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

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INTRODUCTION

Picture the scene: it was a fall day in San Jose; late October 2016. It was my second week working at SDAP and I had just reviewed a short record in a drug-possession and drug-sale case. Following discussion with my co-worker, I learned that before proceeding any further in the appeal, I needed to let my client know about some relatively sizeable "adverse consequences." I admit that my first thought was "adverse, what now?" Though I do not remember exactly what my first verbal question was, I hope it was more appropriately along the lines of: (1) what exactly is an "adverse consequence"? and (2) what exactly do I do with one?

The answer to "what is an adverse consequence?" is two-fold. First, it involves a trial court error that benefits the client. Second, the "consequence" aspect relates to the risk the error will be noticed and corrected to the detriment of the client because the appeal was undertaken.

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,"[1] a bank error in our favor,[2] or an issue that takes

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[1] Appellate Defenders, Inc., Appellate Practice Manual, 2d. (Rev. 12/2016), ch. 4, p. 1.

[2] William M. Robinson, *Credits Redux: How to Get 'Em, Where to Get 'Em*, (May 2009), p. 38.

us to the "dark side"[3] of the law, the phrase "adverse consequences" appears to be the accepted collective noun.[4]

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 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. 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 (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 ("*Scott*").) 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,

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[3] 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].

[4] According to collectivenouns.biz, there are many collective nouns for lawyers: Disputation, Eloquence, Escheat, Greed, Huddle, Quarrel. Who knew?

§ 12;[5] *People v. Cheffen (*1969) 2 Cal.App.3d 638, 641.) "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"[6] 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* 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.[7]

A. INITIAL CONSIDERATIONS

i. In Some Circumstances, The Court Is Not Allowed To Impose A Greater Sentence Even If The Original Sentence Was "Unauthorized."

As has been noted, a trial court may generally impose a greater sentence on remand if the original sentence was "unauthorized."(*People v. Serrato, supra,* 9 Cal.3d 753, 764.) However, counsel should be sensitive to certain circumstances that

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[5] All future unspecified statutory references are to the Penal Code.

[6] See footnote 3., *ante*.

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

may prevent operation of the general rule.

People v. Torres (2008) 163 Cal.App.4th 1420 presented an interesting situation. There, the trial court imposed a seven year sentence for a violation of section 422 and imposed the middle stayed term for a violation of section 136.1 pursuant to 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. Although an appeal was not taken, CDCR wrote to the trial court and pointed out that the sentencing triad for a violation of section 422 was 16 months, two or three years. 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. On appeal, it was held that the trial court erred. The Court of Appeal reasoned that the original seven year sentence could have been lawfully imposed. Since "the aggregate sentence of seven years imposed on defendant at the original sentencing hearing could have been lawfully achieved by imposing the mid term of two years on count three plus the consecutive enhancement term of five years; it did not fall below the mandatory minimum sentence and was therefore not a legally unauthorized lenient sentence." (*Id*., at p. 1432.) Since the length of the original sentence was lawful, the trial court was ordered 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, the court imposed a 15 year sentence. On the defendant's appeal, the Court of Appeal determined that the trial court had erred by failing to impose a mandatory five year prior conviction enhancement and by failing to double a component of the sentence under the Three Strikes law. On remand, a 22 year term was imposed. 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.

People v. Velasquez (1999) 69 Cal.App.4th 503 is another helpful precedent. There, the defendant was charged with a crime that carried a punishment of two, four, or six years. The defendant entered a plea bargain for a grant of probation with the added condition that any prison sentence following the revocation of probation would be limited to 3 years. When probation was subsequently revoked, a three year term was imposed. On the defendant's appeal, the sentence was reduced to the lawful term of two years. 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.)

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].)

ii. 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.)

The Sixth District decision in *People v. Puentes* (2010) 190 Cal.App.4th 1480 provides a paradigmatic 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). The jury hung on the felony and convicted the defendant on the misdemeanor. The prosecutor dismissed the felony charge when sentence was imposed on the misdemeanor. After the misdemeanor conviction was reversed on appeal, the prosecutor reinstated the felony charge. 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. The motion was denied and the defendant was convicted of the felony. On appeal, the court held that the prosecutor's justification for reviving the felony was

insufficient to dispel the presumption of prosecutorial vindictiveness. Finding no basis for a change in circumstances other than the defendant's success on appeal, the court dismissed the conviction. (*Id.* at p. 1488.)

As *Puentes* establishes, the prosecutor needs a good reason to add new charges after the defendant wins his appeal. Without such reasons, the defendant cannot be punished for exercising the right to appeal.

B. EXAMPLES: Where the Trial Court had no Discretion (but exercises some anyway).

As an initial note, the statutes in effect on the date of the commission of the offense control the sentencing. (U.S. Const., art I, § 10; Cal. Const., art I, § 9.)

1. Wrong Sentencing Scheme Applied.

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. The various schemes include the basic Determinate Sentencing Law, indeterminate sentencing, and the Three Strikes law.[8]

Since the determinate scheme of section 1170.1 does not apply to indeterminate terms, and any term for life is an indeterminate term, once it has been pled and proved that a defendant has two or more prior felony convictions, the Three Strikes law must be applied. (See *People v. Williams* (2004) 34 Cal.4th 397, 402-403; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 505 ("*Romero*") [on proof of prior violent or serious felony, sentencing proceeds under the Three Strikes law].)

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[8] The Determine Sentencing Law or "DSL" is codified in section 1170, et seq. 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.)

A defendant convicted of murder who meets the requirements for section 667.7 [habitual offender] must be sentenced under that statute rather than section 190. (*People v. Jenkins* (1995) 10 Cal.4th 238, 249.) 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, & Prison Time[9]

i. Prior Convictions

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. There are three types of prior convictions: (1) a prior prison term (or term served under section 1170, subdivision (h)), serious felony priors, and strike priors.

Unlike cases involving serious felonies in the current case (i.e., strike case), sentences imposed under the determinate sentencing scheme handle prior serious or violent felony convictions as a component of the aggregate term.

Under section 1170.1 and the determinate sentencing law, a trial court must impose a sentence enhancement for a prior felony conviction - including section 667, subdivision (a), enhancement - only once [as a component of the aggregate term], regardless of the number of new felony offenses. (*People v. Tassell* (1984) 36 Cal.3d 77, 90 overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 387.)

Be alert: When a prior felony narcotic conviction is used as a separate enhancement, there are mandatory sentencing requirements. (See Health & Saf. Code, § 11370.2 [status enhancement requiring full, separate, consecutive three-year enhancement for each prior without the one-third subordinate term limit].)

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

ii. Strike Priors

One Strike Prior

Where 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].)

The clear language of section 667, subdivision (e)(1) [two strikes sentence], provides for doubling of a 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.)

Two or More Strike Priors

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: When any prior conviction involves personal use of a weapon or personal the infliction of great bodily injury, it is a strike. This is so regardless of the charge for which the defendant was convicted because the prosecution can use the entire record of the prior to prove that the prior was a strike-able felony. (*People v. Rodriguez* (1998) 17 Cal.4th 253, superseded by statute on other grounds as stated in *People v. Luna* (2003) 113 Cal.App.4th 395.)

Further note: When a wobbler is reduced pursuant to section 17, subdivision (b), it is still a strike, but not a felony prior subject to the five-year enhancement. (*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].)

iii. Prison: Priors [§ 667.5] & Mandatory Confinement [§ 1170]

When the prison prior enhancement applies: Physical commitment to the state prison or county jail for a section 1170, subdivision (h), offense is not required. If there was sufficient presentence credit to satisfy the sentence, the enhancement still applies. (§ 1170, subd. (a).) Only where a defendant actually serves a sentence for a prior felony conviction, the enhancement attaches. (§ 667.5, subd. (e).)

Procedural Requirement: Under section 667.5, subdivision (d), the prior prison terms must be charged and either admitted or found true. Further, 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.)

Consequences: 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. (§ 667.5, subd. (a).)

As between the present and prior felonies, if only one was violent or if neither were violent, a mandatory one-year term for each separate prison term is imposed. (§ 667.5, subd. (b).)

While the same conviction cannot be used as both a prison prior and a serious felony prior (*People v. Jones* (1994) 5 Cal.4th 1142, 1152) or a violent felony prior (§ 667.5, subd. (a)), if the defendant was convicted and sentenced to prison on both serious (or violent) and non-serious (or non-violent) felonies, the prison prior may be imposed. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1054.)

Prison Sentence Mandatory

Under section 1170.1, subdivision (a) [aggregate and consecutive terms for multiple convictions, non-strike], where a defendant is sentenced to state prison for any component of the aggregate term, the trial court has no discretion but to sentence the defendant to actually serve time in prison. This is so regardless of whether a component of the sentence specifies imprisonment in county jail under section 1170, subdivision (h).

Where a Prison Sentence is Mandatory Despite Section 1170, subdivision (h)

Enacted as part of the 2011 Realignment Act, section 1170, subdivision (h), describes which defendants must serve their sentence in state prison and those eligible for sentencing to county jail (so-called "3 Nons" or "non-non-non" defendants). (§ 1170, subd. (h)(3).) A potential trial court error would be in sentencing an ineligible defendant to county jail instead of prison.

Further Note: check to ensure the punishment scheme for the offense of conviction explicitly sets forth a triad of sentences to be served "pursuant to subdivision (h) of section 1170" or equivalent language.[10]

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).) However, there are exceptions where consecutive sentences are mandated: (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)); and (3) With enumerated sex offenses involved separate victims or separate occasions, the conviction must be run consecutively (§§ 667, subd. (d)), 667.61, subd. (I) [one-strike cases]).

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[10] For more on sentencing including the Realignment Act, see CEB, Cal. Law Procedure and Practice, Felony Sentencing, § 37 et seq. [authored by SDAP's very own Jonathan Grossman].

An error may occur when the trial court fails to impose consecutive (rather than concurrent) sentences for subordinate terms when a strike prior has been proven true. (*People v. Casper* (2004) 33 Cal.4th 38 [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].)

Further, when sentencing for more than one felony or more than one strike-able felony, where there is more than one current felony conviction, consecutive sentences 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, supra*, 33 Cal.4th at p. 42.)

i. Required Consecutive Sentences Under the Strikes law

(1) Current convictions for offenses not committed on the same occasion or not arising from the same set of operative facts: If there are multiple present convictions, consecutive sentences are mandated unless the same occasion or same set of operative facts exceptions apply. (§ 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 pursuant to 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.)

(2) Current conviction for more than one serious or violent felony: "[T]he court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced . . . ." (§ 667, subd. (c)(7) or § 1170.12, subd. (a)(7); see also *People v. Deloza* (1998) 18 Cal.4th 585, 591.)

(3) Life sentence under the 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 Strikes law must be consecutive. (§§ 667, subd. (e)(2)(B) or 1170.12, subd. (c)(2)(B).)

(4) 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 can be applied:

(a) 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).)

(b) 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 arena 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].)

Counsel should be alert that 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].)

i. Mis-Application of the Serious Felony Prior Enhancement [§ 667, subd. (a)]

While 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), the court has no authority to strike any prior conviction of a serious felony for purposes of the mandatory five-year enhancement under section 667, subdivision (a). (See § 1385, subd. (b).) The five-year enhancement must be imposed. Furthermore, in a case involving multiple prior serious felony convictions, ensure that the court imposed the five-year enhancement for *each* serious felony prior and not just once.

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.

But compare: Under 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).)

ii. Firearm Use Enhancements, On-Bail Enhancements & Great Bodily Injury Enhancements

(1) 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.

(2) 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. Also note that the court has no power under section 1385 to strike an allegation or finding that a person is subject to this statute.

(3) 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.[11] (§ 12022.53, subd. (b).) If the defendant personally discharges a firearm, the additional and consecutive term is 20 years. (§ 12022.53, subd. (c).) 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).) 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; see also *People v. Munoz* (2009) 178 Cal.App.4th 468 [defendant's firearm enhancement of 25 years to life on a count for which a consecutive term had been imposed was not subject to reduction under the Determinate Sentencing Law (§ 1170.1, subd. (a)) because the enhancement was indeterminate; case law addressing an enhancement that provided a determinate term was inapplicable].)

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[11] 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.

(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, subds. (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 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).)

(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.

iii. 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, subds. (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[12]

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. Circumstances Involving Full-Term Subordinate Terms

(1) Full middle term consecutive for **kidnapping multiple victims** (§1170.1, subd. (b));

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[12] 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*.)

(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.)

(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. 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 outside of the Determinate Sentencing Law that must be imposed.

i. Habitual Criminal Offenders Inflicting Great Bodily Injury or Force Likely to Cause Great Bodily Injury [§ 667.7]

Section 667.7 is not an enhancement, but 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).)

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).

ii. 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.

iii. 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.

iv. Other Offense-specific Punishment Schemes

(1) § 187 - murder [dependant on circumstances; see § 190 for punishment scheme];

(2) § 205 - aggravated mayhem [life with possibility of parole];

(3) § 206 - torture [life with possibility of parole];

(4) § 209 - kidnapping for gain or for robbery/rape [dependant on circumstances; see § 209];

(5) § 209.5 - kidnapping in course of carjacking [life with possibility of parole];

(6) § 273ab - Assault resulting in death, coma due to brain injury, or paralysis of permanent nature of child under eight years of age [25 years to life];

(7) § 451.5 - aggravated arson [dependant on 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. (a)(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. (a)(1)(C).) There is also a minimum parole period of 15 years involved. (§ 186.22, subd. (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

While a trial court has discretion to strike the additional punishment dictated by this statute, its discretion is limited to "an unusual case where the interests of justice would best be served" and requires that the court specifies on the record and enters into the minutes a statement of those reasons. (§ 186.22, subd. (g).)

8. Misapplication of a Section 654 Stay

Appellate counsel are 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

i. Mandatory Sentencing Provisions

An enumerated sex offense is a conviction for any crime listed in section 667.6, subdivision (c).[13] Generally, the court may impose a **concurrent** sentence **or**

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[13] 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)

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

(1) Specified sex offenses subject to life imprisonment [§ 667.61]: Depending on the circumstances, defendants convicted of certain sex offenses may be subject to a mandatory term of 25 years to life.[14]

(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: 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 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.

Kidnapping with the intent to commit a specified sexual offense (§ 209, subd. (b)); (12) Aggravated sexual assault of a child (§ 269); (13) An offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision.

[14] 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).

(5) When a consecutive sentence is mandatory: 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 or Prison Terms

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,[15] 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

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[15]§§ 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].

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 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.[16]

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[16] For more on Double Jeopardy issues, see Part II, *post.*

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 & Requirement for Oral Reasons on the Record

Section 1385, subdivision (a), was amended effective January 1, 2015. (Stats. 2014, ch. 137, § 1.) 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." (Pen. Code, § 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.)

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) No authority to dismiss an allegation or finding under section 12022.5 (firearm enhancement): The trial court has no power to strike an allegation or finding that the defendant used a firearm, machine-gun, or assault weapon in commission or attempted commission of a felony.

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, "The 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." (*Id*. at p. 187.)

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 Pen. Code, §§ 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.[17])

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. (*People v. Serrato*, *supra*, 9 Cal.3d at p. 763; see Part I, *ante*.) 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.)

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

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[17] *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.

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. Eroshevich* (2014) 60 Cal.4th 583, 589.)

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

Sentencing factors that do not fall within the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [any conduct enhancement that potentially increases the punishment beyond the statutory maximum must be proved beyond a reasonable doubt], 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 allegations, there is no bar to retrial of the sentencing allegations. (*People v. Anderson*, *supra*, 47 Cal.4th at p. 105.)

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. (*People v. Barragon* (2004) 32 Cal.4th 236.)

III. PROBATION

i. 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.[18]

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.

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[18] For a handy chart detailing persons ineligible for probation, see CEB, Cal. Criminal Law Procedure and Practice, § 37.52, at p. 1176-1177.

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].)

ii. 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].)

IV. PLEA AGREEMENTS [Withdrawal of Guilty Plea/Restrictions on Plea Bargaining][19]

i. 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

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[19] 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.

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 pursuant to 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*[20] be restored by reviving the . . . dismissed counts." (*In re Sutherland* (1972) 6 Cal.3d 666, 672.)

ii. 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.

(1) 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

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[20] *Status quo ante*: the previously existing state of affairs where everyone is put back to their starting positions.

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).)

iii. Other Adverse Consequences in Attacking Pleas[21]

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.

(a) 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);

(b) 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;

(c) The defendant could have been charged with sex priors, creating a life case;

(d) In sex cases, charges could be added for each act, especially if the defendant pled before the preliminary hearing.

V. 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 is the excellent, and annually updated, CCAP resource webpage: http://www.capcentral.org/criminal/crim_fines.asp

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

i. Failure to Impose a Mandatory Fee or Fine[22]

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 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.)

ii. 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.

iii. 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.)

iv. 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).

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[22] 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>)

v. 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.)

vi. 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.)

VI. MIS-CALCULATING CREDITS[23]

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.

i. Awarding Conduct Credits using the Wrong Formula

Where a defendant is convicted of a "violent felony," a potential adverse consequence exists if the trial court fails to limit pre-sentence custody credits to 15% under section 2933.1. (see § 667.5, subd. (c).) [But compare, 15% limit of section 2933.1 for "violent felonies" should not be confused with the 20% limit under the Three Strikes law because "three strikes" credit limits apply only to *post-sentence* credits and have no application to pre-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,

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[23] See also Mr. William M. Robinson's fantastic 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>

1130.)

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

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].)

ii. 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).)

A Three Strikes defendant receiving an indeterminate sentence does not qualify for prison conduct credits. (*In re Cervera* (2001) 24 Cal.4th 1073, 1077.)

iii. 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 CRC (*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).

VII. OTHER CONSIDERATIONS

i. Typos

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

ii. 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.

iii. 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.

iv. 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.

v. Can One's Client go Back to Jail?

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

VII. APPROACHING THE CLIENT & ASSESSING THE RISK[24]

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, 915.)

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, it appears that these days, this check occurs much closer to the supposed 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.[25]

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

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[24] 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)

[25] For a review of the client's authority for handling appeal decisions, see Appellate Defenders, Inc., Appellate Practice Manual, 2d. (Rev. 12/2016)

is dismissed.

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.[26] (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 a 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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[26] 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>

APPENDIX A:

SAMPLE CLIENT ABANDONMENT LETTER & ABANDONMENT FORM

December 1, 2015

Client
A street somewhere,
A city someplace, CA

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

Dear Mr/Ms _____:

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 that decision, I would like to fully explain those risks. Once you have read through this letter, I ask that you respond to me, in writing, before December 21, 2015, to tell me how you wish to proceed.

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.

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.

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.

Second, 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.

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 finding anything, it will decide the case and notify us. I will review whatever it does, 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]
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Sixth District Appellate Program, Inc.
95 S. Market Street, Suite 570
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. 12/2016)

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 (2016), *Felony Sentencing After Realignment*, (May, 2016)

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>

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>

P. J. McKenna, *Appeals from Orders After Judgment*, (May, 2016), <http://www.sdap.org/downloads/research/criminal/pjm16.pdf>

Proposition 47 Case Outline, edited by D. Feinberg

William M. Robinson, *Credits Redux: How to Get 'Em, Where to Get 'Em*, (May 2009), http://www.sdap.org/downloads/research/criminal/ptc2.pdf>