App.4th 369, 388-389 [harmless error when father did not take action for more than a year after the initial notice].)
- Correct categorization of parent. Was the type of parent correctly identified? The dependency court recognizes four types of parents: presumed, biological or natural, alleged, and

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a quasi-presumed or *Kelsey S.* parent (see *Adoption of Kelsey S.* (1992) 1 Cal.4th 816)?

- Presumed parent. Were the rights of any presumed parent observed? Such a parent has the highest status under the law. It is created by statutory presumption. (Fam. Code, § 7611.) Statutory presumed parenthood is based not on a biological connection but rather on a person's relationship with the child or the child's natural mother, and therefore, genetic testing has limited applicability in determining presumed parent status. (Fam. Code, § 7611; *In re D.S.* (2014) 230 Cal.App.4th 1238, 1244; *In re Nicholas H.* (2002) 28 Cal.4th 56, 62-63.) A presumed parent is entitled to custody and reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449.)

  - By voluntary declaration. (Fam. Code, §§ 7570 et seq.)

  - Based on marital presumption. (Fam. Code, § 7611, subds. (a)-(c).)

  - Based on conduct. "A man who receives a child into his home and openly holds the child out as his natural child is presumed to be the natural father of the child." (*In re Nicholas H.* (2002) 28 Cal.4th 56, 62; see also Fam. Code, § 7611, subd. (d).) That presumption may be rebutted by clear and convincing evidence in an appropriate case. (*Id.* at p. 59; Fam. Code, § 7612, subd. (a).)

- *Kelsey S.* parent. Did the case involve a quasi-presumed, or *Kelsey S.*, father? To attain such a status, the father must show he did everything he could to assume parental responsibilities but was thwarted by the mother from receiving the child into his home and openly holding out the child as his natural child. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816; *Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1144-1150 [father fails to show he qualifies as a *Kelsey S.* father]; *Adoption of Baby Boy W.* (2014) 232 Cal.App.4th 438 [father qualified as a *Kelsey S.* father].) Under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, a father who has made an adequate showing has a

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constitutional right to block an adoption unless he is an unfit parent.

- Biological father. Was the father a biological or natural father? Such a father has established biological paternity but is not a presumed father. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448.) Biological fathers may be eligible for reunification services, relative placement consideration, and placement of the child. (See *In re John M.* (2006) 141 Cal.App.4th 1564, 1569-1571 [placement with nonoffending, noncustodial parent]; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596-601 [bypass of services for alleged or biological father].) Where a child has a presumed and a biological father, the trial court must hold an evidentiary hearing to reconcile competing paternity interests. (*In re P.A.* (2011) 198 Cal.App.4th 974, 981-982.)

- Alleged father. Was the father an alleged father? He may be a biological father, but paternity has not been established. Alleged fathers are entitled to notice and an opportunity to be heard but little else and not reunification services or placement of the child. (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159-160; *In re Paul H.* (2003) 111 Cal.App.4th 753, 760; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596.)

- Unconventional parentage issues. Did the case involve unconventional parentage issues? The Uniform Parentage Act (UPA) is not applied in a gender-neutral way to allow a stepmother to be found a presumed mother. (*In re D.S.* (2012) 207 Cal.App.4th 1088, 1093.)

    - But note: Courts have applied the UPA to recognize two presumed mothers. (See, e.g., *E.C. v. J.V.* (2012) 202 Cal.App.4th 1076, 1084-1090; *S.Y. v. S.B.* (2012) 201 Cal.App.4th 1023, 1031.)

    - Previously, the juvenile court was limited to finding a child had two presumed parents. (*In re M.C.* (2011) 195 Cal.App.4th 197, 214, overturned by legislative action in

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Fam. Code, § 3040.) A new subdivision now allows the juvenile court to "find that more than two persons with a claim to parentage . . . are parents if the court finds that recognizing only two parents would be detrimental to the child." (Fam. Code, § 7612, subd. (c); see also *In re M.Z.* (2016) 5 Cal.App.5th 53, 64; *In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1084.)

4.8.12 ICWA issues

When preparing your opening brief, present ICWA-related facts and procedure in a separate subsection under your Statement of Facts and Procedure. Use a distinct heading such as "Proceedings Under ICWA and Related California Statutes" or "ICWA Inquiry and Compliance."

This organizational approach serves two purposes: it isolates complex statutory compliance issues from the factual narrative, and it allows the court to quickly locate ICWA-specific information when evaluating your arguments. This structure is particularly valuable when your appeal challenges ICWA compliance or when ICWA issues may affect the scope of available remedies.

The Indian Child Welfare Act (ICWA) is a federal statute (25 U.S.C. §1901 et seq.) and is codified in California under Welfare and Institutions Code sections 224 to 224.6 and California Rules of Court, rule 5.480 et seq. The statute presumes it is in a child's best interests to retain tribal ties and cultural heritage, and in the tribe's interest to preserve future generations. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469; *In re Crystal K.* (1990) 226 Cal.App.3d 655, 661.) ICWA is also an attempt to recognize and redress what Congress described as an "alarmingly high percentage of Indian families broken up by removal." (25 U.S.C. § 1901(4).)

- Duty of inquiry. Did the agency and the court comply with the duty to inquire?
  - The agency and the juvenile court have an affirmative and continuing duty to inquire whether a child may be an Indian child under the ICWA. (Welf. & Inst. Code, §

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224.2, subd. (a); Cal. Rules of Court, rule 5.481(a).) Because the tribe has the right to intervene at any stage of an involuntary child custody proceeding, the duty to ascertain the child's Indian status is a continuing one. (25 U.S.C. § 1911(c); Welf. & Inst. Code, § 224.4; *In re Isaiah W.* (2016) 1 Cal.5th 1, 9; *In re I.B.* (2015) 239 Cal.App.4th 367, 376.)

- The agency has an initial duty to inquire about possible Indian heritage. (Welf. & Inst. Code, § 224.2, subd. (b); Cal. Rules of Court, rule 5.481(a)(1).) Such inquiry includes asking the child, parents, and extended family members, among others. (§ 224.2, subd. (b); see also 25 U.S.C. § 1903(2).)

- The court must also ask, at the parties' first appearance, whether the child is, or may be, an Indian child and order the parents to complete an ICWA-020 form at their first appearance. (Welf. & Inst. Code, § 224.2, subd. (c); Cal. Rules of Court, rule 5.481(a)(2); *In re Y.W.* (2021) 70 Cal.App.5th 542, 552; *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741-742.)

- If the agency or the juvenile court has reason to believe the child is an Indian child, the agency and the court must make further inquiries of the parents and extended family members and contact the Bureau of Indian Affairs, the State Department of Social Services, the tribes, and any other persons that may have information about the child's possible Indian heritage. (Welf. & Inst. Code, § 224.2, subd. (e); Cal. Rules of Court, rule 5.481(a)(4); *In re D.S.* (2020) 46 Cal.App.5th 1041, 1050-1052; *In re Dominic F.* (2020) 55 Cal.App.5th 558, 569; *In re Austin J.* (2020) 47 Cal.App.5th 870, 887-889.)

- Duty of notice. Were all required notices given?

  - Formal notice is required whenever the court knows or has reason to know the child is an Indian child. (25

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U.S.C. § 1912(a); Welf. & Inst. Code, §§ 224.2, subds. (d), (f), 224.3; Cal. Rules of Court, rule 5.481(b), (c); *In re M.W.* (2020) 49 Cal.App.5th 1034, 1043-1045; *In re Austin J.* (2020) 47 Cal.App.5th 870, 886-887.)

- The agency is required to provide notice to all named tribes from which the child may belong of the proceedings involving the custody of an Indian child and of the tribe's right to intervene. (25 U.S.C. § 1912, subd. (a); 25 C.F.R. § 23.111(b); Welf. & Inst. Code, § 224.3.)

- In determining whether the notice is proper, it is important to thoroughly review the notice documents and the return receipts. It is essential to ensure all the information provided by the parents and others is included in the ICWA-030 form. (25 C.F.R. § 23.111(d); Welf. & Inst. Code, § 224.3, subd. (a)(5).)

- The notice must be sent to the chairperson or designated agent for service of process of each tribe. (Welf. & Inst. Code, § 224.3, subd. (a)(3); Cal. Rules of Court, rule 5.481(c)(4); *In re H.A.* (2002) 103 Cal.App.4th 1206, 1213.) Further, the documentation showing notice to the tribes must be filed with the juvenile court. (Cal. Rules of Court, rule 5.482(b); *In re Asia L.* (2003) 107 Cal.App.4th 498, 507.)

- The agency is required to provide all the information about family members it has gathered on the form and the information must be correct including dates, names and locations, where known. (Welf. & Inst. Code, § 224.3, subd. (a)(5)(C); *In re S.E.* (2013) 217 Cal.App.4th 610, 614-615; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

- The determination that a child is an Indian child is the exclusive province of the tribe. (25 C.F.R. § 23.108.)

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- The court has a sua sponte duty to assure compliance with the notice requirements of ICWA. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 852.)

- Special procedures. Were all applicable special procedures followed?

  - The child is not an Indian child and ICWA does not apply unless the child is a member of a federally recognized tribe or is eligible for membership in such a tribe and is the biological child of a tribal member. (25 U.S.C. § 1903(4); Welf. & Inst. Code, § 224.1, subd. (b)(a); *In re Abbigail A.* (2016) 1 Cal.5th 83, 90.) The tribe has the definitive authority to determine who is a tribal member in the tribe itself.[246] (25 C.F.R. § 23.108; Welf. & Inst. Code, § 224.2, subd. (h); see also *In re Isaiah W.* (2016) 1 Cal.5th 1, 8.)

  - The tribe can intervene at any time. (25 U.S.C. § 1911(c); Welf. & Inst. Code, § 224.4; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

  - If the child is an Indian child, then heightened evidentiary rules and standards apply for each hearing and placement of the child. (25 U.S.C. §§ 1912 et seq.; Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rules 5.484-485; *In re A.C.* (2015) 239 Cal.App.4th 641, 656; *In re H.G.* (2015) 234 Cal.App.4th 906, 909; *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1338-1340.)

  - The juvenile court is required to consider, where appropriate, a tribal customary adoption. (Welf. & Inst. Code, §§ 366.24, 366.26, subds. (b)(2), (4); *In re H.R.* (2008) 208 Cal.App.4th 751, 759; but see *In re I.P.*

[246]Even if the parent denies being a tribal member, one may argue the denial is insufficient to establish the child is not an Indian child. The parent might be unaware of their tribal membership status. (See *In re Y.W.* (2021) 70 Cal.App.5th 542, 554; *In re S.R.* (2021) 64 Cal.App.5th 303, 315.)

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(2014) 226 Cal.App.4th 1516, 1525; *In re G.C., Jr.* (2013) 216 Cal.App.4th 1391, 1399.)

- Before terminating parental rights to an Indian child, the juvenile court must satisfy ICWA requirements. (25 U.S.C. § 1912; Welf. & Inst. Code, §§ 224.6, 366.26, subd. (c)(2); Cal. Rules of Court, rule 5.485(c).) In addition, special evidentiary burdens apply. Parental rights may not be terminated if it is not in child's best interests (e.g., if doing so would substantially interfere with the child's connection to their tribal community). (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(vi); Cal. Rules of Court, rule 5.486.)

- For assistance with interpretation of ICWA, the Bureau of Indian Affairs has published detailed guidelines for state courts to use in implementing ICWA in child custody proceedings. (80 Fed.Reg. 10146-02 (Feb. 25, 2015).) These are not intended to have binding legislative effect but are entitled to great weight. (In *re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422 fn. 3.)

4.8.13 Non-minor dependents

The juvenile court has discretion to retain jurisdiction over a dependent until the dependent attains the age of 21 years but until recently the utility of doing so was limited by insufficient funds to assist non-minor dependents. (Welf. & Inst. Code, § 303.)

In 2012, the California Fostering Connections to Success (CFCS) Act permitted the state to take advantage of federal funding for extended foster care benefits. (Welf. & Inst. Code, § 303; see also 42 U.S.C. § 675(8).)

Welfare and Institutions Code section 391, subdivisions (d) and (h) as amended by the CFCS Act provides that a dependency court may not terminate jurisdiction over a non-minor unless a hearing is conducted under the section.

Issues include:

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- Whether the trial court properly applied the factors listed in Welfare and Institutions Code section 391 governing termination of jurisdiction. (*In re Shannon M.* (2013) 221 Cal.App.4th 282, 299-300.)

- Whether a non-minor's efforts were adequate to continue extended foster care. (*In re R.G.* (2015) 240 Cal.App.4th 1090, 1097-1100; but see *In re A.A.* (2016) 243 Cal.App.4th 765, 773-774 [termination of jurisdiction because placement in juvenile hall was not foster care placement].)

- Whether continued jurisdiction is in the non-minor's best interests. (Welf. & Inst. Code, § 391, subd. (d)(2); *In re Nadia G.* (2013) 216 Cal.App.4th 1110, 1118-1119; *In re Holly H.* (2002) 104 Cal.App.4th 1324, 1331-1336.)

- Whether a non-minor can remain dependent after he/she gets married. (*In re H.C.* (2017) 17 Cal.App.5th 1261, 1266-1271.)

4.9 Appendix D: Checklist of some common issues raised on delinquency appeals

The following list includes some general issues to check as part of counsel's regular review of the record.

> NOTE: The issues and citations are just a starting point for research. The law changes frequently, and so the checklist and law must be continuously reviewed and updated. The issues below are distilled, for the most part, from the article, "Representing A Minor on Appeal in a Juvenile Delinquency Case," which is updated periodically on the ADI website.

❑ Capacity

> Does clear and convincing evidence defeat the presumption that a minor under the age of 14 is incapable of committing a crime? (Pen. Code, § 26; *People v. Cottone* (2013) 57 Cal.4th 269, 280; *In re Manuel L.* (1994) 7 Cal.4th 229, 231; *In re Gladys R.* (1970) 1 Cal.3d 855, 862.)

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- ❑ Deferred entry of judgment

  Deferred entry of judgment (DEJ) is available in juvenile cases involving felony allegations, if certain prerequisites are met. (Welf. & Inst. Code, §§ 790-795.)

  - ▫ If a minor is eligible for DEJ, the court must follow a set of mandatory procedures. (Welf. & Inst. Code, §§ 790-792; In re C.W. (2012) 208 Cal.App.4th 654, 660; *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.)

  - ▫ There is a right to appeal a denial of DEJ (e.g., *In re Sergio R.* (2003) 106 Cal.App.4th 597), but there is no right to appeal where DEJ is granted (*Luis M. v. Superior Court* (2014) 59 Cal.4th 300, 303, fn. 3; *In re T.C.* (2012) 210 Cal.App.4th 1430, 1433 [restitution order is a component of the DEJ order and not appealable]).

  - ▫ Writ of mandate may be available, depending on what issue is in contest. (*Luis M. v. Superior Court*, *supra*, 59 Cal.4th 300 [restitution order vacated]; *G.C. v. Superior Court* (2010) 183 Cal.App.4th 371 [minor who received DEJ raised a question of law concerning the juvenile court's belief that it was not required to consider ability to pay restitution for vandalism under Welf. & Inst. Code, § 742.16].)

- ❑ Dual jurisdiction

  Does the case involve both the delinquency and dependency proceedings and, if so, have the proper procedures and protocols for the minor's best needs been followed? (Welf. & Inst. Code, § 241.1; *In re Joey G.* (2012) 206 Cal.App.4th 343, 348-349; *In re Marcus G.* (1999) 73 Cal.App.4th 1008, 1012-1013.)

- ❑ Informal probation

  Was informal probation granted? If so, such order is nonappealable. (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 788-789.)

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- ❑ Admissions
    - ▫ Did the minor admit to the allegations of the petition *without* consent of counsel? (Welf. & Inst. Code, § 657, subd. (b); Cal. Rules of Court, rule 5.778(d); *In re Alonzo J.* (2014) 58 Cal.4th 924, 939.)
    - ▫ Does clear and convincing evidence support a finding the minor lacked capacity to understand the consequences of their admission because of a developmental disability? (See, e.g., *In re Matthew N.* (2013) 216 Cal.App.4th 1412, 1420.)
- ❑ Pre-trial issues
    - ▫ Ensure that the offender was a minor on the date of the offense, that proceedings commence in juvenile court and are transferred to adult court under proper circumstances, i.e., if unfit (Welf. & Inst. Code, § 706, subd. (a)(1)). If at least 14 years old but not 16 years old, check that the charged offense is a felony that falls under Welfare and Institutions Code section 707, subdivision (b).

      Note: An order granting or denying a motion to transfer jurisdiction to adult court is not an appealable order. Appellate review would be by extraordinary petition (Cal. Rules of Court, rule 5.770(g)), a task for trial counsel. If trial counsel should have sought, but neglected to seek writ review and it is reasonably probable the minor would have prevailed, then ineffective assistance of counsel should be investigated.
- ❑ Same judge for admission and disposition

  Like a guilty plea in adult court, an implied term of every admission in juvenile court is that the judge who accepts the admission will be the judge who imposes the disposition. (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 312.)
- ❑ Procedural options

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- After making a true finding, did the court: consider setting aside the finding and dismissing the petition in the interests of justice and the welfare of the minor or, if the minor is not in need of rehabilitation, set forth the specific reasons for dismissal in the minutes (Welf. & Inst. Code, § 782; cf. Pen. Code, § 1385); or consider not adjudging the minor a ward and placing the minor on probation for less than six months (Welf. & Inst. Code, § 725, subd. (a))? (See also Welf. & Inst. Code, § 202 [list of permissible sanctions, e.g., fines, community service, probation conditions.)

- If the court adjudged the minor a ward, did the court consider the range of options, such as:

  - Placing the minor on unsupervised probation (Welf. & Inst. Code, § 727, subd. (a));

  - Placing the minor on supervised probation at home (Welf. & Inst. Code, § 730, but see Welf. & Inst. Code, § 727, subd. (a));

  - Placing the minor with a relative or in a licensed group or foster home (Welf. & Inst. Code, § 727, subd. (a));

  - Committing the minor to juvenile hall or a county camp or ranch (Welf. & Inst. Code, § 730, subd. (a)); or

  - Committing the minor to the Division of Juvenile Facilities (Welf. & Inst. Code, § 731)? (See also Welf. & Inst. Code, § 202 [list of permissible sanctions, e.g., fines, community service, probation conditions].)

- Did the court consider dismissing the petition – an act that operates to erase the juvenile adjudication as if it never occurred (Welf. & Inst. Code, § 782; *People v. Haro* (2013) 221 Cal.App.4th 718, 720) or recall a case in which commitment to the Division of Juvenile Facilities was ordered for the purpose of ordering an alternative disposition (Welf. & Inst. Code, § 731.1, subd. (a)) or where the minor is under parole supervision (Welf. & Inst. Code, § 731.1, subd. (b))?

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- ❑ Probation conditions

  The juvenile court may impose reasonable terms and conditions of probation. (Welf. & Inst. Code, §§ 725, 730, subd. (b).)

  - ▫ Such conditions must be "fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, §§ 730, subd. (b)); *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

  - ▫ The conditions may be broader than criminal probation conditions. (*In re S.O.* (2018) 24 Cal.App.5th 1094 [juvenile court has authority to require restitution for losses beyond those that resulted from criminal conduct with which the minor was charged]; *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1330; *Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1180; *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.)

- ❑ Commitment

  - ▫ Did the court find the commitment imposed was likely to produce a probable benefit to the minor? (*In re Aline D.* (1975) 14 Cal.3d 557, 565-567.) Does the record contain some evidence that the court appropriately considered and rejected reasonable alternative placements as ineffective or inappropriate? (*In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1159; *In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

  - ▫ Welfare and Institutions Code section 733 precludes a Division of Juvenile Facilities commitment for juvenile court wards under 11 years of age, wards suffering from illness that would "probably endanger the lives or health" of other inmates, and wards whose most recent offense alleged in any petition and admitted or found to be true by the court is not described in Welfare and Institutions Code section 707, subdivision (b) or Penal Code section 290.008, subdivision (c), and who are not otherwise ineligible for commitment to DJF under the section.

  - ▫ If a ward is committed to the Division of Juvenile Facilities, did the wardship petition include a non-qualifying offense

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precluding such a disposition? (Welf. & Inst. Code, § 733, subd. (c); *In re D.B.* (2014) 58 Cal.4th 941, 944.)

- The court must determine whether the minor has committed one of the offenses listed in Welfare and Institutions Code section 707, subdivision (b). If so, the Division of Juvenile Facilities has jurisdiction over the minor until age 25. (Welf. & Inst. Code, § 1769, subds. (a)-(c); *In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1064.)

- When an offense has degrees or is a wobbler (i.e., it can be either a felony or misdemeanor if committed by an adult), the court must make an express finding as to the degree of the offense or designate the offense as a felony or misdemeanor. (Welf. & Inst. Code, §§ 702; Pen. Code, § 1157; Cal. Rules of Court, rule 5.778(f)(9); *In re Eddie M.* (2003) 31 Cal.4th 480, 487; *In re Manzy W.* (1997) 14 Cal.4th 1199, 1209; *In re Kenneth H.* (1983) 33 Cal.3d 616, 618-620.) The admission of an allegation charged as a felony or calculation of the maximum period of confinement as a felony is insufficient. (E.g., *In re Manzy W.*, *supra*, at pp. 1207-1208; *In re Ricky H.* (1981) 30 Cal.3d 176, 191; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 675.)

- When a minor is removed from the custody of their parents, the court must calculate the maximum length of confinement. (Welf. & Inst. Code, § 726, subd. (d).) A minor cannot be confined in excess of the maximum term that could be imposed on an adult convicted of the same offenses. (Welf. & Inst. Code, §§ 726, subd. (d), 731, subd. (c).)

- When a minor is removed from parental custody but not committed to the Division of Juvenile Facilities, the court must set the maximum at the longest potential sentence provided for by statute, taking into account both the offenses committed and enhancements. (*In re Eddie L.* (2009) 175 Cal.App.4th 809, 813-816.) If a minor is committed to DJF, rather than just calculating the maximum period of confinement, the court must exercise its discretion in setting

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the maximum period of confinement. (Welf. & Inst. Code, § 731, subd. (c).)

- ❑ Fines and Fees

  - ▫ Restitution fines — Welfare and Institutions Code section 730.6 refers to two restitution fines – a restitution fine per se and a victim restitution fine – analogous to restitution fines for adult offenders under Penal Code section 1202.4. This section shall refer to the restitution fine per se. Victim restitution shall be addressed below.

    Upon a minor being found to be a person described in section 602, the court shall consider levying a discretionary fine in accordance with section 730.5. (Welf. & Inst. Code, § 730.6, subd. (a)(2).) These provisions, in essence, are the counterpart to Penal Code section 1202.4, subdivision (b). Section 730.5, in turn, provides, however, the court must find the minor has the financial ability to pay the fine. In addition, the court shall order victim restitution. (§ 730.6, subd. (a)(2).) But, if victim restitution is ordered, "[t]he court shall not impose a separate and additional restitution fine against [the] minor . . . ." (*Ibid*.)

  - ▫ Other fines

    Under Welfare and Institutions Code section 730.5, the court may levy a discretionary fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine. *(In re Steven F.* (1994) 21 Cal App.4th 1070, 1080.)

  - ▫ Unpaid balances

    Various unpaid outstanding balances of county-assessed or court-ordered costs against the parent, guardian, or other person liable for the support of a minor have been vacated and are unenforceable and uncollectable under certain conditions. (Welf. & Inst. Code, § 232.2, subd. (a).) Likewise, certain unpaid outstanding balances of any county-assessed or court-

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ordered against minors have been vacated and held unenforceable and uncollectable under certain conditions. (Welf. & Inst. Code, § 232.2, subd. (b).) The unpaid outstanding balances of any county-assessed or court-ordered costs against adults who at the time were not adults who were over 21 years of age and were under the jurisdiction of the criminal court is vacated and shall be unenforceable and uncollectable under certain conditions. (Welf. & Inst. Code, § 232.2, subd. (c).) Upon the expiration of 10 years after the date of imposition of a restitution fine pursuant to Penal Code section 730.6 against a minor, any outstanding balance, including any collection fees, is vacated and shall be unenforceable and uncollectable. (Welf. & Inst. Code, § 232.2, subd. (d).)

- ❑ Victim Restitution

  - ▫ A victim restitution fine under Welfare and Institutions Code section 730.6 subdivisions (a)(2), (b) is the counterpart to Penal Code section 1202.4, subdivision (a) et seq. For graffiti in particular, did the orders comply with the tailored statutory scheme? (Welf. & Inst. Code, §§ 742.14 & 742.16; *Luis M. v. Superior Court* (2014) 59 Cal.4th 300.)

  - ▫ A minor shall be held severally liable and shall not be held jointly and severally liable as co-offenders. The court shall apportion liability based on each minor's percentage of responsibility or fault for all economic losses included in the order of restitution. The aggregate amount of apportioned liability for all minors involved shall not exceed 100 percent in total. (Welf. & Inst. Code, § 730.6, subd. (b)(3).)

  - ▫ Parental Obligation

    Parents may be obligated to pay for restitution, fines, penalty assessments (Welf. & Inst. Code, § 730.7; Civil Code, §§ 1714.1, 1714.3 [joint and several liability], probation supervision, legal services, and "reasonable costs of support" if the minor is confined (Welf. & Inst. Code, §§ 903, 903.1, 903.15, 903.2, 903.25, 903.45, 903.5). Welfare and Institutions Code section

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730.7 imposes joint and several liability on the parents of the minor for the economic damage arising out of the criminal acts of their child. (*In re Michael S.* (2007) 147 Cal.App.4th 1443, 1448-1449; *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017, 1025.) Welfare and Institutions Code section 730.7, however, limits a parent's liability to $25,000 for each tort of the minor. Civil Code sections 1714.1 and 1714.3 further limit monetary damages. Also, Welfare and Institutions Code section 730.7 expressly permits a court to consider a parent's inability to pay.

- ❑ Money judgment

  Has a parent been held liable for a money judgment for the child's acts? If so, the parent may appeal. (E.g., *In re Michael S.* (2007) 147 Cal.App.4th 1443; *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017.)

- ❑ Sealing records

  Five years after the termination of juvenile court jurisdiction or upon reaching age 18, individuals have the right to seal juvenile records, with some exceptions, by petition to the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).) Once sealed, the proceedings are deemed never to have occurred, and the person can properly reply accordingly to any inquiry about the events. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

  - ▫ The court and probation department have an affirmative duty to inform minors who have had wardship petitions filed on or after January 1, 2015, about the right to seal. (Welf. & Inst. Code, § 781, subd. (h)(1).)

    - · A potential issue is whether the court abused its discretion in denying the petition because it determined that rehabilitation has not been attained to the satisfaction of the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

    - · Another is whether the court erred in denying a request to remove the lifetime sex offender registration when the defense presents evidence to show the individual has

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been rehabilitated and the juvenile adjudication did not involve a Welfare and Institutions Code section 707, subdivision (b) (forcible sex) crimes committed when the individual was 14 years or older. (Welf. & Inst. Code, § 781, subd. (a)(1)(C)-(D).)

- The court has an independent duty to seal records when a minor satisfactorily completes a supervision program or probation. (Welf. & Inst. Code, § 786, subd. (a).) Once sealed, the arrest and other proceedings in the case are deemed not to have occurred and the minor may reply accordingly to an inquiry by employers, educations institutions, or other persons or entities regarding the arrest and proceedings in the case. (Welf. & Inst. Code, § 786, subd. (b).) Example of issues include:

  - Did the court abuse its discretion by making a finding that the minor did not satisfactorily complete a program or probation? (Welf. & Inst. Code, § 786, subd. (a) & (c)(1).)

  - Did the court abuse its discretion by not sealing records from a prior petition? (Welf. & Inst. Code, § 786, subd. (f)(1).)

  - Did the court abuse its discretion by not sealing records in the custody of a public agency (other than law enforcement agencies, the probation department, or the Department of Justice), such as a school? (Welf. & Inst. Code, § 786, subd. (f)(2).)

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5 CHAPTER FIVE

EFFECTIVE WRITTEN ADVOCACY: BRIEFING

5.1 Introduction

The brief is the foundation of appellate advocacy. It is the most important and often the only medium (when oral argument is waived) for reaching the court. Counsel's responsibility is to ensure all briefs are accurate, professional, and persuasive. Compliance with formal requirements, clear and effective writing, proficiency in research and the use of authorities, strong analytical skills, and mastery of the art of advocacy are all essential.

This responsibility is especially acute in appeals covered by the appointed counsel program. The attorney must not only carry the heavy burden of establishing legal grounds to overturn a final judgment but also bring fundamental credibility to the client's cause to convince the court to rule in the client's favor.

5.2 Appellant's opening brief

Every appellant's attorney must give the utmost attention and care to the preparation of a persuasive opening brief. That brief is the pivotal document in virtually every appeal. The client's chances for relief will be profoundly affected by its contents, tone, and effectiveness. It sets up the framework for everything that follows. It gives the court the first picture of the factual background of the case and introduces the principal legal authorities and concepts to be discussed. The most important function, perhaps, is determining what issues will be the basis of the appeal. The entire "conversation" among the parties and the court will revolve around the issues raised in the opening brief.

The appellant's opening brief bears a heavy laboring oar. No court reverses automatically: the judgment is presumed to be correct, and the appellant must *persuade* it to upset the judgment. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Consequently, virtually all the presumptions and principles on appeal favor the respondent. (See § 5.3.4 Appellate presumptions and principles, *post*.) For example, conflict and silence in the record are resolved in favor of the judgment. The trial court is usually presumed to have had adequate reasons for a decision and to know the law; and even if the court gave legally incorrect reasons for a decision, no error will be found if legally correct reasons would require the same

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result. The jury is presumed to have followed the instructions if they are correct and consistent. Judges, clerks, and court reporters are presumed to have performed their duty. Finally, for most kinds of error, the burden is on the appellant to show prejudice – that is, to show the error affected the result. To overcome all of these and similar obstacles, the appellant's opening brief must build a compelling case for relief.

5.2.1 General structure

A typical appellant's opening brief usually contains, in approximate order, a cover, a table of contents, a table of authorities, an introduction (optional but highly recommended), a statement of appealability, a statement of the case and statement of facts confined to matters shown in the record,[247] arguments with headings or subheadings summarizing each contention, a conclusion, a word count certificate, and a proof of service. (Cal. Rules of Court, rules 8.40, 8.204 (a)(1) & (2), 8.212, 8.360, 8.412(a), 8.480(a), 8.482(a).)[248] It may have attachments, generally limited to 10 pages. (Rules 8.204(d), 8.360, 8.412(a), 8.480(a), 8.482(a).) The ADI website has templates for both issue and no-issue briefs.

Other formalities for briefs as required by the California Rules of Court are detailed in § 5.6 Briefing formalities et seq., *post*. These include such matters as form (type, spacing, numbering, copying, bookmarks, length, signature), filing, service, and deadlines.

5.2.2 Cover of brief

The cover page of the brief must set forth the title of the brief; the title, trial court number, and the Court of Appeal number of the case; the names of the trial judge (and each participating trial judge if more than one); the name, address, telephone number, California State Bar number, and fax and email information, if available, of each attorney filing or joining in the brief; and the name of the

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[247]Quite often in civil (including juvenile dependency) cases, but infrequently in criminal and juvenile delinquency cases, the facts and case will be combined into a single chronological narrative. Both formats are acceptable; counsel should reflect on whether the combined or separate presentation will be more effective in the case.

[248]If the appellant is a corporation or other entity, rule 8.208 on certificates of interested parties also applies. (Rule 8.361.)

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party that each attorney represents. (Cal. Rules of Court, rules 8.204(b)(10), 8.360(a), 8.412(a)(2), 8.480(a), 8.482(a), 8.40(b) & (c).)[249]

No-issue briefs or letters identifying no arguable issues[250] must be identified as such prominently on the cover of a brief or first page of a letter. For example, in a criminal case, instead of "Appellant's Opening Brief," it could be labeled "Brief Submitted on Behalf of Appellant Under *People v. Wende* (1979) 25 Cal.3d 436 (or *People v. Delgadillo* (2022) 14 Cal.5th 216), and *Anders v. California* (1967) 386 U.S. 738." In a dependency case, a *Sade C.* letter or brief could be labeled "(Letter Brief/ Brief) Submitted on Behalf of Appellant Under *In re Sade C.* (1996) 13 Cal.4th 952." This label helps the Court of Appeal identify it for internal processing purposes.

Appointed attorneys in the Fourth Appellate District are required to include the following statement after the attorney's name and other identifying information:

> By appointment of the Court of Appeal under the Appellate Defenders, Inc., program.

5.2.3 Tables

Topical index

A topical index (table of contents) is required by rule 8.204(a)(1)(A).) It is more than a technical requisite: it is an important device of advocacy. The table of contents reiterates the argument headings (see § Headings, *post*), which in turn should summarize the arguments in a concise, clearly understandable, and forceful manner. This preview gives the reader a conceptual framework for assimilating the facts and the arguments. In other words, the topical index acts

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[249] Under rule 8.71(a), "all parties are required to file all documents electronically in the reviewing court" and the color cover requirements only apply in the rare instances when a paper copy of a brief is filed with the reviewing court. (See rules 8.71(g), 8.204(b).)

[250] *Wende-Anders* and *Delgadillo* briefs and *Sade C.* letters or briefs are filed when appointed counsel is unable to find any arguable issues to raise on appeal. They are discussed in more detail in § 1.3.12 Representation When There Are No Arguable Issues (Wende-Anders-Sade C. Filings) et seq. and § 4.5 What To Do When Counsel Cannot Find Any Issues et seq.

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as a preview to the brief, focusing the reader's attention to all that follows – and, ideally, inclining the reader toward persuasion.

Table of Authorities

The table of authorities must separately list "cases, constitutions, statutes, court rules, and other authorities cited." (Cal. Rules of Court, rule 8.204(a)(1)(A).) It must indicate on which page(s) of the brief each authority is cited.

The organization of the table of authorities is a matter of convention, not rule. The most common arrangement, which is familiar to the court and thus convenient for it to use, suggests the following arrangement:

- Cases: list in alphabetical order by the case title, regardless of court or jurisdiction.

- Constitutions: The United States Constitution goes first, then the California Constitution, and then other state constitutions alphabetically. Within each constitution the listing is numerical, first by articles and then by amendments.

- Statutes: List California statutes alphabetical order by code and, within each code, in numerical order by section. List general laws by date, most recent to oldest. Federal statutes follow the same pattern. Statutes of other states are listed alphabetically by state and, within each, by code and then section number.

- California court rules: Arrange numerically.

- Other authorities, such as treatises: Group alphabetically by author or, if there is no author, by title.

A heading separates and identifies each type of authority ("Cases," "Statutes," "Rules," etc.). (See Cal. Rules of Court, rule 8.204(a)(1)(A), and ADI template for Appellant's Opening Brief.)

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5.2.4 Introduction

An introduction is not required, but it can be very useful, and appellate justices have repeatedly stressed how valuable they find a good introduction. It gives an immediate overview of the case and helps the reader focus on relevant matters when approaching the brief. An introduction concisely highlights the key facts and issues. It often presents a cogent statement of the result sought and the reasons the court should reach it. An introduction is a good place for presenting a "theme" for the appeal, a distinctive way of characterizing the client's cause, carried throughout the brief, that gets the reader's attention and compellingly punctuates the need for relief. (Garner, The Winning Brief (3rd ed. 2014) has some excellent, innovative suggestions for framing a case in a way that inclines the reader to the client's point of view.)

Ideally the introduction should be no more than a page in length and should avoid mere repetition of the statements of the case or facts and the argument headings.

5.2.5 Statement of Appealability

Rule 8.204(a)(2)(B) requires the opening brief to "state that the judgment appealed from is final, or explain why the order appealed from is appealable." Preferably located at or near the start of the text in the brief, this statement assures the court that it has authority to decide the case and helps counsel identify the occasional case for which a remedy other than appeal might be needed. The following are examples of appropriate statements of appealability.

Criminal appeal after a trial

This statement of appealability is appropriate for an appeal from a judgment imposed after trial in a criminal case:

> This appeal is from a final judgment following a trial and is authorized by Penal Code section 1237, subdivision (a).

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Criminal appeal from an order after judgment

This statement of appealability is appropriate for an appeal from an order after judgment in a criminal case:[251]

> This appeal is from an order made after judgment, affecting the substantial rights of the defendant, and is authorized by Penal Code section 1237, subdivision (b).

Criminal appeal after a guilty plea

Any one or any combination of the following statements may be used, as applicable to the case:

> This appeal is from a final judgment following a guilty plea and is based on the sentence imposed, within the meaning of California Rules of Court, rule 8.304(b)(4)(B). It is authorized by Penal Code section 1237.

> This appeal is from a final judgment following a guilty plea after denial of a Penal Code section 1538.5 motion, within the meaning of California Rules of Court, rule 8.304(b)(4)(A). It is authorized by Penal Code section 1538.5, subdivision (m).

> This appeal is from a final judgment following a plea of guilty and issuance of a certificate of probable cause, as prescribed by California Rules of Court, rule 8.304(b)(1) & (2). It is authorized by Penal Code section 1237.5.

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[251]Examples of such appeals might be a probation revocation or change in the terms of probation, a restitution order, or a correction of an unauthorized sentence. See § 2.4 et seq. In applicable situations, include references to *People v. Loper* (2015) 60 Cal.4th 1155 or *Teal v. Superior Court* (2014) 60 Cal.4th 595.

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Juvenile law or family law appeal

The following statement is appropriate for an appeal after entry of the dispositional order in juvenile delinquency proceedings under Welfare and Institutions Code section 601 or 602:

> This appeal is from a final judgment in proceedings under Welfare and Institutions Code section [601 or 602] and is authorized by Welfare and Institutions Code section 800.

This language may be used for a juvenile dependency case under Welfare and Institutions Code section 300:

> This appeal is from [a judgment entered under Welfare and Institutions Code section 300][an order under Welfare and Institutions Code section (e.g., 366.21, 366.22, 388 – specify)] and is authorized by Welfare and Institutions Code section 395.
>
> or
>
> This appeal is from a judgment entered after a permanency planning hearing under Welfare and Institutions Code section 366.26 and is authorized by Welfare and Institutions Code sections 366.26, subdivision (l) and 395, subdivision (a)(1).

For proceedings under Family Code section 7802, the statement of appealability might read:

> This appeal is from a judgment entered under Family Code section 7802 et seq. and is authorized by Family Code section 7894.

Appeal from civil commitment

One of the following statements may be used for an appeal from an involuntary civil commitment:

> This appeal is from a final judgment in a Sexually Violent Predator proceeding under Welfare and Institutions Code section 6600 et seq. and is authorized by Code of Civil Procedure section 904.1.

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This appeal is from [an extension of] a commitment under the Mentally Disordered Offender law under Penal Code section 2960 et seq. and is authorized by Code of Civil Procedure section 904.1.

This appeal is from a commitment under the LPS conservatorship law under Welfare and Institutions Code section 5300 et seq. and is authorized by section 5352.4 of that code.

This appeal is from an extended detention of a youthful offender under Welfare and Institutions Code section 1800 et seq. and is authorized by section 1803 of that code.

This appeal is from [an extension of] a commitment of a person found not guilty by reason of insanity under the Penal Code section 1026 et seq. and is authorized by section 5352.4 of that code. (*People v. Coleman* (1978) 86 Cal.App.3d 746.)

Other

For other proceedings counsel should cite the order or judgment being appealed and the statutory or other authorization for the appeal. For example, an appeal from a finding of incompetence under Penal Code section 1368 is an appeal from a final judgment in a "special proceeding." (Code Civ. Proc., § 904.1, formerly § 963; *People v. Fields* (1965) 62 Cal.2d 538, 540.)

5.2.6 Statement of the Case[252]

Rule 8.204(a)(2)(A) requires the brief to "state the nature of the action, relief sought in the trial court, and the judgment or order appealed from." The purpose of this rule is to give the Court of Appeal a concise overview of the relevant trial court proceedings. Usually this would include, in chronological

[252] This procedure is different in dependency appeals where there is a combined Statement of Case and Statement of Facts. For further information see Part Three, starting at section 2.8, where dependency appeals are discussed in further detail.

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order: the charges,[253] relevant motions and rulings, the type of proceeding,[254] the verdict or other result, the judgment and sentence, and the date the notice of appeal was filed.[255]

The statement should include only information relevant to the issues or necessary to give the appeal an intelligible setting. It should not quote or paraphrase pleadings or other documents extensively or offer excessive detail about dates and procedures not material to the issues. One page or less will often suffice. If numerous charges and convictions are involved and the information is relevant to the appeal, a chart may be useful. The key is to offer the court procedural context and focus.

Factual matters mentioned in the statement of the case (and elsewhere) must be supported by citation to the record – usually to the clerk's transcript in this section of the brief. The citation must include the volume if applicable and the exact page where each matter can be found. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

Citations within a paragraph need not follow every sentence or individual bit of information if they are all to the same page of the transcript. But they must be provided at least at the conclusion of each paragraph and be sufficiently frequent to pinpoint precisely where the information can be located. It is unhelpful and improper to offer a long narrative followed by a sweeping citation – e.g., "2 C.T. pp. 2-135."

5.2.7 Statement of Facts

This statement summarizes the facts of the underlying offenses. It is required by rule 8.204(a)(2)(C), which provides the opening brief must include "a summary of the significant facts limited to matters in the record." The facts must be supported by citation to the record, including the volume if applicable and exact page where the fact can be found. (Rule 8.204(a)(1)(C); see *Berg v. Traylor*

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[253]Normally the charges mentioned in the statement of the case would be those in the last accusatory pleading (information or indictment). It is unnecessary to mention earlier versions of the pleading superseded by amendment unless they are relevant to the issues in the case.

[254]E.g., jury or court trial, guilty plea, probation revocation, Welfare and Institutions Code section 602 or 6600 proceeding.

[255]If the notice of appeal was constructively filed – e.g., under *In re Benoit* (1973)10 Cal.3d 72 – note that fact.

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(2007) 148 Cal.App.4th 809, 812, fn. 2.) Generally, in the statement of the facts, citations will be to the reporter's transcript. As with the clerk's transcript, these citations should be sufficiently frequent to pinpoint for the reader precisely where the information can be located. It is unhelpful and improper to offer a long narrative followed by a sweeping citation – e.g., "R.T. pp. 48-125."

If the appeal follows a guilty plea, the facts may be gleaned from the preliminary hearing transcript, the defendant's statements in court, the probation report, and other sources. Counsel should be aware that all details in such sources are not necessarily official "facts" and should take care to note this in the brief when the sources cited contain potentially prejudicial information not admitted by the plea. If the change of plea form or colloquy includes a specific factual basis of the plea, that language can be used for the statement of facts.

As the rule indicates, the presentation should be "summary" and include "significant" facts. A tedious recitation of every detail found in the transcripts, whether material or not, is boring and distracting. More specific details can always be set forth in particular argument sections, where facts will be fresh in the reader's mind and the relevance of the information will be evident. However, the exposition of the facts should provide sufficient information for the court to understand why the defendant was convicted and to assess the issues in light of the whole case. Thus, a careful balance must be reached.

While repetitive recitation of dates which are not necessary to the issues should be avoided, key dates should be included, such as the dates of the offense, when the Information was filed, when trial began, and when sentencing occurred. If the case wherever to be relitigated, such as after ameliorative resentencing or habeas corpus, key dates might become essential for such matters as ex post facto determinations.

The overall goal in presenting the facts is to start the job of persuading the court to reach the desired result. The facts offer a chance to tell a coherent story, to humanize the client, to set forth the basis for the legal arguments, and to build both counsel's and the client's credibility. The following guidelines help achieve these goals.

Respect the facts favorable to the judgment

It has been conventional wisdom for years that California reviewing courts require appellate briefs following a jury trial to "state the facts in the light most favorable to the judgment." But this obviously cannot be right; it would, for instance, preclude including evidence that impeaches prosecution witnesses. In fact, every California Supreme Court case cited for this purported rule is actually

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addressing *insufficient evidence arguments*, not the statement of facts generally. (For instance, see a case often cited for this idea, *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Notably, within an argument challenging the sufficiency of the evidence, impeachment evidence is most likely not relevant and should not be included. But that does not mean it should not be in the statement of facts of the same brief.

So rather than "state the facts in the light most favorable to the verdict," a more appropriate framework for the statement of facts in an appellant's opening brief is "respect the facts favorable to the judgment."[256] After reading a statement of facts, the reader should have a clear understanding of what led to appellant being convicted, including all the evidence supporting proof of the elements of the charges resulting in convictions. The statement should not omit any material evidence supporting the judgment, even if – indeed, *especially* if – it is unfavorable to the client.

Evidence presented by the losing party should be noted as such,[257] or put in a separate "defense evidence" subsection of the statement of facts. (In a typical defendant's appeal, the statement of facts would include a separate section labeled "defense.")

Including evidence inconsistent with the judgment (e.g., evidence impeaching a prosecution witness) is often important to set the stage for arguing error (such as failure to instruct on a certain defense) or for demonstrating prejudice. Further, omission of facts favorable to the client is usually poor advocacy. The goal is not to induce the court to despise and reject the client's case, but rather quite the opposite: the facts should deftly draw the court into seeing the case from the client's point of view, so that it will be receptive to the client's contentions and the need for relief. A skillful presentation honestly

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[256]Different rules may apply when there has been no resolution of the underlying facts – for example, a judgment on a demurrer, summary judgment in a civil case, etc. Many specific issues – such as instruction on a particular defense – are likewise judged by a different presumption, highlighting the specificity of "the light most favorable" framework to issues of insufficient evidence.

[257]For example: "Doe said he was sitting at the bar when appellant entered and started shouting. (2RT 445.) But Jones, called by the defense, testified that Doe had gone out the back door to smoke and only came back inside when appellant was walking back out the front door. (4RT 736.)"

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renders the facts in a way even the opposing party would agree is fair, while guiding the court to accept the client's position on the issues.

Do not inject opinion into the Statement of Facts

The statement should have only "facts." It should not contain arguments or judgment about the facts. For example, this section is not the place to express the explicit opinion that a certain witness was "thoroughly impeached", or a scientific test was "unreliable."

Nevertheless, it is proper and indeed usually advisable to state objectively evidence that might suggest such a conclusion:

> The eyewitness observed the defendant from more than 200 feet away at 11:00 p.m. in an unlighted alley. (2 R.T. pp. 280-281.) She was not wearing her glasses to assist her 20:400 vision. (2 R.T. p. 285.)
>
> The accident reconstruction expert used a homemade device, fashioned from roller skates and never subjected to clinical testing, to conclude the defendant's car was going at speeds more than 100 m.p.h. (2 R.T. pp. 455-456, 470.)

But the facts should be stated, as just illustrated, in the neutral tone of a reporter, not the opinionated voice of an editorial writer (or advocate). The argument section of the brief is the place to urge the conclusions to be reached from these facts.[258]

Tell a short, readable story; do not simply repeat the testimony

The statement of facts should tell a story – normally, a chronological narrative of the material events constituting and surrounding the underlying offense. (E.g., *Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 931, fn. 1 ["jumbled gestalt . . . is not very helpful in explaining to the reader what the facts of the case are"; instead, court follows "chronologically oriented statement of

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[258] The courts are mindful of an improper rendition. "Appellants' statement of facts is argumentative, incomplete and contains statements which stretch the bounds of reasonable advocacy. . . ." (*Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1345.)

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facts" in opposing brief].) It should strive to capture the interest and concern of the reader. An encyclopedic witness-by-witness recapitulation of the testimony (rather like a deposition summary) is rarely helpful to understanding the case and is almost never engaging or persuasive. A series of paragraphs starting "Witness A testified that . . ." and "Witness B testified that . . ." is usually a tip-off that the statement has rendered the facts mechanically, rather than thoughtfully.[259]

The statement should be as short as possible, including only information that has some bearing on the outcome of the appeal or that is necessary to understanding the context of the facts and issues. If the nature of the case demands a lengthier statement, descriptive subheadings can be useful. For example, subheadings can segregate evidence involving multiple incidents ("February 5 robbery at Vons"; "March 1 robbery at Mobil station").

In dependency cases, it is rarely helpful to submit a report-by-report or hearing- by-hearing summary of the transcripts. Doing so may bore or confuse the reader and considerably lengthen the statement of facts. The statement of facts should read like the story of a family.

Be meticulously accurate

Nothing destroys counsel's and, derivatively, the client's credibility more than an inaccurate presentation of the facts or inaccurate (or missing) citations to the record. This is especially true, of course, of material facts; but inaccuracy on even collateral details will erode and ultimately undercut the effort to persuade. Inaccuracy includes relevant and misleading omissions, as well as affirmative misstatements. (See § Accuracy, *post*, on credibility and accuracy as one of the essentials of persuasiveness.)

Observe the confidentiality of certain records and respect the privacy of participants

In preparing the statement of the facts, counsel should guard against disclosure of information protected by law, court order, or judicial policy. Details

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[259] Common sense may dictate otherwise in a particular situation. For example, occasionally it is necessary to highlight who said what – e.g., "witness A said the robber was tall and skinny; witness B was quite certain he was short and stout."

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from probation and diagnostic reports, transcripts of in-camera proceedings, sealed records, juvenile court records, and similar matters, unless elsewhere disclosed in the public record, should not be included in the facts. If necessary for presentation of the case, the confidential facts should be included in an unredacted brief filed under motion to seal (Cal. Rules of Court, rule 8.46(f)(4) & (g)(2)), along with a public redacted brief. (See § 5.2.12 Protecting confidentiality, *post*, for more detail.) The ADI website also offers extensive analysis and guidance on confidential records and briefs referring to them.

In dependency cases, all surnames are confidential, as is the address of confidential caregivers.[260] (Welf. & Inst. Code, § 308, subd. (a).) Similarly, "protected persons" – including victims of sex crimes, minors innocently involved in court proceedings, LPS conservatees, trial jurors and sworn alternate jurors, and some victims and witnesses in criminal matters – generally should be kept anonymous. Counsel may refer, for example, to "Susan T.," "the complaining witness," "the child," "J.L.," etc. Identifying information – e.g., last names, middle names or middle initials, street addresses, full birth dates, parent's last name if same as minor's, etc. – should also be avoided. (See California Style Manual (4th ed. 2000) §§ 5.9, 5.10.)

5.2.8 Argument: Preliminaries

Before beginning the legal analysis, a brief writer must give thought to how the arguments will be set up and organized.

Order of arguments

The order in which the arguments are arranged can be a significant strategic decision. A common rule of thumb is that the strongest issues should go first. It is indeed a poor tactic to start off a brief on the wrong foot with a marginal issue.

However, leading off with an issue of very narrow scope, even if the strongest in terms of likely success, can diminish the stature of later, broader arguments. In criminal cases, for example, issues concerning trial would normally precede sentencing issues because the former tend to be perceived as

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[260]When sending transcripts to the client, appellate counsel is generally advised to redact caregiver surnames. If the transcripts are in electronic form, it may be necessary to contact the court for a redacted electronic form. Consult ADI.

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the "bigger" ones. An argument urging the sentence must be reduced from 35-to-life to 34-to-life may be a "slam dunk," but putting it in a lead-off position tends to relegate to second-class status an attack on the defendant's confession that formed the basis for the whole conviction.

A broadest-to-narrowest arrangement of groups of issues, with the stronger points first within each group, is often a good solution.[261]

Headings

Argument headings are required by rule. A brief must "state each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).)[262] To comply with this requirement, the heading must be a complete sentence, not just a label.

Minimal compliance with rule requirements is a bare beginning, not an end. Much more, the heading is a tool of advocacy that should communicate the client's position to the court instantly, concisely, and compellingly. The goal is that the court upon reading the heading will think, at least tentatively: "That sounds like a really good point. I wonder how the respondent will be able to counter it."

To be persuasive, the heading should be specific, not just general and conclusory, and should succinctly explain the underlying rationale of the argument. (A "because" clause is often helpful in achieving this goal.) For example, a heading for a contention concerning the admissibility of a confession because of an alleged *Miranda*[263] violation could variously be worded:

- *Label (unacceptable):* "Inadmissible Confession."

- General and conclusory (unpersuasive): "The Confession Was Inadmissible."

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[261]Depending on the issues, however, a chronological sequence may be appropriate, for instance, for pre-trial issues (suppression, in limine, voir dire), trial (sufficiency, instructional error), and then sentencing issues.

[262]The court may disregard a point not mentioned in a heading or subheading. (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 84, fn. 1.)

[263]*Miranda v. Arizona* (1966) 384 U.S. 436.

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- *Specific and explanatory (begins the job of persuasion):* "The Confession Was Inadmissible Because It Was Elicited by Continued Questioning After Defendant Unequivocally Invoked His Right to Silence."

Insufficiency of the evidence to support a robbery conviction might be described in these ways:

- *Label (unacceptable):* "Insufficient Evidence."

- *General and conclusory (unpersuasive):* "The Evidence of Robbery Was Insufficient."

- *Specific and explanatory (begins the job of persuasion):* "The Evidence of Robbery Was Insufficient Because the Victim Admitted She Was Never Subjected to Any Intimidation, Force, or Threat of Force."

Subheadings are helpful, particularly if the argument is complex, but should not be overused to the extent they visually clutter the brief or distract the reader by accentuating the organizational scheme instead of the substance.[264]

Defining the issue at the outset

In the text of the argument, the contention and desired result should come first. The appellate court wants to know up front what the trial court allegedly did wrong, what legal theory supports that allegation, and what conclusion to draw from the errors. This sets up the conceptual framework for assimilating the facts and law. Sometimes the argument heading is sufficient for this purpose, but with more complicated issues an expanded explanation of several sentences (or, very rarely, paragraphs) is usually needed.

[264]As a matter of good style, no subheading should stand alone. If there is an "A,"for example, there should also be a "B"; a "1" requires a "2," etc.

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Setting the procedural and factual context of the issue before reviewing the applicable law in depth

This point is critical – and often not observed: *The argument should never dive into an abstract legal discussion without first relating it to the facts of the case*. The Court of Appeal wants to know right away whether the issue was raised below, how the trial court ruled on it, and what reasons the trial court gave. It also wants to know the facts that gave rise to the contention.[265]

The court is exceedingly busy deciding cases and is unlikely to be receptive to anything it perceives as extended academic discourse. Indeed, the court may well lose interest altogether and turn to the respondent's brief to find out what the case is about. Having the court learn about one's own issues from the opposing party is a disaster of high order in the effort to persuade.

Addressing questions of potential waiver or forfeiture

The Court of Appeal always wants to know how the issue was dealt with in the trial court. One reason is to assure itself that the issue has been properly preserved for review on appeal. Failure to make a proper objection or otherwise raise an issue in the trial court often means it is forfeited or waived,[266] for purposes of appellate review. (E.g., *In re E.A.* (2012) 209 Cal.App.4th 787.) If there is any obvious question of forfeiture, the opening brief should address the problem forthrightly. Experience shows an opponent is quick to notice and raise such matters.

Many strategies may be used to overcome potential forfeiture obstacles:

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[265]Within an argument, the facts related to a given issue are not necessarily stated in a light favorable to the judgment. For example, if an issue is failure to instruct on self-defense, the evidence supporting self-defense should be described as if it were true; the appellate court need not defer to the jury as trier of fact when the jury has never had a chance to consider the matter.

[266]Technically, "waiver" refers to an explicit and intentional relinquishment of a right, while "forfeiture" refers to loss of entitlement to raise an issue on appeal because of failure to follow procedures required to preserve it. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) The distinction was largely ignored in older opinions, which used "waiver" for both meanings.

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- The opening brief may contend that no objection was *necessary* because the error was jurisdictional, obvious, or fundamental or involved purely legal issues or a sua sponte duty. (E.g., Pen. Code, § 1259; *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484; *People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383 [errors in instructions given can be raised without objection if they affect substantial rights]; *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [unauthorized sentence may be corrected at any time];[267] *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 115-117.)

- The brief can urge that an objection adequate to preserve the issue *was* made, even though not exactly in the same form as on appeal because it gave the trial court a fair opportunity to rule on the essence of the matter and gave the opponent an adequate chance to present argument and evidence on it. (E.g., *People v. Partida* (2005) 37 Cal.4th 428, 431, 435 [objection under Evid. Code, § 352 adequately apprises trial court of argument that admission of evidence would have legal consequence of violating federal due process and so preserves due process issue for appeal];[268] *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.)

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[267]Cf. *People v. Welch* (1993) 5 Cal.4th 228, 235 (impermissible probation condition not an "unauthorized sentence" for this purpose and requires objection).

[268]*Partida*'s rationale is rather abstruse. It distinguishes the question whether the trial court committed error for reasons other than those stated in the trial objection from the question whether the alleged error in overruling the objection violated due process. Counsel should frame the issue as exactly as possible in the terms used in the opinion, to distinguish earlier, closely similar cases, with which *Partida* apparently does not disagree, such as:

- *People v. Rowland* (1992) 4 Cal.4th 238, 273, fn. 14: "Defendant claims that by denying his motion, the court committed error not only under Evidence Code section 352, but also under the United States Constitution including the due process clause of the Fourteenth Amendment. He failed to make an argument below based on any federal constitutional provision. Hence, he may not raise such an argument here."

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- The brief can urge the Court of Appeal to overlook the default in the interests of fundamental *due process*. (E.g., *People v. Barber* (2002) 102 Cal.App.4th 145, 150; *People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn.1; *People v. Norwood* (1972) 26 Cal.App.3d 148, 152-153.)

- It may argue an objection would have been *futile*, given the state of the law at the time or the trial court's previous rulings. (*People v. Turner* (1990) 50 Cal.3d 668, 703 [pertinent law changed so unforeseeably after trial it is unreasonable to expect defendant to have made anticipatory objection]; *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 [futile to object to multiple incidents of judicial misconduct].)

- If the case is a potential vehicle for a newly announced objection requirement, the brief may argue it would be *unfair* to hold the defendant to it. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238 [requirement of objection to probation condition not retroactive; unfair to hold defendant to standards not in existence at time of sentencing].)

- The issue might be raised via ineffective assistance of counsel, arguing on appeal or in a habeas corpus petition that the attorney either could not conceivably have had a reasonable tactical purpose for failing to object or did not in fact have such a purpose. (E.g., *In re Rocha* (2005) 135 Cal.App.4th 252; *People v. Burnett* (1999) 71 Cal.App.4th 151; see *People v. Mitchell* (2008) 164 Cal.App.4th 442 [such an argument must be developed properly, explaining how counsel's failure fell below an objective standard of reasonableness and resulted in prejudice].)[269]

- *Duncan v. Henry* (1995) 513 U.S. 364, 366: "The California Court of Appeal analyzed the evidentiary error by asking whether its prejudicial effect outweighed its probative value, not whether it was so inflammatory as to prevent a fair trial. . . . [T]hose standards are no more than 'somewhat similar,' not 'virtually identical.' . . . [M]ere similarity of claims is insufficient to exhaust."

[269]It is rarely proper to raise ineffective assistance of counsel as an issue on appeal, as opposed to habeas corpus. The issue should not be raised in an appellate brief except in the unusual circumstance where (a) there are no

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If one or more of these arguments or some equivalent cannot credibly be made, counsel should seriously question whether the issue should be raised at all. For additional information, see the ADI article, "Forfeiture".)

Identifying the standard(s) of review

To assess the arguments the reviewing court needs to know the degree of deference it must give to the trial court's findings. At some point in the argument, therefore – usually early – the relevant standard or standards of review must be established. This part of the argument may discuss, as well, which party has the burden of proving or disproving the error and how heavy that burden is. Unless the standard of review is in dispute, the discussion should be short. (See § 4.4.2 Standard of review: Degree of deference to findings below.)

The most common standards of review are abuse of discretion, substantial evidence, and de novo. When an issue involves both factual and legal issues, a mixed standard may be applied.

Abuse of discretion

Under this standard, the reviewing court will not second-guess the trial court's exercise of judgment unless no reasonable judge could have reached that result. (*People v. Williams* (1998) 17 Cal.4th 148, 162; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977; see § Abuse of discretion.) This standard is applied to a wide range of decisions involving the conduct of the trial – severance or joinder, change of venue, admissibility of evidence, order of proceedings, continuances, sentencing, etc.[270]

The theory is that the trial court is in the best position to observe the proceedings, parties, jurors, witnesses, etc., and to make judgment calls about the steps needed to handle the case in an orderly way. In addition, a reviewing court's

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conceivable tactical reasons for counsel's actions or (b) the record affirmatively shows that trial counsel in fact did not have valid reasons for the actions. In most cases, establishing ineffective assistance of counsel depends on facts outside the appellate record and thus requires habeas corpus. (See 8.1.1 Uses of Habeas Corpus Often Encountered in Criminal and Juvenile Appellate Practice.)

[270]A decision by a trial court based on an error of law is an abuse of discretion.(*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737,746.)

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routine substitution of its judgment for that of the trial court would undermine the trial court's authority.

Substantial evidence

The "substantial evidence" standard is like "abuse of discretion" in the degree of deference but is applied to factual findings rather than the exercise of judgment. (See § Substantial evidence.) Under this standard, the reviewing court will not disturb the findings of the trier of fact unless the findings are not supported by substantial evidence – which means no reasonable trier could have made those findings under the applicable burden of proof. (*Jackson v. Virginia* (1979) 443 U.S. 307; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) For example, in a criminal case the Court of Appeal will not reverse a jury verdict of guilty for insufficient evidence unless no reasonable jury could have found guilt beyond a reasonable doubt. It will not disturb a trial court's finding of *fact* on a search and seizure issue unless no reasonable judge could have made that finding by a preponderance of the evidence.[271] (*People v. Lawler* (1978) 9 Cal.3d 156, 160.)

The theory is that the jury or trial court is in the best position to observe the demeanor of witnesses and can weigh evidence more accurately than an appellate court looking at a cold record. A jury also brings into the courtroom community values and collective common sense. To preserve the authority of the jury or trial court and ensure reasonable finality of their decisions, the system has given them the institutional role as primary trier of fact.

De novo review

The reviewing court does not defer at all to the lower court under the "de novo" standard, which applies most commonly to issues of pure law. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242-1243; see § De novo.) Examples might be the interpretation of a statute, the legal correctness of a jury instruction, the *reasonableness* of a search and seizure, or the constitutionality of a certain procedure.

The theory here is that a reviewing court is institutionally in a superior position to decide a question of law: its judges occupy higher office than trial

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[271]The question whether the search or seizure was *reasonable* is one of law, not fact, and is governed by another standard. See §§ De Novo Review and Mixed Standard of Review, *post*.

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judges and usually have more experience in the law; appellate decisions are collective; and the court's fundamental processes are intrinsically deliberative. Further, the law is supposed to mean the same no matter where in the jurisdiction it is being applied; assigning trial judges the final say on the law, with only deferential review, would almost certainly fragment legal interpretation and introduce inconsistency and unpredictability into the system.

Mixed standard of review

If the issue has mixed questions of fact and law, the appellate court will apply the deferential "substantial evidence" standard to the factual questions and the de novo standard to the legal ones. (See § Mixed standards.) An example is a search and seizure issue. What observations the officer made before conducting a search would be a factual question, and the reviewing court will defer to the trial court's findings if they are reasonable, i.e., supported by substantial evidence. The question of whether the search was reasonable given these observations, on the other hand, is a legal one, to be reviewed de novo. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

5.2.9 Legal analysis

Once the argument is introduced and its context is established as described above, the legal framework must be constructed. The principles and authorities governing the issue need to be set forth, and the law must be applied to the present case – the most important and often most difficult part of the argument.

Rule 8.204(a)(1)(B) requires the brief to "support each point by argument and, if possible, by citation of authority."[272] That requirement is deceptively simple. As all experienced appellate lawyers recognize, good advocacy requires more than "some" argument and "some" citation of authority, even though that may satisfy the minimum requirements of the rules. The goal is to support each

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[272]"'Where a point is merely asserted [by counsel] without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.' (Citation.)" (*People v. Morse* (1993) 21 Cal.App.4th 259, 275; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793 [if point not supported, court may treat it as waived]; *Jones v. Superior Court* (1994) 26 Cal.App.4th. 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived"]; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1118.)

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argument with the skillful use of legal reasoning and authority and to structure it so that it is logical, clear, concise, and persuasive. The following principles offer a guide to this often-elusive goal.

Setting forth the law: Analogy and analysis

Persuasive explication of the law requires analysis, not just description. A series of paragraphs beginning, "In *People v. X*, the court held . . . ," with no effort to explain X's concrete relevance to the issue at hand, does not advance the argument very far or hold the audience's attention very long. You will rarely have authority so completely on point that no discussion is necessary.

While "issues du jour," which are identical in law, will arise, especially with the enactment of new law or publication of landmark opinions, for the most part, cases will be unique in their facts and the application of law to those facts. Counsel will need to argue why Case A and Case B apply and suggest the conclusions necessary, and why Case C does not suggest a contrary conclusion (i.e., why it can be distinguished). Counsel will need to deal with general principles, public policies, rules, subtle variations of rules, and the reasons behind rules. In short, counsel will have to analyze the law and argue what it means or should mean in the case.

Purposes and policies behind the law

The purposes behind a rule of law are often critical to understanding its meaning. Judicial interpretations and legislative history may also need to be examined. Various sources for statutory history are available.[273] For rule history, the Judicial Council maintains materials showing the reasons behind the adoption, amendment, or repeal of a rule of the California Rules of Court. It is available online for the years 1997 and later.

Adverse law and significant counterarguments

For both ethical and credibility reasons, counsel must advise the court of binding adverse authority. The authority needs to be confronted and either

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[273]For example, the Legislature has a website, https://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml, as does the California State Archives, http://www.sos.ca.gov/archives. Commercial research sites may offer easily navigated sources.

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distinguished or challenged as wrong. Even if the authority is not strictly binding, if it is highly persuasive – as with direct Court of Appeal precedents or strong dicta from the California or United States Supreme Court – the brief should almost always acknowledge it.

Consideration should also be given to citing prominent adverse decisions from a federal court of appeals (especially the geographically local court – in California, the Ninth Circuit) or an exceptionally well-known decision from another state. Citing such authority lends credence to the brief and offers the opportunity to blunt the impact of the adverse law before the opponent has a chance to exploit it.

For the same reasons, it is usually a good idea to discuss up front obvious points almost surely to be raised by opposing counsel or discerned by the court, rather than saving rebuttal for the reply brief. Otherwise, the court will be left at the end of the opening brief with an almost inescapable question: "But what about . . . ?" Such a question subverts the goal of having the court finish the opening brief at least tentatively persuaded on the merits. Waiting for the reply brief also runs the all-too-frequent risk that the respondent will miss the counterargument, but the court will not. That means the rebuttal may be presented for the first time at a highly disadvantageous stage (a petition for rehearing) and may be held to have been forfeited altogether.

On the other hand, as the probability decreases that a particular non-binding authority or counterargument will be used, counsel confronts contrary strategic considerations. It may not be a good idea to invite attention to a potential weakness that may never otherwise be perceived or to create several "straw men" merely for the purpose of rebutting them. It is weak advocacy to structure an argument around a series of points beginning, "The respondent may contend that . . . ." Counsel must weigh the relative advantages of raising the point spontaneously versus keeping the focus on the strongest and most obvious issues until and unless counsel's hand is forced.

Use of quotations

Quotations are most effective (a) when they are used to deliver special dramatic impact or (b) when they are needed to set out exact language. If used for the first purpose (rhetorical effect), quotations *must* be kept concise. Lengthy blocks of quotations not only fail to impress, but also stupefy and inevitably issue a loud invitation, certain to be heeded: "Please ignore me."

If the precise language is at issue, however, as when a statute or jury instruction is being analyzed, full quotation, not just paraphrase, is essential. A

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brief must be adequate within its own two covers to persuade. Forcing the reader to look up something critical in an external source just to understand the argument is annoying, distracting, and potentially dangerous: in the process the brief loses its audience, perhaps permanently. If the quotation is long, the key passage can be emphasized or quoted by itself in the main body, with the full context in a footnote.

5.2.10 Prejudice

An important and often decisive part of the argument is showing the court how the error affected the outcome of the case to the client's detriment. The most compelling demonstration of error will mean nothing if the respondent persuades the court the error had no effect on the case. Indeed, a showing of prejudice is required by the California Constitution, article VI, section 13, Penal Code sections 1258 and 1404, and Evidence Code sections 353 and 354. (See also Code Civ. Proc., § 475.) § 4.4.3 Standard of prejudice et seq. deals at length with issues of prejudice.

Standards

There are three principal standards by which error is assessed:

- reversal per se – the relatively rare standard used for "structural" error that affects the basic integrity of the proceedings;[274]

- reversal unless the record demonstrates the error harmless beyond a reasonable doubt – *Chapman* error,[275] the standard for most federal constitutional errors; and

[274]E.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275; cf. *People v. Aranda* (2012) 55Cal.4th 342; see also § Prejudicial Per Se.

[275]*Chapman v. California* (1967) 386 U.S. 18; see § Reversible Unless Lack of Prejudice Is Shown Beyond A Reasonable Doubt (Chapman).

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- reversal only if the record demonstrates a reasonable probability that but for the error the result would have more favorable for the defendant – *Watson* error,[276] the standard for most errors of state law.

These are not rigid categories allowing for easy pigeonholing of all errors. Their source (e.g. federal Constitution, state law) is one factor. Others include how fundamental or absolute a right or procedure is, and how difficult and speculative the job of assessing prejudice is.

Some areas of the law, such as ineffective assistance of counsel, prosecutorial failure to disclose favorable defense evidence, and conflicts of interest on defense counsel's part, use specialized "boutique" standards of prejudice. (See § Boutique tests of prejudice, et seq.)

Establishing prejudice in the case

Prejudice can be established in several ways. Some kinds of error inherently carry a high probability of prejudice, such as confessions, comments by judges or prosecutors, and evidence of other crimes or gang affiliation. Sometimes the error may be prejudicial because it was exploited or given special prominence by the prosecutor during argument. The error may have directly affected the key issue in the case. The jury may have asked for rereading of testimony or asked questions related to the area of the error. The fact the case was close factually, or the jury deliberated a long time, or the verdict occurred in close proximity to the error may be used to establish prejudice. See § 4.4.3 Standard of prejudice et seq.

5.2.11 Federalization

It can be important to "federalize" an issue where appropriate – that is, show the applicability of federal law (usually, the federal Constitution). Doing so gives the client the opportunity to present the claim in federal court by certiorari or habeas corpus. (See *Duncan v. Louisiana* (1995) 513 U.S. 364, 365-366; see also 28 U.S.C. § 2254(b)(1)(A) [a state petitioner must exhaust all available state

[276] *People v. Watson* (1956) 46 Cal.2d 818; see § Not Reversible Unless the Appellant Shows It Is Reasonably Probable The Error Affected The Outcome (Watson). *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th704, 715, italics original: "'[P]robability' in this context does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*."

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remedies before seeking federal habeas corpus relief].) (See Exhausting State Remedies article, ADI website.)

Issues that might be federalized

Many issues directly implicate federal law, such as self-incrimination, cruel and unusual punishment, and double jeopardy. Other federal issues may be less obvious. For example, the clear misapplication of state constitutional, statutory, or case law may constitute a deprivation of federal due process or equal protection. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [state sentencing statute created liberty interest in right to jury sentencing]; see *Toney v. Gammon* (8th Cir. 1996) 79 F.3d 693, 699-700 [defendant had federal due process liberty interest in being sentenced under correct interpretation of state statute, which required trial court to exercise discretion]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [liberty interest in application of state statute requiring trial court to make individualized determination as to whether defendant is habitual offender]; *Rust v. Hopkins* (8th Cir. 1993) 984 F.2d 1486, 1493 [liberty interest in having sentencing authority apply statutorily prescribed standards and procedures]; *Willeford v. Estelle* (5th Cir. 1981) 637 F.2d 271, 272 [liberty interest in having trial judge exercise statutorily prescribed sentencing discretion].)[277]

Accordingly, counsel should consider federalizing such issues as insufficiency of the evidence (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319), sentencing violations, cumulative error (*People v. Woods* (2006) 146 Cal.App.4th 106, 113, 117-118), flawed inquiry into competence to stand trial (Pen. Code, § 1368; *Drope v. Missouri* (1975) 420 U.S. 162), and any trial error or instructional error that "so infused the trial with unfairness as to deny due process of law" (*Estelle v. McGuire* (1991) 502 U.S. 62, 75).

Method of federalizing an issue in the brief

Although federalizing an issue need not be time-consuming or elaborate, the issue needs to be sufficiently highlighted and well developed to give the state court notice it is being raised as a separate ground for relief. (See § Federal

[277]Cf. *Rivera v. Illinois* (2009) 566 U.S. 148, 157 (good faith error by trial court in denying defendant's peremptory challenge to a juror is not federal constitutional error).

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habeas corpus as additional or alternative remedy et seq.) For this purpose, it is important to:

- State the federal claim in a *heading or subheading* of the argument and not bury it in the text.[278] (See Cal. Rules of Court, rule 8.204(a)(1)(B).)

- Set forth the specific *factual* bases for the federal claim. (*Kelly v. Small* (9th Cir. 2002) 315 F.3d 1063, 1069.)

- Cite the specific federal legal *authority* for the claim, including the federal constitutional provisions relied on and any leading cases, especially those of the United States Supreme Court. (*Gray v. Netherland* (1996) 518 U.S. 152, 162-163.)

- Present *argument* (not a bare, conclusory claim), articulating a legal theory for why the facts violated the constitutional provision. (*Castillo v. McFadden* (9th Cir. 2004) 399 F.3d 993, 1002.)

Follow-through needed to exhaust state remedies

Exhaustion of state remedies requires a petition for review to the California Supreme Court. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.) The petition must raise the federal issue sufficiently prominently to put the court on notice of its presence in the case. (*Baldwin v. Reese* (2004) 541 U.S. 27, 30-32; *Gray v. Netherland* (1996) 518 U.S. 152, 162-163; *Anderson v. Harless* (1982) 459 U.S. 4, 7; *Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987; *Hiivala v. Wood* (9th Cir. 1999) 195 F.3d 1098, 1106.)

Rule 8.508 allows an abbreviated petition for review when the primary intention is to exhaust state remedies, and the case does not present grounds for plenary review by the California Supreme Court within the terms of rule 8.500(b).

If the Court of Appeal omits an issue in its opinion, the Supreme Court normally will decline to review it unless the omission is called to attention of the

[278]The state court may disregard a point not mentioned in a heading or subheading (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 84, fn. 1), thus running the risk, the federal court will find procedural default.

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Court of Appeal in a petition for rehearing. (Rule 8.500(c)(2).) To avoid possible procedural default, it is therefore advisable to file a petition for rehearing.

5.2.12 Protecting confidentiality

Counsel should take care in briefing not to disclose confidential matters that may be in the record. This problem arises in all juvenile cases, where both the transcripts and the briefs are closed to public inspection (Welf. & Inst. Code, § 827; Cal. Rules of Court, rule 8.401), and in cases with sealed records (rule 8.46). It also may come up in cases involving, for example, *Marsden* and related records, probation and diagnostic reports, defense requests for expert funding, confidential informants, medical records or psychological evaluations in dependency cases, etc. In all such cases, counsel should consider the possibility that the need for confidentiality persists after trial and, if so, should avoid inappropriate disclosure. (See rule 8.46(g) [disclosure of nonpublic material in public records prohibited].)

If reference to non-public matters is essential, counsel may file a complete, unredacted brief with a motion to seal[279] and a public, redacted version deleting references to the confidential matters. (Cal. Rules of Court, rule 8.46(f)(4).) In redacting, however, counsel must remove *only* legally protected or sealed material from the public brief. The public has a First Amendment right to access court records unless otherwise provided by law. (See also Code Civ. Proc., § 124; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178.)

If the confidential material was protected from disclosure to the prosecution, and counsel concludes the need for confidentiality continues on appeal,[280] counsel may seek a protective order guarding against disclosure by the Attorney General to the trial prosecutor. (See *James G. v. Superior Court* (2000) 80 Cal.App.4th 275, 277, fn. 1, & 284.) If that measure is not possible, appellate counsel may consult with trial counsel and the client on the relative merits of waiving the issue versus waiving confidentiality.

The possibility of the court's denying sealing raises practical considerations. Under rule 8.46(d)(7), the unredacted version will be returned

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[279]Motions to seal should explain why sealing is necessary under the criteria laid out in rule 2.550(c)-(e). (Rule 8.46(f)(5).)

[280]Usually, the need for protecting against disclosure of the defense no longer exists on appeal because the defense was revealed at trial. Appellate counsel should consult with trial counsel when in doubt.

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unfiled unless within 10 days the party informs the court it elects to file it publicly. Because that period may be insufficient to obtain the client's consent to waive the issue or forgo confidentiality, counsel must seek the client's decision proactively at an early stage.

Sometimes counsel will not have access to the confidential records – for example, those involving *Pitchess* motions[281] and confidential informants.[282] In those situations, counsel may merely refer to the fact that an in-camera hearing was held and ask the Court of Appeal to review the record for error, without briefing from either party.[283]

Briefs should also be sensitive to privacy interests in identifying people, whether on the cover, in headings, or in the text. Victims of sex crimes and parties involved in juvenile court or other confidential proceedings generally should be kept anonymous – e.g., "Susan T.," "the complaining witness," "the child," etc. (See California Style Manual (4th ed. 2000) §§ 5.9, 5.10.)

5.2.13 Joinder with other parties' arguments

If there are other parties in a single appeal with compatible positions, counsel may divide briefing responsibilities among them and then join each other's arguments. This approach is indeed highly encouraged, because it promotes judicial economy. It is approved by the rules 8.200(a)(5), 8.360(a), and 8.412(a).

A simple joinder may be sufficient if the original briefing is fully satisfactory and the issue applies identically to each defendant. Many issues, however, will require individualized argument on such matters as whether it was properly preserved, how it applies to the client, how it may have prejudiced the client, what remedy is appropriate, etc. Counsel's responsibility is to represent

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[281]*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (defense motion for disclosure of complaints of misconduct made against an officer, when potentially relevant to the defense). (Evid. Code, §§ 1043-1047; Pen. Code, §§ 832.5, 832.7, 832.8; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1227.

[282]Evidence Code sections 1041 and 1042; *People v. Hobbs* (1994) 7 Cal.4th 948.

[283]The defendant, not the court, is responsible for augmenting the record to include those confidential records. (*People v. Rodriguez* (2011) 193 Cal.App.4th 360.) The augmented record is only sent to the court.

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the individual client as effectively as possible, and that includes any matters in which counsel joins.

Especially egregious are arguments joining other parties' points "to the extent they may benefit my client." This approach suggests counsel expects the court or opposing counsel to decide what benefits the client and how. It is an abdication of counsel's own responsibility to do exactly that. (*People v. Bryant* (2014) 60 Cal.4th 335.) If the brief joined in was filed earlier, counsel must specify what the points joined are and fill in any needed details. If it has not yet been filed, the opening brief may advise the court of the possibility of a later joinder letter or supplemental brief, but counsel must then file whatever document is required to present the issue properly. Joinder should be undertaken before respondent has filed its brief or counsel may risk the court not considering the joinder since respondent has not had an opportunity to respond.

5.2.14 Conclusion to the brief

The concluding section of the brief may concisely summarize the contentions, unless that would be unduly repetitive of the arguments or argument headings. Argument summaries in the conclusion are often valuable in complex issues or cases with multiple issues. The conclusion can offer an excellent opportunity to demonstrate the relationship among the arguments and how they interact to present a compelling case for relief. It is also a good place to remind the court of any "theme" developed through the brief and the implications for the result being urged.

The conclusion should state the exact relief sought for each contention. For example:

> Because the evidence was insufficient to support defendant's conviction of simple kidnaping in count one, the conviction on that count must be reversed and remanded with directions to dismiss the charge without leave to refile.
>
> Because the trial court erred in failing to instruct on the lesser included offense of simple possession of cocaine as to counts two and four, those counts must be reversed for a new trial.
>
> Because the trial court relied on improper factors in imposing the upper term on count three, first degree robbery, the matter must be remanded for resentencing on that count.

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5.2.15 Attachments

Rule 8.204(d) states that "A party filing a brief may attach copies of exhibits or other materials in the appellate record or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible." This approach facilitates the appellate court's review when such materials are important to the resolution of the issues. The combined attachments may not exceed 10 pages without leave of court. (*Ibid.*)

Rule 8.1115(c) requires that any citable[284] unpublished opinion of the Court of Appeal, on request of the court or a party, must be furnished to the court or the requesting party.

5.3 Respondent's brief

Although ordinarily appointed appellate attorneys represent appellants, occasionally counsel is called on to handle a People's or County's appeal or otherwise are cast into the role of respondent. (See Pen. Code, § 1238.) In such a situation, it will be necessary to file a respondent's brief.[285] Many of the principles for good brief writing discussed in the preceding treatment of the appellant's opening brief apply to the respondent's brief. This section addresses a few considerations especially applicable to a respondent's brief.

5.3.1 Importance

A respondent's brief is covered by rules 8.200(a)(2), 8.360(c), and 8.412 and is of supreme importance to the appellate process. It is important

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[284]Rule 8.1115(b) lists the narrow and rare occasions when it is appropriate to cite an unpublished California opinion. For further discussion of publication and citability, see § 7.3.2 How Publication Status Affects Stare Decisis and Citability et seq.

[285]In cases where there are cross-appeals by both the defendant and the People, unless the court orders otherwise the defendant files the first opening brief; the People file a combined appellant's opening brief and respondent's brief; then the defendant files a combined respondent's and reply brief; the People file a reply. (Cal. Rules of Court, rules 8.216(b), 8.360(e), 8.412(a)(2).) A combined brief must address the points in each appeal separately but may include a single summary of the facts. (Rule 8.216(b)(2).)

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systemically: if no respondent's brief is filed, there may not be any defense of the lower court's judgment in the appellate court, and the adversary system on which the decision-making process is based will fail to perform its function.

In addition, filing the respondent's brief is important to the respondent as a party. The respondent's brief is usually that party's one and only chance to make a comprehensive written presentation to the appellate court. The brief responds to the appellant's contentions and offers an opportunity to show how the appellant's arguments are legally or logically flawed and why the authorities the appellant relies on do not compel a conclusion favorable to the appellant. It can call the court's attention to procedural and other formal obstacles to resolution on the merits, such as forfeiture or waiver, invited error, res judicata, collateral estoppel, law of the case, non-appealability, or lack of standing. It can analyze the alleged errors in context and urge that they caused no prejudice to the appellant. It can help the appellate court see the respondent's case through the eyes of the respondent, can take away the momentum established by the appellant having had the stage alone during the opening brief and can ultimately be used to persuade the appellate court that the lower court was correct.

5.3.2 Formal considerations

For the most part a respondent's brief should follow the general form for the appellant's opening brief, as detailed above. Rule 8.204(a)(1) requires a table of contents, table of authorities, headings, argument supported by authority, and citations to the record. A statement of appealability is unnecessary. (See rule 8.204(a)(2).) The brief may adopt the statement of the case and facts in the appellant's brief, if they are satisfactory, but doing so may deprive the respondent of a chance to begin the job of persuasion early in the brief. The rules as to form discussed in § 5.6 Briefing formalities et seq., *post*, apply to a respondent's brief.

5.3.3 Formulation of issues

The respondent should answer the principal contentions by the appellant but is not bound by the formulation and structure. The respondent may restate the issues as the respondent sees them and may rearrange them, if necessary, to make a logical presentation.

Restating the appellant's contentions

The respondent will want to frame the issues in a way most likely to result in a favorable outcome to the respondent. If the appellant has overstated or

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otherwise incorrectly represented the law or facts and formulated the issues accordingly, the respondent must urge the court to view the case from a different perspective.

It is a dubious tactic, however, to recast the appellant's contentions in a form weaker than the appellant presented them and weaker than they really are and answer only the weaker version, hoping the court will uncritically accept the respondent's restatement of appellant's contentions. That approach leaves the respondent vulnerable, since the appellant (who has the last word in briefing) is likely to jump on the failure to answer the real contention;[286] and even if the appellant overlooks the attempted transformation of the issues, the court likely will not.

Ideally, counsel should state the opposing party's contention so skillfully even that party would say, "I wish I had said it that well" – and then refute it. (This does not mean, of course, that counsel for a criminal defendant in a respondent's role should bring up *new issues* on the prosecution's behalf.[287])

Developing issues of procedural default

As noted above, matters such as forfeiture or waiver, invited error, lack of standing, estoppel, and other obstacles to resolution on the merits may prevent consideration of some issues the appellant has raised. Counsel for respondent should review each issue carefully for compliance with procedural prerequisites and point out problems in this area.

Doing so is not just opportunism or mean-spirited insistence on "technicalities." Procedural requirements serve public policy. For example, rules of forfeiture or waiver exist to shield the trial process from endless repetitions because of failure to call a problem to the court's attention at a time when it can be cured on the spot. They also protect parties from being "sandbagged" and having to endure (and, sometimes, pay for) still another trial. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) Rules on res judicata, collateral estoppel, and

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[286]Indeed, failure to address the appellant's contention might even be seen as a concession. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

[287]The Attorney General has somewhat different obligations here, since a prosecutor has a special duty to promote the ends of justice. (*United States v. Agurs* (1976) 427 U.S. 97, 110-111; *In re Ferguson* (1971) 5 Cal.3d 525, 531; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.)

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law of the case serve to preserve the stability of judgments and guard against the costs of repetitive litigation.

Usually, it is advisable for the respondent's brief to address the issues on the merits, even if strong procedural default arguments are made. The court may disagree with the respondent on the question of default. As a matter of self-protection, the respondent will want their arguments and authorities on the merits before the court.

5.3.4 Appellate presumptions and principles

Most presumptions and principles on appeal favor the respondent, and the respondent must be poised to take advantage of them. For example:

- Conflict and silence in the record are resolved in favor of the decision below. (*People v. Woods* (1999) 21 Cal.4th 668, 673; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

- An appellate court will presume the trial court had adequate reasons for a decision, unless the record affirmatively shows otherwise (or unless the law requires reasons to be stated explicitly). (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *People v. Golliver* (1990) 219 Cal.App.3d 1612, 1620.)

- For many issues, the evidence is viewed in the light most favorable to the judgment. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

- The trial court is presumed to know the law. (*People v. Braxton* (2004) 34 Cal.4th 798, 814; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *In re Justin B.* (1999) 69 Cal.App.4th 879, 888; *People v. Torres* (1950) 98 Cal.App.2d 189, 192.)

- Under the "right result, wrong reason" principle, even if the court gave legally incorrect reasons for a decision such as admitting or excluding evidence, no error will be found if legally correct reasons would require the same result. (*People v. Smithey* (1999) 20 Cal.4th 936, 972; *People v. Zapien* (1993) 4 Cal.4th 929, 976; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)

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- The jury is presumed to have understood and followed the instructions if they are correct and consistent. (*People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Rich* (1988) 45 Cal.3d 1036, 1090; cf. *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.)

- Judges, clerks, and court reporters are presumed to have performed their duty. (*People v. Wader* (1993) 5 Cal.4th 610, 661; *People v. Ward* (1953) 118 Cal.App.2d 604, 608; see Evid. Code, § 664.)

- For most kinds of error, the burden is on the appellant to show prejudice – that is, to prove the error affected the result. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)[288]

As respondent, counsel should keep these advantages in mind and make skillful use of them when possible.

5.3.5 Primary focus: salient points in the case

The respondent's brief should always keep in mind the likely response of the court to the conversation between the parties. What did the appellant say that is most likely to persuade the court? The respondent should focus on rebutting or neutralizing that. What are the weakest points in the appellant's case? The respondent's brief should prominently call them to the court's attention and take maximum advantage of them. However, it is poor tactics to point out every trivial error in the appellant's brief, because that can make the respondent look petty and bury the good points among the inconsequential.

5.3.6 Concessions

Occasionally it may be necessary to concede a particular point raised in the opening brief because the appellant has proved it conclusively. In such a case, the respondent's brief should do so forthrightly. It will enhance the credibility of the respondent's entire case and make the arguments on the remaining issues more persuasive because counsel will have shown the ability and willingness to exercise critical judgment in the course of advocacy.

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[288]See § 5.2.10 Prejudice, *ante*, and § 4.4.3 Standard of Prejudice et seq. for further discussion of prejudice standards.

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5.3.7 Steadfast professionalism

Sometimes an appellant will make absurd arguments or attack the respondent or even respondent's counsel personally. It is vital respondent's counsel does not take the bait and answer in kind, but instead keep a professional tone. The court will note and appreciate the difference between the respondent's professionalism in focusing on the merits and the appellant's lack thereof.

5.4 Appellant's reply brief, non-appealing minor's brief, and supplemental brief

5.4.1 Appellant's Reply Brief

The principal formal and practical purpose of a reply brief is to respond to the points and authorities raised in the respondent's brief. Reply briefs in criminal cases are permitted under rules 8.200(a)(3), 8.360(a), and 8.412(a)(1). They are due 20 days after the respondent's brief is filed (rules 8.360(c)(3), 8.412(b)(3)) and should follow the general principles and forms required for all briefs, as detailed in § 5.2 Appellant's opening brief et seq., *ante*, and § 5.6 Briefing formalities et seq., *post*.[289]

Importance of reply briefs

Attorneys in the ADI program are expected to file reply briefs in their cases unless strong justification appears for not doing so. It is a rare case indeed when the opening and respondent's briefs have so thoroughly covered the issues that nothing further could be said on behalf of the client. Further, a reply brief is an exceedingly important tool of advocacy that performs several critical strategic functions:

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[289]In cases where there are cross-appeals by both the defendant and the People or County, unless the court orders otherwise the defendant files the first opening brief; the People or County files a combined appellant's opening brief and respondent's brief; then the defendant files a combined respondent's and reply brief; the People file a reply. (Cal.Rules of Court, rules 8.216(b), 8.360(e), 8.412(a)(2).) A combined brief must address the points in each appeal separately but provide a single summary of the facts.

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- The reply brief is a chance to answer the respondent's arguments and authorities.

- It offers an opportunity to counter procedural obstacles such as forfeiture or invited error and to rebut claims of harmless error.

- A reply brief can take account of new legal developments, arguments by the respondent not anticipated in the opening brief, and other "surprises."

- It can be used to reshape, refine, or bolster arguments that are basically sound but were less than optimally stated in the opening brief. (But see § Restriction against raising new issues, *post*.)

- Replying communicates confidence in the case. Conversely, failing to answer suggests discouragement and resignation to inevitable defeat.

- A reply brief can retake the psychological initiative temporarily seized by the respondent in its attack on the opening brief arguments and redirect the momentum in the appellant's favor. It can show why, despite the respondent's efforts to salvage the case, relief for the client is compelled.

- The reply brief gives the appellant the chance to have the last word in written form and to leave a final impression on the court before it drafts an opinion. (Most if not all California appellate courts have draft opinions or bench memos reaching a tentative conclusion before oral argument.)

Restriction against raising new issues

Although a reply brief may be used to enhance or reshape the approaches taken in the opening brief in light of the respondent's positions, it is not the place to raise truly new issues. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) It properly functions as an answer to the respondent's brief, not as a new opening brief.

If the appellant wants to raise a genuinely new contention after filing the opening brief, the proper procedure is to submit a supplemental opening brief,

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along with a request to the presiding justice for permission to file it.[290] (Cal. Rules of Court, rule 8.200(a)(4); § 5.4.3 Supplemental brief et seq., *post*.) Simply inserting the new issue into the reply brief runs a high risk the court will refuse to consider it. By the time the court gets around to making that ruling, it may well be too late to file a supplemental opening brief; courts in exercising their discretion under rule 8.200 tend not to be receptive to filings changing the basic contours of the appeal after most of the work is done. The issue will then be lost.[291]

Preparing a reply brief

A common first reaction to getting a respondent's brief is to feel daunted. Counsel for the appellant ideally had persuaded himself or herself in the opening brief that this is a strong case. Now the respondent is throwing cold water all over those compelling points and possibly raising some objections counsel had not even considered. The natural temptation is to put the brief away and say, "I'll think about it tomorrow." This may suffice for an initial psychological defense mechanism, but the reply brief is due in 20 days and so soon it is time to reopen the respondent's brief and really think about it.

Often, appellant's counsel is pleasantly surprised. Those confident assertions by the respondent can be answered, the allegedly devastating cases are not so unequivocal as the respondent has painted them, and there really is a good case for showing the client was prejudiced by errors at trial. At this point counsel can recapture the sense of being on the road to a likely win.

The whole focus of the reply brief should be to hammer home the message, "There is no way around it; relief is compelled." For maximum effectiveness, counsel should keep these key goals and concepts in mind:

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[290]In the Fourth Appellate District, if the need for a supplemental brief arises before the respondent's brief has been filed, counsel should move to strike the AOB and file a new brief with the added issue. If the respondent's brief has already been filed, counsel should submit a supplemental opening brief and a separate request for permission to file it.

[291]There is an exception for briefing before the California Supreme Court. California Rules of Court, rule 8.520(d)(1) permits supplemental brief(s) "limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." The brief must be filed no later than 10 days before oral argument. (Rule 8.520(d)(2).)

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Aim for conciseness

The reply brief should be concise and to the point. Although it may be useful to summarize the basic arguments to put the reply in context, there is no need to rehash the opening brief – indeed, doing so at length may prompt the court to stop reading the reply. The purpose is to rebut the respondent's positions and to explain succinctly the reasons the court needs to grant the relief requested, not to reargue the whole case from scratch.

Counsel is well advised to reread the opening and respondent's briefs together before writing the reply. The opening and respondent's briefs typically are filed several months apart, and so the appellant's counsel needs a refresher when resuming work on the case at the reply brief stage. But the court has a different frame of reference: it will probably read all briefs at one sitting and so will find unnecessary repetition boring, even irritating. The reply will be more focused and effective if it just gets to the point.

Take tactical advantage of omissions in respondent's brief or attempts to water down the issues

It is a common tactic on the part of respondents to ignore a position difficult to refute or convert it into something much weaker. The reply brief can take advantage of such tactics by noting the respondent's failure to refute the real argument and insisting that the issues be defined, debated, and decided in the way the appellant has framed them.

Follow Commonsense rules for answering the opponent's points

Many of the principles discussed in § 5.3 Respondent's brief et seq., *ante*, for respondent's briefs apply as well to reply briefs. Counsel should focus on countering the strongest points made by the respondent and calling attention to the areas of weakness. The reply should not pounce on immaterial petty errors in the respondent's brief. If necessary, it should forthrightly concede when the respondent has proved conclusively that a point raised in the opening brief is invalid; this will enhance the credibility of the appellant's entire case and make the arguments on the remaining issues more persuasive.

If the respondent's attorney has adopted a dismissive, scornful, and disrespectful tone, the reply brief should not answer in kind. Counsel need not be worried that the court will be impressed by the respondent's interjections of "nonsense," "balderdash," "hogwash," and other efforts to substitute name-

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calling for analysis; to the contrary, appellant's professionalism will stand in prominent contrast to the respondent's display of the opposite.

5.4.2 Non-appealing minor's brief

The role of a non-appealing dependency minor's attorney has long been the subject of puzzlement. Unlike the usual counsel for an appellant or a respondent, minor's counsel has no pre-determined adversarial position to take. The minor may side with either the appellant or the respondent or stake out an independent position, depending on the issues and the child's needs. Although a traditional adversarial role does not apply, the law nevertheless provides for minor's counsel in the juvenile court (Welf. & Inst. Code, § 317(c)(1)) and, on a determination of need, in the appellate court (Welf. & Inst. Code, § 395, subd. (b); Cal. Rules of Court, rule 8.403(b)(3)).

In theory, minor's counsel role is to determine what result of the appeal is best for the minor. This certainly includes advocating for the minor's wishes, if the client is of an age and mental capacity to have meaningful preferences. But it is not that simple, because counsel also must protect the minor's best interests and above all safety, regardless of the child's wishes. The complexity of the task requires, in some instances, specialized training and consultation with other experts. Regardless, counsel's role on appeal is to advocate for the result preferred by, or in the interests of, the minor, not to act as a "judge" as to whether the appellant or the respondent has the better legal argument.

Appointment of appellate counsel and minor's counsel's guidelines

Appointment of appellate counsel for a non-appealing minor used to be universal in the Fourth Appellate District, although not in other districts. Because the indeterminacy of minor's counsel's role was such a pervasive issue in the district, ADI and other advocates worked with the court to develop minor's counsel guidelines, which laid out the court's expectations and the duties and limitations associated with counsel's role. The guidelines covered such matters as communication and investigation, principles to follow in developing a position, nature of the minor's filings, argument, facts outside the record, and developments in the trial court.

Budgetary constraints ultimately forced the courts to confine appointments to cases where a particular showing of need is made. Generally, the presumption is that the County can adequately fulfill its assigned role of protecting the minor's interests on appeal. But the County also has the assigned role of defending the

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trial court's decision on appeal. When there is doubt the child's interests were well served by the decision below, the County faces a conflict of interest, and the minor may need independent counsel. Other reasons for appointing minor's counsel may include inadequate briefing by either or both of the parties, conflicting interests among minors, the minor's interest in participating, conflict between the minor and trial counsel or the County, post-judgment factual changes, etc. (See Cal. Rules of Court, rule 5.661(f) [factors trial counsel should consider in recommending independent appellate counsel for the minor].) If counsel for another party has reason to believe an appellate attorney should be appointed for the minor, counsel should contact the project and minor's trial attorney.

The minor's counsel guidelines have evolved considerably with new case law and court policy – especially the shift to selective rather than routine appointment of minor's counsel. The Guide for Counsel Representing Minors is on the ADI website. Counsel for minors throughout the state may benefit from them, although always taking care to confirm with the applicable project what local policies may apply.

Briefs and other filings

As to briefing, the role of non-appealing minor's counsel in the former times of routine minor's counsel appointment was an investigative, protective one with the presumptive filing being a joinder letter. This was appropriate because the County was often able to represent the minor without conflict. Under the selective-appointment regimen, however, non-appealing minor's counsel is not appointed unless there is doubt as to the process below or the propriety of a simple joinder. Thus, minor's counsel more often now is thrust into a conventional adversarial advocate's role, where the attorney provides full briefing. Accordingly, the Guide for Counsel Representing Minors provides that the non-appealing minor's filing may be:

- *Letter:* A letter or short letter brief is appropriate if the minor's position is served by joining in the position taken by one of the parties. It may present additional points and authorities. A letter brief is less costly to produce than a full brief, without tables and the like. But if it is more than five pages long, single- spaced reading gets unduly tedious. The filing should then be converted to a conventional brief.

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- *Brief:* Full briefing is appropriate if the parties' briefing does not adequately present the minor's position, if the minor wants to state a position significantly different from that of either party, or if for other reasons appellate counsel deems it necessary to protect the minor's interests.

In either case, the guidelines provide, the letter or brief should state what the minor's position is and why. In the typical case, it should contend whether the judgment should be affirmed, reversed, or modified, and it should indicate that the position is taken because of the minor's preferences and/or best interests. The points and authorities or other legal arguments presented should support the minor's position in favor of affirmance, reversal, or modification.

Position on appeal

The briefing guidelines above presuppose counsel has already determined the minor's position on appeal (in favor of reversal, affirmance, modification, etc.). But choice of position can be in doubt – and then it can easily become the single most crucial decision appellate counsel must make. (See approach to taking a position laid down in Guidelines for Counsel Representing Minors.)

In re Josiah Z. (2005) 36 Cal.4th 664 offers some principles for the process of selecting the minor's position on appeal. In that case, the appellate attorney was considering whether to abandon an appeal filed by minor's trial counsel. The court determined the decision belonged to the client or, in the case of young children, the minor's CAPTA guardian ad litem,[292] a role ordinarily filled by minor's trial counsel. Extending *Josiah Z.* to choice of the fundamental position to take on appeal, most often it should be clear to appellate counsel what side the

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[292]Child Abuse Prevention and Treatment Act (CAPTA) (42 U.S.C. § 5101 et seq.).

> The act authorizes federal funding of state child protective programs if among, other things, the state ensures appointment of a specially trained guardian ad litem in every judicial proceeding involving the child. Generally, in California, the child's dependency trial counsel acts as the CAPTA guardian ad litem. The guardian's authority extends to appellate proceedings. (*Josiah Z.*, 36 Cal.4th at p. 681.)

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minor should take: the minor should take the same position on appeal as that taken by trial counsel in the lower court.

But the waters can get very muddied very quickly. Grave complications arise when the appellate attorney concludes trial counsel/guardian ad litem was indisputably wrong, and the position is detrimental or even dangerous to the child.[293] Sometimes the minor personally and the guardian ad litem are in conflict.[294] Other combinations of factors, such as the minor's maturity and mental capacity, the position of the County, other siblings, multiple caregivers, etc., can enter the mix. It is impossible to lay down black-and-white rules for these situations. The imperative is to *contact the project*. Important policy and systemic interests are in play, as well as the client's personal interests.

5.4.3 Supplemental Brief

Leave of court required

If the appellant wants to raise a genuinely new contention after filing the opening brief, the proper procedure is either to move to strike the original opening brief and file a new one with the new issue or to submit a supplemental opening brief. Either procedure requires the permission of the presiding justice.[295] (Cal. Rules of Court, rule 8.200(a)(4).) Counsel should consult the project or the court clerk's office about the procedure to be used.

The amended opening or supplemental brief procedure is suitable when an unexpected development occurs, such as a new case, new proceedings in the lower court, changes affecting the parties, etc.

Unfortunately, it is sometimes necessary to correct a serious deficiency in the opening brief. Because counsel is expected to make every effort to file a proper opening brief to begin with, the need to file the brief may subject counsel to justifiable criticism. Nevertheless, if the client could be prejudiced by the deficiency and especially if the alternative is ineffective assistance of appellate

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[293]*Josiah Z.* noted it may be possible for the appellate court to appoint another CAPTA guardian ad litem for the appeal to break the impasse. (*Josiah Z.*, at p. 682, fn. 8.) Replacing appellate counsel is another option. The project and appellate counsel must make the decision in consultation.

[294]*Josiah Z.* pointed out that at some point the minor attains the capacity to make the decision himself or herself. (*Josiah Z.*, at p. 681, fn. 7.)

[295]If the court requested the brief, permission is implied.

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counsel, it is *imperative* to file the brief and avert possible disaster. It is improper to file an incomplete opening brief with the expectation of filing an amended opening or supplemental brief with the remaining issues, merely because counsel is in a time crunch when the opening brief becomes due.

An amended opening brief may be filed, with court permission, to correct errata. For minor corrections, the court *perhaps* may accept a letter. Counsel should check on the prescribed procedure before acting.

The rule for amended or supplemental briefs is the earlier, the better: an amended or supplemental brief after the respondent's brief requires supplemental briefing by the respondent and may interrupt the court's handling of the case.

Filing as a matter of right

Supreme Court remand

An exception to the requirement of the presiding justice's permission applies when the Supreme Court has remanded or transferred a case for further proceedings in Court of Appeal. (See chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," § Decision.) Within 15 days after finality of the remand or transfer order, the parties may file briefs limited to matters arising after the previous Court of Appeal decision, unless the presiding justice permits briefing on other matters. The opposing party may file a response within 15 days. (Cal. Rules of Court, rule 8.200(b).)

New authority: Supplemental letter in Court of Appeal

Rule 8.254(a) permits a supplemental letter in the Court of Appeal to call attention to significant, recent authority. It must be filed as soon as counsel learns of the new authority; if filed after oral argument, it may address only new authority that became available after that argument. (Rule 8.254(c).)

The letter must only *cite* the authority and identify the pages of a previously filed brief affected by it – *no argument is allowed*. (Rule 8.254(b).) If briefing with argument is needed, counsel should proceed under rule 8.200(a)(4) and seek leave of court to file an amended or supplemental brief.

New authority – Supplemental Brief in Supreme Court

If counsel's case is in the California Supreme Court, rule 8.520(d)(1) permits supplemental brief(s) "limited to new authorities, new legislation, or

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other matters that were not available in time to be included in the party's brief on the merits." The brief must not exceed 2,800 words and should be filed no later than 10 days before oral argument. (Rule 8.520(d)(2).)

5.5 Research and citations

5.5.1 Citation form

The Court of Appeal uses the system of citation adopted by the California Reporter of Decisions and based on the California Style Manual (4th ed. 2000). Because use of another system, such as the Harvard "Bluebook,"[296] potentially distracts the court's attention from the substance of an argument to the form, ADI recommends the Style Manual system. Likewise, the Judicial Council Appellate Advisory Committee's comment to rule 8.204(b) states: "Brief writers are encouraged to follow the citation form of the *California Style Manual* (4th ed., 2000)." However, a brief that consistently follows either system is acceptable. (Rule 1.200.)

It is extremely important to give the exact page number from which a cited quote or point is located.[297] The court has expressed impatience with and even occasional distrust of attorneys who have failed to do so.

Parallel citations to the California Reporter are not necessary or desirable in the text of the brief. Similarly, full parallel citations for United States Supreme Court cases, including the Supreme Court Reporter and Lawyer's Edition, are unnecessary.

5.5.2 Updating cited authorities

Attorneys should of course be sure all research is current. This includes checking the current validity of cases, recent amendments to statutes and rules, and other potential changes. A published California opinion may be cited as soon as it is certified for publication or ordered published. (Cal. Rules of Court, rule 8.1115(d).) With computerized legal database systems, attorneys have powerful resources at their fingertips.

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[296]The Bluebook: A Uniform System of Citation (22nd ed. 2025).

[297]Most rules have exceptions; the common sense one here is that no pinpoint citation is needed (although it is always proper) when the case in its entirety is well known for a legal principle – e.g., *Teague v. Lane* (1989) 489 U.S. 288 [retroactive application of changes in the law].

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Be alert for cases that have been depublished or granted rehearing, or where the California Supreme Court has granted review. One cannot cite the Court of Appeal opinion in the first two situations and must note the grant of review in the third. (Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(a), (e)(1).)[298] For further discussion of citability and publication, see § 7.3.2 How publication status affects stare decisis and citability et seq.

5.6 Briefing formalities

The ADI website has a Fourth District Filing & Service page. Rules 8.71 through 8.79 govern the formalities of electronic filing (TrueFiling in California.) This chapter and the web charts referred to apply to electronic briefs. Rule 8.74 includes detailed requirement for the formatting of electronically filed briefs, including font, spacing, margins, and alignment.

5.6.1 Form of the brief

Unless a specific criminal or juvenile rule applies, briefs in criminal and juvenile cases must comply, as far as practicable, with the rules governing the form of civil appellate briefs. (Rules 8.360(a), 8.412(a)(2); see rules 8.204(a) & (b), 8.40(a).)[299] Under rules 8.480 and 8.482, the criminal rules govern briefs on appeals from conservatorship and sterilization proceedings. Rule 8.74 on electronic filings applies to all categories of briefs.

Paper

This topic does *not* apply to electronic briefs. The format for paper briefs is specified in rule 8.204(b).

Type

Rule 8.74(b)(1) discusses fonts in electronic filings. The rule calls for text and footnotes to be in a 13-point, proportionally spaced serif font (e.g. Century

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[298]Rule 8.1115(a) refers only to California opinions. Therefore, unpublished opinions from other jurisdictions may be cited.

[299]Exceptions to some formal requirements may be allowed for those who are filing in forma pauperis or who are incarcerated. (E.g., Cal. Rules of Court, rule 8.204(b)(11)(A) & (C).)

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Schoolbook [preferred] or Times New Roman). Sans serif fonts are acceptable in captions, headings, and subheadings.

Line spacing

Rule 8.74(b)(2) discusses line spacing in electronic filings. The rule calls for the text of an electronic brief to have 1.5 line spacing.

Margins and alignment

Rule 8.74(b)(3) and (4) addresses margins and alignment (justification) in electronic filings. Margins must be set at 1.5 inches on top and bottom. Paragraphs should be left-aligned, *not justified*.

Page numbering

Rule 8.74(a)(2) addresses page numbering in electronic filings. Numbering should start with the cover page as page one and continue consecutively. The page number does not have to appear on the cover but should be on all other pages.

Bookmarks

Rule 8.74(a)(3) addresses bookmarks in electronic filings. The Fourth District electronic filing page has instructions.

Copying

Electronically filed documents do not need multiple copies for the court.

Binding

Electronically filed documents do not need binding.

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Length and size

In non-capital criminal and juvenile cases in the Court of Appeal, briefs may not exceed 25,500 words[300] (including footnotes but excluding tables, attachments, and certification),[301] unless the presiding justice gives permission for a longer brief. (Cal. Rules of Court, rules 8.360(b)(1), 8.412(a)(3).) Some courts rarely grant such permission.[302]

Rule 8.204(c)(3) excludes from the limits any attachments referenced in rule 8.204(d), such as exhibits and other materials in the appellate record; but under rule 8.204(d) the attachments are subject to a separate 10-page limit, unless the presiding justice grants permission for a longer attachment.

A file may not exceed 25 megabytes. If the document exceeds that limit, it must be submitted as multiple files. (Cal. Rules of Court, rule 8.74(a)(5).)

Signature

A brief need not be signed, and it may not be feasible with TrueFiling. (Rules 8.75(b), 8.204(b)(9).) If it is signed, the court expects the signature to be by counsel of record, not associate counsel or some other person. Other topics included in rule 8.74 include the requirement of text-searchable portable document format (PDF), rules for manual filing, use of color, cover or first page information, hyperlinks, attachments, agreed or settled statements, and sealed and confidential documents.

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[300]If the brief is typewritten, the limit is 75 pages. (California Rules of Court, rule8.360(b)(2).) Note that criminal and civil rules differ here; in civil appeals, rule 8.204(c)limits length to 14,000-words or 50 pages.

[301]In the combined briefs required by rules 8.216 and 8.360 for cross-appeals, the length limit is subject to rule 8.204(c)(4) (double the length of a normal brief).

[302]As a matter of effective advocacy, counsel should make every effort to keep briefs concise and avoid having to request special permission under rule 8.360(b)(5). In the unusual situation, a very lengthy record with multiple complex issues may necessitate a brief more than the limit.

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5.6.2 Filing and service

TrueFiling applies to attorney filings in all Courts of Appeal and the California Supreme Court.

Time

In criminal cases and juvenile appeals not under rule 8.416, the opening brief is due within 40 days after the filing of the record in the Court of Appeal, unless the court grants an extension of time. (Cal. Rules of Court, rules 8.360(c)(1), 8.412(b)(1).) In a juvenile fast-track case under rule 8.416,[303] the opening brief is due in 30 days. (Rule 8.416(e).)

The respondent's brief is due 30 days after the opening brief is filed. (Cal. Rules of Court, rules 8.360(c)(2), 8.412(b)(2), 8.416(e)(2).) The appellant's reply brief is due 20 days after the respondent's brief is filed. (Rule 8.360(c)(3), 8.412(b)(3), 8.416(e)(2).) A brief for a non-appealing dependency minor represented by counsel is due 10 days after the respondent's brief is filed. (Rule 8.412(b)(4).)

Briefing times in criminal and juvenile cases may be extended on court order, but not by stipulation. (Cal. Rules of Court, rules 8.60, 8.63, 8.360(c)(4).) In a criminal, delinquency, or non-fast-track dependency appeal, if the appellant or respondent fails to file its brief, notice under rule 8.360(c)(5) or 8.412(d) will be issued, advising the party that if the brief is not filed in 30 days the following sanctions may be imposed: (a) if the defendant is represented by appointed counsel, the court will appoint new counsel[304] or, if there is no appointed counsel, the appeal may be dismissed; (b) the respondent is told the case may be decided on the record, the opening brief, and the appellant's oral argument, if any. In a fast-track dependency appeal, the notice is the same except that the period allowed is only 15 days. (Rule 8.416(g).) The court may require that this time be shortened by the amount of any extension granted.

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[303]These cases include judgments terminating parental rights under Welfare and Institutions Code section 366.26 or freeing a child from custody and control under Family Code section 7800 et seq. They also include all dependency appeals in the Fourth Appellate District, Divisions One and Three. (Rule 8.416(a).)

[304]In practice, an order relieving counsel for failure to file a brief is "without compensation." The issuance of such a notice imperils the attorney's panel status.

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Rules 8.360(c)(4), 8.412(c), 8.416(f), 8.50, 8.60, and 8.63 govern extensions of time. See also § 3.3 Requests for extension of time et seq. In juvenile fast-track cases, extensions require an "exceptional showing of good cause" (rule 8.416(f); Code Civ. Proc., § 45); some courts may require counsel to waive all or part of the 15-day "grace" period under rule 8.416(g) (see preceding paragraph) as a condition of getting an extension of time on the brief.

Counsel can confirm whether and when pleadings are filed in their cases and discover any court action on them by accessing the online docket on the Court of Appeal website. They can retrieve the case page and look at the bottom of the page for "Click here to request automatic e-mail notifications about this case." By ADI policy, counsel should register for automatic e-mail notification of developments in every case for which they are responsible.

Number of copies

Electronic filings do not require multiple copies.

Service

A copy of the brief must be served on appellate counsel for all parties. (Cal. Rules of Court, rule 8.25(a).)[305] Note that, for effective program management, ADI requires service on certain individuals (e.g., trial counsel) and entities (e.g., ADI) not mentioned in the California Rules of Court.

5.7 Persuasiveness

Persuasive written advocacy is an art and a learned skill. The measures needed to turn mechanically "okay" position statements into persuasive arguments vary to some extent according to the case, the court, and counsel's own personality, and this kind of individuality should never be ignored. However, certain universal requirements always apply – credibility, forceful and effective use of the written word, and technical proficiency in the language.

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[305]Rule 8.25(a) technically requires service to be done *before* filing. Given the practical need to complete the proof of service and mail or email all documents in one step, essentially contemporaneous service is satisfactory.

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5.7.1 Credibility

An attorney is the client's window to the court. If the attorney is not rigorously credible, the client will have a hard time persuading the court to grant relief. Counsel therefore needs to consider what enhances or undercuts credibility.

Accuracy

As every sworn witness knows, the law always seeks and demands "the truth, the whole truth, and nothing but the truth."

"*The truth*": Counsel must meticulously avoid any misstatements of law or fact or citation. Even one slip-up, especially on a material point, can cripple not only the case, but years of effort to build the attorney's reputation.

"*The whole truth*": Accuracy includes thoroughness. It is not sufficient to avoid incorrect statements: all relevant information must be included, so that the court receives an undistorted picture. Omission of relevant unfavorable information – "hiding the ball" – is especially devastating to credibility.[306]

"*Nothing but the truth*": Even on relatively immaterial details, inaccuracies are harmful. Counsel should avoid exaggerations, statements based on untested assumptions or hazy memory instead of investigation, misquotation or improperly attributed quotation, and the like. After catching counsel in a few such misstatements, whether they are material to the outcome of the appeal, the court will begin to doubt whether anything counsel says can be counted on without full and independent verification. An attorney in that position has lost credibility both as an officer of the court and as an advocate.

Objectivity

An advocate must sound persuaded to persuade. However, credibility in a legal setting demands an adequate distance from the subject matter and

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[306]It can even subject counsel to sanctions. E.g., *Jones v. Superior Court* (1994) 26 Cal.App.4th. 92, 98-99: "As an officer of the court and member of the bar, the lawyer is obligated to use only such means as are consistent with truth: he may not seek to mislead a judge by artifice or suppress evidence he has a legal obligation to reveal. [(Cal. Rules Prof. Conduct, rule 3.3.)] In the final analysis, we cannot accept the notion that a selective recitation of facts satisfies the rules: half the truth in this case is just as misleading as a complete fabrication."

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personalities of the case. The attorney cannot be effective if coming across as a personally interested or emotionally involved participant, rather than a professional. The goal is to sound persuaded by the merits of the position, so that the court can relate to and ultimately share the attorney's sense of conviction.

Reasonableness and sound judgment

One can hardly persuade a critical professional audience such as a panel of appellate justices by pressing unreasonable positions. Credibility requires critical judgment, the ability to perceive the weaknesses in one's own positions, and the good sense to weed out points that cannot be legally or logically defended.

The exercise of critical judgment may require an occasional concession or withdrawal of a point fully refuted. While counsel should give a great deal of thought to such an action before taking it, the willingness to do so when necessary, ultimately enhances the attorney's credibility – and the remaining positions in the client's case.

Far better than withdrawing an argument, of course, is exercising critical judgment in the first place when preparing the opening brief. Counsel should always go through the discipline of ruthlessly asking how opposing counsel could counter each argument and how the counterargument could be rebutted. If there were no reasonable way to refute a likely counterargument, the point probably should be discarded as frivolous.

Reasonableness includes a sense of proportion. The client is often best served when technically arguable, but relatively weak or trivial arguments are left out, to avoid detracting from the strong ones. (See *Jones v. Barnes* (1983) 463 U.S. 745, 751-754 [appellate counsel has no constitutional duty to raise non-frivolous issues desired by the client].)

Professionalism

It can be tempting to "get personal" when personally attacked or when faced with what appears to be a totally unreasonable position on the part of opposing counsel or the court. The natural reaction is anger, resentment, or frustration, and it can be very difficult to avoid expressing that feeling in a responsive pleading such as a reply brief or petition for rehearing. Nevertheless, "venting" invariably comes across as unprofessional, impairing the attorney's credibility and focusing the case on the personality of the attorney rather than the merits of the issues.

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Venting against opposing counsel. It should go without saying that cases cannot be won by assailing the opponent's attorney. But they can be lost that way – and it occasionally happens if the behavior gets too far out of bounds. It is far better to stay above the mud-slinging fray, leaving the low road to the opposition. The court will notice the difference in approaches, and the client whose attorney has maintained consistent professionalism will gain a tactical benefit.

Venting against the court. Even more evident, cases cannot be won by showing disrespect to the court. What rational advocate would try to win over a court by insulting the judges? Does any attorney really think the justices will slap their collective foreheads and say, "Of course! Now that you point it out, we really are incompetent, biased, and corrupt. We'll rule in your favor!"? Yet attorneys have occasionally succumbed to the temptation to lash out at the court for making what appears to be a significant error.[307]

Persuasive advocacy requires a vigorous but respectful presentation – one based entirely on the merits. When faced with a serious mistake by the court, counsel can act most effectively by appealing to the court's best sense of duty. Counsel can convey (subtly, of course, to avoid sounding manipulative) a message such as this:

> The decision is in error, and here is why my client's vital interests will be gravely and unjustly impaired by the ruling. We know the court is dedicated to reaching the right result and will correct the error.

This approach forcefully attacks the *ruling*, not the court or the judges personally, and at the same time affirms the attorney's respect for the dignity and integrity of the court.

5.7.2 Forceful and effective use of the written word

Mastery of written advocacy is of dominant importance in appellate practice. In a brief, counsel cannot gesture or change the inflection of the voice to

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[307]In *In re Koven* (2005) 134 Cal.App.4th 262, 264, 276-277, the court held in contempt an appellate counsel who, in a petition for rehearing, accused the court of "deliberate judicial dishonesty" and other misconduct. (See also *In re S.C. v. Kelly E.* (2006) 138 Cal.App.4th 396 [referral to State Bar in lieu of contempt for unreasonably impugning integrity of trial court].)

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help convey the message. Skillful use of words – rhetorical proficiency – must do the written equivalent. Keys to rhetorical effectiveness include the following:

Simplicity – to a point

A cardinal rule for persuasiveness is to keep the argument concise and easy to understand. It must convey with unmistakable clarity the reasons the client should win. That means keeping these basic precepts in mind:

- The point should be made in the *best* way, not all possible ways; a one-two punch carries more impact than a series of feeble jabs.

- Collateral details and digressions distract far more than they persuade.

- Cumbersome, convoluted sentences that lose the reader in a maze of subordinate clauses, participles, prepositional phrases, parenthetical insertions, footnotes, and the like may lose the reader *period*.

- Self-conscious erudition, legalisms, archaic and foreign phrases, and "$100 words" that require a dictionary usually reflect negatively on the attorney as a showoff and detract from the merits.

Simplicity is occasionally carried to an extreme, with the omission of critical points and facts. Counsel needs to gear the sophistication of the presentation to the intrinsic complexity of the issues. Failure to recognize and address the genuine and unavoidable subtleties of an issue can be even more fatal to persuasiveness than burying the big points in a morass of trivia. While counsel should not patronize the court and pedantically spell out obvious matters, leaving the court to do crucial parts of the analysis itself in a complicated case is a risky practice.

Knowledge of the audience(s)

All effective writing, not just legal writing, speaks to its intended audience. In appellate practice, the primary audience is the court – the justices and their research attorneys. The brief will need to inform the court of the legal authorities, principles, and points essential to the argument without boring or insulting it with overly elementary matters. An effective balance might be achieved by an approach that employs a respectful tone, in acknowledgment of the audience's

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professional stature, but carefully leads the discussion through the applicable law and logic.

The opposing party and its counsel are another part of the audience. While counsel is not exactly writing for their "benefit," it is important the brief make sure they understand exactly what the appellant is arguing and why. Careful delineation of the issues and skillful use of analysis and authority will promote discussion of the issues on the appellant's chosen terms. Counsel does not want to be blind-sided by a respondent's brief, much less an opinion, redefining the case in such a way that the opening brief loses its dominant position as the director of the discussion.

The client is still another part of the audience. A vital role for an appellant's counsel is convincing the client they are getting a fair day in court, and they are represented by a strong advocate who truly cares about the case and the client. Vigorous advocacy, not dry, academic discussion, is essential to persuading the client, as well as the court. (As noted in § Objectivity, *ante*, however, counsel must not lose the objectivity and professional distance crucial to credibility.) Although counsel need not and should not raise every point the client wants if that is against counsel's best judgment (see *Jones v. Barnes* (1983) 463 U.S. 745, 751-754), counsel should explain such decisions respectfully to the client in non-technical language the client can understand.

Re-re-revision

As once famously observed, good writing is essentially rewriting. Editing and revision are absolute requirements for effective writing. In this area, written advocacy has an advantage over other forms, since counsel has the luxury of making a point repeatedly in various ways, until the exact wording needed to nail the point has been achieved. The ideal suggested here always must be balanced against practical realities.

It is good practice to ask someone else to read a brief.[308] Another lawyer can provide expert criticism before the respondent, or the court has a chance to do so. A layperson can offer invaluable feedback on whether the goal of clear communication has been achieved.

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[308]One should not, however, have another person read a nonpublic juvenile dependency brief containing confidential facts. (See Cal. Rules of Court, rule 8.401(b)(1).)

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Confidence

Counsel must sound persuaded to persuade. A passive, tentative tone that limply suggests the court might want to consider a given position is not going to have much impact on a court that is trying to process hundreds of "routine" cases and is predisposed to think this one, too, is destined for assembly-line disposition. The attorney's job is to make the case "special" – to convince the court that the case needs close attention, and that the client deserves and expects to win.

Language such as "appellant respectfully submits the instruction was wrong" or "appellant beseeches this Honorable Court to find the instruction was wrong" suggests a hope for a favor, rather than the necessity for and expectation of justice. Counsel should state unequivocally – "the instruction was wrong" – to communicate the message that relief is compelled by justice and the law.

Using the tools of the language for maximum impact

A skillful writer must cultivate an intimate acquaintance with the nuances of the language and the ways word choice and use affect communication. A good resource for this purpose is the classic English language guide, Strunk et al., The Elements of Style (4th ed. 1999). "Words are to lawyers, as scalpels are to surgeons. They are tools to be used with precision." (*People v. Ramirez* (2024) 104 Cal.App.5th 315, 320.) While the principles covered in these authorities cannot be reviewed in their entirety here, certain fundamentals deserve specific attention.

Strong, vivid language

The careful use of words and grammatical constructs for maximum impact is vital for effective appellate brief writing. Strong, evocative words carry more punch than relatively neutral ones. For example, the word *vital* is more compelling than *important*, and *ignored* or *neglected* is stronger than *omitted*. Concrete words that call to mind a lively image (*the shooter raced to the getaway car*) carry more immediacy and elicit a stronger response than more abstract, removed words (*the subject with the weapon was observed proceeding to the vehicle operated by the second subject*). The active voice (*the burglar broke in through the window screen*) speaks more dramatically than the passive (*entry was made through the window screen*).

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On the other hand, writing needs pace and variety to deliver ultimate impact and to give the most important points their due. Counsel should heed such caveats as:

- Credibility is impaired if an image is overdrawn, or a point is overstated.
- The ultimate punch line can be swallowed up if the entire brief, even on the most collateral detail, "screams."
- Precision is often more important than drama in legal analysis.
- Counsel should be wary of addressing the court as if it were a jury. The court might feel manipulated, and counsel might inadvertently send an undesired message: "I'm an appellate amateur."
- Understatement can be an effective rhetorical tool and can sometimes capture the audience better than a "hard sell."

Use of emphasis

The judicious use of emphasis can clarify meaning and hammer a point home. It can also highlight especially relevant segments from long passages or quotations.

Explicit emphasis is so easily overused, however, that appellate writers should employ a strong, though not irrebuttable, presumption against it. Usually, the intended emphasis is discernible from the context and supplying it explicitly may tend to patronize the reader. (It is *not* necessary to emphasize every "not" in one's sentences, for example.) Letting the reader collaborate in the argument and acquire ownership of the desired conclusion is often an extremely effective tool of persuasion. In addition, overused emphasis tends to be a visual and mental distraction; pages filled with a variety of underscoring, italics, bold fonts, and capital letters[309] are bewildering, wearying, and repelling – just the opposite of the intended goals of clarifying and persuading.

A closely related technique is attempting to strengthen a point by cloaking it with such rhetorical boosters as *clearly* or *it is clear that*. Here the

[309]Rule 8.74(b)(1) of the California Rules of Court warns: "Do not use all capitals (i.e., ALL CAPS) for emphasis."

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presumption against use should be absolute. Those words at best are superfluous (if the proposition is clear, it will speak for itself) and at worst send a red flag that counsel has little confidence in the point and is trying to prop it up with labels.

Effective transitions

An aid to readability can be a segue, or transition, which helps move the argument from one point to another and clarify the relationship between them. Transitions might be words or phrases such as, *however*, *therefore*, *consequently*, *alternatively*, *for example*, or *in any event*, or even complete sentences or paragraphs.

As with the use of emphasis, the writer needs to be conscious of the easy temptation to overuse transitions. A series of sentences laden with such words as, *however* or *moreover* or the ubiquitous (and often misused) *thus* can be tedious, distracting. Often the relationship of one point to another is obvious. Why not let the reader make the transition and be drawn into the argument as a participant rather than a spectator?

5.7.3 Technical proficiency

Effective use of language includes technical as well as rhetorical mastery. Small lapses of grammar, syntax, and diction that would slip by in an oral presentation are fixed forever in the unforgiving glare of the written word. "Formal" matters such as capitalization, spelling, and punctuation are elevated to the realm of the essential. Meticulous editing becomes an absolute, not just a nice touch. Strunk et al., The Elements of Style (4th ed. 1999) is commended to counsel as a classic resource on the formal and practical necessities of good writing. The California Style Manual (4th ed. 2000) has a section on style mechanics (§ 4.1 et seq.), which sets forth the rules the court itself uses.

Some common problem areas to watch include the following:

Proofreading

The review of the written page needs to be exhaustive and uncompromising – in a word, perfect. Reliance on a simple spell-check program is insufficient. One suggestion is to set the brief aside for a day or so and then review a hard copy (not just the computer screen). Mistakes previously elided in the brain may suddenly jump out. Better still, have someone else (a non-attorney) proofread the work.

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Compliance with court rules

Basic professional competence for a criminal appellate lawyer requires knowledge of the California Rules of Court as they apply to this area of practice. As ADI's founding executive director, the Honorable J. Perry Langford (late judge of the superior court), used to tell his attorneys:

> It is impossible to know all of the criminal law or all of criminal procedure. But at least you should know the rules.

It is inadvisable indeed to play fast and loose with formal rule requirements. The court may forgive lapses – or it may not. Briefs that do not conform with rules may be refused for filing or stricken. (See Cal. Rules of Court, rule 8.204(e).) Assuming permission to refile is granted, the new deadline may be unmanageable.

5.8 Conclusion

This chapter has reviewed a variety of topics on effective brief writing. The subjects range from the great rhetorical arts of eloquence and persuasion to the nitty- gritty of grammar, citation style, and the Rules of Court. A single chapter obviously cannot accommodate so immense a subject. It is hoped that the ideas discussed here will promote further study of the topic and further thought. A superb advocate does not spring from the earth or receive talents as a jolt of lightning from the sky. Counsel must patiently and assiduously build the necessary skills by learning about the craft, reflecting on its fundamental principles, refining them to suit the attorney's individual aptitudes, and then applying them thoughtfully and creatively to each situation.

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6 CHAPTER SIX

EFFECTIVE USE OF THE SPOKEN WORD ON APPEAL: ORAL ARGUMENT

6.1 Introduction

This chapter is intended to help counsel use oral argument more effectively. It is not a comprehensive treatment, but rather a basic guide to oral argument practice in the California courts.

6.1.1 Views of oral argument

Oral argument is, to many attorneys and judges, the highlight of an appeal. It is the time to step out of cloistered offices and libraries and into the spotlight, to engage one another in dialogue and debate, and to work toward the correct resolution of the case. At its best it is interactive, challenging, lively, and enlightening.

To some attorneys and judges, on the other hand, it is the most dreaded part of appellate work. Whatever one's personal predilections, oral argument plays a vital role in the appellate process. While secondary to briefing in most courts, especially intermediate appellate courts, it can and occasionally does have influence on the result. Appellate judges have often offered anecdotal evidence of how oral arguments have changed some decisions. The potential for influencing the outcome is empirically observable in Division Two of the Fourth Appellate District, which provides tentative opinions before oral argument (see § 6.3.2 Tentative opinion et seq., *post*); on occasion the final opinion has held the exact reverse of the tentative opinion because of oral argument.

6.1.2 Functions of oral argument

Oral argument is counsel's last opportunity to persuade the court before it makes a final decision. It is, ideally, a conversation with the court, not a speech or a rehash of the briefs. It is an opportunity to answer the court's questions, the one chance in an appeal when counsel can look the court in the eye, assess its reactions to the issues, make midstream adjustments, dispel doubts, and "nail" crucial points.

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> Oral argument provides the only opportunity for a dialogue between the litigant and the bench. As a result, "it promotes understanding in ways that cannot be matched by written communication." [Citation.] For example, in complex cases, oral argument "provides a fluid and rapidly moving method of getting at essential issues." [Citation.] In the words of one judge, "'Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the Bar.'" [Citations.] [¶] No proof of the value of oral argument is more compelling, however, "than the fact that many judges find that the opportunity for a personal exchange with counsel makes a difference in result." [Citation.] This aspect of oral argument — the chance to make a difference in result — is extremely valuable to litigants.

(*Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 872.) Unless the appellate court takes the comparatively rare action of telegraphing its concerns via a pre-argument letter or a request for further briefing, or unless the case is in Division Two of the Fourth Appellate District with its tentative opinion practice, oral argument is "the advocate's only window into the court's decision-making process." (*Id.* at § 6.32, *post*.) It also provides a forum for discussing new appellate decisions filed after the completion of briefing, presenting a fresh slant to the case, or highlighting a "theme" for the appeal.

6.2 Law governing oral argument

Oral argument in California is governed by the state Constitution, statutes, and the California Rules of Court, as well as case law interpreting this authority. Local practices vary widely within the basic legal framework and can significantly affect the role of oral argument in the decision-making process.[310] (See § 6.3 Court procedures as part of the dynamics of oral argument et seq., *post*.)

6.2.1 Right to oral argument

The California Constitution gives parties on appeal the right to oral argument on the merits in both the California Supreme Court and the Court of Appeal. (Cal. Const., art. VI, §§ 2, 3; *Moles v. Regents of University of California*

[310]Each court's processes are described in the Internal Operating Practices and Procedures (IOPPs), published by the various courts and revised periodically.

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(1982) 32 Cal.3d 867, 871-872; *People v. Brigham* (1979) 25 Cal.3d 283, 287-288; see *People v. Peña* (2004) 32 Cal.4th 389, 398.) Penal Code section 1254 implements this right for criminal cases.

Although it is a legal right, oral argument can be waived. As *Kowis v. Howard* (1992) 3 Cal.4th 888, 899, footnote 3, stated, with original emphasis: "We stress that it is the *opportunity* for oral argument that is important, not necessarily the actual argument. Oral argument may be, and often is, waived for varied and legitimate reasons." (See also *People v. Brigham*, *supra*, 25 Cal.3d 283, 288; *Philbrook v. Newman* (1905) 148 Cal. 172, 176-179; see *People v. Lang* (1974) 11 Cal.3d 134, 144, dis. opn. of Clark, J. [waiver of oral argument and submission on the briefs would not per se constitute lack of diligence; "[t]o the contrary, last year two-thirds of the criminal cases in the division considering defendant's appeal were submitted without oral argument"].

An appeal may be decided only by the concurrence of a majority of the justices who heard the oral argument, although the parties may stipulate to the participation of an absent justice. (Cal. Const., art. VI, §§ 2, 3; *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 874.) Oral arguments are recorded, and the practice is for absent justices to listen later to the recording.

There is no right to oral argument in original proceedings for extraordinary relief (writs) unless an alternative writ or order to show cause is issued. Thus, if the petition is summarily denied or the court issues a peremptory writ in the first instance, there is no right to oral argument.[311] (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237.) Similarly, interlocutory motions during the pendency of an appeal and petitions for rehearing or review do not require oral argument. However, a court may place a motion on calendar at the request of a party or on its own motion. (Cal. Rules of Court, rule 8.54(b).)

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[311]A grant is in the "first instance" when the court orders a peremptory writ – one giving ultimate relief – without prior issuance of an alternative writ or order to show cause. It is available in mandate or prohibition proceedings, if the respondent has an opportunity to file informal opposition. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171; Cal. Rules of Court, rule 8.487(a)(4).) In contrast, a writ of habeas corpus granting ultimate relief may not be issued without giving the respondent an opportunity to file a formal return. (*People v. Romero* (1994) 8 Cal.4th 728, 740-745.) This topic is covered in §§ Effect of Prior Habeas Corpus Writ Or Order To Show Cause and Peremptory Writ in the First Instance.

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6.2.2 Rules governing oral argument

The procedures for oral argument are prescribed by rule 8.256 for the Court of Appeal and rule 8.524 for non-capital cases in the Supreme Court.[312] These rules apply to criminal and juvenile appeals. (Rules 8.366, 8.368, 8.470, 8.472.)

Argument in the Court of Appeal

Rule 8.256 governs oral argument in the Court of Appeal. (See also rules 8.366, 8.470.) The Court of Appeal clerk must notify the parties of the setting of oral argument at least 20 days before the date, unless there is good cause for shortening the time. (Rule 8.256(b).) Under rule 8.256(c), the appellant has the right to open the argument. Each side has 30 minutes unless local rules or orders provide otherwise (see discussion below on Fourth District practices). (See § Time estimate, *post*.) Only one counsel may argue for each separately represented party. Argument by multiple parties and/or amicus curiae is governed by rule 8.256(c)(2).

Argument in the California Supreme Court

Rule 8.524 governs non-capital cases in the California Supreme Court. (See also rules 8.368, 8.472.) The Supreme Court clerk must notify the parties at least 20 days before the date of oral argument unless the Chief Justice orders otherwise. (Rule 8.524(c).) The petitioner opens and closes, and each side has 30 minutes. Unlike the Court of Appeal, only one counsel per side – regardless of the number of parties on the side – may argue, unless the court orders otherwise upon a request to divide argument among multiple parties and/or amicus curiae. (Rule 8.524(d)- (g).)

6.3 Court procedures as part of the dynamics of oral argument

Court operating procedures may significantly affect the use of oral argument. Because of differences in internal procedure and "culture," the role of oral argument varies among courts. It tends to play a prominent role in the Supreme Court. The role varies among the districts and divisions of the Court of

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[312]This chapter does not cover the special rules and practices that apply to death penalty cases.

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Appeal. The differences among the divisions of the Fourth District will be discussed here.

6.3.1 Traditional procedures

The typical process for most divisions of the California Court of Appeal is that after the reply brief has been filed or the time to file it has passed, the clerk of the appellate court sends a notice to the parties asking whether any party requests oral argument. (See Cal. Rules of Court, rule 8.256(b).)

The assigned justice prepares a memorandum opinion, which is distributed with the case file to the other two members of the panel in preparation for oral argument. After argument, the three panel members confer. If no one has any reservations about the memorandum opinion and nothing in oral argument has changed their view, the memorandum opinion will become the final opinion. If any differences emerge, further conferencing and drafts may be necessary.

6.3.2 Tentative opinion

Division Two of the Fourth Appellate District has a unique pre-oral argument procedure.[313] The court provides counsel with a tentative opinion that usually has the preliminary vote of at least two justices of the assigned panel. When it sends counsel a notice about requesting oral argument, the court includes the tentative opinion. The tentative opinion may indicate whether the panel is considering full or partial publication.

Notice of oral argument opportunity

Division Two sends two types of oral argument notices – one saying oral argument is unlikely to be useful and one notifying counsel the court intends to calendar the case for argument.

"Argument is available but unlikely to be useful" notice

The more common notice in Division Two states oral argument is unlikely to aid in the decision-making process, although counsel may nevertheless request

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[313]Division Two's tentative opinion program is described on the court website. Its internal processes are described in section VII of its Internal Operating Practices and Procedures (IOPPs).

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it. (Cf. *People v. Peña* (2004) 32 Cal.4th 389, 400-404 [stating the importance of oral argument and criticizing the former version of this letter, which more actively discouraged it].) The letter sets a deadline for requesting argument, which is enforced strictly.

On receiving such a notice accompanied by a tentative opinion unfavorable to the client, counsel should weigh whether there is a reasonable possibility oral argument will persuade the court to change its mind. Merely repeating the briefs will not help if the tentative opinion shows the court has understood the points made in the briefs and has analyzed them under the correct law. On the other hand, argument that spotlights the heart of the client's case and places it in the most persuasive light clears up confusion evidenced in the tentative opinion or rebuts the analysis of the tentative opinion can change the result.

"Argument will be set" notice

The other type of Division Two notice affirmatively "invites" counsel to argue and says counsel will be notified of the date. No request is necessary. Counsel should treat the invitation as an *order* to appear. The court is suggesting the outcome may be hanging in the balance. The tentative opinion may not have the concurrence of a majority of the justices, or the votes supporting it may not be "solid." With this type of notice, counsel can anticipate active questioning by the court.

Uses of tentative opinion

The tentative opinion can be useful to all sides. First, it gives counsel clues as to the value of orally arguing at all. If the court's analysis is a reasonable application of settled law and suggests the issues are not troublesome or close in any way, counsel may conclude there is no significant chance of changing the court's mind and therefore make a reasoned decision to waive argument. If the opposite is true, counsel is alerted to the importance of further argument.

Second, the tentative is an invaluable guide to preparing for argument. It offers a way around the usual guessing game of where to concentrate the most effort. It helps counsel to avoid areas that do not concern the court and instead focus on those most open to potential change. The tentative losing party knows the court's exact reasoning and can target the most vulnerable points at oral argument. If the opinion rests on a particular case, for example, counsel may argue it can be distinguished or is inconsistent with other cases. Faulty logic, unforeseen repercussions, and inaccurate factual or legal premises can be pointed

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out. The tentative winning party, on the other hand, knows the crucial underpinnings of the decision and can seek to reinforce them.

6.4 Requesting and waiving oral argument

After receiving the notice of an opportunity to request oral argument, counsel must consider how to respond.

6.4.1 "To argue or not to argue"

The first decision counsel faces, when given an opportunity to request argument, is whether to ask for it at all.[314] The decision may be influenced by the court's procedures – whether only orally argued cases are discussed in conference or whether argument will delay the case. The court's or individual justices' reputation for receptivity to oral argument is an intangible but significant consideration. Secondary factors may be the length of the sentence and the client's wishes. Counsel may find it helpful to discuss such matters with the assigned staff attorney or other experienced appellate counsel.

If the client is anxious and heavily involved, and especially if the client has specifically expressed interest in oral argument, it is highly advisable to advise the client *before* waiving. Although the decision is reserved to counsel as "captain of the ship," and the client has no right to interfere (see *In re Barnett* (2003) 31 Cal.4th 466, 472),[315] counsel's duties do include keeping the client informed of significant developments in the case (Bus. & Prof. Code, § 6068, subd. (m).).

Factors suggesting the need for argument

Argument is most effective when the case is complex, or difficult, or novel – whenever the correct resolution is less than obvious and requires exploration. The court may well have questions in such cases. Oral argument gives counsel a

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[314]Oral argument is expected as matter of routine in the California Supreme Court.

[315]Incarcerated criminal defendants have no legal right to argue their own appeal or even to be present at the argument. (*Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152; *People v. Scott* (1998) 64 Cal.App.4th 550, 562-563; *In re Walker* (1976) 56 Cal.App.3d 225, 228; Pen. Code, § 1255 [defendant need not be personally present in appellate court].)

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chance to assess the court's grasp of the issues and provide additional support for the position urged.

Signals from the court, such as requested supplemental briefing or the tentative opinion from Division Two, may suggest the court is wavering and needs further input. In such a case, the briefs may provide inadequate assistance to the court, because they do not offer the give-and-take of conversation.

If the court has asked for oral argument, counsel *must* not waive. Even if the court permits the waiver despite its previous request, the attorney has failed to provide the kind of advocacy ADI expects. If counsel believes waiver is appropriate, consult with the assigned staff attorney prior to waiving.

Responsible waiver of oral argument

The reasons for waiver are many, but among the most common are: If briefing is thorough and an interpersonal exchange with the justices seems unlikely to develop their understanding of the issues further, there may be little reason to seek oral argument.

California courts' internal operating procedures tend to emphasize written submissions and diminish the role of oral argument in the decisional process. This is because by the time of oral argument there is usually a tentative decision, and it is harder to persuade afterward than to persuade before the court has invested effort in a written product. If counsel has filed a reply brief, as ADI *strongly* encourages, then the client has had the last word; oral argument gives the opponent a chance to rebut it and snatch away the momentum created by the reply. Indeed, if counsel's own briefing is complete and effective and the opponent's is not, oral argument may help the other side more. It may also delay the case – an important consideration in time-sensitive situations.

When in doubt

A rule of thumb is that, if in doubt, counsel should request oral argument. First, once requested, oral argument may be waived later,[316] whereas the converse is not true. Second, as noted above, placing a matter on an oral argument track may result in a different treatment of the case.

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[316]Counsel should notify the court and other counsel of a decision to waive well in advance of the argument date. A last-minute cancellation is frowned upon – it is discourteous and may cause unnecessary preparation and/or travel.

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Oral argument is a vital tool of appellate practice, and failure to use it when counsel concludes it will help the client is a failure to fulfill the duty of zealous advocacy. Indeed, waiver of oral argument, combined with defective briefing leaving factual or legal issues unresolved, may constitute ineffective assistance of appellate counsel. (*People v. Lang* (1974) 11 Cal.3d 134, 138-139.) For all these reasons, if there is reasonable doubt as to the value of oral argument, the doubt should be resolved – for the client's benefit – in favor of the argument.

6.4.2 Requesting argument

The notice from the court of an opportunity to request argument usually requires an affirmative response by a specified date. In such a situation, the failure to file a timely request is deemed a waiver of oral argument.[317] In Division Two of the Fourth Appellate District, the court may sometimes indicate in its notice letter that the case *will* be set for argument; it is unnecessary to submit a request in such a situation.

General thrust of argument

Some courts' notices not only ask whether oral argument is requested but also ask counsel to state "the general thrust" of the argument if requested. Whether the "general thrust" description affects the argument varies with the membership of the three-justice panel.

Time estimate

The court's notice may also ask counsel to provide a time estimate for oral argument. (See also § Calendar formalities, *post*.) Rule 8.256 allows 30 minutes per side, "[u]nless the court provides otherwise by local rule or order."[318] Some

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[317]If counsel for some reason does not receive the notice or fails to meet the deadline, counsel can file a late request seeking oral argument. But a caveat: some courts strictly apply the stated deadlines for requesting argument, and so counsel should not count on having any latitude. Promptness in seeking relief from default is essential; a request made a few days beyond the deadline is more likely to be granted than one submitted just before the opinion is to be filed.

[318]A court's notice of oral argument may state the court's local time limit. Division One of the Fourth Appellate District normally limits oral argument to 15

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presiding justices will hold counsel to the written time estimate provided in the request, whereas others will go by the one given at the time of oral argument. Because the time allotted may be consumed in varying degrees by questions from the bench, and because counsel will always be allowed to revise their estimates downward but not necessarily upward, *reasonable* estimates on the higher side may be advisable. However, to maintain credibility counsel should not give an inordinately long estimate merely for the sake of having some leeway.

If the issue(s) are especially complex or multiple, and counsel believes that more than the normally allowed time will be necessary to protect the client's interests, counsel should request it. Be prepared to make a strong showing of good cause and acknowledge that other parties in the case should have their time extended by the same amount. (Cal. Rules of Ct., rules 8.256, 8.366, 8.470, 8.472.)

Remote argument

During the COVID-19 pandemic, all three divisions of the Fourth District conducted oral argument remotely using videoconferencing technology. Division Three has returned to in-person arguments for Fourth District appeals (remote argument remained the default for cases transferred from the Sixth District). Division Three does allow counsel with special needs to conduct oral argument telephonically (audio only) upon a motion and showing of good cause. Division Two offers counsel the choice to argue in-person in Riverside or remotely via videoconferencing. Some of the justices continue to appear remotely. Division One has returned to in-person argument as the default method of appearance, although parties may request to appear remotely.

6.5 Preparation for oral argument

A month or so before oral argument, counsel will receive a copy of the oral argument calendar. (If counsel registers for e-mail notification of the progress of the appeal, counsel will receive an e-mail notification of the calendar.) In most cases, preparation for argument will begin in earnest somewhere between that time and the date of argument.

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minutes per side. Division Two of the Fourth issues an annual miscellaneous order limiting time to 15 minutes per party except for good cause.

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6.5.1 Approaches to preparation

Reviewing materials and selecting main focus

In preparing for argument counsel should review the briefs filed in the case and crucial parts of the record. Because the reply brief is often the most tightly focused brief and takes account of the respondent's points, in many cases it will be the best vehicle on which to construct oral argument.

Counsel should plan to focus on the most important issues at oral argument. Addressing too many issues will likely cause the justices' eyes to glaze over, and they may lose interest in the argument altogether. Counsel should nevertheless be prepared to discuss any issue in case the court takes off in unexpected directions.

"Important" is a variable notion. One issue may be important because it is of considerable general legal interest; another issue, because it may mean years off the client's sentence; another, because it is the most likely to succeed. Of course, what the *court* will think is important must always be factored in, too. In Division Two of the Fourth Appellate District the tentative opinion will offer considerable insight into this question.

It is often very effective to plan a "theme" that runs through the important issues, ties them together, and gives a focal point to the presentation. This technique enables counsel to construct a cumulative and persuasive case for a decision in the client's favor. If the brief itself has such a theme, the oral presentation can reinforce it and enhance its impact.

Updating authorities

It is a good idea to do last-minute research on the most important issues, both to refresh the memory and to determine whether there are relevant new legal developments, such as a recent decision, a grant of review in a case involving a related issue, or a change in the legal force of any case cited in the briefs. If there has been such a development, counsel should alert the court and the opponent as soon as counsel finds out about it (in writing, if time permits); the court frowns on "hiding the ball" until the day of the court appearance. In the rare situation where advance notice is not possible, counsel should bring the citation and copies of the opinion to oral argument and provide both the opposing counsel and the court with them before argument begins.

If any of counsel's own cases can no longer be cited, it is far better for counsel, rather than the opponent, to bring the court's attention to the fact. If the

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opponent's authority has been undermined, the opponent should be given the courtesy of an opportunity to notify the court, but if that is not practical or the opponent fails to do so promptly, counsel has the responsibility to bring up the matter himself or herself.

If an opponent cites authority for the first time at oral argument and counsel is not prepared to address it, counsel should request leave to submit a supplemental letter brief.

Outlining argument

Counsel should never write an oral argument as a "speech" to be memorized. However, most counsel find it valuable to outline the salient points. Most importantly, whether writing an outline or just mentally preparing, counsel should assume the position of a skeptical cross-examiner and ask what the hardest questions are likely to be and how those questions might be followed up. Then counsel must develop appropriate responses. If counsel has prepared only to summarize the case or deliver an oration and not to engage in a conversation with the court about the strengths and weaknesses of the issues, oral argument is going to be at best ineffectual and at worst disastrous.

Rehearsing

Counsel should rehearse the oral argument and the various ways it may play out. If possible, other attorneys or even lay persons should help. While the number of oral arguments precludes ADI staff attorneys from providing a moot court in every case, if counsel has not previously argued or if the case is especially important, counsel can request that staff attorneys help prepare for the argument. If counsel has never argued before the court, counsel might try to attend an oral argument there beforehand, to get a feel for the process.

6.5.2 Coordination with other counsel

Oral argument may be complicated if the case involves a co-appellant or amicus. When the issues present no true conflict among parties on the defense side, the attorneys should devise a coordinated strategy, to present a complete argument without undue redundancy or fragmentation. If possible, one attorney should do the argument – a series of short presentations is confusing and often ineffective.

When a co-appellant has an actual conflict with one's client, the attorney must argue individually. The co-appellant's argument could undermine the

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client's position, and therefore counsel should prepare to answer multiple opponents – not only the respondent but the co-appellant as well.

6.5.3 Members of panel deciding the case

Knowing who is on the three-justice panel assigned to decide the case may help counsel develop an approach to the argument. Some courts' calendars or websites may expressly name the panel, although the composition of the panel is subject to change before argument. Backgrounds of justices are online, as well.

6.5.4 Late waiver of argument

If during the preparation period counsel concludes argument will not be advantageous, counsel should advise both the court and opposing counsel as soon as a decision to waive has been made, not in the courtroom on the day of argument. (This is especially true as to opposing counsel. The court takes a dim view of causing the opponent to prepare for and travel to oral argument unnecessarily.)

6.6 Delivery of oral argument

To put first things first, counsel should plan to arrive early enough to find the courtroom, check in, and become oriented to the surroundings. Cutting the time close invites serious problems. Counsel should double-check the starting time (not all courts are the same) and allow time for court security measures. In the event of a delay, contact the court to alert them of a late arrival.

6.6.1 Mechanics

In most courts, counsel will first check in with a deputy clerk, confirming or revising a time estimate.[319] Rule 8.256(c) provides 30 minutes per side for oral argument, unless the court provides otherwise by order or local rule; counsel should consult the assigned staff attorney for local practices. In any court, questioning from the bench can prolong argument beyond putative limits.

[319]The court will almost always accept a downward revision. Some presiding justices will permit an upward revision, but some will not.

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Calendar formalities

The presiding justice usually will order the oral argument calendar according to estimated time, with the shortest first. A lengthy estimate is almost guaranteed to be near the end of the calendar unless counsel has a legitimate reason to seek preference.

In Division Two of the Fourth Appellate District, the calendar order is determined before the day of argument and is posted for counsel. Repeat of time estimates is therefore obviated. Counsel should nevertheless check in to announce their presence.

The presiding justice will typically give the audience a brief statement indicating that the panel has read the briefs and is familiar with the cases and therefore counsel should not repeat what is in the briefs. (Counsel should heed this admonition but not treat it as an absolute injunction against repeating core concepts necessary to help the court understand the case.) The presiding justice will then call the first case on the calendar.

Formalities at the lectern

When case is called, counsel should proceed to the lectern. Counsel should first state their name and the party represented. It is good practice for the appellant's counsel at this point expressly to reserve time for rebuttal; while brief rebuttal might be permitted regardless of whether time has been specifically reserved, some presiding justices may not permit rebuttal if the time estimate has been exceeded.

6.6.2 Tone

Every attorney, like every person, has a different style and at argument should remain faithful to the attorney's own personality. However, it is important to do so adaptively, taking account of the forum, its purpose and internal dynamics, and the expectations of decorum.

Respect

A court and its members carry the authority and dignity of government and must be treated with invariable respect. Counsel should maintain an attentive posture (avoiding slouching or leaning all over the lectern) and a respectful tone of voice. At the same time, counsel is an advocate and must be assertive; the

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message should be that the client is *entitled* as a matter of law to prevail, not that counsel is beseeching the court to grant a favor.

Opposing counsel should likewise be shown respect, even in the face of provocation. Taking the high road – resisting the impulse to answer in kind when opposing counsel has breached decorum or made a personal attack – is always right. The court will notice the contrast and appreciate the restraint, and both the client's cause and counsel's reputation will be enhanced.

Conversation

Oral argument is not a forum for making speeches. The point is to engage in dialogue, to understand where the court is and persuade it to go in the right direction. Justices are legally astute and do not want to be manipulated. A blatantly oratorical style, an overly emotional or strident delivery, or an argument that sounds like one for a jury is going to fall flat. Counsel should strive for a conversational tone, while still showing respect for the dignity of the proceedings.

Humor

Some have suggested humor should be used sparingly, if at all. There are few absolute rules, however, and some levity might help dispel an emotionally tense situation or revitalize the court and counsel toward the end of a lengthy calendar. It is often more effective when spontaneous, rather than built into the presentation as "entertainment." Sarcasm, put-downs of the opponent, and impertinence are never appropriate.

Candor

As to absolute rules of conduct, there is no exception to the rule of honesty and forthrightness. If counsel has made an error or does not know the answer to a question, a candid admission will do far more for the client and the attorney alike than an effort to cover up. Counsel need not be embarrassed about not knowing an answer; the justice didn't either, or else they would not have asked the question.

6.6.3 Dialogue with the court

Since the whole purpose of oral argument is to engage in conversation with the court, eliciting a response from the bench is a key objective. Counsel in turn must be prepared to deal with that response.

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Process of give and take

The court's response takes the form of questions to counsel. When a question is asked, counsel should make sure they understand the question and seek clarification if needed. Once the question is understood, counsel should answer it directly and immediately. Attempting to evade or delay implies that a direct answer would be harmful. In the end, answering the court's questions is more important to the success of oral argument than plowing through a prepared presentation.

Counsel must continuously observe and listen, as well as speak. Both the questions themselves and the justices' body language may offer clues as to whether counsel should abbreviate – or prolong – a particular discussion or change the direction of the argument.

"Softballs"

Although of course counsel must be prepared for the hard questions, it is a mistake to assume that all questions are hostile or skeptical. Sometimes counsel may be used as a foil among the members of the panel. Although the questions are outwardly voiced to counsel, some may be aimed at another justice on the panel. Counsel should be alert to the possibility of "softball" questions – ones that back counsel's position – and answer them supportively.

Loaded questions

Some questions, like leading questions in eliciting testimony, will include a foundational premise that counsel does not accept. The best way to approach such a question is: (1) state very briefly that the question contains a premise not conceded, (2) assume arguendo the existence of the premise and answer the question forthrightly, and (3) after answering the direct question, explain why the premise is wrong.

"Off the wall" questions

Among the hardest questions to answer (and impossible to prepare for) are those that are "off the wall," go in a completely tangential direction, contain a logical fallacy, or betray the individual justice's ignorance of the real issue or applicable law. It may be hard to maintain a respectful attitude in dealing with it, but there is no alternative. A patient, tactful answer that shoulders the blame for any confusion may be the most effective response. The other justices will be

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aware of the questioner's errors and be sympathetic to counsel's predicament, unless counsel responds in a way that embarrasses their colleague.

Concessions and other damaging answers

Sometimes, counsel will be put into a position where it is difficult to avoid making a concession or giving an otherwise damaging answer. There is no cardinal rule as to how to respond. If the response relates to a comparatively minor point, counsel may gain credibility simply by agreeing to it. Some answers could spell doom to the appeal and should be resisted strenuously. If counsel's hand is forced into offering a potentially hurtful answer, counsel should control the damage by providing the best supporting explanation available.

This is the very kind of situation in which thorough preparation pays off. Getting blind-sided by a devastating point counsel failed to consider can fluster even the best oral advocate.

Supplemental Briefing

If the court seems concerned about any point not fully briefed or any point counsel was unable to answer during oral argument, counsel can seek leave to submit supplemental briefing before the case is taken under submission. (Cal. Rules of Court, rules 8.200(a)(4) and (b), 8.256(d).)

6.6.4 Concluding oral argument

Counsel wants the court to incorporate the oral argument into the deliberating and decision-making process. To make a firm impression on the court, counsel should use the concluding part of it effectively and persuasively.

Watching the clock

Counsel must be conscious of the elapsed time and be prepared to end argument smoothly. Toward the end of the estimated time the presiding justice may ask whether counsel wants to stop and reserve the balance of the time. Some courts use color-coded lights to inform counsel when the time is nearing its end.

Cues that it is time to conclude

Counsel must be perceptive in gauging the court's reaction to argument. If the court is leaning in a favorable direction, it is wise to heed the old adage "quit

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while you're ahead" and wind up promptly. Unnecessarily prolonging argument increases the chances the court will change its mind; it is indeed possible to snatch defeat from the jaws of victory. If the court says it would like to hear from opposing counsel, that usually means trouble for the other side and is a definitive signal to sit down.

Strong ending

The argument should be concluded on a strong point. This is not to advise reserving the clinching "zinger" for the last word. Time may expire without an opportunity to make the point at all. However, the conclusion of the argument should relate to an important aspect of the case and not to a trivial or insignificant point.

6.6.5 Rebuttal

This is an opportunity to *rebut* the opponent's points and not rehash the opening argument. Unless there is to be supplemental briefing, rebuttal is the last opportunity to address the court and, most importantly, the only opportunity to correct any misstatements, factual or legal, by the opponent or the court (or oneself, if counsel has said something in error). It can also be used to address concerns raised by the court during the opponent's argument. Rebuttal should be concise and to the point, but not rushed or fragmentary.

A cautionary note: By the end of appellant's and respondent's arguments, the panel may be weary. Making every rebuttal point can risk losing their attention altogether and making no point at all. It may be advisable to confine remarks to a few emphatic points and a strong conclusion.

Another possibility is that respondent will submit without making any substantive arguments, thereby precluding rebuttal. For this reason, appellants should not save important points or their conclusions for the rebuttal. A rebuttal conclusion should be a reworded version of the strong conclusion from the opening argument.

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7 CHAPTER SEVEN

THE END GAME: DECISIONS BY REVIEWING COURT AND PROCESSES AFTER DECISION

7.1 Introduction

This chapter discusses decisions by reviewing courts and proceedings after decision. It addresses the requirements for appellate opinions in California. It gives an overview of the doctrine of stare decisis and the implications, as well as processes, of publication. The chapter also covers what happens after the Court of Appeal files its decision. It examines the rules governing finality of decisions and offers general guidance on seeking rehearing in the Court of Appeal and review in the California Supreme Court. It discusses basic procedures for handling cases in which the California Supreme Court has granted review. Finally, the chapter looks at the process of seeking certiorari in the United States Supreme Court.

7.2 Requirements for reviewing court opinions

Decisions by reviewing courts are rendered as opinions and orders. An opinion is the disposition of a cause, such as an appeal or a writ with an order to show cause, on the merits with a written statement of reasons. Orders include such decisions as summary denials of a writ, denials of a petition for review, rulings on motions and applications, dismissals, sanctions, and interlocutory orders. The focus here is primarily on opinions in appeals.

7.2.1 "In writing with reasons stated"

The California Constitution provides Supreme Court and Court of Appeal decisions that determine causes must be "in writing with reasons stated." (Cal. Const., art. VI, § 14.) That requirement does not apply to decisions such as writ denials and orders that do not determine causes on the merits. It "is designed to ensure that the reviewing court gives careful thought and consideration to the case and that the statement of reasons indicates that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected." (*People v. Rojas* (1981) 118 Cal.App.3d 278, 288-289.)

Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1262, 1264, explains the written opinion requirement:

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> [A]n opinion sufficiently states "reasons" if it sets forth the "grounds" or "principles" upon which the justices concur in the judgment. . . . [¶] . . . The constitutional requirement is satisfied as long as the opinion sets forth those reasons upon which the decision is based; that requirement does not compel the court to discuss all its reasons for rejecting the various arguments of counsel.

In *People v. Kelly* (2006) 40 Cal.4th 106, counsel in the Court of Appeal filed a *Wende*[320] brief and the defendant filed a pro per brief raising substantive issues. The Court of Appeal dealt with the pro per contentions by saying it had "read and considered defendant's written argument." The Supreme Court held this conclusory statement was inadequate to satisfy the constitutional requirement for opinions. At the least the Court of Appeal must set out the facts, procedural history, the convictions, and the sentence, and must describe the contentions, stating briefly why they are being rejected. (*Id.* at p. 124.) Such a decision serves several functions: it provides guidance to the parties and other courts in subsequent litigation; it promotes careful consideration of the case; it conserves judicial resources by making a record of what has been decided and, possibly, persuading the defendant of the futility of further litigation. (*Id.* at pp. 120-121.)

The Court of Appeal is not required to address an issue on the merits if it is frivolous. (*People v. Rojas* (1981) 118 Cal.App.3d 278, 290 ["issues presented were ones which either were not raised in the trial court or lacked even a modicum of support in the record"].)

Standard 8.1 of the Standards of Judicial Administration[321] suggests the use of a "memorandum opinion" if the cause "raise[s] no substantial issues of law or fact" – e.g.:

> (1) An appeal that is determined by a controlling statute which is not challenged for unconstitutionality and does not present any substantial question of interpretation or application;

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[320] *People v. Wende* (1979) 25 Cal.3d 436; see also *Anders v. California* (1967) 386U.S. 738. These cases deal with procedures when counsel is unable to find any issues on appeal.

[321] https://courts.ca.gov/cms/rules/index/standards

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(2) An appeal that is determined by a controlling decision which does not require a reexamination or restatement of its principles or rules; or

(3) An appeal raising factual issues that are determined by the substantial evidence rule.

As explained in *People v. Garcia* (2002) 97 Cal.App.4th 847, 853:

> Memorandum opinions may vary in style, from a stereotyped checklist or "fill in the blanks" form to a tailored summary of the critical facts and the applicable law. . . . The briefest formats are appropriate in cases . . . where the result is consistent with an intermediate federal or state appellate decision with which the court agrees, . . . cases decided by applying the authority of a companion case, cases in which the result is mandated by the United States Supreme Court, and cases where the appeal is not maintainable.

The difference between a short opinion and a memorandum opinion is unclear. In the absence of frivolous issues, concessions, or other factors permitting a summary disposition, any opinion must meet the constitutional standard of written reasons. Many of the issues described in Standard 8.1 would appear to be frivolous. If there is controlling adverse authority and counsel offers no way of distinguishing or challenging it, raising the issue has no point. If counsel has attempted to distinguish or challenge it, then a citation to the case in the opinion without more does not answer the contention and seems inadequate as a statement of reasons.

An exception may arise when the issue is being raised to preserve it for argument in another forum with power to re-examine the governing precedent.

7.2.2 Time frame

No formal provision of the California Rules of Court sets out a specific deadline for filing an opinion.[322] The "practical" deadline for filing an opinion is

[322]Rule 8.416 expresses a goal of deciding a juvenile fast-track appeal within 250 days after the notice of appeal is filed. (See Cal. Rules of Court, rule 8.416(e)(1), and Advisory Committee comments to subds. (g) & (h).) There is no enforcement mechanism for this provision, however, beyond control over extensions of time.

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90 days after the case is submitted. This limit follows from the law that a justice must certify that no cause before the justice has been undecided more than 90 days to receive a paycheck. (Cal. Const., art. VI, § 19; Gov. Code, § 68210.)

The 90-day clock starts on the date of submission. Submission usually occurs when the court has heard oral argument or approved its waiver and the time for filing briefs and papers has passed. (Cal. Rules of Court, rules 8.256(d)(1), 8.366(a), 8.470, 8.524(h)(1).) Except for such specialized areas as certain juvenile dependency cases (e.g., Cal. Rules of Court, rule 8.416(h)(2)), the rules do not specify a deadline for hearing oral argument or approving its waiver.

Vacating submission and resubmitting is allowed (Cal. Rules of Court, rules 8.256(e), 8.366(a), 8.470, 8.524(h)(2)), but is considered an exceptional step, not to be used routinely as a way of dealing with backlog.

7.3 Stare decisis, publication, and citability

The doctrine of stare decisis requires or encourages courts to apply the same legal principles as previous courts in a similar situation, to promote consistency, equality, and foreseeability. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *Montejo v. Louisiana* (2009) 556 U.S. 778.) Publication determines the stare decisis effect and citability of California state opinions, as explained below, and so familiarity with its meaning and the processes affecting it is crucial to a grasp of case law authority.

7.3.1 Doctrine of stare decisis as it applies in California

Stare decisis is the effect of a prior court decision on later court decisions in different cases. It can be both *vertical* (the authority of higher courts to bind lower ones) and *horizontal* (the duty of courts to follow the decisions of courts of equal rank). It can also be *intra-jurisdictional* – applying only to courts in the same geographical judicial hierarchy, or *inter-jurisdictional* – binding on courts in other areas as well.

Stare decisis can mean the *binding* effect of a decision on other courts, which is how the following sections use it. It also may be used, however, to mean the general prudential principle that courts should consider their own and other courts' previous decisions to promote stability, predictability, equal treatment, and similar interests. There are some uniformities throughout the country. The decisions of the United States Supreme Court on matters of federal law are binding on all courts in the country. The decisions of the highest court in each state are binding on all lower courts in that state. No state court is bound to

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follow, as stare decisis, the decisions of a court of another state or of lower federal courts.[323]

Beyond these basic principles, however, the various state and federal court systems in the United States have produced a mixture of doctrines.

Vertical stare decisis

In California, vertical stare decisis is statewide and inter-jurisdictional. A decision of a Court of Appeal is binding on every lower court in the state, not just those in its own appellate district, until another Court of Appeal or the Supreme Court contradicts it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"].) If there are conflicting decisions, the trial court must choose between them (*id*. at p. 456) – the one it considers the better reasoned. (See *In re Alicia T*. (1990) 222 Cal.App.3d 869, 880) The court need not apply the decision of the Court of Appeal in its own appellate district, although for pragmatic reasons it usually does so.

By contrast, in the federal system, the decisions of a circuit court of appeals bind only the district courts in its own circuit. (*Jenkins v. United States* (2d Cir. 2004) 386 F.3d 415, 418-419.) Thus, a district court in California is not required to follow the decisions of any circuit court other than the Ninth.

Horizontal stare decisis

California has no horizontal stare decisis. The Supreme Court may overrule itself. (E.g., *People v. Anderson* (1987) 43 Cal.3d 1104, overruling *Carlos v. Superior Court* (1983) 35 Cal.3d 131.) Similarly, a single Court of Appeal cannot bind itself, but may change its mind and overrule a prior decision. (E.g., *In re Angelica V*. (1995) 39 Cal.App.4th 1007, 1012, overruling its decisions in *In re Joyleaf W*. (1984) 150 Cal.App.3d 865, and *In re Brian B*. (1983) 141 Cal.App.3d

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[323]Under the Supremacy Clause of the United States Constitution, a decision of a federal court of appeals is binding on the state court in the individual case. An example would be a federal habeas corpus order. But that decision is not binding as *precedent* in other state cases. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 375-376 (conc. opn. of Thomas, J.); *People v. Williams* (1997) 16 Cal.4th 153, 190; *People v. Memro* (1995) 11 Cal.4th 786, 882; *People v. Burnett* (2003) 110 Cal.App.4th 868, 882; *In re Alicia T*. (1990) 222 Cal.App.3d 869, 879.)

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397.) One Court of Appeal does not bind another Court of Appeal. (E.g., *People v. Kim* (2011) 193 Cal.App.4th 836, 847.) Furthermore, different panels of the same court may simultaneously disagree with one another. (E.g., *In re Andrew B.* (1995) 40 Cal.App.4th 825, and *In re Kayla G.* (1995) 40 Cal.App.4th 878 [opposing decisions filed on same day by same division of same appellate district].[324])

For the sake of predictability, stability, consistency, and even-handedness, courts should give substantial weight to precedents and consider them for their persuasive value. Accordingly, they do honor stare decisis, especially in their own district, but they are not *required* to do so. (E.g., *Mega Life and Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.)

In the federal court system, the Supreme Court is not bound by horizontal stare decisis; it can overrule its own decisions and on a number of occasions has done so. (E.g., *Montejo v. Louisiana* (2009) 556 U.S. 778.) The circuits are free to disagree with other circuits. (*United States v. Carney* (6th Cir. 2004) 387 F.3d 436, 444; *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1170; *Garcia v. Miera* (10th Cir. 1987) 817 F.2d 650, 658; see *Hertz v. Woodman* (1910) 218 U.S. 205, 212.)

Unlike California, however, in several federal circuits, including the Ninth, horizontal stare decisis applies *within* the circuit, a doctrine known as "law of the circuit." Under this doctrine a decision is binding on all later three-judge panels of the circuit until a higher authority – the circuit sitting en banc or the United States Supreme Court – overrules it. (*Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889, 899-900; *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1171-1173; *Burns v. Gammon* (8th Cir. 1999) 173 F.3d 1089, 1090, fn.2; see generally *Textile Mills Sec. Corp. v. Commissioner* (1941) 314 U.S. 326, 335; *Bonner v. Prichard* (11th Cir. 1981) 661 F.2d 1206, 1209.)

> [A] decision of a division is the decision of the court . . . . One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court.

(LaShawn A. v. Barry (D.C. Cir. 1996) 87 F.3d 1389, 1395, internal quotation marks omitted.) The doctrine is a prudential one – a matter of policy, not jurisdiction – and so allows the court to depart from its own precedents in certain

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[324]The Supreme Court resolved the conflict in *In re Sade C.* (1996) 13 Cal.4th 952, 982, fn. 11, disapproving *Andrew B.*

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unusual circumstances. (*Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866-867; *Miller v. Gammie*, at p. 900; *LaShawn A. v. Barry*, at p. 1395; *North Carolina Utilities Com. v. Federal Communications Com.* (4th Cir. 1977) 552 F.2d 1036, 1044-1045; see also *Hertz v. Woodman* (1910) 218 U.S. 205, 212.)

Holdings versus dicta

Binding stare decisis applies only to the actual holdings of cases, not to dicta – language unnecessary to the decision.[325] Dicta may have persuasive value, but other courts are not bound to observe them.

> The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum and not as the law of the case. . . . The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed . . . , no matter how often repeated. Expression of dictum is not binding on a court inferior to that which rendered the decision . . . .

(*People v. Squier* (1993) 15 Cal.App.4th 235, 240, internal quotation marks and citations omitted; see also *People v. Rodriguez* (1990) 51 Cal.3d 437, 444 ["stare decisis requires no deference to . . . dicta"].)

Decisions by a split court may pose a challenge: sometimes no rationale for a given result gains the assent of a majority of justices. In such situations, there are no reasons of "the court." As *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829, explained: "[A]ny proposition or principle stated in an opinion is not to be taken as the opinion of the [California Supreme Court], unless it is agreed to by at least four of the justices." (See also *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 66.) Then the holding of the court is "that position taken by those

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[325]When multiple reasons are given for a decision, none is mere dictum; each is of equal validity. (*Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, 650; see also *Woods v. Interstate Realty Co.* (1949) 337 U.S. 535, 537 [same]; *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485 [same].)

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[justices] who concurred in the judgments on the narrowest grounds." (*Marks v. United States* (1977) 430 U.S. 188, 193.)

Law of the case

A doctrine related to but distinct from stare decisis is law of the case, which binds both reviewing and lower courts to follow the initial decision of the appellate court on a point of law in later phases of the same case. (Stare decisis, in contrast, focuses on the duty to follow a ruling of law in *other* cases.)

> [W]here, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . , and this although in its subsequent consideration [the reviewing] court may be clearly of the opinion that the former decision is erroneous in that particular. The principle applies to criminal as well as civil matters . . . and it applies to [the Supreme Court] even though the previous appeal was before a Court of Appeal (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal 3d 425, 434).

(*People v. Stanley* (1995) 10 Cal.4th 764, 786, internal quotation marks omitted [under law of case doctrine, Court of Appeal pretrial writ decision on merits of search and seizure issue will not be revisited by Supreme Court in later automatic appeal]; see also *People v. Shuey* (1975) 13 Cal.3d 835, 841-842; *In re J.D.* (2013) 219 Cal.App.4th 1379, 1386.) For the doctrine to apply, the subsequent proceedings must involve the same facts, issues, and parties. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 668-670 [no law of case if later proceeding reviews different decision and involves additional party]; cf. *In re Ditsch* (1984) 162 Cal.App.3d 578, 582 [subsequent habeas corpus petition may raise law of case in attacking trial court's revised sentence for failure to follow previous directions of appellate court, even though statute had changed; those directions were "determinative of the rights of the same parties in any subsequent proceeding in the same case"].)

The principal reason for the doctrine is judicial economy: to avoid repeated litigation of the same issues. The doctrine is a prudential one, a rule of procedure, and does not go to the jurisdiction of the court. It is not binding if its application would result in a substantial miscarriage of justice or the controlling law has been

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altered by an intervening decision.[326] (*People v. Stanley* (1995) 10 Cal.4th 764, 787; *In re Harris* (1993) 5 Cal.4th 813, 843; *In re Saldana* (1997) 57 Cal.App.4th 620, 627-627 [trial court properly granted habeas corpus and resentenced, despite previous appellate decision affirming judgment, when later Supreme Court decision, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, established contrary rule of law].)

7.3.2 How publication status affects stare decisis and citability

In California, as in several other jurisdictions, some cases are published and others are not. A case's publication status may affect its citability and its effect as both binding and persuasive precedent.

California cases cited to in California courts

The California Rules of Court cover only cases cited in California courts. The law of other jurisdictions governs the citability of cases in those courts.

In general: rule 8.1115(a)

An opinion of a California court may be cited or relied on as precedent in the courts of the state only if it is published. (Cal. Rules of Court, rule 8.1115(a).) Unpublished opinions[327] are not binding precedent for purposes of stare decisis. The proscription on citation or reliance applies to unpublished orders of the Court of Appeal as well as opinions. (*In re Sena* (2001) 94 Cal.App.4th 836, 838-839.)

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[326]As to the trial court, however, jurisdictional limits apply on remand: a trial court has no jurisdiction after remand from the Court of Appeal to do other than follow the directions of the remand order, even though a later decision of the Supreme Court suggests the Court of Appeal decision on the law was incorrect. (See *People v. Dutra* (2006) 145 Cal.App.4th 1359, and § 7.4.4 Remittitur, *post*, on scope of proceedings after remittitur; see also *In re Ditsch* (1984) 162 Cal.App.3d 578, 582 [habeas corpus petition may raise law of case in attacking trial court's revised sentence for failure to follow previous directions of appellate court, even though law had changed; those directions were "determinative of the rights of the same parties in any subsequent proceeding in the same case"].)

[327]Unpublished opinions include those never certified for publication and those depublished by court order or a grant of review or rehearing.

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It may be a violation of professional ethics, subjecting an attorney to discipline, to knowingly cite as authority a decision that is not citable. (See Bus. & Prof. Code, § 6068, subd. (d); Cal. Rules Prof. Conduct, rule 3.3.)

Exceptions: rule 8.1115(b) and similar situations

Under rule 8.1115(b), unpublished cases may be cited when the opinion is relevant under the law of the case, res judicata, or collateral estoppel doctrine. Another exception is for cases relevant to a different criminal proceeding or a disciplinary proceeding affecting the same defendant or respondent.

In addition to the exceptions specifically enumerated in the rule, counsel have occasionally discussed unpublished cases – without protest from the court – when the use of the cases is consistent with the rationale underlying the general no-citation rule. A petition for review, for example, may point to unpublished cases to show conflicts among the courts on a particular issue, the frequency with which an issue arises, or the importance of an issue to litigants and society. A brief or petition may refer to the unpublished Court of Appeal opinion in a case pending before the California or United States Supreme Court to describe an issue in the pending case. These and similar uses are consistent with the general no-citation rule because they refer to unpublished cases, not as *authority* or *precedent* to persuade the court on the merits of an issue, but as *evidence* of some external fact.

When referring to unpublished cases for these purposes, counsel should avert criticism or misunderstanding by explicitly discussing rule 8.1115(a), and explaining why the references do not violate the rule. Counsel must also be scrupulous in confining the references to permitted purposes.

If an unpublished opinion is cited in a document, a copy of the opinion must be furnished to the court or a party on request. (Cal. Rules of Court, rule 8.1115(c).)

Depublished cases

An opinion of the Court of Appeal that was certified for publication becomes instantly uncitable upon an order for depublication or the grant of a rehearing. Cases granted review before July 1, 2016, are not citable; those granted review later are citable but have no binding effects under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, pending review, unless the Supreme Court orders otherwise. (Cal. Rules of Court, rules 8.1105(e), 8.1115(e).) The fact that a depublished opinion continues to be printed in the advance sheets to

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permit tracking pending review does not make the opinion citable. (*Barber v. Superior Court* (1991) 234 Cal.App.3d 1076, 1082.)

Appellate counsel should always check the status of recent cases to see if they are still published and therefore citable. If the case becomes depublished, it is counsel's obligation promptly to inform the court and opposing counsel. Providing this information demonstrates knowledge, skill, candor, and ethics. Even if a case has become uncitable, counsel can argue the rationale of the case without citing it.

Cases not yet final

Clearing up previous confusion as to whether an opinion certified for publication could be cited immediately or had to await finality, rule 8.1115(d), specifically provides "a published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." In fact, it may be ineffective assistance of counsel *not* to cite a helpful case even if it was decided just yesterday. When a recent case has been cited in a brief, appellate counsel of course should regularly check the status of the case to see if it is still published and thus citable.

The *stare decisis* effect of a case not yet final is a different matter from citability. ADI explored this matter in an October 2015 memo, responding to the Supreme Court's invitation to comment on a proposed rule. The memo found the law inconclusive as to whether a non-final, published appellate decision is binding on lower courts under *Auto Equity Sales, Inc.* (1962) 57 Cal.2d 450, but concluded the weight of authority is that only a final opinion is binding. (E.g., *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1547-1548 [published case could not be relied on before it was final]; *Barber v. Superior Court* (1991) 234 Cal.App.3d 1076 ["our [earlier] decision never became final and is without any precedential value or binding force"]; *Rogers v. Detrich* (1976) 58 Cal.App.3d 90, 103 ["final decision" is binding]; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) § 14:191 ["Once a published supreme court or appellate court decision becomes final, it is *binding* on lower courts under the doctrine of 'stare decisis'"]; cf. *Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093, 1098 [trial court's action in declining to follow Court of Appeal decision on ground it was not yet final "was brave but foolish . . . [and] also legally wrong"; but stating rule very narrowly as "a trial judge should follow an opinion of the Court of Appeal that speaks to conditions or practices in the judge's courtroom" and noting its prior opinion was "laser-targeted" toward that specific trial judge]; see Cal. Rules of Court, rule

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8.1115(d), superseding *Clark*, *supra*, to the extent it implied a published opinion could not be *cited* before it was final.)

Non-California opinions and proceedings cited to California courts

In prohibiting citation of an unpublished opinion, rule 8.1115 expressly refers to opinions of the "California Court of Appeal or superior court appellate division." It applies only to proceedings in California courts. An unpublished opinion from another court, such as a federal court or the court of another state, may be cited and relied on in a California proceeding. (E.g., *Moss v. Kroner* (2011) 197 Cal.App.4th 860, 874, fn. 6.) If an opinion is unpublished, a copy of the opinion must "promptly" be provided upon request of the court or a party. (Cal. Rules of Court, rule 8.1115(c).)

Unpublished California opinions cited to in non-California courts

An unpublished California opinion may be cited in proceedings in another jurisdiction if the law of that jurisdiction permits.

Federal courts and other jurisdictions with selective publication

In a jurisdiction with selective publication, citation to or reliance on unpublished cases in the courts of the jurisdiction may be restricted.

For example, with some exceptions, unpublished opinions of the Ninth Circuit decided before January 1, 2007, cannot be cited to the courts of the circuit, and those opinions are not precedent. (U.S. Cir. Ct. Rules (9th Cir.), rule 36-3(a) & (b).) By order of April 12, 2006, however, the United States Supreme Court directed that all unpublished decisions of the federal courts issued on or after January 1, 2007, may be cited to in federal courts. (Fed. Rules App. Proc., rule 32.1 ["Citing Judicial Dispositions"].)

7.3.3 Publication

The California Constitution gives the Supreme Court authority to determine which decisions will be published. (Cal. Const., art. VI, § 14; Gov. Code, § 68902.) All opinions of the California Supreme Court are published in full. (Cal. Rules of Court, rule 8.1105(a).)

Opinions of the Court of Appeal and appellate division of the superior court are published if the rendering panel or the Supreme Court so orders.

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Standards for publication of Court of Appeal opinions

An opinion of the Court of Appeal is published if a majority of the rendering panel certifies it for publication. (Rule 8.1105(b).) The court considers whether the opinion meets the standards of rule 8.1105(c).

Rule 8.1105(c) and (d) creates a presumption in favor of publication if the opinion meets certain listed criteria. The rule also identifies factors that should not be considered in deciding whether to certify an opinion for publication, such as court workload or embarrassment to attorneys, litigants, judges, or others. The provisions in rule 8.1105 include:

(d) Standards for certification

An opinion of a Court of Appeal or a superior court appellate division – whether it affirms or reverses a trial court order or judgment – should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;
(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
(5) Addresses or creates an apparent conflict in the law;
(6) Involves a legal issue of continuing public interest;
(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

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(e) Factors not to be considered

Factors such as the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person, should not affect the determination of whether to publish an opinion.

Partial publication of those sections of opinions meeting these criteria may also be ordered. (Cal. Rules of Court, rule 8.1110.)

Publication of opinions not originally ordered published

An originally unpublished opinion may later be ordered published by court order, on a court's own motion or on request of a party or other interested person. The order for publication makes it citable precedent. (Cal. Rules of Court, rule 8.1115(d).)

Court order

The Court of Appeal rendering the decision may order publication until the case becomes final as to that court. (Cal. Rules of Court, rule 8.1105(b); see rules 8.366(b) and 8.470; see also § 7.4.2 Finality of decision as to rendering court et seq., *post*, on finality.)

The Supreme Court at any time may order publication of a Court of Appeal opinion that was not certified for publication by the Court of Appeal. (Cal. Rules of Court, rule 8.1105(e)(2).) An order for publication does not mean the Supreme Court is expressing an opinion about the correctness of the result or law. (Cal. Rules of Court, rule 8.1120(d); see *People v. Saunders* (1993) 5 Cal.4th 580, 592, fn. 8.)

Request for publication

Under rule 8.1120(a), any party or other interested person may request by letter that the Court of Appeal certify the opinion for publication. The request for publication must be made within 20 days after the opinion is filed. (Cal. Rules of Court, rule 8.1120(a)(3).) It must state the person's interest and the reason why the opinion meets a standard for publication. (Cal. Rules of Court, rule 8.1120(a)(2).) To be persuasive, it should cite policy reasons as well. The request must be accompanied by a proof of service on each party in the Court of Appeal proceeding. (Cal. Rules of Court, rule 8.1120(a)(4).) An original and one copy

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must be filed in the Court of Appeal.[328] (Cal. Rules of Court, rule 8.44(b)(6).) A sample request for publication is available on ADI's Forms and Samples page.

The Court of Appeal has jurisdiction to act on a request for publication until the judgment becomes final as to that court, which is normally 30 days after the date the opinion was filed. (See Cal. Rules of Court, rules 8.264, 8.366(b), 8.470; § 7.4.2 Finality of decision as to rendering court et seq., *post*, on finality.) If the court denies the request or has lost jurisdiction to act on it, it must forward the request, with its recommendation and reasons, to the Supreme Court, which will order or deny publication. (Cal. Rules of Court, rule 1120(b).)

7.3.4 What gets depublished and how

California Supreme Court opinions

A Supreme Court opinion is superseded and is not published if the Supreme Court grants rehearing unless the Supreme Court orders otherwise. (See Cal. Rules of Court, rule 8.1105(e)(1) & (2).)

An opinion of the California Supreme Court remains published even when the United States Supreme Court grants certiorari. The California Supreme Court opinion is binding on lower California courts pending the United States Supreme Court decision. (*People v. Jaramillo* (1993) 20 Cal.App.4th 196, 197-198.) If the United States Supreme Court reverses, the California Supreme Court decision remains published and is binding precedent on any point not in conflict with the United States Supreme Court's decision.

Court of Appeal opinions

A Court of Appeal opinion originally published may lose its publication status and become uncitable in several ways.

Rehearing or review

A grant of rehearing prevents publication of the original opinion, unless otherwise ordered by the Supreme Court. (Cal. Rules of Court, rule 8.1105(e)(1) & (2).) The new opinion on rehearing will supersede the original opinion and will be published only if so certified.

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[328]Some courts may ask for additional copies of the request. It is a good idea to call the clerk's office about local practice.

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For cases granted review before July 1, 2016, a grant of review by the Supreme Court supersedes the lower court opinion and the opinion, if previously certified for publication, is decertified by the grant of review. (Cal. Rules of Court, rule 8.1105(e)(1).) For cases granted review on or after July 1, 2016, a published case remains published and citable but has no binding effect under *Auto Equity Sales, Inc.* (1962) 57 Cal.2d 450. Its review-granted status must be prominently noted. (Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e).)

The Supreme Court may order a lower court opinion to be published or depublished in whole or in part at any time after granting review. (Cal. Rules of Court, rule 8.1105(e)(2).)

Order of Supreme Court

The Supreme Court may order depublication of a Court of Appeal or superior court appellate division opinion that was originally certified for publication. (Cal. Rules of Court, rule 8.1105(e)(2).) It may do so on denial of review, at the request of a party or other interested person, or on the court's own motion. Depublication is not an expression by the Supreme Court about the correctness of the result or the law in the opinion. (Cal. Rules of Court, rule 8.1125(d); *People v. Saunders* (1993) 5 Cal.4th 580, 592, fn. 8.) There is no time limit to the Supreme Court's power to depublish; a case can be depublished years after it is otherwise final, although such late action is rarely taken.

Request for depublication

Any person, whether a party, may request the Supreme Court order depublication of a published opinion. (Cal. Rules of Court, rule 8.1125(a)(1).) The request must not be part of a petition for review. Instead, it must be by letter to the Supreme Court within 30 days after the case becomes final as to the Court of Appeal. (Cal. Rules of Court, rule 8.1125(a)(2) & (4); see Cal. Rules of Court, rules 8.264, 8.366(b), 8.470; § 7.4.2 Finality of decision as to rendering court et seq., *post*, on finality.) The request must not exceed 10 pages and must state the nature of the person's interest and the reasons the opinion should not be published. (Cal. Rules of Court, rule 8.1125(a)(2) & (3).) It must be accompanied by proof of service on the rendering court and on each party. (Cal. Rules of Court, rule 8.1125(a)(5).) A sample depublication request can be found on ADI's Forms and Samples page.

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The letter should be submitted via TrueFiling. (See Supreme Court Rules Regarding Electronic Filing (SCRREF), rules 3(a)(1)(G), 4(b).) It is a good idea to check with the Supreme Court clerk's office about current expectations.

The Court of Appeal or any person may, within 10 days after the Supreme Court receives a depublication request, file a response either joining the request or giving reasons in opposition. A response submitted by anyone other than the rendering court must state the nature of the person's interest. A response must be accompanied by proof of service on the Court of Appeal, each party, and each person requesting depublication. (Cal. Rules of Court, rule 8.1125(b).)

7.4 Disposition and post-decision processes in Court of Appeal

7.4.1 Disposition

Penal Code section 1260 sets forth the authority of the reviewing court in ordering a disposition on appeal:

The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

The power to modify the judgment includes reducing the conviction to a lesser included offense if the evidence is insufficient as to the greater offense but sufficient as to the latter. (E.g., *People v. Ruiz* (1975) 14 Cal.3d 163, 165 [modifying conviction for possession of heroin for sale to simple possession of heroin]; *People v. Noah* (1971) 5 Cal.3d 469, 477 [modifying conviction for assault by a prisoner serving less than a life sentence to assault by means of force likely to produce great bodily injury].) It does not include reducing the conviction to more than one lesser included offense. (*People v. Navarro* (2007) 40 Cal.4th 668; cf. *People v. Eid* (2014) 59 Cal.4th 650.)

A reversal in a defendant's appeal is deemed to be an order for a new trial unless the appellate court directs otherwise. (Pen. Code, § 1262.)

The grounds for decision must be based on issues the parties briefed or had an opportunity to brief. (Gov. Code, § 68081; *People v. Alice* (2007) 41 Cal.4th 668, 677-679; *In re Manuel G.* (1997) 16 Cal.4th 805, 812; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864; *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1149.)

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The filing of the opinion does not conclude the case legally: it is over only when no further appellate processes are available. The opinion may or may not conclude the case from a practical point of view: either party may decide to continue the litigation, or they both may decide further proceedings would be futile.

7.4.2 Finality of decision as to rendering court

This section discusses finality as it applies to decisions by the Court of Appeal as the rendering court. "Rendering court finality" means that the court making the decision has lost jurisdiction to modify or rehear it. "Finality" has different meanings in different contexts.[329] (See *In re Pine* (1977) 66 Cal.App.3d 593, 596.)

Time of finality

Most Court of Appeal decisions become final as to the Court of Appeal 30 days after filing. At that point, the Court of Appeal loses jurisdiction to modify the opinion, grant rehearing, or order publication. (Cal. Rules of Court, rules 8.264(b)(1) & (c), 8.268(a), 8.366(b)(1), 8.387(b)(1), 8.470, 8.490(b)(2), 8.1105(b).) Grants of a writ, denials of a writ after issuance of an alternative writ

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[329]For example, a judgment becomes final for purposes of a given court when the court loses jurisdiction. A judgment becomes final for California appellate review purposes when the time has passed for either the Court of Appeal or the California Supreme Court to review it under those courts' appellate jurisdiction.

For purposes of starting the federal habeas corpus statute of limitations, the direct review process becomes final when no further appellate review is possible, including a petition for certiorari to the United States Supreme Court. (28 U.S.C. § 2244(d); see § 7.7, *post*.)

The same definition of direct review is used for determining the retroactive applicability of many changes in the law. (See *Teague v. Lane* (1989) 489 U.S. 288, 295- 296; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5; *In re Spencer* (1965) 63 Cal.2d 400, 405-406; *In re Pine* (1977) 66 Cal.App.3d 593, 594-595; see ADI article, Retroactivity: Taking Advantage of Changes in the Law & Retroactivity.)

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or order to show cause, and involuntary dismissals of an appeal, as well as appellate opinions on the merits, are among these decisions.[330]

Certain decisions are final immediately. The denial of a writ petition without the issuance of an alternative writ or order to show cause is usually final immediately (Cal. Rules of Court, rules 8.387(b)(2)(A), 8.490(b)(1)), except that the denial of a petition for writ of habeas corpus becomes final in 30 days if it is filed on the same day as the opinion in a related appeal. (Cal. Rules of Court, rule 8.387(b)(2)(B).) A voluntary dismissal under rule 8.366(c) or 8.411(b)(2) is also final immediately. (Cal. Rules of Court, rules 8.366(b)(2)(B), 8.470.)

Change in judgment or publication status

When the court modifies the opinion after filing, the time for finality starts to run from the filing of the modification order if the modification changes the judgment. If the modification does not change the judgment, the original finality date applies. (Cal. Rules of Court, rules 8.264(c)(2), 8.366(b)(4), 8.387(d)(2), 8.470, 8.490(b)(5).) The modification order must specify whether it changes the judgment.

If the court orders publication (whole or partial) after the opinion is filed, the finality period runs from the date of the order for publication. (Cal. Rules of Court, rules 8.264(b)(3), 8.366(b)(3), 8.470, 8.387(b)(3)(B), 8.490(b)(4).)

Modification of finality date

The Court of Appeal may order early or immediate finality on its own motion when granting a peremptory writ petition or denying a writ petition after issuance of an alternative writ or order to show cause, "[i]f necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice." (Cal. Rules of Court, rules 8.387(b)(3)(A), 8.490(b)(3).) Such an order applies only to the Court of Appeal's own jurisdiction; it does not make the case final for all appellate purposes, because the opposing party still has the right to

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[330]An interim order can be reconsidered sua sponte if the court has jurisdiction over the cause. (*LaFrancois v. Goel* (2005) 35 Cal.4th 1094 [statute limiting power to reconsider interim rulings sua sponte would violate separation of powers]; *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172.) For purposes of petitioning for review from an interlocutory order, however, the order is "final" as to the Court of Appeal in 30 days. (Cal. Rules of Court, rule 8.500(a)(1) & (e).)

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petition for review and the Supreme Court retains power to grant review within rule time, either on a petition or on its own motion. (See *Ng v. Superior Court* (1992) 4 Cal.4th 29, 33-34 [Court of Appeal cannot issue actual writ until the case is final as to Supreme Court]; Cal. Rules of Court, rule 8.512(b) & (c).)

The Court of Appeal has no direct power to extend rendering court finality. The court may accomplish that result indirectly by granting a rehearing.

7.4.3 Rehearing

The Court of Appeal may grant rehearing on a petition or on its own motion. (Cal. Rules of Court, rules 8.268(a), 8.366(a), 8.387(e), 8.470.) A petition for rehearing is a brief argument contending the Court of Appeal should reconsider its decision because of errors or omissions in its analysis of the facts, the issues, or the law.

Grounds for rehearing

The grounds for granting rehearing are not defined by statutes or rules; however, some guiding principles emerge from case precedent and established practice. The petition is most often needed to call the court's attention to significant and material errors, such as a misstatement of fact, an error of law, an omission in the facts or law, or failure to consider an argument raised in the brief.

Reliance in the opinion on a theory not briefed by the parties is another basis for rehearing. (Gov. Code, § 68081; see *People v. Alice* (2007) 41 Cal.4th 668, 677-679; *In re Manuel G.* (1997) 16 Cal.4th 805, 812; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864; *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1149.) A petition for rehearing can be used when a strongly supportive case has just been decided, but that accident of timing is rare. Occasionally, a petition for rehearing might be used to offer a new and especially compelling way of viewing a contention already raised, but the likelihood of persuading the court to go the other way at this point is remote. This type of use should not be routine.

A petition for rehearing generally is not appropriate merely to reargue the points made in briefs and rejected, if the court properly understood the points and supporting authorities and simply disagreed with the conclusion being urged.

The petition should not address points that were not included in the briefs on appeal. (*Blackman v. MacCoy* (1959) 169 Cal.App.2d 873, 881-882; but cf. *In re Marilyn H.* (1993) 5 Cal.4th 295, 301, fn. 5.) An exception is jurisdictional issues, which may be raised at any time. (*Sime v. Malouf* (1950) 95 Cal.App.2d

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82, 115-117.) Further exceptions might be made for issues based on new developments in the law or other good cause. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121.)

Naturally, it is imperative to file a petition for rehearing if there are good grounds and correcting the problem in the opinion could materially affect the outcome of the case. Even if the correction would not affect the outcome, it is important the opinion accurately reflect the facts and issues "for the record," in the event any aspect of the appeal ever becomes material in a later proceeding. (See, e.g., *People v. Woodell* (1998) 17 Cal.4th 448 [appellate opinion in prior case considered as evidence of underlying fact stated in opinion].)

Rule 8.500(c): Petition for rehearing required to raise errors or omissions in Court of Appeal opinion as grounds for petition for review

Although a petition for rehearing is not a prerequisite for a petition for review, it is required if review is sought on the ground the Court of Appeal opinion contained errors or omissions of issues or facts.

Rule 8.500(c) provides:

> (1) As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.
> (2) A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.

The purpose of rule 8.500(c)(2) is to make Supreme Court review unnecessary just to correct obvious oversights of fact or law by the Court of Appeal, which would have been corrected if the errors had been pointed out in a petition for rehearing.[331] If the attorney does not intend to file a petition for

[331] If a case is in Division Two of the Fourth Appellate District, which provides tentative opinions, counsel may call attention to an error or omission after receiving the tentative. (See § 6.3.2 Tentative Opinion et seq.) If the court does not correct the problem in the final opinion, counsel should still file a

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review but the client wants to continue in pro per, the attorney should preserve it for the client by seeking to cure the error or omission; such a correction is a legitimate ground for rehearing, and as a practical matter, few clients would be able to prepare a petition for rehearing within rule time limits.[332]

Formal Requirements For Petition For Rehearing

Rule 8.268 governs petitions for rehearing. (Cal. Rules of Court, rules 8.366-8.368, 8.470-8.472.) Rule 8.70 et seq. governs formalities in TrueFiling of petitions for rehearing.

Time limits

The date of the appellate opinion's filing is the controlling date in calculating time limitations. A petition for rehearing must be served and filed within 15 days after the filing of the decision. (Cal. Rules of Court, rule 8.268(b)(1); see also Cal. Rules of Court, rule 8.25.) The presiding justice may grant leave to file a late petition for good cause if the opinion is not yet final. (Cal. Rules of Court, rule 8.268(b)(4).)

An order for publication made after the opinion is filed restarts the 15-day period unless the party has already filed a petition. (Cal. Rules of Court, rule 8.268(b)(1)(B).) A modification to the opinion changing the judgment also restarts the period.[333] (Cal. Rules of Court, rule 8.268(b)(1)(C).)

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petition for rehearing if a petition for review is contemplated, as a precaution against potential procedural default under rule 8.500(c)(2).

[332]Some courts take the position that clients represented by counsel have no standing to file in pro per and refuse to accept a petition for rehearing submitted by the client. A procedural way around that problem, if the client wants to file in pro per, would be for counsel to ask to be relieved right after the decision not to proceed further is made.

[333]The Court of Appeal order modifying the opinion must state whether the judgment is being changed. (Cal. Rules of Court, rule 8.264(c)(2).)

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Format

Petitions for rehearing must conform to the provisions of rules 8.70 et seq., 8.204, 8.360, and 8.412(a). (Cal. Rules of Court, rule 8.268(b)(3).) The length limit is 7,000 words. (Cal. Rules of Court, rule 8.204(c)(5).)

Filing and service

Petitions filed by an attorney must be filed via TrueFiling in the Court of Appeal. TrueFiling is optional for self-represented parties and those granted an excuse from electronic filing by court order.

One copy must be served on each party represented by separate counsel and on opposing counsel. (Cal. Rules of Court, rules 8.268, 8.25(a)(1).) By practice, the superior court and, in criminal cases, the district attorney should also be served. A copy should be sent to the client unless they have requested otherwise. By policy, panel attorneys must also serve the appellate project.

Substantive content and tone

Because the petition for rehearing contests the appellate opinion itself, the task of persuasion is a formidable one. Counsel should strive to be compelling and concise in explaining exactly what the problem is and why it affects the client. At the same time, counsel must be sensitive to the court's possible reactions and maintain an attitude of great respect. The tone should remain objective and avoid any intimation of personal criticism. Counsel should emphasize the importance of a correct decision and the injury to the client, not the court's "foolishness" in making the error; it helps to use language critiquing the "opinion," rather than the "court" or, surely, the author of the opinion.

A contemptuous or irate attitude is neither beneficial to the client's interests or to counsel's stature before the court.[334] Ideally, counsel wants not to target the court as an enemy or portray it unflatteringly, but to enlist the court as an ally, showing counsel's confidence in and respect for the court's desire to do justice and reach the right result, as well as its willingness to recognize and correct its own mistakes.

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[334]In *In re Koven* (2005) 134 Cal.App.4th 262, 264, 276-277, the court held in contempt an appellate counsel who, in a petition for rehearing, accused the court of "deliberate judicial dishonesty" and other misconduct.

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Answer

Under rule 8.268(b)(2), a party may not file an answer to a petition for rehearing in the Court of Appeal unless the court requests; the rule indicates a petition for rehearing is not usually granted unless the court has requested an answer. The answer should defend and reinforce the opinion of the court. It must conform to the requirements of rules 8.70 et seq. and 8.204.

Disposition

A rehearing may be granted on a petition, or on the court's own motion, before the decision becomes final. Under rule 8.264(b), a decision of the Court of Appeal normally becomes final 30 days after filing. Thereafter, the court loses jurisdiction over the cause.[335] If the court fails to act on a petition while it has jurisdiction, then the petition is deemed denied. (Cal. Rules of Court, rule 8.268(c).)

The court may deny the petition for rehearing yet still modify the original opinion. The date of finality and the time to petition for review in the Supreme Court are not extended if the order for modification does not change the judgment. However, if the order changes the judgment, then the clock begins to run anew from the date of the modification, for purposes of finality and petitioning for rehearing and review. (Cal. Rules of Court, rules 8.264(c)(2), 8.268(b)(1)(C).) The order modifying the opinion must state whether the judgment is being changed. (Cal. Rules of Court, rule 8.264(c)(2).) An order for publication issued after the opinion is filed resets the date of finality. (Cal. Rules of Court, rule 8.264(b).)

7.4.4 Remittitur

The remittitur is the document sent by the reviewing court to the court or other tribunal whose judgment was reviewed. A remittitur is issued after an appeal or original proceeding, except on the summary denial of a writ petition. (Cal. Rules of Court, rules 8.272(a)(2), 8.366(a)-8.368, 8.387(f), 8.470-8.472, 8.490(c), 8.540(a); see ADI practice article, Reversal and Remand: Appellate Counsel's Duties, by Anna Jauregui-Law.)

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[335]For a discussion of finality, see § 7.4.2 Finality of Decision as to Rendering Court et seq., *ante*.

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The remittitur functions as a transfer of jurisdiction from the appellate court to the lower court. (*Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 8-10.) Policy considerations require that only one court has jurisdiction over a case at any given time. The filing of a notice of appeal divests the trial court of jurisdiction and vests it in the Court of Appeal. (*People v. Perez* (1979) 23 Cal.3d 545, 554.) The remittitur revests it in the lower court.

> [T]he essence of remittitur is the returning or revesting of jurisdiction in an inferior court by a reviewing court. The reviewing court loses jurisdiction at the time of remittitur, and the inferior court regains jurisdiction.

(*Gallenkamp*, at p. 10.) Until the remittitur issues, the trial court lacks jurisdiction to retry a case or, with certain exceptions,[336] make other orders. (*People v. Sonoqui* (1934) 1 Cal.2d 364, 365-367; *People v. Saunoa* (2006) 139 Cal.App.4th 870.)

If further proceedings in the trial court are ordered, the scope of the trial court's authority is limited by the terms of the remittitur. (Code Civ. Proc., § 43; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701; *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656; *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 147; cf. *People v. Rosas* (2010) 191 Cal.App.4th 107 [authority to lower restitution order even if that issue not addressed on original appeal].) This is true even if a later decision of a higher court casts doubt on the correctness of the decision. (*People v. Dutra* (2006) 145 Cal.App.4th 1359.)

A remittitur from the Court of Appeal normally goes to the superior court. A Supreme Court remittitur goes to the Court of Appeal in a review-granted case and to the lower court or tribunal in other types of proceedings. (Cal. Rules of Court, rule 8.540(b).)

Issuance

Court of Appeal remittiturs are governed by rule 8.272. They are issued when a case is final for state appellate purposes, i.e., no further appellate review

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[336]For example, the trial court retains authority to correct clerical error, correct custody credits or fines and fees (Pen. Code, §§ 1237.1, 1237.2), recall the sentence (Pen. Code, § 1172.1), modify or revoke probation, and make orders in juvenile cases. It also has jurisdiction to issue writs related to the case not inconsistent with the appellate court's jurisdiction over the underlying judgment.

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within the *California* judicial system is available. (Certiorari to the United States Supreme Court or original post-conviction writ remedies may still be open.)

If no review in the California Supreme Court is sought, the remittitur for a Court of Appeal opinion will be issued when the time for the Supreme Court to grant review expires – normally on the 61st day after the opinion's filing. (Cal. Rules of Court, rule 8.272(b)(1)(A).) The Supreme Court may extend that time when it is considering granting review on its own motion. (Cal. Rules of Court, rule 8.512(c)(1).)

If review is sought, the remittitur will issue immediately upon a denial of the petition for review or dismissal of review. (Cal. Rules of Court, rule 8.272(b)(1)(A).)

If review is granted and the case is decided by the Supreme Court, the Supreme Court will issue a remittitur to the Court of Appeal, which in turn will act on it. If it calls for further proceedings in the Court of Appeal, the Court of Appeal will follow the directions from the Supreme Court. If not, the Court of Appeal will immediately issue its remittitur to the superior court. (Cal. Rules of Court, rules 8.272(b)(2), 8.540.)

The Court of Appeal may order immediate issuance of a remittitur on stipulation of the parties or voluntary dismissal of the appeal. (Cal. Rules of Court, rules 8.272(c)(1), 8.316(b)(2), 8.366(a), 8.411(b)(2), 8.470; see also rule 8.244(b) & (c).) The court may stay issuance of the remittitur for a reasonable period. (Cal. Rules of Court, rule 8.272(c)(2).)

Recall

For good cause, the court may recall the remittitur on its own or a party's motion, thereby reinvesting jurisdiction over the case in the appellate court. (Cal. Rules of Court, rule 8.272(c)(2).) Good cause may consist of such grounds as ineffective assistance of appellate counsel or a change in the law abrogating the basis for the previous judgment. (E.g., *People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490, fn.12; *People v. Lewis* (2006) 139 Cal. App.4th 874, 879.) The recall order does not supersede the opinion or affect its publication status. (Cal. Rules of Court, rules 8.272(c)(3).) As the court explained in *In re Grunau* (2008) 169 Cal.App.4th 997, 1002:

> By recalling the remittitur, an appellate court reasserts jurisdiction on the basis that the remittitur, or more often the judgment it

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transmitted, was procured by some improper or defective means. Technically the court does not reclaim a jurisdiction it has lost, but disregards a relinquishment of jurisdiction that is shown to have been vitiated.

In criminal cases, a petition for writ of habeas corpus may be the vehicle for requesting the remittitur be recalled. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484-490, fn. 12; see § 8.4.6 Reinstatement of appeal.)

7.5 Petitions for review in the California Supreme Court

If the case presents a new or important question of law or an issue on which districts or divisions of the Court of Appeal are in conflict, or if it is necessary to exhaust state remedies to preserve an argument for subsequent federal review,[337] a petition for review in the California Supreme Court should be considered. A petition should be filed if it seems (a) appropriate given the criteria for petitions and (b) reasonably necessary to protect the client's interests. The fact the client or attorney disagrees with the Court of Appeal or is unhappy with its reasoning is usually not itself a sufficient reason for petitioning.[338] The decision whether to seek review should be made soon after the Court of Appeal opinion is filed.

If counsel decides not to file a petition, the client must be notified promptly and provided with information on how to file a petition for review in pro per,

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[337]Exhaustion of state remedies is a valid consideration if the client has a serious potential federal issue that has been raised adequately in the Court of Appeal. It is not appropriate to petition "just in case something should come up in the federal courts." See § 7.5.4 Abbreviated Petition to Exhaust State Remedies, *post*.

[338]An occasional exception can occur when the Court of Appeal has obviously misapplied undisputed law or denied the appellant procedural due process during the appeal. In that situation, the Supreme Court has occasionally granted review and transferred the case back to the Court of Appeal with directions. (See Cal. Rules of Court, rules 8.500(b)(4), 8.528(d); e.g., *People v. Thomas* (March 16, 2005, No. S130587) 108 P.3d 860, 26 Cal.Rptr.3d 301, 2005 Cal. Lexis 2771; see §§ Grant and Transfer and Disposition, *post*.)

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including the date by which the petition must be filed and the address of the Supreme Court.[339]

If the outcome in the Court of Appeal was mixed – a victory in part and a loss in part – counsel should evaluate whether a petition for review on the losing issue(s) is called for and advise the client accordingly but should leave it up to the client to decide whether to proceed, since doing so could risk losing the partial victory already in hand.[340]

7.5.1 Grounds for review and factors relevant to the discretionary decision

The grounds for review in the Supreme Court are found in rule 8.500(b), which permits review when: (1) it appears necessary to secure uniformity of decision or to settle important questions of law; (2) the Court of Appeal was without jurisdiction; (3) because of disqualification or other reason the decision of the Court of Appeal lacked the concurrence of the required majority of the qualified judges; or (4) the Supreme Court determines further proceedings in the Court of Appeal are necessary. (Cal. Rules of Court, rule 8.500(b).)

Typically, the Supreme Court grants review in roughly two to five percent of the petitions for review filed.[341] One of the reasons for this low percentage is that the dominant role of the Supreme Court is supervisory. It promotes justice, not necessarily by ensuring the correct result is reached in each individual case, but by maintaining uniformity in the decisional law and overseeing the development of the law.

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[339]Petition for review information forms for clients are on the forms and samples page of the ADI website. Basic information is on the court website. As to the latter, assure the client that some of the information (e.g., on filing fees) does not apply to criminal or juvenile cases.

[340]Even if opposing counsel does not file a petition for review, rule 8.504(c) allows them to file an answer to the client's petition, raising additional issues to be considered in the event review is granted.

[341]In fiscal year 2023-2024, the Supreme Court granted review in approximately 10 percent of all the petitions for review filed, including both criminal and civil cases. However, most of those grants were grant and holds in criminal cases. The Supreme Court granted full review in only approximately one percent of all petitions for review filed. Annual Court Statistics Reports can be found on the court's website.

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The Supreme Court may, on its own motion, order review of the Court of Appeal decision. (Cal. Rules of Court, rule 8.512(c)(1); see, e.g., *Maas v. Superior Court* (*People*), review granted March 25, 2015, S225109; *People v. Buycks*, review granted January 20, 2016, S231765.) During the pendency of a case in the Court of Appeal, the Supreme Court may also order the case transferred to itself, on its own or a party's motion. (Cal. Rules of Court, rule 8.552(a); e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256.)

Uniformity of decision

The likelihood that conflicting appellate authority will prompt the Supreme Court to grant review on this ground depends on a number of factors. These include the ages of conflicting cases, the importance of the issue, the frequency with which it arises, and the extent to which other courts have questioned or followed the various conflicting cases.

Important questions of law

Among the factors relevant to the Supreme Court's judgment that a legal question is an important one warranting review are issues of first impression; issues of broad or frequent applicability; differences between California law and the law of other states, treatises, or restatements; criticism of California law by other courts or commentators; the joinder of amicus curiae in the petition; statistics, reports, commentaries, and news articles suggesting the issues are likely to recur; and the impact of the issue on the judicial system.[342] (See *The Supreme Court of California (7th ed.): Containing Internal Operating Practices and Procedures of the California Supreme Court* (the Booklet).) Another consideration may be the quantity of pending cases with the same issue.

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[342]While rule 8.1115(a) prohibits the citation to unpublished opinions, an unstated exception exists. A member of the court and member of the central staff have informed in various MCLE forums, that to determine the need for uniformity of decision, the Supreme Court is interested in a split of authority, even in unpublished opinions. Thus, citation made be made to unpublished opinions not for their reasoning, but rather to demonstrate the need to resolve an existing conflict in law. But counsel must be careful to emphasize that any such authority is unpublished and cited solely for the purpose of showing a conflict rather than for any reasoning.

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The fact an opinion is published increases the likelihood review will be granted, as does the existence of concurring or dissenting opinions at odds with the majority reasoning.

Other grounds under rule 8.500(b)

The second and third grounds for review under rule 8.500(b) (lack of jurisdiction in the Court of Appeal and lack of a majority) seldom arise. (Cf. *Pennix v. Winton* (1943) 61 Cal.App.2d 761, 777.)

The Supreme Court does exercise with some regularity its power under the fourth ground to grant review and transfer a matter to the Court of Appeal for further proceedings. (Cal. Rules of Court, rule 8.500(b)(4).) This procedure is used often when the Court of Appeal proceedings were improperly truncated (for example, by the summary denial of a writ petition or the dismissal of an appeal), when new law may affect the Court of Appeal decision, or when the Court of Appeal made a clear error that needs correction but not plenary Supreme Court review.[343]

Considerations apart from rule 8.500(b) listed grounds

The Supreme Court has broad discretion in determining whether to grant review. On the one hand, the court may grant review even when grounds under rule 8.500(b) are technically absent – as when it sees a serious injustice or error in the individual case – although a grant of review for this reason is infrequent.

On the other hand, the court often does not grant review despite the presence of one or more conditions under rule 8.500(b). For example, in a case involving an extremely important issue of law, the Supreme Court may deny review because the Court of Appeal has settled the question in a manner that will adequately guide other courts. Similarly, the Supreme Court may decide not to intervene despite conflicting appellate court opinions because the issue is rare, or its impact is minimal. The Court may also wish to defer consideration of an issue until it has been refined through repeated deliberations in the lower courts.

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[343]In *People v. Thomas* (March 16, 2005, No. S130587) 108 P.3d 860, 26 Cal.Rptr.3d 301, for example, the Court of Appeal had dismissed the appeal on the ground the notice of appeal was inadequate. The Supreme Court granted review and transferred the case to the Court of Appeal with directions to reinstate the appeal and deem the notice of appeal properly filed.

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Alternatively, the case may simply not be, for one reason or another, a good vehicle for deciding a particular issue.

7.5.2 Formal requirements for petition

Time limitation

A party seeking review must serve and file a petition for review within 10 days after the decision of the Court of Appeal becomes final. (Cal. Rules of Court, rule 8.500(e)(1).)

30-day finality cases

Decisions of the Court of Appeal are usually final as to that court 30 days after filing of the decision. (Cal. Rules of Court, rule 8.264(b)(1).) Grants of a writ, denials of a writ after issuance of an alternative writ or order to show cause, involuntary dismissals of an appeal, and interlocutory orders, as well as opinions in an appeal, are among these decisions. In most cases, therefore, a petition for review must be filed within the window period of 31-40 days after the filing of the Court of Appeal opinion.[344]

As with other filing deadlines, if the 10th day falls on a non-business day, the due date is the next business day. (Code Civ. Proc., § 12a; *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 955.[345])

Some attorneys have fallen prey to a particular misunderstanding of the relevant time calculation: if the day of finality is a non-business day, the 10-day period for filing a petition for review still starts on the non-business day. (Cal. Rules of Court, rule 8.500(e)(1).) In other words, the "next business day" rule applies to the *filing* date, not to *starting* the clock on the petition for review.

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[344]An order for publication after the opinion is filed or a modification of the opinion changing the judgment restarts the period of finality. (Cal. Rules of Court, rule 8.264(b) & (c).)

[345]See also Code of Civil Procedure section 12: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

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Immediate finality cases

Some decisions are final immediately and in those cases a petition for review must be filed within 10 days of the filing date of the decision denying or granting relief. For example, with the exception noted in § Habeas corpus denial on same day as opinion in related appeal, *post*, the denial by the Court of Appeal of a petition for an original writ, when it has not issued an alternative writ or an order to show cause, is final immediately (i.e., on the date the denial is filed). (Cal. Rules of Court, rules 8.387(b)(2)(A), 8.490(b)(1); see also rules 8.452(i) and 8.456(h)(5) [finality in juvenile dependency statutory writs is governed by rule 8.490].) Other examples of immediately final decisions are denials of bail pending appeal, voluntary dismissals of an appeal, denials of a petition for writ of supersedeas, and denials of a transfer of a case within the appellate jurisdiction of the superior court. (Cal. Rules of Court, rules 8.264(b)(2), 8.366(b)(2), 8.470.)

Because of the tight time frame for immediate-finality cases, counsel must take care to monitor the Court of Appeal online docket closely and sign up for automatic e-mail notification on all writ cases, under both that case number and the number of any related appeal. (See § 1.3.1 Appropriate administration of office and files.)

Habeas corpus denial on same day as opinion in related appeal

An exception to the rule of immediate finality for summary writ denials is that the denial of a petition for writ of habeas corpus filed on the same day as a decision in a related appeal becomes final at the same time as the related appeal, even if no order to show cause has issued. (Cal. Rules of Court, rule 8.387(b)(2)(B).) But *separate petitions for review are required* for the writ proceeding and the appeal if they were not consolidated in the Court of Appeal and no order to show cause was issued. (Cal. Rules of Court, rule 8.500(d).)

Premature petition

A petition for review submitted for filing before the Court of Appeal decision becomes final will be received and deemed filed the day after finality. (Cal. Rules of Court, rule 8.500(e)(3).)

Extending time

The time for filing a petition for review cannot be extended, but the Chief Justice may relieve a party from default from failure to file a timely petition if the

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time for the court to grant review on its own motion has not expired. (Cal. Rules of Court, rules 8.500(e)(2), 8.512(c)(1).) In contrast, an extension of time to file an answer or reply may be granted. (Cal. Rules of Court, rules 8.500(e)(4) & (5), 8.60(b), and Advisory Committee comment to rule 8.500(e); see § 7.5.5 Answer and Reply, *post*.) No attorney should count on relief from default or an extension, however; the court can be parsimonious in granting such requests.

Format

Except as otherwise provided in rule 8.504, an electronic petition for review must comply with the provisions of rules 8.74 and 8.204, which lay out the general rules for the form of appellate documents. (Cal. Rules of Court, rule 8.504(a).) A petition filed by an attorney must also comply with the Supreme Court Rules Regarding Electronic Filing. ADI's Filing and Service charts lay out these requirements.

The petition filed in the Supreme Court must contain or be accompanied by a copy of the opinion or order of the Court of Appeal for which review is sought and any order for modification or publication. (SCRREF, rule 10.) The service copies, however, do not require an attached opinion. (Cal. Rules of Court, rule 8.504(b)(4).) No other attachments are permitted except for an opinion required by rule 8.1115(c) [available only in computer-based source] or up to 10 pages of relevant lower court orders, exhibits, and citable regulations, rules, or other non-accessible law. (Cal. Rules of Court, rule 8.504(e)(1) & (2).)

The petition must follow rule 1.201, on excluding personal identifying information, as well as applicable provisions of rules 8.45-8.47 on sealed and confidential records. (SCRREF, rule 11.)

Length

If produced on a computer, a petition for review must not exceed 8,400 words including footnotes and must include a certificate by appellate counsel or an unrepresented party stating the number of words in the document. The certifying person may rely on the word count of the computer program used to prepare the document. (Cal. Rules of Court, rule 8.504(d)(1).) Upon application, the Chief Justice may permit for good cause a petition greater than the specified length or the inclusion of more annexed material. (Cal. Rules of Court, rule 8.504(d)(4).)

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Filing and service

TrueFiling is required for petitions filed by an attorney. (SCRREF, rule 3(a).) Rule 8.74 prescribes formal requirements for electronic documents. ADI's Filing and Service charts also lay out the requirements for electronic filing and service.

Self-represented parties have a choice of using TrueFiling or filing in paper form. (SCRREF, rule 4.) The court may grant an excuse from TrueFiling for hardship, prejudice, or lack of technical feasibility. (SCRREF, rule 6.)

7.5.3 Purpose and substantive content

Purpose of petition

The objective of a petition for review (other than an exhaustion petition) is to obtain *review*, not reversal or affirmance. If the petition is granted, new briefs on the merits will be filed. Thus, there is no reason to include extended merits briefing in the petition beyond what is required to ensure the court knows what the issues are and why further consideration of them is needed (for example, why the Court of Appeal's treatment was inadequate or erroneous).

The critical function of a petition is to attract the interest of the Supreme Court and persuade it that review is necessary. Counsel's persuasive skills should be focused on the message "Why you should hear this case," not "Why my client should win." Since the granting of petitions for review is completely discretionary and counsel is competing with numerous other briefs and petitions for the attention of the justices and their research attorneys, appellate counsel should make the petition as concise, interesting, and compelling as possible.

For this reason, the petition for review should not just repeat the arguments already rejected and try at length to persuade the Supreme Court on the merits. It should instead develop the theme of why review is necessary. Questions of law become more important when they have consequences beyond the individual case. It should point out any social or political concerns involved, any implications for the judicial system, and the frequency with which the issues arise. The petition should note any conflicts among the Courts of Appeal and any dissenting or concurring opinions.[346] The alleged incorrectness of the result

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[346]As discussed in § Exceptions: Rule 8.1115(B) and Similar Situations, *ante*, unpublished opinions may be useful in showing a conflict among courts, the

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reached in the Court of Appeal and injustice to the individual client would be factors to point out, but that will rarely suffice to differentiate the case from most others seeking review.

From this, it should go without saying that *it is inappropriate simply to copy the briefs wholesale, stick on a new cover and an "Issues Presented" section, and file that as a petition for review*. Such petitions are filed all the time, but they represent poor advocacy.

An exception might be when the sole purpose of the petition is to exhaust state remedies for federal purposes. (See § 7.5.4 Abbreviated petition to exhaust state remedies, *post*.) The objective of such a petition is not to persuade the Supreme Court of anything, but to present the issue to satisfy procedural requirements.

If a petition has a mix of merits issues and exhaustion issues, counsel should identify them clearly and present them in a manner appropriate to their purpose.

Content

Rule 8.504(b) prescribes the contents of a petition for review. It need not contain all the elements of an opening brief, such as statement of appealability or of the facts and case, etc. Frequently, counsel includes such matters to help the court understand the issue, but they are not necessary and, in some situations, might be a distraction.

Issues presented

The body of the petition for review must begin with a concise, non-argumentative statement of the issues presented for review, framing them in terms of the facts of the case without unnecessary detail, and the petition must explain how the case presents a ground for review. (Cal. Rules of Court, rule 8.504(b)(1) & (2); §§ 7.5.1 Grounds for review and factors relevant to the

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frequency with which an issue arises, the general importance of the issue, and other facts relevant to granting review. When referring to unpublished cases for these purposes, counsel should avert possible criticism or misunderstanding by explicitly discussing rule 8.1115(a), which prohibits reliance on a case not published, and by explaining why the references do not violate the rule.

Counsel must also be scrupulous in confining the references to permitted purposes.

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discretionary decision et seq. and Purpose of petition, *ante*.) If rehearing was available, the petition must state whether it was sought and how the court ruled. (Cal. Rules of Court, rule 8.504(b)(3).)

Required attachments

The opinion or order sought to be reviewed, and any order modifying the opinion or directing its publication, are required attachments to a petition for review under rule 8.504(b)(4) and (5). No other attachments are permitted except the opinion required by rule 8.1115(c) [available only in computer-based source] and up to 10 pages of exhibits, orders of a trial court or Court of Appeal that the party considers unusually significant, relevant citable regulations or rules, or other relatively non-accessible law. (Cal. Rules of Court, rule 8.504(e)(1) & (2).) Incorporation by reference is prohibited, except for references to a petition, answer, or reply filed by another party in the same case or another case with the same or similar issues, in which a petition for review is pending or has been granted. (Cal. Rules of Court, rule 8.504(e)(3).)

Argument

The argument section of a petition for review should carry out the theme of why review is necessary – usually (1) to secure uniformity of decision or (2) to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1); §§ 7.5.1 Grounds for review and factors relevant to the discretionary decision et seq. and Purpose of petition, *ante*.) The argument should point out any social or political concerns implicated by the issues and any consequences beyond those related to the petitioner. It should alert the court to any other pending cases that raise identical or related issues and, when appropriate may explain how the instant case highlights the issues more clearly than other pending cases.

Depublication request

In addition to or in lieu of review, a request for depublication may be made.[347] (Cal. Rules of Court, rule 8.1125.) However, that measure offers no remedy to the individual client, and to the extent it suggests depublication is an adequate substitute for a grant of review, it may render a disservice to the client. Counsel therefore must be exceedingly cautious about making such a request and

[347]See § Request for Depublication, *ante*.

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should eschew it. The court can depublish on its own – and occasionally does – without counsel's request. (Cal. Rules of Court, rule 8.1105(e)(2).)

Alternative remedies

The petition for review may also suggest a disposition other than a full review and decision on the merits by the Supreme Court. An example would be a "grant and hold" (Cal. Rules of Court, rule 8.512(d)(2)), when the issue is already pending in the Supreme Court. Another example would be a grant of review and transfer to the Court of Appeal with instructions. (Cal. Rules of Court, rules 8.500(b)(4), 8.528(d)). This remedy might be appropriate when, for example, the Court of Appeal decision omits or misstates important matters, when a relevant new decision has been issued,[348] when the court has denied a writ petition summarily, or when the court has dismissed an appeal for improper reasons.

7.5.4 Abbreviated petition to exhaust state remedies

Rule 8.508 permits an abbreviated petition for review when no grounds for review under rule 8.500(b) exist, but a petition for review is needed to exhaust state remedies for potential habeas corpus relief in federal court. The Supreme Court may still grant review if the case warrants it.

An exhaustion petition for review need not comply with rule 8.504(b)(1) and (2), which requires a non-exhaustion petition to begin with a statement of the issues presented for review and explain how the case presents a ground for review under rule 8.500(b).

The words "Petition for Review to Exhaust State Remedies" must appear prominently on the cover. (Cal. Rules of Court, rule 8.508(b)(1).) The petition must comply with rule 8.504(b)(3) through (5). It must state it presents no grounds for review under rule 8.500(b) and is filed solely to exhaust state remedies for federal habeas corpus purposes. (Cal. Rules of Court, rule 8.508(b)(3)(A).)

An exhaustion petition for review must contain a brief statement of the underlying proceedings, including the conviction and punishment, and the

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[348]Often such a transfer will order reconsideration in light of a Supreme Court decision, but it may be based on Court of Appeal decisions, as well. (See, e.g., *In re Henderson* (November 19, 2009, No. S177100) [petition for review granted and transferred to Court of Appeal "with instructions to vacate its opinion and reconsider its disposition in light of" two Court of Appeal decisions].)

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factual and legal bases of the federal claims. (Cal. Rules of Court, rule 8.508(b)(3)(B) & (C).) It is important for this statement to present the facts and issues sufficiently to exhaust state remedies under federal law. (See Exhausting State Remedies article, ADI website.)

7.5.5 Answer and reply

Rule 8.500(a)(2) and (e)(4) permits but does not require an answer to a petition for review. The answer is due within 20 days after the filing of the petition. A party may request an extension of time in which to file an answer. (Cal. Rules of Court, rules 8.500(e)(4), 8.50(a), 8.60(b), and Advisory Committee comment to rule 8.500(e); contrast Cal. Rules of Court, rule 8.500(e)(2) [not permitting extensions to file petition for review].) An answer may ask the Supreme Court to address additional issues if the court grants review of any issue presented to the Court of Appeal but not mentioned in the petition for review. (Cal. Rules of Court, rule 8.500(a)(2).) When the Court of Appeal declines to reach important issues because it reverses on other grounds, an answer may be required to alert the Supreme Court to these issues. (See, e.g., *In re Manuel G.* (1997) 16 Cal.4th 805, 814, fn. 3.)

The answer should support the result reached in the Court of Appeal. It should point out any errors of fact or law in the petition for review. It may rebut the claimed need for the Supreme Court's intervention, for example, by explaining why any decisional conflict is insignificant or disputing the importance of the issue being raised. If opposing counsel has failed to comply with rule 8.500(c)(2), which requires a petition for rehearing in certain cases, the answer should point out that omission. An answer may also ask the Supreme Court to reconsider certain aspects of the Court of Appeal's decision, should review be granted.

The answer may not exceed 8,400 words including footnotes. (Cal. Rules of Court, rule 8.504(d)(1).) Except as otherwise provided in rule 8.504, the answer must comply with the provisions of rule 8.204. (Cal. Rules of Court, rule 8.504(a).) Like the petition, TrueFiling is mandatory for an answer filed by an attorney. (SCRREF, rules 3 and 5.)

Within 10 days after the filing of the answer, the petitioner may serve and file a reply, not exceeding 4,200 words including footnotes. (Cal. Rules of Court, rules 8.500(a)(3) & (e)(5), 8.504(d)(1).) A party may request an extension of time in which to file a reply. (Cal. Rules of Court, rules 8.500(e)(5), 8.50, 8.60(b); third paragraph of Advisory Committee Comment to rule 8.500(e).) The filing rules described above for the petition and answer apply.

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7.5.6 Amicus curiae

Amici curiae may file letters in support of or opposition to review (commonly called "me too" letters). They must comply with rule 8.500(g). TrueFiling is optional. (SCRREF, rules 3(a)(1)(G), 4(b).)

7.5.7 Disposition of petition

The Supreme Court must act within 60 days after the filing of a petition but may and often does extend the time to rule an additional 30 days. (Cal. Rules of Court, rule 8.512(b)(1).) The total time including extensions may not exceed 90 days after the filing of the last timely petition for review.[349] (*Ibid.*)

Denials or dismissals of review and orders for transfer or retransfer are final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(A) & (B).)

Preliminary screening process

The processes for considering petitions for review are described in the Booklet.[350] The preliminary stage in the decision whether to grant review is staff screening of the petitions for review-worthiness. The Booklet describes the process:

- Staff attorneys at the Supreme Court assess petitions for review in non-capital criminal cases according to such criteria as significance, the likelihood of a grant, length, issues, and publication status. They prepare a memo and make a recommendation as to disposition. The recommendation set forth in a conference memorandum will generally be one of the following: (1) "grant," (2) "grant and hold," (3) "grant and transfer," (4) "deny," (5) "submitted," meaning discussion warranted, (6) "denial submitted," meaning deny but some issue could arguably justify a grant or warrants discussion by the court, or (7) "deny and depublish." (Booklet, at p. 29.)

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[349] If no petition for review is filed by a party, the Supreme Court may order review on its own motion within 30 days of finality of the decision in the Court of Appeal. This time may be extended up to an additional 60 days. (Cal. Rules of Court, rule 8.512(c)(1).)

[350] https://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf. The Internal Operating Practices and Procedures of the Court begin at page 25 of the Booklet.

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- Cases are assigned to either a "A" or the "B" list, according to the recommendation in the conference memorandum. Cases assigned to the A list include all those in which the recommendation is to grant or take affirmative action of some kind. They also include cases in which a dissenting opinion has been filed in the Court of Appeal, or in which the memorandum recommends special attention. Cases assigned to the B list concern routine matters, or application of settled law, in which a simple denial is the recommended disposition. (Booklet, at p. 30.)

Decision

The Supreme Court must rule within 60 days after the last petition for review is filed, although it may extend the time so that the total does not exceed 90 days. (Cal. Rules of Court, rule 8.512(b)(1).)

The justices meet weekly to confer on pending matters. Matters on the "B" list will be denied. Matters on the "A" list are discussed and then voted on. Any justice may request that a case on either list be continued to a later conference for further consideration. (Booklet, at pp. 30-31.) A vote of at least four justices is required to grant review. (Cal. Rules of Court, rule 8.512(d)(1).)

Denial

The Supreme Court most commonly denies petitions for review. A denial is final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(A).)

Grant of full review

The court may grant review by an order signed by at least four justices. (Cal. Rules of Court, rule 8.512(d)(1).)

Upon granting full review, the Supreme Court may and often does specify what issues are to be within the scope of the review. (Cal. Rules of Court, rule 8.516(a)(1).) This order is not binding on the court, and it may later expand or contract review, if the parties are given an opportunity for argument. (Cal. Rules of Court, rule 8.516(a)(2).)

Grant and hold

The Supreme Court may dispose of the petition other than by granting full review. In a "grant and hold" disposition, it grants the petition and defers action

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on the case, pending decision in another case on which the court has granted review. (Cal. Rules of Court, rule 8.512(d)(2).)

Grant and transfer

In a "grant and transfer" disposition, the court grants the petition and transfers the case back to the Court of Appeal, usually with instructions. (Cal. Rules of Court, rules 8.500(b)(4), 8.528(d).) The court may choose this type of disposition when further action, but not full Supreme Court review is needed – for example, when the Court of Appeal denied a writ petition summarily, when the opinion failed to consider substantial issues or authorities, or when a controlling decision was filed after the opinion. (See, e.g., *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272 *People v. Howard* (1987) 190 Cal.App.3d 41, 45; *People v. Thomas* (March 16, 2005, No. S130587) 108 P.3d 860, 26 Cal.Rptr.3d 301.)

A "grant and transfer" order is final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(B).) Any supplemental briefing in the Court of Appeal after remand or transfer from the Supreme Court is governed by rule 8.200(b).[351] (Cal. Rules of Court, rule 8.528(f).)

Order affecting publication status

The court may also deny the petition but publish or depublish the Court of Appeal opinion. Depublication leaves the opinion as the law of the case but prevents it from being cited as precedent in future cases. (Cal. Rules of Court, rule 8.1115(a).) Neither publication nor depublication expresses the Supreme Court's views about the correctness of the opinion. (Cal. Rules of Court, rules 8.1120(d), 8.1125(d).) See § Law of the case et seq., *ante*, for further discussion of publication.

[351]Rule 8.200(b)(1), imposes a short deadline of 15 days after the finality of the Supreme Court decision to file a supplemental brief, with 15 days for opposing counsel to respond. The brief is limited to matters arising after the previous Court of Appeal decision unless the presiding justice permits other briefing. (Cal. Rules of Court, rule 8.200(b)(2).)

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Dismissal of review

A grant of review can later be dismissed for any reason without Supreme Court decision. The court might do so, for example, if it no longer wishes to consider the issues, if the case was on a "grant and hold" and after the lead case has been decided, the Supreme Court believes the Court of Appeal decision was substantially correct, or if the case becomes moot. (Cal. Rules of Court, rule 8.528(b).)

Retransfer

If the case had been transferred to the Supreme Court under rule 8.552, while pending in the Court of Appeal, it may be retransferred without decision. (Cal. Rules of Court, rule 8.528(e).)

7.6 Proceedings in review-granted cases

This section deals with non-capital criminal cases in which the California Supreme Court has granted review.[352]

7.6.1 Appointment of counsel

If review is granted on at least one requested issue, counsel's appearance in the Supreme Court on an appointed case will be made under a new appointment by the Supreme Court, with a recommendation by the appellate project. Often, counsel who represented appellant in the Court of Appeal is appointed by the Supreme Court, although sometimes a change is made for one reason or another. All appointments in the Supreme Court are designated *assisted*, by policy of the court and the appellate projects. (See §§ 1.2.2 Assisted cases and 1.2.3 Independent cases for further information on assisted and independent cases.)

7.6.2 Briefing on the merits

Briefing is governed by rule 8.520. Unless otherwise ordered, briefs must be confined to the issues specified in the order granting review and others "fairly

[352]Death penalty cases are governed by separate rules. Civil cases in the Supreme Court are for the most part governed by the same rules as non-capital criminal cases.

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included" in them. (Cal. Rules of Court, rule 8.520(b)(3).) Extensions of time, permission to file an over-length brief, and other variations from the rules require the order of the Chief Justice. (Cal. Rules of Court, rule 8.520(a)(5) & (c)(4).)

Information about filing and service requirements is summarized on ADI's Filing and Service pages and TrueFiling is required.

Opening brief on the merits

Under rule 8.520(a)(1), after the court grants review, the petitioner[353] must within 30 days of the order granting review file an opening brief on the merits. Unless otherwise ordered, an opening brief on the merits in non-capital cases may not exceed 14,000 words including footnotes. (Cal. Rules of Court, rule 8.520(c)(1).) At the beginning of the body, the brief must quote any Supreme Court orders specifying the issues or, if there is no such order, quote the issues stated in the petition for review and any additional ones from the answer. (Cal. Rules of Court, rule 8.520(b)(2)(A) & (B).) Attachments are governed by rule 8.520(h).

Answer brief on the merits

Within 30 days after the filing of the petitioner's brief, the opposing party must file an answer brief on the merits. (Cal. Rules of Court, rule 8.520(a)(2).) The answer brief may not exceed 14,000 words including footnotes. (Cal. Rules of Court, rule 8.520(c)(1).)

Reply Brief

The petitioner may file a reply brief within 20 days after the filing of the opposing party's brief. (Cal. Rules of Court, rule 8.520(a)(3).) It may not exceed 8,400 words including footnotes. (Cal. Rules of Court, rule 8.520(c)(1).)

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[353]In some situations, it is unclear which party is to be deemed petitioner – for example, if petitions from opposing sides were both granted, or if the court granted review on its own motion. In such cases, the court may designate which party is deemed the petitioner or otherwise direct the sequence of briefing. (Cal. Rules of Court, rule 8.520(a)(6).)

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Supplemental Brief

A supplemental brief of no more than 2,800 words including footnotes may be filed by either party no later than 10 days before oral argument and must be limited to new authorities, new legislation, or other matters not available in time to be included in the party's brief on the merits. (Cal. Rules of Court, rule 8.520(d).)

Amicus Curiae brief

Amicus briefs may be filed with the court's permission. Rule 8.520(f) governs these briefs.

Judicial notice

Judicial notice under Evidence Code section 459 in the Supreme Court requires compliance with rule 8.252(a). (Rule 8.520(g).)

7.6.3 Oral argument

Unless the court permits more time, oral argument in non-capital cases is limited to 30 minutes per side. (Rule 8.524(e).) The petitioner opens and closes; if there is more than one petitioner, the court sets the order. (Rule 8.524(d).)

Under rule 8.524(f), in non-capital cases, only one counsel per side may argue – even if there is more than one party per side – unless the court orders otherwise.[354] A request for more attorneys to argue must be filed no later than 10 days after the order setting oral argument. (Cal. Rules of Court, rule 8.524(f)(2).) Except for rebuttal, each attorney's segment may be no less than 10 minutes. (Cal. Rules of Court, rule 8.534(f)(3).)

[354]The rule is different in the Court of Appeal, which allows one counsel "for each separately represented party." (Cal. Rules of Court rules 8.256(c)(3), 8.366(a), 8.470.)

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7.6.4 Decisions and post-decision proceedings in the Supreme Court

Disposition

On a grant of review, the Supreme Court reviews the judgment of the Court of Appeal. It may order that the judgment wholly or partially be affirmed, reversed, or modified and may direct further actions or proceedings. (Cal. Rules of Court, rule 8.528(a).) The court usually will decide all the issues on which review is granted, although it may decide only some and then transfer the case back to the Court of Appeal for decision on the remaining issues. (Cal. Rules of Court, rule 8.528(c).)

Alternatively, the Supreme Court may not decide any issues on the merits. It may dismiss review. (Cal. Rules of Court, rule 8.528(b).) It may, without reaching a decision, transfer the cause with directions for further proceedings in the Court of Appeal. (Cal. Rules of Court, rule 8.528 (d).) If the case was transferred before decision in the Court of Appeal under rule 8.552, the Supreme Court may retransfer the case to the Court of Appeal. (Cal. Rules of Court, rule 8.528(e).)

Rule 8.200(b) provides that a party "may serve and file a supplemental opening brief" following remand or transfer from the Supreme Court. (Cal. Rules of Court, rule 8.200(b).) The right to supplemental briefing after the transfer or retransfer is covered in § Supreme Court remand.

Finality of decision

With certain exceptions, a decision of the California Supreme Court becomes final as to that court 30 days after filing. The court may order earlier finality. The Supreme Court may also extend the period for finality up to an additional 60 days, if the order extending time is made within the original 30 days or any extension thereof. (Cal. Rules of Court, rule 8.532(b)(1).)

Certain Supreme Court decisions are final immediately: the denial of a petition for review, dismissal, transfer, retransfer, denial of a writ petition without an order to show cause or alternative writ; and the denial of a supersedeas petition. (Cal. Rules of Court, rule 8.532(b)(2).)

Rehearing

The Supreme Court may order rehearing as provided in rule 8.268(a). (Cal. Rules of Court, rule 8.536(a).) Any petition for rehearing must be filed within 15

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days of the decision. It is limited to 7,000 words. (Cal. Rules of Court, rules 8.204(c)(5), 8.536(b).) Any answer must be filed no later than eight days after the petition. Since rule 8.536(a) requires compliance only with subdivisions (1) and (3) of rule 8.268(b), the proscription of rule 8.268(b)(2) against the filing of an answer without request from the court is inapplicable. At least four justices must assent to grant rehearing. (Cal. Rules of Court, rule 8.536(d).)

Remittitur

The remittitur is the document sent by the reviewing court to the court whose judgment was reviewed, which reinvests the lower tribunal court with jurisdiction over the case. If the Supreme Court decision reviews a Court of Appeal decision, the remittitur is to the Court of Appeal. A Supreme Court remittitur is governed by rule 8.540.

Issuance

In a case before the court on a grant of review, the Supreme Court remittitur is addressed to the Court of Appeal. (Cal. Rules of Court, rule 8.540(b)(2).) It issues when the opinion is final as to the Supreme Court – normally on the 31st day after filing of the Supreme Court's decision, absent a rehearing or order shortening or extending the time for finality. (Cal. Rules of Court, rules 8.532(b), 8.540(b)(1).) If there are further proceedings in the Court of Appeal, the Court of Appeal must follow the directions of the Supreme Court. If there are to be no further proceedings, the Court of Appeal must immediately issue its own remittitur to the lower court. (Cal Rules of Court, rule 8.272(b)(2).)

If the case was not before the Supreme Court on a grant of review – e.g., an automatic appeal or transfer – the remittitur is sent to the applicable lower court or tribunal. (Cal. Rules of Court, rule 8.540(b)(3).) A remittitur is not issued on the summary denial of a writ petition. (Cal. Rules of Court, rule 8.540(a).)

The California Supreme Court may order immediate issuance of the remittitur. (Cal. Rules of Court, rule 8.540(c)(1).) It may stay issuance of the remittitur for a reasonable period. (Cal. Rules of Court, rule 8.540(c)(2).)

Recall

The court may recall the remittitur, on its own or on motion, for good cause and thereby reinvest jurisdiction over the case in the court. The recall order does not supersede the opinion or affect its publication status. (Cal. Rules of Court, rule 8.540(c)(3).) In criminal cases, a petition for writ of habeas corpus

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may be the vehicle for requesting the remittitur be recalled. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397; *In re Smith* (1970) 3 Cal.3d 192, 203-204; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484-490, fn.12.)

7.7 Certiorari in the United States Supreme Court

If the California Supreme Court has denied review of a case with a federal constitutional issue or has granted review but decided the issue adversely, an option is a petition for writ of certiorari filed in the United States Supreme Court. The petition is part of the direct appellate process.

This section discusses only the basics of certiorari petitions in state criminal cases. It does not purport to be a comprehensive treatment. Further resources for Supreme Court practice include the Rules of the Supreme Court of the United States,[355] the Supreme Court website,[356] and Shapiro et al., Supreme Court Practice (11th ed. 2019).

7.7.1 Uses of certiorari

Last step in direct appeal from state judgment

A petition for certiorari is the last part of the direct appeal process for state cases. It is uncommon for appointed counsel to file one because of the long odds against success.

Unlike a petition for review to a *state* high court, a certiorari petition is not required to preserve issues for later collateral review. (*Fay v. Noia* (1963) 372 U.S. 391, 435-437, overruled on other grounds in *Wainwright v. Sykes* (1977) 433 U.S. 72, 84-85; cf. *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845, 848 [to be preserved for future federal review, issue must be presented to state's highest court in which review is available]; *Roberts v. Arave* (9th Cir. 1988) 847 F.2d 528, 530.) Its use is therefore primarily substantive – to obtain review of the

[355] See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

[356] http://www.supremecourt.gov/

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issues after the state appellate processes have been exhausted – rather than procedural.[357]

Criteria for certiorari

The primary concern of the United States Supreme Court is to decide cases presenting issues of importance beyond the particular facts and parties involved. Most often, it accepts a case to resolve conflict or disagreement among lower courts and to determine an issue of broad social or legal importance.

Whether to file a petition for certiorari depends in part on whether there is a reasonable chance of getting certiorari granted. For the Supreme Court to consider the case, there must be a strong, adequately preserved federal issue that has important societal implications. As the Supreme Court rules warn:

> A petition for writ of certiorari will be granted only for compelling reasons. . . . [¶] A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(U.S. Supreme Ct. Rules, rule 10.) Only about 1 percent of the petitions filed are granted.[358]

Because of the slim chance of success, only a few certiorari petitions are filed in appointed cases each year. Consequently, it is seen as an exceptional step. For Fourth District cases, ADI should review the issue and give appointed counsel input as to whether the petition is worth filing. If counsel intends to seek compensation for the petition, ADI's executive director must give pre-approval.

The discussion in §§ 7.5.1 Grounds for review and factors relevant to the discretionary decision et seq. and Purpose of petition, *ante*, on factors affecting

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[357]Occasionally certiorari may be used for procedural reasons. For example, if an issue that might result in a substantial favorable change in the law is pending before the United States Supreme Court, it may well be desirable to petition for certiorari in cases with similar issues to keep them in the direct appellate review process. For the most part, changes in the law are retroactive only to cases still on direct appeal. (*Teague v. Lane* (1989) 489 U.S. 288, 295-296; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5; see ADI's article, Potentially Favorable Changes in the Law.

[358]https://www.supremecourt.gov/filingandrules/rules_guidance.aspx, *Guide to Filing In Forma Pauperis Cases,* at p. 1.

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the decision of the California Supreme Court whether to grant review, is applicable in large part to certiorari in the United States Supreme Court, as well.

Federal habeas corpus as additional or alternative remedy

In addition to or instead of certiorari, federal review after an unsuccessful state appeal may be sought through a petition for writ of habeas corpus.[359] Prior to 1996, appellate counsel could seek, with some modicum of success, federal habeas corpus relief in either the federal district or circuit courts. After the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 U.S.C. § 2241 et seq.), the gateways to federal relief from state court federal constitutional error has contracted immeasurably.

Title 28 United States Code section 2254(d) provides relief can be granted only if the state decision was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts. Section 2254(e) establishes a presumption that a state factual determination was correct, rebuttable only by clear and convincing evidence. After a state court determines that an error at trial did not prejudice a criminal defendant, a federal court may not grant habeas relief based solely on its independent assessment of the error's prejudicial effect under *Brecht v. Abrahamson* (1993) 507 U.S. 619, but a federal court must also evaluate the state court's decision under AEDPA. (*Brown v. Davenport* (2022) 596 U.S. 118.) When a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant relief without first applying both the test the Supreme Court outlined in *Brecht* and the one Congress prescribed in AEDPA.

Moreover, "[i]t is not enough for a federal court to disagree with the state court . . . . Rather, the state court's decision must conflict with clearly established law and be obviously wrong 'beyond any possibility for fair-minded disagreement.' [Citations.]" (*Edwards v. Vannoy* (2021) 593 U.S. 255.)

Given the increasing hurdles now faced and the ever-decreasing frequency of state-appointed counsel pursuing federal habeas relief, ADI has discontinued

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[359]From a practical viewpoint, appointed counsel will not receive compensation under their state appellate appointment for federal habeas corpus litigation, although payment may be available from the federal court. Certiorari is compensable under the appellate appointment, but only if reasonable under the criteria discussed here.

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former Chapter Nine. In its stead, we would note several federal habeas corpus treaties. The following are noted without recommendation or favoritism, and if any other treatise is unmentioned, it is without any intent to ignore: Hertz and Liebman, Federal Habeas Corpus Practice and Procedure (7th ed. 2021); Means, Federal Habeas Manual (2025); Means, Postconviction Remedies (2025). Each is revised frequently and available on-line.

Advantages of habeas corpus

In contrast to certiorari, which is unlikely to succeed if the issue is not one of considerable social significance, habeas corpus most often focuses on injustice in the individual case. Further, one has *the right* to consideration on the merits in habeas corpus if foundational requirements are met, whereas certiorari review is a matter of *discretion* and is exercised very rarely. Thus, in cases involving application of standard authority, certiorari is virtually unattainable, and habeas corpus is the remedy of choice.

Advantages of certiorari

In federal courts habeas corpus is a highly restricted remedy, both procedurally and substantively. Under the Antiterrorism and Effective Death Penalty Act (28 U.S.C. § 2241 et seq.) (AEDPA), for example, a federal court may not disturb a state judgment unless the state judgment was an unreasonable application of or contrary to established United States Supreme Court precedent. (28 U.S.C. § 2254(d).)

Federal habeas corpus thus cannot be used to decide an issue not already resolved by the United States Supreme Court. Even if state court decision was contrary to established federal circuit court precedent, and therefore wrong or unreasonable under circuit law, habeas corpus relief is unavailable unless the state decision was also contrary to established or an unreasonable application of United States Supreme Court precedent. (See *Kane v. Espitia* (2005) 546 U.S. 9 (*per curiam*) [circuit court split on whether *Faretta v. California* (1975) 422 U.S. 806, requires pro per prisoner access to legal materials cannot be resolved in federal habeas corpus, when neither *Faretta* itself nor any other Supreme Court decision has addressed the topic]; *Mitchell v. Esparza* (2003) 540 U.S. 12, 17; *Lockyer v. Andrade* (2003) 538 U.S. 63, 71-73.)

Further, even if there is United States Supreme Court precedent, relief is barred unless the state court's application of it was not only wrong, but also "unreasonable." The test is whether the state court's decision was objectively

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unreasonable. "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." (*Williams v. Taylor* (2000) 529 U.S. 362, 410, italics original.)

If there is no established United States Supreme Court precedent, therefore, or if the state decision was wrong but not objectively unreasonable, certiorari may be the only federal remedy available. Similarly, if federal habeas corpus is barred because of a procedural problem not applicable to certiorari, the latter may be the only option.

Use of both remedies

If the case meets the applicable criteria, *both* certiorari and federal habeas corpus may be sought. Certiorari, as part of the regular appellate process, ordinarily should be sought first.[360] There is some question whether the habeas corpus petition *may* be filed until the time for certiorari has passed.[361]
It is also possible to seek certiorari after federal habeas corpus review of a state judgment. (E.g., *McWilliams v. Dunn* (2017) 582 U.S. 183.)

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[360]The one-year federal deadline for filing a habeas petition does not begin until the period for filing for certiorari has passed. (See 28 U.S.C. § 2244(d); *Bowen v. Roe* (9th Cir. 1999) 188 F.3d 1157, 1158-1159; see also *Clay v. United States* (2003) 537 U.S. 522 [similar timing for 28 U.S.C. § 2255 motion for relief from federal convictions]; cf. *Lawrence v. Florida* (2007) 549 U.S. 327; *White v. Klitzkie* (9th Cir. 2002) 281 F.3d 920, 924-925 [period for filing certiorari petition not counted as part of state *collateral* proceedings for purposes of tolling limitations period].)

[361]See *Kapral v. United States* (3d Cir. 1999) 166 F.3d 565, 570, and *Feldman v. Henman* (9th Cir. 1987) 815 F.2d 1318, 1321 (federal court should not entertain habeas corpus petition when petition for certiorari from a *federal* appellate decision is pending); cf. *Roper v. Weaver* (2007) 550 U.S. 598 (*per curiam*) (defendant could have filed federal habeas corpus petition after state denied *collateral* relief, even though petition for certiorari was pending from the state decision). These cases do not necessarily answer the question whether a *state* prisoner must wait for the conclusion of the certiorari period on *direct appeal* to file the federal petition.

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7.7.2 Jurisdiction

It is not possible to review this subject in depth here. The discussion focuses on some of the most encountered principles in criminal appeals.

Legal authority

The United States Supreme Court and the federal judiciary are established in article III of the United States Constitution. Section 2 describes federal judicial and Supreme Court authority over state criminal cases (in relevant part):

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .; – to Controversies . . . between . . . a State [and] Citizens thereof. . . . In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The specific jurisdiction of the United States Supreme Court over state court judgments is governed by 28 United States Code section 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Exhaustion of state remedies

Certiorari jurisdiction requires that state appellate review processes be exhausted. To be considered on certiorari, an issue must be raised and/or decided on appeal in the state's highest court in which a decision could be made, and that court's decision must be final. (28 U.S.C. § 1257(a); see *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [same in habeas corpus].)

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For the purposes of non-capital criminal appellate practice, that means that in most California felony cases the issue must be raised squarely (1) as a federal constitutional issue, with reliance on federal authority such as an amendment to the United States Constitution, and (2) successively in the superior court, in the Court of Appeal, and in a petition for review to the California Supreme Court.[362] (See "Federalization", Chapter 5, commencing with § 5.2.11 Federalization, et seq.; ADI article, Exhausting State Remedies.) If a petition for review is granted and the case decided on the merits, the issue must be raised appropriately in the brief on the merits.

If the state court failed to *decide* the federal issue, the petitioner must show that the failure was not due to lack of proper presentation. (See *Street v. New York* (1969) 394 U.S. 576, 582 ["when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary"].)

Finality of state court decision

The state court decision must be final for the United States Supreme Court to review it. If further state proceedings are to take place, the court lacks jurisdiction. (28 U.S.C. § 1257(a); *Florida v. Thomas* (2001) 532 U.S. 774, 777.) The decision must be final in two senses: (1) no further review or correction is possible in any other state tribunal and (2) the decision determines the litigation, not merely interlocutory or intermediate parts of it. (*Jefferson v. City of Tarrant* (1997) 522 U.S. 75, 81.) "It must be the final word of a final court." (*Market Street R. Co. v. Railroad Comm'n of Cal.* (1945) 324 U.S. 548, 551.)

In certain circumstances, the court has treated state judgments as final for jurisdictional purposes although further proceedings were to take place. (*Florida v. Thomas* (2001) 532 U.S. 774, 777; *Flynt v. Ohio* (1981) 451 U.S. 619, 620-621 (*per curiam*). *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 divided cases of this kind into four categories: (1) the federal issue is conclusive, or the outcome of further proceedings preordained (*id.* at p. 479); (2) the federal issue will

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[362]An issue need not have been raised in a lower court if failure to do so does not constitute a waiver or other form of procedural default preventing consideration at the next higher level – or if the court decides the issue even though not raised. (*Francis v. Henderson* (1976) 425 U.S. 536, 542, fn. 5; *Sandgathe v. Maass* (9th Cir. 2002) 314 F.3d 371, 376-377.)

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require a decision regardless of the outcome of state proceedings (*id.* at p. 480); (3) the federal claim has been finally decided and cannot be reviewed after further state proceedings (*id.* at p. 481);[363] and (4) the federal issue has been finally decided, the party seeking certiorari might prevail on nonfederal grounds in the later state proceedings, reversal of the state court on the federal issue would preclude further litigation on the relevant cause of action, and a refusal immediately to review the state decision might seriously erode federal policy (*id.* at pp. 482-483).

California state review is concluded when the decision of the California Supreme Court is final and no further review in state court is possible. If a petition for review is denied, the decision is final immediately. (Cal. Rules of Court, rule 8.532(b)(2)(A).) When a petition for review is granted and the California Supreme Court decides the case on the merits, the decision is final in 30 days, with certain exceptions. (Cal. Rules of Court, rule 8.532(b)(1).)

The California Rules of Court should be consulted for other situations; see also § 7.4.2 Finality of decision as to rendering court et seq., § 7.5.7 Disposition of petition et seq., and § 7.6.4 Decisions and post-decision proceedings in the Supreme Court et seq., *ante*.)

Dispositive federal issue

The case must present a federal issue that affects the outcome of the case. As *Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126, states: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

[363]In *Johnson v. California* (2004) 541 U.S. 428 (*per curiam*), the California Supreme Court ruled adversely on federal constitutional grounds but remanded to the Court of Appeal for determination of other claims, which could independently support reversal. The United States Supreme Court found this circumstance did not come under the third *Cox* category. If the Court of Appeal were to affirm, the petitioner could once more seek review of his original federal claim in the California Supreme Court. A change of mind, although highly unlikely, would not be foreclosed.

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The United States Supreme Court has no jurisdiction to interpret state law.[364] If a state decision rests on independent and adequate state grounds, the United States Supreme Court has no jurisdiction to review it, even though federal issues may be involved. (See *Coleman v. Thompson* (1991) 501 U.S. 722, 729.) If it is ambiguous whether the state court relied on an independent and adequate state ground, the court uses a test:

> When a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

(Michigan v. Long (1983) 463 U.S. 1032, 1040-1041; see also *Florida v. Powell* (2010) 559 U.S. 50; *Harris v. Reed* (1989) 489 U.S. 255, 261-262 [same test for habeas corpus].)

7.7.3 Certiorari petitions

Petitions for certiorari are governed by the Rules of the Supreme Court of the United States. Guidelines for the filing of a petition for writ of certiorari by an unrepresented indigent appellant are available on the website of the Supreme Court.

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[364]There are a very few exceptions. "On rare occasions, the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' (*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). See *Ward v. Love County*, 253 U.S. 17 (1920); *Terre Haute & I.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579 (1904)." (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 691, fn. 11; see also *Bush v. Gore* (2000) 531 U.S. 98, 112-115 (conc. opn. of Rehnquist, C.J.).)

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Counsel's membership in the United States Supreme Court bar

Counsel must be admitted to the United States Supreme Court Bar to file documents in that court. (U.S. Supreme Ct. Rules, rule 9.)[365] The procedures for gaining membership are prescribed in rule 5 of the Supreme Court rules.

Several ADI staff attorneys are members of the Supreme Court bar and can serve as sponsors for attorneys seeking admission.

Time for filing

The petition must be filed within 90 days from the entry of the final judgment by the California Supreme Court or 90 days from the denial of a timely filed petition for rehearing. (U.S. Supreme Ct. Rules, rule 13.) The final judgment may be the denial of review or the filing of an opinion. If rehearing is sought or the court suggests it is considering rehearing on its own, the final judgment is the denial of rehearing. (*Ibid.*; see *Hibbs v. Winn* (2004) 542 U.S. 88.)

The crucial date for starting the 90-day period is the *filing* of the state high court opinion or order regarding rehearing, not its *finality* under state law. Thus, the issuance of a remittitur has no bearing on the computation of time and does not extend the time for filing. (U.S. Supreme Ct. Rules, rule 13; see Shapiro et al. (11th ed. 2019).)

The state decision nevertheless must be final for the United States Supreme Court to have jurisdiction. (28 U.S.C. § 1257(a); see § Finality of state court decision, *ante*.) If timing permits, it may be most prudent for counsel to file a certiorari petition after the California Supreme Court decision is final but well before 90 days have elapsed since the filing of its original opinion. Regardless, it is always the safest course to file earlier rather than later – when counsel *knows* it is not too late.

"Filing" of a certiorari petition means actual receipt of the documents by the Supreme Court's clerk, or postmarking of first-class mail, or consignment to a third-party commercial carrier for delivery within three calendar days. (U.S. Supreme Ct. Rules, rule 29.) Extensions of time may be granted by application to a justice but are disfavored. (U.S. Supreme Ct. Ruleshttps://www.supremecourt.gov/filingandrules/rules_guidance.aspx, rules

[365]See postscript to this chapter on the potentially confusing numbering system used in the Rules of the Supreme Court of the United States.

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13, ¶ 5, 22 [application to individual justice]; see also rules 21 [motions and applications], 30 [computations and extensions of time], & 33, ¶ 2 [format].)

Procedures for filing in forma pauperis

Except for an unrepresented inmate confined in an institution, it is necessary to file, along with the petition for certiorari, an original and 10 copies of a motion for leave to proceed in forma pauperis with a supporting declaration in compliance with 18 United States Code section 3006A. (U.S. Supreme Ct. Rules, rules 21, 39.) The Supreme Court website gives a sample and instructions on how to complete the in forma pauperis documents.

Formal requirements for certiorari petition

Formatting requirements for certiorari petitions filed in forma pauperis are set out in rule 33, paragraph 2(a) of the Supreme Court rules. These include size of paper, spacing, binding, and signature. Rule 34, paragraph 1 prescribes what must appear on the cover; paragraph 2 specifies required tables; paragraph 3 governs identification of counsel of record. The petition may not exceed 40 pages. (U.S. Supreme Ct. Rules, rule 33, ¶ 2(b); see U.S. Supreme Ct. Rules, rule 33, ¶ 1(d) for exceptions.) An original and 10 copies are required for in forma pauperis petitions, except in the case of unrepresented inmates who are confined. (U.S. Supreme Ct. Rules, rules 12, ¶ 2, & 39, ¶ 2.) Rule 29 governs service and the proof of service. (U.S. Supreme Ct. Rules, rule 29, ¶¶ 3 & 5.)

Contents of certiorari petition

Rule 14 of the Rules of the Supreme Court of the United States prescribes the contents and arrangement of a petition for writ of certiorari. Shapiro's Supreme Court Practice offers comprehensive guidance in preparing each of the component parts of the petition. (Shapiro et al., Supreme Court Practice (11th ed. 2019).)

Required sections

The typical petition must contain, in the indicated order, (1) the question presented for review; (2) a list of all parties (unless shown in the caption); (3) a table of contents and a table of authorities; (4) citation of the opinion and orders in the case; (5) a statement of Supreme Court jurisdiction, including the date of the judgment to be reviewed and any order regarding rehearing, and the

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statutory basis for jurisdiction;[366] (6) the constitutional, statutory, and other provisions related to the case, set out verbatim (lengthy provisions may be reserved for the appendix and merely cited at this point); (7) a concise statement of facts, including a description of how and when the federal issues were presented to the state courts and how they were ruled on, with quotations or summaries taken from the record and record citations; (8) an argument on the need for certiorari; and (9) an appendix.

The appendix must include in the following order: the opinion of the state court (Court of Appeal or California Supreme Court) from which certiorari is sought; other relevant findings and orders such as the trial court decision; any order by the California Supreme Court denying review; and any order by the California Supreme Court denying rehearing.

Argument

Although compliance with all requirements is essential, the argument on the need for certiorari is the pivotal section of the petition. The case must be presented in a way that will capture the court's attention and distinguish it from the 99 percent for which certiorari will be denied. It is advisable to focus the discussion on conflicts among state high courts or federal courts or on the social and legal importance of the question of federal law presented, rather than on the injustice to the individual party or the mere incorrectness of the state court decision. (U.S. Supreme Ct. Rules, rule 10.)

Shapiro offers insights into the court's certiorari screening processes in chapter 4, "Factors Motivating the Exercise of the Court's Certiorari Discretion." (Shapiro et al., Supreme Court Practice (11th ed. 2019).

The discussion in this Manual on crafting a persuasive petition for review (§ 7.5.1 Grounds for review and factors relevant to the discretionary decision et seq. and § Purpose of petition et seq., *ante*) is also applicable in many respects to petitions for certiorari.

[366]For review of a state judgment, the statutory basis is 28 United States Code section 1257(a). In specialized situations, other statements on jurisdiction are required. (U.S. Supreme Ct. Rules, rule 14.)

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7.7.4 Other filings

Opposition and reply

Opposition to the petition may be filed. (U.S. Supreme Ct. Rules, rule 15, ¶ 1.) If requested, it is then mandatory.[367] (*Ibid.*) In addition to addressing the issues raised in the petition, counsel filing an opposition has an obligation to point out, at this stage of the proceedings and not later, any perceived misstatements of law or fact in the petition, or the objection may be waived. (*Id.*, ¶ 2.) The opposition is due 30 days after the case is placed on the docket. (*Id.*, ¶ 3.) An indigent respondent filing an opposition may proceed in forma pauperis as specified in the rules. (*Ibid.*; see also U.S. Supreme Ct. Rules, rule 39.)

The petitioner may reply to the opposition if new points have been raised. The reply brief may be filed in forma pauperis if the petitioner has qualified for that status. (U.S. Supreme Ct. Rules, rules 15, 6, 39.)

Formal requirements for an opposition and reply filed in forma pauperis include format (U.S. Supreme Ct Rules, rules 33, ¶ 2(a) & 34); page limits – 40 and 15 pages, respectively (U.S. Supreme Ct. Rules, rule 33, ¶ 2(b)); cover, tables, and identification of counsel (U.S. Supreme Ct. Rules, rule 34); and number of copies – original plus 10 (U.S. Supreme Ct. Rules, rules 12, ¶ 2 & 39).

Amicus curiae briefs in support of or in opposition to petition for certiorari

Amicus curiae briefs relating to the grant or denial of a petition for certiorari are permitted by written consent of all parties or by leave of court. They are governed by rule 37, paragraph 2 of the Rules of the Supreme Court of the United States.

7.7.5 When certiorari is granted

It is beyond the scope of this manual to deal with procedures in the United States Supreme Court past the petition for certiorari stage, but counsel is referred to the Shapiro treatise, which offers comprehensive guidance on Supreme Court practice. (Shapiro et al., Supreme Court Practice (11th ed. 2019).)

Payment for appointed counsel for appearances in the Supreme Court beyond the petition stage is very much an ad hoc matter, given the infrequency

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[367]Frequently, the Supreme Court will request opposition when the petition is filed by the Attorney General.

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with which certiorari petitions are granted. ADI will actively consult with any attorney making an appearance before the Supreme Court in a Fourth Appellate District case, both on the matter of compensation and on the substance of the case.

7.8 Postscript on U.S. Supreme Court rule numbering

The Rules of the Supreme Court of the United States use a different form of numbering from that of the California Rules of Court. The Supreme Court rules refer to subdivisions or paragraphs by adding a period to the rule number and then the paragraph number – for example, rule 29, paragraph 3 is called "Rule 29.3" when another Supreme Court rule cross-references it.

This numbering system can be confusing to California practitioners, because in California periods are used in the number of the rule itself – for example, rule 8.300. For clarity, this manual uses paragraph symbols rather than periods in citing to subdivisions of the Rules of the Supreme Court of the United States. Attorneys are alerted to the problem so that in reading the text of the Supreme Court rules (or cases or texts referring to the rules), they will be able to find cross-referenced rules.

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8 CHAPTER EIGHT

PUTTING ON THE WRITS: CALIFORNIA EXTRAORDINARY REMEDIES

8.1 Introduction

This chapter primarily addresses post-conviction writs of habeas corpus in non-capital criminal cases. It also briefly discusses other uses of state habeas corpus and other state writ remedies.

The writ of habeas corpus – the Great Writ – provides an avenue of relief from unlawful custody when direct appeal is inadequate. "[T]he Great Writ has been justifiably lauded as the safe-guard and the palladium of our liberties." (*In re Sanders* (1999) 21 Cal.4th 697, 703-704, internal quotation marks deleted.)

Habeas corpus has been around a long time. (See Habeas Corpus Act of 1679, 31 Chs. II, ch. 2 – the forerunner of all habeas corpus acts.) The United States Constitution expressly protects it: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." (Art. I, § 9, cl. 2.) The comparable state provisions are California Constitution, article I, section 11, and article VI, section 10. (See also Pen. Code, § 1473 et seq.)

8.1.1 Uses of habeas corpus often encountered in criminal and juvenile appellate practice

A few hypotheticals illustrate when it might be necessary to file a petition for writ of habeas corpus:

CRIMINAL CONTEXT:

- At trial counsel's advice (not as part of a plea bargain), the defendant admitted a prior serious felony, residential burglary (Pen. Code, § 667, subd. (a)). In fact, the burglary was of a commercial building.

- Before trial, the defendant unsuccessfully contested several strong issues, including adequacy of the evidence under Penal Code section

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995, speedy trial, and *Miranda*.[368] In anticipation of getting a reversal on these issues, to avoid a time-consuming trial, counsel had the defendant plead guilty.

- After the defendant was sentenced, trial counsel received a call from a juror who, plagued by conscience, described how one juror swayed others by "evidence" the juror obtained outside the courtroom.

- New legislation was enacted which would inure to defendant's benefit if the conviction did not become final before the legislation's effective date. But counsel neglected to file an appeal, and the conviction appears to have become final before the effective date.

DEPENDENCY CONTEXT:

- Counsel failed to object to jurisdiction under Welfare and Institutions Code section 300, subdivision (g) where the incarcerated mother could arrange for the care of her child and in fact there were relatives available to provide.

- Review of the record shows valid grounds for a motion based on a change in circumstances. (Welf. & Inst. Code, § 388.) Trial counsel, however, made no such motion and now admits having failed to consider making one.

- The child welfare agency never asked father whether he had Indian heritage. Father is a registered member of the Comanche Tribe.

- Counsel did not take any steps to establish paternal status in a timely manner. Father is a biological father capable of providing safe care.

[368] *Miranda v. Arizona* (1966) 384 U.S. 436.

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EITHER CONTEXT:

- The client claims several witnesses who could have testified favorably were either not interviewed by trial counsel or not called to testify. The potential witnesses corroborate this claim.

- In a previous appeal, counsel neglected to raise an issue that has come back to haunt the client. Prior appellate counsel admits never having considered the issue.

What do all these examples have in common? Appeal is not an adequate remedy, either because the facts necessary to resolve the problems do not appear in the appellate record or because the time for appeal is past. The remedy is a petition for writ of habeas corpus. Habeas corpus allows a petitioner to bring in facts outside the record, if those facts support a claim cognizable in habeas corpus. It often has more relaxed, non-jurisdictional deadlines than an appeal. (See § Timing, *post*.)

Several of the examples above describe possible ineffective assistance of counsel, trial or appellate. This is one of the most common uses of habeas corpus in both criminal and juvenile proceedings. Courts expect an allegation of IAC to be presented by habeas corpus and refer to evidence outside the record establishing lack of strategic purpose to counsel's actions. (E.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268.)

Other examples are specified in Penal Code section 1473, subdivision (b), which also provides these are not the exclusive uses of habeas corpus.[369] A

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[369] Under section 1473, subdivision (b), a petition may allege, among other grounds:

> (A) False evidence that is material on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration. [¶] (B) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person. [¶] (C) (I) New evidence exists that is presented without substantial delay, is admissible, and is sufficiently

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petition for writ of habeas corpus may serve purposes other than challenging a conviction based on facts outside the record. (See § 8.4 Other applications of state habeas corpus et seq., *post*.)

8.1.2 ADI's expectations

Pursuit of writs when appropriate

As a matter of policy, ADI expects appointed counsel to be attentive to issues requiring habeas or other writ remedies and to pursue those necessary and reasonably within the scope of appellate responsibilities. Although the California Supreme Court has stated that in a noncapital case counsel has no legal duty to investigate to discover facts outside the record, nevertheless if counsel learns of such facts in the course of representation, counsel may have an ethical obligation to advise the client of a course of action to obtain relief "or take other appropriate action." (*In re Clark* (1993) 5 Cal.4th 750, 783-784, fn. 20.)

Regardless of legal duty, some appellate projects such as ADI, with the approval of their courts, hold counsel to higher expectations than the bare minimum. Counsel is expected to pursue remedies outside the four corners of the appeal, including habeas corpus, when reasonably necessary to represent the client appropriately. (See *People v. Thurman* (2007) 157 Cal.App.4th 36, 47 [quoting Manual, part of preceding sentence].) In some appellate districts, however, the court imposes restrictions on the authority of counsel to pursue extraordinary remedies. Counsel must consult the applicable project.

Consultation with ADI before pursuing writ remedy

Counsel should consult with the assigned ADI staff attorney when considering a writ investigation or petition. Counsel must consider such questions as whether the available evidence and the current law or signs of potential changes support a petition; whether and how off-record claims should be investigated; whether, where, and when a petition should be filed; whether the

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material and credible that it more likely than not would have changed the outcome of the case l. . . .

For purposes of section 1473, "'new evidence' means evidence that has not previously been presented and heard at trial and has been discovered after trial." (Pen. Code, § 1473, subd. (b)(1)(C)(ii).)

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client would benefit from the remedy; and whether the client might suffer adverse consequences[370] by pursuing writ relief. Given the complexity of these matters, it is necessary for the attorney to heed the old adage "two heads are better than one" and consult with the assigned staff attorney. Thus, counsel should consult with the assigned ADI staff attorney when in doubt about applying these expectations to their own case.

ADI can also provide input on how to approach trial counsel in investigating possible ineffective assistance of counsel claim. Appellate counsel should avoid becoming a potential witness. Counsel will also want to elicit trial counsel's cooperation. In most instances prior counsel is cooperative in investigating ineffective assistance of counsel, but some attorneys are not, perhaps because of embarrassment or concern about their professional status.[371] ADI may be able to assist in these situations.[372]

In appropriate cases appellate counsel may seek fees for expert assistance, such as an investigator, a physician, a psychiatric evaluation of the client or client's records, or DNA testing. Travel, translation services, and other costs may be approved, as well. The assigned ADI staff attorney should be consulted; court preapproval may be necessary for some expenses.

8.2 Basic requirements for and limitations on state habeas corpus to challenge criminal conviction[373]

People v. Duvall (1995) 9 Cal.4th 464 and *People v. Romero* (1994) 8 Cal.4th 728 are especially useful in describing general state habeas corpus procedure, law, and theory in the context of challenging a criminal conviction.

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[370] See § 4.6 Adverse Consequences: Potential Risks of Appealing et seq.

[371] Business and Professions Code sections 6068, subdivision (o)(7) and 6086.7 require an attorney and a court to notify the State Bar whenever a modification or reversal of a judgment in a judicial proceeding is based on misconduct or willful misrepresentation by an attorney. In addition, the sections, respectively, require reporting when modification or reversal is based on "gross[] incompetent representation" or "incompetent representation."

[372] The requirement of consultation with ADI before raising ineffective assistance of counsel is not confined to habeas corpus investigations but also applies to raising that issue on direct appeal.

[373] Dependency and family law applications of habeas corpus are discussed in § 8.4.7, post.

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(See also *People v. Pacini* (1981) 120 Cal.App.3d 877.) As noted above, this use of habeas corpus is the most encountered use in appellate practice and is invoked when the basis for the challenge lies in facts outside the record.

Habeas corpus use has certain limitations. Among these are the requirement of custody and related mootness issues, the bar against repetitive petitions, the bar against use of habeas corpus when appeal is or would have been available, and the requirement of due diligence.

8.2.1 Custody and mootness

The fundamental purpose of habeas corpus in most post-conviction contexts is to provide a remedy for the release of persons confined under the restraint of an illegal judgment. This theoretical underpinning necessarily raises the question of whether the petitioner is under the restraint of the decision under attack – in other words, whether he is in custody. It also raises the related but distinct question of whether habeas corpus can offer meaningful relief – i.e., whether the case is moot.

Custody requirement

A fundamental prerequisite for habeas corpus jurisdiction is that the petitioner be "in state custody," either actual or constructive, at the time the petition is filed.[374] (See Pen. Code, § 1473, subd. (a); *People v. Villa* (2009) 45 Cal.4th 1063; *In re Azurin* (2001) 87 Cal.App.4th 20, 26; *In re Wessley W.* (1981) 125 Cal.App.3d 240, 246.) Constructive custody means the person is not physically incarcerated but is subject to the potential of incarceration – as when on probation, parole, bail, or own recognizance. (*Wessley W.*, at pp. 246-247; e.g., *In re Lira* (2013) 58 Cal.4th 573.)

The jurisdictional custody requirement applies at the time the petition is filed. If the petitioner is released or dies while the petition is pending, the requirement remains satisfied, and the court continues to have jurisdiction. (See *In re King* (1970) 3 Cal.3d 226 [relief on habeas corpus granted, although

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[374] Federal habeas corpus has a similar rule. (*Spencer v. Kemna* (1998) 523 U.S. 1, 7 ["custody" satisfied; defendant incarcerated when petition filed but released before adjudication of petition]; *Carafas v. LaVallee* (1968) 391 U.S. 234, 237-240; *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, 1219 [enough that defendant be in custody when petition filed; subsequent release does not deprive court of jurisdiction].

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defendant no longer in custody at time of decision]; *Ex parte Byrnes* (1945) 26 Cal.2d 824, 827 [habeas corpus relief granted although defendant no longer in custody]; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [defendant died during pendency of habeas corpus proceeding; judgment of guilt vacated and proceedings permanently abated].)[375] The remedy at that point will be something other than release from custody – such as removing the conviction from the petitioner's record or correcting the record (*In re King*, *supra*, 3 Cal.3d at pp. 237-238) or ordering an appeal from the conviction to go forward (*Ex parte Byrnes*, *supra*, 26 Cal.2d at p. 828) or abating the proceedings (*In re Sodersten*, *supra*, 146 Cal.App.4th at pp. 1236-1237).

If the petition is filed after all actual or potential custody has expired, however, the court lacks habeas corpus jurisdiction, even though the petitioner is currently suffering collateral consequences of the conviction.[376] (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [mandamus is proper remedy to seek post-finality relief in cases where the defendant is no longer in custody];[377] *In re Douglas* (2011) 200 Cal.App.4th 236; *In re Azurin* (2001) 87 Cal.App.4th 20, 26 [no habeas corpus jurisdiction because petition filed long after state custody expired, even though petitioner in federal custody pending deportation because of state conviction]; *In re Wessley W.* (1981) 125 Cal.App.3d 240, 246-247 [court lacked power to order sealing of criminal records for which petitioner no longer in custody, despite collateral consequences from records]; see also *In re Stier* (2007) 152 Cal.App.4th 63 [prospective loss of medical license and speculative risk of future custody if defendant fails to register as sex offender do not prove constructive custody].) Detention by federal immigration officials pending deportation because of a state conviction is not itself "custody" for state habeas corpus purposes, if all actual or potential custody is past. (*People v. Villa* (2009)

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[375] Mootness becomes a consideration at this point. (See § Mootness Issues, post.)

[376] Other remedies than habeas corpus may be available. (See § Alternatives To Habeas Corpus If Custody Requirement Is Not Met, post.)

[377] *Picklesimer* specifically involved relief under the ruling of *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, which held mandatory lifetime sex offender registration for violations of Penal Code section 288a, subdivision (b)(1), voluntary oral copulation with a 16- or 17-year-old minor, violates equal protection. *Hofsheier*'s equal protection holding was overruled in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. *Picklesimer* remains good law on the remedy.

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45 Cal.4th 1063; *People v. Kim* (2009) 45 Cal.4th 1078; *People v. Azurin*, *supra*, 87 Cal.App.4th at p. 26.)

Mootness issues

When a petitioner is released from all custody constraints, actual or constructive, an issue of mootness may arise. If the habeas corpus proceeding is attacking a criminal judgment, the case is ordinarily not moot, even after all potential for custody expires, because of the collateral consequences flowing from a felony conviction. (*In re King* (1970) 3 Cal.3d 226, 229, fn. 2.; *People v. Succop* (1967) 67 Cal.2d 785, 789-790; *Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 325 [habeas considered, though moot, where trial court had refused to appoint particular public defender based on case load]; cf. *In re Jackson* (1985) 39 Cal.3d 464, 468, fn. 3; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [death of defendant makes habeas corpus proceedings moot, although it may continue in court's discretion].)

If the petition is attacking some other decision than a judgment of conviction, however – one that no longer affects the petitioner in any way – the case may be considered moot. Examples might be pretrial detention, custody credits after discharge from parole, and prison disciplinary decisions corrected or no longer correctable. In that situation the court will usually decline to entertain the petition.

Even if the case is moot, a California court may exercise discretion to decide the case if it involves issues of serious public concern that would otherwise elude resolution. (*In re Jackson* (1985) 39 Cal.3d 464, 468, fn. 3, and *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217 [death of defendant]; *In re William M.* (1970) 3 Cal.3d 16, 23-25 [detention of juvenile before jurisdictional hearing]; *In re Newbern* (1961) 55 Cal.2d 500, 505 [contact with bondsman]; *In re Fluery* (1967) 67 Cal.2d 600, 601 [credits for time in jail].)

(In the federal system, in contrast, because of the "case or controversy" requirement of article III, section 2 of the United States Constitution, mootness as to the individual litigants defeats jurisdiction. (*United States v. Juvenile Male* (2011) 564 U.S. 932, 936 ["basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed"].)

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Alternatives to habeas corpus if custody requirement is not met

Certain remedies may be available even if the custody requirement for habeas corpus is not met. Depending on the facts and circumstances of the case, for example, a petition for a writ of error *coram nobis* might be a possibility. (See *In re Azurin* (2001) 87 Cal.App.4th 20, 27, fn. 7; cf. *People v. Ibanez* (1999) 76 Cal.App.4th 537, 546, fn. 13 [coram nobis not appropriate if underlying claim is ineffective assistance of counsel]; see § 8.5.1 Writs of error coram nobis and error coram vobis et seq., *post*.) A post-judgment motion under Penal Code section 1385 to dismiss previous convictions in the interests of justice is beyond the jurisdiction of the court. (*People v. Chavez* (2018) 4 Cal.5th 771.)

In certain specialized situations a person may have a statutory right to attack a judgment. For example, Penal Code section 1016.5 requires the trial court to advise of immigration consequences before accepting a guilty plea and allows the defendant to move to vacate the judgment if the trial court fails to comply with the requirement. (See *People v. Totari* (2002) 28 Cal.4th 876.) Penal Code section 1473.5 permits habeas corpus on the ground expert evidence on domestic battering and its effects was excluded. (See *In re Walker* (2007) 147 Cal.App.4th 533.)

Another example is Penal Code section 1473.6, which allows a person no longer in physical or constructive custody to challenge the judgment by motion, if there is newly discovered evidence of fraud or perjury or misconduct by a government official. (See *People v. Germany* (2005) 133 Cal.App.4th 784; see also *People v. Murillo* (2021) 71 Cal.App.5th 1019.) Still another is section 1473.7, which allows a person no longer imprisoned or restrained to move to vacate a conviction or sentence because of (a) error prejudicing the defendant's understanding of immigration consequences of the plea, (b) newly discovered evidence of actual innocence, or (c) a violation of the Racial Justice Act. In contrast, Penal Code section 1385 is not available to dismiss an action after judgment is imposed, and the defendant has served the sentence. (*People v. Kim* (2012) 212 Cal.App.4th 117.)

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8.2.2 Successive petitions

The general rule is that all claims must be presented in a single, timely petition; successive petitions will subject to summary denial.[378] Repeated presentation of the same issue may be considered an abuse of the writ and subject counsel or petitioner to sanctions. (*In re Reno* (2012) 55 Cal.4th 428, 512; *In re Clark* (1993) 5 Cal.4th 750, 769; *In re White* (2004) 121 Cal.App.4th 1453, 1479 [imposing sanctions].) An exception to this rule might be petitions alleging facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to a conviction or sentence. (*In re Clark* (1993) 5 Cal.4th 750, 796-797; see also *In re Martinez* (2009) 46 Cal.4th 945, 950, *In re Robbins* (1998) 18 Cal.4th 770, and *In re Gallego* (1998) 18 Cal.4th 825; see Pen. Code, § 1475.)[379]

Also, changes in the law may excuse the bar against a successive or repetitive habeas corpus petition. (*In re Richards* (2016) 63 Cal.4th 291, 294, fn. 2 [change in applicable law concerning definition of false evidence, petition was not subject to procedural bar of successiveness]; *In re Reno* (2012) 55 Cal.4th 428, 466 [change in law will excuse successive or repetitive habeas petition].)

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[378] Sometimes a court may treat a post-conviction "motion" as a petition for writ of habeas corpus. If so, the movant/petitioner should be aware that cognizable issues not included in the motion/petition may be foreclosed from later consideration under the successive petitions rule. (Cf. *Castro v. United States* (2003) 540 U.S. 375, 383 [as a matter of federal judicial procedure, before re-characterizing a motion to review a federal conviction as a 28 U.S.C. § 2255 federal habeas corpus petition, the district court must warn the defendant of the successive petitions rule].)

[379] In contrast with "fundamental miscarriage of justice," Penal Code section 1509, subdivision (d), provides for capital habeas, "[A] successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive . . . petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility [for capital sentence as defined in the statute]. . . ."

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A habeas corpus petition collaterally attacking a conviction is not a successive petition to an earlier *Benoit*[380] petition used to gain the right to appeal after an untimely notice of appeal. The *Benoit* petition is not an attack on the judgment, but merely a vehicle for rescuing the right to appeal. (See *Johnson v. United States* (9th Cir. 2004) 362 F.3d 636, 638 [construing analogous federal provision].)

8.2.3 Availability of appeal

Habeas corpus cannot be used to raise issues that could have been but were not raised on appeal (*In re Dixon* (1953) 41 Cal.2d 756, 759), nor to seek a second determination of issues raised on appeal and rejected (*In re Foss* (1974) 10 Cal.3d 910, 930; *In re Waltreus* (1965) 62 Cal.2d 218, 225; see also *In re Brown* (1973) 9 Cal.3d 679, 683 [defendant who abandoned appeal after certificate of probable cause was denied and at that time failed to use proper remedy (mandate) to perfect appeal cannot use habeas corpus to attack denial of motion to withdraw plea].[381])

In re Harris (1993) 5 Cal.4th 813, 829-841, disapproved on other grounds in *Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, discusses at some length the exceptions to this policy (called the *Waltreus* rule for convenience). They include "in rare situations, some clear and fundamental constitutional violation striking at the heart of the trial process that should have been raised or was unsuccessfully raised on appeal, and that cannot be remedied by resort to the doctrine of ineffective assistance of counsel" (*Harris*, *supra*, at p. 836),[382] lack of fundamental jurisdiction over the subject matter (*Harris*, *supra*, at pp. 836-838; see *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 66), errors of sufficient magnitude that the trial court may be said to have acted in excess of jurisdiction

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[380] *In re Benoit* (1973) 10 Cal.3d 72.

[381] Dictum in *Foss* on another point disapproved in *People v. White* (1976) 16 Cal.3d 791, 796, footnote 3; dictum in *Brown* on another point disapproved in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 and footnote 7.

[382] *Harris* found this exception considerably narrower than previous opinions had indicated and declined to "define the exact boundaries of any . . . surviving exception." (*In re Harris*, *supra*, 5 Cal.4th at p. 836.) *In re Seaton* (2004) 34 Cal.4th 193, 199-200, held the exception to *Waltreus* for "fundamental" issues not raised on appeal does not apply to errors not objected to at trial.

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(*Harris*, *supra*, at pp. 838-841;[383] *In re Sands* (1977) 18 Cal.3d 851, 856-857), excessive punishment (*In re Nunez* (2009) 173 Cal.App.4th 709, 724), and a change in the law benefitting the petitioner (*In re King* (1970) 3 Cal.3d 226, 229, fn. 2; see ADI's guide to "Retroactivity: Taking Advantage of Changes in the Law & Retroactivity"). (See also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 ["rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal . . . would not bar an ineffective assistance claim on habeas corpus"]; see *In re Robbins* (1998)18 Cal.4th 770, 814, fn. 34.) In addition, habeas corpus may be used when appeal is an inadequate remedy because prompt relief is required. (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305.)

8.2.4 Timeliness

Unlike appeals or federal habeas corpus proceedings, which have specific time limits, there is no prescribed, fixed time period in which to seek state habeas corpus relief in a noncapital criminal case.[384] The general limitation is that habeas relief must be sought in a "timely fashion," "reasonably promptly." (*In re Sanders* (1999) 21 Cal.4th 697, 703; *In re Robbins* (1998)18 Cal.4th 770, 805-806; *In re Swain* (1949) 34 Cal.2d 300, 304.) Unreasonable delay, or laches, is a ground for denial of relief. (*In re Ronald E.* (1977) 19 Cal.3d 315, 321-322; *People v. Jackson* (1973) 10 Cal.3d 265, 268-269.) A petitioner must point to particular circumstances sufficient to justify substantial delay.[385] (*In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1.) Reasonable delay may be excused, within limits, particularly when the petition seeks to correct an erroneous sentence. (*In re Nunez* (2009) 173 Cal.App.4th 709, 723-724; *People v. Miller* (1992) 6 Cal.App.4th 873, 881; see *In re Streeter* (1967) 66 Cal.2d 47, 52.)

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[383] *Harris* limited this exception to cases where "a redetermination of the facts underlying the claim is unnecessary." (*In re Harris, supra*, 5 Cal.3d at pp. 840-841.)

[384] Dependency habeas corpus cases have tight time restrictions because of the need to avoid undue delay. (See § 8.4.7 Dependency and Family Law Applications, *post*.)

[385] To show diligence when a petition collateral to an appeal is contemplated, counsel should indicate by footnote in the brief that a petition is anticipated, and when appropriate explain why the petition is not being filed contemporaneously.

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Delay in seeking habeas corpus or other collateral relief is measured from the time a petitioner becomes aware of the grounds for relief, which may be as early as the date of conviction. (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5, and cases cited therein; *In re Douglas* (2011) 200 Cal.App.4th 236; see also *Robinson v. Lewis* (2020) 9 Cal.5th 883, 898, fn. 7 ["as promptly as the circumstances allow" and "without substantial delay" are equivalent terms].)

8.2.5 Retroactivity

California courts have applied two tests for retroactivity, often referred to as the federal and state tests. (*In re Milton* (2022) 13 Cal.5th 893 and cases therein.) Under both tests, a judicial decision applies retroactively to final cases on collateral review only where the decision created a "new rule" that is substantive. (*Ibid.*) Under the federal test, a judicial decision that created a new procedural rule will not apply retroactively. (*Ibid.*) Under the state test, a new procedural rule may be retroactive upon satisfying a three-factor test: """(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."" (*Ibid.*, citing *People v. Johnson* (1970) 3 Cal.3d 404.)

8.3 Habeas corpus procedures

Habeas corpus, like other writs, has its own requirements and terminology that can seem arcane even to experienced practitioners. To help navigate the maze, see § 8.6 Appendix A: Requirements for habeas corpus petitions et seq, and § 8.7 California post-conviction habeas corpus," flow charts showing the typical progression of a habeas corpus case through the California courts. Part I, deals with "Typical proceedings to initial decision." Part II, deals with "Proceedings to review initial decision." These materials may be useful in clarifying the procedural requirements and visualizing the various steps in the process.

8.3.1 Where and when to file

Filing a habeas corpus petition when an appeal is pending requires a decision as to both as to *venue* – the appropriate court in which to file the petition – and *timing* – whether to file it during or after the appeal.

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Venue

All superior and appellate courts have statewide habeas corpus jurisdiction. (Cal. Const., art. VI, § 10; *In re Roberts* (2005) 36 Cal.4th 575, 582; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 346; *In re Van Heflin* (1976) 58 Cal.App.3d 131, 135.) However, practical and judicial policy considerations generally dictate that the court most closely associated with the case and most efficiently equipped to resolve the issues should decide the petition. Venue choice involves the "territorial" question of the area where the habeas corpus proceeding should take place and the "vertical" question of which court – trial or appellate – within a given territory should hear the matter. The present discussion covers only challenges to the judgment or sentence; see § 8.4 Other applications of state habeas corpus et seq., *post*, for other uses of habeas corpus, such as remedying illegal prison conditions and parole denials.

"Territorial" question

The appropriate venue for challenges to a conviction or sentence is normally the district or county where judgment was imposed. (*In re Roberts* (2005) 36 Cal.4th 575, 583; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.) If the petition is filed in the wrong appellate district, the Court of Appeal may deny it without prejudice and, if it does, must identify the appropriate court in its order. (Cal. Rules of Court, rule 8.385(c).) If a petition is filed in the wrong superior court, the court may retain jurisdiction or transfer the case after making an initial determination that the petition states a prima facie case.[386] (Rule 4.552(b)(2); *Roberts*, *supra*, at p. 583; *Griggs*, *supra*, at p. 347.)

"Vertical" question

Normally as a matter of orderly procedure a habeas corpus petition should be filed in the superior court in the first instance. (*People v. Hillery* (1962) 202

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[386] If the petition challenges a denial of parole or seeks relief on a *Tenorio* claim (*People v. Tenorio* (1970) 3 Cal.3d 89 [invalidating statute requiring consent of prosecutor to strike prior conviction]), the superior court normally should transfer the petition to the court that rendered the underlying judgment without making an initial determination of prima facie merit. (Rule 4.552(c); *In re Roberts*, *supra*, 36 Cal.4th 575, 593; *In re Cortez* (1971) 6 Cal.3d 78, 88-89, fn. 9; see also *Griggs v. Superior Court*, *supra*, 16 Cal.3d at p. 347, fn. 5.)

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Cal.App.2d 293, 294 [an appellate court "has discretion to refuse to issue the writ as an exercise of original jurisdiction on the ground that application has not been made therefor in a lower court in the first instance"]; see also *D.C. v. Superior Court* (2021) 71 Cal.App.5th 441, 458 [habeas petition should be initiated in superior court]; *In re Ramirez* (2001) 89 Cal.App.4th 1312 [this policy not changed by trial court unification].) This is especially true when there are factual matters to be resolved (*Hillery*, at p. 294); an appellate court is not well equipped to conduct evidentiary hearings and make factual determinations (*People v. Pena* (1972) 25 Cal.App.3d 414, 423, disapproved on another ground in *People v. Duran* (1976) 16 Cal.3d 282, 292).

Appellate courts nevertheless have authority to entertain habeas corpus petitions not previously filed in a lower court. They are more inclined to do so when the petition is closely related to an issue in a pending appeal and/or the issue is purely one of law. (See, e.g., *In re Davis* (1979) 25 Cal.3d 384, 389; *In re Kler* (2010) 188 Cal.App.4th 1399; *People v. Pena* (1972) 25 Cal.App.3d 414, 423, disapproved on another ground in *People v. Duran* (1976) 16 Cal.3d 282, 292.) Thus, when a habeas corpus issue is directly linked to an appeal, it is preferable to file the petition in the appellate court.[387] (See *People v. Frierson* (1979) 25 Cal.3d 142, 151.) A common example is an appeal arguing ineffective assistance of trial counsel as a matter of law and a related petition raising facts outside the record to support the showing of ineffectiveness.

Timing

If the petition is to be filed in the Court of Appeal while an appeal is pending, it should be submitted promptly, so that the appeal and writ can be considered together.

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[387] The cover should prominently state that the petition is collateral to a pending appeal. A request to consolidate the appeal and the petition is usually a good idea. (See, e.g., rule 8.500(d) [separate petitions for review required if appeal and writ not consolidated and no order to show cause issued].) As with all motions, it should be filed as a separate document, not included in a brief or petition. (See rule 8.54.) For mandatory electronic filing, see *post*, at § 8.6. For those who may be exempt from mandatory electronic filing, the cover must be red (Cal. Rules of Court, rule 8.40(a)(1); see also rule 8.44.)

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If an appeal is pending and the petition is to be filed in the superior court,[388] the issue arises whether to file it before or after the appeal has concluded. The superior court has concurrent habeas corpus jurisdiction over the case on matters that are not and could not be raised in a contemporaneous appeal. (*In re Carpenter* (1995) 9 Cal.4th 634, 645-646.) In some cases, it may be important to file the petition during the appeal. Witness availability, for example, may be limited. In a criminal case, for a client who has a short sentence, meaningful relief may require an early decision. (See generally § 1.3.14 Protecting the client in time-sensitive cases et seq. on protecting the client in time-sensitive cases.)

In other situations, however, it may be desirable to defer the filing. Two simultaneous attacks on the same judgment can be inefficient and generate confusion. The decision on appeal might moot the writ proceeding, and vice versa. A trial judge may be doubtful about, or reluctant to exercise, their authority to grant the petition, since such a decision could effectively preempt proceedings in the higher court.

Juvenile dependency habeas corpus proceedings are subject to much stricter time limits. (See § 8.4.7 Dependency and family law applications, *post*.)

8.3.2 Petition

"The petition serves primarily to launch the judicial inquiry into the legality of the restraints on the petitioner's personal liberty." (*People v. Romero* (1994) 8 Cal.4th 728, 738.) The petition also states the grounds for the claimed illegality of the petitioner's liberty, so that the return can respond to the allegations and frame the issues for the proceedings.

§ 8.6 Appendix A: Requirements for habeas corpus petitions et seq., provides a step-by-step guide to preparing a petition. (See also Cal. Rules of Court, rule 8.384 et seq.)

Information about filing and service requirements is summarized on ADI's Filing and Service pages. See rule 8.74 for electronic filing standards. TrueFiling is mandatory for filings by an attorney in non-capital original writ proceedings in the California Supreme Court. (Supreme Court Rule Regarding Electronic Filing, rule 3(a)(2).)

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[388] When the petition challenges the ruling of a superior court judge, usually another judge must hear the case. (Pen. Code, § 859c; *Fuller v. Superior Court* (2004) 125 Cal.App.4th 623, 626-628.)

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Purpose: Establishing prima facie cause for relief

The purpose of a habeas corpus petition is to set forth facts and law sufficient to state a prima facie cause– i.e., if the facts stated are assumed true, the petitioner would be entitled to relief.[389]

> If the imprisonment is alleged to be illegal, the petition must . . . state in what the alleged illegality consists. The petition should both (i) state fully and with particularity the facts on which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.

(People v. Duvall (1995) 9 Cal.4th 464, 474, internal citations and quotation marks omitted.)

The petition should be factually and legally adequate *as filed*. As the California Supreme Court has warned:

> The inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later

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[389] Occasionally a petitioner may find it difficult to state a cause without discovery. The Catch 22 is that in the absence of a pending cause a California trial court lacks jurisdiction to order post-judgment discovery. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256.) There is a statutory exception for special circumstances cases. (Pen. Code, § 1054.9, which superseded *Gonzales*; see *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897 et seq.; *In re Steele* (2004) 32 Cal.4th 682, 691.) Another exception is the provision for the petition raising a violation of the Racial Justice Act where a motion for disclosure may be made in preparation for filing the petition. (Pen. Code, §§ 745, subd. (d), 1473, subd. (d)(3).)

Even after trial, however, the prosecution continues to have an ethical duty to disclose exculpatory information that casts doubt on conviction. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179; see also *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383-1384; see *Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 749-750 [state had "present duty to turn over exculpatory evidence" in federal habeas corpus proceeding].)

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> date has no effect. The court will determine the appropriate disposition of a petition for writ of habeas corpus based on the allegations of the petition as originally filed and any amended or supplemental petition for which leave to file has been granted.

(*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

Formal petition

Although the entire document filed with the court is usually called a "petition" for habeas corpus, it contains within it a formal pleading, also called a "petition," that sets out the facts and law necessary to state a prima facie cause of action. The formal pleading is supplemented with points and authorities and evidentiary exhibits. The formal petition must include a prayer for relief and be verified.

Format

Rule 8.384 prescribes the requirements for a petition filed by an attorney. A formal petition can be drafted using the format from a reliable source book such as Appeals and Writs in Criminal Cases (3d ed. Cal CEB), with updates. Another option is to use Judicial Council form HC-001, a copy of which is available from the California courts' website. This form is required for pro per petitions, unless the Court of Appeal has excused use of it. (Rule 8.380(a).) A petition filed by an attorney need not be on the form, but it should include all the information specified on the form. (Rule 8.384(a)(1).) With TrueFiling, the use of the form must be integrated with the district's local rules for electronic document formatting. (See § 8.3.2 Petition, *ante*.)

Facts and law

The key elements in the formal petition are supporting facts and supporting cases, rules, or other authority. Although the facts and law in the formal petition need not and generally should not be extremely detailed, they must be sufficiently specific to constitute a cause of action, i.e., a prima facie case for relief. Amplifying detail and legal analysis can be included in the accompanying points and authorities. Technically, however, the petition must stand on its own without reference to anything else. (E.g., *In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12; *In re Robbins* (1998) 18 Cal.4th 770, 799, fn. 21.)

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Conclusion and prayer for relief

The petition should include a conclusion. It may summarize the main points made in the petition.

The prayer should specify the ultimate relief sought, such as an order to set aside the conviction, to vacate the sentence and return to court for resentencing, or to vacate the plea.[390] It may also ask for such intermediate orders as issuance of an order to show cause or petition for writ of habeas corpus. (The Judicial Council form does not include a specific prayer for relief.)

Verification

A petition must be verified under penalty of perjury. (See Pen. Code, §§ 1474, subd. 3, & 1475; see also Code Civ. Proc., § 2015.5.)[391] Counsel may apply for habeas corpus relief on behalf of a client, and verification by counsel satisfies this requirement. (*In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5.) Counsel should have sufficient personal knowledge of and confidence in the facts to sign under penalty of perjury.[392] Otherwise, it is better practice to instruct the client to sign the verification.

Points and authorities

A memorandum of points and authorities should be attached to the formal petition to amplify the legal implications of the facts and address relevant authority. It must be in the proper format for the intended court, including a statement of case, statement of facts, argument, and conclusion. It must include references to the record, declaration, or exhibits. (See Cal. Rules of Court, rules

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[390] In doing so it should recognize that habeas corpus relief is given by an order, not a writ. (*People v. Romero* (1994) 8 Cal.4th 728, 743.) A common mistake is to pray for a "writ of habeas corpus granting [the ultimate] relief."

[391] Because of the verification requirement, a petition is not "properly filed" in state court until a verification is filed, for purposes of tolling the federal habeas corpus statute of limitations. (*Zepeda v. Walker* (2009) 581 F.3d 1013.)

[392] A verification on counsel's "belief" in the truth of the allegations is insufficient. (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 597, disapproved on other grounds in *In re Joyner* (1989) 48 Cal.3d 487.) Factual allegations on which the petition is based must be "in such form that perjury may be assigned upon the allegations if they are false." (*Ex parte Walpole* (1890) 84 Cal. 584.)

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8.204(a)-(b), 8.384(a)(2).) Except in capital cases, the memorandum is subject to the length limit for civil briefs established in rule 8.204(c). (Rule 8.384(a)(2).) Given TrueFiling, it must comply with the applicable local rule provisions on pagination, etc. (See § 8.3.2 Petition, *ante*.)

Declarations, exhibits, and other supporting documents

Declarations and exhibits should be attached to the petition.[393] Any reference to facts outside the record must be supported by adequate declarations or exhibits.[394] If petitions in the same case have been filed previously, copies of the petitions (but no exhibits) must be included, unless the prior petition was filed in the same appellate court and the present petition so states and identifies the documents by case name and number. (Cal. Rules of Court, rule 8.384(b)(1).) If the petition asserts a claim that was the subject of an evidentiary hearing, a certified copy of the transcript must be included. (Rule 8.384(b)(2).)

For hard copy petitions filed by a person not mandated to use TrueFiling, supporting documents accompanying the formal pleading must be bound, tabbed, and preceded by a table of contents. (Cal. Rules of Court, rules 8.384(b)(3), 8.486(c).) With TrueFiling, see section 8.3.2 Petition, *ante*.

If the case is time-sensitive, counsel may wish to consider the possibility of release pending decision on habeas corpus. (Pen. Code, § 1476.)

8.3.3 Initial response by Court of Appeal to petition

This section addresses procedures after a petition is filed in the Court of Appeal. (See Cal. Rules of Court, rule 8.385 et seq.) Superior court procedures are

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[393] For a person not mandated to use TrueFiling, for Court of Appeal habeas corpus cases, four copies of the petition itself must be filed, but, unless the court orders otherwise, only one copy of the supporting documents is required. (Cal. Rules of Court, rule 8.44(b)(3) & (5).) Different rules apply to Supreme Court writ filings. (Rule 8.44(a)(2) & (3).)

[394] Factual allegations on which the petition is based must be "in such form that perjury may be assigned upon the allegations if they are false." (*Ex parte Walpole* (1890) 84 Cal. 584.) Hearsay statements in the petition or declarations thus may be insufficient. (See *People v. Madaris* (1981) 122 Cal.App.3d 234, 242, disapproved on another ground in *People v. Barrick* (1982) 33 Cal.3d 115; cf. *People v. Duvall* (1995) 9 Cal.4th 464, 484-485 [handling of factual allegations difficult or impossible to establish at pleading stage].)

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discussed in § 8.3.10 Proceedings in superior court after habeas corpus petition is filed et seq., *post*. Counsel should consult the published Internal Operating Practices and Procedures of the Courts of Appeal or call the appellate project or court clerk's office for details about practices in a particular court. § 8.7.1 Part I. Typical proceedings to initial decision, and § 8.7.2 Part II. Proceedings to review initial decision, may help in visualizing the process.

The Court of Appeal may respond to a petition in a few ways – most commonly, (a) summary denial, (b) denial without prejudice to refiling in superior court, (c) request for an informal response, or (d) issuance of a writ of habeas corpus or an order to show cause.[395] (Cal. Rules of Court, rule 8.385.) The court may use (c) as a way of determining whether a prima facie case is stated, but after deciding the petition does establish a prima facie case warranting relief, the court *must* choose (d). (*People v. Romero* (1994) 8 Cal.4th 728, 740; see Pen. Code, § 1476, rule 8.385(d).) Summary relief based on the petition alone is not authorized in habeas corpus cases. (*Romero*, at pp. 740-744.)[396]

Summary denial

If, assuming its factual allegations are true, the petition fails to state a cause for relief on its face or that all claims are procedurally barred, the Court of Appeal may deny the petition summarily. (*People v. Romero* (1994) 8 Cal.4th 728, 737.) Such a decision does not create a cause of action (*id.* at p. 740); it does not require oral argument or a written opinion (see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237); it does not create the law of the case (*People v. Pacini* (1981) 120 Cal.App.3d 877, 884, dicta on other grounds disapproved in *People v. Lara* (2010) 48 Cal.4th 216, 228, fn. 19; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 891-892).

If a summary denial is not filed on the same day as the decision in a related appeal, the decision is final immediately; no petition for rehearing may be filed, and any petition for review is due within 10 days. (Cal. Rules of Court, rules 8.268(a)(2), 8.387(b)(2)(A), 8.500(e)(1).) However, if the denial is filed on the same day as the decision on appeal, it becomes final at the same time as the appeal. Normally, that would be 30 days after filing, unless rehearing is granted,

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[395] The court may occasionally dismiss a petition for mootness, inappropriate venue, or other procedural reason.

[396] In mandate and other prerogative writ cases, in contrast, a peremptory writ in the first instance is possible.

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or the opinion is later certified for publication, or the judgment is modified, or some other event affecting finality occurs. (Rule 8.387(b)(2)(B); see § 7.4.2 Finality of decision as to rendering court et seq.)

Summary denial is not authorized if the petition states a prima facie cause of action; in that case, the court is obligated by statute to issue a writ of habeas corpus or order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728, 737-738; see Pen. Code, § 1476.)[397]

Summary denial without prejudice to refile in superior court

If no petition has yet been filed in the superior court, the Court of Appeal may dismiss the petition "without prejudice" to refile in the superior court. This disposition is not a decision on the sufficiency of the allegations in the petition but is merely a determination the superior court is a more appropriate venue to hear the petition in the first instance. (E.g., *In re Ramirez* (2001) 89 Cal.App.4th 1312, 1313 et. seq.; see *In re Roberts* (2005) 36 Cal.4th 575, 593-594; *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 806, fn. 3.)

8.3.4 Request for informal response

Before determining the adequacy of the petition, the Court of Appeal often uses an "informal response" procedure, outlined in rule 8.385(b), which enables the court to assess the sufficiency of the petition without immediately issuing a writ or order to show cause. It streamlines the statutory procedures (Pen. Code, § 1473 et seq.), which were designed for the superior court and many of which date back to the 1800s. It permits the Court of Appeal to deny a petition without oral argument or a written opinion. The procedure is roughly (and imperfectly) analogous to demurrer in a civil action. (*People v. Romero* (1994) 8 Cal.4th 728, 742, fn. 9.)

Rule 8.385(b) provides:

> (b) Informal response
>
> (1) Before ruling on the petition, the court may request an informal written response from the respondent, the real party in interest, or

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[397] In mandate and other prerogative writ cases, in contrast, issuance of an order to show cause or alternative writ is discretionary; the petition may be summarily denied.

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an interested person. The court must send a copy of any request to the petitioner.

(2) The response must be served and filed within 15 days or as the court specifies. If the petitioner is not represented by counsel in the habeas corpus proceeding, one copy of the informal response and any supporting documents must be served on the petitioner. If the petitioner is represented by counsel in the habeas corpus proceeding, the response must be served on the petitioner's counsel. If the response is served in paper form, two copies must be served on the petitioner's counsel. If the petitioner is represented by court-appointed counsel other than the State Public Defender's Office or Habeas Corpus Resource Center, one copy must also be served on the applicable appellate project.

(3) If a response is filed, the court must notify the petitioner that a reply may be served and filed within 15 days or as the court specifies. The court may not deny the petition until that time has expired

The court may not deny the petition until that time has expired. [398]

Upon considering the informal response and reply, the court may deny the petition, if it does not state a prima facie case for relief or issue an order to show cause if it does. The informal procedure does not permit the Court of Appeal to order ultimate relief without issuing an order to show cause or providing an opportunity for a formal return.[399] (Pen. Code, § 1476; *People v. Romero* (1994) 8 Cal.4th 728, 740-744.)

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[398] This subdivision addresses the Supreme Court's warning "due process may require that . . . habeas corpus petitioners be permitted to answer the response." (*In re Ibarra* (1983) 34 Cal.3d 277, 283, fn. 2, abrogated on another ground as recognized in *People v. Mosby* (2004) 33 Cal.4th 353, 360.)

[399] The respondent may waive the requirement of an order to show cause by stipulating to the truth of the allegations and the right to relief. (*Romero*, at p. 740, fn. 7; cf. *In re Olson* (2007) 149 Cal.App.4th 790, 801-802 [failure to object to granting of relief without order to show cause is not waiver of requirement].)

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Issuance of writ of habeas corpus or order to show cause

If the petition establishes a prima facie case warranting relief, the court *must* issue either a writ of habeas corpus requiring the presence of the petitioner or an order to show cause, which does not require the petitioner's presence. (*People v. Romero* (1994) 8 Cal.4th 728, 740; Pen. Code, § 1476, Cal. Rules of Court, rule 8.385(d).) The issuance of the writ or order establishes a cause of action. (*Romero,* at p. 740.) It is a preliminary determination that the facts as alleged in the petition, if true, state a cause for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, rejected on other grounds in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) If the writ or order is issued only as to some of the claims alleged in the petition, it implicitly denies those not mentioned. (*In re Bolden* (2009) 46 Cal.4th 216, 218.) Neither the writ nor the order to show cause adjudicates the ultimate right to relief. (*Romero*, at p. 738.)

The writ of habeas corpus and order to show cause are functionally similar. A writ of habeas corpus is an order to produce "the body" – i.e., physically bring the petitioner before the court for proceedings on the petition. (*People v. Romero* (1994) 8 Cal.4th 728, 738, fn. 4.) The petition serves only a limited function: to institute formal proceedings and order the custodian to file a return. Appellate courts usually do not order the petitioner's physical presence before them, because they are not equipped to handle prisoners, but instead issue an order to show cause, which requires the custodian to file a return. (*Id.* at p. 738; see also *People v. Villa* (2009) 45 Cal.4th 1063, 1073.)[400]

Once the cause of action is established, several kinds of further proceedings are possible, depending on the issues and their relationship if any to an appeal. In the order to show cause, the Court of Appeal will direct which procedures will be followed. § 8.7.1 et seq., appendix B, "California Post-Conviction Habeas Corpus," part I, "Typical proceedings to initial decision," may help in visualizing the alternatives in this process.

Legal pleadings without fact-finding

If there appear to be no contested factual matters, the Court of Appeal may order further pleadings without fact-finding.

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[400] In recognition of this reality, rule 8.385(d) requires issuance of an order to show cause and does not mention the writ of habeas corpus alternative.

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Return before superior court

The Court of Appeal may make the order to show cause returnable in the superior court, thus transferring jurisdiction to that court. (Pen. Code, § 1508; Cal. Rules of Court, rule 8.385(e); *People v. Romero* (1994) 8 Cal.4th 728, 740; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4, rejected on other grounds in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) It frequently chooses that option when the case involves issues of fact requiring an evidentiary hearing. (*Romero*, *supra*, at p. 740.) The respondent must then file a return before that court, the petitioner must have an opportunity to file a traverse, and the court must decide the case formally. The superior court may not summarily deny the petition or decline to decide the facts on the grounds habeas corpus is not a proper remedy. (*Hochberg*, *supra*, at pp. 875-876; *Rose v. Superior Court (People)* (2000) 81 Cal.App.4th 564, 574-576 [mandate issued when superior court failed to hold evidentiary hearing or state reasons in response to Court of Appeal order to show cause].)

Reference to superior court

The appellate court, alternatively, may "refer" the matter to the superior court, i.e., retain jurisdiction but order a "referee" (usually a superior court judge) to serve as a factfinder and report the findings back to the Court of Appeal. (E.g., *In re Sakarias* (2005) 35 Cal.4th 140, 144; Cal. Rules of Court, rule 8.386(f).)

As discussed further in § 8.3.9 Decision on the merits et seq., *post*, upon receipt of the factual findings, the appellate court will resolve the issues raised by the petition and determine whether any relief should be granted. It must first permit an opportunity for oral argument. (Cf. *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 230; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895; *People v. Medina* (1972) 6 Cal.3d 484, 489-490; but see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237, 1256-1261 [no right to oral argument if a peremptory writ of mandate is issued in the first instance].)

Court of Appeal as trier of fact

On very rare occasions, the Court of Appeal may sit as a fact-finding tribunal in the first instance and directly receive evidence.

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8.3.5 Return

People v. Duvall (1995) 9 Cal.4th 464 deals with the topic of habeas corpus returns in depth. Once the writ or order to show cause is issued, the return by the prosecution to the court's order becomes the principal pleading, analogous to a complaint in a civil proceeding. (*People v. Romero* (1994) 8 Cal.4th 728, 738-739.) While this analogy is far from complete, it does underscore one of the basic functions of the return: to "sharpen[] the issues that must be decided." (*Duvall*, at p. 480.)

The return must be responsive to allegations of the petition and may not simply assert "the existence of a judgment of conviction and sentence." (*People v. Duvall* (1995) 9 Cal.4th 464, 476; see Pen. Code, § 1480.) A general denial is insufficient: the return must allege specific facts in support of the petitioner's detention and recite the facts on which any denial of the petition's allegations is based. (*Duvall,* at pp. 476, 479-480.) The return, "where appropriate, should provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed." (*In re Lewallen* (1979) 23 Cal.3d 274, 278, fn. 2.) The return is deemed to admit those material factual allegations it fails to dispute. (*In re Sixto* (1989) 48 Cal.3d 1247, 1252.)

Rule 8.386(b) and (c) governs the time, form, length, and content of the return.

8.3.6 Traverse

The petitioner's response to the return is a traverse.[401] It is analogous to the answer in a civil lawsuit, and through the return and traverse the issues are joined. (*People v. Romero* (1994) 8 Cal.4th 728, 739.) The factual allegations in the return will be deemed true unless the petitioner controverts them in the traverse. (*In re Lawler* (1979) 23 Cal.3d 190, 194.) Appellate counsel should keep these principles and analogies in mind and not be lulled into thinking a traverse is an "optional" pleading like a reply brief on appeal.

In the traverse the petitioner may reassert the allegations of the petition and may incorporate by reference material previously put forth in either the petition or the reply to an informal response. (*In re Lewallen* (1979) 23 Cal.3d 274, 277.) The petitioner may also stipulate that the petition be treated as a

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[401] For proceedings in the superior court, rule 4.551(e) calls this pleading by the petitioner a "denial."

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traverse. (*People v. Duvall* (1995) 9 Cal.4th 464, 477; see *In re Stafford* (1958) 160 Cal.App.2d 110, 113.) If the factual allegations in the return are so inadequate that the petitioner cannot answer them, "the petitioner may 'except to the sufficiency' (Pen. Code, § 1484) of the return in his . . . traverse, thus raising questions of law in a procedure analogous to demurrer." (*Duvall,* at p. 477.)

The traverse may allege additional facts in support of the claim on which an order to show cause has issued, but it may not introduce additional claims or wholly different factual bases for those claims. It cannot "expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.) To bring additional claims before the court, petitioner must obtain leave to file a supplemental petition for writ of habeas corpus. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235; see also *In re Cox* (2003) 30 Cal.4th 974, 980-981; *People v. Green* (1980) 27 Cal.3d 1, 43, fn. 28, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

Rule 8.386(d) governs the time, form, length, and content of the traverse.

8.3.7 Evidentiary hearing

If the return and traverse present no disputed material factual issue, the court may dispose of the petition without the necessity of an evidentiary hearing. (*People v. Romero* (1994) 8 Cal.4th 728, 739, and cases cited therein.) If there are disputed facts and the petitioner's right to relief may turn on the resolution of a factual matter, then a hearing is required.[402] (*Id.* at pp. 739-740; see Pen. Code, § 1484; Cal. Rules of Court, rule 3.386(f)(1).)

Evidentiary hearings are normally conducted in the superior court before a judge of that court, even if the Court of Appeal has retained jurisdiction over the cause. (See Cal. Rules of Court, rule 3.386(f)(2).)

8.3.8 Argument in the Court of Appeal

If the Court of Appeal has retained jurisdiction and has issued a prior writ of habeas corpus or order to show cause, the court must permit oral argument. (Cal. Const., art. VI, § 14; see *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895; *People v. Medina* (1972) 6 Cal.3d 484, 489-490; *Rosato v. Superior Court* (1975)

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[402] The hearing is governed by the rules of evidence. Hearsay is not admissible unless an exception applies. (See *In re Fields* (1990) 51 Cal.3d 1063, 1070.)

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51 Cal.App.3d 190, 230; cf. *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237 [no right to oral argument if a peremptory writ of mandate is filed in the first instance].)

8.3.9 Decision on the merits

Rule 8.387 governs the filing, finality, and modification of the decision, rehearing, and remittitur in a habeas corpus proceeding.

Effect of prior habeas corpus writ or order to show cause

Without a prior writ of habeas corpus to produce the petitioner or an order to show cause, a proceeding initiated by a habeas corpus petition does not become a "cause."[403] Relief may not be *granted* in that situation (*People v. Romero* (1994) 8 Cal.4th 728, 740), although it can be *denied* (*id.* at p. 737).[404] If the proceeding is in the Court of Appeal, no written opinion is then required. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1260, fn. 18.)

If a writ or order to show cause has been issued and the case is in the Court of Appeal, a written opinion is necessary. (Cal. Const., art. VI, § 14 ["Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated"]; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-895.)

Factual findings

Factual findings by any referee the court may have appointed are not binding, but are entitled to great weight when supported by substantial evidence, especially findings that require resolution of testimonial conflicts and assessment of witnesses' credibility because the referee has the opportunity to observe the

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[403] In contrast, issuance of a peremptory writ of mandate in the first instance without an alternative writ or order to show cause creates a cause. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178, fn. 6.)

[404] The respondent may waive the requirement of an order to show cause by stipulating to the truth of the allegations and the right to relief. (*Romero*, at p. 740, fn. 7; cf. *In re Olson* (2007) 149 Cal.App.4th 790, 801-802 [failure to object to granting of relief without order to show cause is not waiver of requirement].)

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witnesses' demeanor.[405] (*In re Sakarias* (2005) 35 Cal.4th 140, 151; *In re Hamilton* (1999) 20 Cal.4th 273, 296-297; *In re Ross* (1995) 10 Cal.4th 184, 201; *In re Marquez* (1992) 1 Cal.4th 584, 603.)

Burden of proof

The petitioner ordinarily bears the burden of proving, by a preponderance of the evidence, the facts on which the claim depends. (*In re Large* (2008) 41 Cal.4th 538, 549.) Some claims, however, must meet other standards.[406] For example, the long-standing burden for a habeas corpus claim based on *newly discovered evidence* used to be that the evidence must "completely undermine the entire structure of the case upon which the prosecution was based." (*In re Lawley* (2008) 42 Cal.4th 1231, 1239; *In re Clark* (1993) 5 Cal.4th 750, 766.) But on January 1, 2017, subdivisions (b)(3)(A) and (B) -- now numbered (b)(1)(C)(i & ii) -- of Penal Code section 1473 became effective.

One court has noted the amendment to section 1473 changed that. (*In re Sagin* (2019) 39 Cal.App.5th 570, 579.) A petitioner no longer has to prove innocence but rather must show that the new evidence – viewed in relation to the evidence actually presented at trial – would raise a reasonable doubt as to guilt.[407] The statute creates a sliding scale: in a case where the evidence of guilt

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[405] The same standard applies when the appellate court is considering a habeas corpus petition after denial of a petition in the superior court in the same case. (*In re Resendiz* (2001) 25 Cal.4th 230, 249, abrogated on other grounds by *Padilla v. Kentucky* (2010) 559 U.S. 356; *In re Wright* (1978) 78 Cal.App.3d 788, 801-802.) See § Factual Findings, *post*.

[406] When a petition alleges instructional error as to the elements of an offense, based on intervening law, reversal is required unless the People can show beyond a reasonable doubt that the jury must have relied on a valid theory of guilt. (*In re Martinez* (2017) 3 Cal.5th 1216, 1225.)

[407] Since the standard requires that a court engage in the retrospective analysis of deciding whether the new evidence would have changed the trial outcome, the court considers only the new evidence identified by the petitioner and the trial record. The court does not consider other evidence outside the record such as exhibits attached to the return to order to show cause. Such effort misapprehends the nature of the court's inquiry, which is to determine whether the new evidence proffered by petitioner entitles them to a new trial, not to

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presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner. (*Id.* at pp. 579-580.)

In contrast, a claim of *false evidence* under Penal Code section 1473, subdivision (b)(1)(B) raises a question of "materiality" – whether the false evidence was of such significance as to create a reasonable probability it may have affected the outcome of the trial. (*In re Richards* (2016) 63 Cal.4th 291, 312.) This standard is the same as the one for *Watson* prejudice. (*Id.* at pp. 312-313, referring to *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is lower than the preponderance burden. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [under *Watson* a reasonable "'probability' . . . does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*," italics original]; see also *Watson*, 46 Cal.2d at p. 837.)

Form of relief

If the court decides to grant relief, it issues an *order* (e.g., releasing the petitioner, altering the conditions of confinement, etc.), not a *writ*. The "writ" of habeas corpus has the limited function described in § Issuance of writ of habeas corpus or order to show cause, *ante* – to bring the petitioner brought before the court and require the respondent to file a return justifying the custody. This aspect of habeas corpus is in contrast to mandate, in which the relief is granted by issuance of a peremptory writ (either in the first instance or after issuance of an alternative writ or order to show cause). (*People v. Romero* (1994) 8 Cal.4th 728, 743.)

The terms of the order are shaped to the individual situation, "as the justice of the case may require." (Pen. Code, § 1484; *In re Crow* (1971) 4 Cal.3d 613, 619.) The nature of habeas corpus requires "the initiative and flexibility essential to ensure that miscarriage of justice within its reach are surfaced and corrected." (*Harris v. Nelson* (1969) 394 U.S. 286, 291.)

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predict the outcome of a future trial or to determine the ultimate issue of culpability. (*Sagin*, *supra*, at p. 579. fn. 2.)

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8.3.10 Proceedings in superior court after habeas corpus petition is filed

Habeas corpus proceedings in the superior court are governed by rule 4.550 et seq.[408] (See also Pen. Code, § 1473 et seq.; see *Maas v. Superior Court* (2016) 1 Cal.5th 962 [habeas is a "special proceeding" and is subject to Code Civ. Proc., § 170.6 peremptory challenge to judge upon filing of petition].) The requirements and sequence are, for the most part, similar to those for Court of Appeal habeas corpus cases. Unlike Court of Appeal proceedings, however, the rules for superior court cases set forth procedural timelines. § 8.7.1, appendix B, "California Post-Conviction Habeas Corpus," part I, "Typical proceedings to initial decision," may help in visualizing the process.

Initial ruling on petition

The court must rule on the petition within 60 days. (Cal. Rules of Court, rule 4.551(a)(3).) This means the court must make a preliminary determination whether the case is to go forward – that is, it must deny the petition, issue an order to show cause, or request an informal response. (Rule 4.551(a)(4).) In doing so, the court must assume the petitioner's factual allegations are true and then decide whether they would, if proven, establish a right to relief. (Pen. Code, § 1476; rule 4.551(c)(1).) The court may deny the petition summarily if it fails to state a prima facie case for relief. It *must* issue an order to show cause if the petitioner has made a prima facie showing of entitlement to relief. (Pen. Code, § 1476; rule 4.551(c)(1).)

Informal response

Rule 4.551(b) provides for an informal response procedure to assist the superior court in assessing the sufficiency of the petition, similar to that in rule 8.385(b) for Court of Appeal proceedings. The informal response must be filed within 15 days after the court requests it. (Rule 4.551(b)(2).) The petitioner must be given an opportunity to file an informal reply (due 15 days after the response). (Rule 4.551(b)(2) & (3).) After allowing a time for a reply, the court must either

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[408] Compensation for services in the superior court generally must be sought in that court, rather than under the appellate appointment. Counsel should contact the assigned ADI staff attorney about the situation.

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deny the petition or issue an order to show cause within 45 days from the filing of the informal response. (Rule 4.551(a)(5).)

Later proceedings

If the court issues an order to show cause and the petitioner is indigent, it must appoint counsel. (Cal. Rules of Court, rule 4.551(c)(2).) The respondent may file a return within 30 days, and the petitioner may file a denial (i.e., traverse) within 30 days after that. (Rule 4.551(d) & (e).) Within 30 days of the petitioner's denial or expiration of the time for filing one, the court must either grant or deny the relief sought or, if needed, order an evidentiary hearing. (Rule 4.551(f).) An order denying the petition must include a statement of reasons. (Rule 4.551(g).) The court may reconsider an order granting relief within the 60 days the People have to appeal. (*Jackson v. Superior Court (People)* (2010) 189 Cal.App.4th 1051; see also *People v. Berg* (2019) 34 Cal.App.5th 856, 861 [trial court lacks jurisdiction, after unqualified affirmance, to reconsider merits of action, even in face of change in law].)

8.3.11 Review of habeas corpus decision

Filing in Court of Appeal after superior court decision

The denial of a petition for writ of habeas corpus by the superior court is not appealable. (Pen. Code, § 1506; *In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; see *People v. Gallardo* (2000) 77 Cal.App.4th 971, 986.) The remedy is to file a new petition for writ of habeas corpus in the Court of Appeal.

Unlike a denial, the *grant* of a writ of habeas corpus is appealable. (Pen. Code, § 1506.) The standard of review when the People appeal a grant is the same as that on appeal after a trial. The court applies the substantial evidence test to pure questions of fact and the abuse of discretion standard to decisions within the lower court's discretion and independently reviews questions of law. If there are mixed questions of law and fact, the Court of Appeal's review uses the substantial evidence standard when the decision is predominantly factual and a de novo one when it is predominantly legal. (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

Factual findings

When the Court of Appeal considers a habeas corpus petition filed after denial of a petition in the superior court in the same case, the court is exercising its original as opposed to appellate jurisdiction. The Court of Appeal is thus

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acting as finder of fact and makes its own determination. "Because a petition for a writ of habeas corpus is a collateral attack on a presumptively final criminal judgment, [a petitioner] bears the burden of proving his entitlement to relief by a preponderance of the evidence. [Citations.]" (*In re Gay* (2020) 8 Cal.5th 1059, 1072.)

Nevertheless, as when it considers the findings of a referee it has appointed, "[t]he referee's factual findings are 'entitled to great weight where supported by substantial evidence.' [Citations.] Those findings are not, however, conclusive, and 'we can depart from them upon independent examination of the record even when the evidence is conflicting.' [Citations.] The ultimate responsibility for determining whether [petitioner] is entitled to relief rests with this court. [Citation.]" (*In re Gay* (2020) 8 Cal.5th 1059, 1072–1073; § Factual findings, *ante*.)

Court review

Whether the Court of Appeal denies or grants the petition, relief may be sought from the California Supreme Court by a petition for review (Pen. Code, § 1506; Cal. Rules of Court, rule 8.500(a)(1)) or, if necessary, a new habeas corpus petition in the Supreme Court. Since the general rule is that writ relief will be denied if adequate appellate remedies are available, normally a petition for review should be sought. However, if it is necessary to present additional materials (for example, newly discovered information) or if time considerations make the appellate remedy (petition for review) inadequate, then a petition for habeas corpus would be appropriate.

A petition for review must be filed within 10 days after a decision denying habeas corpus relief becomes final as to the Court of Appeal. (Cal. Rules of Court, rule 8.500(e)(1).) A denial is final in 30 days if (1) it is filed on the same day as a related appeal or (2) an order to show cause was issued (rule 8.387(b)(1) & (2)(B)). In these two circumstances, a petition for review is due in the 30 to 40-day window after decision. Otherwise, a denial is final immediately, and the petition for review is due 10 days after the decision. (Rule 8.387(b)(2)(A).) The Court of Appeal may order earlier finality as to that court for good cause. (Rule 8.387(b)(3)(A).)

If the Court of Appeal decided the habeas corpus petition without issuing an order to show cause and without consolidating it with a related appeal, separate petitions for review must be filed for the habeas corpus and appeal. (Cal. Rules of Court, rule 8.500(d).)

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§ 8.7.2, appendix B, part II, "Proceedings to review initial decision," a flow chart, may help in visualizing the review process.

8.4 Other applications of state habeas corpus

Habeas corpus has applications in other circumstances than a post-conviction challenge to the judgment under which the petitioner is constrained. While detailed analysis is beyond the scope of this chapter, examples encountered in appellate practice include:

8.4.1 Late or defective notice of appeal

Although habeas corpus cannot be used as a substitute for appeal, it may be used to establish a constructive filing of a notice of appeal when the petitioner reasonably relied on counsel to file a timely notice of appeal and counsel failed to do so.[409] (*In re Benoit* (1973) 10 Cal.3d 72; see also *Rodriquez v. United States* (1969) 395 U.S. 327.) Habeas corpus can also be used to establish constructive filing of a writ petition with a deadline. (*In re Antilia* (2009) 176 Cal.App.4th 622; see *In re Lambirth* (2016) 5 Cal.App.5th 915 [habeas corpus used to establish constructive filing of administrative appeal].); see also § 8.5.4 Statutory writs, *post*.)

Habeas corpus may also be used to validate a late-filed appeal on the ground of ineffective assistance of counsel, when trial counsel failed to consult with the client about an appeal and a reasonable defendant might have wanted to appeal. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470.) Another possible ineffective assistance of counsel issue would be based on failure to obtain timely a certificate of probable cause in a guilty plea appeal.

For use of habeas in dependency appeals based on ineffective assistance of counsel in failing to perfect a timely notice of appeal, see *In re A.R.* (2021) 11 Cal.5th 234, 256-257. This subject is treated in § Constructive filing doctrine.

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[409] Practice note: Courts vary in their handling of requests for late filing of a notice of appeal. A motion is used in some courts, while others require a formal petition for writ of habeas corpus. (See *People v. Zarazua* (2009) 179 Cal.App.4th 1054.) Counsel should consult with the project if the situation arises.

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8.4.2 Release pending appeal

Before trial, a writ of habeas corpus may be used to review either a denial of release or the imposition of excessive bail. After judgment, the superior court's denial of release pending appeal may be challenged by a habeas corpus petition or, more simply, an application under rule 8.312. (*In re Pipinos* (1982) 33 Cal.3d 189, 196-197; *In re Podesto* (1976) 15 Cal.3d 921; *People v. McGuire* (1993) 14 Cal.App.4th 687, 700, fn. 14, citing *People v. Lowery* (1983) 145 Cal.App.3d 902, 904.) See § 3.4 Release pending appeal et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal," for an extended discussion of release pending appeal.

8.4.3 In-prison conditions and administrative decisions, parole, and other issues arising after judgment[410]

Habeas corpus may be used to challenge in-prison conditions, administrative decisions such as credits and discipline, and similar matters.[411] (E.g., *In re Vicks* (2013) 56 Cal.4th 274; *In re Cabrera* (2012) 55 Cal.4th 683; *In re Arias* (1986) 42 Cal.3d 667, 678; *In re Gomez* (2016) 246 Cal.App.4th 1082; *In re Martinez* (2013) 216 Cal.App.4th 1141; *In re Villa* (2013) 214 Cal.App.4th 954; *In re Fratus* (2012) 204 Cal.App.4th 1339; see *In re Lambirth* (2016) 5 Cal.App.5th 915 [habeas corpus used to establish constructive filing of administrative appeal].) A petition seeking to remedy unlawful custodial conditions or administrative decisions should be filed in the district or division in which the petitioner is in custody. (*In re Roberts* (2005) 36 Cal.4th 575, 583-584; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.) If the proceeding becomes moot as to the petitioner personally during litigation because the individual matter is resolved, but the inmate's complaint is a matter of broad public concern or is a recurring issue for other prisoners and the Department of Corrections and Rehabilitation, the court may permit it to proceed as a "class action" vehicle, figuratively speaking. (*In re Carr* (1981) 116 Cal.App.3d 962, 964, fn. 1; *In re*

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[410] Counsel is cautioned that an appellate appointment does not cover such proceedings. Counsel may seek compensation elsewhere or refer the client to a prisoner assistance organization.

[411] Federal habeas corpus or civil rights relief may be available. (E.g., *Skinner v. Switzer* (2011) 562 U.S. 521; *Wilkinson v. Dotson* (2005) 544 U.S. 74; *Preiser v. Rodriguez* (1973) 411 U.S. 475.)

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Brindle (1979) 91 Cal.App.3d 660, 670; see also *In re Jackson* (1987) 43 Cal.3d 501, 504, fn. 1; *In re Davis* (1979) 25 Cal.3d 384.)

A prisoner under civil commitment may use habeas corpus as a way of testing forced medication. (E.g., *In re Qawi* (2004) 32 Cal.4th 2 [MDO]; *In re Greenshields* (2014) 227 Cal.App.4th 1284 [NGI]; *In re Calhoun* (2004) 121 Cal.App.4th 1315 [SVP]; Welf. & Inst. Code, § 5332 [LPS].)

A finding by the Board of Parole Hearings that a prisoner is not suitable for parole is subject to state habeas corpus review.[412] (*In re Roberts* (2005) 36 Cal.4th 575, 584.) A petition attacking denial of parole is not a challenge to the conditions of confinement and should be filed in the county in which judgment was imposed, rather than the county in which petitioner is incarcerated. (*Id.* at p. 593.) The Board's or Governor's decision denying parole is subject to a limited judicial review by habeas corpus, to determine only whether the decision is supported by "some evidence." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 625; *In re Scott* (2005) 133 Cal.App.4th 573; *In re Smith* (2003) 109 Cal.App.4th 489; see *In re Lira* (2013) 58 Cal.4th 573.) Habeas corpus may also be used to contest the reasonableness of parole conditions. (*In re David* (2012) 202 Cal.App.4th 675.)

8.4.4 Contempt

Code of Civil Procedure section 1209 et seq. and Penal Code section 166 set forth the statutory provisions covering contempt.

Direct contempt is conduct occurring in the immediate presence of the judge, such as disruptive or disrespectful courtroom behavior. It may be dealt with summarily by the judge against whom and in whose court the offense was committed. (E.g., *In re Buckley* (1973) 10 Cal.3d 237, 247, 256, 259 [in-court disparagement of trial judge]; *In re Ciraolo* (1969) 70 Cal.2d 389, 393 [false

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[412] Federal habeas corpus is available to review state parole decisions alleged to violate such provisions of the federal Constitution as due process or ex post facto. Federal review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), at 28 United States Code section 2241 et seq. Section 2254 of AEDPA requires a deferential standard of review of these decisions. (*Himes v. Thompson* (9th Cir. 2003) 336 F.3d 848, 852-854.) Section 2244(d) applies a one-year statute of limitations to filing for federal relief. (*Redd v. McGrath* (9th Cir. 2003) 343 F.3d 1077; see also *Shelby v. Bartlett* (9th Cir. 2004) 391 F.3d 1061).

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declaration about statements made by judge].) A finding of direct contempt requires an order reciting the facts constituting the contempt, adjudging the person guilty, and prescribing the punishment. The facts as recited must show on their face a legal contempt. (*Id.* at p. 394.)

Indirect contempt occurs outside the courtroom – for example, disobedience of a court order. (E.g., *Kreling v. Superior Court* (1941) 18 Cal.2d 884, 887 [violation of injunction]; see also *In re Berry* (1968) 68 Cal.2d 137.) The accused is entitled to notice of the accusations, in the form of a declaration setting forth the facts constituting the alleged contempt, and an order to show cause giving him an opportunity for a defense. (*Warner v. Superior Court* (1954) 126 Cal.App.2d 821, 824, superseded by statute as noted in *In re Ivey* (2000) 85 Cal.App.4th 793; *In re Felthoven* (1946) 75 Cal.App.2d 466, 468-469; see also *In re M.R.* (2013) 220 Cal.App.4th 49.) If punitive sanctions are imposed, the burden of proof is beyond a reasonable doubt. (*Hicks v. Feiock* (1988) 485 U.S. 624, 632, fn. 5; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256.)

Procedures for reviewing contempt order

Habeas corpus is available to review an adjudication of contempt imposing punitive (as opposed to remedial) sanctions, involving incarceration of the accused. (*In re Buckley* (1973) 10 Cal.3d 237, 247, 259 [in-court disparagement of trial judge]; *Kreling v. Superior Court* (1941) 18 Cal.2d 884, 887 [violation of injunction alleged to be void].)

Certiorari is another remedy. (See Code Civ. Proc., § 1222; *In re Buckley* (1973) 10 Cal.3d 237, 259; *Hawk v. Superior Court* (1972) 42 Cal.App.3d 108, 115; see also § Certiorari, *post*.)

A criminal contempt conviction under Penal Code section 166 is appealable as a misdemeanor. (*In re Buckley* (1973) 10 Cal.3d 237, 259, fn. 28.)

Jurisdiction

To make a finding of contempt, the trial court must have "jurisdiction," in a specialized meaning of the term.

Jurisdiction to find a direct contempt committed in the immediate presence of the court requires an order reciting the facts, adjudging guilt, and prescribing the punishment. The facts recited must demonstrate on their face the commission of legal contempt. (*In re Buckley* (1973) 10 Cal.3d 237, 247.)

Jurisdiction to find an indirect contempt, disobedience of a court order outside the presence of the court requires specific factual findings:

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> The facts essential to jurisdiction for a contempt proceeding are (1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance; (4) willful disobedience of the order. The record of the court must affirmatively show upon its face the facts upon which jurisdiction depends so that an appellate court can determine if a contempt has been committed.

(*Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736, internal citations and quotation marks omitted [violation of consent decree].)

Standards of review

In reviewing an adjudication of contempt, the reviewing court's sole responsibility is to determine whether the trial court had jurisdiction to render the judgment. (*In re Buckley* (1973) 10 Cal.3d 237, 247.) "Jurisdiction" has the specialized meaning described in § Jurisdiction, *ante*.

A contempt judgment is construed in favor of the accused – that is, the appellate court does not presume it is justified unless shown otherwise, but instead requires that each element of jurisdiction, in the specialized sense described in § Jurisdiction, *ante*, be demonstrated affirmatively on the face of the record. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256; *In re Liu* (1969) 273 Cal.App.2d 135, 146; see also *In re Cassill* (1995) 37 Cal.App.4th 1081, 1087; *Blake v. Municipal Court* (1956) 144 Cal.App.2d 131, 136.)

This principle does not mean, however, that the appellate court must take a view of the evidence least favorable to upholding the order. (*City of Vernon v. Superior Court* (1952) 38 Cal.2d 509, 517.) The standard is whether there was any substantial evidence before the trial court to sustain its jurisdiction, and the power to weigh the evidence rests with the trial court. (*In re Buckley* (1973) 10 Cal.3d 237, 247; *City of Vernon*, at p. 517; *Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1737.) If punitive sanctions are imposed, the burden of proof is beyond a reasonable doubt (*Hicks v. Feiock* (1988) 485 U.S. 624, 632, fn. 5; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256), and therefore the appellate court must determine whether under the evidence the trial court could have found beyond a reasonable doubt the accused was guilty of contempt.

8.4.5 Civil commitments

Because civil commitments involve custody of the person, habeas corpus may be used to challenge the legality of the confinement when appellate remedies

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are unavailable or inadequate. For example, in proceedings under the Sexually Violent Predator Act, the appropriate remedy for challenging a probable cause finding is a habeas corpus petition, not a motion to dismiss under Penal Code section 995. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405.) Habeas corpus is also used for seeking dismissal of an SVP petition when the underlying judgment has been reversed on appeal. (*In re Smith* (2008) 42 Cal.4th 1251; *In re Franklin* (2008) 169 Cal.App.4th 386.) Habeas corpus is used in *Lanterman-Petris-Short* conservatorship proceedings to challenge short-term detentions. (Welf. & Inst. Code, §§ 5275, 5353.) It is the appropriate procedure for testing the administrative placement of a mentally disordered offender and for raising a claim that the individual's confinement in a prison facility violates his constitutional rights. (*People v. Gram* (2012) 202 Cal.App.4th 1125, 1143.)

8.4.6 Reinstatement of appeal

A petition for writ of habeas corpus filed in a reviewing court may be used after an appeal to challenge the appellate proceedings on such grounds as ineffective assistance of appellate counsel. If the petition is successful, recall of the remittitur is an appropriate remedy. (*People v. Mutch* (1971) 4 Cal.3d 389, 396-397*; In re Smith* (1970) 3 Cal.3d 192, 203-204; *In re Grunau* (2008) 169 Cal.App.4th 997; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388, disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490, fn. 12; Cal. Rules of Court, rules 8.272(c)(2), 8.366(a), 8.540(c)(2).) Alternatively, a motion to recall the remittitur may be used when the grounds do not depend on facts outside the record. (*Mutch,* at pp. 396-397 [fundamental change in law, altering elements of the offense, after original opinion]; *People v. Lewis* (2006) 139 Cal.App.4th 874, 879.)

Habeas corpus may also be used to seek reinstatement of an appeal dismissed under rule 8.360(c)(5) for failure to file an opening brief. (*In re Serrano* (1995) 10 Cal.4th 447, 450.) A motion to reinstate is commonly used, as well.

8.4.7 Dependency and family law applications

Habeas corpus may be available in the juvenile dependency context, on the theory "custody" is involved. The remedy not only safeguards the parent's fundamental rights but also ensures the correctness of the result. If the proceedings have resulted in an inappropriate termination of the parent-child relationship, the child may have an interest equal to that of the parents in its

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restoration. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1664; see also *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1093.)

A common issue in dependency habeas corpus proceedings is ineffective assistance of counsel based on facts outside the appellate record. (E.g., *In re Darlice C.* (2003) 105 Cal.App.4th 459, 462-467; *In re Carrie M.* (2001) 90 Cal.App.4th 530, 534-535; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1642, 1672; *Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 136, superseded by statute on another point; but see *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161-1166 [habeas corpus based on ineffective assistance of counsel not available after termination of parental rights under Welf. & Inst. Code, § 366.26]; cf. *In re Darlice C.*, *supra*, 105 Cal.App.4th 459, 464-466 [declining to follow *Meranda P.*]; *In re Carrie M.* (2001) 90 Cal.App.4th 530, 533-534 [same].) Habeas corpus may not be used to challenge a child's placement. (*In re Cody R.* (2018) 30 Cal.App.5th 381, 393.)[413]

Family law applications include non-dependency child custody issues (*In re Richard M.* (1975) 14 Cal.3d 783, 789) and adoption-related proceedings (see generally, *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 866-868).

Because of the time-sensitive nature of child-focused proceedings, juvenile dependency and family habeas corpus cases are held to a stricter time schedule than criminal cases. To protect the child's welfare, the parent generally must file the petition within the deadlines for filing an appeal from the particular juvenile court order or judgment. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 866; *Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1093; *In re Carrie M.* (2001) 90 Cal.App.4th 530 533-534.) The right to habeas corpus relief is limited to the dependency order to which the claimed ineffective assistance of counsel relates. (*In re Carrie M.*, *supra*, 90 Cal.App.4th at pp. 533-534.) It may not be used to challenge earlier orders. (*Id.* at p. 534.)

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[413] *Cody R.* also says, more expansively: "[H]abeas corpus in dependency proceedings is limited to claims of wrongful withholding of custody of the child, including lack of jurisdiction, and claims of ineffective assistance of counsel." Counsel should not be deterred by this language, arguably dictum, from considering use of habeas corpus when necessary. Habeas has been used in some ICWA situations, for example. Consult the project in this situation.

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8.4.8 Other applications

Habeas corpus is occasionally used in other ways than those outlined above; this discussion does not purport to enumerate all such ways. Some of the most commonly encountered applications in criminal and juvenile appellate practice might be seeking habeas corpus in lieu of appeal when, because of extreme time pressures, appellate remedies are inadequate (and particularly so when the case involves a constitutional issue) (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305; *In re Duran* (1974) 38 Cal.App.3d. 632, 635); securing immediate release of an inmate who has already served all the time legally authorized; challenging on ineffective assistance of counsel grounds the validity of a prior conviction used to enhance a sentence in a current proceeding (see *Custis v. United States* (1994) 511 U.S. 485, 497; *People v. Allen* (1999) 21 Cal.4th 424, 435; cf. *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 964-966 [similar in regard to alleged prior IAC]);[414] and collaterally attacking an enhancement because of an ameliorative change in the law or providing "a vehicle to obtain relief limited to a new sentencing hearing in the original criminal action, which may result in a different sentence" (*People v. Buycks, et al.* (2018) 5 Cal.5th 857, 895, quoting In re *Kirchner* (2017) 2 Cal.5th 1040, 1052, fn. 9.)

8.5 Other extraordinary writs in California criminal and juvenile appellate practice

Criminal and juvenile appellate practitioners seldom need to apply for writ relief other than habeas corpus, but occasionally they may have to consider use of *coram nobis* or *coram vobis*, supersedeas, mandate or prohibition, certiorari, or other common law or statutory writs. The writs most likely to be encountered in appellate practice are mentioned here, with a brief description of their typical uses and requirements. Other resources offer more comprehensive treatment. (E.g., Appeals and Writs in Criminal Cases (3d ed. Cal CEB) Pt. II, §§ 7.1-11.1.) Division One of the Fourth Appellate District has a handout on writs of mandate, prohibition, and supersedeas.

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[414] A challenge to a prior conviction enhancement grounded on failure to comply with *Boykin-Tahl* requirements may, in contrast, be done by a motion to strike in the current proceeding. (*Allen*, at pp. 426-427; see *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.)

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8.5.1 Writs of error *coram nobis* and error *coram vobis*

A petition for writ of error *coram nobis* in the criminal law context is filed in the superior court that rendered judgment and is the equivalent of a post-judgment motion to withdraw a guilty plea or a motion to vacate the judgment. If the judgment was previously appealed and affirmed, a petition for writ of error *coram vobis* is filed in the reviewing court. The writs also are available in the juvenile dependency context. (E.g., *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296-1298 [extrinsic fraud element missing]; *In re Derek W.* (1999) 73 Cal.App.4th 828, 831-833 [procedural and substantive requirements for writ were not met].)

Coram nobis as motion to vacate judgment

In its function as a motion to vacate the judgment, a writ of error *coram nobis* may be granted when three requirements are met:

> (1) [T]he petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment; (2) the petitioner has shown that the newly discovered evidence does not go to the merits of the issues tried; and (3) the petitioner has shown that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.

(*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618-1619; see also *People v. Shipman* (1965) 62 Cal.2d 226, 230; see *People v. Kim* (2009) 45 Cal.4th 1078 [discussing cases granting and denying the writ]; *People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352.) *Coram nobis* is used only to correct errors of *fact*, as distinguished from errors of law. (See *People v. Ibanez* (1999) 76 Cal.App.4th 537, 545.)[415] Due diligence and unavailability of alternative remedies are procedural prerequisites. (*Kim*.)

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[415] In *Ibanez*, the alleged error was the failure of the trial court to admonish the defendant of the possibility of consequences under the Sexually Violent Predators Act before accepting the defendant's plea of guilty. On the People's

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Coram nobis as motion to withdraw guilty plea

Without statutory authorization, no right exists to seek relief by a post-judgment motion to vacate a guilty plea. (*People v. Shokur* (2012) 205 Cal.App.4th 1398; see also *People v. Picklesimer* (2010) 48 Cal.4th 330, 337-338 [unless authorized by specific statute, motion made after judgment becomes final cannot be considered].) *Coram nobis* may be available, however. In a *coram nobis* petition seeking withdrawal of a guilty plea, the defendant must make a showing similar to the "good cause" showing required for withdrawal of a plea before judgment under Penal Code section 1018.

For example, *coram nobis* relief may be available when a defendant has entered a plea because of a misrepresentation by a responsible public official, duress, fraud, or other fact overreaching free will and judgment. In such situations, the defendant has improperly been deprived of the right to a trial on the merits. (*People v. Goodrum* (1991) 228 Cal.App.3d 397, 400-401 [statements by judge caused misperception, *id.* at p. 400, fn. 4]; cf. *Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 793, 796 [*coram nobis* not available to challenge guilty plea induced by prospect that perjured testimony would be offered against defendant, if neither prosecuting authorities nor court had reason to know about the perjury at the time].)[416]

If the misrepresentation or overreaching of will comes from counsel rather than a public official, habeas corpus rather than *coram nobis* is the appropriate remedy. (*People v. Kim* (2009) 45 Cal.4th 1078, 1104; People *v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983; *People v. Goodrum* (1991) 228 Cal.App.3d 397, 400-401.)

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appeal from the grant of the defendant's coram nobis petition, the appellate court concluded that there was no error in the failure to advise and in any event coram nobis was unavailable because the alleged error was legal not factual. In footnote 13, the court also noted that ineffective assistance of counsel could not be raised by coram nobis. (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 546, fn. 13.)

[416] An exception to this general rule is when the court fails to advise a defendant of immigration consequences pursuant to Penal Code section 1016.5; rather than a common law writ, the correct remedy is a statutory motion. (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1521, 1524-1526, 1531.)

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Appeal of coram nobis denial

Unlike the denial of a habeas corpus petition in the trial court, the denial of a *coram nobis* petition may be appealable to the Court of Appeal. As explained in *People v. Gallardo* (2000) 77 Cal.App.4th 971, 982:

> Denial of a defendant's request for *coram nobis* relief is appealable (*People v. Allenthorp* (1966) 64 Cal.2d 679, 683) unless the petition failed to state a prima facie case for relief (*People v. Kraus* (1975) 47 Cal.App.3d 568, 575, fn. 4) or the petition merely duplicated issues which had or could have been resolved in other proceedings (*People v. Vaitonis* (1962) 200 Cal.App.2d 156, 159; see generally [Prickett, *The Writ of Error Coram Nobis in California* (1990) 30 Santa Clara Law Rev. 1, 48-66].)

(See also *People v. Castaneda* (1995) 37 Cal.App.4th 1612; *People v. Goodrum* (1991) 228 Cal.App.3d 397; §§ Quasi-appeal from judgment and Ruling on writ petition.)

Coram vobis

Coram vobis is essentially the same as *coram nobis*, except that it is addressed to a higher court, while *coram nobis* is addressed to the court in which the petitioner was convicted. (*People v. Welch* (1964) 61 Cal.2d 786, 790; *In re De La Roi* (1946) 28 Cal.2d 264, 276.) It is necessary if the trial court has no jurisdiction to vacate the judgment. For example, when the judgment has been affirmed in a previous appeal, the appropriate remedy is a *coram vobis* petition filed in the court that affirmed the judgment – that is, the Court of Appeal (or Supreme Court, if review was granted). (Pen. Code, § 1265, subd. (a).[417]) Similarly, if an appeal is pending when the error is discovered, *coram vobis* in the appellate court is necessary. (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1435.)

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[417] If the trial court denies the petition and the decision is appealed, the Court of Appeal may treat the appeal as a petition for writ of error coram vobis. (*People v. Forest* (2017) 16 Cal.App.5th 1099, 1108.)

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8.5.2 Mandate, prohibition, and certiorari

Writs of mandate, prohibition, and certiorari are "prerogative" writs. The theory and requirements of these writs are explained in several leading cases of the California Supreme Court. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232; *Kowis v. Howard* (1992) 3 Cal.4th 888; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171; see also *People v. Romero* (1994) 8 Cal.4th 728, and *People v. Pacini* (1981) 120 Cal.App.3d 877, 883-884 [distinguishing between habeas corpus and prerogative writs].)

Writ proceedings in reviewing courts are governed by rule 8.485 et seq.[418] Decisions in some writ proceedings filed in the superior court may be reviewed by appeal (see § Ruling on writ petition) or by a writ proceeding filed in the reviewing court (see *Kinder v. Superior Court* (1978) 78 Cal.App.3d 574, 578, citing *Robinson v. Superior Court* (1950) 35 Cal.2d 379, 383-384).

Basic purpose

Mandate

A writ of mandate (mandamus) is an order from a higher court to a lower one, or to some other entity or individual, commanding that some act be performed. (Code Civ. Proc., §§ 1084-1097.) Many applications in criminal cases are pretrial. A common use of mandate in criminal appellate practice is ordering the issuance of a certificate of probable cause, to permit an appeal contesting the validity of a guilty plea.[419] (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1180; *In re Brown* (1973) 9 Cal.3d 679, 683, dictum on another point disapproved in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 & fn. 7; cf. Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.304(b); *People v. Warburton* (1970) 7 Cal.App.3d 815, 820, fn. 2.) It is also available in the dependency context. (E.g., *Karen P. v. Superior Court* (2011) 200 Cal.App.4th 908.)

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[418] Rule 8.486, petitions; 8.487, opposition and amicus curiae; 8.488, certificate of interested parties; 8.489, notice to trial court; 8.490, decisions; 8.492, sanctions; 8.493, costs.

[419] Certificates of probable cause are covered in § 2.3.7 Certificate of Probable Cause and § Notice of Appeal and Certificate of Probable Cause After Guilty Plea et seq.

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Another potential use is in lieu of an expedited appeal, when even an accelerated appeal may not be expedient enough. (Cf. *Turner v. Superior Court* (2003) 105 Cal.App.4th 1046, 1053-1054 [where Court of Appeal initially denied mandamus because defendant could seek expedited appeal after trial, Supreme Court issued order to show cause to hear mandamus on merits].)

Mandate may be an alternative to appeal when required by statute. (E.g., § 8.5.4 Statutory writs, *post*, on statutory writs.) Case law or the exigencies of a case may call for mandate. (E.g., *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408, 1412 [dismissal of dependency petition at conclusion of detention hearing]; see *In re Mario C.* (2004) 124 Cal.App.4th 1303, 1311-1312 [deferred entry of judgment in delinquency case]; cf. *People v. Mena* (2012) 54 Cal.4th 146 [availability of writ review does not bar review by appeal].) It may also be an alternative to habeas corpus when the person is no longer in actual or constructive custody (e.g., *People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [mandamus is proper remedy to seek post-finality relief in cases where the defendant is no longer in custody];[420] § Custody requirement, *ante*).

Prohibition

A writ of prohibition is an order prohibiting a threatened act in excess of the jurisdiction of the court or other entity, such as a trial of a defendant once in jeopardy. (Code Civ. Proc., §§ 1102-1105; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 509, fn. 1.)

For purposes of prohibition, the term "jurisdiction" is given a broad meaning, beyond the most fundamental sense – the presence or absence of power over the subject matter. Prohibition also applies to situations in which a court has authority to act only in a particular manner, or to give only certain kinds of relief, or to act only with the occurrence of certain procedural prerequisites. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-289.)

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[420] *Picklesimer* specifically involved relief under the ruling of *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, which held mandatory lifetime sex offender registration for violations of Penal Code section 288a, subdivision (b)(1), voluntary oral copulation with a 16- or 17-year-old minor, violates equal protection. *Hofsheier*'s equal protection holding was overruled in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. *Picklesimer* remains good law on the remedy.

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Certiorari

Certiorari, also known as a writ of review, is used when a tribunal has acted in excess of jurisdiction and an appeal is an unavailable or inadequate remedy – for example, review by the Supreme Court of a decision of the appellate division of the superior court, or review of a contempt judgment.[421] (Code Civ. Proc., §§ 1067-1077; see *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230; *Dvorin v. Appellate Dept of Superior Court* (1975) 15 Cal.3d 648; *In re Buckley* (1973) 10 Cal.3d 237, 240, fn. 1, citing *John Breuner Co. v. Bryant* (1951) 36 Cal. 2d 877, 878; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454-455.) As with prohibition, for purposes of certiorari the term "jurisdiction" is construed to mean considerably more than fundamental power to act on the subject matter. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-289.)

Petition and informal opposition, reply

A petition for a prerogative writ in the Supreme Court and Court of Appeal must comply with rule 8.486.[422] (See also rules 8.204 as to form and length, 8.74 as to e-filing, and 8.73 as to service and filing.) It must explain any failure to seek relief in a lower court, must name the respondent and any real party in interest, must identify any related appeal, must be verified, and must include points and authorities. (Rule 8.486(a).) It must be accompanied by an adequate record and supporting documents. (Rule 8.486(b).)[423] The form of supporting documents is governed by rule 8.486(c), again subject to e-filing modifications. Service is recipients and other requirements are set forth in rule 8.486(e).)

The respondent or real party in interest may file a preliminary opposition within 10 days stating legal and factual bases why the relief should not be granted. The petitioner may reply within 10 days. (Rule 8.487(a).)

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[421] Habeas corpus is also an appropriate remedy for reviewing a contempt adjudication if the contemnor is incarcerated. (*In re Buckley* (1973) 10 Cal.3d 237, 240, fn. 1; see § 8.4.4 Contempt et seq., *ante*.)

[422] Rule 8.486 refers to rule 8.44 but see rule 8.70.

[423] If the petitioner is a corporation or other entity, a certificate of interested parties under rule 8.208 is required. (Rule 8.488(b).)

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Court response and return or opposition, reply

When an appellate court considers a petition for writ of mandate or prohibition the court may: (1) deny the petition summarily; (2) issue an alternative writ or order to show cause; or (3) grant a peremptory writ[424] in the first instance after giving the required notice and opportunity for opposition. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1239; Code Civ. Proc., §§ 1088, 1105; see Cal. Rules of Court, rule 8.487(a)(4).) It may also grant or deny a request for a temporary stay. (Rule 8.487(a)(4).)

Summary denial

The court may deny a petition summarily, before or after receiving preliminary opposition. (Cal. Rules of Court, rule 8.487(a)(4).) A "summary denial" is one without an order to show cause or alternative writ and without a written opinion or opportunity for oral argument. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 898 [summary denial with a brief statement of reasons does not establish law of the case, even if a decision on the merits is the sole possible ground; declaring "firm rule that a denial without an alternative writ and written opinion does not establish law of the case"]; cf. *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1024 [setting of case for oral argument and decision by full opinion is equivalent of order to show cause and means the decision is not "summary denial"; thus it becomes final 30 days after filing as to deciding court under current rule number 8.490(b)(2)]; *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 413-417 [denial of writ after notice under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, with full opinion, is law of the case and final as to deciding court in 30 days, in case where statute requires writ as the only available means of review]; see also *People v. Medina* (1972) 6

[424] A "peremptory" writ is an order for ultimate relief. It may be issued after an alternative writ or an order to show cause or "in the first instance," without such a prior order. (E.g., *Albertson v. Superior Court* (2001) 25 Cal.4th 796 [litigation begun by alternative writ, followed by peremptory writ]; *Hotel Employees & Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585 [order to show cause, followed by peremptory writ]; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, 181 [speaking of peremptory writs both with and without prior issuance of an alternative writ]; see Code Civ. Proc., §§ 1087, 1088.)

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Cal.3d 484 [summary denial without opinion of pretrial writ challenging Penal Code section 1538.5 denial is not law of the case or res judicata on subsequent appeal].)

Oral argument and a written opinion are not required when a writ is resolved by a summary denial. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241.) The decision is final immediately. (Cal. Rules of Court, rules 8.490(b)(1), 8.532(b)(2)(C).) With a summary denial, the writ proceeding does not become a "cause," and the denial does not establish law of the case. (*Kowis v. Howard* (1992) 3 Cal.4th 888.)

Alternative writ or order to show cause

The court may issue an alternative writ or order to show cause, before or after receiving preliminary opposition. An alternative writ commands the respondent either to perform a specific act or to show cause why it has not done so. (Code Civ. Proc., § 1087.) An order to show cause invites further argument in support of the respondent's position in a formal return, which may be by demurrer and/or a verified answer, filed within 30 days of the alternative writ or order to show cause. The petitioner may reply within 15 days. (Cal. Rules of Court, rule 8.487(b).)

If the respondent performs the act specified in an alternative writ, the matter does not become a "cause," and the proceeding is moot. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241.) If the respondent files a return instead or an order to show cause is issued, the matter is a cause. In that case, an opportunity for oral argument and a written decision, which becomes law of the case, are required. (*Ibid.*; *Kowis v. Howard* (1992) 3 Cal.4th 888 , 894-895; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178, fns. 5 & 6; see Cal. Const., art. VI, §§ 2, 3, 14.) The decision is final in 30 days. (Cal. Rules of Court, rules 8.490(b)(2), 8.532(b)(1).)

Peremptory writ in the first instance

The court may grant a peremptory writ in the first instance – that is, order ultimate relief without first issuing an alternative writ or order to show cause. (Code Civ. Proc., § 1088.) If the court is considering such a remedy, it must notify the parties and provide an opportunity for opposition. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-180; Cal. Rules of Court, rule 8.487(a)(4) & (b)(1).) This accelerated procedure should be used only sparingly and only in exceptional circumstances. (See *Lewis v. Superior Court* (1999) 19

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Cal.4th 1232, 1261; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223;[425] *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

Issuance of a peremptory writ in the first instance creates a "cause," establishing law of the case and triggering the state constitutional requirement of a written decision with reasons stated. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241, 1261 et seq.; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178; see Cal. Const., art. VI, § 14.) It does not, however, require an opportunity for oral argument. (*Lewis*, at pp. 1260-1261; see Cal. Const., art. VI, § 2, 3; cf. *People v. Brigham* (1979) 25 Cal.3d 283, 285-289.) It is final 30 days after filing. (Cal. Rules of Court, rules 8.490(b)(2), 8.532(b)(1).)

Disposition

When the court has issued an alternative writ or order to show cause or is ordering peremptory relief in the first instance, the decision must be in the form of a written opinion with reasons stated. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241.)

If the Court of Appeal grants ultimate relief, the opinion itself is not a peremptory writ. The writ cannot be issued until the case is final as to the Supreme Court. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 33-34; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 181; see Cal. Rules of Court, rule 8.532(b).) This rule contrasts with habeas corpus, where the "writ" is an intermediate procedural step and the actual judgment is an "order." (See § Form of relief, *ante*; *People v. Romero* (1994) 8 Cal.4th 728, 743.)

8.5.3 Supersedeas

Supersedeas is an order staying a judgment or order pending appeal. It is seldom encountered in criminal practice but can be used to stay potential harm such as a custodial condition of probation. (*In re Manuel P.* (1989) 215 Cal.App.3d 48, 72-73; *In re Batey* (1959) 175 Cal.App.2d 541, 542; see Cal. Rules of Court, rule 8.112.) Supersedeas may also be used in dependency appeals. (*In re M.M.* (2007) 154 Cal.App.4th 897, 916 [in appeal where state jurisdiction was lost upon order transferring jurisdiction to tribe pursuant to ICWA, loss of jurisdiction might have been averted had minor's counsel sought immediate stay of transfer order pending minor's exhaustion of appellate remedies; if juvenile

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[425] Overruled on other grounds in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, footnote 4.

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court denies stay, aggrieved party may then petition for supersedeas pending appeal].)

8.5.4 Statutory writs

General statutory writs

Sometimes a statute specifically permits or requires review by writ – usually to avoid the delay entailed in an appeal. Such a procedure, called a "statutory writ," may be the exclusive remedy for review or may be an alternative to appeal.[426]

Many such provisions involve interlocutory orders in ongoing trial proceedings. (E.g., Code Civ. Proc. §§ 170.3, subd. (d), 170.6 [disqualification of trial judge]; Pen. Code, §§ 871.6 [delay in preliminary hearing], 999a [denial of motion to set aside information or indictment], 1511 [trial date], 1512 [severance or discovery], 1538.5, subds. (i) & (o) [denial of search and seizure suppression motion], 4011.8 [denial of application for voluntary mental health services by person in custody]; Welf. & Inst. Code, § 707 and Cal. Rules of Court, rule 5.770(g) [fitness for juvenile delinquency proceedings], construed in *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, disapproved on another ground in *People v. Green* (1980) 27 Cal.3d 1, 33-35; *Kevin P. v. Superior Court* (2020) 57 Cal.App.5th 173, 187.)

Other statutory writs involve final judgments potentially affecting the immediate public welfare. (E.g., Pen. Code, § 1238, subd. (d) [review sought by People of order granting probation]; Health & Saf. Code, § 11488.4, subd. (h) [challenge to order declaring seized property not subject to forfeiture].) An appellate practitioner might encounter such a case on occasion.

Usually statutory writs are mandate, prohibition, or certiorari in form. They may, however, entail a specially prescribed procedure created by statute and/or rule. (E.g., Welf. & Inst. Code, §§ 366.26, subd. (l) & 366.28; Cal. Rules of Court, rules 8.450, 8.452, 8.454, 8.456 [review of order for permanency plan

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[426] For a catalog of civil and juvenile statutory writs, see (in combination) Eisenberg at al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) 15:97-15:134.17 and 16 Witkin, Summary of Cal. Law (11th ed. 2021) Juvenile, § 887. For a catalog of criminal statutory writs, see Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2021) § 7.7.

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hearing or order for placement of child after termination of parental rights]; see § Dependency writs under sections 366.26 and 366.28, *post*.)

Most statutory writs have short, jurisdictional time limits. But the doctrine of constructive filing sometimes can be invoked to determine a writ petition was timely filed. (*In re Antilia* (2009) 176 Cal.App.4th 622; see § 8.4.1 Late or defective notice of appeal, *ante*, and § Constructive filing doctrine et seq.)

Dependency writs under sections 366.26 and 366.28

An especially important limitation on appellate practice in dependency law is the provision in Welfare and Institutions Code sections 366.26 and 366.28 that referral orders for a permanent plan hearing (§ 366.26) or a post-termination child placement order (§ 366.28) cannot be appealed unless they have previously been the subject of a writ under rules 8.450 et seq. and the writ has been denied other than on the merits. (See *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1513-1514.)

The requirement of challenge by writ applies to the order setting a permanent plan hearing and other findings subsumed within that order, such as a decision to bypass or terminate reunification services or a finding that services were adequate. (Welf. & Inst. Code, § 366.26, subd. (l).) This provision ensures that challenges to findings made at the time the hearing is set are resolved expeditiously and do not interfere with later proceedings. (*In re A.L.* (2015) 243 Cal.App.4th 628, 639; see *In re Zeth S.* (2003) 31 Cal.4th 396, 413.)

A dependency writ is functionally a hybrid of an appeal and a writ. It is intended to take the place of an appeal from these highly time-sensitive proceedings and replace it with a streamlined writ-like procedure. Like appeal, it is initiated by filing a notice in the trial court – in this situation, a *notice of intent to file a writ petition*.[427] The notice of intent is filed by trial counsel or the petitioner, under short time limits. (Cal. Rules of Court, rules 8.450(c), (e), 8.454(c), (e).) The superior court clerk mails notice of the filing to relevant parties and prepares a "normal record," as in an appeal. (Rules 8.450(g)-(h), 8.454(g)-(h).)

The filing of the record in the Court of Appeal triggers a short, 10-day deadline for a writ petition. (Cal. Rules of Court, rules 8.452(a)-(c), 8.456(a)-(c).) The Judicial Council has a sample form petition, JV-825, in a fill-in-the blanks style, which trial counsel or the petitioner in pro per may find more convenient.

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[427] See Judicial Council form notices of intent are JV-820 and JV-822.

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Counsel may file a no-issue letter if no arguable issues are found. (See *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 579-580.) Any response by the real party in interest is due within 10 days after the petition is filed, or 15 days if the service copy was mailed. (Rules 8.452(c)(2), 8.456(c)(2).) The record may be corrected or augmented. (Rules 8.452(e), 8.456(e).) Procedures in the Court of Appeal are governed by rules 8.452(g)-(i) and 8.456(g)-(i). A decision on the merits is required except in extraordinary circumstances. (Rules 8.452(h), 8.456(h).)

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8.6 Appendix A: Requirements for habeas corpus petitions filed by counsel in Court of Appeal

Habeas corpus proceedings are governed generally by Penal Code section 1473 et. seq. rule 8.384 governs petitions by an attorney filed in the Court of Appeal or California Supreme Court. Rule 8.380 deals with pro per petitions, and rule 4.550 et seq. governs petitions filed in the superior court. The following discussion ***only*** applies to petitions filed by ***counsel*** in the ***Court of Appeal*** or ***Supreme Court***.

8.6.1 Formal requirements

Information about filing and service requirements is summarized on ADI's Filing and Service page.

Form

A petition filed by attorney in a reviewing court may be on Judicial Council form HC-001. If it is not filed on the HC-001 form, the petition must include the information required by that form, and both the petition and any accompanying points and authorities must comply with rule 8.204(a) and (b). (Rule 8.384(a)(1) & (2).)

Cover

The cover, or the required information on the first page if there is no cover, is required for a petition filed by an attorney. (Cal. Rules of Court, rules 8.384(a)(1); 8.40(b).) The required information for e-filed documents is specified in rule 8.74(a)(9). It should identify the petitioner's custodian[428] and comply, to the extent applicable, with rule 8.204(b)(10).

[428] If the petitioner is in constructive rather than physical custody – for example, on probation, bail pending appeal, parole – the name of the custodian (such as the chief parole agent, chief probation officer, or superior court) should be used. (See generally 6 Witkin, Cal. Crim. Law (5th ed. 2024) Crim. Writs, ch, XVIII, § 16.)

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Service

Proof of service must be attached to the petition. (See Pen. Code, § 1475, 3.)

Persons to be served

The rules do not specify service requirements, but counsel should err on the side of inclusiveness and serve those who reasonably may be affected or have an interest in the petition – for example, the Attorney General, district attorney, custodian of the petitioner, the superior court or Court of Appeal (unless filed there, of course), trial and/or appellate counsel, ADI, etc. – as dictated by the nature of the petition and issues.

Penal Code section 1475, third paragraph, specifically requires service on the district attorney "of the county wherein such person is held in custody or restraint" if the person is held under restraint by an officer of any court. That statute also has special service requirements when the person is in local custody for violation of an ordinance or when the petition is challenging a parole decision and an order to show cause has issued.

Method of service

Practices may vary as to whether the court will permit service by mail on the respondent. If it is filed in the Court of Appeal, proof of service by mail is usually adequate. When immediate relief is requested, personal service is advisable. Email service may be an adequate substitute for personal service.

Filing copies

Unless otherwise provided by Supreme Court Rules Regarding Electronic Filing, electronic filing in the Supreme Court is governed by California Rules of Court, rules 8.70–8.79. (Supreme Court Rules Regarding Electronic Filing, rule 1.) Electronic filing is voluntary for: (1) self-represented litigants and (2) trial courts. (Supreme Court Rules Regarding Electronic Filing, rule 3.) Every filer who is required or voluntarily chooses to file a document electronically under these rules must register as a TrueFiling user. (Supreme Court Rules Regarding Electronic Filing, rule 5(a).) In addition to the ways identified in California Rules of Court, rule 8.78, that a recipient may agree to accept electronic service, a recipient is deemed to have agreed to electronic service in a matter before this court if the recipient agreed to electronic service in the same proceeding in the Court of Appeal. (Supreme Court Rules Regarding Electronic Filing, rule 7(a).)

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When service of a document is required to be made on a person or entity that has not consented to electronic service, the server must comply with California Rules of Court, rule 8.25, regarding service of paper copies. (Supreme Court Rules Regarding Electronic Filing, rule 7(b).)

If they are filed in a trial court, counsel should consult the superior court rules. (Pro per petitioners should use Judicial Council form HC-001.)

Other requirements

Specific requirements for the formal petition, points and authorities, etc., are covered below.

Local rules: Local rules should additionally be consulted since there are variances in procedure. (See, e.g., Ct. App., Fourth Dist., Fourth District, Local Rules. Another source of information is the Internal Operating Practices and Procedures (IOPP's) of the Courts of Appeal. Counsel may also consult the appellate project (e.g., ADI) or the court clerk's office.

8.6.2 Contents of formal petition

If counsel does not use form HC-001, the petition must contain all information requested on the form including:

Current confinement

The petition must state the place of detention if the petitioner is in physical custody and the name of the prison warden or other custodian.

Underlying proceedings

Court

The petition must state the name and location of the court under whose authority the person is confined (such as the superior court in which judgment was entered).

Identity of case

The petition must identify the kind of proceeding (such as criminal or juvenile delinquency) and the case number.

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Offense(s)

The petition must include a description of the offense, including the code section.

Proceedings

The petition must indicate the plea entered, the type of trial (such as jury, court, or submission on preliminary hearing transcript), and all relevant dates, including the dates of conviction and judgment.

Sentence

The petition must state the sentence, with the expected date of release, if applicable.

Previous review

The petition must describe the review previously sought – such as appeal, Supreme Court, or habeas corpus[429] – including the courts, case numbers, issues raised, any hearings held, the results, and all relevant dates. Even if the answer is "none," the petition should so state. (See Pen. Code, § 1475, ¶ 2.) Copies of the petitions, excluding exhibits, must be attached; except that if the previous petition was in the Supreme Court or same Court of Appeal the current petition need only so state and identify the previous case by name and number. (Cal. Rules of Court, rule 8.384(b)(1).)

Administrative decision

If from an administrative decision, the petition must include a description of that decision and what review of it was sought.

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[429] Under Penal Code section 1475, information about previous writ applications, any related proceedings, and the results must be included. Copies of the previous petitions and a certified transcript of any evidentiary hearing must be included. (Cal. Rules of Court, rule 8.384(b)(1) & (2).)

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Counsel

The petition must provide the name and address of the current attorney, trial counsel, and appellate, habeas corpus or other counsel if applicable.

Possible procedural irregularities

Counsel has an affirmative duty to address why applicable procedural bars do not preclude consideration of their claims. Failure to do so may be considered an abuse of the writ, subject to sanctions and grounds for denying the claims without consideration of the merits. (*In re Reno* (2012) 55 Cal.4th 428, 453; *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

Delay

The petition should explain any delay in filing it or in discovering the claimed ground for relief.

Failure to raise on appeal

The petition should explain why the current issue was not raised on appeal (for example: "The issue is based on facts outside of the appellate record").

Failure to file in lower court

If the petition could have been filed in a lower court, the petition should explain why it was not.

Failure to exhaust administrative remedies

If administrative remedies were arguably available but were not exhausted, the petition should explain why they were inadequate.

Relief sought

The petition must identify the nature of the relief sought – such as "new trial," "recall of remittitur," "order deeming notice of appeal timely filed," "immediate release from custody," etc.

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Grounds for relief

The petition must include a summary of the grounds for relief, including all essential supporting facts and basic supporting law. These can be expanded in the points and authorities, but the formal petition should be self-contained, so as to state a cause of action on its face. References to matters in the supporting documents must include citations to the index tab and page. (Cal. Rules of Court, rule 8.384(a)(3).)

Verification

Requirement for petition

Verification is required by Penal Code sections 1474, paragraph 3, and 1475, paragraph 2.

Verification by counsel

Because counsel may apply for habeas corpus relief on behalf of a client, verification by counsel satisfies this requirement. (*In re Robbins* (1998) 18 Cal.4th 770, 783, fn. 5; see Pen. Code, § 1474.) However, a verification based on information and belief may be found defective. (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204-205; *Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568, 574.)

Sample verification by counsel

I am an attorney admitted to practice before the courts of the State of California and have my office in (name of) County.

I represent the petitioner and am authorized to file this petition for writ of habeas corpus. Petitioner is unable to make this verification because he is incarcerated at (place), California. I am filing this petition under the authority of Penal Code section 1474. I drafted this petition and know its contents.

I declare under penalty of perjury under the laws of the state of California that the foregoing statements are true and correct.

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I am an attorney admitted to practice before the courts of the State of California and have my office in (name of) County. (Date and place of signing, signature, name, State Bar number, address, and other contact information.)

8.6.3 Points and authorities

This section should expand on the legal points summarized in the formal petition. It resembles an appellate brief. In form it must comply with rule 8.204(a)-(b). (Rule 8.384(a)(2).) References to matters in the supporting documents must include citations to the index number or letter and page. (Rule 8.384(a)(3).)

8.6.4 Supporting documents

Rule 8.384(b)(1)-(3) covers the requirements for attachments and other supporting documents.

Required attachments

All relevant records, declarations, and other documents necessary to establish right to relief must be attached as exhibits or, if substantial (such as transcripts), lodged with the court.[430] A copy of any previous petition pertaining to the same judgment must accompany the petition, along with a certified copy of a transcript of any evidentiary hearing.

Form

Rule 8.486(c) governs the form of supporting documents if the petition is filed by counsel in a reviewing court. (See rule 8.384(b)(3).) Rule 8.486(c)(1)(A)-(B) specifically refers to submission in paper form, whereas counsel is now expected to file and serve electronically; see rules 8.71, 8.74. Rule 8. 74 should be reviewed with particularity.

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[430] *Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568, 574; *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 156; *Rose v. Superior Court* (1941) 44 Cal.App.2d 599, 600-601.

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Number of filed supporting copies

For the Supreme Court, rule 8.385(c) refers to rule 8.44(a) regarding the number of copies of supporting documents. Ordinarily, for the Supreme Court, one unbound paper copy of the document must also be submitted. (Supreme Court Rule Regarding Electronic Filing, rule 5(a)(1).) The paper copy must be mailed, delivered to a common carrier, or delivered to the court within two court days after the document is filed electronically with the court. If the filing requests an immediate stay, the paper copy must be delivered to court by the close of business the next court day after the document is filed electronically. (Supreme Court Rule Regarding Electronic Filing, rule 5(a)(2).)

Rule 8.44(b)(5) nominally requires one set of supporting paper documents if bound separately from a petition filed in in the Court of Appeal. But rule 8.44(c) permits a court to establish otherwise for the submission of an electronic copy. Though the Courts of Appeal have not expressly provided by rule, as a practical matter, the courts do not want and will not accept paper copies from those required to and who file electronically.

8.6.5 Petition filed in conjunction with appeal

Cover

The cover should state "Related Appeal Pending" and the name and number of the appeal. The petition and opening brief in the appeal must each be independent documents; neither should attempt to incorporate parts of the other by reference. (*In re Ronald E.* (1977) 19 Cal.3d 315, 322, fn. 3, overruled on another issue in *People v. Howard* (1992) 1 Cal.4th 1132, 1175–1178.).)

Record

References to a reporter's or clerk's transcript are often necessary in the petition and points and authorities. If the references are brief, it is best to attach the pertinent pages of the record to the petition, along with a declaration that they are true and correct copies. If the references are substantial, a request for judicial notice of the appellate transcripts would be appropriate. Such a request should be made by motion filed separately from a brief or petition. (Cal. Rules of Court, rules 8.252(a)(1), 8.386(e)– *note*: rule 8.386 governs proceedings once a return is ordered to be filed in the reviewing court, but as a practical matter, the

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reviewing courts accept judicial notice, accompanying a petition seeking an order to show cause, as a means of reviewing voluminous materials.)

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8.7 California post-conviction habeas corpus (Appendix B)

8.7.1 Part I. Typical proceedings to initial decision

8.7.2 Part II. Proceedings to review initial decision

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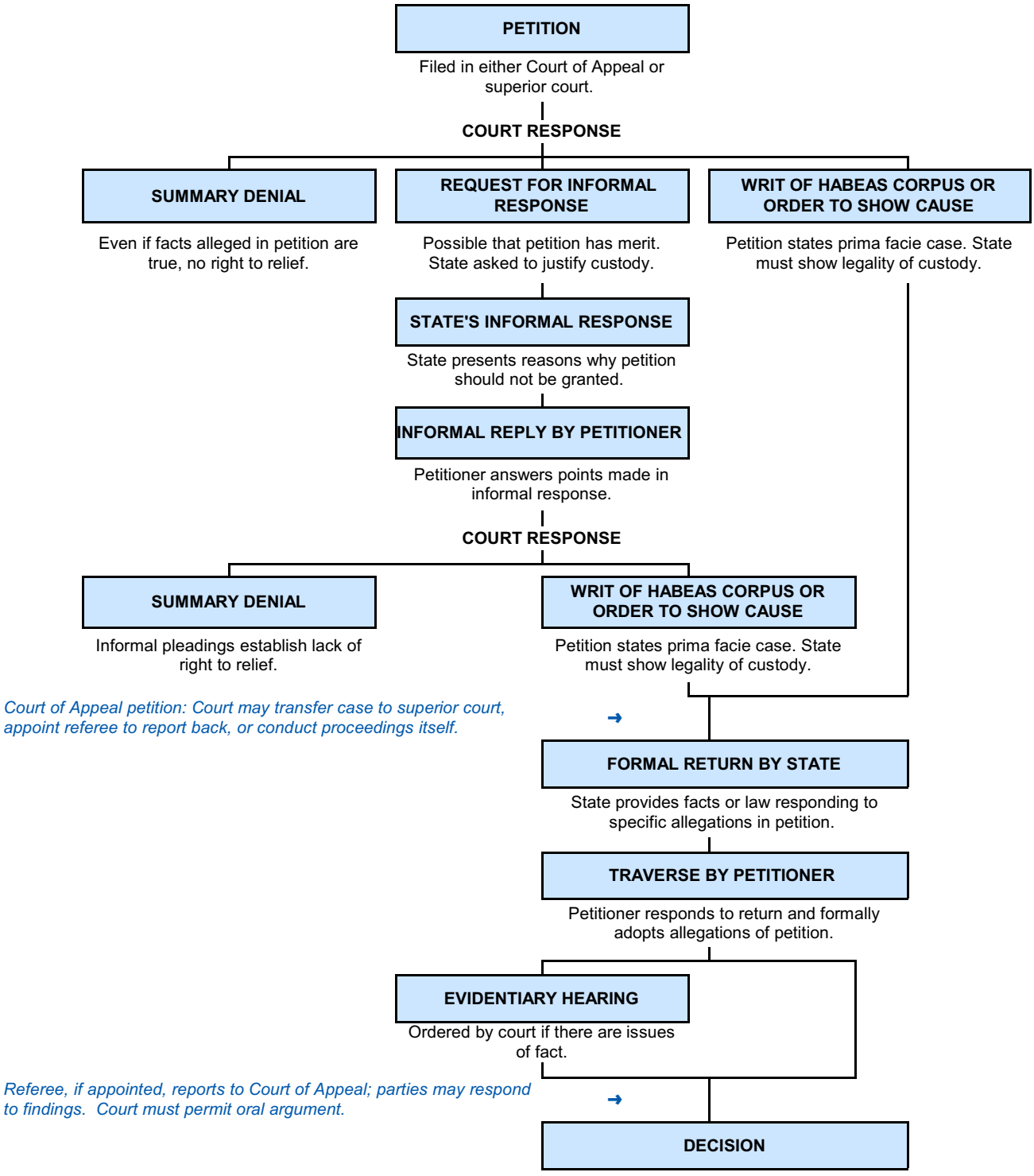
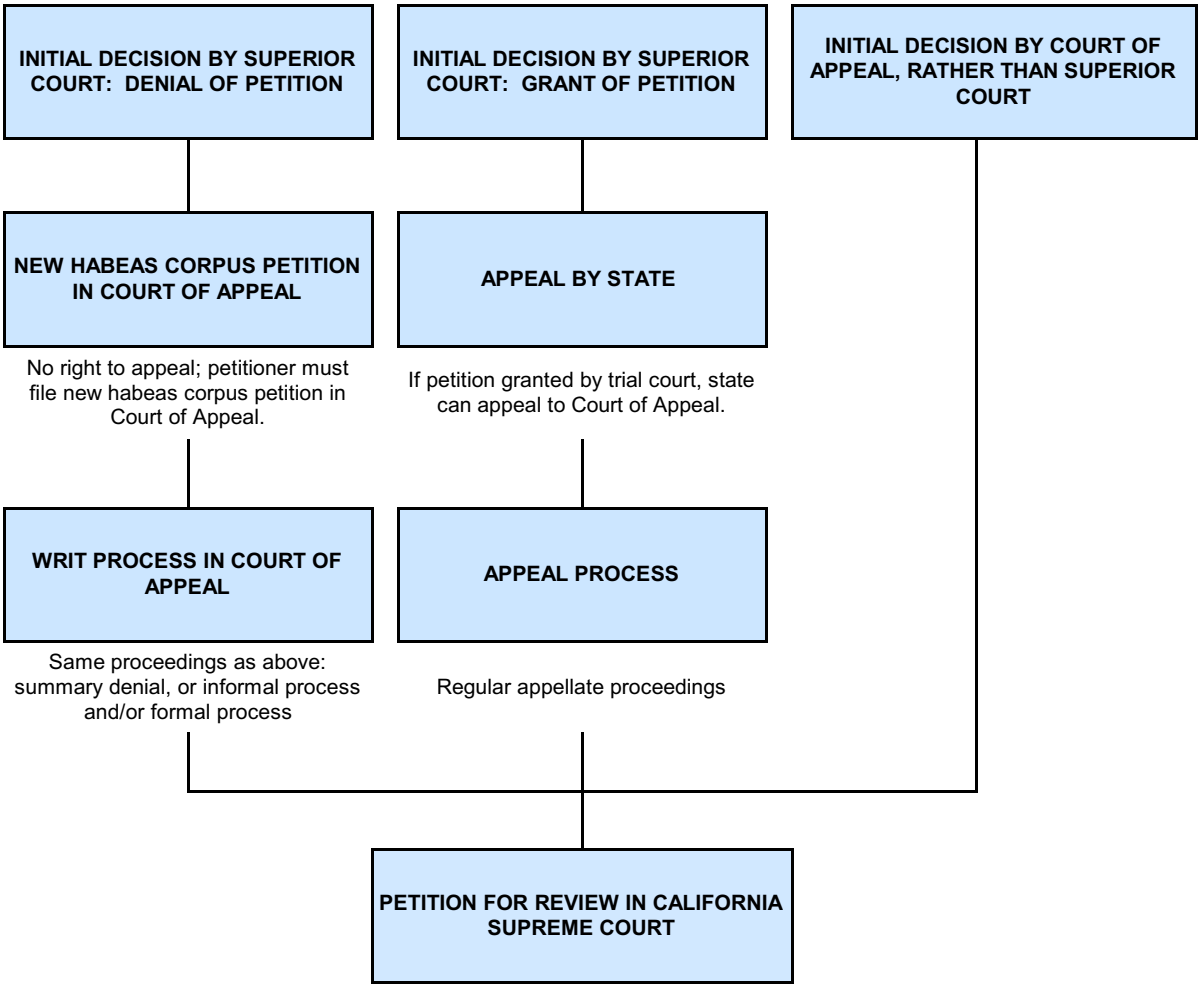
Part I. TYPICAL PROCEEDINGS TO INITIAL DECISION [§ 8.123]

ADI Appellate Practice Manual 2d ed. (rev. 4/2019)



Part II. PROCEEDINGS TO REVIEW INITIAL DECISION [§ 8.124]



**See text for discussion of habeas petition in lieu of petition for review.*