

- CHAPTER FOUR -

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

**CALIFORNIA CRIMINAL APPELLATE PRACTICE MANUAL
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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 constitutionally 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 the answer is an easily solved problem. Not even *asking* the 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 do the same.

¹Discussion with the assigned ADI staff attorney is also required, regardless whether the issue is being 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 is to read 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 such as the Daily Journal, Barclay’s, the California Defender (published by the California Public Defenders Association), and FORECITE (which provides information on pending issues concerning jury instructions), 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. These are compiled on the CCAP website and can be reached through ADI’s.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.

²ADI: http://www.adi-sandiego.com/news_issues_review.html

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. 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.³ (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 8.328(c)).

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 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

³The 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).

important to determine what happened to every charge, every motion, and every co-defendant. 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 analysis 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 defendant generally may not raise issues on appeal if they were not raised at trial. Second and conversely, failure to raise on appeal a meritorious issue litigated at trial 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. One of these areas is instruction of the jury.⁴ 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.⁵ 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 misread the text at some point or have improvised.⁶ (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.

⁴Many 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.”)

⁵California Criminal Jury Instructions, approved by the Judicial Council.

⁶The 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.)

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*⁷]; *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 so an erroneous response is likely to be found prejudicial.

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]

Counsel should also 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, and probation conditions

⁷*Chapman v. California* (1967) 386 U.S. 18; see §4.52, *post*.

– 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 defendant’s favor since the crime. Jurisdictional and venue questions can arise in unusual proceedings or events involving multiple counties. Prior proceedings in the same case may suggest the need to scrutinize for 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.⁸

6. Checklist [§4.31]

§4.121 et seq., appendix A, lists a number of issues commonly raised on appeal and can serve as the starting point for a checklist. 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.

⁸Memo on taking advantage of favorable changes:
<http://www.adi-sandiego.com/PDFs/Favorable%20changes%2011-08.pdf>

Web page on recent changes:
http://www.adi-sandiego.com/changes_in_the_law.html

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.

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.⁹

⁹See 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/PDFs/April%202008%20News%20Alert.pdf>

Memo: <http://www.adi-sandiego.com/PDFs/Arguable%20issues%20memo.pdf>

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.

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.)

A California court may exercise discretion to decide a moot case if it involves issues of serious public concern that would otherwise elude resolution.¹⁰ (*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,

¹⁰In the federal system, in contrast, because of the “case or controversy” requirement of article III, section 2 of the United States Constitution, mootness as to the individual litigants defeats jurisdiction. (See §9.3 of chapter 9, “The Courthouse Across the Street: Federal Habeas Corpus.”)

especially when there is widespread public interest in the answer to a particular legal question.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

3. Review by writ [§4.37]

Certain pretrial issues or those affecting whether the trial should proceed at all may require a writ petition. For example, the sufficiency of the evidence at the preliminary hearing to support the information is reviewable only by pretrial writ. (Pen. Code, §§ 995, 999a.) Examples of other criminal statutory writs include Penal Code sections 279.6, 871.6, 1238, subdivision (d), 1511, 1512, and 4011.8. (See §8.83 of chapter 8, “Putting on the Writs: California Extraordinary Remedies,” for further discussion of statutory writs.)

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.¹¹ (*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].)

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.)

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

¹¹In 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.)

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 waiver (technically, forfeiture) obstacles, such as arguing: the issue was obvious to all parties and the trial court, even without a formal objection; the issue was raised indirectly or substantially, even if not exactly as formulated on appeal; raising it would have been futile in light of other rulings by the trial court; the issue implicates fundamental due process; trial counsel rendered ineffective assistance in failing to raise it; or the law has since changed. (See more detailed description and authorities in §5.27 of chapter 5, “Effective Written Advocacy: Briefing.”)

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.)

8. Credits issues – Penal Code section 1237.1 [§4.42]

Another limitation is imposed by Penal Code section 1237.1, which applies to issues based on the calculation of credits:

No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not

discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court.

This limitation applies only when a credits issue is the *sole* issue on appeal.¹² (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420; accord, *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270; cf. *People v. Mendez* (1999) 19 Cal.4th 1084, 1101 [distinguishing *Acosta* and declining to pass on its result or reasoning].) It does not apply to juvenile cases. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 350.)

Appellate reviewability requires a formal motion to the superior court, not just an informal letter. (*People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519.) However, frequently a simple letter to the trial court (commonly called a *Fares*¹³ letter) will achieve the result sought.

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 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”];¹⁴

¹²It is good practice to request correction in the superior court even if the issue is reviewable on appeal without such a request. A motion in the trial court is expeditious and often meets no opposition from the district attorney. If unfavorable, the court’s ruling may be challenged on the appeal.

¹³*People v. Fares* (1993) 16 Cal.App.4th 954, 958.

¹⁴Before dismissing, the court in *Clark* decided the case on its merits, because it had been fully briefed before the escape.

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 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.¹⁵

The abuse of discretion standard is often applied to issues involving judgment calls, such as sentencing, withdrawal of the plea, evidentiary rulings, motions for new trial, and *Marsden*¹⁶ and *Faretta*¹⁷ motions.¹⁸

Part of the reason for using a deferential standard like abuse of discretion is that the trial court is in a far superior position 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 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. 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. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742 [“that standard should not be interpreted as insulating trial court . . . orders from meaningful appellate review”; 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.)

¹⁵A 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. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

¹⁶*People v. Marsden* (1970) 2 Cal.3d 118 (motion to remove appointed trial counsel because of defective performance).

¹⁷*Faretta v. California* (1975) 422 U.S. 806 (right to self-representation at trial).

¹⁸A 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.)

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.¹⁹ (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Different burdens of proof, such as “clear and convincing evidence” and “preponderance of the evidence,” apply in different contexts. (E.g., *In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423, and *In re Angelia P.* (1981) 28 Cal.3d 908, 924 [clear and convincing in termination of parental rights case]; *Lake v. Reed* (1997) 16 Cal.4th 448, 468 [preponderance of evidence in civil case]; 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].)²⁰ 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, 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

¹⁹The evidence must be viewed in the light most favorable to the verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

²⁰In 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.*)

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 ex rel Locker v. Shamrock Foods, Co.* (2000) 24 Cal.4th 415, 432; *People v. Rells* (2000) 22 Cal.4th 860, 871), the legal correctness of instructions (*People v. Guiuan* (1998) 18 Cal.4th 558, 570-571), and the legal implications of given facts (*People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [prosecution’s due diligence in locating witness]).

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

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

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.) 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.)

A some situations 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].)

C. Standard of Prejudice [§4.50]

An error is not reversible unless it is prejudicial. With very few exceptions, an issue 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 defendant 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 trial²¹ (*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).²²
- Denial of retained counsel of choice (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [126 S.Ct. 2557, 165 L.Ed.2d 409]).
- Biased judge (*Tumey v. Ohio* (1927) 273 U.S. 510) or juror (*People v. Nesler* (1997) 16 Cal.4th 561, 579).²³
- Denial of the right to self-representation at 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]²⁴).

²¹Failure 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.)

²²Not 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.)

²³In 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.)

²⁴In *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

- Material misinstruction on the reasonable doubt standard (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278).
- 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).
- 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*²⁵ error in denying jury trial as to sentencing factors subject to *Chapman*²⁶ 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]).²⁷
- 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 *Riggins v. Nevada* (1992) 465 U.S. 127, 137 [administration of psychotropic medication against defendant’s will during trial: “whether the outcome of the trial might have been different if Riggins’ motion had been granted would be purely speculative”]; *Frantz v. Hazey* (9th Cir. 2008) 513 F.3d 1002 [self-represented defendant, presence at in-chambers substantive discussion]).

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].)

²⁵*Blakely v. Washington* (2004) 542 U.S. 296.

²⁶*Chapman v. California* (1967) 386 U.S. 18; see §4.52, *post*.

²⁷Good 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.)

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

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 defendant is that of *Chapman v. California* (1967) 386 U.S. 18, which held violations of most federal constitutional rights²⁸ 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 (the prosecution), and in creating a high standard for showing harmlessness (beyond a reasonable doubt).

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

²⁸Exceptions 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*).

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).²⁹

Other examples 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 342³⁰; *People v. Vann* (1971) 12 Cal.3d 220, 227-228; *People v. Flores* (2007) 147 Cal.App.4th 199); omission of an element in instructing on an offense (*Neder v. United States* (1999) 527 U.S. 1, 9-12, 16; *People v. Mil* (2012) 53 Cal.4th 400 [omission of two or more elements of offense in instruction does not automatically make error reversible per se]; *People v. Flood* (1998) 18 Cal.4th 470, 502-503)³¹; instructing the jury malice should be presumed in the absence of contrary evidence (*Rose v. Clark*, at pp. 577-578); 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); 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); and *Blakely*³² error in failing to submit a

²⁹*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*.

³⁰If 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.

³¹The 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).

³²*Blakely v. Washington* (2004) 542 U.S. 296.

sentencing factor to a jury (*Washington v. Recueno* (2006) 548 U.S. 212). (See also list of *Chapman* cases in *Arizona v. Fulminante*, at pp. 306-307.)³³

3. Not reversible unless the defendant 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 defendant, 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 defendant must show 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, defendant has necessarily shown miscarriage of justice]; see also *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918.)

Just a few examples of error governed by the *Watson* test are error in admitting evidence that was irrelevant or violated Evidence Code section 352, error affecting expert

³³An 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.)

testimony, many forms of prosecutorial misconduct, denial of a *Pitchess*³⁴ motion or motion for a physical lineup,³⁵ and ordinary instructional error.³⁶

ADI's article on arguing the relatively difficult *Watson* error most effectively³⁷ suggests, in summary: (1) remind the court to apply the correct *College Hospital* "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.

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.

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.³⁸ A reasonable probability is defined as a probability

³⁴*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. Husted* (1999) 74 Cal.App.4th 410, 415-423.

³⁵*Evans v. Superior Court* (1974) 11 Cal.3d 617; see *People v. Mena* (2012) 54 Cal.4th 146, 169-171.)

³⁶Good 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.)

³⁷<http://www.adi-sandiego.com/PDFs/Arguing%20Watson%20Error.pdf>

³⁸The *Strickland* "reasonable probability" standard is similar in phrasing and meaning to the *Watson* "reasonably probable" standard. (*Richardson v. Superior Court*

sufficient to affect “the reliability of the result” (*id.* at p. 693) or, in other words, to undermine “confidence in the outcome” (*id.* at p. 694).³⁹ 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 *Brady v. Maryland* (1963) 373 U.S. 83.) Materiality 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), or having a past attorney-client relationship with a current witness (*Levenson v. Superior Court* (1983) 34 Cal.3d 530). 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-

(2008) 43 Cal.4th 1040, 1050-1051; cf. *People v. Howard* (1987) 190 Cal.App.3d 41, 47-48, fn. 4.)

³⁹*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.)

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, 417.⁴⁰)

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 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

⁴⁰*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.)

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.)

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 on arguing the relatively difficult *Watson* error most effectively⁴¹ is summarized in §4.53, *ante*.)

⁴¹<http://www.adi-sandiego.com/PDFs/Arguing%20Watson%20Error.pdf>

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:

- *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.)⁴²
- *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.⁴³
- *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”].)⁴⁴

⁴²See *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.

⁴³See *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.

⁴⁴There 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).

- *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.⁴⁵

- *Evidence of other crimes or gang affiliation*: The fact that the defendant has committed other crimes or has criminal affiliations, such as gang membership, might sway a jury to convict, regardless of the evidence on the current charge, if they think: “He did it before and so probably did it this time,” or “He’s a bad person who should be punished, even if not guilty now,” or “He’s a menace to society and should be taken off the streets.”⁴⁶

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 case or damaged the heart of the defense.⁴⁷

- *Emphasis given error*: An error may have been repeated or exploited or given special emphasis by the prosecutor during argument.⁴⁸ As the Supreme Court has put it:

⁴⁵See *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.

⁴⁶See *People v Williams* (1997) 16 Cal.4th 153, 191 (gang affiliation); *People v Ewoldt* (1994) 7 Cal.4th 380, 404 (uncharged offenses); *People v. Rolon* (1967) 66 Cal.2d 690, 694, *People v. Allen* (1978) 77 Cal.App.3d 924, 935, and *People v. Stinson* (1963) 214 Cal.App.2d 476, 482, and *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 (prior offenses).

⁴⁷See *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.

⁴⁸See *People v. Louis* (1986) 42 Cal.3d 969, 995; *People v. Woodard* (1979) 23 Cal.3d 329, 341.

“There is no reason why we should treat this evidence as any less “crucial” than the prosecutor – and so presumably the jury – treated it.”⁴⁹

- *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 gives signs that the matters affected by the error are the very ones it considers troublesome or important, prejudice can often be inferred.⁵⁰

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 prosecution case is weak or the defense is strong may well be affected by an error.⁵¹ Conversely, in a one-sided case heavily weighted against the defendant, convincing a court of prejudice is difficult even under *Chapman*.

⁴⁹*People v. Powell* (1967) 67 Cal.2d 32, 56-57, quoting *People v. Cruz* (1964) 61 Cal.2d 861, 868.

⁵⁰See *People v. Williams* (1976) 16 Cal.3d 663, 669; *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.

⁵¹See, 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.

- *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.⁵² On the other hand, a short deliberation time can indicate probable prejudice, if without the error the evidence would have seemed sufficiently close to have required substantial deliberation time.⁵³ 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.”⁵⁴

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 may be used to establish prejudice. 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.⁵⁵

⁵²*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).

⁵³See, 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.

⁵⁴*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.

⁵⁵See *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.

- *Comparative results*: The fact a prior proceeding or another count without the error had a more favorable result is another factor suggesting prejudice.⁵⁶

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.)

⁵⁶See *People v. Brooks* (1979) 88 Cal.App.3d 180, 188; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.

- 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.)⁵⁷

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.

⁵⁷See §4.50 et seq., *ante*, for further discussion of prejudice standards.

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, even against the odds, by at least raising the issues – after all, the attorney is not infallible in judging issues, and occasionally “lightning strikes.”

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.)

This manual favors the selective approach. Counsel should consider the overall strategic impact of each issue. They might ask: Will the issue strengthen the probability the client will get 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 be 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 matter is explored in an ADI memo on arguability, “To Brief or Not To Brief: Marginal Issues.”⁵⁸

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, rule 8.316 [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.

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]

In the apparent absence of colorable issues, special procedures and considerations apply. (Counsel should be assured the problem does not indicate personal failure – it happens to the best.)

No-issue cases have been addressed with some frequency by both the United States Supreme Court⁵⁹ and California Supreme Court.⁶⁰ The courts have a constitutional duty

⁵⁸ <http://www.adi-sandiego.com/PDFs/Arguable%20issues%20memo.pdf>

⁵⁹ *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;

to provide effective counsel on appeal (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 issues, not only for the client and counsel, but also for the court.

A. 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.

1. Additional review of record [§ 4.75]

When a potential no-issues case appears, it often may be profitable for counsel to undertake another review of the record, eliminating nothing from consideration. A new issue may emerge, or a credible way of reformulating an issue previously rejected may appear.⁶¹

2. Project approval [§ 4.76]

Under the California project-panel system and judicial policy, approval by the assigned ADI staff attorney is required before any attorney, assisted or independent, files a no-issue brief. Counsel must submit a complete draft *Wende-Anders* brief (4.77 et seq., *post*) to the ADI attorney and also, in most situations, tender the record for further review.

McCoy v. Wisconsin (1988) 486 U.S. 429; *Pennsylvania v. Finley* (1987) 481 U.S. 551; *Jones v. Barnes* (1983) 463 U.S. 745.

⁶⁰*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 Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544; *In re Sade C.* (1996) 13 Cal.4th 952.

⁶¹See 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/PDFs/April%202008%20News%20Alert.pdf>
Memo: <http://www.adi-sandiego.com/PDFs/Arguable%20issues%20memo.pdf>

B. Wende-Anders Brief [§ 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.)

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 client, and counsel's own files.

2. Description of issues [§ 4.79]

A question of some disagreement is whether a *Wende* brief should describe the issues counsel considered. In *Smith v. Robbins* (2000) 528 U.S. 259, the United States Supreme Court held listing possible issues is not invariably required, if other safeguards are in place.

ADI for the most part encourages listing of issues. 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 both the court and the client.

However, such a listing 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.) Counsel must tell the client he or she may seek to

have counsel relieved. (*Ibid.*) ADI recommends that counsel submit with the brief a provisional request to withdraw, conditioned on the client's request.

4. Sending record to client [§ 4.81]

Counsel may send the record to the client after filing the brief, so that the client can file a pro per brief, if desired. Alternatively, if counsel believes there is a reasonable possibility the court will 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.⁶²

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, the right to file a pro per brief, the opportunity for access to the record, and the option of requesting counsel be relieved.

C. Appellate Court Responsibilities [§ 4.83]

1. Independent review of record [§ 4.84]

Wende held that under *Anders* the appellate court must independently review the entire appellate record 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.)⁶³

⁶²A 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.

⁶³This 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), and mentally disordered offender appeals (*People v. Taylor* (2008) 160 Cal.App.4th 304).

2. Pro per brief [§ 4.85]

The court must give the appellant an opportunity to file a pro per brief. (*People v. Wende* (1979) 25 Cal.3d 436, 440; *People v. Feggans* (1967) 67 Cal.2d 444, 447.)⁶⁴ 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.

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.⁶⁵ (*People v. Kelly* (2006) 40 Cal.4th 106, 120.) Thus a Court of Appeal *Wende* 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.) Such a decision serves a number of functions: it provides guidance to the parties and other courts in subsequent litigation; it promotes careful consideration of the case; it conserves judicial resources by making a record of what has been decided and, possibly, persuading the defendant of the futility of further litigation. (*Id.* at pp. 120-121.) It also satisfies the requirement that decisions determining causes must be "in writing with reasons stated." (Cal. Const., art. VI, § 14; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1262, 1264).

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 constitutionally may not decide the case without the benefit of such briefing. (*Penson v. Ohio* (1989) 488 U.S. 75, 81-83.) If for some reason counsel had been permitted to withdraw or counsel is

⁶⁴This right applies, too, in a conservatorship or mentally disordered offender case. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544, fn. 6; *People v. Taylor* (2008) 160 Cal.App.4th 304, 313.) It does not apply in a juvenile dependency case. (*In re Phoenix H.* (2009) 47 Cal.4th 835.)

⁶⁵It is not a right in the dependency context. (*In re Phoenix H.* (2009) 47 Cal.4th 835.)

disabled from arguing the issue,⁶⁶ new counsel must be appointed to do the briefing. (*Ibid.*)

D. Choice Between Brief on the Merits and *Wende* 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.⁶⁷

1. Sure loser [§ 4.88]

If the issue is a sure loser, it normally is best to opt for the *Wende* approach. Often counsel, engaged in understandable wishful thinking, will judge an issue as weak when it is in fact frivolous. Counsel can list the “loser” issue among the *Anders* issues and give the court a chance at least to consider it.

An exception is when the issue, though a sure loser in the state courts, is being preserved for later federal review. (See § 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.

2. Weak but not frivolous issue [§ 4.89]

If the issue is just weak but not frivolous or a sure loser, counsel should probably include it and file a regular brief on the merits. When counsel files a *Wende-Anders* 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.

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

⁶⁶Counsel 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.

⁶⁷See 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.

– 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 explicitly get the client's waiver of it and file a legitimate *Wende* brief.

(Chapter continued with § 4.91, next page.)

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,⁶⁸ reinstatement of dismissed charges, or the addition of more serious charges on remand. They also can entail non-penal consequences that may be more onerous than the original disposition. Some of the adverse effects may be minor; others, catastrophic.

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 is 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

⁶⁸See § 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.

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.)

⁶⁹In *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.

⁷⁰Restitution *finis* 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 Rule⁷¹ [§ 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

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

⁷²Clerical 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).

⁷³If 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*].)

⁷⁴In 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, 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.

⁷⁵In contrast, the prosecution's failure to object to a *discretionary* sentencing choice waives the right to appeal the issue. (*People v. Tillman* (2000) 22 Cal.4th 300, 303 [failure to impose restitution fine and parole revocation fine waived 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 waived 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 warning "appellate courts cannot be expected to apply this doctrine in every case in which . . . [the

⁷⁶On 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].)

⁷⁷The *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.

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 Rule⁷⁸ [§ 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. DeV Vaughn* (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 [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

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

⁷⁹An 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.

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].)

§ 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.

⁸⁰These 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.)

⁸¹To 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.)

D. Added Charges After Appeal As Possible Exception to Henderson Rule⁸²
[§ 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 because of original conviction
[§ 4.104]

Reversal on appeal may give the prosecution an incentive to file charges 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]; *Arnold v. Superior Court* (1971) 16 Cal.App.3d 984 [assault charge originally dismissed at prosecution’s request under Pen. Code, § 1385 after mistrial, because defendant serving murder sentence; when conviction was reversed on appeal and retrial ended in acquittal, assault charge was properly refiled];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

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

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

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.*)

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].)

E. Non-Penal Dispositions as Exceptions to *Henderson* Rule⁸⁴ [§ 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 *finis* 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 is punishment for ex post facto purposes.

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

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].)

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

⁸⁵Principles 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.)

⁸⁶The 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.)

⁸⁷Constitutionally, 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.)

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. opinion. 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.

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; 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 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 risk⁸⁹.

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. However, since the assessment can be highly speculative, 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)

⁸⁸The 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.

⁸⁹Needless 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.

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]; ABA Model Code of Prof. Responsibility, Canon 7, EC 7-7 [appeal is client's decision]; see generally ABA Model Rules of Prof. Conduct, Rule 1:2 .)

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; therefore, if the client fails to respond, counsel must proceed with the appeal.

**CHECKLIST OF SOME COMMON ISSUES
RAISED ON APPEAL [§ 4.122]**

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.)

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.)

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; cf. *People v. Floyd* 31 Cal.4th 179; see also *Fiore v. White* (2001) 531 U.S. 225 [later state Supreme Court decision establishing defendant's conduct did not violate state requires defendant be freed].)
- Is there a federal law that might preempt the provisions of the state statute under which the defendant was convicted? (*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.)

□ 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? Check for material variances between the pleading and the evidence at trial.

□ 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.

□ 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. 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.)

□ 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 waived 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:

- 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., *Blueford v. Arkansas* (2012) ___ U.S. ___ [132 S.Ct. 2044, 182 L.Ed.2d 937] [statement by jury of preliminary vote does not constitute acquittal for jeopardy purposes]; *People v. Fields* (1996) 13 Cal.4th 289, 299-302 [acceptance of guilty verdict on lesser included offense precludes retrial on greater]; *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].)

- 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 on both a greater offense and a lesser included one? (*People v. Pearson* (1986) 42 Cal.3d 351, 355.)
- 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. Massie* (1998) 19 Cal.4th 550, 563-565; *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 *Barker v. Wingo* (1972) 407 U.S. 514, 530; *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; *People v. Wagner* (2007) 154 Cal.App.4th 81.)

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.)
- 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*].)
- 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; *People v. Husted* (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. 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. 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; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1413-1416; 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 while mentally competent].)

- ▶ 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.)

□ 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?⁹⁰ Do both the advisement and the defendant's personal waiver appear explicitly on the record? (*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

⁹⁰See § 2.46 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

judged by totality of circumstances indicating voluntary and intelligent plea]; *In re Tahl* (1969) 1 Cal.3d 122, 130-133.⁹¹)

- Was the defendant adequately advised of the consequences of the plea?⁹² (*In re Resendiz* (2001) 25 Cal.4th 230, 243, fn. 7; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.)
- 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].)

□ 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. (*Faretta v. California* (1975) 422 U.S. 806, 818, but see *Indiana v. Edwards* (2008) 554 U.S. 164 [128 S.Ct. 2379, 171 L.Ed.2d 345] [state law may constitutionally require higher standard of competence to represent self than to stand trial] and 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 if permitted by *Faretta*⁹³]; *People v. Butler*

⁹¹*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.

⁹²See § 2.47 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started."

⁹³Under *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 where he or she cannot carry out the basic tasks needed to present the defense without the

(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].)

- 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].)

- 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].)

help of counsel. (53 Cal.4th at p. 530.)

- 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) ___ U.S. ___ [130 S.Ct. 1473].)
- Conflicts of interest.⁹⁴ 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.)
 - 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.)

⁹⁴Rules of Professional Conduct, rule 3-310(B) allows for representation by a conflicted attorney if the defendant consents in writing after full disclosure and opportunity to seek new counsel. 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.)

- 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. (*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.)

☐ 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.)
- ☐ 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].)

□ Motions. [§ 4.140]

Review motions that were made and consider whether others should have been made. 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*.⁹⁵ (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].)⁹⁶
- 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.)

⁹⁵A 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.

⁹⁶Error 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.)

- 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. 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. Anderson* (2001) 25 Cal.4th 543, 591-593; *People v. Lopez* (2011) 198 Cal.App.4th 698, 713-714.)
- 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.)
- 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 *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Whorton v. Bockting* (2007) 549 U.S. 406 [127 S.Ct. 1173, 167 L.Ed.2d 1]; *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. 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.)
- 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.)
- Writings. (Evid. Code, § 1400 et seq.)
- 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:
 - 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].)

□ 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.⁹⁷ 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.

⁹⁷Many 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.”)

- Did the instructions fully and accurately state the basic elements of the offenses?
 - 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 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 instructions adequately put forth the defense theory of the case?
 - Were instructions given over defense objection? Were defense instructions refused?
- 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, 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?

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. 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?⁹⁸ (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])?

⁹⁸To 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.⁹⁹ 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].)

□ 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?
- 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 *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?
 - 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 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey* (2000)?¹⁰⁰
- 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?

¹⁰⁰See articles at <http://www.adi-sandiego.com/articles.html> under BLAKELY/ CUNNINGHAM/ BLACK II.

□ Custody credits. [§ 4.149]

Recheck all custody credits awarded. Multiple offenses, parole or probation holds and revocations, and a variety of statutory provisions often make computation of credits confusing.¹⁰¹ (E.g., *People v. Brown* (2012) 54 Cal.4th 314.) Penal Code section 1237.1 requires a motion in the trial court for correction of presentence custody credits as a prerequisite to raising the issue on appeal.

¹⁰¹See 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.”

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.

❑ Dismissing a strike in violation of statute. [§ 4.158]

Although the issue has not yet been decided squarely, direct violations of a statutory mandate in dismissing 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. On the other hand, the court's exercise of discretion in dismissing a strike is arguably not reviewable on the merits unless the People appeal in their own right, although counsel should advise the client of the

⁷⁷Counsel 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).

possibility the court might find otherwise.⁷⁸ Examples of potentially unauthorized dismissals of a strike include:

- Failure to enter reasons for dismissing a strike in the minute order, as required by Penal Code section 1385: Cf. *People v. Bonnetta* (2009) 46 Cal.4th 143; *People v. Williams* (1998) 17 Cal.4th 148, 161-162 (People’s appeal; dismissal was not only abuse of discretion on the merits, but “ineffective” and “invalid” because of Pen. Code, § 1385 violation), and *People v. Beasley* (1970) 5 Cal.App.3d 617, 637-638 (same); see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 532 (People’s petition for writ of mandate; although trial court had authority to dismiss strike, it had to state reasons on minutes).
 - 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 *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 645, subdivision (a):⁷⁹ *People v. Crowder* (2000) 79 Cal.App.4th 1365, 1371 (even when defendant was sentenced on two

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” waived by failure to object].)

⁷⁹The 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 subject to that restriction.

counts in separate proceedings, Pen. Code, § 654, subd. (a) requires longer of two potential terms).

❑ 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).

NOTE: 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 waived 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 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.