First Do No Harm: Adverse Consequences, a Review (10/2024)

INTRODUCTION

The phrase "adverse consequence" describes a situation where there is a legal error related to the client's current judgment, but no one has noticed the error (yet), and the error is to the client's benefit. The legal error is "adverse" because if it discovered and corrected during the appeal process, the "consequence" of the appeal would be to harm the client's interests.

In this article, we define the concept of adverse consequences and provide a summary of the key areas where adverse consequences arise in criminal and dependency cases. We also cover appellate counsel's important advisory role when encountering one of these issues so that the client understands the issue and risk. Part I reviews the definition of an adverse consequence, Part II describes the process of risk evaluation and client advisement, Part III reviews adverse consequences in criminal appeals, Part IV cover adverse consequences in appeals relating to youth justice, and Part IV covers dependency appeals.

In addition, this article includes a checklist of issues, sample client letters, and a list of resources and ideas for further reading. Finally, know that this is a living document, and we encourage you to reach out to anna@sdap.org with any adverse consequences not mentioned herein as well as to give us any other feedback regarding these resources on adverse consequences.

PART I: What is an Adverse Consequence?

"Adverse consequence" means a bad result should your client proceed with their appeal. More specifically, it can refer to either (a) an error made by the trial court that provided your client with a benefit to which they were not entitled, or (b) an unwanted outcome should your client prevail on appeal.

A. Error made by the trial court

This benefit typically falls into one or more of the following broadly-defined categories: a lighter prison term than should have been imposed; an unauthorized grant of probation; a greater presentence custody credit than earned; a lesser financial burden (fines, penalty assessments, restitution) than mandated by law; or a statutorily prohibited plea bargain.

B. Unwanted outcome following a successful appeal [1]

Examples include where your client challenges an unauthorized sentence; succeeds in undoing his or her plea and ends up with a sentence greater than what they received as a result of the plea bargain; where your client has dismissed charges reinstated or more serious charges added on remand; where your client succeeds in getting his or her not guilty by reason of insanity determination reversed but ends up with a lengthy prison sentence, etc.

PART II. Assessing the Risk after Identifying an Adverse Consequence and Communicating with the Client [2]

Appellate counsel's first duty is to correctly advise the client 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 other words, what your client really wants to know is, "Is it likely the adverse consequence will be discovered?" Unfortunately, determining the odds of discovery with any certainty is difficult at best, but you can aid your client's decision-making by providing them with a "more likely/less likely" discussion, where the determination is supported by controlling or analogous authority.

The odds of discovery of an adverse consequence are driven, in part, by the number of parties involved in the appeal. Should your client proceed with the appeal, then the Attorney General/County Counsel and the Court of Appeal will all be reviewing the record. Thus, it is more likely that the adverse consequence will be discovered.

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

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[1] The authors recognize that the term "successful" in appellate practice is open to myriad definitions.

[2] The problem of adverse consequences is a complex one, appellate counsel should not hesitate to contact their project buddy for advice on the nature of the consequence and the method of client advisement.

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.

Concerning an appeal where the client is transferred to the CDCR, appellate counsel should keep in mind the following practicalities too. First, CDCR does not receive the entire record. Second, CDCR receives your client's sentencing records regardless of whether a notice of appeal was filed. Thus, regardless of whether your client proceeds with or abandons the appeal, CDCR may discover an adverse consequence. Additionally, counsel should be aware that CDCR will review an inmate's sentencing records each time they are transferred to a new prison, so an adverse consequence that is apparent in the sentencing materials and is not discovered initially may be discovered later.

Also, in a juvenile/youth justice appeal, there is always the possibility that any adverse consequence might be uncovered by a probation officer or other person, regardless of whether the appeal proceeds.[3]

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, their financial situation, and the general emotional toll that the entire situation entails.[4]

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 recommendations, to enable the client to make that decision intelligently. It is also important to communicate 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.

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.) Although it is good

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[3] There is a conscious attempt here and elsewhere to move away from the term "delinquency" as it relates to our juvenile justice system. (See e.g., https://oycr.ca.gov/about/ [California's efforts to refocus youth justice toward rehabilitation]; see also https://youthrightsjustice.org/621-2/ [2021 article from an Oregon-based non-profit highlighting the impact of word choice in youth justice].)

[4] 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*, 4th., § 1.4.3.1 (Rev. 2024), <https://www.adi-sandiego.com/wp-content/uploads/2024/08/Manual-4th-Edition-Oct-2024.pdf>

practice to obtain the client's consent in writing, individual projects may have differing requirements. At a minimum, counsel should consult with the relevant project before filing an abandonment notice. There is a sample motion on the SDAP website regarding abandonment 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.[5] Cal. Rules of Court, rule 8.316(a) [abandonment may be signed by counsel alone].)

PART III: Criminal Adverse Consequences

A. Unauthorized sentences: What are they?

An unauthorized sentence is one not permitted by law. Generally, a sentence is "unauthorized" where it could not lawfully be imposed under any circumstances in the particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An unauthorized sentence can be corrected during an appeal because 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.) Accordingly, unauthorized sentences are an exception to the forfeiture rule of *Scott*, which noted that certain sentencing errors require "a timely and meaningful objection" at the time of sentence to avoid forfeiture or waiver of the issue for appeal. (*Id.*, at p. 351.)

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.)[6] "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.) If the court acts outside this mandate, it imposes an unauthorized sentence. (*People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6 [harsher sentence on remand possible where trial court failed to pronounce judgment on misdemeanors constituting an unauthorized sentence].) If a judgment of conviction is

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[5] For more on appellate counsel's ethical duties, see Lori A. Quick, *Ethical Issues in Appellate Advocacy* (May 2021) <https://sdap.org/wp-content/uploads/downloads/research/criminal/laq21.pdf>, J. Grossman & P. McKenna, *Ethics in the Modern Age: The New Rules of Professional Responsibility,* (May 2019) <https://sdap.org/wp-content/uploads/downloads/research/criminal/pjm-jg19.pdf>

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

proper, but the sentence unauthorized, the conviction should be affirmed but the case remanded for resentencing. (*Scott*, *supra*, 9 Cal.4th 331, 354.)

B. Double 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 (typically the Court of Appeal's disposition order will reference the People's ability to retry the defendant). 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.) Albeit with caveats depending on why the case was reversed (e.g., reversal for a successful challenge to a guilty verdict or true finding based on insufficient evidence, precludes retrial on that offense).

The principles of double jeopardy are of constitutional import. The Fifth Amendment of the United States Constitution provides 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."

It is important to note here that whenever the double jeopardy principles are referenced herein, they refer only to the state double jeopardy clause set forth in the California Constitution under article I, section 13. Case law makes clear that the double jeopardy clause of the federal constitution established a minimum standard of protection for criminal defendants, whereas the state counterpart is significantly more protective. (See e.g., *People v. Collins* (1978) 21 Cal.3d 208, 216 [construing state double jeopardy provision to bar imposition of greater sentence on retrial after the defendant's successful appeal, contrary to the applicable federal constitutional rule of *North Carolina v. Pearce* (1969) 395 U.S. 711, 719-721; see also *People v. Batts* (2003) 30 Cal.4th 660, 686-687 [providing a summary of some of the differences between the federal and state double jeopardy clauses].)

The rules under California law 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 their right of appeal after trial by risking a more severe punishment. (*People v. Henderson* (1963) 60 Cal.2d 482.)[7]

Sounds great, but what is the catch? If the original sentence was unauthorized, a defendant runs the risk of a more severe punishment upon conviction after retrial under the "*Serrato* exception." (See *People v. Serrato* (1973) 9 Cal.3d 753, 763, disapproved of on another ground by *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; see Part III-B-1-a, below.) *Serrato* described an exception to the *Henderson* rule that allows imposition of a harsher sentence on remand following an appeal where the first sentence was not legally authorized. (See *ibid.*)

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[7] *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.

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 under section 1181 may act as waiver of double jeopardy protections (as with an agreement to a mistrial). (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 136.)

1. Double jeopardy and unauthorized sentences.

As noted above the double jeopardy bar protects a criminal defendant from being penalized for exercising their right to appeal. (*Henderson, supra*, 60 Cal.2d at pp. 495-497.) Despite this principle, however, can an unauthorized sentence lead to a harsher sentence on remand? In short: Yes. This is a classic adverse consequence, but there are arguments appellate counsel should consider to anticipate this issue.

The "dark side" of "unauthorized sentences" is where adverse consequences lurk. Notwithstanding the California Constitution's protection against double jeopardy, the trial court **may** impose a lengthier sentence on remand after an illegal sentence is set-aside on appeal. (See *Serrato*, *surpa*, 9 Cal.3d at pp. 764-765 [outlining the soon to be called "*Serrato* exception"].)[8] Discussed below are scenarios to consider to avoid such an outcome.

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. Even with the above-referenced principles in mind, what constitutes an "unauthorized sentence" has yet to be definitively defined. (See, e.g., *People v. Trammel*

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(2023) 97 Cal.App.5th 415, 435 [providing extensive review of how courts have defined waiver and unauthorized sentences].)

a. The *Serrato* exception

When correcting an unauthorized sentence, the trial court has discretion to increase the defendant's sentence following the exercise of the right to appeal.

In *Serrato*, the California Supreme court enunciated an exception to the double jeopardy bar that precludes increasing a defendant's sentence following a successful appeal. (See *Serrato*, *supra*, 9 Cal.3d at pp. 762-763.) The so-called *Serrato* exception states that a trial court may generally impose a greater sentence on remand if the original sentence was "unauthorized." (*Serrato, supra,* 9 Cal.3d at p. 764.)

As recently as 2023, appellate courts have been grappling with the boundaries of the *Serrato* exception. In November 2023, the First District Court of Appeal in *Trammel*, *supra*, 97 Cal.App.5th 415, 420-437, undertook a comprehensive review of the intertwined nature of double jeopardy principles, the People's rights, the defendant's rights, unauthorized sentences, the *Serrato* exception, and the waiver doctrine. The court identified the times when a defendant's sentence may be increased following a successful appeal and a way of identifying when a defendant's sentence may not be so increased. Appellate counsel is urged to review *Trammel* if ever an unauthorized sentence appears in your client's record, but in essence, the *Trammel* court held that to avoid the California Constitution's prohibition against double jeopardy, the *Serrato* exception only applies to unauthorized sentences which were unlawfully lenient to the detriment of the People (*id.*, at p. 434), and to the extent the unauthorized sentence related to a component of an aggregated sentence, the new aggregate sentence cannot be harsher than the original aggregate sentence (*id.*, at p. 435).

Appellate counsel is cautioned, however, that courts may yet disagree with the holding of *Trammel*, just as they have for the case of *Torres*, discussed below.

Irrespective, appellate counsel should be sensitive to the circumstances in which the *Serrato* exception does not apply. Consider the following:

b. The *Serrato* exception may not apply where the unauthorized sentence was erroneously harsh or neutral rather than lenient (*Trammel*, *supra*, 97 Cal.App.5th at p. 434.)

In his first appeal, the *Trammel* defendant challenged the trial court's sentencing order, which imposed an aggregate 12-year prison term for numerous convictions arising out of his violent relationship with his former girlfriend. (*Trammel*, *supra*, 97 Cal.App.5th at p. 470.) The Court of Appeal agreed with the defendant that the trial court erroneously failed to stay the punishment for two convictions under section 654 and remanded the matter for a full resentencing. (*People v. Trammel* (June 30, 2022, A161381) [nonpub. opn.].)

On remand, the trial court corrected its section 654 errors, resentencing the defendant to a total prison term of 12 years four months – so a higher sentence. (*Trammel*, *supra*, 97 Cal.App.5th at p. 470.) In the second appeal, the defendant argued that his new sentence ran afoul of the prohibition against double jeopardy set forth in article I, section 15 of the California Constitution. (*Ibid.*) The *Trammel* court agreed, but finding no reasonable likelihood that the trial court would embark on a significant departure from the original total sentence, it invoked its own authority and modified the defendant's sentence to 11 years and 4 months. (*Id.* at pp. 436-437.)

Appellate counsel should rely on *Trammel* where the unauthorized sentence, including any component therein, was unlawful because it was erroneously harsh or neutral rather than lenient.

c. The *Serrato* exception may not apply where the unauthorized sentence could be restructured to reach the same aggregate term

The next situation where there can be no increase on remand is where the original unauthorized sentence could be restructured to reach the same aggregate term. As of the date of this article, section 1172.1 governs the recall of sentence procedure in this circumstance.[9] Section 1172.1, subdivision (a)(1), provides in relevant part that the trial court may, "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced . . . and provided the new sentence, if any, is no greater than the initial sentence."

The case of *People v. Torres* (2008) 163 Cal.App.4th 1420, illustrates how the recall provisions of section 1172.1 (formerly section 1170, subdivision (d)), and double

[9] The tenets of section 1172.1 were formerly enumerated under section 1170, subdivision (d), and briefly under section 1170.13. (See Stats. 2021, ch. 719 § 3.1 (AB 1540) and Stats. 2022, ch. 58 § 9 (AB 200).)

jeopardy principles 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 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 former 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 former 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 under section 654, (*Ibid.*) The new sentence was a significantly higher seven years to life. (*Ibid.*) On appeal, the *Torres* court held that the trial court erred by imposing a higher sentence because the original seven-year sentence could have been lawfully imposed as 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 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 CDCR-initiated recall under former section 1170, subdivision (d); 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." (*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.[10] Counsel should rely on *Torres* in a proper case.

Note on pleading and notice: Where a charging document does not list the defendant's prior's as "serious or violent felonies" but do allege provisions of the Three Strikes law, can the defendant be subject to the mandatory 5-year enhancement under section 667, subdivision (a)(1), despite the lack of notice?

~ Yes, according to the original decision in *People v. Vizcarra*, 2013 Cal.App.Unpub, LEXIS 366 ("*Vizcarra I*"), where the court held that the fact that the defendant's present offense was a serious felony was enough to put the defendant on notice that he was facing five years of additional punishment for his prior.

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[10] There is a split of authority on whether a trial court (and therefore an appellate court) has jurisdiction to correct an unauthorized sentence "at any time." (See *People v. Hernandez* (2024) 103 Cal.App.5th 1111, 1118-1124 [concluding that the trial court lacks jurisdiction to correct an unauthorized sentence after it denies recall and resentencing under section 1172.6]; see also *In re G.C.* (2020) 8 Cal.5th 1119, 1130 [no jurisdiction to correct an error unless it correlates to the judgment on appeal]; *People v. Moore* (2021) 68 Cal.App.5th 856, 865-866 [no jurisdiction because the appeal related to a post-conviction *Franklin* hearing]; *People v. King* (2022) 77 Cal.App.5th 629, 640 [although an unauthorized sentence may be challenged at any time, even after a judgment of conviction has become final, and even if the judgment has already been affirmed on appeal, to invoke the unauthorized sentence rule, the trial court must have jurisdiction over the judgment]; but see *People v. Codinha* (2023) 92 Cal.App.5th 976, 990 ["A trial court that imposes a sentence unauthorized by law retains jurisdiction (or has inherent power) to correct the sentence at any time the error comes to its attention, even if execution of the sentence has commenced or the judgment imposing the sentence has become final and correction requires imposition of a more severe sentence, provided the error is apparent from the face of the record"].) *Trammel, supra*, 97 Cal.App.5th at p. 435 [discussing the definition of an unauthorized sentence, also that "the *Serrato* exception only applies to unauthorized sentences which were unlawfully lenient to the detriment of the People"].

~ No, according to *People v. Nguyen* (2017) 18 Cal.App.5th 260 at page 267. Citing *People v. Mancebo* (2002) 27 Cal.4th 735 at page 745, the *Nguyen* court held that the pleading document would not give sufficient notice to the defendant of what possible punishment he was facing as the term "serious felony" was not used. (*Nguyen*, *supra*, 18 Cal.App.5th at p. 267.)

~ In this type of scenario, appellate counsel should argue *Nguyen* and the trial court's relatively new authority to dismiss five-year priors under section 1385 after SB 1393.

d. The *Serrato* exception may not apply where the unauthorized sentence was negotiated as part of a plea agreement

The third 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. 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.)

3. 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 .)

4. Double jeopardy principles only apply 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.)

5. 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. Four years later, the California Supreme Court held that when a premeditation allegation for attempted murder is reversed for evidentiary insufficiency, retrial of the allegation is barred by the federal double jeopardy clause. (See *People v. Seel* (2004) 34 Cal.4th 535, 542, 549-550.) Quoting *Apprendi*, the *Seel* court explained that because a true finding on the premeditation allegation for attempted murder "exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict" the allegation was thus "the functional equivalent if an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.*, at p. 548.) Accordingly, retrial of a premeditation allegation reversed for evidentiary insufficiency was barred. (*Id.*, at p. 550.)

Notwithstanding *Apprendi* and *Seel*, however, sentencing/penalty allegations are not considered a greater offense for purposes of double jeopardy in two scenarios. First, there is no bar to retrial of the sentencing allegations where a defendant is convicted of a substantive offense, but the jury is deadlocked on the factual sentencing/penalty 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].) Second, where the jury deadlocks on a sentencing/penalty allegation, the allegation can be retried. (See *People v. Bright* (1966) 12 Cal.4th 652, overruled in part by *Seel*, *supra*, 34 Cal.4th 535.)

6. 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.)

7. Double jeopardy principles inapplicable to victim restitution

The issue of victim restitution being revisited on remand is what happened in *People v. Harvest* (2000) 84 Cal.App.4th 641. There, the defendant was convicted of first degree and second degree murder, with the jury finding true a multiple murder special circumstance allegation. On appeal, the reviewing court reversed the second degree murder conviction and special circumstance finding with directions that the prosecution either retry the second degree murder charge or consent to reducing the charge to voluntary manslaughter. After the prosecution elected not to retry the charge, the trial court imposed victim restitution for first time at resentencing. On the subsequent appeal challenging the imposition of victim restitution, the reviewing court affirmed, holding that victim restitution is not punishment for double jeopardy purposes so the defendant cannot be punished for exercising the right to appeal.

C. Presumption of vindictiveness can be overcome: 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. (See *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371; but see *Short v. Superior Court* (2019) 42 Cal.App.5th 905, 917 [a presumption of vindictiveness would not arise from the prosecution's addition of lesser charges with no additional exposure].) 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 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 the increase in charges or reinstatement of dismissed charges will violate the due process guarantee against vindictive prosecution.

D. Can one's client go back to prison/jail?

Unfortunately, there is precedent for re-incarcerating a defendant who has already been released from custody. (See *People v. Clancey* (2013) 56 Cal.4th 562, 584-587 [defendant ordered back into custody since he received too many presentence credits].) But there is room to challenge this outcome. In *United States v. Denson* (5th Cir. 1979) 603 F.2d 1143 at page 1148, the two defendants were facing a harsher sentence after the prosecution successfully argued their original sentence was unauthorized. The reviewing court upheld the sentence as unauthorized and noted that "the mere fact that the defendants have psychologically prepared themselves" for the original and shorter term was not a persuasive reason to find otherwise. (*Ibid.*) The *Denson* court explained that all was not lost for the defendants because "[t]he trial judge may take into account any difficulties caused by resentencing when [they] impose[] a new and legal sentence just as [they] may consider any other appropriate factors when they militate toward lenity or severity." (*Ibid.*) Appellate counsel – and indeed trial counsel - should reference *Denson* in the appropriate case.

E. Some adverse consequences to look for

1. Dismissal Error

a. Trial erred when striking/dismissing an action, charge, or punishment under Penal Code section 1385

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

Section 1385, subdivision (a), was amended effective January 1, 2018, following the passage of Senate Bill No. 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.)

Where the trial court fails to state reasons in the record, an adverse consequence occurs because the dismissal order may be deemed "unauthorized." (*People v. Johnson* (2015) 61 Cal.4th 734, 769; see Part III-A, *infra*.)[11]

Counsel should be aware that a former version of section 1385 required the reasons for the dismissal to be set forth in an order entered upon the minutes in every case (now the court is only required to set forth the reasons in a minute order if requested by a party or if the proceedings are not being recorded). The amendment changing this requirement was effective January 1, 2015. (Stats. 2014 ch. 137 § 1 (SB 1222).) As a result, you may find older cases where the appellate court remanded the case to the trial court because the reasons for striking the sentencing component were not stated in the minutes. (See *People v. Bonnetta* (2009) 46 Cal.4th 143.) This is unlikely to happen after the 2015 amendment unless the trial court failed to state the reasons in a minute order where a party requested the reasons be stated in the minute order or the proceedings were not recorded.

While it may not appear to be of much consequence, the failure of the trial court to state on the record why dismissal of an action is in the furtherance of justice (§ 1385, subd. (a)) presents a situation with potentially significant consequences for your client. *People v. Orin* (1975) 13 Cal.3d 937, at pages 940-948, illustrates an adverse outcome following a trial court's failure to state on the record its reasons for striking an action. Although *Orin* is a People's appeal, and thus any adverse consequence could not have been mitigated by abandoning the appeal, it is nonetheless instructive. The People argued that the trial court's order dismissing two of the defendant's three charged counts under section 1385 following the defendant's plea to the third was not in the furtherance of justice as required by that code section. The California Supreme Court agreed, holding that the order dismissing the two counts was invalid both because the trial court failed to state on the record its reasons

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[11] To the extent pre-2015 judgments are still on appellate review, counsel should be aware that a former version of section 1385 required the reasons for the dismissal to be set forth in an order entered upon the minutes in every case (now the court is only required to set forth the reasons in a minute order if requested by a party or if the proceedings are not being recorded). The amendment changing this requirement was effective January 1, 2015. (Stats. 2014 ch. 137 § 1 (SB 1222).) As a result, you may find older cases where the appellate court remanded the case to the trial court because the reasons for striking the sentencing component were not stated in the minutes. (See *People v. Bonnetta* (2009) 46 Cal.4th 143.) This is unlikely to happen after the 2015 amendment unless the trial court failed to state the reasons in a minute order where a party requested the reasons be stated in the minute order or the proceedings were not recorded.

for dismissal and because, based on the record, the dismissals were not in the furtherance of justice. The dismissal of the two counts was reversed and the matter remanded.

Counsel should check the record to make sure that the correct version of section 1385 is complied with.

b. Is there a statement of reasons for amending/dismissing charges in the accusatory pleading?

In a felony case, when charges in the accusatory pleading are amended or dismissed, section 1192.6 provides that the record must contain a statement of reasons as follows:

- ~ When the charges contained in the original accusatory pleading are amended or dismissed, the record shall contain a statement explaining the reason for the amendment or dismissal. (§ 1192.6, subd. (a).)
- ~ When the prosecuting attorney seeks a dismissal of a charge in the complaint, indictment, or information, they shall state the specific reasons for the dismissal in open court, on the record. (§ 1192.6, subd. (b).)
- ~ In a guilty/no contest plea case, when the prosecuting attorney recommends what punishment the court should impose or how it should exercise any of the powers legally available to it, the prosecuting attorney shall state the specific reasons for the recommendation in open court, on the record. The reasons for the recommendation shall be transcribed and made part of the court file. (§ 1192.6, subd. (c).)

If charges in the accusatory pleading were amended or dismissed and the record does not contain the required statement of reasons in the record, this poses a potential adverse consequence.

2. Plea Agreements [Withdrawal of Guilty Plea/Restrictions on Plea Bargaining][12]

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[12] 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

a. 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 situations, the defendant may receive a longer sentence in the renewed trial court proceedings. (*People v. Collins* (1978) 21 Cal.3d 208, 215 [motion to withdraw plea]; *People v. Hill* (1974) 12 Cal.3d 731, 769, overruled on another ground in *People v. De Vaughn* (1977) 18 Cal.3d 889, 896 [successful appellate challenge to a motion to suppress created potential for re-instatement of two serious driving charges that were dismissed as part of the plea].)

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."[13] (*In re Sutherland* (1972) 6 Cal.3d 666, 672.)

b. The *Stamps* Decision; Impact on Plea Agreements at Resentencing [see also Assembly Bill No. 2483, discussed *post*].

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 No. 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)

(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.

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

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.)

Since the *Stamps* decision, appellate courts are split on whether a defendant who received an upper term in a plea agreement that included a stipulated sentence, is entitled to a remand under Senate Bill 567. The issue is pending before our Supreme Court. (Compare *People v. Todd* (2023) 88 Cal.App.5th 373, 381–382, review granted Apr. 26, 2023, S279154 [defendant entitled to remand]; *People v. Fox* (2023) 90 Cal.App.5th 826, 831 [same]; *People v. Mitchell* (2022) 83 Cal.App.5th 1051, 1057–1059, review granted Dec. 14, 2022, S2773143 [defendant not entitled to remand]; *People v. Sallee* (2023) 88 Cal.App.5th 330, 333–334, review granted Apr. 26, 2023, S278690 [same].) Two other decisions – one from the Sixth District Court of Appeal, and one from the California Supreme Court (*Prudholme*) provide further insights into how *Stamps* may (or may not) operate.

***People v. Prudholme* (2023) 14 Cal.5th 961:** In this case, the defendant's appeal was pending when the Legislature enacted Assembly Bill No. 1950, which shortened the probationary terms for certain offenses, one of which applied to the defendant. (*Id.*, at p. 970.) The defendant argued on appeal that AB 1950 retroactively applied to him. (*Id.*, at p. 964.) The Court of Appeal agreed AB 1950 was retroactive but held that the remedy of *Stamps* applied. (*Ibid.*) On review, our Supreme Court held that the Legislature intended for the trial court to be able to unilaterally modify a stipulated term and thus application of the *Stamps* rule would be contrary to the legislative intent. (*Id.*, at p. 971.) Accordingly, the Supreme Court modified the defendant's judgment to reduce the length of probation from three years to two. (*Id.*, at p. 980.)

***People v. De La Rosa Burgara* (2023) 97 Cal.App.5th 1054**, review granted February 21, 2024, S283452 [held behind *Mitchell*]. The *De La Rosa* court agreed with *Todd*, *supra*, 88 Cal.App.5th at pp. 381–382 and *Fox*, *supra,* 90 Cal.App.5th at p. 831. *De La Rosa* involved a sentence imposed following a stipulated plea agreement and involved an upper term on one count before SB 567.

Relevant holding: *De La Rosa* was entitled to resentencing under SB 567, but the trial court must follow *Stamps* to determine the appropriate remedy. The *De La Rosa* court provided a helpful outline of the possible procedure:

1) The defendant could waive the requirements of section 1170, subdivision (b) (re proof of aggravators), and thus the trial court must reinstate the original sentence (including the upper term)
2) If the defendant invokes the requirements of section 1170, subdivision (b), they must state, under section 1170, subdivision (b)(2), whether they either stipulate to an aggravating circumstance that justifies the imposition of the upper term or desire a jury trial or court trial on any aggravating circumstances alleged by the district attorney.
3) If the defendant requests a jury trial or court trial, the trial court should hold such a trial, at which the district attorney will bear the burden of proving the truth of any alleged aggravating circumstance beyond a reasonable doubt. (§ 1170, subd. (b)(2).) If the district attorney fails to prove the truth of any aggravating circumstance that justifies the imposition of the upper term, the trial court shall find that the sentence may not exceed the middle term.
4) If the defendant stipulates to an aggravating circumstance justifying the upper term or the district attorney proves the existence of such an aggravating circumstance to a jury or the court, the trial court shall find that the upper term may be imposed
5) The defendant may assert in the trial court the applicability of section 1170, subdivision (b)(6) such that the trial court must find whether any purportedly applicable factor listed in that subparagraph (§ 1170, subd. (b)(6)(A)–(C)) "was a contributing factor in the commission of the offense" and, if so, whether "the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice."
6) If, after compliance with the procedures invoked by the defendant, the trial court determines that the upper term can be imposed, the court shall reinstate the original sentence.
    a. But if the trial court determines that either the lower term or the middle term is the proper sentence under section 1170, subdivision (b), the court must ask the district attorney whether he assents to the reduced sentence. If the district attorney agrees to the reduced sentence, the court must decide whether it approves the plea agreement with that reduction. If the

court approves the plea agreement with the reduced sentence, the court shall resentence the defendant accordingly.

b. But if the district attorney does not agree to the reduced sentence on count 3, or if the trial court does not approve the plea agreement with the reduced sentence, the court shall vacate the plea agreement in toto and place the parties back into the position they occupied before they entered into the plea agreement.

Note: The *De La Rosa* court did not reach the issue of whether a longer sentence can be imposed on remand.

The key take-away for appellate counsel here is three-fold: (1) absent Legislative authority or California Supreme Court precedent to the contrary (see e.g., *Prudholme*, *supra*, 14 Cal.5th 961), the *Stamps* decision may be an aspect of the remedy for any resentencing of a previously stipulated sentence where an ameliorative change in the law applies; (2) it is vital to determine the consequences for the client should the plea ultimately be withdrawn, and explain the potential outcome to them so that they can make an informed decision on whether to continue with the appeal; and (3) for briefing: to the extent you can analogize the ameliorative law in your case to the legislative intent of laws like AB 1950, you may be able to argue your client away from application of *Stamps*.

It should be noted that in *De La Rosa,* the defendant was originally charged with very serious offenses, which were dismissed as part of the plea. The potential risk for the *De La Rosa* defendant, therefore, was withdrawal of the plea agreement and reinstatement of the original charges that carried a life sentence.

In sum, the risk in this situation is if the Court of Appeal permits a remand for resentencing under SB 1393, SB 567, or others, it still remains "the defendant's choice whether" to "seek relief under," but in order to help make the decision, it is appellate counsel's duty to properly inform the client of the potential consequences.

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 III-E-18-d, below)Assembly Bill No. 2483 (AB 2483)

On September 29, 2024, the California governor signed AB 2483, which is effective as of January 1, 2025. AB 2483 prohibits requiring the plea be withdrawn when a defendant is resentenced under sections 1170.18, 1172.1, 1172.6, 1172.7, or 1172.75.

(New Pen. Code, § 1171, subds. (a) & (c)(3).) It remains to be seen how *Stamps* will impact the resentencing procedures in plea cases going forward. Arguably, even if *Stamps* is held to apply, the defendant need not necessarily abandon the appeal. If on remand there is any indication that the plea would be withdrawn, the defendant can at that point decide not to be resentenced.

c. 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.

i. For defendants who entered into a plea bargain, was there a prohibition on plea bargaining?

Not all defendants are entitled to plea bargaining. Section 1192.7, subdivisions (a)(2) and (a)(3), prohibit plea bargaining where an indictment or information charges:

- a serious felony
- any felony in which it is alleged the defendant personally used of a firearm
- driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance
- a violent sex crime, as listed in section 667.61, subdivision (c), that could be prosecuted under sections 269, 288.7, subdivisions (b) through (i) of section 667, section 667.61, or section 667.71

The exceptions, also provided by section 1192.7, subdivisions (a)(2) and (a)(3), are where "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." For violent sex crimes, the district attorney must state on the record why a sentence under one of the enumerated sections was not sought when the agreement is presented to the court. If your client was convicted following a plea bargain and one or more of the convictions was for any of the offenses triggering the prohibition on plea bargaining, and none of the exceptions apply, then your client faces a potential adverse consequence.

Note: Section 1192.7, subdivision (a)(2), "prohibition against plea bargaining appears to apply only to the postindictment or postinformation stage . . . ." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 259.) In other words, should your otherwise ineligible client have

entered into a plea bargain based on the complaint, they do not appear to be barred from entering into a plea agreement.

NOTE: the only published authority challenging a plea agreement on the grounds it violated section 1192.7's prohibition on plea bargaining, have been People's appeals. (See e.g., *People v. Superior Court (Ludwig)* (1985) 174 Cal.App.3d 473, 475-476 [trial court violated prohibition]; but see *People v. Arauz* (1992) 5 Cal. App. 4th 663, 665 [trial court did not violate section 1192.7's prohibition].) While this in itself is not an adverse consequence, it is something appellate counsel should consider in this context.

d. Other adverse consequences in attacking pleas.[14]

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 they 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.

3. Probation

a. Did the trial court erroneously grant probation because the defendant was not eligible 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.[15]

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.

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[14] See J. Grossman, *Recent Developments in Sentencing Law*, (May 2024), <https://sdap.org/wp-content/uploads/downloads/research/criminal/JG24.pdf>

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

(*People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1991.) Certain enhancements may also preclude probation, but typically must also be pled and proved.

b. 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].)

The trial court's discretion to grant probation as an alternative to imposing a prison sentence (§§ 1202.7, 1202.8, 1203; Cal. Rules of Court, rule 4.414) is thus not absolute. A defendant who has been convicted of certain kinds of offenses is not eligible for probation, regardless of mitigating factors. These offenses include:

- Any current felony conviction if the person has a prior conviction for one of the violent felonies listed under section 667.5, subdivision (c), or serious felonies listed under section 1192.7, subdivision (c) (§ 667, subds. (c)(2), (d))
- Any current conviction of one of the violent felonies listed under 667.5, subdivision (c), or serious felonies listed under 1192.7, subdivision (c), if the person was on felony probation at the time the current offense was committed (§ 1203, subd. (k))
- A conviction of certain enumerated offenses committed while personally using a firearm (§§ 12022.53, subds. (a), (g), 1203.06, subd. (a)(1))
- A conviction for the commission or attempted commission of certain enumerated offenses in which the defendant personally inflicts great bodily injury (§ 1203.075, subd. (a))
- A conviction of certain enumerated sex offenses (§§ 667.61, subd. (h), 1203.065, subd. (a), 1203.066, subd. (a))
- A conviction of certain violations related to destructive devices, explosives, and similar weapons (§ 18780)

In addition to convictions that preclude a grant of probation, certain other offenses come with the presumption of ineligibility "except in unusual cases where the interests of justice would best be served . . . ." (§ 1203, subd. (e).) Should probation be granted in such a case, the trial court must specify on the record and enter on the minutes its reasons for doing so. (§ 1203, subd. (f).) Examples of some of the more commonly-occurring scenarios that presume ineligibility for probation include:

- ~ Being armed with a deadly weapon either at the time of committing certain enumerated offenses or at the time of arrest (§ 1203, subd. (e)(1))
- ~ Using or attempting to use a deadly weapon in connection with the convicted offense (§ 1203, subd. (e)(2))
- ~ Willfully inflicting great bodily injury or torture in connection with the convicted offense (1203, subd. (e)(3))
- ~ Inflicting great bodily injury or death by discharging a firearm from or at a vehicle while committing a felony (§ 1203, subd. (e)(10))
- ~ A conviction of certain other enumerated sex offenses (§ 1203.066, subd. (d)).
- ~ A conviction of certain enumerated drug offenses where there is a prior conviction of certain enumerated drug offenses (Health & Saf. Code, § 11370, subd. (a).)

The lists above are not exclusive. In any appeal from a grant of probation, always check the particulars of your client's case—including the offense(s) of which your client was convicted, any prior convictions your client may have suffered, and any enhancements that were imposed—to determine whether your client in fact qualified for probation.

c. Did the trial court fail to impose a mandatory probation condition?

In addition, you should check the statute under which probation was granted in order to determine that the terms and conditions of probation were correctly ordered. A trial court's failure to impose a mandatory probation condition at sentencing creates a legally unauthorized sentence that can be corrected when the error is discovered. (*People v. Cates* (2009) 170 Cal.App.4th 545, 552.) If the trial court failed to impose a mandatory probation condition when sentencing the defendant, there may be a potential adverse consequence.

d. Do new facts jeopardize grant of probation upon remand?

It is well-established that "a defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his [or her] right to appeal." (*People v. Ali* (1967) 66 Cal.2d 277, 281.) However, this rule is not absolute, as discussed above. Another exception can occur in the context of a grant of probation. If a defendant received probation following their first trial court proceedings, and then succeeds in gaining a reversal of conviction on appeal, the trial court is within its discretion to sentence the defendant to prison on remand versus reinstating probation if new facts come to the trial court's attention during the second proceedings. (*People v. Thornton* (1971) 14 Cal.App.3d 324, 326-327.) Thus, if your client is appealing from a grant of probation, they

need to be advised that should the appeal be successful, and should new facts come to light on remand, it is possible that they will not be granted probation the second time around.

4. Trial court failed to address each and every offense and/or enhancement/allegation at sentencing

Counsel should review the jury verdicts/findings and the trial court's oral pronouncement of the sentence to see if the trial court addressed all the offenses the defendant was convicted of committing and all the enhancements/allegations that the jury found true. If the court failed to impose, strike, dismiss, or stay the punishment for any of the offenses/enhancements, or failed to consider any special allegations that could impact the sentence, there may be a potential adverse consequence if the error benefited the defendant.

5. Trial court used the wrong sentencing scheme

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.)

a. Determine Sentencing Law

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.)[16]

[16] See also J. Grossman, *Recent Developments in Sentencing Law*, (May 2024) <https://sdap.org/wp-content/uploads/downloads/research/criminal/JG24.pdf>

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.)[17]

b. The Three Strikes law

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

When approaching a sentence, 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].)

c. The One Strike law

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

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[17] 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.)

commits one of the enumerated offenses may be subject to a mandatory sentence of 15 or 20 years to life without parole.

d. 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.

i. 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).

For clients convicted of murder and 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.)

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. Murder [§ 187]

Sentencing for murder is dependent on the circumstances. See section 190 for punishment scheme.

iv. Aggravated mayhem [§ 205]

The sentence for aggravated mayhem is life with the possibility of parole.

v. Torture [§ 206]

The sentence for torture is life with the possibility of parole.

vi. Kidnapping for financial gain or robbery/rape [§ 209]

Sentencing for kidnapping for financial gain or robbery/rape is dependent on the circumstances. (See § 209).

vii. Kidnapping in the course of carjacking [§ 209.5]

The sentence kidnapping in the course of carjacking is life with the possibility of parole.

viii. Child abuse likely to result in great bodily injury [§ 273ab]

A sentence of 25 years to life is mandatory for a violation of section 273ab (assault resulting in death, coma due to brain injury, or paralysis of permanent nature of child under eight years of age).

ix. Aggravated Arson [§ 451.5]

The sentence for aggravated arson is dependent on the circumstances. (See § 451.5.)

6. Trial court miscalculated subordinate terms

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.

a. Witness dissuasion

Section 1170.15 is an alternative sentencing scheme that applies when the defendant is convicted of a felony and an additional felony witness dissuasion offense. Note that section 1170.15 applies only if the trial court first determines it will impose consecutive sentences for the dissuading a witness felony. (*People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1476.) Under specified circumstances, it provides that subordinate terms shall consist of the full middle term of imprisonment for the felony for which a

consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury. The alternative sentencing scheme applies to the following witness dissuasion offenses:

- **Intimidation of witnesses and victims:** A felony violation of section 136.1 (intimidation of witnesses and victims) and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony
- **Influencing testimony or information given to law enforcement official:** A felony violation of section 137 that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony
- **Soliciting commission of certain offenses:** A felony violation of section 653f that was committed to dissuade a witness or potential witness to the first felony

b. Two or more violations of kidnapping (§ 207) involving separate victims.

If your client was convicted of "two or more violations of kidnapping [§ 207] involving separate victims, the subordinate term for each consecutive offense of kidnapping shall consist of the full middle term and shall include the full term imposed for specific enhancements applicable to those subordinate offenses." (§ 1170.1, subd. (b); § 1170.1, subd. (b).) Failure to impose the required full middle term subordinate term presents a potential adverse consequence.

c. Offense(s) involving the intimidation of a witness involving threats of force or violence [§ 1170.13]

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]

d. Full enhancements may be added for enumerated sex offenses. (§ 1170.1, subd. (h).)

7. Trial court miscalculated consecutive terms

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.

a. Failure to impose consecutive terms for escape

The trial court is required to impose consecutive prison terms if your client was convicted for escaping from custody. This includes escape from:

- a mental health facility (§ 1370.5, subd. (a) [consecutive to any other term or commitment]),
- a state prison (§ 4530 [consecutive sentencing required]),
- a county or city jail or alternative custody program when convicted of a misdemeanor and the escape was with force or violence (§ 4532, subd. (a)(2) [consecutive sentencing required]);
- a county or city jail or alternative custody program when convicted of a felony (§ 4532, subd. (b) [consecutive sentencing required even where no force or violence was used], (d)(5).

b. Failure to impose consecutive terms for in-prison offense

The trial court is required to impose consecutive prison terms if your client was convicted of an offense committed while in prison. Failure to do so presents a potential adverse consequence. Such in-prison offenses include:

- assault (§ 4501)
- aggravated battery by gassing (§ 4501.1)
- battery (§ 4501.5)
- possession or manufacture of a weapon (§ 4502) and the
- holding hostages (§ 4503)

c. Failure to impose consecutive sentence when defendant convicted of felony committed on bail or own recognizance (OR) release

A consecutive sentence is required when a defendant is convicted of a felony offense that was committed while the defendant was released from custody on bail or on their own recognizance for a prior felony (the primary offense). If the person is convicted of the primary offense and sentenced to state prison, any sentence for the secondary offense shall be consecutive to the primary sentence and the aggregate term shall be served in the state prison. (§ 12022.1, subd. (e).)

d. Failure to impose consecutive terms for certain enumerated sex offenses where the crimes involve separate victims or involve the same victim on separate occasions

A full, separate, and consecutive term shall be imposed for each violation of an offense specified in section 667.6, subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. (§ 667.6, subd. (d)(1).)

Note that the requirement that certain facts be submitted to a jury and found beyond a reasonable doubt rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Alleyne v. United States* (2013) 570 U.S. 99, does not apply to section 667.6, subdivision (d). (*People v. Catarino* (2023) 14 Cal.5th 748.)

e. Other mandatory consecutive sentences

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.)

8. Trial court 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].)

a. Status enhancements: Determinate Sentencing Law versus 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].)

b. Misapplication 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, the court must impose the five-year enhancement for *each* serious felony prior and not just once. Of course, the court may now exercise its discretion to strike the punishment under section 1385, subd. (b).[18]

The same is not true, however, for sentencing under the Determinate Sentencing Law. 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).)

Tip: Under section 667, subdivision (a), 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 see, *People v. Fletcher* (2023) 92 Cal.App.5th 1374, review granted Sept. 27, 2023, S281282 [Questions presented: (1) Does Assembly Bill No. 333 amend the requirements for a true finding on a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)), or is that determination made on "the date of that prior conviction"? (See Pen. Code, §§ 667, subd. (d)(1) & 1170.12, subd. (b)(1).) (2) Does Assembly Bill No. 333 (Stats. 2021, ch. 699), which modified the criminal street gang statute (Pen. Code, § 186.22), unconstitutionally amend Proposition 21 and Proposition 36, if applied to strike convictions and serious felony convictions?].)

c. Misapplied firearm use enhancements

i. Use of a firearm in the commission of a felony [§ 12022.53][19]

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[18] 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).). This is no longer true thanks to Senate Bill No. 1393.

[19] Note that the California Supreme Court held in *People v. Tirado* (2022) 12 Cal.5th 688 at page 692, that when a section 12022.53 firearm enhancement has been charged and found true, a sentencing court has discretion to strike the enhancement and impose an uncharged lesser included enhancement. And in *People v. McDavid* (2024) 15 Cal.5th 1015 at pages 1022 to 1030,

A ten-year firearm use enhancement to be added as an additional and consecutive term of imprisonment is required for certain enumerated offenses.[20] (§ 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).)

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].)

ii. 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.[21]

iii. Failure to properly impose enhancement for discharging a firearm from a vehicle [§ 12022.55]

An additional 5, 6, or 10-year mandatory consecutive enhancement for discharging of a firearm from a vehicle during the commission or attempted commission of a felony where the defendant intends to inflict great bodily injury or death and in fact inflicts great

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our High Court held that that a trial court has the discretion to impose a lesser, uncharged enhancement under other Penal Code sections, e.g., section 12022.5.

[20] 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 former Section 262 (rape); (9) Section 264.1 (rape or sexual penetration in concert); (10) Section 286 (sodomy); (11) Section 287 or former Section 288a (oral copulation); (12) Section 288 or 288.5 (lewd act on a child); (13) Section 289 (sexual penetration); (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.

[21] Following passage of Senate Bill No. 620, a trial court has discretion under section 1385 to strike or dismiss a section 12022.5 enhancement.

bodily injury or causes the death of a person, other than an occupant of a motor vehicle. Counsel should check the record to see if the trial court failed to properly impose this enhancement, which presents a potential adverse consequence.

iv. 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).)

v. Failure to properly impose enhancement for furnishing a firearm to another [§ 12022.4.]

Section 12022.4 provides for a mandatory consecutive enhancement of one, two, or three years for furnishing a firearm to another related to the commission of a felony. The enactment of this statute was in response to *People v. Miley* (1984) 158 Cal.App.3d 25. (See *People v. Heston* (1991) 1 Cal.App.4th 471, 477-478.) If the trial court failed to properly impose the enhancement for furnishing a firearm to another in your client's case, your client faces a potential adverse consequence.

d. Enhancements for personal infliction of great bodily injury

Section 12022.7 imposes a mandatory consecutive enhancement for personally inflicting great bodily injury on any person other than an accomplice under various scenarios during the commission or attempted commission of a felony:

- Personally inflicting great bodily injury: additional consecutive term of three years. (§ 12022.7, subd. (a).)
- Personally inflicting great bodily injury causing the victim to become comatose due to brain injury or permanently paralyzed: additional consecutive term of five years. (§ 12022.7, subd. (b).)
- Personally inflicting great bodily injury on a person who is 70 years or older: additional consecutive term of five years. (§ 12022.7, subd. (c).)
- Personally inflicting great bodily injury on a child under five years of age: additional consecutive term of four, five, or six years. (§ 12022.7, subd. (d).)
- Personally inflicting great bodily injury under circumstances involving domestic violence: additional consecutive term of three, four, or five years. (§ 12022.7, subd. (e).)

The enhancements provided for in subdivisions (a), (b), (c), and (d) may not be imposed if the infliction of great bodily injury is an element of the offense. (§ 12022.7, subd. (g).) Additionally, the section 12022.7 enhancement does not apply to the following offenses:

- ~ murder (§ 187),
- ~ manslaughter (§ 192),
- ~ arson (§ 451), or
- ~ unlawfully causing a fire (§ 452)

Section 12022.8 provides a five-year enhancement for great bodily injury inflicted during the commission or attempted commission of specified sex offenses. Like all enhancements, there is the potential for an adverse consequence due to the trial court's failure to impose a great bodily injury enhancement.

Section 12022.95 provides a four-year enhancement when a child endangerment conviction (§ 273a) causes great bodily harm or the death of a child.

e. Failure to properly impose enhancement for committing additional offense while released on bail or on own recognizance [§ 12022.1]

Section 12022.1 requires that the trial court impose a two-year consecutive term enhancement if the defendant committed an additional offense while released on bail or on own recognizance prior to judgment. Thus, the trial court does not have discretion to stay the enhancement or run it concurrently. The failure to properly impose the enhancement presents a potential adverse consequence. (*People v. Garrett* (1991) 231 Cal.App.3d 1524 [trial court erroneously stayed the two-year section 12022.1 enhancement]; see also *People v. Baries* (1989) 209 Cal.App.3d 313 [section 12022.1 requires consecutive sentencing, not concurrent sentencing]). The failure to properly impose the enhancement presents a potential adverse consequence.

f. 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. (§ 1170.1, subd, (d)(1).) Note that since passage of Senate Bill No. 567, the trial court may only impose a sentence exceeding the middle term when aggravating

factors have been stipulated to or found true beyond a reasonable doubt by a jury or judge in a court trial. (§ 1170.1, subd. (d)(2).)

Be alert: In some cases, the court may impose a single weapons use enhancement and a separate great bodily injury enhancement. (§ 1170.1, subds. (f) & (g).)

9. Trial court mishandled priors[22]

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 used 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.

a. Prison priors [§ 667.5][23]

A defendant who had previously served a prison term that was charged and either admitted or found true in the current case, may be 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

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[22] See footnote 6., *infra*.

[23] Section 667.5, subdivision (b), was amended effective January 1, 2020, following passage of Senate Bill 136, to preclude the one-year enhancement for non-sexually violent prior prison term offenses. Section 1172.75, provides the statutory mechanism for vacating these invalid priors.

followed by a period of 5 years in which the defendant was out of custody and suffered no felony convictions).

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.)

10. Trial court erred under Penal Code section 654 (stay sentencing components)

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." (*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."].)

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].) Note that following passage of Assembly Bill No. 518, section 654 was amended such that the trial court was no longer required to impose the "longest potential term of imprisonment" on any stayed counts.

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].)

Tip: If the trial court stays a sentencing component under section 654, check the sentence to see if the trial court made an error in your client's favor. If the trial court erroneously stayed a sentence, your client faces a potential adverse consequence. The impact of the error depends on how your client should have been sentenced. If your client should have been sentenced concurrently, then the impact of the error is more conceptual than practical. This is because with a concurrent sentence "the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously." (*People*

v. Jones (2012) 54 Cal.4th 350, 353, quoting *People v. Miller* (1977) 18 Cal.3d 873, 887.) By contrast, a stay becomes permanent following the completion of the unstayed term(s). (See *People v Beamon* (1973) 8 Cal.3d 625, 640.) Should one of the unstayed terms be vacated, the imposed and then stayed term is available for imposition. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1469.) An erroneously stayed term may have benefited your client with a shorter-than-required total prison term, which is a potential adverse consequence of note.

Note: there are exceptions to section 654:

- Section 654 does not require a stay if the defendant commits a violent act (or an indivisible course of violent conduct) against multiple victims. (*People v. McFarland* (1989) 47 Cal.3d 798, 803; *People v. Martin* (2005) 133 Cal.App.4th 776, 781-783; *People v. Calles* (2012) 209 Cal.App.4th 1200, 1215-1216.)
- Section 654 does not require a stay if the defendant commits multiple sex acts. (See *People v. Perez* (1979) 23 Cal.3d 545; *People v. Harrison* (1989) 48 Cal.3d 321, 334-338.)
- A sentence imposed under section 667.6, subdivision (c), which permits the imposition of consecutive full-term sentences when a defendant has been convicted of certain enumerated sex offenses, does not fall under section 654. Instead, section 667.6, subdivision (c), creates an exception that allows consecutive full-term sentences be imposed without staying them even for separate acts, including non-sex offenses, committed during an indivisible or single transaction. (*People v. Hicks* (1993) 6 Cal.4th 784, 787.)

Also, section 654 may not apply to enhancements. In a case with multiple enhancements, the specific sentencing statutes should first be examined. If these statutes provide the answer for how to sentence the enhancements, section 654 will not apply. Only if the specific statutes do not provide the answer should the court turn to section 654. (*People v. Ahmed* (2011) 53 Cal.4th 156.)

For a more detailed discussion of section 654, see California Criminal Law Procedure and Practice, Felony Sentencing §§ 37.44-37.50.

Because section 654 error results in an unauthorized sentence, the prosecution's failure to object does not forfeit the issue on appeal. (*Scott*, *supra*, 9 Cal.4th at p. 354 n. 17; *People v. Phung* (2018) 25 Cal.App.5th 741, 761 n. 10.)

11. Trial court failed to calculate any indeterminate sentence and determinate sentence separately

If your client was convicted of both determinate term crimes and indeterminate term crimes, the trial court must calculate the terms for each independent of the other, due to the determinate and indeterminate sentencing schemes being separate and unique schemes. (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) "Only after each [sentence under each scheme] is determined are they added together to form the aggregate term of imprisonment." (*Ibid.*) Thus, if the trial court designated your client's indeterminate term the principle term and any determinate term as the subordinate term at one-third the middle term for the determinate term offense, your client faces a potential adverse consequence. (*Ibid.*) The designation of principal and subordinate terms for consecutively imposed sentences (§ 1170.1, subd. (a)) "applies only when all terms of imprisonment are 'determinate' . . . ." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856.)

12. Trial court error related to fines, fees, and 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.

The list of adverse consequences related to the imposition of any of the required fines, mandatory penalty assessments, and restitution assessments is long due to the numerous financial burdens that may be imposed on a defendant. An adverse consequence occurs if the trial court imposes a lower financial burden on your client than statutorily required. This can occur if the trial court (1) fails to pronounce the required financial burden, (2) pronounces the required financial burden but fails to record it on the abstract of judgment, or (3) erroneously pronounces and records a lesser financial burden than required.

a. Failure to impose a mandatory fee or fine[24]

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

[24] This section contains a very brief summary of the typical problems in this area, but for more detailed analysis, see Appendix B [Resources], herein.

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.)

A resource to aid you in your analysis of whether your client faces an adverse consequence related to fines, mandatory penalty assessments, and restitution is CCAP's Fines Chart Page found at: https://capcentral.org/criminal/crim_fines/. This page includes the following charts:

- ~ Fines That Apply In (Nearly) All Criminal Cases
- ~ Fines Imposed When Diversion Granted or When Sentence Includes Probation or Parole Term
- ~ Fines/Fees for Drug Offenses
- ~ Fines/Fees for Sex Offenses
- ~ Fines/Fees for Offenses Involving Minors (Excluding Direct Sexual Acts)
- ~ Fines/Fees for Vehicle Offenses

While not a substitute for checking the actual code section(s), these charts are a helpful tool to get you started.

b. Examples of common errors with fine and penalty assessments

i. 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.)

ii. 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; see *People v. Taylor* (2004) 118 Cal.App.4th 454, 456 [fee is mandatory]).

iii. 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.)

One specific example relates to the lab fee for drug convictions noted above (Health & Saf. Code, § 11372.5). Despite a prior split among the appellate courts, the California Supreme Court has held that the drug lab fee is punishment and thus subject to penalty assessments. (See *People v. Ruiz* (2018) 4 Cal.5th 1100, 1122 [disapproving *People v. Watts* (2016) 2 Cal.App.5th 223, and *People v. Vega* (2005) 130 Cal.App.4th 183, to the extent they held otherwise

iv. Failure to impose mandatory fee after a Penal Code section 654 stay

Whenever a defendant is convicted of multiple offenses and the trial court stays the punishment for at least one under section 654, counsel must check to make sure that any mandatory fees are applied even to the stayed count. (See e.g., *People* v. *Crittle* (2008) 154 Cal.App.4th 368, 370-371 [the punishment for one of the defendant's convictions was stayed under section 654, but it was error for the trial court to impose fees on only the remaining count; since the fees were not punishment, the punishment stay was irrelevant to the fee calculation].)

v. 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.[25]

c. Did the trial court fail to impose victim restitution where victim suffered economic loss?

There is one financial burden that can be imposed on a defendant that is sufficiently distinguished from the rest to warrant specific discussion—victim restitution as required by section 1202.4, subdivision (f). This code section requires that "in every case in which a

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[25] While not necessarily an adverse consequence, note that this issue can be forfeited by the People. (See *Tillman*, *supra*, 22 Cal.4th at p. 303; see also *Burnett* , *supra*, 116 Cal.App.4th at p. 261.)

victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) If your client's case involved a victim incurring economic loss, but no provision for victim restitution was made at your client's sentencing due to the trial court reserving the issue, and should your client prevail on appeal and the matter be remanded for resentencing, there is a possible adverse consequence of the victim restitution being revisited on remand. (See *People v. Harvest* (2000) 84 Cal.App.4th 641.)

13. Trial court miscalculated custody credits[26]

As part of your record review, always check the number of presentence actual and conduct custody credits your client was awarded. Should your client have been awarded too many, the resulting adverse consequence could be a longer sentence, even if your client is released from incarceration before the appeal is final. (*People v. Clancey* (2013) 56 Cal.4th 562, 586-587 [concluding that returning the defendant to prison to serve additional time resulting from an excessive award of presentence custody credits would not be so unjust as to preclude reincarceration].) The following are various ways in which an adverse consequence can occur related to presentence custody credit.

a. Calculating actual presentence custody credits

To calculate the correct number of actual presentence custody credits your client earned, add up the time your client spent in presentence custody based on the in/out dates noted in the probation report or other parts of the record. If this information is not included in the record, check with trial counsel for any information they may have.

Under section 2900.5, a defendant sentenced either to county jail or to state prison is entitled to credit against that term for any days spent in custody prior to sentencing, as well as any days served as a condition of probation. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1053.) Because section 2900.5 refers to "days" rather than hours, "it is presumed the

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[26] For more information on credits, check out the latest version of the California Prison and Parole Law Handbook available online: <https://prisonlaw.com/resources/prison-handbook/>; see also SDAP Staff Attorney Bill Robinson's pre-Proposition 57 article on credits, their calculation, and how to handle errors: *Credits Revisited 2021: An Update* (May 2021), <https://sdap.org/wp-content/uploads/downloads/research/criminal/wmr21.pdf>

Legislature intended to treat any partial day as a whole day." (*People v. King* (1992) 3 Cal.App.4th 882, 886.) Thus, count the in- and out-day each as a full day.

CCAP has a "Day & Date Calculator" on its website for calculating total days based on in/out dates: https://capcentral.org/resources/charts_calcs/datecalc/

Once you have calculated your client's total presentence actual custody days, compare it with what was recorded on the abstract of judgment. If they actually earned fewer than awarded, your client faces a possible adverse consequence.

Here are some common adverse consequences related to presentence custody credit:

b. Actual presentence custody credit awarded when it was not available

Section 2900.5, subdivision (a), provides that a defendant will earn custody credit for any actual time they spend in presentence confinement. Such confinement includes "any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution . . . ." (§ 2900.5, subd. (a).) If your client spent part or all of their presentence custody in a facility other than one of those listed in section 2900.5, subdivision (a), i.e., in a facility for which presentence custody credit is not earned, but the trial court nonetheless awarded such credit, your client faces a potential adverse consequence.

A mentally disordered offender, a mentally disordered sex offender, and a defendant found not guilty by reason of insanity do not receive actual presentence custody credit for time in an unlocked outpatient facility. (§ 1600.5.)

A defendant does not receive actual presentence custody credit for time spent as an outpatient in a drug rehabilitation program. (*People v. Schnaible* (1985) 165 Cal.App.3d 275, 277.)

c. Conduct credit errors

In addition to credit for actual time spent in presentence custody, your client may also be entitled to conduct credit for that time. Unfortunately, calculating presentence conduct credit can be a challenging task due to the many and frequent changes to the governing code sections. At its simplest, calculating conduct credit involves determining which code section applies (§§ 4019, 2933.1, or 2933.2), applying the associated conduct credit formula, and adding the calculated conduct credits to your client's actual presentence custody credits.

For a detailed discussion of the amendments to the statutes governing the calculation of presentence custody credit, see "Awarding Custody Credits after Realignment" by J. Richard Couzens (Judge of the Superior Court, County of Placer (Ret.)) and Tricia A. Bigelow (Presiding Justice, District Court of Appeal, 2nd Appellate, Div. 8), located at: www.courts.ca.gov/partners/documents/Credits_Memo.pdf. https://www.courts.ca.gov/partners/documents/CalculatingCustodyCredits.pdf

Also see CCAP's website for two helpful charts summarizing the various enactments and the associated formulas: https://capcentral.org/criminal/custody_credits/credits_calc/.

For post-sentence credits, consider reviewing the Prison Law Office handbook, which has a wealth of helpful information and tools (not just credit-related). https://prisonlaw.com/resources/prison-handbook/

Below is a list of the several ways that error related to presentence conduct credit can occur.

i. Incorrect section 4019 enactment applied

Section 4019 is one of several code sections governing presentence conduct credit. It was amended three times over an 18-month period. This resulted in four different versions of section 4019 to contend with: the version in effect prior to January 25, 2010; the revision effective January 25, 2010; the revision effective September 28, 2010; and the revision effective October 1, 2011. As the years pass, the need to work with more than one enactment for any given case will affect fewer and fewer cases. However, it may still come up. Thus, be sure to check the date the offense of conviction was committed and the dates of confinement to determine the correct enactment to use. Each involves different formulas, exclusions, etc.

ii. Confinement did not qualify for conduct credit under section 4019

If the defendant was awarded presentence conduct credit, counsel should review section 4019 to verify the defendant was entitled to conduct credit based on the location of their confinement or treatment. This statute has been amended in recent years to expand the types of locations that qualify for section 4019 credit. For example, effective January 1, 2022, section 4019, subdivision (a)(8) was added to allow credit for individuals in state hospitals and related treatment centers during section 1368 proceedings. (See Stats 2021 ch. 599 § 3 [Senate Bill No. 317].) If the trial court awarded presentence conduct credit and the defendant did not qualify for the credit, this poses a potential adverse consequence.

iii. Failure to apply the section 2933.1 limitation

Another presentence custody credit error to look for is where your client was convicted of a violent felony (offenses listed in § 667.5, subd. (c)). Such a conviction limits presentence conduct credit to 15 percent of the actual presentence credit your client earned. (§ 2933.1, subds. (a), (c).) If the trial court did not impose the section 2933.1 limitation and instead credited your client with section 4019 conduct credit, your client received more conduct credit than they were entitled to and face a potential adverse consequence.

iv. Failure to apply the section 2933.2 limitation

Similar to section 2933.1, section 2933.2 affects the grant of presentence conduct credit that may be earned. In the case of section 2933.2, if your client has been convicted of murder (§ 187), they are not entitled to any presentence conduct credit. (§ 2933.2, subds. (a), (c).) Should the trial court have awarded any conduct credit, your client faces a potential adverse consequence.

v. Failure to apply the section 12022.53 limitation

Section 12022.53, subdivision (i), also limits presentence conduct credit to 15 percent if a section 12022.53 enhancement is imposed.

d. Duplicate presentence custody credit erroneously awarded

An adverse consequence related to presentence custody credit can occur when your client's appeal involves multiple cases.

Under section 2900.5, "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (§ 2900.5, subd. (b).)

When evaluating a multiple-case fact pattern, it is helpful to keep in mind the general purpose of section 2900.5. That purpose is to eliminate the inequities that exist between defendants charged with a crime who cannot afford to post bail and thus must spend time in presentence custody, and those who can afford bail and therefore do not spend time in presentence custody. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Equity is accomplished by awarding presentence custody credit to the former group of defendants. (*Ibid.*) Because the purpose of section 2900.5 is not to bestow a windfall of duplicative credits on a defendant in a multiple case (consecutively sentenced, or previously sentenced)

scenario, the question to ask is whether your client would have been free from custody if the case upon which they were sentenced went away. (*Id.*, at pp. 1180, 1191-1192.) If the answer is no, then your client is likely not entitled to the credit in question and faces a potential adverse consequence. (*In re Joyner* (1989) 48 Cal.3d 487.)

Alert: *People v. Cofer* (2024) 103 Cal.App.5th 333, review granted Oct. 2, 2024, S286927

Counsel handling a credits issue concerning sentencing involving concurrent terms on multiple cases jointly resolved, should take a look at the *Cofer* case because a related issue is currently on review after the People's petition for review was granted. The question presented: When a defendant is sentenced to concurrent terms on multiple cases jointly resolved at a single hearing, does Penal Code section 2900.5, subdivision (b) entitle the defendant to duplicative presentence custody credits for time spent in custody on one or more of the cases, but not others?

14. Was the sentence the trial court orally pronounced properly recorded in the abstract of judgment? Are there any typos in the abstract of judgment?

It is always advisable to carefully compare the trial court's oral pronouncement at sentencing with any abstract of judgment or probation order. Counsel should also carefully check the minute orders and abstract of judgment for possible typographical errors.

15. Errors in sentencing under the Three Strikes law

a. 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.)

b. 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.

c. Three Strikes law mandatory consecutive sentences

~ 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].)

~ 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).)

~ 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.)

~ 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 [court retains concurrent sentence discretion for "same occasion" sentences].) (§ 667, subd. (c)(7) or § 1170.12, subd. (a)(7); see also *People v. Deloza* (1998) 18 Cal.4th 585, 591.) Note that in 2022, the California Supreme Court held in *Henderson* that *Hendrix* discretion for concurrent "same occasion" sentences survived Three Strikes Reform. (*People v. Henderson* (2022) 14 Cal.5th 34, 41-56.)

~ **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).)

Note: How to calculate 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:

~ (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.)

d. Strike priors: sentencing with one strike prior

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, arson, crimes involving explosive devices, or attempts to commit any of those offenses.

When a defendant has a prior strike pled and proved, 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].)

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.)

16. Errors in sentencing in gang-related cases [§ 186.22]

a. Failure to impose mandatory indeterminate life sentence with a minimum term for certain gang-related offenses

Both subdivisions (b)(4) and (b)(5) of section 186.22 require that an indeterminate life sentence with a minimum term be imposed under certain scenarios, as detailed by these two subdivisions. The trial court's failure to do so presents a potential adverse consequence.

b. Failure to impose mandatory gang-related enhancement

Except as provided in section 186.22, subdivisions (b)(4) and (b)(5), when a jury finds a gang enhancement under section 186.22, subdivision (b) true, in addition and consecutive to the punishment prescribed for the underlying felony or attempted felony, the defendant must be punished as follows:

- If the underlying crime is a serious felony (as defined in section 1192.7, subdivision (c)), the additional term is five years. (§ 186.22, subd. (b)(1)(B).)
- If the underlying felony is a violent felony (as defined in section 667.5, subdivision (c)), the additional term is 10 years. (§ 186.22, subd. (b)(1)(C).)
- For other felonies, the additional term is two, three, or four years. (§ 186.22, subd. (b)(1)(A).) "The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing." (§ 186.22, subd. (b)(3).)

The trial court's failure to properly impose this enhancement presents a potential adverse consequence.

c. Failure to impose mandatory minimum jail term in gang-related case

Section 186.22, subdivision (c), provides that, "[i]f the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof." Failure to impose this minimum county jail sentence presents a potential adverse consequence in an appeal.

d. Failure to state on the record why a case was unusual such that the interests of justice would be served by striking additional gang-related punishment

Section 186.22, subdivision (h) (formerly subdivision (g)), gives the trial court discretion to strike additional punishment for the enhancements provided in section 186.22 "or refuse to impose the minimum jail sentence for misdemeanors in an unusual

case where the interests of justice would best be served." The trial court may do so "if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 186.22, subd. (h).) A trial court's failure to state its reasons on the record and in the minutes may be a potential adverse consequence. (See *People v. Torres* (2008) 163 Cal.App.4th 1420, 1433 fn. 7 [trial court erred in not ordering the reasons for dismissal to be set forth in the minutes]; *People v. Bonnetta* (2009) 46 Cal.4th 143 [construing former version of § 1385 (which contained similar language to § 186.22, subd. (h)) and concluding that an order of dismissal is ineffective in the absence of a written statement of reasons entered upon the minutes].)

Note: A trial court has the discretion under section 1385, subdivision (a) to dismiss a sentencing enhancement allegation for a gang-related offense, and the court is not limited to its authority under section 186.22, subdivision (h). (*People v. Fuentes* (2016) 1 Cal.5th 218.)

17. Errors in sentencing in sex offense cases

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

a. Mandatory sentencing provisions

An enumerated sex offense is a conviction for any crime listed in section 667.6, subdivision (e).[27] Generally, for multiple sex offense convictions, the court may impose a **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).)

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[27] Section 667.6, subdivision (e), provides the following list of enumerated sex offenses: (1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261; (2) Rape, in violation of paragraph (1), (4), or (5) of subdivision (a) of former Section 262; (3) Rape or sexual penetration, in concert, in violation of Section 264.1; (4) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286; (5) Lewd or lascivious act, in violation of subdivision (b) of Section 288; (6) Continuous sexual abuse of a child, in violation of Section 288.5; (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 287 or of former Section 288a; (8) Sexual penetration, in violation of subdivision (a) or (g) of Section 289; (9) As a present offense under subdivision (c) or (d), assault with intent to commit a specified sexual offense, in violation of Section 220; (10) As a prior conviction under subdivision (a) or (b) [of section 667.6], an offense committed in another jurisdiction.

i. 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.[28]

- ~ 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 years to life sentence on all counts, which would be error and an adverse consequence. (See *People v. Zaldana* (2019) 43 Cal.App.5th 527, overruled in part by *In re Vaquera* (2024) 15 Cal.5th 706, 724, fn. 10.)
- ~ But note that the issue is one of notice. In *In re Vaquera* (2024) 15 Cal.5th 706 at pages 719-720, the California Supreme Court held that to "satisfy due process, an accusatory pleading must inform the defendant that the prosecution is relying on specific facts to support imposition of a particular One Strike sentence." *Vaquera* further held that while adequate notice does not necessarily require reference to the specific section 667.61 provision, such notice can be conveyed so long as enough facts exist in the charging document to alert the defendant that the 25 years to life provision applies. (*Id.*, at pp. 720, 724.)

ii. 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).)

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[28] Specified sex offenses under this section (§ 667.61, subd. (c)): (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261; (2) Rape, in violation of paragraph (1) or (4) of subdivision (a) of former Section 262; (3) Rape or sexual penetration, in concert, in violation of Section 264.1; (4) Lewd or lascivious act, in violation of subdivision (b) of Section 288; (5) Sexual penetration, in violation of subdivision (a) of Section 289; (6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286; (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 287 or former Section 288a; (8) Lewd or lascivious act, in violation of subdivision (a) of Section 288; (9) Continuous sexual abuse of a child, in violation of Section 288.5.

iii. Repeat child molesters/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]. This enhancement applies for a prior conviction of an enumerated sex offense [§§ 261, 264.1, 269, 285, 286, 287, 288, 288.5, or 289, former Section 262 or 288a, or any offense committed in another jurisdiction that includes all of the elements of any of the offenses specified in this subdivision]. Also under section 667.51, subdivision (c), 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**.

iv. 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).)

v. Mandatory consecutive sentences

With enumerated sex offenses involving separate victims or the same victim on *separate* occasions, the conviction must be run consecutively. (§§ 667.6, subd. (d), 667.61, subd. (i) [one-strike case]; Cal. Rules of Court, rule 4.426.) Note that this provision does not apply if the offense occurred before 2006. (See *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.)

vi. Prior conviction enhancements for violent sex crimes [§ 667.6]

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); see § 667.5, subd. (c) [list of relevant enumerated sex offenses].)

Where a defendant has **two** prior violent sex offense convictions, the mandatory enhancement is **ten-years**. (§ 667.6, subd. (b); see § 667.5, subd. (c) [list of relevant enumerated sex offenses].)

vii. Failure to impose full and separate term for enhancements attached to certain sex offenses [§ 1170.1, subd. (h)]

Section 1170.1, subdivision (h), provides that "[f]or any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term." Section 667.6, subdivision (e), lists a number of sex offenses. (See fn. 28, *infra*.) In other words, 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, and that each enhancement must be **fully consecutive** to its base term and any other enhancement.

viii. Other enhancement issues in sex offense cases

(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,[29] 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

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[29] §§ 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].

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 they have AIDS or HIV [§ 12022.85]

A mandatory three-year enhancement for committing enumerated sex offenses with knowledge that the defendant has AIDS or HIV.

b. Failure to impose mandatory sex offender registration

Registration under the Sex Offender Registration Act (§ 290) is mandatory for defendants convicted of the enumerated offenses under section 290, subdivision (c), listed below. There is currently a three-tier system to determine the length the minimum registration period depending on the offense of conviction. (See § 290, subd. (d) [describing tier one (10 year minimum), tier two (20 year minimum), and tier three (lifetime registration requirement)].)

The potential adverse consequences concerning § 290 registration are as follows:

(1) The trial court fails to order registration at all, or fails to order registration under the correct tier (e.g., orders tier one registration when the client should be considered a tier two or tier three offender);

(2) The abstract of judgment omits or misstates the registration requirement.

When the client is convicted of any of the following offenses, appellate counsel should double-check the existence and accuracy of any required section 290 registration requirement:

- **Murder (§ 187)** when committed in the perpetration, or an attempt to perpetrate, rape, or any act punishable under Section 286, 287, 288, or 289 or former Section 288a;
- **Kidnapping (§§ 207, 209)** committed with intent to violate Section 261, 286, 287, 288, or 289 or former Section 288a
- **Section 220**, except assault to commit mayhem, subdivision (b) or (c) of Section 236.1, Section 243.4, Section 261, paragraph (1) of subdivision (a) of former Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 287, 288, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, or former Section 288a, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10,

311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the offenses described in this subdivision; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the offenses described in this subdivision.

c. Other implications following a successful appeal involving sex offenses: the risk of more convictions

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.[30]

18. Other Considerations

a. 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, they must be carefully advised as to the potential adverse consequences of taking a petition for review.

b. To request or not request an early remittitur from respondent

So you win a remand on appeal and the client wants to get back to the trial court without waiting the proscribed amount of time for the remittitur – do you ask respondent for an early remittitur? Before going ahead and contacting respondent, it is important for appellate counsel to assess the risk whether asking for an early remittitur *increases* the likelihood that the respondent would petition for review. Why does this matter? Respondent may not otherwise have been considering a petition for review or was on course to miss the due date (it happens), but by contacting them before the review petition's due date, you alert respondent to consider the case in the context of a review petition. This may or may not be helpful to the client.

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[30] For more on double jeopardy issues, see Part III.B, *supra.*

In addition, use your appellate skills to assess the likelihood of the People filing a review petition. If this was a published decision favorable to the defendant that has state-wide relevance (e.g., credits error, interpretation of new legislation), the likelihood increases.

c. Considerations for section 1172.6 cases

Parole attorneys state the defendant's pursuit of a section 1172.6 petition has come up in parole hearings.

There is concern in some cases that evidence offered in a section 1172.6 proceeding, such as the defendant's testimony, may be treated by the board as indicating the defendant is unsuitable for parole – posing a danger to public safety because they do not have insight as to his behavior and does not take full responsibility.

In some cases, the defendant may seek to dismiss the petition or abandon the appeal to avoid this potential adverse consequence. An example of a case in which this would be considered is when the defendant was the direct perpetrator, and the petition had little promise.

In order to fully inform the defendant's decision, the attorney handling the section 117.26 case should determine the status of any parole hearing and locate and, if possible, contact the parole attorney.

d. 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).[31]

e. 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.)

f. Not guilty by reason of insanity; both guilty 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

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[31] 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].) In California in 2022, the percentage of schedule parole suitability hearings that resulted in the granting of parole was just 14%. (See <https://www.prisonpolicy.org/blog/2023/12/19/california-parole/>)

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.

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.

PART IV: Juvenile/Youth Justice Adverse Consequences[32]

A. The juvenile court erroneously granted probation

Welfare and Institutions Code section 725, subdivision (a), provides that the juvenile court "may, without adjudging the minor a ward of the court, place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months." However, there are exceptions to such a grant of probation. Under Welfare and Institutions Code section 654.3, subdivision (a), a minor shall not be eligible for the program of supervision set forth in sections 654 or 654.2 in the following cases, except where the interests of justice would best be served and the court specifies on the record the reasons for its decision:

- A petition alleges that the minor has violated Penal Code sections 245.5, 626.9, or 626.10.

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[32] See fn. 10, *ante*.

- ~ A petition alleges that the minor has violated Penal Code section 186.22 of the Penal Code.
- ~ The minor has previously participated in a program of supervision pursuant to section 654.
- ~ The minor has previously been adjudged a ward of the court pursuant to section 602.
- ~ A petition alleges that the minor has violated an offense in which the restitution owed to the victim exceeds $5,000.

Additionally, a minor shall not be eligible for probation in the case of a petition alleging that the minor has violated an offense listed in Welfare and Institutions Code section 707, subdivision (b), except in unusual cases where the court determines the interests of justice would be best served and the court specified on the record the reason for its decision. (Welf. & Inst. Code, § 654.3, subd. (a).)

If your client was placed on probation in a case outlined above and the court did not specify on the record the reasons for its decision, your client faces a potential adverse consequence and should be advised accordingly.

B. The juvenile court failed to impose probation conditions

Welfare and Institutions Code section 725, subdivision (a) also requires the juvenile court to impose probation conditions:

> The minor's probation shall include the conditions required in Section 729.2 [concerning education programs] except in any case in which the court makes a finding and states on the record its reasons that any of those conditions would be inappropriate. If the offense involved the unlawful possession, use, or furnishing of a controlled substance, as defined in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, a violation of subdivision (f) of Section 647 of the Penal Code, or a violation of Section 25662 of the Business and Professions Code, the minor's probation shall include the conditions required by Section 729.10 [concerning alcohol and drug education programs]. The juvenile court's failure to impose required probation conditions under section 729.10 and/or failure to impose required probation conditions under section 729.2 without findings as to why the conditions required in section 729.2 are inappropriate, presents a potential adverse consequence.

C. Failure to properly calculate maximum confinement time and conduct credit

Whenever a minor is removed from parental custody, Welfare and Institutions Code section 726, subdivision (d), requires the juvenile court to calculate the minor's maximum confinement time to ensure that the minor "not be held in physical confinement for a period in excess of the middle term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." "Maximum term of imprisonment" means the middle of the three time periods set forth in section 1170, subdivision (a)(3), but without the need to follow the provisions of section 1170, subdivision (b), or to consider time for good behavior or participation pursuant to sections 2930, 2931, and 2932 of the Penal Code, plus enhancements which must be proven if pled. (Welf. & Inst. Code, § 726, subd. (d)(2).) Also, although the minor is awarded custody credit for actual days served pending disposition, conduct credit is not awarded for time at a juvenile detention facility. (*In re Ricky H.* (1981) 30 Cal.3d 176, 186-190.) Failure by the court to order the full maximum confinement time is a potential adverse consequence of the minor's appeal. So the court's calculation of maximum confinement time should be checked against the provisions of section 726.

D. Sex offender registration

"Section 290.008 sets forth the sex offender registration requirements for juvenile offenders. [Citations.] Effective January 1, 2021, this statute in relevant part provides: 'Any person who, on or after January 1, 1986, is *discharged or paroled from the Department of Corrections and Rehabilitation* to the custody of which [he or she was] committed after having been adjudicated a ward of the juvenile court pursuant to [s]ection 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in subdivision (c) shall register in accordance with the Act unless the duty to register is terminated pursuant to [s]ection 290.5 or as otherwise provided by law.'" (*In re T.O.* (2022) 84 Cal.App.5th 252, 263, quoting Pen. Code, § 290.008, subds. (a).) Subdivision (c) provides the enumerated sex offenses for which registration is mandatory.

Effective January 1, 2021, there is a two-tiered system of registration. Tier one offenders—minors required to register as a result of offenses listed in section 290.008, subdivision (c), but not listed in section 667.5, subdivision (c) (violent offenses) or section 1192.7, subdivision (c) (serious offenses)—are eligible to have a court relieve them of the registration requirement 5 years following a period free from custody. (Pen. Code, § 290.008, subds. (d)(1), (d)(3)).) Tier two offenders—minors required to register as a result

of offenses listed in section 290.008, subdivision (c), that is a serious or violent felony—are eligible to have a court relieve them of the registration requirement 10 years following a period free from custody. (Pen. Code, § 290.008, subds. (d)(2), (d)(3).)

Thus, the registration requirement is effectively a minimum of 5 years or 10 years, depending on the offense. It is still true that the requirement applies to DJJ commitments where the most recent offense was registrable. (See *In re Alex N.* (2005) 132 Cal.App.4th 18, 22, 24-25; *In re G.C.* (2007) 135 Cal.App.4th 405, 409-411.) However, since DJJ has closed, there will be fewer commitments where sexual offender registration is required. (See Welf. & Inst., Code, § 736.5, subds. (b) [beginning July 1, 2021, a ward shall not be committed to DJJ except in limited circumstances specified in subdivision (c)], (e) [DJJ shall close on June 30, 2023].) The registration requirement does not apply to juveniles committed to secure youth treatment facilities (SYTF). (*In re T.O., supra*, 84 Cal.App.5th 252, 265; see *In re I.B.* (2024) 104 Cal.App.5th 702, 708.)

Note that sex offender registration is still possible for juveniles even with the closure of DJJ. A juvenile offender may still be subject to registration if the juvenile's case is transferred to adult court under Welfare and Institutions Code section 707, subdivision (b). (*In re T.O.*, supra, 84 Cal.App.5th at p. 266.) Also, an honorable discharge from DJJ does not relieve a person of the duty to register. (Welf. & Inst. Code, § 1179, subd. (a).)

E. Failure to impose mandatory driver's license suspension

There is a Vehicle Code section that provides that the juvenile court shall suspend a minor's driver's license under specific circumstances. Vehicle Code section 13202.5 applies to minors 13 to 20 years of age whose offense involved controlled substances or alcohol. (Veh. Code, § 13202.5, subds. (a) & (d).) It provides that "the court shall suspend the person's driving privilege for one year. If the person convicted does not yet have the privilege to drive, the court shall order the [Department of Motor Vehicles] to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive." (Veh. Code, § 13202.5, subd. (a).)

Should your client have been found in violation of an offense involving a controlled substance or alcohol, and the juvenile court did not order your client's current or future driving privileges suspended, your client faces a potential adverse consequence.

F. Failure to impose mandatory restitution

For minors adjudged a ward of the court (Welf. & Inst. Code, § 602), the juvenile court is required to impose both a restitution fine and victim restitution, if applicable. (Welf. & Inst. Code § 730.6, subds. (a)-(b).) The juvenile court must impose the restitution fine regardless of the minor's inability to pay. (Welf. & Inst. Code, § 730.6, subd. (c); *In re M.B.* (2020) 44 Cal.App.5th 281; but see *People v. Dueñas* (2019) 30 Cal.App.5th 1157). The juvenile court may, however, waive the imposition of the restitution fine should it find that there are extraordinary and compelling reasons to do so and it states those reasons on the record. (Welf. & Inst. Code, § 730.6, subd. (g)(1); see also *People v. Tillman* (2000) 22 Cal.4th 300 [trial court failed to state on the record the compelling and extraordinary reasons for not imposing Penal Code section 1202.4 restitution fine, but the People forfeited the issue].) The court shall waive imposition of the restitution fine if the minor also comes within the description of a dependent child. (*Id.*, subd. (g)(2).)

PART V: Dependency Law Adverse Consequences

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

Here is a non-exhaustive list of circumstances to keep an eye out for and, if located, advise one's client about in advance of any opening brief.

1. Client-favorable orders that provided for something that was unauthorized under the facts of the case;
2. A situation where your client is appealing an order granting services to the other parent, where no services were ordered for your client and your client has no chance of gaining custody. It is possible that if your client is successful on appeal, the unintended consequence could be the termination of parental rights of both parents and the placement of the child(ren) with someone outside of the family.
3. A situation when the juvenile court orders services or a type of service that is not authorized for the particular person. This might apply when the appellant is not a parent, such as an alleged father, de facto parent, or relative.
4. A situation where the juvenile court ordered more reunification services than is permitted by law.
5. The long timeline for some appeals may unnecessarily prolong the Department's oversight of the family. An example from a First District case in which the child was placed with the maternal grandmother following a termination hearing. The appeal dragged on due to an issue under the ICWA, but in the meantime, the County kept its eyes on the grandmother and ultimately removed the child from her care (for the weakest of reasons) and placed with strangers. So the pursuit of a an issue under the ICWA with all of the attendant appellate delays had a very awful unintended result for the family. While keeping in mind that appellate counsel has a duty to raise all non-frivolous issues, in a circumstance like this one from the First District, it would be important to fully explain the potential consequence of extended government oversight versus the potential reward of success on appeal.

Dependency Takeaway: for dependency-related adverse consequences, the main take-ways is the same as for criminal: identify the potential problem, assess the risk, and communicate the same to your client for them to make the decision on whether or not to proceed with the appeal.

CONCLUSION

In closing, know that the goal in producing this overview was to centralize a store of these adverse consequences. We do not pretend to be experts, 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 e.g., 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."

APPENDIX A:

SAMPLE CLIENT ABANDONMENT LETTER & ABANDONMENT FORM

October 1, 2024

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 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, 2024.

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,

Appellate Counsel

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
Law Offices of Someone
1 Market Street, Suite 123
San Jose, CA 95113
Telephone (555) 123-4567

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

Note: Some of the material referenced below has been superseded by more recent developments in the law. We highly recommend not relying solely on the information provided here, but instead always read a cited case to be sure it is accurate, and you should always check to be sure the case law and statutory authority remains valid.

1. Appellate Defenders, Inc., Legal Resources webpage, including the *Appellate Practice Manual* (currently in its 4th edition, rev. 2024), https://www.adi-sandiego.com/legal-resources/
2. CEB, Cal. Law Procedure and Practice
3. Central California Appellate Project (CCAP), https://capcentral.org/
4. CCAP Criminal Fines Chart Webpage, https://capcentral.org/criminal/crim_fines/
5. Judge Couzens' Memos: J. Richard Couzens, Judge of the Superior Court County of Placer (Ret.), has shared the following memoranda that is posted on the CCAP website: https://capcentral.org/judge-couzens-memos/
   - ~ Accomplice Liability for Murder Penal Code §§ 188, 189, and 1172.6 (SB 1437 and SB 775) (May 2024)
   - ~ AB 1950: Length of Felony and Misdemeanor Probation (May 2024)
   - ~ Assembly Bill 2542: "California Racial Justice Act of 2020" (April 2024)
   - ~ Community Assistance, Recovery, and Empowerment (Care) Act (May 2023)
   - ~ Determining Custody Status Under In Re Humphrey and Penal Code, § 1203.25 (July 2024)
   - ~ Felony Sentencing After Realignment (April 2023), authored with Tricia A. Bigelow, Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)
   - ~ Mental Health Diversion Under Penal Code Sections 1001.35 and 1001.36 (May 2024)
   - ~ Proposition 47: "The Safe Neighborhoods and Schools Act" (May 2024), authored with Tricia A. Bigelow, Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)
   - ~ Proposition 57: "The Public Safety and Rehabilitation Act of 2016" (May 2024), authored with Tricia A. Bigelow, Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)
   - ~ Proposition 64: "Adult Use of Marijuana Act" Resentencing Procedures and Other Selected Provisions (May 2024), authored with Tricia A. Bigelow, Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)
   - ~ Recall of Sentence Penal Code, § 1172.1 (August 2024)
   - ~ Selected Changes to California Sentencing Laws Effective 2022 (May 2024)

- ~ Striking Firearms Enhancements Under Penal Code Sections 12022.5 and 12022.53 (April 2023), authored with Tricia A. Bigelow, Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)
- ~ The Amendment of the Three Strikes Sentencing Law (April 2023), authored with Tricia A. Bigelow, Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)Couzens & Bigelow (2016) *Cal. Three Strikes Sentencing* (rev. 05/16)
- ~ Hon. J. Richard Couzens (Ret.), Hon. Tricia A. Bigelow (Ret.), and Hon. Gregg L. Prickett, Sentencing California Crimes (updated annually)
- ~ Hon. J. Richard Couzens (Ret.) and Hon. Tricia A. Bigelow (Ret.), California Three Strikes Sentencing (updated annually)

6. Materials from FDAP/SDAP Appellate Workshop (2013), https://sdap.org/research/r-workshop/
7. Sixth District Appellate Program (SDAP), https://sdap.org/
   a. J. Grossman & P. McKenna, *Ethics in the Modern Age: The New Rules of Professional Responsibility,* (May 2019), https://sdap.org/wp-content/uploads/downloads/research/criminal/pjm-jg19.pdf
   b. J. Grossman, *Recent Developments in Sentencing Law,* (May, 2024), https://sdap.org/wp-content/uploads/downloads/research/criminal/JG24.pdf
   c. Lori A. Quick, *Fees, Fines, and Penalty Assessments*, https://www.sdap.org/wp-content/uploads/downloads/research/criminal/fines.pdf
   d. Lori A. Quick, *Ethical Issues in Appellate Advocacy* (May 2021), https://sdap.org/wp-content/uploads/downloads/research/criminal/laq21.pdf
   e. P. J. McKenna, *Appeals from Orders After Judgment*, (May 2016), https://sdap.org/wp-content/uploads/downloads/research/criminal/pjm16.pdf
   f. William M. Robinson, *Credits Revisted 2021: An Update*, (May 2021), https://sdap.org/wp-content/uploads/downloads/research/criminal/wmr21.pdf
   g. D. Sacher, *Perfecting a Sentencing Appeal*, (May, 2008), https://www.sdap.org/wp-content/uploads/downloads/research/criminal/sentence08.pdf
   h. SDAP's overview of Penalty Assessments, https://sdap.org/penalty-assessments/