

# First Do No Harm: Adverse Consequences or Bank Favorable Errors, A Review

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## INTRODUCTION

The phrase “adverse consequence” describes a situation where there is a legal error related to the client’s current judgment, but the error is to the client’s benefit. The legal error is considered “adverse” because if it is discovered and corrected during the appeal process, the “consequence” of the appeal would be to harm the client’s interests.

The answer to the question of how to handle an adverse consequence appears to be the classic law school one: it depends. Invariably, it involves careful counseling of the client to help them decide how to proceed. When it comes to adverse consequences, the essential problem for appellate counsel is the risk that pursuit of the appeal will come at an unintended cost to the client if the error is discovered. Thus, when encountering one of these issues, there is an important assessment to undertake that weighs such elements as the size of the consequence, the risk of error-discovery, and the likelihood of a successful appeal.

In my research, I’ve seen this topic referenced in myriad ways, but whether it is considered a “negative issue,”<sup>1</sup> a bank error in our favor,<sup>2</sup> or an issue that takes us to the “dark side”<sup>3</sup> of the law, the phrase “adverse consequences” appears to be the accepted collective noun.

In the pages that follow, I will summarize some of the big areas where adverse consequences arise, providing case-specific examples designed to help explain the issues. I will also provide an approach on how to counsel one’s clients with a sample letter for such communication. As an initial note, as you work through the following, consider

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<sup>1</sup> Appellate Defenders, Inc., Appellate Practice Manual, 2d. (Rev. 12/2016), ch. 4, p. 1.

<sup>2</sup> William M. Robinson, *Credits Redux: How to Get ‘Em, Where to Get ‘Em*, (May 2009), p. 38.

<sup>3</sup> J. Bradley O’Connell and Renee Torres, Appellate Advocacy College 2000, *Lecture 3: How to Approach a Case/Issue Spotting*, p. 40 [referencing specifically the “dark side” of unauthorized sentences].

whether the possible adverse consequence is one that is obvious from the face of the judgment or would require delving more deeply into the appellate record. Ultimately, when it comes to properly advising one’s client, the more obvious the error, the more likely it is to be caught through pursuit of the appeal.

The following review is by no means exhaustive. This article originated in 2016; this is the September 2020 edition. I hope to be continually adding to and refining its contents as the years go by and the laws get altered. I welcome additions, comments, and suggested changes at any time ([anna@sdap.org](mailto:anna@sdap.org)).

So here we go . . .

## I. UNAUTHORIZED SENTENCES.

An unauthorized sentence is one not permitted by law. A sentence is generally “unauthorized” where it could not lawfully be imposed under any circumstances in the particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Unauthorized sentences are an exception to the forfeiture rule of *Scott*: appellate courts are “willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing.” (*Ibid.*, internal citations omitted.)

It is the duty of the court to impose the prescribed punishment. (Pen. Code, § 12; *People v. Cheffen* (1969) 2 Cal.App.3d 638, 641.)<sup>4</sup> “Pursuant to this duty the court must either sentence the defendant or grant probation in a lawful manner; it has no other discretion.” (*Cheffen, supra*, 2 Cal.App.3d at p. 641.) Otherwise, it is an unauthorized sentence. (*People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6.) If a judgment of conviction is proper, but the sentence unauthorized, the conviction should be affirmed but the case remanded for re-sentencing. (*Scott, supra*, 9 Cal.4th 331, 354.)

The “dark side” of “unauthorized sentences” is where adverse consequences lurk. When an illegal sentence is set aside on appeal, the trial court may generally impose a lengthier sentence on remand. (*People v. Serrato* (1973) 9 Cal.3d 753, 764-765 [the “*Serrato*

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<sup>4</sup> All future unspecified statutory references are to the Penal Code.

exception”], overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583; *People v. Brown* (1987) 193 Cal.App.3d 957, 961-962.) Other negative outcomes include a reduction in custody credits, application of a missed fine or fee, or transfer to state prison because the situation dictated a prison commitment. There is no clear answer as to what constitutes an “unauthorized sentence” and, unfortunately, the concept of “unauthorized sentences” is a growth industry.<sup>5</sup>

**A. Increasing a Defendant’s Sentence Following the Exercise of The Right to Appeal.**

**1. The trial court may impose a greater sentence if the original sentence was “unauthorized.”**

Known as the “*Serrato*” exception, a trial court may generally impose a greater sentence on remand if the original sentence was “unauthorized.” (*Serrato, supra*, 9 Cal.3d 753, 764.) Appellate counsel should be sensitive to the circumstances in which the general rule does not apply. Consider the following two scenarios:

**i. Where the unauthorized sentence could be restructured to reach the same aggregate term.**

The first situation where there can be no increase on remand is where the original unauthorized sentence could be restructured to reach the same aggregate term. Section 1170, subdivision (d), governs the recall of sentence procedure and subdivision (G) provides, “The court shall have the discretion to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.” (§ 1170, subd. (d)(G).)

The case of *People v. Torres* (2008) 163 Cal.App.4th 1420, illustrates how double jeopardy principles and the recall provisions of section 1170, subdivision (d), can be used to prevent an increased sentence on remand following an appeal. (See *People v. Torres* (2008) 163 Cal.App.4th 1420, 1432.) In *Torres, supra*, 163 Cal.App.4th at page 1432, the trial court initially imposed a seven-year sentence for a violation of section 422 (criminal

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<sup>5</sup> See D. Sacher, *Perfecting a Sentencing Appeal*, (May 2008), p. 33, <[www.sdap.org/downloads/research/criminal/sentence08.pdf](http://www.sdap.org/downloads/research/criminal/sentence08.pdf)>

threats) and imposed the middle term for a violation of section 136.1 (dissuading a witness), which was stayed under section 654. In imposing the seven-year sentence, the court struck a gang enhancement that would have required the imposition of a life term for the section 136.1 conviction. (*Id.* at p. 1428.) Although an appeal was not taken, CDCR wrote to the trial court under section 1170, subdivision (d), and pointed out that the sentencing triad for a violation of section 422 was lower than the sentence imposed (16 months, two, or three years). (*Id.* at p. 1427.)

The trial court recalled the defendant's sentence and resentenced him under section 1170, subdivision (d)(1). (*Torres, supra*, 163 Cal.App.4th at p. 1428.) In resentencing the defendant, the court imposed a life term on the section 136.1 conviction and stayed the punishment for the section 422 conviction pursuant to section 654 yielding a seven-years to life, and thus higher, sentence. (*Ibid.*) On appeal, the appellate court held that the trial court erred because the original seven-year sentence could have been lawfully imposed since it did not fall below the mandatory minimum possible sentence and restructuring the sentence lawfully could still result in a seven-year term. (*Id.* at pp. 1432-1433.) The *Torres* court reversed the judgment and remanding the matter for a resentencing hearing with orders to the trial court to impose a sentence no greater than seven years. (*Id.* at p. 1434.)

The principle enunciated in *Torres* is of substantial utility. So long as the original sentence can be imposed in a lawful manner, the trial court should be precluded from imposing a longer sentence on remand.

Regrettably, the holding in *Torres* has not been unanimously followed. In *People v. Vizcarra* (2015) 236 Cal.App.4th 422 at page 425, the trial court had originally imposed a 15-year sentence. The defendant's first appeal resulted in a remand for resentencing because the 15-year sentence had been unlawfully calculated when the trial court failed to impose a mandatory five-year prior conviction enhancement and had not doubled a component of the sentence under the Three Strikes law. (*Id.* at p. 426.) Upon remand, a 22-year term was imposed. (*Id.* at p. 427.) When the defendant relied on *Torres* in his

subsequent appeal, the Court of Appeal found the case inapposite for two reasons: (1) *Torres* involved a section 1170, subdivision (d), recall; and (2) the error in *Torres* related to an illegal “component” whereas the error in *Vizcarra* related to the omission to add components. (*Id.* at pp. 437-438.) These distinctions are not persuasive.

The essence of the “unauthorized” sentence doctrine is that an illegal sentence must be corrected when “it could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott, supra*, 9 Cal.4th 331, 354.) Given this principle, it follows that the *Torres* court necessarily got it right. The purpose of correcting an illegal sentence is to ensure that the will of the Legislature is respected. If the length of the original sentence is within the limits specified by the Legislature, it makes no sense to say that the trial court must impose a longer sentence if its original sentence suffered from a correctable defect. Counsel should rely on *Torres* in a proper case.

**ii. Where the unauthorized sentence was negotiated as part of a plea agreement.**

The second situation to be aware of is where an unauthorized sentence is the result of a plea bargain. In this regard, the case of *People v. Velasquez* (1999) 69 Cal.App.4th 503, is another helpful precedent. There, the defendant entered a plea bargain for a grant of probation with a specified maximum prison term of three years were probation to be revoked. (*Id.* at p. 504.) It was later determined that the defendant was charged with a crime that carried a punishment of two, four, or six years; three years was not a maximum sentence under the triad. (*Ibid.*) When probation was subsequently revoked, a legally unauthorized three-year term was imposed under the original plea agreement. (*Id.* at p. 505.) On the defendant’s appeal, the sentence was reduced to the lawful term of two years. (*Id.* at p. 507.) In response to the People’s claim that the defendant had agreed to the three year term and was therefore estopped to complain, the court replied that the “negotiated disposition left open the possibility of a lawful two-year state prison sentence if he violated the terms and conditions of probation.” (*Id.* at p. 506.) The court reasoned it

was a “fair inference” that the prosecutor “simply misread the range of punishment” at the time the original agreement was made. (*Id.* at p. 505.)

Although the facts in *Velasquez* are unusual, its reasoning is potentially quite useful. The court found that the illegality in the sentence was “directly attributable to the prosecutor’s negligence” in framing a disposition that led to an illegal sentence. (*Velasquez, supra*, 69 Cal.App.4th at p. 507.) Since a lawful two-year term was not necessarily inconsistent with the terms of the plea bargain, the defendant was not made to suffer due to the prosecutor’s error. (But see *People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567, 574-577 [disagreeing with the holding in *Velasquez* that the prosecutor bears the burden of a mistake made in crafting the terms of a plea bargain].)

## **2. The Prosecutor May Generally Not Increase the Charges Following the Defendant’s Successful Appeal.**

In evaluating possible adverse consequences from prevailing on appeal, it is important to note that a prosecutor may generally **not** increase the charges after a successful appeal by the defendant. To do so violates the due process guarantee against vindictive prosecution.

When a defendant exercises a fundamental procedural right such as going to trial or taking an appeal, a presumption of vindictiveness arises if the prosecutor subsequently increases the charges. (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371.) The presumption may only be rebutted by establishing: (1) an objective change in circumstances or in the state of the evidence; and (2) that the new information could not have been found at the time that the original charges were brought. (*In re Bower* (1985) 38 Cal.3d 865,879.)

As a corollary to this principle, it has long been settled that under California law, “[w]hen a defendant successfully appeals a criminal conviction, California’s constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing.” (*People v. Hanson* (2000) 23 Cal.4th 355, 357, citing *People v. Henderson* (1963) 60 Cal.2d 482, 495-497.)

The Sixth District decision in *People v. Puentes* (2010) 190 Cal.App.4th 1480, provides a solid example of the operation of vindictive prosecution principles. In *Puentes*, the defendant was originally charged with statutory rape (a felony) and contributing to the delinquency of a minor (a misdemeanor). (*Id.* at p. 1483.) The jury hung on the felony and convicted the defendant on the misdemeanor. (*Ibid.*) The prosecutor dismissed the felony charge when sentence was imposed on the misdemeanor. (*Ibid.*) After the misdemeanor conviction was reversed on appeal, the prosecutor reinstated the felony charge. (*Ibid.*) In response to the defense motion to dismiss the felony charge on vindictive prosecution grounds, the prosecutor indicated that she thought that it was only proper to proceed on the original charge since she believed that the defendant had committed the crime. (*Id.* at p. 1487.) The motion to dismiss the felony count was denied and the defendant was convicted of the felony. (*Id.* at p. 1482.)

On appeal, the appellate court held that the prosecutor's justification for reviving the felony was insufficient to dispel the presumption of prosecutorial vindictiveness. (*Puentes, supra*, 190 Cal.App.4th at p. 1488.) The court noted the rule that a presumption of vindictiveness arises only if the prosecutor "ups the ante" after exercise of a postconviction right. (*Id.* at p. 1484.) "While a defendant's exercise of some pretrial procedural right may present an opportunity for vindictiveness, 'a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule.'" (*Ibid.*) Finding no basis for a change in circumstances other than the defendant's success on appeal, the court reversed the judgment. (*Id.* at p. 1488.)

As *Puentes* establishes, the prosecutor needs a good reason to add new charges or reinstate previously dismissed charges after the defendant wins his appeal. Without such reasons, the prosecutor will not have carried their burden to dispel the presumption of vindictiveness, and so the defendant cannot be punished for exercising the right to appeal.

## **B. California's Sentencing Schemes.**

California has multiple sentencing schemes. These include the basic Determinate Sentencing Law, indeterminate sentencing, the One Strike Law, and the Three Strikes law. When assessing the validity of a client's sentence, remember that the applicable sentencing scheme is the one that in effect on the date of the **commission** of the underlying offense. (U.S. Const., art I, § 10; Cal. Const., art I, § 9.)

- ~ **The Determine Sentencing Law** or "DSL" is codified in section 1170, et seq. A "determinate" sentence is one that is specified for a certain number of years and is usually the result of the selection of one of three sentencing choices (also known as a "triad"). An aggregate term under the DSL is one comprised of the principal term and a subordinate term. (See § 1170.1, subd. (a).) The principal term should be the longest available term under the DSL for an offense when there are multiple offenses. The principal term includes the base term and any specific enhancements (personal firearm use, personal infliction of GBI, etc.)<sup>6</sup>
- ~ **An indeterminate sentence** is any sentence in which the court imposes life in prison or for a term of years to life. (§ 1168, subd. (b); see *People v. Felix* (2000) 22 Cal.4th 651.)
- ~ **The Three Strikes Law** was enacted in 1994 following both a Legislative effort and a voter initiative (deriving its name from the phrase "Three Strikes & You're Out" attached to the voter initiative). The Legislature added to the existing recidivist statute of section 667. Proposition 184, in contrast, created a second version of the law by adding section 1170.12. Although there are some minor differences between sections 667 and 1170.12, courts have interpreted them as analogous. In 2012, Proposition 36, ameliorated some of the harsher provisions of the original Three Strikes Law. As of today, the basic tenets of the law require that a third-strike defendant receive a 25-year to life sentence only if his two prior

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<sup>6</sup> See also J. Grossman, *Four Easy Steps to Understanding Determinate Sentencing Law*, <<http://www.sdap.org/downloads/research/criminal/sentence.pdf>>



strike offenses constitute “serious” or “violent” felonies as defined under sections 11927, subdivision (c) and 667.5, subdivision (c).

~ **The One Strike Law** is a separate sentencing scheme for sex offenders who meet the relevant criteria under section 667.61. Under this provision, a first-time offender who commits one of the enumerated offenses may be subject to a mandatory sentence of 15 or 20 years to life without parole.

### **C. Examples of Unauthorized Sentences.**

Here are some common ways the trial court (and parties) get the sentence wrong.

#### **1. The Wrong Sentencing Scheme Was Used.**

As noted above, California has several sentencing schemes so, when reviewing a client’s sentence, it is wise for appellate counsel to consider which sentencing scheme should apply versus which scheme was actually applied by the trial court.

First, make sure that the Three Strikes Law was not inappropriately ignored, which could have disastrous consequences for an appellant. If a client has at least one prior “violent” or “serious” felony conviction, sentencing must proceed under the Three Strikes law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 505 [on proof of prior violent or serious felony, sentencing proceeds under the Three Strikes law].) It thus follows that if the client has two or more prior serious or violent felonies that are pled and proved, the Three Strikes Law must be applied. (See *People v. Williams* (2004) 34 Cal.4th 397, 402-403 [any term for life is an indeterminate term and the determinate scheme of section 1170.1 does not apply to indeterminate terms, and so once it has been pled and proved that a defendant has two or more prior felony convictions, the Three Strikes law must be applied].)

For clients convicted of murder who have previously been in prison more than once, check whether they meet the requirements for section 667.7 [habitual offender]. If they do, with one exception, they must be sentenced under section 667.7 rather than section 190 [punishment for murder]. (See *People v. Jenkins* (1995) 10 Cal.4th 238, 249.)

The one exception is a big one. A defendant eligible for sentencing under both section 667.7 and the Three Strikes law must be sentenced under the Three Strikes law. (*Id.* at p. 238, fn. 2.)

## **2. Mishandled Priors: Convictions, Strikes, Etc.<sup>7</sup>**

There are a few types of prior convictions (a.k.a “priors”) including serious felony priors, strike priors, and prison priors (or term served under section 1170, subdivision (h)). Prior convictions can be to enhance a defendant’s sentence, exclude a defendant from probation, establish mandatory minimum terms, serve as a driver’s license restriction, or elevate misdemeanor conduct into felony conduct. Generally, a prior felony conviction may be used to enhance a sentence imposed under the Determinate Sentencing Law, as a strike under the Three Strikes law, or as both an enhancement and a strike.

### **i. Strike priors.**

A “strike prior” is any serious or violent prior felony conviction. They are defined in sections 667.5(c) [violent felonies] and 1192.7(c) [serious felonies]. They include, but are not limited to: residential burglary, robbery, kidnapping, murder, most sex offenses like rape and child molestation, any offense in which a weapon was personally used whether or not anyone was injured, any offense in which the defendant personally inflicted great bodily injury was inflicted, arson, crimes involving explosive devices, or attempts to commit any of those offenses.

### **~ Sentencing with One Strike Prior**

Under the determinate sentencing scheme, where both principal and subordinate terms are imposed, the terms for both are doubled. (§§ 667, subd. (e)(1), 1170.12(c)(1); see *People v. Morales* (2003) 106 Cal.App.4th 445, 454 [doubling two-strike defendant’s sentence is required on all felony counts; it is not necessary to find prior strike conviction allegation true as to each count].)

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<sup>7</sup> See footnote 6., *infra*.

Where a sentence involves both a determinate and indeterminate term, section 667, subdivision (e)(1) [two strikes sentence], requires doubling of both the determinate sentence and the **minimum term of an indeterminate sentence**. Minimum term of an indeterminate sentence refers to the establishment either expressly or via other statutes of a minimum time that must be served before a defendant can become eligible for parole. (See *People v. Smithson* (2000) 79 Cal.App.4th 480, 502-503.) There is no doubling of a Life-Without-Parole (LWOP) sentence. (*Id.* at p. 503.)

~ **Sentencing with Two or More Strike Priors**

If the defendant has two or more prior serious or violent felony convictions and the current offense is neither serious nor violent, then sentencing proceeds under section 667, subdivision (e)(1).

The exposure to the infamous third-striker mandatory life term turns on whether the CURRENT new felony conviction qualifies as a serious or violent felony. Following the passage of Proposition 36 in 2012, when a defendant has **two or more prior serious or violent felony convictions**, and the **new felony** conviction is a **serious or violent** felony, the term for the new felony conviction is **an indeterminate life term**, with a minimum term calculated as the greater of: (i) three times the term otherwise provided for each current felony conviction; (ii) 25 years; or (iii) the determinate term, including enhancements (under section 1170), or any period prescribed by section 190 (murder) or section 3046 (life term). (§ 667, subd. (e)(2)(A).)

**Be alert: Under the Three Strikes Reform Act, if the “Current Offense” conviction involves the pleading and proof of personal use of a weapon or personal infliction of great bodily injury, the 25 to life term still applies even when the current crime is not a serious felony.** The same applies if one of the defendant’s prior convictions is for a “super strike” – mostly sex offenses and murder. (See §§ 1170.12, subd. (c)(2)(C)) 1192.7, subd. (c).) This is also the case even where the current offense is not a serious or violent felony.

**Further strike-related note on wobblers:** When a wobbler is reduced to a misdemeanor under section 17, subdivision (b), and this reduction occurred after the original sentence is pronounced in the prior case (see § 1170.12(b)(1)), it is still a strike, but not a felony prior subject the five-year enhancement under section 667, subdivision (a). (*People v. Park* (2013) 56 Cal.4th 782, 795 [reduced offense did not count as five-year prior although it did qualify as a strike due to legislative intent].)

**ii. Prison priors [§ 667.5] & mandatory confinement [§ 1170].**

A defendant who had previously served a prison term that was charged and either admitted or found true in the current case, is subject to sentence enhancements under section 667.5, subdivisions (a) and (b).

Under section 667.5, subdivision (a), if the prior prison term and the current offense are a violent felony (see § 667.5, subd. (c)), a mandatory three-year term for each prior separate prison term is imposed (there is an exception if the prior conviction was followed by a period of 10 years in which the defendant was out of custody and suffered no felony convictions).

Under section 667.5, subdivision (b), if any prior prison term was served for sexually violent offenses (those listed in Welfare and Institutions Code section 6600, subdivision (b)), and the current felony offense is not a violent felony, a mandatory one-year term for each separate prison term is required (there is an exception if the prior conviction was followed by a period of 5 years in which the defendant was out of custody and suffered no felony convictions).<sup>8</sup>

**Be alert:** In sentencing a defendant subject to multiple indeterminate sentences, a trial court must impose or strike the prior prison term enhancement for every count. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1559.)

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<sup>8</sup> This section was amended in 2019 following passage of Senate Bill 136, to preclude the one-year enhancement for non-sexually violent prior prison term offenses.

### 3. Mishandled Consecutive Sentences.

Generally, the court has discretion to run terms concurrently or consecutively (§ 669, subd. (a)), and if the court does not specify, then the term is presumed to be concurrent. (§ 669, subd. (b).) But there are exceptions.

#### i. Mandatory consecutive sentences.

- ~ (1) Escape from custody (§§ 1370.5, 4530, 4532);
- ~ (2) Where there is an OR (own recognizance) or on-bail enhancement, the two cases must be run consecutively (§12022.1, subd. (e));
- ~ (3) With enumerated sex offenses involving separate victims or the same victim on separate occasions, the conviction must be run consecutively (§§ 667, subd. (d)), 667.61, subd. (i) [One Strike Law cases] Note that this provision does not apply if the offense occurred before 2006. (See *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.)
- ~ (4) In a non-strike case (i.e., the defendant has no prior strikes) where the current case involves more than one felony or more than one strike-able felony, consecutive sentences are the default and are only discretionary if the current felony convictions are committed on the same occasion or arise from the same set of operative facts. (§§ 667, subdivisions (c)(6) and (c)(7), 1170.12, subdivisions (c)(6) and (c)(7) [sentencing for more than one felony or strike-able felony]; *People v. Casper* (2004) 33 Cal.4th 38, 42.)

#### ii. Three Strikes law required consecutive sentences.

- ~ (1) Where at least one strike prior has been pled and proven true, consecutive sentences are required for **every** subordinate term relating to current felony convictions not arising from the same set of operative facts. (§ 667, subd. (c)(6) & (7); see *Casper, supra*, 33 Cal.4th at pp. 43-44 [trial court dismissed strike allegations as to 34 out of 35 counts, consecutive sentences for all current felonies were mandated by virtue of the one remaining strike allegation].)

- ~ (2) Where at least one strike prior has been pled and proven true and the defendant is currently serving a sentence for another offense, the sentence for the current offense(s) must be run consecutively. (§ 667, subd. (c)(8).)
- ~ (3) If there are multiple present convictions, consecutive sentences are mandated unless the exception for offenses that occurred on the same occasion or same set of operative facts applies. (§ 667, subd. (c)(6) or § 1170.12, subd. (a)(6).) Crimes committed on the same occasion are those where there is a “close spatial and temporal proximity” between the offenses. (*People v. Lawrence* (2000) 24 Cal.4th 219, 229.) Crimes are committed under the same set of operative facts when they share “common acts or criminal conduct that [serve] to establish the elements” of the offenses. (*Id.* at p. 233.)
- ~ (4) If one or more prior serious or violent felony convictions have been pled and proved, and the **current conviction is for more than one serious or violent felony**, “the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced . . .” unless they occurred on the same occasion. (See *People v. Hendrix* (1997) 16 Cal.4th 508, 514.) (§ 667, subd. (c)(7) or § 1170.12, subd. (a)(7); see also *People v. Deloza* (1998) 18 Cal.4th 585, 591.)
- ~ (5) A **life sentence under the Three Strikes law must be run consecutive to any other sentence**. So long as a consecutive sentence could be imposed under the law, a life sentence imposed under the Three Strikes law must be consecutive. (§§ 667, subd. (e)(2)(B) or 1170.12, subd. (c)(2)(B).)

**A note on calculating the life sentence for a Three Strikes sentence:** When it has been pled and proved that a defendant has two or more violent or serious prior felony convictions, the standard formula is 25 years to life. However, there are two circumstances under which a longer indeterminate term must be applied:

- ~ (1) if a tripled determinate term exceeds 25 years, the tripled term plus conduct enhancements is to be imposed. (§§ 667, subd. (e)(2)(A) or 1170.12, subd. (c)(2)(A)(I).)
- ~ (2) if the determinate term plus enhancements exceeds 25 years, the higher term must be imposed. For example, if the defendant who received the middle term of 12 years for violating section 288.5 had five prior serious felonies brought and tried separately (five x five-year priors), the defendant would receive a sentence of 37 years to life consecutive to 25 years for the enhancements (12 + 25 + 25). (*People v. Dotson* (1997) 16 Cal.4th 547, 559.)

#### 4. Mishandled Enhancements.

Application of enhancements is a very tricky sentencing area and thus a constant source for trial court error and, by unfortunate extension, potential adverse consequences. There are generally two kinds of enhancements. **Conduct enhancements** are those that relate to the specific offense and are attached to specific counts. (See e.g., § 12022.53 [gun use enhancement].) **Status enhancements** are those that relate to the recidivist status of the defendant and are attached to the accusatory pleading as a whole (prior convictions, prior prison sentences, habitual offender, etc.). (See e.g., § 667, subd. (a) [mandatory five-year enhancement for serious felony prior].)

##### i. Status enhancements: Determinate Sentencing Law v. the Three Strikes law.

The Determinate Sentencing Law and the Three Strikes law approach application of status enhancements differently. Under the Determinate Sentencing Law, recidivist enhancements are applied only once. (See *People v. Tassell, supra*, 36 Cal.3d at p. 90, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 387.) In contrast, under the Three Strikes law, status enhancements are to be applied individually to each count of a third strike sentence. (See *People v. Williams* (2004) 34 Cal.4th 397, 402-403; see

also Couzens and Bigelow (2001) *Cal. Three Strikes Sentencing*, p. 86 (rev. 11/02)  
[application of enhancements in the Three Strikes context].)

**ii. Mis-application of the serious felony prior enhancement [§ 667, subd. (a)].**

A court may strike the prior serious felony conviction for purposes of the Three Strikes law (i.e., to prevent the defendant from being subject to the Three Strikes law), but in a case involving multiple prior serious felony convictions that are pled and proved, and there are multiple current offenses on which consecutive third-strike life terms are imposed, the court must impose the five-year enhancement for *each* serious felony prior *as to each current offense conviction*, and not just once. (*People v. Williams* (2004) 34 Cal.4th 397.) Of course, the court may now exercise its discretion to strike the punishment under section 1385, subd. (b).<sup>9</sup> The same is not true, however, for sentencing under the Determinate Sentencing Law.

**Fortunately, the Supreme Court has clarified that because of the limitations in the** Determinate Sentencing Law, the five-year enhancement for a prior serious felony conviction under section 667, subdivision (a), can only be added once to multiple determinate terms imposed as part of a second-strike sentence. (*People v. Sasser* (2015) 61 Cal.4th 1, 7; § 667, subd. (e)(1).)

**Tip:** The date for determining whether the prior offense was enumerated in section 1192.7, to qualify as a serious felony, is the date of the charged offense.

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<sup>9</sup> Prior to January 1, 2019, a trial court had no discretion and had to impose the mandatory five-year enhancement under section 667, subdivision (a), if the prior serious felony had been pled and proved. (See § 1385, subd. (b).). Thanks to Senate Bill 1393, that is no longer true.



**iii. Firearm use enhancements, on-bail enhancements & great bodily injury enhancements.**

If a defendant's sentence includes any of the following enhancements (listed from common ones to less common ones), it is imperative to make sure the related sentence was properly calculated.

- ~ **(1) Enhancement for personal infliction of great bodily injury in the commission of a felony** [§ 12022.7]: When infliction of great bodily injury is *not an element* of the offense charged, and depending on the status of the victim, mandatory enhancements of between three and six years apply. (§ 12022.7, subds. (a)-(d).) This enhancement does not apply to murder or manslaughter. (§ 12022.7, subd. (g).)
- ~ **(2) Use of a firearm in the commission of a felony** [§ 12022.53]: A ten-year firearm use enhancement to be added as an additional and consecutive term of imprisonment is required for certain enumerated offenses.<sup>10</sup> (§ 12022.53, subd. (b).) If the defendant personally discharges a firearm, the additional and consecutive term is 20 years. (§ 12022.53, subd. (c).)
  - ~ **(2)(a)** If the discharge of the firearm proximately causes great bodily injury or death, the additional and consecutive indeterminate term is 25 years to life. (§ 12022.53, subd. (d).)

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<sup>10</sup> This section applies to the following felonies: (1) Section 187 (murder); (2) Section 203 or 205 (mayhem); (3) Section 207, 209, or 209.5 (kidnapping); (4) Section 211 (robbery); (5) Section 215 (carjacking); (6) Section 220 (assault with intent to commit a specified felony); (7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter); (8) Section 261 or 262 (rape); (9) Section 264.1 (rape or sexual penetration in concert); (10) Section 286 (sodomy); (11) Section 288 or 288.5 (lewd act on a child); (12) Section 288a (oral copulation); (13) Section 289 (sexual penetration with a foreign object); (14) Section 4500 (assault by a life prisoner); (15) Section 4501 (assault by a prisoner); (16) Section 4503 (holding a hostage by a prisoner); (17) Any felony punishable by death or imprisonment in the state prison for life; (18) Any attempt to commit a crime listed in this subdivision other than an assault.

- ~ **(2)(b)** Where a defendant commits multiple felonies involving a single firearm use, section 12022.53 gun use enhancements are mandatory as to each count and cannot be stayed under section 654. (*People v. Palacios* (2007) 41 Cal.4th 720, 723 [the defendant fired a single shot at a single victim during the commission of three separate felonies; a section 12022.53, subdivision (d), enhancement had to be imposed as to each count].)
- ~ **(2)(c)** Where a defendant is convicted of a single felony, but has multiple section 12022.53 gun enhancements attached, the court must impose the most serious enhancement (longest punishment) and stay the others. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130.)
- ~ **(3) Use of a firearm, machine-gun or assault weapon in commission or attempted commission of a felony** [§ 12022.5]: An additional and consecutive term of imprisonment for three, four, five, six or 10 years is required unless use of a firearm is an element of the offense. While it had always been the case that a trial court was precluded from striking a firearm enhancement allegation or punishment under section 1385, this has changed with the enactment of Senate Bill 620, which now gives a court discretion to strike such enhancement allegations.
- ~ **(4) Discharging a firearm from a vehicle** [§ 12022.55]: A five, six, or ten year enhancement is applicable to an individual who, with the intent to inflict great bodily injury or death or who causes the death of a person, discharges a firearm from a vehicle in the commission or attempted commission of a felony.
- ~ **(5) On-bail enhancement** [§ 12022.1]: A two-year consecutive term penalty enhancement applies where a defendant commits a second felony offense while **on bail** or on his or her **own recognizance** from another felony offense. The enhancement must be pled and proved. There are procedural requirements for staying the enhancement during the pendency of the primary offense. Critically, if the primary offense conviction is reversed on appeal, the enhancement must be

suspended pending retrial, which may result in recommitment if the individual is out of custody and is then reconvicted on the primary offense. (§ 12022.1, subs. (d)-(g).)

- ~ **(6) Possession of body-armor penetrating ammunition or body vest** [§ 12022.2]: A mandatory three, four, or ten-year enhancement for committing or attempting to commit a felony while in possession of body-armor piercing ammunition. (§ 12022.2, subd. (a).) A mandatory one, two, or five-year sentence enhancement for wearing a body vest during the commission or attempted commission of a felony. (§ 12022.2, subd. (b).)
- ~ **(7) Enhancement for furnishing firearm to another** [§ 12022.4.]: Where the fact of furnishing is pled and proved, an additional one, two, or three year sentence enhancement is imposed where a defendant furnishes a firearm to another for the purpose of aiding, abetting, or enabling that person or any other person to commit a felony.
- ~ **(8) Section 273a - Child Endangerment Convictions** [§ 12022.85]: A four-year enhancement is required when a child endangerment conviction causes great bodily harm or the death of a child.

#### **iv. Other enhancement problems.**

Under the Determinate Sentencing Law, there is generally **no limit** on enhancements to the principal term, but there can be only one weapons enhancement and only one great bodily injury enhancement for any charge. (§§ 1170.1, subs. (f) & (g), 12022.53, subd. (f).) Also, enhancements must be added as *additional and consecutive* terms to the underlying offense and, if an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing. (§ 1170.1, subd. (d).)

**Be alert:** In some cases the court may impose a single weapons use enhancement and a separate great bodily injury enhancement. (§ 1170, subds. (f) & (g).)

## 5. **Miscalculating the Principal, Subordinate, or Indeterminate Terms:**<sup>11</sup>

A court must calculate determinate and indeterminate sentences separately. When one term is determinate and the other is indeterminate, neither is principal nor subordinate; instead each is calculated without reference to the other. (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856.)

Generally, when imposed consecutively, most subordinate terms must be one-third the middle term. (§ 1170.1, subd. (a).) Further, most subordinate sentences shall include one-third of the term for applicable enhancements. (§1170.1, subd. (a).) However, there are exceptions that require full-term subordinate terms.

### i. **Mandatory full-term subordinate terms.**

- ~ **(1) Full mid-term consecutive for kidnapping multiple victims** (§1170.1, subd. (b));
- ~ **(2) Offense(s) involving the intimidation of a witness:** If consecutive sentences are imposed, a mandatory full-term subordinate term is imposed when a person is convicted under section 139, subdivision (h) [threats of force or violence against witness or victim]. (§ 1170.13.)
- ~ **(3) Conviction of felony and additional felony involving offense against witness or victim of first felony:** A mandatory full-term subordinate term is required where a defendant is convicted of a felony and then further convicted of violating section 136.1 [preventing/dissuading witness or victim], 137 [influencing or inducing testimony], or 653f [solicitation to dissuade a witness or potential witness]. (§ 1170.15.)

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<sup>11</sup> As in previous sections, this part is produced with reference to J. Grossman's *Four Easy Steps to Understanding Determinate Sentencing Law*. (See footnote 9., *ante*.)

- ~ **(4) Offense(s) committed while in prison or during escape from custody:** If consecutive sentences are imposed, the sentences are full term. (§ 1170, subd. (c).)
- ~ **(5) Full enhancements may be added for enumerated sex offenses.** (§1170.1, subd. (h).)
- ~ **(6) Kidnapping** [§ 207; § 1170.1, subd. (b)]: When a person is convicted of two or more violations for kidnapping involving separate victims, the subordinate term for each consecutive sentence must be the full-middle term.

## 6. Offense-Specific Mandatory Sentencing.

Appellate counsel would be wise to always check the punishment scheme for the offense of conviction as many have specific terms that must be imposed that are outside of the Determinate Sentencing Law.

- ~ **(1) Habitual criminal offenders inflicting great bodily injury or force likely to cause great bodily injury** [§ 667.7]: Section 667.7 is an alternate sentencing scheme for violent habitual offenders. A person who has: (a) served two prior separate prison terms as defined in section 667.5 [prison prior enhancements]; (b) the prior prison terms were for serious or violent offenses; and (c) the current offense involves infliction of great bodily injury (§§ 12022.53 or 12022.7) is punished by a life term and is not eligible for parole for at least 20 years. (§ 667.7, subd. (a)(1).) Under this same scheme, a person who has served three or more prior separate prison terms is punished by a life term without the possibility of parole. (§ 667.7, subd. (a)(2).
- ~ **(2) Habitual Drug Offender** [§ 677.75]: This section subjects a person to a possible punishment of state prison for life with parole eligibility limitations. It applies to any person who is presently convicted of violating Health and Safety Code section 11353, 11361, 11380, 11380.5 AND has previously served two or more prior separate prison terms for a violation of Health and Safety Code sections 11353, 11353.5, 11361, 11380, or 11380.5.

- ~ **(3) Murder** [§ 187]: sentencing is dependent on the circumstances; see § 190 for punishment scheme;
- ~ **(4) Aggravated mayhem** [§ 205]: life with possibility of parole;
- ~ **(5) Torture** [§ 206] life with possibility of parole;
- ~ **(6) Kidnapping for gain or robbery/rape** [§ 209]: sentencing is dependent on the circumstances; see § 209;
- ~ **(7) Kidnapping in the course of carjacking** [§ 209.5]: life with possibility of parole;
- ~ **(8) Child abuse likely to result in great bodily injury** [§ 273ab] – a sentence of 25 years to life is mandatory for a violation of this section (assault resulting in death, coma due to brain injury, or paralysis of permanent nature of child under eight years of age);
- ~ **(9) Aggravated Arson** [§ 451.5]: sentencing is dependent on the circumstances; see § 451.5].

## 7. **Gang-related Issues: Enhancements & Mandatory Sentences** [§ 186.22].

There are many potential pitfalls in sentencing when gang activity is alleged and proved. Thus, appellate counsel is well advised to ensure the correct enhancement and sentence was imposed before pursuing an appeal.

### i. **Gang enhancements.**

Felonies committed for the benefit of a criminal street gang receive an additional two, three, or four year term of imprisonment. (§ 186.22, subd. (b)(1)(A).) If the felony is a “serious felony,” the additional term is five years. (§ 186.22, subd. (b)(1)(B).) If the felony is a “violent felony,” the additional term is 10 years. (§ 186.22, subd. (b)(1)(C).) There are also minimum parole periods to be aware of under section 186.22, subs. (b)(4) and (b)(5).

**ii. Gang-related mandatory sentencing.**

Section 186.22, subdivision (b)(4) mandates an indeterminate life term with a minimum term requirement for home invasion robbery (§ 213, subd. (a)(1)(A)), carjacking (§ 215), felony discharge of a firearm at an inhabited dwelling/vehicle (§ 246), a violation of section 12022.55 (firearm use enhancement), or felony extortion (§ 519). (§ 186.22, subd. (b)(4)(B) & (C).)

**iii. Mandatory minimum jail term when probation imposed.**

In addition to the above, where probation is granted, there is a mandatory minimum of a 180-day county jail term. (§ 186.22, subd. (c).)

**iv. Gang-related special treatment of a discretionary dismissal.**

The trial court may strike the punishment for the enhancements under section 186.22, but its discretion is limited to “an unusual case where the interests of justice would best be served.” (§ 186.22, subd. (g).) If the trial court decides to strike any additional punishments for the enhancements under section 186.22, make sure the court specifies on the record and enters into the minutes a statement of reasons. (§ 186.22, subd. (g).)

**8. Misapplication of a Section 654 Stay.**

Section 654 precludes double punishment for an act or omission that is punishable in different ways by different provisions of law. Although it is not uncommon for a trial court to forget to stay a conviction under section 654 (an arguable issue on appeal), the reverse would be considered an adverse consequence. Appellate counsel is thus always advised to review the judgment of the trial court where a section 654 stay is imposed as this is a ripe area for trial court error. According to at least one decision, the erroneous imposition of a section 654 stay renders the entire sentence “unauthorized.” (*People v. Price, supra*, 184 Cal.App.3d 1405, 1411; but see *People v. Brown* (1987) 193 Cal.App.3d 957, 962 [erroneous section 654 stay may not render sentence “unauthorized.”].)

Possible section 654 errors include where the court stays a count under section 654, but erroneously imposes the lighter sentence. This is error since section 654 requires imposition of the “longest potential term of imprisonment.” Another issue is where the court finds section 654 applies but runs the conviction concurrently. (See *People v. Miller* (1977) 18 Cal.3d 873, 886 [rather than impose concurrently, procedure is to stay execution of sentence on convictions subject to section 654; upon successful service of the more serious conviction, the stay becomes permanent].)

Under the Three Strikes law, a prior conviction that has been stayed under section 654 is still a strike. (*People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8; but see *People v. Vargas* (2014) 59 Cal.4th 635, 640 [when a single act resulted in two convictions, the court is required to strike one of the prior convictions].)

When the court imposes a sentence pursuant to section 667.6, subdivision (c), section 654 cannot be applied to a consecutive term for a non-sex offense. (*People v. Hicks* (1993) Cal.4th 784, 787 [consecutive term for burglary upheld even though it was the means by which the sex offenses were committed].)

## **9. Sex Offenses.**

The sentencing requirements for sex offenses are complex. Appellate counsel is well advised to carefully review the multiple relevant statutes to look for errors.

### **i. Mandatory sentencing provisions.**

An enumerated sex offense is a conviction for any crime listed in section 667.6, subdivision (e).<sup>12</sup> Generally, for multiple sex offense convictions, the court may impose a

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<sup>12</sup> Section 667.6, subdivision (c), provides the following list of enumerated sex offenses: Rape (§§ 261, subd. (a), par. (2) or (6)); Spousal rape (§262, subd. (a), par. (1) or (4)); (3) Rape, spousal rape, or sexual penetration, in concert (§ 264.1); (4) Lewd or lascivious act (§ 288, subd. (a) or (b)); (5) Sexual penetration (§ 289, subd. (a) or (j)); (6) Continuous sexual abuse of a child (§ 288.5); Sodomy (§ 286, subds. (c) or (d)); (8) Oral copulation (§ 288a, subds, (c) or (d)); (9) Kidnapping (§ 207, subd. (b)); (10) Kidnapping to commit specified sex offenses (§ 208, subd. (d)); (11) Kidnapping with the intent to commit a specified sexual offense (§ 209, subd. (b)); (12) Aggravated sexual assault of a child (§



**concurrent sentence or run a full lower/middle/upper term consecutive sentence** along with full consecutive terms for conduct enhancements. (§§ 667.6, subd. (c), sens. 2-4; 1170.1, subd. (h).)

- ~ **Specified sex offenses subject to life imprisonment** [§ 667.61]:
- ~ **(1)** Depending on the circumstances, defendants convicted of certain sex offenses may be subject to a mandatory term of 25 years to life.<sup>13</sup>
- ~ **NOTE:** Before 2010, the punishment for multiple section 288 convictions against two victims was 15 years to life, but after 2010, the punishment for multiple section 288 convictions against more than one victim is 25 years to life. Courts sometimes erroneously impose the 15 year to life sentence on all counts, which would be error and an adverse consequence. (See *People v. Zaldana* (2019) 43 Cal.App.5th 527; *In re Vaquera* (2019) 39 Cal.App.5th 233.)
- ~ **(2) Habitual Sex Offenders** [§ 667.71]: A person who has been previously convicted of one or more enumerated sex offenses and who is convicted in the present proceeding of one of those offenses is subject to a mandatory 25 years to life sentence. **Procedural Requirement under section 667.71:** A defendant's status as a habitual offender must be alleged in the information and admitted by the defendant or found true by the jury or court. (§ 667.71, subd. (f).)
- ~ **(3) Repeat child molesters** [§ 667.51, subd. (d)]: For those convicted of violating sections 288 [Lewd or lascivious acts involving children] or 288.5 [continuous

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269); (13) An offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision.

<sup>13</sup> Specified Sex Offenses under this section: (1) Rape (§ 261, subd. (a), par. (2) or (6)); (2) Spousal rape (§ 262, subd. (a), par. (1) or (4)); (3) Rape, spousal rape, or sexual penetration, in concert (§ 264.1); (4) Lewd or lascivious act (§ 288, subd. (b)); (5) Sexual penetration (§ 289, subd. (a)); (6) Sodomy (§ 286, subds (c) or (d), pars. (2) or (3)); (7) Oral copulation (§ 288a (subds (c) or (d), pars. (2) or (3)); (8) Lewd or lascivious act (§ 288, subd. (a)); (9) Continuous sexual abuse of a child (§ 288.5).

sexual abuse of child] a special five-year enhancement for certain felony priors applies as well as a possible mandatory minimum of 15 years in state prison.

~ **(4) Aggravated sexual assault of a child** [§ 269]: a person convicted of violating this section is subject to a minimum 15 years to life sentence. Consecutive sentences are mandatory for multiple convictions under section 269, if the crimes involve separate victims or involve the same victim on separate occasions. (§ 269, subd. (c).)

~ **(5) Mandatory consecutive sentences:** A consecutive sentence is mandatory if it involves *separate victims* or the same victim on *separate occasions*. (§§ 667.6, subd. (d), 667.61, subd. (i) [one-strike case]; Cal. Rules of Court, rule 4.426.)

**ii. Prior convictions for violent sex crimes.**

A mandatory **five-year enhancement** applies for each prior conviction where the defendant is presently convicted of a violent sex crime and has a prior conviction for a violent sex crime. (§ 667.6, subd. (a).)

Where a defendant has **two** prior violent sex offense convictions, the mandatory enhancement is **ten-years**. (§ 667.6, subd. (b).)

**iii. Enhancements.**

Section 1170.1, subdivision (h), provides that the number of conduct enhancements that may be imposed for the crimes enumerated in section 667.6 may not be limited, regardless of what provision they are imposed under. Each enhancement must be **fully consecutive** to its base term and any other enhancement.

~ **(1) Enhancement for specified sex offense carried out with firearm or deadly weapon** [§ 12022.3]: For each violation of Section 220 [assault with intent] involving a specified sexual offense, or for each violation or attempted violation of

certain enumerated sex offenses,<sup>14</sup> and in addition to the sentence provided, any person shall receive the following: (a) a three, four, or 10-year enhancement if the person uses a firearm or a deadly weapon in the commission of the violation; (b) a one, two, or five-year enhancement if the person is armed with a firearm or a deadly weapon.

- ~ **(2) Administering a controlled substance for purposes of committing certain felony sex offenses** [§ 12022.75]: A mandatory five-year enhancement for administering any of an enumerated list of substances for the purposes of committing a felony violation of (A) Rape § 261, subd. (a), pars. (3) or (4); (B) Sodomy (§ 286, subds. (f) or (i)); (C) Oral copulation (§ 288a, subds. (f) or (i)); (D) Sexual penetration (§ 289, subds. (d) or (e)); (E) Any enumerated sex offense (§ 667.61, subd. (c)).
- ~ **(3) Where person inflicts great bodily harm, or sodomy or oral copulation by certain means** [§ 12022.8]: A five-year enhancement for any person who inflicts great bodily injury on any victim in a violation of enumerated sex offenses or who commits sodomy or oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
- ~ **(4) Commission of certain sex offenses with knowledge that he or she has AIDS or HIV** [§ 12022.85]: A mandatory three-year enhancement for committing enumerated sex offenses with knowledge that the defendant has AIDS or HIV.
- ~ **(5) Lewd act enhancement** [§ 667.51]: A five-year enhancement is mandated under section 667.51 for a person found guilty of violating section 288 [lewd or lascivious acts with a child or dependent adult], 288.5 [continuous sexual assault of child] 262 [spousal rape], or 269 [aggravated sexual assault of a child] This enhancement applies for a prior conviction of an enumerated sex offense. Also

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<sup>14</sup> §§ 261 [rape], 262 [spousal rape], 264.1 [acts in concert], 286 [sodomy], 288 [lewd acts on a child under 14], 288a [oral copulation], or 289 [sexual penetration with a foreign object].

under section 667.51, a violation of section 288 or 288.5 by a defendant who has **two or more prior convictions of an enumerated sex offense**, mandates that the current offense be punished by a **minimum term of 15 years to life**. (§ 667.51, subd. (c).)

**iv. Other implications following a successful appeal.**

In cases involving sexual crimes with different victims over a period of time, there is no procedural double-jeopardy bar for trying cases relating to other victims. The danger of appealing, and being successful, is the risk that more victims will come forward and more convictions result.<sup>15</sup>

**II. ROGUE APPLICATION OF A 1385 DISMISSAL: The Power to Strike a Strike & Other Issues.**

Appellate counsel must ensure that the trial court properly handled a dismissal under section 1385 as its power to strike is not unlimited.

**i. Dismissals and the requirement for oral reasons on the record.**

Section 1385, subdivision (a), was amended effective January 1, 2018 following Senate Bill 1393. (Stats 2018 ch 1013 § 2.) This section now provides: “The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. **The reasons for the dismissal shall be stated orally on the record.** The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.” (§ 1385, subd. (a), emphasis added.) If the court fails to state reasons in the record, the dismissal order may be deemed “unauthorized.” (*People v. Johnson* (2015) 61 Cal.4th 734, 769.)

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<sup>15</sup> For more on Double Jeopardy issues, see Part III, *post*.

**ii. Other dismissal limitations.**

- ~ **(1) Dismissal as to fewer than all counts:** dismissal of strike allegations as to fewer than all counts still requires mandatory consecutive sentences as to all counts (unless they arose from the same occasion or under the same set of operative facts). (*People v. Casper, supra*, 33 Cal.4th at pp. 42-43.)
- ~ **(2) Dismissal limitation when prison commitment is mandated:** Section 1170, subdivision (f), prohibits a trial court from dismissing “any allegation that a defendant is eligible for state prison due to prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender.” In other words, imprisonment in state prison is mandated. (But see Couzens & Bigelow, *Felony Sentencing After Realignment*, (May, 2016), at p. 49 [suggesting that this provision only applies to convictions so juvenile adjudications may not be subject to the limitation].)
- ~ **(3) Note:** Senate Bill 620 removed the prohibition on a trial court’s authority to dismiss an allegation or finding under section 12022.5 (firearm enhancement).

**III. DOUBLE-JEOPARDY (a.k.a. the defense of Former Jeopardy).**

Let’s imagine that appellate efforts result in a reversal. Under section 1262, the reversal is deemed an order for a new trial unless the appellate court directs otherwise. Generally, a reversal of judgment leaves a proceeding in the same situation in which it stood before judgment. (*Odlum v. Duffy* (1950) 35 Cal.2d 562, 564.)

The principles of double jeopardy are of constitutional import. The Fifth Amendment of the United States Constitution proves that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .” (U.S. Const., 5th Amend.) Our California Constitution similarly provides that “[p]ersons may not twice be put in jeopardy for the same offense . . . .” (Cal. Const., art. I, § 15.)

As Justice Black noted in *Green v. United States* (1957) 355 U.S. 184 at page 187, “[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system

of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

The rules for application of double jeopardy principles are well established and provide that: (1) jeopardy attaches when a defendant is placed on trial in a court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn; and (2) a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it. (See *Curry v. Superior Court of San Francisco* (1970) 2 Cal.3d 707, 713; see also §§ 654, 687, 1023, 1140, and 1141.)

This constitutional protection requires that a defendant not be penalized for exercising his or her right of appeal after trial by risking a more severe punishment. (*People v. Henderson* (1963) 60 Cal.2d 482.)<sup>16</sup>

Sounds great, but what is the catch? A defendant may run a risk of a more severe punishment on conviction after retrial when the original sentence was unauthorized.

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<sup>16</sup> *People v. Henderson, supra*, 60 Cal.2d at pp. 495-497: In this seminal case, the defendant secured reversal of his murder conviction for which he had been sentenced to life in prison. Following retrial, he was again convicted of murder but was sentenced to receive the death penalty. On appeal, he argued the increased punishment violated the state’s prohibition against double jeopardy. The California Supreme Court agreed. The court reasoned that the constitutional clause in question “states a fundamental principle limiting the state’s right repeatedly to prosecute a defendant.” (*Id.* at p. 495.)

In holding that a defendant is not required to elect between suffering an erroneous conviction to stand unchallenged and appealing therefrom at the cost of forfeiting a valid defense to the greater offense, the Court agreed with the reasoning in the *Green* case, that “a defendant faced with such a ‘choice’ takes a ‘desperate chance’ in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.” (*Id.* at p. 496.) The Court also noted that there is no distinction for purposes of double jeopardy between a conviction on a lesser-included or a lesser-degree offense. The double jeopardy protection is triggered by a finding that the defendant is not guilty of the greater or greater degree of the offense.

(*People v. Serrato*, *supra*, 9 Cal.3d at p. 763; see Part I, *infra*.) The so-called “*Serrato* exception” to the *Henderson* rule allows imposition of a harsher sentence on remand following an appeal where the first sentence was not legally authorized. (See *People v. Vizcarra* 236 Cal.App.4th 422, 436; see Part I, *infra*.)

The purpose of section 1023 [describing the double jeopardy bar] is to prevent a retrial when a jury acquits the defendant of the greater offense yet remains silent on the lesser offense. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 521.) Thus, hung juries on prior convictions, hung juries on specific counts, and lesser-included offenses for which the jury was deadlocked, are all exempted from double-jeopardy principles.

**Be alert:** A defendant’s motion for new trial may act as waiver of double jeopardy protections. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 136.)

**i. Where re-trial is prohibited following reversal of a conviction.**

A defendant may not be retried if the judgment is reversed because, as a matter of law, the evidence was insufficient to support a conviction. (See *People v. Eroshovich* (2014) 60 Cal.4th 583, 589; *Hudson v. Louisiana* (1981) 450 U.S. 40, 44.)

**ii. Deadlocked juries.**

Generally, if even one member of the jury panel disagrees with the rest, the jury is hung. A “hung jury” results in either (1) a mistrial (which means the case may be retried with a new jury), (2) a plea bargain to a reduced charge that carries a lesser sentence, or (3) a dismissal of the case.

When a jury convicts a defendant on some counts, but hangs on others resulting in a mistrial, the mis-tried counts may be tried to a new jury. (*People v. Anderson* (2009) 47 Cal.4th 92, 103.)

When a **jury acquits** the defendant of the **greater offense** but is affirmatively **deadlocked** on a **lesser-included** offense, **retrial is permitted** on the lesser-included offense. This is based on the concept of legal necessity. (See *People v. Allen* (1980) 110 Cal.App.3d 698, 704 .)

**iii. Double-jeopardy principle only applies in criminal setting.**

Double jeopardy does not attach to civil proceedings. Since Sexually Violent Predator (SVP) proceedings are civil in nature, there are no double-jeopardy implications. (See *Kansas v. Hendricks* (1997) 521 U.S. 346, 369.) However, collateral estoppel may apply. (*Turner v. Superior Court* (2003) 105 Cal.App.4th 1046, 1057.)

**iv. Sentencing allegations may be retried.**

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 at page 490, the United States Supreme Court held that the Sixth Amendment right to a jury trial means that any fact that potentially increases the punishment beyond the statutory maximum must be proved beyond a reasonable doubt. But such sentencing/penalty allegations are not considered a greater offense for purposes of double jeopardy. As a consequence, where a defendant is convicted of a substantive offense, but the jury is deadlocked on factual sentencing/penalty allegations, there is no bar to retrial of the sentencing allegations. (See *Anderson, supra*, 47 Cal.4th at p. 105 [defendant convicted of kidnapping, but the jury hung on the penalty allegations that if found true would have mandated a 15-years to life sentence; the sentencing allegations could be retried].)

**v. Double-jeopardy principles inapplicable to prior conviction enhancements.**

In a non-capital case, a prior strike reversed on appeal for insufficient evidence is not subject to double-jeopardy principles and can be re-tried. (*Monge v. California* (1998) 524 U.S. 721, affirming *People v. Monge* (1997) 16 Cal.4th 826; *People v. Hernandez* (1998) 19 Cal.4th 835. Furthermore, additional evidence may be introduced at the second trial, and collateral estoppel principles do not normally apply. (*People v. Barragan* (2004) 32 Cal.4th 236.)



#### IV. PROBATION.

##### 1. Defendant is Statutorily Ineligible for Probation.

Errors may occur if the defendant is granted probation but is not actually eligible for probation. Thus, when probation is granted, check to see whether the offense, any prior conviction, or any enhancements specifically preclude such a grant.<sup>17</sup>

**Procedural Requirements:** As a general rule, when a prior conviction results in the mandatory denial of a grant of probation, the prior conviction must be pled and proved. (*People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1991.) Certain enhancements may also preclude probation, but typically must also be pled and proved.

A **Three Strikes defendant** is ineligible for probation or diversion. (§ 667, subd. (c)(2).)

**Be alert:** Following a successful appeal, if new facts come to the court's attention to justify a harsher sentence on remand, a probationer may be sentenced to state prison. (*People v. Thornton* (1971) 14 Cal.App.3d 324, 327 [defendant appealed his conviction for grand theft, won a reversal on instructional error grounds, but was retried and found guilty. Despite the grant of probation the first time, the existence of a new victim and other facts that came to light since the first trial led the court to impose a state prison sentence].)

##### 2. Restricted Probation Eligibility.

Sometimes while probation may be granted, it is only in "unusual cases where the interests of justice would be best served." (See e.g., § 462 [precluding probation for burglary of an inhabited dwelling unless the interests of justice allow it and the court states its justification on the record].)

#### V. PLEA AGREEMENTS [Withdrawal of Guilty Plea/Restrictions on Plea Bargaining]<sup>18</sup>

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<sup>17</sup> For a handy chart detailing persons ineligible for probation, see CEB, Cal. Criminal Law Procedure and Practice, § 37.52, at p. 1176-1177.

## 1. Withdrawal of Guilty Plea.

In many cases, the remedy sought on appeal is the opportunity to withdraw a guilty plea. Typically, this remedy is sought in cases where a pretrial suppression motion was denied and a plea was entered, or where the defendant made a motion to withdraw his guilty plea. In both of these situations, the defendant may receive a longer sentence in the renewed trial court proceedings. (*People v. Collins* (1978) 21 Cal.3d 208, 215; *People v. Hill* (1974) 12 Cal.3d 731, 769.)

When a guilty plea is *properly* vacated, whether on the defendant's motion or otherwise, the double jeopardy prohibition does not prevent re-trial on the offense charged. (See *People v. Clark* (1968) 264 Cal.App.2d 44, 47; *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1058.)

**Counts that are dismissed under a plea bargain may be restored** when a defendant withdraws his guilty plea or otherwise succeeds in attacking it. “[T]he ends of justice require that [when a defendant is permitted to withdraw a guilty plea] the *status quo ante* be restored by reviving the . . . dismissed counts.”<sup>19</sup> (*In re Sutherland* (1972) 6 Cal.3d 666, 672.)

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<sup>18</sup> Cal. Rules of Court, Rule 4.412: Reasons -- agreement to punishment as an adequate reason and as abandonment of certain claims:

(a) Defendant's agreement as reason: It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law

(b) Agreement to sentence abandons section 654 claim: By agreeing to a specified term in prison or county jail under section 1170(h) personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.

<sup>19</sup> *Status quo ante*: the previously existing state of affairs where everyone is put back to their starting positions.

## 2. The *Stamps* Decision; Impact on Plea Agreements at Resentencing.

On June 25, 2020, the California Supreme Court issued its decision in *People v. Stamps* (2020) 9 Cal.5th 685. *Stamps* involved a defendant's request for resentencing under Senate Bill 1393 (SB 1393) following an earlier plea agreement. The Court held three things: (1) a certificate of probable cause was not required to argue on appeal that SB 1393 applied; (2) SB 1393 applied retroactively to all cases not yet final on appeal; and (3) that the appropriate remedy was to remand the matter to give the defendant the opportunity to "seek the court's exercise of discretion." (*Id.* at p. 692.) The looming adverse consequence concerns this remedy.

The *Stamps* court stated that in the event the trial court decided to exercise its discretion, then the People would be permitted to withdraw from the underlying plea agreement since they were no longer getting the benefit of the bargain, and the trial court could also withdraw its prior approval of the plea. (*Stamps, supra*, 9 Cal.5th at pp. 707-708.) The People's potential withdrawal from the plea agreement, and the trial court's ability to withdraw consent to the agreement, must be communicated to an appellant before they seek resentencing. If the Court of Appeal permits a remand for resentencing under SB 1393, it still remains "the defendant's choice whether" to "seek relief under [SB 1393]," but in order to help make the decision, it is appellate counsel's duty to properly inform the client of the potential consequences.

A further adverse consequence also looms. What if your client is seeking relief not under SB 1393, but SB 136, which abrogated the one-year prior prison term enhancement under section 667.5, subdivision (b)? The application of *Stamps* to SB 136 resentencing is a current question being litigated across the state. To date, one published opinion has held that the remedy outlined in *Stamps* applies to SB 136 resentencing, notwithstanding the fact that SB 136 is a mandatory change in the law, where SB 1393 granted a trial court

new discretion. (See *People v. Martinez* (August 31, 2020, B303086) \_\_\_ Cal.App.5th \_\_\_ (2020 Cal.App.LEXIS 831.)<sup>20</sup>)

Appellate counsel must also keep in mind that a resentencing hearing could yield negative consequences for a client’s Proposition 57 parole eligibility date if a restructured sentence increases the base term (the full term of the primary offense). (Cal. Const. art. I, § 32; see Part VIII, *post*.)

### **3. Limitations on Plea Bargaining**

Where a plea-bargained case involves a one-strike, three-strike, or habitual sex offender situation, care should be taken to assess whether the statutory limitations on plea bargaining were followed.

#### **~ Enumerated Sex Offenses and Serious Felony Priors (§ 1192.7)**

With section 1192.7, the Legislature intended that District Attorneys should prosecute violent sex crimes under “one strike,” “three strikes,” or the habitual sex offender statute rather than engaging in plea-bargaining, with the caveat that plea-bargaining is possible if there is “insufficient evidence to prove the people’s case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.” If the latter is true, “[a]t the time of presenting the agreement to the court, the district attorney shall state on the record why a sentence under one of those sections was not sought.” (§ 1192.7, subd. (a)(3).)

Section 1192.7 also limits the availability of plea-bargaining for serious felonies, felonies involving personal use of a firearm, or driving-while-intoxicated offenses unless “there is insufficient evidence to prove the people’s case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.” (§ 1192.7, subd. (b).)

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<sup>20</sup> But search LEXIS/Westlaw for a number of unpublished cases that have held the opposite; one can hope that the California Supreme Court will soon weigh in on this issue.

#### 4. Other Adverse Consequences in Attacking Pleas.<sup>21</sup>

Where a plea is successfully challenged, the potential for new charges or a more serious charge looms. Thus, in the following situations, careful counseling of the client is appropriate.

- ~ Certain priors that could have been alleged, but were not initially, could be added at any time (e.g., enumerated sex offenses, serious felonies, or strikes);
- ~ The defendant could have been charged with a more serious charge; especially in sex cases where he or she might be eligible for punishment under one strike law;
- ~ The defendant could have been charged with sex priors, creating a life case;
- ~ In sex cases, charges could be added for each act, especially if the defendant pled before the preliminary hearing.

#### VI. FINES, FEES, & RESTITUTION .

A very common area for adverse consequences is the arena of missing mandatory fines, fees, or restitution. Thus, appellate counsel is well-advised to review the oral transcript and written minute order to ensure application of the correct fines, fees, penalty assessments, and restitution-related costs. A go-to in the realm of appropriate fines and fees can be found at the CCAP resource webpage:

[http://www.capcentral.org/criminal/crim\\_fines.asp](http://www.capcentral.org/criminal/crim_fines.asp).

##### 1. Failure to Impose a Mandatory Fee or Fine.<sup>22</sup>

There are many mandatory fines and fees applicable to criminal convictions depending among other things on the nature of the offense, the arresting agency, the

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<sup>21</sup> See J. Grossman, *Four Easy Steps to Understanding Determinate Sentencing Law*, <<http://www.sdap.org/downloads/research/criminal/sentence.pdf>>

<sup>22</sup> This section contains a very brief summary of the typical problems, for a more in-depth review of fines, fees, and penalty assessments, see my colleague Lori Quick's article on the same topic. (L. Quick, *Fees, Fines, and Penalty Assessments*, <<http://www.sdap.org/downloads/research/criminal/fines.pdf>>)

status of the offender, and the date of offense. It is therefore crucial to ensure the correct fines or fees were imposed.

Where a trial court fails to impose a mandatory fine or fee, the correction can be made at any time regardless of whether the prosecutor objected below. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153.) But note that mere judicial error is not necessarily an unauthorized sentence. If the court does not make express finding of inability to pay a discretionary fine or fee, that omission is not the type of error that makes the fine or fee unauthorized. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.) Also, the appellate court may presume the finding was made. (*People v. Burnett* (2004) 116 Cal.App.4th 259, 261.)

**2. Failure to Impose Victim Restitution.**

When a trial court fails to impose victim restitution despite a recommendation from probation, the trial court could impose the order following an appeal.

**3. Failure to Impose Restitution Revocation Fine.**

There must be a parole revocation restitution fine equal to the restitution fine whenever the defendant is sentenced to prison. (§ 1202.45.)

**4. Failure to impose \$50 Lab Fee for Drug Convictions.**

A \$50 lab fee must be assessed for each drug conviction (Health & Saf. Code, § 11372.5).

**5. Failure to Apply Mandatory Penalty Assessments.**

Except for the amounts set for victim restitution, restitution fines, and parole revocation restitution fines, there must be certain penalty assessments, which can add up to 310% of the monetary loss to the defendant. (§ 1214, Gov. Code, § 76000, Veh. Code, § 23649.)

**6. Failure to Order Mandatory AIDS Testing.**

Omitting to order an AIDS tests when required by law may be corrected at any time. (*People v. Barriga* (1997) 54 Cal.App.4th 67, 69-70.)

**7. Sex Offense Cases: Failure to Impose the section 290.3 fine as to each count.** Unless there is an inability to pay finding, a defendant convicted of multiple sex crimes enumerated under section 290, subdivision (c), must have the fines outlined in section 290.3, imposed as to each count.

## **VII. MIS-CALCULATING CREDITS.<sup>23</sup>**

It is critical to check that the client received at least the number of presentence credits to which he or she was entitled. Where a court applies too many credits, whether by miscalculating the dates or by applying the wrong formula or the wrong statutory scheme, the adverse consequence is the potential for a longer-than-anticipated sentence.

### **1. Awarding Pre-Sentence and Conduct Credits using the Wrong Formula.**

Where a defendant is convicted of a “violent felony” (see § 667.5, subd. (c)) a potential adverse consequence exists if the trial court fails to limit pre-sentence custody credits to 15% under section 2933.1. [Note that the 15% limit of section 2933.1 for “violent felonies” is for pre-sentence custody credits and should not be confused with the 20% limit under the Three Strikes law because “three strikes” credit limits apply only to *post-sentence* credits.]

Generally, under section 4019, a defendant is entitled for four days credit for every two days spent in county jail. (§ 4019, subd. (f).) The scheme of section 4019 applies even in second-strike sentences. (*People v. Thomas* (1999) 21 Cal.4th 1122, 1130.)

Under section 2933.2, for murder convictions (§ 187) after June 3, 1998, a defendant is not entitled to pre-sentence conduct credits.

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<sup>23</sup> For more information on credits, see the Prison Law Office’s *Proposition 57 Prison Conduct Credit and Parole Consideration* handout available online <https://prisonlaw.com/wp-content/uploads/2019/01/Prop-57-Parole-and-Credits-Jan-2019.pdf>; see also SDAP Staff Attorney Bill Robinson’s pre-Proposition 57 article on credits, their calculation, and how to handle errors: *Credits Redux: How to Get ‘Em, Where to Get ‘Em* (2009), <http://www.sdap.org/downloads/research/criminal/ptc2.pdf>

It is an error to award duplicative credits for custody time attributable to other charges. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180 [strict causation rule].)

**2. In Prison Credit Errors in the Three Strikes Context.**

When a defendant is serving a determinate sentence under the Three Strikes law, total in-prison conduct credits may not exceed one-fifth of the total term and do not accrue until the defendant is physically placed in prison. (§ 667, subd. (c)(5).)

**3. Credit Errors Involving the Place of Confinement.**

Appellate counsel is advised to ensure that the place of confinement allows for accrual of custody credits as it is feasible that the trial court may have awarded actual credit for time spent in a facility where the defendant should not earn actual credit. (See *In re Wolfenbarger* (1977) 76 Cal.App.3d 201, 205.)

A defendant is not entitled to conduct credit for time spent at a rehabilitation center (*People v. Guzman* (1995) 40 Cal.App.4th 691, 694-695), at a drug program (*People v. Moore* (1991) 226 Cal.App.3d 783, 787), in a work release program (*People v. Willis* (1994) 22 Cal.App.4th 1810, 1813), or in psychiatric treatment (*People v. Waterman* (1988) 42 Cal.3d 565, 571).

**VIII. OTHER CONSIDERATIONS.**

**A. Proposition 57 Parole Eligibility.**

If the client obtains a resentencing hearing, perhaps to correct an unauthorized sentence or to allow relief under a new change in the law (e.g., Senate Bill Nos. 1393, 136, 620, etc.), the new sentence could have a potentially harmful impact on a defendant's parole eligibility date under Proposition 57. Appellate counsel should identify the client's current "base term" and assess whether a resentencing hearing would cause an increase in the base term. If it might, then the client should be so advised.

Proposition 57 was passed by California voters in 2016 and added section 32 to Article I of the California Constitution. The new section states in relevant part that, "[a]ny



person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.” (Cal. Const., art. I, § 32, subd. (1); see *In re Edwards* (2018) 26 Cal.App.5th 1181, 1185-1186.) Under this section, “the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.” (Cal. Const., art. I, § 32, subd. (1)(A).)

**How might a resentencing hearing impact this date?** Take a defendant who was convicted by jury and given the **low term** of two years for assault with GBI likely (§ 245, subd. (a)(4)), that was doubled due to a strike prior. The defendant was also given two one-year prior prison terms (§ 667.5, subd. (b)), for a total sentence of six years. On this sentence, the defendant is Proposition 57 parole eligible after serving two years in prison (the full base term). But what if the defendant wins resentencing under Senate Bill 136, which abrogated the prior prison term enhancement for most offenses? At the resentencing, the trial court would not be required to simply strike the two prison prior enhancements, but instead could restructure the sentence to get the defendant closer to the original six-year term. In order to do that, the court would select the midterm of three years on the assault conviction, which would be doubled due to his strike prior, for a new total of six years (i.e., the same aggregate sentence as before). The problem is, the defendant’s new Proposition 57 parole eligibility date is now after THREE years in prison and not just two (his new base term is three years).<sup>24</sup>

three.

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<sup>24</sup> Will the client even get parole? Between July 2017 and March 2020, 2,603 inmates were granted release under Proposition 57, while parole was denied to 10,397. (See <https://www.sandiegouniontribune.com/news/courts/story/2020-03-02/prop-57-was-meant-to-give-nonviolent-inmates-a-chance-at-early-parole-but-thats-not-how-it-has-worked-out>, the San Diego Union-Tribune [Prop. 57 was meant to give nonviolent inmates a chance at early parole, but that’s not how it has worked out].)

**B. Typos in the record.**

It is always advisable to carefully check the minute orders and abstract of judgment for possible typographical errors.

**C. Not Guilty by Reason of Insanity: Both Guilt and Sanity Phase Subject to Retrial Following Reversal.**

In the case where a defendant was initially found not guilty by reason of insanity, but then successfully obtains a full reversal on appeal, both the guilt and sanity phases may be subject to re-trial. (See *People v. James* (2015) 238 Cal.App.4th 794, 813, fn. 6 [reversal of a judgment involving a bifurcated jury trial on guilt and sanity phases, required retrial of both guilt and sanity phases because trying the issue of alleged insanity is not a separate trial, but a separate determination of an issue of the original charge].) Consequently, careful counseling of one's client is crucial as it is feasible that following a second trial, the client will be subject to a prison term.

**D. Petition for Review.**

A petitioner has no control over the issues that the Supreme Court may consider because the court has the express authority to review the entire cause upon the filing of a petition for review. (Cal. Rules of Ct., rule 8.516(a)(2).) Thus, in the situation where the defendant obtains some benefit from the judgment in the Court of Appeal, he or she must be carefully advised as to the potential adverse consequences of taking a petition for review.

**E. Failure of the Prosecutor to Charge a Prior Conviction as a Strike.**

The prosecutor can add the strike if the case is overturned on appeal.

**F. Can One's Client go Back to Prison?**

See *People v. Clancey* (2013) 56 Cal.4th 562, 584-587 [defendant ordered back into custody since he received too many presentence credits].

## **IX. APPROACHING THE CLIENT & ASSESSING THE RISK.<sup>25</sup>**

Appellate counsel's first duty is to correctly advise our clients about any possible adverse consequence and provide a meaningful assessment of the likelihood that the consequence will occur. (See *United States v. Beltran-Moreno* (9th Cir. 2009) 556 F.3d 913, 918.)

In weighing the likelihood the error will be caught, consider how obvious the error is on the face of the judgment. If it is one involving more hidden issues, the risk may be reduced. If it is more obvious, such as a clearly unauthorized sentence, even if the Attorney General or Court of Appeal does not catch it, the CDCR routinely checks the sentencing and credits and acts accordingly. While it used to be that the CDCR would do a routine check for error at the beginning of a defendant's term, anecdotally at least it appears that these days this check occurs much closer to the end of the sentence.

Another critical concern relates to the potential negative impact for the client on a personal level. Factors that are absent from the record, but that ought to be considered, include the client's feelings about the case, his or her financial situation, and the general emotional toll that the entire situation entails.<sup>26</sup>

When counseling the client, keep in mind that the client must make the decision to assume the risk of an adverse consequence. Therefore, appellate counsel's duty is to provide sufficient information, legal advice, and professional recommendation, to enable the client to make that decision intelligently. It is also important to realize that while abandoning an appeal might reduce the likelihood of the problem being detected, the client might suffer the consequence even if the appeal is dismissed.

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<sup>25</sup> The problem of adverse consequences is a complex one, and SDAP is available to provide guidance in this area. Also review the SDAP website, which offers further advice (<http://www.sdap.org/pt-a-tips.html>)

<sup>26</sup> For a review of the client's authority for handling appeal decisions as well as a plethora of other guidance, see Appellate Defenders, Inc., *Appellate Practice Manual*, 2d., § 1.56 (Rev. 4/2020), <[http://www.adisandiego.com/panel/manual/California Appellate Practice Manual.pdf](http://www.adisandiego.com/panel/manual/California_Appellate_Practice_Manual.pdf)>

**In terms of abandonment, appellate counsel cannot abandon an appeal without the client's consent.** (*Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053.) It is good practice to obtain the client's consent in writing. There is a sample motion on the SDAP website which has a space for both the client and the attorney to sign so that there is no doubt as to the client's consent.<sup>27</sup> (But see Cal. Rules of Court, rule 8.316(a) [abandonment may be signed by counsel alone].)

## CONCLUSION

In closing, I will note that my goal in producing this overview was to centralize a store of these adverse consequences. I do not pretend to be an expert and this article could not have been created and fleshed out were it not for the works of a great array of appellate counsel and myriad sources (see Appendix B).

At the end of the day, appellate counsel would be wise to take a cue from the Hippocratic Oath; when embarking on an appeal, care must be taken to “first do no harm.”

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<sup>27</sup> For more on appellate counsel's ethical duties in this and other legal realms, see Ethical Duties you need to know about in Communicating with Clients, the Court, and Others, Lori A. Quick & J. Grossman, <[www.sdap.org/downloads/seminar/ethics5.doc](http://www.sdap.org/downloads/seminar/ethics5.doc)>

**APPENDIX A:  
SAMPLE CLIENT ABANDONMENT LETTER & ABANDONMENT FORM**

December 1, 2015

Client

A street somewhere,  
A city someplace, CA

**CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION**

Dear \_\_\_\_\_:

I am writing today because I have reviewed the record of appeal and wish to explain your options. Unfortunately, after review of the record, I have not found any significant errors made by the superior court which would entitle you to a reversal or a reduction of your sentence. In addition, I have determined that there are some possible consequences that may negatively affect you if do decide to proceed. Before you make the decision on whether to proceed with the appeal, I would like to fully explain those risks.

Once you have decided whether or not to continue your appeal, **I ask that you contact me in writing before December 21, 2015.** On the next page I describe what action I will need you to take.

First, here is a summary of the risks and other considerations to help you make the decision as to whether to continue or dismiss this appeal.

**A. Mandatory fees not imposed by trial court**

Upon review of the record, I noted that the trial court did not impose certain required fees that total \$320. If we appeal, there is a risk the attorney general, or the Court of Appeal, will catch this and you could end up having to pay that sum. Sometimes, no one notices any mistakes even if you do pursue an appeal. But by pursuing an appeal, you increase the chance that someone might notice something.

**B. Low likelihood that continuing the appeal will result in a change in the outcome**

As I noted above, having thoroughly reviewed the record in your case, I have not found any significant errors by the superior court that would entitle you to a change in your conviction or sentence. Since the superior court failed to impose those required fees, I believe that there is a risk to pursuing the appeal. Ultimately, the decision as to whether to pursue your appeal, or dismiss your appeal (called an abandonment), is your decision.

**NEXT STEPS**

**If you decide to dismiss this appeal (known as an abandonment):** please sign the attached abandonment form and return it to me in the enclosed stamped and addressed envelope before December 21, 2015.

**If you wish to pursue the appeal,** I will file what is known as a “no issue” or “*Wende*” brief. Further information on this process is below.

**If I do not hear from you by December 21, 2015:** I will proceed with your appeal and file the “*Wende*” brief as I will not dismiss your appeal without your written agreement.

A “*Wende*” brief is a brief filed in the Court of Appeal that follows the process outlined in the California Supreme Court a case *People v. Wende* (1979) 25 Cal.3d 436 (“*Wende*”). This case says that the appellate court must review everything in all the transcripts and any other material in the appellate record to see if there is anything there that I have missed. You will receive a copy of this brief when it is filed.

In the *Wende* brief I will set out a summary of what happened in the trial court, and I will ask the appellate court to review the entire record on its own. Although the Court of Appeal will carefully review the record for arguable issues, based on my research and careful review of the record, I do not believe there is any reason to think the court will find an issue. You do have some rights in connection with a *Wende* brief. Please read the enclosed information sheet carefully before deciding how to proceed.

I do not wish to discourage you, but it is my job to be honest and straightforward with you regarding your appeal. As I mentioned earlier, I will not submit a request to dismiss your appeal unless you clearly state you wish the appeal to be dismissed. The simplest way to make it clear that you wish to dismiss (abandon) the case is to return the enclosed abandonment form.

If you have any questions, please contact me as soon as possible.

Kind Regards,

Anna L. Stuart

Enclosures (2):  
Information sheet for *Wende* brief.  
Abandonment form

## INFORMATION SHEET – *Wende* Brief

1. You have the right to file a supplemental brief of your own directly with the court. If you have anything you would particularly like the court to look for, you may raise that issue in your brief. Your brief does not have to be as formal as the opening brief that I file. The brief should have at least the name of the case and the court's case number on it. Since the court will review the entire record, you do not have to do much more than let it know what issues you think I should have raised on your behalf. If the court agrees with you, it will order me to brief the issues more fully for you. Your brief must be filed within 30 days of the date that mine is filed.

2. The court only provides one set of transcripts to you during the appeal and that copy was sent to me. You have the right to have your copy of the transcripts in order to help you prepare your own brief, which includes citations to the record. If you ask me to do so, I will send you this copy of the record. However, whether or not you file your own brief, the court may find some issues that it wants me to address in another brief. For that reason, I am going to hold on to the transcripts for now, and I will only send them to you if you ask me to do so.

3. You have the right to ask the court to relieve me as your attorney. The court may or may not do so, and if you feel that there is a good reason why it should, you should tell the court those reasons when you ask for a new attorney. I want you to know that I am very willing to continue working for you on this case, but you do have the right to ask the court to relieve me if you feel that it is in your best interests.

4. After the court receives the brief, it will wait for the Attorney General to file anything it feels is needed and for you to file a supplemental brief, should you opt to do so. The court will then review the case on its own. If it identifies an issue, it will either tell me to file another brief discussing the question it has, or it will decide the case and notify us. If it does not find anything, it will decide the case and notify us. I will review whatever the court files, if I have not been relieved, and write you again at that time. When the case is over, I will send the transcripts to you.

[INSERT ATTORNEY NAME/ADDRESS]

State Bar No. 123456

Sixth District Appellate Program, Inc.

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San Jose, CA 95113

Telephone (408) 241-6171

anna@sdap.org

Attorney for Appellant, [INSERT CLIENT NAME]

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SIXTH APPELLATE DISTRICT**

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and Respondent,

v.

[INSERT CLIENT NAME],

Defendant and Appellant.

Court of Appeal

No. H12345

(Santa Clara County

Case No. 123456)

**ABANDONMENT OF APPEAL**

Pursuant to rules 8.244(c) and 8.316, California Rules of Court, Appellant hereby abandons his appeal and requests that it be dismissed.

DATED: \_\_\_\_\_

\_\_\_\_\_  
[INSERT CLIENT NAME]

I agree with the decision to dismiss the appeal.

DATED: \_\_\_\_\_

\_\_\_\_\_  
[INSERT ATTORNEY NAME]

Attorney for Appellant



**APPENDIX B:**  
**SOURCES & OTHER READING MATERIALS**

Appellate Advocacy College Lecture Materials (2000)

Appellate Defenders, Inc., *Appellate Practice Manual*, 2d. (Rev. 4/2020), <[http://www.adisandiego.com/panel/manual/California Appellate Practice Manual.pdf](http://www.adisandiego.com/panel/manual/California_Appellate_Practice_Manual.pdf)>

*Apprendi v. New Jersey, The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far is Too Far?* 29 Pepperdine LR 729.

B. Bristow, *Adverse Consequences of Appeal to Look For in Guilty Plea Cases*, CCAP Staff Attorney CEB, Cal. Law Procedure and Practice, *Felony Sentencing*, § 37 et seq.

Couzens & Bigelow (2016) *Cal. Three Strikes Sentencing* (rev. 05/16)

Couzens & Bigelow (2017) *The Amendment of the Three Strikes Sentencing Law* (rev. 5/2017)

Couzens & Bigelow (2016), *Felony Sentencing After Realignment*, (May, 2017)

*Double Jeopardy's Demise: Double Jeopardy: The History, the Law*. By George C. Thomas III. 88 Cal LR 1001.

D. Sacher, *Perfecting a Sentencing Appeal*, (May, 2008),

<[www.sdap.org/downloads/research/criminal/sentence08.pdf](http://www.sdap.org/downloads/research/criminal/sentence08.pdf)>

J. Bradley O'Connell and Renee Torres, Appellate Advocacy College 2000, *Lecture 3: How to Approach a Case/ Issue Spotting*

J. Grossman, *Four Easy Steps to Understanding Determinate Sentencing Law*,

<<http://www.sdap.org/downloads/research/criminal/sentence.pdf>>

Lori A. Quick, *Fees, Fines, and Penalty Assessments*,

<<http://www.sdap.org/downloads/research/criminal/fines.pdf>>

Lori A. Quick & J. Grossman, *Ethical Duties you need to know about in Communicating with Clients, the Court, and Others*, < [www.sdap.org/downloads/seminar/ethics5.doc](http://www.sdap.org/downloads/seminar/ethics5.doc)>

P. J. McKenna, *Appeals from Orders After Judgment*, (May, 2016),

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