– CHAPTER TWO –

FIRST THINGS FIRST:

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

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

PART ONE: GENERAL

I. INTRODUCTION [§ 2.0]

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.

A. Basic Authority Governing the Right to Appeal and Appellate Jurisdiction [§ 2.1]

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.

1. Constitutions [§ 2.2]

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 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,[1] 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.[2] (Cal. Rules of Court, rule 8.304(a)(2) [definition of "felony" for purposes of appellate jurisdiction]; see also statutory provisions (§ 2.3A, *post*.)

2. Statutes [§ 2.3]

a. Criminal cases [§ 2.3A]

Penal Code section 1237, subdivision (a) governs a criminal defendant's right to appeal after a trial or other contested proceeding. (See § 2.17, *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 § 2.60 et seq., *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 § 2.13,

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[1]That date marked the unification of the superior court and municipal courts.

[2]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.)

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 § 2.18 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 § 2.22 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 § 2.31 et seq., *post*.)

Grounds for appeal by the People are enumerated in Penal Code section 1238 for criminal cases. (See § 2.84 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).[3] An appeal filed in the wrong court may be transferred under certain circumstances. (See § 2.83, *post*.)

b. Juvenile delinquency cases [§ 2.3B]

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 § 2.77 et seq., *post*.)

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 § 2.77, *post*, and footnote on anomalous case of *In re Almalik S.* (1998) 68 Cal.App.4th 851.*)*

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[3]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.)

Appeals by the People in delinquency cases are governed by Welfare and Institutions Code section 800, subdivision (b). (See § 2.84 et seq., *post*.)

c. Juvenile dependency cases [§ 2.3C]

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 PART THREE, § 2.124 et seq., *post.*

d. Other appointed cases [§ 2.3D]

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.

3. Rules [§ 2.4]

The primary provisions governing criminal appeals in the Court of Appeal are found in rule 8.300 et seq. of the California Rules of Court. 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 8.248 through 8.276 govern hearing and decision in the Court of Appeal.

Juvenile appeals are under California Rules of Court, 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 are governed by rule 8.500 et seq. of the California Rules of Court. 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.

B. Priority on Appeal [§ 2.4A]

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 of the California Rules of Court allows courts to give individual cases "calendar preference" (expedited appeal) on a showing of good cause.[4] 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:[5]

- *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(a)(1) gives precedence over all other appeals to juvenile dependency appeals; Code of Civil Procedure

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[4]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].)

[5]See memo on the meaning of statutory priorities, analyzing a 2013 proposal, considered by the Appellate Court Committee of the San Diego County Bar Association, to eliminate priority for criminal appeals except for those in which custody is at stake. http://www.adi-sandiego.com/pdf_forms/Priority_on_appeal.pdf

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 rules 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.)

C. Limitations on Right To Appeal [§ 2.5]

The right to appeal is not unlimited. Guilty plea appeals, for example, have strict limitations; these are discussed in detail in § 2.18 et seq., *post*.) This section discusses appeals in general.

1. Jurisdiction [§ 2.6]

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)) or a writ petition (rule 8.450 et seq.) may not have been met; or the judgment or order appealed from may not be appealable as a matter of law.

2. Mootness and ripeness [§ 2.7]

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 will not be binding on or otherwise affect 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 be in the nature of an advisory opinion, which ordinarily is outside both the proper functions and jurisdiction of 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.)[6]

A California court may exercise discretion to decide a moot case if it involves issues of serious public concern that would otherwise elude resolution.[7] (*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 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].) 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.)

3. Review by writ instead [§ 2.8]

a. Criminal cases [§ 2.8A]

Certain pretrial issues or those affecting whether the trial should proceed at all may require a writ petition. For example, in criminal cases, 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 § 8.83 of chapter 8, "Putting on the Writs: California Extraordinary Remedies," for further discussion of statutory writs.)

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[6]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, future legal disabilities, etc., the case is not moot. (*People v. Feagley* (1975) 14 Cal.3d 338, 345.) (See chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," § 9.3, on mootness under federal law.)

[7]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. (See § 9.3 of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus.")

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. 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.[8] (*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].) The same rule applies to denial of a defendant's motion for a physical lineup under *Evans v. Superior Court* (1974) 11 Cal.3d 617. (*People v. Mena* (2012) 54 Cal.4th 146, 169-171.)

b. Dependency cases [§ 2.8B]

The most prominent requirement for a writ rather than appeal in dependency cases is Welfare and Institutions Code sections 366.26 and 366.28, which 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 California Rules of Court, rule 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 rule 8.403(b).) This requirement is explored more fully in PART THREE, § 2.124 et seq., *post.*

4. Standing [§ 2.9]

Lack of standing may 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.)

5. Waiver of right to appeal [§ 2.9A]

As a term of a plea bargain, defendants occasionally agree they will not appeal the resulting judgment or a particular issue. Such a waiver must be knowing, voluntary, and intelligent, with demonstrable knowledge of the relevant facts. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80; *People v. Vargas* (1993) 13 Cal.App.4th 1652, 1662.)

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[8]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.)

Generally, a waiver of the right of appeal does not include error occurring after the waiver, including breach of the plea agreement, because it could not be made knowingly and intelligently. (*Ibid.*; *People v. Mumm* (2002) 98 Cal.App.4th 812, 815; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 659; *People v. Olson* (1989) 216 Cal.App.3d 601, 604, fn. 2.)

In dependency cases, a parent may waive the right to appeal by, for example, unambiguously stipulating to a dispositional order. (*In re Jennifer V*. (1988) 197 Cal.App.3d 1206; see also *In re N.M.* (2011) 197 Cal.App.4th 159; cf. *In re Tommy E.* (1992) 7 Cal.App.4th 1234 [father did not waive right to contest jurisdictional findings on appeal, by submitting jurisdictional determination on information in social services report].)

6. Forfeiture for failure to raise issue properly below [§ 2.10]

Probably the most common reason for the Court of Appeal to decline to decide a particular issue is forfeiture (informally often called waiver), 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.

Counsel may consider ways around forfeiture 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 § 5.27 of chapter 5, "Effective Written Advocacy: Briefing.")

7. Motions requiring renewal at later stage [§ 2.11]

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 § 2.35 et seq., *post*.)

8. Invited error [§ 2.12]

Invited error is another reason for a court to reject an argument other than on the merits. In such a situation the appellant by his explicit words or actions has solicited some type of action that is legally incorrect. To constitute invited error the action must have resulted from an intentional tactical decision. (*People v. Marshall* (1990) 50 Cal.3d 907, 931.)

9. Credits and fees or fines issues – Penal Code sections 1237.1 and 1237.2 [§ 2.13]

Another limitation is imposed by Penal Code sections 1237.1 and 1237.2, which require appellate issues based on the calculation of credits and monetary assessments (such fees or fines), respectively, to be raised in the trial court first, if they are the only issues to be raised on appeal.

Section 1237.1, as modified effective 2016, provides:

> No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction.

Section 1237.2 provides:

> An appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction. This section only applies in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal.

Although Penal Code section 1237.1 refers to presentence *custody* credits, courts have also applied it to presentence *conduct* credits, as well. (See, e.g., *People v. Clavel*

(2002) 103 Cal.App.4th 516, 518; *People v. Acosta* (1996) 48 Cal.App.4th 411, 415.) The requirement applies only to minor ministerial corrections, such as mathematical or clerical error or oversight, not legal error; a legal issue such as which version of a statute applies, especially when the decision has constitutional implications, may be raised as a single issue without first seeking correction in the superior court. (*People v. Delgado* (2012) 210 Cal.App.4th 761; see *People v. Verba* (2012) 210 Cal.App.4th 991.)

Under both statutes, requirement applies only when a credits or fees or fines issue is the *sole* one on appeal. (Pen. Code, § 1237.2; *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].) It does not apply to juvenile cases. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.)

A request that the superior court modify custody and conduct credits or a fine or fee assessment may be made informally, rather than by a formal motion. (Pen. Code, §§ 1237.1, 1237.2, abrogating *People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519.) A more detailed analysis by FDAP executive director Jonathan Soglin of the changes wrought by A.B. 249, enacted in the 2015-2016 Legislative session, is on the FDAP website.

10. Fugitive dismissal doctrine [§ 2.14]

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].) Another theory is "disentitlement" – the defendant, having effectively renounced the authority of the court by leaving its jurisdiction, may not try to take advantage of its processes. (*In re Kamelia S.* (2000) 82 Cal.App.4th 1224.)

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"];[9] *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].)

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. Unit2.142 ed 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].)

The fugitive dismissal doctrine applies to juvenile proceedings. (*In re E.M.* (2012) 204 Cal.App.4th 467, 474, and *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*]; see also *In re A.K.* (2016) 246 Cal.App.4th 281 [disentitlement to appeal applied whenby reason of defiant and uncooperative attitude].)

11. Previous resolution of matter [§ 2.15]

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. (See chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," § 7.7B, on law of the case doctrine.) Res judicata and collateral estoppel are treated in more detail in § 2.52, *post*.

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

D. Advisability of Appealing [2.16]

Counsel must evaluate, not only the availability of appeal,[10] 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 inadvisable to challenge the validity of the plea on appeal, because withdrawing the plea means loss of the negotiated benefits.[11] 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 possibly may be added on retrial, and there may be non-penal consequences more onerous than the original punishment.

In dependency cases, some results favorable to the client may have been unauthorized and would be subject to correction on appeal. 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.

Appellate counsel should always be vigilant, therefore, to spot potential downsides and to advise the client about them. Counsel should help the client assess (a) the magnitude and likelihood of potential benefits from appealing, (b) the magnitude and

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[10]An opening brief must include a statement of appealability, indicating the judgment or order appealed from and the basic authority for the appeal. (Cal. Rules of Court, rules 8.204(a)(2)(B), 8.360(a).) See § 5.8 et seq. of chapter 5, "Effective Written Advocacy: Briefing," for a more extensive discussion of this requirement.

[11]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 withdrawing the plea. It would not be appropriate to ask for a remand if under no circumstances would the defendant want to withdraw the plea. Further, pulling the client out of prison to go to a hearing that will change nothing might be detrimental to the client's prison status (job, placement, etc.).

likelihood of potential risks, and (c) the likelihood the adverse result might occur even in the absence of appeal.[12]

The topic of adverse consequences on appeal is explored in detail in § 4.91 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection." (See also § 2.39, *post*.)

PART TWO: CRIMINAL AND DELINQUENCY APPEALS[13]

II. APPEAL BY A CRIMINAL DEFENDANT AFTER TRIAL [§ 2.17]

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 § 2.8A, *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 § 2.8A

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[12]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.3d 689, 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.

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

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 separately appealable,[14] but may be reviewed on an appeal from the judgment. Relief by writ 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.)

The defendant must timely appeal from an order granting probation or a 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 at a later time. 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 § 2.61 et seq., *post*.)

A vast array of issues can be raised on such an appeal if they are shown on the record and were timely preserved by proper objection or other procedural prerequisite. Just a few 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.

The scope of issues reviewable after trial may be preserved by entering a "slow plea," 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. (See § 2.20, *ante*.)

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[14]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.)

III. APPEAL BY A CRIMINAL DEFENDANT AFTER GUILTY PLEA [§ 2.18]

Guilty plea appeals are a different breed from appeals after trial.[15] The scope of issues is limited both substantively and procedurally.

A. General: Waiver of Most Issues and Procedural Limitations [§ 2.19]

The right to appeal after a guilty plea is considerably 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 of its procedural requirements. (See § 2.122, appendix, for examples of issues waived by the plea.) Thus all issues going to guilt or innocence including affirmative defenses, most pretrial evidentiary rulings, and most procedural defects before the plea are considered 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 [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 § 2.105 et seq., *post*.)

B. Exception to General Limitations: "Slow Plea" [§ 2.20]

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.)

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[15]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.)

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.)

C. Exception to Waiver: Matters Arising After Entry of the Plea [§ 2.21]

1. Attacks on sentence [§ 2.22]

a. Sentence not incorporated into plea agreement [§ 2.23]

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 § 2.24, *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.)

b. Negotiated sentence limitations [§ 2.24]

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. However, if a specific sentence has been negotiated and is 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 § 2.56, *post*, and § 2.123, appendix, 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 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].)[16]

However, an attack on the trial court's *authority* to impose the lid is an attack on the plea. (*People v. Shelton* (2006) 37 Cal.4th 759, 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* (2006) 37 Cal.4th 759, 771, the bargain provided a maximum of 25 years to life and an opportunity to request dismissal of priors. On appeal the court held the defendant's challenge on appeal 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

c. Credits issue and fines or fees issue limitation [§ 2.25]

As mentioned above in § 2.13, *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.

2. Procedural defects in hearing motion to withdraw plea [§ 2.26]

The failure to provide the defendant 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

[16]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.)

Cal.App.4th 560, 565.) Issues concerning the underlying merits of a motion to withdraw also are reviewable and also require a certificate of probable cause. (§ 2.38 et seq., *post*.)

3. Non-compliance with terms of bargain by People or court [§ 2.27]

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 by definition they were not contemplated when the agreement was made.

a. Remedies [§ 2.28]

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* (1982) 32 Cal.3d 855, 861; see *People v. Kanawha* (1977) 19 Cal.3d 1, 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 will implement the parties' reasonable expectations without binding the trial judge to an unreasonable disposition. (*People v. Mancheno* (1982) 32 Cal.3d 855, 861; see *Santobello v. New York* (1971) 404 U.S. 257, 262-263; see also *People v. Kanawha* (1977) 19 Cal.3d 1, 13-14; *Amin v. Superior Court (People)* (2015) 237 Cal.App.4th 1392 [People's mistake in reading police report 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 778; *People v. McClaurin* (2006) 137 Cal.App.4th 241, 248-249 [enforcement of pre-plea bargain]; *People v. Toscano* (2004) 124 Cal.App.4th 340; *People v. Leroy* (1984) 155 Cal.App.3d 602, 606-607; *People v. Preciado* (1978) 78 Cal.App.3d 144, 147-149; *People v. Newton* (1974) 42 Cal.App.3d 292, 298-299.)

It may not be appropriate when an original term of the plea bargain was invalid because 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].)

b. Certificate of probable cause [§ 2.29]

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. (*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; *People v. Osorio* (1987) 194 Cal.App.3d 183, 187, overruled on other grounds in *People v. Johnson* (2009) 47 Cal.4th 668.)

c. Prejudice [§ 2.30]

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; *People v. Mancheno* (1982) 32 Cal.3d 855, 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 – for example, imposition of a mandatory restitution fine at or near the statutory minimum – withdrawal of the plea may be inappropriate. On appeal, an error in imposing a fine not bargained for generally should be corrected by reducing it to the minimum. (*Id.* at pp. 1027-1030.)

D. Exception to Waiver: Fourth Amendment Suppression Issues [§ 2.31]

1. Statutory authorization to appeal [§ 2.32]

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:

> 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.

a. Policy basis [§ 2.33]

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.

b. Type of issues preserved [§ 2.34]

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 § 2.122, appendix). (*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.)[17]

2. Need to make or renew motion after information filed [§ 2.35]

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

[17]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. (*People v. Hobbs, supra,* 7 Cal.4th at p. 957; *People v. Seibel*, *supra*, 219 Cal.App.3d at p. 1285.)

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.

a. "Proceedings" as used in section 1538.5(m) [§ 2.36]

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 appellate review of the search and seizure decision is foreclosed. (*People v. Richardson* (2007) 156 Cal.App.4th 574.)

b. Method of renewing [§ 2.37]

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, arguing the unlawfulness of holding the defendant to answer on the basis of evidence seized in violation of the Fourth Amendment. (See Pen. Code, § 1538.5, subd. (m); see also *People v. Lilienthal* (1978) 22 Cal.3d 891, 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"].)

E. Exception to Waiver: Issues Going to the Validity of the Plea [§ 2.38]

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].) 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, a number of bases for attacking the validity of the plea might be asserted on appeal.[18] 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

[18]On occasion the People may attack the validity of the plea. (E.g., *People v. Clancey* (2013) 56 Cal.4th 562.)

- *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.

1. Preliminary caveat for counsel: need to warn client about consequences of challenging the plea [§ 2.39]

As noted in § 2.16, *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 § 4.99 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection," for more detail.) It is therefore crucial the client be fully advised what charges and sentences he or she might be facing upon withdrawal of the plea. Commonly clients do not at first understand the potential drawbacks when they urge attacking the plea; after they learn what might happen, more often than not the response is, "Forget it. I don't want to give up what I bargained for."

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. Procedural standards and requirements in attacking plea [§ 2.40]

a. Adequate appellate record [§ 2.41]

In order 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 § 2.72 et seq., *post*, and § 8.1 et seq. and § 8.66 et seq. of chapter 8, "Putting on the Writs: California Extraordinary Remedies"; Appeals and Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2005) §§ 2.172(A)-2.237, pp. 515-582.)

b. Motion to withdraw plea [§ 2.42]

Often an attack on the validity of the plea on appeal will require that a motion to withdraw the plea have been made in the trial court, since otherwise the necessary facts will not be in the appellate record. Abuse of discretion in denying 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 as a whole, 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;[19] *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. Totari* (2002) 28 Cal.4th 876, 879, 887 [denial of such a motion is appealable 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].)

c. Certificate of probable cause [§ 2.43]

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 § 2.105 et seq., *post*.

3. Validity issues concerning the entry of the plea [§ 2.44]

The validity of a plea may be attacked on appeal on the ground the circumstances of its entry violated the defendant's rights.

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[19] *Brown* was disapproved on another ground by *People v. Mendez* (1999) 19 Cal.4th 1084, 1098.

a. Violation of right to effective assistance of counsel [§ 2.45]

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) ___U.S.___ [132 S.Ct. 1376] [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) ___U.S.___ [132 S.Ct. 1399] [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]; *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];[20] *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 his or her own choice,[21] undue influence on a defendant to accept a plea bargain because counsel obviously is not prepared to proceed to trial,[22] and counsel's failure to determine that an enhancement the prosecutor was offering to dismiss as part of the bargain was in fact invalid.[23] (See also cases listed in *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 542.)

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[20]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.)

[21]*People v. Holland* (1978) 23 Cal.3d 77, 89, disapproved on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1098.

[22]*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142.

[23]*People v. McCary* (1985) 166 Cal.App.3d 1, 8-12.

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.)

b. Inadequate advice on constitutional and other rights [§ 2.46]

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 finding of the allegation. (*People v. Cross* (2015) 61 Cal.4th 164; *In re Yurko* (1974) 10 Cal.3d 857.)

c. Inadequate advice on consequences of plea [§ 2.47]

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) ___ U.S. ___ [130 S.Ct. 1473].[24] They include the range of punishment (see *Bunnell v.*

[24]*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.

Superior Court (1975) 13 Cal.3d 592, 605), a restitution fine (see *People v. Walker* (1991) 54 Cal.3d 1013, 1022), 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.)

d. Erroneous advice on appealability of issue [§ 2.48]

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*[25] 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. (*DeVaughn*, at p. 896 [trial court assured defendant *Miranda* issue could be raised];

[25]*Miranda v. Arizona* (1966) 384 U.S. 436.

People v. Collins (2004) 115 Cal.App.4th 137, 148-149, and *People v. Coleman* (1977) 72 Cal.App.3d 287, 292-293 [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*[26] 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. Krotter* (1984) 162 Cal.App.3d 643, 649; *People v. Shults* (1984) 151 Cal.App.3d 714, 720, fn. 2.)

e. Involuntariness of plea or incompetence of defendant [§ 2.49]

A number of 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 as a result 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 his or her 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 him or her 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.)

[26]*People v. Hitch* (1974) 12 Cal.3d 641 [sanctions for destruction of evidence].)

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.) 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.)

4. Validity issues concerning the proceedings as a whole [§ 2.50]

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).

a. Jurisdictional defects [§ 2.51]

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.));

- 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).

b. Prior proceedings involving the same offenses as bar to current litigation [§ 2.52]

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 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]; chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," § 7.7A, on law of the case doctrine.)

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.[27] 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. 61, 62; see also *Blackledge v. Perry* (1974) 417 U.S. 21, 30.) 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.*

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[27]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.)

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].)

c. Flaws in the initiation of the proceedings [§ 2.53]

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,[28] 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 seq.)

[28]See also Penal Code section 1389 [analogous provision for out-of-state prisoners].

d. Statute of limitations [§ 2.54]

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.[29] (*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,[30] the question is an evidentiary one waived by the plea. (*People v. Padfield* (1982) 136 Cal.App.3d 218, 226.)

5. Validity issues concerning the substance of the plea [§ 2.55]

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.

a. Bargained-for sentences and convictions unauthorized by law or unconstitutional [§ 2.56]

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; *In re Babak S.* (1993) 18 Cal.App.4th 1077.)

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 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)

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[29]A certificate of probable cause is required. (*People v. Smith* (1985) 171 Cal.App.3d 997, 1000-1001.)

[30]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.)

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 [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[31]), 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.

b. Bargain attempting to confer fundamental jurisdiction [§ 2.57]

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.

c. Terms of bargain contrary to public policy [§ 2.58]

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,

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[31] *Young* was cited with approval in *People v. Shelton* (2006) 37 Cal.4th 759, 771, on the certificate requirement. In *People v. Buttram* (2003) 30 Cal.4th 773, 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.

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 § 2.56, *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.)[32] 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 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 indeterminate term at any recommitment hearing after the two-year term expired.)

d. Plea to a legally invalid count or non-existent crime [§ 2.59]

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

[32]The court did not foreclose the possibility that a habeas corpus writ seeking to withdraw the plea might be available. (*Renfro*, at p. 233.)

repealed by the Legislature after the plea but before final judgment; the court found the plea was invalid and therefore had to be withdrawn.[33] (*Id.* at p. 213.) Similarly, in *People v. Wallace* (2003) 109 Cal.App.4th 1699, 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. (*Id.* at p. 1704; see also *People v. King* (2007) 151 Cal.App.4th 1304 [obligation to register as sexual offender premised solely on condition of probation for nonregistrable 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].)

IV. APPEAL BY THE DEFENDANT FROM ORDER AFTER JUDGMENT [§ 2.60]

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.

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.

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

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[33]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); cf. *Harris v. Superior Court* (2016) 1 Cal.5th 984.

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];[34] 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 Pen. Code, § 1170, subd. (d); denial of recall was not appealable], all distinguished in *People v. Loper* (2015) 60 Cal.4th 1155.)

A. Orders Related to Probation [§ 2.61]

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].)

1. Terms and conditions of probation [§ 2.62]

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.)

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[34] *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 [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].)

2. Revocation [§ 2.63]

A decision to revoke probation is not itself an appealable order, but it may be reviewed on appeal from the disposition after revocation.[35] (*People v. Robinson* (1954) 43 Cal.2d 143, 145.)

3. Review of matters occurring before probation grant [§ 2.64]

An appeal after judgment may not review matters, such as trial proceedings, that occurred before the original judgment, which is considered to be the grant of probation. 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.)

4. Review of sentence [§ 2.65]

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) 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.

5. Orders after grant of probation affecting underlying conviction [§ 2.66]

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.)

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[35]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.

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.)

B. Resentencing [§ 2.67]

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].)

1. Correction of unauthorized sentence [§ 2.68]

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 § 2.24, *ante*), can be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Smith* (2001) 24 Cal.4th 849, 852-853; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

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 § 4.93 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection."

2. Sentence recall under Penal Code section 1170(d)(1) [§ 2.69]

A defendant has a right to appeal a resentencing under Penal Code section 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 after 120 days on the recommendation of the Department of Corrections and Rehabilitation. At the resentencing the trial court must follow all the procedures and rules attendant to sentencing. If error occurs, the defendant may appeal from the new judgment. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442, 463.)

Section 1170, subdivision (d)(1) does not confer standing on a defendant to initiate a motion to recall a sentence. (*Thomas v. Superior Court* (1970) 1 Cal.3d 788, 790.) Formerly, case law had concluded from this fact that the defendant cannot appeal the refusal to recall the sentence. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 194; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725.) The Supreme Court cast serious doubt on this line of authority in *People v. Loper* (2015) 60 Cal.4th 1155, when it rejected the argument that a litigant's lack of standing to initiate a proceeding necessarily precludes the litigant from an appeal once the decision is made. (*Id.* at pp. 898-902, overruling *People v. Druschel* (1982) 132 Cal.App.3d 667 and *People v. Niren* (1978) 76 Cal.App.3d 850.)

3. Resentencing under other laws [§ 2.69A]

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 a number of 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 § 2.72, *post*.)

4. Sentencing after remand [§ 2.70]

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 rearraignment and sentencing cannot raise issues arising at first trial].)

C. Credits Calculations and Fines or Fees [§ 2.71]

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.) 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.

D. Other Post-Judgment Rulings [§ 2.72]

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 § 2.73 et seq., *post*. In addition to those and sentence recalls discussed in §§ 2.69 and 2.69A, *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 [order granting newspaper's request to

make contents of defendant's probation report public]; *People v. Sword* (1994) 29 Cal.App.4th 614 [denial of outpatient status after confinement under a not guilty by reason of insanity finding]; *People v. Coleman* (1978) 86 Cal.App.3d 746 [denial of application for release on ground of restored sanity].)

1. Quasi-appeal from judgment [§ 2.73]

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.)

2. Ruling on writ petition [§ 2.74]

Denial of a petition for writ of error *coram nobis* is generally appealable unless, as discussed in § 2.73, 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. Gallardo* (2000) 77 Cal.App.4th 971; *People v. Castaneda* (1995) 37 Cal.App.4th 1612; *People v. Goodrum* (1991) 228 Cal.App.3d 397; see also § 8.69 of chapter 8, "Putting on the Writs: California Extraordinary Remedies.")

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* (2000) 77 Cal.App.4th 971, 986.[36]) The remedy is to file a new petition for writ of habeas corpus in the Court of Appeal. (See § 8.49 et seq. of chapter 8, "Putting on the Writs: California Extraordinary Remedies.") 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."

3. Penal Code section 1016.5 motion [§ 2.75]

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].)

4. Penal Code section 1473.6 motion [§ 2.76]

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.)

V. APPEAL BY MINOR AFTER DELINQUENCY FINDING [§ 2.77]

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

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[36]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.)

> 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. Section 800 gives the appeal priority over all other proceedings in the Court of Appeal.[37]

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.[38]

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[37]See memo on the meaning of statutory priorities, analyzing a 2013 proposal, considered by the Appellate Court Committee of the San Diego County Bar Association, to eliminate priority for criminal appeals except for those in which custody is at stake. http://www.adi-sandiego.com/pdf_forms/Priority_on_appeal.pdf

[38]*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 [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 parent has no right to appeal from a delinquency order that affects his or her 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.

A. Judgment [§ 2.78]

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].)

B. Pre-Judgment Orders [§ 2.79]

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 not appealable by either the minor or the People. Review is exclusively by extraordinary writ. (See Cal. Rules of Court, rule 5.772(j); *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 677-680 [People challenging finding of fitness]; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 713 [minor contesting finding of unfitness], disapproved on another ground in *People v. Green* (1980) 27 Cal.3d 1, 33-35; see § 8.71 et seq. and § 8.83 of chapter 8, "Putting on the Writs: California Extraordinary Remedies.")[39]

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.)

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 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.)[40]

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[39]The standard of review for a finding of fitness or unfitness is an abuse of discretion. (*Jones*, at p. 680; *Chi Ko Wong*, at p. 718.) The juvenile court's findings required under the criteria affecting fitness are findings of fact. (*Jones*, at p. 680.)

[40]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

C. Inapplicability of Special Procedural Requirements for Criminal Appeals [§ 2.80]

1. Certificate of probable cause [§ 2.81]

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.)

2. Custody credits and fines or fees [§ 2.82]

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.

D. Transfers [§ 2.83]

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.[41] (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 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].)

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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.)

[41]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)].)

VI. PEOPLE'S APPEALS AND ISSUES RAISED BY THE PEOPLE [§ 2.84]

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.)

A. People's Appeals in Criminal Cases [§ 2.85]

1. General authority for People to appeal [§ 2.85A]

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:

> (1) An order setting aside all or any portion of the indictment, information, or complaint.[42]
>
> (2) An order sustaining a demurrer to all or any portion of the indictment, accusation, or information.

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[42]See *People v. Alice* (2007) 41 Cal.4th 668, 680; *People v. Chapman* (1984) 36 Cal.3d 98, 105, fn. 3; *People v. McClaurin* (2006) 137 Cal.App.4th 241, 247-248.

(3) An order granting a new trial.[43]

(4) An order arresting judgment.

(5) An order made after judgment, affecting the substantial rights of the people.[44]

(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.[45]

(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].[46]

(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.[47]

(9) An order denying the motion of the people to reinstate the complaint or a portion thereof pursuant to Section 871.5.[48]

(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

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[43]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.

[44]See *People v. Douglas* (1999) 20 Cal.4th 85, 89-92.

[45]See *People v. Williams* (2005) 35 Cal.4th 817; *People v. Statum* (2002) 28 Cal.4th 682; *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.

[46]See *People v. Chapman* (1984) 36 Cal.3d 98, 105, fn. 3; *People v. Bonds* (1999) 70 Cal.App.4th 732, 734; *People v. Yarbrough* (1991) 227 Cal.App.3d 1650.

[47]See *People v. Chacon* (2007) 40 Cal.4th 558; *People v. Smith* (1983) 33 Cal.3d 596, 600-602; *People v. Craney* (2002) 96 Cal.App.4th 431, 439-442; 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."

[48]See *People v. Williams* (2005) 35 Cal.4th 817, 824; *People v. Matelski* (2000) 82 Cal.App.4th 837.

> 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 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.[49]
>
> (11) An order recusing the district attorney pursuant to Section 1424.[50]

2. Appeal after grant of probation [§ 2.85B]

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 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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[49]See *People v. Williams* (1998) 17 Cal.4th 148, 157; *People v. Labora* (2010) 190 Cal.App.4th 907; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1284.

[50]See *People v. Eubanks* (1996) 14 Cal.4th 580.

3. Prosecution issues raised in defendant's appeal [§ 2.86]

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.[51] In addition, the People may point out an unauthorized sentence or clerical error, which may be corrected at any time. (This possibility raises the potential for adverse consequences from appealing. See § 4.93 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection"; cf. § 2.133, *post*, on dependency appeals.)

a. Issues likely to appear on remand [§ 2.87]

This provision is intended to allow decision 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].)

b. Issues supporting affirmance [§ 2.88]

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].)

c. Limits to Penal Code section 1252 review [§ 2.89]

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 brought up as a result of the defendant's appeal. (See §§ 2.87 and 2.88, *ante*.)

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[51]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.)

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 Pen. Code, § 1252 that trial court had improperly stayed prior serious felony five-year enhancement];[52] *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.

B. People's Appeals in Delinquency Cases [§ 2.89A]

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 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.

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[52]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 [any means may be used to call the error to the court's attention]; see § 4.93 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection," on unauthorized sentences.)

> (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.[53]
>
> (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; *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 590.)

VII. PROCEDURAL STEPS FOR GETTING CRIMINAL OR DELINQUENCY APPEAL STARTED [§ 2.90]

A. Advice to Defendant by Court [§ 2.91]

Under rules 4.305 and 4.470 of the California Rules of Court, 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.[54] (Rule 5.590(a).)

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[53]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.) It does not cover an order sealing juvenile records. (*People v. Superior Court (Manual G.)* (2002) 104 Cal.App.4th 915.)

[54]See § 2.77, *ante*, and accompanying footnote on a parent's right to appeal in a delinquency case.

B. Responsibilities of Trial Counsel as to Initiating Appeal [§ 2.92]

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 so 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* notice of appeal and subject to same principles on timeliness].)

1. Duties under Penal Code section 1240.1 [§ 2.93]

Section 1240.1 specifically provides that in a criminal, juvenile, or civil commitment case trial counsel must, if the client is indigent:

- 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).

a. Advising defendant about appeal [§ 2.94]

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 also 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 § 2.100, *post*).

b. Filing notice of appeal on request [§ 2.95]

Under Penal Code section 1240.1, subdivision (b) trial counsel must file a notice of appeal if the defendant so requests. This duty is also of constitutional magnitude. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477; see § 2.99, *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).)

c. Filing notice of appeal without defendant request [§ 2.96]

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 so.[55] (Pen. Code, § 1240.1, subd. (b), ¶ 1; *Guillermo G. v. Superior Court* (1995) 33 Cal.App.4th 1168, 1173-1174 [dicta].[56])

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[55]Counsel's duty to file a notice of appeal does not preclude a client's doing so in pro per. (§ 1240.1, subd. (d).)

[56]*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].)

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 his or her 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];[57] *In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043 [filing appeal requires client's consent in dependency case]; ABA Model Rules of Prof. Conduct, Rule 1:2 [lawyer must follow client's direction as to objectives of appeal].)

d. Trial counsel representation on appeal [§ 2.97]

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 problems involved in identifying and arguing 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 appointed to act as counsel on appeal"].)[58]

2. Federal constitutional duties [§ 2.98]

The United States Constitution imposes specific duties on trial counsel with respect to filing an appeal and advising the defendant about appeal.

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[57]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.

[58]Division Two of the Fourth District has issued a miscellaneous order stating trial counsel normally will not be appointed on appeal: http://www.adi-sandiego.com/practice/fourth_dist_div2.asp

a. Filing appeal if defendant requests [§ 2.99]

A lawyer who disregards specific instructions from the client to file a notice of appeal is constitutionally ineffective. (See *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 and *Campusano v. United States* (2d Cir. 2006) 442 F.3d 770 [counsel must file appeal at defendant's request even if defendant has waived right to appeal], but see *Nunez v. United States* (7th Cir. 2008) 546 F.3d 450, 453 [contra, where waiver covers issues to be raised on appeal].)

b. Advising defendant about appeal [§ 2.100]

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 country]

C. Notice of Appeal [§ 2.101]

1. Court in which to file [§ 2.102]

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.)

2. Signature [§ 2.103]

California Rules of Court, rule 8.304(a)(3) provides: "If the defendant appeals, the defendant or the defendant's attorney must sign the notice of appeal."[59]

3. Contents of notice of appeal following trial [§ 2.104]

Rule 8.304 of the California Rules of Court 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.

The notice of appeal need not be in any particular format, but use of standardized forms is encouraged, to ensure sufficiency, accuracy, and completeness.[60]

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[59]An authorized agent of the defendant may be sufficient. (E.g., *Estate of Hultin* (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.)

[60]Fourth Appellate District criminal, delinquency, dependency, extended commitment, Family Code section 7800 appeals, LPS, not guilty by reason of insanity appeals: http://www.adi-sandiego.com/practice/forms_samples.asp

General forms:

Judicial Council, criminal appeals:
http://www.courts.ca.gov/documents/cr120.pdf
Judicial Council, juvenile delinquency and dependency appeals:
http://www.courts.ca.gov/documents/jv800.pdf

4. Notice of appeal and certificate of probable cause after guilty plea [§ 2.105]

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 California Rules of Court, rule 8.304(b), which implements Penal Code section 1237.5.[61] Rule 8.304(b) provides:

> (1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court – in addition to the notice of appeal required by (a) – the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.
>
> (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate.
>
> (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project.
>
> (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:
>
> > (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or
> >
> > (B) Grounds that arose after entry of the plea and do not affect the plea's validity.
>
> (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).

Under these provisions, an appeal after a guilty plea is operative either if the notice of appeal specifies at least one noncertificate ground (sentencing or Pen. Code, § 1538.5

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[61]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.)

suppression issue) or if a certificate of probable cause has been issued. "Operative" means the appeal will go forward – that is, a record will be prepared and counsel for the defendant, if indigent, will be appointed. (See *People v. Jones* (1995) 10 Cal.4th 1102, 1106-1108, dictum on another point disapproved in *In re Chavez* (2003) 30 Cal.4th 643, 656.)

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 only the validity of the plea and require a certificate of probable cause to become operative.

- *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.

a. Certificate appeals [§ 2.106]

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 California Rules of Court, rule 8.304(b). (See §§ 2.24 and 2.38 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 challenging the validity of the plea.[62] (*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 weed out wholly frivolous appeals and so avoid the costs of preparing records and appointing counsel. (*People v. Holland* (1978) 23 Cal.3d 77, 84; see also *People v. Hoffard* (1995) 10 Cal.4th 1170, 1179.) Another is to screen out certain frivolous issues, even if the appeal itself is going forward,

[62]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.)

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 § 2.48, *ante*; *People v. DeVaughn* (1977) 18 Cal.3d 889, 896), although withdrawal of the plea is a potential remedy.

b. Noncertificate appeals [§ 2.107]

A notice of appeal is operative if it specifies at least one noncertificate ground – (a) an issue involving post-plea matters such as sentencing 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. Kanawha* (1977) 19 Cal.3d 1, 8; *People v. Ward* (1967) 66 Cal.2d 571, 574-576; 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].)

Any noncertificate issue can be raised if the appeal is otherwise operative; it is not necessary that the particular issue to be raised have been specified 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.) 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.*)

c. Mixed appeals [§ 2.108]

If the appeal has both certificate and noncertificate grounds, the appeal is operative and will go forward without a certificate of probable cause if a proper notice of appeal stating noncertificate grounds, as specified in California Rules of Court, rule 8.304(b)(4),

is filed.[63] The defendant can then 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 California Rules of Court rule 8.304(b),[64] 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. Thermion* (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 he was not given complete advisements before admission].) If a certificate of probable cause has been granted, any properly 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.)

D. Time Frames [§ 2.109]

1. Notice of appeal [§ 2.110]

Under rule 8.308(a) of the California Rules of Court,[65] 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.[66] (*In re Jordan* (1992) 4 Cal.4th 116, 121.)

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[63]See order in *People v. Thomas* (March 16, 2005, S130587) 26 Cal.Rptr.3d 301, 108 P.3d 860, 2005 Cal. Lexis 2771, vacating Court of Appeal decision dismissing case because the notice of appeal did not state *solely* noncertificate grounds.

[64]Numbered rule 31(d) at the time of *Mendez*.

[65]Time requirements are set by rule, rather than statute.

[66]Certain remedies are available for defendants whose late filings are attributable to causes beyond their own control. (See § 2.113, *post.*)

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).)

2. Certificate of probable cause [§ 2.111]

Under California Rules of Court, rule 8.304(b)(1) a request for certificate of probable cause must be filed with the notice of appeal.[67] 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.[68] (*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)(2).) If the court denies the request, the defendant must either seek a writ of mandate to compel issuance of the certificate (§ 2.120, *post*) or forfeit any issues going to the validity of the plea (§§ 2.105, 2.106, 2.108, *ante*).

3. Filing date [§ 2.112]

The notice of appeal is filed when the superior court clerk receives it. (Cal. Rules of Court, rules 8.308(a), 8.25(b).) 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 California Rules of Court rule 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,

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[67]Although rule 8.304(b)(1) 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.)

[68]Certain remedies are available for defendants whose late filings are attributable to causes beyond their own control. (See § 2.113, *post.*)

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.)

E. Remedies for Untimely or Defective Filing of Notice of Appeal and Failure To Obtain Certificate of Probable Cause [§ 2.113]

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 the jurisdictional failure.

1. Application to amend notice of appeal [§ 2.114]

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. For example, if only a validity of the plea issue is mentioned in the original notice and no certificate of probable cause has been granted, it may be possible to amend the notice to state a noncertificate ground such as sentencing or a search and seizure suppression issue. The application must show good cause that the defendant intended to appeal on that ground. (*People v. McEwan* (2007) 147 Cal.App.4th 173, 178-179.)

If the sentence was stipulated as part of the plea agreement, "sentencing" could not be a ground 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.

2. Constructive filing doctrine [§ 2.115]

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.[69]

a. Reasonable reliance on counsel to file: *Benoit* [§ 2.116]

In re Benoit (1973) 10 Cal.3d 72, 80, held that if before the time for filing an appeal has expired, the defendant asks the 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 [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 [retained counsel 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* (2003) 30 Cal.4th 773, 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 § 2.121, *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 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].)

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[69]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.)

b. Other constructive filing [§ 2.117]

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);[70] 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 particular circumstances actually prevented his 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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[70]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.

c. Procedures [§ 2.118]

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.

3. Ineffective assistance of counsel [§ 2.119]

If failure to file an appeal was caused by ineffective assistance in a constitutional sense (see § 2.98, *ante*), late filing relief can be sought by habeas corpus or by motion, depending on the practices of the particular 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.

4. Mandate from denial of certificate of probable cause [§ 2.120]

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 p. 440.)

5. Remedy for failure to obtain timely certificate of probable cause [§ 2.121]

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)) of the California Rules of Court 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 California Rules of Court, 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 ground 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* (2003) 30 Cal.4th 643, 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.[71] 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 Kentucky law requiring filing of "statement of appeal"];[72] *In re Benoit* (1973) 10 Cal.3d 72, 87-88; Pen. Code, § 1240.1,

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[71]ADI has used habeas corpus successfully in this situation. Samples are available.

[72]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

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* (2003) 30 Cal.4th 773, 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].)

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.)

APPENDIX TO PART TWO [§ 2.122]

COMMON ISSUES WAIVED BY GUILTY PLEA [§ 2.123]

- 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; *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. 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)].)

- Failure to hold 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, 1103-1104.)

- Refusal to grant a continuance. (*People v. Kanawha* (1977) 19 Cal.3d 1, 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, 957-958 [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. (*United States v. Broce* (1989) 488 U.S. 563, 565, 569 [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 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.)[73]

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[73]"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.)

- 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 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].)

- Failure to arraign defendant on sentence enhancement (*People v. Hodges* (2009) 174 Cal.App.4th 1096, 1103-1104.)

- Entrapment defenses. (*People v. Benweed* (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.)

- 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* (2006) 37 Cal.4th 759, 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.

PART THREE: DEPENDENCY APPEALS[74]

VIII. DEPENDENCY APPEALS [§ 2.124]

A. Appealable Judgments and Orders [§ 2.125]

1. Juvenile dependency proceedings [§ 2.126]

As pointed out in PART ONE: GENERAL, Welfare and Institutions Code section 395 grants the right to appeal a disposition 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. (*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. (*Ibid.*)

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 Z.S.* (2015) 235 Cal.App.4th 754, 769.)

A significant exception to the appealability of post-judgment orders is an order setting a permanent plan 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 § 2.8B, *ante.*)

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[74] PART ONE covers the general law of appealability. PART TWO covers criminal and delinquency appeals.

Dependency appeals, like delinquency appeals, are governed by California Rules of Court, 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.) Many dependency appeals are fast-track under rule 8.416, and extensions of time require an exceptional showing of good cause (rule 8.416(f)). Parts of these rules incorporate by reference certain other rules on the processes in reviewing courts.

2. Family Code section 7800 appeals [§ 2.127]

Family Code section 7800 appeals are governed by sections 7894 and 7895. (See § 2.159, *post.*)

B. Reviewability Considerations [§ 2.128]

The right to appeal is limited by the need for (a) standing by the party wishing to appeal and (b) 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.

1. Standing [§ 2.129]

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 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.

a. Parents [§ 2.130]

A party must be aggrieved by an order to appeal from it. (Code of Civil Proc. § 902; *In re Crystal J.* (2001) 92 Cal.App.4th 186, 189.) Juvenile dependency cases involve the removal of a child from his or her parent because of health and safety concerns.

(Welf. & Inst. Code, § 300.2.) A parent has a constitutional right to custody and care of his or her child. (*Stanley v. Illinois* (1972) 405 U.S. 645, 658.) Thus, unless and until a parent's rights have been terminated, the parent 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.) Parents 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].) A parent nevertheless may benefit from another party's appeal and file a brief in support of that party's position.

b. De facto parents and relatives [§ 2.131]

Parties other than the parents may also be aggrieved by an order and have standing to appeal. (Code of Civil Proc. § 902; *In re Crystal J.* (2001) 92 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.) For purposes of this statute, "relative" includes grandparents, aunts and uncles, and siblings. (Welf. & Inst. Code, § 361.3, subd. (c)(2); *In re Luke L.* (1996) 44 Cal.App.4th 670, 680.) After the child is freed for adoption after an involuntary termination of parental rights, any person who has cared for the child is given placement preference and therefore may appeal the denial of his or her placement request. (Welf. & Inst. Code, § 366.26, subd. (k).) 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. Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035.)

c. Minors [§ 2.132]

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).)[75] Appellate counsel must consult with the guardian ad litem.

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.

d. County Counsel appeals [§ 2.133]

In contrast to Penal Code section 1238, on People's appeals (see § 2.84 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 partent 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 § 2.86 et seq., *ante*.)

2. Mootness and ripeness [§ 2.134]

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

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[75]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.)

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 Holly H.* (2002) 104 Cal.4th 1324, 1338; *In re A.Z.* (2010) 190 Cal.App.4th 1177.) 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, including stigma, future legal disabilities, etc. (*In re D.M.* (2015) 242 Cal.App.4th 643.) 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. (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499.) See § 2.7, *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.

3. Waiver and forfeiture [§ 2.135]

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 chapter 5, "Effective Written Advocacy: Briefing," § 5.27.

a. Waiver [§ 2.136]

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 his or her 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.)

b. Forfeiture [§ 2.137]

Dependency appeals are limited by issues forfeited at juvenile court. (*In re Paul W.* (2007) 151 Cal.App.4th 37, 58.) 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:

> "[A]n unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1149–1150.) This "waiver rule" holds "that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order," even when the issues raised involve important constitutional and statutory rights.

(*In re Z.S.* (2015) 235 Cal.App.4th 754, 769.) Exception: Claims under the Indian Child Welfare Act (ICWA) can be raised at any time during the proceedings. (See Welf. & Inst. Code, § 224.4 [tribe's right to intervene at any time]; *In re I.B.* (2015) 239 Cal.App.4th 367 [court's ongoing duty to keep tribe informed].)

c. Exceptions to waiver and forfeiture [§ 2.138]

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 more detailed description and authorities in § 5.27 of chapter 5, "Effective Written Advocacy: Briefing.") 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 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.*)

Policy considerations may dictate overlooking waiver or forfeiture. (See, e.g. *People v. Butler* (2003) 31 Cal.4th 1119, 1128; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153-1154.) 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; *In re T.G.* (2013) 215 Cal.App.4th 1.) 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 chapter 8, "Putting on the Writs: California Extraordinary Remedies," § 8.63.)

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.)

4. Reviewability by hearing [§ 2.139]

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 § 2.135 et seq., *ante*, on waived issues.) 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, 983.) If an issue is not raised on the first appeal for which it is ripe, therefore, it is waived for future appeals. (See a more detailed discussion of potential issues in dependency appeals in § 4.163, et seq., Appendix C of chapter 4, "On the Hunt: Issue Spotting and Selection," 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 California Rules of Court, rules 8.450-8.452. All findings and orders made at the hearing setting the section 366.26 hearing must be reviewed by writ. (*In re Amber U.* (1992) 3 Cal.App.4th 871.)

a. Dispositional order [§ 2.140]

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 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 Civ. Proc. Code, § 430.40; Welf. &

Inst. Code, § 252; Cal. Rules of Court, rule 8.486; see also chapter 8, "Putting on the Writs: California Extraordinary Remedies," § 8.71 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.) A number of issues from this hearing focus on the sufficiency of the evidence as to each allegation, as described in Welfare and Institutions Code section 300.

The dispositional order commences after the court finds a child is a person described by Welfare and Institutions Code section 300. (Welf. & Inst. Code, § 358.) This order may be made on the same day as or after the jurisdictional hearing. The child is either detained or released from custody. 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.

b. Status review hearings [§ 2.141]

Following the dispositional order and depending on the circumstances of the case, there may be as many as four status review hearings. (See Welf. & Inst. Code, § 361.5.) Each review hearing is set for six months after the last hearing. The initial status review hearing must be 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); rule 5.715.) There also may be an 18-month and even a 24-month review hearing in qualifying cases. (Welf. & Inst. Code, §§ 366.22, subds. (a) & (b), 366.25, subd.(a)(1); rules 5.720, 5.722(a).)

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 § 2.135 et seq., *ante*, on forfeiture; *In re Albert A*. (2016) 243 Cal.App.4th 1220.) Counsel should consult with the project attorney to determine whether an exception to this otherwise straightforward rule may apply.

c. Hearings on section 388 petition and other motions [§ 2.142]

A common motion 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.[76] Sometimes denials of section 388 petitions are appealed by de facto parents and relative caretakers who have requested placement of the child in their care after termination of parental rights. (*Cesar V. v. Super. Ct*. (2001) 91 Cal.App.4th 1023, 1034-1035; but see *In re K.C*. (2011) 52 Cal.4th 231, 281 [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.

d. Termination of reunification services [§ 2.143]

Orders terminating services 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 one parent is found likely to reunify with the child but the other is not. 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.)

[76] www.courts.ca.gov/documents/jv180.pdf

e. Termination of parental rights [§ 2.144]

The hearing at which parental rights are terminated and concomitant orders may be appealed under Welfare and Institutions Code section 395. (E.g., *In re Melvin A.* (2000) 82 Cal.App.4th 1243; see also Welf. & Inst. Code, § 366.26, subd. (*l*).)

f. Post-permanency proceedings [§ 2.145]

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, or another planned permanent living arrangement with a foster parent or relative caregiver. (See Welf. & Inst Code, § 366.26, subds. (b), (c)(4).)

Extended dependency jurisdiction past age 18 may be the subject of appeals. (Welf. & Inst. Code, §§ 303, 366.3, subd. (d); *In re Shannon M.* (2013) 221 Cal.App.4th 282, 293.)[77] 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 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 his or her parents if their rights were not terminated before the dependent reached the age of majority, 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 § 2.153 et seq., *post*.

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[77]On January 1, 2012, provisions of the California Fostering Connections to Success Act (Assem. Bill No. 12 (2009–2010 Reg. Sess.); Assem. Bill No. 212 (2011–2012 Reg. Sess.)) became operative. It allowed California to take advantage of newly-available federal funding for extended foster care benefits for certain nonminor dependents who were under an order of foster care placement when they turned 18. (*In re Shannon M.*, *supra*, 221 Cal.App.4th at p. 284.)

IX. PROCEDURAL STEPS FOR GETTING THE DEPENDENCY REVIEW PROCESS STARTED [§ 2.146]

A. Appeal [§ 2.147]

This section addresses the specific requirements pertaining to dependency appeals. For a general discussion of notice of appeal filing procedures, see § 2.101, *ante*.

1. What orders can be appealed [§ 2.148]

Appealable judgments and orders are discussed in § 2.125 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 § 2.140, *ante*.)

2. Who can file notice of appeal [§ 2.149]

The notice of appeal may be filed by the appellant or by his or her 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 his or her behalf. (Cal. Rules of Court, rule 8.405(a)(2); see § 2.103, *ante*.)[78]

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 Counsel, 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.

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[78]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.

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, rule 8.405 (a)(1).)

3. Where to file notice of appeal [§ 2.150]

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).)

4. When to file notice of appeal [§ 2.151]

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 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; § 2.116, *ante*.) Because of the inherent delay involved in *Benoit* procedures, however, this equitable exception is applied only on rare occasions in dependency proceedings.[79] Thus every effort must be made to file a timely notice of appeal.[80] If the appellate attorney discovers the notice of appeal was not timely filed, the attorney must contact the project immediately.

5. Content of notice of appeal [§ 2.152]

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

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[79]Delay avoidance is of primary importance in dependency cases. 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.)

[80]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 § 2.112, *ante*.)

of appeal (rule 8.405(a)(3)), counsel should provide as much information as possible to identify the hearing being appealed.

It is best practice to use a standard form for dependency appeals. In the Fourth District, ADI's form[81] is much preferred. Use of the Judicial Council form JV-800[82] 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.

B. Writ Petition to Review Orders at Hearing Setting Section 366.26 Proceeding or at Post-Termination Child Placement Hearing [§ 2.153]

1. Statutory writ requirement [§ 2.154]

Welfare and Institutions Code sections 366.26 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 California Rules of Court, rule 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 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." A nutshell description of the entire dependency writ process is on ADI's web page on dependency writs.[83]

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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[81] http://www.adi-sandiego.com/practice/forms_samples.asp under "Notice of Appeal Forms."

[82] www.courts.ca.gov/documents/jv800.pdf

[83] http://www.adi-sandiego.com/delinq_depend/dependency/dep_writs.asp

2. Who may file notice of intent [§ 2.155]

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); see also *Rayna R. v. Superior Court* (1993) 20 Cal.App.4th 1398, 1403-1405.) A notice of intent to file writ petition must be timely filed. (See rules 8.450(e), 8.454(e).) The use of the Judicial Council forms JV-820[84] and JV-822[85] is encouraged to ensure a complete and proper notice of intent is filed.

3. When to file notice of intent [§ 2.156]

a. From hearing setting section 366.26 hearing [§ 2.157]

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 if the party was present. (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. (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. (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. (Rule 8.450(e)(4)(D).) When the order setting the hearing was made by a referee not acting as a temporary judge, an additional 10 days are added to the deadline. (Rule 8.450(e)(4)(E).)[86]

b. From post-termination child placement order [§ 2.158]

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

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[84] www.courts.ca.gov/documents/jv820.pdf

[85] www.courts.ca.gov/documents/jv822.pdf

[86] A filing by a person in a custodial setting is timely if delivered by the due date to an authorized official of the institution. (Rule 8.25(b)(5); *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106; see § 2.112, *ante*.)

final under rule 5.540(c). (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. (Rule 8.454(e)(5).)[87]

C. Special Issues with Family Code Appeals [§ 2.159]

1. Appeals from private terminations of parental rights [§ 2.160]

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.)

a. Termination of parental rights in stepparent adoptions [§ 2.161]

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 retaining parental rights who did not consent to an adoption by a stepparent and whose rights were terminated at the adoption proceeding. A natural father without presumed father status need not have his rights terminated for the adoption to proceed. (See Fam. Code, § 7800, et seq.) But an alleged father may appeal the order dispensing with his consent for adoption. (Fam. Code, § 7669, subd. (a).)

If a birth 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. 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 § 2.162, *post*.)

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[87]A filing by a person in a custodial setting is timely if delivered by the due date to an authorized official of the institution. (Rule 8.25(b)(5); *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106; see § 2.112, *ante*.)

b. Appeals from proceedings freeing child from parental custody and control [§ 2.162]

A proceeding for declaration of freedom from parental control and custody under Family Code section 7800, et seq., is appealable under section 7894 and 7895. 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).)

2. Appeals involving issues of parentage/paternity [§ 2.163]

The Uniform Parentage Act defines the legal relationship existing between a child and his or her natural or adoptive parents. (Fam. Code § 7600 et seq.) There are four main types of fathers: presumed fathers, biological fathers, alleged fathers, and *Kelsey S.* fathers. (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 father has different rights and responsibilities.

The most expansive rights belong to presumed fathers. (*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 chapter 4, "On the Hunt: Issue Spotting and Selection," § 4.175, for possible issues arising from these proceedings.)