– CHAPTER FOUR –

ON THE HUNT:

THE SCIENCE AND ART
OF ISSUE SPOTTING AND SELECTION

ADI APPELLATE PRACTICE MANUAL
SECOND EDITION, REV. APRIL 2020

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ON THE HUNT: THE SCIENCE AND ART OF ISSUE SPOTTING AND SELECTION

I. INTRODUCTION [§ 4.0]

Issue spotting is probably *the* most important function of lawyering in criminal appeals. An attorney may perform a masterful job of research, analysis, and briefing, but if an issue that would win for the client is overlooked, the attorney has probably rendered legally ineffective assistance. Appellate counsel must therefore work assiduously to develop strong issue-spotting skills and in every case must put maximum effort into ensuring all potential issues have been identified and properly evaluated.

Counsel also have a duty to spot "negative" issues – those that could put the client in a worse position after the appeal than before. Sometimes helping the client avoid the adverse consequence trap is the most valuable service appellate counsel can offer.

II. THE FUNDAMENTALS [§ 4.1]

A. Approaching the Case [§ 4.2]

Finding issues on appeal is both a science and an art. Entering the scientist's laboratory, the appellate lawyer must focus a microscope on the minutest suspicious detail, analytically dissect the facts and law, and question everything that happened or did not happen. Moving to the artist's studio, the lawyer must engage all his or her capacity for creativity and sensitivity, seeing apparently mundane or discouraging matters from new, imaginative perspectives. Like both the scientist and the artist, counsel on the hunt for issues will find an observant eye, a curious and relentlessly inquiring mind, and sheer perseverance to be absolute prerequisites.

It is best to start with the basics. First, the obvious – the issues litigated below. Then – counsel should question, question, and question some more. If something in the record, either a factual matter or a point of law, seems puzzling, unfair, or otherwise not quite right, counsel should pursue it until satisfied. Not knowing an answer is an easily solved problem. Not even *asking* the right question can lead to disaster.

B. Going to the "Horse's Mouth" [§ 4.3]

The participants at trial – the client and trial counsel – are potentially crucial sources of issues. Even if they do not formulate an issue in terms that can be raised on appeal, their suggestions may raise a red flag.

1. Trial counsel [§ 4.4]

Appellate counsel should ask the trial attorney for input on the most significant, unusual, or especially troubling aspects of the proceedings. Not everything that happens in a trial is in the record, nor does the record fully reflect the flavor and subtleties of the proceedings. Trial counsel may also be able to call the appellate attorney's attention to missing parts of the record. If ineffective assistance of the trial attorney is a potential issue, it is mandatory to contact trial counsel.[1] (It may not be advisable to allude to that possibility at the initial contact, in order to elicit cooperation on other issues.)

2. Client [§ 4.5]

Counsel should ascertain what the client expects to accomplish from the appeal and allow the client to participate appropriately in the decision-making process. Although counsel makes the final selection among potential issues, the client needs to decide the basic objectives of the appeal. (See § 1.56 et seq. of chapter 1, **"**The ABC's of Panel Membership: Basic Information for Appointed Counsel," on decision-making authority of attorney and client.) Counsel must also explain any potential adverse consequences and determine whether the client wants to proceed. (See § 4.91 et seq., *post*.)

C. Knowing the Legal Landscape [§ 4.6]

Experience with appellate issues is one of the most important components of strong issue-spotting skills. This requirement of course poses a difficulty for the newer attorney, but the attorney can cope by working closely with staff attorneys, networking with more experienced panel attorneys, and developing a finely tuned awareness of what is going on in the legal world – in the Legislature and in the California and federal courts. Indeed, the most experienced lawyers must do the same.

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[1]Discussion with the assigned ADI staff attorney is also required, regardless whether the issue is being for considered for the direct appeal or for a habeas corpus investigation. This requirement does not apply for a brief "fallback" IAC argument ("No objection was required, and if it was, counsel was ineffective for not raising it").

1. Legal resources [§ 4.7]

To keep abreast of changes and develop a deeper understanding of the law, counsel must be attuned to and diligently use the many legal resources available. An indispensable practice is reading new appellate opinions regularly – not just for the holdings, but especially for their underlying analysis. Another way is to keep track of recently enacted and pending legislation. Articles and treatises provide a source of "cutting edge" issues and in-depth critical analysis of the law. Project websites and newsletters may publish "kudos" – recent winning issues. The Internet, as well as numerous printed publications are excellent tools for broadening and sharpening knowledge of the law.

2. Potentially important pending cases [§ 4.8]

Tracking cases pending before the United States and California Supreme Courts is an important duty. The California Supreme Court has a list, and CCAP maintains its own list of both courts. These resources can be reached through ADI's website.[2]

3. Networking with colleagues [§ 4.9]

It is critical for attorneys of all experience levels to confer with colleagues about cases and issues whenever the opportunity arises. This practice will help avoid the need to reinvent the wheel, will provide ideas for new issues or new slants on old ones, and will serve as a reality check on issues that just won't fly.

4. Personal reference resource [§ 4.10]

Many outstanding appellate attorneys keep a notebook, a checklist, or some other type of reference system for saving cases, ideas, articles, and other sources of potential issues. The process of writing things down reinforces the information in the mind, and the written format allows counsel to retrieve it efficiently later. § 4.121 et seq., appendix A, enumerates some commonly raised appellate issues that can serve as a starting point or supplement to counsel's own lists.

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[2] http://www.adi-sandiego.com/news_alerts/pending_issues.asp

III. REVIEWING THE RECORD FOR ISSUES [§ 4.11]

The most critical source of issues in any case is by far the appellate transcript. Except for occasional investigations into potential writs, the search for issues on appeal generally begins and ends with the record. Counsel therefore must scrutinize the record meticulously.

A. Ensuring Adequate Record [§ 4.12]

Without a complete record counsel will not be able to make the necessary search for issues on appeal. It is appellate counsel's constitutional responsibility to ensure a complete record. (See *People v. Barton* (1978) 21 Cal.3d 513, 519-520; *People v. Harris* (1993) 19 Cal.App.4th 709, 714.)

1. Augmentation and correction [§ 4.13]

The record should be augmented if necessary (Cal. Rules of Court, rules 8.155, 8.340(d)), and any omission from the normal record should be corrected (rule 8.340(b)). For greater detail, see § 3.12 et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal."

2. Superior court records [§ 4.14]

In some instances it will be important to review the superior court file or exhibits. Sometimes the original transcripts will have gaps, or reference will be made to documents, tapes, physical evidence, and other items not in the transcripts. Occasionally vital information turns up that is not even suggested in the normal record – for instance, jury notes. An ADI staff attorney often can review the file on behalf of appointed attorneys located far from the superior court, although sometimes the needs of the case demand that appointed counsel personally review the file.

3. Proceedings not in transcripts [§ 4.15]

Counsel should be alert for proceedings not in the transcripts, such as bench or in-chambers conferences. Sometimes counsel can find out what happened by calling trial counsel or the court reporter. If the proceeding is potentially significant to the appeal, counsel should attempt to incorporate it into the record. If a reporter's transcript cannot be prepared, counsel may seek to prepare a settled or agreed statement. (Cal. Rules of Court, rules 8.134, 8.137, 8.344, 8.346.)

When a substantial portion of the proceedings is not available, because for example the reporter's notes have been lost, a motion to vacate the judgment may be in order. (See Pen. Code, § 1181, subd. 9.)

4. Improper material in record [§ 4.16]

Counsel should also be alert for materials not supposed to be in the record. (See ADI's web page on confidential records[3] and and the California courts' Nondisclosure of Identity Policies.[4]) For example, by law the transcripts must not include the names, addresses, or telephone numbers of sworn jurors; jurors must be referred to by an identifying number.[5] (Code Civ. Proc., § 237, subd. (a)(2); Cal. Rules of Court, rule 8.332(b).) Other examples might be confidential juvenile filings (see Welf. & Inst. Code, § 827; rule 8.401) and confidential transcripts (rule 8.47), as well as social security numbers (rule 1.201(a)(1) and addresses required to be confidential (e.g., Welf. and Inst. Code § 308 [foster parents]).

Upon discovering material that counsel is not supposed to see, counsel should stop reading that part of the transcript immediately and notify the Court of Appeal and ADI. The court may order return of the records, redaction, or other corrective action. Under no circumstances should counsel send such material to clients or other persons without specific authorization from the court or ADI.

B. The Initial Review of the Record [§ 4.17]

The initial reading of the record will give a comprehensive picture of the contours of the appeal. It is wise to set aside an uninterrupted block of time to give the record undivided attention. This will help counsel develop a sense of the proceedings as a whole

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[3]http://www.adi-sandiego.com/practice/conf_records.asp

[4]http://www.adi-sandiego.com/news_alerts/pdfs/2011/NONDISCLOSURE_POLICY.pdf. (Excerpt from the California Style Manual (4th ed. 2000) §§ 5.9-5.13.)

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

If access to juror identification information is required to handle the case, counsel may apply to the trial court under Code of Civil Procedure section 237, subdivisions (b)-(d).

and also facilitate timely completion of the record if necessary. It may be helpful to write up and organize the rough transcript notes while everything is still fresh in mind.

1. Clerk's transcript [§ 4.18]

Counsel should ordinarily begin review of the record by reading the clerk's transcript, looking for total continuity to ensure critical pieces are not missing. It is important to determine what happened to every allegation, every motion, and every party. If something enters the picture that is puzzling or incomplete or dubious, it should be added to the list of questions to be investigated.

2. Reporter's transcript [§ 4.19]

Counsel should then read the reporter's transcript, taking concise notes with page references. The overall evidentiary picture can be filled in as counsel goes through direct, cross, redirect, and recross testimony. Counsel should scrutinize any motions, noting the arguments made on both sides, the evidence offered, and the disposition and reasoning offered by the court. It is important to review every significant objection and its disposition and to record any matters that apparently should have been objected to but were not.

C. Spotting Potential Issues [§ 4.20]

While reading the record, counsel should compile a list of potential issues. At the first stage counsel should strive to be over-inclusive – anything counsel cannot positively reject should be on the list. The search for issues begins with a wide-open, creative, anything-goes approach; only later is critical judgment applied to sort out the arguable issues from those to be discarded.

1. Issues litigated at trial [§ 4.21]

Working with the obvious is a productive initial approach. This means looking for "flagged" issues, such as objections, motions, and rejected instructions. Flagged issues are an exceedingly important screening device. First, a party generally may not raise issues on appeal if they were not raised in the proceedings below. Second and conversely, failure to raise on appeal a meritorious issue litigated below may give rise to an allegation of ineffective assistance of appellate counsel.

2. Jury instructions [§ 4.22]

Special scrutiny is called for in reviewing those parts of the proceedings where most errors generally are made and those parts where the standards of review and prejudice are most favorable to the appellant. In cases tried to a jury, one of these areas is the instructions.[6] Counsel should inspect jury instructions minutely – in several different ways.

a. Court's selection of instructions to be given [§ 4.23]

First, counsel should compare written instructions from which the judge was reading, and any rejected ones, with standard approved instructions such as CALCRIM.[7] It is helpful to use checklists of sua sponte and other important instructions to ensure the correct ones were selected.

b. Oral rendition of instructions [§ 4.24]

Second, counsel must analyze the oral instructions in the reporter's transcript to make sure that they correspond with the printed ones and that the law *as stated to the jury* was complete and correct in light of the facts of the case. What the court actually said – not what it intended to say – is how the jury was "instructed." The court might have

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[6]Many instructional errors can be raised despite lack of objection in the trial court. (See Pen. Code, § 1259: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.")

[7]California Criminal Jury Instructions, officially approved by the Judicial Council. Their use is "strongly encouraged." (Cal. Rules of Court, rule 2.1050(e).) If an alternative is used, it should be "accurate, brief, understandable, impartial, and free from argument." The CALCRIM User's Guide expressly cautions that "[t]he CALJIC and CALCRIM instructions should *never* be used together," (Jud. Council of Cal.Crim. Jury Instns. (2020) Guide for Using Jud. Council of Cal.Crim. Jury Instns., p. xx, italics original.) Still, "the trial court may modify any proposed instruction to meet the needs of a specific trial, so long as the instruction given properly states the law and does not create confusion." (*People v. Beltran* (2013) 56 Cal.4th 935, 943, fn. 6.)

misread the text at some point or have improvised.[8] (See *People v. Silva* (1978) 20 Cal.3d 489, 493; *People v. Gloria* (1975) 47 Cal.App.3d 1, 6.)

c. Printed instructions sent into jury room [§ 4.25]

Third, counsel needs to review any printed instructions sent into the jury room, if available. (See Pen. Code, §§ 1093, subd. (f), 1137.) Sometimes they are redacted improperly or contain irrelevant, prejudicial, or legally incorrect information. In the event of a conflict between oral and printed instructions given the jury, the latter govern. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Thus an error in the printed instructions may well be prejudicial.

d. Reasonable doubt [§ 4.26]

While it very rarely happens, judges have been known to omit any instruction on reasonable doubt or to improvise incorrectly in explaining it. (E.g., *Cage v. Louisiana* (1990) 498 U.S. 39; *People v. Aranda* (2012) 55 Cal.4th 342; *People v. Vann* (1974) 12 Cal.3d 220; *People v. Crawford* (1997) 58 Cal.App.4th 815; *People v. Phillips* (1997) 59 Cal.App.4th 952; *People v. Elguera* (1992) 8 Cal.App.4th 1214; cf. *Victor v. Nebraska* (1994) 511 U.S. 1, 5; *People v. Brown* (2004) 33 Cal.4th 382, 392; *People v. Mayo* (2006) 140 Cal.App.4th 535.)

Since failure to explain reasonable doubt properly can be reversible per se, counsel should always make sure adequate instruction was given. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [incorrect reasonable doubt instruction]; cf. *People v. Aranda* (2012) 55 Cal.4th 342 [omission of instruction altogether is subject to harmless error analysis under *Chapman*[9]]; *People v. Mayo* (2006) 140 Cal.App.4th 535 [omission of CALJIC No. 2.90 not federal constitutional error when other instructions repeatedly stated jury must find every element beyond a reasonable doubt].)

e. Response to jury request for additional instruction [§ 4.27]

An area of exceeding importance is the trial court's handling of a jury question or request for additional instruction. The jury's query signals it is focusing on that area, and

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[8]The oral instructions as they appear in the reporter's transcript are not necessarily a precise record of what the judge said. (See *People v. Huggins* (2006) 38 Cal.4th 175, 189-194.)

[9]*Chapman v. California* (1967) 386 U.S. 18; see § 4.52, *post.*

so an erroneous response is likely to be found prejudicial. (See *People v. Thompkins* (1987) 195 Cal.App.3d 244, 253.)

Counsel should analyze the content of the court's answer for correctness, responsiveness, and understandability. It is also critical to review the procedure used – e.g., whether the answer was provided in open court and whether the client and counsel were present and were given a chance for prior input. (*People v. Dagnino* (1978) 80 Cal.App.3d 981 [counsel's presence at reinstruction required unless waived]; see also *People v. Avila* (2006) 38 Cal.4th 491, 613-614 [communications must be in open court].)

3. Sentencing [§ 4.28]

In a criminal case, counsel should look very closely at sentencing, a complicated area fraught with potential for error. The sentence imposed should be checked against the statute in effect at the time of the crime. Issues involving such matters as enhancements, consecutive sentences, Penal Code section 654, strikes, credits, fines or fees, and probation conditions – to name only a few – need to be considered. Attorneys are encouraged to consult with ADI if they are not extensively familiar with the law of sentencing.

4. Uncommon but "big" issues [§ 4.29]

Counsel should be on the alert for errors that are unusual but occur occasionally – some can be of momentous importance when they do occur. For example, if the client was convicted of a crime committed a considerable time ago, it is advisable to check for statute of limitations or ex post facto issues and to ascertain whether the law has changed in the client's favor since the crime. Jurisdictional and venue questions can arise in unusual proceedings or events involving multiple counties, as when a minor is transferred from one county to another. Prior proceedings in the same case may suggest the need to scrutinize for collateral estoppel, res judicata, double jeopardy, multiple prosecution, and similar issues.

5. Recent and potential changes in the law [§ 4.30]

Counsel should be alert to relevant issues opened up by recent developments in the law, such as new decisions and grants of review of certiorari in the California or United States Supreme Court. These issues often can be raised on the client's behalf, even at later stages of an appeal. If a change in the law occurred after trial, the appellate court usually will find it unnecessary to have raised the point below. The subject of taking advantage of favorable changes in the law is treated extensively in a memo on the ADI

website, which also offers a web page following important recent changes and analyzing their potential effect.[10]

6. Checklist [§ 4.31]

Appendix A lists a number of issues commonly raised on criminal appeals. and can serve as the starting point for a checklist. Appendix C offers a list of common dependency issues, and Appendix D does the same for delinquency appeals. It should go without saying that each attorney must (1) modify and supplement the list as experience and legal changes dictate and (2) confirm and update the issue and its underlying authorities every time the issue is raised.

7. Issues that may hurt the client [§ 4.32]

A special problem in issue spotting is adverse consequences. Counsel should look not only for errors against the client, but for favorable ones, too. If a favorable error resulted in an unauthorized sentence or other unlawful disposition, the client may face additional time. (See § 4.91 et seq., *post*, on adverse consequences.) Often pursuing an appeal will make it more likely the error will be noticed and corrected. (E.g., *People v. Ingram* (1995) 40 Cal.App.4th 1397 [sentence increased from 27 years-life to 61 years-life because of unauthorized sentence discovered on appeal], disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547.)

IV. ASSESSMENT AND SELECTION OF ISSUES [§ 4.33]

After counsel has compiled a list of all possible issues to be considered on appeal, the winnowing process begins. During the review and elimination process, counsel should annotate the list of potential issues, assessing each in writing and explaining why issues are retained or rejected. This method will systematically cover all possible issues. It will also document counsel's handling of the issues; if there is later occasion to review the file, counsel will have a record what issues were considered and why they were or were not raised.

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[10]Memo on taking advantage of favorable changes:
http://www.adi-sandiego.com/pdf_forms/RECENT_CHANGES_Favorable_changes_Feb_2013_EAA.pdf
Web page on recent changes:
http://www.adi-sandiego.com/news_alerts/changes_law.asp

Those issues obviously not supported by the facts after the record review is complete or by the law after quick research, or any so trivial a prejudicial error argument would essentially be impossible, can be discarded early.

A more searching analysis will be needed for the remaining issues. Evaluating an issue requires assessing not only its legal merits, but also its reviewability, the standard of review, the standard of prejudice, and other rules, principles, and presumptions governing appellate review.

ADI articles offer a multi-perspective view of the issue-selection process. The article, *To Brief or Not to Brief: Marginal Issues*[11] explores the tension between the need to advocate zealously on the client's behalf and the attorney's duty as an officer of the court to refrain from pursuing frivolous claims. It reviews the standards set out below for assessing arguability. The news alert entry on *Assertive Issue Selection*[12] looks at the opposing tendency to omit issues merely because they can be contested or might be rejected by the court. It points out the standard for arguability is whether a court reasonably *might* accept the argument, not whether the court actually *will*.

A. Reviewability [§ 4.34]

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

1. Jurisdiction [§ 4.35]

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

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[11]See April 2008 ADI news alert and memo on the topic of criteria for arguable and frivolous issues and ways of converting a borderline issue into a credible one:
Alert: http://www.adi-sandiego.com/news_alerts/pdfs/2008/April-2008-News-Alert.pdf
Memo: http://www.adi-sandiego.com/news_alerts/pdfs/2008/AA-Arguable-issues-memo-final.pdf

[12]http://www.adi-sandiego.com/news_alerts/pdfs/2009/069-June-2009-alert-update.pdf

2. Mootness and ripeness [§ 4.36]

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.)[13]

A California court may exercise discretion to decide a moot case if it involves issues of serious public concern that would otherwise elude resolution.[14] (*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 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.)

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[13]A case is not necessarily moot because the course of current litigation will not be affected. If the defendant may suffer collateral consequences, including stigma, or future legal disabilities, etc., the case is not moot. (*People v. Feagley* (1975) 14 Cal.3d 338, 345; *People v. Nolan* (2002) 95 Cal.App.4th 1210, 1213 [even if defendant not subject to further punishment, is opportunity to erase stigma of criminality].) (See chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," § 9.3, on mootness under federal law.)

[14]In the federal system, in contrast, because of the "case or controversy" requirement of article III, section 2 of the United States Constitution, mootness as to the individual litigants defeats jurisdiction. (*Massachusetts v. E.P.A.* (2007) 549 U.S. 497; see § 9.3 of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus.")

3. Review by writ [§ 4.37]

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

A notable example in dependency proceedings is a court decision to end reunification efforts and set a hearing to determine a permanency plan for the child. At this point the dominant consideration is permanent stability for the child. An appeal from the decision to set a hearing would prolong the uncertainty for many months, and so Welfare and Institutions Code section 366.26 requires any challenge to the decision to be made initially by writ. This procedure is governed by California Rules of Court, rules 8.450-8.452. A similar requirement applies to proceedings challenging a post-termination order affecting the child's placement. (Welf. & Inst. Code, § 366.28; rules 8.454-8.456.)

In criminal proceedings, the sufficiency of the evidence at the preliminary hearing to support the information is reviewable only by pretrial writ. (Pen. Code, §§ 995, 999a.) Examples of other criminal statutory writs include Penal Code sections 279.6, 871.6, 1238, subdivision (d), 1511, 1512, and 4011.8. (See § 8.83 et seq. of chapter 8, "Putting on the Writs: California Extraordinary Remedies," for further discussion of statutory writs.)

Some issues are reviewable by either pretrial writ or appeal from a final judgment, but under different standards. While error may be sufficient to justify issuance of certain pretrial writs, appeals require a showing that the error prejudiced the outcome of the trial. Defects at the preliminary hearing, for example, cannot be reviewed after judgment unless the defendant demonstrates how they affected the trial. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) Denial of a speedy trial is similarly reviewable after judgment only on a showing of prejudice to the outcome of the case.[15] (*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].)

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[15]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.)

4. Standing [§ 4.38]

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

5. Forfeiture or waiver [§ 4.39]

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

Counsel may consider ways around forfeiture or waiver[16] 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.")

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

6. Motions requiring renewal at later stage [§ 4.40]

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. of chapter 2, First Things First: What Can Be Appealed and How To Get an Appeal Started.")

7. Invited error [§ 4.41]

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; see, e.g., *In re G.P.* (2014) 227 Cal.App.4th 1180, 1193.)

8. Credits and fines or fees issues – Penal Code sections 1237.1 and 1237.2 [§ 4.42]

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

9. Fugitive dismissal doctrine [§ 4.43]

Another limitation, derived from common law, applies when the defendant absconds while an appeal is pending. An appeal by a fugitive is subject to discretionary dismissal. One theory underlying this doctrine is that the court no longer has control over the person to make its judgment effective. (*People v. Fuhr* (1926) 198 Cal. 593, 594; *People v. Redinger* (1880) 55 Cal. 290, 298; *People v. Buffalo* (1975) 49 Cal. App.3d 838, 839 [giving defendant 30 days to surrender]; cf. *People v. Mutch* (1971) 4 Cal.3d 389, 399 [defendant fled during appeal, but was recaptured the same day; dismissal rule

held inapplicable]; *People v. Puluc-Sique* (2010) 182 Cal.App.4th 894 [deported defendant not fugitive].)

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

The court has discretion to reinstate the appeal. (See *People v. Clark* (1927) 201 Cal. 474, 477-478 [refusing to reinstate appeal a year after it was dismissed; power to reinstate "should only be exercised in those cases where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong upon the appellant"];[17] *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. United States* (1993) 507 U.S. 234, 249 [striking down Eleventh Circuit rule mandating automatic dismissal of appeals filed *after* defendant recaptured; there must be some reasonable nexus between defendant's conduct and appellate process].)

10. Previous resolution of matter [§ 4.44]

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

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

Supreme Court. These doctrines are treated in more detail in § 2.52 of chapter 2, "First Things First: What Can Be Appealed and What It Takes To Get an Appeal Started."

B. Standard of Review – Degree of Deference to Findings Below [§ 4.45]

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

1. Abuse of discretion [§ 4.46]

A high degree of deference to the decision below is given under the "abuse of discretion" standard. The reviewing court asks whether the trial court's decision was one a reasonable court could have made or whether it exceeded the bounds of reason.[18] It does not ask what the appellate court would have decided, or what the trial court perhaps should have decided. It asks whether any reasonable decision-maker *could* have made the decision.

The abuse of discretion standard is often applied to issues involving judgment calls, such as sentencing, disposition, withdrawal of the plea, evidentiary rulings, motions for new trial, and *Marsden*[19] and *Faretta*[20] motions.[21]

Part of the reason for using a deferential standard like abuse of discretion is that the trial court is in a position far superior to that of a reviewing court in making judgment calls, because the trial court observes the proceedings firsthand and can assess more precisely such multiple intangible factors as witness credibility and interpersonal

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

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

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

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

dynamics that must go into the decision-making process. Another reason is to avoid routinely second-guessing the trial court's decisions and possibly undermining its authority in presiding over courtroom proceedings. Still another is to conserve appellate court resources.

Although the appellate court's deference to the decision below is high under the abuse of discretion standard, it is not absolute. (*People v. Grimes* (2016) 1 Cal.5th 698, 712, fn. 4 [standard "is not designed to insulate legal errors from appellate review"]. *People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 742 [when "trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion"].) All exercises of discretion must be guided by legal principles and policies, not arbitrariness or caprice. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977; e.g., *People v. Jacobs* (2015) 156 Cal.App.4th 728, 736-737 [test is whether "reasonable basis for the action" is shown]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519.) A trial court abuses its discretion if *no* reasonable decision-maker could have made that decision under the circumstances.

2. Substantial evidence [§ 4.47]

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

If the issue is sufficiency of the evidence to sustain a conviction in a criminal case, the question for the appellate court is whether a reasonable trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt in light of all the evidence.[22] (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Different burdens of proof, such as "clear and convincing evidence" and "preponderance of the evidence," apply in different contexts.[23] (E.g., *In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423, and *In re Angelia P.* (1981) 28 Cal.3d 908, 924 [clear and convincing in termination of parental rights case];

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

[23]See ADI's practice article, *Sufficiency of the Evidence: Does the Burden of Proof "Disappear" on Appeal?*

People v. Lucas (2014) 60 Cal.4th 153 and *People v. Arriaga* (2014) 58 Cal.4th 950 [preponderance standard on certain collateral matters in criminal proceeding]; see *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1082, conc. opn. of Brown, J. [evidence sufficient under preponderance standard, but not under clear and convincing one].)[24] The substantial evidence test varies accordingly.

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

3. De novo [§ 4.48]

In some circumstances the reviewing court will not defer at all to the lower court, but will reach an independent decision; this standard is called "de novo" review. It applies primarily to questions of law. It is used, for example, with respect to issues involving statutory construction (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Rells* (2000) 22 Cal.4th 860, 871; *In re Dakota J.* (2015) 242 Cal.4th 619); the legal correctness of instructions (*People v. Guiuan* (1998) 18 Cal.4th 558, 570-571); voluntariness of a statement if facts are undisputed (*People v. Maury* (2003) 30 Cal.4th 342, 404); and legal conclusions about facts (*People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [prosecution's due diligence in locating witness]).

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

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

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

4. Mixed standards [§ 4.49]

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

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

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

C. Standard of Prejudice [§ 4.50]

An error is not reversible unless it is prejudicial. Although a few types of errors automatically call for reversal (see § 4.51, *post*), an issue otherwise will not be successful on appeal unless counsel can demonstrate to the court not only that there was error but also that it affected the outcome of the proceedings. (Cal. Const., art. VI, § 13; Pen. Code, §§ 1258, 1404; Evid. Code, §§ 353, 354.) In assessing this critical question, counsel must take account of the applicable standard of prejudice, asking, "What likelihood of prejudice must be shown to get a reversal or other relief?" Counsel must then weigh the facts of the case in light of this standard, asking, "Can a reasonable argument be made that the error was prejudicial?"

1. Prejudicial per se [§ 4.51]

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

Examples of prejudicial per se errors include:

- Complete lack of counsel at a criminal trial[25] (*Gideon v. Wainwright* (1963) 372 U.S. 335) or representation by an attorney who has resigned from the State Bar with disciplinary charges pending (*In re Johnson* (1992) 1 Cal.4th 689, 694; *People v. Vigil* (2008) 169 Cal.App.4th 8).[26]

- Denial of retained counsel of choice (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140).

- Biased judge (*Tumey v. Ohio* (1927) 273 U.S. 510) or juror (*People v. Nesler* (1997) 16 Cal.4th 561, 579).[27]

- Denial of the right to self-representation at a criminal trial (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, fn. 8; see *Faretta v. California* (1975) 422 U.S. 806; cf. *People v. Tena* (2007) 151 Cal.App.4th 720 [any error in denying *Faretta* request at preliminary hearing subject to harmless error rule when defendant later accepted counsel][28]).

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[25]Failure to provide counsel on appeal to brief an arguable issue is also reversible per se. (*Penson v. Ohio* (1988) 488 U.S. 75.) Placing severe restrictions on attorney-client communication may be reversible per se as the equivalent of denying counsel altogether. (*People v. Hernandez* (2009) 178 Cal.App.4th 1510.)

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

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

[28]In *People v. Burgener* (2009) 46 Cal.4th 231, 243-245, the court noted but did not decide the standard of prejudice for a *Faretta* waiver not made knowingly and intelligently. It reviewed decisions in the lower California courts, which are split, and in the federal circuits, which generally use reversible per se; in this case, the error was reversible even under *Chapman v. California* (1967) 386 U.S. 18. (Cf. *People v. Wrentmore* (2011) 196 Cal.App.4th 921, 931, and *People v. Williams* (2003) 110 Cal.App.4th 1577, 1588 [right to counsel and thus to self-representation in Mentally Disordered Offender proceeding is statutory, subject to harmless error test].)

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

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

- Defendant's lack of competence to stand trial (*People v. Stankewitz* (1982) 32 Cal.3d 80, 94; see *Pate v. Robinson* (1966) 383 U.S. 375, 378; cf. *In re James F.* (2008) 42 Cal.4th 901 [in dependency case, incompetent parent made to appear through guardian ad litem; due process error in procedure for appointing guardian is not structural error, but one subject to harmless error analysis]; *People v. Shiga* (2016) 6 Cal.App.5th 22 [failure to exercise discretion re inquiry into competence and *Faretta* capability is structural])**.**

- Denial of a jury trial (*People v. Ernst* (1994) 8 Cal.4th 441, 448-449; see *Rose v. Clark* (1986) 478 U.S. 570, 578; cf. *Washington v. Recueno* (2006) 548 U.S. 212 [*Blakely*[29] error in denying jury trial as to sentencing factors subject to *Chapman*[30] review]; *People v. Mil* (2012) 53 Cal.4th 400 [omission of two or more elements of offense in instruction does not automatically make error reversible per se]).[31]

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

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

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

[30]*Chapman v. California* (1967) 386 U.S. 18; see § 4.52, *post.*

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

speculative"]; *Frantz v. Hazey* (9th Cir. 2008) 513 F.3d 1002 [self-represented defendant, presence at in-chambers substantive discussion]).

- Denial of defendant's right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers defendant best defense (*McCoy v. Louisiana* (2018) __ U.S. __ [138 S.Ct. 1500]).

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

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

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

2. Reversible unless lack of prejudice is shown beyond a reasonable doubt (*Chapman*) [§ 4.52]

The standard of prejudice next most favorable to the appellant is that of *Chapman v. California* (1967) 386 U.S. 18, which held violations of most federal constitutional rights[32] require reversal unless the prosecution can prove beyond a reasonable doubt that the violation did not affect the result. *Chapman* error is distinctive in its source (the federal Constitution), in placing the burden of proof on the beneficiary of the error (such as the state or county), and in creating a high standard for showing harmlessness (beyond a reasonable doubt). It applies in dependency as well as criminal cases. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 134.)

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[32]Exceptions to the applicability of *Chapman* for federal constitutional errors are those that are reversible per se (§ 4.51, *ante*) and those governed by specialized "boutique" tests, such as ineffective assistance of counsel issues, prosecutorial suppression of evidence, and conflicts of interest on the part of defense counsel (§ 4.54 et seq., *post*).

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

> [*Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 684] (failure to permit cross-examination concerning witness bias); *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (*per curiam*) (denial of right to be present at trial); *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983) (improper comment on defendant's failure to testify); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment). See also *Hopper* v. *Evans*, 456 U.S. 605, 613-614 (1982) (citing *Chapman* and finding no prejudice from trial court's failure to give lesser included offense instruction).[33]

Other examples of *Chapman* error are:

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

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

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

- Failure to instruct directly on reasonable doubt (*People v. Aranda* (2012) 55 Cal.4th 342[34]; *People v. Vann* (1971) 12 Cal.3d 220, 227-228; *People v. Flores* (2007) 147 Cal.App.4th 199);

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

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

- Omission of an element in instructing on an offense (*Neder v. United States* (1999) 527 U.S. 1, 9-12, 16; *People v. Mil* (2012) 53 Cal.4th 400 [omission of two or more elements of offense in instruction does not automatically make error reversible per se]; *People v. Merritt* (2017) 2 Cal.5th 819 [failure to instruct on crime of conviction, if defendant conceded it had been committed, but contended another perpetrator was responsible]; *People v. Flood* (1998) 18 Cal.4th 470, 502-503)[35];

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

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

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

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

- Failure of counsel to object to closure of courtroom during jury selection (*Weaver v. Massachusetts* (2017) __ U.S. __ [137 S.Ct. 1899].)

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

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

(See also list of *Chapman* cases in *Arizona v. Fulminante*, at pp. 306-307.)[36]

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

3. Not reversible unless the appellant shows it is reasonably probable the error affected the outcome (*Watson*) [§ 4.53]

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

"Reasonably probable" does not mean the appellant must show the error more likely than not the error affected the outcome. "Probable" in this context does not mean a more than 50% chance, "but merely *a reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics original); *People v. Watson* (1956) 46 Cal.2d 818, 837 [if probabilities of prejudice and harmlessness are equally balanced, appellant has necessarily shown miscarriage of justice]; see also *People v. Wilkins* (2013) 56 Cal.4th 333, 351; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051; *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 918; ADI practice article *Some Tips for Arguing Watson Prejudice More Persuasively*.[37])

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

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

[37]http://www.adi-sandiego.com/news_alerts/pdfs/2010/Arguing-Watson-Error.pdf

Just a few examples of error governed by the *Watson* test are error in admitting evidence that was irrelevant or violated Evidence Code section 352, error affecting expert testimony, many forms of prosecutorial misconduct, denial of a *Pitchess* motion[38] or motion for a physical lineup,[39] and ordinary instructional error.[40]

ADI's article[41] on arguing the relatively difficult *Watson* standard most effectively suggests, in summary: (1) remind the court to apply the correct *College Hospital*[42] "reasonable chance" test rather than the bare "reasonably probable" one, which too readily calls to mind the incorrect and more onerous "more likely than not" standard; (2) argue prejudice concretely, in terms of the facts of the case, rather than merely stating a conclusion (see § 4.60 et seq., *post*); and (3) define the "more favorable outcome" optimally, considering more easily demonstrable possibilities than an outright acquittal, such as a hung jury or conviction of a lesser offense.[43]

4. "Boutique" tests of prejudice [§ 4.54]

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

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

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

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

[41]http://www.adi-sandiego.com/news_alerts/pdfs/2010/Arguing-Watson-Error.pdf

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

[43]E.g., *People v. Soojian* (2010) 190 Cal.App.4th 491, 520 (hung jury is more favorable to defendant than guilty verdict).

a. Ineffective assistance of counsel [§ 4.55]

Ineffective assistance of counsel is judged by *Strickland v. Washington* (1984) 466 U.S. 668, 694, which held that unreasonably deficient performance by counsel is reversible only if the defendant shows a "reasonable probability" a different result would have occurred without the error.[44] (E.g., *Lee v. United States* (2017) ___ U.S. ___ [137 S.Ct. 1958, 1965, 198 L.Ed.2d 476] [when defendant claims counsel's deficient performance deprived him of trial by causing him to plead guilty, defendant can show prejudice by demonstrating "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"].) A reasonable probability is defined as a probability sufficient to affect "the reliability of the result" (*Strickland v. Washington, supra,* 466 U.S. at p. 693) or, in other words, to undermine "confidence in the outcome" (*id.* at p. 694).[45] It does not mean more likely than not and does not authorize use of a preponderance of the evidence standard. (*Id.* at pp. 693-694; see also *Woodford v. Visciotti* (2002) 537 U.S. 19, 23-24.)

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

b. Prosecutorial suppression of evidence [§ 4.56]

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

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

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

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

c. Defense counsel conflict of interest [§ 4.57]

Conflicts of interest include such situations as representing multiple parties in the same proceeding (*People v. Mroczko* (1983) 35 Cal.3d 86), having pecuniary interests adverse to the defendant (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612), having a past attorney-client relationship with a current witness (*Leverson v. Superior Court* (1983) 34 Cal.3d 530), and having personal legal interests that could conflict with the defendant's (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129). The trial court must undertake an inquiry if it knows or reasonably should know of the conflict. (*Mickens v. Taylor* (2002) 535 U.S. 162, 168-169; *Wood v. Georgia* (1981) 450 U.S. 261, 273; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 347-349.) With some exceptions, representation by conflicted counsel is analyzed under the principles of *Strickland v. Washington* (1984) 466 U.S. 668, 694, on ineffective assistance of counsel, which requires a defendant to show counsel's deficient performance and a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different. (*People v. Doolin* (2009) 45 Cal.4th 390, 417.[46])

Except when the attorney was forced to represent concurrent conflicting interests over objection (*Holloway v. Arkansas* (1978) 435 U.S. 475, 490-491), to satisfy the deficient performance requirement the defendant must show the conflict actually affected the adequacy of counsel's representation, in the sense of causing counsel not to represent the defendant as vigorously as he or she might have without the conflict, "as opposed to a

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

mere theoretical division of loyalties." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171; see also *Wood v. Georgia* (1981) 450 U.S. 261, 272; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 347-350; *People v. Doolin* (2009) 45 Cal.4th 390, 417-418; *United States v. Rodrigues* (9th Cir. 2003) 347 F.3d 818, 820, 823-824.)

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

d. Juror misconduct [§ 4.58]

Juror misconduct involving receipt of information about the case from outside sources requires reversal if there appears a substantial likelihood of juror bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) Bias may be found in two ways: (1) the extraneous material is inherently prejudicial – i.e., in itself substantially likely to have influenced a juror; or (2) under the circumstances of the case, the court determines that it is substantially likely a juror was *actually* biased against the defendant. If there is a substantial likelihood that a juror was actually biased, reversal is required even though the court is convinced an unbiased jury would have reached the same verdict. "[A] biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler* (1997) 16 Cal.4th 561, 579; see *People v. Solorio* (2017) 17 Cal.App.5th 398 [prosecution failed to rebut presumption of prejudice from jurors' discussion of why defendant did not testify, when topic came up several times during deliberations].)

5. Cumulative error [§ 4.59]

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

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

6. Arguing prejudice [§ 4.60]

Prejudice can be assessed in a number of ways, depending on the nature of the error, its relationship to the facts as presented at trial, the theories of the defense and prosecution, and any evidence of its actual effect on the jury. (ADI's article[47] on arguing the relatively difficult *Watson* error most effectively is summarized in § 4.53, *ante*.)

a. Errors inherently carrying a high probability of prejudice [§ 4.61]

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

[47] http://www.adi-sandiego.com/news_alerts/pdfs/2010/Arguing-Watson-Error.pdf

• *Statements by judges*: "[J]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Lee* (1979) 92 Cal.App.3d 707, 715-716.)[48]

• *Statements by prosecutors*: As a public official charged with representing the general interest and attaining justice, a prosecutor may have special stature in the eyes of the jury, and so his or her misstatements may carry significant weight.[49]

• *Instructions*: Instructions are inevitably crucial in leading jurors (who are for the most part unschooled in the law) to a conclusion. (See *People v. Clair* (1992) 2 Cal.4th 629, 663 ["jurors treat the court's instructions as a statement of the law by a judge"].)[50]

• *Confessions*: The defendant's own words inevitably carry heavy weight before a jury; it is difficult to ignore a confession or substantial admission of guilt.[51]

• *Evidence of other crimes or gang affiliation*: The fact that the defendant has committed other crimes or has criminal affiliations, such as gang membership, might sway a jury to convict, regardless of the evidence on the current charge, if they think: "He did it before and so probably did it this time," or "He's a bad person who should be

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

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

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

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

punished, even if not guilty now," or "He's a menace to society and should be taken off the streets."[52]

b. Prominence of error [§ 4.62]

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

• *Centrality to issues*: The error may have directly affected the key issue in the case, such as identity or mental state. It may have filled a substantial gap in the prosecution's or county's case or damaged the heart of the defense.[53]

• *Emphasis given error*: An error may have been repeated or exploited or given special emphasis by the prosecutor or county during argument.[54] As the Supreme Court has put it: "'There is no reason why we should treat this evidence as any less "crucial" than the prosecutor – and so presumably the jury – treated it.'"[55]

• *Jury's focus in area related to error*: The jury may have asked for rereading of testimony or instructions or asked questions related to the area of the error. When the jury

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

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

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

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

gives signs that the matters affected by the error are the very ones it considers troublesome or important, prejudice can often be inferred.[56]

c. Closeness of the case [§ 4.63]

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

• *Evidence*: A case in which the state or county case is weak or the defense is strong may well be affected by an error.[57] Conversely, in a one-sided case heavily weighted against the defense, convincing a court of prejudice is difficult even under *Chapman*.

• *Length of jury deliberations*: Lengthy deliberations often are interpreted to mean the jury was struggling with the issues and considered the case a close one.[58] On the other

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

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

[58]*In re Martin* (1987) 44 Cal.3d 1, 51 (22 hours over five days); *People v. Rucker* (1980) 26 Cal.3d 368, 391 (nine hours); *People v. Woodard* (1979) 23 Cal.3d 329, 341 (six hours); *People v. Anderson* (1978) 20 Cal.3d 647, 651 (several days); *People v. Collins* (1968) 68 Cal.2d 319, 332 (eight hours); *People v. Steele* (1989) 210 Cal.App.3d 67, 74 (four days of deliberation); *People v. Fuentes* (1986) 183 Cal.App.3d 444, 455-456 (nine days).

hand, a short deliberation time can indicate probable prejudice, if without the error the evidence would have seemed sufficiently close to have required substantial deliberation time.[59] Whether the deliberations were exceptionally long or short depends of course on the complexity of the case.

• *Partial acquittal*: The jury's refusal to convict on some counts may indicate a close case. As one court has said: "In view of the verdict's reflecting the jury's selective belief in the evidence [by acquitting appellant on two of three counts], we cannot conclude otherwise than that the [error] . . . was prejudicial."[60]

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

d. Evidence linking error to verdict [§ 4.64]

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

• *Proximity*: If the verdict was rendered in close proximity to the error, prejudice may be inferred. For example, if the court gave an erroneous instruction during difficult jury deliberations and a guilty verdict followed almost immediately, it may be reasonable to conclude the error affected the result.[61]

• *Comparative results*: The fact a prior proceeding or another count without the error had a more favorable result is another factor suggesting prejudice.[62]

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

[60]*People v. Epps* (1981) 122 Cal.App.3d 691, 698; see also *People v. Washington* (1958) 163 Cal.App.2d 833, 846; see also *People v. Steele* (1989) 210 Cal.App.3d 67, 74.

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

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

D. Appellate Tests and Presumptions [§ 4.65]

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

1. General principles of review [§ 4.66]

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

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

• An appellate court will presume the trial court had adequate reasons for a decision, unless the record affirmatively shows otherwise. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *People v. Golliver* (1990) 219 Cal.App.3d 1612, 1620.) There is an exception when the law requires reasons to be stated explicitly. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1210-1211 [remanding where law required court to declare whether offense was felony or misdemeanor].)

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

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

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

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

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

• For most errors, the burden is on the appellant to show prejudice – i.e., to prove the error actually affected the result. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)[63]

2. Viewing the evidence [§ 4.67]

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

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

E. Final Selection of Issues [§ 4.68]

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

1. Selectivity versus inclusiveness [§ 4.69]

An attorney's duty to raise arguable issues has long been the subject of debate. Some experienced attorneys insist an appellate attorney has a duty to raise every arguable or non-frivolous issue; they argue, the attorney must give the client a chance to prevail,

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[63]See § 4.50 et seq., *ante*, for further discussion of prejudice standards.

even against the odds, by at least raising the issues – after all, the attorney is not infallible in judging issues, and occasionally "lightning strikes." Failure to raise an issue on an appeal may forfeit it in later appeals if there are follow-up proceedings. (E.g., *People v. Senior* (1995) 33 Cal.App.4th 531; cf. *People v. Rosas* (2010) 191 Cal.App.4th 107.)

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

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

(*Id.* at p. 752, internal quotation marks omitted; see also *Davila v. Davis* (2017) ___ U.S. ___ [137 S.Ct. 2058, 2067, 198 L.Ed.2d 603] ["Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed . . . . Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court"].[64])

This manual favors the selective approach. Counsel should consider the overall strategic impact of each issue. They might ask: Will the issue strengthen the probability

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

the client will get meaningful relief, or will it drag stronger ones down to the "lowest common denominator," thus diminishing the client's chances? Are there so many issues that the court will become irritated or weary of reading the brief and turn to the opponent's brief for illumination? Will the good points get lost in the maze of "all but the kitchen sink"?

2. Context [§ 4.70]

The question whether to include weak issues is relative, depending on other issues in the case. If there are a number of much stronger ones, the argument for selective omission is usually quite persuasive. If all of the issues are fairly weak, there may or may not be a reason to exclude some. If there are *no* other issues, a weak but arguable one should be briefed. This is especially true in non-criminal cases, where omitting weak issues does not earn the client the right to court review of the record, but merely guarantees virtually automatic dismissal of the appeal. This matter is explored in an ADI memo on arguability, "To Brief or Not To Brief: Marginal Issues."[65] (See also § 4.84, *post*.)

3. Potential for adverse consequences [§ 4.71]

Another reason not to raise an issue might be that it would call attention to an error in the defendant's favor. Often pursuing a particular issue, or even the appeal itself, makes it more likely the error will be noticed and corrected. If the client could get a more burdensome disposition by pursuing the issue or the appeal, counsel should advise the client of the possibility of abandonment. (See § 4.91 et seq., *post*, on adverse consequences and § 4.150 et seq., appendix B; see also Cal. Rules of Court, rules 8.316, 8.411 [voluntary abandonment of appeal].)

4. Practical benefit from remedy [§ 4.72]

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

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[65] http://www.adi-sandiego.com/news_alerts/pdfs/2008/AA-Arguable-issues-memo-final.pdf

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

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

V. WHAT TO DO WHEN COUNSEL CANNOT FIND ANY ISSUES [§ 4.73]

Appointed counsel who has found no arguable issues after a diligent search must follow a specific procedure – *Wende-Anders-Sade C.*[66] – regardless of whether the appointment is designated as assisted or independent. Depending on whether the case is criminal or civil, the court may have certain responsibilities, as well.

No-issue appeals have been addressed with some frequency by both the United States Supreme Court[67] and California Supreme Court.[68] The courts have a constitutional duty to provide effective counsel on appeal in criminal cases (see *Evitts v. Lucey* (1985) 469 U.S. 387; *Douglas v. California* (1963) 372 U.S. 353), and therefore counsel's failure to assert any issues poses problems, not only for the client and counsel, but also for the court.

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[66]*People v. Wende* (1979) 25 Cal.3d 436, *Anders v. California* (1967) 386 U.S. 738, and *In re Sade C.* (1996) 13 Cal.4th 952.

[67]E.g., *Anders v. California* (1967) 386 U.S. 738; see also *Smith v. Robbins* (2000) 528 U.S. 259; *Austin v. United States* (1994) 513 U.S. 5; *Penson v. Ohio* (1989) 488 U.S. 75; *McCoy v. Wisconsin* (1988) 486 U.S. 429; *Pennsylvania v. Finley* (1987) 481 U.S. 551; *Jones v. Barnes* (1983) 463 U.S. 745.

[68]*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436; *People v. Feggans* (1967) 67 Cal.2d 444; see also *In re Phoenix H.* (2009) 47 Cal.4th 835*, In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544; *In re Sade C.* (1996) 13 Cal.4th 952.

A. What Is Meant by an "Arguable" Issue [§ 4.73A]

An "arguable issue" is one that, in counsel's professional opinion, has a reasonable potential for success and that, if resolved favorably to the client, will result in a reversal or modification of the judgment. (*People v. Johnson* (1981) 123 Cal.App.3d 106.) This matter is explored in an ADI memo on arguability, "To Brief or Not To Brief: Marginal Issues,"[69] as well in the earlier passages of this chapter.

The ultimate test for an arguable issue is whether a reviewing court could reasonably accept the argument and find the client entitled to some kind of relief, in light of (a) relevant law, (b) the facts in the case, and (c) applicable appellate standards for reviewing judgments. If no reviewing court could reasonably do so, the issue is frivolous. *All* of these conditions for arguability must be satisfied.

Note that the test is whether an appellate court *could reasonably* accept the argument – not whether it actually *will* do so. An appellate attorney must be an assertive advocate. Assertive advocacy asks, "How can I make this issue work?" rather than "Might the court reject this?" There are potential responses to almost every issue – very few are obvious candidates for a concession from the opposing party. The question is whether those responses are truly insuperable, in which case the issue is frivolous, or whether they merely mean there are alternative reasonable outcomes to the case. The job of an appellant's attorney is to present the court with arguments it could reasonably accept and use his or her best skills to persuade it to accept them. It is not to decide ahead of time whether the court will or should accept them. Keeping this model in mind will facilitate assertive issue selection and help distinguish counsel's role from that of the court.

Counsel should also understand that the first prong of the test – support within the relevant law – does not mean counsel necessarily must give up when confronted with either an absence of authority or actual adverse authority. If there is no extant law to support the position, the brief may say so and offer credible reasons why the law should be as counsel urges. If the law is adverse, the argument must acknowledge that fact and may urge the law should be changed, provided there are plausible grounds to support the contention, based on cognizable legal principles, logic, and/or policy. (E.g., *People v. Feggans* (1967) 67 Cal.2d 444, 447 ["counsel serves both the court and his client by advocating changes in the law if argument can be made supporting change"].) If there is adverse Court of Appeal authority but the Supreme Court has not yet reached the issue, if

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[69] http://www.adi-sandiego.com/news_alerts/pdfs/2008/AA-Arguable-issues-memo-final.pdf

the Supreme Court has given signals it is reconsidering a legal rule, or if there is a reasonable possibility of federal relief, it may well be appropriate to raise the issue, as long as counsel acknowledges the contrary law.

B. Pre-Briefing Procedure [§ 4.74]

The inability to find arguable issues triggers special pre-briefing procedures and also special responsibilities on the part of appellate counsel. Specifically, counsel must double check all possible sources of issues and must obtain a second opinion and approval from the appellate project. The client must be told and advised of the possibility of filing a pro per brief or letter. The brief must follow special rules for no-merit filings.

1. Completion and additional review of record [§ 4.75]

Counsel should ensure the record is complete before concluding a case may not have any arguable issues and before asking the project for a review. If the case still appears to lack issues, it often may be profitable for counsel to review the record again, eliminating nothing from consideration. A new issue may emerge, or a credible way of reformulating an issue previously rejected may appear.[70]

2. Project approval [§ 4.76]

Under the California project-panel system and judicial policy, approval by the assigned project staff attorney is required before any attorney, assisted or independent, makes a no-issue filing. Counsel must submit a complete draft *Wende-Anders* brief or *Sade C.* letter brief or brief[71] (see § 4.77 et seq., *post*) to the project attorney and also, in

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[70]See April 2008 ADI news alert and article on the topic of criteria for arguable and frivolous issues and ways of converting a borderline issue into a credible one:
Alert: http://www.adi-sandiego.com/news_alerts/pdfs/2008/April-2008-News-Alert.pdf
Article:
http://www.adi-sandiego.com/news_alerts/pdfs/2008/AA-Arguable-issues-memo-final.pdf

[71]The letter brief format is required in all three divisions of the Fourth Appellate District for *Sade C.* cases. Other districts may have different expectations, and so counsel must consult the project for guidance. Regardless of format, the contents must conform to the requirements of *In re Phoenix H.* (2009) 47 Cal.4th 835, 843.

most situations, tender the record for further review.[72] The attorney must detail the issues considered and rejected and give reasons.

C. *Wende-Anders-Sade C.* Filing [§ 4.77]

Anders v. California (1967) 386 U.S. 738 held counsel must file, not just a simple letter saying there are no issues, but a brief outlining the facts and the possible issues in the case. (See also *People v. Feggans* (1967) 67 Cal.2d 444.) The California Supreme Court interpreted *Anders* in *People v. Wende* (1979) 25 Cal.3d 436, and concluded counsel must set forth the facts in the case, but need not (1) explicitly state counsel has been unable to find issues or (2) ask to withdraw. (*Wende*, at p. 442.) Some courts permit or require the brief be in letter form.

1. Facts [§ 4.78]

The statements of case and facts should be relatively thorough. This gives the court guidance in its own review of the record. It also documents counsel's efforts – an important matter for the court, the project, the client, and counsel's own protection. These considerations apply in dependency cases, as well, even though the court is not required to review the record.

2. Description of issues [§ 4.79]

A question of some disagreement is whether a no-issue filing should describe the issues counsel considered. *Anders v. California* (1967) 386 U.S. 738, 744-745, held counsel must file a "brief referring to anything in the record that might arguably support the appeal" and pointed out such a brief would "induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." In *Smith v. Robbins* (2000) 528 U.S. 259, however, the United States Supreme Court held listing possible issues is not invariably required by the Constitution, if other safeguards are in place.

Some courts have strong preferences one way or the other as to the listing of issues, and counsel should naturally heed those. Some courts indifferently leave the matter to counsel's discretion, and some are not clear one way or another. (See, e.g., *People v. Kent* (2014) 229 Cal.App.4th 293 [Fourth Dis., Div. 3: encouraging listing of

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[72]In fast-track dependency cases, the project normally gets its own copy of the record. (Cal. Rules of Court, rule 8.416(c)(2)(B).)

issues and disagreeing with since-withdrawn opinion from another panel of same court criticizing that practice].)

ADI for the most part encourages listing of issues and applicable authorities. It is a way of stimulating and organizing counsel's thoughts, suggesting issues to the Court of Appeal it might not otherwise consider, and demonstrating counsel's efforts to the court, the project, and the client. In non-criminal cases, this policy becomes a nearly absolute requirement, because the court will not read the record unless counsel gives it a reason to; a failure to list issues deprives the client of even that slim opportunity to snatch the case away from virtually certain dismissal.

Such a listing, however, must be done properly. Counsel must not argue the merit or lack of merit of any issue listed, but must neutrally describe the issues considered and any relevant authority, without urging any conclusions. (If the brief urges *relief* because of the issue, it is contradicting the characterization of the case as a no-merit one. If it affirmatively argues the issue should be *rejected*, counsel is impermissibly arguing against the client.)

3. Withdrawal of counsel [§ 4.80]

It is not necessary for counsel who finds no arguable issues to seek leave to withdraw, as long as he or she does not describe the appeal as frivolous. (*People v. Wende* (1979) 25 Cal.3d 436, 442.) Indeed, counsel should not do so. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544 ["[i]f appointed counsel . . . finds no arguable issues, counsel need not and should not file a motion to withdraw"].) Counsel should inform the client of the right to request the court relieve counsel if the client so wishes.[73] (*Id.* at p. 536; see § 4.82, *post*.)

4. Sending record to client [§ 4.81]

Counsel may and normally should send the record to the client before or as soon as the brief or letter brief is filed, so that the client can file a pro per brief or letter, if permitted and desired. (Counsel should consider whether any parts of the record are not legally available to the client and redact or withhold those parts.) Alternatively, if counsel

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[73]The purpose of relieving counsel would ostensibly be to leave the client in pro per and so situated to file a pro per brief. But, except for dependency cases, the client has a right to file such a brief, anyway, when counsel has filed a no-issue brief. (See § 4.85, *post*.)

believes there is a reasonable possibility counsel will need the record – e.g., the court may order supplemental briefing by counsel – and the client has expressed a lack of interest in filing a pro per brief, counsel may retain the record and tell the client it is available on request. Counsel may make a copy of some or all of the record for future reference.[74]

5. Declaration of counsel [§ 4.82]

The brief should include counsel's declaration that the client has been informed of the nature of the brief, any right to file a pro per brief, the opportunity for access to the record, and the right to ask counsel be relieved.[75] (See *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 536.)

D. Appellate Court Responsibilities [§ 4.83]

1. Independent review of record [§ 4.84]

Wende held that, in a first criminal or delinquency[76] appeal of right, *Anders* requires the appellate court to review the entire appellate record independently, to confirm the lack of arguable issues, before disposing of the case. (*People v. Wende* (1979) 25 Cal.3d 436, 440-442; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 110-111.)

This duty does not apply to non-criminal cases, such as LPS conservatorship (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529), dependency (*In re Sade C.* (1996) 13 Cal.4th 952), mentally disordered offender (*People v. Taylor* (2008) 160 Cal.App.4th 304), not guilty by reason of insanity civil commitment (*People v. Martinez* (2016) 246

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

[75]The purpose of relieving counsel would ostensibly be to leave the client in pro per and so situated to file a pro per brief. But, except for dependency cases, the client has a right to file such a brief, anyway, when counsel has filed a no-issue brief. (See § 4.85, *post*.)

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

Cal.App.4th 1226), sexually violent predator (*People v. Kisling* (2015) 239 Cal.App.4th 288), and competence to stand trial (*People v. Blanchard* (2019) 43 Cal.App.5th 1020) proceedings, nor to appeals from post-judgment orders such as motions to set aside a plea because of invalid immigration advice (*People v. Serrano* (2012) 211 Cal.App.4th 496).

2. Pro per brief [§ 4.85]

In a first criminal or delinquency appeal as of right or a civil commitment proceeding, the court must give the appellant an opportunity to file a pro per brief. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529 [LPS]; *People v. Wende* (1979) 25 Cal.3d 436, 440; *People v. Feggans* (1967) 67 Cal.2d 444, 447; *People v. Kisling* (2015) 239 Cal.App.4th 288, 292 [sexually violent predator]; *People v. Taylor* (2008) 160 Cal.App.4th 304 [mentally disordered offender]; see also *People v. Kelly* (2006) 40 Cal.4th 106, 120.) This duty does not apply in a juvenile dependency case. (*In re Phoenix H.* (2009) 47 Cal.4th 835.) The court will normally give the client a deadline; counsel should monitor this and ask for an extension of time on the client's behalf when reasonably necessary.

3. Briefing by counsel of arguable issue that court finds [§ 4.86]

If, in its review of the record or consideration of any pro per brief filed, the court finds an arguable issue, the court must request *counsel* to brief it and may not decide the case without the benefit of such briefing. (*Penson v. Ohio* (1989) 488 U.S. 75, 81-83.) This duty is at a constitutional level for cases in which the party has a constitutional right to counsel on appeal. If the right to appointed counsel is based on statute instead, the duty to seek briefing by counsel is presumably implicit in the statute. If for some reason counsel had been permitted to withdraw or counsel is disabled from arguing the issue,[77] new counsel must be appointed to do the briefing. (*Penson*, at pp. 81-83.)

4. Decision [§ 4.86A]

In a criminal or delinquency appeal, after conducting a *Wende* review and finding no issues, the court normally issues a written opinion. Under some circumstances it may dismiss the appeal instead. In dependency appeals, dismissal upon receipt of a *Sade C.*

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[77]Counsel may become disabled from briefing an issue by characterizing it as frivolous. (See *People v. Wende* (1979) 25 Cal.3d 436, 442.) ADI policy is that counsel must not characterize issues as having or lacking merit, but should simply describe them. (See § 4.79, *ante*.)

filing is common. (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) The theory of dismissal is essentially that the appellant has abandoned the appeal by failing to assert any claims. (*Ibid.*)

If the client has filed a pro per brief in a first criminal appeal of right, the court *must* issue a written opinion with reasons given. (*People v. Kelly* (2006) 40 Cal.4th 106.) Although normally the court need not respond to a client's pro per brief if the client is represented by counsel (*People v. Clark* (1992) 3 Cal.4th 41, 173), in the *Wende* situation the pro per brief has greater status. For one thing, counsel has expressly failed to advocate relief for the client; for another, the pro per brief is a matter of right, not subject to the court's discretion.[78] (*Kelly*, at p. 120.) If such a brief is filed, the Court of Appeal opinion must set out the facts, procedural history, convictions, and sentence, and it must describe the contentions, stating briefly why they are being rejected. (*Id.* at p. 124.) In other words, it must satisfy the state constitutional requirement that decisions determining causes must be "in writing with reasons stated." (Cal. Const., art. VI, § 14.)

Such a decision serves a number of functions besides fulfilling the state constitutional requirement of a written opinion. It provides guidance to the parties and other courts in subsequent litigation; it promotes careful consideration of the case; it conserves judicial resources by making a record of what has been decided and, possibly, persuading the defendant of the futility of further litigation. (*People v. Kelly* (2006) 40 Cal.4th 106, 120-121.)

The duty to produce a written opinion in a no-issue case with a pro per brief arguably applies in a non-criminal case, as well, under *People v. Kelly* (2006) 40 Cal.4th 106. Article VI, section 14, of the California Constitution applies to civil as well as criminal cases. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232.)

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[78]It is not a right in the dependency context. (*In re Phoenix H.* (2009) 47 Cal.4th 835.)

E. Choice Between Brief on the Merits and No-Issue Treatment [§ 4.87]

In cases where there is no other issue, the question arises whether counsel should raise a weak issue (a "*Wende* buster") or simply file a *Wende-Anders* brief. An April 2008 ADI news alert[79] and an accompanying practice article[80] discuss the criteria for arguable and frivolous issues and ways of converting a borderline issue into a credible one.

1. Sure loser [§ 4.88]

If the issue is a sure loser, it is best to opt for the no-issue approach. Often counsel, engaged in understandable wishful thinking, will judge an issue as arguable though weak when it is in fact frivolous. But in a criminal or delinquency case, that approach deprives the client of the right to the court's review of the record. Counsel can list the "loser" issue among the *Anders* issues and give the court a chance at least to consider it. The project will give counsel the benefit of a second opinion on the matter.

An exception is when the issue, though a sure loser in the state courts, is being preserved for later federal review. (See §§ 9.44 et seq. and 9.66 et seq. of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus.") If there is a reasonable possibility of federal relief, the issue should be raised in a regular brief, not a *Wende* brief. Counsel should acknowledge the unfavorable California law and any effect of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Counsel can then state forthrightly that the issue is being raised to preserve it for federal review. Counsel should be sure to petition for review to exhaust state remedies properly.[81]

There is no tactical advantage to the no-issue brief if the court is not going to read the record, as is true in most non-criminal cases except delinquency appeals. Counsel should then give the benefit of any doubt to raising the issue. But if there is no doubt, counsel's ethical duty is to refrain from asserting frivolous claims.

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[79] http://www.adi-sandiego.com/news_alerts/pdfs/2008/April-2008-News-Alert.pdf

[80] http://www.adi-sandiego.com/news_alerts/pdfs/2008/AA-Arguable-issues-memo-final.pdf

[81] An exhaustion petition for review under California Rules of Court, rule 8.508, is sufficient for preservation purposes. (See chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision," § 7.70.)

2. Weak but not frivolous issue [§ 4.89]

If the issue is just weak but not frivolous or a sure loser, counsel should include it and file a regular brief on the merits. When counsel files a no-issue brief, he or she is certifying, as the client's advocate and as an officer of the court, that there is nothing to argue. If that turns out not to be true, the court may conclude counsel carelessly overlooked or misjudged the issue or intentionally mischaracterized the case.

This rule is especially strong in a non-criminal case, where there is no right to a court review of the record and hence no strategic advantage to the client from filing a no-issue brief.

3. Meritorious but trivial issue [§ 4.90]

For the same reasons that a weak but non-frivolous issue should be briefed (§ 4.89, *ante*), counsel also should file a brief on the merits when the only issue is not weak at all – in fact, it may be completely meritorious – but is trivial in that it will give little if any practical benefit to the defendant, at least at present. Examples of possibly inconsequential error might be minor clerical inaccuracies in the record and imposition of a concurrent term that should have been stayed under Penal Code section 654.

Counsel should first try to correct the error in the trial court, if possible. Beyond that, counsel should either raise the issue in a substantive brief or else get the client's written waiver of it and file a legitimate no-issue brief.

VI. ADVERSE CONSEQUENCES: POTENTIAL RISKS OF APPEALING [§ 4.91]

An appellant's attorney not only must wield the familiar sword attacking reversible error, but also must carry a shield, ensuring at the very least the appeal will "do no harm." Although double jeopardy and due process principles generally prevent penalizing the exercise of the right to appeal, in certain cases the defendant may actually be worse off because an appeal was pursued or because it was "successful."

Adverse effects from appealing can include such perils as an increased sentence,[82] reinstatement of dismissed charges, or the addition of more serious charges on remand.

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[82]See § 4.150 et seq., appendix B, listing common examples of unauthorized sentences – mistakes in the defendant's favor that can be corrected at any time.

They also can entail non-penal consequences that may be more onerous than the original disposition. Some of the adverse effects may be minor; others, catastrophic.

In dependency cases, adverse consequences tend to be more limited. Some results favorable to the client may have been unauthorized and would be subject to correction on appeal – for example, a finding of presumed fatherhood or an offer of reunification services. Some matters brought up in the dependency appeal may be used against the client in any concurrent criminal proceeding. A non-legal consequence could be alienating the social worker or foster parents, resulting in decreased visitation or even its denial altogether.

Thus a crucial aspect of issue spotting and selection is identifying errors in the client's *favor*, assessing how a particular issue or remedy might backfire, and when necessary advising the client whether to pursue the appeal. Failure to do so can be a serious breach of the attorney's responsibilities to the client. Proper advice can save both the client and the attorney. (See *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [no ineffective assistance of appellate counsel for proceeding with appeal when counsel informed defendant of possible consequences and defendant decided to pursue appeal].)

A. General California Rule Against Greater Sentence After Appeal: *People v. Henderson* [§ 4.92]

Generally, under California law, after a successful appeal a defendant may not receive a greater sentence on those charges for which the defendant was convicted in the first trial. *People v. Henderson* (1963) 60 Cal.2d 482, 495-497, established that California double jeopardy and due process principles generally forbid such an increased sentence. *Henderson* was based primarily on the rationale that allowing a greater sentence after appeal would unduly burden the right to appeal and deter challenges to erroneous judgments. (*Id.* at p. 497; see also *People v. Collins* (1978) 21 Cal.3d 208, 214; *In re Ferguson* (1965) 233 Cal.App.2d 79, 82.)

The *Henderson* rule applies in a number of contexts, such as:

- When the defendant is originally sentenced to life, retrial may not result in a death sentence, even if new factors justifying death are presented at the second trial. (*People v. Henderson* (1963) 60 Cal.2d 482, 497 ["defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right"].)

- A defendant who originally receives concurrent sentences may not receive a greater sentence through consecutive sentences on retrial after a successful appeal. (See *People v. Ali* (1967) 66 Cal.2d 277, 281-282.)[69]

- A defendant may not receive an increased fine or statutory restitution fine on retrial after a successful appeal.[70] (*People v. Hanson* (2000) 23 Cal.4th 355, 363; see also *People v. Thompson* (1998) 61 Cal.App.4th 1269, 1276; *People v. Jones* (1994) 24 Cal.App.4th 1780, 1785.)

- When a defendant is granted probation at the first trial, a denial of probation at retrial is warranted only when the court affirmatively states for the record new facts that would have warranted denial or revocation of probation in the first instance. (*People v. Thornton* (1971) 14 Cal.App.3d 324, 327.)

- A minor who has successfully challenged a juvenile court adjudication cannot be retried as an adult in criminal proceedings. (*In re David B.* (1977) 68 Cal.App.3d 931, 936, cited favorably in *In re Bower* (1985) 38 Cal.3d 865, 876.)

- The *Henderson* rule applies when a challenge to a judgment after trial is by habeas corpus, as well as appeal. (*In re Ferguson* (1965) 233 Cal.App.2d 79.) (Cf. § 4.99, *post*, on pleas.)

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[69]In *People v. Utter* (1973) 34 Cal.App.3d 366, 369, the court did permit imposition of consecutive terms on retrial, but only because it was not for the same offenses and the new sentence was not higher than the initial sentence; in fact, the court noted the defendant would be eligible for parole earlier than under the original sentence.

[70]Restitution *fines* must be distinguished from restitution orders designed to compensate victims for their losses and restitution ordered as a condition of probation. (See Pen. Code, §§ 1202.4, 1203.1, 1203.1k; Welf. & Inst. Code, § 730.6 [juvenile proceedings]; compare *People v. Hanson* (2000) 23 Cal.4th 355 [restitution fine cannot be increased on retrial after appeal] with *People v. Harvest* (2000) 84 Cal.App.4th 641 [victim restitution is not punishment for *Henderson* double jeopardy purposes and can be imposed for first time on resentencing after appeal]; see also *People v. Daniels* (2012) 208 Cal.App.4th 29 [increase in one component of monetary sentence will not render punishment more severe if another component is reduced by equal amount; *Henderson* requires only that the aggregate monetary sentence, not each component thereof, be no more than that originally imposed].)

B. Unauthorized Sentence as Exception to *Henderson* Rule[71] [§ 4.93]

An unauthorized sentence – one not permitted by law – is an exception to the *Henderson* prohibition against an increased sentence as a result of appeal. Such a sentence is subject to judicial correction at any time, with or without an appeal.[72] (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1120; *People v. Massengale* (1970) 10 Cal.App.3d 689, 693; see also *In re Renfrow* (2008) 164 Cal.App.4th 1251 [on revocation of probation, court must correct previously imposed sentence if it was unauthorized].) Correction of such a sentence is not a penalty for exercising the right to appeal, since the correction could be done at any time and would be required even if the defendant had not appealed. Thus the proscription against a higher sentence after appeal laid down in *People v. Henderson* (1963) 60 Cal.2d 482, does not apply.[73] (*Massengale*, at p. 693.)

1. Risk to defendant from appealing [§ 4.94]

If an unauthorized sentence is discovered on appeal, imposition of a proper judgment, even a more severe one, is permitted and indeed required.[74] (*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.)

Pursuing an appeal poses the risk an erroneously lenient sentence that would otherwise go undetected will be discovered and corrected to a more severe one. The court may notice the error. The Attorney General may also find the error and seek correction; even if the prosecution did not object to an unauthorized sentence in the lower court, it

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[71]*People v. Henderson* (1963) 60 Cal.2d 482. The *Henderson* rule is described more fully in § 4.92, *ante.*

[72]Clerical errors can also be corrected at any time. Examples include failure to record a matter accurately in the minutes or abstract (*In re Candelario* (1970) 3 Cal.3d 702, 705; *People v. Zackery* (2007) 147 Cal.App.4th 380, 386-388) and miswording of a jury verdict (*People v. Trotter* (1992) 7 Cal.App.4th 363, 369-370).

[73]If the original aggregate sentence was authorized but that sentence was structured in an unauthorized manner, the new aggregate sentence may not be increased. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311-1312; see also *People v. Torres* (2008) 163 Cal.App.4th 1420, 1432-1433 [following *Mustafaa*].)

[74]In federal appeals, an unauthorized sentence may not be increased unless the government appeals or cross-appeals. (*Greenlaw v. United States* (2008) 554 U.S. 237 .)

may raise the issue on a defendant's appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Smith* (2001) 24 Cal.4th 849, 853.)[75]

Appellate counsel must be alert to this possibility and advise the client if a potential problem is spotted. (See § 4.117 et seq., *post*, on measures to take.)

2. Nature of unauthorized sentence [§ 4.95]

An unauthorized sentence is the "imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction." (Pen. Code, § 1238, subd. (a)(10).) A sentence is unauthorized if it could not lawfully be imposed under any circumstance in the case. (*People v. Scott* (1994) 9 Cal.4th 331, 354; cf. *People v. Fond* (1999) 71 Cal.App.4th 127, 133-134 [sentence lower than that permitted by statute not "unauthorized" if, for fact-specific reasons, trial court found statutory term would be cruel and unusual punishment].) A sentence not authorized by law exceeds the jurisdiction of the court. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1120; see also *In re Birdwell* (1996) 50 Cal.App.4th 926, 930.)

Examples of unauthorized sentences in the defendant's favor include a sentence other than the alternatives specified in the governing statute, failure to pronounce judgment after a valid conviction, failure to impose a mandatory enhancement or fine or fee, one-third midterm when a fully consecutive sentence is mandated, probation when prohibited by statute, incarceration in county jail when that is not a statutory option, an erroneous stay under Penal Code section 654, and credits not allowed by law. A more complete list with examples from case law is compiled in § 4.151 et seq., appendix B, *post*.)

3. Exceptions [§ 4.96]

On occasion a statutorily unauthorized sentence may not be challenged or corrected on appeal.

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[75]In contrast, the prosecution's failure to object to a *discretionary* sentencing choice forfeits the right to appeal the issue. (*People v. Tillman* (2000) 22 Cal.4th 300, 303 [failure to impose restitution fine and parole revocation fine forfeited by prosecution's failure to object because trial court has discretion not to impose those fines in certain cases]; *People v. Burnett* (2004) 116 Cal.App.4th 257, 261 [failure to impose sex offender fine pursuant to Pen. Code, § 290.3 not unauthorized because not mandatory if judge finds defendant unable to pay].)

a. Limits on prosecution's right to challenge unauthorized sentence on appeal [§ 4.97]

If the unauthorized sentence is a term of a plea bargain, the prosecution may be estopped from challenging it: an agreement to a given sentence generally forfeits the right to argue it is unauthorized.[76]

The doctrine of forfeiture may likewise bar the prosecution from challenging a statutorily unauthorized sentence on a defendant's appeal if the People should have appealed. (See *People v. Fond* (1999) 71 Cal.App.4th 127, 133-134 [by failing to appeal, People forfeited fact-specific attack on trial court's determination that statutory sentence was cruel and unusual punishment];[77] see § 2.89 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started," on exceptions to People's right to raise issues on defendant's appeal.)

b. Remaining potential for adverse consequences [§ 4.98]

The potential for adverse consequences remains even if the prosecution has no right to challenge an unauthorized sentence: the court has the discretion to correct the sentence on its own initiative. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [court raised and corrected sentencing error in People's appeal, despite People's forfeiture of right to raise issue on appeal by failing to object in trial court]; *People v. Beebe* (1989) 216 Cal.App.3d 927, 936 [applying estoppel based on plea bargain, but

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[76]On the flip side, a defendant may not complain that a sentence negotiated as part of a plea bargain is harsher than that allowed by statute: "[D]efendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295 [defendant may not complain negotiated sentence violates Pen. Code, § 654]; see also *People v. Harris* (1991) 227 Cal.App.3d 1223, 1227 [defendant may waive mandated custody credit in order to receive other sentencing considerations].) Similarly, the defendant may not argue the sentence is more lenient than allowed by law as a ground for withdrawing the plea. (*People v. Beebe* (1989) 216 Cal.App.3d 927, 932-936 [defendant estopped from challenging term of plea bargain calling for unauthorized reduction of non-wobbler felony to misdemeanor].)

[77]The *Fond* court held the sentence was not facially "unauthorized," because it was based on constitutional considerations. Thus it was not subject to correction at any time in the absence of appeal.

warning "appellate courts cannot be expected to apply this doctrine in every case in which . . . [the plea] exceeds the court's jurisdiction"]; see also § 2.55 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started,"on terms of plea bargain void as unauthorized or contrary to public policy.)

C. Sentence After Withdrawal of Guilty Plea As Exception to *Henderson* Rule[78] [§ 4.99]

A defendant who successfully attacks the validity of a guilty plea on appeal and seeks to withdraw the plea generally may receive a higher sentence than the original. (*People v. Serrato* (1973) 9 Cal.3d 753, 764-765, dictum on unrelated point disapproved in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) The order vacating the conviction nullifies post-plea proceedings, returning the defendant to the pre-plea position.

1. Loss of benefits of plea bargain [§ 4.100]

Renouncing the plea bargain means renouncing its benefits as well as its burdens. The sentence on the count to which the defendant pleaded guilty can be increased upon conviction, and any counts dismissed as a result of the bargain can be reinstated. (*People v. Hill* (1974) 12 Cal.3d 731, 769, overruled on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, fn. 5; *People v. Aragon* (1992) 11 Cal.App.4th 749, 756-757.[79]

2. Possibility court may void bargain on own initiative [§ 4.101]

Even if the defendant does not directly attack the plea on appeal, it is possible (although not common) for the reviewing court to determine the plea bargain is void and vacate it on its own initiative. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6

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[78]*People v. Henderson* (1963) 60 Cal.2d 482. The *Henderson* rule is described more fully in § 4.92, *ante*.

[79]An unusual exception was *People v. Collins* (1978) 21 Cal.3d 208, 214-217, in which the crime to which the defendant had pled guilty was repealed before sentencing. The Supreme Court vacated the plea because the trial court had no jurisdiction to impose sentence for a non-existent crime. However, the court ordered that on remand the sentence could not be greater than the original; since the plea had been invalidated by operation of law, not renounced by the defendant, he was entitled to retain the benefit of the bargain.

[court has authority to correct sentencing error itself, even if parties cannot].) An example might be a term of the bargain that contains an unauthorized sentence or violates public policy.[80] (See *People v. Renfro* (2004) 125 Cal.App.4th 223, 228, 231, 233 [negotiated provision that offense falls outside the Mentally Disordered Offender law, Pen. Code, § 2960, would violate public policy because it would undermine that law and release a defendant who poses potential danger to society]; cf. *People v. Castillo* (2010) 49 Cal.4th 145 [Attorney General bound by stipulation of district attorney to two-year SVP term].)

3. Argument alleging breach of plea bargain [§ 4.102]

An argument that the prosecution or trial court repudiated or violated the plea agreement can risk an increased sentence because a frequent remedy for such an error is vacating the plea bargain. Normally there are two possible remedies for breach of the bargain – withdrawal of the plea or specific enforcement of the bargain. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861;[81] *People v. Kaanehe* (1977) 19 Cal.3d 1, 15.) While specific performance would not be an adverse consequence, withdrawal of the plea would open the door to the possibility of an increased sentence.

Specific performance is appropriate when it will implement the parties' reasonable expectations without binding the trial judge to an unreasonable disposition. (*People v. Mancheno* (1982) 32 Cal.3d 855, 861.) Withdrawal of the plea is the appropriate remedy when specific performance would limit the judge's sentencing discretion in light of new information or changed circumstances. (*Ibid.*; see *People v. Kaanehe* (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]; but see *Doe v. Harris* (2013) 57 Cal.4th 64 [plea agreement reference to a statutory consequence of conviction (e.g., a registration requirement) is not an implied promise that any subsequent legislative changes to that statutory consequence will not apply to the defendant].)

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[80]These topics are discussed further in § 2.55 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started," on plea bargains requiring unauthorized sentence or violating public policy.)

[81]To repudiate the bargain, the prosecution need only violate one term of the plea. The harmless error doctrine does not apply because it is assumed that any violation of the bargain resulted in detriment to the defendant. (*Mancheno*, at p. 865; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 858.)

§ 2.27 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started," further explores the topic of non-compliance with the plea bargain.

D. Added Charges After Appeal As Possible Exception to *Henderson* Rule[82] [§ 4.103]

Remand for a new trial conceivably could result in a greater sentence if at retrial it gives the prosecution a reason or occasion to add other charges that are not barred by such legal impediments as a twice-dismissed count, expiration of the statute of limitations, or speedy trial violation.

If there appears to be the potential for additional charges as a result of appeal, counsel should consult with trial counsel and the assigned ADI staff attorney.

1. Additional charges initially not tried or retried because of original conviction [§ 4.104]

Reversal on appeal may give the prosecution an incentive to file charges – or to retry charges originally mistried – that it would not otherwise have filed if its "bird in the hand," the first conviction, had remained on the books.

For example, the prosecution may initially decide against pursuing a charge because the defendant has already suffered a conviction for a crime carrying a heavy sentence. It might change its mind, however, if that conviction is reversed on appeal. The defendant then may face, not only retrial on the reversed charge, but prosecution on the charge originally not pursued. (See *People v. Villanueva* (2011) 196 Cal.App.4th 411 [greater sentence on retrial of mistried firearm enhancement allegations after reversal on appeal is permissible]; *People v. Bolton* (2011) 192 Cal.App.4th 541, 549 [no prohibition against increased aggregate sentences following successful appeal when new sentence "is based on additional criminal convictions that were not at issue in the successful appeal and on which the defendant could have been retried without violating double jeopardy"]; *Arnold v. Superior Court* (1971) 16 Cal.App.3d 984 [assault charge originally dismissed at prosecution's request under Pen. Code, § 1385 after mistrial, because defendant serving murder sentence; when conviction was reversed on appeal and retrial ended in

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[82]*People v. Henderson* (1963) 60 Cal.2d 482. The *Henderson* rule is described more fully in § 4.92, *ante.*

acquittal, assault charge was properly refiled];[83] *People v. Dontanville* (1970) 10 Cal.App.3d 783 [sex offense that came to light during first murder trial was properly charged for first time after murder conviction reversed and retrial ended in acquittal].)

Henderson arguably does not prevent this result because the prosecution had the right to try the additional charge regardless of whether there was an appeal – the charge is not a penalty for appealing. The defendant might still be able to allege vindictive prosecution, if the facts warrant it. (See § 4.112 et seq., *post*; e.g., *People v. Puentes* (2010) 190 Cal.App.4th 1480 [mistried felony charge originally dismissed in interests of justice after sentence on misdemeanor, which was later reversed; reinstatement of felony charge on remand was presumptively vindictive].)

Counsel should also consider that Penal Code section 1382 entitles a defendant to a retrial of mistried allegations within 60 days, and a dismissal of such charges unless good cause to the contrary is shown. The defendant must move for dismissal to invoke this right. Good cause may be shown by the pendency of appellate proceedings, *if* they potentially affect the count to be retried. (*People v. Villanueva* (2011) 196 Cal.App.4th 411, 423-424.)

2. Removal of *Kellett* barrier [§ 4.105]

Conceivably reversal could remove an obstacle that would otherwise have barred new charges under Penal Code sections 654 and 954 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827, which requires a single prosecution for all offenses in which the same act or course of conduct played a significant part. A conviction and sentence are a bar to subsequent prosecution of any offense omitted in the initial proceedings. (*Kellett*, at p. 827.) If the conviction and sentence no longer exist, the previously unfiled charges possibly could be tried along with the older, reversed one, thereby potentially increasing the punishment. (See *People v. Brown* (1973) 35 Cal.App.3d 317, 322-323 [no *Kellett* barrier to adding charges at retrial after mistrial].)

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[83]The Ninth Circuit upheld this decision in *Arnold v. McCarthy* (9th Cir. 1978) 566 F.2d 1377.

E. Non-Penal Dispositions as Exceptions to *Henderson* Rule[84] [§ 4.106]

If a consequence of a successful appeal or appellate issue is not "punishment" under double jeopardy principles, the proscription of *People v. Henderson* (1963) 60 Cal.2d 482, against greater sentences after appeal does not apply, even though the subsequent disposition may be more onerous to the defendant than the original one.

1. Victim restitution [§ 4.107]

One area for concern over non-penal adverse consequences is compensatory victim restitution. In *People v. Harvest* (2000) 84 Cal.App.4th 641, at resentencing after an appeal, the trial court for the first time imposed victim restitution of $36,301. The Court of Appeal upheld the restitution order, concluding compensatory victim restitution "is not punishment and is therefore not constitutionally barred." (*Id*. at p. 645.) The court distinguished *People v. Hanson* (2000) 23 Cal.4th 355, 361, which held restitution *fines* are punishment within the meaning of the double jeopardy doctrine. *Harvest* did not mention *People v. Zito* (1992) 8 Cal.App.4th 736, 741, which held compensatory victim restitution and a restitution fine, whose combined amount exceeded the combined statutory limit in effect at the time of the crime, would be considered unauthorized as ex post facto punishment.

2. Confinement upon finding of incompetence to stand trial [§ 4.108]

If the conviction is reversed for a new hearing on competence to stand trial under Penal Code section 1367 et seq. and the defendant is found incompetent on remand, the resulting commitment can be as long as the shorter of three years or the maximum sentence for the most serious crime charged – a period that may be longer than the original prison sentence.[85] Further, the calculation of credits may be less generous. (See Pen. Code, § 1375.5; *People v. Waterman* (1986) 42 Cal.3d 565, 567 [conduct credits].)

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[84]*People v. Henderson* (1963) 60 Cal.2d 482. The *Henderson* rule is described more fully in § 4.92, *ante.*

[85]Principles of due process and equal protection prohibit indefinite confinement of a person found unable to stand trial and impose certain procedural and substantive requirements. (*Jackson v. Indiana* (1972) 406 U.S. 715; *In re Davis* (1973) 8 Cal.3d 798.)

3. Confinement upon finding of not guilty by reason of insanity [§ 4.109]

A longer potential confinement than a straight prison sentence and restricted credits may result if, on remand, the defendant could be found not guilty by reason of insanity (Pen. Code, § 1026 et seq.[86]) or committed to the Youth Authority as a youthful offender (Welf. & Inst. Code, § 1731.5 et seq.[87]).

4. Loss of attorney-client confidentiality [§ 4.110]

Another possible non-penal adverse consequence, encountered often in habeas corpus cases alleging ineffective assistance of counsel, is suspension of the attorney-client privilege and concomitant compromise of confidentiality. In responding to the allegations in the writ proceedings, the former trial counsel may divulge damaging communications from the client and other information obtained during their relationship. (Evid. Code, § 958; *People v. Ledesma* (2006) 39 Cal.4th 641, 690-691; *People v. Dang* (2001) 93 Cal.App.4th 1293, 1299; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 314; *People v. Morris* (1971) 20 Cal.App.3d 659, 663-664, overruled on other grounds in *People v. Duran* (1976) 16 Cal.3d 282, 292; see also *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1189-1192; *People v. Pope* (1979) 23 Cal.3d 412, 440 (dis. opn. of Mosk, J.); cf. Bus. & Prof. Code, § 6068, subd. (e).)

While the confidential evidence produced at that hearing will be privileged in a later retrial, as a matter of judicially declared use immunity (*People v. Ledesma* (2006) 39 Cal.4th 641, 691-695), that privilege can be waived by the defendant's actions at the retrial (*id*. at 695-696). In any case, the disclosure of secret information may pose problems for the defendant apart from its later use as evidence.

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[86]The maximum period of commitment is the longest prison term that could have been imposed. (Pen. Code, § 1026.5, subd. (a); see *People v. Tilbury* (1991) 54 Cal.3d 56, 63; *People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1237.) The commitment may be extended beyond this time. (Pen. Code, § 1026.5, subd. (b).) It is civil in nature. (*People v. Angeletakis* (1992) 5 Cal.App.4th 963, 967-971.)

[87]Constitutionally, the commitment may not exceed the maximum time the defendant would serve if sent to state prison. (*People v. Olivas* (1976) 17 Cal.3d 236; *People v. Sandoval* (1977) 70 Cal.App.3d 73, 89; see *People v. Franklin* (1980) 102 Cal.App.3d 250; cf. Welf. & Inst. Code, § 1770.)

5. Personal detriment [§ 4.111]

Even if no *legal* adverse consequences might occur, the client personally may lose out after "winning" on appeal. Real life does not always follow legal logic. For example, sometimes it may not be to a defendant's personal and practical benefit to get a new sentencing proceeding. The same sentence may be virtually foreordained, given the facts and the judge, while having to leave prison for court may cost the client a favored job or location within the institution, or cause disruption in activities and relationships.

To prevent an "unwanted remedy," appellate counsel should contact trial counsel when needed to get a feel for probable outcomes on remand, then consult with the client about the practical considerations. In the end, as with potential legal consequences, the decision whether to seek a particular remedy or pursue the appeal at all is the *client's*. (See § 1.58 of chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," on the client's role in decision making.)

F. Federal Limitations on Greater Sentences After Appeal [§ 4.112]

Federal double jeopardy provisions do not prohibit a greater sentence after appeal. The federal right to due process, however, does protect against vindictive prosecution. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 725, overruled on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794, 798-799.) Vindictiveness against a defendant, by either a trial judge or a prosecutor, for successfully attacking the first conviction violates fundamental due process because fear of ending up worse after an appeal could deter the defendant from seeking review of a conviction. (*Pearce,* at p. 725.)

A defendant must object at resentencing on grounds of vindictiveness or risk waiving the issue. (*People v. Williams* (1998) 61 Cal.App.4th 649, 654-656.)

1. Statement of reasons for greater sentence [§ 4.113]

To protect against an inference of vindictiveness, the trial court must articulate reasons for a more severe sentence. The reasons must be based on "objective information concerning identifiable conduct on the part of the defendant" that took place after the original sentencing. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 726.) The facts on which the increased sentence is based must be put on the record, "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (*Ibid.*)

2. Presumption of vindictiveness [§ 4.114]

If adequate objective justification for the higher sentence is not provided, a presumption of vindictiveness may arise. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 726; see also *Blackledge v. Perry* (1974) 417 U.S. 21, 27; *United States v. Goodwin* (1982) 457 U.S. 368, 374; e.g., *People v. Puentes* (2010) 190 Cal.App.4th 1480 [mistried felony charge originally dismissed in interests of justice after sentence on misdemeanor, which was later reversed; reinstatement of felony charge on remand was vindictive]; but see *Alabama v. Smith* (1989) 490 U.S. 794, 803 [no basis for presumption when second sentence imposed after trial is heavier than first sentence following guilty plea, overruling *Simpson v. Rice*, companion case decided in *Pearce*].)

If the presumption does not arise or is rebutted, the defendant must affirmatively prove actual vindictiveness. (*Wasman v. United States* (1984) 468 U.S. 559, 569.)

a. How presumption may be rebutted [§ 4.115]

In order to rebut the presumption of vindictiveness, the prosecution has the burden of demonstrating "(1) the increase in charge was justified by some objective change in circumstances or in the state of evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*In re Bower* (1985) 38 Cal.3d 865, 879.)

The presumption of vindictiveness has been found rebutted when there was an intervening conviction for another offense, even if the offense was committed before the original sentencing (*Wasman v. United States* (1984) 468 U.S. 559, 571-572), and when new information was discovered about the crime or the defendant during the new trial (*Texas v. McCullough* (1986) 475 U.S. 134, 141-144; contrast *Nulph v. Cook* (9th Cir. 2003) 333 F.3d 1052, 1062 [after successful challenge to sentence, state applied different calculation method, drastically increasing sentence beyond what it had originally determined would be excessive]).

b. When presumption does not apply [§ 4.116]

The presumption of vindictiveness is limited and does not apply in all cases. (See, e.g., *Alabama v. Smith* (1989) 490 U.S. 794, 801 [no presumption when first sentence followed guilty plea and second followed a trial; overruling *Simpson v. Rice*, companion case decided in *Pearce*]; *Chaffin v. Stynchcombe* (1973) 412 U.S. 17, 26-27 [second sentence imposed by jury with no knowledge of first]; *Colten v. Kentucky* (1972) 407

U.S. 104, 116-117 [greater sentence was imposed by a second court in two-tier trial system]; *People v. Williams* (1998) 61 Cal.App.4th 649, 658-659 [no presumption where defendant's appeal was unsuccessful, People's appeal succeeded, and new sentence one year longer than original but still within terms of plea bargain].)

G. Counsel's Responsibilities Regarding Potential Adverse Consequence [§ 4.117]

Counsel has a duty to advise the client and to seek direction from the client after identifying potential adverse consequences from pursuing a particular issue or the appeal in general. The advice involves:

1. Weighing the magnitude and likelihood of potential benefits from the appeal against the magnitude and likelihood of risk [§ 4.118]

The assessment of potential benefit from the appeal includes such questions as: What relief is possible from pursuing the appeal? Given the substantive law, the applicable standards of review and prejudice, and the facts of this case, what are the chances of such relief?

The potential downside calculation includes such factors as: How much additional time or what other burdens would the client face from the adverse consequence? Is the law clear on this point, or is a contrary position arguable? How evident is the error on the face of the record? How has the court handled such errors in the past?

If there are issues offering a strong chance of significant relief, it may be worthwhile to risk a minor adverse consequence. The reverse could be true if issues are weak or would have minimal effect on the ultimate disposition and the adverse consequence is substantial.

2. Taking into account the possibility the error would be discovered and corrected even if the appeal were dismissed [§ 4.119]

The client may suffer the adverse consequence even without appealing. Errors may be detected and corrected through other mechanisms than appeal. If the consequence is probably going to occur, anyway, there is little point to giving up the appeal. However, making such a prediction is hazardous and uncertain at best.

An unauthorized sentence, for example, may come to the attention of the trial court or prosecution in later proceedings involving the same client or others, in review of files, or in a wholly unanticipated and haphazard way. The California Department of

Corrections and Rehabilitation regularly reviews inmate sentence records, and it reports errors, including recently discovered unauthorized sentences, to the trial court.[88] It is helpful to review the superior court file and obtain a copy of the most current prison records on the client's sentence, to see if the error has already been corrected – in which case the appeal poses no additional risk.[89]

3. Leaving the ultimate decision to the client [§ 4.120]

Counsel must assess these factors thoroughly and offer the client the best possible professional judgment. Since the assessment can be highly speculative, however, the decision necessarily entails rolling the dice. In the end, the *client* must serve the time or suffer any other consequence, and so the *client* must decide.

Indeed, the ultimate decision whether to pursue an appeal is always the client's. (*Jones v. Barnes* (1983) 463 U.S. 745, 751-754 ["the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"]; *In re Josiah Z.* (2005) 36 Cal.4th 664, 680-681; see also *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [client, not counsel, responsible for deciding not to pursue appeal]; *In re Martin* (1962) 58 Cal.2d 133, 136-137 [counsel not permitted to give up right to appeal without client's consent by letting it be dismissed under Cal. Rules of Court, rule 8.360(c)(5) & (6)]; *In re Alma B.* (1994) 21 Cal.App.4th 1037, 1043 [appeal without client's consent]; see generally Cal. Rules of Prof. Conduct, Rule 1.2(a).)

Counsel should advise the client of the relative risks and benefits, then have the client send a decision in writing. It is helpful to provide a form with check boxes for continuing or dismissing the appeal. Counsel should remind the client that an attorney has no authority to dismiss an appeal without the client's consent; if the client fails to respond, therefore, counsel must proceed with the appeal.

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[88]The department's detection rate is erratic. An unauthorized sentence may well be noticed when it is apparent on the face of sentencing documents, such as the abstract of judgment and probation report, which routinely go to the department. On the other hand, the department may not discover an error if the invalidity of the sentence depends on facts not observable in such records.

[89]Needless to say, in making any contact with the court, any law enforcement agencies, or the department, counsel should not divulge that the purpose is to see whether an unauthorized sentence has been corrected.

CHECKLIST OF SOME COMMON ISSUES RAISED ON CRIMINAL APPEALS [§ 4.122]

The following non-exhaustive list includes some general issues to check as part of counsel's regular review of the record.

> **NOTE:** The issues and citations are just a starting point for research. The law changes frequently, and so the checklist and law must be continuously reviewed and updated.

❑ Charge. [§ 4.123]

Confirm that the crime for which the defendant was convicted was adequately charged or is a lesser included offense of the crime charged (see *People v. Toro* (1989) 47 Cal.3d 966, dictum on unrelated point disapproved in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; see also *People v. Bailey* (2012) 54 Cal.4th 740; *People v. Macias* (2018) 26 Cal.App.5th 957; *People v. Hamernik* (2016) 1 Cal.App.5th 412) or is an attempt of the charged offense if specific intent was found (Pen. Code, § 1159; *People v. Fontenot* (2019) 8 Cal.5th 57).

❑ Demurrer. [§ 4.124]

Review any demurrer filed and the basis for the ruling on it. (See Pen. Code, § 1002 et seq.; *People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1191-1192; *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1176-1177.)

❑ Statute. [§ 4.125]

Check the statute under which the defendant was convicted.

- ▫ Does the wording of the statute at the time the offense was committed literally cover the conduct in question; was it intended to do so? (See *Fiore v. White* (2001) 531 U.S. 225.)

- Were ameliorative amendments to the statute enacted after the crime? (See *Bell v. Maryland* (1964) 378 U.S. 226, 230; *People v. Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 63 Cal.2d 740; see also *Fiore v. White* (2001) 531 U.S. 225 [later state Supreme Court decision establishing defendant's conduct did not violate statute requires defendant be freed]; cf. *People v. Brown* (2012) 54 Cal.4th 314; *People v. Floyd* (2003) 31 Cal.4th 179; see *People v. McKenzie* (2020) 9 Cal.5th 40 [defendant could take advantage of ameliorative amendments that took effect while he was appealing from subsequent revocation of his probation and imposition of sentence, despite failure to file appeal from original grant of probation].)

- Is there a federal law that might preempt the provisions of the state statute under which the defendant was convicted? (*Arizona v. United States* (2012) 567 U.S. 387; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751; *People v. Stevens* (1995) 34 Cal.App.4th 56, 58-59, 61-62; *In re Rudolfo A.* (1980) 110 Cal.App.3d 845, 849-853.)

- Was the defendant convicted under a general statute when a more specific one covers his conduct? (*In re Williamson* (1954) 43 Cal.2d 651, 654-655; see also *People v. Murphy* (2011) 52 Cal.4th 81, 86 [if general statute covers same conduct as special statute, court infers Legislature intended conduct to be prosecuted exclusively under special statute].)

- Was the statute under which the defendant was punished unconstitutionally enacted? (*People v. Armogeda* (2015) 233 Cal.App.4th 428 [Legislature could not amend a voter-enacted law in a way inconsistent with the terms and intent of that law].)

- Is the statute unconstitutionally vague? (E.g., *Johnson v. United States* (2015) __ U.S. __ [135 S.Ct. 2551] ["violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another," impermissibly vague, denies fair notice and due process].)

❑ Pleadings and proof [§ 4.126]

Look for adequate specificity in the information regarding the date of the offense, property at issue, etc. Is it clear what conduct was at issue? (*People v. Mancebo* (2002) 27 Cal.4th 735, 743 [failure to plead multiple victim circumstance precluded imposition of indeterminate terms]; *People v. Arias* (2010) 182 Cal.App.4th 1009 [failure to plead attempted murder was deliberate and premeditated required life sentence be reduced to that for unpremeditated attempted murder].) Do charges make clear defendant will be subject to an increased sentence if certain findings are made? (See *People v. Sawyers* (2017) 15 Cal.App.5th 713; *People v. Wilford* (2017) 12 Cal.App.5th 827.) Check for material variances between the pleading and the evidence at trial. Did the trial court properly allow any amendments to the information? (*People v. Lettice* (2013) 221 Cal.App.4th 139; see *People v. Rogers* (2016) 245 Cal.App.4th 1353.) Check for material variance between evidence produced at trial and evidence produced at preliminary hearing to prove any particular count. (E.g., *People v. Graff* (2009) 170 Cal.App.4th 345.) If defendant waived preliminary hearing, did the prosecution improperly amend the information? (Pen. Code, § 1009; *People v. Mora-Duran* (2020) 45 Cal.App.5th 589.)

❑ Subject matter, personal, and territorial jurisdiction [§ 4.127]

Confirm proper jurisdiction existed. Usually this is a non-issue, but it crops up in the occasional case and can be significant when it does occur. (E.g., *In re Steven R.* (2015) 241 Cal.App.4th 812.)

❑ Personal Presence [§ 4.127A]

Was defendant personally present at all proceedings in which her/his appearance was necessary to prevent interference with the opportunity for effective cross-examination and at any stage critical to the outcome and where the defendant's presence would contribute to the fairness of the procedure? (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15; see, e.g., *Kentucky v. Stincer* (1987) 482 U.S. 730, 744–745, fn. 17; *People v. Butler* (2009) 46 Cal.4th 847, 861; see also Pen. Code, §§ 977, 1043). Resentencing on remand is also a critical stage. (*People v. Cutting* (2019) 42 Cal.App.5th 344.)

❑ Change of venue. [§ 4.128]

Look for motions seeking a change of venue, usually because of prejudicial pretrial publicity. (*People v. Dennis* (1998) 17 Cal.4th 468, 523-524; *People v. Williams* (1989) 48 Cal.3d 1112, 1124-1132.)

❑ Statute of limitations [§ 4.129]

Investigate this issue when the crime was committed a substantial time before it was prosecuted. It has gained special vigor since the decision of the United States Supreme Court in *Stogner v. California* (2003) 539 U.S. 607. The relevant limitations periods are set out in Penal Code sections 799 to 805. (See also *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 370-377 [defendant can waive statute of limitations to plead guilty to lesser included offenses]; *People v. Chadd* (1981) 28 Cal.3d 739, 756-757; *People v. Doolittle* (2014) 229 Cal.App.4th 589; *People v. Simmons* (2012) 210 Cal.App.4th 778; *People v. Lynch* (2010) 182 Cal.App.4th 1262; *People v. Le* (2000) 82 Cal.App.4th 1352, 1356-1362; *People v. Lopez* (1997) 52 Cal.App.4th 233, 244-252.) Be aware that the statute may have run as to lesser offenses, even if it has not as to greater charges. (E.g., *People v. Beasley* (2003) 105 Cal.App.4th 1078; compare *People v. Meza* (2019) 38 Cal.App.5th 821 [general consent to prosecutor's packet of instructions does not forfeit statute of limitations objection] with *People v. Stanfill* (1999) 76 Cal.App.4th 1137 [acquiescence to time-barred lesser included offense instructions forfeits statute of limitations objection].)

❑ Bars to relitigation [§ 4.130]

Inquire whether some part of the case was litigated in another proceeding. The doctrines of res judicata, collateral estoppel, law of the case, or rule of consistency might apply. (See generally *People v. Mena* (2012) 54 Cal.4th 146, 166 [resolution of issue on merits by pretrial writ precludes later appellate review as law of the case]; *People v. Barragan* (2004) 32 Cal.4th 236, 250; *People v. Quarterman* (2012) 202 Cal.App.4th 1280 [collateral estoppel prevents prosecution from initiating second probation violation proceeding on same ground following failure to sustain burden of proof at first proceeding]; *People v. Howie* (1995) 41 Cal.App.4th 729, 735-736 [court determination that prior is invalid collaterally

estops later court from imposing sentence based on that prior]; but see *People v. Neely* (1999) 70 Cal.App.4th 767, 782-783 [issue forfeited if no objection made].)

❑ Multiple prosecutions and convictions [§ 4.131]

Review potential issues involving multiple prosecutions and convictions, including double jeopardy problems. Double jeopardy principles and related statutory provisions are multifaceted. (See *People v. Massie* (1998) 19 Cal.4th 550, 563-565.) Some examples include:

- Had the case previously been dismissed under Penal Code section 1387 (see also Pen. Code, § 1387.1)? (*People v. Salcido* (2008) 166 Cal.App.4th 1303.)[90]

- Was there legal necessity to justify an earlier mistrial? (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-714; *Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511.)

- Did the prosecutor deliberately provoke a mistrial in the first proceeding? (*People v. Batts* (2003) 30 Cal.4th 660.)

- Had the defendant previously been convicted or acquitted of the present charge or an offense included within it? (E.g., *Evans v. Michigan* (2013) 568 U.S. 313 [midtrial directed verdict and dismissal, based on trial court's mistake as to element of offense, was "acquittal" for double jeopardy purposes]; *People v. Fields* (1996) 13 Cal.4th 289, 299-302 [acceptance of guilty verdict on lesser included offense precludes retrial on greater]; *Stone v. Superior Court* (1982) 31 Cal.3d 503 [court must accept partial verdict of acquittal as to charged greater offense when jury has expressly indicated it has acquitted on that offense but has deadlocked on uncharged lesser included offenses][91] *People v. Pedroza* (2014) 231 Cal.App.4th 635 [because judge granted motion for new trial on grounds of insufficient

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[90]Once a court dismisses an entire case, it loses subject matter jurisdiction; unless procured by fraud, dismissal cannot be vacated, even upon stipulation by the parties. (*People v. Hampton* (2019) 41 Cal. App.5th 840.)

[91]*Blueford v. Arkansas* (2012) 566 U.S. 599 held a statement by the jury of a preliminary vote does not constitute acquittal for federal jeopardy purposes. *Stone* reached a different conclusion as to the California Constitution, and *People v. Aranda* (2019) 6 Cal.5th 1077 held *Stone* survives *Blueford*.

evidence, no retrial allowed; but order of acquittal is appealable]; *Brown v. Superior Court (People)* (2010) 187 Cal.App.4th 1511 [when jury acquitted of some charges but hung on others, at retrial, prosecutor had duty of showing renewed charges were based on different conduct and charges from those on which the jury had reached a verdict]; *People v. Sullivan* (2013) 217 Cal.App.4th 242 [where jury has reached a verdict on a substantive count, but is hung on an enhancement, the court should take the verdict on the count and declare a mistrial as to the enhancement; to discharge the jury without a verdict on the count is tantamount to an acquittal and double jeopardy is implicated].)

- Before the current proceeding, did a court find insufficient evidence to support the conviction? (*Burks v. United States* (1978) 437 U.S. 1, 18, and *People v. Hatch* (2000) 22 Cal.4th 260, 271-272 [U.S. and California Constitutions preclude retrial if trial court determines evidence was insufficient to support conviction as a matter of law, but not if court exercised its power to weigh evidence or its discretion to dismiss].)

- Was there a previous appeal in the case? (See *People v. Henderson* (1963) 60 Cal.2d 482, 495-497 [California double jeopardy and due process principles generally forbid imposition of a greater sentence on retrial or resentencing on the same charges after a successful appeal]; see § 4.92 et seq., *ante.*)

- Was the defendant convicted of both a greater offense and a lesser included one (*People v. Pearson* (1986) 42 Cal.3d 351, 355)? Or was the defendant convicted of different forms of the same offense for the same conduct (*People v. Vidana* (2016) 1 Cal.5th 632 [grand theft by larceny and embezzlement]; cf. *People v. White* (2017) 2 Cal.5th 349 [defendant may properly be convicted of both rape of an intoxicated person and rape of an unconscious person for single act of intercourse])?

- Had the defendant previously been prosecuted for a factually related offense? Penal Code sections 654 and 954 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827, require a single prosecution for all offenses in which the same act or course of conduct played a significant part. (See *People v. Goolsby* (2015) 62 Cal.4th 360; *People v. Massie* (1998) 19 Cal.4th 550, 563-565; *People v. Linville* (2018) 27 Cal.App.5th 919; *People v. Ochoa* (2016) 248 Cal.App.4th 15; *Barriga v. Superior Court* (2012) 206 Cal.App.4th 739; *In re Witcraft* (2011) 201 Cal.App.4th 659; *People v.*

Williams (1997) 56 Cal.App.4th 927, 932-934; see also *People v. Wensinger* (2012) 204 Cal.App.4th 90 [in first appeal, Court of Appeal reversed without addressing insufficiency of evidence issue, though People had conceded it; on re-trial, over objection, People re-tried count with added evidence; on second appeal, conviction reversed on double jeopardy grounds]; cf. *People v. Valli* (2010) 187 Cal.App.4th 786 [*Kellett* bar not violated when defendant prosecuted for evasive driving, which had been used as evidence of consciousness of guilt in prior murder trial in which he was acquitted].)

❑ Speedy trial [§ 4.132]

Determine whether Penal Code sections 1381 and 1389 demands were made and whether the issue of speedy trial on statutory or constitutional grounds was raised below. Pay special attention to whether prejudice on appeal can be shown. (See *Betterman v. Montana* (2016) ___ U.S. ___ [136 S.Ct. 1609, 194 L.Ed.2d 723]; *Barker v. Wingo* (1972) 407 U.S. 514, 530; *People v. Wagner* (2009) 45 Cal.4th 1039; *People v. Harrison* (2005) 35 Cal.4th 208, 225-227; *People v. Catlin* (2001) 26 Cal.4th 81, 107; *People v. Archerd* (1970) 3 Cal.3d 615, 640.) Also look for prejudicially prolonged precharging delaying, which can violate due process. (*United States v. Lovasco* (1977) 431 U.S. 783, 789; see *People v. Booth* (2016) 3 Cal.App.5th 1284.)

❑ Severance and consolidation [§ 4.133]

Review motions regarding improper joinder of offenses and defendants. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1314-1317; *People v. Morganti* (1996) 43 Cal.App.4th 643, 671-675.) Was failure to sever counts an abuse of discretion? (*Bradford*, at pp. 1314-1317; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048-1049.) Did the joinder satisfy the criteria of Penal Code section 954? Did the court's ruling deny the defendant a fair trial? (*People v. Grant* (2003) 113 Cal.App.4th 579, 583-584.)

❑ Discovery [§ 4.134]

Consider issues regarding the information disclosed, or not disclosed, to the defendant or prosecution. For example:

- ▫ Failure of district attorney to disclose favorable information. (*Kyles v. Whitley* (1995) 514 U. S. 419, 435, 437-438; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-58; *United States v. Bagley* (1985) 473 U.S. 667; *Brady v. Maryland* (1963) 373 U.S. 83; *In re Sassounian* (1995) 9 Cal.4th 535; *People v. Garcia* (2000) 84 Cal.App.4th 316, 329-330; cf. *People v. Wilson* (2013) 216 Cal.App.4th 342 [trial court knew of allegation that witness had recanted, but failed to inform parties].)

- ▫ Suppression or destruction of physical or demonstrative evidence. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [in absence of bad faith, failure to preserve potentially favorable evidence does not deny due process]; *California v. Trombetta* (1984) 467 U.S. 479, 485-489; *People v. Cooper* (1991) 53 Cal.3d 771, 810-812 [expressly adopting *Youngblood* and *Trombetta*]; see also *People v. Alvarez* (2014) 229 Cal.App.4th 761 [failure to preserve potentially exculpatory evidence].)

- ▫ Prosecution or defense failure to comply with discovery order in timely fashion. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1750, 1753-1754; see Pen. Code, § 1054 et seq.)

- ▫ *Pitchess* and other motions for previous citizen complaints made against an officer and for other types of governmental information. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534; Pen. Code, §§ 832.7 & 832.8; Evid. Code, §§ 1043-1045; see *Warrick v. Superior Court* (2005) 35 Cal.4th 1011; *People v. Mooc* (2001) 26 Cal.4th 1216; *Sisson v. Superior Court* (2013) 216 Cal.App.4th 24; *People v. Hustead* (1999) 74 Cal.App.4th 410, 415-423.)

- ▫ Failure to disclose informants. (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1736; *People v. Luera* (2001) 86 Cal.App.4th 513, 525-526.)

❑ Competence to stand trial [§ 4.135]

Examine Penal Code section 1368 issues regarding the defendant's competency to stand trial.

- ▸ CAVEAT: Be cautious in this area; the client may not *want* the remedies such an issue might offer. (See § 4.106, *ante*, on non-penal adverse consequences.)

- ▫ Was there substantial evidence of incompetence before the court, or did the court express doubt about the defendant's competence, so that section 1368

proceedings should have been held? (*People v. Rodas* (2018) 6 Cal.5th 219; *People v. Lightsey* (2012) 54 Cal.4th 668; *People v. Koontz* (2002) 27 Cal.4th 1041, 1064; *People v. Marks* (1988) 45 Cal.3d 1335, 1340-1344; see *Drope v. Missouri* (1975) 420 U.S. 162; *Pate v. Robinson* (1966) 383 U.S. 375; cf. *Moore v. Superior Court (People)* (2010) 50 Cal.4th 802 [defendant in SVP proceeding does not have due process right to be tried or civilly committed only while mentally competent]; *In re Bryan E.* (2014) 231 Cal.App.4th 385 [competence in juvenile proceedings governed by Welf. & Inst. Code, § 709]; see also *United States v. Gillenwater* (9th Cir. 2013) 717 F.3d 1070 [defendant has constitutional right to testify at competency hearing; counsel may not waive it].)

- ▫ Consider also the remedy of a retrospective competency hearing. (*People v. Rodas* (2018) 6 Cal.5th 219; *People v. Lightsey* (2012) 54 Cal.4th 668, 710-711; *People v. Ary* (2011) 51 Cal.4th 510, 520, fn. 3.)

- ❑ Admonitions and waivers of rights [§ 4.136]

Check all pleas of guilty, admissions of priors, waivers of jury trial, and submission on the preliminary hearing transcript.

- ▫ Was the defendant specifically admonished on the constitutional rights to a right to jury trial, to confrontation, against self-incrimination?[92] Do both the advisement and the defendant's personal waiver appear explicitly on the record? (See *People v. Sivongxxay* (2017) 3 Cal.5th 151; *People v. Wright* (1987) 43 Cal.3d 487, 493-495; see *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *People v. Howard* (1992) 1 Cal.4th 1132, 1178-1179 [prejudice from failure to give explicit admonitions judged by totality of circumstances indicating voluntary and intelligent plea];[93] *In re Tahl* (1969) 1 Cal.3d 122, 130-133.[94])

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[92]See § 2.46 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

[93]See *People v. Farwell* (2018) 5 Cal.5th 295 [*Howard* applies to "silent" record].

[94]*Mills v. Mun. Court for San Diego Judicial Dist.* (1973) 10 Cal.3d 288, 306, which held a misdemeanor defendant may plead guilty through counsel, disapproved any implication in *Tahl* inconsistent with this holding.

- Was the defendant adequately advised of the consequences of the plea?[95] (*In re Resendiz* (2001) 25 Cal.4th 230, 243, fn. 7; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) If the defendant is not a citizen, did the trial court advise that conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization? (Pen. Code, § 1016.5.)

- Did the trial court honor the defendant's right to enter a plea of his or own choice or put on a defense, despite counsel's disagreement with the decision? (*People v. Frierson* (1985) 39 Cal.3d 803 [right to defense at guilt phase]; *People v. Rogers* (1961) 56 Cal.2d 301 [right to enter plea personally]; Pen. Code, § 1018 [plea to be made personally by defendant]; Cal. Rules of Court, rule 5.778 [right to plead no contest without consent of counsel]; cf. *People v. Alfaro* (2007) 41 Cal.4th 1277, 1298-1300; *People v. Chadd* (1981) 28 Cal.3d 739 [no right to plead guilty to capital offense without counsel's consent, as required by Pen. Code, § 1018].)

- Were defendant's pleas consistent? (*People v. John* (2019) 36 Cal.App.5th 168 [pleas of guilty and not guilty by reason of insanity irreconcilable; plea bargain encompassing both unauthorized].)

- Did the court properly find a factual basis for the plea? (Pen. Code, § 1192.5; see *People v. v. Palmer* (2013) 58 Cal.4th 110.)

- Did the trial court inform the defendant before the plea that its approval is not binding, that the court may withdraw its approval later, and that, if it does, "the defendant shall be permitted to withdraw his plea if he desires to do so . . . "? (Pen. Code, § 1192.5; *People v. Cruz* (1988) 44 Cal.3d 1253.)

- Was the defendant adequately advised of the consequences of a plea under *People v. Vargas* (1990) 223 Cal.App.3d 1107, providing for a specified sentence if the defendant appeared for sentencing and a heavier one if he or she did not?

- Was the defendant advised of the right to a jury trial on civil commitment and personally waive it? (Cal. Const., art. I, § 16; *People v. Blackburn*

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[95]See § 2.47 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

(2015) 61 Cal.4th 1113 [MDO commitment extension]; *People v. Tran* (2015) 61 Cal.4th 1160 [NGI recommitment].)

❑ Representation [§ 4.137]

Review possible denials of or infringements on the right to counsel or the right to self-representation at any stage. For example:

▫ Right to self-representation.

- General right to self-representation at trial. (*Faretta v. California* (1975) 422 U.S. 806, 818; see *People v. Butler* (2009) 47 Cal.4th 814; *People v. Burgener* (2009) 46 Cal.4th 231, 243-245; *People v. Lawrence* (2009) 46 Cal.4th 186; *People v. Marshall* (1996) 13 Cal.4th 799, 827-828; *People v. Horton* (1995) 11 Cal.4th 1068, 1107-1111; *People v. Miller* (2007) 153 Cal.App.4th 1015; *People v. Robinson* (1997) 56 Cal.App.4th 363, 369-370; *People v. Truman* (1992) 6 Cal.App.4th 1816, 1821-1824; cf. *People v. Wrentmore* (2011) 196 Cal.App.4th 921, 931, and *People v. Williams* (2003) 110 Cal.App.4th 1577, 1588 [right to counsel and thus to self-representation in Mentally Disordered Offender proceeding is statutory].)

- Standard for ability to represent self. (*Indiana v. Edwards* (2008) 554 U.S. 164 [state law may constitutionally require higher standard of competence to represent self than to stand trial]; cf. *People v. Johnson* (2012) 53 Cal.4th 519 [California courts may deny self-representation to mentally ill defendant who has been found competent to stand trial but is unable to present a basic defense by self, if permitted by *Faretta*[96]]; *People v. Gardner* (2014) 231 Cal.App.4th 945.)

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[96]Under *Johnson*, the test for self-representation is higher than competence to stand trial. It asks whether the defendant suffers from a severe mental illness to the point he or she cannot carry out the basic tasks needed to present the defense without the help of counsel. (53 Cal.4th at p. 530.)

- Right to enter a plea of own choice or put on a defense, despite counsel's disagreement with the decision. (*People v. Frierson* (1985) 39 Cal.3d 803 [right to defense at guilt phase]; *People v. Rogers* (1961) 56 Cal.2d 301 [right to enter plea personally]; Pen. Code, § 1018 [plea to be made personally ability to represent self]; Cal. Rules of Court, rule 5.778 [right to plead no contest without consent of counsel]; cf. *People v. Alfaro* (2007) 41 Cal.4th 1277, 1298-1300; *People v. Chadd* (1981) 28 Cal.3d 739 [no right to plead guilty to capital offense without counsel's consent, as required by Pen. Code, § 1018].)

- Right to counsel after choosing self-representation. (*People v. Bauer* (2012) 212 Cal.App.4th 150 [right to advisement of right to counsel at probation revocation hearing after representing self at time guilty plea entered]; cf. *Marshall v. Rodgers* (2013) 569 U.S. 58 [state court determination that right to counsel was not violated by denying counsel to file new trial motion was not contrary to or unreasonable application of federal law, after defendant had waived counsel on three occasions].)

- Right to counsel at all critical stages of proceedings. (*United States v. Wade* (1967) 388 U.S. 218 [post-indictment lineup conducted for identification purposes]; *People v. Ayala* (2000) 24 Cal.4th 243 [*Batson-Wheeler* type of motion]; *People v. Young* (2017) 17 Cal.App.5th 451 [excusal of juror without sufficient information he was unable to perform duties].)

- Right to retained counsel of choice. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140; *Wheat v. United States* (1988) 486 U.S. 153, 159-163; *People v. Ortiz* (1990) 51 Cal.3d 975, 983*; People v. Crovedi* (1966) 65 Cal.2d 199; *People v. Baylis* (2006) 139 Cal.App.4th 1054).

- Substitution of counsel.

  - Duty of the court to make an inquiry when the defendant complains of ineffective assistance of appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-125; cf. *Smith v. Superior Court* (1968) 68 Cal.2d 547 [inappropriate removal of appointed counsel]; *People v. Sanchez* (2011) 53 Cal.4th 80 [when defendant seeks to withdraw

plea on basis of ineffective assistance of counsel, proper remedy is *Marsden* hearing, not appointment of temporary successor counsel to investigate]; *People v. Hill* (2013) 219 Cal.App.4th 646 [*Marsden* applicable in SVPA proceedings].)

- Right to discharge retained counsel without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983; *People v. Lara* (2001) 86 Cal.App.4th 139, 153-164 [motion to discharge retained counsel must be granted if timely and is not subject to *Marsden* standards for replacement of appointed counsel].)

- Ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668; see also *Padilla v. Kentucky* (2010) 559 U.S. 356.)

- Conflicts of interest.[97] These come in many forms (see *People v. Bonin* (1989) 47 Cal.3d 808, 833-836), including:

  - Counsel's representation of a co-defendant or witness. (*Wheat v. United States* (1988) 486 U.S. 153, 159-163; *People v. Jones* (2004) 33 Cal.4th 234*; People v. Mroczko* (1983) 35 Cal.3d 86, 115-116; *People v. Baylis* (2006) 139 Cal.App.4th 1054; *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 897-899.)

  - Counsel's accepting a new position with a prosecuting agency without disclosing it to the client. (*People v. Marshall* (1987) 196 Cal.App.3d 1253, 1256-1259.)

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[97]California Rules of Professional Conduct, rule 1.7 allows for representation by a conflicted attorney if the defendant consents in writing after full disclosure. However, it is doubtful that a client can ever waive the duty to practice competently; if the conflict is fundamental, the consent may be ineffectual. (*Wheat v. United States* (1988) 486 U.S. 153, 159-163; *People v. Jones* (2004) 33 Cal.4th 234*; In re A.C.* (2000) 80 Cal.App.4th 994; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893; San Diego County Bar Association Committee on Legal Ethics, Opinion No. 1995-1, section 4; Los Angeles County Bar Association Formal Opinion No. 471.)

- Arguing counsel's own ineffectiveness. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1139; *People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-55; *In re Fountain* (1977) 74 Cal.App.3d 715, 719.)

- Entering into a contract to write a book about the case. (*People v. Bonin* (1989) 47 Cal.3d 808, 836.)

❑ Jury selection [§ 4.138]

Issues in this area might include challenges to jurors and the exercise of peremptory challenges by either the prosecutor or the defense attorney. (*Foster v. Chatman* (2016) ___ U.S. ___ [136 S.Ct. 1737, 195 L.Ed.2d 1]; *Johnson v. California* (2005) 545 U.S. 162; *Powers v. Ohio* (1991) 499 U.S. 400, 402; *Batson v. Kentucky* (1986) 476 U.S. 79.) Substitution of a juror ordered or denied at any time during trial or deliberations is also potentially important. (E.g., *People v. Garcia* (2012) 204 Cal.App.4th 542.) See *People v. Gutierrez* (2017) 2 Cal.5th 1150, on the constitutional duties of counsel, trial courts, and appellate courts.

❑ Trial process and conditions [§ 4.139]

- Fair and impartial judge. (*Gray v. Mississippi* (1987) 481 U.S. 648; *Tumey v. Ohio* (1927) 273 U.S. 510; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Brown* (1993) 6 Cal.4th 322, 333; *People v. Freeman* (2007) 147 Cal.App.4th 517.)

- Fair and impartial jury. (*Irvin v. Dowd* (1961) 366 U.S. 717 [change of venue]; *People v. Nesler* (1997) 16 Cal.4th 561, 678 [outside influence on juror]; see also *Godoy v. Spearman* (9th Cir., 2017) 861 F.3d 956 en banc.)

- Public trial. (*Waller v. Georgia* (1984) 467 U.S. 39; *People v. Woodward* (1992) 4 Cal.4th 376; *People v. Baldwin* (2006) 142 Cal.App.4th 1416.)

- Presence of defendant. (*Riggins v. Nevada* (1992) 465 U.S. 127, 137; *People v. Freeman* (1994) 8 Cal.4th 450; *People v. Concepcion* (2006) 141 Cal.App.4th 872.)

- Shackling or jail garb. (*Deck v. Missouri* (2005) 544 U.S. 622; *Estelle v. Williams* (1976) 425 U.S. 501; *People v. Mar* (2002) 28 Cal.4th 1201;

People v. Cox (1991) 53 Cal.3d 618, 651; *People v. Duran* (1976) 16 Cal.3d 282.)

- Ability to present defense, access to compulsory process. (*Ake v. Oklahoma* (1985) 470 U.S. 68 [appointment of experts for defense]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [cross-examination of person who repudiated confession to crime defendant accused of]; *People v. Treadway* (2010) 182 Cal.App.4th 562 [plea agreement between prosecutor and co-defendant forbidding co-defendant from testifying at defendant's trial denied right to compulsory process and due process right to present a defense].)

- Waiver of jury trial. (Cal. Const., art. I, § 16; *People v. Blackburn* (2015) 61 Cal.4th 1113 [mentally disordered offender commitment extension]; *People v. Tran* (2015) 61 Cal.4th 1160 [not guilty by reason of insanity recommitment].)

- Right not to be compelled to testify. (*Allen v. Illinois* (1986) 478 U.S. 364, 368; *Hudec v Superior Court* (2015) 60 Cal.4th 815 [not guilty by reason of insanity recommitment proceeding]; *People v. Dunley* (2016) 247 Cal.App.4th 1438 [mentally disordered offender]; *People v. Curlee* (2015) 237 Cal.App.4th 709, 716-722 [sexually violent predator proceeding].)

❑ Motions [§ 4.140]

Review motions that were made and consider whether others should have been made. Be sure the trial court's ruling is supported by the record. (See *People v. Perez* (2015) 233 Cal.App.4th 736.) The possibilities are many, but some common motions to be on the alert for include:

- Motions in limine.

- Penal Code section 1385 motion to dismiss, including Three Strikes issues. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

- Defense request for a continuance. (*People v. Mickey* (1991) 54 Cal.3d 612, 660-661.)

- Penal Code section 1538.5 motion to suppress evidence on Fourth Amendment search and seizure grounds. Make sure trial counsel appropriately moved to suppress and scrutinize the court's reasoning in denying the motion. (*People v. Camacho* (2000) 23 Cal.4th 824, 829-837; *People v. Robles* (2000) 23 Cal.4th 789, 794-795.)

- Motion to suppress the defendant's extrajudicial statements as involuntary or as violative of *Miranda.*[98] (U.S. Const., amends. V, XIV; Cal. Const., art. I, § 15; Evid. Code, §§ 402-405, 1220; *Miranda v. Arizona* (1966) 384 U.S. 436; but see *United States v. Patane* (2004) 542 U.S. 630, 639-640 [failure to give *Miranda* warning does not require exclusion of physical evidence that is fruit of voluntary statement].)[99]

- Defense motion for a physical lineup under *Evans v. Superior Court* (1974) 11 Cal.3d 617. (*People v. Mena* (2012) 54 Cal.4th 146, 168-169.)

- Motion for mistrial. (*People v. Silva* (2001) 25 Cal.4th 345, 372-374.)

- Motion for judgment of acquittal. (Pen. Code, §§ 1118, 1118.1; *People v. Belton* (1979) 23 Cal.3d 516, 520-521; *People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.) A motion for acquittal is a red flag for a possible insufficiency of the evidence issue.

- Motion for new trial. (Pen. Code, § 1181.)

❑ Evidentiary errors [§ 4.141]

Reflect on each piece of evidence that was introduced against or by the defendant, especially any that was contested, and note whether a timely objection was made (see Evid. Code, § 353). Why was the evidence introduced? Should it have been excluded or included or limited? Just a few among the many possible areas of evidentiary issues might be:

- Evidence Code section 352: Did the prejudicial effect outweigh the probative value? (*People v. Lewis* (2001) 25 Cal.4th 610, 641-642; *People v.*

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[98]A confession issue is not preserved if the defendant pleads guilty. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896; cf. Pen. Code, § 1538.5, subd. (m) [search and seizure issue].) However, if the trial court induced a plea by representing that the issue is appealable, the plea itself can be challenged. (*DeVaughn*, at p. 896.) If the plea was induced by counsel's erroneous advice as to appealability, ineffective assistance of counsel may be argued.

[99]Error in admitting a confession is prejudicial unless it proved harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166-1167.)

Anderson (2001) 25 Cal.4th 543, 591-593; *People v. Williams* (2018) 23 Cal.App.5th 396; *People v. Jandres* (2014) 226 Cal.App.4th 340.)

- Exclusion of exculpatory and impeachment evidence offered by defense. (*Davis v. Alaska* (1974) 415 U.S. 308; *Jackson v. Nevada* (9th Cir. 2012) 688 F.3d 1091.)

- Exclusion of defense evidence of possible third party culpability. (*Holmes v. South Carolina* (2006) 547 U.S. 319; *People v. Robinson* (2005) 37 Cal.4th 592, 625-626; *People v. Hall* (1986) 41 Cal.3d 826, 833; see Evid. Code, § 352.)

- Evidence of similar conduct on the part of defendant other than the specific conduct for which he is on trial. (See Evid. Code, §§ 1101, 1108, 1109; *People v. Kipp* (1998) 18 Cal.4th 349, 369-373; *People v. Miller* (2000) 81 Cal.App.4th 1427, 1447-1449; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 910-922; *People v. Lopez* (2011) 198 Cal.App.4th 698, 713-714.)

- Improper coercion of witnesses. (*People v. Williams* (2010) 49 Cal.4th 405, 452–454; *People v. Boyer* (2006) 38 Cal.4th 412, 444.)

- Admission of defendant's prior convictions for purpose of impeachment. (See *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1435-1436; *People v. Vera* (1999) 69 Cal.App.4th 1100, 1103. In order to raise the issue on appeal, the defendant must testify and actually be impeached. (*People v. Collins* (1986) 42 Cal.3d 378, 383-385.)

- Privileges that were claimed or that should have been claimed, such as the privilege against self-incrimination or the marital or attorney-client privilege. (Evid. Code, § 900 et seq.)

- Hearsay and confrontation issues. (Evid. Code, § 1200 et seq.; *Crawford v. Washington* (2004) 541 U. S. 36, 53-54; see *Williams v. Illinois* (2012) 567 U.S. 50; *Bullcoming v. New Mexico* (2011) 564 U.S. 647; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Whorton v. Bockting* (2007) 549 U.S. 406; *Davis v. Washington* (2006) 547 U.S. 813; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284 [cross-examination of person who repudiated confession to crime defendant accused of]; see also *People v. Sanchez* (2016) 63 Cal.4th 665; *People v. Dungo* (2012) 55 Cal.4th 608, *People v. Lopez* (2012) 55 Cal.4th 569, and *People v. Geier*

(2007) 41 Cal.4th 555; *Jackson v. Nevada* (9th Cir. 2012) 688 F.3d 1091; see also *People v. Hopson* (2017) 3 Cal.5th 424.)

- Foundational requirements and prerequisites for the admissibility of evidence. (E.g., Evid. Code, §§ 400 et seq. [preliminary facts], 700 et seq. [competence of witnesses], 1222, subd. (b) and 1223, subd. (b) [certain admissions].)

- Extrajudicial statement of non-testifying co-defendant. (E.g., *Bruton v. United States* (1968) 391 U.S. 123, 132; *People v. Aranda* (1965) 63 Cal.2d 518, 526-527.)

- Accomplices' testimony. (Pen. Code, § 1111; CALCRIM Nos. 334, 335; CALJIC No. 3.10 et seq.)

- Expert witnesses, opinion testimony, and scientific evidence. (Evid. Code, §§ 720 et seq., 800 et seq.; *People v. Sanchez* (2016) 63 Cal.4th 665; *People v. Julian* (2019) 34 Cal.App.5th 878 [expert opinion re statistical probabilities of false abuse allegations, improper]; *People v. Perez* (2017) 18 Cal.App.5th 598 [gang-related matters]; *People v. Cortes* (2011) 192 Cal.App.4th 873.)

- Writings. (Evid. Code, § 1400 et seq.)

- "Testimony" through repeated leading questions without meaningful witness responses. (*People v. Murillo* (2014) 231 Cal.App.4th 448.)

❑ Prosecutorial misconduct [§ 4.142]

Consider whether the prosecutor may have committed misconduct. This issue often arises in final argument but also occurs in examination of witnesses and other facets of the trial. Examples include:

- Interference with right to testify or present defense. (*In re Martin* (1987) 44 c3 1, 30 [arresting or threatening defense witnesses]; *People v. Force* (2019) 39 Cal.App.5th 506 [suggesting potential perjury prosecution if defendant were to testify].)

- Comment on defendant's post-arrest silence after *Miranda* warnings given. (*Doyle v. Ohio* (1976) 426 U.S. 610, 619-620.)

- Comment on defendant's failure to testify or fail to present evidence. (*Griffin v. California* (1965) 380 U.S. 609, 613-615; *People v. Woods* (2006) 146 Cal.App.4th 106, 114.)

- Referring to facts not in evidence or vouching for witness. (*People v. Hill* (1998) 17 Cal.4th 800, 819-820; *People v. Woods* (2006) 146 Cal.App.4th 106, 113, 115-116.)

- Derogatory treatment of defendant and counsel. (*People v. Hill* (1998) 17 Cal.4th 800, 819-820; *People v. Woods* (2006) 146 Cal.App.4th 106, 113, 116-117.)

- Appeals to passion or prejudice. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1056-1058; *People v. Vance* (2010) 188 Cal.App.4th 1182 [invocation of "Golden Rule," asking the jury to put themselves in shoes of victim].)

- Deliberately provoking mistrial. (*People v. Batts* (2003) 30 Cal.4th 660.)

- Urging jurors to preserve civil order, deter future lawbreaking, "send a message" about a current crisis, or accomplish some goal unrelated to the defendant's own guilt or innocence. (*United States v. Sanchez* (9th Cir.) 659 F.3d 1252; cf. *People v. Martinez* (2010) 47 Cal.4th 911, 965-966 [no misconduct in imploring jury to send a message to the community to "restore the confidence and the trust" in system when determining whether to impose capital punishment].)

- Mischaracterizing the law. (*People v. Centeno* (2015) 60 Cal.4th 659 [inaccurate characterization of reasonable doubt and use of misleading visual aids].)

- Withholding immunity with the deliberate intention of distorting the factfinding process in an egregious, unfair, deceptive, or reprehensible way. (See *People v. Masters* (2016) 62 Cal.4th 1019, 1051-1053.)

❑ Jury instructions [§ 4.143]

Scrutinize the instructions with particular care. (See § 4.22 et seq. of this chapter, *ante*.) Instructional error is one of the most fruitful areas and one of the most

successful on appeal.[100] Counsel's review should include the written instructions selected to be given, those rejected, the judge's oral rendition, any printed version sent into the jury room, and any given in response to a jury query.

- Did the instructions fully and accurately state the basic elements of the offenses?

- Did the instructions fully and accurately state the intent and conduct requirements for various participants, such as perpetrators and aider-abettors? (*People v. Johnson* (2016) 62 Cal.4th 600; *People v. McCoy* (2001) 25 Cal.4th 1111.)

- Did the instructions properly set forth the applicable burdens of proof, especially the most fundamental one, proof of guilt beyond a reasonable doubt?

- Were any instructions misleading or confusing? Were technical terms defined?

- Were all applicable sua sponte instructions given?

- Were appropriate unanimity instructions (e.g., CALCRIM Nos. 3500-3502) given?

- Was there evidence to support the giving of each instruction?

- Were special instructions required? Examples might be cautionary instructions, limiting instructions, and instructions relating to accomplices (Pen. Code, § 1111; *People v. Davis* (2005) 36 Cal.4th 510, 547), expert witnesses, and corpus delicti requirements (e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1180).

- Were appropriate instructions on lesser included offenses given? (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007-1008; *People v. Waidla* (2000) 22

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[100]Many instructional errors can be raised despite lack of objection in the trial court. (See Pen. Code, § 1259: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.")

Cal.4th 690, 733-734; see *People v. Breverman* (1998) 19 Cal.4th 142, 154-163; cf. *People v. Bailey* (2012) 54 Cal.4th 740.)

- ▫ Did the trial court properly instruct on how to return a verdict when there are greater and lesser charges (*People v. Marshall* (1996) 13 Cal.4th 799; *People v. Fields* (1996) 13 Cal.4th 289; *People v. Kurtzman* (1988) 46 Cal.3d 322; *Stone v. Superior Court* (1982) 31 Cal.3d 503; see *People v. Olivas* (2016) 248 Cal.App.4th 758)?

- ▫ Did the instructions adequately put forth the defense theory of the case?

- ▫ Were instructions given over defense objection? (See *People v. Mendez* (2018) 21 Cal.App.5th 654 [considering consequences of verdict and treatment options]; *People v. Jo* (2017) 15 Cal.App.5th 1128 [inconsistent affirmative defense].) Were defense instructions refused?

- ▫ Did the court respond appropriately – in terms of both procedure and substance – to any jury questions during deliberations? (See *People v. Fleming* (2018) 27 Cal.App.5th 754 [when jury asks question during deliberation, a technically correct statement of law in response that does not correctly instruct on the subject of query, requires reversal]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 [jury's request for clarification is signal jury believes are this is critical issue; trial court must treat seriously].)

❑ Jury deliberations [§ 4.144]

Watch for any jury notes and the answers given, as well as discussions among the parties on the appropriate response. Look for other unusual occurrences during jury deliberations, such as juror misconduct (e.g., *Remmer v. United States* (1954) 347 U.S. 227), and check with trial counsel. Examine any substitution of one or more jurors during deliberations. Were these matters raised in a motion for a new trial? (See *People v. Nelson* (2016) 1 Cal.5th 513 [questions invading deliberative process]; *People v. Johnson* (2013) 222 Cal.App.4th 486 [remand for release of jurors' identifying information where declarations established jurors' hearsay that they considered defendant's failure to testify in reaching guilty verdict]; see also *People v. Solorio* (2017) 17 Cal.App.5th 398 [prosecution failed to rebut presumption of prejudice from jurors' discussion of why defendant did not testify, when topic came up several times during deliberations].)

❑ Rendering of verdict [§ 4.144A]

Were the correct procedures for receiving and recording a verdict observed? Did the jury follow the rules on lesser included offenses, alternative verdicts, degrees, enhancements, etc.? Did the judge properly handle any irregularities or ambiguity in the way the verdicts were returned? Was the jury polled correctly? Were all of the jurors present? (E.g., *People v. Bailey* (2018) 27 Cal.App.5th 376; *People v. Brown* (2016) 247 Cal.App.4th 211; *People v. Garcia* (2012) 204 Cal.App.4th 542.)

❑ Sufficiency of the evidence. [§ 4.145]

Review the evidence on which the conviction rested, to determine whether it meets constitutional and statutory requirements.

- Could a reasonable trier of fact find each element of each offense proven beyond a reasonable doubt? (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; *People v. Mayfield* (1997) 14 Cal.4th 668, 767-769.)

- Did the trial court improperly refuse to acquit at the close of the prosecution's case?[101] (Pen. Code, §§ 1118, 1118.1; see *People v. Hatch* (2000) 22 Cal.4th 260, 268; *People v. Lines* (1975) 13 Cal.3d 500, 505; *People v. Belton* (1979) 23 Cal.3d 516, 520-521; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 729-732; *People v. Valerio* (1970) 13 Cal.App.3d 912, 919-920.) The test is whether, given "'the evidence [at the time of the motion], including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'" (*Lines*, at p. 505.)

- Were special evidentiary standards met – for example, corroboration of an accomplice's testimony under Penal Code section 1111 and corpus delicti requirements (e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161 [evidence independent of defendant's statements required for conviction])?

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[101]To raise the issue on appeal, the defendant must have made a motion under Penal Code section 1118 or 1118.1 (court and jury trial, respectively). (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.)

❑ Motion for a new trial (Pen. Code, § 1181) [§ 4.146]

Scrutinize the motion, its factual and legal grounds, and the reasons for the court's ruling. This is often a valuable clue to major issues in the case.

- If one ground was that the verdict was against the weight of the evidence under Penal Code section 1181, subdivision 6, determine whether the court used the correct standard. A weight of the evidence question tends to be confused with the question of legal insufficiency. The former is easier for the defendant to show. (See *People v. Robarge* (1953) 41 Cal.2d 628; *People v. Dickens* (2005) 130 Cal.App.4th 1245.)

- If the trial court reduced the offense on the ground under Penal Code section 1181, subdivision 6, make sure the lesser offense is in fact included in the crime of which the jury convicted the defendant. (See *People v. Bailey* (2012) 54 Cal.4th 740 [court may not reduce jury verdict of escape to attempted escape, because latter has an element – specific intent – the former does not have].)

- Ineffective assistance of counsel as non-statutory ground. (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.)

❑ Sentencing [§ 4.147]

Analyze every aspect of the sentence and the sentencing procedures meticulously. Errors in sentencing are quite common. A few issues of the many possible issues to investigate include:

- Did the sentence comply with statutory and rule provisions as to selection of prison vs. probation; the lower, middle, or upper term; concurrent vs. consecutive sentences; enhancements (Pen. Code, § 1170 et seq.; Cal. Rules of Court, rule 4.401 et seq.); Three Strikes sentences (Pen. Code, §§ 667, 1170.12); conditions of probation; restitution orders; and Penal Code section 654 applications? (See *People v. Ahmed* (2011) 53 Cal.4th 156 [how multiple enhancements interact when they are attached to one offense].)

- Did the court abuse its discretion in making any of these decisions? Was the court aware of the breadth of its sentencing discretion?

- Has the statutory punishment changed since the time the offense was committed?

  - If it has been increased, the defendant cannot receive a greater sentence than it was at the time of the commission of the offense. (*Calder v. Bull* (1798) 3 U.S. 386, 390-391 [describing ex post facto law]; see also *Peugh v. United States* (2013) 569 U.S. 530 [imposing new, longer guideline sentence promulgated after date of offense is ex post facto violation]; *Collins v. Youngblood* (1990) 497 U.S. 37, 42; but see *People v. Alford* (2007) 42 Cal.4th 749 [court security fee imposed under Pen. Code, § 1465.8 is not criminal penalty and does not violate prohibition against ex post facto laws].)

  - If it has been reduced, the defendant normally should get the benefit of the change. (See *Bell v. Maryland* (1964) 378 U.S. 226, 230; *People v. Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 63 Cal.2d 740; cf. *People v. Floyd* 31 Cal.4th 179.)

- Were the correct procedures used at sentencing?

  - If a guilty plea case, did the judge who took the plea also do the sentencing? (*In re K.R.* (2017) 3 Cal.5th 295; *People v. Arbuckle* (1978) 22 Cal.3d 749.)

  - Was the proceeding timely? (Pen. Code, § 1381; *People v. Wagner* (2009) 45 Cal.4th 1039, 1056.)

  - Did the trial court provide all required statements of reasons?

  - Was counsel present?

  - Did the defendant have a chance to address the court? (See Pen. Code, §§ 1200, 1201; compare *People v. Evans* (2008) 44 Cal.4th 590 [statutory right must be exercised before judgment is imposed, be under oath, and be subject to cross-examination].)

  - Did the court state that it had read the probation officer's report?

- Did the procedures comply with *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New*

Jersey (2000) 530 U.S. 466?[102] (See also *People v. Gallardo* (2017) 4 Cal.5th 120; see *Descamps v United States* (2013) 570 U.S. 254.)

- ▫ Did the sentence violate the constitutional prohibition against cruel and unusual punishment?

- ▫ If the offense was committed when the defendant was a juvenile and the sentence was equivalent to life without possibility of parole, was there a chance for the defense to present evidence on the mitigating factors of youth for an eventual youthful offender parole hearing? (*People v. Franklin* (2016) 63 Cal.4th 261.) If the defendant is not eligible for such a hearing, does the sentence constitute cruel and unusual punishment? (*People v. Contreras* (2018) 4 Cal.5th 349.)

❑ Correspondence of charge, conviction, and sentence [§ 4.148]

Compare the information, jury verdict, oral pronouncement of judgment, and abstract of judgment. Do they all correspond?

❑ Custody credits [§ 4.149]

Recheck all custody credits awarded. Multiple offenses, whether in the same or different proceedings (Pen. Code, § 669), parole or probation holds and revocations, and a variety of statutory provisions often make computation of credits confusing.[103] (E.g., *People v. Brown* (2012) 54 Cal.4th 314.) Penal Code section 1237.1 requires an application in the trial court for correction of presentence custody credits as a prerequisite to raising the issue as the sole one on appeal.[104]

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[102]See articles at http://www.adi-sandiego.com/practice/pract_articles.asp under BLAKELY/ CUNNINGHAM/ BLACK II.

[103]See further discussion in § 4.42, *ante*, and §§ 2.13, 2.25, and 2.71 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

[104]The requirement applies only to minor ministerial corrections, such as mathematical error, not legal error; a legal issue regarding custody credits may be raised as a single issue without first seeking correction in the superior court. (*People v. Delgado* (2012) 210 Cal.App.4th 761.)

❑ Fines and fees [§ 4.149A]

- Confirm that all fines, fees, and similar monetary assessments have been imposed correctly. This area is a frequent source of error because it is changing rapidly. It is also a source of frequent adverse consequences, because trial courts easily overlook mandatory monetary assessments.[105]

- Penal Code section 1237.2 requires a application in the trial court for correction of such assessments as a prerequisite to raising the issue as the sole one on appeal.

- Determine whether the court considered the defendant's ability to pay. (*People v. Duenas* (2019) 30 Cal.App.5th 1157.)

❑ Restitution [§ 4.149B]

- Was notice given of the amount sought? (*People v. Foster* (1993) 14 Cal.App.4th 939.)

- Was defendant present? If not, see Penal Code section 977.

- Was the evidence substantial to support the award? (*People v. Thygesen* (1999) 69 Cal.App.4th 988.) Was the victim's economic loss incurred as a direct result of the defendant's criminal behavior? (Pen. Code, § 1202.4; *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1508.)

- Did the trial court make a clear statement of the calculation method? (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664.) Did the trial court take into account the time value of money in considering a lump sum payment versus a series of fractional payments spread out over time? (*People v. Pangan* (2013) 213 Cal.App.4th 574, 581.)

- For restitution orders against a juvenile for graffiti, did the orders comply with the tailored statutory scheme (Welf. & Inst. Code, §§ 742.14 & 742.16)? (*Luis M. v. Superior Court* (2014) 59 Cal.4th 300.)

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[105]The Central California Appellate Program website has a useful fines chart that can assist counsel. https://www.capcentral.org/criminal/crim_fines.asp

- Did the trial court have jurisdiction to modify the restitution amount? (See, e.g., *People v. Waters* (2015) 241 Cal.App.4th 822; *Hilton v. Superior Court* (2014) 224 Cal.App.4th 47 [trial court did not have jurisdiction to modify defendant's probation to impose additional restitution after defendant's probationary term had expired].)

- Was a separate notice of appeal filed if the restitution hearing was post-judgment? (*People v. Denham* (2014) 222 Cal.App.4th 1210.) If not, and more than 60 days have passed since the order, a petition or motion seeking *In re Benoit* (1973) 10 Cal.3d 72 relief may be necessary.

– APPENDIX B [§ 4.150] –

EXAMPLES OF UNAUTHORIZED SENTENCES [§ 4.151]

Listed below are illustrations of unauthorized sentences in the defendant's favor that might result in an increased sentence if discovered in an appeal. Counsel should consider developing a supplemental checklist and adding to it as new examples of unauthorized sentences arise.

❑ Failure either to impose sentence or dismiss a charge for which the defendant was convicted [§ 4.152]

People v. Taylor (1971) 15 Cal.App.3d 349, 352-353, fn. 2.

❑ Sentence on uncharged lesser offense without the defendant's consent [§ 4.153]

People v. Serrato (1973) 9 Cal.3d 753, 762-763, overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Cabral* (1975) 51 Cal.App.3d 707, 717.

❑ Sentence not specified in the applicable statute [§ 4.154]

People v. Pitmon (1985) 170 Cal.App.3d 38, 44, fn. 2 (prison term other than one of statutory alternatives); *People v. Superior Court (Buckbee)* (1931) 116 Cal.App. 412, 413-414 (county jail rather than state prison sentence).

❑ Probation granted although prohibited by law [§ 4.155]

Penal Code section 1203.06 et seq; *People v. Brown* (1959) 172 Cal.App.2d 30, 35; *In re Martin* (1947) 82 Cal.App.2d 16, 18.

❑ Mandatory consecutive sentence error [§ 4.156]

- Concurrent sentence when the law mandates it be consecutive: *People v. Miles* (1996) 43 Cal.App.4th 364, 367-371 (Three Strikes scheme); *People v. Garrett* (1991) 231 Cal.App.3d 1524, 1528 (two-year "on-bail" enhancement under Pen. Code, § 12022.1); cf. *People v. Scott* (1993) 17 Cal.App.4th 1383, 1384 (escape).

- Imposing one-third the middle term instead of mandatory full consecutive sentence: *People v. Pelayo* (1999) 69 Cal.App.4th 115, 122-125 (violent sex offenses); *People v. Crooks* (1997) 55 Cal.App.4th 797, 810-811 (firearm enhancement for violation of Pen. Code, § 261, subd. (a)(2))**;** *People v. Miles* (1996) 43 Cal.App.4th 364, 367-371 (two robbery victims under Three Strikes law, Pen. Code, § 667(e)(2)(B)).

❑ Failure to sentence on enhancement [§ 4.157]

- Failure to strike or impose sentence for an enhancement found to be true: *People v. Bradley* (1998) 64 Cal.App.4th 386, 401 (trial court failed either to impose enhanced punishment for prior prison term or to strike it under former Pen. Code, § 1385); *People v. Irvin* (1991) 230 Cal.App.3d 180, 191-192 (trial court failed to impose § 667.5 enhancement); *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589 (Health & Saf. Code, § 11370.4 enhancement improperly stayed rather than imposed or stricken).[77]

- Failure to impose a sentence on an enhancement that cannot be stricken (e.g., five-year sentence under Pen. Code, § 667, subd. (a)): *People v. Dotson* (1997) 16 Cal.4th 547, 554-555; *People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.

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[77]Counsel may argue that in such a situation the defendant is entitled to remand to request dismissal of the enhancement (see *Bradley*, at p. 392), but this argument may not prevail (see *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521; *Irvin*, at p. 190; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589).

❑ Dismissing penalty in violation of statute [§ 4.158]

Direct violations of a statutory mandate in dismissing an allegation (such as a strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) might be found unauthorized and thus correctable on a defendant's appeal.

- An example is dismissal of a strike solely for purposes of plea bargaining in violation of Penal Code sections 667, subdivision (g) and 1170.12, subdivision (e). (See also *People v. Campos* (2011) 196 Cal.App.4th 438 [refusal to impose gang alternate penalty mandated by Pen. Code, § 186.22 was unauthorized].)

- On the other hand, the court's exercise of discretion in dismissing an allegation under Penal Code section 1385 is arguably not reviewable on the merits unless the People appeal in their own right, although counsel should advise the client of the possibility the court might find otherwise.[78] (See *People v. Ramos* (1996) 47 Cal.App.4th 432, 435 [People's appeal], disapproved on other grounds in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

❑ Penal Code section 654 error [§ 4.159]

- Erroneous stay of execution of sentence: *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Price* (1986) 184 Cal.App.3d 1405, 1411 (erroneous stay of weapons enhancement under § 654).

- Imposing the lower term and staying the higher term, in violation of Penal Code section 654, subdivision (a):[79] *People v. Crowder* (2000) 79

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[78]*People v. Williams* (1998) 17 Cal.4th 148, 162-164, which found the dismissal of a strike to be an abuse of discretion under the facts of that case, was a People's appeal. (See also *People v. Smith* (2001) 24 Cal.4th 849, 852-853 [sentence not unauthorized if error not correctable without considering factual issues on the record or remanding for additional findings]; *People v. Scott* (1994) 9 Cal.4th 331, 354-355 [discretionary sentencing decisions imposed in "procedurally or factually flawed manner" forfeited by failure to object].)

[79]The requirement that the court choose the "longest potential term of imprisonment" was added in 1997 to abrogate *People v. Norrell* (1996) 13 Cal.4th 1. A sentence for a crime committed before the effective date of the amendment would not be

Cal.App.4th 1365, 1371 (even when defendant was sentenced on two counts in separate proceedings, Pen. Code, § 654, subd. (a) requires longer of two potential terms). *People v. Kramer* (2002) 29 Cal.4th 720 (enhancement considered along with offense in determining which of defendant's convictions received longest sentence).

- ❑ Failure to impose mandatory fines or fees [§ 4.160]

  - ▫ *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 (state and county penalties); *People v. Smith* (2001) 24 Cal.4th 849, 853 (Pen. Code, § 1202.45 restitution fine); *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413 (laboratory analysis fee and penalty assessments); *People v. Rodriguez* (2000) 80 Cal.App.4th 372, 375-376, and *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1255-1256 (parole revocation fine under Pen. Code, § 1202.45).

  - ▫ If the fine or fee can lawfully not be imposed under some circumstances, failure to impose it is not unauthorized: *People v. Tillman* (2000) 22 Cal.4th 300, 303 (restitution and parole revocation fines under Pen. Code, §§ 1202.5, 1202.45 forfeited by prosecution's failure to object because trial court has discretion not to impose them in certain cases); *People v. Burnett* (2004) 116 Cal.App.4th 257, 260-263 (failure to impose sex offender fine under Pen. Code, § 290.3 not unauthorized because not mandatory if judge finds defendant unable to pay).

- ❑ Mistake in awarding custody credits [§ 4.161]

  - ▫ Miscalculating presentence custody credits in the defendant's favor: *People v. Guillen* (1994) 25 Cal.App.4th 756, 764 (issue raised by government on defendant's appeal; Court of Appeal modified abstract of judgment to reflect 950 rather than 984 days of presentence credit); see also *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192-1193; *People v. Shabazz* (1985) 175 Cal.App.3d 468, 473-474.

  - ▫ Awarding conduct credits if the law mandates more restricted credits, such as the 15% limitation for violent felonies under Penal Code section 2933.1: see *People v. Duff* (2010) 50 Cal.4th 787 and *In re Pope* (2010) 50 Cal.4th 777 [pre-sentence and post-sentence worktime and conduct credit limitations

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subject to that restriction.

of Pen. Code, §§ 2933.2 and 2933.1 apply even if term for qualifying offense is stayed]; *People v. Daniels* (2003) 106 Cal.App.4th 736; *People v. Caceres* (1997) 52 Cal.App.4th 106; cf. *People v. Thomas* (1999) 21 Cal.4th 1122.

❑ Failure to impose mandatory condition of probation [§ 4.162]

- Failing to impose terms mandated by Penal Code section 1203.097: *People v. Cates* (2009) 170 Cal.App.4th 545.

– APPENDIX C [§ 4.163] –

CHECKLIST OF SOME COMMON ISSUES RAISED ON DEPENDENCY APPEALS [§ 4.164]

The following list includes some general issues to check as part of counsel's regular review of the record.

> **NOTE:** The issues and citations are just a starting point for research. The law changes frequently, and so the checklist and law must be continuously reviewed and updated.

❑ General: timeliness of hearings [§ 4.165]

Determine whether the hearings are held timely. Each of the hearings has its own timeline set out by statute:

- ▫ File petition. (Welf. & Inst. Code, §§ 290.1, 290.2, 338.)
- ▫ Detention hearing. (Welf. & Inst. Code, § 315; Cal. Rules of Court, rule 5.670.)
- ▫ Jurisdiction hearing. (Welf. & Inst. Code, § 334; Cal. Rules of Court, rule 5.670(f).)
- ▫ Disposition hearing. (Welf. & Inst. Code, §§ 352, subd. (b), 358; *Renee v. Superior Court* (1999) 76 Cal.App.4th 187, 197.)
- ▫ 6-month review hearing. (Welf. & Inst. Code § 366.21, subd (e); Cal. Rules of Court, rules 5.695(j), 5.710.)
- ▫ 12-month review hearing. (Welf. & Inst. Code, §§ 361.5, subd. (a), 366.21, subd. (f).)
- ▫ 18-month review hearing. (Welf. & Inst. Code, § 366.21, subd. (g).)
- ▫ Section 366.26 hearing. (Welf. & Inst. Code, § 366.21, subd. (f).)
- ▫ Supplemental petition. (Welf. & Inst. Code, § 387.)

❑ General: potential issues for every hearing [§ 4.166]

- Parentage – alleged, biological/natural, presumed, *Kelsey S.* fathers. (Fam. Code, § 7611; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816; *In re M.Z.* (2016) 5 Cal.App.5th 53 [father appeals the court's denial of his status as a third parent]; *Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133 [father fails to show he qualifies as a *Kelsey S.* father]; *In re Paul H.* (2003) 111 Cal.App.4th 753.) See § 4.175, *post*, for details.

- Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; Welf. & Inst. Code, § 224.2 et al.; Cal. Rules of Court, rules 5.481-5.487; *In re Isaiah W.* (2016) 1 Cal.5th 1; *In re W.B.* (2012) 55 Cal.4th 30, 48 et seq.; *In re Abbigal A.* (2016) 1 Cal.5th 83.) See § 4.176, *post*, for details.

- Dual jurisdiction (Welf. & Inst. Code, § 601 or 602 plus dependency provisions; Welf. & Inst. Code, § 241.1; *In re J.S.* (2016) 6 Cal.App.5th 414; *In re W.B.* (2012) 55 Cal.4th 30, 46-48).

- Termination of jurisdiction and family court orders (exit orders). (*In re Ethan J.* (2015) 236 Cal.App.4th 654 [court may not end jurisdiction when child refuses to visit mother and court knows visitation order will not be followed]; *In re John W.* (1996) 41 Cal.App.4th 961 [juvenile court exit order precluding modification of custody order was error].)

- Guardian ad litem appointments for parents – usually mental illness, development delay; sometimes parents are minors. (*In re Esmeralda S.* (2008) 165 Cal.App.4th 84.)

- De facto parents – standing to appeal. (*In re M.M.* (2015) 235 Cal.App.4th 54 [de facto parents entitled to notice and chance to object before child removed from their care]; *In re J.T.* (2011) 195 Cal.App.4th 707, 717-718; *In re Vincent M.* (2008) 161 Cal.App.4th 943; *In re Joel H.* (1993) 19 Cal.App.4th 1185.)

- Placement issues with relative caregiver – standing to appeal. (*In re K.C.* (2011) 52 Cal.4th 231 [father whose rights had been terminated not entitled to appeal placement order]; *In re Isaiah S.* (2016) 5 Cal.App.5th 428; *In re J.T.* (2011) 195 Cal.App.4th 707, 718.)

- Ineffective assistance of counsel – e.g., forfeited issue or inappropriately submitted evidence. Often requires habeas corpus rather than appeal. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 462-467.)

- Social worker's report. (Welf. & Inst. Code, § 358; *In re M.B.* (2011) 201 Cal.App.4th 1057.)

- Children who reach age of majority during case – non-minor dependents. (*In re David B.* (2017) 12 Cal.App.5th 633 [appeal was moot and juvenile dependency proceeding was dismissed because child has since turned 18 years old]; *In re Aaron S.* (2015) 235 Cal.App.4th 507 [jurisdiction ended where 19-year-old not participating in services]; *In re Shannon M.* (2013) 221 Cal.App.4th 282; *In re Tamika C.* (2005) 131 Cal.App.4th 1153.)

❑ Detention hearing [§ 4.167]

The detention hearing's purpose is reflected in Welfare and Institutions Code section 315 – the juvenile court must conduct such a hearing "to determine whether the minor shall be further detained" or released from custody. (*Los Angeles County Dept. of Children and Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408.) It must take place within three court days after the child is detained. (See Welf. & Inst. Code, §§ 313, subd. (a) [dependency petition must be filed within 48 hours (excepting nonjudicial days) of detention], 315 [detention hearing shall take place no later than one judicial day after dependency petition is filed].)

- At the detention hearing after the filing of the petition, the juvenile court must release the child to the parents unless a prima facie showing has been made that the child comes within section 300. (Welf. & Inst. Code, § 319; *In re Heather B.* (1992) 9 Cal.App.4th 535; see *Los Angeles County Dept. of Children and Family Services v. Superior Court* (2008) 162 Cal.App.4th 1408.)

- An order made before the disposition orders (see § 4.169, *post*) cannot be appealed. (*In re James J.* (1986) 187 Cal.App.3d 1339, 1342.) Thus matters at the detention hearing are not separately appealable. They may be reviewed by writ or on appeal from the disposition. (Welf. & Inst. Code, § 395; see *In re Rashad B.* (1999) 76 Cal.App.4th 442.)

❑ Jurisdictional hearing [§ 4.168]

At the jurisdictional hearing, court must determine whether the minor is person described by Welfare and Institutions Code section 300 and thus within the juvenile court's jurisdiction.

- An order made before the disposition orders (see § 4.169, *post*) cannot be appealed. (*In re James J.* (1986) 187 Cal.App.3d 1339, 1342.) Thus the jurisdictional findings are not separately appealable. They may be reviewed on appeal from the disposition. (Welf. & Inst. Code, § 395.)

- Determine whether proper notice was given to the correct parties. (*In re Jorge G.* (2008) 164 Cal.App.4th 125; *In re Alyssa F.* (2003) 112 Cal.App.4th 846 [Mexican father not properly served under the Hague Convention]; *In re DeJohn B.* (2000) 84 Cal.App.4th 100 [no effort to notice mother of six-month review hearing].)

- If more than one state is involved, check for compliance with the Uniform Child Custody Jurisdiction and Enforcement Act. (Fam. Code, §§ 3400-3465.) If California is the child's home state under the UCCJEA, then California has jurisdiction to make a child custody determination. (See *In re Baby Boy M.* (2006) 141 Cal.App.4th 588 [insufficient evidence to show California was home state].) Subject matter jurisdiction can be raised at any time, even after termination of parental rights. (*In re Aiden L.* (2017) 16 Cal.App.5th 508.) The UCCJEA applies to international custody disputes including Mexico. (Fam. Code, § 3405; *In re A.C.* (2017) 13 Cal.App.5th 661 [mother failed to show that the juvenile court's efforts to contact Mexico were insufficient]; *In re R.L.* (2016) 4 Cal.App.5th 125 [temporary hospital stay alone was not sufficient to confer jurisdiction]; *In re A.M.* (2014) 224 Cal.App.4th 593; *In re Jorge G.* (2008) 164 Cal.App.4th 125.)

- A dependency petition must contain a concise statement of facts to support the conclusion that the child is a person within the definition of each of the sections and subdivisions alleged. (Welf. & Inst. Code, § 332; *In re David H.* (2008) 165 Cal.App.4th 1626.) The juvenile court may order the agency to file a dependency petition. (*In re M.C.* (2011) 199 Cal.App.4th 784.)

- Was there sufficient evidence to support jurisdiction? Jurisdictional findings must be proven by a preponderance of the evidence, and the agency bears the burden of proof. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242;

see, e.g. *In re A.L.* (2018) 18 Cal.App.5th 1044 [insufficient causal nexus between mother's mental illness and a risk of harm to the children].)

Examples for allegations under Welfare and Institutions Code section 300:

- Jurisdiction over a child can be assumed based on allegations against only one parent. (*In re James C.* (2002) 104 Cal.App.4th 470.)

- Section 300, subdivision (a): "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." (*In re D.M.* (2015) 242 Cal.App.4th 634; *In re Mariah T.* (2008) 159 Cal.App.4th 428; see *In re R.T.* (2017) 3 Cal.5th 622 [no need to show parental neglect when unruly teenager is at risk of harm from her own rebellious conduct].)

- Subdivision (b)(1): The agency must demonstrate three elements: (1) an omission in providing care for the child; (2) causation; and (3) serious risk of physical harm or illness to the minor, or a substantial risk thereof. (*In re Joaquin C.* (2017) 15 Cal.App.5th 537; see *In re R.T.* (2017) 3 Cal.5th 622.)

- Subdivision (b)(2): This allegation requires a finding that a child was commercially sexually exploited and the child's parents were unable to protect them. (But see *In re M.V.* (2014) 225 Cal.App.4th 1495.)

- Subdivision (c): Parent or guardian's conduct or failure to provide for care causes serious emotional damage. This requires a showing of severe abuse by the parent or that the parent is incapable of providing adequate care. (*In re Nicolas B.* (2001) 88 Cal.App.4th 1126, 1136; *In re Shelley J.* (1998) 68 Cal.App.4th 322; *In re Alexander K.* (1993) 14 Cal.App.4th 549; but see *In re John W.* (1996) 41 Cal.App.4th 961.)

- Subdivision (d): Child is suffering or at risk of suffering sexual abuse because of parent or guardian's conduct or failure to protect. (*In re I.J.* (2013) 56 Cal.4th 766; *In re Karen R.* (2001) 95 Cal.App.4th 84; but see *In re Rubisela E.* (2000) 85 Cal.App.4th 177, overruled in *I.J.* (2013) 56 Cal.4th 766 as to whether abuse of child of one gender is evidence supporting jurisdiction over children of other gender].)

- Subdivision (e): A toddler (under five years of age) has suffered severe physical abuse by a parent or by a person the parent reasonably should have known was physically abusing the child under section 300, subdivision (e). Circumstantial evidence may support a finding. (*K.F. v. Superior Court* (2014) 224 Cal.App.4th 1369, 1382; *In re E.H.* (2003) 108 Cal.App.4th 659.)

- Subdivision (f): Jurisdiction is established when the parent has caused the death of another child through abuse or neglect. (*In re Z.G.* (2016) 5 Cal.App.5th 705; *In re A.M.* (2010) 187 Cal.App.4th 1380.)

- Subdivision (g): Abandonment or failure to provide for a child. A finding is erroneous when an incarcerated parent had relatives available to care for the child. (*In re Isayah C.* (2004) 118 Cal.App.4th 684.) The circumstances must be present at the time of the jurisdictional hearing. (*In re Aaron S.* (1991) 228 Cal.App.3d 202, 208.) Jurisdiction can be assumed if the parent is simply absent or missing. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010.) It does not require an intent to abandon. (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1129.) A petition under subdivision (g) was properly sustained when an incarcerated father showed no interest in the welfare of his children. (*In re James C.* (2002) 104 Cal.App.4th 470, 484.)

- Subdivision (h): The allegation that a child was freed for adoption by the parent is rarely found in original petitions and occurs only when a legal orphan is removed from prospective adoptive parents. (But see *In re Jayden M.* (2014) 228 Cal.App.4th 1452, 1458.)

- Subdivision (i): An allegation is made that a child was subject to an act of cruelty. A finding the parent intended to harm is not required: it is enough that the parent intended the act itself. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1012.)

- Subdivision (j): Alleges a child's sibling was abused or neglected. The court need only consider the totality of circumstances. (*In re R.V.* (2012) 208 Cal.App.4th 837.)

▫ If the agency plans to rely on Welfare and Institutions Code section 355.1 to provide a presumption affecting the production of evidence, then the parents are entitled to notice this section will be relied on and the agency is required

to plead section 355.1 in the petition. (*In re A.S.* (2011) 202 Cal.App.4th 237, 243.)

- ▫ Supplemental petition under Welfare and Institutions Code section 387. The agency has the burden to show the prior disposition did not protect the children. (*In re Javier G.* (2006) 137 Cal.App.4th 453.) A section 387 petition does not moot the original section 300 findings. (*In re Travis C.* (2017) 13 Cal.App.5th 1219.)
- ▫ Possible forfeiture occurs when trial counsel "submits on the agency's recommendations" instead of submitting on "the agency's reports." (*In re Richard K.* (1994) 25 Cal.App.4th 580.)
- ▫ The juvenile court cannot take jurisdiction based on a factual and legal theory not raised in the petition. (*In re G.B.* (2018) 24 Cal.App.5th 464.)

❑ Dispositional hearing [§ 4.169]

Although the jurisdictional and dispositional hearings are often held together, the disposition occurs after the court takes jurisdiction and finds the petition true. At the disposition hearing, the court must decide whether to declare the child a dependent and, if the child is declared a dependent, whether to keep the children with their parents or place them elsewhere. (Welf. & Inst. Code, §§ 360, subd. (d) & 361.)

The court must remove the child from the parent's custody if clear and convincing evidence establishes that continued custody would pose "a substantial danger to the physical health, safety, protection, or physical or emotional well-being" of the child. (Welf. & Inst. Code, § 361, subd. (c)(1).)

- ▫ Placement
  - Was removal proper? (*In re A.E.* (2014) 228 Cal.App.4th 820.) Was there a reasonable alternative to removing the child from the parent(s)? (*In re Ashly F.* (2014) 225 Cal.App.4th 803.)
  - Is a non-custodial parent available? (Welf. & Inst. Code, § 361.2, subd. (a).) Did a non-custodial parent request placement? If so, was that parent denied placement? (Welf. & Inst. Code, § 361.2.) The court must place the child with a non-custodial parent unless it finds such a placement is detrimental. (*In re Patrick S., III* (2013) 218 Cal.App.4th 1254.)
  - Is placement with relatives possible? (Welf. & Inst. Code, §§ 361.2, subd. (e), 361.3, subd. (a).) Has social worker asked about relatives? Are relatives being assessed by the agency? (Welf. & Inst. Code, §

361.3.) Relatives are designated by statute. (Welf. & Inst. Code, § 319, subd. (f); *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 [juvenile court has jurisdiction to review agency's denial of a criminal exemption for relative placement for an abuse of discretion]; but see *In re K.C.* (2011) 52 Cal.4th 231 [parent may not have standing for failure to place with a relative].) Relative placement preference continues throughout reunification, and the agency is required to investigate relative placement even if a new placement is not required. (*In re Joseph T., Jr.* (2008) 163 Cal.App.4th 787.)

- If placement is out of state, confirm the placement was compliant with the Interstate Compact on the Placement of Children. (Fam. Code, § 7900 et seq.) If the child is placed with a non-custodial parent living out of state, an approved ICPC evaluation is not required. (*In re A.J.* (2013) 214 Cal.App.4th 525; *In re Z.K.* (2011) 201 Cal.App.4th 51; but see *In re Suhey G.* (2013) 221 Cal.App.4th 732.)
- If siblings, were they placed together? (Welf. & Inst. Code, § 306.5.)

▫ Reunification plan

- Was the reunification plan sufficiently tailored to remedy the alleged problem? (Welf. & Inst. Code, § 16507; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229; *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 420; see also *In re A.G.* (2017) 12 Cal.App.5th 994 [error for the juvenile court to find the agency provided reasonable services to father in Mexico]; *In re J.P. et al.* (2017) 14 Cal.App.5th 616 [reunification services must be provided in a language the parent understands].)
- Was there sufficient evidence to require the parent to comply with each component of the reunification plan? (Welf. & Inst. Code, § 362, subd. (c); *In re A.E.* (2008) 168 Cal.App.4th 1 [court may order father into services even though he is non-offending parent when he does not understand gravity of underlying abuse]; *In re Jasmin C.* (2003) 106 Cal.App.4th 177; *In re Christopher H.* (1996) 50 Cal.App.4th 1001.)[80]

[80]A parent may not be held in contempt for failing to comply with reunification services and court's orders. (*In re Nolan W.* (2009) 45 Cal.4th 1217.)

- Were time limits appropriate? Time limits for reunification services begin when the child is removed from both parents. (*In re A.C.* (2008) 169 Cal.App.4th 636; see also *W.P. v. Superior Court* (2018) 20 Cal.App.5th 1196 [parent was entitled to 12 months of reunification services when the smallest child (under age 3) was in a different placement than the older children].)
- Were parents adequately supported in their efforts? (*Amanda H. V. Superior Court* (2008) 166 Cal.App.4th 1340 [agency cannot tell mother she is enrolled in proper programs for year and at last minute use mistake about that to terminate services].)
- Was a sufficient period of services offered? (*W.P. v. Superior Court* (2018) 20 Cal.App.5th 1196 [court failed to provide the full 12 months of reunification services for the older children, when they were placed separately from the youngest sibling].)

▫ Denial of reunification services

- Was the court permitted to deny reunification services under Welfare and Institutions Code section 361.5, subdivision (b)? (See *In re M.S.* (2019) 41 Cal.App.5th 568.)
- Did sufficient evidence support the court's finding that one of the subdivisions of section 361.5, subdivision (b), applied?

▫ Visitation

- Visits must be ordered unless detriment appears. (Welf & Inst. Code, § 362.1; *In re T.M.* (2016) 4 Cal.App.5th 1214; *In re C.C.* (2009) 172 Cal.App.4th 1481.)
- Was the visitation in the case plan appropriate under the circumstances? Were there any problems? The child may not be given veto power over whether visits occur. (*In re S.H.* (2003) 111 Cal.App.4th 310; but see *In re Sofia M.* (2018) 24 Cal.App.5th 1038; *In re Brittany C.* (2011) 191 Cal.App.4th 1343.)
- Juvenile court may not delegate authority to allow visitation to any party or nonjudicial official. (*In re T.H.* (2010) 190 Cal.App.4th 1119 [delegated to mother].)

▫ Was there any evidence that the problem in existence at the time of the jurisdictional hearing impacted the parent's ability to provide for the child? (*In re Joaquin C.* (2017) 15 Cal.App.5th 537.)

- ▫ Conduct of proceedings

  - Should the court have granted a continuance? (Welf. & Inst. Code, § 352.) Did the parent request a continuance? (*In re Giovanni F.* (2010) 184 Cal.App.4th 594.)

  - Did the agency notify parents of possibility that reunification efforts would be bypassed? Did the agency satisfy the requirements of the bypass provisions under Welfare and Institutions Code section 361.5? (*K.F. v. Superior* Court (2014) 224 Cal.App.4th 1369; *In re D.F.* (2009) 172 Cal.App.4th 538; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586.) Bypass provisions can apply to custodial or non-custodial parents. (*In re Adrianna P.* (2008) 166 Cal.App.4th 44.)

❑ Welfare and Institutions Code section 388 petition [§ 4.170]

The purpose of a section 388 petition is to request a hearing to modify or set aside a previous court order because of changed circumstances or new evidence. (Welf. & Inst. Code, § 388, subd. (a).)

A section 388 petition may be filed by a parent or anyone having an interest in the dependent child. The petition may be filed at any time during the course of the case. (Welf. & Inst. Code, § 388, subd. (a).) A parent must file a section 388 petition prior to termination of parental rights at the section 366.26 hearing. (*In re Ronald V.* (1993) 13 Cal.App.4th 1803.)

- ▫ Does the notice of appeal purport to appeal from the section 388 petition? (*In re J.F. et al.* (2019) 39 Cal.App.5th 70 [no appeal from section 388 petition is permissible where the notice of appeal said only that the parent was appealing from the termination of parental rights].)

- ▫ Did the court make a prima facie finding on the petition? The court may deny the petition ex parte and without ordering a hearing if the petition fails to state a change of circumstances/new evidence and it does not appear the requested modification will promote the best interest of the child. (Welf. & Inst. Code, § 388, subd. (c); *In re Anthony W.* (2001) 87 Cal.App.4th 246; *In re Kimberly F.* (1997) 56 Cal.App.4th 519.)

- ▫ Did the petition make the required showings (a) that there is a change in circumstances and (b) that the child's best interests would be served by a modification? (*In re J.C.* (2014) 226 Cal.App.4th 503.)

  - It is the petitioner's burden, as the moving party, to show there is new evidence or changed circumstances and that the proposed change is in

the child's best interests. (*In re Michael D.* (1996) 51 Cal.App.4th 1074.)

- The allegations of the petition may not be conclusory but must be specific and factually describe the evidence. (*In re Hashem H.* (1996) 45 Cal.App.4th 1791.)

▫ Was it error to deny an evidentiary hearing on a section 388 petition?

- The section 388 petition must be liberally construed in favor of granting a hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295; *In re Aljamie D.* (2000) 84 Cal.App.4th 424; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407.)

- The court must order an evidentiary hearing on the merits of a petition if it appears the best interests of the child may be promoted by the proposed change in order. (Welf. & Inst. Code, § 388, subd. (c); *In re Lesly G.* (2008) 162 Cal.App.4th 904 [error for court to refuse to take evidence or testimony for Welf. & Inst. Code, § 388 petition]; *In re Daijah T.* (2000) 83 Cal.App.4th 666; but see *In re C.J.W.* (2007) 157 Cal.App.4th 1075 [hearing held even without testimony because court received written evidence].)

▫ Did the court abuse its discretion in denying a section 388 petition?

- The court must assess whether the child's best interest will be served by the proposed modification. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248 [overturned on unrelated grounds in *In re Zeth S.* (2003) 31 Cal.4th 396]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519.)

- Did the trial court apply the proper burden of proof for the section 388 petition? (*In re L.S., Jr.* (2014) 230 Cal.App.4th 1183.)

▫ Did the trial attorney commit ineffective assistance of counsel for failing to file a section 388 petition on the parent's behalf? (*In re Eileen A*. (2000) 84 Cal.App.4th 1248 [overturned on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396]; but see *In re Ernesto R.* (2014) 230 Cal.App.4th 219 [trial attorney not required to make futile motion].)

❑ Review hearing [§ 4.171]

The court must review the family's situation at least at six-month intervals and determine whether to maintain or modify the dependency or return the child to the parent. (Welf. & Inst. Code, § 366.21; *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285.) There is a statutory presumption the child will be returned to parental custody unless the court finds the child's return would create "a substantial

risk of detriment to the physical or emotional well-being" of the child. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242.) The court must also determine whether reasonable reunification services have been offered.

A decision made at a review hearing is normally appealable (Welf. & Inst. Code, § 395), but if the court decides to discontinue reunification efforts and set the case for a permanent plan hearing, the decision must be reviewed by writ under California Rules of Court, rules 8.450-8.452.

- ▫ Verify notice was proper. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100.)
- ▫ Agency required to return unless there is still a risk of detriment. (*In re E.D.* (2013) 217 Cal.App.4th 960; *In re G.W.* (2009) 173 Cal.App.4th 1428.) Was the evidence of detriment from returning the child sufficient? (*In re Liam L.* (2015) 240 Cal.App.4th 1068.)
- ▫ Was the case plan designed to help the parents overcome their initial problems? (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414.)
- ▫ Was there sufficient evidence of reasonable services? Did the social services agency do more than simply provide a list of referrals with little assistance? (*In re J.E.* (2016) 3 Cal.App.5th 557 [reunification services were insufficient because they were not tailored to the needs of the family]; *In re Taylor* J. (2014) 223 Cal.App.4th 1446 [providing two lists of services but little additional assistance did not amount to reasonable services]; *In re Alvin R.* (2003) 108 Cal.App.4th 962.)
- ▫ Where was the child placed? Was a relative or non-related extended family member considered in placement? (Welf. & Inst. Code, § 361.3; *In re Sarah S.* (1996) 43 Cal.App.4th 274.)
- ▫ If there are siblings, were they placed together? (Welf. & Inst. Code, § 306.5; See *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 642; but see *In re Luke H.* (2013) 221 Cal.App.4th 1082.)
- ▫ Review the record for visitation issues. Did visits occur? Were the children available for visits? Did the parents request additional visits? Did the agency facilitate visits? (*In re Alvin R.* (2003) 108 Cal.App.4th 962.)

❑ Subsequent petition [§ 4.172]

A Welfare and Institutions Code section 342 subsequent petition is used for children who are already dependents when there are "new facts or circumstances" that bring them within a category of section 300 "other than those under which the original petition was sustained." (Welf. & Inst. Code, § 342; *In re A.B.* (2014) 225 Cal.App.4th 1358.)

- ▫ Was notice proper? (See *In re Gordon J.* (1980) 108 Cal.App.3d 907.)
- ▫ Were the court's findings supported by substantial evidence? (*In re A.B.* (2014) 225 Cal.App.4th 1358.)
- ▫ Were the facts and circumstances in the petition different from the sustained allegations in the original petition? Verify there were additional grounds for jurisdiction. (Welf. & Inst. Code, § 342.)

❑ Supplemental petition [§ 4.173]

A Welfare and Institutions Code section 387 supplemental petition is used to change the placement of a dependent child from the physical custody of a parent, guardian, relative, or friend to a more restrictive level of court-ordered care. (*In re D.D.* (2019) 32 Cal.App.5th 985; *In re T.W.* (2013) 214 Cal.App.4th 1154.)

- ▫ Was notice proper? (See *In re Gordon J.* (1980) 108 Cal.App.3d 907.)
- ▫ Did the petition allege facts establishing by a preponderance of the evidence that a previous disposition order was ineffective? (*In re F.S.* (2016) 243 Cal.App.4th 799, 808.)
- ▫ Did the proceedings conform to due process? (See *In re Daniel C.H.* (1990) 220 Cal.App.3d 814.)
- ▫ Does clear and convincing evidence establish that the child's current placement was not effective in protecting the child, so that the child may be removed from parental custody to a more restrictive level of placement? (Welf. & Inst. Code, §§ 361, subd. (c), 387; *In re T.W.* (2013) 214 Cal.App.4th 1154, 1168.)

❑ Welfare and Institutions Code section 366.26 hearing [§ 4.174]

The permanency plan, or selection and implementation, hearing under Welfare and Institutions Code section 366.26 occurs after the court has determined to discontinue reunification efforts. Section 366.26 sets out the order of legal preference for the permanent plans. Termination of parental rights and adoption are preferred. In order to terminate parental rights, the court must find: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services will be terminated. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242.)

To satisfy due process, the previous determination to end reunification efforts because of parental unfitness or detriment in returning the child to the parent must have been by clear and convincing evidence. (*In re Frank R.* (2011) 192 Cal.App.4th 532; *In re G.S.R.* (2008) 159 Cal.App.4th 1202; *In re P.A.* (2007) 155

Cal.App.4th 1197; *In re Gladys L.* (2006) 141 Cal.App.4th 845; see *In re Z.K.* (2011) 201 Cal.App.4th 51 [in absence of evidence of detriment, non-offending, non-custodial mother was entitled to custody of her child and termination of her parental rights violated due process]; *In re D.H.* (2017) 14 Cal.App.5th 719.)

- Did the court give proper advisement of the writ requirement at the referral hearing? (Cal. Rules of Court, rule 5.590(b).)
  - This is an issue only if proper notice was *not* provided. If there was inadequate advisement, the parent may raise the merits of the order setting a section 366.26 hearing, including a reasonable services issue, on the appeal. (*In re Hannah D.* (2017) 9 Cal.App.5th 662 [failure to give oral writ advisement does not excuse appellant's failure to bring writ petition as long as written notice was given]; *In re A.O.* (2015) 242 Cal.App.4th 145; *In re X.Z.* (2013) 221 Cal.App.4th 1243, 1250-1251; *In re Cathina W.* (1998) 68 Cal.App.4th 716.)
  - Were the requirements for the timing of the notice followed?
  - Was adequate notice of the hearing given? (*In re D.R.* (2019) 39 Cal.App.5th 583 [notice by publication was insufficient when the child welfare agency knew how to contact father through Facebook]s See also *In re B.G.* (1974) 11 Cal.3d 679; *In re Arlyne A.* (2000) 85 Cal.App.4th 591.)
  - Were the parents present at the referral hearing? Were the parents represented?
  - If the child is over 10 years old, was he/she notified of the right to attend the section 366.26 hearing? (Welf. & Inst. Code, §§ 349, subd. (a), 366.26, subd. (h)(2); *In re Desiree M.* (2010) 181 Cal.App.4th 329.)
- Adoptability
  - Did the court make an adoptability finding by clear and convincing evidence, as is required? (Welf. & Inst. Code, § 366.26; *In re Carl R.* (2005) 128 Cal.App.4th 1051.)
  - The court may find general adoptability – the child's age, physical condition, and emotional state make it likely a family will be willing to adopt – or specific adoptability – a prospective adoptive family has expressed interest or willingness. (E.g., *In re Lukas B.* (2000) 79 Cal.App.4th 1145; *In re Sarah M.* (1994) 22 Cal.App.4th 1642.)

- Did the social services agency withhold from the court information material to the adoption assessment? (*In re B.D.* (2019) 35 Cal.App.5th 803.)

- Exceptions to termination (Welf. & Inst. Code, § 366.26, subd. (c).)

  - Did the parent request application of an exception? If not, was the exception forfeited? (*In re P.C.* (2006) 137 Cal.App.4th 279, 288-289.)

  - Is there a relative available, capable, and willing to be the child's legal guardian? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A); *In re Monica C.* (1995) 31 Cal.App.4th 296.)

  - Is the parental relationship such a benefit to child that it would be detrimental to lose? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) Parent must have had regular visitation and a strong parent-child relationship. (*In re Autumn H.* (1994) 27 Cal.App.4th 567.) Factors to be considered for the second prong of this exception are listed in *In re Angel B.* (2002) 97 Cal.App.4th 454. See also *In re E.T. et al.* (2019) 31 Cal.App.5th 68.)

  - Did the child (age 12 or older) object to termination? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(ii); see *In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1334.)

  - Was the child placed in a residential treatment facility? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(iii); *In re Ramone R.* (2005) 132 Cal.App.4th 1339.)

  - Is the child's current foster family unable or unwilling to adopt? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(iv); *In re Carl R.* (2005) 128 Cal.App.4th 1051.)

  - Will the termination cause a substantial interference with a sibling relationship? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(v); *In re D.M.* (2012) 205 Cal.App.4th 283.) Use a two-prong test – how strong the existing bond between the siblings is and whether termination will interfere with the sibling relationship. In the process the court must consider the child's need for a permanent placement versus the importance of the sibling relationship. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952; see *In re I.R.* (2014) 226 Cal.App.4th 201 [sibling exception did not apply when minors' levels of maturity were

not adequately advanced to be able to experience more than the simplest level of sibling bond with infant sister].)

- If the child is an Indian child, would termination not be in the child's best interest? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292.)
- Were reasonable efforts made to prevent termination? (Welf. & Inst. Code, § 366.26, subd. (c)(1)(D)(2)(A); *In re T.M.* (2009) 175 Cal.App.4th 1166.)
- "At each hearing at which the court was required to consider reasonable efforts or services," did the court find reasonable services were not provided? (Welf. & Inst. Code, § 366.26, subd. (c)(2)(A); Cal. Rules of Court, rule 5.725(d)(2)(A); *In re A.L.* (2015) 243 Cal.App.4th 628.)

▫ Was the permanent plan appropriate?

- Adoption. (E.g., *In re Carl R.* (2005) 128 Cal.App.4th 1051.)
- Guardianship. (E.g., *In re R.N.* (2009) 178 Cal.App.4th 557.)
- Long-term foster care (planned permanent living arrangement). (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882; *In re Ramone R.* (2005) 132 Cal.App.4th 1339.)
- Tribal customary adoption. (*In re H.R.* (2012) 208 Cal.App.4th 751.)

❑ Parentage determinations [§ 4.175]

▫ Did the agency and the juvenile court ask about paternity at the earliest possible time, starting at detention? (Welf. & Inst. Code, § 316.2; Cal. Rules of Court, rule 5.635(a).)

▫ Was a possible father notified of the dependency case and his rights to change his paternity status with Judicial Council form JV-505? (Welf. & Inst. Code, § 316.2, subd. (b); but see *In re Marcos G.* (2010) 182 Cal.App.4th 369 [harmless error when father did not take action for more than a year after the initial notice].)

▫ Was the type of father correctly identified? The dependency court recognizes four types of fathers: presumed, biological or natural, alleged, and a quasi-presumed or *Kelsey S.* father (see *Adoption of Kelsey S.* (1992) 1 Cal.4th 816)?

- Were the rights of any presumed father observed? Such a father has the highest status under the law. It is created by statutory presumption. (Fam. Code, § 7611.)
  - "A man who has neither legally married nor attempted to legally marry the child's natural mother cannot become a presumed father unless (1) he receives the child into his home and openly holds out the child as his natural child, or (2) both he and the natural mother execute a voluntary declaration of paternity." (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586; see Fam. Code, §§ 7611, 7570; *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050-1051; *In re Tanis H.* (1997) 59 Cal.App.4th 1218.) A presumed father is entitled to custody and reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449.)
  - Statutory presumed fatherhood is based not on a biological connection but rather on a man's relationship with the child or the child's mother, and therefore, genetic testing has limited applicability in determining presumed father status. (Fam. Code, § 7611, subd. (a); *In re D.S.* (2014) 230 Cal.App.4th 1238; *In re Nicholas H.* (2002) 28 Cal.4th 56, 69.)
  - "A man who receives a child into his home and openly holds the child out as his natural child is presumed to be the natural father of the child." (*In re Nicholas H.* (2002) 28 Cal.4th 56.) That presumption may be rebutted by clear and convincing evidence in an appropriate case. (*Id.* at p. 59; Fam. Code, § 7612, subd. (a).)
- Did the case involve a quasi-presumed, or *Kelsey S.*, father? To attain such a status, the father must show he did everything he could to assume parental responsibilities but was thwarted by the mother from receiving the child into his home and openly holding out the child as his natural child. (Fam. Code, § 7611, subd. (d); *Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133 [father fails to show he qualifies as a *Kelsey S.* father]; *Adoption of Baby Boy W.* (2014) 232 Cal.App.4th 438 [father qualified as a *Kelsey S.* father].) Under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, a father who has made an adequate showing has a constitutional right to block an adoption unless he is an unfit parent.
- Was the father a biological or natural father? Such a father has established biological paternity but is not a presumed father. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) Biological fathers may be eligible for reunification services, relative placement consideration, and placement of the child if the

court determines that the services will benefit the child. (See *In re John M.* (2006) 141 Cal.App.4th 1564; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596.) Where a child has a presumed and a biological father, the trial court must hold an evidentiary hearing to reconcile competing paternity interests. (*In re P.A.* (2011) 198 Cal.App.4th 974.)

- ▫ Was the father an alleged father? He may be a biological father, but paternity has not been established. Alleged fathers are entitled to notice and an opportunity to be heard but little else and certainly not reunification services or placement of the child. (*In re Christopher M.* (2003) 113 Cal.App.4th 155; *In re Paul H.* (2003) 111 Cal.App.4th 753, 760; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596.) Alleged fathers do not have standing to challenge the juvenile court's findings regarding the presumed father status of another. (*In re Eric C.* (2006) 137 Cal.App.4th 252, 262; *In re J.H.* (2011) 198 Cal.App.4th 635, 647.)

- ▫ Did the case involve unconventional parentage issues? The Uniform Parentage Act (UPA) is not applied in a gender-neutral way to allow a step-mother to be found a presumed mother. (*In re D.S.* (2012) 207 Cal.App.4th 1088.)

  - In cases where two women intend to act as parents, the court has applied the UPA to recognize two presumed mothers. (*E.C. v. J.V.* (2012) 202 Cal.App.4th 1076; *S.Y. v. S.B.* (2012) 201 Cal.App.4th 1023.)

  - Previously, the juvenile court was limited to finding a child had two presumed parents. (*In re M.C.* (2011) 195 Cal.App.4th 197 [overturned by legislative action in Fam. Code, § 3040].) A new subdivision now allows the juvenile court to "find that more than two persons with a claim to parentage . . . are parents if the court finds that recognizing only two parents would be detrimental to the child." (Fam. Code, § 7612, subd. (c); *In re M.Z.* (2016) 5 Cal.App.5th 53 [boyfriend appeals the court's denial of his status as a third parent]; *In re Donovan L., Jr.* (2016) 244 Cal.App.4th 1075.)

❑ ICWA issues [§ 4.176]

The Indian Child Welfare Act is a federal statute (25 U.S.C.§1901 et seq.) and is codified in California under Welfare and Institutions Code sections 224 to 224.6 and the California Rules of Court, rule 5.480 et seq. The statute presumes it is in a child's best interests to retain tribal ties and cultural heritage, and in the tribe's interest to preserve future generations. (*In re Desiree F.* (2000) 83 Cal.App.4th

460; *In re Crystal K.* (1990) 226 Cal.App.3d 655, 661.) ICWA is also an attempt to recognize and redress what Congress described as an "alarmingly high percentage of Indian families broken up by removal." (25 U.S.C. §1901(4) & (5).)

- Did the agency and court comply with the duty to inquire?
  - The agency and the juvenile court are required to inquire about possible Indian heritage and to have the parents complete an ICWA-020 form at the parents' first appearance. (Cal. Rules of Court, rule 5.481(a); *In re Breanna S.* (2017) 8 Cal.App.5th 636; *In re J.N.* (2006) 138 Cal.App.4th 450; *In re E.H.* (2006) 141 Cal.App.4th 1330.) But see *In re C.A.* (2018) 24 Cal.App.5th 511 [presumed, but not biological, father is not a parent for ICWA purposes].
  - If the agency knows or has reason to know the child is an Indian child, the agency must make further inquiries of the parents and extended family members about possible Indian heritage. (Rule 5.481(a)(4)(A); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422; *In re K.R.* (2018) 20 Cal.App.5th 701.)
  - Because the tribe has the right to intervene at any stage of an involuntary child custody proceeding, the duty to ascertain the child's Indian status is a continuing one. (25 U.S.C. § 1911(c); Welf. & Inst. Code, §§ 224.3, subd. (f), 224.4; *In re Isaiah W.* (2016) 1 Cal.5th 1; *In re I.B.* (2015) 239 Cal.App.4th 367; *In re Jonathan D.* (2001) 92 Cal.App.4th 105.)
- Were all required notices given?
  - Notice is required whenever the court knows or has reason to believe the child is an Indian child; the child's status need not be certain. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.)
  - The agency is required to provide actual notice to all named tribes from which the child may have heritage of the proceedings involving the custody of an Indian child and of the tribe's right to intervene. (*In re H.G.* (2015) 234 Cal.App.4th 906.)
  - In determining whether the notice is proper, it is important to thoroughly review the noticing documents and the return receipts. It is essential to ensure all the information provided by the parents is included in the ICWA-030 form. (Welf. & Inst. Code, § 224.2, subd. (5).)

- The notice must be sent to the chairperson or designated agent for service of process of each tribe. (Welf. & Inst. Code, § 224.2, subd. (a)(2); *In re H.A*. (2002) 103 Cal.App.4th 1206, 1213.) Further, the documentation showing notice to the tribes must be filed with the juvenile court. (Cal. Rules of Court, rule 5.482(b); *In re Asia L*. (2003) 107 Cal.App.4th 498, 507.)
- Information: The agency is required to provide all the information about family members it has gathered on the form and the information must be correct including dates, names and locations, where known. (Welf. & Inst. Code, § 224.2, subd. (5); *In re S.E.* (2013) 217 Cal.App.4th 610; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)
- The determination that a child is an Indian is the exclusive province of the tribe. ICWA requires notice be as complete as possible to assist with the determination. (*In re Jonathan D*. (2001) 92 Cal.App.4th 105, 110.)
- The court has a sua sponte duty to assure compliance with the notice requirements of ICWA. (*In re Nikki R*. (2003) 106 Cal.App.4th 844, 852.)

▫ Were applicable special procedures followed?

- The child is not Indian unless a parent is a tribal member. (*In re Abbigail A*. (2016) 1 Cal.5th 83.) But, since the only entity with authority to determine who is a tribal member is the tribe itself, arguably notice still must be provided to the tribe.[81] (See *In re Isaiah W*. (2016) 1 Cal.5th 1; *In re Michael V.* (2016) 3 Cal.App.5th 225.)[82]
- The tribe can intervene at any time. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

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[81]Even if the parent denies being a tribal member, one may argue the denial is insufficient to establish the child is not an Indian child. The parent might be unaware of his or her tribal membership status. (See *In re Desiree F.* (2000) 83 Cal.App.4th 460.)

[82] Thus, even if the parent denies being a tribal member, the denial is insufficient to establish the child is not an Indian child. The parent might be unaware of his or her tribal membership status. (See *In re Desiree F.* (2000) 83 Cal.App.4th 460.)

- If the child is an Indian child, then heightened evidentiary rules apply for each hearing and placement of the child. (Cal. Rules of Court, rule 5.484; *In re A.C.* (2015) 239 Cal.App.4th 641; *In re H.G.* (2015) 234 Cal.App.4th 906; *In re Alexandria P.* (2014) 228 Cal.App.4th 1322.)
- The juvenile court is required to consider, where appropriate, a tribal customary adoption. (*In re H.R.* (2008) 208 Cal.App.4th 751; but see *In re I.P.* (2014) 226 Cal.App.4th 1516; *In re G.C., Jr.* (2013) 216 Cal.App.4th 1391; and *In re A.F.* (2017) 18 Cal.App.5th 833 [court could place child somewhere other than tribe's chosen placement].)
- Before terminating parental rights to an Indian child, the juvenile court must satisfy ICWA requirements. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.) In addition, special evidentiary burdens apply. Parental rights may not be terminated if doing so would substantially interfere with the child's connection to his/her tribal community. (Cal. Rules of Court, rule 5.485.)

▫ For assistance with interpretation of ICWA, the Bureau of Indian Affairs has published detailed guidelines for state courts to use in implementing ICWA in child custody proceedings. (80 Fed. Reg. 10146-02 (2015).) These are not intended to have binding legislative effect but are entitled to great weight. (*C.F. v. Superior* Court (2014) 230 Cal.App.4th 227; In *re Kahlen W.* (1991) 233 Cal.App.3d 1414, fn. 3.)

❑ Non-minor dependents [§ 4.177]

The juvenile court has discretion to retain jurisdiction over a dependent until he or she attains the age of 21 years but until recently the utility of doing so was limited by insufficient funds to assist non-minor dependents. (Welf. & Inst. Code, § 303, subd. (a).) In 2012, the California Fostering Connections to Success (CFCS) Act permitted the state to take advantage of federal funding for extended foster care benefits. (Welf. & Inst. Code, § 303; 42 U.S.C. § 675(8).)

Section 391as amended by the CFCS Act provides that a dependency court may not terminate jurisdiction over a non-minor unless a hearing is conducted under the section.

Issues include:

▫ Whether the trial court properly applied the factors listed in § 391 governing termination of jurisdiction. (*In re Shannon M.* (2013) 221 Cal.App.4th 282.)

- Whether a non-minor's efforts were adequate to continue extended foster care. (*In re R.G.* (2015) 240 Cal.App.4th 1090; but see *In re A.A.* (2016) 243 Cal.App.4th 765 [placement in juvenile hall was sound basis to end extended foster care].)
- Whether continued jurisdiction is in the non-minor's best interests. (Welf. & Inst. Code, § 391; *In re Nadia G.* (2013) 216 Cal.App.4th 1110; *In re Holly H.* (2002) 104 Cal.App.4th 1324.)
- Whether a nonminor can remain dependent after he/she gets married. (*In re H.C.* (2017) 17 Cal.App.5th 1261.)

– APPENDIX D [§ 4.178] –

CHECKLIST OF SOME COMMON ISSUES RAISED ON DELINQUENCY APPEALS [§ 4.179]

The following list includes some general issues to check as part of counsel's regular review of the record.

> **NOTE:** The issues and citations are just a starting point for research. The law changes frequently, and so the checklist and law must be continuously reviewed and updated. The issues below are distilled, for the most part, from the article, "Representing A Minor on Appeal in a Juvenile Delinquency Case," which is updated periodically on ADI's website.

❑ Capacity [§ 4.180]

Does clear and convincing evidence defeat the presumption that a minor under the age of 14 is incapable of committing a crime? (Pen. Code, § 26; *People v. Cottone* (2013) 57 Cal.4th 269, 280; *In re Manuel L.* (1994) 7 Cal.4th 229, 231; *In re Gladys R.* (1970) 1 Cal.3d 855, 862.)

❑ Deferred entry of judgment [§ 4.181]

Deferred entry of judgment (DEJ) is available in juvenile cases involving felony allegations, if certain prerequisites are met. (Welf. & Inst. Code, §§ 790-795.)

- ▫ If a minor is eligible for DEJ, the court must follow a set of mandatory procedures. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123; *In re C.W.* (2012) 208 Cal.App.4th 654, 660; Welf. & Inst. Code, §§ 790-792.)

- ▫ There is a right to appeal a denial of DEJ (e.g., *In re Sergio R.* (2003) 106 Cal.App.4th 597), but there is no right to appeal where DEJ is granted (*Luis M. v. Superior Court* (2014) 59 Cal.4th 300, 303, fn. 3; *In re T.C.* (2012) 210 Cal.App.4th 1430, 1433 [restitution order is a component of the DEJ order and not appealable].)

- ▫ Writ of mandate may be available, depending on what issue is in contest. (*Luis M. v. Superior Court*, *supra*, 59 Cal.4th 300 [restitution order vacated]; *G.C. v. Superior Court* (2010) 183 Cal.App.4th 371 [minor who received DEJ raised a question of law concerning the juvenile court's belief

that it was not required to consider ability to pay restitution for vandalism under Welf. & Inst. Code, § 742.16].)

❑ Dual jurisdiction [§ 4.182]

Does the case involve both the delinquency and dependency proceedings and, if so, have the proper procedures and protocols for the minor's best needs been followed? (*In re Joey G.* (2012) 206 Cal.App.4th 343, 348-349; *In re Marcus G.* (1999) 73 Cal.App.4th 1008, 1012-1013; Welf. & Inst. Code, § 241.1.)

❑ Informal probation [§ 4.183]

Was informal probation granted? If so, such order is nonappealable. (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 788-789.)

❑ Admissions [§ 4.184]

- ▫ Did the minor admit to the allegations of the petition *without* consent of counsel? (Welf. & Inst. Code, § 657, subd. (b); Cal. Rules of Court, rule 5.778(d); *In re Alonzo J.* (2014) 58 Cal.4th 924, 939.)

- ▫ Does clear and convincing evidence support a finding the minor lacked capacity to understand the consequences of his or her admission because of a developmental disability? (See, e.g., *In re Matthew N.* (2013) 216 Cal.App.4th 1412, 1420.)

❑ Pre-trial issues [§ 4.185]

- ▫ Ensure that the offender was a minor on the date of the offense, that proceedings commence in juvenile court and are transferred to adult court under proper circumstances, i.e., if unfit (Welf. & Inst. Code, § 706, subd. (a)(1)), and if at least 14 years old but not 16 years old, also the charged offense is a felony falls under Welfare and Institutions Code section 707, subdivision (b).

  Note: An order granting or denying a motion to transfer jurisdiction to adult court is not an appealable order. Appellate review would be by extraordinary petition (Cal. Rules of Court, rule 5.770(g)), a task for trial counsel. If trial counsel should have sought, but neglected to seek, writ review and it is reasonably probable the minor would have

prevailed, then ineffective assistance of counsel should be investigated.

- Pre-trial procedural issues are many and complex, too varied to be covered here. The reader is referred to ADI's Juvenile Delinquency Articles page,[83] especially Representing a Minor on Appeal in a Juvenile Delinquency Case.[84]

❑ Same judge for admission and disposition [§ 4.186]

Like a guilty plea in adult court, an implied term of every admission in juvenile court is that the judge who accepts the admission will be the judge who imposes the disposition. (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 312.)

❑ Procedural options [§ 4.187]

- After making a true finding, did the court consider setting aside the finding and dismissing the petition in the interests of justice and the welfare of the minor or, if the minor is not in need of rehabilitation, setting forth the specific reasons for dismissal in the minutes (Welf. & Inst. Code, § 782; cf. Pen. Code, § 1385); or not adjudging the minor a ward and place him or her on probation for less than six months (Welf. & Inst. Code, § 725, subd. (a))? (See also Welf. & Inst. Code, § 202 [list of permissible sanctions, e.g., fines, community service, probation conditions.)

- If the court adjudged the minor a ward, did the court consider the range of options, such as:

  - Placing the minor on unsupervised probation (Welf. & Inst. Code, § 727, subd. (a));

  - Placing the minor on supervised probation at home (Welf. & Inst. Code, § 730, but see Welf. & Inst. Code, § 727, subd. (a));

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[83] http://www.adi-sandiego.com/delinq_depend/delinquency/index.asp

[84] http://www.adi-sandiego.com/delinq_depend/pdf_files/July_Representing_Minors.pdf

- Placing the minor with a relative or in a licensed group or foster home (Welf. & Inst. Code, § 727, subd. (a));

- Committing the minor to juvenile hall or a county camp or ranch (Welf. & Inst. Code, § 730, subd. (a)); or

- Committing the minor to the Division of Juvenile Facilities (Welf. & Inst. Code, § 731)? (See also Welf. & Inst. Code, § 202 [list of permissible sanctions, e.g., fines, community service, probation conditions].)

▫ Did the court consider dismissing the petition – an act that operates to erase the juvenile adjudication as if it never occurred (Welf. & Inst. Code, § 782; *People v. Haro* (2013) 221 Cal.App.4th 718, 720) or recall a case in which commitment to the Division of Juvenile Facilities was ordered for the purpose of ordering an alternative disposition (Welf. & Inst. Code, § 731.1, subd. (a)) or where the minor is under parole supervision (Welf. & Inst. Code, § 731.1, subd. (b))?

❑ Probation conditions [§ 4.188]

The juvenile court may impose reasonable terms and conditions of probation. (Welf. & Inst. Code, §§ 725, 730, subd. (b).)

▫ Such conditions must be "fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, §§ 730, subd. (b)); *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

▫ The conditions may be broader than criminal probation conditions. (*In re S.O.* (2018) 24 Cal.App.5th 1094 [juvenile court has authority to require restitution for losses beyond those that resulted from criminal conduct with which the minor was charged]; *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1330; *Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1180; *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.)

❑ Commitment [§ 4.189]

The reader is referred to ADI's juvenile articles page.[85]

- Did the court find the commitment imposed was likely to produce a probable benefit to the minor? (*In re Aline D.* (1975) 14 Cal.3d 557, 565-567.) Does the record contain some evidence that the court appropriately considered and rejected reasonable alternative placements as ineffective or inappropriate? (*In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1159; *In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

- Welfare and Institutions Code section 733 precludes a Division of Juvenile Facilities commitment for juvenile court wards under 11 years of age, wards suffering from illness that would "probably endanger the lives or health" of other inmates, and wards whose most recent offense alleged in any petition and admitted or found to be true by the court is not described in Welfare and Institutions Code section 707, subdivision (b) or Penal Code section 290.008, subdivision (c), and who are not otherwise ineligible for commitment to DJF under the section.

- If a ward is committed to the Division of Juvenile Facilities, did the wardship petition include a non-qualifying offense precluding such a disposition? (Welf. & Inst. Code, § 733, subd. (c); *In re D.B.* (2014) 58 Cal.4th 941, 944.)

- The court must determine whether the minor has committed one of the offenses listed in Welfare and Institutions Code section 707, subdivision (b). If so, the Division of Juvenile Facilities has jurisdiction over the minor until age 25. (Welf. & Inst. Code, § 1769, subds. (a)-(c); *In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1064.)

- When an offense has degrees or is a wobbler (i.e., it can be either a felony or misdemeanor if committed by an adult), the court must make an express finding as to the degree of the offense or designate the offense as a felony or misdemeanor. (Welf. & Inst. Code, §§ 702; Pen. Code, § 1157; Cal. Rules of Court, rule 5.778(f)(9); *In re Eddie M.* (2003) 31 Cal.4th 480, 487; *In re Manzy W.* (1997) 14 Cal.4th 1199, 1209; *In re Kenneth H.* (1983) 33 Cal.3d 616, 618-620.) The admission of an allegation charged as a felony or calculation of the maximum period of confinement as a felony is insufficient. (E.g., *In re Manzy W.*, *supra*, at pp. 1207-1208; *In re Ricky H.*

[85] http://www.adi-sandiego.com/delinq_depend/delinquency/index.asp

(1981) 30 Cal.3d 176, 191; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 675.).

- When a minor is removed from the custody of his/her parents, the court must calculate the maximum length of confinement. (Welf. & Inst. Code, § 726, subd. (d).) A minor cannot be confined in excess of the maximum term that could be imposed on an adult convicted of the same offenses. (Welf. & Inst. Code, §§ 726, subd. (d), 731, subd. (c).)

- When a minor is removed from parental custody but not committed to the Division of Juvenile Facilities, the court must set the maximum at the longest potential sentence provided for by statute, taking into account both the offenses committed and enhancements. (*In re Eddie L.* (2009) 175 Cal.App.4th 809, 813-816.) If a minor is committed to DJF, rather than just calculating the maximum period of confinement, the court must exercise its discretion in setting the maximum period of confinement. (Welf. & Inst. Code, § 731, subd. (c).)

❑ Restitution fines [§ 4.190]

Welfare and Institutions Code section 730.6 refers to two restitution fines – a restitution fine per se and a victim restitution fine – analogous to restitution fines for adult offenders under Penal Code section 1202.4.

- Welfare and Institutions Code section 730.6 subdivision (a)(2)(A) is the counterpart to Penal Code section 1202.4, subdivision (b). If the minor is found to be a person described by Welfare and Institutions Code section 602 for committing of one of more felony offenses, the court must impose a fine between $100 and $1000, regardless of the minor's ability to pay. (*In re Enrique Z.* (1994) 30 Cal.App.4th 464. 470; Welf. & Inst. Code, § 730.6, subd. (b)(1), (c) & (f).) However, this fine may be waived if the court finds there are compelling and extraordinary reasons to support the waiver and states them on the record. (§ 730.6, subd. (g)(1).) If the minor is a ward for a misdemeanor offense, the fine shall not exceed $100. (§ 730.6, subd. (b)(2).)

- The amount of the subparagraph (A) fine is set at the discretion of the court commensurate with the seriousness of the offense. (§ 730.6, subd. (b).) In setting subparagraph (A) fines, the court "shall consider any relevant factors including, but not limited to, the minor's ability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any

economic gain derived by the minor as a result of the offense, and the extent to which others suffered losses as a result of the offense." (§ 730.6, subd. (d)(1).) The minor bears the burden of demonstrating a lack of ability to pay. (§ 730.6, subd. (d)(1).)

- A victim restitution fine under Welfare and Institutions Code section 730.6 subdivision (a)(2)(B) is the counterpart to Penal Code section 1202.4, subdivision (a). The reader is referred to ADI's juvenile articles page.[86]

❑ Other fines [§ 4.191]

- Under Welfare and Institutions Code section 730.5, the court may levy a discretionary fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine. (*In re Steven F.* (1994) 21 Cal App.4th 1070, 1080.)

- Parents may be obligated to pay for restitution, fines, penalty assessments (Welf. & Inst. Code, § 730.7; Civil Code, §§ 1714.1, 1714.3 [joint and several liability], probation supervision, legal services, and "reasonable costs of support" if the minor is confined (Welf. & Inst. Code, §§ 903, 903.1, 903.15, 903.2, 903.25, 903.45, 903.5). Welfare and Institutions Code section 730.7 imposes joint and several liability on the parents of the minor for the economic damages arising out of the criminal acts of their child. (*In re Michael S.* (2007) 147 Cal.App.4th 1443, 1448-1449; *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017, 1025.) Welfare and Institutions Code section 730.7, however, limits a parent's liability to $25,000 for each tort of the minor. Civil Code sections 1714.1 and 1714.3 further limit monetary damages. Also, Welfare and Institutions Code section 730.7 expressly permits a court to consider a parent's inability to pay.

❑ Money judgment [§ 4.192]

Has a parent been held liable for a money judgment for the child's acts? If so, the parent may appeal. (E.g., *In re Michael S.* (2007) 147 Cal.App.4th 1443; *In re Jeffrey M.* (2006) 141 Cal.App.4th 1017.)

❑ Sealing records [§ 4.193]

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[86] http://www.adi-sandiego.com/delinq_depend/delinquency/index.asp

Five years after the termination of juvenile court jurisdiction or upon reaching age 18, individuals have the right to seal juvenile records, with some exceptions, by petition to the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).) Once sealed, the proceedings are deemed never to have occurred and the person can properly reply accordingly to any inquiry about the events. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

- The court and probation department have an affirmative duty to inform minors who have had wardship petitions filed on or after January 1, 2015, about the right to seal. (Welf. & Inst. Code, § 781, subd. (h)(1).)

  - A potential issue is whether the court abused its discretion in denying the petition because it determined that rehabilitation has not been attained to the satisfaction of the court. (Welf. & Inst. Code, § 781, subd. (a)(1)(A).)

  - Another is whether the court erred in denying a request to remove the lifetime sex offender registration when the defense presents evidence to show the individual has been rehabilitated and the juvenile adjudication did not involve a Welfare and Institutions Code section 707, subdivision (b) (forcible sex) crimes committed when the individual was 14 years or older. (Welf. & Inst. Code, § 781, subd. (a)(1)(C)-(D).)

- The court has an independent duty to seal records when a minor satisfactorily completes a supervision program or probation. (Welf. & Inst. Code, § 786, subd. (a).) Once sealed, the arrest and other proceedings in the case are deemed not to have occurred and the minor may reply accordingly to an inquiry by employers, educations institutions, or other persons or entities regarding the arrest and proceedings in the case. (Welf. & Inst. Code, § 786, subd. (b).) Example of issues include:

  - Did the court abuse its discretion in making a finding that the minor did not satisfactorily complete a program or probation? (Welf. & Inst. Code, § 786, subd. (a) & (c)(1).)

  - Did the court abuse its discretion by not sealing records from a prior petition? (Welf. & Inst. Code, § 786, subd. (f)(1).)

  - Did the court abuse its discretion by not sealing records in the custody of a public agency (other than law enforcement agencies, the

probation department, or the Department of Justice), such as a school? (Welf. & Inst. Code, § 786, subd. (f)(2).)