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PREFACE

In her Foreword to the Second Edition of California Criminal Law Procedure and Practice, Associate Justice Joyce L. Kennard of the California Supreme Court wrote about the rapid pace of change in the area of criminal law and procedure. Her observations remain as true today as when she wrote them. For this reason, CEB decided in 2005 that we could better serve our readers by making California Criminal Law Procedure and Practice an annual publication.

We have retained the book's convenient, one-volume, soft-cover format and its practical orientation. As always, California Criminal Law Procedure and Practice is intended as a guide for practicing California criminal trial lawyers and judges.

More than 60 California lawyers and judges served as update authors this year. Among them are representatives from both the prosecution and defense bars. Many of our authors have been associated with the book since its inception. CEB thanks them for devoting so much time to researching and writing their chapters.

Special book features to help serve the busy criminal lawyer were continued from previous editions. Most chapters include a chart, usually in the second section, listing important timelines intended to help lawyers find deadlines quickly, without having to skim through many pages of text. The index includes commonly used shorthand phrases to help lawyers find material quickly.

Other special features were designed particularly for beginning lawyers. Chapter 1, for example, provides guidance on criminal law practice management, and includes a list of resources. Chapter 10 contains a client interview form, followed by a section designed to help the beginning criminal lawyer spot the issues involved in a particular case. The issue-spotting information is keyed to sections of the book that discuss those issues.

California Criminal Law Procedure and Practice is published in both print and electronic formats. Purchasers of the electronic version receive a CD and online access. The online version of the book includes a search engine and links to California cases and statutes cited in the text.

Forms are included in a separate 8½ by 11 inch looseleaf book called the California Criminal Law Forms Manual (2d ed Cal CEB 2005), which is also available on CD and online. A Forms CD is available for purchasers of the print version of the Forms Manual. Contents and numbering of chapters in the Forms Manual are based on chapters in this book, which contain cross-references to the Forms Manual.

The first edition of this book replaced California Misdemeanor Procedure Benchbook (Revised) (Cal CEB 1975), and volumes one and two of California Criminal Law Practice (Cal CEB 1964, 1969). Some of the material from those books was incorporated into this book. CEB wishes to acknowledge the authors from those books: Harold J. Ackerman, Arthur L. Alarcon, John F. Aiso, Raymond J. Arata, Lawrence R. Booth, Charles W. Brown, Stanley E. Cohen, Rupert Crittenden, Bernard L. Diamond, M.D., Richard W. Erskine, Richard F. Finis, Leo R. Friedman, Albert C. Garber, Stanley P. Golde, Alvin H. Goldstein, Jr., Fred M. Henderson, Edward A. Hinz, Jr., Charles Hollopeter, James C. Hooley, William E. James, John D. Kavanaugh, William C. Lerche, Jr., John S. McInerny, Edwin Meese, Herman W. Mintz, James P. Nunnelley, Herbert L. Packer, Everette M. Porter, William L. Ritzi, James F. Thacher, and Thomas C. Yager. Authors of the supplement to volume two were: Dennis Fischer, Bradley Brunon, Edward Rucker, John J. Cleary, Rowan K. Klein, Brian Taugher, Gregory W. Baugher, and William W. Larsen. Ann Fagan Ginger, who was a CEB staff attorney at the time, planned and edited I and II California Criminal Law Practice.

The original edition of California Misdemeanor Procedure Benchbook was written under the direction and supervision of the California College of Trial Judges. The original Misdemeanor Procedure Benchbook advisory committee was composed of Claude M. Owens (chair), Hector P. Baida, Dan B. Eymann, and Manuel L. Kugler. The revised edition was written by Justice Kathryn Mickle Werdegar, who was a CEB staff attorney at that time.

The members of CEB's criminal law subcommittee and a special planning committee who helped plan the second edition were Malvina E. J. Abbott, William M. Baldwin, Jeff Brown, Nancy Chiu, Annie Gutierrez, Barbara Johnson, Kay Kohler, Jeffrey B. Kupers, Jerrold Ladar, Joyce Ladar, Cynthia Lee, Hon. William McKinstry, John T. Philipsborn, Robert Podesta, Peter Quon, Jr., John W. Noonan, Elaine M. Profant-Turner, Richard Schwartzberg, Robert L. Sills, and Stewart Spivak. The members of CEB's criminal law subcommittee and a special planning committee who helped plan

the first edition were Malvina E. J. Abbott, Anita Susan Brenner, Harry Clifford, Dennis A. Fischer, Annie M. Gutierrez, Stephen Kaus, Russell I. Lynn, Gerald Z. Marer, Hon. William McKinstry, Lincoln Mintz, Fred Morrison, Hon. Lillian Lim, Peter Quon, Jr., Hon. Arjuna Saraydarian, and Alex Selvin. CEB is also very grateful to the State Bar Criminal Law Executive Committee for its help. Members of the Executive Committee who were consultants on chapters in the second edition were Randy I. Danto and Marguerite D. Whichard. Members of the Executive Committee who were consultants on chapters for the first edition were Donna Clontz, David R. Disco, John W. Noonan, Mark E. Overland, and Lael R. Rubin.

Anne Harris, former CEB Research Attorney, who planned, coordinated, edited, and nurtured this publication from its inception to its fourth edition, deserves a special note of thanks. A generation of California attorneys have benefited from her expertise and dedication.

2010 Annual. CEB Attorney Editors Nancy Yuenger (managing editor) and Amy Righter and Legal Editors Sarah Pate, Karen Nutter, and Dorothy Robins contributed to this title. Administrative support was provided by Kenya Denman and Nila Kanzaria. Paul McBrearty handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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FOREWORD TO THE SECOND EDITION

The lives of lawyers and judges would be easier (though perhaps duller) if the law never changed, if the knowledge gained in law school sufficed to guide the practice of law through a career. Alas, we know it is not so. In recent years, few areas of the law have remained static, but the area of criminal law and procedure may be unmatched in the scope and sheer number of its legislative alterations. Although definitions of most major crimes remain largely as they were 20 years ago, defenses to criminal charges, sanctions for criminal behavior, and procedures for trying and sentencing those accused of crime have undergone profound changes.

To what should we attribute this ferment in the field of criminal law? The answer may be found in Samuel Johnson's observation that "Laws are formed by the manners and exigencies of particular times." Because public concern—indeed outrage—over violent crime is one of the most powerful exigencies of our own time, it is small wonder that a vast quantity of laws has been formed in response. Two of the most significant of these laws were enacted by the voters as initiative measures.

In 1982, voters enacted Proposition 8, a state constitutional amendment. Among other significant provisions, Proposition 8 limited plea bargaining, required heavier sentences for repeat offenders, and abrogated the rule excluding evidence seized in violation of the state (but not the federal) Constitution.

In 1990, the voters again sought comprehensive reform by enacting Proposition 115. Most significantly, Proposition 115 permits the prosecution to establish probable cause for a felony charge by means of the hearsay testimony of a qualified police officer, eliminates preliminary hearings for felonies charged by indictment, and institutes reciprocal discovery procedures.

The voters have not been alone in the vast enterprise of remodeling the structure of the California Penal Code and related criminal laws. Each year, the legislature makes its own substantial contributions, as do the published decisions of state and federal appellate courts. Indeed, as this preface is being written, the legislature has enacted as an urgency measure a "three strikes" law to mandate and increase prison sentences for repeat felony offenders, and Congress is considering similar legislation at the federal level. When all these forces for change are considered together, can anyone question the need for a new edition of a work like this one?

To help busy lawyers and judges keep up with the powerful flow of new law since the publication of the first edition eight years ago, the editors of this work have added chapters covering client interviews, asset forfeiture, and parole, and they have overseen the substantial revision of many other chapters. Written by experienced criminal law practitioners, this volume contains a wealth of practical suggestions and checklists that will be of use not only to novices but also to seasoned attorneys and judges.

An adversary system of criminal justice such as ours works efficiently and justly only when defense counsel, the prosecutor, and the trial court have mastered the relevant law and procedure. This handbook can help lawyers and judges to achieve that mastery.

Joyce L. Kennard
Associate Justice
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ACKNOWLEDGMENTS

The following attorneys and judges served as authors and consultants on prior editions. Their valuable contributions have made the book comprehensive, practical, and reflective of actual practice. To each of them we express our appreciation and gratitude.

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Jeffrey G. Adachi
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Alan S. Yockelson
Richard W. Young
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NEW DEVELOPMENTS IN 2010

Warrants. A warrant that identifies the suspect by his or her unique DNA profile describes the suspect with sufficient particularity to commence prosecution when there is no more particular, accurate, or reliable means of identification available to law enforcement. *People v Robinson* (2010) 47 C4th 1104, ___ CR3d ___. See §4.8.

Sixth Amendment claims. Doctrines ensuring the voluntariness of a Fifth Amendment waiver of the right to counsel (*Miranda-Edwards-Minnick*) simultaneously ensure the voluntariness of a Sixth Amendment waiver of the right to counsel. *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 969, 129 S Ct 2079 (overruling *Michigan v Jackson* (1986) 475 US 625, 89 L Ed 2d 631, 106 S Ct 1404, as superfluous and costly to truth-seeking process). See §45.15.

Speedy trial. The consequence for noncompliance with the 90-day deadline of Pen C §1381 with respect to a probation revocation proceeding when imposition of sentence was originally suspended is dismissal of the pending probation revocation proceeding, *not* dismissal of the underlying conviction. *People v Wagner* (2009) 45 C4th 1039, 1055, 90 CR3d 26. See §19.33.

Suppression and dismissal. The court's dismissal of a case pursuant to Pen C §1385 at the prosecutor's request following an order granting the suppression of evidence is nonappealable invited error. *People v Gallagher* (2009) 171 CA4th Supp 1, 90 CR3d 695. See §43.4. If the trial court's reasons for dismissing a case in the interests of justice are not set out in an order entered in the minutes, the dismissal is ineffective and the case must be remanded. On remand, the trial court may correct the defect by setting forth its reasons in a written order entered on the minutes. Alternatively, the trial court may determine the dismissal was unwarranted or should be ordered for another reason. *People v Bonnetta* (2009) 46 C4th 143, 153, 92 CR3d 370. See §25.8.

Discovery and competence. The court may order, on timely request by the prosecution, the examination of a defendant who places in issue his or her mental state at any phase of a criminal proceeding. Pen C §1054.3(b). See §§11.9, 48.36.

Sentencing hearing. A defendant has no right to court-appointed experts for sentencing. *People v Stuckey* (2009) 175 CA4th 898, 96 CR3d 477. See §35.18.

Sentencing and enhancements. The definition of serious felony in Pen C §1192.7(c)(28) does not include a misdemeanor that was punished as a felony under the alternate penalty provision of Pen C §186.22(d). *People v Ulloa* (2009) 175 CA4th 405, 408, 95 CR3d 905. See §24.29. Although a Pen C §12022.53 firearm enhancement can be imposed on *all* of the principals when a §186.22(b) enhancement has been pleaded and proved and *any* principal meets specified criteria (§12022.53(e)(1)), Pen C §12022.53(e)(2) bars imposition of the 15-year parole limitation under §186.22(b)(5) on anyone but the principal who personally used or discharged the firearm. *People v Gonzalez* (2010) 180 CA4th 1420, 1425, 103 CR3d 878. See §37.13.

Conduct credits. Instead of receiving 1 day of credit for every 2 days of custody, qualifying jail inmates will now receive 1 day of credit for each day of actual custody served. Pen C §4019. Inmates who are not in jail but who otherwise qualify for conduct credits, such as those assigned to work release, are also entitled to the new one-for-one credits under §4019. See §37.59.

Federal habeas corpus. A state procedural rule is not automatically "inadequate" because it is discretionary; if it is "firmly established" and "regularly followed," it can serve as an adequate ground to bar federal habeas review. *Beard v Kindler* (2009) ___ US ___, 175 L Ed 2d 417, 130 S Ct 612. See §45.24. Rule 11 of the Habeas Rules requires the district court to grant or deny a certificate of appealability (COA) at the same time that it issues a final order adverse to the petitioner. If the district court grants a COA, the petitioner must still file a timely notice of appeal to pursue an appeal. If the district court denies a COA, the petitioner can still seek a COA from the court of appeals. Habeas Rules 11; Fed R App P 22(b)(1). See §45.39.

Juveniles. Juvenile adjudications may be used as strikes (*People v Nguyen* (2009) 46 C4th 1007, 95 CR3d 615) and as a circumstance in aggravation to impose an upper-term sentence in adult court (*People v Quiles* (2009) 177 CA4th 612, 619, 99 CR3d 378). See §56.28.

Noncitizen defendants. Rehabilitative relief will not eliminate the conviction for immigration purposes if the

defendant violated probation before obtaining the rehabilitative relief. *Estrada v Holder* (9th Cir 2009) 560 F3d 1039. See §§52.14, 52.33. The Ninth Circuit will defer to published BIA decisions on whether the particular offense is a crime of moral turpitude so long as the decision is reasonable. See §52.38.

DUI. Competent evidence about partition ratio variability *is* admissible to defend against a generic DUI charge because that charge requires proof that the defendant's ability to drive safely was impaired. *People v McNeal* (2009) 46 C4th 1183, 1188, 96 CR3d 261. See §55.8.

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CUTOFF DATES AND CEB CITATION

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of January 30, 2010, and monitored developments through February 28, 2010.

CEB Citation

Cite this publication as California Criminal Law Procedure and Practice (Cal CEB Annual).

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CRIMINAL LAW PRACTICE MANAGEMENT

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§1.1 I. OVERVIEW

Efficient law office management is an important aspect of a lawyer's practice. Although there are some aspects that are unique to the practice of criminal law, the general principles of law office management usually apply:

- Counsel will save a great deal of time by using standard forms for things such as retainer agreements, interviews, and release of information. See the sample forms in California Criminal Law Forms Manual §§1.28 (client information letter), 1.29 (general authorization for release of information about client), 1.30 (authorization to release medical records), 3.1 (legal fee agreement), 10.1 (client interview) (2d ed Cal CEB 2005); the forms are also on the accompanying CD-ROM.
- Counsel should learn the procedures for attorney visits at the local jails and, if necessary, call ahead before visiting to make sure the client will be available. To save time, "jail kits" should be assembled in advance and ready to take to jail interviews. See §1.9. Following these procedures will ensure that valuable time is not wasted, and counsel will not have to wait for hours at the jail because, for example, counsel has arrived during mealtime.
- Counsel should carry a calendar that lists every court appearance and maintain a duplicate calendar in the office to avoid calendar conflicts. Counsel should also keep a calendar of the dates on which particular motions and other papers are to be filed and personally ensure that they are filed on time.
- Counsel should set up written office procedures for the staff so that new staff members have an office procedure manual to use. The manual should cover opening and closing files, maintaining calendars and tickler files, billing procedures, making appointments, how to take messages, how to compile a jail kit, what information to give to defendants who call from jail, how to set motion dates for the courts in which counsel practices, and what information to give witnesses and defendants when the secretary calls to remind them of a court appearance. Malpractice insurance carriers may have requirements for particular procedures for calendar matters.
- To keep accurate billing records, counsel should maintain a log of the time spent on each case, indicating next to each entry the date, the amount of time spent on the case, and how that time was spent.
- It is very important that counsel have malpractice insurance. One source of relatively inexpensive malpractice insurance that is available to attorneys representing indigent defendants is the National Legal Aid and Defender Association, 1625 K Street NW, 8th Floor, Washington DC 20006; (202) 452-0620; http://www.nlada.org/Insurance/Insurance_Home.

This chapter is by no means exhaustive. Other sources on information management are available from the State Bar Law Office Management Section. Another useful resource is Law Practice Management Magazine, published eight times a year by the American Bar Association Section of Law Practice Management (Chicago, Ill.); http://www.abanet.org/lpm/home.shtml. Help is also available from the State Bar at (415) 538-2520. This number will connect you with the Law Practice Management and Technology Section of the State Bar.

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II. SOURCES OF CLIENTS

§1.2 A. Court-Appointed Cases

Most counties have a list of attorneys who wish to be appointed by the court to represent indigent defendants when the public defender is unable to represent them because of a conflict. In counties that do not have a public defender's office, attorneys may be appointed to represent indigent defendants in all cases. For discussion of conflicts of interest, see §§2.8-2.16.

By agreeing to take court-appointed cases, the attorney is assured both of having clients and of being paid. Not every attorney, however, is eligible for court-appointed cases. Many counties have minimum requirements for being put on the list, such as a certain amount of time in practice, previous experience in criminal cases, and previous attendance at continuing education courses in the field of criminal law. Some counties divide attorneys into different groups, depending on their level of experience in criminal law, and appoint less experienced attorneys to less difficult cases. Attorneys should contact their local bar association to find out about requirements and procedures in their county.

In some counties, the lists of attorneys who wish to be appointed are kept by the individual judges, who appoint from them as they desire. In other counties, the local bar association or a private group selects the attorney.

Ø **Note:** Appointed counsel must be familiar with local practice concerning the requirement that judges are only to appoint counsel in felony cases who represent to the court that they will be "ready" to go to trial or to appear at the preliminary hearing on the date set. Pen C §987.05. See discussion in §§2.29, 8.7, 19.21, 20.32, 58.21.

Attorneys may apply to the appellate projects for the local California courts of appeal and the supreme court to be appointed to represent indigent defendants on appeal. The appellate projects for the various courts of appeal, listed by district, are:

First District
First District Appellate Project (FDAP)
730 Harrison Street, Suite 201
San Francisco, CA 94107
(415) 459-3119
(415) 495-0166 (fax)
http://www.fdap.org

Second District
California Appellate Project (CAP-LA)
520 South Grand Avenue, Fourth Floor
Los Angeles, CA 90071
(213) 243-0300
(213) 243-0303 (fax)
http://www.lacap.com

Third and Fifth Districts
Central California Appellate Program (CCAP)
2407 J Street, Suite 301
Sacramento, CA 95816-4736
(916) 441-3792
(916) 441-0330 (fax)
http://www.capcentral.org

Fourth District

Appellate Defenders, Inc. (ADI)
555 West Beech Street, Suite 300
San Diego, CA 92101
(619) 696-0282
(619) 696-7789 (fax)
http://www.adi-sandiego.com

Sixth District
Sixth District Appellate Program (SDAP)
100 North Winchester Boulevard, Suite 310
Santa Clara, CA 95050
(408) 241-6171
(408) 241-2877 (fax)
http://www.sdap.org

The telephone number for the State Public Defender Appellate Project is (415) 495-0500.

Ø **Note:** The California Appellate Project (CAP) is an independent nonprofit organization that assists counsel in capital cases. CAP can be reached at 1 Ecker Place, Suite 400, San Francisco, CA 94105; (415) 495-0500.

Counsel may apply to represent prisoners at parole revocation hearings, "lifer" hearings, and other hearings at which a state prisoner or parolee has a right to counsel.

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§1.3 B. Court Referrals

Some courts have lists of attorneys who will accept referrals by the court of defendants of limited means who do not qualify for the public defender or appointed counsel but who do not have sufficient funds to pay a large retainer. Attorneys who accept these referrals agree to take a minimum down payment, followed by monthly payments. The attorney sets the fee. Although there is no guaranty that the attorney will be paid in full, such referrals are a good source of clients, especially for a new practitioner.

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§1.4 C. Private Referrals

Satisfied clients are always a good source of referrals. Former clients, whether court-appointed or retained, will send their previous attorney new clients and may retain counsel again if they were satisfied with counsel's representation.

Other lawyers are also a good source of referrals. It is up to the attorney to contact lawyer friends and firms to acquaint them with his or her experience. Civil firms may be a good source of clients, particularly in driving under the influence and white collar crime cases. Many local bar associations also operate a lawyer referral service.

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§1.5 D. Social Service Organizations

Many social service organizations have lists of attorneys to whom they make referrals. Many of these organizations serve a particular ethnic, cultural, or religious group. It is up to the attorney to contact these groups. Some groups expect or require some pro bono work; this often leads to paying clients.

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§1.6 E. United States Military

Many legal officers and military offices keep lists of nonmilitary lawyers to whom they refer cases. Members of the military are not indigent and so do not usually qualify for a court-appointed attorney; private counsel must be employed. It is up to the attorney to contact these individuals and offices.

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§1.7 F. Advertising

Advertisements for clients may be placed in newspapers, in the yellow pages, on the radio, on Internet websites, or on television. However, advertising is the most expensive method of obtaining clients. In addition, ads frequently result in calls from "shoppers" who do not become clients. Although advertising may be a good source of clients for some areas of the law, it is probably the least desirable for building up a criminal law practice.

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§1.8 III. FIRST INTERVIEW

When a person's liberty is at stake, time is usually of the essence. Phone calls from prospective clients should be returned immediately because the client may be in custody. When the client is in custody, the attorney must find out in the first phone call the time and location of the arrest, the arresting agency, the charges (if known), the bail (if any and if known), and the jail in which the client is being held. Several counties now provide access to this information on the local sheriff's website. The attorney must explain the concepts of privileged communications, the right against self-incrimination, and the right to counsel. The client should be warned not to make statements to anyone without the attorney's prior knowledge and approval. The client must understand that he or she should not speak to parole or probation officers, police officers, members of the press, or family members about any pending or possible charges or case-related matters without counsel present.

Counsel should admonish the client not to have any indirect or direct contact with any potential witness against him or her because such communications may be later viewed as attempts to dissuade the witness or as an admission of guilt. *People v Cribas* (1991) 231 CA3d 596, 282 CR 538.

The client should be cautioned that visits or calls to others, *e.g.,* a bondsperson or family member, may be overheard by jail authorities or other inmates. *Kuhlmann v Wilson* (1986) 477 US 436, 91 L Ed 2d 364, 106 S Ct 2616. Spontaneous or unsolicited incriminating statements made to an inmate who is a government informant but who serves as a mere "listening post" have been held not to violate the Sixth Amendment. *Kuhlmann v Wilson, supra*. See also *People v Hovey* (1988) 44 C3d 543, 559, 244 CR 121. Similarly, the high Court has held that an inmate's incriminating statements to an undercover police officer posing as a prisoner are not inadmissible under the Fifth Amendment simply because *Miranda* warnings were not administered. *Illinois v Perkins* (1990) 496 US 292, 296, 110 L Ed 2d 243, 250, 110 S Ct 2394. Asset data may be of as much interest to authorities as evidence of the crime. See discussion of asset forfeiture in chap 57.

> Ø **Note:** Defense counsel should not obtain any other information from the client over the phone. Although Pen C §636 prohibits eavesdropping on a call between an attorney and a client, it is not uncommon for a police officer to place calls for clients and to be nearby during the conversation. Also, Pen C §§629.50-629.98 and 18 USC §§2516-2518 authorize eavesdropping on conversations involving specified offenses if a court order has been obtained. Counsel should be aware that statements taken in violation of a state statute are potentially admissible against the client unless exclusion is based on a violation of the federal Constitution. See Cal Const art I, §28(f)(2).

It is fairly rare to encounter difficulties in getting in to see a jailed client. It is a misdemeanor for any officer having custody of an arrested person to willfully refuse or neglect to allow the arrested person's attorney to visit the prisoner. Pen C §825(b). In addition, the arrestee may recover $500 in damages from the officer. Pen C §825(b); *Beltram v Appellate Dep't* (1977) 66 CA3d 711, 136 CR 211.

Counsel should insist on a private in-person consultation, face-to-face, without wire screens, open doors, or others present or nearby. See *People v Torres* (1990) 218 CA3d 700, 267 CR 213 (open door not necessary because no exigent circumstances indicating threat to institutional security). See also *Barber v Municipal Court* (1979) 24 C3d 742, 751, 157 CR 658 (essential element of right to counsel is opportunity for defendant to consult with counsel in absolute privacy); *In re Poe* (1966) 65 C2d 25, 32 n5, 51 CR 896 (police officers should not be present, even if officers are not listening); *In re Snyder* (1923) 62 CA 697, 699, 217 P 777 (forcing interviews to be conducted across table separated by wire screen was improper; interviews under circumstances affording "absolute privacy of consultation" were ordered).

If counsel is rebuffed, he or she should go to a judge for an order. Although most judicial officers will grant the request pro forma, it is helpful to supplement the case law with examples of why one-on-one visiting is necessary in a particular case (*e.g.,* the need to exhibit documents, have them signed, administer testing that requires observation at close range, examine for physical signs, and eliminate any fear of eavesdropping).

It is conceivable that the interview room will be bugged. If what counsel is going to discuss is highly sensitive,

exchanging the information in written form or whispering it in the ear is the only alternative. In one highly visible and sensitive case, counsel brought a portable radio to the custodial facility, turned it on and held the discussion near the radio in a low voice, hoping to foil electronic eavesdropping.

Regardless of where the initial interview takes place, it is important to establish a good working relationship and rapport with the client. In criminal cases, clients are particularly concerned with "what's going to happen" and how soon they can be released. Therefore, it is very important at the first interview to explain to the client the likely stages of the criminal process and the release opportunities. For further discussion of release possibilities and procedures, see chap 4.

If there is insufficient time for an extended interview, counsel should at least get the basics: the client's true name, address, date and place of birth, work address, telephone numbers, and Social Security number; the name, address, and telephone number of a close relative or friend; and any information needed to try to obtain the defendant's release. If the defendant is in the military, counsel should obtain the client's rate, pay grade, duty station, ship movement, name of commanding or superior officer, duty hours, and a civilian contact. See the sample interview form in §10.1. Sample fee agreement and interview forms are also in California Criminal Law Forms Manual §§3.1 (fee agreement), 10.1 (interview) (2d ed Cal CEB 2005); these forms are also on a CD-ROM that accompanies the book.

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§1.9 IV. THE JAIL KIT

In many instances, the attorney's initial contact with the client is in jail. The attorney should have several "jail kits" with him or her, at home, and in the office so that time is not lost because the attorney either has to take time to find the various things that must be brought to the jail, or must return to the jail to bring documents that were forgotten the first time. Counsel should have the following items in his or her jail kit:

- Business cards;
- Retainer agreements (see discussion in §§3.14-3.18; sample forms in California Criminal Law Forms Manual §§3.1-3.2 (2d ed Cal CEB 2005);
- Bail review information form;
- Interview form (see §10.1);
- Advisement of *Miranda* rights form (see §23.38);
- Client information letter (see sample letter in Crim Law Forms Man §1.28);
- Authorization forms for release of information (see sample form in Crim Law Forms Man §§1.29-1.30);
- Waiver of presence form (see sample form in Crim Law Forms Man §6.1);
- Counsel's jail identification card (if required locally) or State Bar card;
- Change of plea forms (obtain from court);
- Legal pads;
- Camera (preferably a digital camera or instant print);
- Calculator;
- Receipt book;
- Cassette tape recorder;
- Copy of Penal Code that contains selected offenses defined in the Health and Safety and Vehicle codes; and
- List of important telephone numbers.

The attorney should not give anything to the inmate without the prior approval of the jail captain or other person in charge. This includes cigarettes, money, food, and legal papers. It is also prudent to obtain the jail captain's permission before photographing the client.

For discussion of fees, retainer agreements, conflicts of interest, and attorney liability for accepting "tainted" fee money, see §§3.14-3.18 (fees and retainer agreements), 2.8-2.16 (conflicts), and 3.15, 57.33 (tainted fees). For discussion of asset forfeiture, see chap 57. Sample forms are in Crim Law Forms Man §§3.1 (fee agreement), 10.1 (interview); these forms are also on a CD-ROM that accompanies the book.

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Source: Criminal Law/California Criminal Law Procedure and Practice/1 CRIMINAL LAW PRACTICE MANAGEMENT/ §1.10 V. LIST OF FREQUENTLY CALLED PHONE NUMBERS

§1.10 V. LIST OF FREQUENTLY CALLED PHONE NUMBERS

Counsel should have readily available frequently called telephone numbers such as the following:

- The jail:
- Main number
- Watch commander or person in charge
- Number to call ahead for inmate interviews
- Psychiatric unit
- Duty judge
- Bail unit
- Numbers of jails in outlying areas
- The courthouse(s):
- Courtrooms
- Clerk: to trail a matter
- Clerk: to arraign, when permitted by phone
- Clerk: calendar information
- Clerk: court records
- All police departments in the area in which counsel practices, including sheriff's department and marshal's office
- Probation office(s):
- General information number
- Records
- Individual probation officers
- District Attorney's office(s)
- City Attorney's office(s)
- Public Defender's office(s)
- State Attorney General's office
- U.S. Attorney's office
- Law library
- Bail bond agencies
- Military:
- Ship's information
- Military bases in the area
- Shore patrol or military police
- Mental health facilities
- Detox center
- Work furlough center

Counsel should add to this list any other frequently used numbers.

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§1.11 VI. OPENING, CLOSING, AND RETRIEVING FILES

Counsel should have a standard procedure for opening, closing, and retrieving files. The important thing is to keep the procedure consistent so that if there is a change in office staff, the next person to handle the file will be able to do so efficiently. Retrieval is especially important in criminal law because, even after counsel has "closed" a file, he or she may have to open it again because of a probation revocation, modification of sentence, record sealing, or bench warrant service on the client. Counsel may also want to verify previous representation for purposes of conflict in another case.

Counsel may wish to destroy a file after some period of time because of storage space problems and expense. However, it appears that the case file belongs to the client. See Cal Rules of Prof Cond 3-700(D), which defines client papers and property rather broadly. Counsel can deliver the file to the client or obtain the client's consent to destroy the file, but there may be practical difficulties in locating the client. There is no statute or provision of the Rules of Professional Conduct that prescribes how long a closed file should be retained or when it may be destroyed, but it has been suggested that in the absence of an agreement with the client about the retention of files, the attorney must keep potentially significant client papers "until there is no longer any reasonably foreseeable prejudice to the client's rights." San Francisco Bar Ass'n Formal Opinion No. 1996-1. For additional views on counsel's ethical obligations with respect to closed case files, see California State Bar Formal Opinion No. 2001-157; LA County Bar Ass'n Formal Opinion No. 475 (1994). If consent is given for destruction, counsel must be careful to destroy files in a manner that continues to protect the client's confidences. Bus & P C §6068(e). The State Bar Ethics Hotline, (800) 238-4427, can provide practitioners with copies of written discussions of the various problems of client file retention and destruction.

> Ø **Note:** Because of the Three Strikes law, counsel should make it a practice to retain files that contain records from serious and violent felony cases. See Pen C §§667.5(c), 1192.7(c). Such felony convictions can be alleged as "strikes" throughout the client's lifetime. Because court records (particularly reporter's transcripts) are not kept indefinitely, the contents of counsel's files may be the only source of exculpatory or otherwise useful information related to a prior conviction.

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VII. TIME MANAGEMENT

§1.12 A. Court Appointments

Counsel should always carry a calendar with every court appearance listed to avoid calendar conflicts when setting future court dates. See §58.19 on attorney contempt for failure to appear in court, and §19.21 for discussion of the requirement that the court appoint as counsel in felony cases only those attorneys who can represent that they will be ready for the preliminary hearing and trial on the dates set.

Ø **Note:** When filing motions in the clerk's office, counsel should first check to see what department hears motion matters, and the days and times the court hears them, so that counsel can set the motion in the proper department on the right day and at the right time.

The attorney's secretary should be familiar with the courthouses in which the attorney practices so that he or she can direct clients, witnesses, and family members to the appropriate courtroom, if necessary. Some attorneys make it a part of their regular practice to have their secretaries write or call clients before every court appearance to remind them of the date, time, location, and any documents they are to bring.

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§1.13 B. Jail Visiting Hours

Before going to the jail it is wise to call ahead to be sure that the client is still there, and that counsel will be allowed to see him or her on arrival. Some jails have specific visiting hours and procedures; many do not allow attorney interviews during mealtimes and shift changes. For discussion of the first interview, see generally §1.8 and chap 10.

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§1.14 C. Telephone Calls

It is wise to develop some policies and procedures with respect to telephone calls to avoid constant interruptions. For example, counsel can set aside certain hours during the day to take and return calls, and have the secretary take messages during the rest of the day. The attorney might want to instruct the secretary to put through calls from prospective clients at any time.

Attorneys should also have a policy on collect calls. In many areas, jail inmates may make only collect calls. Therefore, counsel will find that his or her jailed clients call collect at all hours of the day and night.

Many custodial facilities have made significant strides in the past few years in giving prisoners more access to telephones. It must be remembered, however, that the prisoner's right to completed telephone calls when booked came through enactment of Pen C §851.5, making it a misdemeanor to willfully deprive a prisoner of the right to telephone calls. The section needed later amendment to counter jail and police evasions of the original statutory right, *e.g.,* requiring the prisoner to have proper change for the pay phone, or counting a busy signal as a call. Officers who violate a defendant's right to make a phone call do not have immunity for that action. *Carlo v City of Chino* (9th Cir 1997) 105 F3d 493.

"Voicemail" is now used in many law offices. The attorney's recorded external greeting should begin by letting the operator know that he or she accepts station-to-station collect calls. The greeting should also request that the caller leave a detailed message to help avoid unnecessary telephone tag.

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D. Calendar Management

§1.15 1. Attorney Availability; Setting Up Calendars

The attorney's secretary must have a current copy of the attorney's calendar so that he or she can find the attorney at any time. Many attorneys use paging devices and cellular phones to increase accessibility. Unlike other types of practice, it is not uncommon for a criminal lawyer to be called to court with very little notice. If a client is arrested on a bench warrant or a new case, the court may call in the morning requesting that counsel appear in court with the client that afternoon. The secretary may also use the calendar to set up appointments over the phone, calendar written motions for the attorney, and set up the attorney's calendar for the day.

Because of the increasing availability of online calendars and PDAs, many attorneys now prefer to keep their calendars online or on portable devices instead of carrying a paper calendar. This practice can serve to reduce clutter and increase counsel's efficiency. However, it remains essential for counsel to ensure that their secretaries have access to their daily calendars. Counsel must therefore provide their secretaries with online access or daily printouts of the calendar so that accurate, up-to-date schedules can be maintained and calendaring conflicts can be avoided.

As soon as counsel obtains dates for future court appearances, the dates should be entered in both the attorney's and the secretary's calendars. If counsel has a law clerk, that person should also have a copy of the attorney's calendar. It is imperative for defense counsel on court-appointed cases to maintain an accurate and current calendar, and to take it to court when appearing to accept new felony cases in order to determine whether counsel can agree to accept the case, given the requirements of new Pen C §987.05. See further discussion of those requirements in §§8.7, 19.21, 58.21.

Counsel should also keep a calendar to ensure that deadlines are met for filing motions and writs, and that appointments are kept. There are a number of software programs for maintaining calendars. Attorneys who do not use a computer program may want to use a "tickler" file to remind them of appointments, court dates, and deadlines. Important dates to calendar are:

- All court dates;
- Deadlines for serving subpoenas;
- Deadlines for filing motions;
- Deadlines for writ review of particular motions;
- New client interviews;
- Witness interviews;
- Lineups; and
- Deadlines for requesting and providing discovery (Pen C §§1054-1054.7).

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§1.16 2. Deadlines for Filing Court Papers; Computation of Calendar Days and Court Days

Attorneys should always keep a current copy of the California Rules of Court in their law offices and be thoroughly familiar with its contents. Desk copies can be obtained from LexisNexis and Thompson West publishers. The rules are also available online on the Judicial Council's website, http://www.courtinfo.ca.gov/rules. Counsel should keep in mind, however, that familiarity with the state rules will not provide all necessary information. Most courts set deadlines and encourage practices that are only published in their local rules. Local rules for most California superior courts are also available on the Judicial Council's website, http://www.courtinfo.ca.gov/rules/localrules.htm.

Therefore, attorneys must have a copy of local rules of the courts in which they practice. These local rules vary from court to court and, consequently, provide for different deadlines for the filing of various types of motions. See §§42.2, 43.2, 44.2 for deadlines applicable to writs and appeals, and §§4.28-4.36 on rules concerning subpoenas. Counsel should keep a list of those deadlines at the front of the office calendar and should be personally responsible for checking the filing dates of the papers he or she files.

In determining whether the number of days given in a statute refers to court days or calendar days, the rule is that calendar days are assumed unless the statute expressly states court days. Govt C §6806 ("[a] day is the period of time between any midnight and the midnight following"); Pen C §7(13) ("[t]he word 'month' means a calendar month, unless otherwise expressed"). In computing time, counsel should exclude the first day and include the last unless the last day is a holiday, and then it too is excluded. CC §10. A paper that would otherwise be filed on a holiday may be filed on the next business day. CC §11; CCP §12a. See also Govt C §§6700-6716 (holidays), 6800-6807 (computation of time); CCP §§10 (judicial holidays), 12-12b (computation of time), 13-13b (holidays and Saturdays), 133-135 (days for transaction of judicial business).

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§1.17 3. Calendar Conflicts

Appointed counsel should not have calendar conflicts on the preliminary hearing or trial dates. See Pen C §987.05, discussed in §§8.7, 19.21.

The trial court has the power to impose sanctions not exceeding $1500 for violation of a lawful court order without good cause or substantial justification. CCP §177.5; *People v Tabb* (1991) 228 CA3d 1300, 279 CR 480. See *People v Superior Court (Laff)* (2001) 25 C4th 703, 739 n16, 107 CR2d 323. Either opposing counsel or the court may seek sanctions under this section. Notice and an opportunity to be heard must be provided, and an order imposing sanctions must be in writing and must recite in detail the conduct or circumstances that justify the order. CCP §177.5.

> Ø **Note:** Sanctions under CCP §177.5 are specifically not to be imposed on "advocacy of counsel before the court."

When an attorney finds that he or she has scheduled more than one court appearance for the same time, and there is enough time to change the date, the attorney may contact the prosecutor and any co-counsel and try to obtain agreement on a new date. Counsel must then obtain the court's approval of the new date either by a phone call, by seeing the judge in person during a break, or by advancing the case with notice to the other party. Local court rules or local practice will dictate which approach is appropriate for a particular jurisdiction. It is helpful if counsel obtains the court file so that the judge's clerk can enter the new dates in the file. It is preferable, of course, for counsel to keep accurate calendars so that conflicts do not occur. See generally chap 20 on continuances.

When attorneys are delayed in one court, which causes them to be late for another court appointment, they should contact the judge or the clerk of the court in which they are expected and tell him or her of their location and their estimated time of arrival; otherwise, they may be subject to contempt (see §58.19) or sanctions (CCP §177.5). Each court makes its own policy on "trailing" a case until counsel arrives, so counsel should become familiar with local practice. See *Mowrer v Superior Court* (1969) 3 CA3d 223, 83 CR 125.

Sole practitioners should enlist the aid of another lawyer or two who can handle calendar conflicts when they are delayed or ill. In planning a vacation, counsel should remember that some courts require counsel to file a vacation affidavit in each court in which counsel practices, indicating the dates counsel will be away. Of course, if a client is arrested during counsel's absence, counsel should have an attorney available to handle the case during his or her absence.

Many judges require compliance with the procedures for continuances set forth in Pen C §1050(b). Counsel should be aware that noncompliance may result in sanctions by the court. Pen C §§1050(c), 1050.5.

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§1.18 VIII. STANDARD FORMS AND LETTERS

Using standard forms and letters saves time and money. It is therefore essential to store frequently used forms and document templates on a computer so that they can be modified and used in new cases without "reinventing the wheel." In addition, the companion to this book, California Criminal Law Forms Manual (2d ed Cal CEB 2005), contains many sample forms in a loose-leaf binder and on an accompanying CD-ROM. Other useful forms (some of which have been adopted for mandatory use) are available on the Judicial Council's website, http://www.courtinfo.ca.gov/cgi-bin/forms.cgi.

The more important types of forms that counsel should keep are listed below. Many are included in the California Criminal Law Forms Manual.

- **Standard office forms**
- Authorization form that permits information to be released to the attorney
- Bail reduction hearing information
- Booklet that explains in simple language the procedures that are likely to be followed, and the client's constitutional rights (counsel may want to have these professionally printed)
- Booklet that instructs witnesses how to conduct themselves in court (counsel may also want to have these booklets professionally printed)
- Financial and personal data about the client
- Interview form (see §10.1 of this book)
- Retainer agreement

- **Standard letters to client**
- Time, date, and place of a court appearance
- Bench warrant notification and instructions on what to do
- At the close of the case, information on the status of the case, the possibility of later expungement or reduction of charges, and, if appropriate, the terms and conditions of probation

- **Standard pretrial motions**
- Change of venue motion (see chap 15)
- Competence to stand trial (see chap 48)
- Constitutionality of prior conviction (see chap 24)
- Continuance (see chap 20)
- Disclose informant (see chap 17)
- Discovery (see chap 11)
- Disqualify judge (see chap 21)
- *Trombetta-Youngblood* motion (requesting sanctions for destroying evidence; see chap 11)
- Lineups (see chap 22)
- Pen C §1538.5 motion (illegal search and seizure; see chap 16)
- Pen C §995 motion (challenging preliminary hearing holding order or grand jury indictment; see chap 13)
- *Pitchess* motion (requesting information on complaints against specific police officers; see chap 11)
- Release of evidence for retesting or analysis (see chap 55)
- Severance (see chap 7)
- Speedy trial motion (see chap 19)

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§1.19 IX. REQUIREMENT THAT LAWYER KEEP CLIENTS REASONABLY INFORMED CONCERNING CASE

Under Cal Rules of Prof Cond 3-500, lawyers must keep clients informed of significant developments relating to their case and to promptly comply with their reasonable requests for information. See also Bus & P C §6068(m). Lawyers must promptly communicate to clients "all terms and conditions of *any* offer made to the client" in a criminal matter, whether written or oral (emphasis added). Cal Rules of Prof Cond 3-510. A sample client information letter is in California Criminal Law Forms Manual §1.28 (2d ed Cal CEB 2005) and on the accompanying CD-ROM.

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§1.20 X. RUNNING AN EFFICIENT CRIMINAL APPELLATE PRACTICE

Many criminal appeals are handled through the indigent appointment system. Hourly pay is less than the prevailing rate for privately retained appeals, which requires the attorney to keep costs low to be able to make a profit. To be cost-efficient, here are some things the attorney might consider:

- Work out of his or her own home.
- To save on shelf space, buy primary resources (cases and statutes) in electronic format, and the main secondary resources (like this book) in either electronic or print format, depending on availability and on counsel's preference. When funds are quite limited, buy only the publications and software that are used frequently. Use the county law library only when necessary because travel time is costly.

Ø **Note:** While most legal research will be performed online through services such as Westlaw and LexisNexis, these services can be expensive. If funds are limited, FindLaw (http://www.findlaw.com) provides a free Internet alternative that can serve many of counsel's research needs.

- Do not hire a secretary, or, if counsel handles both trial and appellate work, use a pooling or sharing arrangement for a secretary who works on trial-related matters, including scheduling, phone-answering, and the like (a malpractice carrier's requirements for calendar management need to be taken into account).
- Use a U-shaped desk arrangement that permits the attorney to have the keyboard for his or her personal computer at the side, frees up a large work area in front, and provides space behind, on the top of a credenza, for transcripts. Keyboard height, monitor height and distance, and other spatial arrangements should be ergonomically correct to eliminate carpal tunnel syndrome and other problems.
- Select a word processing program with the features needed for writing briefs, *e.g.,* the ability to correctly and efficiently generate a table of authorities, as well as those needed for trial court pleadings, such as the ability to internally generate pleading paper with the lines numbered 1 through 28 down the left side.

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2

PROFESSIONAL RESPONSIBILITY

WILLIAM WOODS

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§2.1 I. OVERVIEW

The professional responsibility issues covered in this chapter were selected because of their importance in the area of criminal law. The discussion of legal ethics is not exhaustive. An overview of California legal ethics can be obtained by reading the State Bar Act (Bus & P C §§6000-6238) and the California Rules of Professional Conduct. The ABA Model Code of Professional Responsibility and subsequent ABA Model Rules of Professional Conduct, although not binding on California lawyers, may provide a useful discussion of particular issues and may be persuasive when there is no controlling California authority on point. See California State Bar Formal Opinion No. 1983-71.

Ethics violations may result in contempt sanctions (see chap 58), State Bar of California disciplinary proceedings (Cal Rules of Prof Cond 1-100(A)), reversal on appeal of cases involving misconduct because of incompetence of defense counsel or prosecutorial misconduct (see §§2.20-2.21, 2.40-2.45), or sanctions that affect the presentation of the case (see *Taylor v Illinois* (1988) 484 US 400, 416, 98 L Ed 2d 798, 815, 108 S Ct 646). Attorney misconduct as it relates to alleged error on appeal in a criminal defendant's case is not addressed in this chapter.

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II. SOURCES OF PROFESSIONAL RESPONSIBILITY

§2.2 A. California Statutes and Rules of Professional Conduct

California lawyers must comply with the standards for professional conduct in the State Bar Act (Bus & P C §§6000-6238), the California Rules of Professional Conduct, the statutes defining conduct appropriate in specific situations, California state appellate court and federal appellate court published opinions, and Review Department of the California State Bar Court published opinions.

The California Rules of Professional Conduct are promulgated by the State Bar and approved by the California Supreme Court. Bus & P C §6076. The State Bar of California publishes and distributes a pamphlet, State Bar Publication No. 250, containing the State Bar Act, related statutes, and the California Rules of Professional Conduct. Many of the Rules have a "Discussion" section. The Discussions do not add an independent basis for imposing discipline but are intended to provide guidance in interpreting the Rules. Cal Rules of Prof Cond 1-100(C).

The State Bar's website is found at http://www.calbar.ca.gov. It includes the California Rules of Professional Conduct, the State Bar Act and related statutes, the ethics opinions published by the California State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), and a list of attorneys licensed to practice in California, together with any record of attorney discipline. See *Mack v State Bar* (2001) 92 CA4th 957, 963, 112 CR2d 341.

The Rules are not intended to create new civil causes of action. Cal Rules of Prof Cond 1-100(A). Nor are they intended to supersede existing law relating to attorneys in nondisciplinary contexts. See Discussion to Cal Rules of Prof Cond 1-100. However, the Rules have been used as a standard for measuring an attorney's breach of fiduciary duty, and jury instructions based on the Rules may be proper. *American Airlines Inc. v Sheppard, Mullin, Richter & Hampton* (2002) 96 CA4th 1017, 1032, 117 CR2d 685; *Mirabito v Liccardo* (1992) 4 CA4th 41, 5 CR2d 571.

Enforcement of ethical conduct is under the jurisdiction of the State Bar of California and the California Supreme Court. Bus & P C §§6076, 6100. An attorney who violates a rule of professional conduct or a Business and Professions Code section may be subject to an agreement in lieu of discipline or actual discipline, which can be public or private reproval, suspension from practice, or disbarment. Bus & P C §§6077, 6100.

The Review Department of the State Bar Court and the California Supreme Court address attorney discipline in separate published opinions. Recent Review Department published opinions are available on the State Bar of California website, http://www.calbar.ca.gov. Both the California Supreme Court and the California courts of appeal may apply ethical standards to specific issues of attorney conduct in civil and criminal appeals.

Legislatively enacted ethical standards are minimum standards; the California Supreme Court has the inherent power to require additional standards if it is not satisfied that legislative requirements are sufficient. *Stratmore v State Bar* (1975) 14 C3d 887, 123 CR 101. The court also has the power to discipline attorneys for criminal convictions even if they are unrelated to the attorney's practice of law. *In re Kelley* (1990) 52 C3d 487, 494, 276 CR 375.

Ø **Note:** The court's inherent power and the generality of the legislative standards place a duty on the individual attorney to investigate all sources of ethical authority before acting when the attorney suspects an ethical concern.

Ø **Warning:** The California Supreme Court's discipline orders may serve as the basis for reciprocal disbarment actions by both the Ninth Circuit Court of Appeals and the Board of Immigration Appeals. See, *e.g.*, *Gadda v Ashcroft* (9th Cir 2004) 363 F3d 861, 865, amended, 377 F3d 934.

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§2.3 B. Additional Sources of Professional Responsibility

California Attorney Guidelines of Civility and Professionalism. The State Bar of California has adopted voluntary guidelines intended to complement codes of professionalism adopted by bar associations. Section 20 of the Guidelines is an additional provision that applies to criminal law practitioners. This guideline states that criminal law practitioners must appreciate both the role of the prosecutor who is charged with seeking justice, and the role of a defender who must zealously represent his or her client even in the face of seemingly overwhelming evidence of guilt. The guideline specifically admonishes that a prosecutor should not question the propriety of defending a person accused of a crime and that appellate counsel and trial counsel should communicate openly, civilly, and without rancor, endeavoring to keep the proceedings on a professional level.

ABA Model Rules. The American Bar Association (ABA) Model Rules of Professional Conduct have not been adopted, nor are they binding, in California. California State Bar Formal Opinion No. 1983-71. The Rules may, however, assist in the interpretation of standards of professional responsibility in California when there is no California authority on point. Formal Opinion No. 1983-71.

The ABA's website is located at http://www.abanet.org. The ABA Model Rules and summaries of ABA formal ethics opinions from 1984 to the present are available through the ABA website.

ABA publications on professional conduct. The American Bar Association and the Bureau of National Affairs (BNA) publish the ABA/BNA Lawyers' Manual on Professional Conduct, and Current Reports. The Lawyers' Manual is divided by subject. Current Reports is updated with summaries of court decisions, ethics opinions, disciplinary proceedings, and other news, including recent legislation and specific issues of professional responsibility. This publication may be ordered from BNA's Customer Contact Center, 9435 Key West Avenue, Rockville, MD 20850; (800) 372-1033; http://www.bna.com.

Other jurisdictions. The state bar associations of many jurisdictions have their rules of professional conduct and often their legal ethics opinions online.

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§2.4 C. California Legal Ethics Opinions

Individual attorneys who submit written inquiries on specific issues of professional responsibility may obtain advisory written opinions from the California State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), or from the ethics committees of the Los Angeles County (LACBA), Orange County, San Diego County, and San Francisco County Bar Associations if they are members of these bar associations. These opinions are published in the California Compendium on Professional Responsibility, which is updated annually. Copies of the Compendium may be obtained from the Office of Professional Competence, Planning and Development, State Bar of California, 180 Howard Street, San Francisco, CA 94105. The phone number is (415) 538-2112. COPRAC ethics opinions are available at the State Bar's website at http://www.calbar.ca.gov.

Ethics opinions of local bar associations are also available at the associations' websites. LACBA ethics opinions from Number 476 to the present, and summaries of opinions Numbers 302-475, are available at the LACBA's website at http://www.lacba.org. San Diego County Bar Association Formal Opinions from 1968-1 to the present are available at http://www.sdcba.org. Ethics opinions of the Bar Association of San Francisco from 1970 to 1999 are available at http://www.sfbar.org. Ethics opinions of the Orange County Bar Association from 1993 to 2005 are available at http://www.ocbar.org.

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§2.5 D. Ethics Hotline and Alcohol/Drug Abuse Hotline

The State Bar of California staffs an "Ethics Hotline," which attorneys may call if they have specific questions on legal ethics. Although the information provided is not binding on the State Bar, it is intended to offer guidance. The telephone number is (800) 2-ETHICS. See *Wallis v PHL Assocs., Inc.* (2009) 168 CA4th 882, 899, 86 CR3d 297 (sanction upheld despite attorney's reliance on Ethics Hotline, because hotline is confidential research service, not source of legal advice).

There is a lawyer assistance program (Stress, Substance Abuse, and Chemical Dependency), which may be reached by telephoning (866) 436-6644.

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§2.6 III. GENERAL ETHICS REQUIREMENTS

Business and Professions Code §6068 contains general ethical requirements for attorneys. These include supporting the Constitution and laws of the United States and California; maintaining respect for the courts and judicial officers; counseling or maintaining only actions that appear legal or just, except the defense of a person charged with a public offense; employing only means that are consistent with truth, and never seeking to mislead a judge or judicial officer by a false statement of fact or law; maintaining inviolate client confidences and preserving the client's secrets; advancing no fact prejudicial to the honor or reputation of a witness unless justice so requires; not encouraging an action or proceeding from a corrupt motive or interest; not rejecting the cause of the defenseless or oppressed; cooperating in State Bar disciplinary investigations and proceedings, and reporting one's own misconduct (see §2.7); and responding promptly to client inquiries, keeping clients reasonably informed of significant developments in their cases and providing clients with copies of required documents (see §2.19).

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Source: Criminal Law/California Criminal Law Procedure and Practice/2 PROFESSIONAL RESPONSIBILITY/§2.7 IV. WHEN ATTORNEY MISCONDUCT MUST BE REPORTED TO STATE BAR

§2.7 IV. WHEN ATTORNEY MISCONDUCT MUST BE REPORTED TO STATE BAR

An attorney must report his or her own misconduct to the State Bar, in writing, within 30 calendar days after the date the attorney learns of any of the following (Bus & P C §6068(o)):

- Three or more malpractice lawsuits filed against the attorney within a year.
- A civil judgment against the attorney for fraud, misrepresentation, breach of fiduciary duty, or gross negligence in the attorney's professional capacity.
- A judicial sanction of $1000 or more imposed on attorney for any conduct other than failure to make discovery.
- Conviction of any felony, or an attempt, conspiracy, or solicitation of another to commit a felony.
- Conviction of a misdemeanor, or an attempt, conspiracy, or solicitation of another to commit a misdemeanor, that was committed in the course of the practice of law, or in which a client was the victim, or that has as an essential element of improper conduct of any attorney, including dishonesty or moral turpitude.
- The imposition of professional discipline against an attorney by any professional or occupational licensing or disciplinary agency.
- Reversal of a judgment because of an attorney's misconduct, grossly incompetent representation, or willful misrepresentation.

Courts must notify the State Bar of any of the following (Bus & P C §6086.7):

- A final order of contempt imposed against an attorney for conduct that may warrant discipline.
- The modification or reversal of a judgment because of an attorney's misconduct, incompetent representation, or willful misrepresentation.
- The imposition of any judicial sanction of $1000 or more, other than a sanction for failure to make discovery.

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V. DUTY TO AVOID CONFLICTS OF INTEREST

§2.8 A. Prescreening for Conflicts

To avoid conflicts, defense counsel should screen prospective clients *before* interviewing them. Prescreening avoids disqualification. See, *e.g., Yorn v Superior Court* (1979) 90 CA3d 669, 153 CR 295.

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B. Multiple Representation

§2.9 1. Codefendants

Conflicts of interest; multiple representation. Defense counsel must avoid conflicts of interest that infringe or deny a defendant's constitutional right to the effective assistance of counsel. *People v Mroczko* (1983) 35 C3d 86, 103, 197 CR 52, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209. See also *People v McDermott* (2002) 28 C4th 946, 990, 123 CR2d 654. This danger usually arises when counsel represents codefendants. For example, if codefendants have conflicting defenses, counsel may have to deny or weaken one defendant's defense to benefit the other. *People v Mroczko, supra*. Moreover, except as specified in Bus & P C §6068(e)(2) and Cal Rules of Prof Cond 3-100, attorneys must maintain client confidence and secrets inviolate. Bus & P C §6068(e)(1). Multiple representation may make "undivided loyalty" difficult. It is thus common practice in California for defense attorneys to represent only one of several codefendants. When potential or actual conflicts exist, attorneys must comply with Cal Rules of Prof Cond 3-310(C), which requires both clients' informed written consent as defined in Cal Rules of Prof Cond 3-310(A).

If defense counsel decides to represent codefendants despite a conflict, he or she must inform the court of the existence of potential or actual conflict. *Mroczko,* 35 C3d at 112. See below for discussion of the court's obligations in this event.

Counsel who has obtained confidential information material to the employment from one codefendant should not continue to represent another codefendant in the same case without the informed written consent of both the first codefendant and the client. Cal Rules of Prof Cond 3-310(E).

Procedure when retained counsel is involved. If the defense attorney, prosecutor, or court perceives that a conflict may exist in joint representation of defendants, the trial court should be informed, or on its own motion ascertain, whether defense counsel has obtained a knowing and intelligent written waiver from each client. *People v Bonin* (1989) 47 C3d 808, 836, 254 CR 298. Additionally, the court must, on its own, determine and state on the record that there is a knowing and intelligent waiver of any conflict legally waivable. The court might inquire as follows:

Has your attorney (or outside counsel) discussed with you the dangers and possible consequences of joint representation?

Do you wish to discuss these potential drawbacks and consequences of joint representation?

You have the right to speak about this matter with outside counsel. Do you wish outside counsel?

Ø **Note:** If a defendant requests outside counsel, that should be provided, and full waiver should be made later on the record, with outside counsel present.

Do you understand that you have the right to conflict-free representation?

Fully understanding all I have told you, do you freely and voluntarily waive all conflicts and the right to hire separate counsel?

If the defendant answers in the affirmative, the court states:

I find that the defendant has freely, voluntarily, and intelligently waived all actual and possible conflicts.

Defense counsel must join on the record in the court's finding.

Ø **Note:** On the issue of conflict waivers, see *People v McDermott* (2002) 28 C4th 946, 990, 123 CR2d 654; *People v Mroczko* (1983) 35 C3d 86, 110 n26, 197 CR 52. See also *Wheat v U.S.* (1988) 486 US 153, 100 L Ed 2d 140, 108 S Ct 1692, in which the Supreme Court upheld the lower court's refusal to accept three codefendants' waiver of conflict-free representation; they wanted the same attorney to represent them at trial.

Procedure when appointed counsel is involved. When the court appoints counsel to represent codefendants, it must appoint separate and independent counsel for each defendant even if there is no apparent conflict of interest. *People v Mroczko* (1983) 35 C3d 86, 115, 197 CR 52; *People v Owen* (1989) 210 CA3d 561, 566, 258 CR 535. The defense attorney and prosecutor should both make sure that no conflict exists with appointed counsel. See Cal Rules of Prof Cond 3-110, 3-310.

If a potential conflict becomes an actual conflict, or is raised by either the prosecution or the defense during the scope of subsequent proceedings, the court must inquire again, as set out above, and obtain new waivers from both the defendant and defense attorney. See *Wood v Georgia* (1981) 450 US 261, 272, 67 L Ed 2d 220, 230, 101 S Ct 1097. See also *Holloway v Arkansas* (1978) 435 US 475, 484, 55 L Ed 2d 426, 434, 98 S Ct 1173; *People v Bonin, supra*. The defendant must be given an opportunity to confer with independent counsel. See *People v Owen* (1989) 210 CA3d 561, 566, 258 CR 535. Counsel must again obtain an informed written consent from each client. Cal Rules of Prof Cond 3-310(C).

When defense counsel advises the court that a conflict exists that requires counsel to withdraw from representation, the court must give counsel's remarks great weight even if counsel cannot disclose the basis for the conflict because of the attorney-client privilege. *Leversen v Superior Court* (1983) 34 C3d 530, 537, 194 CR 448; *Aceves v Superior Court* (1996) 51 CA4th 584, 59 CR2d 280. See also Bus & P C §6068(e).

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§2.10 2. Concurrent and Former Clients, Who Are Not Codefendants, in Same Proceeding

Conflicts can occur when an attorney represents a defendant in a criminal matter and concurrently represents, or formerly represented, another person who is a witness in the represented defendant's case. The attorney is forbidden from using confidential information, acquired during the attorney-client relationship, to the detriment of any client or former client. *Leversen v Superior Court* (1983) 34 C3d 530, 538, 194 CR 448. See Bus & P C §6068(e); Cal Rules of Prof Cond 3-310(E). A conflict exists if the attorney is forced to choose between providing effective representation to the client/defendant, and protecting the confidences of the witness with whom the attorney also has or had an attorney-client relationship. *Leversen v Superior Court, supra*. A potential conflict also exists when an attorney represents a defendant and formerly represented someone whom the defense suspects committed the crime of which the defendant is accused. See *People v Jones* (2004) 33 C4th 234, 241, 14 CR3d 579. See also *Lewis v Mayle* (9th Cir 2004) 391 F3d 989.

When a defendant consults with an attorney about representation but no employment results, the communication may be protected from disclosure even if made in a non-office setting (see California State Bar Formal Opinion No. 2003-161), and if the attorney later represents another individual who may testify against the defendant, courts will presume that confidential information was imparted during the consultation that would preclude the later representation if they find that a "substantial relationship" was created during the consultation. Whether a substantial relationship exists depends on the facts of the particular case. See *People v Thoi* (1989) 213 CA3d 689, 699, 261 CR 789; *Vangsness v Superior Court* (1984) 159 CA3d 1087, 1090, 206 CR 45.

If an attorney represents a defendant and the prosecution calls as a witness a former client of the attorney, the attorney must provide written disclosure to the defendant of the relationship with the former client. Cal Rules of Prof Cond 3-310(B). If the representation resulted in the attorney's obtaining confidential information about the former client, the attorney must obtain from the former client informed written consent before accepting employment adverse to the former client. Cal Rules of Prof Cond 3-310(E). However, when a public defender's office formerly represented a prosecution witness, the entire office is not necessarily disqualified. Factors to be considered include the length of time between the representations, the nature and notoriety of the witness's case, whether the current attorney was a member of the office at that time, whether the attorney who represented the witness is still a member of the office, and the nature and extent of screening procedures established by the office. See *Rhaburn v Superior Court* (2006) 140 CA4th 1566, 45 CR3d 464.

It may be ethically improper to represent conflicting interests. For example:

- It is improper for counsel to continue representing either defendant charged in two separate, unrelated criminal cases once counsel learns that one defendant is attempting or has become an undercover informant against the other defendant. California State Bar Formal Opinion No. 1981-59.
- It is ethically improper for criminal defense counsel to represent a defendant when a previous client of that attorney's office is a witness against the new client and it is reasonably foreseeable that confidences or secrets of the former client may be, or may reasonably appear to the client to be, used. California State Bar Formal Opinion No. 1980-52.

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§2.11 C. When Attorney Fees Are Paid by Other Than Client

Lawyers must ensure that their loyalties are reserved solely for the client when someone other than the client is paying for the client's representation. This means that a lawyer may not do anything, or promise anything, that might impair the attorney's ability to zealously represent the client with undivided loyalty. California State Bar Formal Opinion No. 1975-35; Cal Rules of Prof Cond 3-310(F). The lawyer is forbidden from disclosing the client's confidences and secrets to anyone, including the person paying for his or her representation. See Bus & P C §6068(e). Finally, the attorney must obtain the client's informed written consent before representation begins. Cal Rules of Prof Cond 3-310(F)(3).

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§2.12 D. Attorney's Relationship With Another Party's Lawyer

Lawyers are specifically directed not to represent a client in a matter in which another party's attorney is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer, or has an "intimate personal relationship" with the lawyer, unless the lawyer informs the client in writing of the relationship. Cal Rules of Prof Cond 3-320. See *People v Jackson* (1985) 167 CA3d 829, 213 CR 521 (defense attorney and prosecutor had dated each other and defendant was not informed; new trial granted). "Intimate personal relationship" has not been defined. See *People v Jackson, supra*.

Ø **Note:** California Rules of Professional Conduct 3-320 is not intended to apply to a lawyer's relationship with another lawyer who is a partner or an associate in the same firm as the adverse party's counsel and who has no direct involvement in the matter. See Discussion to Cal Rules of Prof Cond 3-320; California State Bar Formal Opinion No. 1984-83 for discussion of issues involving public defender/prosecutor spouses; California State Bar Formal Opinion No. 1987-93 on ethical duties regarding relationships with witnesses and other court personnel. The court and the defendant should be informed, on the record, of these relationships.

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§2.13 E. Other Possible Conflicts of Interest

Sharing office space. Attorneys sharing space or staff must take reasonable steps to ensure that their clients and potential clients are not deceived, misled, or confused about the nature of their relationship. Attorneys who share office space or services also must take reasonable steps to protect each client's confidences and secrets. If attorneys do not address these issues sufficiently, they may violate their obligation to maintain clients' confidential information. California State Bar Formal Opinion No. 1997-150.

Sexual relations with client. An attorney is precluded from requiring or demanding sexual relations with a client as a condition of representation, intimidating a client into entering into sexual relations, or continuing representation of the client if the sexual relations cause the attorney to perform legal services incompetently. Cal Rules of Prof Cond 3-120; Bus & P C §6106.9. Sexual relations with a client may become the basis of a lawsuit for violation of fiduciary duties owed the client. *Barbara A. v John G.* (1983) 145 CA3d 369, 193 CR 422. See also Orange County Bar Ass'n Formal Opinion No. 2003-02 (discussing attorney-client sexual relationship).

An intimate relationship with someone close to the defendant or the victim should be disclosed to the court and to the defendant on the record. See *People v Singer* (1990) 226 CA3d 23, 33, 275 CR 911 (covert sexual relationship between defendant's attorney and defendant's wife compelled reversal).

Attorney's own concurrent criminal prosecution. When defense counsel was being prosecuted for felony drug possession by the same district attorney's office that was prosecuting the defendant at the same time, the California Court of Appeal assumed that an actual conflict of interest existed and then determined that the defendant's representation was not adversely affected. On subsequent habeas, the Ninth Circuit concluded that this approach was neither contrary to clearly established federal law nor an unreasonable application of federal law to the facts of the case. See *Campbell v Rice* (9th Cir 2005) 408 F3d 1166, 1170.

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§2.14 F. Attorney Business Transactions Adverse to Client

An attorney may not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless (1) the terms are fair and reasonable; (2) the terms are fully disclosed in *writing* to the client; (3) the client is advised in *writing* that he or she may seek the advice of an independent attorney on the matter; and (4) the client consents in *writing* to the terms of the transaction or terms of the acquisition. Cal Rules of Prof Cond 3-300. Attorneys must follow all requirements of Rule 3-300 when obtaining a security or ownership interest adverse to the client to secure, or in payment of, fees.

An attorney can take a promissory note from the client as security for fees as long as the attorney complies with Rule 3-300. California State Bar Formal Opinion No. 1981-62.

Attorneys must comply with Cal Rules of Prof Cond 3-300 when accepting a security interest in real property (or any other personal property) to ensure payment of fees by a client whenever the attorney knows that the client has any interest in the property. LA County Bar Ass'n Formal Opinion No. 492 (1998). See also San Francisco Bar Ass'n Formal Opinion No. 1997-1. Moreover, if the client has an interest in the property, the attorney must comply with Rule 3-300 even when record ownership of the property is held by a third person. LA County Bar Ass'n Formal Opinion No. 492 (1998). Rule 3-300 is inapplicable to the extent a security interest is given the attorney for payment of legal fees by someone on the client's behalf. San Francisco Bar Ass'n Formal Opinion No. 1997-1. An attorney may refer a potential client to a broker for the purpose of obtaining a real property loan to pay attorney fees and costs so long as the attorney (1) does not provide legal representation or receive compensation with respect to the referral or resulting loan or escrow transaction and (2) has no undisclosed business relationship with the broker. California State Bar Formal Opinion No. 2002-159.

> Ø **Note:** Attorneys should be aware of the requirement for written fee agreements when the client's total expenses may reasonably be foreseen to exceed $1000. Bus & P C §6148. Sample attorney fee agreement forms may be obtained from the State Bar's website at http://www.calbar.ca.gov.

Defense attorneys should be aware of the pitfalls of literary contracts under which an attorney accepts rights to publish a client's story in exchange for all or part of the attorney fee:

(1) Literary contracts are regulated by Rule 3-300.

(2) They are criticized as inherently in conflict with the attorney's duty to give the client unqualified loyalty. See *People v Corona* (1978) 80 CA3d 684, 720, 145 CR 894.

(3) Civil Code §2225 establishes an involuntary trust for the benefit of individuals injured by a convicted felon's criminal conduct. But see *Keenan v Superior Court* (2002) 27 C4th 413, 117 CR2d 1, which held that California's "Son of Sam" law, CC §2225, is facially invalid under the free speech clauses of the United States and California constitutions.

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§2.15 G. Conflicts That May Disqualify Defense Attorney's Firm

In certain circumstances, an entire law firm may be required to decline or withdraw from employment when a lawyer in the firm is precluded from representing the client. However, California State Bar Formal Opinion No. 1993-128 states that a law firm may represent a client in a criminal matter when a member of the firm directly assisted in the matter as a government attorney before joining the firm, as long as the affected member takes no part in the defense, does not share in fees earned, and the firm effectively screens him or her from any contact with the case.

A conflict may arise when an attorney is asked to represent a client in a criminal case and the attorney's law firm had represented the client in a charged prior conviction. Prior counsel's effectiveness may be an issue, thereby creating a potential conflict of interest. Effective representation of clients, particularly in "strikes" cases, involves vigorous representation on both the immediate charge as well as exhaustive review of, and possible vigorous attack on, the validity of prior convictions. Under Cal Rules of Prof Cond 3-310, attorneys must disclose to clients any potential conflict of interest in order to accept or continue representation.

The creation of a physically separated "firm" within a public office charged with indigent criminal defense, so that different "firms" represent different defendants, can avoid conflicts arising from the representation of multiple defendants, but only with adequate safeguards, including maintaining the separateness of the multiple "firms." California State Bar Formal Opinion No. 2002-158. See *Rhaburn v Superior Court* (2006) 140 CA4th 1566, 1581, 45 CR3d 464, discussed in §2.10.

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§2.16 H. Conflicts Confronting Prosecutor

Recusal. Although a prosecutor may be disqualified for individual conflict, a stronger showing must be made to recuse the entire prosecution office. *People v Hamilton* (1988) 46 C3d 123, 139, 249 CR 320. A recusal motion should not be granted unless the evidence shows that a conflict exists that would make it unlikely that the defendant would receive a fair trial. Pen C §1424; *Hollywood v Superior Court* (2008) 43 C4th 721, 727, 76 CR3d 264. Moreover, the prosecutor's office may be able to create a "wall of silence" between the individual prosecutor and the remainder of the office so that recusal of the entire office is not necessary. Compare *People v Lopez* (1984) 155 CA3d 813, 827, 202 CR 333 (wall of silence created with newly hired deputy district attorney), with *Younger v Superior Court* (1978) 77 CA3d 892, 144 CR 34 ((decided before enactment of §1424) conflict wall could not be effectively created with third-ranking administrative prosecutor in office). Recusal is discussed in §§18.26-18.31.

Prosecutor may not also defend. A prosecutor may not also engage in criminal defense. Govt C §26540; *People v Rhodes* (1974) 12 C3d 180, 186, 115 CR 235; 66 Ops Cal Atty Gen 30 (1983). It is a misdemeanor, and grounds for disbarment, for an attorney to directly or indirectly help defend an individual whom the attorney has in any manner prosecuted. Bus & P C §6131.

City attorneys. A city attorney who does not exercise prosecutorial responsibilities is not precluded from private criminal defense representation, except for criminal defense of violations of that city's ordinances, and of crimes related to other matters handled by that office, as long as the city that employs the city attorney expressly relieves that attorney of all prosecutorial responsibilities, and the accused is informed of and expressly waives any rights created as a result of any potential conflict based on the attorney's position as city attorney. Govt C §41805.

Ø **Note:** Section 41805 does not preclude the city from limiting or prohibiting the private practice of any attorney it retains or employs. When one attorney in a firm handles misdemeanor prosecutions as a city attorney, another attorney in the firm cannot defend a criminal action brought by the same or a different prosecutorial agency. LA County Bar Ass'n Formal Opinion No. 453 (1990). Attorneys must also be aware that other conflicts may limit or prevent representation of clients in criminal or civil matters. See, *e.g.,* Cal Rules of Prof Cond 3-310, 3-600.

Ø **Note:** The prosecutor reporting an actual or potential conflict should notify the supervisor as early as possible so that an early reassignment can be made.

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§2.17 VI. ATTORNEY ADVERTISING AND SOLICITATION

Attorneys may advertise their services, consistent with Cal Rules of Prof Cond 1-400. In addition to the usual ads in local telephone books, an attorney may send letters to persons recently arrested where that information was obtained through public records documenting the arrest. California State Bar Formal Opinion No. 1995-142; San Diego Bar Ass'n Formal Opinion No. 1992-3. This type of mailing is subject to several restrictions, which are set out in Cal Rules of Prof Cond 1-400. In particular, the attorney must state in the letter and on the envelope that it is an advertisement (Cal Rules of Prof Cond 1-400, Standard (5)), and the letter cannot include any false or misleading matter (Cal Rules of Prof Cond 1-400(D)). On using a website to advertise professional services, see California State Bar Formal Opinion Nos. 2001-155 (website is a "communication" and an "advertisement" but not a "solicitation") and 2005-168 (attorney who provides electronic means on his or her website to submit legal questions may owe duty of confidentiality to those who respond but do not become clients).

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§2.18 VII. ATTORNEY AS WITNESS

Under Cal Rules of Prof Cond 5-210, an attorney may not act as an advocate *before a jury* when the attorney will also testify as a witness unless:

- The attorney's testimony relates to an uncontested matter;
- The testimony relates to the nature and value of legal services rendered in the case; or
- The attorney has the client's informed, written consent.

Prosecutors must obtain consent from the head of their office or the designee of the head of that office.

Rule 5-210 does not apply to partners or associates in the advocate's firm who will be witnesses. Discussion to Cal Rules of Prof Cond 5-210. Further, Rule 5-210 is limited to jury trials; it does not apply to court trials or other proceedings. See Discussion to Rule 5-210.

Ø **Note:** One situation that may force an attorney to be a witness in his or her own case arises when the attorney interviews a witness without someone else present. If that witness must be impeached at trial with the earlier interview, the attorney is then the only one able to provide the impeaching testimony. This dilemma can be prevented by having an independent third person present (usually an assistant or an investigator) when discussing a matter with a witness or when investigating a case. Thus the third person, and not the attorney, can become the witness if the matter is contested at trial.

Ø **Note:** If a prosecutor becomes a voluntary witness in a case that he or she is prosecuting, that may cause reversal. *People v Donaldson* (2001) 93 CA4th 916, 927, 113 CR2d 548.

Only in extraordinary circumstances should an attorney in an action be called as a witness by the opposing attorney. Before the attorney is called as a witness, the opposing side must demonstrate that there is no other source for the evidence sought. *People v Garcia* (2000) 84 CA4th 316, 332, 100 CR2d 789.

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§2.19 VIII. DUTY TO KEEP CLIENT INFORMED

Attorneys have an ethical duty to keep clients reasonably informed about "significant" developments in their cases and to respond promptly to reasonable requests for information. Cal Rules of Prof Cond 3-500; Bus & P C §6068(m). The Discussion to Rule 3-500 states that an attorney will not be disciplined for failing to communicate insignificant or irrelevant information. "Significant" is left undefined.

Defense counsel should contact clients about their cases in any of the following situations:

- The date of the defendant's next court appearance was set when the defendant was not present;
- A bench warrant issued because of the defendant's failure to appear;
- A motion was decided in the defendant's absence;
- The defense investigator is unable to find witnesses, and the defendant may know their whereabouts.

Ø **Note:** A separate rule *requires* that attorneys promptly communicate to the client all terms and conditions of any offer, written or oral, made in a criminal matter. Cal Rules of Prof Cond 3-510(A)(1).

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IX. DUTY TO PROVIDE EFFECTIVE REPRESENTATION

§2.20 A. Obligations and Standards for Effective Representation

Necessary learning and skill to take case. An attorney who lacks the necessary learning and skill to represent a defendant in a particular case has several choices: decline representation; associate with another attorney reasonably believed to be competent; or acquire sufficient learning and skill before performance is required, if the attorney has sufficient time, resources, and the ability to do so. Cal Rules of Prof Cond 3-110(C).

Proper supervision of others working on case. An attorney who represents a client is required to supervise the work of subordinate attorneys and nonattorney employees and agents, including law clerks and secretarial staff. See Discussion to Cal Rules of Prof Cond 3-110.

Participating in guilty plea when defendant denies guilt. For discussion of this issue, see §26.43.

Ineffective assistance of counsel (IAC). To sustain a claim of IAC, a court must determine that counsel's performance fell "below an objective standard of reasonableness… under prevailing professional norms" (*People v Ledesma* (1987) 43 C3d 171, 216, 233 CR 404, quoting *Strickland v Washington* (1984) 466 US 668, 688, 80 L Ed 2d 674, 693, 104 S Ct 2052), and that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different" (*People v Ledesma* (1987) 43 C3d 171, 218, 233 CR 404, quoting *Strickland v Washington* (1984) 466 US 668, 693, 80 L Ed 2d 674, 698, 104 S Ct 2052).

Duty to investigate. A common ground for IAC claims is failure to adequately investigate the case. The defense attorney must explore all potentially meritorious defenses before making a tactical choice about what defense (if any) to present. *In re Cordero* (1988) 46 C3d 161, 181 n8, 249 CR 342. See also *Riley v Payne* (9th Cir 2003) 352 F3d 1313, 1321 (prejudicial IAC when trial attorney failed to interview key witness who would have testified that victim angrily threatened to shoot defendant who pleaded self-defense).

Notice to State Bar of IAC. An attorney must report himself or herself to the State Bar of California when reversal of a judgment is based in whole or in part on the attorney's misconduct, grossly incompetent representation, or willful misrepresentation. Bus & P C §6068(o)(7). The court must also notify the State Bar whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney. Bus & P C §6086.7(b). The State Bar shall investigate these matters to evaluate the appropriateness of initiating disciplinary action against the attorney. Bus & P C §6086.7.

Withdrawing from representation. Defense counsel may not withdraw from representation in a filed case without the court's consent and notice to the client. *Read v State Bar* (1991) 53 C3d 394, 412, 279 CR 818; Cal Rules of Prof Cond 3-700(A). Abandonment of a client warrants attorney discipline. *Borre v State Bar* (1991) 52 C3d 1047, 1053, 277 CR 864. Defense counsel must also take reasonable steps to avoid any prejudice to the client, *e.g.,* counsel shall notify the client in time for the client to secure new counsel before the next court appearance. Counsel must release to the client, or the client's new attorney, all client papers regardless of whether the attorney has been paid for his or her services (Cal Rules of Prof Cond 3-700(D); San Diego Bar Ass'n Formal Opinion Nos. 2000-1, 1984-3; San Francisco Bar Ass'n Formal Opinion No. 1990-1; LA County Bar Ass'n Formal Opinion No. 509 (2002)) and must refund any unearned fee (Cal Rules of Prof Cond 3-700(D)(2)).

Duty to assist on appeal. Appointed trial counsel has the duty to execute and file a timely notice of appeal in the following circumstances (Pen C §1240.1):

- When requested to do so by the client; or
- When counsel is of the opinion that arguably meritorious grounds exist for reversal or modification of the judgment or orders to be appealed from when in counsel's judgment it is in the client's interest to pursue such relief as may be available on appeal.

Retained trial counsel has a duty to either file a notice of appeal or instruct the client on the proper procedure to do so or to see that the client has counsel to do these things for him or her. *People v Diehl* (1964) 62 C2d 114, 118, 41 CR 281.

Counsel must also turn over to the client or to successor counsel written materials, *e.g.,* pleadings, reports, and correspondence, generated during the representation. California State Bar Formal Opinion No. 1992-127. Former counsel must also provide the client or successor counsel with information not reduced to writing if failure to provide that information might result in prejudice to the client. Formal Opinion No. 1992-127. For further discussion of trial counsel's obligations to clients on appeal, see Appeals and Writs in Criminal Cases §§2.3-2.11 (3d ed Cal CEB 2007).

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§2.21 B. Examples of Representation Challenged as Ineffective

The following cases are examples of ineffective assistance of counsel (IAC):

- Inadequate investigation. *In re Marquez* (1992) 1 C4th 584, 596, 3 CR2d 727 (attorney did not interview important potential witnesses, including alibi witnesses in Mexico for one of the murders; not all witnesses interviewed were subpoenaed for trial; new penalty trial ordered); *In re Edward S.* (2009) 173 CA4th 387, 407, 92 CR3d 725 (public defender's failure to investigate potentially exculpatory evidence not excused by caseload).
- Failure to object to amendment of information adding new charge after defendant waived preliminary hearing. *People v Peyton* (2009) 176 CA4th 642, 652, 98 CR3d 243.
- Failure to move to suppress evidence. *People v Ledesma* (1987) 43 C3d 171, 233 CR 404 (one of grounds for finding IAC).
- No investigation for penalty phase, and no presentation of evidence. See, *e.g., In re Lucas* (2004) 33 C4th 682, 721, 16 CR3d 331 (counsel overlooked substantial evidence of childhood abuse and presented no mitigating evidence at penalty phase).
- Failure to object to inadmissible evidence. *People v Ledesma, supra* (other grounds for IAC as well); *People v Stratton* (1988) 205 CA3d 87, 252 CR 157.
- Failure to investigate or object to use of prior. *People v Marquez* (1986) 188 CA3d 363, 232 CR 577 (defense counsel failed to object to prior conviction for sale of heroin in present sale of heroin case).
- Attorney on inactive status while representing client. *In re Johnson* (1992) 1 C4th 689, 4 CR2d 170 (IAC reversal); *People v Barillas* (1996) 45 CA4th 1233, 53 CR2d 418 (conviction affirmed: no IAC). But see *People v Ngo* (1996) 14 C4th 30, 38, 57 CR2d 456 (involuntary enrollment of attorney to inactive status for MCLE noncompliance does not, in itself, amount to IAC).
- Representation by attorney after resignation with State Bar charges pending. *People v Vigil* (2008) 169 CA4th 8, 86 CR3d 528 (error is reversible per se).
- Failure to tell defendant correct sentencing exposure. *In re Alvernaz* (1992) 2 C4th 924, 8 CR2d 713 (defendant rejected offer of 5 years because defense counsel said defendant could only serve maximum 8-year sentence; defendant found guilty and received greater sentence; while conviction not reversed because defendant received fair trial, writ of habeas corpus was subsequently granted in *Alvernaz v Ratelle* (SD Cal 1993) 831 F Supp 790). But see *Sophanthavong v Palmateer* (9th Cir 2004) 378 F3d 859, 868 ("mere inaccurate prediction" about applicability of sentencing statute that did not amount to "gross mischaracterization of the likely outcome" was not IAC).
- Failure to file opening brief within time allowed, resulting in dismissal of appeal. *In re Grunau* (2008) 169 CA4th 997, 1003, 86 CR3d 908.
- Failure to file a notice of appeal when one is requested by defendant. *Roe v Flores-Ortega* (2000) 528 US 470, 477, 145 L Ed 2d 985, 120 S Ct 1029; *U.S. v Sandoval-Lopez* (9th Cir 2005) 409 F3d 1193, 1197.

Ineffective counsel claims may be denied when the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence. *People v Bunyard* (1988) 45 C3d 1189, 1215, 249 CR 71.

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§2.22 X. DUTY TO MAINTAIN CLIENT'S CONFIDENCES AND SECRETS

Business and Professions Code §6068(e)(1) requires a California attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The principle of client confidence encompasses, but is broader than, the attorney-client privilege. LA County Bar Ass'n Formal Opinion No. 436 (1985).

The duty to maintain confidence and secrets attaches when an individual consults with the attorney, even when no legal representation results. *People v Gionis* (1995) 9 C4th 1196, 1208, 40 CR2d 456; California State Bar Formal Opinion No. 2003-161; LA County Bar Ass'n Formal Opinion No. 506 (2001). The same duty outlasts the attorney's employment. *People v Singh* (1932) 123 CA 365, 368, 11 P2d 73; LA County Bar Ass'n Formal Opinion No. 389 (1981).

An exception to the nondisclosure rule is that when a client challenges an attorney's effectiveness, the attorney may reveal client confidential information to the extent it is placed in issue by the client's claim of incompetence of counsel. *In re Gray* (1981) 123 CA3d 614, 176 CR 721.

Confidential communications between attorney and client as they relate to a completed crime may not be disclosed. *People v Singh, supra*. See California State Bar Formal Opinion No. 1986-89. Minimum disclosures of completed crimes may be allowed, however, as necessary, to protect an attorney from criminal liability based on client conduct. LA County Bar Ass'n Formal Opinion No. 329 (1972).

Business and Professions Code §6068(e)(2) and Cal Rules of Prof Cond 3-100 permit, but do not require, an attorney to disclose confidential information when the attorney reasonably believes disclosure is necessary to prevent a crime that the attorney reasonably believes is likely to result in death or substantial bodily harm to an individual.

If it is reasonable under the circumstances, before revealing confidential information, the attorney must try to persuade the client:

- Not to commit the crime; and/or
- To make an effort to prevent the threatened injury or death; and
- At "an appropriate time," tell the client of the attorney's ability or decision to reveal the information.

Cal Rules of Prof Cond 3-100(C). Disclosure should be limited to that which is necessary to prevent the criminal act. Cal Rules of Prof Cond 3-100(D). However, an attorney's decision not to reveal such information is not a violation of the rule. Cal Rules of Prof Cond 3-100(E). Information disclosed in these circumstances is not privileged. See Evid C §956.5.

Although no case has addressed a lawyer's civil liability for failure to warn potential victims, in *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 131 CR 14, the California Supreme Court held that, when a psychotherapist knows or reasonably should know that a patient presents a serious danger of violence to others, the therapist must use reasonable care to protect the intended victim by warnings or other appropriate conduct.

If the attorney does decide to disclose that the client intends to commit a future crime, counsel should not reveal the client's commission of past crimes or wrongdoing. See LA County Bar Ass'n Formal Opinion No. 414 (1983).

When defense counsel maintains that he or she must withdraw from representation because of a disabling conflict involving privileged communications, and once the trial court accepts that statement, it may neither deny the motion to withdraw nor condition withdrawal on divulgence of the facts underlying the conflict. *Aceves v Superior Court* (1996) 51 CA4th 584, 587, 596, 59 CR2d 280.

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§2.22A XI. DUTY TO RETAIN FORMER CLIENT'S FILES

"Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file. [Therefore] it is incumbent on the attorney in a criminal matter to obtain some specific written instruction from the client authorizing the destruction of the file. Absent such written instruction, the attorney should not undertake the destruction of client files on the attorney's initiative." LA County Bar Ass'n Formal Opinion No. 420 (1983). Client files in criminal cases should not be destroyed without the former client's express consent while the former client is alive. See California State Bar Formal Opinion No. 2001-157.

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XII. DUTY TO COMPLY AND TO ADVISE COMPLIANCE WITH LAW

§2.23 A. Assisting in Violation of Rules of Professional Conduct

An attorney cannot advise the violation of any law, rule, or ruling of a tribunal unless the attorney believes in good faith that the law, rule, or ruling is invalid. The attorney may, however, take appropriate good faith steps to test the validity of any law, rule, or ruling. Cal Rules of Prof Cond 3-210.

It is a separate violation of the Rules of Professional Conduct to knowingly assist in, solicit, or induce any violation of the California Rules of Professional Conduct or the State Bar Act (Bus & P C §§6000-6238). Cal Rules of Prof Cond 1-120.

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§2.24 B. Counseling Commission of Crime

An attorney must not counsel or assist a client in committing a crime or fraud. See Cal Rules of Prof Cond 3-210. Information exchanged between the attorney and client in furtherance of crime or fraud is not privileged. Evid C §956; see Evid C §956.5. Similarly, attorney work product undertaken in furtherance of a crime or fraud is subject to disclosure during an investigation into the criminal conduct of an attorney. CCP §2018.050.

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§2.25 C. Conditioning Return of Stolen Property on Agreement Not to Prosecute

Not only is it ethically improper, it is also a violation of law and against public policy to try to condition return of stolen property on the victim's agreement not to prosecute. California State Bar Formal Opinion No. 1986-89; *People v Pic'l* (1982) 31 C3d 731, 183 CR 685.

Ø **Note:** Penal Code §§1377-1379 do permit civil compromise of actions in certain circumstances when the provisions of those sections are followed by the parties and sanctioned by the court. See discussion in §§25.5-25.6.

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§2.26 D. Suppressing, Concealing, Destroying, or Removing Evidence

Destruction, alteration, or concealment of evidence may be a crime as well as the basis for attorney discipline. Pen C §§134-135; *Price v State Bar* (1982) 30 C3d 537, 179 CR 914. In addition, attorneys are prohibited from suppressing evidence that the attorney or client has a legal obligation to reveal or produce. Cal Rules of Prof Cond 5-220. Therefore, both prosecution and defense attorneys must comply with discovery requirements under Pen C §§1054-1054.10, and prosecutors must further comply with constitutionally mandated discovery. For discussion of discovery, see chap 11.

Neither the attorney-client privilege nor the duty to preserve a client's confidences and secrets authorizes an attorney to conceal physical evidence of a crime received from the client or from anyone else. *People v Meredith* (1981) 29 C3d 682, 175 CR 612; *People v Superior Court (Fairbank)* (1987) 192 CA3d 32, 237 CR 158; *People v Lee* (1970) 3 CA3d 514, 526, 83 CR 715. If an attorney or the attorney's agent comes into possession of, or removes or alters, physical evidence pertaining to a crime, the attorney must immediately inform the court if a case has been filed and, in any event, must provide the evidence to the prosecution. California State Bar Formal Opinion No. 1986-89; LA County Bar Ass'n Formal Opinion No. 466 (1993). In offering that evidence to a jury, the prosecution should present it in a manner that avoids revealing the content of attorney-client communications or the original source of the information. The prosecution may not reject a stipulation offered by the defense that simply informs the jury of the relevant location or condition of the evidence in question. *People v Meredith* (1981) 29 C3d 682, 695 n8, 175 CR 612.

When a client raises the possibility of defense counsel's taking possession of evidence, defense counsel should inform the client of the attorney's obligation to turn over the evidence to the prosecution once attorney possession is acquired. Defense counsel must question the consequences of taking possession of such evidence. California State Bar Formal Opinion No. 1984-76.

A defense attorney who merely observes physical evidence, without moving or altering it, is not compelled to disclose its existence. *People v Meredith* (1981) 29 C3d 682, 695, 175 CR 612.

> Ø **Note:** When an attorney inadvertently receives discovery materials from opposing counsel that are protected by either the attorney-client or work product privilege, the attorney should review the materials only to the extent needed to determine that they are privileged and then must notify the other party of the disclosure. *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 817, 68 CR3d 758. The parties can then agree how to resolve the issue or seek guidance from the court, including the issuance of a protective order.

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§2.27 E. Interfering With Witnesses; Paying Witnesses

Attorneys, as members of the general public, are prohibited by various statutes from interfering with victims and witnesses in criminal proceedings. It is a crime for anyone to attempt to prevent or dissuade a victim or witness from reporting a crime to law enforcement or from prosecuting the case. Pen C §136.1(b). It is a crime for anyone to knowingly and maliciously prevent or dissuade or to attempt to prevent or dissuade a witness or victim from testifying. Pen C §136.1(a). In addition, it is an ethical violation for an attorney directly or indirectly to cause a person to hide, or to leave the jurisdiction, in order to become unavailable as a witness. Cal Rules of Prof Cond 5-310(A). A prosecutor's substantial interference with a defense witness's choice to testify also may amount to a violation of the defendant's due process rights. See, *e.g., People v Bryant* (1984) 157 CA3d 582, 203 CR 733.

Attorneys are prohibited from paying or offering to pay witnesses contingent on the content of their testimony or the outcome of the case. Cal Rules of Prof Cond 5-310(B). An attorney may, however, pay a witness's expenses, may provide compensation for loss of time reasonably incurred in testifying, and may pay an expert witness fees for professional services.

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§2.28 F. Making False Representations and Presenting False Evidence in Court

It is unethical for an attorney to mislead or lie to the court. Bus & P C §6068(d); Cal Rules of Prof Cond 5-200(B); *Di Sabatino v State Bar* (1980) 27 C3d 159, 162 CR 458 (defense attorney disciplined for failing to disclose that he had made two previous unsuccessful bail motions in that case).

It is a felony to prepare a false or antedated book, paper, record, instrument in writing, or other matter with the intent that it will be introduced for a fraudulent or deceitful purpose at a trial, or at a legal proceeding or inquiry. Pen C §134. It is also a felony to knowingly offer in evidence as genuine or true a forged or fraudulently altered or antedated book, paper, document, record, or other writing. Pen C §132.

It is a misdemeanor to knowingly exhibit a false statement, representation, token, or writing to a witness or to a person about to be called as a witness with the intent of affecting the witness's testimony. Pen C §133. It is also a misdemeanor to practice any fraud or deceit with the intent of affecting a witness's testimony. Pen C §133.

Defense counsel should not volunteer information about a client's prior convictions to correct a trial judge's mistaken information about them. California State Bar Formal Opinion No. 1986-87. However, counsel cannot mislead the court by affirmative misrepresentation or silence that appears to be relied on by the court as an affirmation that there is no such record. California State Bar Formal Opinion No. 1986-87. See Bus & P C §6068(d); Cal Rules of Prof Cond 5-200(B). To avoid revealing priors disclosed by the client, which would violate the duty to preserve client confidences and secrets (Bus & P C §6068(e)), Formal Opinion No. 1986-87 recommends that counsel deflect the question to the prosecutor or inform the court that silence is not intended as an affirmation and it is not appropriate for the attorney to comment further.

Orange County Bar Ass'n Formal Opinion No. 94-003 discusses the ethical obligation of a prosecutor in a contested matter to apprise the court of factual information the prosecutor has that may be adverse to the position of his or her client, such as when a prosecutor fails to inform an administrative judge, in response to an inquiry, that the defendant is not present at a hearing because he is being arraigned on a related criminal charge.

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§2.29 XIII. ATTORNEYS WHO ARE UNABLE TO PROCEED

Attorneys may be ordered by the trial court to proceed in a case when they are unprepared. Defense counsel's first obligation is to the client. If counsel cannot provide effective assistance to the client because of inadequate preparation, counsel should answer "not ready for trial" and seek a continuance or move to withdraw from the case, depending on the circumstances. The trial court may then appoint another attorney. If the trial court will not permit a continuance or withdrawal, counsel must decide either to refuse to proceed, risking contempt and disciplinary proceedings, or to participate, depriving the defendant of effective assistance of counsel. See *In re Edward S.* (2009) 173 CA4th 387, 413, 92 CR3d 725 (public defender with an "excessive caseload" that undermines ability to adequately represent clients should move to withdraw from a number of cases so adequate representation can be provided); *Hughes v Superior Court* (1980) 106 CA3d 1, 4, 164 CR 721 (public defender held in contempt for refusing to go to trial because unprepared; appellate court granted public defender writ relief based on facts). When a trial court proceeds even after counsel has announced that he or she is unable to participate, a subsequent conviction may be reversed. *People v Locklar* (1978) 84 CA3d 224, 148 CR 322 (defendant's assigned public defender was ill, and trial court forced another public defender who knew nothing of case to participate in jury selection; that public defender sat silently through voir dire; conviction reversed). When it appears that the court will require counsel to proceed, it is important for subsequent appellate review to make as complete a record as possible of the factors relevant to the prejudice to the defendant in requiring counsel to proceed to trial.

Having sufficient time to prepare one's own case is best addressed when counsel appears in court and sets the case for pretrial hearings and trial. It is unethical for counsel to set a case for trial at a time that the attorney knows he or she will not be ready to proceed. See Bus & P C §6068(d). Adequate preparation is ethically required by Cal Rules of Prof Cond 3-110(A).

See §§19.21 on appointed counsel's obligation to be ready to proceed, 20.14-20.16 for additional discussion of the issue of unpreparedness, and 20.13 on the inability to appear.

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XIV. PERJURY BY CLIENT OR WITNESS

§2.30 A. Defendant's Perjury

A criminal defendant has a constitutional right to testify. See *Harris v New York* (1971) 401 US 222, 225, 28 L Ed 2d 1, 4, 91 S Ct 643. In addition, a criminal defendant has a constitutional right to effective representation by defense counsel (*Strickland v Washington* (1984) 466 US 668, 693, 80 L Ed 2d 674, 104 S Ct 2052), and counsel has a corresponding duty to provide zealous representation within the bounds of the law (*Hawk v Superior Court* (1974) 42 CA3d 108, 126, 116 CR 713). Criminal defense attorneys, like other lawyers, have an affirmative obligation to employ "those means only as are consistent with truth and never to seek to mislead the judge … by an artifice or false statement of fact or law." Bus & P C §6068(d); Cal Rules of Prof Cond 5-200(B). This obligation encompasses an ethical duty not to "cooperate with planned perjury." *Nix v Whiteside* (1986) 475 US 157, 173, 89 L Ed 2d 123, 138, 106 S Ct 988; see *People v Riel* (2000) 22 C4th 1153, 1217, 96 CR2d 1.

In criminal cases, there is an apparent conflict between these duties when the defendant proposes to exercise his or her right to testify and defense counsel knows that the testimony will be false. Although defense counsel is ethically barred from affirmatively assisting the client to present testimony the attorney knows to be false, absent an admission by the client of an intent to testify falsely, a defense attorney must protect a defendant's right to testify, and assist in the presentation of the defendant's testimony. See Orange County Bar Ass'n Formal Opinion No. 2003-01.

When an attorney *knows* that the client intends to commit perjury, counsel should advise the client that there is no right to commit perjury (*Nix v Whiteside* (1986) 475 US 157, 173, 89 L Ed 2d 123, 138, 106 S Ct 988) and that giving false testimony could subject the defendant to prosecution. See Pen C §118. Counsel should also explain that if the client insists on offering perjured testimony, counsel will not participate in the testimony and will not argue it to the court or to the jury. See *People v Guzman* (1988) 45 C3d 915, 941, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409.

If the client insists on testifying despite these advisements, it is appropriate for counsel to ask the court for permission to withdraw from the case. *People v Brown* (1988) 203 CA3d 1335, 1339, 250 CR 762. See Cal Rules of Prof Cond 3-700(C)(1). Counsel could truthfully describe the reason for the request as an irreconcilable conflict. There is no requirement in California for counsel to disclose the reason for the request to withdraw on the basis of privileged information. *Aceves v Superior Court* (1996) 51 CA4th 584, 59 CR2d 280. The prosecutor should be excluded from this proceeding. The trial court may properly grant or deny the motion to withdraw. *People v Brown, supra*. However, the court and counsel should be aware that allowing the attorney to withdraw may create more problems than it solves. See, *e.g*., *People v Bolton* (2008) 166 CA4th 343, 356, 82 CR3d 671 (permitting withdrawal 4 days before trial had to begin resulted in conflict between rights to speedy trial and effective assistance of counsel).

A defense attorney who is not permitted to withdraw may make a record, outside the jury's presence, that the defendant is taking the stand against counsel's advice and that the "free narrative" approach will be used during direct examination. *People v Guzman, supra*; *People v Bolton* (2008) 166 CA4th 343, 358, 82 CR3d 671; *People v Johnson* (1998) 62 CA4th 608, 72 CR2d 805. On direct examination, defense counsel should not ask the defendant any specific questions that might elicit perjury (*People v Guzman, supra*), which usually means that defense counsel asks defendant's name and other identifying information and then asks the defendant to give his or her testimony as a narrative statement. Defense counsel should omit from final argument any reference to the perjured testimony. *Guzman,* 45 C3d at 944 n8. This procedure has been held not to be a forced waiver of defendant's right to counsel, a denial of effective assistance of counsel, or a denial of the defendant's right to a fair trial. *Guzman,* 45 C3d at 941. See also *People v Jennings* (1999) 70 CA4th 899, 83 CR2d 33.

An attorney who learns that the client has committed perjury must keep that information confidential. LA County Bar Ass'n Formal Opinion Nos. 305 (1968), 386 (1980).

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§2.31 B. Witness's False Testimony

An attorney may not knowingly allow a witness to testify falsely. *In re Branch* (1969) 70 C2d 200, 210, 74 CR 238. See Bus & P C §6068(d). A defendant convicted on the basis of false testimony has been denied due process of law. *Napue v Illinois* (1959) 360 US 264, 269, 3 L Ed 2d 1217, 1221, 79 S Ct 1173.

Furthermore, when the state offers testimony in good faith that it later discovers to be false, it must disclose and *correct* the evidence. *Napue v Illinois, supra*. For example, in *U.S. v Alli* (9th Cir 2003) 344 F3d 1002, 1007, the Ninth Circuit held that the government had an independent obligation to immediately take steps to correct its witnesses' known misstatements. This obligation was incurred even though the government did not solicit the false testimony, which went only to the credibility of the witness. When the prosecution fails to correct testimony of a prosecution witness that it knows or should know is false and misleading, reversal is required if there is any reasonable likelihood the false testimony could have affected the judgment of the jury. See *People v Dickey* (2005) 35 C4th 884, 909, 28 CR3d 647.

Both prosecutors and defense attorneys should be careful when jailhouse informants are involved because of the likelihood of fabrication. See §17.14.

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XV. MATTERS CONCERNING JUDGES

§2.32 A. Improper Communications With Judges

It is improper for an attorney, in the absence of opposing counsel, to communicate directly or indirectly with a judge or judicial officer on the merits of a contested matter pending before that officer except with opposing counsel's consent. Cal Rules of Prof Cond 5-300(B). See *People v Hundal* (2008) 168 CA4th 965, 970, 86 CR3d 166 (prosecutor's note to judge regarding defense attorney's State Bar suspension was "technical violation" of Rule 5-300(B)). An exception is made for matters legally allowed to be handled ex parte. See Cal Rules of Prof Cond 5-300(B)(5); Code of Judicial Ethics, Canon 3B(7)(d). "Judicial officer" as used in Cal Rules of Prof Cond 5-300 includes law clerks, research attorneys, and other court personnel who participate in the decision-making process (Cal Rules of Prof Cond 5-300(C)).

Documents filed with the court must be provided to opposing counsel. Cal Rules of Prof Cond 5-300(B)(4); *Heavey v State Bar* (1976) 17 C3d 553, 558, 131 CR 406.

An attorney cannot communicate ex parte with a trial judge on the merits of a contested matter decided by the judge and on review to a higher court if the matter may come again before the same judge. California State Bar Formal Opinion No. 1984-78.

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§2.33 B. Gifts and Campaign Contributions to Judges

An attorney cannot give or lend anything of value to a judge, directly or indirectly, unless the personal or family relationship between the attorney and judge is such that gifts are customarily given and exchanged. Cal Rules of Prof Cond 5-300(A).

An attorney may contribute to a campaign fund for a judge running for election or re-election. The payment must be made to the judge's campaign committee and not to the judge personally. LA County Bar Ass'n Formal Opinion No. 387 (1981).

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§2.34 C. Comments Regarding Judges and Judicial Rulings

Although attorneys have a duty to treat courts and judicial officers with respect (Bus & P C §6068(b)), they do have the right to comment appropriately on judges and judicial rulings. See *Standing Comm. on Discipline v Yagman* (9th Cir 1995) 55 F3d 1430, 1438; San Diego Bar Ass'n Formal Opinion No. 1974-8.

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§2.35 XVI. IMPROPER CONTACTS WITH REPRESENTED PARTY

An attorney may not communicate directly or indirectly with a party whom the attorney knows to be represented by another lawyer about the subject of the representation without that other lawyer's consent. Cal Rules of Prof Cond 2-100. The "subject of the representation," "matter," and "party" are not limited to a litigation context. See Discussion to Rule 2-100.

There is authority that permits a prosecutor to contact, ex parte and without attorney consent, a represented suspect and speak about the subject of the representation during investigation and before case filing, but not thereafter. *U.S. v Powe* (9th Cir 1993) 9 F3d 68; *U.S. v Lopez* (9th Cir 1993) 4 F3d 1455, 1461 (beginning at latest on moment of indictment, prosecutor has duty under Rule 2-100 to refrain from communicating ex parte with represented defendant); 75 Ops Cal Atty Gen 223 (1992) (during investigative phase of criminal or civil law enforcement proceeding, before formal charges have been filed, Rule 2-100 does not prohibit prosecutor from communicating ex parte with person known to be represented concerning subject of representation). There is also authority that when, prior to filing, the prosecution and defense have taken "adversarial positions, ex parte contact with a knowingly represented client, absent the consent of the client's attorney, is not permitted." *U.S. v Talao* (9th Cir 2000) 222 F3d 1133, 1139.

Kain v Municipal Court (1982) 130 CA3d 499, 181 CR 751, states that victims of crime are not parties within the meaning of the predecessor to Rule 2-100 (former Rule 7-103), and that an attorney is not prevented from interviewing a victim ex parte. However, a victim may refuse an interview request by the defense and set reasonable conditions for any interview to which he or she consents. Cal Const art I, §28(b)(5). Concerning ex parte and unconsented-to contacts with current employees of a represented corporation or association, see *U.S. v Talao* (9th Cir 2000) 222 F3d 1133, 1138; *La Jolla Cove Motel & Hotel Apartments, Inc. v Superior Court* (2004) 121 CA4th 773, 776, 17 CR3d 467; *Snider v Superior Court* (2003) 113 CA4th 1187, 7 CR3d 119; *Truitt v Superior Court* (1997) 59 CA4th 1183, 69 CR2d 558; *Jorgensen v Taco Bell Corp.* (1996) 50 CA4th 1398, 58 CR2d 178. Rule 2-100 does not apply to former employees of a corporation or association. *Triple A Mach. Shop, Inc. v State* (1989) 213 CA3d 131, 261 CR 493.

The Review Department of the California State Bar Court has opined that a represented criminal defendant is not a "party" within the meaning of Rule 2-100 for purposes of an unconsented-to ex parte interview by an attorney representing a party in a distinct civil proceeding in which the criminal defendant is merely a witness. See *In re Dale* (2005) 4 Cal St Bar Ct Rptr 798, 2005 WL 1389226.

> Ø **Note:** Especially in light of *Dale,* it is advisable that an attorney representing a client suspected or charged with a crime instruct the client not to talk to anyone about his or her matter without the attorney's prior consent.

Witnesses. A party seeking to interview a witness disclosed by the opposing party must first identity himself or herself including "the full name of the agency by whom he or she is employed, and identifying whether he or she represents, or has been retained by, the prosecution or the defendant." If the interview is in person, the party must also show the witness a business card, official badge, or other form of official identification before beginning the interview. Pen C §1054.8.

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§2.36 XVII. IMPROPER CONTACTS WITH JURORS

An attorney connected with a case may not communicate directly or indirectly with jurors, potential jurors, or their family members while a case is pending except in the course of official proceedings before the judge and with opposing counsel present. Cal Rules of Prof Cond 5-320. During trial, no attorney, whether or not connected with the case, may communicate directly or indirectly with a juror or juror's family about the case. Cal Rules of Prof Cond 5-320(C), (F). An improper attempt to influence a juror with respect to a verdict is a felony. Pen C §95.

An attorney should make every effort to avoid contact with jurors outside of official proceedings. *In re Possino* (1984) 37 C3d 163, 170, 207 CR 543. An attorney who is approached by a juror should politely inform the juror that any conversation is improper. The attorney should then advise the court, with opposing counsel present, of the nature and extent of the juror's contact, thereby allaying any suggestion of improper conduct by the attorney.

An attorney should inform the client and, when necessary, the client's family, friends, and witnesses to stay away from jurors and prospective jurors, and to immediately report to the attorney any contact by a juror or prospective juror. All attorneys, whether or not involved in a case, must promptly reveal to the court improper conduct by a juror or member of the venire, or improper conduct of another toward a juror, member of the venire, or member of the juror's family. Cal Rules of Prof Cond 5-320(G).

It is improper for an attorney to communicate with a juror who has been removed from an impaneled jury, regardless of whether notice is given to other counsel, until the entire jury has been discharged from further service. Cal Rules of Prof Cond 5-320(I); California State Bar Formal Opinion No. 1988-100.

Once the entire jury has been discharged, communication with discharged jurors is permitted as long as the attorney does not intend to harass or embarrass the discharged jurors, or intend to influence their state of mind or actions regarding future jury service. Cal Rules of Prof Cond 5-320(D). An attorney may disclose to discharged jurors evidence that was excluded at trial as long as in doing so the attorney does not intend to harass, embarrass, or influence the discharged jurors in future jury service. California State Bar Formal Opinion No. 1987-95 (overruling California State Bar Formal Opinion No. 1976-39).

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§2.37 XVIII. PRETRIAL AND TRIAL PUBLICITY

An attorney may be subject to discipline for statements made by the attorney to the media. Cal Rules of Prof Cond 5-120. This rule prohibits extrajudicial statements a reasonable person would expect to be disseminated by means of public communication when the attorney knows or reasonably should know the statement will have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Cal Rules of Prof Cond 5-120(A).

Rule 5-120 provides for limited exceptions to this prohibition. See Cal Rules of Prof Cond 5-120(B)-(C).

The "substantial likelihood" test has been upheld against constitutional attack. *Gentile v State Bar* (1991) 501 US 1030, 115 L Ed 2d 888, 111 S Ct 2720. Rule 5-120 applies equally to prosecutors and criminal defense counsel. See Discussion to Cal Rules of Prof Cond 5-120.

The trial court has a duty to restrict prejudicial publicity. *Sheppard v Maxwell* (1966) 384 US 333, 361, 16 L Ed 2d 600, 86 S Ct 1507.

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§2.38 XIX. TRIAL CONDUCT

Attorneys should be respectful of the court. Bus & P C §6068(b). Attorneys may not seek to mislead a judge or jury by an artifice or a false statement of fact or law. Cal Rules of Prof Cond 5-200(B); Bus & P C §6068(d). Attorneys may not intentionally misquote to the court the language of a book, statute, or decision (Cal Rules of Prof Cond 5-200(C)), nor knowingly cite a case that has been overruled or a statute that has been repealed or declared unconstitutional (Cal Rules of Prof Cond 5-200(D)). An attorney may not assert personal knowledge of the facts at issue unless properly testifying as a witness. Cal Rules of Prof Cond 5-200(E).

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§2.39 XX. RESPONDING TO SUBPOENA OF CLIENT'S RECORDS

If counsel is served with a subpoena duces tecum for a client's records, counsel must assert both the attorney-client privilege and the duty of confidentiality. Evid C §§950-962 (attorney-client privilege); Bus & P C §6068(e) (ethical duty to maintain client's confidences and secrets). These objections are usually made through a motion to quash. On procedures for quashing subpoenas, see §§4.32-4.35.

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XXI. PROSECUTOR'S SPECIAL PROFESSIONAL RESPONSIBILITIES

§2.40 A. When Prosecutor Personally Believes Defendant to Be Innocent

A prosecutor should never file a criminal charge or prosecute a case when the prosecutor personally believes the defendant to be innocent. *Berger v U.S.* (1935) 295 US 78, 88, 79 L Ed 1314, 55 S Ct 629. Under such circumstances, the prosecution should be terminated or the matter reassigned to a prosecutor who believes that the defendant committed the charged criminal offense. See §2.41.

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§2.41 B. Duty When Charges Not Supported by Probable Cause

A prosecutor should not file criminal charges that are not supported by probable cause. Cal Rules of Prof Cond 5-110. If, after filing, the attorney responsible for prosecuting the charges personally comes to believe that the charges are not supported by probable cause, the attorney must personally inform the court in which the case is pending. Cal Rules of Prof Cond 5-110. If a prosecutor moves the court to dismiss a case because he or she personally believes there is insufficient probable cause to support the charges, accompanied by a full presentation of the reasons for making the motion, and the court denies the motion, the prosecutor may continue to prosecute the case. LA County Bar Ass'n Formal Opinion No. 429 (1984). It would be advisable, however, to immediately discuss the case with other members of the prosecution office, who could, if necessary, prosecute the case or otherwise provide assistance.

On limitations on the prosecution's charging discretion, see §7.14. On abuse of prosecutorial discretion (discriminatory prosecution) and retaliatory prosecution, see §§18.16-18.25, 18.32-18.37.

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§2.42 C. Threatening Criminal, Administrative, or Disciplinary Charges

An attorney cannot threaten to bring criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Cal Rules of Prof Cond 5-100. Rule 5-100 applies before and after the formal filing of a civil action. Cal Rules of Prof Cond 5-100(C). The Rule does not apply to an attorney's threat to initiate contempt proceedings against a party for failure to comply with a court order. See Discussion to Cal Rules of Prof Cond 5-100.

Rule 5-100 occurs in two contexts in criminal cases. First, some prosecution offices not only prosecute criminally but also file civil actions, *e.g.,* unfair competition under Bus & P C §§17200-17210. It is clearly improper to threaten criminal prosecution in an attempt to obtain a favorable civil settlement. San Francisco Bar Ass'n Formal Opinion No. 1975-6. However, California State Bar Formal Opinion No. 1991-124 provides that it is not ethically improper, in a private civil context, to send a letter stating that all available legal remedies will be pursued unless satisfactory settlement is promptly forthcoming. It therefore follows that a prospective litigant may be told of possible criminal and civil consequences of litigation as long as no threat of criminal prosecution is made to obtain an advantage in the civil matter. Nothing prevents the governmental agency from proceeding both criminally and civilly against a named defendant.

The second context involving Rule 5-100 occurs when a police agency requests a prosecutor to plea bargain or dismiss a criminal prosecution conditioned on a release from civil liability whereby the defendant is required to stipulate that there was probable cause for his or her arrest, thus attempting to release the police agency from potential civil liability. California State Bar Formal Opinion No. 1989-106 states that this practice is unethical. Also, because the prosecutor does not represent the police agency, any such negotiations involving police civil liability are best left to the agency's legal representative.

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§2.43 D. Duty to Disclose Exculpatory Evidence

The prosecutor must disclose to the defense exculpatory evidence even without a request. *Brady v Maryland* (1963) 373 US 83, 87, 10 L Ed 2d 215, 219, 83 S Ct 1194. See also *U.S. v Bagley* (1985) 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375; *U.S. v Agurs* (1976) 427 US 97, 107, 49 L Ed 2d 342, 352, 96 S Ct 2392; *Giglio v U.S.* (1972) 405 US 150, 154, 31 L Ed 2d 104, 108, 92 S Ct 763. The duty to disclose evidence favorable to the accused extends to evidence that may reflect on the credibility of a material witness. *People v Ruthford* (1975) 14 C3d 399, 406, 121 CR 261, overruled on other grounds in *In re Sassounian* (1995) 9 C4th 535, 545, 37 CR2d 446. The prosecution's duty of disclosure extends to all material evidence or material information that is favorable to the accused, and is in the possession of the prosecutor, investigating law enforcement agency, or other governmental agency that is part of the "prosecution team." *In re Brown* (1998) 17 C4th 873, 879, 72 CR2d 698; *Strickler v Greene* (1999) 527 US 263, 144 L Ed 2d 286, 119 S Ct 1936; *Kyles v Whitley* (1995) 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555. See also Pen C §1054.1. For example, information regarding jailhouse informants must be shared among prosecutors in the same office. *Giglio v U.S.* (1972) 405 US 150, 154, 31 L Ed 2d 104, 109, 92 S Ct 763.

For discussion of discovery obligations, see chap 11.

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§2.43A E. Tampering With Official Jury Lists

A prosecutor may not tamper with official jury lists. In *Noland v State Bar* (1965) 63 C2d 298, 46 CR 305, a prosecutor was suspended from practice for 30 days for counseling and aiding in the unauthorized removal of names of prospective jurors from an official jury list.

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§2.44 F. Informing Crime Victims of Possible Civil Remedies

A prosecutor may properly inform a crime victim of civil remedies available against a criminal defendant, even without being consulted about the possibility of civil action, unless the prosecutor's motivation is a desire for publicity or an intent to harass or injure the defendant. California State Bar Formal Opinion No. 1976-40.

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Source: Criminal Law/California Criminal Law Procedure and Practice/2 PROFESSIONAL RESPONSIBILITY/§2.45 G. Checklist: Prosecutorial Misconduct

§2.45 G. Checklist: Prosecutorial Misconduct

Issues that may constitute prosecutorial misconduct include:

Before Trial

- Discriminatory prosecution. See §§18.16-18.25.
- Vindictive or retaliatory prosecution. See §§18.32-18.37.
- Interference with attorney-client relationship. *Boulas v Superior Court* (1986) 188 CA3d 422, 429, 233 CR 487.
- Misconduct during grand jury proceedings. See §9.11.
- Denial of discovery of material that is legally required to be disclosed. See chap 11.
- Failure to make good faith effort to keep contact with informer who is material witness. See §17.18.
- Prejudicial statements to the press. See §§2.37, 14.6.
- Breach of plea bargain. See §26.50.
- Unauthorized ex parte communications with judge. See §2.32.

During Trial

- Intentional use of false testimony. See §§2.30-2.31.
- Reference to facts not in record. *People v Bolton* (1979) 23 C3d 208, 212, 152 CR 141; *In re Brian J.* (2007) 150 CA4th 97, 123, 58 CR3d 246.
- Eliciting or attempting to elicit inadmissible evidence in defiance of a court order. *People v Wallace* (2008) 44 C4th 1032, 1070, 81 CR3d 651; *People v Crew* (2003) 31 C4th 822, 839, 3 CR3d 733.
- Offer of inadmissible evidence. *People v Hudson* (1981) 126 CA3d 733, 742, 179 CR 95.
- Failure to correct false testimony of prosecution witness. *Jackson v Brown* (9th Cir 2008) 513 F3d 1057, 1074.
- Comment on defendant's silence after he or she was given *Miranda* warnings. *Doyle v Ohio* (1976) 426 US 610, 618, 49 L Ed 2d 91, 96 S Ct 2240.
- Comment on defendant's refusal to participate in police interview. *People v Waldie* (2009) 173 CA4th 358, 366, 92 CR3d 688.
- Comment on defendant's failure to testify at trial. *Griffin v California* (1965) 380 US 609, 613, 14 L Ed 2d 106, 85 S Ct 1229.
- Improper cross-examination of defendant. *People v Zambrano* (2004) 124 CA4th 228, 241, 21 CR3d 160 (prosecutor's questions to defendant whether police officers were lying constituted prosecutorial misconduct). But see *People v Tafoya* (2007) 42 C4th 147, 177, 64 CR3d 163 (examining when prosecutor may ask defendant "were they lying" questions).
- Stating personal opinion. *People v Kirkes* (1952) 39 C2d 719, 723, 249 P2d 1; *In re Brian J.* (2007) 150 CA4th 97, 123, 58 CR3d 246.
- Appeals to passion or prejudice. *People v Criscione* (1981) 125 CA3d 275, 292, 177 CR 899; *People v Zurinaga* (2007) 148 CA4th 1248, 1258, 56 CR3d 411 (prosecutor compared defendants' crime to terrorist attacks on 9/11). See also *U.S. v Nobari* (9th Cir 2009) 574 F3d 1065, 1074 (prosecutor made ethnic generalizations that encouraged jury to convict defendants on basis of their ethnicity).
- Unauthorized ex parte communication with represented defendant in a filed case, or improper communication with judge or jurors. See §§2.32, 2.35-2.36.
- Vouching for the credibility of a witness or otherwise bolstering the witness's credibility by referring to evidence outside the record. *People v Alvarado* (2006) 141 CA4th 1577, 1584, 47 CR3d 289. But see *People v Bonilla* (2007) 41 C4th 313, 337, 60 CR3d 209 (prosecutor has wide latitude to give assurances regarding

honesty or reliability of prosecution witnesses as long as those assurances are based on facts in record and inferences reasonably drawn from them).

- Coercion of a defense witness or undue interference in a defense witness's decision to testify. See *People v Bryant* (1984) 157 CA3d 582, 590, 203 CR 733.
- Attacking the integrity of defense counsel or casting aspersions on defense counsel. See *People v Hill* (1998) 17 C4th 800, 832, 72 CR2d 656.
- Arguing that defense counsel had an "obligation" to present evidence. *People v Woods* (2006) 146 CA4th 106, 113, 53 CR3d 7.
- Misstating the law. *People v Katzenberger* (2009) 178 CA4th 1260, 1266, 101 CR3d 122 (prosecutor's PowerPoint presentation misrepresented "beyond a reasonable doubt" standard).

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3

RIGHT TO COUNSEL; THE ATTORNEY-CLIENT RELATIONSHIP

C. BRADLEY PATTON

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§3.1 I. OVERVIEW

Right to counsel. A criminal defendant is entitled to counsel at all crucial stages of the proceeding. US Const amend VI; Cal Const art I, §15. See also Pen C §§686, 859, 987; *Gideon v Wainwright* (1963) 372 US 335, 9 L Ed 2d 799, 83 S Ct 792. The defendant, however, has only a limited right to have counsel of his or her choice appointed. *Harris v Superior Court* (1977) 19 C3d 786, 140 CR 318. The right to appointed counsel includes the right to have ancillary defense services paid for at public expense. *Corenevsky v Superior Court* (1984) 36 C3d 307, 319, 204 CR 165. See Pen C §987.9 (funds for ancillary services in capital cases). A defendant may choose to waive the right to be represented by counsel and to represent himself or herself as long as the waiver is timely and is knowingly and intelligently made. *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525. Representation by certified law students does not infringe on the right to counsel. *People v Perez* (1979) 24 C3d 133, 139, 155 CR 176.

Beginning the relationship. The first step in forming the attorney-client relationship is usually the client interview. The interview serves to acquaint the attorney with the circumstances of the case and to inform the client of the scope of the representation, explain the legal proceeding, and set the fee. Fees for retained counsel are usually set on a case-by-case basis rather than at an hourly rate, and are paid in advance. Procedures for setting and collecting fees for *appointed* counsel vary depending on the county and court in which the work is performed. The attorney should accept the employment, whether retained or appointed, only after determining that he or she is competent to handle the case and that no conflicts of interest exist. See §§2.8-2.16. When the attorney and client have agreed on the terms of employment in a retained case, the agreement should be confirmed by a signed retainer agreement. The attorney becomes attorney of record by filing a pleading or appearing in court on the client's behalf. Once counsel has become attorney of record, legal steps in the proceeding, and particularly tactical decisions, are typically controlled by the attorney. *People v Williams* (1970) 2 C3d 894, 905, 88 CR 208. The defendant, however, retains the right to decide certain issues affecting his or her fundamental rights. *People v Robles* (1970) 2 C3d 205, 214, 85 CR 166. See §3.23 on which rights the defendant retains and which are under the attorney's control.

In felony cases, judges may appoint lawyers for indigent defendants only if those lawyers represent on the record that they will be ready to proceed with the preliminary hearing or trial as prescribed in the Penal Code. Pen C §987.05.

Discharge, substitution, and withdrawal of counsel. The procedure for discharge, substitution, and withdrawal of retained counsel in criminal proceedings is the same as that in civil proceedings. *People v Bouchard* (1957) 49 C2d 438, 317 P2d 971. See CCP §§284-285, 286 (substitution, etc. in civil proceedings). A change of attorney can be accomplished by filing with the court, or entering in the minutes, the consent of both the client and the attorney to the change or, if the attorney and client do not both consent, by court order, on the application of either the client or the attorney. CCP §284. If the defendant refuses to consent to a substitution of counsel, counsel who wishes to withdraw must move for an order allowing withdrawal, citing one of the grounds for withdrawal in Cal Rules of Prof Cond 3-700. Defendants represented by appointed counsel may not discharge counsel but may ask the court to remove the attorney and appoint new counsel when the defendant's right to effective representation is jeopardized by the existing representation. *People v Marsden* (1970) 2 C3d 118, 123, 84 CR 156. The trial judge may not summarily deny a *Marsden* motion but must conduct an inquiry into the circumstances underlying the request. 2 C3d at 124. Although removal of counsel is generally initiated by the defendant or existing counsel, the court may, under severely restricted circumstances, dismiss counsel on its own. *People v McKenzie* (1983) 34 C3d 616, 630, 194 CR 462.

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Source: Criminal Law/California Criminal Law Procedure and Practice/3 RIGHT TO COUNSEL; THE ATTORNEY-CLIENT RELATIONSHIP/ II. RIGHT TO COUNSEL/§3.2 A. When Right Applies

II. RIGHT TO COUNSEL

§3.2 A. When Right Applies

A criminal defendant is entitled to counsel at all critical stages of a proceeding when his or her substantial rights may be affected. *Mempa v Rhay* (1967) 389 US 128, 134, 19 L Ed 2d 336, 340, 88 S Ct 254. See US Const amend VI; Cal Const art I, §15. See also Pen C §686. Critical stages of a criminal proceeding include the evidentiary part of trial and these other stages:

- Interrogation before initiation of formal proceedings (*Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602);
- Lineup that is compulsory and conducted by the police (*U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926; *Gilbert v California* (1967) 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951 (lineup held after formal charge or indictment); *People v Bustamante* (1981) 30 C3d 88, 177 CR 576 (lineup held before initiation of formal proceeding));
- Preliminary hearing (*Coleman v Alabama* (1970) 399 US 1, 7, 26 L Ed 2d 387, 395, 90 S Ct 1999);
- Instructions (*People v Dagnino* (1978) 80 CA3d 981, 987, 146 CR 129);
- Exhibits requested by jurors during deliberations (*People v Price* (1991) 1 C4th 324, 414, 3 CR2d 106);
- Sentencing (*Mempa v Rhay* (1967) 389 US 128, 134, 19 L Ed 2d 336, 340, 88 S Ct 254);
- Probation (Pen C §1203.3(c); see *Gagnon v Scarpelli* (1973) 411 US 778, 790, 36 L Ed 2d 656, 666, 93 S Ct 1756), and some parole revocation proceedings (*In re Love* (1974) 11 C3d 179, 182, 113 CR 89); and
- Appeal, at least to the first appellate level in felony cases (*Douglas v California* (1963) 372 US 353, 9 L Ed 2d 811, 83 S Ct 814) and in misdemeanor cases in which the defendant who was represented by appointed counsel in the trial court or establishes indigency is subject to incarceration or a fine of more than $500 or is likely to suffer adverse collateral consequences as a result of conviction (Cal Rules of Ct 8.851(a)(1)).

Before arraigning a defendant who appears without counsel, the court must advise the defendant that he or she has the right to be represented by retained counsel or to have counsel appointed if the defendant is indigent. Pen C §§859, 987. A defendant's right to counsel also applies to misdemeanor offenses even when the court imposes only a suspended jail sentence. *Alabama v Shelton* (2002) 535 US 654, 152 L Ed 2d 888, 122 S Ct 1764.

Ø **Note:** A defendant can lose the right to counsel through serious misconduct, such as violence and threats of violence toward a succession of appointed counsel. See, *e.g., King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585; *U.S. v Sutcliffe* (9th Cir 2007) 505 F3d 944.

When right does not apply. There is no right to counsel in the following situations:

- Filing of a complaint by a police investigator for an arrest warrant (see *Anderson v Alameida* (9th Cir 2005) 397 F3d 1175, 1180);
- Commencement of extradition proceedings (*People v Wheelock* (2004) 117 CA4th 561, 569, 11 CR3d 796);
- State habeas proceedings (*In re Barnett* (2003) 31 C4th 466, 474, 3 CR3d 108); and
- Federal habeas proceedings (*Miranda v Castro* (9th Cir 2002) 292 F3d 1063, 1068; *Miller v Keeney* (9th Cir 1989) 882 F2d 1428, 1432) and other postconviction collateral attacks on a federal conviction such as a motion for a new trial (*U.S. v Harrington* (9th Cir 2005) 410 F3d 598).

Right to counsel is case-specific. The right to counsel is case-specific and attaches for the prosecution of particular alleged acts or events arising out of the same act or transaction. *Texas v Cobb* (2001) 532 US 162, 173, 149 L Ed 2d 321, 121 S Ct 1335; *People v DePriest* (2007) 42 C4th 1, 33, 63 CR3d 896. See, *e.g., Anderson v Alameida* (9th Cir 2005) 397 F3d 1175 (New Hampshire counsel appointed to represent defendant in extradition hearing played no legal role to invoke or attach Sixth Amendment right to counsel concerning California charges).

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B. Right of Indigent Defendants to Have Counsel Appointed

§3.3 1. Generally

An indigent defendant has a right to have counsel appointed at public expense when a felony or a misdemeanor is charged. *Tracy v Municipal Court* (1978) 22 C3d 760, 766, 150 CR 785; *Mills v Municipal Court* (1973) 10 C3d 288, 301, 110 CR 329. See also Pen C §§859, 987. A defendant charged with an infraction is not entitled to appointed counsel unless he or she is arrested and not released on a written promise to appear, on his or her own recognizance or on bail. Pen C §19.6. A juvenile charged with a misdemeanor who elects to proceed informally before a traffic hearing officer has a right to appointed counsel, even though the offense cannot be punished by confinement. *In re Kevin G.* (1985) 40 C3d 644, 221 CR 146.

In all cases in which the court determines that the defendant is entitled to appointed counsel, the court must first attempt to appoint the public defender and may appoint private counsel only if no public defender is available or the public defender is unable to represent the defendant because of a conflict of interest. Pen C §987.2(a); Govt C §27706; *People v Hall* (1978) 87 CA3d 125, 133, 150 CR 628. See also *Charlton v Superior Court* (1979) 93 CA3d 858, 863, 156 CR 107.

The court in which the proceeding is pending has jurisdiction to determine whether a defendant is entitled to appointed counsel. Pen C §987; *In re Smiley* (1967) 66 C2d 606, 620, 58 CR 579. The determination of indigency must be made on the basis of as complete a financial picture as is feasible to obtain. 66 C2d at 619. Factors the court may consider in determining indigency include the defendant's assets, the nature and extent of debts, encumbrances on property, the number and ages of dependents, and obligations to pay spousal and child support. 66 C2d at 619. The court may require the defendant to file a financial statement. Pen C §987(c); Govt C §27707. See §20.7 for discussion of disclosure and use of the defendant's financial statement, whether given to the court or to the public defender.

Although the trial court is charged with the responsibility for determining indigency, the public defender's office usually makes that determination. Govt C §27707. Once the public defender determines that a defendant is entitled to representation at public expense and is appointed by the court to represent the defendant, the public defender's office must continue to provide legal representation until a contrary determination is made. Govt C §27707.

> Ø **Note:** Financial statements are not usually required by the court when the defendant has been accepted for representation by the public defender's office.

Once the court has determined that a defendant is indigent and has appointed counsel to represent the defendant, the court cannot redetermine eligibility and discharge appointed counsel. *Roswall v Municipal Court* (1979) 89 CA3d 467, 475, 152 CR 337. However, the court may reevaluate the defendant's present ability to pay after the criminal proceeding has concluded and may then require the defendant to pay all or a portion of the cost of legal representation. Pen C §987.8(b)-(c). See Pen C §987.8 generally for a detailed description of hearing requirements for determination of the present ability to pay costs of representation. The court may also hold a hearing after counsel has been appointed and before the case is concluded to determine whether the defendant owns any real property or other assets that may be attached. Pen C §987.8(a).

See discussion of the right to counsel at the preliminary hearing in §8.7.

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§3.4 2. Right to Select Appointed Counsel

The defendant's personal preference for a particular attorney must be considered by the court but is not a determinative factor requiring the appointment of that attorney. *People v Chavez* (1980) 26 C3d 334, 347, 161 CR 762; *Drumgo v Superior Court* (1973) 8 C3d 930, 106 CR 631.

Ø **Note:** Indigent defendants do not have a federal constitutional right to be represented by their counsel of choice. *Caplin & Drysdale, Chartered v U.S.* (1989) 491 US 617, 624, 105 L Ed 2d 528, 540, 109 S Ct 2646; *Gonzalez v Knowles* (9th Cir 2008) 515 F3d 1006, 1012.

It is an abuse of discretion, however, for the court to deny a motion to appoint particular counsel when the defendant's preference is timely made and based on a relationship of trust derived from prior representation in related cases, and when no countervailing considerations have comparable weight. *People v Cole* (2004) 33 C4th 1158, 1179, 17 CR3d 532 (court not required to appoint private attorney who had earlier represented defendant while he was employed by Alternate Defense Counsel, because criteria not met); *People v Daniels* (1991) 52 C3d 815, 844, 277 CR 122 (court not required to appoint private attorney who had represented defendant in earlier case, because criteria not met); *Harris v Superior Court* (1977) 19 C3d 786, 799, 140 CR 318 (attorneys of defendants' choice ordered appointed because they met these criteria). See also *People v Chavez* (1980) 26 C3d 334, 161 CR 762 (supreme court disapproved trial court policy requiring appointment of new counsel in superior court even though other counsel had been appointed and had begun representing defendant in municipal court).

When an indigent defendant has counsel appointed in one county, that same lawyer may be appointed to represent the defendant concerning offenses in other counties. Pen C §987.2(e).

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§3.5 3. Appointment of Co-Counsel in Capital Cases

The trial court may appoint co-counsel in a capital case if the appointment is necessary to provide the defendant with effective representation. Pen C §987(d). See also *Keenan v Superior Court* (1982) 31 C3d 424, 180 CR 489 (recognizing conditional right to co-counsel in pre-Pen C §987(d) capital cases). Co-counsel, however, is not always required. *People v Wright* (1990) 52 C3d 367, 411, 276 CR 731. The right to co-counsel at public expense does not extend to noncapital homicide cases. *Sand v Superior Court* (1983) 34 C3d 567, 572, 194 CR 480.

A request for appointment of co-counsel is made by defendant's first-appointed counsel by filing a detailed confidential affidavit showing the reasons co-counsel is needed. Pen C §987(d). Although §987(d) does not specify facts that will support a request for co-counsel, the *Keenan* court considered these factors important:

- Complexity of legal and factual issues;
- Number of witnesses;
- Need for scientific and psychiatric testimony;
- Need for pretrial motions;
- Possibility of pretrial appellate review; and
- Lack of time between appointment of first counsel and trial date.

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§3.6 4. Payment for Ancillary Defense Services

The constitutional right to effective representation includes the right to have "reasonably necessary ancillary defense services" paid for at public expense. *Corenevsky v Superior Court* (1984) 36 C3d 307, 319, 204 CR 165. Statutes providing authority for requesting public funds for ancillary defense services include Pen C §987.9 (state funds for ancillary services in capital case (see §54.11)), Pen C §987.8(g)(1) (legal representation includes ancillary services), and Evid C §730 (payment of court-appointed experts at county expense).

There is generally no right to have a particular expert appointed. *Ake v Oklahoma* (1985) 470 US 68, 77, 84 L Ed 2d 53, 62, 105 S Ct 1087. An indigent defendant is not entitled to "all the assistance that his wealthier counterpart might buy." *Ake v Oklahoma, supra*.

The test of indigency for the purpose of funding ancillary services is whether the defendant is financially able to pay for these services. *Anderson v Justice Court* (1979) 99 CA3d 398, 403, 160 CR 274. A defendant who is otherwise eligible for ancillary fees does not lose that right simply because someone else (for example, a family member) retains counsel for him or her. *Tran v Superior Court* (2001) 92 CA4th 1149, 112 CR2d 506. Thus, ancillary services may be publicly funded even though the defendant has retained counsel. *Anderson v Justice Court, supra*.

Fee requests in capital cases cannot be heard by the trial judge. Pen C §987.9; *People v Anderson* (1987) 43 C3d 1104, 240 CR 585. Check local court rules and practices to learn to which judge or department the application is to be presented.

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Source: Criminal Law/California Criminal Law Procedure and Practice/3 RIGHT TO COUNSEL; THE ATTORNEY-CLIENT RELATIONSHIP/ C. Defendant's Right to Represent Self/§3.7 1. When Self-Representation Permitted; Termination of Self-Representation; Court Obligation

C. Defendant's Right to Represent Self

§3.7 1. When Self-Representation Permitted; Termination of Self-Representation; Court Obligation

A defendant has the right, under the Sixth and Fourteenth Amendments to the U.S. Constitution, to waive counsel and represent himself or herself. *Faretta v California* (1975) 422 US 806, 835, 45 L Ed 2d 562, 581, 95 S Ct 2525. As with other waivers of constitutional rights, the waiver of counsel must be knowing, intelligent, and voluntary. *Iowa v Tovar* (2004) 541 US 77, 81, 158 L Ed 2d 209, 216, 124 S Ct 1379. The Sixth Amendment does not, however, require the trial court to advise the defendant of specific dangers that may flow from self-representation. *Iowa v Tovar, supra*.

The trial court can deny a request for self-representation when the defendant is unable or unwilling "to abide by rules of procedure and courtroom protocol." *McKaskle v Wiggins* (1984) 465 US 168, 173, 79 L Ed 2d 122, 130, 104 S Ct 944; *People v Watts* (2009) 173 CA4th 621, 629, 92 CR3d 806. Self-representation can also be denied if the defendant cannot coherently communicate. *People v Watkins* (1992) 6 CA4th 595, 8 CR2d 5 (defendant had severe speech impediment; request for self-representation properly denied). Lack of fluency in the English language, however, is not a sufficient basis for denying self-representation; the remedy is to appoint an interpreter. *People v Poplawski* (1994) 25 CA4th 881, 891 n1, 30 CR2d 760. Further, a timely motion for self-representation cannot be denied on the ground that the defendant poses a security risk or is motivated by the desire to gain special privileges. *People v Superior Court (George)* (1994) 24 CA4th 350, 354, 29 CR2d 305. See *Sandoval v Calderon* (9th Cir 2000) 241 F3d 765, 774 (no error when court accepts defendant's trade of library privileges in lieu of self-representation).

A defendant's request to represent himself or herself must be made in a timely fashion. *People v Rivers* (1993) 20 CA4th 1040, 25 CR2d 602 (court properly denied represented defendant's motion to proceed in propria persona made after verdict but before prior was adjudicated). See §3.9. The defendant must make the request unequivocally. A request may be denied if it is "equivocal," *i.e.,* is insincere or made in an emotional outburst. *People v Marshall* (1997) 15 C4th 1, 21, 61 CR2d 84; *People v Tena* (2007) 156 CA4th 598, 607, 67 CR3d 412 (defendant sought attorney amenable to his defense strategy, rather than self-representation). After a request is denied, a waiver of the request may be found if it reasonably appears that the defendant abandoned the request. *People v Dunkle* (2005) 36 C4th 861, 907, 32 CR3d 23, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Tena* (2007) 156 CA4th 598, 67 CR3d 412.

A defendant who waives counsel and chooses self-representation cannot later appeal the result on the ground of ineffective assistance of counsel. *Faretta v California, supra*. When a self-represented defendant testifies, the trial court is not obligated to advise the defendant about the privilege against compelled self-incrimination. *People v Barnum* (2003) 29 C4th 1210, 131 CR2d 499.

The right of self-representation applies to both the guilt phase of capital cases (*People v Teron* (1979) 23 C3d 103, 113, 151 CR 633) and the penalty phase (*People v Clark* (1990) 50 C3d 583, 618, 268 CR 399). *Teron* and *Clark* apparently, though not expressly, overrule Pen C §§859 and 987, which require appointment of counsel in capital cases. However, a defendant may not plead guilty to a felony for which the maximum penalty is death or life imprisonment without parole without the appearance and consent of counsel. Pen C §1018; *People v Chadd* (1981) 28 C3d 739, 746, 170 CR 798.

It has been suggested, but not authoritatively decided, that an incarcerated defendant's right to self-representation includes access to a law library, telephone, and legal runners. See *Wilson v Superior Court* (1978) 21 C3d 816, 821, 148 CR 30. Once a defendant has been granted these privileges, he or she is deprived of due process if the privileges are later taken away without procedural safeguards, including notice and hearing. 21 C3d at 825 (describing exact safeguards that must be provided).

Once self-representation has been deemed appropriate, the court may not ordinarily terminate self-representation and impose counsel on the defendant. See *People v Wilks* (1978) 21 C3d 460, 468, 146 CR 364. The court may, however, suspend self-representation if the defendant's in-court conduct is disruptive to the process of justice. See

Faretta v California (1975) 422 US 806, 834 n46, 45 L Ed 2d 562, 581 n46, 95 S Ct 2525. A trial court may also terminate or revoke a criminal defendant's right of self-representation for *out-of-court* misconduct that seriously threatens the core integrity of the trial. See *People v Carson* (2005) 35 C4th 1, 23 CR3d 482.

Ø **Note:** With out-of-court misconduct, the trial court must create an appropriate record that documents its decision to terminate self-representation with evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatened the core integrity of the trial. The record may be created through a hearing or through written memorandums accompanied by evidentiary support. See *People v Carson* (2005) 35 C4th 1, 11, 23 CR3d 482.

A defendant who has been found competent to stand trial may not be competent to conduct the trial proceedings by himself or herself and may be denied the right to self-representation. *Indiana v Edwards* (2008) ___ US ___, 171 L Ed 2d 345, 357, 128 S Ct 2379. Likewise, a defendant may be denied the right to self-representation if his or her mental competence comes into question. *People v Burnett* (1987) 188 CA3d 1314, 234 CR 67; *People v Powell* (1986) 180 CA3d 469, 225 CR 703. Denial of a defendant's right to self-representation, however, is not required solely because a defendant has a history of mental illness. *People v Clark* (1990) 50 C3d 583, 618, 268 CR 399 (all mental health experts who examined defendant said he was competent). A defendant's competence to waive the right to counsel is not measured by a standard higher than or different from the standard for competence to stand trial. *Godinez v Moran* (1993) 509 US 389, 400, 125 L Ed 2d 321, 333, 113 S Ct 2680; *People v Welch* (1999) 20 C4th 701, 740, 85 CR2d 203.

When a defendant who has chosen to waive counsel and represent himself or herself chooses to terminate self-representation and makes a request for counsel, the court should ordinarily appoint counsel (or permit defendant to retain counsel) and grant a continuance to allow adequate time for the new attorney to prepare the defense. *People v McKenzie* (1983) 34 C3d 616, 629, 194 CR 462. See also *People v Lawrence* (2009) 46 C4th 186, 194, 92 CR3d 613 (trial court did not abuse discretion in denying defendant's midtrial request to revoke *Faretta* waiver); *People v Gallego* (1990) 52 C3d 115, 163, 276 CR 679 (discussion of factors to consider when defendant makes midtrial request to terminate self-representation); *People v Boulware* (1993) 20 CA4th 1753, 25 CR2d 381 (magistrate properly denied pro per defendant's motion for counsel made on day preliminary hearing to begin).

Ø **Note:** Defense counsel should refrain from formally opposing a client's motion for self-representation. *People v Kirkpatrick* (1994) 7 C4th 988, 30 CR2d 818.

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§3.8 2. Inquiry Required Before Ruling on Motion; Second Inquiry Required After Preliminary Hearing

The only relevant inquiry into a defendant's request for self-representation is whether the defendant has the mental capacity to make a knowing and intelligent waiver. The court cannot inquire into the defendant's technical knowledge of the law or ability to litigate a case. *Faretta v California* (1975) 422 US 806, 835, 45 L Ed 2d 562, 581, 95 S Ct 2525; *People v Nauton* (1994) 29 CA4th 976, 34 CR2d 861. Only the defendant's present mental capacity is germane; even a history of serious mental illness does not necessarily constitute substantial evidence of incompetence that would require a court to declare a doubt concerning a defendant's competence and to conduct a hearing on that issue. *People v Blair* (2005) 36 C4th 686, 714, 31 CR3d 485.

In making its inquiry, the court should inquire into the defendant's capacity to make intelligent decisions and admonish the defendant about the dangers and disadvantages of self-representation. *Faretta v California, supra*. No particular form of words is required: "the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." *People v Koontz* (2002) 27 C4th 1041, 1070, 119 CR2d 859. See, *e.g., People v Burgener* (2009) 46 C4th 231, 240, 92 CR3d 883; *People v Blair* (2005) 36 C4th 686, 707, 31 CR3d 485.

One court suggested the following areas of inquiry (*People v Lopez* (1977) 71 CA3d 568, 573, 138 CR 36):

- The defendant's education and familiarity with legal procedures;
- The defendant's mental capacity (if it appears questionable, the court should order a psychiatric examination);
- The defendant's awareness of the availability of counsel at no cost to himself or herself;
- The defendant's awareness of the nature of the proceedings and the possible outcome; and
- The defendant's awareness that the right to self-representation may be terminated for misbehavior or disruption of trial.

The *Lopez* court also recommended that the defendant who professes to want to represent himself or herself be told of some of the problems he or she may confront (71 CA3d at 572):

- Self-representation is almost always unwise; the defendant may conduct the defense to his or her own detriment.
- The defendant will have to abide by the same rules as lawyers and will receive no help from the judge.
- The prosecution will be represented by experienced, professional counsel who will have the advantage of skill, training, and ability.
- The defendant will have no special library privileges nor a staff of investigators.

Ø **Note:** The California Supreme Court has specifically rejected the contention that detailed advisements on the dangers of self-representation are required. *People v Blair* (2005) 36 C4th 686, 710, 31 CR3d 485. See *People v Riggs* (2008) 44 C4th 248, 277, 79 CR3d 648.

The court must re-advise a pro per defendant of his or her right to counsel after the preliminary hearing. If an effective waiver is not made, the court must appoint counsel. Error is considered prejudicial per se. Pen C §987; *People v McKenzie* (1983) 34 C3d 616, 636, 194 CR 462; *Cordova v Baca* (9th Cir 2003) 346 F3d 924, 926 (defective waiver waives nothing and is of no consequence). Note, however, that the trial court need not personally question a defendant who previously requested self-representation and subsequently decides not to proceed pro per. See *Sandoval v Calderon* (9th Cir 2000) 241 F3d 765, 774.

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§3.9 3. Time for Making Motion

Ordinarily, a defendant's waiver of counsel and unequivocal request to represent himself or herself must be made within a reasonable time before trial in order to invoke the absolute right to self-representation. *People v Windham* (1977) 19 C3d 121, 127, 137 CR 8. However, there is no inflexible requirement for when the motion must be made. A midtrial motion might be considered timely depending on circumstances such as the quality of defense counsel's representation, the reasons for the request, and the delay that might be expected if the request were granted. *People v Windham, supra*. If the motion is made at a later time, it is subject to the court's discretion guided by the *Windham* factors. *People v Hamilton* (1988) 45 C3d 351, 369, 247 CR 31. However, a trial court must grant a postverdict request for self-representation as a matter of right when the request is made a reasonable time before sentencing; such a request is not subject to the court's discretion, because it is not made "during trial." *People v Miller* (2007) 153 CA4th 1015, 1023, 62 CR3d 900.

On the basis of the facts of the case, several post-*Windham* courts have reversed convictions because of the denial of requests for self-representation made on the first day of trial or later. See, *e.g., People v Herrera* (1980) 104 CA3d 167, 174, 163 CR 435; *People v Tyner* (1977) 76 CA3d 352, 355, 143 CR 52. On habeas, the Ninth Circuit has found denial, based on untimeliness, of a request for self-representation made on the first day of trial was not contrary to clear Supreme Court precedent. *Marshall v Taylor* (9th Cir 2005) 395 F3d 1058. On the other hand, in a capital case, the trial court did not abuse its discretion in finding a request was made too late when it was made after a full day of voir dire and at the tail end of jury instruction. *People v Jackson* (2009) 45 C4th 662, 690, 88 CR3d 558.

No continuance is required when a motion under *Faretta v California* (1975) 422 US 806, 835, 45 L Ed 2d 562, 581, 95 S Ct 2525 (see §§3.7-3.9), is granted at the penalty phase of a capital trial, despite restricted jail and courtroom conditions. *People v Jenkins* (2000) 22 C4th 900, 1040, 95 CR2d 377.

> Ø **Note:** For discussion of whether there is a difference between a federal and California standard of timeliness for a motion for self-representation, and citations to federal authorities, see *People v Burton* (1989) 48 C3d 843, 852, 258 CR 184.

If the court grants a motion to dismiss counsel during trial and permits self-representation, it should also consider granting the defendant a continuance to prepare the defense. *People v Bigelow* (1984) 37 C3d 731, 741 n3, 209 CR 328. When the motion is made before trial in a timely fashion, the defendant is *entitled* to a reasonable continuance. *People v Maddox* (1967) 67 C2d 647, 653, 63 CR 371; *People v Wilkins* (1990) 225 CA3d 299, 304, 275 CR 74.

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§3.10 4. Advisory Counsel, Standby Counsel, Co-Counsel; Defendant's Participation as "Co-Counsel"; Ancillary Services

Advisory counsel. The trial court has discretion to permit an attorney adviser for an indigent defendant and may have a duty to appoint advisory counsel if it determines that the defendant's waiver is intelligently made but that he or she lacks the skill to defend the case. *People v Bigelow* (1984) 37 C3d 731, 742, 209 CR 328 (abuse of discretion not to appoint advisory counsel in complex capital case). See *People v Garcia* (2000) 78 CA4th 1422, 1429, 93 CR2d 796 (declined to extend *Bigelow* to noncapital cases).

Standby counsel and co-counsel. A defendant who chooses self-representation has no absolute right to have counsel *appointed* to assist in the defense, even though the defendant does have the right to have *retained* counsel fill that role. *People v Mattson* (1959) 51 C2d 777, 795, 336 P2d 937; *Scott v Superior Court* (1989) 212 CA3d 505, 260 CR 608. The court may appoint standby counsel or co-counsel, even over the defendant's objection. *McKaskle v Wiggins* (1984) 465 US 168, 79 L Ed 2d 122, 104 S Ct 944 (standby counsel participated in trial while defendant still pro per). See *Faretta v California* (1975) 422 US 806, 834 n46, 45 L Ed 2d 562, 581 n46, 95 S Ct 2525. The role of standby counsel may be to advise the defendant and to be able to represent the defendant if the defendant chooses to withdraw the waiver of counsel or if self-representation is terminated; or it may include participating in the trial as co-counsel, even over defendant's objection. See *McKaskle v Wiggins, supra* (counsel participated when counsel chose to); *Faretta v California, supra* (dicta: standby counsel described as acting only on defendant's request and as available to step in if self-representation ceased).

An attorney who believes that acting as advisory counsel would be contrary to his or her duty as an attorney apparently may refuse to act as adviser. See *Chaleff v Superior Court* (1977) 69 CA3d 721, 138 CR 735. For discussion of the role of advisory counsel, see *People v Doane* (1988) 200 CA3d 852, 246 CR 366.

Defendant as co-counsel. A defendant has no constitutionally guaranteed right to act as co-counsel, but the court has discretion to permit a defendant to participate in the defense. *People v Kirkpatrick* (1994) 7 C4th 988, 30 CR2d 818; *People v Crabtree* (2009) 169 CA4th 1293, 1310, 88 CR3d 41. The court should not grant the right except on a substantial showing that the ends of justice would be served and the conduct of the court's business would not be substantially hindered. *People v Kirkpatrick, supra*. The burden is on the defendant to make this showing. *People v Crabtree, supra*. There is no requirement that a defendant granted co-counsel status be given *Faretta* warnings. *People v Jones* (1991) 53 C3d 1115, 1143, 282 CR 465.

Ancillary services. The right to ancillary services arises only when an indigent defendant demonstrates that funds are "reasonably necessary" for his or her defense. *Corenevsky v Superior Court* (1984) 36 C3d 307, 320, 204 CR 165. See discussion in §3.6. A self-represented defendant must also satisfy this requirement. *People v Blair* (2005) 36 C4th 686, 733, 31 CR3d 485; *People v Faxel* (1979) 91 CA3d 327, 330, 154 CR 132. A self-represented defendant's access to the resources necessary to present a defense must be reasonable under all the circumstances. *People v Blair* (2005) 36 C4th 686, 733, 31 CR3d 485 (self-represented capital defendant had reasonable access to necessary resources when he had advisory counsel, several investigators, a runner, and a fingerprint expert).

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§3.11 5. Standard of Review

If a reviewing court finds that the trial court should have granted a defendant's request for self-representation, the reversible per se standard is applied. *People v Joseph* (1983) 34 C3d 936, 946, 196 CR 339. This standard also applies if the defendant was convicted following self-representation when the defendant's waiver of counsel was defective. *Cordova v Baca* (9th Cir 2003) 346 F3d 924, 926 (defective *Faretta* waiver waives nothing and is of no consequence). However, if the trial court erroneously denies a request for self-representation and the defendant subsequently validly waives the right to self-representation and proceeds to trial represented by counsel, the defendant is not entitled to relief on appeal for the erroneous denial. *People v Dunkle* (2005) 36 C4th 861, 909, 32 CR3d 23, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209. See *People v Weeks* (2008) 165 CA4th 882, 887, 81 CR3d 257 (*Faretta* error waived when defendant proceeded to trial with retained counsel and neither defendant nor counsel revisited issue of self-representation).

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§3.12 D. Representation by Certified Law Students

Qualified law students are authorized to participate in the conduct of a defense. State Bar Rules Governing the Practical Training of Law Students, Rule 5. Representation by a qualified law student in compliance with the State Bar Rules does not violate a defendant's right to be represented by counsel. *People v Perez* (1979) 24 C3d 133, 144, 155 CR 176. Although the defendant must consent to such representation in writing, the consent need not be knowing and intelligent within the meaning of *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525, because it is not a waiver of the right to counsel. *People v Perez, supra*.

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III. BEGINNING THE RELATIONSHIP

§3.13 A. Interviewing Client

The first interview with a client serves several purposes:

- It permits counsel to ascertain whether a conflict exists that requires counsel to decline representation. See discussion of conflicts in §§2.8-2.16.
- With retained counsel, it allows counsel and the client to decide whether they wish to enter into an attorney-client relationship, and, if they do, to set the fee and other terms of employment.
- It provides an opportunity for the attorney to define the relationship for the client, explain the respective authority of the client and the attorney, and describe the legal process in which the client will be involved.
- It begins the investigation process by providing counsel with background information about the case.
- Counsel is able to advise the client not to speak with anyone about the case except counsel.
- Counsel can obtain the client's signature on any necessary release forms.
- It alerts counsel to possible motions and hearings that should be set, *e.g.,* a Pen C §1538.5 motion, a severance motion, or a demurrer.
- Counsel can find out if there are any related problems that must be dealt with, *e.g.,* immigration problems, a possible parole hold, a pending probation revocation, or another pending case.

For a client interview form and discussion on how the interview questions relate to counsel's case and to this book, see chap 10.

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B. Fees and Retainer Agreements

1. Retained Counsel

§3.14 a. Written Attorney Retainer Agreements

Written attorney retainer agreements are required if fees and costs will exceed $1000. A signed duplicate must be given to the client—otherwise, the contract is voidable. Bus & P C §6148. The written contract must specify the hourly rate and other standard charges that may be made, the general nature of the legal services to be provided to the client, and the respective responsibilities of the client and the attorney.

Some California firms are taking the position that, despite the "shall" language in Bus & P C §6148(a), the only sanction for failing to have a written contract is Bus & P C §6148(c), which limits recovery to a "reasonable fee." This construction assumes that there is no professional disciplinary sanction for failure to have a written contract.

Ø **Note:** Business and Professions Code §6149 purports to create a privilege for written attorney fee contracts within the meaning of Bus & P C §6068(e)(1) and Evid C §952. How this statute will be applied with regard to state or federal subpoenas for information, to grand jury proceedings, or to actions to forfeit attorney fees remains to be seen.

An attorney who does not have professional liability insurance must inform the client in writing of that fact when it is reasonably foreseeable that his or her representation of the client in the matter will exceed 4 hours. Cal Rules of Prof Cond 3-410(A). This notice can be included in the retainer agreement.

See Fee Agreement Forms Manual (2d ed Cal CEB 2007) for complete discussion of preparing a fee agreement, including a sample criminal law fee agreement. There are sample criminal law fee agreements in California Criminal Law Forms Manual §§3.1-3.2 (2d ed Cal CEB 2005).

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§3.15 b. Potentially Tainted Fee Money

Defense counsel should be quite cautious in all types of cases when deciding whether to accept fee money from a client. Both forfeiture of assets and criminal charges are potentially involved with the receipt or handling of assets that were originally obtained from, were the product of, or facilitated illegal conduct. See discussion in §57.33.

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Source: Criminal Law/California Criminal Law Procedure and Practice/3 RIGHT TO COUNSEL; THE ATTORNEY-CLIENT RELATIONSHIP/§3.16 c. Fees May Not Be Illegal or Unconscionable

§3.16 c. Fees May Not Be Illegal or Unconscionable

California Rules of Professional Conduct 4-200 precludes fees that are illegal or unconscionable. Under Cal Rules of Prof Cond 4-200(B), factors to be considered in determining whether a fee is legal include:

- The amount of the fee in proportion to the value of the services performed;
- The relative sophistication of the attorney and the client;
- The novelty and difficulty of the questions involved and the skill required to perform the legal service properly;
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member;
- The amount involved and the results obtained;
- The time limitations imposed by the client or by the circumstances;
- The nature and length of the professional relationship with the client;
- The experience, reputation, and ability of the attorney performing the services;
- Whether the fee is fixed or contingent;
- The time and labor required; and
- The informed consent of the client to the fee agreement.

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§3.17 d. Ways of Setting Fees

Fees in a criminal matter are generally set on a case-by-case basis rather than at an hourly rate. In a typical arrangement, half of the fee is paid before the attorney makes an appearance as attorney of record, and the other half is paid before trial. Other common arrangements include payment of the full fee in advance or regular installment payments accompanied by a secured or unsecured promissory note. A fee in a criminal case is usually not refundable, unless counsel withdraws or another attorney is substituted. It is advisable to make the terms of any refund or lack of refund clear, because three of the factors used to determine whether a fee is conscionable are whether it is fixed or contingent, the time and labor required, and whether the client gave informed consent to the fee. Cal Rules of Prof Cond 4-200(B)(9)-(11).

Ø **Note:** A fee agreement providing for a nonrefundable retainer should specify that oral modification of the agreement is prohibited. See *Brooks v Shemaria* (2006) 144 CA4th 434, 50 CR3d 430.

Often, the most reliable starting point for determining a reasonable fee is the prevailing range within the local legal community. The inexperienced practitioner should determine what, if any, prevailing standard exists within the community for the type of case involved and should then apply the factors listed in Cal Rules of Prof Cond 4-200 to determine whether any of them justifies a fee outside the prevailing range.

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§3.18 e. Referral Fees

Referral fees to lawyers who are not partners, associates, or shareholders are permitted as long as the client is informed in writing of the shared fee arrangement and consents in writing. Cal Rules of Prof Cond 2-200(A). However, the total fee may not be increased solely because of the division of fees. Cal Rules of Prof Cond 2-200(A). The division of fees does not have to be in proportion to the work actually done by the referring attorney. *Moran v Harris* (1982) 131 CA3d 913, 916 n2, 182 CR 519 (decided under former Cal Rules of Prof Cond 2-108, now see Cal Rules of Prof Cond 2-200).

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§3.19 2. Appointed Counsel

Private counsel appointed to represent a criminal defendant are entitled to a reasonable sum for compensation and necessary expenses. Pen C §987.2(a); *Gilbert v Superior Court* (1985) 169 CA3d 148, 215 CR 305 (judge's order appointing second counsel in capital case and setting hourly fee constituted contract). The court sets the actual amount of compensation in a particular case. Pen C §987.2(a). If the attorney does not have professional liability insurance, he or she must inform the client in writing of that fact when it is reasonably foreseeable that his or her representation of the client in the matter will exceed 4 hours. Cal Rules of Prof Cond 3-410(A).

Ø **Note:** Many counties have schedules fixing fees for particular types of work.

Procedures for claiming fees for appointed counsel depend on the county and the court within the county in which the work was performed. Appointed counsel programs may be administered by the court, the local bar association, or another county office. Practitioners should check on the procedure for fixing and claiming fees within the individual county before accepting employment as appointed counsel. See also §41.8 on reimbursement of appointed counsel.

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C. Accepting Employment

§3.20 1. Considerations Before Accepting Employment

Before accepting employment as either retained or appointed defense counsel, the attorney must determine whether any standards of professional conduct prevent or limit the employment. The attorney should consider these possibilities:

- **Attorney as witness.** The attorney should consider whether he or she may be called as a witness in the case. See §2.18.
- **Competence.** An attorney who does not have sufficient learning and skill to handle a case competently should not accept the employment. Cal Rules of Prof Cond 3-110. An inexperienced attorney can accept a case as long as he or she consults experienced counsel or has time to learn how to handle the case. Cal Rules of Prof Cond 3-110(C). See §2.20.
- **Conflicts of interest.** Such conflicts include representation of codefendants or of concurrent or former clients with interests adverse to the current defendant. Cal Rules of Prof Cond 3-310. See §§2.8-2.16. A conflict of interest may exist when counsel accepts literary rights in lieu of a fee. *People v Corona* (1978) 80 CA3d 684, 720, 145 CR 894. A defendant may give an informed waiver of any conflict of interest. *Maxwell v Superior Court* (1982) 30 C3d 606, 180 CR 177, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209.
- **Other grounds.** Does the case present the potential that grounds for mandatory or permissive withdrawal will develop? Cal Rules of Prof Cond 3-700.

See also §19.17 on appointed counsel's obligation to be ready to proceed.

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§3.21 2. Becoming Attorney of Record

It is generally accepted that an attorney becomes the attorney of record when his or her name is on a pleading or motion filed with the court on behalf of a client, or when the attorney first appears in court on behalf of a client and counsel's name is entered in the court minutes. See California Civil Procedure Before Trial §4.3 (4th ed Cal CEB 2004). In civil cases, in which a defendant may be sued even though not in court if the court has personal jurisdiction (among other requirements), attorneys make "special" appearances to contest personal jurisdiction. See 2 Witkin, California Procedure, *Jurisdiction* §§205-207 (5th ed 2008). By analogy, private criminal attorneys sometimes make a special appearance when the defendant was unable to pay the attorney fee, on the theory that by making a special appearance they have not become the attorney of record. Once the fee is paid, the usual practice is for the attorney to formally enter the case by making a "general" appearance the next time he or she appears in court on the client's behalf. This is a common practice, even though there appears to be no statutory authority for it.

The fee agreement may restrict legal services through preliminary hearing only. Thereafter counsel may, without written motion, move to be relieved as attorney of record if a new agreement has not been reached. *Lempert v Superior Court* (2003) 112 CA4th 1161, 5 CR3d 700.

Once counsel becomes the attorney of record, other parties may rely on that attorney's representation until they receive notice of substitution of counsel (*People v Bouchard* (1957) 49 C2d 438, 441, 317 P2d 971) or until the defendant has been granted the right to represent himself or herself. CCP §285.

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§3.22 3. Associating Counsel; Counsel Pro Hac Vice

There are no formal requirements for associating an attorney. If possible, all attorneys who will appear in an action should be named on the initial pleading filed in court or should be identified in the court minutes at the first appearance. Counsel should notify the court and other parties if an attorney enters the case later by filing and serving an association of attorney form. See California Civil Procedure Before Trial §4.61 (4th ed Cal CEB 2004) for sample form. Before associating counsel, the primary attorney should get the client's consent to the association and to any arrangement for fee-splitting. Cal Rules of Prof Cond 2-200.

A member in good standing of the bar of another jurisdiction who has been retained by the defendant may apply to appear as counsel in a particular matter (called counsel pro hac vice), provided an active member of the California Bar is associated as attorney of record. Cal Rules of Ct 9.40(a). A person seeking to appear as counsel pro hac vice must file a verified application for association, with proof of service on all parties and on the State Bar of California, and schedule a hearing on the application. Cal Rules of Ct 9.40(c)(1). See *Magee v Superior Court* (1973) 8 C3d 949, 106 CR 647 (discusses court's discretion in ruling on application). See Civ Proc Before Trial §4.62 for sample form.

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§3.23 D. Authority of Attorney

Once counsel has become attorney of record, all legal steps must be taken by the attorney, not the client. *Magee v Superior Court* (1973) 34 CA3d 201, 213, 109 CR 758, disapproved on other grounds in *People v Norris* (1985) 40 C3d 51, 56, 219 CR 7. Other attorneys may deal with the client concerning the subject matter of that representation only through the attorney of record. Cal Rules of Prof Cond 2-100. See discussion in §2.35.

Generally, the attorney controls all decisions affecting trial tactics and court proceedings. *People v Masterson* (1994) 8 C4th 965, 35 CR2d 679; *People v Whittington* (1977) 74 CA3d 806, 820, 141 CR 742. Decisions that have been held to be within the attorney's control include:

- Whether to call a particular witness (*People v Williams* (1970) 2 C3d 894, 905, 88 CR 208);
- Whether to introduce particular evidence (*People v Murphy* (1972) 8 C3d 349, 366, 105 CR 138);
- Whether to object to evidence (*People v Lanphear* (1980) 26 C3d 814, 828, 163 CR 601, vacated and remanded (1980) 449 US 810, reaff'd (1980) 28 C3d 463, 171 CR 505);
- Whether to stipulate to facts during the penalty phase (*People v Cooper* (1991) 53 C3d 771, 842, 281 CR 90);
- Whether to challenge a particular trial judge (*People v Jackson* (1960) 186 CA2d 307, 317, 8 CR 849);
- Whether to request a change of venue (*People v Guzman* (1988) 45 C3d 915, 937, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409);
- Whether to stipulate to proceed with fewer than 12 jurors (*People v Masterson, supra*); and
- Whether to request a determination of the defendant's competence to stand trial (Pen C §1368).

The defendant retains the absolute right to decide certain issues affecting his or her fundamental rights. *People v Robles* (1970) 2 C3d 205, 214, 85 CR 166. These decisions include:

- Whether to testify (*People v Robles, supra*);
- Whether to enter an insanity plea (Pen C §1018; *People v Gauze* (1975) 15 C3d 709, 717, 125 CR 773);
- Whether to plead guilty (Pen C §1018; *People v Rogers* (1961) 56 C2d 301, 305, 14 CR 660); and
- Whether to demand a jury trial (*People v Holmes* (1960) 54 C2d 442, 5 CR 871).

There are other areas in which the division of authority between counsel and the defendant is less clear because of the involvement of the defendant's fundamental rights. Counsel's general control over the proceedings permits him or her to waive the defendant's *statutory* right to trial within 60 days (Pen C §1382(a)(2)), but with limitations. *Townsend v Superior Court* (1975) 15 C3d 774, 781, 126 CR 251. When the waiver is simply to accommodate defense counsel's calendar, counsel has no right to set a court date beyond statutory deadlines. *People v Johnson* (1980) 26 C3d 557, 568, 162 CR 431.

Another situation in which the attorney's authority is unclear is the decision to present a mental state defense. Compare *People v Milner* (1988) 45 C3d 227, 246, 246 CR 713, and *People v Frierson* (1985) 39 C3d 803, 814, 218 CR 73 (defendant had right to insist that diminished capacity defense (now nonexistent) be presented at guilt phase of trial), with *People v Jones* (1991) 53 C3d 1115, 1139, 282 CR 465 (defense counsel properly argued mental state defense over defendant's objection; defendant insisted he was innocent, but evidence of guilt was overwhelming).

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IV. DISCHARGE, SUBSTITUTION, AND WITHDRAWAL OF COUNSEL

§3.24 A. Retained Counsel

The procedure for discharge, withdrawal, and substitution of *retained* counsel in criminal proceedings is the same as that for civil proceedings. *People v Bouchard* (1957) 49 C2d 438, 441, 317 P2d 971. See CCP §§284-285 (substitution of attorney in "action or special proceeding"); Cal Rules of Ct 3.1362 (motion to be relieved as counsel), 8.36 (withdrawal or substitution of attorney in pending appeal). California Rules of Court 3.1362 requires that the notice of motion, motion, declaration, and order be made on Judicial Council Forms MC-051, MC-052, and MC-053. On withdrawing from representation and substitution of counsel in civil actions, see California Civil Procedure Before Trial, chap 4 (4th ed Cal CEB 2004).

Ø **Note:** A retained attorney who represents the defendant at the preliminary hearing does not have to file a motion to withdraw at the arraignment if the attorney is retained (and compensated) only through the preliminary hearing. It is an abuse of the court's discretion to force counsel to represent an indigent defendant from arraignment on the information all the way through trial without compensation, when counsel was originally retained to represent the defendant at the preliminary hearing only. *Lempert v Superior Court* (2003) 112 CA4th 1161, 1171, 5 CR3d 700. See Pen C §987.1.

Defense attorneys may ask to be relieved from representation because the client has failed to pay their fee. CCP §284(2); *People v Castillo* (1991) 233 CA3d 36, 55, 284 CR 382. It is appropriate for the trial court to appoint the previously retained counsel if the client becomes indigent and the public defender is unavailable. *People v Castillo, supra*.

When an attorney is substituted by mutual consent, counsel should file a written notice of substitution with the court and serve a copy of it on the adverse party. CCP §284. Counsel may also notify the judge and adverse party in court, as long as the withdrawal is entered in the minutes. CCP §284. Substitution by mutual consent is not effective, however, in the interim between the preliminary hearing and the arraignment unless the court relieves counsel from continuing in the case. Pen C §987.1. If the attorney and client do not each consent to the attorney's withdrawal, the party requesting the attorney's withdrawal must give notice to the other and obtain the court's consent. CCP §284. Grounds for mandatory and permissive withdrawal are set out in Cal Rules of Prof Cond 3-700(B).

An attorney seeking to be relieved because of a conflict must be careful not to provide the court with too much detail about the conflict while, at the same time, protecting the record for appeal. The attorney-client privilege and the duty to maintain the client's confidence and secrets limit the information that can be divulged. *Leversen v Superior Court* (1983) 34 C3d 530, 194 CR 448; *Uhl v Municipal Court* (1974) 37 CA3d 526, 112 CR 478. The trial court should accept defense counsel's good faith assertion of conflict with a third person as the basis for a motion to withdraw, without requiring details that would require counsel to breach attorney-client confidentiality. *Uhl v Municipal Court, supra* (sufficient for attorney to assert conflict based on representation of unnamed person in unrelated case).

An attorney who contemplates withdrawing from a case must take reasonable steps to avoid prejudicing the client's rights, including giving the client due notice, allowing time for the employment of other counsel, and delivering papers and property to which the client is entitled. Cal Rules of Prof Cond 3-700(D).

Discharge or withdrawal of an attorney is effective only when written notice of substitution of a new attorney, or of the party on his or her own behalf, is given to the adverse party. Until notice is given, the adverse party must recognize the former attorney. CCP §285; *People v Bouchard, supra*.

The trial court usually permits the substitution of counsel but has the discretion to refuse to permit substitution if to permit it would delay the trial or cause some other interference with the process of justice. *People v Ortiz* (1990) 51 C3d 975, 983, 275 CR 191; *People v Durham* (1969) 70 C2d 171, 190, 74 CR 262 (motion made on first day of trial; disagreement with counsel on trial tactics); *People v Keshishian* (2008) 162 CA4th 425, 428, 75 CR3d 539 (case had been pending for 2½ years; motion made on day case called for trial); *People v Murphy* (1973) 35 CA3d 905, 921, 111

CR 295 (motion made after trial date set; defendant unable to pay counsel). In making its determination, the court must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution. *People v Lara* (2001) 86 CA4th 139, 155, 103 CR2d 201. If the court does not permit counsel to withdraw and counsel refuses to continue representing the client despite the court's ruling, counsel is subject to contempt proceedings. *In re Jackson* (1985) 170 CA3d 773, 216 CR 539.

Ø **Note:** Counsel who wishes to withdraw for nonpayment of fees should do so *before a trial date is set,* if possible. See *People v Murphy, supra*.

A criminal defendant who becomes indigent, and wishes to discharge retained counsel and request appointed counsel, has the right to do that as long as the change in attorneys is timely and will not significantly prejudice the defendant. *People v Ortiz* (1990) 51 C3d 975, 983, 275 CR 191 (once error is found, prejudice is presumed). In this situation, the defendant is not required to show that retained counsel is incompetent in order to discharge him or her. *People v Stevens* (1984) 156 CA3d 1119, 1127, 203 CR 505.

An attorney who is discharged or withdraws is entitled to compensation for work performed. See 1 Witkin, California Procedure, *Attorneys* §§194-207 (5th ed 2008). An attorney who withdraws must refund any part of a fee paid in advance that has not been earned. Cal Rules of Prof Cond 3-700(D). See §§41.8-41.9 for discussion of fee hearings and compensation of appointed counsel.

For discussion of withdrawal, discharge, and substitution of counsel, and sample forms, see Civ Proc Before Trial, chap 4. See also the forms in California Criminal Law Forms Manual §§3.3 (letter notifying former counsel of substitution and requesting release of information), 3.5 (motion to remove defense counsel), and 3.6 (defense motion to withdraw as counsel) (2d ed Cal CEB 2005).

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B. Discharge of Appointed Counsel (*Marsden* Motion)

§3.25 1. In General; Right to Hearing; Remedy

A defendant represented by appointed counsel or the public defender may request that the court discharge the attorney and substitute new counsel if the defendant's right to counsel would be substantially impaired by continuing with the original attorney. *People v Marsden* (1970) 2 C3d 118, 123, 84 CR 156. This occurs when counsel is not providing adequate representation or when counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. *People v Jones* (2003) 29 C4th 1229, 1244, 131 CR2d 468. Typically, the defendant makes an oral *Marsden* motion before the trial judge (see *People v Marsden, supra*); although a formal motion is not required, the defendant must make some clear indication that he or she wants a substitute attorney. *People v Mendoza* (2000) 24 C4th 130, 157, 99 CR2d 485. The right to counsel is personal to the defendant, and the court is not required to conduct a *Marsden* hearing when a third party complains concerning the representation received by a defendant. *People v Martinez* (2009) 47 C4th 399, 418, 97 CR3d 732. A motion for a new trial based on trial counsel's incompetence requires the court to conduct a *Marsden* hearing to investigate the defendant's complaints regarding his or her appointed counsel's performance, even if the defendant does not make a request for new counsel. *People v Mendez* (2008) 161 CA4th 1362, 1366, 75 CR3d 162; *People v Mejia* (2008) 159 CA4th 1081, 1086, 72 CR3d 76.

Marsden does not apply to retained counsel. Retained counsel may be discharged at any time, with or without cause, even on the eve of trial, as long as the move is not intended to delay. *People v Lara* (2001) 86 CA4th 139, 103 CR2d 201.

A *Marsden* motion may be made at any stage in the proceedings, including presentation of a motion for a new trial or a motion to withdraw a plea. *People v Smith* (1993) 6 C4th 684, 695, 25 CR2d 122; *People v Mejia, supra* (motion for new trial based on incompetence of counsel); *People v Eastman* (2007) 146 CA4th 688, 696, 52 CR3d 922 (motion to withdraw plea).

The trial judge must conduct a hearing on a *Marsden* request and allow the defendant to state specific reasons for the requested dismissal. *People v Cole* (2004) 33 C4th 1158, 1190, 17 CR3d 532; *People v Fierro* (1991) 1 C4th 173, 204, 3 CR2d 426. The court may appoint another attorney to help the defendant present the *Marsden* motion (*People v Bean* (1988) 46 C3d 919, 947, 251 CR 467), but such an appointment is not required (*People v Daniels* (1991) 52 C3d 815, 849, 277 CR 122). The court can conduct a *Marsden* hearing even after proceedings have been suspended under Pen C §1368 (*People v Stankewitz* (1990) 51 C3d 72, 86, 270 CR 817; *People v Solorzano* (2005) 126 CA4th 1063, 24 CR3d 735; *People v Canfield* (1992) 2 CA4th 1357, 1360, 3 CR2d 825), and *must* promptly consider the defendant's request while proceedings are suspended when the right to effective assistance would be substantially impaired if the request were ignored. *People v Stankewitz* (1990) 51 C3d 72, 88, 270 CR 817; *People v Solorzano* (2005) 126 CA4th 1063, 1069, 24 CR3d 735. If the defendant, after being granted the opportunity, fails to specify adequate reasons for the substitution, the court may properly deny the request. *People v Bean, supra; People v Silva* (1988) 45 C3d 604, 247 CR 573.

On appeal, inadequate inquiry into a *Marsden* motion is treated as prejudicial per se error because the very nature of the error precludes meaningful appellate review of its prejudicial impact. *People v Solorzano* (2005) 126 CA4th 1063, 24 CR3d 735 (erroneous refusal to hear *Marsden* motion on whether appointed counsel was rendering effective assistance at defendant's competency hearing required reversal of conviction entered after defendant was found competent); *People v Hill* (1983) 148 CA3d 744, 755, 196 CR 382. However, instead of reversing the judgment, the appellate court can remand the case to the trial court for a *Marsden* hearing. See, *e.g., People v Mejia, supra*. If the trial court determines on remand that the *Marsden* motion should not be granted, there is no basis for a reversal on appeal. *People v Maese* (1985) 168 CA3d 803, 214 CR 365; *People v Minor* (1980) 104 CA3d 194, 200, 163 CR 501. This type of remand hearing is sometimes called a *Minor* hearing because the procedure was first ordered by the appellate court in *People v Minor, supra*.

Ø **Note:** If the trial court denies a defendant's *Marsden* motion, a subsequent plea of guilty or no contest, when intelligently and voluntarily made (see §§26.10-26.17), waives any alleged *Marsden* error. *People v Lovings* (2004) 118 CA4th 1305, 1311, 13 CR3d 710; *People v Lobaugh* (1987) 188 CA3d 780, 786, 233 CR 683.

The normal record on appeal includes a *confidential* transcript of any *Marsden* hearing. Cal Rules of Ct 8.328(b)(1). When appellate counsel is appointed or retained for the defendant, a copy of the confidential transcript is sent to defendant's counsel only, or to the appellate project for the district if appellate counsel has not been obtained. Cal Rules of Ct 8.328(b)(3). If the *Marsden* issue will be raised in the appeal, the defendant must serve and file a notice stating whether the confidential transcript contains any confidential information that is not relevant to the issues raised on appeal (including the page and line numbers of the transcript where this material appears). Cal Rules of Ct 8.328(b)(4). Even if defense counsel files such a notice, however, the prosecutor can still make a motion for a copy of the relevant portions of the confidential transcript. Cal Rules of Ct 8.328(b)(5).

If the defendant raises a *Marsden* issue in the opening brief but fails to serve and file a notice under Cal Rules of Ct 8.328(b)(4), on written application the prosecutor may request a copy of the confidential transcript. Within 10 days after the application is filed, the defendant may serve and file opposition to this application on the grounds that the transcript contains confidential material not relevant to the issues on appeal. Any such opposition must identify the page and line numbers of the transcript containing this irrelevant material. If the defendant does not timely serve and file opposition to the application, the reviewing court clerk must send a copy of the confidential transcript to the prosecutor. Cal Rules of Ct 8.328(b)(6).

When the trial court erroneously denies a *Marsden* motion and the defendant subsequently asks to represent himself or herself, the *Marsden* error taints the defendant's waiver of the right to be represented by counsel, even though the court's admonitions otherwise satisfy the *Faretta* requirements (see *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525). *People v Hill* (1983) 148 CA3d 744, 755, 196 CR 382; *People v Cruz* (1978) 83 CA3d 308, 318, 147 CR 740.

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§3.26 2. Conduct of Hearing; Role of Defense Counsel

The court must question the client and usually the attorney in order to rule on a *Marsden* motion. See §3.25. A ruling cannot be based on the judge's personal confidence in the attorney, observations of the attorney's previous courtroom conduct, or ex parte communications with other participants. *People v Hill* (1983) 148 CA3d 744, 753, 196 CR 382.

To protect the client's interests in confidentiality during this inquiry, defense counsel should move to exclude the prosecutor from the *Marsden* hearing. *People v Madrid* (1985) 168 CA3d 14, 19, 213 CR 813. Although the court is not required to exclude the prosecutor, the *Madrid* court stated that a trial court should exercise its discretion and exclude the prosecutor if the defense makes a timely request. *People v Madrid, supra*. If the defense fails to make this request, the *Madrid* court said the trial court should assess whether the information adduced at the hearing would be of the type that might lighten the prosecution's burden of proof (based on *Prudhomme v Superior Court* (1970) 2 C3d 320, 85 CR 129) and, if so, exclude the prosecutor from the hearing. *Prudhomme* has since been disapproved. *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231 (Cal Const art I, §30(c) mandates that discovery in criminal cases be reciprocal). It appears, however, that prosecutors can still be excluded from *Marsden* hearings because Cal Rules of Ct 8.328(b), discussed in §3.25, assumes that prosecutors are being excluded from those hearings. In addition, the discovery statutes provide that neither the defense nor the prosecution is required to disclose any work product or privileged information to the other (Pen C §1054.6), yet it is likely that both work product and attorney-client privileged material would have to be disclosed during a *Marsden* hearing.

The trial court generally begins its inquiry by hearing the defendant's complaints concerning defense counsel and then decides whether to hear further testimony. When the nature of the evidence requires inquiry into the attorney's state of mind to determine whether counsel can provide adequate representation, the courts are divided on whether such an inquiry should be undertaken. Compare *People v Hill, supra* (inquiry required), and *People v Young* (1981) 118 CA3d 959, 966, 173 CR 700 (inquiry required), with *People v Terrill* (1979) 98 CA3d 291, 159 CR 360 (no inquiry ever required of defense counsel).

When responding to the defendant's complaints, defense counsel should clearly describe for the record the work that has been done on the case by counsel, by other attorneys in the office, and by others such as paralegals and investigators. See, *e.g., People v Hovey* (1988) 44 C3d 543, 573, 244 CR 121.

The attorney must carefully balance the need to provide complete testimony with the client's interest in having confidentiality maintained. In an analogous area, the inquiry into competence of counsel in habeas corpus proceedings, the court in *In re Gray* (1981) 123 CA3d 614, 176 CR 721, held that there is no attorney-client privilege as to matters put in issue by a challenge to defense counsel's competence. See also Evid C §958 (no attorney-client privilege for communications relevant to breach of duty arising from attorney-client relationship). There are no clear guidelines on the extent to which this waiver applies to the various issues raised through *Marsden* motions.

After the hearing is over, defense counsel should have the court direct that the transcript be sealed and given to the judge's clerk or have the court order that it not be transcribed until appeal.

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§3.27 3. Showing Required

New defense counsel should be appointed if counsel being challenged is not providing adequate representation, or if defendant and counsel have such an irreconcilable conflict in their relationship that ineffective representation is likely to result. *People v Smith* (1993) 6 C4th 684, 25 CR2d 122. The standard is the same whether the motion is made before or after conviction. *People v Smith, supra*.

The trial court has discretion to deny a *Marsden* motion "in the absence of a sufficient showing that a defendant's right to counsel would otherwise be substantially impaired." *People v Walker* (1976) 18 C3d 232, 238, 133 CR 520. The defendant has the burden of proving substantial impairment (*People v Young* (1981) 118 CA3d 959, 173 CR 700) by demonstrating that counsel is inadequate (*People v Marsden* (1970) 2 C3d 118, 84 CR 156).

Grounds found *insufficient* to require the discharge of appointed counsel include:

- Defendant did not think counsel had the client's best interests at heart (*People v Silva* (1988) 45 C3d 604, 247 CR 573);
- Counsel would not make certain motions the defendant wanted brought (*People v Silva, supra* (motions either not legally cognizable or not right court));
- Defendant did not relate well with defense counsel (*People v Berryman* (1993) 6 C4th 1048, 25 CR2d 867, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656);
- Defendant had seen defense counsel only once (*People v Silva, supra*);
- Defendant did not trust the attorney and therefore could not discuss the case fully with counsel (*People v Berryman, supra*);
- Counsel refused to make a particular argument at a Pen C §1538.5 hearing (*People v Carr* (1972) 8 C3d 287, 104 CR 705); and
- Counsel and defendant disagreed on trial tactics (*People v Jackson* (2009) 45 C4th 662, 688, 88 CR3d 558; *People v Carter* (2005) 36 C4th 1114, 1200, 32 CR3d 759).

Ø **Note:** The *Williams* court noted that disagreement may signal a breakdown of such magnitude that the defendant's right to counsel is jeopardized. *People v Williams* (1970) 2 C3d 894, 905, 88 CR 208.

Grounds found *sufficient* to require reversal include the following:

- Ineffective representation on appeal (*In re Banks* (1971) 4 C3d 337, 93 CR 591);
- Failure to investigate adequately (*People v Minor* (1980) 104 CA3d 194, 200, 163 CR 501); and
- Defendant's credibility undermined by trial error (*People v Coleman* (1992) 9 CA4th 493, 11 CR2d 800).

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§3.28 4. Discharge Initiated by Court

Although removal of counsel is generally initiated by the defendant or counsel, the court may also remove counsel on its own motion. *People v McKenzie* (1983) 34 C3d 616, 630, 194 CR 462. The test for dismissing appointed counsel and retained counsel is generally the same. *Smith v Superior Court* (1968) 68 C2d 547, 561, 68 CR 1. Removal of counsel by the trial court, however, is unusual. Once an attorney has been retained or appointed, the court should make a reasonable effort to ensure that the representation continues. See *People v Crovedi* (1966) 65 C2d 199, 208, 53 CR 284 (court abused its discretion in denying continuance during retained counsel's illness).

If the accommodation required to permit continued representation would prejudice another party or interfere in some other way with the process of justice, the court may remove the attorney. *People v McKenzie, supra* (appellate court advised trial court that it could discharge attorney who refused to proceed with case); *Stevens v Superior Court* (1988) 198 CA3d 932, 244 CR 94 (on motion of prosecutor, court removed retained counsel who was involved in another trial and would not be available for several months); *People v Ward* (1972) 27 CA3d 218, 233, 103 CR 671 (retained attorney required 4-week continuance while material witness was being held in custody; substitution of counsel approved). See Pen C §1050(a) (criminal cases should be set for trial and heard as quickly as possible, with precedence given to death penalty cases). The individual circumstances of a particular case determine whether a trial court has acted within its discretion in removing counsel to prevent interference with the orderly process of justice. For example, a trial court's removal of an inexperienced and injured secondary counsel at the beginning of a capital trial, and his replacement with a more experienced attorney, was not an abuse of discretion. *People v Panah* (2005) 35 C4th 395, 426, 25 CR3d 672.

If retained counsel has an apparent conflict, the trial court must notify the defendant of the right to conflict-free representation. If the defendant waives the conflict, the court may not remove the lawyer. *Maxwell v Superior Court* (1982) 30 C3d 606, 619, 180 CR 177, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *Alcocer v Superior Court* (1988) 206 CA3d 951, 254 CR 72. However, the trial court may remove appointed counsel because of a potential conflict of interest, despite the defendant's desire to waive that conflict, without violating the defendant's right to counsel. *People v Jones* (2004) 33 C4th 234, 240, 14 CR3d 579 (trial court removed murder defendant's appointed attorney because attorney previously represented man whom defense suspected of committing the murder). See also *People v Richardson* (2008) 43 C4th 959, 995, 77 CR3d 163 (appointed attorney relieved despite waiver because of representation of proposed prosecution witness). For further discussion of conflicts of interest, see §§2.8-2.16.

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§3.29 C. Prosecution Interference With Right to Counsel

Egregious behavior by the prosecution can result in dismissal of the case if prejudice is shown. *U.S. v Morrison* (1981) 449 US 361, 66 L Ed 2d 564, 101 S Ct 665 (stated rule that prejudice must be shown but found none on facts of case); *Morrow v Superior Court* (1994) 30 CA4th 1252, 36 CR2d 210 (post-*Morrison*; eavesdropping by DA investigator was sufficient grounds to support motion to dismiss); *People v Tribble* (1987) 191 CA3d 1108, 236 CR 733 (post-*Morrison*; no prejudice); *Boulas v Superior Court* (1986) 188 CA3d 422, 233 CR 487 (post-*Morrison*; government conduct was so outrageous it interfered with accused's right to due process; dismissal of charges only appropriate remedy). See also *Barber v Municipal Court* (1979) 24 C3d 742, 157 CR 658 (pre-*Morrison* case did not require prejudice; case ordered dismissed); *People v Wesley* (1990) 224 CA3d 1130, 274 CR 326 (post-*Morrison*; conduct not found to be outrageous).

The mere bringing of a motion by the prosecution to determine whether a conflict of interest exists between the defendant and defense counsel does not constitute prosecutorial misconduct or an interference with the defendant's right to counsel. *People v Harris* (2005) 37 C4th 310, 342, 33 CR3d 509.

Once a prima facie case of eavesdropping has been made, the burden shifts to the prosecution to show, by clear and convincing evidence, that none occurred. *People v Jordan* (1990) 217 CA3d 640, 266 CR 86. A prior working relationship between police and a jailhouse informant, without more, is insufficient to show interference with the right to counsel. *In re Williams* (1994) 7 C4th 572, 29 CR2d 64.

The trial court may take steps to ensure that any possible prejudice is prevented. *People v Benally* (1989) 208 CA3d 900, 256 CR 483. In *Benally,* a police officer taped a conversation between the defendant's attorney and the defense investigator. The judge ordered the tape sealed, ordered the detective who heard it not to discuss it with anyone, and ruled that if at any time during trial defense counsel objected to any evidence, the prosecution would have the burden of proving that the evidence came from a source other than the tape.

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4

ARREST AND BENCH WARRANTS, SUMMONSES, SUBPOENAS

LINDSEY B. MERCER
C. BRADLEY PATTON

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§4.1 I. OVERVIEW

Arrest warrants. Arrests can be made with or without a warrant. Pen C §836. They are usually made by peace officers, but they can also be made by private persons. See Pen C §834. The United States and California constitutions and California statutes and case law place restrictions on arrests. For discussion of these restrictions, including the procedure for moving to exclude evidence based on an illegal arrest, see chap 16. For discussion of moving to exclude a confession obtained as a result of an illegal arrest, see chap 23.

Arrest warrants are usually printed forms filled in by a judge or magistrate directing any peace officer to arrest a particular person and bring him or her before the issuing judge or magistrate or, if the judge or magistrate is unavailable, before the nearest or most accessible magistrate. Pen C §§814, 1427.

Arrested persons must be taken before a magistrate "without unnecessary delay, and, in any event, within 48 hours after … arrest, excluding Sundays and holidays," unless the 48 hours expire when the magistrate's court is not in session. Pen C §825. See chap 6 for further discussion of Pen C §825.

Summons in lieu of arrest warrant. A summons may be used instead of an arrest warrant at the prosecutor's request when a complaint charging a felony is filed. Pen C §813. A summons gives the defendant the opportunity to appear in court for arraignment without being arrested.

> Ø **Note:** In some counties, the district attorney will send a "notify letter" advising the accused that a complaint has been filed and directing the accused to appear in court on a certain date. Failure to appear can result in issuance of a warrant.

Search warrants. Search warrants are judicial orders authorizing peace officers to search specified places and things and to seize specified evidence. US Const amend IV; Cal Const art I, §13; Pen C §§1523-1542. Searches and seizures may also be conducted in certain circumstances without a warrant. Searches and seizures that violate the Fourth Amendment are attacked by a motion to suppress under Pen C §1538.5. For further discussion, see chap 16.

Bench warrants. Bench warrants are warrants issued by a judge to bring a nonappearing defendant or witness before the court. Pen C §§978.5-981 (defendants); CCP §1993 (witnesses). These are sometimes called body attachments.

If a defendant has been ordered to appear, or has promised to appear, and counsel has not been authorized to appear on his or her behalf under Pen C §977, the court may issue a bench warrant. Pen C §§978.5-981, 985-986, 1195-1196, 1284-1285. Prescribed forms for bench warrants are in Pen C §§814 and 1197.

Bench warrants for nonappearing subpoenaed witnesses may issue only if the subpoena was personally served; service by mail under Pen C §1328d is insufficient. Pen C §1328d. See CCP §§1993 (bench warrant may issue on proof of service of subpoena), 1987(a) (personal service required).

Subpoenas. Subpoenas are orders compelling the attendance of a witness in a case. Cal Const art I, §15; Pen C §1326(a); Govt C §204. A subpoena duces tecum is an order requiring the subpoenaed person to bring with him or her specified evidence. See Pen C §§1326(b)-(d), 1327 (subpoena form). The relevant Judicial Council form is in California Criminal Law Forms Manual §4.1 (2d ed Cal CEB 2005).

Special time limits apply for subpoenaing police officers if they are not personally served. If their superior officer is to be served, it should be done more than 5 working days before the hearing—otherwise, there is a risk that the police officer will not have to attend. Pen C §1328(e).

> Ø **Note:** In civil actions and proceedings, and administrative per se hearings, a $150 deposit must be paid to the officers' department by private parties subpoenaing peace officers. Govt C §§68096.1-68097.2. No deposit is required in criminal cases. See Govt C §68093 (no mention of such a requirement in this statute).

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§4.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart.

Nature of Appearance or Event	Deadline in Felony Cases	Deadline in Misdemeanor Cases
Appearance before magistrate following arrest (arraignment if pleading on file).	*Arrests with a warrant*. Without unnecessary delay, but no longer than 48 hours after arrest, excluding holidays and Sundays, unless the 48 hours expire when magistrate's court is not in session. Pen C §825. When a complaint or indictment is filed, defendant appears before issuing judge or magistrate. *Warrantless arrests*. Probable cause determination must be made within 48 hours after arrest, *including* Sundays and holidays. *County of Riverside v McLaughlin* (1991) 500 US 44, 56, 114 L Ed 2d 49, 63, 111 S Ct 1661.	Same as in felony cases.
Subpoena of police officer.	If personally served, no time limit. If service on officer's superior, and less than 5 working days before hearing date, service may be refused; or superior may accept service, then later inform server of inability to contact officer if notice given at least 48 hours before hearing. Pen C §1328.	Same as in felony cases.
Subpoena of all others.	Service must allow witness a reasonable time for preparation and travel to place of attendance. CCP §1987(a).	Same as in felony cases.

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III. ARREST WARRANT

§4.3 A. Prosecutor's Role in Obtaining Arrest Warrant

An investigating officer from a police agency who wishes to obtain an arrest warrant may contact a prosecutor to discuss whether an arrest warrant should be used or whether the prosecutor should write a letter to the person to be charged stating that a charge has been filed and that the defendant must appear in court before a date certain to preclude the issuance of an arrest warrant.

Prosecutors are also available to assist investigating officers in preparing the affidavit or complaint required to secure an arrest warrant. See §4.5 for discussion of the documents that support the arrest warrant.

In felony cases proceeding by complaint, the prosecutor may ask the magistrate to issue a summons instead of an arrest warrant. Pen C §813. See discussion in §4.18.

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§4.4 B. Nature and Purpose of Warrant; Judges and Magistrates

A warrant of arrest is a written order, normally issued by a magistrate, directing any peace officer to arrest a designated person charged with a crime and bring him or her before a judge or magistrate. Pen C §§813-816, 1427; 4 Witkin & Epstein, California Criminal Law, *Pretrial Proceedings* §§15-23 (3d ed 2000). If the arrest is for a felony, the defendant is brought before the issuing magistrate or the nearest or most accessible magistrate in the county. Pen C §821. If the arrest is for a misdemeanor, the defendant is brought before the issuing judge or magistrate. Pen C §1427. See also Pen C §822 (arrest on out-of-county warrant), discussed in §6.30.

All judges are magistrates. Pen C §808. The office of magistrate is a statutory creation—a statutory office separate and distinct from the elective office of judge. *Koski v James* (1975) 47 CA3d 349, 354, 120 CR 754. Courts initially restricted the powers of magistrates to those specified in Pen C §§806, 807, 859, 859a, 859b, 871, and 872; however, later decisional law has accorded magistrates adjudicatory functions similar to those of trial judges. *Gray v Municipal Court* (1983) 149 CA3d 373, 377, 196 CR 808 (magistrates have "inherent judicial powers ancillary to their express statutory powers").

A magistrate uses an arrest warrant to obtain personal jurisdiction of the defendant. Personal jurisdiction is a necessary element in the prosecution of a criminal case. *Burns v Municipal Court* (1961) 195 CA2d 596, 599, 16 CR 64.

Arrest warrants are usually printed forms. The prescribed format is found in Pen C §§814 (felony) and 1427 (misdemeanor).

See §4.18 for discussion of the use of a summons as an alternative to a warrant.

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C. Requirements for Issuance

§4.5 1. Probable Cause

Procedure for obtaining warrant. An arrest warrant can be issued only by a magistrate. See Pen C §§813, 817, 1427. See also Pen C §808 (all judges are magistrates). A police officer can obtain an arrest warrant by:

- Filing a complaint (usually accompanied by a sworn statement setting forth facts constituting the offense and facts that led officer to believe defendant committed it) (Pen C §§813 (felonies), 1427(a) (misdemeanors));
- Submitting a written declaration of probable cause (also known as a *Ramey* warrant) (Pen C §817(a)-(b), codifying the holding in *People v Bittaker* (1989) 48 C3d 1046, 1070, 259 CR 630; see also *People v Ramey* (1976) 16 C3d 263, 127 CR 629); or
- Making an oral statement of probable cause under oath, either in person or on the telephone, that complies with Pen C §817(c).

Probable cause required. Whatever approach is used, the officer must "allege underlying facts upon which the magistrate can independently find probable cause to arrest the accused." *People v Sesslin* (1968) 68 C2d 418, 421, 67 CR 409, relying on *Giordenello v U.S.* (1958) 357 US 480, 485, 2 L Ed 2d 1503, 1509, 78 S Ct 1245. See also *People v Thompson* (1970) 6 CA3d 945, 950, 86 CR 327 (complaint couched solely in language of statute defining offense will not support arrest warrant). The magistrate must independently judge the persuasiveness of these facts and not merely accept a conclusion that the person whose arrest is sought has committed an offense. *Giordenello v U.S.* (1958) 357 US 480, 486, 2 L Ed 2d 1503, 1509, 78 S Ct 1245. A magistrate may issue a warrant of arrest only if he or she is satisfied from the evidence presented that the offense complained of has been committed and that there is reasonable cause to believe that the arrestee committed it. Pen C §§813, 1427; *People v Sesslin* (1968) 68 C2d 418, 426, 67 CR 409. See also *Taliaferro v Locke* (1960) 182 CA2d 752, 6 CR 813 (magistrate has discretion to refuse to issue warrant).

Ø **Note:** A *Ramey* warrant is used when the police want authority to arrest a suspect without at the same time filing formal charges. *People v Bittaker* (1989) 48 C3d 1046, 1070, 259 CR 630; *People v Case* (1980) 105 CA3d 826, 831, 164 CR 662 (formal initiation of criminal proceedings not prerequisite to arrest). It cannot be used to justify an arrest *to obtain* probable cause to charge an individual. *Goodwin v Superior Court* (2001) 90 CA4th 215, 108 CR2d 553 (court could not compel individual to appear in lineup before initiation of criminal proceedings).

Probable cause defined. "Reasonable cause," "probable cause," and "sufficient cause" are synonymous terms. *Ortega v Superior Court* (1982) 135 CA3d 244, 256, 185 CR 297. They mean a state of facts that would lead a person of ordinary caution and prudence to believe and conscientiously entertain an honest and strong suspicion that the person to be arrested is guilty of a crime. *People v Ingle* (1960) 53 C2d 407, 412, 2 CR 14. Probable cause for an arrest warrant, like probable cause for issuance of a search warrant, is measured by the totality of the circumstances standard enunciated by the U.S. Supreme Court in *Illinois v Gates* (1983) 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317. *People v Rosales* (1987) 192 CA3d 759, 768, 237 CR 558. As applied to arrests, this standard requires the issuing magistrate to make a practical, commonsense decision that, given all the circumstances set forth in the affidavit, a fair probability exists that a crime has been committed and that the individual named in the arrest warrant committed it.

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§4.6 2. Failure to Appear on Citation

When no probable cause needed in warrant. Warrants issued for failure to post bail or appear as promised in a notice to appear (Pen C §853.8; Veh C §40515) or for failure to post bail or appear after notice and complaint in parking violation cases (Veh C §§40203, 40215, 40513) are exempt from the usual requirements of a verified complaint and finding of probable cause.

The filing of a criminal complaint and a determination of probable cause by a magistrate are unnecessary if either the offense has been committed in the presence of the court and is revealed by its records (as in failure to appear as promised (Pen C §853.8; Veh C §40515; *People v Superior Court (Copeland)* (1968) 262 CA2d 283, 68 CR 629)) or circumstances giving rise to the issuance of the warrant are apparent from the court records (as in failure to post bail or to appear after notice and complaint in parking violation cases (Veh C §§40202-40203, 40205, 40215, 40513; *People v Weitzer* (1969) 269 CA2d 274, 75 CR 318)). See generally 56 Ops Cal Atty Gen 165 (1973). A warrant issued by the clerk in such cases is valid. *People v Weitzer* (1969) 269 CA2d 274, 285, 75 CR 318.

Warrants issued because of a failure to appear become part of the court's case file. For example, if a defendant received a traffic citation for speeding and failed to appear in court on the citation, a warrant would be issued. Veh C §40508. A copy of the warrant would be included in the court file relating to the speeding citation.

Effect of irregularities in warrant. Any irregularities in the warrant itself, or lack of merit in the underlying case, have no bearing on a defendant's obligation to appear; the warrant's invalidity does not excuse a failure to appear. Pen C §853.7.

> Ø **Note:** In many counties, prosecutors do not appear in court on traffic citations even though a failure to appear may be involved. Defense counsel may appear. Veh C §40507.

Civil assessment for failure to appear. When a defendant fails to appear, the court may impose a civil assessment of up to $300 instead of issuing a bench warrant or warrant of arrest. Pen C §1214.1(a). If a warrant is outstanding on the case, it must be recalled. Pen C §1214.1(c). Notice of failure to appear may be given to the Department of Motor Vehicles (DMV). Veh C §40509.5.

Requirements for issuing warrant on Veh C §40508 violation. No arrest warrant may be issued for a violation of Veh C §40508(a) (failing to appear) unless (1) the underlying offense is a misdemeanor or felony; (2) the offense relates to an equipment violation, a towing or loading violation, or overweight or oversized violation; (3) the driver has no driver's license; and (4) the driver has other pending failures to appear. Veh C §40509.5(e).

DMV action on failure to appear, failure to pay, or failure to obey court order. On notification of a defendant's willful failure to appear or pay a fine on an infraction, the DMV must suspend the person's privilege to operate a vehicle if the person has a prior willful failure. Veh C §13365. A failure to appear on a misdemeanor or felony or to obey a court order mandates suspension on the first failure to appear or obey. Veh C §13365.5.

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§4.7 D. Form of Arrest Warrant

Statutory form. The statutory forms for arrest warrants are set forth in Pen C §§814 (felony warrant), 817 (probable cause warrant), and 1427 (misdemeanor warrant).

Telegraphic and telephonic warrants. A copy or an abstract of a warrant may be transmitted by telegraph, teletype, or any other electronic device, and the copy or abstract is as effectual as the original in the hands of any peace officer. Pen C §850(a). The required contents of an abstract are set out in Pen C §850(b).

Police officers do not have to have a copy of an arrest warrant in their possession to make a valid arrest. Pen C §842. For example, officers who are advised of an arrest warrant through official channels over police radio or by telephone may make a valid arrest. See *People v Sanford* (1968) 265 CA2d 960, 71 CR 790.

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§4.8 E. Contents of Warrant

Directed to peace officer. A warrant of arrest must be directed generally to any peace officer in the state, or to any public officer or employee in the state authorized to serve process when the warrant is for a violation of a statute or ordinance that the officer has the duty to enforce. The warrant may be executed by any officer to whom it is delivered. Pen C §816.

Crime charged. A warrant must state the crime alleged to have been committed. The crime may be designated generally. Pen C §§814, 1427; *In re McCue* (1908) 7 CA 765, 96 P 110, overruled on other grounds in *Pryor v Municipal Court* (1979) 25 C3d 238, 158 CR 330.

Name of person to be arrested. The warrant must specify the name of the person to be arrested. Pen C §§814-815, 1427. See Cal Const art I, §13 (warrant must particularly describe person to be seized). If the defendant's real name is unknown but he or she has an alias, that name may be used on the warrant. *People v McLean* (1961) 56 C2d 660, 663, 16 CR 347. Otherwise, a fictitious name may be used (Pen C §815) as long as the warrant contains "sufficient information to permit [the arrestee's] identification with reasonable certainty" (*People v Montoya* (1967) 255 CA2d 137, 142, 63 CR 73). See also *People v McCrae* (1963) 218 CA2d 725, 728, 32 CR 500; *People v Erving* (1961) 189 CA2d 283, 290, 11 CR 203. A statement of the defendant's occupation, appearance, physical peculiarities, or place of residence might provide sufficient information, but a description of the defendant solely by height, approximate age, coloring, and build does not meet the constitutional requirement of reasonable particularity. *People v Montoya, supra*. A warrant that identifies the suspect by his or her unique DNA profile describes the suspect with sufficient particularity to commence prosecution when there is no more particular, accurate, or reliable means of identification available to law enforcement. *People v Robinson* (2010) 47 C4th 1104, ___ CR3d ___.

Time and place issued. An arrest warrant must state the time of its issuance and the city or county where it was issued. Pen C §815.

Signature of magistrate. An arrest warrant must be signed by a magistrate, who may be a judge of the superior court or a justice of the court of appeal or the supreme court. Pen C §808. The title of his or her office or the name of the court or other agency must appear on the warrant. Pen C §§814-815, 1427.

A printed or stamped signature is sufficient if it is authorized or adopted by the magistrate for the particular arrest warrant. *People v Brussel* (1932) 122 CA Supp 785, 788, 7 P2d 403. However, arrest warrants issued by a clerk under a blanket order authorizing him or her to endorse the judge's facsimile signature stamp are invalid. See *People v Weitzer* (1969) 269 CA2d 274, 75 CR 318 (dictum), and cases cited.

Warrants issued for failure to appear as promised, and warrants issued for standing and parking violations under the Vehicle Code, when issued under a magistrate's blanket authorization, are valid even though prepared by computer, stamped by the clerk, and never seen by the magistrate. *People v Weitzer* (1969) 269 CA2d 274, 75 CR 318; *People v Superior Court (Copeland)* (1968) 262 CA2d 283, 68 CR 629. These cases were decided under Pen C §840 when it did not require a showing of good cause for nighttime service (*People v Dinneen* (1974) 45 CA3d Supp 5, 119 CR 186) but are otherwise valid.

Amount of bail. If the offense is bailable, the magistrate must fix the amount of bail and endorse on the warrant a signed statement that the defendant is to be admitted to bail in the amount fixed. Pen C §815a. When the bail amount set on the warrant varies from the bail schedule, the increase must be supported by factual findings. Reliance on conclusionary language, such as "a danger to public safety" or "continues to pose a threat," is insufficient. *In re Christie* (2001) 92 CA4th 1105, 112 CR2d 495. See §§5.16-5.38 on bail.

Authorization for nighttime service. A warrant charging the defendant with a misdemeanor or an infraction can be executed between 10:00 p.m. and 6:00 a.m. if the warrant, "for good cause shown," directs that it may be served at any time of the day or night. Pen C §840.

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F. Execution of Warrants

§4.9 1. Nighttime Service

A warrant charging the commission of a felony may be served at any time. Pen C §840.

A warrant charging the defendant with a misdemeanor or an infraction cannot be executed between 10:00 p.m. and 6:00 a.m. unless (Pen C §840):

- The arrest is made in a public place (see *People v Whitted* (1976) 60 CA3d 569, 131 CR 639 (nighttime arrest in car on public street was valid under "public place" exception);
- The defendant is otherwise lawfully in custody;
- The warrant, "for good cause shown," directs that it may be served at any time of the day or night (see *People v Dinneen* (1974) 45 CA3d Supp 5, 119 CR 186 ("convenience of the marshals" was not good cause for nighttime arrest); or
- The arrest is made without a warrant under Pen C §§836 and 837.

The remedy for unlawful service of an arrest warrant is the same as that for unlawful service of a search warrant. The criminal action will not be dismissed because of an unlawful arrest, but if the illegality amounts to a violation of the Fourth Amendment (see Cal Const art I, §28(f)(2); *People v McKay* (2002) 27 C4th 601, 117 CR2d 236), evidence obtained as a result of the illegal service may be subject to suppression. *In re Larry C.* (1982) 134 CA3d 62, 67, 184 CR 505. See chap 16.

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§4.10 2. Duty to Execute

When an officer receives a warrant that appears on its face to be in proper form, it is his or her duty to carry out the order of the court and make an arrest. *Malone v Carey* (1936) 17 CA2d 505, 506, 62 P2d 166. The court may punish a willful failure to execute a warrant as contempt of court. *Pankewicz v Jess* (1915) 27 CA 340, 149 P 997.

A warrant appears on its face to be in proper form when it emanates from a court, officer, or body having the legal authority to issue a warrant that is legal in form and contains nothing to notify or fairly apprise a reasonable person that it was issued without authority. *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405; *Massachusetts v Sheppard* (1984) 468 US 981, 82 L Ed 2d 737, 104 S Ct 3424. These cases are discussed in §4.27. See also *People v Weitzer* (1969) 269 CA2d 274, 295, 75 CR 318.

When an arrest is made on communicated police information of an outstanding arrest warrant, the prosecution, if challenged, must prove that the arresting officer actually received the transmitted arrest warrant information. *People v Armstrong* (1991) 232 CA3d 228, 283 CR 429. On preservation of these tapes, see §8.32.

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§4.11 3. Time Limit on Service of Warrant

Unless an arrest warrant is served within a reasonable time after the complaint is filed, the defendant may be entitled to a dismissal on the ground that he or she was deprived of the right to a speedy trial. See *Jones v Superior Court* (1970) 3 C3d 734, 91 CR 578; *Stabio v Superior Court* (1994) 21 CA4th 1488, 26 CR2d 615. See also chap 19 (right to speedy trial).

For discussion of whether passage of time renders an arrest warrant irregular on its face within the meaning of CC §43.55 (civil liability of peace officer), see 57 Ops Cal Atty Gen 542 (1974).

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§4.12 4. Arrest Warrant Execution at Residence

To arrest a person inside his or her home, an arrest warrant is required unless a legal exception applies. *Payton v New York* (1980) 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371; *People v Ramey* (1976) 16 C3d 263, 127 CR 629. These exceptions include consent, exigent circumstances (such as hot pursuit of a fleeing felon), and the imminent need to prevent the destruction of contraband. *U.S. v Santana* (1976) 427 US 38, 49 L Ed 2d 300, 96 S Ct 2406; *People v Ortiz* (1995) 32 CA4th 286, 292, 38 CR2d 59.

Ø **Note:** When the arrest is for a minor offense, the Fourth Amendment may impose an absolute ban on warrantless entry. *Welsh v Wisconsin* (1984) 466 US 740, 750 n1, 80 L Ed 2d 732, 739 n1, 104 S Ct 2091.

To *forcibly* enter a residence with an arrest warrant to arrest a resident, officers must have probable cause to believe that the resident to be arrested is in the residence at the time. Pen C §844; *People v Jacobs* (1987) 43 C3d 472, 233 CR 323; *People v Dyke* (1990) 224 CA3d 648, 274 CR 66.

To enter a residence to arrest a guest, a search warrant is required. *Steagald v U.S.* (1981) 451 US 204, 206, 68 L Ed 2d 38, 41, 101 S Ct 1642.

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§4.13 5. Location of Arrest Warrant After It Is Served

Copies of arrest warrants are generally kept in the court file of the case to which the warrant relates. Because the file is a public record, a request to the court clerk to see the warrant is all that is required.

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§4.14 6. Duty to Bring Arrestee Before Magistrate

Arrest warrants command the arresting officer to bring the named defendant before the issuing magistrate or, if the magistrate is absent or unable to act, before the nearest or most accessible magistrate in the county where the warrant was issued. Pen C §§814, 1427. Under Cal Const art I, §14, all defendants charged with a felony are specifically guaranteed the right to "be taken without unnecessary delay before a magistrate." Under Pen C §825, a defendant must be taken before the appropriate magistrate "without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays," unless the prescribed 2 days expire when the magistrate's court is not in session. This section does not authorize even a 48-hour detention in all cases, but places a limit on what may be considered a necessary delay; depending on the circumstances of the case, a delay of less than 48 hours may be unreasonable. *People v Powell* (1967) 67 C2d 32, 59, 59 CR 817.

In *Youngblood v Gates* (1988) 200 CA3d 1302, 1319, 246 CR 775, the court interpreted the language of Pen C §825 to mean that an appearance the same day may be required in many instances.

Persons arrested on misdemeanor arrest warrants must be released on a citation unless certain specified conditions exist. Pen C §827.1 If an exception exists, the 48-hour rule of §825 applies.

For discussion of the legal effect of failure to comply with the 2-day requirement, and counsel's remedy, see §19.14.

If a peace officer serves a misdemeanor Vehicle Code violation warrant that states that a citation may be used instead of physical arrest, the officer may release the defendant on a promise to appear. Pen C §818. The issuance of a notice to appear and securing a promise to appear, with an appropriate endorsement on the warrant, is considered compliance with the directions of the warrant. Pen C §818.

Penal Code §853.6(h) authorizes a peace officer to use the written notice to appear procedure in Pen C §853.6 for any misdemeanor offense in which the arrest is based on Pen C §836, which includes an arrest with a warrant.

For the procedure when a defendant is arrested in a county other than the issuing county, see §6.30. For discussion of probable cause hearings, see §6.23.

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§4.15 G. Surrendering Defendant on Arrest Warrant

When an out-of-custody client contacts defense counsel about an outstanding warrant, counsel should find out whether it is for an unpaid parking ticket, an outstanding warrant on a criminal case, or a failure to appear. The traffic clerk's office is usually able to accept payment for unpaid traffic tickets and clear the warrant.

When a warrant is for a case on which the defendant has not yet appeared, counsel should find out the amount of the bail. Counsel should then arrange for the defendant to be prepared to post bail at the time he or she turns him- or herself in. Arrangements must also be made for the defendant to be fingerprinted and photographed by the police. Counsel should tell the client not to discuss the case with the police and should tell the police not to question the defendant without counsel present. See the sample advisement in §23.5.

When a warrant is issued for failure to appear on a pending case, counsel may contact the judge who issued the warrant, or the judge's clerk, and arrange to have the case put on calendar. At that time, counsel should be prepared to present any necessary witnesses and evidence to support the reason for the defendant's failure to appear. The defendant should be prepared to have bail raised, or set if the defendant was on O.R. release.

Ø **Note:** Local rules may require 2 or more days' notice to place a case on the calendar. In jurisdictions requiring such notice, the bench warrant remains outstanding until the defendant appears in court.

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IV. CONSEQUENCES OF INVALID ARREST WARRANT

§4.16 A. No Effect on Personal Jurisdiction of Defendant

A defendant cannot obtain the dismissal of a criminal prosecution on the ground that he or she was illegally arrested. *People v Bradford* (1969) 70 C2d 333, 344, 74 CR 726 (defendant illegally arrested on warrant that should not have issued, because no underlying facts showing probable cause were submitted to magistrate).

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§4.17 B. Can Affect Admissibility of Evidence

Evidence seized following an illegal arrest must be suppressed unless the prosecution shows that the taint of the illegal arrest has been dissipated or the doctrine of inevitable discovery applies. *People v Superior Court (Sosa)* (1982) 31 C3d 883, 185 CR 113; *People v DeVaughn* (1977) 18 C3d 889, 893, 135 CR 786. As a result of Proposition 8, however, the term "illegal" must be construed as violating the Fourth Amendment, not merely California law. *People v McKay* (2002) 27 C4th 601, 117 CR2d 236 (holding under authority of *Atwater v City of Lago Vista* (2001) 532 US 318, 149 L Ed 2d 549, 121 S Ct 1536, that evidence obtained as result of custodial arrest for fine-only offense (here, riding bicycle against traffic) is not subject to suppression, even if illegal under California law). For discussion of motions to suppress, see chap 16.

The fruits of an illegal arrest are admissible when the prosecution can show that the connection between the illegal arrest and the discovery of the evidence is sufficiently attenuated to dissipate the taint of the illegal conduct. See *U.S. v Ceccolini* (1978) 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054.

The doctrine of inevitable discovery applies when the prosecution can establish that there was a reasonably strong probability that the evidence would have been discovered by lawful means independent of any illegal arrest. *Nix v Williams* (1984) 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (police illegally had defendant lead them to victim's body, but volunteer searchers would have discovered it without defendant's assistance); *Hernandez v Superior Court* (1980) 110 CA3d 355, 364, 185 CR 127. Cases analyzing this principle are collected in *People v Superior Court (Tunch)* (1978) 80 CA3d 665, 671, 145 CR 795.

If an arrest warrant should have been recalled because the defendant had posted bail and showed the bail receipt to the police, the officers cannot claim they acted in good faith in executing the warrant, and the resulting evidence should be excluded. *People v Ivey* (1991) 228 CA3d 1423, 1428, 279 CR 554.

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§4.18 V. SUMMONS IN PLACE OF ARREST WARRANT

At the prosecution's request, a magistrate may issue a summons instead of an arrest warrant after a complaint has been filed. A summons gives the defendant the opportunity to appear voluntarily, without being arrested.

A summons should be in substantially the same form as an arrest warrant. It should inform the defendant of the offense with which the defendant is charged and the time and place at which the defendant is to appear, and give notice that the defendant must complete the booking process before the first court appearance, with instructions on how to do so.

The prosecutor is precluded from requesting a summons in place of an arrest warrant if (1) the offense charged involves violence, a firearm, or resisting arrest; (2) there are outstanding arrest warrants for the defendant; (3) the prosecution of this or other offenses would be jeopardized; (4) there is a reasonable likelihood that the offense would continue or the safety of persons or property would be jeopardized; or (5) there is reason to believe the defendant would not appear at the time specified. Pen C §813(e).

If the defendant has not completed the booking process at the time of the first appearance, the court must order him or her to do so. Pen C §813(d).

> Ø **Note:** Some counties permit a brief "book and release" in the courthouse without requiring the defendant to complete the entire booking procedure in the jail. In counties that require the defendant to be booked in jail, it may take many hours to complete a records check of the defendant. The process may also involve transporting the person to a different location. Some counties permit the defendant to complete the booking at a future date. The defendant should be advised of the time involved.

If a defendant was properly served with a summons and fails to appear at the designated time and place, a bench warrant will be issued. However, in absence of proof of actual receipt of the summons by the defendant, a failure to appear should not be charged. Pen C §813(c).

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§4.19 VI. PROBABLE CAUSE FOR WARRANTLESS ARRESTS

Even when circumstances authorize an arrest without a warrant, the officer must have probable cause for the arrest. Probable cause for a warrantless arrest exists when the facts known by the officer at the time of arrest would have led a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested was guilty of a crime. *People v Price* (1991) 1 C4th 324, 410, 3 CR2d 106. See *People v Ortiz* (1995) 32 CA4th 286, 38 CR2d 59, for what does not meet this test.

The police can arrest a person suspected of carrying a loaded firearm without a warrant even though no other crime was committed in the officer's presence. Pen C §12031. The police can also arrest a person suspected of carrying a concealed firearm (Pen C §12025) without a warrant when that person is within the inspection area of any airport (Pen C §836(e)).

An officer has the power to arrest a person whom the officer has reasonable cause to believe has been driving under the influence of alcohol, drugs, or both, when one or more of the following conditions exist (Veh C §40300.5):

- The person has been involved in a traffic incident;
- The person is observed in or about a vehicle that is obstructing a roadway;
- The person will not be apprehended unless an arrest is made immediately;
- The person may cause injury to him- or herself or damage property unless immediately arrested; or
- The person may destroy or conceal evidence of the crime unless immediately arrested (see *People v Thompson* (2006) 38 C4th 811, 820, 43 CR3d 750).

On a domestic violence call, the police may arrest an individual whom the police have reasonable cause to believe has committed an assault or a battery, whether or not a battery was in fact committed, as long as the officer makes the arrest as soon as reasonable cause arises. Pen C §836(d).

A probable cause determination must be made within 48 hours after the arrest when a person is arrested without a warrant. *County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 111 S Ct 1661. For further discussion, see §6.23.

In misdemeanor cases in which the defendant is in custody at arraignment, a probable cause hearing is required on request. Pen C §991. The case must be dismissed unless the court finds probable cause to believe that (1) a public offense has been committed and (2) the defendant is guilty of committing it. No notice is required, and the motion may be made orally following entry of a not guilty plea. Pen C §991. For further discussion, see §6.23.

In felony cases prosecuted by complaint, a preliminary hearing to test probable cause is required. See Pen C §871. Preliminary hearings are discussed in chap 8.

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§4.20 VII. CORPORATE SUMMONS

When an accusatory pleading is filed against a corporation, the court must issue a summons rather than a warrant of arrest. Penal Code §1390 provides that the summons must be "signed by the judge with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than 10 days after the issuing of the summons." For form of the summons, see Pen C §1391.

At the time appointed in the summons, the magistrate proceeds in the same manner as in other cases. Pen C §1393.

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VIII. BENCH WARRANT

§4.21 A. Purpose

A bench warrant is the process used to bring a nonappearing defendant before the court when his or her personal presence is required. Pen C §§978.5-981, 985-986, 1195-1197, 1284-1285. See 4 Witkin & Epstein, California Criminal Law, *Pretrial Proceedings* §102 (3d ed 2000). See also CCP §1993 (bench warrant may issue for witness's failure to obey subpoena).

At any time after the order for a bench warrant is made, whether the court is sitting or not, the clerk, or if there is no clerk, the judge or justice of the court, on application of the prosecuting attorney, may (or, in case of a warrant issued for failure to appear for judgment, must) issue a bench warrant. Pen C §§978.5 (general section relating to bench warrants), 1196 (bench warrant for judgment).

On issuance of a bench warrant for a subpoenaed witness who fails to appear, see §4.36.

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B. Requirements for Issuance

§4.22 1. Failure of Defendant to Appear When Required

Penal Code §978.5 sets forth a nonexclusive list of situations in which a defendant's failure to appear may result in the issuance of a bench warrant by a judge or magistrate:

- The defendant was ordered by a judge or magistrate to personally appear in court at a specific time and place.
- The defendant was released from custody on bail and ordered by a judge or magistrate, or other person authorized to accept bail, to personally appear in court at a specific time and place.
- The defendant was released from custody on his or her own recognizance and promised to personally appear in court at a specific time and place.
- The defendant was released from custody or arrest on citation by a peace officer or other person authorized to issue citations and signed a promise to personally appear in court at a specific time and place.
- The defendant authorized counsel to appear for him or her, but the court or magistrate ordered the defendant to personally appear in court at a specific time and place.

Ø **Note:** Courts cannot have a policy of always requiring misdemeanor defendants to be present in court when the defendant wishes to appear through counsel. Unless the defendant's appearance is required by law (see, *e.g.,* Pen C §977(a)(2)), an order requiring the defendant's personal presence must be based on the circumstances of each case. *Simmons v Superior Court* (1988) 203 CA3d 71, 249 CR 721.

- An information or indictment was filed in the superior court and the court fixed the date and place for the defendant to personally appear for arraignment.

If a defendant who has been released on bail, or on his or her own recognizance (see Pen C §1318), fails to appear for arraignment when his or her personal presence is necessary, the court, in addition to ordering bail forfeited, may order the clerk to issue a bench warrant. Pen C §979. See also *Brewer v Municipal Court* (1961) 193 CA2d 510, 514, 14 CR 391.

Ø **Note:** Willful failure to appear in order to evade the court's process when the person has been released on his or her own recognizance is a misdemeanor in a misdemeanor case and a felony in a felony case. Pen C §1320. In felony cases, willful failure to appear in order to evade the court's process while the defendant is released on bail is a felony. Pen C §1320.5.

Under Pen C §1043(e), the trial court in a misdemeanor case may issue a bench warrant if the defendant does not appear at or during trial and the absence was not previously authorized under Pen C §977.

If the defendant fails to appear for judgment when his or her personal appearance is necessary, the court may (or on application of the prosecuting attorney must) direct the clerk to issue a bench warrant for the defendant's arrest. Pen C §1195.

The court is not required to issue a bench warrant when a defendant is not in court when his or her case is called. When the court has reason to believe that there is an excuse for the defendant's absence, the court can continue the case for an amount of time it considers reasonable. Pen C §1305.1. It is not uncommon for courts to put cases over to a later time the same day, without immediately issuing a bench warrant, when counsel represents that the client has an excuse or has indicated that he or she will be there later.

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§4.23 2. Order Increasing Defendant's Bail

If bail in a felony case is increased (see Pen C §1269c) and the defendant is not present in court when the order is made, the court may issue a bench warrant. Pen C §§985-986.

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§4.24 C. Form and Contents of Warrant

Statutory forms for bench warrants are set out in Pen C §§981 (failure to appear for felony arraignment) and 1197 (failure to appear for judgment). The felony arraignment form may be adapted for use in misdemeanor cases. Pen C §690. Additional forms approved by the Judicial Council follow Pen C §814.

A bench warrant must name or describe the person to be arrested. See §4.8. If the offense is bailable, the court must fix the amount of bail and endorse on the warrant an order admitting the defendant to bail in the fixed amount. Pen C §982.

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§4.25 D. Execution of Warrant

A bench warrant may be served in any county in the same manner as an arrest warrant. Pen C §§983, 1198.

A bench warrant, like an arrest warrant, must be served within a reasonable time after its issuance; otherwise, the defendant may be entitled to dismissal on the ground that he or she has been deprived of the right to a speedy trial. *People v Mitchell* (1972) 8 C3d 164, 104 CR 348 (dismissal for unjustified, prejudicial 13-month delay in service). See also chap 19 on speedy trial.

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§4.26 E. Duty to Bring Arrestee Before Court or Magistrate

A bench warrant for failure to appear at arraignment directs the officer to whom it is addressed to bring the defendant before the issuing court or, on the defendant's request, before any magistrate in the issuing county or in the county of arrest for the purpose of giving bail. Pen C §§981-982, 984, 1284.

If a bench warrant is issued for the defendant's failure to appear for judgment, it directs the arresting officer to bring the defendant before the issuing court for judgment. Pen C §1197. Whether a warrant is served in the county in which it was issued or in another county, the officer serving it must bring the defendant before the issuing court or deliver him or her to any peace officer of the issuing court, who must bring the defendant before the issuing court. Pen C §1199.

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§4.27 IX. SEARCH WARRANT

A search warrant is a written order issued by a magistrate and directed to a peace officer, commanding the officer to search for personal property and bring it before the magistrate. Pen C §1523.

"If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched." *Michigan v Clifford* (1984) 464 US 287, 294, 78 L Ed 2d 477, 484, 104 S Ct 641. The warrant must particularly describe "the place to be searched, and the persons or things to be seized." US Const amend IV; Cal Const art I, §13. For discussion of *Illinois v Gates* (1983) 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317, which enunciated a commonsense, totality-of-the-circumstances test for determining probable cause in search warrants, see §4.5.

The exclusionary rule does not apply to search warrants issued by a detached and neutral magistrate if they are reasonably relied on by the police, acting in good faith. *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405 (affidavit did not provide probable cause); *Massachusetts v Sheppard* (1984) 468 US 981, 82 L Ed 2d 737, 104 S Ct 3424 (defect in warrant form). See also *People v Rodrigues-Fernandez* (1991) 235 CA3d 543, 286 CR 700 (court applied *Leon*). For further discussion of the "good faith" exception to the exclusionary rule, see §16.18.

The statutory provisions governing search warrants are in Pen C §§1523-1542. See chap 16 for discussion of search and seizure motions.

Search warrants are kept on file by the magistrate who authorized the warrant. Clerical personnel generally file them consecutively by number according to when the warrant was issued, or by street address. The first warrant issued in each new year would bear the number one.

Police are required to leave a receipt for any property taken. Pen C §1535. See also Fed R Crim P 41(f) (officer taking property under the warrant must give a copy of the warrant and a receipt for property taken). Failure to display or provide a copy of the warrant at the time of execution does not, however, require suppression. See *People v Calabrese* (2002) 101 CA4th 79, 85, 123 CR2d 570. For comprehensive treatment of the law applicable to search warrants, particularly the constitutional prerequisites to issuing the warrant, the warrant's form and content, and the procedures available for challenging the warrant, see 4 Witkin & Epstein, California Criminal Law, *Illegally Obtained Evidence* §§79-142 (3d ed 2000), and LaFave, Search and Seizure (Criminal Practice Series) (4th ed 2004).

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X. SUBPOENAS

§4.28 A. Forms, Issuance, and Service

A defendant in a criminal case has the right to compel the attendance of witnesses on his or her behalf. Cal Const art I, §15; Pen C §686(3). The state has the same right to compel the attendance of witnesses. Govt C §204. In either case, the process ordinarily used to compel the attendance of a witness is a subpoena.

However, when a material witness is imprisoned in a state prison or in a jail in another county, the party desiring to obtain his or her attendance in a criminal proceeding, a preliminary hearing, or a grand jury proceeding must obtain a court order for the witness's temporary removal and production before the judge, magistrate, or grand jury. See Pen C §§1567, 2621. If the witness is incarcerated in a state prison outside the county in which the request is made, the district attorney, defense counsel, or the defendant must file an affidavit "showing that the testimony is material and necessary." Pen C §2621. The court's order will be addressed to the sheriff of the county in which the court issuing the order is located. Pen C §§1567, 2621. There is no requirement that the inmate witness be served with a subpoena before the removal order issues. *People v Garcia* (2008) 160 CA4th 124, 130, 72 CR3d 544.

There are two types of subpoenas: a subpoena, which requires a person to attend a hearing (Pen C §1326(a)), and a subpoena duces tecum (Pen C §1326(b)-(d)), which requires specified evidence to be produced in court. See Pen C §1327 (form of subpoena). See also §§4.32-4.35 (quashing subpoena and subpoena duces tecum).

Counsel can obtain records from a nonparty directly if the person or entity whose records are being sought consents and signs a form authorizing release of information to counsel. See Pen C §1326(d). Without consent, counsel may cause a subpoena duces tecum to be issued directing the custodian of records to deliver the records to the court. Evid C §1560(b); Pen C §1326(b)-(c). The subpoena duces tecum, however, does not entitle the person subpoenaing records to have access to them. When the defense issues a subpoena duces tecum to a nonparty, the court may order an in camera hearing to decide whether the defense is entitled to receive the documents; the court may not order the documents disclosed to the prosecution except as required by Pen C §1054.3. Likewise, a judicial determination must first be made that the prosecution is entitled to receive subpoenaed documents. *People v Blair* (1979) 25 C3d 640, 651, 159 CR 818.

Among the persons authorized to sign and issue a subpoena under Pen C §1326 are a judge or magistrate, court clerk, district attorney or his or her investigator, public defender or his or her investigator, and the attorney of record for the defendant. See Pen C §1326(a). In some counties, attorneys can obtain presigned subpoena forms from the clerk's office. Use of Judicial Council Form CR-125 (Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile)) is mandatory. See Cal Rules of Ct 1.31. Using commercial software containing the Judicial Council form allows information required on the subpoena to be saved and reused if the court appearance is changed and new subpoenas need to be reissued. This practice is particularly helpful in cases with a large number of witnesses.

Ø **Note:** Defendants are entitled to obtain as many blank subpoenas as they need from the clerk or judge of the court where the case is to be tried. Pen C §1326(a)(3).

Penal Code §1327, which sets out the requirements for subpoenas duces tecum in criminal cases, requires only that the person subpoenaed be told the name of the case, where and when to appear, and what documents or papers, if any, are requested. Code of Civil Procedure §1985(b), which requires service of an affidavit or declaration showing good cause for production of the requested items with a subpoena duces tecum, does not apply in criminal cases. *Michael B. v Superior Court* (2002) 103 CA4th 1384, 127 CR2d 454.

Ø **Note:** Civil discovery rules generally do not apply in criminal cases. See, *e.g., Pitchess v Superior Court* (1974) 11 C3d 531, 536, 113 CR 897 (CCP §§1985.3-1985.4, for subpoenaing consumer records—called "personal records" (*e.g.,* financial, medical, and educational records, including electronic data of those records)—that do not apply in criminal cases). They do apply, however, in civil commitment proceedings, including the

special proceedings of a civil nature authorized by the Sexually Violent Predator Act (Welf & I C §§6600-6609.3). *People v Yartz* (2005) 37 C4th 529, 537, 36 CR3d 328. See, *e.g., Lee v Superior Court* (2009) 177 CA4th 1108, 1112, 99 CR3d 712 (CCP §1985 affidavit requirement for subpoena duces tecum).

Subpoenas may be personally served by anyone except a defendant in the case. Personal service means delivering the subpoena to the person to be served. *Holiness Church v Metropolitan Church Ass'n* (1910) 12 CA 445, 448, 107 P 633. See Pen C §1328. A telegraphic copy of a subpoena may be served in place of the original. Pen C §1328a. Peace officers are required to serve subpoenas in their county for either the prosecution or the defendant. Pen C §1328(a). Because of fiscal restraints, however, timely service may not always be possible. Many private defense attorneys use private process servers or investigators.

Subpoenas for minors are served on the parent, guardian, or other person specified in Pen C §1328(b), or on the minor directly if the minor is age 12 or older. Pen C §1328(b). Witness fees are provided to the person served on behalf of the minor. Pen C §1328(b).

Security can be required of a material witness when there is good cause to believe that he or she will not appear to testify. Pen C §1332(a). See also Pen C §§878-880, 882, 1336, 1345.

Service must be made in time to allow the witness a reasonable time for preparation and travel to the place of attendance. CCP §1987(a). Special time requirements apply for substituted service on police officers (discussed in §4.30).

A subpoena duces tecum of business records is governed by Evid C §§1560-1567. See Jefferson's California Evidence Benchbook §4.11 (4th ed CJA-CEB 2009); Effective Introduction of Evidence in California, chap 13 (2d ed Cal CEB 2000). Production of official writings is governed by Evid C §§1530-1532. See Evidence Benchbook §§5.1-5.5; Effective Intro of Evidence, chap 36.

Ø **Note:** In civil cases, the subpoenaing party may direct the witness to make the records available for inspection or copying at the witness's business address under reasonable conditions during normal business hours, rather than delivering copies to the court. Evid C §1560(e). This option is not available in criminal cases. Evid C §1560(e); Pen C §1326(b).

The subpoena server must give a written return of service to the subpoenaing party that states whether service was made (including time and place of service). Pen C §1328(a).

Ø **Note:** Counsel should bring the return of service to court if requesting a continuance to try to find the witness. The subpoena server may also be needed to testify to efforts made to find the witness. See Pen C §1050. The return of service will also be needed if the witness fails to appear. See §4.36.

A witness who has been subpoenaed may be placed "on call" by oral or written agreement with the party who subpoenaed the witness if the witness agrees to appear on another date and agrees to other forms of notice. Pen C §1331.5.

Ø **Note:** If the witness is in court when the case is continued, counsel can ask the judge to order the witness back on a particular date.

Service may be effected by mail or messenger under Pen C §1328d. Service by mail or messenger is not effected until the witness acknowledges receipt of the subpoena by telephone, by mail, or in person, and identifies him- or herself by date of birth and driver's license or Department of Motor Vehicles identification card number. Pen C §1328d. See §4.36 on remedies if witness fails to appear.

Ø **Note:** Service by "messenger" (Pen C §1328d) probably means delivery by a person under conditions other than those that would qualify for personal service. If "messenger" meant personal service, the acknowledgment required by §1328d would be unnecessary, because a proper personal service needs no such acknowledgment to be effective. The legislature should consider amending the statute (Pen C §1328d) to include service by fax and e-mail with the appropriate acknowledgment.

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§4.29 B. Geographic Factors Affecting Issuance and Service

If the distance from a witness's residence to the place of trial is less than 150 miles, an ordinary subpoena is sufficient. Pen C §1330. If the distance is 150 miles or more (but within California), the party seeking the witness must present an affidavit or declaration (CCP §2015.5) to a judge in the court in which the offense is triable, a superior court judge, or a justice of the California Supreme Court, stating a belief that the witness's evidence is material and his or her attendance is necessary. Pen C §1330. The subpoena is valid only if the court then endorses on it an order for the witness's attendance. Pen C §1330. If only documents are subpoenaed, the 150-mile limitations do not apply. Pen C §1330.

Ø **Note:** If there is not enough room on the subpoena to include the mileage endorsement, some practitioners prepare a separate order and endorsement, which they staple to the subpoena. Counsel should ascertain local practice before relying on this format.

If a witness is outside California, the party desiring the witness's presence at trial must comply with the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (Pen C §§1334-1334.6). As with a witness who lives more than 150 miles from the place of trial, only a judge can authorize an effort to secure the presence of a witness who is outside California. Pen C §1334.2; *People v Cavanaugh* (1968) 69 C2d 262, 266, 70 CR 438. Subpoenaed out-of-state witnesses are exempt from arrest or service of civil or criminal process. Pen C §1334.5.

If counsel represents a witness in California subpoenaed to testify out of state, counsel should appear at the hearing held under the Uniform Act in the California county where the witness resides to see if the subpoena will issue. See Pen C §1334.2. The California judge determines whether the witness should be taken into custody. Pen C §1334.3. The witness is entitled to witness fees and reimbursement for additional expenses. Pen C §1334.3.

The 150-mile limitation on the attendance of witnesses does not apply to the issuance of a subpoena duces tecum if the subpoena does not require the attendance of the custodian of records. Pen C §1330. The 150-mile limitation also does not apply in civil cases. CCP §1989.

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§4.30 C. Subpoenaing Law Enforcement Officers

Peace officers. Subpoena of a peace officer must be by personal service or by service of two copies to the peace officer's immediate superior or the agent designated by his or her immediate superior to receive such service. In some counties, service may be done electronically, *e.g.,* by e-mail, computer modem, or fax, to the officer's immediate superior or agent. The superior or agent must acknowledge receipt of the subpoena. Pen C §1328(c).

If the subpoena is served on the superior or his or her agent, the superior or agent may refuse to accept service if that person knows that he or she does not have enough time to deliver a copy of the subpoena to the subpoenaed officer. Pen C §1328(d). If the subpoena is accepted by the superior or his or her agent, but that person later determines that he or she will be unable to deliver it to the subpoenaed officer, the superior or agent must notify the subpoena server or his or her office or agent of that fact no less than 48 hours before the hearing date. Pen C §1328(f). If the subpoena is served on the superior less than 5 working days before the hearing date, the superior may refuse to accept service if he or she is not reasonably certain that service may be completed. Pen C §1328(e).

When a superior accepts service and no exception exists excusing compliance, the superior must serve the officer being subpoenaed as soon as possible, and in no event later than a time that will allow the officer to comply with the subpoena. Pen C §1328(c). When a California Highway Patrol officer's immediate superior is served with a subpoena for the officer, it must be served on the officer on the officer's first work day following acceptance of the subpoena. Failure of the superior to deliver the subpoena is not a defect in service. Pen C §1328(g).

Private parties who subpoena peace officers for civil actions or proceedings must pay a $150 deposit to the officer's department. Govt C §§68096.1-68097.2. These provisions are, by their terms, inapplicable to criminal proceedings.

A subpoena to compel the attendance of a member of the California Highway Patrol at an administrative per se hearing (see Veh C §13558 concerning those hearings) requires a $150 deposit even if the driver is indigent. *Nick v DMV* (1993) 12 CA4th 1407, 16 CR2d 305; Govt C §68097.2.

Department of Justice employees. Special rules govern attempts to compel the appearance of current or former employees of the Department of Justice, including FBI and DEA Special Agents. A request under 28 CFR §§16.22-16.29 must be presented to the U.S. Attorney or Assistant Attorney General. When the United States is not a party to the case, an affidavit by the party seeking the testimony or documents must be submitted that sets forth a summary of the testimony or information sought and its relevance to the proceeding. 28 CFR §16.22.

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§4.31 D. Witness Fees

The payment of witness fees is governed by Pen C §1329. Under §1329, the court or magistrate has the discretion to grant $12 per day for each day's attendance, a reasonable sum for necessary expenses, and, if the witness is employed, up to $18 per day rather than the $12 per day if the employer does not pay the employee's wages for the time lost because of the employee's appearance in court.

Expenses for out-of-state witnesses are governed by the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (Pen C §§1334-1334.6) and are specified in Pen C §1334.2.

Under Govt C §68098, fees for witnesses in criminal cases are charged against the same fund as jurors' fees in criminal cases. Jurors' fees in criminal cases are county charges under CCP §215. In other words, witness fees are paid by the county rather than by the party.

In criminal cases, a court does not have the power to order a party to pay additional compensation to a witness as a sanction for the party's abuse of process. *Fabricant v Superior Court* (1980) 104 CA3d 905, 163 CR 894.

Ø **Note:** It appears permissible for either the prosecution or defense to pay the reasonable cost of travel and lodging for a witness who does not reside in the local area when the court refuses to authorize such costs. However, an unreasonable expenditure of money on a witness subjects the witness to impeachment under Evid C §780(f) on the ground that the witness was influenced by the monetary attention paid to him or her.

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E. Quashing Subpoena

§4.32 1. Subpoena for Witness

A trial court may quash a subpoena that is regular on its face when the facts justify such an action. See CCP §1987.1. See also *People v Rhone* (1968) 267 CA2d 652, 657, 73 CR 463. It may be quashed when the prospective witness would not have contributed material evidence. *People v Rhone, supra* (defendant failed to show how police chief's testimony was relevant to his case); *Civiletti v Municipal Court* (1981) 116 CA3d 105, 110, 172 CR 83 (same regarding U.S. Attorney General).

The trial court does not have the power to quash a subpoena relating to a material witness (*People v Superior Court (Long)* (1976) 56 CA3d 374, 126 CR 465) or a subpoena relating to a witness who can establish the materiality of another witness (*People v Singletary* (1969) 276 CA2d 601, 81 CR 79).

The power to quash a subpoena for a witness includes a witness subpoenaed for a hearing on a motion as well as a witness subpoenaed to testify at trial. *People v Rummler* (1975) 44 CA3d 638, 642, 118 CR 872.

For further discussion of motions to quash in the civil context, see California Trial Practice: Civil Procedure During Trial §§4.45-4.51 (3d ed Cal CEB 1995) (grounds, forms, and procedure). A sample motion to quash a subpoena (duces tecum) is in California Criminal Law Forms Manual §4.2 (2d ed Cal CEB 2005).

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§4.33 2. Subpoena Duces Tecum

The issuance of a subpoena duces tecum under Pen C §§1326-1327 is a ministerial act requiring only that the described records be produced in court; it does not authorize legal access to the records by the party who obtained the subpoena until the court has decided that the party is legally entitled to receive them. Pen C §1326(c); *People v Hammon* (1997) 15 C4th 1117, 65 CR2d 1; *People v Blair* (1979) 25 C3d 640, 651, 159 CR 818.

A subpoena duces tecum may be issued in a criminal case to require the production of documentary evidence in the possession of a person or entity who is not a party to the proceeding. *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897. After such a subpoena has been issued, the person or entity who is ordered to produce the documentary evidence has the right to appear in court and show cause why the records should not be revealed to the party who issued the subpoena. *Pacific Lighting Leasing Co. v Superior Court* (1976) 60 CA3d 552, 131 CR 559. The court may hold an in camera hearing to decide whether the subpoenaing party is entitled to receive the documents. Pen C §1326(c). If an in camera hearing is held with respect to a defense-issued subpoena, the prosecution must receive notice of the hearing. *People v Superior Court (Humberto S.)* (2008) 43 C4th 737, 749, 76 CR3d 276. For further discussion of discovery, see chap 11.

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§4.34 3. Alternatives to Motion to Quash

As an alternative or in addition to moving to quash (discussed in §§4.32-4.33), counsel can object to the subpoenaed witness or evidence during the hearing or trial. *Spencer v Hibernia Bank* (1960) 186 CA2d 702, 9 CR 867. Objections may also be raised as defenses during contempt proceedings if the witness refuses to appear or testify. See 2 Witkin, California Evidence, *Witnesses* §28 (4th ed 2000).

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§4.35 F. Mandate When Motion to Quash Denied

The appropriate remedy when a motion to quash is denied is to file a petition for writ of mandate. The burden is on the party seeking the writ to demonstrate that the trial court abused its discretion. *Pitchess v Superior Court* (1974) 11 C3d 531, 535, 113 CR 897. For discussion and forms regarding writ of mandate, see chap 42 (writs); Appeals and Writs in Criminal Cases, chaps 7-8 (3d ed Cal CEB 2007).

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§4.36 G. Counsel's Options When Witness Fails to Appear

When a witness was not subpoenaed and fails to appear for a hearing or trial, counsel's only remedy is to request a continuance. Counsel must give opposing counsel at least 2 court days' notice if counsel knows in advance that the witness is unavailable. Pen C §§1050, 1050.5 (discussed in §§20.9-20.12).

If the witness was properly subpoenaed, counsel may ask the court to issue a bench warrant ordering the sheriff to bring the witness before the court. Pen C §§881, 980, 1196; CCP §1993. The court may also punish disobedience of a properly served subpoena as a contempt. CCP §§1209(a)(9), 1991; Pen C §1331; *In re Keller* (1975) 49 CA3d 663, 123 CR 223 (witness appeared but refused to answer questions). There are extra requirements and some exceptions:

- A subpoena served under Pen C §1328d (by mail or messenger) must have been issued and acknowledged according to the §1328d requirements to support contempt. Such a subpoena, however, even though issued and acknowledged according to the §1328d requirements, will not support issuance of a bench warrant. Pen C §1328d.
- If a subpoena was for a minor and was served on a parent, guardian, or other person specified in Pen C §1328(b), the adult served may be punished by contempt for failure to produce the minor. Pen C §1328(b)(1).
- When a witness has been subpoenaed and placed "on call" by agreement with the party who subpoenaed the witness, but fails to appear according to the agreement, the witness may only be punished by contempt if the subpoena stated on its face that failure to appear according to any agreement was punishable as contempt. Pen C §1331.5; *In re Garcia* (1974) 41 CA3d 997, 116 CR 503.

When a subpoenaed witness fails to appear at a DMV administrative per se hearing (Veh C §13558(a)), Govt C §§11455.10 and 11455.20 provide the presiding officer may transmit to the superior court certification of facts to justify a contempt sanction for failure to appear, if the party issuing the subpoena so requests. *Parris v Zolin* (1996) 12 C4th 839, 50 CR2d 109. This certification serves to initiate contempt proceedings in the superior court, which must promptly file the certification and issue an order to show cause. 12 C4th at 845.

For discussion of contempt, see chap 58; California Trial Objections, chap 57 (Cal CEB Annual).

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RELEASE PROCEDURES

LORI S. STUART

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§5.1 I. OVERVIEW

The in-custody client's first impression of defense counsel is usually based on counsel's ability to secure the defendant's release from custody. Counsel can help the client post the bail listed on the bail schedule at the police station; specific bail amounts are set for each of the various crimes. See §5.19 on bail schedules. In some counties, a judge or bail commissioner is on duty at all times to determine whether an own recognizance (O.R.) release is appropriate or whether the bail figure set in the bail schedule should be lowered. (The police also use the bail magistrate to raise bail.) See the list of phone numbers for these "duty" judges and bail magistrates in the larger counties in §5.2. When this service exists, counsel should phone as soon as he or she has enough information to support an O.R. or lowered bail request. In counties without a 24-hour bail magistrate or duty judge, counsel may want to attempt to call the judge if counsel knows him or her well enough, or may want to wait until the defendant makes the first court appearance to make an O.R. or bail motion.

In addition to release through a judge or magistrate, in some larger jurisdictions sheriffs or custodians release prisoners on a citation to appear ("cite" them out) on what would otherwise be a bail matter to keep the jail population within the confines of federal court orders on overcrowding. People managing the O.R. project will generally tell counsel how the procedures work in a particular county.

If a large amount of money was seized when the defendant was arrested and the police believe it was the fruit of illegal activity, various agencies such as the Internal Revenue Service may file a notice of tax lien on the money. See 18 USC §§1961-1968 (Racketeer Influenced and Corrupt Organizations Act (RICO)); IRC §§6321-6322 (IRS liens); see also Health & S C §§11469-11495 (drug forfeitures). Once a tax lien has been filed, forfeiture proceedings take place. If no tax lien has been filed, defense counsel may move for a return of seized currency. See chap 57 on forfeiture.

Deposits of cash for bail by the defendant (and in some circumstances by third parties on his or her behalf) are subject to forfeiture and seizure under expansive forfeiture statutes. The practice of obtaining an assignment of cash on deposit for bail to cover fees is imperiled by these forfeiture procedures. It is common in federal and state proceedings for the prosecutor to inquire about the amount posted and the source of the deposit. See Pen C §1275.1. Also, §1275.1 provides that, when a bail bond is involved, the magistrate must be convinced that no portion of the pledge, surety, consideration, deposit, or indemnification has been feloniously obtained by *anyone*.

The type of release obtained by a defendant, or the amount of bail, is important to the prosecutor, particularly if there is a risk that the defendant will flee, is dangerous, or has threatened a victim. Prosecutors who obtain information on a defendant's conduct if released, but who will not be in court when the defendant appears, should put a note in the file sufficient to give the deputy who will appear enough information to make the necessary representations to the court.

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Source: Criminal Law/California Criminal Law Procedure and Practice/5 RELEASE PROCEDURES/§5.2 II. CHART: PHONE NUMBERS OF O.R. PROJECTS, DUTY JUDGES, AND BAIL MAGISTRATES IN SELECTED COUNTIES

§5.2 II. CHART: PHONE NUMBERS OF O.R. PROJECTS, DUTY JUDGES, AND BAIL MAGISTRATES IN SELECTED COUNTIES

County	Contact Person/Contact Hours	Phone Number
Fresno	Honor release program; contact honor release officer (M-F, 8 a.m.-12 noon, 1-5 p.m.)	(559) 488-3420
Kern	Call clerk's office, criminal division, superior court (M-W, F, 8 a.m.-5 p.m.; Thu, 8 a.m.-4 p.m.)	(661) 868-5393 (master no.) (661) 868-2482 (misdemeanors only)
Los Angeles	O.R. program (M-F, 7 a.m.-4:30 p.m.)	(213) 351-0373
Orange	Main Office (6 a.m.-3 p.m.)	(714) 834-4793
	24-hour number that provides information on detention release	(714) 647-4581
Riverside	County Jail (bail); Riverside O.R. (M-F, 7 a.m.-4 p.m.) and Riverside Police Department	(951) 955-4400 (jail); (951) 955-2881 (O.R.); (951) 782-5314 (Riverside PD)
Sacramento	Sacramento County Jail	(916) 874-6752
San Diego	San Diego County and City Jails (select particular jail from menu)	(619) 615-2700 (city); (619) 615-2737 (county)
San Francisco	O.R. Project (includes Electronic Monitoring Program option) (office: M-F, 8:30 a.m.-5 p.m.; jail: after hours, 7 days a week, 24 hours a day)	(415) 552-2202 (office); (415) 575-4441 (jail)
Santa Barbara	Pretrial services (7 days a week, 8 a.m.-5 p.m.)	(805) 681-5644
	After hours: Jail Records Department (for paperwork and for transfer to proper person: 7 days a week, 24 hours a day)	(805) 681-4260, 681-4261
Santa Clara	O.R. desk at main jail (7 days a week, 24 hours a day) or Booking at jail (bail: 5 a.m.-1 a.m.)	(408) 299-4082 (O.R.) (408) 299-2306 (Booking)
Ventura	Bail Review Officer at Court Services Department (M-F, 5:30 a.m.-3:30 p.m.)	(805) 654-2854
	After hours and weekends: call jail; contact classification and security person who does O.R. and can contact on-call judge	(805) 654-3311

Ø **Note:** The California Association of Pretrial Services is a good resource for information on pretrial service programs statewide. More information is available at http://www.pretrialservicesca.org.

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§5.3 III. CHART: DEADLINES

Action	Deadline	Authority
Filing of formal complaint when misdemeanor citation filed with prosecutor.	Within 25 calendar days after arrest.	Pen C §853.6(e)
Fixing amount of bail after filing notice with magistrate or filing of formal complaint.	On filing of notice or complaint, magistrate may fix amount of bail.	Pen C §853.6(e)
Bail on old offense applied to new offense when recommitted following successful Pen C §995 motion.	If new charge is filed within 15 calendar days of dismissal, old bail must be applied to new offense.	Pen C §1303
Release from bail forfeiture and bond reinstatement when defendant can show satisfactory excuse for failure to appear.	Surety, or surety and defendant, must appear before court within 180 calendar days after notice of bail forfeiture; court may extend that period if defendant was ill, insane, or in custody.	Pen C §1305(c)(1)

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IV. CITATION (NOTICE TO APPEAR)

§5.4 A. Citation Described

A citation is a written notice to appear issued by a peace officer, directing the defendant to appear at a time and place before a judge, magistrate, or other officer authorized by the court to accept bail. See Pen C §853.6; Veh C §40500. The Judicial Council prescribes the form of notices to appear. Sample forms are in the Judicial Council Forms pamphlet, available from the Judicial Council. The defendant must sign the promise to appear and either show "satisfactory identification" or provide a fingerprint; the defendant will then be given a copy and released. Pen C §853.6(d).

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§5.5 B. Who May Be Released

Infraction and misdemeanor arrests: non-Vehicle Code. Generally, people arrested for committing an infraction or a misdemeanor who do not ask to be taken before a magistrate must be released on signing a written notice to appear. Pen C §853.6(a)(1). There are several exceptions. This procedure does not apply to crimes specified in Pen C §1270.1. Pen C §853.6(a)(3). In addition, an individual arrested for a misdemeanor violation of a domestic violence protective order issued under Pen C §13700, or under established law enforcement policies for handling domestic violence calls (see Pen C §13701), must be taken before a magistrate unless the arresting officer determines that there is not a reasonable likelihood that the offense will continue or resume, or that the arrestee will pose an imminent danger to people or property. Each county must develop a protocol to assist officers in making these decisions. See Pen C §853.6(a)(2).

An arresting officer also may decide not to release a person arrested for any misdemeanor if (Pen C §853.6(i)):

- The arrestee is so intoxicated that he or she may be a danger to himself or herself or to others;
- The arrestee requires medical examination or care or is unable to care for his or her own safety;
- The arrestee was arrested under one or more of the circumstances listed in Veh C §40302 or §40303(b);
- The arrestee has outstanding arrest warrants;
- The arrestee cannot provide satisfactory identification;
- Immediate release would jeopardize the prosecution of the offense or offenses for which the person was arrested, or any other offense or offenses;
- A reasonable likelihood exists that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by releasing the arrestee;
- The arrestee demands to be taken before a magistrate or refuses to sign the notice to appear; or
- The officer has reason to believe the arrestee will not appear at the time and place specified in the notice.

The arresting officer who decides not to cite and release an individual arrested for a misdemeanor must state the reason on a form provided by the law enforcement agency. Pen C §853.6(i).

Infraction and misdemeanor arrests: Vehicle Code. An individual arrested for a Vehicle Code violation designated as a misdemeanor or an infraction, or for violating a local traffic ordinance, must be released unless he or she asks to be taken before a magistrate (Veh C §§40302-40304, 40500, 40504), or unless the person arrested (Veh C §40302):

- Has no driver's license or other satisfactory evidence of identity;
- Refuses to give his or her written promise to appear in court; or
- Is charged with driving under the influence (Veh C §23152).

Wobbler. A peace officer may not cite and release a defendant arrested without a warrant for a violation that could be charged as either a felony or a misdemeanor (called a "wobbler"). 58 Ops Cal Atty Gen 886 (1975).

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§5.6 C. Prosecutor's and Magistrate's Duties

The arresting officer files a duplicate copy of the notice to appear with the prosecuting attorney, unless the prosecutor has directed a filing with the magistrate. Pen C §853.6(e)(2)-(3). If the matter involves an infraction, the officer must file the notice to appear with a magistrate. Pen C §853.6(e)(1).

When a notice to appear is filed with the prosecutor, a formal complaint from that office must be filed with the magistrate within 25 calendar days after the arrest. Pen C §853.6(e). Thereafter, the magistrate has the duty to fix bail.

Failure to file a complaint within 25 calendar days does not bar the prosecutor from charging the case. It does, however, require the issuance of a new arrest warrant or citation. Pen C §853.6(e).

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Source: Criminal Law/California Criminal Law Procedure and Practice/5 RELEASE PROCEDURES/§5.7 D. Defendant's Compliance With Notice to Appear

§5.7 D. Defendant's Compliance With Notice to Appear

The defendant complies with a notice to appear by (see Pen C §§853.6(e)-(f), 977(a); Veh C §40507):

- Appearing personally at the time and place specified;
- Depositing the amount of bail set by schedule or by the magistrate; or
- Appearing by counsel, when permitted. If the arrestee has been charged with a misdemeanor offense involving driving under the influence, in an appropriate case the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing. Pen C §977(a)(3).

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§5.8 E. Optional Bail Forfeiture in Infraction Cases

When a defendant who has deposited bail fails to appear when the case is called for arraignment, the general practice is for the magistrate to declare the bail forfeited and order that no further proceedings occur. A forfeiture of bail on a citation is equivalent to a conviction for purposes of infraction violations of the Vehicle Code and for administrative sanctions of the Department of Motor Vehicles. Veh C §§1803(a)(2), 13103. The *Boykin-Tahl* requirements for a valid plea of guilty to a misdemeanor or felony charge have no application to optional bail forfeitures in infraction cases. *Mills v Municipal Court* (1973) 10 C3d 288, 302 n11, 110 CR 329.

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Source: Criminal Law/California Criminal Law Procedure and Practice/5 RELEASE PROCEDURES/§5.9 F. Effect of Failure to Appear in Misdemeanor Cases

§5.9 F. Effect of Failure to Appear in Misdemeanor Cases

After a defendant has been released on a promise to appear, an arrest warrant can issue on the charge if the defendant (Pen C §§853.6(f), 853.8, 1320; Veh C §40514):

- Fails to appear either in person or, if permitted, by counsel;
- Fails to deposit bail; or
- Fails to comply with the terms of the judgment, if any.

If the defendant fails to appear for trial in a misdemeanor case, the court may:

- Proceed with the trial in the defendant's absence if the court finds that the defendant has authorized counsel to proceed in his or her absence under Pen C §977(a), or has absented himself or herself voluntarily with full knowledge that the trial is to be held or is being held (Pen C §1043(e));
- Continue the case (Pen C §§853.6(e), 1043(e)(1));
- Order bail forfeited or revoke the defendant's O.R. (Pen C §§853.6(e), 1043(e)(2)); or
- Issue a bench warrant (Pen C §§978.5, 1043(e)(3)).

Willful violation of a promise to appear is a misdemeanor, regardless of the disposition of the original charge. Pen C §853.7; Veh C §40508(a). See also Pen C §1320 (failure to appear after O.R. release).

For discussion of appearance by counsel only, see §§6.5, 35.12-35.13.

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V. OWN RECOGNIZANCE (O.R.) RELEASE

§5.10 A. Guidelines

Under Cal Const art I, §12, "[a] person may be released on his or her own recognizance in the court's discretion." See also Pen C §1270(a) (defendant not charged with offense punishable by death may be released on O.R.). A defendant charged with only misdemeanor offenses, including a defendant arrested on an out-of-county warrant, is entitled to release on O.R. unless it will compromise public safety or will not reasonably ensure the defendant's appearance in court. Pen C §1270(a). In making this determination, the court considers the factors listed in Pen C §1275, applicable to setting bail. Pen C §1270(a). The court should consider factors that relate to the individual defendant; the general failure of persons accused of similar crimes to appear for trial is not an appropriate reason to deny O.R. release. *People v Arnold* (1976) 58 CA3d Supp 1, 5, 132 CR 922; see *In re Podesto* (1976) 15 C3d 921, 937, 127 CR 97 (denial of bail on appeal requires brief statement of reasons); *In re William M.* (1970) 3 C3d 16, 31, 89 CR 33 (juvenile court required to consider merits of each case when deciding to release juvenile from custody). The court is not, however, constitutionally required to give a written statement of its reasons for denying O.R. *Van Atta v Scott* (1980) 27 C3d 424, 166 CR 149. Own recognizance release is available before and during trial and on appeal. See *In re Robinson* (1971) 16 CA3d 539, 94 CR 148.

Ø **Note:** The court's order granting release must be followed. For example, a sheriff's practice of holding prisoners for 26 plus hours after receiving a release order raised the issue of deliberate indifference to the prisoners' constitutional rights sufficient to support a federal civil rights action. *Berry v Baca* (9th Cir 2004) 379 F3d 764, 773.

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§5.11 B. Own Recognizance (O.R.) Hearing: When Required, Conduct of Hearing, and Conditions of Release

Unless the defendant is charged with one of the crimes discussed in the following paragraphs, O.R. release may be granted without a formal adversarial hearing or advance notice to the prosecutor. See §5.41. It is common for persons arrested on misdemeanors to be O.R.'d at arraignment on the basis of representations by defense counsel or a report submitted by an O.R. project. The court usually asks the prosecutor for any information he or she has concerning the defendant and for the prosecutor's position on whether the defendant should be O.R.'d. The prosecutor, however, need not be given any notice or opportunity to participate in the decision. See *Williams v County of San Joaquin* (1990) 225 CA3d 1326, 275 CR 302.

If the defendant is charged with a serious or violent felony (other than residential burglary), specified crimes of domestic violence, or certain violations of one of the protective orders specified in Pen C §273.6, the prosecutor must receive notice, and a hearing is required before the defendant may be released on O.R. (or at a bail lower than that specified for the offense in the bail schedule). Pen C §1270.1. Note, however, that for a defendant in custody, the hearing must take place within the time limits of Pen C §825 (normally, 48 hours). See *Dant v Superior Court* (1998) 61 CA4th 380, 71 CR2d 546 (trial court erred in setting misdemeanor defendant's O.R. request outside §825 limit, even though prosecutor had not received notice required by Pen C §1270.1(b)). On Pen C §825, see §§6.8-6.9, 19.14.

When the charge is a violent felony listed in Pen C §667.5(c), O.R. release is prohibited if the defendant willfully and without excuse failed to appear on an earlier felony. Pen C §1319(b). In all other cases involving such a felony, a court hearing is required, and the prosecutor must have notice and a reasonable opportunity to be heard. Pen C §1319(a). The judge must consider the following factors (Pen C §1319(b)):

- The existence of any outstanding felony warrants for the defendant;
- The information in the report prepared to conform with Pen C §1318.1 (*e.g.,* criminal record and residence); and
- Any information presented by the prosecutor.

The court must state on the record the reasons for its decision. Pen C §1319(c).

A defendant may be required to submit to reasonable conditions of O.R. release. Pen C §1318. These conditions are meant to ensure public safety and the defendant's future appearance. *In re York* (1995) 9 C4th 1133, 1143, 40 CR2d 308. The court may condition an O.R. release on the individual defendant's needs as they relate to making subsequent court appearances. For example, if a defendant who uses drugs plans to enter a custodial drug rehabilitation facility, an O.R. release may be granted with this condition. *People v Sylvestry* (1980) 112 CA3d Supp 1, 7, 169 CR 575. The condition must be based on the specific facts of the defendant's case. *In re York* (1995) 9 C4th 1133, 1143, 40 CR2d 308.

> Ø **Note:** In *York,* the California Supreme Court also approved an O.R. release condition of submitting to random drug testing and warrantless search and seizure. *In re York* (1995) 9 C4th 1133, 1144, 40 CR2d 308. However, the Ninth Circuit has ruled that a district court could not condition O.R. release on a waiver of a defendant's Fourth Amendment rights. *U.S. v Scott* (9th Cir 2006) 450 F3d 863. While no California court has addressed this issue since *Scott,* the contrary ruling in *York* may no longer be good law.

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§5.12 C. County O.R. Programs

A court may, with the concurrence of the board of supervisors, employ an investigative staff for the purpose of preparing a report and recommendation about whether a defendant should be released on his or her own recognizance (O.R.). Pen C §1318.1. The report submitted to the court must include written verification of outstanding warrants, any prior failure to appear, criminal record, and residence for the previous year, together with a recommendation on whether to O.R. the defendant. Pen C §1318.1.

Los Angeles County, for example, operates an O.R. program that offers all Los Angeles County criminal courts handling felony cases the investigative services of its personnel. The program is located at Pretrial Services Division of Superior Court, 433 Bauchet St., Room 100, Los Angeles, CA 90012; telephone: (213) 351-0373.

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§5.13 D. Defendant's O.R. Agreement

To be released on his or her own recognizance, the defendant must file with the clerk of the court, or other person authorized by the court to accept bail, a signed release agreement that includes (Pen C §1318):

- Defendant's promise to appear at all times and places as ordered;
- Defendant's promise to obey all reasonable conditions imposed by the court;
- Defendant's promise not to leave the state without the court's permission;
- Defendant's agreement to waive extradition, if it becomes necessary; and
- Defendant's acknowledgment that he or she has been informed of the consequences of violating the conditions of release.

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E. Revoking O.R. Release Order

§5.14 1. Requiring Defendant to Post Bail

Former Pen C §1318.6 allowed the court to revoke O.R. and require bail under certain circumstances. That statute was repealed in 1985 and has not been reenacted. Judges may therefore lack the authority to require bail after a defendant has been released on O.R. In practice, most circumstances that would give a court reason to want to set bail involve circumstances that allow the court to set bail, *e.g.,* a new crime, or a failure to appear (Pen C §§1320-1320.5).

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§5.15 2. Placing Defendant in Custody

The trial court has the authority to issue a bench warrant for a defendant who fails to appear, under Pen C §978.5. See also Pen C §853.8. In addition, a person on O.R. release who willfully fails to attend a scheduled court appearance is guilty of a misdemeanor if charged with a misdemeanor (Pen C §1320(a)), or guilty of a felony if charged with a felony (Pen C §§1320(b), 1320.5). There is a presumption that a person who willfully fails to appear within 14 days of his or her scheduled appearance date intended to evade the process of the court. Pen C §§1320-1320.5. Willful failure to attend a scheduled court appearance is also a misdemeanor under Pen C §853.7.

Ø **Note:** A defendant who fails to appear after signing an agreement that does not meet all the requirements of Pen C §1318 cannot be guilty of the offense of failure to appear; literal compliance with the statute is required. *People v Mohammed* (2008) 162 CA4th 920, 933, 76 CR3d 372.

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VI. RELEASE ON BAIL

§5.16 A. Bail Defined

Bail permits a defendant to be released from actual custody into the constructive custody of a surety on a bond given to procure the defendant's release. The amount of bail must be specified in a court order or on the arrest warrant. Pen C §§815a, 1268, 1269a. The methods of posting bail are described in §§5.27-5.29.

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§5.17 B. When Defendant Is Entitled to Bail

Before conviction, bail is a matter of right unless the offense is punishable by death, or a public safety exception is established. Cal Const art I, §12. The "public safety exception," allowing preventive detention, applies only to certain classes of felonies and to offenses listed in Pen C §292. See discussion in §5.21.

Before the defendant goes to court, bail may be posted according to the amount on the bail schedule. See §5.19 for discussion of bail schedules. Once the defendant appears in court, the judge or magistrate has the discretion to admit the defendant to bail. See Pen C §1268.

After a conviction, the defendant in a misdemeanor case has the right to have a bail amount fixed that will cover the period between conviction and the pronouncement of judgment. Pen C §1272(1)-(2). Although this right is "absolute," the trial court may impose reasonable conditions on granting bail if those conditions are related to public safety. *In re McSherry* (2003) 112 CA4th 856, 863, 5 CR3d 497. Bail is discretionary after conviction in felony cases. Pen C §1272(3).

The discretionary bail allowed after conviction of a felony and before sentencing (Pen C §1272(3)) is governed by Pen C §1272.1. If the application for bail on appeal is made at sentencing, "reasonable" notice to the prosecutor is required. Pen C §1274. If the application is made after sentencing, a 5-court-day notice to the prosecutor is required. Pen C §1272(3).

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§5.18 C. Duration of Bail

Bail, once posted, stands until forfeited or exonerated to ensure the defendant's appearance at all stages of the proceedings on the original charge. Pen C §§1273, 1278(a), 1458-1459. If bail was posted through a bail bond agency, the agent and the defendant (or someone acting on his or her behalf) sign a bail agreement that usually fixes the term of the bail bond as 1 year. The defendant must pay a renewal premium for any additional period.

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D. Fixing Amount of Bail

§5.19 1. Bail Schedules

In each county, a countywide schedule of bail exists for all bailable felony offenses and for all misdemeanors and infractions other than Vehicle Code infractions. Pen C §1269b(c). The schedules typically list the offense by code section and description, then indicate the recommended amount of bail. The bail schedule usually specifies additional amounts for cases in which sentence enhancing allegations or other extraordinary facts are present. The jails have a copy of the bail schedules. Pen C §1269b(f). They are also available from the court clerk. See Pen C §1269b(f). Defendants may post the amount of bail listed in the bail schedule to effect their release before appearing in court.

Once in court, either the prosecution or the defense may argue for a departure from the bail schedule. The prosecution may request additional amounts for aggravating or enhancing factors. Defense counsel may argue for a downward departure from the bail schedule on the basis of mitigating facts.

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§5.20 2. Discretionary Authority; Bail Hearing

Bail is set initially by the magistrate at the defendant's first court appearance. Cal Const art I, §12; Pen C §1271. A magistrate is authorized to set bail in any amount he or she deems sufficient to ensure the defendant's appearance (see Pen C §§1268, 1269c, 1275, 1289), but the usual practice is to adhere to the amount set in the county's bail schedule unless conditions specific to the case point toward a higher or lower amount. See discussion of bail schedules in §5.19. A defendant who remains in custody is entitled to a review of the initial bail order within 5 days, but this review can be waived. Pen C §1270.2.

Counsel can request any superior court judge to set a higher or lower bail amount. See Pen C §§1269c, 1270.2, 1289. In addition, a peace officer may file a declaration stating that he or she does not believe that the amount of bail set in the schedule is sufficient to assure the defendant's appearance. Pen C §1269c. Defense counsel must give the prosecutor "reasonable notice" of any request for bail when bail is discretionary. Pen C §1274. Defense counsel must also notify the prosecutor of any request for a bail reduction or an O.R. release after the information or indictment has been filed. See 71 Ops Cal Atty Gen 64 (1988).

Traditionally, the bail hearing is informal and devised to discover salient information relating to permissible guidelines for setting bail. Either side may produce evidence through testimony, declarations, or representations. See *Van Atta v Scott* (1980) 27 C3d 424, 437, 166 CR 149.

It is important to present new evidence at a bail hearing. Another judge can change the original bail amount only for good cause. Pen C §1289. See *In re Alberto* (2002) 102 CA4th 421, 125 CR2d 526 ("good cause" requires change of circumstances; second judge had no authority to increase amount previously set because he disagreed with amount set by first judge); *In re Annis* (2005) 127 CA4th 1190, 26 CR3d 321 (court complied with §1289 requirements in revoking O.R. and setting bail at "no bail").

Ø **Warning:** It is unethical for counsel to request a change in the amount of bail without telling the judge of previous bail motions in the case. *Di Sabatino v State Bar* (1980) 27 C3d 159, 162 CR 458 (attorney disciplined).

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3. Permissible Guidelines for Setting Bail

§5.21 a. California Constitution Article I, §12

The standards governing the setting of bail are set forth in Cal Const art I, §12. This section allows preventive detention. Under art I, §12, the court can deny bail in felony cases in which the facts are evident or the presumption great, if:

- The defendant inflicted "acts of violence" on another person, and the court finds, based on clear and convincing evidence, that there is a substantial likelihood that the person's release would result in great bodily harm to others;
- The court finds by clear and convincing evidence that the defendant has threatened another with great bodily harm and there is substantial likelihood that the defendant would carry out the threat if released; or
- The defendant is charged with a capital crime. See *People v Superior Court (Kim)* (1993) 20 CA4th 936, 25 CR2d 38 (error for trial court to grant bail to minor charged with capital crime despite fact that death penalty could not be imposed).

Ø **Note:** Penal Code §292 includes specific sex offenses within Cal Const art I, §12's preventive detention scope. (These sex offenses are *not* mentioned by name in art I, §12.)

The phrase "when the facts are evident or the presumption great" was defined in *In re Page* (1927) 82 CA 576, 578, 255 P 887:

> [I]t is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged.

The standard of clear and convincing evidence has been defined as requiring a finding of high probability, based on evidence so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. *In re Nordin* (1983) 143 CA3d 538, 543, 192 CR 38.

Article I, §12, was found to be constitutional in *In re Nordin, supra*.

When bail is available, the following factors are considered in fixing the amount: the seriousness of the offense; the defendant's previous criminal record; and the probability that the defendant will make future court appearances.

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§5.22 b. Additional Guidelines for Setting Bail

Bail during pending case. Penal Code §1275 lists several factors that the court must consider in setting, reducing, or denying bail:

- Public safety, which is the primary consideration;
- Seriousness of the offense charged, including these factors:
- Alleged injury to victim,
- Alleged threats to victim or witness to crime charged,
- Alleged use of firearm or other deadly weapon in commission of the crime charged, and
- Alleged use or possession of controlled substances by defendant.

Courts routinely consider several additional aspects in ruling on whether the defendant is likely to make future court appearances. Some of the more common areas of inquiry are:

- Does the defendant have ties to the community?
- Does the defendant live in the community?
- Does the defendant's family live in the area?
- Is the defendant employed locally (give length of employment)?
- Does the defendant own property in the community?
- What is the value of the bond to the defendant (defendant's relative wealth as it affects value to him or her of bond)?
- Are there express indications by the defendant that he or she will not appear at future court hearings?
- Does the defendant have a prior record of failure to appear?

Special rules in Pen C §1275 apply when specified drug offenses are charged against the defendant.

A defendant who is charged with a serious or violent felony (other than residential burglary), specified crimes of domestic violence, or certain violations of one of the protective orders specified in Pen C §273.6 cannot be released on bail in an amount different (either higher or lower) from the bail schedule without an adversarial hearing. This hearing can be held as early as the date of arraignment. Pen C §1270.1; *Dant v Superior Court* (1998) 61 CA4th 380, 71 CR2d 546. If the magistrate deviates from the countywide bail schedule, the reasons for that decision must be stated on the record. If any threats were made against the victim or a witness, the court must address those issues on the record in relation to any bail set. Pen C §1270.1(d). Guidelines the court must consider at the hearing are in Pen C §1270.1(c).

> Ø **Note:** To allow for meaningful review, trial courts in all instances must clearly articulate on the record their reasons for deviating from the bail schedule. Facts, and not mere conclusions, must be set forth on the record. *In re Christie* (2001) 92 CA4th 1105, 112 CR2d 495.

If the court reduces bail below the amount established by the bail schedule approved for the county for a person charged with a serious felony, the court must make a finding, on the record, of unusual circumstances. Pen C §1275(c).

Bail pending probation or appeal. In misdemeanor cases, bail must be granted as a matter of right pending sentencing and following judgment; in all other cases, bail is discretionary. Pen C §1272. Although a convicted misdemeanant has an absolute right to bail, a court may impose reasonable conditions related to public safety. *In re McSherry* (2003) 112 CA4th 856, 861, 5 CR3d 497. The criteria the trial court must consider in deciding whether to set bail pending probation or appeal are in Pen C §1272.1. Pen C §1272. There are differing standards for granting bail in misdemeanor and felony cases, according to §1272; those differences do not violate equal protection of the law. *In re Podesto* (1976) 15 C3d 921, 931, 127 CR 97.

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§5.23 4. Increasing or Reducing Bail

By the time defense counsel enters a case, police agencies may have already applied for and received a deviation of bail to a higher amount than that called for in the bail schedule. See Pen C §1269c. If this has occurred, the bail commissioner, magistrate, or judge who granted the deviation should be contacted and an attempt made to return the bail to its original figure or to a lower amount. See Pen C §1269c. In both felony and misdemeanor cases, the court has the authority to modify a bail order during the proceedings if new facts are brought to the court's attention. Pen C §§1289, 1458.

If the police have not requested a bail figure higher than that in the bail schedule, defense counsel may wish to seek a lower bail figure.

Ø **Warning:** Keep in mind that a request for deviation will involve the arresting agency, and facts may be elicited that work to the client's detriment, such as his or her parole status.

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§5.24 5. Hearing to Determine if Bail Deposit Feloniously Obtained

Once the court has set the amount of bail, the source of bail funds becomes important. The court cannot accept a bail bond unless the judge is convinced that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained by the defendant. Pen C §1275.1. Thus the court may inquire into the legitimacy of the source of any bail, either proffered or accepted. Pen C §1275.1. This suggests an evidentiary hearing procedure, called a "*Nebbia* hearing" in federal court, after *U.S. v Nebbia* (2d Cir 1966) 357 F2d 303.

Handling of fee money must be carefully considered in view of the criminal penalties enacted in the past few years. See §§3.15, 57.33 for discussion of forfeiture and criminal penalties.

If the court concludes that the source of the bail bond is a product of criminal activity, the bail must not be accepted or, if already accepted, must be returned. The reason for not allowing bail to be posted that is the product of criminal activity is that the primary purpose of bail is to provide a financial incentive for the defendant to appear in court. The strength of this incentive depends on the defendant's commitment to assets pledged as bail. If the assets are illegally obtained, or represent the "business expense" of a larger criminal enterprise, there may be minimal incentive for the defendant to appear at court hearings. *U.S. v Ellis DeMarchena* (SD Cal 1971) 330 F Supp 1223, 1226.

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§5.25 6. Excessive Bail Prohibited

"Excessive bail may not be required." Cal Const art I, §12(c). However, bail is not "excessive" merely because the defendant cannot post the amount fixed. *In re Burnette* (1939) 35 CA2d 358, 360, 95 P2d 684.

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§5.26 E. Conditions of Bail

Magistrates have the authority to set bail on conditions that they consider appropriate. Pen C §1269c. The nature of the conditions is left to the court's sound discretion, as long as they serve the purpose of bail. See Pen C §1269c. For example, a magistrate may (1) require a defendant to surrender his or her passport, driver's license, or other document with a rational nexus to mobility; (2) require the defendant to appear at a designated location or agency at appointed times; or (3) condition bail on the defendant's not traveling outside of a designated geographic area. The court may order a defendant not to intimidate, dissuade, or contact victims and witnesses. Pen C §136.2. However, imposition of a bail condition must not violate the defendant's procedural due process rights. See *Gray v Superior Court* (2005) 125 CA4th 629, 23 CR3d 50 (trial court violated defendant's procedural due process rights by suspending his medical license as bail condition without prior notice). The same limitations that apply to O.R. release conditions probably apply to release on bail. See §5.11.

Defense counsel can also use imaginative thinking when making a motion for bail. Defense counsel should explore the possibility of alternatives to bail such as inpatient rehabilitative programs and private counseling. Alternatives such as these in combination with a modest bail or release on O.R. may persuade the court that it can assure the defendant's appearance in court while addressing the defendant's long-term problems.

Counsel faced with a difficult release situation may want to consider requesting a curfew condition. Electronic monitoring (commonly called "house arrest" or "home detention") is another possibility. A Global Positioning System (GPS) device is sometimes used in lieu of bail, or as a condition of bail, because the arrestee is without a home telephone or has a need to travel. The use of GPS is growing in popularity in gang cases, domestic violence cases (to enforce "stay-away" orders), or as a way to provide enhanced supervision of sex offenders and higher-risk offenders. A Secure Continuous Remote Alcohol Monitor (SCRAM) device may be used in a driving under the influence case. SCRAM devices provide continuous, 24-hour monitoring of alcohol concentration through the skin and have been used by courts to ensure sobriety. See §39.32 for discussion of home detention *sentencing* options.

One other part of the Penal Code covers release: Pen C §§701-714 ("Security to Keep the Peace"). This procedure is commonly called a "peace bond." Penal Code §714 states: "Security to keep the peace, or be of good behavior, cannot be required except as prescribed in this Chapter." To the extent that Pen C §1269c seeks to restrict a defendant's conduct while on bail (as opposed to enforcing the duty to appear), §§714 and 1269c seem to be in conflict.

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F. Methods of Posting Bail

1. Deposit

§5.27 a. Cash, Check, Money Order, Traveler's Check

The defendant, or anyone on his or her behalf, may deposit with the court clerk or with the law enforcement agency having custody of the defendant the sum set by the applicable bail schedule or mentioned in the order admitting the defendant to bail. A personal check, bank cashier's check, money order, or traveler's check may be accepted in payment of a bail deposit for a nonfelony offense on certain conditions, including satisfactory identification. However, some courts and law enforcement agencies do not accept all of these alternatives to cash, particularly when the amount is large or when a check is from a defendant in custody. See *Williams v City of Oakland* (1972) 25 CA3d 346, 101 CR 137. The courts are not allowed to accept a general assistance check for this deposit. Pen C §1295(c). When counsel is not using a bail bond agency, he or she should call first to inquire about what is acceptable.

State criminal court clerks are required to send an "information return" to the Internal Revenue Service reporting receipt of *more than* $10,000 in cash as bail when the charges involve controlled substances, racketeering, or money laundering. IRC §6050L(g). A return is required only if *cash* is posted. "Structuring" a cash bail deposit is a federal felony. 31 USC §5324.

Ø **Note:** The defendant must receive credit for any sums already deposited as bail for an original charge if a new charge is filed on the basis of the same acts. Pen C §1295.

Defense counsel may wish to discuss with the defendant the possibility of having a third party post bail instead of using the defendant's assets. An *innocent* third party's assets used for bail are not subject to use by the court after the judgment to satisfy a fine or judgment, nor are they subject to seizure by a government agency. At the same time, one should keep in mind that any third party depositor makes public his or her interest in the defendant, and the existence of his or her assets. Forfeiture is discussed in chap 57; inquiry into the source of bail money is discussed in §5.24.

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§5.28 b. Government Bonds; Equity in Real Property

Instead of a deposit of money, the defendant, or anyone else on his or her behalf, may deposit state or U.S. government bonds with the court, or may give as security an equity in real property. The defendant may not be charged for the transaction. Pen C §1298.

Ø **Note:** The jail does not have to accept bonds (*Williams v City of Oakland* (1972) 25 CA3d 346, 101 CR 137) or equity in real property (see Pen C §1298, which requires a court hearing on equity interest in real property used for bail).

The value of state bonds is that of present market value. *Newton v Superior Court* (1971) 16 CA3d 499, 505, 94 CR 120.

With respect to real estate equity, a hearing must be held in which the magistrate determines the value of the equity. Real estate equity is allowed as bail only when its value is equal to twice the amount of any required cash deposit. Pen C §1298. At the hearing, defense counsel files a bail undertaking, an appraisal of the property prepared by a licensed real estate broker or property appraiser, and a preliminary title report from a title company.

Ø **Note:** It is a good idea for defense counsel to coordinate with county counsel on the adequacy of the posting papers before the hearing; the district attorney may seek the county counsel's advice on requirements for these papers. Ideally, defense counsel can then take an approved package to the district attorney and court.

A careful prosecutor may insist on proof of prior recordation in the county of the property's location and then ask for submission, as a condition subsequent to release, of a title company report or policy after recordation. This process ensures that no liens other than those represented to exist at the time of initial recordation and up to release have been recorded against the property.

The prosecutor may wish to inquire, on the basis of Pen C §1275.1, into the sources underlying the purchase of the property. Defense counsel should consider this possibility before attempting to use real property as bond.

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§5.29 2. Undertaking of Bail (Bail Bond)

A bail bond is a document, executed by a surety, which is a promise to pay the face amount of the bond equivalent to the sum set as bail, unless the defendant fulfills the conditions of the bond. Pen C §1269. Typically, a defendant agrees to "appear and answer any charge in an accusatory pleading… in whatever court it may be prosecuted, and… at all times hold himself or herself amenable to the orders and process of the court… and if convicted, will appear for pronouncement of judgment or grant of probation." Pen C §1278(a). A bond or undertaking of bail executed by a licensed bail agent must be accepted unless the judge or magistrate is convinced that part or all of the consideration to be posted for bail was feloniously obtained. Pen C §§1275.1, 1276(a). A qualified bail bond agent may both execute and issue a bail bond or undertaking of bail. Pen C §1276(b). All or part of the money paid to obtain the bond is designated as a nonreturnable fee.

The officer in charge of a jail, a designated employee of the police or sheriff's department, the superior court clerk of the county in which the offense was allegedly committed, or the clerk of the county in which the prosecution is pending may accept bail in the amount fixed by the complaint, warrant, or bail schedule; order the release of the arrestee; and issue a notice to appear. Pen C §1269b(a). All money and bond deposits accepted by a jailer are to be transmitted immediately to the judge or clerk of the court that fixed bail. Pen C §1269b(g).

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G. When Judge Can Place Defendant Who Is on Bail in Custody

§5.30 1. After Appearance for Trial

When a defendant who has posted bail appears for trial, the court in its discretion may order him or her committed to custody. Pen C §1129.

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§5.31 2. After Adverse Verdict

If a verdict is rendered against a defendant, Pen C §1166 says that the defendant must be remanded to custody to await judgment of the court on the verdict. However, after considering the protection of the public, the seriousness of the offenses charged and proved, the defendant's previous criminal record, the probability of the defendant's appearing before the court to hear judgment on the verdict, and public safety, the court may allow the defendant to remain out on bail if the court concludes that the evidence supports this decision. Pen C §1166. Section 1166 does not apply to defendants who plead guilty. *People v Seneca Ins. Co.* (2003) 29 C4th 954, 129 CR2d 842.

In a misdemeanor case, the defendant has the right to have bail fixed after conviction, although the trial court may set reasonable bail conditions related to public safety. *In re McSherry* (2003) 112 CA4th 856, 861, 5 CR3d 497. Bail is discretionary after conviction in felony cases. Pen C §1272.

If the defendant fails to appear for judgment after conviction, the judge must issue a bench warrant for his or her arrest. Pen C §1313.

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§5.32 3. On Appeal

Requests for bail on appeal are made to the trial court. See Pen C §1272. On application by the defendant, the reviewing court can set or reduce bail or release the defendant on other conditions, if the defendant can show an erroneous denial by the trial court. Cal Rules of Ct 8.312(a)-(b). Bail issues are also cognizable on habeas corpus. See §§5.38, 42.22-42.34.

In misdemeanor cases, or in misdemeanor or felony cases in which only a fine is imposed, bail is a matter of right. This is true even when the appeal is from a modification or reinstatement of probation that imposes imprisonment, if the defendant was originally granted probation without imprisonment. *In re O'Driscoll* (1987) 191 CA3d 1356, 236 CR 882 (120 days in county jail). In all other cases, it is discretionary with the judge. Pen C §1272; *In re Pipinos* (1982) 33 C3d 189, 187 CR 730. The alternative to bail is custody.

Bail application on felony appeal requires reasonable notice to the prosecutor. See Pen C §1274; Cal Rules of Prof Cond 5-300(B). Although there is no statutory requirement that the prosecution be given an opportunity to be heard in open court, it would be unusual for a court to deny a request to be heard. If the bail application is made after sentencing, a 5-court-day notice to the prosecutor is required. Pen C §1272(3).

When bail is discretionary, the court must release the defendant on bail pending appeal if he or she demonstrates all of the following (Pen C §1272.1):

- That, by clear and convincing evidence, the defendant is unlikely to flee, determined by his or her ties to the community and record of court appearances in previous cases, as well as the severity of the possible sentence.
- That, by clear and convincing evidence, the defendant does not pose a danger to another or to the community. The court must consider whether the crime is a violent felony described in Pen C §667.5(c).
- That appeal is not for delay, but raises a substantial legal question that is likely to result in reversal if decided in the defendant's favor.

The court must state its reasons for granting or denying bail on appeal.

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§5.33 4. After Appeal

When a case is returned to the trial court following completion of the appellate process, the court usually sets a sentencing date and notifies the attorneys. If the defendant is out of custody and fails to appear, the court can direct that he or she be arrested. See Pen C §1310.

The court has discretion to fix bail on the order of recommitment. Pen C §§1314-1315.

It remains an undecided issue whether a federal district court has the authority to grant bail to a state prisoner seeking habeas corpus relief in federal court. *In re Roe* (9th Cir 2001) 257 F3d 1077. Several courts, however, appear to favor the recognition of a federal court's authority to grant bail pending a decision on a habeas petition. See *In re Roe* (9th Cir 2001) 257 F3d 1077; *Grune v Coughlin* (2d Cir 1990) 913 F2d 41; *Boyer v City of Orlando* (5th Cir 1968) 402 F2d 966; *Johnston v Marsh* (3d Cir 1955) 227 F2d 528.

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Source: Criminal Law/California Criminal Law Procedure and Practice/5 RELEASE PROCEDURES/§5.34 5. Other Reasons for Placing Defendant in Custody

§5.34 5. Other Reasons for Placing Defendant in Custody

Even when a defendant has been admitted to bail, the trial court may order him or her placed in custody if:

- The defendant has failed to appear and the court has forfeited his or her bail (Pen C §1310(a));
- The court determines that the surety is dead or has left the state (Pen C §1310(b));
- The defendant fails to meet an increased amount of bail set by the court under Pen C §985 (Pen C §1310(c)); or
- The defendant has been held to answer following a preliminary examination (*In re Annis* (2005) 127 CA4th 1190, 26 CR3d 321).

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§5.35 H. Bail Forfeiture; Bench Warrant; Defendant Appearing Through Counsel

If a defendant fails to appear as ordered by the court and does not have a sufficient excuse, the court must declare the bail forfeited. Pen C §1305. In addition, the court may issue a bench warrant for the defendant's arrest. Pen C §978.5. When the court concludes that the defendant may have a sufficient excuse for not appearing, the court may issue a bench warrant but hold service of it and continue the case for a reasonable period of time without ordering a forfeiture to enable the defendant to appear. Pen C §1305.1. This approach avoids returning the bail bond agent to court when it is not necessary. Sufficient reasons for failure to appear are usually based on the representation of counsel. See, *e.g., People v Amwest Sur. Ins. Co.* (1997) 56 CA4th 915, 925, 66 CR2d 29. Defense counsel should present verification of the defendant's excuse when possible, *e.g.,* a letter from the defendant's doctor stating that the defendant was too ill to come to court or from a towing service that towed the defendant's car at the time of the court appearance.

Ø **Note:** A defendant's failure to appear is not cause for forfeiting bail if, within 15 court days of the scheduled arraignment, no complaint issues, or the charges are dismissed. Pen C §1305(a).

A misdemeanor defendant generally need not be personally present in court if counsel appears on his or her behalf. Pen C §977(a)(1). There are two exceptions: If the accused is charged with the offenses specified in Pen C §977(a)(2) (involving misdemeanor domestic violence offenses and violations of specified protective orders), he or she must be present; and if the accused is charged with the misdemeanor offenses involving driving under the influence specified in Pen C §977(a)(3), the court can order the defendant to be present for arraignment, at the time of plea or at sentencing. If a misdemeanor defendant appears by counsel, bail cannot be forfeited unless the court has specifically ordered the defendant to appear. See Pen C §1043(e) (court can order defendant to be personally present at trial for purposes of identification unless counsel stipulates to identity). Similarly, when the court has granted the defendant in a felony case the right to appear through counsel at certain proceedings, the court cannot forfeit bail when the defendant does not appear in compliance with the Pen C §977(b) form. See Pen C §§977(b), 1043(a)-(d).

Ø **Note:** Defendants are required to be present at trial readiness (sometimes called status) conferences, even without the court's order. Cal Rules of Ct 4.112(a).

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§5.36 I. Relief Against Bail Forfeiture

The surety or the surety and the defendant must appear before the court within 180 calendar days after notice of forfeiture to establish a satisfactory excuse for the defendant's neglect. Pen C §1305(a). The court may extend that period if it finds that the defendant was temporarily disabled by illness, insanity, or detention by other authorities. Pen C §1305(e)(1).

The surety is entitled to be released from the forfeiture if any of the following apply (Pen C §1305):

- The court fails to meet the requirement of mailing notice;
- The defendant and his or her surety appear with a satisfactory excuse for the defendant's absence;
- The defendant surrenders to the court or to custody;
- The defendant dies or has a permanent inability to appear due to illness, insanity, or detention by other authorities, all without connivance of the surety. See *People v American Sur. Ins. Co.* (2000) 77 CA4th 1063, 92 CR2d 216 (defendant barred from reentry into United States because of prior conviction).

To obtain relief against bail forfeiture, the surety must strictly adhere to the technical procedural aspects of Pen C §1305.

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§5.37 J. Exoneration of Bail; Forfeiture of Bail

Exoneration. Termination of the obligation of bail has become known as "exoneration." When bail has served its purpose, the depositor or the surety is relieved of the obligation and is entitled to return of the deposit. If the defendant is the depositor and the judgment includes a fine, the bail may be applied toward payment of the fine. Pen C §1297.

Exoneration occurs under the following conditions:

- Demurrer is sustained (Pen C §1008);
- Motion in arrest of judgment is granted (Pen C §1188);
- Case is dismissed following suppression of evidence (Pen C §1538.5(k)-(*l*));
- Case is dismissed under Pen C §1385 (Pen C §§1188, 1384);
- Court orders the defendant into a diversion program for drug abuse (Pen C §1000.2) or based on cognitive developmental disability (Pen C §1001.27);
- Defendant is committed to custody after an adverse verdict (Pen C §1166);
- Defendant is found mentally incompetent to stand trial under Pen C §§1368, 1370, 1370.01, or 1371; or
- Case is dismissed under Pen C §995 (Pen C §997).

Under Pen C §1166, when the jury returns a guilty verdict, the trial court is required to remand or commit the defendant to custody unless *at that time* it considers the propriety of allowing the defendant to remain on bail and concludes that the five factors specified in §1166 support its decision.

Forfeiture. Forfeiture of the defendant's bail as a result of his or her failure to appear is proper only when the defendant failed to appear on the charges for which the bail was posted. *People v King Bail Bond Agency* (1990) 224 CA3d 1120, 274 CR 335 (bail posted on Pen C §278.5 charge; defendant acquitted but held in contempt during trial; bail cannot be forfeited for failure to appear on contempt).

Before forfeiture, the surety or other person who deposited assets may surrender the defendant into custody to obtain exoneration of the bail money. Pen C §1300(a).

> Ø **Note:** When the defendant is surrendered to the court by the bail bond agent and the court determines that good cause does not exist for the surrender because the defendant has not failed to appear and has not violated any court order, the judge may order the bail returned to the depositor and the premium or any part of it returned to the person who paid it. Pen C §1300(b).

When bail is exonerated following a dismissal and the prosecutor recharges the defendant, bail on the original offense must be applied to the new charge if it is filed within 15 calendar days of the dismissal. Pen C §1303. This procedure permits the defendant to avoid the costs of depositing a second sum or of paying the premium on a second bond.

A deposit of bail received for an infraction in the Vehicle Code (or any local ordinance adopted under the Vehicle Code) must be refunded within 30 calendar days of cancellation, dismissal, or a finding of not guilty of the charges. Multiple deposits in payment of a parking ticket must be identified and returned within 30 calendar days. After 60 calendar days, unreturned amounts accrue interest as set by CC §3289. Veh C §42201.6. Other bail money does not earn interest for the depositor. Govt C §53647.5; Pen C §1463.1.

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§5.38 K. Habeas Corpus

A writ of habeas corpus is an appropriate vehicle to gain review of a bail issue. See *In re McSherry* (2003) 112 CA4th 856, 859, 5 CR3d 497; *In re Bright* (1993) 13 CA4th 1664, 17 CR2d 105. It may be used to challenge detention without bail and to examine the amount and conditions of bail. Pen C §§1490-1491. See §§42.22-42.34 on writs of habeas corpus.

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VII. DEFENSE ATTORNEY PROCEDURES

§5.39 A. Client Interview; Obtaining Prosecution Information

The defense attorney's initial contact in a criminal case may come from a suspect in custody, a member of his or her family, or his or her friends. To obtain a release, it is essential to determine the following:

- The true name of the person in custody, and, if different, the name under which he or she was booked;
- Where the person is being held;
- Who the caller is and how he or she was referred;
- A physical description of the suspect and date of birth, if possible (often several persons with the same name are held in jail facilities);
- The charges on which the person was arrested;
- Which police agency made the arrest and what officer is handling the case;
- Whether the suspect is on parole or probation and the facts concerning such cases, including whether there are parole or probation holds;
- How financial arrangements are to be made for bail and legal fees;
- Whether there is a hold by any foreign jurisdiction; and
- Whether there is an immigration hold.

It is advisable to obtain a copy of the police report to find out the police point of view about the case. Often the facts in the police report differ from those related by the suspect or his or her friends.

Defense counsel should bring to the attention of the person setting bail facts that will bear on the amount of bail to be set, or on whether an agreement can be reached to release the suspect on O.R. or by citation. In rare cases, information may be revealed that suggests the suspect's noninvolvement, which results in his or her release pending further investigation. Of course, the attorney must weigh the risks of revealing evidence at this point that may be damaging to the client at a later time against the possibility of reduced bail, O.R., a citation release, or a release without further proceedings under Pen C §849(b).

Counsel should advise the defendant that commission of a felony while on bail or O.R. for a felony will increase the sentence on the original charge. Pen C §12022.1.

Counsel should remain cognizant of the statutes governing attorney fee contracts, forfeiture potentials (including a "relation back" forfeiture of attorney fees), and the crimes that apply to attorneys who accept "tainted" money. See discussion in §§3.15, 57.33. See Fee Agreement Forms Manual (2d ed Cal CEB 2007) on fee agreements.

For further discussion of interviewing the defendant, see chap 10 and §3.13.

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B. Determining Best Release Procedure Before Arraignment

§5.40 1. Release on Citation

In many misdemeanor arrests, it is possible to convince police agencies to release suspects on a citation or written promise to appear. See §§5.4-5.5. Even if the suspect is not released on a citation by the arresting officer, it may be possible to convince a superior officer at the station to do so.

In driving under the influence of alcohol cases, the police usually detain the person arrested until he or she is sober, then release him or her on a citation. Of course, the option of an earlier release should be presented to the client and bail posted if an immediate release is desired. Because of the time required for a bond to be processed, release on citation may prove to be the most expedient means.

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§5.41 2. O.R. Release

Own recognizance release is available only from the court. In some jurisdictions there is an on-call judge or bail commissioner. That person may be called by phone at any time of the day or night, and has the authority to release a defendant on his or her own recognizance or to change the amount of bail. This procedure is not available to a defendant charged with a serious or violent felony or with certain domestic violence offenses. See Pen C §1270.1. See the chart in §5.2 for a listing of bail and O.R. telephone numbers for some of the larger jurisdictions.

When counsel will have to make a court appearance to request an O.R. release, he or she should immediately request an investigation by the court's O.R. division. The better procedure is for counsel to assist the client in filling out the O.R. form, work with the O.R. investigator, and present facts to the police investigating officer or prosecuting attorney to show that an O.R. release is appropriate so that the prosecutor will not oppose defense counsel's motion in court. Because this procedure may take some time, the client may prefer posting bail and seeking an O.R. release at a later date.

Certain factors may militate against initiating an O.R. investigation, such as the defendant's desire to prevent family or an employer from learning of the arrest or the possibility that an O.R. investigation may uncover information detrimental to the defendant.

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§5.42 3. Effect of Parole, Probation, or Immigration Holds

An immediate release is especially important if the client is already on parole or probation. If the arrest comes to the attention of probation or parole authorities, a "hold" may be placed, in which case release will be blocked even if bail is posted on the new offense. *In re Law* (1973) 10 C3d 21, 23, 109 CR 573. If release is effectuated before the "hold," however, the probation or parole officer may allow the defendant to remain free on bail pending a resolution of the current charge. The client should be aware that, if he or she is arrested by the parole or probation officer after posting bail and no bail is set on the violation, the premium paid for bail will most likely be lost and the defendant will not be able to receive credit for time served on the new case. See §§37.53-37.63 on credit for time served.

If a client is detained by a hold placed by the Department of Homeland Security's (DHS) Bureau of Citizenship and Immigration Services, counsel should consult 8 USC §§1252(a) and 1357(a), 8 CFR §287.3, and their regulations. If counsel is inexperienced in immigration matters, counsel should also seek advice from an immigration law specialist. An immigration hold request is often initiated by a call to the immigration officials by local authorities, so defense counsel must be sure to tell the client not to answer any questions about alienage posed by local or federal authorities. The DHS's ability to "hold" without a warrant is circumscribed. A verbal hold must be followed by an administrative warrant within 24 hours. A detained noncitizen may be released on bond or conditional parole (*i.e.,* without bond). The process involves the discretion of an immigration official and the action of an administrative law judge. Their discretion is rarely interfered with on review, which must be by a writ of habeas corpus to a federal district court. See chap 52 for general discussion of immigration issues.

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§5.43 4. Cash Bail

By posting cash bail, the defendant avoids paying a 10 percent or more premium to a bail bond agent and tying up property as collateral. In certain types of cases, however, posting cash bail creates other problems. For example, in a narcotics case, the deposit of a high cash bail may be of interest to the Internal Revenue Service or the Franchise Tax Board. See also the discussion of court clerk reporting requirements on cash bail in §5.27. Furthermore, a large amount of ready cash will be noted by the police, district attorney, investigating officer, or prosecuting attorney and may be used against the defendant. There is also the possibility of a hearing under Pen C §1275 (see §5.24) to learn the source of the cash. Therefore, it may be advisable for defendants in narcotic cases to work through a bail bond agent and maintain a low profile. Even this avenue may have problems, as the subpoenaing of bail bond records and inquiry at bail hearings into the source of bail bond funds occurs with regularity.

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§5.44 5. Pros and Cons of Delaying Release

Counsel should advise the defendant of the benefits and detriments of delaying release. The defendant must then make the final decision; some individuals would prefer to pay any amount to avoid the shame of incarceration.

Some of the advantages of delay are that charges may not be filed, misdemeanor charges may be filed with a lower bail schedule, or counsel may be successful in convincing the court at the time of arraignment to set lower bail than that called for by the schedule, or to release the defendant on his or her own recognizance. On the deadlines for arraigning the defendant, see §§6.7-6.8.

One of the disadvantages of delay is the possibility that the amount of bail will be increased because a misdemeanor arrest becomes a felony with the passage of time (*e.g.,* if a victim is found to have injuries not apparent at first, priors are discovered, or parole or probation holds are placed; and, of course, if the victim dies, bail might not be set at all).

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§5.45 C. Contacting Bail Bond Representative

Much of the legwork in obtaining a client's release can be accomplished by a reliable and competent bail bond agent. This individual can visit the client at the jail and make all the contacts and arrangements for the collateral necessary to secure a bond, including appraisals. A bail bond agent may also be able to locate an arrestee whose location in custody is unknown.

It is important for any attorney with criminal cases to establish a relationship with a good bail bond agent. The efficiency of this person will reflect on the attorney. Conversely, a poor impression may result in the client's retaining other counsel.

As a rule, counsel should never "guarantee" bail.

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§5.46 D. Contacting Prosecutor

Defense counsel should contact the prosecutor whether or not counsel is successful in securing the client's release. If the arrest occurred in a jurisdiction in which different agencies prosecute misdemeanor and felony cases, and if there is a possibility of either being filed, counsel should contact both offices. If possible, counsel may want to attempt to communicate with the investigating police officer because he or she will probably make the initial decision on charging and on bail or other release.

In some jurisdictions, if defense counsel believes that the case against the client is weak, counsel can call the prosecutor's office and ask the charging deputy to contact defense counsel before filing the case to hear from counsel why the case should not be filed.

The purpose of discussions with the prosecutor varies. Counsel can attempt to prevent a criminal filing, convince the prosecutor to file misdemeanor rather than felony charges, attempt to limit counts, arrange for an office hearing if these are available (see §26.41), arrange for a voluntary surrender, and, if the suspect is in custody, negotiate bail. This may be the time to make a tactical decision to reveal defense evidence unknown to the prosecutor. Of course, counsel must know the prosecutor with whom he or she is dealing and weigh the consequences of such a step.

If the client is seeking immunity from prosecution or wishes to cooperate with authorities, this may be the time to make such overtures. See chap 49 on immunity for testimony.

Throughout the proceedings, counsel should continue to review the potential for lowering an agreed and reasonable bail to an even lower sum or for securing an O.R. release. As the case proceeds, the prosecutor may be agreeable to further lowering bail, which can result in release of collateral the surety posted with the bail bond agent to secure appearance, release of a cash sum posted with the court, or release of parcels of posted real property. In addition, the psychological effect of having a lower bail at the end of a given proceeding or if other charges are filed is helpful.

Counsel is required to notify the prosecutor before moving to reduce bail after an information or indictment has been filed, when O.R. is sought following arrest for a specified violent felony, or when bail is a matter of discretion rather than a matter of right. 71 Ops Cal Atty Gen 64 (1988).

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§5.47 E. Surrendering Defendant

If a defendant is not in custody and counsel is aware of pending criminal charges, every effort should be made to surrender the defendant before he or she is arrested. If negotiations have been ongoing with the prosecuting agency, arrangements to surrender should include setting reasonable bail or release on the defendant's O.R. Defense counsel may secure the prosecutor's agreement to a lower bail figure if the defendant agrees to conditions such as surrendering his or her passport, agreeing to check in daily with the prosecutor's office or the police department, or waiving extradition. These conditions may also be suggested in any bail argument.

Investigators often ask defense counsel to have the defendant surrender at the police station for booking (*i.e.,* photographing and fingerprinting; Pen C §7(21)). Counsel should be sure that there is an agreement to transport the defendant to court immediately thereafter. Alternatively, counsel can arrange to surrender the client in court when the case is filed. If this is done, counsel can ask the court to release the client from court without first being booked with the order that the defendant arrange to be booked while out of custody.

Once the defendant is before the court, the arrest warrant will be recalled and counsel may argue for reasonable bail in light of the defendant's voluntary surrender. Unless an O.R. release has been agreed on, it is always best to have a bail bond agent present in court to obtain the defendant's immediate release.

Counsel may wish to have family members and friends present in court when the client surrenders. In the right case, a strong showing by friends and family can be influential in persuading the court that the defendant is not a flight risk or a danger to the community. It may even be appropriate to have the individuals who are putting up the bail or posting real property on behalf of the defendant address the court and express their opinion on the defendant's honesty, integrity, and trustworthiness.

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VIII. PROSECUTION PROCEDURES

§5.48 A. Who Makes Release Recommendation

Usually, the prosecutor who prepares the complaint recommends an amount for bail. The sum is typically the amount shown on the bail schedule. The recommendation is placed on the face of the complaint and on any related arrest warrant. Alternatively, the prosecutor's original release recommendation is made by a deputy assigned to after-hours duty. Typically, such a deputy is contacted by an arresting or booking officer who desires a higher bail than that reflected on the countywide bail schedule. The deputy gleans the facts of the case, the reasons for a higher bail, and assists the officer (in person or by phone) in drafting a bail deviation declaration. See Pen C §1269c. The deputy may contact a magistrate to advise that the officer will be visiting the magistrate to request that bail be fixed at a higher amount than that given in the bail schedule.

As the case advances procedurally, the prosecutor appearing in court at any stage may recommend a different sum as additional factors are discovered. See Pen C §§1269c, 1275, 1310. See also Pen C §§1129, 1166. There are sample motions to increase bail and to examine the source of bail in California Criminal Law Forms Manual §§5.1, 5.3 (2d ed Cal CEB 2005).

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§5.49 B. Factors Affecting Release Recommendation

The usual sum recommended is that indicated on the countywide bail schedule. Any variation should be based on articulable factors.

The prosecutor should fully discuss the evidence with the investigating officer. Sometimes it may be necessary to contact the victim to determine the details of what occurred, the severity of injuries, the relationship of the parties, and the existence of any threats. It is essential that all available police reports be read carefully.

In addition, the prosecutor should be amenable to requests from the defense attorney or bail bond agent to discuss factors relevant to bail. Explanations for the defendant's conduct on previous occasions can be quite informative. The prosecutor should not hesitate to discuss the matter with anyone who has relevant information.

Ø **Note:** If the defendant is represented by counsel, defense counsel's permission must be obtained before talking to the defendant about the subject matter of that representation. Cal Rules of Prof Cond 2-100.

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§5.50 C. Preparing for Bail Hearing

Preparation for a bail hearing is the same as that for any contested adversarial setting. The prosecutor should be prepared to present evidence and oral argument to prove the case for the bail recommended. If allowed by local practice or court rules, declarations should be drafted and ready for filing. Any witnesses who would tend to establish a public safety exception or reveal the defendant's propensity to flee should be in court. In addition, the original court files, or certified copies of documents showing the defendant's previous failures to appear, should be secured for submission into evidence. See *Van Atta v Scott* (1980) 27 C3d 424, 441, 166 CR 149. Proof of previous failures to appear is usually conclusive. See Cal Const art I, §12.

With authority to make inquiries to satisfy the criteria in Pen C §1270 and the inquiry now allowed by Pen C §1275.1, prosecutors should prepare to ask questions about the source of assets proposed for bail or placed with a bond agent and not neglect detailed inquiry into the sureties or assets behind the bail. Alleged narcotic offenders may be discomfited when they realize that inquiry into available assets is contemplated. A sample motion to examine the source of bail is in California Criminal Law Forms Manual §5.3 (2d ed Cal CEB 2005).

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6

ARRAIGNMENT

ELENA CONDES

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§6.1 I. OVERVIEW

An arraignment is a court hearing at which an individual accused of a public offense—an infraction, a misdemeanor, or a felony—is informed of the nature of the charge or charges, given a copy of the accusatory pleading, and given an opportunity to enter a plea. Pen C §988; *In re Mitchell* (1961) 56 C2d 667, 16 CR 281. It is the defendant's first court appearance. See Pen C §§740, 806, 1462.2.

In addition to fulfilling these statutory requirements, the judge or magistrate conducting the arraignment is also required to advise each unrepresented defendant of the right to counsel and the right to have appointed counsel if indigent. Cal Const art I, §15; Pen C §§858, 859, 987(a). In counties using mass advisements, the initial advisement of rights includes other trial rights.

If the defendant is charged with a bailable offense, the court must also set bail at the first court appearance, unless bail has already been set. Cal Const art I, §12; Pen C §1271. See *Van Atta v Scott* (1980) 27 C3d 424, 166 CR 149.

When the arraignment takes place depends on several factors, the most important of which is the defendant's custodial status. If the defendant is in custody, arraignment must take place within 48 hours (not including weekends and court holidays) after the arrest. Pen C §825. If the defendant was arrested without a warrant and has not yet been released, the arraignment is usually combined with a probable cause determination. This determination must be made by a magistrate as soon as reasonably feasible but no later than 48 hours after arrest; weekends and holidays may *not* be excluded from the 48 hours. *County of Riverside v McLaughlin* (1991) 500 US 44, 57, 114 L Ed 2d 49, 63, 111 S Ct 1661. See §6.23.

If the case is not disposed of at the arraignment, the court will also set the date for the next hearing.

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§6.2 II. CHART: DEADLINES

Procedure	Deadline	Authority
In-custody defendant arraigned on complaint (either misdemeanor or felony).	Without undue delay; no more than 2 calendar days after arrest (excluding Sundays and holidays).	Cal Const art I; Pen C §§825, 849; *People v Lee* (1970) 3 CA3d 514, 83 CR 715.
Continuance to obtain counsel.	No more than 7 days in misdemeanor cases; no less than 1 day in felony cases.	Pen C §990.
Out-of-custody defendant arraigned on citation for misdemeanor or infraction.	At least 10 calendar days after arrest unless defendant consents to earlier date.	Pen C §853.6(b); Veh C §40303.
Out-of-custody defendant arraigned on misdemeanor complaint.	Prosecutor has 25 days after misdemeanor citation to file formal complaint. No statutory deadline for arraignment.	Pen C §853.6(e). Pen C §825 time limits apply only when accused is in custody.
Out-of-custody defendant arraigned on felony complaint.	Without unnecessary delay (same as in-custody defendant for all practical purposes).	Cal Const art I, §14; Pen C §859.
Probable cause determination following warrantless arrest.	No later than 48 hours after arrest (including weekends and holidays).	*County of Riverside v McLaughlin* (1991) 500 US 44, 56, 114 L Ed 2d 49, 63, 111 S Ct 1661.
Defendant arraigned on information, whether in or out of custody.	When information filed.	Pen C §§859, 1382.
Defendant arraigned on indictment.	If arrested on bench warrant, same deadlines as defendants arrested on complaint.	Pen C §§945, 978.5; see Pen C §§825, 849; *People v Redinger* (1880) 55 C 290, 298.

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Source: Criminal Law/California Criminal Law Procedure and Practice/6 ARRAIGNMENT/§6.3 III. CHECKLIST: ARRAIGNMENT

§6.3 III. CHECKLIST: ARRAIGNMENT

MISDEMEANOR CASES

Defense Counsel

- Motion for defendant's release from custody
  - Bail motion
  - O.R. release motion
- File waiver of defendant's appearance
- Probable cause (*Walters*) hearing (Pen C §991)
- Serve on prosecutor and file informal discovery request
- File demurrer (before plea)
- Request continuance before entering plea
- Enter plea:
  - Not guilty
  - Guilty
  - Nolo contendere
  - Once in jeopardy
  - Former judgment of acquittal or conviction
  - Not guilty by reason of insanity (seldom used in misdemeanor cases)
- Set pretrial motions (see checklist in §18.4)
- Set trial date

Prosecutor

- Request higher bail or no bail if appropriate
- Bring discovery for defense counsel (usually a police report)
- Provide complaint to defense on request
- Serve on defense and file informal discovery request
- Make motions:
  - Handwriting exemplars
  - Fingerprints
  - Lineup
  - Severance
  - Joinder
  - Amend complaint

FELONY CASES CHARGED BY COMPLAINT

Defense Counsel

- Motion for defendant's release from custody
  - Bail
  - Own recognizance
- Probable cause (*County of Riverside*) hearing
- File waiver of defendant's appearance (Pen C §977)
- File demurrer (before plea)

Prosecutor

- Request higher bail or no bail, if appropriate
- Bring discovery for defense counsel (usually police reports)
- Provide complaint to defense on request
- Serve on defense and file with court informal discovery request

- Serve on prosecutor and file informal discovery request
- Request continuance before entering plea
- Enter plea:
- Not guilty
- Guilty
- Nolo contendere
- Once in jeopardy
- Former judgment of acquittal or conviction
- Not guilty by reason of insanity (usually entered at or after arraignment on information or indictment)
- Set date for preliminary hearing, including motions to be heard as part of preliminary hearing (*e.g.,* former judgment of acquittal or conviction)

- Make motions for:
- Handwriting exemplars
- Fingerprints
- Lineup
- Severance
- Joinder
- Amend complaint

FELONY CASES CHARGED BY INDICTMENT OR INFORMATION

Defense Counsel

- Motion for defendant's release from custody
- Bail motion
- Own recognizance release motion
- File waiver of defendant's appearance (Pen C §977)
- File demurrer (before plea)
- File formal discovery motion if needed
- Request continuance before entering plea
- Enter plea:
- Not guilty
- Guilty
- Nolo contendere
- Once in jeopardy
- Former judgment of acquittal or conviction
- Not guilty by reason of insanity
- Set date for pretrial motions (see checklist in §18.4)

Prosecutor

- Request higher bail or no bail, if appropriate
- File formal discovery motion if needed
- Set hearing on motion to reinstate complaint (Pen C §871.5)
- Joinder motion
- Amend information

- Set motion to dismiss under Pen C §995
- Set hearing on motion for search and seizure hearing (Pen C §1538.5(i)-(j))
- Set trial date
- Severance motion

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IV. PROCEEDINGS ON ARRAIGNMENT

§6.4 A. Purpose of Arraignment

An individual accused of a public offense has the right under the U.S. Constitution to be informed of the "nature and cause of the accusation." US Const amend VI. See also Cal Const art I, §14 (arraignment for felony). Arraignment serves this purpose, and it gives the accused a fair opportunity to plead to the charges. *In re Mitchell* (1961) 56 C2d 667, 16 CR 281. In addition, both federal and state constitutions grant an accused the right to a speedy trial. US Const amend VI; Cal Const art I, §15; Pen C §1382. A prompt arraignment is a component of the right to speedy trial. On the right to speedy trial, see chap 19.

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§6.5 B. Procedures Generally Applicable to Arraignments

When an accusatory pleading is filed, the defendant is arraigned on the pleading in the court in which it is filed unless the case is transferred to another court for trial, *e.g.,* because the defendant was arrested outside the county. Pen C §976. On out-of-county arrests and arraignments, see §6.30.

Ø **Note:** California courts employ four kinds of accusatory pleadings: citation, complaint, information, and indictment. Although the purpose of arraignment is the same no matter what offense is charged and what accusatory pleading is used, certain aspects of the procedure may vary, depending on the kind of accusatory pleading used and the custody status of the defendant. For discussion, see §§6.6-6.10.

Arraignment occurs when a judge (or the clerk or prosecutor acting at the court's direction) reads the accusatory pleading to the defendant and asks whether the defendant pleads guilty or not guilty. Pen C §988. A defendant accused of a felony is also given a copy of the pleading.

Ø **Note:** When a complaint charges only misdemeanor violations, the defendant who wants a copy of the pleading must request one. Pen C §988.

A defendant in a felony case is typically required to appear in person at the arraignment and most other proceedings in the case, unless he or she executes a written waiver of appearance in open court. Pen C §977(b)(1).

Most misdemeanor defendants may appear through counsel at all stages of the case, including the arraignment. Pen C §977(a)(1). However, an individual charged with a misdemeanor involving domestic violence (see Fam C §6211) or violation of a protective order (see Pen C §273.6) must be personally present at the arraignment and sentencing (Pen C §977(a)(2)); and the court may order an individual charged with specified misdemeanors involving driving under the influence to be present at the arraignment (Pen C §977(a)(3)). If an out-of-custody defendant fails to appear at the arraignment in person (if required) or through counsel (if permitted), the court may issue a bench warrant. See Pen C §§979-984. On failure to appear, see also §6.33.

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§6.6 C. Arraignment on Citation

A citation may be used for infractions and misdemeanors when the defendant is not taken into custody, or is released from custody at booking. Pen C §§853.5-853.6. The citation includes a written notice to appear in court, giving the time, place, and date of the court appearance. This appearance is the arraignment. The time set for arraignment must be at least 10 days after the citation is issued, unless the accused consents to an earlier date, and the arraignment takes place in the court of the magistrate before whom the accused would have appeared if he or she had not been released (Pen C §853.6(c)), *i.e.,* the department of the superior court assigned to handle misdemeanors and infractions.

Ø **Note:** The term "magistrate" refers to a judge of any court (see Pen C §808) who is fulfilling the constitutional and statutory duties assigned to magistrates. These duties, which include presiding over arraignments in criminal matters, are scattered throughout the Penal Code. See, *e.g.,* Pen C §§807, 825, 849.

If the offense for which the citation was issued is a misdemeanor, the prosecutor has discretion to issue a formal complaint, even though the arresting officer has released the accused on a promise to appear. Pen C §853.6(e). See §6.7.

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D. Arraignment on Complaint

§6.7 1. When Complaint Used

Formal complaint discretionary. A complaint *may* be issued for the infractions listed in Pen C §19.8 (see Pen C §17(d)) and for other infractions when the individual arrested cannot provide satisfactory identification (see Pen C §853.5). See §6.32. In addition, a complaint may be issued for a misdemeanor, even when the arresting officer has released the accused on a promise to appear. A copy of the citation, along with the underlying police reports, goes to the prosecutor, unless the prosecutor has previously directed the officer to file it with the magistrate. Pen C §853.6(e). The prosecutor then has 25 days to initiate prosecution by filing the citation or a formal complaint with the magistrate. Pen C §853.6(e).

Ø **Note:** Although failure to act within the 25-day period does not preclude prosecution, a later decision to prosecute requires a new citation or an arrest warrant.

Formal complaint mandatory. A complaint *must* be issued when an individual is arrested for a misdemeanor if the accused (1) demands to be taken before a magistrate or (2) is not released before or at booking. Pen C §853.6. A complaint must also be issued when an individual is arrested for a felony, unless the arrest is made as a result of a felony indictment. Cal Const art I, §14.

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§6.8 2. Time for Arraignment

The filing of the complaint must be followed by arraignment. See Pen C §976. When the defendant is accused of a felony, the arraignment must take place "without unnecessary delay" (Pen C §860), but when the accused is not in custody, no specific statutory deadline applies. *People v Newell* (1923) 192 C 659, 221 P 622.

When, however, an individual is arrested and held in custody, the term "without unnecessary delay" means no more than "48 hours after [the] arrest, excluding Sundays and holidays." Pen C §825; CCP §§134-135; Govt C §§6700, 6706. *People v Lee* (1970) 3 CA3d 514, 521, 83 CR 715 (Saturday is a court holiday). See also *People v Pickens* (1981) 124 CA3d 800, 177 CR 555. The applicability of Pen C §825 is not limited to individuals charged with felonies; it applies to everyone arrested and held in custody, no matter what the charge.

If court is not in session when the arrest takes place, the time is extended to the next regular judicial day. Pen C §825. A defendant arrested on Wednesday must be arraigned by the following Friday, no matter what time the arrest occurred, unless the Friday is a court holiday. Pen C §825(a)(2). Code of Civil Procedure §134, authorizing local courts to conduct arraignments on judicial holidays, does not convert them into nonholidays for the purpose of computing time. Forty-eight hours is only an outside limit; a delay of less than 48 hours could be unreasonable. *Dragna v White* (1955) 45 C2d 469, 289 P2d 428.

If the arrest was made without a warrant, an individual accused of a felony is entitled to a prompt probable cause hearing. *Gerstein v Pugh* (1975) 420 US 103, 125, 43 L Ed 2d 54, 71, 95 S Ct 854. This hearing is typically combined with the arraignment. An individual taken into custody without a warrant for a misdemeanor is entitled to a probable cause hearing on request. *In re Walters* (1975) 15 C3d 738, 126 CR 239. For discussion, see §6.23.

An arraignment on a complaint, whether it alleges a felony or a misdemeanor, occurs in the department of the superior court that ordinarily handles infractions and misdemeanors.

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§6.9 3. Consequences of Delay

An unreasonable delay between arrest and arraignment converts a lawful arrest into an unlawful detention, and a confession obtained as a result of the unlawful detention may be subject to suppression. See *People v Pettingill* (1978) 21 C3d 231, 145 CR 861 (when police kept defendant in custody for 61-hour period without arraignment and continued to interrogate him after he had invoked *Miranda* rights, confession was product of illegalities). But see *In re Walker* (1974) 10 C3d 764, 779, 112 CR 177 (delay is but one factor in determining whether statement is voluntary; confession made during illegal delay is not automatically inadmissible). See also *People v Thompson* (1980) 27 C3d 303, 329, 165 CR 289 (arresting officer's need for sleep did not justify delaying arraignment; however, no showing was made that illegal detention produced defendant's confession).

An unreasonable delay in bringing the defendant before the magistrate may serve as a ground for a civil suit against the arresting officer (*Dragna v White* (1955) 45 C2d 469, 289 P2d 428), but it is not a ground for dismissing the prosecution unless it causes prejudice. See, *e.g., People v Valenzuela* (1978) 86 CA3d 427, 150 CR 314 (reviewing court reversed dismissal because record did not support defendant's claim that his inability to obtain timely urine test was caused by delay in arraignment).

> Ø **Note:** Defense counsel may seek a defendant's release from custody when the defendant is held beyond the Pen C §825 limits by filing a petition for writ of habeas corpus. *People v Wilson* (1963) 60 C2d 139, 152, 32 CR 44. For further discussion of these writs, see §§42.22-42.34.

When the arraignment of a minor found to be unfit is delayed, the actual arraignment date starts the 20-day limitations period within which a writ challenging the finding of unfitness must be filed under Cal Rules of Ct 5.772(j). *Rene C. v Superior* Court (2006) 138 CA4th 1, 9, 41 CR3d 71.

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§6.10 E. Arraignment on Information or Indictment in Felony Prosecutions

Misdemeanors and infractions are prosecuted either by citation or complaint. There are no other pleadings in these cases. See Pen C §§740, 853.5-853.6. In a felony prosecution, however, a complaint, if one is filed, is only a preliminary pleading. An information or indictment is required to initiate a felony prosecution. See Cal Const art I, §14.

Information. In California, the information is used far more often than is the indictment, and almost always when the event triggering the prosecution is the defendant's arrest. Thus, typically, when an accused is arraigned on a felony complaint and pleads not guilty, the magistrate sets the case for a preliminary hearing, which must be held no less than 2 court days and no more than 10 court days after the arraignment, unless there is "good cause" for delay and the defendant waives time. Pen C §859b. On preliminary hearings, see chap 8.

If the defendant is held to answer at the preliminary hearing, Pen C §1382(a)(1) requires dismissal unless the information is filed in the superior court within 15 calendar days after the holding order was issued. The parties and the magistrate may stipulate that the complaint is to become the information. *People v Dominguez* (2008) 166 CA4th 858, 864, 83 CR3d 284. Under Pen C §976, the defendant must be arraigned "when" the accusatory pleading is filed. The word "when" has been construed to mean "after." *People v Hale* (1957) 156 CA2d 478, 319 P2d 660. There is no separate statutory or constitutional time limit for arraigning the defendant on the information. See *People v Newell* (1923) 192 C 659, 221 P 622 (no statutorily prescribed time within which arraignment must take place). In practice, however, the arraignment usually takes place promptly after the information is filed.

Indictment. Although the prosecutor may seek an indictment from a grand jury after an arrest and a felony complaint, the indictment procedure is used much less frequently than is the preliminary hearing in this situation. As a rule, the prosecution seeks an indictment when the secret nature of grand jury proceedings is an important factor—*e.g.,* in investigations involving organized crime and other criminal conspiracies, or confidential or reluctant witnesses. For additional examples, see §9.8. On grand jury proceedings generally, see chap 9.

If the grand jury finds probable cause to believe a named individual has committed a felony, it files an indictment in the superior court. If the defendant is already in custody, the court will order the defendant brought before it for arraignment. Pen C §978. If the defendant is not already in custody, the court will issue a bench warrant. Pen C §§945, 979-984. If the defendant is taken into custody on a bench warrant and held, the arraignment must take place within 48 hours (excluding noncourt days) under Pen C §825. See §§6.8-6.9.

> Ø **Practice tip:** When the subject of a grand jury investigation has retained counsel before the indictment is returned, defense counsel can sometimes negotiate the bail amount or O.R. release before the bench warrant issues or is served.

Arraignment on information or indictment starts statutory speedy trial clock. The date on which the arraignment on an information or indictment occurs is important for speedy trial purposes. Under Pen C §1382(a)(2), the 60-day period for bringing the defendant to trial begins to run when the defendant is arraigned on the indictment or information. Although the date the defendant is asked to plead and the date of the plea are usually the same, this is not always true. In *Chartuck v Municipal Court* (1975) 50 CA3d 931, 123 CR 816, the court, noting that Pen C §988 makes no reference to entry of a plea, concluded that for purposes of computing the §1382 deadline, the defendant was "arraigned" within the meaning of the statute at her first court appearance when she was given an opportunity to enter a plea, even though she did not enter a plea at that time. But see *Valdes v Municipal Court* (1977) 69 CA3d 434, 438 n3, 138 CR 50 (speedy trial period did not begin to run until defendant actually entered plea). On the right to a speedy trial, see chap 19.

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§6.11 F. Record of Arraignment

In felony cases, a court clerk must prepare and maintain minutes that reflect the title of each action and all orders and proceedings in those actions. Govt C §69844. In misdemeanor and infraction cases, a docket entry is a legally sufficient substitute for minutes. Pen C §1428.

An official court stenographer routinely makes a verbatim record of all oral proceedings in felony cases, including the arraignment. See CCP §269(a). The practice is not as uniform in misdemeanor and infraction cases, but the state must "provide, upon the defendant's request, some method of recording verbatim, the testimony and other oral proceedings of a felony or misdemeanor criminal action." *In re Armstrong* (1981) 126 CA3d 565, 573, 178 CR 902. When an official court reporter is unavailable to record the oral proceedings in a misdemeanor or infraction case, they may be recorded electronically. Govt C §69955. See also Cal Rules of Ct 2.952.

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V. DUTIES OF MAGISTRATE OR JUDGE AT ARRAIGNMENT

§6.12 A. Informing Defendant of Charges

The duty of the judge or magistrate to inform the defendant of the charges and give him or her the opportunity to enter a plea includes prior-conviction allegations. Thus, when the charging document alleges priors, the court must ask whether the allegation is true or not true at the time the defendant is asked to plead to the substantive charges. Pen C §1025(a). A refusal to answer is equivalent to a denial. Pen C §1025(a).

The duty to inform the defendant of the charges is ongoing. Thus, if a new accusatory pleading is filed or the original pleading is amended, the accused must be arraigned on any *new* charges but need not be rearraigned on *existing* charges. *In re Mitchell* (1961) 56 C2d 667, 16 CR 281. Rearraignment can, however, be waived. See, *e.g., People v Mayfield* (1993) 5 C4th 142, 173, 19 CR2d 836.

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§6.13 B. Ascertaining Defendant's True Name

At arraignment, defendants must be given the opportunity to give the court their true names. If a defendant provides a true name that is different from the one on the complaint, the court must direct that the correction be entered in the court minutes. Pen C §989.

Section 989 does not require a defendant to provide his or her true name; a defendant may be tried under the name he or she provided at arrest. When the true name will incriminate the defendant, defense counsel should direct the client to remain silent.

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§6.14 C. Advising Defendant of Right to Counsel

An individual charged with a misdemeanor or a felony is entitled to be represented by counsel at public expense if he or she cannot afford to hire an attorney. Pen C §686. See *Tracy v Municipal Court* (1978) 22 C3d 760, 150 CR 785. To implement this right, the magistrate or judge, immediately after informing the accused of the charge or charges, must inform an unrepresented defendant of the right to counsel. Pen C §§858, 859.

Ø **Note:** No such duty exists in infraction cases unless the defendant is in custody at the time of arraignment, because a defendant charged with an infraction is not otherwise entitled to representation by the public defender or other counsel at public expense. *People v Prince* (1976) 55 CA3d Supp 19, 127 CR 296. See also Pen C §19.6.

If an unrepresented defendant is charged with a felony, the magistrate must also ask the defendant whether he or she wants the assistance of counsel and must allow the defendant a reasonable time to obtain counsel. Pen C §859. The magistrate must appoint counsel for a defendant who desires representation and cannot afford to hire counsel. See Pen C §859; *People v Downer* (1962) 57 C2d 800, 812, 22 CR 347. In a capital case, the magistrate will assign counsel for the defendant even if the defendant can afford to hire an attorney, if the defendant refuses to hire counsel, or if he or she appears without counsel after a reasonable opportunity to obtain representation. Pen C §859. A capital defendant cannot waive counsel at the arraignment. Pen C §§686.1, 987. See also *People v Mayfield* (1993) 5 C4th 142, 173, 19 CR2d 836. If the defendant appears to be a minor, the magistrate must try to find out whether he or she is a minor, and if the magistrate concludes that the defendant is a minor, must either immediately notify the minor's parent or guardian of the arrest or appoint counsel. Pen C §859.

Ø **Note:** An unrepresented defendant in a noncapital case may enter a plea, but it is common (and better practice) for the judge to delay asking a defendant to enter a plea until after he or she appears with an attorney.

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§6.15 1. Mass Advisement

Misdemeanor cases. In heavily populated counties, the magistrate often collectively advises defendants of the right to counsel in misdemeanor cases. This practice does not deny the defendant any constitutional rights. *Mills v Municipal Court* (1973) 10 C3d 288, 307, 110 CR 329. The court can easily cure any possible shortcomings in this procedure during the arraignment of individual defendants, by asking each one if he or she has heard and understood the advisements. *In re Johnson* (1965) 62 C2d 325, 332 n5, 42 CR 228. Typically, a mass advisement of rights includes the trial rights a defendant waives when pleading guilty or nolo contendere, and notice of the right to a hearing on probable cause. On pleading guilty at arraignment, see §6.22. On probable cause hearings, see §6.23.

Ø **Note:** Counsel may usually obtain a sample of the mass arraignment form from the court clerk in order to review what advice was given.

Although mass advisement of the right to counsel is constitutionally permissible, the magistrate may not accept the defendant's waiver of the right to counsel without making sure that the defendant knowingly and intelligently waived counsel. *In re Johnson* (1965) 62 C2d 325, 333, 42 CR 228. For further discussion, see §6.14.

Felony cases. Advisement of rights in felony cases is done individually. *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577, disapproved on other grounds in *Mills v Municipal Court* (1973) 10 C3d 288, 306 n16, 110 CR 329.

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§6.16 2. Televised Arraignment and Advisements

Unless the defendant was indicted by a grand jury, the initial court appearance may, with the defendant's consent, be conducted by two-way electronic audio-video communication when the defendant is in custody. Pen C §977(c). This section applies to both felony and misdemeanor prosecutions.

Ø **Note:** The court may not accept a guilty or no contest plea to a felony from a defendant who is not physically present in court unless the parties stipulate to the procedure. Pen C §977(c).

Videotaped mass advisements of constitutional rights in court are not constitutionally objectionable. *People v Shannon* (1981) 121 CA3d Supp 1, 175 CR 331 (misdemeanor DUI prosecution).

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D. Appointment of Counsel

§6.17 1. Duties of Court

When the court appoints counsel, it may hold a hearing to learn whether the defendant has any assets, particularly real property, that can be attached by the county to reimburse it for legal assistance to the defendant. Pen C §987.8(a). The court must inform defendants *before* appointing counsel that they may be ordered to reimburse the county for all or part of the cost of court-appointed legal services if the court, at the conclusion of the criminal proceedings, determines that the defendant has the present ability to pay. Pen C §987.8(f). The court clerk must note on the docket that this admonition was given at the time the court appoints counsel. See *People v Amor* (1974) 12 C3d 20, 29, 114 CR 765 (due process requires notice). See Pen C §987.8 generally for a detailed description of the hearing requirements for redetermination of indigency.

Because of the potential for conflict of interest for the attorney undertaking the joint representation of codefendants, when indigent codefendants appear without counsel, the court must select separate and independent counsel for each defendant. *People v Mroczko* (1983) 35 C3d 86, 115, 197 CR 52, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209. Codefendants may be jointly represented only after each has made a knowing and intelligent waiver of the right to separate counsel. 35 C3d at 109. For further discussion of conflicts in joint representation, see §2.9.

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§6.18 2. Procedures for Assigning Cases to Public Defender

Determining whether the defendant will be represented or unrepresented at the arraignment differs from county to county in California, depending on the policy of the local public defender or other program for indigents without counsel. In some counties, defendants are routinely interviewed by a public defender before their first court appearance and represented at that appearance. This procedure has several advantages for the defense. First, defense counsel is able to advise the defendant of his or her right to remain silent, because police officers may seek to continue or begin questioning about the crime for which the defendant was arrested, or about an unrelated crime, after arrest and before the first court appearance. Second, defense counsel is prepared to make a bail or own recognizance release recommendation at the first appearance. Third, defense counsel or an investigator can conduct any investigation that must be done right away, *e.g.,* photographing the defendant's bruises or other injuries.

In other counties, the public defender waits until the first court appearance to be appointed by the court and then interviews the defendant. The advantage of this approach is that some or many defendants bail out before a public defender goes to the jail to interview them, and they are more likely to secure private counsel or come to the public defender's office, where they can be interviewed more conveniently.

Private counsel retained after a public defender has been appointed may give the public defender's office a substitution-of-counsel form signed by the defendant and request a copy of any discovery they have received or investigation they have conducted. See Evid C §§953-954 (lawyer-client privilege). See Cal Rules of Prof Cond 3-700(D)(1) (client papers and property). A sample letter notifying counsel of the substitution and seeking a release of information is in California Criminal Law Forms Manual §3.3 (2d ed Cal CEB 2005). In practice, many courts will accept an oral substitution of counsel when done in open court with the defendant's express consent.

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§6.19 3. Advisement of Other Trial Rights

The vast majority of defendants charged with infractions, and many misdemeanor defendants as well, waive the right to counsel and plead guilty at the arraignment. A valid plea of guilty or no contest to a misdemeanor or felony charge requires a knowing and voluntary waiver of the right to jury trial, the right to confront witnesses, and the privilege against self-incrimination. *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 81 CR 577, disapproved on other grounds in *Mills v Municipal Court* (1973) 10 C3d 288, 306 n16, 110 CR 329. See *People v Sumstine* (1984) 36 C3d 909, 921, 206 CR 707. An individual charged with an infraction has no right to jury trial (Pen C §19.6) but does have the privilege against self-incrimination and the right to confront witnesses.

In counties that routinely use mass advisements, the standard advisement typically advises defendants of the *Boykin-Tahl* rights as well as the right to counsel.

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E. Taking Defendant's Plea

§6.20 1. Grounds for Postponing Entry of Plea

A defendant must be given an opportunity to enter a plea at the arraignment. However, when a defendant appears without counsel and wishes to have representation, the better practice is for the court to delay entry of a plea until after he or she appears with an attorney. If the defendant requires additional time to answer the charges, the court must allow a reasonable continuance—at least 1 day for a felony charge and no more than 7 days in a misdemeanor or infraction case. Pen C §990. A defendant who has been arrested for a Vehicle Code misdemeanor or infraction is entitled to a continuance of at least 5 days to plead and prepare for trial. However, the defendant may waive the 5-day continuance either in writing or in open court. Veh C §40306(b).

A defendant who refuses to enter a plea is deemed to have entered a plea of not guilty. Pen C §1024.

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§6.21 2. Prior-Conviction Allegations

When a prior conviction is alleged, the court must ask the defendant whether the allegation is true. Pen C §1025. A defendant's refusal to answer is the equivalent of a denial of the prior. Pen C §1025. On prior convictions, see chap 24.

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§6.22 3. Entering Plea of Guilty or No Contest

Advisement of trial rights. Before the court accepts a plea of guilty or no contest from a defendant, whether represented or unrepresented, each of the *Boykin-Tahl* rights—"self-incrimination, confrontation, and jury trial—must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea." *In re Tahl* (1969) 1 C3d 122, 131, 81 CR 577, disapproved on other grounds in *Mills v Municipal Court* (1973) 10 C3d 288, 306 n16, 110 CR 329. In addition, before pleading guilty or no contest, the defendant must be made aware of the direct consequences of the conviction. *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. See also *Rhyne v Municipal Court* (1980) 113 CA3d 807, 819, 170 CR 312 (in county that used mass advisements and preprinted waiver forms, use of "counseling" attorney to explain trial rights and consequences of plea was necessary to protect defendants' rights).

The court must give the same advisements before accepting the defendant's admission of the truth of a prior conviction. On challenging the constitutionality of a prior conviction, see §§24.30-24.39.

> Ø **Note:** It is unusual for a represented defendant to enter a plea of guilty or no contest at arraignment, because there usually has not been sufficient time to investigate the case and discuss a plea bargain with the prosecutor. However, in some cases, when counsel does have the facts, an early plea may be strategically advisable to bar prosecution for more serious uncharged offenses. See *People v Bas* (1987) 194 CA3d 878, 241 CR 299. For further discussion, see chaps 26 (plea bargaining and requirements when defendant enters a plea of guilty) and 35 (pronouncing judgment).

Advisement of the right to counsel. Before accepting a plea of guilty or no contest from an unrepresented misdemeanor defendant, the magistrate must ascertain that the defendant's waiver of the right to counsel was knowing and voluntary. In a felony case, the waiver must be expressly made in open court. Pen C §1018.

> Ø **Note:** An unrepresented defendant charged with a crime punishable by death or life in prison without the possibility of parole may not plead guilty; a defendant in such a case who appears with counsel may plead guilty only with counsel's consent.

In misdemeanor and infraction cases, the court does not have to take each individual waiver in open court. *In re Johnson* (1965) 62 C2d 325, 332, 42 CR 228. Many jurisdictions use mass advisements and preprinted waiver forms that are initialed by the defendant. However, the trial court retains the duty to assure itself that the defendant's waiver of the right to counsel was knowing and voluntary. 62 C2d at 333. The defendant can enter a plea of guilty or no contest through counsel in most misdemeanor cases but must appear in court to do so in felony cases. See Pen C §977; *Simmons v Superior Court* (1988) 203 CA3d 71, 249 CR 721.

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§6.23 F. Determining Probable Cause

Felonies. An individual arrested without a warrant must be promptly taken before a magistrate, who must determine whether there is probable cause to hold the individual. *Gerstein v Pugh* (1975) 420 US 103, 125, 43 L Ed 2d 54, 71, 95 S Ct 854. This probable cause hearing must be held within 48 hours after the arrest, including weekends and holidays. *County of Riverside v McLaughlin* (1991) 500 US 44, 56, 114 L Ed 2d 49, 63, 111 S Ct 1661. See also *People v Bonillas* (1989) 48 C3d 757, 787, 257 CR 895 (48-hour rule is merely guideline; earlier probable cause determination may be unreasonable in some circumstances).

The probable cause hearing does not have to be adversarial; attorneys do not have to be present, and the magistrate may base his or her decision solely on documents. *Gerstein v Pugh* (1975) 420 US 103, 120, 43 L Ed 2d 54, 69, 95 S Ct 854. In many jurisdictions, as a matter of regular practice, prosecutors file the complaint with declarations supporting probable cause attached. The hearing may be combined with the arraignment or some other proceeding if held within the 48-hour time limit. *County of Riverside v McLaughlin* (1991) 500 US 44, 57, 114 L Ed 2d 49, 64, 111 S Ct 1661.

Misdemeanors. A defendant who (1) is accused of a misdemeanor, (2) is in custody when arraigned, and (3) pleads not guilty may request a probable cause determination. Pen C §991(a). At this hearing, the magistrate must determine whether there is probable cause to believe that a public offense has been committed and that the defendant is the person responsible. Pen C §991(a).

The court must give the defendant notice of the right to a probable cause hearing. *In re Walters* (1975) 15 C3d 738, 750, 126 CR 239. This notice can be given en masse. *Sundance v Municipal Court* (1986) 42 C3d 1101, 1129, 232 CR 814; *Mills v Municipal Court* (1973) 10 C3d 288, 303, 110 CR 329. The court may rule on the legality of any detention or arrest as part of the probable cause determination. *People v Ward* (1986) 188 CA3d Supp 11, 235 CR 287.

Unless the defendant requests a continuance, the court will make the probable cause determination at the arraignment. Pen C §991(b). The court may grant a continuance only for good cause, and it may not exceed 3 court days. Pen C §991(b). At the §991 hearing, the court can consider the arrest warrant and its supporting affidavits or declarations and any other documents of similar reliability that are incorporated by reference. Pen C §991(c). If the court finds probable cause, it must set the case for trial. If the court finds that no probable cause exists, it must dismiss the complaint. Pen C §991(d). This dismissal is not a bar to another prosecution for the same offense if the prosecutor refiles within 15 calendar days after the dismissal. However, a second dismissal under Pen C §991 is a bar to further prosecution for that offense. Pen C §991(e).

Infractions. Although §991 refers only to misdemeanors, the holding of *In re Walters, supra,* applies equally to individuals in custody who are charged with infractions.

Delinquency proceedings. A prompt probable cause hearing is required in juvenile proceedings, but it does not have to be held within 48 hours. *Alfredo A. v Superior Court* (1994) 6 C4th 1212, 26 CR2d 623.

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§6.24 G. Setting Bail; Own Recognizance (O.R.) Release

The court must set bail at defendant's first court appearance if the offense is bailable. Cal Const art I, §12; Pen C §1271. A court cannot set bail on a parole hold. *In re Law* (1973) 10 C3d 21, 26, 109 CR 573.

The court may release on his or her own recognizance, *i.e.,* without having to post bail, anyone for whom the court could set bail. Pen C §1270(a).

A person who is arrested on a misdemeanor charge from another county has the right to be brought to court in the county of arrest to have bail set if no bail was set by the warrant itself. Pen C §822. The magistrate in the arresting county may not set bail when the charge is a felony, although the defendant may be released on bail if the warrant specifies an amount. Pen C §821. See §6.30.

For further discussion of bail and O.R. release, see chap 5.

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VI. OTHER MATTERS THAT MAY BE ADDRESSED AT ARRAIGNMENT

§6.25 A. Deferred Entry of Judgment or Diversion

Counsel may request deferred entry of judgment, or diversion, depending on what program is available, at the first court appearance. They are available in certain drug cases, bad check cases, child abuse and neglect cases, and cases involving developmentally disabled defendants. In addition, some counties may have their own programs for particular classes of cases. Pen C §§1000-1001.90. On successful completion of the program, the charge is dismissed. Pen C §§1001.1, 1001.7.

For further discussion of diversion and deferred entry of judgment, see chap 27.

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§6.26 B. Mentally Ill and Developmentally Disabled Defendants

Counsel or the judge may wish to have a defendant examined because of apparent mental incompetence. See Pen C §§1368, 4011.6. These procedures are discussed in §§48.3-48.22.

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C. Setting Next Court Appearance

§6.27 1. Misdemeanor Cases

After arraignment, counsel can ask the court to schedule appropriate pretrial motions for hearing, pretrial hearings for plea negotiations, and trial dates. Some counties require written notice of the grounds for search and seizure motions. Counsel should check local court rules before setting motions.

Pretrial motions are discussed in chaps 11 (discovery), 19 (speedy trial), 15 (change of venue), 22 (lineups and identification), 16 (motion to return or suppress evidence), 17 (motion to disclose informant), and 18 (selected pretrial motions). See chap 48 on procedures for mentally ill and developmentally disabled defendants.

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§6.28 2. Felony Cases

Initiated by complaint. In felony cases initiated by the filing of a complaint, defense counsel may obtain some discovery at arraignment, depending on local practice. However, it is important for defense counsel to obtain full discovery before the preliminary hearing. Therefore, defense counsel should make an informal discovery request at the arraignment unless a standing discovery order covers the items desired by the defense. Prosecutors should also make an informal discovery request at arraignment. On discovery, see chap 11.

If counsel wishes to have a motion heard at the preliminary hearing, he or she should check and follow the notice requirements for that particular motion as well as any local rules of court. See §§8.31-8.34 for discussion of motions that may be brought at the preliminary hearing.

Initiated by information or indictment. At arraignment on a felony information or indictment, defense counsel should notice discovery and other appropriate motions for hearing. Defense pretrial motions are discussed in chaps 11 (discovery), 19 (speedy trial), 15 (change of venue), 22 (lineups and identification), 16 (motion to return or suppress evidence), 17 (motion to disclose informant), 13 (motion to dismiss the information or indictment under Pen C §995), and 18 (selected pretrial motions). See chap 48 on procedures for mentally ill or developmentally disabled defendants. The prosecution also has the right to hearings on discovery requests made to the defense under Pen C §§1054-1054.7. See chap 11.

Prosecutors may notice a special hearing to challenge a ruling at the preliminary hearing favorable to the defense under Pen C §1538.5(j) (see §16.31), a motion to reinstate charges (see §§13.32-13.36, 16.30), a discovery motion (see chap 11), and any other relevant motion (see checklist in §18.4).

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§6.29 D. Selecting Trial Date

A defendant is entitled to at least 5 days to prepare for trial after entering a plea. Pen C §1049.

Misdemeanor cases. In misdemeanor cases, a trial must be set no more than 30 calendar days after the defendant is arraigned when he or she is in custody, or 45 calendar days after arraignment when not in custody unless the defendant waives time or good cause is shown for a continuance. Pen C §1382(a)(3). A defendant unrepresented by counsel cannot waive these time limits or consent to a trial date beyond the statutory period unless the court has explained to him or her (1) the right to be tried within the statutory period (unless there is good cause for delay) or to have the case dismissed, and (2) the effect of consent to a postponement. Pen C §1382; *Hill v Municipal Court* (1962) 206 CA2d 257, 24 CR 34. See discussion of what constitutes "arraignment" in §6.5.

Felony cases. Felony trials must be set no more than 60 calendar days after the filing of the information or finding of the indictment absent a time waiver or good cause. Pen C §1382(a)(2). Another statute, Pen C §1049.5, requires felony trials to be set within 60 calendar days after arraignment on an information or indictment unless good cause is shown under Pen C §1050 for a later date. If the trial in a felony case does not take place within these guidelines, and time was not waived, the defendant is entitled as a matter of right to have the case dismissed. Pen C §1382.

Preferential setting. Trials in the following types of cases are to be set before other trials, and in any event must be set for trial within 30 calendar days after arraignment (Pen C §1048):

- When a minor is detained as a material witness or is the victim of the alleged offense, or when any person is the victim of a sex crime charged under Pen C §§261, 264.1, 286, 288, 288a, or 289 and committed by force, violence, or threat of violence;
- When a witness or victim was 70 years of age or older at the time of the alleged offense or was a dependent adult; or
- When a violation of Pen C §§261, 264.1, 273a, 273d, 285, 286, 288, 288a, or 289, committed by the use of force, violence, or the threat of violence, is charged.

Ø **Note:** Nothing in §1048 provides for a statutory right to trial within 30 calendar days. Pen C §1048(c).

When one of the sexual assault offenses described in Pen C §11165.1(a) or (b) or child abuse or neglect under Pen C §11165.6 is charged, the court, in scheduling a trial date, must make "reasonable efforts" to avoid setting the trial on the same day that the prosecuting attorney assigned to that case has another trial set. Pen C §1048.1.

For further discussion of speedy trial requirements, see chap 19.

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§6.30 VII. OUT-OF-COUNTY ARREST AND ARRAIGNMENT

A defendant who is arrested on a felony charge in a county other than the one in which the alleged crime occurred has the right to be arraigned without unnecessary delay in the county in which the arrest occurred. The arresting officer must inform the defendant of this right in writing. Pen C §821. If the arrest warrant sets a bail amount, the magistrate must admit the defendant to bail in that amount and set a date by which the defendant is required to appear before the court or magistrate who issued the warrant. This date must be within 25 days after the defendant is admitted to bail. Pen C §821. When the warrant sets a bail amount, the officer in charge of the jail has the authority to admit the defendant to bail in that amount and to set a time and date for the defendant to appear in the appropriate court. Pen C §§821, 1269b(a)-(b).

If the warrant does not set bail, if the defendant cannot make bail, or if the defendant does not demand to be taken before a magistrate in the county of arrest, the arresting officer must immediately inform the law enforcement agency that obtained the warrant that the defendant is in custody. That law enforcement agency must take custody of the defendant within 5 days after receiving the notice (5 *court* days if the county that issued the warrant is more than 400 miles from the county which has the defendant in custody). Pen C §821. The procedures applicable to misdemeanors are very similar. See Pen C §822. The major difference is that when the charged offense is a misdemeanor, the magistrate in the arresting county is authorized to set and accept bail, even if the warrant does not specify a bail amount. Pen C §822, ¶1.

When the court fails to tell a defendant of these rights or to set bail, or the county that issued the warrant does not timely take custody of the defendant, defendant's remedy is to petition for a writ of habeas corpus. See chap 42.

A defendant arrested for a felony violation of the Vehicle Code is treated like any other felony defendant. Veh C §40301. For Vehicle Code violations that are not felonies, the defendant must be taken before a magistrate in the county in which the offense is alleged to have been committed or, depending on the offense, be given a notice to appear before that magistrate. Veh C §§40302-40303. See *People v Superior Court (Simon)* (1972) 7 C3d 186, 101 CR 837; *Kramer v Superior Court* (1966) 239 CA2d 500, 48 CR 897.

A defendant in custody and undergoing prosecution in one county who has cases pending in other counties may not, under Pen C §§821-822, compel arraignment in another county on separate charges until the pending prosecution in the first county is completed. *Ng v Superior Court* (1992) 4 C4th 29, 13 CR2d 856.

Ø **Note:** All trial courts in the county in which an alleged criminal offense was committed have jurisdiction to try the case. Pen Code §§691(b), 777 (felonies), 1462.2 (misdemeanors). For discussion of venue and jurisdiction, see §15.3.

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VIII. INFRACTION CASES

§6.31 A. Limitations of Rights of Defendant

An infraction is an offense not punishable by incarceration. Pen C §19.6. Because of this, "[p]roceedings on infractions are not attended by the same constitutional safeguards as those attending felony or misdemeanor prosecutions." *People v Sava* (1987) 190 CA3d 935, 939, 235 CR 694. Hence, a defendant charged with an infraction is not entitled to a jury trial. Pen C §19.6. Moreover, unless incarcerated at the arraignment, an individual charged with an infraction is not entitled to legal representation at public expense. Pen C §19.6; *People v Prince* (1976) 55 CA3d Supp 19, 127 CR 296. But see Pen C §19.7 (unless otherwise provided by law, all legal provisions applicable to persons accused of misdemeanors also apply to those accused of infractions).

Ø **Note:** If an offense is classified as a misdemeanor, the defendant has the rights applicable to all misdemeanor defendants, even if incarceration is not an authorized punishment. *Tracy v Municipal Court* (1978) 22 C3d 760, 150 CR 785 (Health & S C §11357(b)).

It is rare for the district attorney's office to represent the people in the trial of an infraction. However, the judge cannot take the prosecutor's place. *People v Daggett* (1988) 206 CA3d Supp 1, 253 CR 195.

Counsel may appear for a defendant charged with an infraction; the defendant's presence is not required. Pen C §§19.7, 977(a).

A defendant ordered to appear on a traffic infraction may, before the date of his or her required appearance, plead not guilty in writing. Veh C §40519(b).

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§6.32 B. Offenses That May Be Charged Alternatively as Misdemeanors or Infractions

Penal Code §19.8 lists offenses that can be charged either as misdemeanors or infractions. Counsel should consult this list regularly because it is often amended.

Petty theft of property valued at $50 or less can also be charged as either a misdemeanor or an infraction under Pen C §490.1. If the offense was charged as a misdemeanor, however, the trial court cannot reduce the offense to an infraction over the prosecutor's objection. *People v Campbell* (2002) 104 CA4th Supp 1, 129 CR2d 601.

A defendant charged with a traffic infraction who has suffered three prior infraction convictions within the preceding 12 months can convert the infraction into a misdemeanor (see Veh C §40000.28) by admitting the prior convictions even though the priors are not charged or have been stricken in the interests of justice. *People v Shults* (1978) 87 CA3d 101, 150 CR 747. This procedure makes available those rights in misdemeanor prosecutions not otherwise available in an infraction case.

When a defendant is charged with a misdemeanor, the prosecution and the court cannot, without the defendant's consent, reduce the charge to an infraction to deny the defendant's right to a jury trial, when the charge is based on the same facts. However, when a prosecutor has the alternative of charging a single act under either of two statutes, one requiring a jury trial and the other not, he or she has no obligation to choose the one affording the right to a jury trial. *People v Bowden* (1978) 86 CA3d Supp 1, 150 CR 633.

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§6.33 IX. PROCEDURE ON FAILURE TO APPEAR

When a defendant's personal appearance is necessary in court, such as for arraignment, and the defendant is in custody, the court may direct that the officer having custody bring the defendant before the court. Pen C §978.

If a defendant is released on bail or on his or her own recognizance and fails to appear at arraignment when the defendant's personal presence is required, the court may order forfeiture of bail (Pen C §§979, 1269b(g), 1305-1306) and order a bench warrant to issue for the defendant's arrest (Pen C §§978.5, 979). Failure to appear on a written promise to appear on a felony violation is a felony. Pen C §1320. Failure to appear on a written promise to appear on a misdemeanor or an infraction is a misdemeanor. Pen C §§19.7, 853.7, 1320.

Ø **Note:** When a bail bond is forfeited because of a failure to appear, the defendant may request that the bail bond company reassume the bond. Many courts accept the bail bond reassumption and allow the defendant to remain out of custody.

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7

PLEADINGS; JOINDER AND SEVERANCE

RUTH SPEAR

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§7.1 I. OVERVIEW

Types of criminal pleadings. There are three types of pleadings (also called charging documents and accusatory pleadings) in criminal cases: complaints, informations, and indictments. A complaint may charge misdemeanor offenses, felony offenses, or both. An information is the charging document filed in felony cases (or when felonies and misdemeanors are both charged) following a holding order after a preliminary hearing based on a complaint. An indictment is returned by the grand jury and filed in superior court. For sample pleadings, see the Uniform Crime Charging Manual (updated annually) published by the Los Angeles County District Attorney's office and distributed by them to District Attorney offices throughout the state. Most prosecutors follow the Uniform Crime Charging Manual in determining whether and what charges to file. See §7.13 for a checklist of limitations on prosecutorial discretion in charging.

Amendments. The prosecutor can amend an accusatory pleading without the court's permission at any time before a plea is entered or a demurrer to the original pleading is sustained. After that, amendments are made at the court's discretion. Pen C §1009. A *complaint* or an *indictment* can be amended as long as the amendment does not change the offense charged. Pen C §1009; *People v Crosby* (1962) 58 C2d 713, 723, 25 CR 847 (amendment to indictment that would have tolled statute of limitations should have been allowed). However, an *information* may not be amended to add a charge that was not shown by the evidence at the preliminary hearing. Pen C §1009; *People v Winters* (1990) 221 CA3d 997, 270 CR 740. See also Pen C §739; *People v Peyton* (2009) 176 CA4th 642, 653, 98 CR3d 243. The prosecution may amend an information to add prior conviction enhancement allegations at any time before sentencing when there has been a guilty plea, and at any time before the jury has been excused after a trial. Pen C §969a; *People v Valladoli* (1996) 13 C4th 590, 54 CR2d 695. See also *People v Tindall* (2000) 24 C4th 767, 102 CR2d 533 (unless defendant has waived or forfeited jury on priors, amendment after discharge violates defendant's right to have same jury try guilt and priors).

If an amendment is made shortly before trial and requires further preparation by defense counsel, it is common for the court to grant a continuance. See Pen C §1050 on continuances. See also chap 20. Because amendment of an information at trial is proper only if it does not compromise the defendant's substantial rights (*People v Jones* (1985) 164 CA3d 1173, 1178, 211 CR 167), amendments during trial are rarely permitted. By that time, defense counsel may be committed to a defense that he or she would not otherwise have pursued if counsel had known of the new charge. However, if the defense had notice from the prosecutor earlier that additional charges might be filed, the court may allow the amendment during trial. *People v Jones, supra*.

Demurrer and entry of plea. Once a complaint, indictment, or information is filed, and if no alternative to court proceedings is available, *e.g.,* a citation hearing (see §26.41) or diversion (see chap 27), defense counsel can either demur to the pleading or enter a plea. Pen C §1002. Available pleas are guilty, not guilty, not guilty by reason of insanity, once in jeopardy, nolo contendere, and former judgment of conviction or acquittal. Pen C §1016.

A demurrer asserts error on the face of the charging document, such as the running of the statute of limitations (see *People v Ayhens* (1890) 85 C 86, 24 P 635) or lack of notice of the charges (see *People v Jordan* (1971) 19 CA3d 362, 97 CR 570). A demurrer does not require the court's permission if it is made before a plea is entered. Pen C §1004. Once a plea has been entered, counsel must obtain the court's permission to demur. Pen C §§1003-1004.

Joinder and severance. It may be proper for a complaint, information, or indictment to charge one defendant with multiple crimes or multiple defendants with one or more crimes, or charge multiple crimes against multiple defendants, not all of whom are charged with each count. Pen C §§954, 1098. The prosecutor or the defense can move to join (also called consolidate) or sever counts or defendants after the pleading has been filed. See Pen C §954.

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§7.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many counties have specific time requirements not otherwise required by the Penal Code.

Action	Deadline	Authority
File complaint.	Must be filed to comply with due process and speedy trial requirements and statute of limitations.	US Const amends VI, XIV; Cal Const art I, §15; Pen C §§799-805; see chap 19.
File indictment.	Must comply with due process and speedy trial requirements and statute of limitations.	US Const amends VI, XIV; Cal Const art I, §15; Pen C §§799-805; see chap 19.
File information.	Within 15 calendar days after holding order (commitment) following preliminary hearing, unless good cause shown for late filing.	Pen C §1382(a)(1); *Ciaccio v Superior Court* (1984) 156 CA3d 130, 202 CR 674.
Demur.	Before a plea is entered unless judge allows it to be made later.	Pen C §1004.
Amend pleadings.	Without leave of court before defendant pleads or demurrer sustained; with leave of court "at any stage of the proceedings." Better practice is to amend as early as possible.	Pen C §1009.
Make severance motion.	As soon as possible.	*People v Aranda* (1965) 63 C2d 518, 47 CR 353; *Coleman v Superior Court* (1981) 116 CA3d 129, 139, 172 CR 86; see Pen C §§954, 1098.
Make joinder motion.	As soon as possible.	See Pen C §§954, 1098.

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III. PLEADINGS

§7.3 A. Complaint; Citation

A written complaint, subscribed under oath, can be a preliminary pleading in a felony case, or the only pleading in a misdemeanor or infraction case. Pen C §§859, 949. Infractions and misdemeanors that are not alternative misdemeanor/felonies may also be initiated by filing a citation in the court. Pen C §853.6; 58 Ops Cal Atty Gen 886 (1975). See §7.9 on the requirement of a verified pleading.

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§7.4 B. Information; Indictment

The complaint in a felony case is followed by a preliminary hearing. The pleading filed by the people if the defendant is held to answer for a felony after a preliminary hearing is the information. If the prosecution takes the case to the grand jury, there is no formal complaint. The pleading filed by the people, if defendant is indicted by the grand jury, is the indictment. If the defendant pleads guilty to a felony before there is a holding order, the case is certified under Pen C §859a and the pleading is a complaint. Pen C §949. See also Pen C §§739, 944.

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C. Form and Content

§7.5 1. Summary of Form and Content; Sample Charging Document

The charging document in a criminal case includes the following information:

- The defendant's name or each codefendant's name, when codefendants are jointly charged;
- The date of the alleged offense or offenses;
- The crime or crimes charged;

Ø **Note:** A defendant may be convicted of a necessarily lesser included offense of a crime charged. Pen C §1159. See §§8.41, 26.25, 32.8.

- Where the offense or offenses were committed;
- If a crime charged is an alternative misdemeanor/felony, whether it is charged as a misdemeanor or a felony;
- The defendant's age, if required;
- Any prior convictions that must be pleaded and proved (see chart in §24.18);
- Any special allegation, *e.g.,* that the defendant used a gun during the commission of the crime; and
- Information on tolling of the statute of limitations, if required (see Pen C §803; see also §7.10).

The date on which an arrest warrant was obtained may be (but is not required to be) on the complaint.

A typical complaint might read as follows:

That on or about the 12th day of June, 2003, at and in the County of Santa Clara, State of California, the crime of robbery in violation of Section 211 of the Penal Code, a felony, was committed by Leslie Johnson, who, at that time and place, did willfully, unlawfully, and by means of force and/or fear take personal property from the person, possession, and/or immediate presence of Chris Potter.

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§7.6 2. Name of Court and Parties

The accusatory pleading must contain the title of the action, the name of the court to which it is presented, and the names of the parties. Pen C §950. A criminal action is prosecuted in the name of the people of the State of California. Pen C §684; see *People v Black* (2003) 114 CA4th 830, 832, 7 CR3d 902 (prosecution by "The People" does not violate federal or state constitutional guaranties of fair trial and due process). If the court is not named, the accusatory pleading is sufficient if it shows that it is filed in a court having authority to receive it. Pen C §959(1). If the defendant's name is unknown, that fact must be stated, and he or she must be described by a fictitious name. Pen C §959(4).

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§7.7 3. Manner of Statement of Offense

The accusatory pleading must contain a statement of the public offense or offenses charged. Pen C §950. No technical language is required. In charging an offense, each count is sufficient if it states in ordinary and concise language that the accused has committed a specific public offense. The statement may be in the words of the statute or ordinance making the conduct a public offense or in any words sufficient to give the defendant notice of the offense of which he or she is accused. Pen C §952. See, *e.g., Brown v Superior Court* (1965) 234 CA2d 628, 630, 44 CR 519 (speed violation in words of statute). When there is an issue concerning the tolling of the statute of limitations (Pen C §803), the pleading must give reasons the cause of action is not barred by the statute of limitations. *People v Zamora* (1976) 18 C3d 538, 564 n26, 134 CR 784. An accusatory pleading stating the charged offense also provides notice of any necessarily included offenses. *People v Lohbauer* (1981) 29 C3d 364, 368, 173 CR 453; *People v Tardy* (2003) 112 CA4th 783, 786, 6 CR3d 24.

Not every pleading that satisfies Pen C §952 will satisfy due process notice requirements when tested by demurrer. *Lamadrid v Municipal Court* (1981) 118 CA3d 786, 790, 173 CR 599. Due process requires that an accused be advised of the charges in order to have a reasonable opportunity to prepare and present a defense and not be taken by surprise by evidence offered at trial. *In re Hess* (1955) 45 C2d 171, 175, 288 P2d 5; *People v Jordan* (1971) 19 CA3d 362, 97 CR 570 (pleading in terms of statute, and viewed in light of preliminary hearing transcript, did not give constitutionally adequate notice of nature of charges sufficient to notify defendants of what they had to defend against and whether there was sufficient certainty to allow future plea in bar; order dismissing action affirmed). See also *People v West* (1970) 3 C3d 595, 612, 91 CR 385; *Gaylord v Municipal Court* (1987) 196 CA3d 1348, 242 CR 486 (in Pen C §647(b) prosecution, complaint must allege agreement to engage in prostitution and act in furtherance of agreement). See generally *In re Rudolfo A.* (1980) 110 CA3d 845, 168 CR 338 (constitutional sufficiency of petition charging "trespass" on school grounds in violation of local ordinance).

A misdemeanor complaint charging a defendant with being under the influence of a controlled substance in violation of Health & S C §11550 must specify the specific substance. Discovery will not satisfy the requirement of notice and it cannot be assumed that the defendant knows the nature of the substance, because the defendant is presumed innocent. *Sallas v Municipal Court* (1978) 86 CA3d 737, 743, 150 CR 543. But see *Ross v Municipal Court* (1975) 49 CA3d 575, 579, 122 CR 807 (complaint that does not specify substance gives adequate notice).

California courts have uniformly held that an information charging murder generally provides constitutionally adequate notice to the defendant that the prosecution might rely on theories other than malice aforethought or premeditation and deliberation, such as felony murder or murder by lying in wait. See, *e.g., People v Gurule* (2002) 28 C4th 557, 629, 123 CR2d 345; *People v Gallego* (1990) 52 C3d 115, 181, 276 CR 679. But see *Sheppard v Rees* (9th Cir 1990) 909 F2d 1234 (defendant ambushed by prosecutor's 11th-hour reliance on felony murder theory).

When the statute imposing an enhancement requires the facts supporting the enhancement to be stated in the accusatory pleading, the enhancement should be alleged with respect to every count on which the prosecution seeks to invoke it. However, failure to do so is not fatal as long as the defendant has fair notice of the potential punishment. *People v Riva* (2003) 112 CA4th 981, 985, 5 CR3d 649.

It is not necessary to negate exceptions in a statute; these are a matter of defense. *People v Kinsley* (1931) 118 CA 593, 597, 5 P2d 938 (information charging sale of narcotics was not defective for failure to allege that defendant was not a physician).

For discussion of demurrers, see §§7.19-7.26.

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§7.8 4. Time of Offense

The precise date on which an offense was committed need not be stated unless the date is material to the offense. Pen C §955.

The accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations, and if the time elapsed exceeds the statute of limitations, the pleading must allege further facts, *e.g.,* the defendant's absence from the state for a sufficient period to toll the statute under Pen C §803(d). *In re Demillo* (1975) 14 C3d 598, 121 CR 725.

Pleadings in cases involving repeated or continuous acts of child sexual abuse present special problems for the defense because the charging document may be vague about when the offense occurred, *e.g.,* Count 1: a violation of Pen C §288(a) between September 1, 2003, and December 31, 2003. The California Supreme Court has upheld such generic accusatory pleadings against due process challenge. See *People v Jones* (1990) 51 C3d 294, 317, 270 CR 611 (generic child molestation pleading does not deprive defendant of due process rights to notice and to present defense).

In *Jones,* the court observed that the defendant had a variety of procedural remedies to test the pleading, such as demurrers and pretrial motions to set aside the information or indictment (Pen C §995 motion). 51 C3d at 320. However, the decision in *People v Jennings* (1991) 53 C3d 334, 356, 279 CR 780 (no due process notice violation in information that alleged offense occurred "on or about the summer of 1983"), suggests that a demurrer to generic child molestation charges is not likely to be successful. Defense counsel should demur but should also be prepared to pursue pretrial motions to dismiss under Pen C §995 (see chap 13) and to require the prosecutor to elect the specific incident on which he or she is relying to prove a particular count. See §31.33. At trial, counsel should request a jury unanimity instruction. See CALCRIM 3550. See also *People v Jones* (1990) 51 C3d 294, 321, 270 CR 611. A defendant who waives a preliminary hearing forfeits any claim regarding vagueness in the accusatory pleading. See *People v Butte* (2004) 117 CA4th 956, 959, 12 CR3d 221.

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§7.9 5. Court Jurisdiction; When Signed and Sworn To

The accusatory pleading must show that the offense charged is triable in the court in which it is filed. Pen C §959(5). On jurisdiction and venue, see §15.3.

A complaint must be in writing, sworn to under oath or penalty of perjury (see CCP §2015.5; *People v Salazar* (1968) 266 CA2d 113, 71 CR 894), and signed by a natural person. It may be verified on information and belief. Pen C §§740, 959(3). Indictments must be endorsed as a "true bill," and the endorsement must be signed by the grand jury foreman or forewoman. Pen C §940. Informations do not have to be signed or sworn to. See Pen C §959(2).

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§7.10 D. Statute of Limitations

Criminal accusatory pleadings must be filed before the applicable statute of limitations period has run. See Pen C §§799-805. This is a jurisdictional requirement and so may be asserted as a bar to prosecution either before or after judgment. *People v Zamora* (1976) 18 C3d 538, 134 CR 784.

On statutes of limitation, see §§19.13-19.16.

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IV. CRIME-CHARGING DISCRETION

§7.11 A. Broad Discretion in Charging

Prosecutors are responsible for charging crimes in all but grand jury cases. Govt C §§26500-26501. California prosecutors generally follow the Uniform Crime Charging Standards (1996) published by the California District Attorneys Association (CDAA) and the Uniform Crime Charging Manual (updated annually), published by the Los Angeles County District Attorney's office, in deciding what charges to bring and when to bring them. Information on purchasing the standards is available at the CDAA's website: http://www.cdaa.org/pubs.

The prosecutor has broad discretion in charging. He or she can:

- Not charge at all (see Govt C §26501; see Cal Rules of Prof Cond 5-110 on prosecutor's ethical obligations in charging);
- Set up a "citation" or "office" hearing with the victim and defendant instead of filing a complaint, if such an informal program is available in the district attorney's office;
- Bring the evidence before the grand jury and allow it to determine whether there is sufficient evidence to charge (see Pen C §§917, 935);
- Grant immunity instead of filing charges (see Pen C §§1324-1324.1);
- Reach a civil compromise instead of filing charges (see CCP §33);
- When alternative felony/misdemeanors are charged, decide whether they will be charged as misdemeanors or felonies (see Pen C §17(b)(4));
- Decide what crimes to charge (see *Mitchell v Superior Court* (1989) 49 C3d 1230, 1250, 265 CR 144; *People v Cockburn* (2003) 109 CA4th 1151, 1157, 135 CR2d 807);
- Decide whether to charge prior convictions and special allegations, and which ones (see *People v Adams* (1974) 43 CA3d 697, 707, 117 CR 905);
- Decide whether to join counts, defendants, or both in the same case (see *People v Adams, supra*);
- Decide whether to aggregate multiple instances of misdemeanor vandalism to make a felony offense (see *In re Arthur V.* (2008) 166 CA4th 61, 67, 82 CR3d 148); and
- Decide whether to aggregate several petty thefts against the same victim to make one grand theft count or charge theft counts separately (see *People v Bailey* (1961) 55 C2d 514, 519, 11 CR 543; *People v Drake* (1996) 42 CA4th 592, 49 CR2d 765).

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§7.12 B. Alternative Misdemeanor/Felony ("Wobbler")

Some crimes, often called "wobblers," list both county jail (misdemeanor sentence) and state prison (felony sentence) as possible punishment. The prosecutor has the discretion to charge them either as misdemeanors or as felonies. Pen C §17(b)(4).

The prosecution may file an alternative misdemeanor/felony first as a misdemeanor, and then, before a plea is entered, dismiss the misdemeanor complaint under Pen C §1385 and refile the charge as a felony. *Necochea v Superior Court* (1972) 23 CA3d 1012, 100 CR 693. The prosecution may also refile a wobbler as a felony after the defendant has been allowed to withdraw a plea to the crime as a misdemeanor. *People v Hudson* (1989) 210 CA3d 784, 258 CR 563. But see discussion in §§18.32-18.37 of retaliatory prosecution.

The magistrate has the discretion to reduce a felony to a misdemeanor at the preliminary hearing. Pen C §17(b)(5). The trial court's authority to declare a "wobbler" to be a misdemeanor under Pen C §17(b) was not abrogated by the "three strikes" laws. *People v Superior Court (Alvarez)* (1997) 14 C4th 968, 60 CR2d 93.

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§7.13 C. Checklist: Limitations on Prosecutorial Discretion

The prosecution's ability to charge may be limited by the following:

- There was no probable cause. Cal Rules of Prof Cond 5-110. See §2.41.
- The prosecution was retaliatory. *Twiggs v Superior Court* (1983) 34 C3d 360, 374, 194 CR 152. See §§18.32-18.37.
- The prosecution was discriminatory. *Yick Wo v Hopkins* (1886) 118 US 356, 30 L Ed 220, 6 S Ct 1064. See §§18.16-18.25.
- The defendant was already acquitted or convicted of the offense. Pen C §1023. See §26.34.
- The defendant was already once in jeopardy on the same offense. Pen C §§656, 793-794. See §§26.23-26.28.
- There was res judicata or collateral estoppel. *People v Gephart* (1979) 93 CA3d 989, 997, 156 CR 489. See §§26.29-26.33.
- The new offense should have been joined with an offense of which the defendant has already been acquitted or convicted. *Kellett v Superior Court* (1966) 63 C2d 822, 828, 48 CR 366. See §7.35.
- A charged offense was not shown by the evidence at the preliminary hearing. Pen C §739. See §§8.43, 13.37.
- The charges are inconsistent with factual findings of the magistrate at the preliminary hearing. *Pizano v Superior Court* (1978) 21 C3d 128, 133, 145 CR 524. See §8.39.
- The court has ruled against the prosecution on a Pen C §871.5 motion. Pen C §871.5(c) (if motion denied, dismissed complaint or portion of complaint may not be refiled). See §13.36.
- A misdemeanor case or count has been dismissed once under Pen C §1387.
- A felony case or count, or a misdemeanor count charged with a felony count, has been dismissed twice under Pen C §1387. On the "two-dismissal" rule, see §§13.31, 25.45-25.47.
- A violent felony has been dismissed three times under Pen C §1387.1. See §25.45.
- The defendant was previously found guilty or not guilty of a necessarily lesser included offense. *People v Willoughby* (1985) 164 CA3d 1054, 1067, 210 CR 880. See §26.25.
- The case was dismissed twice and filed a third time with added enhancements or charges that allege a violent crime to avoid the two-dismissal rule of Pen C §1387. *People v Salcido* (2008) 166 CA4th 1303, 1313, 83 CR3d 561.

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V. AMENDING ACCUSATORY PLEADINGS

§7.14 A. Allowable Reasons for Amending Pleadings

An amendment may be made to remedy "any defect or insufficiency" in a complaint, in an information (as long as the amendment does not charge an offense not shown by the evidence taken at the preliminary hearing), and in an indictment (as long as the amendment does not change the offense charged). Pen C §1009. Thus, an accusatory pleading may be amended to:

- Correct clerical errors (see, *e.g.*, *People v Miralrio* (2008) 167 CA4th 448, 458, 84 CR3d 169);
- Include an allegation charging a technically essential element of the offense;
- Allege facts showing that the charges are not barred by the statute of limitations;

Ø **Note:** For discussion of amendments affected by the statutes of limitation, see §19.13.

- Include prior-felony-conviction allegations (Pen C §969a (information may be amended to include enhancement any time before jury discharged); Pen C §969.5 (information may be amended to include enhancement after guilty plea); see also *People v Valladoli* (1996) 13 C4th 590, 54 CR2d 695);

Ø **Note:** If the prior conviction is an element of the substantive offense, it must be proved at the preliminary hearing. See §24.18.

- Join several different complaints or informations (see §§7.27-7.42);
- Add an offense or enhancement that was proved at the preliminary hearing (see §8.43); or
- Allege aggravating facts for sentencing purposes (*Barragan v Superior Court* (2007) 148 CA4th 1478, 1482, 56 CR3d 660; but see *People v Superior Court (Brooks)* (2007) 159 CA4th 1, 71 CR3d 49).

A defendant's due process rights may not be prejudiced by amendment of the information. An information may not be amended to add an offense not shown by the evidence at the preliminary hearing or arising out of the same transaction on which the commitment order was based. *Jones v Superior Court* (1971) 4 C3d 660, 664, 94 CR 289; *People v Dominguez* (2008) 166 CA4th 858, 866, 83 CR3d 284; *People v Burnett* (1999) 71 CA4th 151, 165, 83 CR2d 629. For example, the defendant's due process rights were violated when the trial court permitted the prosecution to add an alternative basis for conviction at the close of all the evidence. *People v Dominguez, supra*.

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§7.15 B. Time to Amend Pleadings

The prosecuting attorney may file an amended complaint without leave of court any time before the defendant pleads or a demurrer to the original pleading is sustained (Pen C §1009; *People v Crosby* (1962) 58 C2d 713, 721, 25 CR 847), or after the defendant has withdrawn his or her original plea and before he or she has entered another (*People v Stuhlmiller* (1940) 37 CA2d 603, 99 P2d 1072).

After a plea has been entered or a demurrer has been sustained, a complaint may be amended only with the court's permission. See *People v Brower* (1949) 92 CA2d 562, 564, 207 P2d 571 (amended information filed without leave of court does not supersede original). But see *People v Loggins* (1955) 132 CA2d 736, 738, 282 P2d 961 (amended information filed in open court presumed to have been filed with leave).

The court is authorized to order or permit filing an amended complaint at any stage of the proceedings as long as "defendant's substantial rights are not prejudiced." *People v Hernandez* (1961) 197 CA2d 25, 31, 17 CR 20; Pen C §1009. See, *e.g., People v Jones* (1985) 164 CA3d 1173, 211 CR 167 (amendment adding misdemeanor permitted after defendant's Pen C §1118.1 motion granted at conclusion of prosecutor's case-in-chief); *People v Martin* (1978) 87 CA3d 573, 579, 151 CR 141 (after filing of remittitur); *People v Flowers* (1971) 14 CA3d 1017, 92 CR 647 (after mistrial); *In re McWhinney* (1968) 267 CA2d 691, 73 CR 291 (after guilty plea at time set for pronouncement of judgment); *People v Sipult* (1965) 234 CA2d 862, 866, 44 CR 846 (at beginning of trial); *People v Alves* (1957) 154 CA2d Supp 877, 879, 315 P2d 755 (after order sustaining demurrer without leave to amend but before judgment of dismissal); *People v Jones* (1938) 25 CA2d 517, 521, 77 P2d 897 (after close of prosecution's case).

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§7.16 C. Procedure

An amendment may be made on the prosecuting attorney's oral application or on the court's own motion. Pen C §1009; *People v Hernandez* (1961) 197 CA2d 25, 17 CR 20 (prosecutor's motion); *People v Walker* (1947) 82 CA2d 196, 185 P2d 842 (court's motion).

A motion to amend may be heard without the defendant present if defense counsel is present and the defendant's presence is or has been properly waived. *People v Cayer* (1951) 102 CA2d 643, 651, 228 P2d 70.

The usual method of amending a complaint is to file a new and separate pleading, usually captioned "first amended complaint." See Pen C §1009. If the alteration to be made is slight, amendment by interlineation may be permitted (see *People v Crosby* (1962) 58 C2d 713, 719, 25 CR 847 (indictment); *People v O'Hara* (1960) 184 CA2d 798, 811, 8 CR 114 (information)), but the court's permission is necessary (see Cal Rules of Ct 3.1324(d)). The amended complaint must be verified. Pen C §1009.

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§7.17 D. Effect of Amendment

An amended complaint supersedes the original, which then has no further function as a pleading. *Muns v Superior Court* (1955) 137 CA2d 728, 732, 290 P2d 951.

An amendment that does not change the substance of the original charge relates back to the original complaint's filing date. Tolling of the statute of limitations continues (*In re Davis* (1936) 13 CA2d 109, 113, 56 P2d 302), and the time within which the defendant must be brought to trial continues to run (*Hankla v Municipal Court* (1972) 26 CA3d 342, 357, 102 CR 896). Examples of amendments that do not change substance are adding priors (*Huerta v Superior Court* (1971) 18 CA3d 482, 95 CR 748) and adding new evidentiary allegations of the same charge as separate counts (*Hankla v Municipal Court, supra*).

When the amendment substantially changes the charges, *e.g.,* circumstances are alleged that would increase punishment, several results may follow:

- The defendant may be granted additional time before having to enter a plea to the amended complaint (Pen C §1009);
- A continuance for trial may be granted (*People v Hembree* (1956) 143 CA2d 733, 743, 299 P2d 1043);
- The right to a jury trial may be reinstated (*People v Hopkins* (1974) 39 CA3d 107, 110, 113 CR 880 (when amended information increased defendant's potential punishment, jury trial waiver based on original information not binding)); and
- The original pleading does not toll the statute of limitations applicable to the added charges (see *In re Davis, supra*).

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§7.18 E. Procedure After Amendment

The defendant must enter a plea to an amended complaint or information at the first court appearance at which the amended pleading is presented, unless another time is set for plea. See Pen C §1009. However, unless prejudice results, a defendant's failure to object to the amendment or to demand rearraignment usually waives the requirement. *People v Hopkins* (1974) 39 CA3d 107, 113 CR 880.

When a complaint or information is amended, the court must again advise an unrepresented defendant of his or her right to counsel and must determine that any waiver is knowing and intelligent. *In re Peterson* (1970) 4 CA3d 979, 84 CR 694 (new count added).

After an accusatory pleading is amended, the case continues as if the pleading had been originally filed as amended, unless the defendant's substantial rights would be prejudiced by failure to grant a continuance, *e.g.,* if a trial date had already been set. See Pen C §1009.

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VI. DEMURRER

§7.19 A. Function and Grounds

Demurrers are used to challenge defects that appear on the face of the accusatory pleading. Pen C §1004. Five such grounds are listed in Pen C §1004; they are discussed in §§7.20-7.24. A defendant can demur to a pleading instead of entering a plea if one of the grounds in Pen C §1004 exists. Pen C §§1002, 1004.

Defendants can demur to enhancement allegations as well as to counts. *People v Equarte* (1986) 42 C3d 456, 467, 229 CR 116. The objections specified in Pen C §1004 are the exclusive grounds for demurrer. *People v Saffell* (1946) 74 CA2d Supp 967, 972, 168 P2d 497.

Ø **Note:** If there is a jurisdictional error in the charging document, *e.g.,* failure to state a cause of action or the statute of limitations has run, counsel may choose not to raise the issue by demurrer in a felony case, because a first dismissal is not final. The issue can be raised for the first time on appeal even if no objection was made in the trial court. *People v Zamora* (1976) 18 C3d 538, 547, 134 CR 784. See §25.45 for discussion of the two-dismissal rule in felony cases.

A possible alternative or adjunct to a demurrer is a taxpayer's complaint for injunctive and declaratory relief under CCP §526a. See *Williams v Garcetti* (1993) 5 C4th 561, 20 CR2d 341 (claim that amendment to Pen C §272 failed to provide fair notice or objective standard of enforcement heard and rejected).

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§7.20 1. Lack of Jurisdiction (Pen C §1004(1))

The defendant may demur on the ground that the court has no jurisdiction over the offense. Pen C §1004(1). See, *e.g., People v Superior Court (Caswell)* (1988) 46 C3d 381, 250 CR 515 (constitutionality of Pen C §647(d)); *In re Demillo* (1975) 14 C3d 598, 121 CR 725 (running of statute of limitations); *People v Webber* (1901) 133 C 623, 66 P 38 (offense committed outside court's jurisdiction).

A dismissal for lack of territorial jurisdiction is not a dismissal in furtherance of justice under Pen C §1385 and is not subject to the two-dismissal rule of Pen C §1387. *Casey v Superior Court* (1989) 207 CA3d 837, 845, 255 CR 81. For discussion of §1387, see §§13.31, 25.45.

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§7.21 2. Uncertainty (Pen C §1004(2))

A defendant may demur on the ground that a complaint or information does not substantially conform to the Pen C §§950 and 952 requirements relating to statement of the offense. Pen C §1004(2). See, *e.g., People v Horiuchi* (1931) 114 CA 415, 300 P 457 (statement of offense ambiguous). A statement in the statute's language, or in any language giving the accused notice of the offense charged, although not of the particular circumstances, is generally held to be sufficient in the face of a general demurrer. *Brown v Superior Court* (1965) 234 CA2d 628, 632, 44 CR 519.

Ø **Warning:** A defendant who waives a preliminary hearing forfeits the right to complain of vagueness in the accusatory pleading. *People v Butte* (2004) 117 CA4th 956, 959, 12 CR3d 221.

Literal compliance with Pen C §952 is *insufficient* if the accusation fails to give constitutionally adequate notice of what the accused must defend against. *People v Jordan* (1971) 19 CA3d 362, 97 CR 570. Pleading in the language of the statute is also insufficient when the statute is not sufficient in itself to define the offense. When a statute defines a material element by referring to other forbidden acts, the pleading must specify the forbidden acts. See, *e.g., In re Jamil H.* (1984) 158 CA3d 556, 204 CR 816 (charge of entering school "without lawful business," although language of statute, held vague because it did not adequately inform defendant of charge); *Lamadrid v Municipal Court* (1981) 118 CA3d 786, 173 CR 599 (vehicular manslaughter complaint in language of statute subject to demurrer because it did not advise defendant of factual theories on which prosecution would rely).

See §7.8 for discussion of what must be alleged concerning the date of the offense.

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§7.22 3. Misjoinder (Pen C §1004(3))

When more than one offense is charged, a defendant may demur on the ground that joinder is not authorized by Pen C §954. Pen C §1004(3). A severance motion may also be made. See discussion of joinder and severance in §§7.27-7.42.

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§7.23 4. No Offense Stated (Pen C §1004(4))

A defendant may demur on the ground that the facts stated do not constitute a public offense. Pen C §1004(4). This ground, like lack of jurisdiction, may be used to raise questions of constitutionality, inoperative legislation, and limitations. See, *e.g., People v Superior Court (Caswell)* (1988) 46 C3d 381, 250 CR 515 (constitutional challenge to Pen C §647(d)); *People v Heitzman* (1994) 9 C4th 189, 37 CR2d 236 (former Pen C §368(a) (defining elder abuse) unconstitutionally overbroad unless construed to apply only to person who, under existing tort principles, has duty to control conduct of individual who is directly causing or inflicting abuse on elder or dependent adult); *People v Smith* (1955) 133 CA2d Supp 777, 779, 284 P2d 203 (invalidity of statute).

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§7.24 5. Prosecution Barred (Pen C §1004(5))

A defendant may demur on the ground that the complaint contains matter that, if true, is legal justification for the offense charged or is a legal bar to the prosecution. Pen C §1004(5). See, *e.g., People v Ayhens* (1890) 85 C 86, 24 P 635 (allegation of time of commission showed that statute of limitations had run).

In certain circumstances, Pen C §1387 bars prosecution of crimes that were previously dismissed. See chap 25 on discharge and dismissal.

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§7.25 B. Procedure; Format, Service, and Filing

A demurrer must be made before entry of a plea (Pen C §1004), either at the time of arraignment or at whatever later time the defendant is required to answer the complaint (Pen C §1003), unless the court allows the defendant to withdraw the plea and interpose a demurrer (*People v Linton* (1929) 102 CA 608, 283 P 389).

A demurrer must be in writing. It must "distinctly specify" the grounds of objection to the complaint. Pen C §1005. See also *People v Hadley* (1924) 66 CA 370, 373, 226 P 836. On sufficient specification, see *People v Saffell* (1946) 74 CA2d Supp 967, 980, 168 P2d 497. The demurrer must be signed by the defendant or defense counsel and filed with the court. Pen C §1005.

In addition to filing a written demurrer, the defense must state in open court that it demurs to the pleading. This demurrer is made at arraignment or at the time set to enter a plea. Pen C §1003.

> Ø **Note:** An oral demurrer that is unaccompanied by a written demurrer is ineffective. *People v Bailey* (1946) 72 CA2d Supp 880, 884, 165 P2d 558; *People v Kinsley* (1931) 118 CA 593, 596, 5 P2d 938.

Because Pen C §1002 defines a demurrer as a pleading, it is not entirely clear whether Cal Rules of Ct 4.111 (pretrial motion must be accompanied by a supporting memorandum) is applicable. It is, however, wise to include a supporting memorandum, so that counsel can set out full factual and legal support for the demurrer. Counsel should check local court rules to see if they regulate the time for filing demurrers. Form, service, and filing requirements for pretrial motions under Rule 4.111 are discussed in §§18.5-18.7.

Argument on the objections presented by demurrer must be heard at the time the demurrer is entered unless the court grants a continuance for exceptional cause. Pen C §1006. After argument on the motion, the court must make an order either overruling or sustaining the demurrer. Pen C §1007. If the demurrer is overruled, the defendant must immediately enter a plea unless the court extends the time for doing so. Pen C §1007.

Objections to the court's jurisdiction (see §7.20) or that the facts stated do not constitute a public offense (see §7.23) may also be made by a motion in arrest of judgment (Pen C §1012) or by appeal (*People v Gann* (1968) 259 CA2d 706, 709, 66 CR 508).

The California Criminal Law Forms Manual §§7.1-7.2 (2d ed Cal CEB 2005) contain a sample demurrer and an opposition to demurrer.

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§7.26 C. Court's Ruling

If the trial court sustains a demurrer and if the defect can be remedied, it must permit the prosecutor to file an amended complaint within a set period of time, not exceeding 10 calendar days. Pen C §1007; *People v Bailey* (1946) 72 CA2d Supp 880, 884, 165 P2d 558 (leave to amend should be granted for remediable defect). If the defect cannot be remedied by amendment, the court should sustain the demurrer without leave to amend, and dismiss the case. Pen C §§1007-1008; *People v Bailey* (1946) 72 CA2d Supp 880, 884, 165 P2d 558 (dictum). Dismissal is also required if the prosecution fails to amend the pleading or files an untimely amendment. Pen C §1008.

If the case is dismissed and the defendant is in custody, the court must order his or her discharge. Pen C §1008. If the defendant has been admitted to bail, bail must be exonerated or the deposit refunded. Pen C §1008.

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VII. JOINDER AND SEVERANCE

A. Checklists: Grounds for Severance

§7.27 1. Checklist: Grounds for Severing Counts

The most common grounds for severing counts are the following:

- A count with strong evidence is being used to bolster a count with weak evidence. *Williams v Superior Court* (1984) 36 C3d 441, 452, 204 CR 700 (partially superseded by statute; see Pen C §954.1); *Coleman v Superior Court* (1981) 116 CA3d 129, 172 CR 86.
- One of the crimes is highly inflammatory. *Coleman v Superior Court, supra*.
- Special care must be taken with joinder in death penalty cases. *Williams v Superior Court* (1984) 36 C3d 441, 454, 204 CR 700.
- Joinder permits the admissibility of additional prejudicial evidence such as a prior felony. *Walker v Superior Court* (1974) 37 CA3d 938, 942, 112 CR 767.
- Joinder of unrelated crimes will prejudice a defendant's right to remain silent when the defendant plans to testify about one or more crimes while exercising the right to remain silent about other charged crimes. *People v Smallwood* (1986) 42 C3d 415, 228 CR 913.
- Joinder violates Pen C §954 or §954.1.

Ø **Note:** When a defendant moves to sever counts on the ground that evidence on one count will impair the defendant's ability to defend against another count, the court generally considers whether the allegedly prejudicial evidence is admissible on the count or counts the defendant is seeking to sever. If the evidence is cross-admissible, there is no ground for severance. The absence of cross-admissibility is not the primary factor for the court to consider in ruling on the motion (Pen C §954.1; see *People v Stitely* (2005) 35 C4th 514, 532, 26 CR3d 1), but the absence of cross-admissibility may be considered as a factor suggesting prejudice (*Belton v Superior Court* (1993) 19 CA4th 1279, 1286, 24 CR2d 34). See discussion in §7.34.

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§7.28 2. Checklist: Grounds for Severing Codefendants

Severance of codefendants is usually discretionary. Pen C §1098. However, the Sixth Amendment right to confrontation may require severance when an out-of-court statement of a nontestifying codefendant implicates another defendant. *Bruton v U.S.* (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620; *People v Aranda* (1965) 63 C2d 518, 47 CR 353. If the extrajudicial statement cannot be edited to eliminate portions that incriminate the defendant, severance is required unless the prosecution is willing to forgo use of the statement altogether. See *Gray v Maryland* (1998) 523 US 185, 140 L Ed 2d 294, 118 S Ct 1151. For further discussion, see §§7.39-7.40.

The fact that one defendant is not available or ready to proceed is not a ground for severance unless it appears that it will be impossible for all defendants to be available and prepared within a reasonable time. Pen C §1050.1. See *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491 (motion by one defendant to continue preliminary hearing considered motion by all defendants). But see *Greenberger v Superior Court* (1990) 219 CA3d 487, 502, 267 CR 849 (lengthy continuance may implicate speedy trial guaranty; 6-month delay on facts was not abuse of discretion).

The following grounds do not require severance but give some of the reasons for granting severance that courts have found persuasive:

- Joint trial with codefendants will prejudice defendant in eyes of jury ("prejudicial association"). *People v Chambers* (1964) 231 CA2d 23, 28, 41 CR 551.
- Jury confusion may arise from evidence on multiple counts. *People v Chambers, supra*.
- Codefendants' defenses are inconsistent. *People v Graham* (1969) 71 C2d 303, 331, 78 CR 217; *People v Reeder* (1978) 82 CA3d 543, 147 CR 275. See also *People v Cummings* (1993) 4 C4th 1233, 1286, 18 CR2d 796.
- Evidence that was suppressed against some codefendants is admissible against others. *U.S. v Graham* (6th Cir 1968) 391 F2d 439, 446. See also *Brown v U.S.* (1973) 411 US 223, 36 L Ed 2d 208, 93 S Ct 1565.
- One defendant desires to introduce otherwise inadmissible evidence in his or her own defense. See *People v Reeder, supra*.
- Strong evidence against one defendant may bolster a weak case against another defendant. *People v Massie* (1967) 66 C2d 899, 915, 59 CR 733.
- Possibility exists that codefendant would give exonerating testimony for defendant at separate trial. See *People v Anderson* (1987) 43 C3d 1104, 1115, 240 CR 585; *People v Conerly* (2009) 176 CA4th 240, 250, 98 CR3d 76; *People v Isenor* (1971) 17 CA3d 324, 332, 94 CR 746.
- Prosecutor's insistence on joint trial is not in good faith, is intended to obtain an otherwise illegal delay, or is intended to take unfair advantage of defendants. *People v Clark* (1965) 62 C2d 870, 883, 44 CR 784.

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§7.29 B. Separate Juries as Alternative to Severance

When a defendant moves to sever his or her case from that of a codefendant, the trial court has discretion to impanel separate juries as an alternative to granting the motion for severance. *People v Harris* (1989) 47 C3d 1047, 255 CR 352. See also *People v Cummings* (1993) 4 C4th 1233, 1286, 18 CR2d 796.

If the trial court impanels dual juries over a defendant's objection, that decision may not be urged as error on appeal unless the defendant can show identifiable prejudice or such gross unfairness as to deny the defendant a fair trial. *People v Cummings* (1993) 4 C4th 1233, 1286, 18 CR2d 796; *People v Turner* (1984) 37 C3d 302, 312, 208 CR 196, overruled on other grounds in *People v Anderson* (1987) 43 C3d 1104, 1115, 240 CR 585.

Ø **Note:** When the facts supporting a defense motion for severance are strong, the prosecution may be able to persuade the court to impanel separate juries if complete severance would result in substantial duplication of evidence. See, *e.g., People v Jackson* (1996) 13 C4th 1164, 1207, 56 CR2d 49. Defense counsel might also consider requesting separate juries as an alternative if it appears that for reasons of judicial economy, the trial court is reluctant to grant an outright severance.

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§7.30 C. Defense Procedures for Challenging Multiple Counts or Defendants

Challenging joinder of counts or defendants by demurrer and by motion to sever. A defendant may attack joinder (also called consolidation) of counts or of defendants before trial by demurring to the accusatory pleading when it appears on the face of the pleading that more than one offense is charged in violation of Pen C §954. Pen C §1004(3). Penal Code §1012 states that failure to demur to errors that appear on the face of a pleading that are mentioned in Pen C §1004(2)-(3), (5), which include improper joinder, is a waiver of the right to challenge that error. Despite that language, counsel may be able to attack joinder by a pretrial motion to sever under §954, even when a demurrer was available. See *People v Molano* (1967) 253 CA2d 841, 61 CR 821 (district attorney did not object in trial court, and severance should have been granted).

Ø **Note:** The court in *Molano* said it was "far better practice" to raise objections to joinder issues by demurrer. 253 CA2d at 846. To be safe, counsel should always demur when misjoinder is apparent on the face of the accusatory pleading.

The supreme court approved using a motion to sever in order to attack joinder of defendants in *Williams v Superior Court* (1984) 36 C3d 441, 446, 204 CR 700. Demurrers are seldom available to attack joinder of defendants, because this error does not appear on the face of the pleading. When the prosecution moves to amend a complaint or information to add a new count, or moves to consolidate two or more separate accusatory pleadings, the defense should oppose the motion and should file an opposition memorandum when possible. For discussion of format, service, and filing, see §7.25 (demurrers) and the following paragraph on severance motions.

Format, service, and filing of severance motion. A defendant's motion for severance must be in writing and served on all parties. Cal Rules of Ct 4.111. It must be supported by affidavits or declarations (CCP §2015.5 allows declarations to be substituted for affidavits) showing the likelihood of prejudice from a joint trial. *People v Kemp* (1961) 55 C2d 458, 477, 11 CR 361; *Coleman v Superior Court* (1981) 116 CA3d 129, 139, 172 CR 86. See *People v Isenor* (1971) 17 CA3d 324, 333, 94 CR 746, for an example of an insufficient showing. Consult local court rules for the appropriate time to make a severance motion. See §18.7 for the service and filing requirements of Rule 4.111. Sample motions and opposition are in California Criminal Law Forms Manual §§7.3-7.6 (2d ed Cal CEB 2005) (motion to sever counts and opposition memorandum, and motion to sever codefendants and opposition memorandum).

Hearing on severance motion. The trial court cannot deny a defendant's motion for severance without giving him or her the opportunity to be heard. *People v Massie* (1967) 66 C2d 899, 917, 59 CR 733. The defendant should present all grounds for severance and all facts supporting them at that hearing. See, *e.g., People v Box* (2000) 23 C4th 1153, 1195, 99 CR2d 69 (court's severance ruling reviewed on facts known to trial court at time of ruling).

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D. Single Defendant; Multiple Charges

1. Permissible Joinder (Consolidation)

§7.31 a. In General

A complaint, information, or indictment may charge a defendant in separate counts with having committed two or more offenses. Pen C §954. See discussion of the requirements of Pen C §954 in §§7.32-7.34. In addition, the court may order consolidation for trial of two or more charging documents filed in the same court against the same defendant in the instances set out in §§7.32-7.35. See Pen C §954. The California Constitution is not to be construed by the courts to prohibit the joining of criminal cases. Cal Const art I, §30(a).

When different offenses are joined, the complaint must show on its face that the joinder is proper under at least one of the specified classifications. *People v Degnen* (1925) 70 CA 567, 234 P 129. Some examples of this charging language:

COUNT TWO

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charge set forth in count one, complainant further complains and says: [*crime information omitted*]

COUNT THREE

For a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in count two, complainant further complains and says: [*crime information omitted*]

If different offenses or counts are properly joined, the prosecutor is not required to elect between them: "The defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.... An acquittal of one or more counts shall not be deemed an acquittal of any other count." Pen C §954. Thus, if a single act constitutes more than one offense, the defendant can usually be charged with and convicted of any (or all) of them, although Pen C §654 may preclude punishment for more than one count of conviction. See §7.33.

Ø **Note:** There are two exceptions to the general rule:

- A defendant may not be convicted of two crimes when one is a necessarily lesser included offense of the other (see *People v Ortega* (1998) 19 C4th 686, 80 CR2d 489; *People v Gamble* (1994) 22 CA4th 446, 450, 27 CR2d 451); and
- When a conspiracy and substantive offenses are charged and the substantive charges are alleged to be the only overt acts in furtherance of the conspiracy, an acquittal of all the substantive offenses operates as an acquittal of the conspiracy count (see *In re Johnston* (1935) 3 C2d 32, 43 P2d 541).

Although misdemeanors and felonies are ordinarily tried in separate proceedings, misdemeanor counts may be joined with felony counts if tests for joinder are otherwise satisfied. *Aydelott v Superior Court* (1970) 7 CA3d 718, 722, 86 CR 713. However, evidence must be presented at the preliminary hearing to establish probable cause to believe that the defendant is guilty of the misdemeanor as well as the felony. *People v Thiecke* (1985) 167 CA3d 1015, 213 CR 731; *Medellin v Superior Court* (1985) 166 CA3d 290, 212 CR 171.

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§7.32 b. Offenses Connected Together May Be Joined

If the offenses charged were "connected together in their commission," they may be joined even though they do not relate to the same transaction. Pen C §954. Similarly, offenses are properly joined if there is a "common element of substantial importance in their commission." *People v Miranda* (1987) 44 C3d 57, 78, 241 CR 594 (severance of robbery and unrelated attempted robbery-murder was properly denied); *People v Scott* (1944) 24 C2d 774, 778, 151 P2d 517 (possession of firearm common to counts charging rape and tampering with pistol). See *People v Valdez* (2004) 32 C4th 73, 119, 8 CR3d 271 (escape and murder were connected when apparent motive for escape was to avoid prosecution for murder); *People v Meneley* (1972) 29 CA3d 41, 51, 105 CR 432 (common factors in murder and kidnapping were that victims were young women walking alone, subjected to assault and kidnapping, and taken to secluded area). But see *Walker v Superior Court* (1974) 37 CA3d 938, 941, 112 CR 767 (charges of robbery and possession of concealable firearm by ex-felon did not have common element when there was no evidence that same weapon was involved and there was substantial time lapse between two crimes); *People v Saldana* (1965) 233 CA2d 24, 30, 43 CR 312 (error to join rape and possession of marijuana when only evidence connecting two offenses was that defendant possessed marijuana at time of rape).

Ø **Note:** A defendant's failure to appear in a case cannot be joined with the substantive offense. *People v Madden* (1988) 206 CA3d Supp 14, 254 CR 207 (violates Pen C §954).

The defendant must show prejudice from joinder to obtain a severance. *People v Johnson* (1988) 47 C3d 576, 253 CR 710 (denial of motion to sever murder from rape upheld because charges were statutorily joinable (Pen C §954), and no showing of prejudice from joinder).

Ø **Note:** A proper jury instruction at trial is a factor that courts will consider on appeal as supporting joinder of counts. See *People v Ruiz* (1988) 44 C3d 589, 607, 244 CR 200.

For further discussion of joinder of offenses connected together, see 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§394-403 (3d ed 2000).

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§7.33 c. Different Statements of Same Offense May Be Joined

If the offenses charged are "different statements of the same offense," they may properly be joined. Pen C §954. Thus, when only one offense has been committed but, depending on how the evidence is considered, the acts charged may violate one of several different Penal Code sections, the prosecutor is not required to elect between the offenses; he or she may join different statements of the same offense under separate counts. See Pen C §954; *People v Koehn* (1929) 207 C 605, 608, 279 P 646 (attempted murder and malicious use of explosives); *People v Lofink* (1988) 206 CA3d 161, 166, 253 CR 384 (former Pen C §273a(1) and Pen C §273d for same course of conduct); *People v Jones* (1985) 164 CA3d 1173, 1178, 211 CR 167 (causing death while under influence of alcohol and vehicular manslaughter). However, the defendant cannot be convicted of two crimes if one is a necessarily lesser included offense of the other. *People v Ortega* (1998) 19 C4th 686, 80 CR2d 489.

When an accusatory pleading includes different statements of the same offense, it must show clearly on its face that the separate counts all relate to the same act, transaction, or event. *People v Degnen* (1925) 70 CA 567, 573, 234 P 129.

Ø **Note:** Even when a defendant may properly be found guilty of different offenses based on the same act, he or she may be punished for only one of those offenses. Pen C §654. For further discussion, see §§37.44-37.50.

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§7.34 d. Unrelated Offenses of Same Class May Be Joined

If the offenses charged are "of the same class" or have "common characteristics or attributes," they may properly be joined. Pen C §954; *Price v Superior Court* (2001) 25 C4th 1046, 1054, 108 CR2d 409; *People v Lucky* (1988) 45 C3d 259, 275, 247 CR 1. Section 954 permits joinder of offenses that are not related or connected in any way in their commission. *People v Walker* (1988) 47 C3d 605, 621, 253 CR 863; *People v Leney* (1989) 213 CA3d 265, 269, 261 CR 541.

Examples of offenses determined to be of the same class and therefore properly joined include multiple murder counts (*People v Carter* (2005) 36 C4th 1114, 1153, 32 CR3d 759; *People v Mason* (1991) 52 C3d 909, 933, 277 CR 166); murder, robbery, kidnap, escape from custody, rape, sodomy, assault with a deadly weapon, and oral copulation (*People v Balderas* (1985) 41 C3d 144, 170, 222 CR 184); attempted murder, ex-felon in possession of a gun, and robbery (*People v Thomas* (1990) 219 CA3d 134, 140, 267 CR 908); and murder and a later assault (*People v Macklem* (2007) 149 CA4th 674, 679, 57 CR3d 237).

If the evidence from each count is admissible to prove the other counts (called cross-admissibility), severance is not warranted. *People v Ruiz* (1988) 44 C3d 589, 605, 244 CR 200. While severance may be appropriate when evidence is not cross-admissible, absence of cross-admissibility of evidence does not mandate severance (Pen C §954.1): It is just one factor for the court to consider (*People v Geier* (2007) 41 C4th 555, 575, 61 CR3d 580). Those factors include:

- Certain of the charges are unduly inflammatory;
- A weak case will be unfairly bolstered by joinder with a stronger case; and
- One of the charges carries the death penalty.

People v Arias (1996) 13 C4th 92, 127, 51 CR2d 770. See *Calderon v Superior Court* (2001) 87 CA4th 933, 104 CR2d 903 (joinder of counts when two defendants charged with an attempted murder and one of them also charged with an unrelated murder was unduly prejudicial to defendant charged only in the attempted murder).

> Ø **Note:** Penal Code §954.1 took effect on June 6, 1990. Cases decided before that date are no longer good law to the extent that they hold that lack of cross-admissibility alone is sufficient to preclude joinder. See *Belton v Superior Court* (1993) 19 CA4th 1279, 1286, 24 CR2d 34.

For further discussion of joinder of crimes of the same class, see 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§394-403 (3d ed 2000).

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§7.35 2. Mandatory Joinder (*Kellett* Rule)

When the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance is permitted for good cause. *Kellett v Superior Court* (1966) 63 C2d 822, 828, 48 CR 366. If the prosecution charges only some of the offenses that should have been joined under this rule, a judgment in that case bars prosecution of the offenses that could have been charged but were not. *Kellett v Superior Court, supra* (conviction of brandishing weapon bars prosecution of ex-felon in possession of concealable weapon). This is commonly called the *Kellett* rule. The federal rule is similar: Successive prosecutions for the same criminal act or transaction under two different criminal statutes are forbidden unless each statute "contains an element not contained in the other." *U.S. v Dixon* (1993) 509 US 688, 125 L Ed 2d 556, 568, 113 S Ct 2849 (overruling *Grady v Corbin* (1990) 495 US 508, 109 L Ed 2d 548, 110 S Ct 2084). This is known as the "same elements" or *Blockburger* test (after *Blockburger v U.S.* (1932) 284 US 299, 304, 76 L Ed 306, 52 S Ct 180).

Ø **Note:** *Kellett* does not require that offenses committed at different times and at different places be prosecuted in a single proceeding. *People v Carpenter* (1999) 21 C4th 1016, 1038, 90 CR2d 607.

The rule against multiple prosecutions is based on Pen C §§654 and 954. It is meant to prevent harassment of defendants, avoid repetition of evidence, and save the state and defendants time and money. *Kellett v Superior Court, supra*. In deciding a motion to dismiss based on *Kellett* error, the court should look at the totality of the facts, examined in light of the legislative goals of §§654 and 954. *People v Flint* (1975) 51 CA3d 333, 336, 124 CR 269.

In the following cases, prosecution was barred because of *Kellett* error: *Sanders v Superior Court* (1999) 76 CA4th 609, 90 CR2d 481 (prosecutor could not amend information to add new charges based on the same evidence used in earlier prosecution); *People v Flint, supra* (guilty plea to drunk driving barred prosecution for grand theft of car defendant was driving); *People v Wasley* (1970) 11 CA3d 121, 89 CR 418 (defendant was acquitted of robbery alleging prior felony convictions; he could not later be prosecuted for felon with firearm on the basis of gun used in robbery).

In the following cases, prosecution was allowed because there was no *Kellett* error: *People v Carpenter* (1999) 21 C4th 1016, 90 CR2d 607 (murder of separate victims on separate days by "Trailside Killer" is not a single act or course of conduct); *People v Cuevas* (1996) 51 CA4th 620, 59 CR2d 146 (prosecution for possession and sale of drugs on different dates could be done separately, even though part of same investigation; plea of guilty to possession on one date did not bar later prosecution for sales counts that occurred before possession case); *Stackhouse v Municipal Court* (1976) 63 CA3d 243, 133 CR 694 (risk that defendant would escape prosecution of more serious charge of hit-and-run and reckless driving outweighed harassment from facing separate prosecution for citation for marijuana found in car when he was arrested); *People v Hartfield* (1970) 11 CA3d 1073, 90 CR 274 (defendant pleaded guilty to reckless driving of car with which he assaulted officer; defendant represented by same attorney in both reckless driving and assault cases; defendant could have avoided harassment by moving to consolidate cases); *Gail v Municipal Court* (1967) 251 CA2d 1005, 60 CR 91 (plea of guilty to driving without license when defendant knew his actual license status was no bar to prosecution for driving on suspended license); *People v Breland* (1966) 243 CA2d 644, 52 CR 696 (prosecution for battery did not bar prosecution for murder when victim died after defendant pleaded guilty to battery). See also *In re R.L.* (2009) 170 CA4th 1339, 88 CR3d 854 (in juvenile proceeding, prosecution may amend petition to add counts after minor has admitted one count and before disposition because successive prosecution is prohibited under §654 only after conviction and sentence).

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§7.36 3. Court's Discretion to Sever Counts: In Interests of Justice, for Good Cause Shown

Even though separate counts are properly joined, or separate pleadings properly subject to consolidation, the court, "in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." Pen C §954.

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E. Multiple Defendants, Same Offense

§7.37 1. Joint Trial of Codefendants Contemplated

Penal Code §1098 provides in part that "[w]hen two or more defendants are jointly charged with any public offense whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." Accordingly, whether or not separate accusatory pleadings are filed (see Pen C §1098), a joint trial is contemplated. A separate trial is a privilege and not a matter of right. *People v Parker* (1954) 122 CA2d 867, 871, 265 P2d 933. See also *People v Thomas* (1941) 45 CA2d 128, 137, 113 P2d 706 (rearraignment on consolidated information unnecessary).

Severance is not mandatory simply because the evidence from one case would not be admissible in the other case if separate trials were held (called cross-admissibility). Pen C §954.1; *Belton v Superior Court* (1993) 19 CA4th 1279, 1286, 24 CR2d 34.

For the effect of one defendant's request for a continuance, see §7.28.

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§7.38 2. Grounds for Severance

Penal Code §1098 recognizes the court's discretion to order:

- A separate trial for one or more defendants, and a joint trial for the others; or
- A separate trial for each defendant.

Common grounds for severance include "an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." *People v Massie* (1967) 66 C2d 899, 917, 59 CR 733, quoted in *People v Avila* (2006) 38 C4th 491, 574, 43 CR3d 1; *People v Tafoya* (2007) 42 C4th 147, 162, 64 CR3d 163. See checklist in §7.28.

Ø **Note:** Because of the statutory preference for joint trials, the trial court's denial of a motion to sever is reviewed only for abuse of discretion. See, *e.g., People v Ervin* (2000) 22 C4th 48, 69, 91 CR2d 623. Consequently, defense counsel can prevail on a motion to sever only by persuading the trial court that severance is necessary to afford a defendant a fair trial. Unless there is an *Aranda-Bruton* issue (see §§7.39-7.40), there is no binding appellate court authority controlling the trial court's ruling.

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3. Effect of Codefendant's Implicating Confession

§7.39 a. Statement of *Aranda-Bruton* Rules

***Bruton v U.S.* and *People v Aranda*.** When the out-of-court statement of a nontestifying defendant implicates a codefendant, its admission at a joint trial presumptively violates the codefendant's Sixth Amendment right to confrontation. *Bruton v U.S.* (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620. The Sixth Amendment violation cannot be cured by instructing the jury not to consider the statement against the codefendant. 391 US at 135, 20 L Ed 2d at 484.

If the declarant testifies at the joint trial, however, there is no error, because the declarant is available for cross-examination. *Nelson v O'Neil* (1971) 402 US 622, 29 L Ed 2d 222, 91 S Ct 1723; *People v Coffman* (2004) 34 C4th 1, 43, 17 CR3d 710; *People v Ainsworth* (1988) 45 C3d 984, 1010, 248 CR 568.

In *People v Aranda* (1965) 63 C2d 518, 47 CR 353, the California Supreme Court, anticipating *Bruton* by several years, reached a similar result under California law. *Aranda* and *Bruton* are coextensive. See *People v Fletcher* (1996) 13 C4th 451, 465, 53 CR2d 572; *People v Coffman, supra*.

Scope of *Aranda-Bruton* rule. It was conceded in *Bruton* that the declarant's confession was inadmissible against the nondeclarant, and the court declined to consider whether a statement admissible against the nondeclarant under an accepted hearsay exception would violate the Confrontation Clause. *Bruton v U.S.* (1968) 391 US 123, 128 n3, 20 L Ed 2d 476, 480 n3, 88 S Ct 1620. That question appears to have been answered in *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, which held that if an out-of-court statement incriminating a criminal defendant is "testimonial" in nature, the Confrontation Clause forbids its introduction in evidence in a criminal case unless the declarant is unavailable *and* the defendant has had an opportunity to cross-examine the declarant. 158 L Ed 2d at 194. Although the Court left the outer boundaries of the word "testimonial" to future development (158 L Ed 2d at 203 n10), it held that a suspect's statement made during police interrogation is "testimonial under even a narrow standard" (158 L Ed 2d at 193). An unanswered question in *Crawford* is how the admission of nontestimonial hearsay should be analyzed. See 158 L Ed 2d at 203. For further discussion, see §7.40.

The *Aranda-Bruton* rule applies to both the guilt and the penalty phases of a criminal proceeding (*People v Floyd* (1970) 1 C3d 694, 719, 83 CR 608, disapproved on other grounds in *People v Wheeler* (1978) 22 C3d 258, 148 CR 890), but not to *court* trials (*People v Walkkein* (1993) 14 CA4th 1401, 1409, 18 CR2d 383).

Editing or redaction. "The Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or to her existence." *Richardson v Marsh* (1987) 481 US 200, 211, 95 L Ed 2d 176, 188, 107 S Ct 1702. See also *Gray v Maryland* (1998) 523 US 185, 140 L Ed 2d 294, 118 S Ct 1151 (edited confession that substituted blanks and "delete" for defendant's proper name was inadmissible under *Bruton*). In *People v Fletcher* (1996) 13 C4th 451, 467, 53 CR2d 572, the California Supreme Court approved a case-by-case approach to the question of whether redaction sufficiently protects a nondeclarant defendant's right to confrontation, holding that the relevant question is whether "the average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession."

When editing the codefendant's statement will not cure the *Aranda-Bruton* problem, severance or other relief should be granted. *People v Aranda* (1965) 63 C2d 518, 531, 47 CR 353; *U.S. v Mayfield* (9th Cir 1999) 189 F3d 895. See *People v Massie* (1967) 66 C2d 899, 918, 59 CR 733 (error to refuse severance). Additionally, the court should grant a severance when effective deletion would be unfair to the declarant defendant. See *People v Douglas* (1991) 234 CA3d 273, 285 CR 609; *People v Matola* (1968) 259 CA2d 686, 66 CR 610.

> Ø **Note:** An alternative to severance when there is an *Aranda-Bruton* issue is the impaneling of separate juries. *People v Fletcher* (1996) 13 C4th 451, 468, 53 CR2d 572. For discussion, see §7.29.

Effect of *Aranda-Bruton* error. *Aranda-Bruton* error requires reversal unless the court is convinced beyond a reasonable doubt that the verdict would have been the same absent the error (*Chapman v California* (1967) 386 US

18, 17 L Ed 2d 705, 87 S Ct 824). *People v Anderson* (1987) 43 C3d 1104, 1118, 240 CR 585.

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§7.40 b. Determining Whether *Aranda-Bruton* Rule Applies

For almost 25 years, determining whether the introduction of a nontestifying defendant's out-of-court statement against the nondeclarant defendant violates the Confrontation Clause was governed by the analytical framework set down in *Ohio v Roberts* (1980) 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, overruled in part by *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 199, 124 S Ct 1354. Under *Ohio v Roberts,* the introduction of an out-of-court statement admissible under a "firmly rooted" exception to the hearsay rule would ordinarily not violate the Confrontation Clause if the declarant was unavailable. 448 US at 66, 65 L Ed 2d at 608. Evidence admissible under other hearsay exceptions could be admitted without infringing on a defendant's right of confrontation if the circumstances surrounding the making of the statement provided "particularized guarantees of trustworthiness." *Ohio v Roberts, supra*.

Although the case-by-case approach of *Ohio v Roberts* may still apply to nontestimonial hearsay, *Crawford v Washington* substitutes a bright-line rule for that approach if the hearsay statement is testimonial (and statements made during police interrogation are by definition "testimonial"). Under *Crawford*, if the hearsay statement is testimonial, it is simply inadmissible unless the defendant has had an opportunity to cross-examine the declarant. *Crawford v Washington, supra*. Consequently, decisions made under the *Ohio v Roberts* framework will have to be reassessed in light of *Crawford*.

Under traditional Confrontation Clause analysis, the introduction of a codefendant's statement admissible under the adoptive admission exception to the hearsay rule does not violate the Confrontation Clause. *People v Osuna* (1969) 70 C2d 759, 765, 76 CR 462 (no *Aranda-Bruton* error when conversation among codefendants in noncustodial setting was admitted under adoptive admissions rule). But see *People v Jennings* (2003) 112 CA4th 459, 472, 5 CR3d 243 (defendant's silence during joint interrogation did not amount to adoptive admission). Following *Crawford,* the California Supreme Court held that adoptive admissions elicited during a joint police interrogation did not implicate the Sixth Amendment and did not constitute *Crawford* error in a case in which the defendants were tried separately. *People v Combs* (2004) 34 C4th 821, 22 CR3d 61. *Express* adoptive admissions elicited during a joint interrogation are also admissible in a joint trial. *People v Castille* (2005) 129 CA4th 863, 877, 29 CR3d 71. It is unclear whether an implicit adoptive admission manifested by an equivocal response (as opposed to silence) may also be admissible in a joint trial. See *People v Castille* (2005) 129 CA4th 863, 881, 29 CR3d 71. For further discussion of adoptive admissions as an exception to the *Aranda-Bruton* rule, see §23.16.

Admission of a codefendant's statement for a purpose other than its truth does not violate the defendant's Sixth Amendment right of confrontation. *Tennessee v Street* (1985) 471 US 409, 85 L Ed 2d 425, 105 S Ct 2078 (codefendant's confession properly admitted to rebut defendant's claim that sheriff had read him portions of confession and forced him to confess to same things).

> Ø **Note:** Defense counsel should carefully examine the prosecutor's assertion that a statement is not offered for its truth. There must be an independent nonhearsay purpose for admitting the part of the statement that implicates the nondeclarant defendant. If no such purpose exists, or if the portion of the statement implicating the nondeclarant defendant is not relevant on the nonhearsay theory of admissibility, redaction may still be appropriate.

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§7.41 F. Multiple Defendants, Multiple Offenses

The Pen C §1098 preference for joint trials extends to most cases in which multiple defendants are charged with multiple offenses. However, a joint trial is not permissible unless there is at least one count in which all defendants are charged. *People v Ortiz* (1978) 22 C3d 38, 43, 148 CR 588. See also *Dove v Superior Court* (1974) 39 CA3d 960, 114 CR 889 (husband and wife charged separately with same statutory offense occurring on different dates). If the rule were otherwise, "all persons charged with the same statutory offense could be joined together in one mass trial." *Dove v Superior Court, supra*. An exception exists when codefendants are charged with committing offenses at the same time and place that were part of the same transaction. *People v Wickliffe* (1986) 183 CA3d 37, 227 CR 780; *People v Hernandez* (1983) 143 CA3d 936, 192 CR 432.

When joinder is permissible, the factors that weigh in favor of severance of codefendants charged with multiple offenses are the same as those supporting severance in other multiple defendant cases: incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, and the possibility that a codefendant would give exonerating testimony at a separate trial. *People v Turner* (1984) 37 C3d 302, 312, 208 CR 196, overruled on other grounds in *People v Anderson* (1987) 43 C3d 1104, 1115, 240 CR 585.

For the effect of one defendant's request for a continuance, see §7.28.

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§7.42 G. Appellate Review of Severance Issues

Pretrial relief. Defense counsel may file a petition for writ of mandate to challenge a refusal to sever offenses (*Coleman v Superior Court* (1981) 116 CA3d 129, 172 CR 86) or defendants (*Dove v Superior Court* (1974) 39 CA3d 960, 114 CR 889).

The prosecution may file a pretrial petition for writ of mandate challenging an order granting severance. Pen C §1512.

After conviction. In reviewing the trial court's decision on a motion to sever, the appellate court confines its review to the facts before the trial court at the time of the motion. *People v Price* (1991) 1 C4th 324, 388, 3 CR2d 106. Unless an *Aranda-Bruton* issue is involved, the trial court's denial of a motion to sever is reviewed on appeal for abuse of discretion and the defendant must make a clear showing of prejudice. *People v Carter* (2005) 36 C4th 1114, 1153, 32 CR3d 759; *People v Price, supra*. See, *e.g., People v Earle* (2009) 172 CA4th 372, 91 CR3d 261 (defendant satisfied burden of demonstrating actual prejudice from joinder of trials for misdemeanor indecent exposure and felony sexual assault). Determination of prejudice "is a highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." *Williams v Superior Court* (1984) 36 C3d 441, 452, 204 CR 700.

> Ø **Note:** Even if the trial court's denial of a motion to sever was correct at the time it was made, a judgment of conviction will be reversed if the defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process. *People v Mendoza* (2000) 24 C4th 130, 162, 99 CR2d 485. See, *e.g.*, *People v Grant* (2003) 113 CA4th 579, 587, 6 CR3d 560.

An *Aranda-Bruton* error is reviewed under the standard established in *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (error that denies defendant a right guaranteed by federal Constitution requires reversal unless prosecution can show it was harmless beyond a reasonable doubt). See, *e.g., People v Garcia* (2008) 168 CA4th 261, 281, 85 CR3d 393.

The same standards apply to the trial court's denial of a request for separate juries or the trial court's decision to impanel separate juries rather than granting outright severance. *People v Cummings* (1993) 4 C4th 1233, 1286, 18 CR2d 796.

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8

PRELIMINARY HEARINGS

GARY GIBSON

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Source: Criminal Law/California Criminal Law Procedure and Practice/8 PRELIMINARY HEARINGS/§8.1 I. OVERVIEW

§8.1 I. OVERVIEW

The prosecution begins a felony case either by filing a grand jury indictment in the trial court or by filing a complaint with a magistrate. Cal Const art I, §14. If a complaint is filed, a preliminary hearing (also called preliminary examination, "PX," "PE," or "prelim") must be held before a magistrate to ensure that there is enough evidence to hold the defendant to answer in the trial court. Pen C §872; *People v Slaughter* (1984) 35 C3d 629, 200 CR 448. When an indictment is filed, there is no right to a preliminary hearing. Cal Const art I, §14.1; *Bowens v Superior Court* (1991) 1 C4th 36, 2 CR2d 376.

At the preliminary hearing, the prosecution must present sufficient evidence to convince the magistrate that probable cause exists to believe that a crime has been committed and that the defendant committed it. See Pen C §§872 ("sufficient cause" required for holding order), 995 ("probable cause" required to uphold commitment order on superior court review). If the prosecution shows probable cause, the magistrate will hold the defendant to answer to the charge in the trial court. The prosecution must then file an information in that court within 15 days. Pen C §§739, 1382(a)(1). See also Pen C §860. Once the magistrate makes a holding order, the magistrate's power ceases and jurisdiction vests in the trial court to deal with the charges in the case. See *People v Silva* (1995) 36 CA4th 231, 43 CR2d 8 (magistrate lacked authority to reduce felony offense to misdemeanor after magistrate ordered defendant "bound over").

Because the vast majority of felony cases settle before trial, the preliminary hearing may be the sole proceeding in the case at which evidence is taken. The preliminary hearing gives the defense a key opportunity to show the prosecutor why a particular settlement is justified, and to show the magistrate why the case should be discharged or reduced. In Three Strikes cases, it provides one of the few opportunities to reduce a "wobbler" (an offense that can be charged as a felony or a misdemeanor) and to eliminate enhancements. Ideally, both prosecutors and defense attorneys should be as prepared for the preliminary hearing as they would be for trial. In reality, if the hearing proceeds on a "no-time-waiver" basis (*i.e.,* 10 court days after arraignment), neither side will be fully prepared.

Defense counsel must make sure that all discovery has been obtained (see chap 11 on discovery) and that any necessary investigation has been completed so that cross-examination will be effective and complete. However, there are significant limitations on the "right" to discovery at the preliminary hearing. Defense counsel must review the police reports, witnesses' statements, the results of defense investigation, and other evidence and may discuss with the client the benefits of resolving the case by a guilty plea before the preliminary hearing. This has become common when "serious felonies" are charged because the new offenses (see Pen C §1192.7, discussed in §§8.6, 26.20) cannot be negotiated after the preliminary hearing in courts that strictly follow §1192.7. However, because many courts pay only "lip service" to §1192.7, that section usually is not a significant obstacle to negotiation and settlement.

Prosecutors should interview the witnesses needed to prove the charges and have all evidence available that must be introduced. Not all witnesses need testify at the preliminary hearing, only those required to prove the charges. See *De La Riva v Owl Drug Co.* (1967) 253 CA2d 593, 597, 61 CR 291.

The preliminary hearing transcript can provide a basis for later impeaching a witness at trial if the witness testifies inconsistently (Evid C §1235; *California v Green* (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930), and may even be used as a substitute for testimony at trial if the witness is unavailable (Evid C §§240(a)(4), 1291; *California v Green, supra*; see §8.47).

The prosecution may present live witnesses, hearsay from qualified law enforcement witnesses, or a combination of the two. See Pen C §872(b); Cal Const art I, §30(b); *Whitman v Superior Court* (1991) 54 C3d 1063, 2 CR2d 160.

> Ø **Note:** If a witness's hearsay testimony was introduced at the preliminary hearing in place of live testimony, and the witness fails to appear at trial, the witness's hearsay statements admitted at the preliminary hearing are not admissible at trial. *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 196, 124 S Ct 1354. See Evid C §1200.

The defense may cross-examine witnesses for purposes of raising an affirmative defense (*Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440), negating an element of the offense (*Jennings v Superior Court, supra*), or impeaching a witness (*Alford v Superior Court* (1972) 29 CA3d 724, 728, 105 CR 713). Cross-examination for the

purpose of discovery is not allowed. Pen C §866(b). Similarly, the presentation of defense evidence is limited to that which, if believed, is reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach a prosecution witness or declarant. Pen C §866(a). After *Crawford v Washington, supra,* however, if the defendant did not have an adequate opportunity to cross-examine the witness, the preliminary examination testimony may not be admissible. See *People v Price* (2004) 120 CA4th 224, 239, 15 CR3d 229 (defendant allowed to "vigorously" cross-examine witness about statement to police officer later admitted at trial; no *Crawford* violation).

At the preliminary hearing, defense counsel may move to suppress illegally seized evidence introduced at the hearing by making a written motion under Pen C §1538.5 with 5 days' notice. Pen C §1538.5(f)(1). A favorable ruling on a motion to suppress evidence may result in a discharge of part or all of the complaint. See *People v Belknap* (1974) 41 CA3d 1019, 116 CR 664. It is more common, however, to make the motion in the trial court. See discussion in §8.31.

The defense may ask the magistrate to make factual findings based on a determination of the credibility of the witnesses, which may result in a discharge of some or all charges. The evidence presented at the preliminary hearing may support a defense request for lower bail.

When the felony charged in the complaint provides a misdemeanor sentencing alternative (called a "wobbler"), the magistrate may reduce the charge to a misdemeanor. Pen C §17(b).

Almost all cases that proceed to preliminary hearing result in holding orders (commitments) to the trial court.

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§8.2 II. CHART: DEADLINES

Action	Deadline	Authority
Preliminary hearing begins.	Within 10 *court* days after date defendant is arraigned or enters plea, whichever is later, or within 10 court days after date criminal proceedings are reinstated under Pen C §§1367-1376 unless magistrate finds good cause for continuance or time is waived by both prosecutor and defendant. However, hearing must be held within 60 days even if good cause for continuance is shown unless there is a time waiver. See discussion of special requirements for court-appointed counsel in §§8.7, 19.17.	Pen C §859b.
Notice motions for preliminary hearing.	Absent contrary local rules, motions other than under Pen C §1538.5 need not be noticed.	*People v Ciraco* (1986) 181 CA3d 1142, 226 CR 541. See Pen C §1538.5(f).
File information in trial court.	Within 15 days after holding order (commitment).	Pen C §§739, 1382(a)(1). See also Pen C §860.
Request by prosecutor for review under Pen C §871.5 of magistrate's dismissal of all or part of action at preliminary hearing.	Prosecutor must file motion in trial court within 15 days after dismissal.	Pen C §871.5; *People v Dianda* (1986) 178 CA3d 174, 223 CR 635.

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§8.3 III. DESCRIPTION OF HEARING

A preliminary hearing is an evidentiary hearing that follows the filing of a felony complaint (see Pen C §859b). The judge sits as a magistrate and trier of fact. See §8.36. The prosecution must present evidence that provides sufficient cause (also called "probable cause") for the magistrate to believe that a crime was committed and that the defendant committed it. Pen C §866(b). If that is done, the magistrate "holds the defendant to answer" and the prosecution may then file an information in the trial court. *People v Slaughter* (1984) 35 C3d 629, 637, 200 CR 448; *Williams v Superior Court* (1969) 71 C2d 1144, 1147, 80 CR 747; see Cal Const art I, §14; *People v Encerti* (1982) 130 CA3d 791, 182 CR 139. A preliminary hearing in the average case is usually quite short: from ½ to 2 hours.

A magistrate who does not find sufficient evidence to support probable cause will discharge the complaint. See *Somers v Superior Court* (1973) 32 CA3d 961, 108 CR 630.

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§8.4 IV. PROPER VENUE

A preliminary hearing may be heard in any court in the county where the offense took place, although not necessarily in a specific judicial district within that county. *Stanley v Justice Court* (1976) 55 CA3d 244, 127 CR 532. Some statutes relating to venue permit more than one county to be a proper site for the prosecution of an offense. See, *e.g.,* Pen C §§781, 786, 791. See chap 15 on change of venue motions.

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V. DEFENSE ALTERNATIVES TO PRELIMINARY HEARING

§8.5 A. Waiver of Preliminary Hearing

The accused may relinquish the right to a preliminary hearing. Pen C §§738, 860; *People v Connor* (1964) 229 CA2d 716, 718, 40 CR 603. This is usually done to avoid evidence of additional offenses or to avoid preserving testimony that could later be used at trial if the witness became unavailable. Evid C §240. See §8.47. The defendant must personally waive the right to a preliminary hearing and must be represented by counsel. See Pen C §860; *People v Connor, supra*; *People v White* (1963) 213 CA2d 171, 174, 28 CR 656.

Despite the defendant's waiver, the prosecutor may proceed, or the magistrate may require the prosecutor to proceed, with the preliminary hearing. Pen C §860. A prosecutor may not add new charges to an information after the waiver of a preliminary hearing. *People v Peyton* (2009) 176 CA4th 642, 652, 98 CR3d 243.

Ø **Warning:** A defendant who waives a preliminary hearing forfeits any claim of vagueness in the accusatory pleading. See *People v Butte* (2004) 117 CA4th 956, 959, 12 CR3d 221.

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§8.6 B. Prehearing Guilty or No Contest Plea

An accused may plead guilty or no contest before the magistrate makes a holding (commitment) order, if not charged with an offense punishable by death. Pen C §859a(a). If the defendant pleads guilty, the case proceeds to the sentencing phase. The magistrate has sentencing jurisdiction under §859a. See *People v Superior Court (Feinstein)* (1994) 29 CA4th 323, 329 n2, 34 CR2d 503. Plea and sentencing in the preliminary hearing court can be an attractive alternative for defendants charged with offenses that may not be plea-bargained after the defendant has been arraigned in superior court under Pen C §1192.7 (*i.e.,* "serious felonies"; see §§8.6, 26.20). For further discussion of pleas of guilty and no contest, see §§26.7-26.22.

If an information is filed, the case will be assigned to a judge for sentencing, or the trial judge who presides over the remainder of the case will be the sentencing judge. See Pen C §§859a(b), 877a. If the magistrate who accepts the plea will not be the sentencing judge, the parties should obtain the trial court's approval before entering a plea before the magistrate: the sentencing judge must approve any disposition and may refuse to accept the plea if it disagrees with the bargain that is the basis for the plea. The sentencing judge may not set aside a plea bargain, however, simply because he or she disagrees with the plea itself; a proper ground under Pen C §1018 must exist. *People v Superior Court (Barke)* (1976) 64 CA3d 710, 715, 134 CR 704. See also Pen C §1192.5.

Although the magistrate may accept a plea and sentence the defendant on the felony complaint without filing an information (see Pen C §§682, 859a(b), 877a), some magistrates ask the parties to stipulate that the complaint is deemed to be an information when the defendant is to be sentenced on a felony in the preliminary hearing court.

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VI. DEFENDANT'S RIGHTS BEFORE AND DURING PRELIMINARY HEARING

§8.7 A. Rights to Counsel and Self-Representation

A defendant has the constitutional right to the effective assistance of counsel at the preliminary hearing. Pen C §858; *Coleman v Alabama* (1970) 399 US 1, 26 L Ed 2d 387, 90 S Ct 1999; *Bogart v Superior Court* (1963) 60 C2d 436, 34 CR 850; *Little v Superior Court* (1980) 110 CA3d 667, 168 CR 72. At arraignment, the magistrate must permit the defendant a reasonable time to secure an attorney. If the defendant asks the magistrate to contact a particular attorney, the judge must direct a peace officer to take a message without delay or fee to any counsel named by the defendant who is within the judicial district. Pen C §859. In practice, the court clerk usually calls counsel on the telephone.

If a defendant cannot afford to pay for counsel, the court must appoint an attorney. Pen C §987; *Williams v Superior Court* (1964) 226 CA2d 666, 38 CR 291. If there is a holding order, the attorney who represents the defendant at the preliminary hearing must continue the representation until the date set for arraignment. The statute does not require counsel to continue representing the client after that date. Pen C §987.1; *Lempert v Superior Court* (2003) 112 CA4th 1161, 5 CR3d 700. Once counsel is appointed, the magistrate cannot relieve him or her even if there is a later finding that the defendant is no longer indigent. The magistrate may assess a fee, if the defendant has been apprised of that possibility before the appointment. *Roswall v Municipal Court* (1979) 89 CA3d 467, 152 CR 337. See §3.28.

Penal Code §987.05 requires the magistrate to appoint only counsel who represents that he or she will be ready to proceed with the preliminary hearing within the statutory time (10 court days (Pen C §859b)), unless the magistrate concludes that because of the complexities of the case no counsel could be prepared within that time. When the defendant's right to a preliminary hearing within 10 court days (see Pen C §859b) conflicts with the right to effective assistance of counsel, the latter prevails. *People v Kowalski* (1987) 196 CA3d 174, 178, 242 CR 32 (complex case; three attorneys stated that they could not adequately prepare within the "no time waiver" limit demanded by defendant). In deciding whether the case is one requiring more time, the magistrate may not consider the attorney's other commitments or caseload. Pen C §987.05; *Williams v Superior Court* (1996) 46 CA4th 320, 53 CR2d 832.

> Ø **Note:** Although in effect since 1990, Pen C §987.05 has not, as far as the author is aware, been stringently enforced by the trial courts. Defense counsel should check with local attorneys to learn how particular local judges apply the statute. For further discussion, see §19.21.

A defendant has the right of self-representation at every stage of the proceedings, including the preliminary hearing. If the magistrate erroneously denies the defendant this right, the error must be raised in a Pen C §995 motion; otherwise, that issue is not cognizable on appeal. *People v Matthews* (1986) 183 CA3d 458, 228 CR 316.

> Ø **Note:** The failure to grant a defendant pro per status, after a proper request, denies the defendant a substantial right and requires the trial court to grant a Pen C §995 motion without any further showing of prejudice. *Moon v Superior Court* (2005) 134 CA4th 1521, 1531, 36 CR3d 854.

Although denial of the effective assistance of counsel at the preliminary hearing renders the commitment unlawful and subject to challenge, the defendant must show prejudice if the challenge occurs on appeal after conviction. *People v Coleman* (1988) 46 C3d 749, 251 CR 83 (defendant's §995 motion on that issue had been denied). Thus, new defense counsel should challenge preliminary hearing errors by prior counsel by a petition for writ of prohibition, and not wait until appeal following conviction.

For further discussion of the right to counsel, see chap 3.

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§8.8 B. Right to Interpreter

A defendant who cannot understand English has the right to a court-provided interpreter at the preliminary hearing; codefendants are entitled to separate interpreters. Cal Const art I, §14. See *People v Rodriguez* (1986) 42 C3d 1005, 232 CR 132.

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§8.9 C. Defendant's Right to Be Present

A defendant has a right to be personally present at the preliminary hearing (Pen C §1043.5(a)), and must be present to be identified, although the magistrate may permit a temporary absence while an eyewitness testifies if no line-up was previously conducted. *People v Green* (1979) 95 CA3d 991, 1003, 157 CR 520; see Pen C §§977(b), 1043.5(a).

The court may continue to hold the preliminary hearing without the defendant if the defendant appeared at the beginning of the hearing, then voluntarily failed to return (in a noncapital case), or was so disruptive that he or she had to be removed from the courtroom after having been warned. Pen C §1043.5(b)(1). A defendant may regain the right to be present by showing willingness to behave properly. Pen C §1043.5(c). See *People v Sully* (1991) 53 C3d 1195, 1239, 283 CR 144.

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§8.10 D. Right to Discovery

The prosecution is constitutionally required to turn over all exculpatory evidence and all evidence relevant to guilt or punishment independently of any demand. *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194; *U.S. v Bagley* (1985) 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375; *In re Brown* (1998) 17 C4th 873, 879, 72 CR2d 698; *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231. There is no other statutory requirement that discovery be provided by either party before the preliminary hearing unless the hearing is held more than 15 days after the discovery request. This is because under Pen C §1054.5(b), a party is not under an obligation to turn over any material at all until 15 days after the opponent makes an "informal request" for discovery. See *People v Superior Court (Sturm)* (1992) 9 CA4th 172, 11 CR2d 652 (finding §1054.5(b) constitutional). Many prosecutors turn over discovery before the preliminary hearing to avoid continuance requests and *Brady* problems. The defense should not depend on a prosecutor's general practice, however. Unless the prosecutor in a particular case promises discovery, the defense should plan on doing its own prehearing investigation.

> Ø **Note:** In counties where prehearing discovery is being denied, appointed counsel should ask the magistrate at arraignment for funds to pay for pre-preliminary hearing investigation. See *Ake v Oklahoma* (1985) 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087; *People v Worthy* (1980) 109 CA3d 514, 167 CR 402.

Neither side may use the preliminary hearing itself to obtain discovery. Pen C §866(b).

In prosecutions for certain sex offenses, the prosecutor may file a noticed motion before the hearing to exclude from evidence the victim's current address and telephone number. The magistrate must find that the danger to the victim outweighs the probative value of the evidence in order to exclude this information. The defendant still has the right to obtain the information through discovery. Evid C §352.1. In *People v Watson* (1983) 146 CA3d 12, 193 CR 849, the court permitted the prosecutor to refuse disclosure in a non-sex case on a proper showing made by competent evidence.

When material should have been disclosed before the preliminary hearing and it was not, a common law motion to dismiss may lie. See *Stanton v Superior Court* (1987) 193 CA3d 265, 239 CR 328; see discussion in §11.17. This is another reason for the prosecution to consider carefully before deciding not to turn over discovery before the preliminary hearing.

> Ø **Note:** Both prosecution and defense counsel should be aware that the complete absence of pre-preliminary hearing discovery may adversely affect the defendant's constitutional right to the effective assistance of counsel at the preliminary hearing.

For discussion of discovery motions that may be made at the preliminary hearing, see §8.32.

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§8.11 E. Right to Have Preliminary Hearing Transcribed

A defendant has the right to a transcript of the preliminary hearing without charge. *People v Anderson* (1961) 55 C2d 655, 657, 12 CR 500. See also Pen C §870. Although Pen C §869 still reads that in nonhomicide cases the preliminary hearing need not be reported absent a demand by one of the parties, as a matter of practice preliminary hearings are always reported.

The transcript must be filed with the county clerk within 10 days after the close of the preliminary hearing. Pen C §869(e). Late filing, however, does not require dismissal of the case. *People v Ladmirault* (1989) 214 CA3d 900, 263 CR 285.

When the defendant is eligible for the death penalty, the defense must be provided with a daily transcript of the preliminary hearing (Pen C §190.9(a)(1)), even if the prosecution has not announced its decision to seek the death penalty (*Abernathy v Superior Court* (2007) 157 CA4th 642, 645, 68 CR3d 726).

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§8.12 F. Right to Confront and Cross-Examine Prosecution Witnesses

It is possible for the prosecution to present its entire case through the testimony of a qualified law enforcement officer. Pen C §872(b). See discussion in §8.30. All prosecution witnesses who testify, including an officer testifying under §872(b), may be cross-examined. Pen C §865. A qualified English-speaking police officer who personally received statements from a non-English-speaking witness through an interpreter may testify to those statements at the preliminary hearing. *Correa v Superior Court* (2002) 27 C4th 444, 117 CR2d 27.

Cross-examination may be for the purpose of raising an affirmative defense (*Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440), negating an element of the offense (*Jennings v Superior Court, supra*), or impeaching a witness (*Alford v Superior Court* (1972) 29 CA3d 724, 728, 105 CR 713). Cross-examination for purposes of discovery is not permitted. Pen C §866(b).

After *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 196, 124 S Ct 1354, if the defendant did not have *an opportunity* to cross-examine the witness, the preliminary examination testimony would not be admissible. See *People v Carter* (2005) 36 C4th 1114, 1172, 32 CR3d 759; *People v Price* (2004) 120 CA4th 224, 239, 15 CR3d 229 (defendant allowed to "vigorously" cross-examine witness on statement to police officer later admitted at trial; no *Crawford* violation). However, as long as a defendant is provided with the opportunity for cross-examination, the admission of preliminary hearing testimony at trial under Evid C §1291 does not offend the Confrontation Clause of the federal Constitution even if cross-examination was brief or could have been more effective. See, *e.g., People v Carter* (2005) 36 C4th 1114, 1172, 32 CR3d 759 (defense motive and interest in cross-examining victim's boyfriend at preliminary hearing were closely similar, if not identical, to defense objectives at guilt phase of capital trial).

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§8.13 G. Right to Present Defense Witnesses and Affirmative Defenses

Although the defense has the right to call witnesses, the prosecution has the right to demand that the magistrate require an offer of proof from defense counsel before permitting any defense witness to testify. Pen C §866(a). The magistrate may not allow the defense to call a witness to testify unless the magistrate is satisfied that the testimony, if believed, "would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant." Pen C §866(a). For example, the defense can raise discriminatory enforcement (*People v Hertz* (1980) 103 CA3d 770, 163 CR 233) or entrapment (*Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440; *People v Iocca* (1974) 37 CA3d 73, 112 CR 102), or can show that the prosecution is barred by the statute of limitations (see *Parnell v Superior Court* (1981) 119 CA3d 392, 173 CR 906). See the list of affirmative defenses in §32.12. Defense counsel should make as complete an offer of proof as possible to the magistrate regarding any expected testimony. *People v Eid* (1994) 31 CA4th 114, 36 CR2d 835.

It is unclear whether defendants can be kept from testifying under §866(a). Compare the wording of §866(a), which appears to apply to defendants, with *People v Robles* (1970) 2 C3d 205, 85 CR 166, which gives defendants the absolute right to testify at the preliminary hearing. It is unusual, however, for a defendant to testify or to put on a defense, because it would provide the prosecution with discovery; even if the defendant is not held to answer, the prosecution can usually refile. See §8.44 on the effect of a dismissal.

Ø **Note:** The defense has a right to present hearsay evidence through a qualified officer under Pen C §872(b). *Nienhouse v Superior Court* (1996) 42 CA4th 83, 49 CR2d 573.

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§8.14 H. Right to Freedom From Shackles

Only a showing of need, specific to the defendant, can justify shackling at a preliminary examination. However, the threshold for the showing of need is lower at a preliminary hearing than at a jury trial. *People v Fierro* (1991) 1 C4th 173, 219, 3 CR2d 426; *Tiffany A. v Superior Court* (2007) 150 CA4th 1344, 1356, 59 CR3d 363. The issue is not cognizable on appeal following conviction; it should be raised by a Pen C §995 motion and followed by a writ petition if the motion is denied. *People v Fierro* (1991) 1 C4th 173, 3 CR2d 426.

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§8.15 I. Special Considerations When Codefendants Have Joint Preliminary Hearing

When multiple defendants have a joint preliminary hearing, several special considerations arise:

- The possibility of conflicts among codefendants' interests;
- The possibility that one codefendant (or more) will be given immunity to testify against another (see chap 49 on immunity);
- If one codefendant obtains a continuance that is granted for good cause, the other codefendants' cases must also be continued (Pen C §1050.1; see *Greenberger v Superior Court* (1990) 219 CA3d 487, 267 CR 849 (continuance approved on basis of Pen C §1098 (joint trials preferred); decided before enactment of §1050.1));
- The order in which the various parties engage in cross-examination;
- Separate interpreters are required for each witness and defendant who needs an interpreter (*People v Rioz* (1984) 161 CA3d 905, 207 CR 903; *People v Nieblas* (1984) 161 CA3d 527, 207 CR 695);
- Only one peremptory challenge to a judge is usually allowed per case, no matter how many codefendants there are (see §21.5).

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Source: Criminal Law/California Criminal Law Procedure and Practice/8 PRELIMINARY HEARINGS/ VII. TIMING OF PRELIMINARY HEARING/§8.16 A. When Preliminary Hearing Must Be Held

VII. TIMING OF PRELIMINARY HEARING

§8.16 A. When Preliminary Hearing Must Be Held

A preliminary hearing must be set within 10 court days after the date the defendant is arraigned or enters a plea, whichever occurs later. Pen C §859b. This time requirement applies whether or not the defendant is in custody. Pen C §859b. Saturdays, Sundays, and the statewide holidays specified in Govt C §6700 are not court days, but local court holidays count as court days. *People v Pickens* (1981) 124 CA3d 800, 177 CR 555.

The preliminary hearing may be delayed beyond the 10-court-day period only if that time is waived by both the prosecutor and the defendant (*Irving v Superior Court* (1979) 93 CA3d 596, 155 CR 654), or the magistrate finds that good cause exists to continue the case beyond this time period. Pen C §859b.

If the defendant is in custody for 10 court days or more solely because of the pending complaint, the magistrate must dismiss the complaint absent a finding of good cause to continue the case beyond the 10-day period. Pen C §859b; *People v Standish* (2006) 38 C4th 858, 865, 43 CR3d 785. Clerical errors made by the court in setting or calendaring the hearing do not constitute good cause to extend the mandatory time period. *People v Pickens* (1981) 124 CA3d 800, 177 CR 555. Dismissal is not a remedy for violation of the 10-day rule if the defendant was out of custody unless the defense can prove actual prejudice. See *People v Luu* (1989) 209 CA3d 1399, 258 CR 10.

If the magistrate finds good cause to continue the case beyond the 10-day period and the defendant is in custody solely on that case, the magistrate *must* release the defendant on his or her own recognizance unless (Pen C §859b(b)(1)-(6)):

- The defendant requested setting the preliminary hearing beyond the 10-court-day period;
- The defendant is charged with a capital offense in a case in which the proof is evident and the presumption of guilt is great;
- A witness necessary to the hearing is unavailable because of the defendant's actions;
- Counsel is ill;
- Counsel is unexpectedly engaged in a jury trial; or
- Unforeseen conflicts of interest require the court to appoint new counsel.

Whether or not the defendant is in custody, the magistrate must dismiss the complaint when the preliminary hearing is set or continued more than 60 days after arraignment or plea, absent a personal waiver from the defendant. Pen C §859b. Neither Pen C §1050.1, which permits a continuance over a defendant's objection to allow joinder of a codefendant, nor good cause allows continuing a preliminary hearing past 60 days after arraignment absent a defendant's personal waiver. *Ramos v Superior Court* (2007) 146 CA4th 719, 731, 53 CR3d 189. A violation of the 60-day rule mandates dismissal when challenged under Pen C §995.

> Ø **Note:** If a defendant comes into custody on a bench warrant, *e.g.,* for failure to appear, after having previously waived time while out of custody, the 10- and 60-day limits do not apply. Once the 60-day rule is waived, it is waived forever. However, speedy trial rights may be implicated. See *People v Love* (2005) 132 CA4th 276, 283, 34 CR3d 6. Speedy trial rights are discussed in chap 19.

A waiver of the right to a preliminary hearing within 10 days waives the right to have it held at the "earliest possible time." Pen C §859b. The applicable time frame then becomes the 60-day period of Pen C §859b(b). The time waived by the defendant is not subtracted from the 60 days. *People v Mackey* (1985) 176 CA3d 177, 221 CR 405.

The district attorney does not have to show good cause for a continuance under §859b if the defendant waives the 10-day period and is not in custody. The hearing is then held within the 60-day period of §859b(b). However, the prosecutor still has to comply with Pen C §1050, which requires good cause for a continuance. The magistrate may dismiss the case after denying the continuance if the prosecutor cannot proceed. *People v Alvarez* (1989) 208 CA3d 567, 256 CR 289.

When a complaint has been discharged or dismissed and then refiled, the statutory time for holding a preliminary

hearing on the refiled complaint alleging the same charges is the same as if it were a new complaint. *Landrum v Superior Court* (1981) 30 C3d 1, 15, 177 CR 325. With the consent of the defendant and the prosecution, the defendant can be rearraigned on the same complaint. Pen C §1387.2.

Both sides may seek a writ of mandate or prohibition if the court sets a preliminary hearing beyond the §859b time limits. Pen C §871.6.

Ø **Note:** Defense counsel should challenge the failure to comply with Pen C §859b by a Pen C §995 motion in the trial court and by a pretrial petition for writ of prohibition if the §995 motion is unsuccessful, because on appeal after conviction, the defendant has the additional requirement of proving prejudice from the delay. *Serrato v Superior Court* (1978) 76 CA3d 459, 142 CR 882.

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§8.17 B. Time to Prepare for Preliminary Hearing

Both sides have the right to at least 2 court days to prepare for a preliminary hearing. Pen C §859b. But see *People v Castaneda* (1987) 190 CA3d 961, 235 CR 740 (language of §859b is directory, not mandatory).

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§8.18 C. One-Session Requirement; Continuances

A preliminary hearing must be completed in one court session unless the magistrate postpones it for good cause shown by affidavit. Pen C §861. The term "session" has not been limited to 1 day, but the magistrate is required to devote a substantial majority of his or her time to the hearing on continuous court days until it is concluded, with interruptions only to conduct brief court matters, attend to human needs, or observe legal holidays. Pen C §861. See, *e.g.*, *Kruse v Superior Court* (2008) 162 CA4th 1364, 1373, 76 CR3d 664 (8-day delay in transporting in-custody defendant to court, in order to resume his preliminary hearing, required dismissal of case). But see *Stroud v Superior Court* (2000) 23 C4th 952, 98 CR2d 677 (even though the magistrate erred in continuing hearing for 1 day to attend Judicial Council meeting, under totality of circumstances, error did not require that information be set aside).

When the defendant is not in custody, the one-session requirement is more flexible and does not require the magistrate to devote a substantial majority of time to the hearing as long as there is a prompt disposition of the matter. *People v Guevara* (1982) 132 CA3d 193, 183 CR 18 (court recess from 5:10 p.m. one day to 3:00 p.m. the next did not violate §861; magistrate devoted substantial majority of its time throughout 4-day session to that preliminary hearing); *People v Castagnola* (1972) 28 CA3d 882, 105 CR 62 (defendant not in custody; continuance from noon one day to 8:30 a.m. the next at judge's direction for counsel to find authority on prosecutor's request for discovery did not violate §861).

The court may deny a defense motion to continue a preliminary hearing as long as that denial is not arbitrary. *Wizar v Superior Court* (1981) 124 CA3d 190, 177 CR 88.

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§8.19 D. Postponement for Child Witness or Dependent Person

A magistrate may postpone a preliminary hearing for 1 court day to accommodate the special physical, mental, or emotional needs of a child witness who is 10 years old or younger, or a dependent person as defined in Pen C §288. The magistrate must admonish the prosecution and the defense not to coach the witness before the witness's next court appearance. Pen C §861.5.

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Source: Criminal Law/California Criminal Law Procedure and Practice/8 PRELIMINARY HEARINGS/§8.20 E. Relief by Expedited Writ Proceeding

§8.20 E. Relief by Expedited Writ Proceeding

Both the prosecution and the defense may file petitions for writs of mandate or prohibition to challenge violations of speedy hearing rights. These petitions are entitled to expedited processing. Pen C §871.6.

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VIII. PRESENCE OF WITNESSES AND SPECTATORS AT PRELIMINARY HEARING

§8.21 A. Defense Motion to Exclude Public

The defense may move to close the courtroom by noticed motion against all but certain specified persons. Pen C §868; *Tribune Newspapers W., Inc. v Superior Court* (1985) 172 CA3d 443, 218 CR 505 (notice requirement); *Telegram-Tribune, Inc. v Municipal Court* (1985) 166 CA3d 1072, 213 CR 7. See the sample motion in California Criminal Law Forms Manual §8.1 (2d ed Cal CEB 2005). Requirements for closing the preliminary hearing are discussed in §14.12.

When the motion is granted, everyone is cleared from the courtroom except the judge, the defendant, defense counsel, the prosecutor, the investigators for both the defense and the prosecution, a person present to give a prosecution witness moral support under Pen C §868.5, and necessary court personnel such as the clerk, court reporter, and bailiff. On the prosecutor's motion, the victim's family is entitled to remain unless the magistrate finds a reasonable likelihood that their presence poses a risk of affecting the testimony. The magistrate must admonish family members not to discuss the testimony with anyone. The court's failure to remove all persons but those allowed to be present under §868 renders the commitment legally defective. *Ortega v Superior Court* (1982) 135 CA3d 244, 185 CR 297. This error may be challenged by a Pen C §995 motion. See chap 13 on §995 motions.

In cases that attract media attention, closing the preliminary hearing and sealing the transcript (see *Cromer v Superior Court* (1980) 109 CA3d 728, 167 CR 671, and discussion in §14.12) may be one of the few methods of preserving the defendant's right to an impartial jury. See §868 (discussed in §14.12). For further discussion of dealing with the media, and problems associated with highly publicized cases, see chap 14. A sample prosecution memorandum opposing a defense motion to close the preliminary hearing is in Crim Law Forms Man §8.2.

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§8.22 B. Prosecution Motion to Exclude Public

The court may close the courtroom to the public at the prosecutor's request when the victim of a sex crime specified in Pen C §868.8 is under age 16 or is a dependent person with a substantial cognitive impairment, after considering the factors listed in Pen C §859.1. See Pen C §288(f)(3) ("dependent person" defined).

The court may close the courtroom in the manner specified in Pen C §868 (see §8.21) when the victim of a sex crime is a minor or a dependent person with a substantial cognitive impairment, would be caused serious psychological harm, and alternatives such as a video-recorded deposition or contemporaneous closed-circuit television examination are unavailable. Pen C §868.7(a)(1); see *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613 (closure permitted if necessary to protect psychological or physical well-being of minor victim); *People v Pompa-Ortiz* (1980) 27 C3d 519, 165 CR 851 (error denying defendant's right to public hearing was harmless, absent showing that defendant was prejudiced by exclusion of public from preliminary hearing); *People v Baldwin* (2006) 142 CA4th 1416, 1421, 48 CR3d 792 (at trial, claim that child would have difficulty testifying is, by itself, insufficient basis to exclude public); *Eversole v Superior Court* (1983) 148 CA3d 188, 195 CR 816 (magistrate erred in failing to consider alternatives to closure).

The court may clear the courtroom at the prosecutor's request when a witness's life would be subject to a substantial risk of harm and no alternative would adequately minimize the threat. Pen C §868.7(a)(2). The procedures suggested in §868.7(a)(2) as possible alternatives to closure include concealing the witness's features, searching members of the public before they can enter the courtroom, and temporarily excluding other actual or potential witnesses.

The court may remove spectators who are intimidating a witness. Pen C §686.2.

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§8.23 C. Motion to Exclude Witnesses Under Pen C §867

Either side may move to exclude witnesses before the preliminary hearing begins. See Pen C §867. Counsel may state:

Your Honor, I move to exclude all witnesses from this preliminary hearing, and for an order that the witnesses are not to talk with each other before they have testified and are to be kept separate until after they have testified, based on Penal Code §867.

This motion is available to either party and requires the magistrate on request to exclude "all potential and actual witnesses who have not been examined." Pen C §867. The court must also order counsel to instruct the witnesses not to converse with each other until after they have testified and, when feasible, to separate them from each other until after they have testified. Pen C §867.

Section 867 permits a defense as well as a prosecution investigator to remain. If this person is to be a witness at the preliminary hearing, opposing counsel should ask the court to have him or her testify as the first witness; although there is no authority for this, it follows the reasoning behind §867.

Ø **Note:** A witness who has completed his or her testimony may wish to remain in the courtroom and watch the remainder of the preliminary hearing. Nothing in Pen C §867 mandates that a witness be excluded from the courtroom after testifying; however, a witness who is "subject to recall" is still a witness and can be excluded.

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§8.24 D. Right of Prosecuting Witness in Certain Cases to Have Persons of Own Choosing Present While Testifying

On request by the prosecutor, the magistrate must allow a prosecuting witness to have present during his or her testimony up to two persons of his or her own choosing, one of whom may also be a witness, when the crime charged is a violation of Pen C §§187, 203, 205, 207, 211, 215, 220, 240, 242, 243.4, 245, 261, 262, 273a, 273d, 273.5, 273.6, 278, 278.5, 285, 286, 288, 288a, 288.5, 289, 314(1), 647.6; or former §277 or §647a; or §368(b), (d), or (e) when the prosecuting witness is the dependent or elder adult. Pen C §868.5. The term "prosecuting witness" in Pen C §868.5 includes all the prosecution's witnesses. *People v Kabonic* (1986) 177 CA3d 487, 223 CR 41. Only one person may accompany the witness to the stand. Neither person may be a news reporter as described in Evid C §1070, unless related to the victim, and neither person may take notes. Pen C §868.5(a).

If either support person is a prosecuting witness, the prosecution must present evidence that the witness desires that person's attendance and that attendance will be helpful to the witness. The magistrate must grant the prosecutor's motion unless the defense presents information, or the magistrate believes, that the support person's attendance establishes a substantial risk of influencing the witness's testimony. Pen C §868.5(b). The presence of an interpreter for a support person does not violate the statute. *Ortega v Superior Court* (1982) 135 CA3d 244, 185 CR 297.

A support person who is also a witness must testify before the prosecuting witness testifies, and the prosecuting witness must be excluded from the courtroom during the support person's testimony. The support person's testimony is subject to a motion to strike if it is admitted before the corpus delicti has been established, and the corpus is not later established by the prosecuting witness's testimony. Pen C §868.5(c); *People v Disandra* (1987) 193 CA3d 1354, 239 CR 9.

Penal Code §868.5 does not preclude the trial court from removing persons from the courtroom who may be prompting or influencing the witness. Pen C §868.5(b).

Ø **Note:** Objections to the presence of witnesses at preliminary hearings must be properly raised and argued at the hearing itself; they should be challenged by a motion to dismiss under Pen C §995 and a petition for writ if that motion is denied because, on appeal, prejudice must be shown. *People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83; *People v Pompa-Ortiz* (1980) 27 C3d 519, 529, 165 CR 851.

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§8.25 E. Contemporaneous Examination of Minor Victim

When a minor is age 10 or younger and testifying about an alleged sexual offense, the court on the prosecutor's motion may order the minor's testimony taken by contemporaneous examination and cross-examination in another place and relayed to the courtroom by one-way or two-way closed-circuit television. Pen C §1347. The prosecutor must request this procedure in writing at least 3 days before the date at which the minor is scheduled to testify. The court may also initiate this procedure on its own motion. The judge, defendant, and attorneys should not be present in the same room with the minor. The court is required to make several findings before using this procedure. See Pen C §1347(b)(1)-(3).

Penal Code §872(b)'s hearsay provision should render this section unnecessary at the preliminary hearing, because it allows the child's testimony to be related to the magistrate by a law enforcement officer with the requisite training or experience. See also *Maryland v Craig* (1990) 497 US 836, 111 L Ed 2d 666, 110 S Ct 3157 (upholding use of one-way closed-circuit television).

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§8.26 F. Videotapes of Developmentally Disabled or Young Victims of Certain Sex Crimes

When the victim of a violation of Pen C §§243.4, 261, 261.5, 264.1, 273a, 273d, 285, 286, 288, 288a, 288.5, or 289 is age 15 or younger, or is developmentally disabled, the prosecution may apply for an order that the victim's testimony at the preliminary hearing be videotaped. Pen C §1346(a). A written application must be served at least 3 days before the preliminary hearing. Pen C §1346(b). Any videotape made under Pen C §1346 must be made available to the prosecution and the defense and is subject to a protective order to protect the victim's privacy. Pen C §1346(e)-(f). The court may admit the videotape as former testimony under Evid C §1291 if, at the time of trial, the court finds that further testimony would cause the victim such emotional trauma that the victim would be medically unavailable to testify, or if the victim is otherwise unavailable to testify within the meaning of Evid C §240. Pen C §1346(d). On using preliminary hearing testimony at trial, see §8.47. On proving unavailability of a witness, see §§31.20-31.21.

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IX. EVIDENTIARY ISSUES

§8.27 A. Proof of Corpus Delicti; Sufficiency of Evidence

Under the corpus delicti rule, to obtain a conviction, the prosecution must produce some evidence, independent of the defendant's admission or confession, that a crime in fact occurred. *Jones v Superior Court* (1979) 96 CA3d 390, 393, 157 CR 809. Confessions and admissions are discussed in chap 23. The corpus cannot be established by the extrajudicial statement of a codefendant. The corpus delicti of a felony-based special circumstance enumerated in Pen C §190.2(a)(17) does not have to be proved independently of the defendant's extrajudicial statement. Pen C §190.41.

The truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)) abrogated the evidentiary portion of the corpus delicti rule, *i.e.,* that evidence of a defendant's admission or confession at trial is inadmissible until the corpus is established. *People v Alvarez* (2002) 27 C4th 1161, 119 CR2d 903. However, it did not affect the sufficiency-of-the-evidence component of the corpus delicti rule. 27 C4th at 1169. Thus, a defendant's bare admission or confession without independent proof that a crime occurred cannot provide proof beyond a reasonable doubt. See *Rayyis v Superior Court* (2005) 133 CA4th 138, 147, 35 CR3d 12. While the *Alvarez* court did not consider or decide whether the defendant's statement alone provides sufficient evidence to hold the defendant to answer, courts of appeal have decided that a defendant cannot be held to answer at the preliminary hearing simply on the basis of his or her statements. *People v Herrera* (2006) 136 CA4th 1191, 1200, 39 CR3d 578; *Rayyis v Superior Court* (2005) 133 CA4th 138, 145, 35 CR3d 12.

The corpus delicti is normally proved through the testimony of witnesses or the introduction of evidence. *People v Davidson* (1964) 227 CA2d 331, 38 CR 660.

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§8.28 B. Uncorroborated Accomplice Evidence

At the preliminary hearing (as opposed to the trial), the uncorroborated testimony of an accomplice can form the exclusive basis for a holding order. *People v McRae* (1947) 31 C2d 184, 187 P2d 741. In addition, a qualified officer may relate a nontestifying codefendant's out-of-court confession incriminating the defendant, as long as the magistrate finds it reliable. *People v Miranda* (2000) 23 C4th 340, 96 CR2d 758.

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§8.29 C. Elements That Must Be Proved

Evidence of each element of a crime must be proved at the preliminary hearing. See *People v Graff* (2009) 170 CA4th 345, 362, 87 CR3d 827 (conviction reversed because jury permitted to convict on basis of charges not established at preliminary hearing); *People v Burnett* (1999) 71 CA4th 151, 83 CR2d 629 (conviction reversed because based on evidence presented at trial of completely different incident than shown at preliminary hearing). Prior convictions must be proved, including that they are in fact priors committed by the defendant, if they are elements of the crime (*e.g.,* Pen C §12021 (ex-felon with a gun)) or enhancements (*e.g.,* Pen C §§12022, 12022.5). *People v Superior Court (Mendella)* (1983) 33 C3d 754, 191 CR 1; *Panos v Superior Court* (1984) 156 CA3d 626, 203 CR 115. Special circumstance allegations must be established. *Ghent v Superior Court* (1979) 90 CA3d 944, 153 CR 720. Failure to prove these elements may be challenged by a Pen C §995 motion in trial court. Allegations of prior convictions that are not elements of the crime charged do not have to be pleaded or proved at the preliminary hearing. *People v Robinson* (2004) 122 CA4th 275, 281, 18 CR3d 744 (prior theft conviction when petty theft with a prior charged); *Thompson v Superior Court* (2001) 91 CA4th 144, 150, 110 CR2d 89. For further discussion of the use of prior convictions, see chap 24. For a detailed discussion of sufficiency of evidence issues, including a list of cases holding that a Pen C §995 motion should have been granted because the evidence at the preliminary hearing was insufficient, see §§13.6-13.10.

Ø **Note:** The prosecution is not precluded from amending an information to allege aggravating facts for sentencing purposes simply because those facts were not presented at the preliminary hearing. An information may be amended to add an aggravating fact for sentencing purposes when that fact was not presented at the preliminary hearing, because such a fact is not an "offense" within the meaning of Pen C §1009. *Barragan v Superior Court* (2007) 148 CA4th 1478, 1484, 56 CR3d 660. But see *People v Superior Court (Brooks)* (2007) 159 CA4th 1, 71 CR3d 49 (no amendment).

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Source: Criminal Law/California Criminal Law Procedure and Practice/8 PRELIMINARY HEARINGS/§8.30 D. Application of Rules of Evidence

§8.30 D. Application of Rules of Evidence

General rules. Only evidence admissible under the Evidence Code can support a holding order (see *Priestly v Superior Court* (1958) 50 C2d 812, 815, 330 P2d 39; *Pinizzotto v Superior Court* (1968) 257 CA2d 582, 587, 65 CR 74), with certain exceptions: some hearsay is permitted through police officer testimony (Pen C §872, discussed below); the secondary evidence rule does not apply (Pen C §872.5); the rule of Evid C §1203 that a hearsay declarant may be called by the adverse party as if under cross-examination does not apply at preliminary hearings (Evid C §1203.1); the direct and cross-examination of certain minors can be conducted by two-way television (Pen C §1347, discussed in §8.25); and there are relaxed rules for admitting the statements of certain minor victims to provide a corpus for the purpose of admitting the defendant's confession (Evid C §1228, discussed in §8.27). If the defense does not object to inadmissible material, however, the objection may be waived. *People v Castro* (1968) 257 CA2d 643, 65 CR 62.

Ø **Note:** A hearsay declarant can have his or her credibility attacked in the same manner as a "live" witness. See Evid C §1202.

A holding based partly on incompetent evidence will not be set aside if there was sufficient competent evidence on which to hold the defendant to answer. *People v Haybron* (1980) 108 CA3d 31, 166 CR 264.

Hearsay by law enforcement officer or honorably retired officer. Penal Code §872(b) states that

> the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. An honorably retired law enforcement officer may only relate statements of declarants made out of court and offered for the truth of the matter asserted that were made when the honorably retired officer was an active law enforcement officer. Any law enforcement officer or honorably retired law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training [POST] that includes training in the investigation and reporting of cases and testifying at preliminary hearings.

Whitman v Superior Court (1991) 54 C3d 1063, 2 CR2d 160, generally upheld the constitutionality of hearsay preliminary hearings under §872(b).

Completion of a POST course by an officer, which qualifies the officer to testify, may be established by the officer's testimony that he or she completed the course, and by the magistrate's taking judicial notice of POST's administrative regulations. *People v Dawkins* (1992) 10 CA4th 565, 12 CR2d 633; *Hollowell v Superior Court* (1992) 3 CA4th 391, 4 CR2d 321 (officer not qualified to testify; prosecutor failed to establish that training course was approved by POST).

In addition to the experience or educational qualifications required by Pen C §872(b), the testifying officer must possess personal knowledge of the subject matter about which he or she testifies. When the testifying officer does have personal knowledge about the case, he or she may testify as to statements made by other peace officers as well as by other witnesses. *Whitman v Superior Court* (1991) 54 C3d 1063, 1072, 2 CR2d 160; *Hosek v Superior Court* (1992) 10 CA4th 605, 12 CR2d 650 (acceptable in DUI case for officer to testify to blood alcohol content based on phone conversation with criminalist). *Whitman*, however, forbids the use of a "reader" officer who merely recites what another officer wrote in the police report. In addition, multiple hearsay is inadmissible. *Whitman* points out that, although §872(b) contains an exception to Evid C §1200, the rule against hearsay, it does *not* contain an exception to Evid C §1201, the rule that multiple hearsay is allowed only if each level of hearsay is covered by a hearsay exception. See *Shannon v Superior Court* (1992) 5 CA4th 676, 7 CR2d 47 (officer could testify to statements related to him by another officer, but not to statements made to other officer by victim); *Tu v Superior Court* (1992) 5 CA4th 1617, 7 CR2d 758 (officer's hearsay testimony about what nontestifying primary investigator told testifying officer not admissible); *People v Wimberly* (1992) 5 CA4th 439, 6 CR2d 800 (police detective's double hearsay testimony not allowed); *Montez v Superior Court* (1992) 4 CA4th 577, 5 CR2d 723 (multiple hearsay by noninvestigating officer not allowed); *Hollowell v Superior Court* (1992) 3 CA4th 391, 4 CR2d 321 (officer not qualified to testify).

A qualified English-speaking police officer who personally received statements from a non-English-speaking witness

through an interpreter may testify to those statements at the preliminary hearing. *Correa v Superior Court* (2002) 27 C4th 444, 117 CR2d 27.

Hearsay from victim of physical violence. Evidence Code §1370 permits hearsay statements of a victim of physical violence to be admitted when the following requirements are met:

- The statement purports to narrate, describe, or explain the infliction or threat of physical injury on the declarant;
- The declarant is unavailable as a witness under Evid C §240;
- The statement was made at or near the time of the infliction or threat of physical injury, and less than 5 years before the action is filed;
- The statement was made under circumstances that would indicate its trustworthiness; and
- The statement was made in writing, was electronically recorded, or was made to a law enforcement official.

When determining trustworthiness, the magistrate may consider these factors:

- Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested;
- Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive; and
- Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

The statement is admissible only if the proponent "makes known" to the adverse party the intention to offer the statement and the particulars of the statement. The constitutionality of this provision was upheld in *People v Hernandez* (1999) 71 CA4th 417, 83 CR2d 747.

Ø **Note:** Although *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, may affect the use of Evid C §1370 at trial, it probably does not affect its use at the preliminary hearing, because there is no federal constitutional right to a preliminary hearing. *Hines v Enomoto* (9th Cir 1981) 658 F2d 667, 677.

Prior inconsistent statement. Evidence Code §1294 permits evidence of a witness's prior inconsistent statements that were properly admitted at a preliminary hearing to be admitted at trial if the witness is unavailable and if the witness's former testimony is admitted under Evid C §1291. The evidence of a prior inconsistent statement must be either a video-recorded statement introduced at the preliminary hearing or a transcript containing the statements made at the preliminary hearing. Evid C §1294(a)(1)-(2); see *People v Martinez* (2003) 113 CA4th 400, 407, 7 CR3d 49.

Ø **Note:** To the extent that Evid C §1294 permits the introduction for their truth of "testimonial" statements that have not been subjected to cross-examination, it has probably been abrogated by *Crawford v Washington, supra*.

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§8.31 E. Motion to Suppress Evidence

A motion to suppress evidence may be made in conjunction with the preliminary hearing. Pen C §1538.5(b), (f). See *In re Lance W.* (1985) 37 C3d 873, 210 CR 631. The motion may be made in the trial court rather than at the preliminary hearing. However, a defendant is, with limited exceptions, entitled only to one evidentiary Pen C §1538.5 hearing. Pen C §1538.5(i). Many factors must be considered when deciding whether to have the §1538.5 hearing at the preliminary hearing rather than in the trial court. See §16.7.

If the defendant's motion to suppress is granted at the preliminary hearing, and the defendant is not bound over for trial, the prosecution may file a new complaint or seek an indictment after the preliminary hearing. The ruling at the prior hearing is not binding in any later proceeding. However, if the defendant's motion to suppress is granted, and the defendant is held to answer, the magistrate's order suppressing the evidence is binding unless the prosecution moves within 15 days after the preliminary hearing to relitigate the suppression motion de novo at a special hearing in the trial court. Pen C §1538.5(j); *People v Jackson* (2002) 96 CA4th 1265, 117 CR2d 886 (if prosecution forgoes opportunity to relitigate grant of suppression motion for special hearing, it may not relitigate that ruling by dismissing action and refiling case after time for requesting special hearing has elapsed).

Ø **Note:** A second motion to suppress evidence, brought after the first motion was granted and the case dismissed and refiled, must be heard by the same judge who granted the first motion. *Soil v Superior Court* (1997) 55 CA4th 872, 64 CR2d 319.

Failure to move for suppression at the preliminary hearing may constitute ineffective assistance of counsel if a motion in trial court proves to be an insufficient remedy. *People v Rosales* (1984) 153 CA3d 353, 200 CR 310 (failure to move to suppress defendant's palm print; de novo §1538.5 motion in trial court insufficient remedy because additional fingerprints were legally obtained in the interim).

Five court days' notice and a written motion with supporting memorandum are required for a motion to suppress evidence in a preliminary hearing. Pen C §1538.5(f)(2).

Ø **Note:** A §1538.5 motion at the preliminary hearing is restricted to evidence that the prosecutor seeks to introduce at that hearing. Pen C §1538.5(f)(1).

Live witness testimony, not affidavits, is required at a suppression hearing. *People v Johnson* (2006) 38 C4th 717, 720, 42 CR3d 887 (affidavit of investigating officer was inadmissible as evidence at suppression hearing). Testimony that would otherwise be hearsay is admissible on the issue of probable cause. *People v Magana* (1979) 95 CA3d 453, 157 CR 173. If defense counsel moves to suppress evidence at the preliminary hearing, he or she should be careful to limit the admission of otherwise inadmissible hearsay evidence to the probable cause issue both during the prosecutor's direct examination and during cross-examination. If hearsay is admitted without objection, it can provide a basis for holding the defendant to answer. *W.T. Grant Co. v Superior Court* (1972) 23 CA3d 284, 286, 100 CR 179. The following language may be used to obtain an order limiting the use of hearsay offered on the suppression issue:

Your Honor, I move that all hearsay admitted on the issue of probable cause be limited to that issue only, and not be admitted with regard to any other issue.

If no motion to suppress is made, cross-examination on search and seizure matters is irrelevant and may be prohibited. *People v Williams* (1989) 213 CA3d 1186, 262 CR 303.

If the defense suppression motion is denied at preliminary hearing (before a magistrate), the defense *must* renew the motion in superior court to preserve postjudgment appellate review of the denial. *People v Richardson* (2007) 156 CA4th 574, 67 CR3d 552 (defendant waived right to appellate review of denial of his preliminary hearing suppression motion because he took advantage of certified plea process under Pen C §859a).

For further discussion of motions to suppress, see chap 16, particularly §§16.5-16.8 (when to make motion).

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F. Other Motions at Preliminary Hearing

§8.32 1. Discovery Motions

Some discovery motions may be made at the preliminary hearing. The most common are these:

- Motions to discover information concerning a police officer's prior use of excessive force or bias (*Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897, discussed in §§11.19-11.24);
- Motions to disclose the identity of an informant (*Cooper v Superior Court* (1981) 118 CA3d 499, 173 CR 520, discussed in chap 17);
- Motions to discover information to support a motion to dismiss based on discriminatory enforcement of the law (*Murgia v Municipal Court* (1975) 15 C3d 286, 124 CR 204, discussed in §§18.16-18.20);
- Motions to discover prior acts of violence by the victim in a self-defense case (*Engstrom v Superior Court* (1971) 20 CA3d 240, 97 CR 484);
- Motions to discover information to support a motion for sanctions or to dismiss based on the prosecution's destruction or loss of evidence (*Arizona v Youngblood* (1988) 488 US 51, 102 L Ed 2d 281, 109 S Ct 333; *California v Trombetta* (1984) 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528); and
- Motions to preserve and obtain video and audio recordings made of communications by the arresting officers concerning the defendant's arrest (Govt C §26202.6 (recordings need be preserved for only 100 days absent request); *People v Madden* (1970) 2 C3d 1017, 88 CR 171; see *People v Armstrong* (1991) 232 CA3d 228, 241, 283 CR 429 (*Madden* survived *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405)).

See §8.10 on general discovery motions before and during the preliminary hearing, and §8.34 on the notice required for preliminary hearing motions.

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§8.33 2. Other Evidentiary Motions

Confessions. If the prosecution introduces a defendant's confession into evidence at the preliminary hearing, the defense can raise voluntariness and *Miranda* objections, discussed in §§23.34-23.48. See *People v Neal* (1942) 53 CA2d 379, 127 P2d 996 (no reversal because error cured at trial). The defense may wish to argue that the prosecution is bound by the contents of the confession. See §23.31.

Identification. At the preliminary hearing, counsel can challenge the procedures used by the prosecution to elicit an identification of the defendant. *People v Green* (1979) 95 CA3d 991, 157 CR 520; *People v Malich* (1971) 15 CA3d 253, 93 CR 87, disapproved on other grounds in *People v Medina* (1972) 6 C3d 484, 99 CR 630. Defense lineups should be held before the preliminary hearing if no prior prosecution lineups have been held so that the defendant is not identified for the first time at the preliminary hearing wearing jail clothing while seated next to defense counsel. *Evans v Superior Court* (1974) 11 C3d 617, 114 CR 121. In some counties, defense lineups are held the same day as the preliminary hearing. In others, they are held several days in advance. Failure to request a lineup as soon after arrest or arraignment as practicable may waive the right to hold one at or immediately before trial. *People v Baines* (1981) 30 C3d 143, 177 CR 861. For further discussion of defense lineups, see §22.17.

Speedy trial motions. The defense may have the right to make a speedy trial motion at the preliminary hearing. Compare *People v Wright* (1969) 2 CA3d 732, 82 CR 859 (yes), and *People v McCoy* (1983) 147 CA3d 638, 195 CR 285 (implied yes), with *Jackson v Superior Court* (1982) 135 CA3d 767, 185 CR 766, disapproved on other grounds in *People v Konow* (2004) 32 C4th 995, 1025 n10, 12 CR3d 301 (magistrate has power to allow speedy trial motion, but is not required to do so). See also §19.33. A defendant has the right to a de novo speedy trial hearing in trial court in felony cases, even though the issue was litigated in the preliminary hearing court. *People v McCoy, supra*.

If the court failed to hold the preliminary hearing within the deadlines required by Pen C §859b, or to conclude it in one session, counsel may move for a dismissal at the preliminary hearing. See *People v Guevara* (1982) 132 CA3d 193, 183 CR 18. For further discussion of these deadlines, see §§8.16-8.20. This error can also be challenged in the trial court by a Pen C §995 motion. Section 995 motions are discussed in chap 13.

Application to videotape preliminary hearing testimony of minor victim of sex crime (Pen C §1346). This motion must be noticed in writing 3 days before the preliminary hearing. Pen C §1346(b). See §8.26.

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§8.34 G. Notice Required for Motions

There are no general statutes or state rules concerning notice at preliminary hearings. California Rules of Court 4.111 applies only to the trial courts. Some statutes governing specific motions give notice requirements, *e.g.,* Pen C §§1346-1347, Evid C §1228, discussed in §8.33, and Pen C §1538.5. Counsel should find out the magistrate's preferences (or requirements) and be familiar with the applicable local rules of court.

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§8.35 H. Taking Evidence Outside Court

If the magistrate wishes to take evidence outside court, he or she must follow the relevant procedures in CCP §651 (view of object, demonstration, or experiment) and Pen C §1119 (jury view). See *People v Jackson* (1990) 218 CA3d 1493, 267 CR 841.

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X. MAGISTRATE'S ROLE

§8.36 A. Who May Be a Magistrate

Magistrates include judges of the supreme court, courts of appeal, and superior courts. Pen C §808. Only a magistrate may hear a preliminary hearing. *People v Haskett* (1982) 30 C3d 841, 858, 180 CR 640 (court commissioner may not hear preliminary hearing absent consent of all parties); see *Foosadas v Superior Court* (2005) 130 CA4th 649, 30 CR3d 358 (same).

Ø **Note:** It may be that a retired judge may not sit as a magistrate. See 61 Ops Cal Atty Gen 487 (1978) (temporary municipal court judge is not a magistrate).

A magistrate's jurisdiction ceases once the magistrate makes a holding order, at which time jurisdiction is vested in the trial court to deal with the charges in the case. See *People v Silva* (1995) 36 CA4th 231, 43 CR2d 8.

It is preferable but not mandatory that a different judge preside at the preliminary hearing from the one who arraigned the defendant. *O'Neal v Superior Court* (1986) 185 CA3d 1086, 230 CR 257.

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§8.37 B. Challenges to Magistrates

Both challenges for cause (CCP §170.1) and peremptory challenges (CCP §170.6) may be exercised by either side against a magistrate. *McCauley v Superior Court* (1961) 190 CA2d 562, 12 CR 119. Counsel rarely use their peremptory challenge at the preliminary hearing, however, because they prefer to preserve it for possible use at trial. See chap 21 on challenges.

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§8.38 C. Standard for Sufficiency of Evidence; Magistrate's Duty to Weigh Evidence

When a preliminary hearing concludes, the magistrate must decide whether enough evidence has been presented to hold the defendant to answer in the trial court. Pen C §872. To make that decision, the magistrate must weigh the evidence, resolve conflicts, and assess credibility. *Johnson v Superior Court* (1975) 15 C3d 248, 124 CR 32. If the judge finds the evidence sufficient, he or she makes an order referred to as a commitment order or holding order. In some counties, the judge "holds the defendant to answer." The evidence necessary to support a commitment to the trial court is a state of facts that would lead a person of ordinary caution or prudence to believe and consciously entertain a strong suspicion of the guilt of the accused. *People v Encerti* (1982) 130 CA3d 791, 182 CR 139.

The magistrate is not a trier of fact. He or she "does not decide whether defendant committed the crime, but only whether there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." *People v Slaughter* (1984) 35 C3d 629, 637, 200 CR 448. See also *People v McGlothen* (1987) 190 CA3d 1005, 1011, 235 CR 745.

If the evidence presented at the preliminary hearing leads to two inferences, the reviewing court is bound by the magistrate's findings and cannot grant a Pen C §995 motion. *People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 257 CR 678.

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Source: Criminal Law/California Criminal Law Procedure and Practice/8 PRELIMINARY HEARINGS/§8.39 D. Factual Versus Legal Findings

§8.39 D. Factual Versus Legal Findings

Magistrates can make factual and legal findings at the preliminary hearing. Legal findings are not binding on the prosecution after the preliminary hearing; factual findings are. *People v Uhlemann* (1973) 9 C3d 662, 108 CR 657. The most common example of a factual finding is a magistrate's ruling on the credibility of a witness. See, *e.g., Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289. An example of a legal finding is that certain undisputed facts do or do not constitute a crime.

If a magistrate makes a factual finding that results in a discharge on a count, the prosecution cannot include that offense in the trial court information. *Walker v Superior Court* (1980) 107 CA3d 884, 166 CR 209. The prosecution's options are to refile another complaint if that is available under Pen C §§1387-1387.1 or to file a motion to reinstate the count (Pen C §871.5).

If the magistrate accepts the evidence but concludes that on legal grounds one or more charges have not been proved, that conclusion is not binding on the prosecution, and it may file the discharged count or enhancement in the information in the trial court, subject to a Pen C §995 challenge by the defense. Pen C §§739, 1009; *People v Farley* (1971) 19 CA3d 215, 96 CR 478.

If the magistrate agrees to make findings, defense counsel should ensure that the record is clear that the findings are factual; appellate courts require explicit rulings. *People v Superior Court (Henderson)* (1986) 178 CA3d 516, 223 CR 741 (magistrate's holding on manslaughter charges did not include adequate factual findings); *People v Superior Court (Day)* (1985) 174 CA3d 1008, 220 CR 330 (similar charges, evidence, and findings); *People v Superior Court (Gibson)* (1980) 101 CA3d 551, 161 CR 923. Additionally, if a magistrate focuses on one discrepancy and ignores other far more powerful evidence, his or her findings are not controlling. *People v McGlothen* (1987) 190 CA3d 1005, 235 CR 745.

Factual findings can be made not only on charged counts, but also on uncharged counts and enhancements that are revealed by the evidence. *People v Manning* (1982) 133 CA3d 159, 183 CR 727.

> Ø **Note:** If defense counsel believes that evidence at the preliminary hearing has shown uncharged offenses or enhancements, but that the magistrate might make a favorable factual finding on them, counsel may ask the magistrate to weigh the evidence concerning them and decide whether to hold the defendant to answer on those counts or enhancements. See discussion in §8.43.

A factual finding might be phrased as follows:

I make the following factual finding:

That witness Smith's testimony that he was able to see the fight between defendant Hayes and Mr. Greeley is unbelievable because it is improbable, if not impossible, for him to have seen the fight from where he says he was standing, given the lighting conditions, the distance, and the crowd between Mr. Smith and the fight. I therefore disregard all of his testimony because it is unbelievable.

A magistrate may not make new factual findings after a remand following the granting of a §871.5 motion. *People v Childs* (1991) 226 CA3d 1397, 277 CR 456.

The decisions conflict on whether a magistrate must make findings on every charge shown by the evidence at the request of the defense. *People v Estrada* (1987) 188 CA3d 1141, 233 CR 754, holds that, although the magistrate must name at least one offense that he or she believes was committed, there is no duty to provide specific findings on each possible charge, disagreeing with *People v Brice* (1982) 130 CA3d 201, 181 CR 518. The conflict still exists.

The prosecution must prove any misdemeanor counts charged together with felonies, and defense counsel may request findings concerning them. *People v Thiecke* (1985) 167 CA3d 1015, 213 CR 731; *Medellin v Superior Court* (1985) 166 CA3d 290, 212 CR 171. There is no indication that Pen C §866(b), which as amended in 1990 provides that the purpose of a preliminary hearing is to establish whether there exists probable cause to believe the defendant committed "a felony," was intended to abrogate the rule of *Medellin* and *Thiecke* or to contravene the language of Pen C §737 requiring that all "public offenses" triable in the superior court be prosecuted by indictment or information.

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Source: Criminal Law/California Criminal Law Procedure and Practice/8 PRELIMINARY HEARINGS/§8.40 E. Reducing Felony to Misdemeanor ('Wobblers'); Pen C §17(b)(5)

§8.40 E. Reducing Felony to Misdemeanor ("Wobblers"); Pen C §17(b)(5)

Felonies that provide for either a county jail sentence or a state prison commitment are often referred to as "wobblers." When a defendant is charged with a wobbler, the magistrate may order the accused held to answer to either a misdemeanor or a felony. Pen C §17(b)(5). A magistrate may also reduce a felony to a misdemeanor under Pen C §§17(b)(5) and 18 when the offense is described as a felony punishable by state prison *or* a fine, without an alternative sentence to county jail. But when the offense is punishable only by state prison, it is not reducible. *People v Mauch* (2008) 163 CA4th 669, 674, 77 CR3d 751; *People v Isaia* (1989) 206 CA3d 1558, 254 CR 500. A magistrate may not discharge nonwobbler felonies and hold on "lesser included" misdemeanors. *People v Superior Court (Feinstein)* (1994) 29 CA4th 323, 34 CR2d 503.

Reduction of a felony to a misdemeanor can be done either on the court's own motion or on that of defense counsel. *People v Manning* (1982) 133 CA3d 159, 183 CR 727; *People v Municipal Court (Kong)* (1981) 122 CA3d 176, 175 CR 861. The prosecutor's consent is not required for the court to reduce a wobbler to a misdemeanor. *Esteybar v Municipal Court* (1971) 5 C3d 119, 95 CR 524. The prosecutor cannot dismiss and refile the charge as a felony after the judge has reduced it under §17(b)(5) unless the judge consents. *Malone v Superior Court* (1975) 47 CA3d 313, 120 CR 851. Judges may reduce wobblers even in Three Strikes cases. See *People v Superior Court (Alvarez)* (1997) 14 C4th 968, 60 CR2d 93. Although the prosecution does not have the right under Pen C §1238 to appeal the magistrate's order reducing a wobbler charged as a felony to a misdemeanor, writ review *may* be available. See *People v Williams* (2005) 35 C4th 817, 28 CR3d 29.

The magistrate does not have the authority to fix the degree of an offense. *People v Estrada* (1987) 188 CA3d 1141, 233 CR 754; *People v Buckley* (1986) 185 CA3d 512, 228 CR 329. Thus, when an offense is one of varying degrees, such as burglary, and the greater degree is not a wobbler but the lesser is, the court cannot reduce the crime to a lesser degree and then reduce it to a misdemeanor without the prosecutor's consent, unless the evidence shows only the lesser degree. See Pen C §§1192.1-1192.2, 1192.4.

> Ø **Note:** The defense may be in a better position to request reductions when live witnesses have not testified (see Pen C §872(b), discussed in §8.30), because the officer may forget to testify to all details of the offense.

Section 17(b)(5) does not provide much guidance on the application of the power to reduce. The legislature had in view unburdening the superior courts from cases that were likely to be given misdemeanor sentences, saving time by eliminating unnecessary felony prosecutions, and encouraging guilty pleas because of reduced sentencing exposure. *Henry v DMV* (1972) 25 CA3d 649, 653, 102 CR 36. In practice, the court usually looks to sentencing factors to decide when to reduce a felony to a misdemeanor. If the accused's criminal record is not significant and the crime does not appear to be aggravated, the magistrate may consider a misdemeanor finding. If the magistrate has some question on the matter, he or she can request a waiver of the one-session rule (Pen C §861) from the defendant and order a preplea probation report (Pen C §1203.7). See chap 27 on preplea probation reports.

If the court reduces a felony to a misdemeanor, it is treated thereafter as a misdemeanor for all purposes (see, *e.g., Henry v DMV, supra*) except that it retains the felony statute of limitations. See Pen C §805. Any appeal of a conviction received on the reduced charge is treated as a misdemeanor appeal and handled by the appellate division of the superior court. *People v Nickerson* (2005) 128 CA4th 33, 36, 26 CR3d 563.

When a defendant is charged with a felony and a misdemeanor and the felony count is dismissed, the magistrate should order the defendant arraigned on the misdemeanor count. *People v Hardin* (1967) 256 CA2d Supp 954, 64 CR 307.

A magistrate cannot inquire whether a defendant will enter a guilty plea before determining whether to reduce the charge because it appears to penalize the accused who wishes to exercise his or her right to a jury trial. *Hartman v Superior Court* (1982) 135 CA3d 205, 185 CR 182.

> Ø **Note:** If the prosecutor is the one who seeks to reduce a felony offense to a misdemeanor, the defendant can require that it remain a felony. Pen C §17(b)(4); *Larson v Municipal Court* (1974) 41 CA3d 360, 116 CR 1.

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§8.41 F. Lesser Included and Related Offenses

The court can hold a defendant to answer to offenses other than those charged in the complaint "according to the fact." Pen C §872(a). Presumably, this means an offense shown by the evidence at the preliminary hearing that is either a lesser included offense or lesser related offense based either on factual or legal findings. See *Walker v Superior Court* (1980) 107 CA3d 884, 166 CR 209.

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§8.42 G. Magistrate Who Hears Refiled Complaint

When a magistrate dismisses a felony complaint, and the prosecutor is able to recharge it (see §§8.39, 8.44 on when prosecutor allowed to recharge), it may be refiled before a different magistrate from the one who dismissed the first complaint (see *People v Luna* (1983) 140 CA3d 788, 189 CR 792), unless the dismissal followed the grant of defendant's motion to suppress (see *Soil v Superior Court* (1997) 55 CA4th 872, 64 CR2d 319).

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§8.43 XI. UNCHARGED OFFENSES AND ENHANCEMENTS

The prosecutor may charge in the information filed in the trial court offenses and enhancements shown by the evidence presented at the preliminary hearing and arising from the transaction that was the basis for the commitment, even though they were not charged in the complaint on which the preliminary hearing was based and were not a part of the holding order (commitment). Pen C §739. That cannot be done, however, unless a holding order was issued on the same transaction from which the newly added charges arose. *People v Dominguez* (2008) 166 CA4th 858, 866, 83 CR3d 284; *People v Winters* (1990) 221 CA3d 997, 270 CR 740 (defendant waived preliminary hearing; information could not later be amended to add an offense to one originally pleaded in complaint). See also *People v Thiecke* (1985) 167 CA3d 1015, 1018, 213 CR 731 (misdemeanor charge may be added to felony count in information as long as probable cause for misdemeanor was established at preliminary hearing).

Although the presumption implicit in §739 is that the preliminary hearing itself serves as notice to the accused of potential charges, one court has suggested that there "may be cases where an uncharged offense is psychologically so well camouflaged that a claim of having been misled at the preliminary hearing has some substance." *People v Brice* (1982) 130 CA3d 201, 207, 181 CR 518.

Defense counsel has several options when the evidence at the hearing shows uncharged offenses. All are potentially dangerous. If defense counsel believes that factual findings on the credibility of a witness concerning an uncharged offense or enhancement will be favorable, counsel can request factual findings. *People v Manning* (1982) 133 CA3d 159, 183 CR 727. However, this option may alert the prosecutor to charges of which he or she was unaware. Another alternative is for defense counsel to put on a defense through cross-examination of prosecution witnesses, or affirmative defense evidence, then ask the magistrate to make factual findings. This is rarely done because it not only alerts the prosecutor to the uncharged offenses or enhancements, but also reveals the defense to the prosecutor. Finally, the defense can refrain from raising the issue.

The information filed in the trial court need only tell a defendant what kinds of offenses are charged and the number of counts, as long as the evidence presented at the preliminary hearing supports each offense charged and covers the time period described in the information. *People v Jeff* (1988) 204 CA3d 309, 251 CR 135. If the information contains more counts than were shown by the preliminary hearing evidence, or covers a different time period, the defendant should move to set aside the relevant counts under Pen C §995.

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XII. EFFECT OF DISMISSAL

§8.44 A. Prosecution Remedies After Dismissal

If a magistrate made no factual findings but dismissed the case on legal grounds at the preliminary hearing, the prosecution may:

- Refile a new complaint (*People v Luna* (1983) 140 CA3d 788, 189 CR 792) or seek a grand jury indictment (*People v Uhlemann* (1973) 9 C3d 662, 108 CR 657), as long as there have not been two dismissals under Pen C §1387 or if an exception under §1387 applies (see discussion of the dismissal rule in §13.31); or
- Petition the superior court for reinstatement of the charges under Pen C §871.5, arguing that the dismissal was based on an erroneous legal ruling (see §13.32; see, *e.g., People v Dawson* (2009) 172 CA4th 1073, 1087, 91 CR3d 841).

The prosecutor may not directly appeal the magistrate's order of dismissal. See *People v Mimms* (1988) 204 CA3d 471, 251 CR 672; *People v Belknap* (1974) 41 CA3d 1019, 116 CR 664. The prosecutor may, however, appeal the denial of a motion for reinstatement. Pen C §§871.5, 1238(a)(9).

If the magistrate held the defendant to answer to fewer than all charges shown by the evidence, the prosecution may file an information in the trial court charging those offenses proved at the preliminary hearing (Pen C §739) and transactionally related to the offenses to which the defendant was held to answer. *Ondarza v Superior Court* (1980) 106 CA3d 195, 164 CR 892.

If the magistrate made factual findings fatal to holding the defendant to answer to any offense, the prosecution cannot recharge that offense in the trial court information. *Walker v Superior Court* (1980) 107 CA3d 884, 166 CR 209. The prosecution has the other remedies discussed above.

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§8.45 B. Defense Remedies After Holding Order

Errors at the preliminary hearing are challenged by a Pen C §995 motion to dismiss in the trial court, made after an information has been filed. Failure to challenge error by a §995 motion waives the error on appeal. Pen C §996. See *In re Torres* (1982) 128 CA3d 826, 180 CR 700. For discussion of §995 motions, see chap 13.

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§8.46 C. Effect on Defendant's Custody Status of Reinstatement of Complaint Following Dismissal

When the prosecutor chooses to file a new complaint after a magistrate has dismissed the case and the defendant is arrested within 15 days after dismissal of the first complaint, the defendant is entitled to apply the original bail to the new charge if he or she is arrested and charged with an offense arising from the same act or omission on which the earlier complaint was based. Pen C §1303.

If the defendant was on his or her own recognizance on the dismissed complaint, the prosecutor must send a letter to the defendant and his or her attorney, stating the date, time, and place for rearraignment unless the defendant was present in court when the complaint was refiled. Pen C §1388(a). The defendant must be allowed to continue on his or her own recognizance unless there are changed conditions that require bail to be set. Pen C §1388(c).

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§8.47 XIII. USES OF PRELIMINARY HEARING TESTIMONY

Preliminary hearing transcripts may be used during other hearings, including trial, to impeach witnesses (Evid C §1235; *People v Ford* (1981) 30 C3d 209, 178 CR 196 (used to impeach witness who repudiated preliminary hearing identification); *People v Chavez* (1980) 26 C3d 334, 161 CR 762 (same); *People v De Larco* (1983) 142 CA3d 294, 190 CR 757. They may also be used at trial in place of the witness (Pen C §1291; *People v Diaz* (2002) 95 CA4th 695, 115 CR2d 799 (witness could not be found); *People v Francis* (1988) 200 CA3d 579, 245 CR 923 (witness refused to testify); *People v Maxwell* (1979) 94 CA3d 562, 156 CR 630 (witness invoked privilege against self-incrimination)), but only if the defendant had an opportunity to cross-examine the witness at the preliminary hearing. See *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 203, 124 S Ct 1354.

To use a preliminary hearing transcript in place of a witness, the following conditions must be met:

- The witness must be unavailable. 541 US at 68, 158 L Ed 2d at 203; *Barber v Page* (1968) 390 US 719, 722, 20 L Ed 2d 255, 259, 88 S Ct 1318. The prosecution has the burden of proving by a preponderance of the evidence that the witness is unavailable. *People v Turner* (1990) 219 CA3d 1207, 268 CR 686, disapproved on other grounds in *People v Cromer* (2001) 24 C4th 889, 103 CR2d 23. The prosecution must demonstrate due diligence in trying to secure the witness's presence at trial. See, *e.g., People v Diaz* (2002) 95 CA4th 695, 706, 115 CR2d 799.
- The prior testimony must be reliable. *Ohio v Roberts* (1980) 448 US 56, 65, 65 L Ed 2d 597, 607, 100 S Ct 2531, overruled in part by *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 203, 124 S Ct 1354. See Evid C §§701-702; *People v Lyons* (1992) 10 CA4th 837, 13 CR2d 112 (preliminary hearing transcript not admissible at trial, because witness unable to understand duty to tell truth).
- The defendant must have had the opportunity to cross-examine the witness at the preliminary hearing. *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 203, 124 S Ct 1354; Evid C §1291(a)(2). For example, if the evidence at the preliminary hearing was presented through the hearsay testimony of an officer under Pen C §872(b), that testimony is not admissible at trial. Having the opportunity to cross-examine at the preliminary hearing means that the defendant must have had "an interest and motive similar to that which he has at the hearing." Evid C §1291(a)(2). See *People v Brock* (1985) 38 C3d 180, 190, 211 CR 122, for a summary of cases on the opportunity to cross-examine.
- Preliminary hearing testimony cannot be used either as prior recorded testimony or as a prior inconsistent statement when the witness at trial claims partial loss of memory that is genuine and not evasive. *People v Hawthorne* (1992) 4 C4th 43, 55, 14 CR2d 133. But see *People v Fierro* (1991) 1 C4th 173, 221, 3 CR2d 426 (loss of memory that is inconsistent "in effect" may satisfy hearsay exception as inconsistent statement).

Other uses of preliminary hearing transcripts are the following:

- At court trials at which the defense and prosecution waive jury trial and agree to submit the case on the preliminary transcript. For further discussion of these trials, see §§28.19-28.21.
- To provide a record for a later motion to revoke probation. *People v Winson* (1981) 29 C3d 711, 175 CR 621. See chap 46 on probation revocations.
- To establish the corpus delicti of a conspiracy. *People v Lawless* (1987) 195 CA3d 1248, 241 CR 344.
- To prove that a defendant's prior conviction was for a "serious felony." *People v Reed* (1996) 13 C4th 217, 52 CR2d 106 (witnesses considered unavailable because prosecution is precluded from proving nature of prior conviction by evidence outside record); *People v Gonzales* (2005) 131 CA4th 767, 32 CR3d 172 (rejecting claim that *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 203, 124 S Ct 1354, and *Shepard v U.S.* (2005) 544 US 13, 161 L Ed 2d 205, 125 S Ct 1254, precluded admitting evidence of preliminary hearing transcript as part of record of conviction of defendant's prior serious felony).

The testimony of a minor at the preliminary hearing is admissible at a dependency hearing (Welf & I C §300). Evid C

§1293; *In re Elizabeth T.* (1992) 9 CA4th 636, 12 CR2d 10.

Ø **Note:** A video recording of testimony at the preliminary hearing may be used in place of the preliminary hearing transcript. *People v Moran* (1974) 39 CA3d 398, 408, 114 CR 413 (case discusses procedural safeguards to follow before showing videotape to jurors). See also Pen C §§1335-1345 (conditional examinations), discussed in §11.25A.

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§8.48 XIV. PROCEDURE WHEN DEFENDANT'S MENTAL COMPETENCE IN DOUBT

When a magistrate doubts a defendant's mental competence, *i.e.,* whether the defendant is able to understand the nature of the criminal proceedings and to assist defense counsel in a rational manner (Pen C §1367), the magistrate must set the case for a hearing in the trial court on that issue before the preliminary hearing unless defense counsel requests a preliminary hearing (Pen C §1368.1(a)).

If a preliminary hearing is to be held, defense counsel may also demur and move to dismiss the complaint. Pen C §1368.1(a). Defense counsel can make a Pen C §1538.5 motion to suppress evidence at the preliminary hearing. Pen C §1368.1(a). If there is no holding order (commitment), no competence hearing is held and the defendant is discharged. *Hale v Superior Court* (1975) 15 C3d 221, 124 CR 57.

A defendant shown to have been incompetent during the preliminary hearing is entitled to a second hearing. The procedure to raise the issue is a nonstatutory motion to dismiss. The defendant bears the burden of showing incompetence before or during the preliminary hearing. *People v Duncan* (2000) 78 CA4th 765, 93 CR2d 173.

If the defendant is discharged after the preliminary hearing, the prosecutor's only option, if he or she thinks the defendant is mentally ill and should be hospitalized, is to invoke the Lanterman-Petris-Short Act (Welf & I C §§5000-5550), discussed in §§48.71-48.74.

> Ø **Note:** To avoid repetitive preliminary hearings, some prosecutors seek an indictment instead of refiling in a *Hale* (*Hale v Superior Court, supra*) situation.

For further discussion, see §48.15.

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9

GRAND JURY

DMITRY GORIN

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§9.1 I. OVERVIEW

Scope of chapter. This chapter is intended to give the practicing attorney a working knowledge of the state grand jury investigative and charging procedures. These procedures are sometimes inadequately understood because of confusion between trial juries and grand juries, and between the federal and state grand jury systems. For discussion of the federal grand jury system, see Brenner & Lockhart, Federal Grand Jury Practice (1996).

Purpose of grand jury. Operating in the county where it is impaneled, a grand jury investigates civil and criminal matters in proceedings closed to the public. A civil grand jury investigates the operation, management, and fiscal affairs of the county and the cities in the county. See §§9.26-9.30. A criminal grand jury has constitutional authority to indict a suspect after finding probable cause that he or she committed an offense. See §§9.6-9.25.

The grand jury process, including its selection, functions, and procedures, is largely defined in Pen C §§888-945. The prosecutor has broad discretion in deciding whether to proceed by indictment or by complaint and a preliminary hearing. See §9.7.

Presumptive validity of grand jury indictments. Counsel contemplating an attack on the validity of an indictment should consider the well-settled view attaching a strong presumption of regularity to grand jury indictments. See *Costello v U.S.* (1956) 350 US 359, 363, 100 L Ed 397, 403, 76 S Ct 406; *People v Yu* (1983) 143 CA3d 358, 191 CR 859; *People v Gordon* (1975) 47 CA3d 465, 120 CR 840. See the checklist of possible challenges to an indictment in §9.11.

Composition of grand jury. In most California counties, a grand jury consists of 19 citizens. Los Angeles County, which has a population of over 4 million, has 23-member grand juries. In a county with a population of 20,000 or less, a grand jury can have 11 members if the board of supervisors approves the smaller number. Pen C §888.2. The composition of the grand jury may be attacked on several grounds. See discussion in §9.5.

Procedure. The prosecutor presents the case to the grand jury in the form of testimony and other evidence and may answer questions that members of the grand jury have concerning the law. A grand jury is not supposed to receive evidence that would be inadmissible over objection at trial. However, even if the grand jury hears evidence that would be inadmissible at trial, the indictment is not void if there is sufficient competent evidence to support the indictment. Pen C §939.6(b).

Once the presentation of evidence is completed, the grand jury deliberates in secret. A 19-member grand jury may bring an indictment when 12 or more jurors conclude that the evidence presented establishes probable cause to believe that the accused committed the offense. A 23-member grand jury requires the concurrence of at least 14 jurors; an 11-member grand jury requires the concurrence of at least 8 jurors. Pen C §§888.2, 940. Probable cause is the same standard used by the magistrate at a preliminary hearing: whether the evidence would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1027, 13 CR2d 551; Pen C §939.8.

In limited circumstances, the prosecutor can tell defense counsel that an indictment has been returned before the client is arrested, to allow for voluntary surrender. See §9.24. Alternatively, the indicted defendant may be arrested on a bench warrant. Pen C §945.

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§9.2 II. CHART: DEADLINES

Action	Deadline	Authority
File indictment.	None, other than statute of limitations for that crime, and constitutional limitations.	Pen C §§799-805; US Const amend VI; Cal Const art I, §15.
Notify defendant of charge.	Bench warrant issued; no statutory limitations. Only constitutional limitations.	US Const amends V-VI; Cal Const art I, §15.
Deliver to counsel a copy of grand jury transcript.	To be delivered to county clerk within 10 calendar days after indictment is found. For good cause, judge may extend time by 20 calendar days. Court clerk must immediately deliver copies to prosecutor and defense counsel.	Pen C §938.1(a).

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III. SELECTION PROCESS FOR GRAND JURORS

§9.3 A. Method of Selection

The qualifications for grand jurors are similar to those for trial (petit) jurors. Grand jurors must be citizens of the United States, over 18 years of age, and residents of the county for at least 1 year immediately before being selected. They must be in possession of their natural faculties, of ordinary intelligence, sound judgment, and fair character. They must also be "possessed of sufficient knowledge of the English language." Pen C §893(a)(3).

A person is incompetent to serve on the grand jury if he or she is serving on a trial jury in any court of this state, has been discharged as a grand juror within 1 year, has been convicted of malfeasance in office or any felony or other high crime, or is serving as an elected public officer. Pen C §893(b). Investigators from the district attorney's office may make preliminary determinations of the basic qualifications of potential grand jurors to assist the grand jury commissioner and superior court judge, who remain free to give any weight they wish to the investigation results in selecting grand jurors. See *People v Thornton* (2007) 41 C4th 391, 412, 61 CR3d 461.

The grand jury is selected at least once each year. Cal Const art I, §23; Pen C §901(a).

Once the grand jury is selected, its members serve until the end of the fiscal or calendar year (Pen C §905.5) or until after the completion of the business before the court (*People v Leonard* (1895) 106 C 302, 319, 39 P 617). After impanelment, the grand jury's duties are outlined by a superior court judge (Pen C §§914, 914.1), usually the presiding judge. At this time the presiding judge also appoints a foreperson. Pen C §912. Each grand jury determines its own rules of proceeding and elects any other officers it feels are necessary. Pen C §916.

Grand jurors serve 1-year terms usually beginning on July 1. In most counties a grand jury pool is selected by the judges of the county's superior court, and this pool (between 25 and 40 persons—Pen C §904) is then reduced by lot to the correct number (see §9.1), with those not selected remaining as potential alternates for the balance of the term of that grand jury.

The composition of either the pool or the final grand jury is subject to Sixth Amendment challenge on the ground that its membership does not represent a fair cross-section of the community. Courts have adopted various procedures (including actively seeking volunteers from identifiable groups that might not be included in lists of those selected exclusively through the nomination process) to minimize disproportionate membership. On challenging the composition of the grand jury, see §9.5.

Although most counties follow these procedures in selecting grand juries, there is a statutory alternative. The superior court may have the jury commissioner furnish the judges with a list of persons qualified to serve as grand jurors. Pen C §903.1. This list must be proportionate to the county's various wards, judicial districts, and supervisorial districts. Pen C §899. This list may apparently be drawn from the petit jury rolls. See Pen C §903.1. The superior court judges then examine the jury list and select the persons that a majority feels should be selected for grand jury duty. Pen C §903.3. The judges are not limited to names on the list; they may select any individuals in the county who would be suitable and competent grand jurors. Pen C §903.4.

The presiding judge of the superior court, or the judge appointed by the presiding judge to supervise the grand jury, may also impanel an additional grand jury. Pen C §904.6(a).

Ø **Note:** In Los Angeles County, the presiding judge of the superior court, or the judge appointed by the presiding judge to supervise the grand jury, may direct the impanelment of up to two additional grand juries. Pen C §904.8.

Members of this additional grand jury must be selected at random from the list of trial jurors. Pen C §904.6(b), (e). If impaneled, the additional grand jury has the sole jurisdiction to return indictments, except for any matters that the regular grand jury is already looking into when the second grand jury is impaneled. Pen C §904.6(d). The Attorney General may petition the court to convene a third "special grand jury" when public interest requires, to investigate Medi-Cal fraud. Pen C §923.

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§9.4 B. Staggered Terms; Holdovers

The superior court may stagger the terms of grand jurors so that half begin a 1-year term on July 1 and the remaining half begin a 1-year term on January 1. Pen C §908.2. This method provides that at any particular time at least half of the members of the grand jury will be experienced, and thus in a position to assist in orientation of new members.

The superior court can hold over up to 10 grand jurors, with their consent, to serve on a subsequent grand jury. Pen C §901(b).

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Source: Criminal Law/California Criminal Law Procedure and Practice/9 GRAND JURY/§9.5 C. Challenges to Composition of Grand Jury

§9.5 C. Challenges to Composition of Grand Jury

In most counties, grand juries are selected by superior court judges. See Pen C §§903.1-904.6. To pass constitutional muster, grand juries must represent a fair cross-section of the community. US Const amends VI, XIV; Cal Const art I, §16. But see *People v Carrington* (2009) 47 C4th 145, 177, 97 CR3d 117 (noting that neither California Supreme Court nor U.S. Supreme Court has held that Sixth Amendment requirement for fair cross-section of community that applies to petit jury also applies to grand jury). There is no requirement that a grand jury mirror exactly the diversity of the county in which it sits. The selection process, however, must be free from "purposeful discrimination." *People v Newton* (1970) 8 CA3d 359, 388, 87 CR 394. Defense counsel may consider a challenge to the grand jury if a cognizable, distinct group is underrepresented in its membership.

Challenges to grand jury composition may be based on:

- Intentional discrimination in violation of the right to equal protection (*Vasquez v Hillery* (1986) 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (grand jury); *Batson v Kentucky* (1986) 476 US 79, 84, 90 L Ed 2d 69, 79, 106 S Ct 1712 (petit jury)); or
- Nonpurposeful exclusion that results in the absence of a fair cross-section in violation of the Sixth Amendment right to trial by an impartial jury, and in violation of due process (*Duren v Missouri* (1979) 439 US 357, 364, 58 L Ed 2d 579, 587, 99 S Ct 664; *People v Corona* (1989) 211 CA3d 529, 536, 259 CR 524; but see *People v Carrington* (2009) 47 C4th 145, 177, 97 CR3d 117).

The rules are the same for grand juries as for petit juries (*Carter v Jury Comm'n* (1970) 396 US 320, 330, 24 L Ed 2d 549, 557, 90 S Ct 518; *People v Newton* (1970) 8 CA3d 359, 388, 87 CR 394), and are the same for the State of California as for the federal courts (*Carter v Jury Comm'n, supra*).

The defendant has standing to challenge the composition of the grand jury even if he or she is not a member of the allegedly underrepresented group. *Campbell v Louisiana* (1998) 523 US 392, 140 L Ed 2d 551, 118 S Ct 1419 (white defendant has standing to assert equal protection rights of black persons not to be excluded from grand jury service on racial grounds); *Peters v Kiff* (1972) 407 US 493, 33 L Ed 2d 83, 92 S Ct 2163 (defendant has personal due process claim based on racial discrimination in selection of grand jurors); *People v Estrada* (1979) 93 CA3d 76, 95 n15, 155 CR 731.

The challenge is made in the superior court through a motion to quash the indictment. *Vasquez v Hillery* (1986) 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (defendant had made unsuccessful motion to quash indictment in California superior court; U.S. Supreme Court reversed because of systematic exclusion of African-Americans from grand jury).

Ø **Note:** The challenge in the trial court is *not* made as a Pen C §995 motion, because extensive evidence must be taken, and §995 review is almost always based exclusively on the record of the grand jury proceedings. On §995 motions and procedures, see chap 13.

At the hearing on the motion, the defense first puts on evidence to prove a prima facie case. See *People v Navarette* (1976) 54 CA3d 1064, 127 CR 55 (discussion of evidence presented in support of motion based on underrepresentation of women). The defense commonly relies on census figures to show what percentage of the county's population belongs to the underrepresented group and on testimony from the jury commissioner to show what criteria are used and how they are applied.

Ø **Note:** Unlike most of the issues subject to litigation in criminal cases, jury composition challenges involve heavy research on demographics, and occasionally on community attitudes. Such a challenge requires counsel to be familiar with the U.S. Census, the manner in which a census is conducted, the way census figures are updated, and the way the state, counties, and local governments, as well as components of private demographic research concerns, formulate population estimates. The evidence produced at a hearing on a jury composition challenge may be quite sophisticated: A party may try to introduce the fruit of a countywide special census conducted just for the case in question. More often, parties will rely on comparisons of updated census figures

with specific research conducted on the demographics of jury-eligible persons in a given community. Reference materials on jury composition challenges should be consulted.

The procedures for challenging the composition of a grand jury mirror those used to establish purposeful racial discrimination in the exercise of peremptory challenges during selection of the petit jury. See *Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712. If the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut it. *Castaneda v Partida* (1977) 430 US 482, 494, 51 L Ed 2d 498, 510, 97 S Ct 1272; *People v Brown* (1999) 75 CA4th 916, 89 CR2d 589 (prosecution rebutted prima facie case based on historical exclusion of ethnic Chinese and Hispanic forepersons).

To prove a prima facie case in the trial court, a defendant must show that the selection procedure has resulted in substantial underrepresentation of an identifiable group over a period of time, and that the selection procedure is either not neutral on its face or susceptible to abuse. *Castaneda v Partida* (1977) 430 US 482, 494, 51 L Ed 2d 498, 510, 97 S Ct 1272 (grand jury). See also *Duren v Missouri* (1979) 439 US 357, 364, 58 L Ed 2d 579, 587, 99 S Ct 664 (petit jury); *People v Bell* (1989) 49 C3d 502, 525, 262 CR 1 (petit jury).

There are two different standards on appeal. Intentional racial discrimination in the selection of grand jurors renders the conviction reversible per se. *Vasquez v Hillery, supra; Castaneda v Partida, supra; People v Carrington* (2009) 47 C4th 145, 178, 97 CR3d 117. Other violations of the fair-cross-section requirement are subject to reversal only on a showing of prejudice. *People v Carrington, supra*.

Several different methods are available for analyzing the procedures a county uses to select the panel of prospective grand jurors. For discussion, see Sperlich & Jaspovice: *Methods for the Analysis of Jury Panel Selections,* 6 Hastings Con LQ 787 (1979); Kairys, et al., *Jury Representativeness,* 65 Cal L Rev 776 (1977). While a 14-percent absolute disparity was deemed constitutionally significant (*Alexander v Louisiana* (1972) 405 US 625, 630, 31 L Ed 2d 536, 541, 92 S Ct 1221), a 10-percent disparity was deemed inadequate to make a prima facie showing of discrimination (*Swain v Alabama* (1965) 380 US 202, 208, 13 L Ed 2d 759, 766, 85 S Ct 824, overruled on other grounds in *Batson v Kentucky* (1986) 476 US 79, 101, 90 L Ed 2d 69, 90, 106 S Ct 1712). In calculating disparity, only the portions of the population that possess the minimum statutory requirements for service should be measured. *People v Bell* (1989) 49 C3d 502, 529, 262 CR 1.

Motions attacking the composition of the grand jury are necessarily complicated and voluminous. A skeletal form is reproduced in California Criminal Law Forms Manual §9.1 (2d ed Cal CEB 2005). Such motions have been made in California counties, and defense counsel can obtain information on locating and obtaining copies through California Attorneys for Criminal Justice, 1225 Eighth St., Suite 150, Sacramento, CA 95814; (916) 448-8868; (916) 448-8965 (fax); http://www.cacj.org. Prosecutors can obtain information through California District Attorneys Association, 731 K St., 3rd Floor, Sacramento, CA 95814; (916) 443-2017; http://www.cdaa.org.

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IV. GRAND JURY PROCEDURES IN CRIMINAL CASES

§9.6 A. Origin of Grand Jury [Deleted]

The material in this section has been deleted.

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§9.7 B. Differences Between Grand Jury and Preliminary Hearing

Prosecutors may initiate a criminal action either by filing a complaint before a magistrate (for both misdemeanors and felonies) or a grand jury indictment in the superior court. Cal Const art I, §14; Pen C §§737-740, 889, 949. If a felony is charged by complaint, a preliminary hearing is required unless it is waived by both parties. If a felony is prosecuted by indictment, there is no right to a postindictment preliminary hearing. Cal Const art I, §14.1.

Grand jury proceedings are secret, unless a public session of the grand jury is requested by both the prosecutor and the jury foreperson and approved by the court. See Pen C §939.1. The only persons who may be present during a grand jury criminal hearing are members of the grand jury, the prosecutor (Pen C §935), witnesses when actually being questioned, a court reporter (see Pen C §938), an interpreter if such services are necessary to assist the grand jury in understanding the testimony of a witness or who is needed by a grand juror who has a sight, hearing, or speech disability (see Pen C §§937, 939.11), and a custodial officer of a prisoner-witness testifying before the grand jury (Pen C §939). It is within the prosecutor's discretion to permit a support person to accompany a minor or dependent person (see Evid C §177 ("dependent person" defined)) into the grand jury when the minor or dependent person is testifying in specified crimes, including child abuse, molestation, and prostitution. See Pen C §939.21 for complete list. The witness has free choice of the support person, except that the support person may not be a witness in the same proceeding or a newsperson. The foreperson must admonish the support person not to reveal the testimony or to prompt or influence the witness.

Unless testifying as a witness, the accused may not be present during any portion of the grand jury proceeding. Counsel for an accused or a witness may not be present. See *Farnow v Superior Court* (1990) 226 CA3d 481, 484, 276 CR 275, for a review of the secrecy aspects of a grand jury and who may attend a session.

Generally, hearsay evidence that would be inadmissible during trial may not be presented to a grand jury. See Pen C §939.6. However, sworn testimony of certain law enforcement officers reporting out-of-court statements by third parties is admissible. Note the "harmless error" rule found in Pen C §939.6(b), discussed in §9.23.

Preliminary hearings, however, are held in the superior court and are usually open to the public. Pen C §§867-868, 868.7. See also §§14.12, 8.21-8.23. The preliminary hearing is presided over by a superior court judge sitting as a magistrate. The defendant and his or her attorney are present, and the case is presented by the prosecutor. Witnesses called by the prosecutor are subject to cross-examination by defense counsel, who may also call witnesses to testify on the defendant's behalf. If the magistrate concludes that sufficient evidence has been presented to believe that the person charged committed the crimes, that person is held to answer in the superior court, and the prosecutor then files an information in the superior court. Pen C §737.

> Ø **Practice tip:** Although a prosecutor may amend an information by adding new charges based on evidence adduced at the preliminary hearing, he or she is prohibited from adding charges to an indictment. The prosecutor may, however, cure technical defects and add prior convictions to an indictment. See Pen C §§969a, 1009; *Owen v Superior Court* (1976) 54 CA3d 928, 127 CR 1.

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Source: Criminal Law/California Criminal Law Procedure and Practice/9 GRAND JURY/§9.8 C. Types of Cases Prosecutor Is Most Likely to Bring to Grand Jury; Prosecution Safeguards in Presenting Case

§9.8 C. Types of Cases Prosecutor Is Most Likely to Bring to Grand Jury; Prosecution Safeguards in Presenting Case

Cases that prosecutors are most likely to bring by way of indictment. Many district attorneys consider the following factors when deciding whether a case is appropriate for presentation to a grand jury:

- The preliminary hearing was unreasonably delayed.
- There are complicated factual issues, multiple counts, or multiple defendants.
- Official misconduct or corruption is involved.
- The crimes were committed by members of organized criminal organizations or groups.
- There is a need to temporarily protect the identity of a victim or witness. For example, when jailed cooperating individuals, witnesses in a witness protection program, or undercover police are involved, grand jury proceedings may postpone disclosure.
- The case could potentially generate publicity prejudicial to a fair trial.
- Indictment may be needed to prevent the flight of a defendant from the jurisdiction, or to assist in the extradition of an accused from another jurisdiction.
- The prosecutor wishes to question a reluctant witness, evaluate the presentation of an important witness, or pin down a witness's testimony.
- The prosecutor wants to add one or more defendants to a pending case to avoid multiple trials.
- Victims or witnesses need protection from the emotional trauma of multiple cross-examinations or being in the defendant's presence.

Prosecution safeguards in presenting case to grand jury. There are several specific safeguards that a prosecutor can use to present a clear and concise case to the grand jury, obtain an indictment, and protect the indictment from subsequent defense challenges in superior court:

- Establish an adequate foundation for any hearsay that can properly be admitted under an exception to the hearsay rule. See Pen C §939.6(b)-(c). For example, with evidence admissible under the business records exception, the prosecutor may bring in the custodian of records or other person qualified to testify to the preparation and maintenance of the records, or may submit an affidavit including the necessary foundational information.

  Ø **Warning:** Testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. *Crawford v Washington* (2004) 541 US 36, 53, 158 L Ed 2d 177, 194, 124 S Ct 1354. *Crawford* restricts the admissibility of testimonial hearsay, including grand jury testimony sought to be admitted at trial. *Crawford* also impacts hearsay exceptions in the Evidence Code such as Evid C §§1231 (statements of deceased witnesses in gang crimes), 1253 and 1360 (statements of victims under 12), and 1360-1380 (statements in domestic and elder abuse prosecutions). See, *e.g., People v Pirwani* (2004) 119 CA4th 770, 786, 14 CR3d 673 (Evid C §1380 held unconstitutional on its face). After *Crawford*, a prosecutor should avoid presenting hearsay statements to a grand jury that will be inadmissible at trial.

- Exercise self-control in asking questions. Because there is no defense attorney present, the prosecutor should be careful not to lead a witness or elicit inadmissible evidence. When a witness is slow to answer (or to think), it is easy to lapse into leading questions to prompt an answer. Avoid the temptation.
- When appropriate, use charts or other demonstrative evidence that will keep the grand jurors' interest. Grand jurors, like petit jurors, respond to an entertaining presentation. They also appreciate the prosecutor's efforts to simplify their task. Charts and diagrams are often effective in making a case more easily understood but can be confusing to someone reading the record. Be sure that testimony referring to any charts or photos accurately identifies each exhibit and the portion of the exhibit the witness is testifying about. Identify the charts and other materials as they would be identified in court.

- To preclude a subsequent defense attack on the indictment, be sure to present all potentially exculpatory evidence to the grand jury. See Pen C §§939.7, 939.71(a); *Johnson v Superior Court* (1975) 15 C3d 248, 124 CR 32; *Berardi v Superior Court* (2007) 149 CA4th 476, 490, 57 CR3d 170. If the defense could call the evidence exculpatory under any reasonable theory of the case, it is best to present it at the indictment hearing or, at the very least, make the grand jury aware that this evidence exists, so that they may ask to view it if they so desire.
- Carefully select and word the charges in the indictment. See Pen C §1009 (limits to amendment of accusatory pleading).
- Ensure that *all* participants in grand jury proceedings are administered oaths and advised about their duties and responsibilities, including the court reporter, members of the grand jury, witnesses, interpreters, custodial personnel, and any support person for a minor. Pen C §911.
- Verify that only authorized persons are present during grand jury proceedings. Pen C §§934-939.11, 939.21.
- Provide all required legal instructions to the grand jury. Although the prosecutor is not required to instruct the grand jury on the law in the same way a trial judge must instruct a petit jury, the prosecutor must explain the legal principles necessary to enable it to fulfill its charge and must provide accurate legal advice in response to the jury's inquiries. See *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1034, 13 CR2d 551 (prosecutor not required to instruct on lesser included offenses but must give correct advice in response to questions); *People v Gnass* (2002) 101 CA4th 1271, 1305, 125 CR2d 225 (prosecutor's misleading instructions required court to set aside indictment); *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829 (defendant challenging sufficiency of indictment may rely on instructions and advice given by prosecutor).
- Ensure that *all* communications with the grand jurors and witnesses, including questions, advisements, argument, and instructions, are placed on the record. See Pen C §938; *Dustin v Superior Court* (2002) 99 CA4th 1311, 122 CR2d 176 (capital indictment dismissed when prosecutor ordered court reporter to leave while he made opening and closing statements (see Pen C §190.9)); *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829 (in mandate proceeding seeking to dismiss indictment, appellate court upheld trial court's order to produce nontestimonial portions of grand jury proceedings, including all communications between the prosecutor and the grand jury, the prosecutor's opening and closing statements and argument, all responses to the jury's requests for read-backs of testimony, and the trial court's answers to jurors' questions). See also *People v Bennett* (2009) 45 C4th 577, 590, 88 CR3d 131.
- Be careful not to compromise the grand jury's ability to reach a determination independently and impartially. See *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1032, 13 CR2d 551; *People v Backus* (1979) 23 C3d 360, 152 CR 710; *People v Superior Court (Mouchaourab), supra*.

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§9.9 D. Indictment of Minor

A minor, tried as an adult under Welf & I C §§707-708, may be prosecuted by indictment or by filing an information after a preliminary hearing. *Guillory v Superior Court* (2003) 31 C4th 168, 1 CR3d 879.

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§9.10 E. Indictment for Misdemeanor Offenses

In *People v Lukenbill* (1991) 234 CA3d Supp 1, 285 CR 461, the Appellate Department of the San Francisco Superior Court held that a grand jury may not indict for a misdemeanor offense. This decision rests on questionable authority: a line of cases decided in the late 1800s before the enactment of Pen C §§889 and 917. These provisions allow the grand jury to return an indictment for any public offense. Under Pen C §§15-16, "public offense" includes misdemeanors and infractions. Furthermore, Pen C §951 contains specific language stating that an indictment can charge a misdemeanor.

However, although there is a strong argument that a grand jury has the power to indict for a misdemeanor, in practice the grand jury is used almost exclusively in felony cases.

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F. Role of Counsel in Representing Witness or Potential Defendant

§9.11 1. Checklist: Challenges to Indictment

The following are among the potential issues that defense counsel might want to consider in making a challenge to the indictment process:

- Error in the superior court's charge to the grand jury regarding its duties and responsibilities. See Pen C §§914-914.1.
- The indictment's failure to have the concurrence of 12 grand jurors. *Stern v Superior Court* (1947) 78 CA2d 9, 177 P2d 308.
- Error in the process of selecting grand jurors. See §9.3.
- The grand jury's reliance on inadmissible or irrelevant evidence. Pen C §939.6; *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 424, 92 CR2d 829.
- Failure to inform the grand jury of exculpatory evidence. Pen C §§939.7, 939.71(a); *Johnson v Superior Court* (1975) 15 C3d 248, 124 CR 32; *Berardi v Superior Court* (2007) 149 CA4th 476, 490, 57 CR3d 170.
- Improper or inadequate instructions on the law by the prosecutor. See *Cummiskey v Superior Court* (1992) 3 C4th 1018, 13 CR2d 551; *People v Gnass* (2002) 101 CA4th 1271, 1305, 125 CR2d 225; *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 424, 92 CR2d 829; *People v Haskin* (1976) 55 CA3d 231, 241, 127 CR 426.
- The presence of unauthorized persons in the grand jury hearing room. See Pen C §§934-935, 937-939; *People v Rojas* (1969) 2 CA3d 767, 82 CR 862.
- Failure to properly record grand jury proceedings. See Pen C §938; *Dustin v Superior Court* (2002) 99 CA4th 1311, 122 CR2d 176 (dismissal of indictment in death penalty prosecution when prosecutor's opening and closing remarks to grand jury were not recorded); *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829 (production ordered of nontestimonial portions of grand jury proceedings, including transcripts of argument, and answers to questions and requests, as well as the read-back of witness testimony).
- Prosecutor's compromising "the grand jury's ability to reach a determination independently and impartially." *Cummiskey v Superior Court* (1992) 3 C4th 1018, 13 CR2d 551; *People v Backus* (1979) 23 C3d 360, 393, 152 CR 710; *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 430, 92 CR2d 829.
- Variance in prosecution's theory and/or charges from language in indictment in violation of Fifth Amendment right to be charged by grand jury. Pen C §1009 (prohibition on adding charges to the indictment).

A successful challenge will not preclude a subsequent attempt by the prosecutor to cure any error. The challenge may, however, result in procedural changes by either the prosecutor or the superior court, or may discourage prosecutors from using a grand jury indictment as a method of initiating a criminal prosecution.

See §13.22 for discussion of raising grand jury errors by Pen C §995 motion. Defense challenges to the indictment are best made pretrial, rather than on appeal following a conviction, due to a lower standard of proof required for a successful challenge. See *People v Becerra* (2008) 165 CA4th 1064, 1070, 81 CR3d 348.

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Source: Criminal Law/California Criminal Law Procedure and Practice/9 GRAND JURY/§9.12 2. Preparing Witnesses, Deciding Whether Privileges Apply, and Negotiating Immunities

§9.12 2. Preparing Witnesses, Deciding Whether Privileges Apply, and Negotiating Immunities

When counsel is asked to represent a witness called to testify before the grand jury, counsel should contact the prosecutor to find out whether the witness is under investigation or is being called to testify concerning another person. Counsel for a person under investigation (*i.e.,* a "target") may advise the witness to testify (unusual) or to refuse to testify, based on the self-incrimination privilege (US Const amend V; Cal Const art I, §17).

If the subject of the investigation is called to testify, some prosecutors advise the subject of his or her status and rights before asking questions. A warning relating to self-incrimination is not required, because answering questions before a grand jury does not amount to police custodial interrogation. *U.S. v Mandujano* (1976) 425 US 564, 48 L Ed 2d 212, 96 S Ct 1768. But see *U.S. v McKenna* (9th Cir 2003) 327 F3d 830 (discussion of "perjury trap" defense).

A grand jury witness should be vigorously and strongly admonished to tell the truth and not evade or prevaricate, even when immunized. It is better that the witness refuse to answer and confer with counsel. "Fudging" is likely to make a case for the prosecution in addition to the one under investigation.

If a witness is not the target of the grand jury's inquiry, counsel for the witness should consider seeking to elicit from the prosecutor whether the witness nonetheless has any criminal exposure. If there is the slightest doubt about exposure, the prudent course is to negotiate immunity. Statutory "use" immunity is provided in Pen C §1324 for felony matters. However, the prosecutor is authorized to seek broader protection (*e.g.,* transactional immunity) from the court. Consideration of the adequacy of immunity concerning other states and sovereigns (federal, extraterritorial) should be reviewed. For further discussion of immunity, see chap 49.

A witness before the grand jury does not lose statutory privileges (except self-incrimination, if granted immunity). Evidence Code §300 states that the Evidence Code is inapplicable to grand jury proceedings, but Pen C §939.6 and Evid C §910 expressly apply the Evidence Code to privileged matters before the grand jury. Regardless of the prosecutor's response, careful inquiry of the witness should be made and consideration given to all applicable privileges. See Evid C §§930-1070 for statutory privileges. For further discussion of these privileges, see California Trial Objections, chaps 33-51 (Cal CEB Annual). Counsel may wish to consider whether any federal or California constitutional rights (*e.g.,* privacy) may also apply. Counsel also should be well informed on the exceptions to the privilege, *e.g.,* "crime-fraud," in case the witness pursues an illegal course.

Consideration must also be given to who is the holder of the privilege. An absent, nontestifying person may hold the privilege. For example, an attorney who is a grand jury witness is not the holder of the client's privilege for attorney-client communication; the attorney cannot waive it for the client. See Evid C §912. The holder or joint holder (in the case of a corporation, trustee, or receiver) may have a right to intervene. See *Commodity Futures Trading Comm'n v Weintraub* (1985) 471 US 343, 85 L Ed 2d 372, 105 S Ct 1986 (corporation's former counsel asserted attorney-client privilege in CFTC formal investigation; trustee of corporation in bankruptcy is holder of privilege and has power to waive privilege on communications that took place prebankruptcy, in face of opposition by former director, officers, and shareholders); *Upjohn Co. v U.S.* (1981) 449 US 383, 394, 66 L Ed 2d 584, 594, 101 S Ct 677 (extends attorney-client privilege beyond corporate "control group"); *Hugle v U.S.* (9th Cir 1985) 754 F2d 863, 865 (marital privilege applies to grand jury testimony; nonsubpoenaed, absent spouse may intervene to assert privilege).

A grant of immunity applies only to the privilege against self-incrimination. Counsel should therefore carefully instruct witnesses about other applicable privileges. Often, the most effective way to avoid waiver problems is to instruct the witness that if a privileged area, *e.g.,* any conversations with a spouse or with an attorney, is at all touched on, the witness should ask to consult with counsel before answering. Great care should be taken to ensure that the witness does not waive any applicable privileges. See generally chap 51 on representing witnesses.

> Ø **Note:** Defense counsel should be aware of the potential dangers of advising *nonclients* subpoenaed to testify before the grand jury. In at least one such instance, prosecutors charged the attorney with witness-tampering for advising a witness, among other things, to seek immunity before testifying and not to volunteer any information when testifying. See Leland, *Just Doing His Job,* 4 Cal Law 10 (Nov. 1984).

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§9.13 3. Representation While Witness Is Testifying

A person is called to testify before the grand jury by being served with a subpoena. See Pen C §939.2. Failure to appear is punishable by contempt. See Pen C §1331; chap 58 on contempt.

A person who is being investigated is not entitled to have counsel present before the grand jury. See *People v Dale* (1947) 79 CA2d 370, 376, 179 P2d 870. Similarly, a person subpoenaed to appear as a witness is not entitled to have counsel present during his or her testimony before the grand jury. See *Farnow v Superior Court* (1990) 226 CA3d 481, 276 CR 275. Although counsel cannot be present in the grand jury hearing room while the client is being questioned, counsel can instruct the client to request a brief recess to consult with counsel outside the grand jury room, *e.g.,* when the client is asked a difficult or surprise question, or believes that privileged information is being solicited. If either the prosecutor or the grand jury objects to such a procedure, counsel might instruct the client not to answer such questions, placing on the record the legal objections to the questions. A simple refusal may not suffice for later court proceedings.

In such a situation, to maintain a record of needing legal advice, a witness should be instructed to respond:

I need to consult with my counsel regarding my legal rights.

A bare "I refuse to answer" (or "Let me see what my lawyer says") is not as precise as needed. Writing out the objection for the witness to read is the safest procedure. The prosecutor or grand jury may then have the client brought before a superior court judge for possible contempt proceedings. See chap 58. Counsel can then represent the witness before the court, and has an opportunity to explain to the judge that the prosecutor was asked to allow the witness to consult with counsel before answering the question, and ask the court to order the prosecutor to follow that procedure. Even if the court rules against the witness, counsel will have had an opportunity to discuss the pending questions with the client before the client is required to answer before the grand jury.

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§9.14 4. Defense Counsel Preparation

Representing witnesses before a grand jury requires attention to an array of issues. See Klieman & Thomas, National Lawyers Guild. Representation of Witnesses Before Federal Grand Juries (4th ed 1999), and Brenner & Lockhart, Federal Grand Jury Practice (1996). Although these books specifically discuss practice involving federal grand juries, there are sufficient similarities with state grand juries to provide counsel with a basic approach to issues involved in representing a witness or a subject of a state grand jury inquiry.

If the witness was previously interviewed by the prosecution or its agents, or previously testified before a grand jury or administrative body, the witness will need to review prior statements before testifying before the grand jury. Besides general fairness to the witness, review avoids subjecting him or her to the possibility of a "perjury trap" because of prior statements. *Bursey v U.S.* (9th Cir 1972) 466 F2d 1059, 1080, overruled on another ground in *In re Grand Jury Proceedings* (9th Cir 1988) 863 F2d 667, 670. See also *U.S. v Chen* (11th Cir 1991) 933 F2d 793.

If the prosecution is seeking production of documents, determine whether the "act of production" may be incriminating within the meaning of the Fifth Amendment privilege against self-incrimination to ascertain whether immunity is needed. Although the contents of records subpoenaed by a grand jury are not privileged under the Fifth Amendment, the act of producing the records may involve testimonial self-incrimination if the government has no previous knowledge of the records' existence or whereabouts. See *U.S. v Hubbell* (2000) 530 US 27, 34, 147 L Ed 2d 24, 35, 120 S Ct 2037; *U.S. v Doe* (1984) 465 US 605, 610, 79 L Ed 2d 552, 559, 104 S Ct 1237.

Counsel should review the procedures for preparing a "Privilege Log": Set up a system for gathering the documents to ensure compliance with the subpoena. Establish a "Bates numbering system," which also establishes the date of production. Never allow documents to be turned over to the grand jury (or law enforcement agents) without retaining a numbered copy. If any documents sought are subject to a privilege, move to quash or modify in advance rather than waiting to assert a ground for noncompliance before the grand jury. Motions to quash or modify subpoenas are discussed in §§4.32-4.35.

Many cases brought to a grand jury involve uncertain or conflicting factual situations or legal problems; the prosecutor will use the investigative powers of the grand jury to assist in determining whether a crime has been committed or whether a specific individual should be charged. In such cases, the prosecutor may invite a potential defendant to testify before the grand jury and may be willing to share crime reports with counsel representing the witness. If after examining these documents it appears to counsel to be in the client's best interest to testify, counsel may advise the client to do so. Counsel should carefully prepare the witness to testify because counsel cannot be present. Pen C §939; *People v Dale* (1947) 79 CA2d 370, 179 P2d 870.

Ø **Note:** Counsel should attempt to review with the prosecutor the line of questions to be asked before the grand jury and then appropriately advise his or her client.

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§9.15 5. Report That Witness Is Not Target

A person called as a witness to an investigation before the grand jury, but who is not the subject of the investigation, can request that a report or declaration be issued so stating at the completion of the investigation. Pen C §939.91(b).

If the witness is under investigation and the grand jury does not indict, a similar procedure is available. See Pen C §939.91(a).

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§9.16 6. Forcing Defense Counsel to Testify

Although fee agreements are privileged (see Bus & P C §6149), attempts to compel defense counsel to testify before the grand jury about fees paid or other details of the attorney-client relationship have become a problem in some jurisdictions. "The practice has been almost universally criticized by courts, commentators and the defense bar." *U.S. v Perry* (9th Cir 1988) 857 F2d 1346, 1347. See §9.12 on asserting the attorney-client privilege.

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§9.17 G. Right to Refuse to Testify

A defendant in a criminal case has a statutory privilege not to be called as a witness and not to testify. Evid C §930. When a grand jury hearing is held before a defendant is charged with a crime in either a complaint or an indictment, however, §930 does not apply. *In re Lemon* (1936) 15 CA2d 82, 59 P2d 213. Of course, a witness called to testify in front of a grand jury may still exercise the right against self-incrimination at the hearing (US Const amend V; Cal Const art I, §15), and that refusal cannot later be used against the witness in either a civil or criminal proceeding. Evid C §913; *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229; *Malloy v Hogan* (1964) 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489. For further discussion, see §9.13, chap 49 (immunity for testimony). See also California Trial Objections, chaps 46 (self-incrimination), 47 (defendant's right not to be called and not to testify) (Cal CEB Annual). Other privileges may also apply to all or portions of a witness's testimony. See §9.12.

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§9.18 H. Immunity and Contempt

A witness who asserts the privilege against self-incrimination in response to a question cannot be forced to testify without immunity. Pen C §§939.3, 1324. See *In re Critchlow* (1938) 11 C2d 751, 81 P2d 966. In addition, defense counsel can seek immunity for the client through informal discussions with the prosecutor before the client testifies. If a witness is granted immunity and still refuses to testify, he or she can be ordered to testify by a superior court judge. Failure to testify is contempt of court. Once held in contempt, a witness can be jailed until the grand jury finishes its investigation (up to 1 year or for a period between 7 and 18 months, depending on the interpretations given to Pen C §§901 and 908.2), or until the witness purges the contempt by testifying. CCP §1219(a); Pen C §166(a)(4); *In re Lemon* (1936) 15 CA2d 82, 59 P2d 213.

Contempt is also a misdemeanor (Pen C §§166(a)(4), 19) generally punishable with a maximum penalty of 6 months in jail, a fine not exceeding $1000, or both. If an immunized witness is likely to balk at testifying, the prosecutor should call him or her early in the life of the grand jury. This approach strengthens the court's coercive power to compel performance by increasing the possible incarceration time. In contrast, defense counsel should seek to have the witness immunized as late in the proceeding as possible.

If a witness is imprisoned under CCP §1219(a), counsel should, after 5 days, seek to obtain release under the theory that further incarceration will not cause the witness to comply. *In re Farr* (1974) 36 CA3d 577, 111 CR 649.

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§9.19 I. Presentation of Exculpatory Evidence by Prosecutor

When the grand jury has reason to believe that evidence "within its reach" will clear the defendant, it must order that the evidence be produced and may require the prosecutor to subpoena witnesses. Pen C §939.7. Furthermore, under Pen C §939.71(a), if the prosecutor is aware of exculpatory evidence, he or she must inform the grand jury of its nature and existence and must advise the grand jury of its duties under §939.7. If the prosecutor violates §939.71, and the violation causes "substantial prejudice," it is grounds for dismissal of the portion of the indictment related to that evidence. Pen C §939.71(a). See also *Johnson v Superior Court* (1975) 15 C3d 248, 124 CR 32; *People v Becerra* (2008) 165 CA4th 1064, 1070, 81 CR3d 348.

The traditional "reasonably probable" test applies to evaluate prejudice in determining if "a miscarriage of justice" occurred that warrants a dismissal of the indictment. Under this test, the court must consider the relative strengths and weaknesses of evidence supporting the probable cause finding, along with the undisclosed exculpatory evidence, to determine whether the record reflects a probability that an informed grand jury would not have found probable cause to indict. *Berardi v Superior Court* (2007) 149 CA4th 476, 492, 57 CR3d 170. On appeal, the "de novo" standard applies to review of the trial court's decision as to the validity of the indictment. *Berardi v Superior Court* (2007) 149 CA4th 476, 495, 57 CR3d 170.

Certain questions that may arise under Pen C §939.71 have not been definitively answered:

- What is exculpatory evidence? (Presumably, it will be as defined in *Johnson v Superior Court, supra;* see Pen C §939.71(b).)
- What duty, if any, does a prosecutor have to make inquiry to find the existence of exculpatory evidence? (See discussion in §2.43.)
- How does one determine the nexus of the evidence to a portion of the indictment?

Ø **Note:** When the grand jury is impaneled, the judge advises the panel that if it learns about the existence of any exculpatory evidence, it may order the prosecutor to subpoena witnesses and records that may negate the criminal allegations. Pen C §939.7. See *Cummiskey v Superior Court* (1992) 3 C4th 1018, 13 CR2d 551.

For an example of a request for the grand jury to consider exculpatory evidence, see California Criminal Law Forms Manual §9.3 (2d ed Cal CEB 2005).

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§9.20 J. Deliberations of Grand Jury

Once evidence of criminal acts has been presented to the grand jury, the prosecutor, the court reporter, and anyone else present who is not on the grand jury, must leave the grand jury room to allow the grand jury members to deliberate. Pen C §939. During deliberations, the grand jury may ask the reporter to reread testimony (see Pen C §938), or may ask the prosecutor or the presiding judge of the superior court for legal clarification (Pen C §934), but all actual deliberations must be done in privacy (Pen C §§934, 939).

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§9.21 K. Finding and Presenting Indictment

A grand jury may return an indictment on probable cause, *i.e.,* when the evidence presented, if unexplained or uncontradicted, would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. The standard of indictment set out in Pen C §939.8 (whether the evidence would warrant conviction by a trial jury) is no longer a correct statement of the law. *Cummiskey v Superior Court* (1992) 3 C4th 1018, 13 CR2d 551.

An indictment is approved on the affirmative vote of 12 or more jurors in a county with a 19-member grand jury, 14 or more in a county with a 23-member grand jury (*i.e.,* Los Angeles), and at least 8 in a county with an 11-member grand jury. See Pen C §940. Those voting must have heard all the evidence that was presented. *People v Fujita* (1974) 43 CA3d 454, 117 CR 757. Once an indictment has been found by the grand jury, the foreperson informs the prosecutor, and the indictment is presented to the superior court. The grand jury assembles in the courtroom, roll is taken, and the judge then asks the foreperson whether the grand jury has any business to bring before the court. The court is then advised by the foreperson that the grand jury has an indictment to deliver to the court. The court inquires whether the required number of jurors voted for the indictment. If so, the indictment must be endorsed as "A true bill," and the endorsement is signed by the foreperson of the grand jury. The court then orders the clerk to file it. See Pen C §944. The suggested form for an indictment is set out in Pen C §951.

Ø **Practice tip:** An indictment may supersede a pending complaint or information and may charge an offense that has been previously dismissed. *Sherwood v Superior Court* (1979) 24 C3d 183, 154 CR 917; Pen C §1387.

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§9.22 L. Bench Warrant, Commitment, Bail, and Release on Own Recognizance on Indictment

After an indictment has been presented, the court will ascertain whether the defendant is in custody. If not, the court will order that a bench warrant be issued. Pen C §§945, 979-984. If the defendant is in custody, the court will order the defendant brought before the court to be arraigned. Pen C §978. The court sets a bail amount, or notes that there is "no bail" on the warrant. See Pen C §815a. The grand jury itself is prohibited from recommending any bail amount. See Pen C §944. Any bail amount set at the time an indictment is returned is subject to review at the defendant's request. See Pen C §§1273-1275, 1289. The warrant is processed like any other bench warrant. See §§4.21-4.26 on bench warrants. Once arrested, the defendant is brought before the court for arraignment on the indictment. See Pen C §§889, 949. The defendant must be booked before being released on bail. Pen C §1284.

When the prosecutor contacts defense counsel before a bench warrant issues or is served, counsel may agree on own recognizance release, or on a particular bail amount. However, either a bench warrant or commitment must be issued. Pen C §168. See discussion in §9.24.

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§9.23 M. Admissibility of Evidence

With one exception, the rules of evidence applicable to criminal trials, including the hearsay rule, also apply in grand jury proceedings. Pen C §939.6(b). Although inadmissible at trial, a law enforcement officer's sworn testimony as to the out-of-court statements of third parties is admissible before the grand jury. Pen C §939.6(c). The officer must have at least 5 years' experience or have completed a certified training course in investigating and reporting cases and testifying at preliminary hearings. Pen C §939.6(c).

Otherwise, a grand jury may not receive evidence that would be inadmissible over objection at trial. The prosecutor must lay a proper foundation for the admission of documentary evidence and must meet all other requirements for introducing evidence. An indictment based on insufficient admissible evidence may be challenged by a Pen C §995 motion to dismiss. See *People v Backus* (1979) 23 C3d 360, 393, 152 CR 710 (indictment based on incompetent or irrelevant evidence may violate due process); *Cook v Superior Court* (1970) 4 CA3d 822, 84 CR 664 (count supported only by hearsay dismissed). See also *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354 (testimonial hearsay inadmissible unless declarant unavailable and defendant had opportunity to cross-examine); *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1022 n1, 13 CR2d 551; *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829.

Further, because a defendant has no opportunity to object to hearsay presented to a grand jury, it may be objected to for the first time in a Pen C §995 motion. *Dong Haw v Superior Court* (1947) 81 CA2d 153, 183 P2d 724.

Even if the grand jury heard evidence that would be inadmissible at trial, the indictment is *not* void if sufficient competent evidence to support the indictment was also presented to the grand jury. Pen C §939.6(b). See also *People v Olf* (1961) 195 CA2d 97, 15 CR 390.

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Source: Criminal Law/California Criminal Law Procedure and Practice/9 GRAND JURY/§9.24 N. Secret Indictment; Disclosure of Indictment and Testimony

§9.24 N. Secret Indictment; Disclosure of Indictment and Testimony

Disclosure of indictment. Members of the *grand jury* are prohibited from disclosing the fact of an indictment until the defendant has been arrested. Pen C §924. However, the prosecutor may disclose the existence of an indictment or a warrant to secure voluntary compliance or to assist in apprehending the defendant. Pen C §168(b)(1)-(2).

> Ø **Practice tip:** Whenever practicable, defense counsel should attempt to work out an arrangement with the prosecutor that permits the indicted defendant to voluntarily appear before the court and surrender for booking under Pen C §1284, as well as an advance agreement concerning bail or O.R. release, to minimize trauma to the client. Often, the prosecution and investigating officers will agree to a voluntary surrender, if only because it saves them time and extra work and allows orderly scheduling.

Disclosure of testimony by custodial officers. If a prisoner-witness is accompanied by a custodial officer before the grand jury, as is permitted by Pen C §939, no statute prohibits the officer from disclosing the testimony he or she hears, unless he or she is considered an officer of the court. The legislature covered disclosure only by grand jurors, reporters, court officers, and interpreters for a grand juror. Pen C §§911, 924.1-924.2, 939.11. The prosecution may want to ask the superior court to order the custodial officer to keep secret what he or she has heard, in concert with Pen C §939 and the general principle that grand jury proceedings are secret. See *Goldstein v Superior Court* (2008) 45 C4th 218, 85 CR3d 213; *McClatchy Newspapers v Superior Court* (1988) 44 C3d 1162, 1180, 245 CR 774; *Farnow v Superior Court* (1990) 226 CA3d 481, 276 CR 275.

Disclosure by grand juror. Grand jurors are generally prohibited from revealing information obtained in grand jury proceedings. Pen C §§924.1-924.6.

Disclosure of testimony by witness who appeared before grand jury. It is a common practice in California for the grand jury foreperson to admonish witnesses not to reveal questions, answers, or information the witness has learned about the nature or subject of the investigation without a court order. See, *e.g., San Jose Mercury News, Inc. v Criminal Grand Jury* (2004) 122 CA4th 410, 413, 18 CR3d 645. This admonition does not deny the defendant due process. *People v Mersino* (1965) 237 CA2d 265, 269, 46 CR 821. See also 66 Ops Cal Atty Gen 85 (1983) (grand jury has authority to admonish witnesses not to reveal questions asked and responses given before grand jury). Note, however, that "a prospective witness and a posttestifying witness under existing law are absolutely free to discuss what they knew preexisting to the hearing before the grand jury." *San Jose Mercury News, Inc. v Criminal Grand Jury* (2004) 122 CA4th 410, 416, 18 CR3d 645.

This admonition is a prior restraint on speech, and, if challenged *by the witness*, can be upheld only on a showing that "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest… ; (2) the order is narrowly drawn… ; and (3) less restrictive alternatives are not available." *Levine v U.S. Dist. Court* (9th Cir 1985) 764 F2d 590, 595 (citations omitted). See also *San Jose Mercury News, Inc. v Criminal Grand Jury, supra*. The U.S. Supreme Court invalidated a Florida statute prohibiting grand jury witnesses from ever disclosing their own testimony. *Butterworth v Smith* (1990) 494 US 624, 108 L Ed 2d 572, 110 S Ct 1376.

Witnesses may want to disclose their testimony to, *e.g.,* their own counsel, to counsel for others, or to journalists. Witnesses may want to preserve their recollection of their own testimony before the grand jury by writing it down after leaving the grand jury room to allow accurate repetition at trial. Whether witnesses can openly record their own testimony while in the jury room has not been litigated. See Pen C §891, which does not specifically answer this question.

Defense counsel who learns from a witness details of the testimony must consider whether use of the information is barred by any secrecy obligation imposed on the witness. Defense counsel may challenge prohibitions against witness disclosure in three ways:

- If the court's practice is to charge the grand jury to instruct the witnesses to keep their testimony secret, counsel can ask the court to delete that instruction. See *San Jose Mercury News, Inc. v Criminal Grand Jury* (2004) 122 CA4th 410, 415, 18 CR3d 645 (prior restraint on speech subject to strict scrutiny).

- The witness may reject the secrecy instruction when first appearing before the grand jury by raising the issue and its effective interference with the witness's right to representation by counsel and other applicable rights, *e.g.,* First Amendment rights. Defense counsel should prepare a script for the witness that says that the witness will testify truthfully, but will not keep secret what he or she says. If raised at the inception, the issue can be whether the witness must testify at all, and can force the matter into court on the spot.
- The witness can, after testifying, seek relief from the court from the instruction. Of course, if the witness violates the instruction, and contempt proceedings are taken, the order or instruction can be challenged in such proceeding. This practice raises a host of unnecessary problems and is not recommended. In addition, an earlier attack on the instruction as suggested above avoids any prosecution claim of waiver.

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§9.25 O. Transcript of Grand Jury Proceedings

The court reporter who records testimony presented to the grand jury must deliver a copy of the transcript of any hearing that resulted in an indictment to the superior court clerk within 10 calendar days after the return of the indictment. That deadline may be extended up to 20 calendar days. Pen C §938.1(a). The transcript is not open to the public until 10 calendar days after it has been given to defense counsel or the defendant. If the transcript is limited to the testimonial portions of the proceedings, the defendant is entitled to discover the nontestimonial portions in connection with a motion to dismiss under Pen C §995. *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829.

Thereafter, on its own motion or at the request of a party, the court may order all or part of the transcript sealed until completion of the defendant's trial. Pen C §938.1(b). Sealing must be based on facts demonstrating a "reasonable likelihood" that making the transcript (or part of it) public may prejudice the defendant's right to a fair and impartial trial. Pen C §938.1(b). In assessing sealing, a court must consider reasonable alternatives, such as change of venue or jury voir dire procedures.

The "reasonable likelihood" standard of Pen C §938.1(b) places a lesser burden on a defendant seeking to seal a grand jury transcript than the "substantial probability" standard that applies to public access cases under the First Amendment. See *Press-Enterprise v Superior Court (Press-Enterprise III)* (1994) 22 CA4th 498, 503 n2, 27 CR2d 708. The First District has concluded that the First Amendment right of access does not extend to postindictment grand jury transcripts at a §938.1 hearing and that a defendant seeking to seal a grand jury transcript until completion of trial need only establish prejudice under the lesser "reasonable likelihood" standard. *Alvarez v Superior Court* (2007) 154 CA4th 642, 653, 64 CR3d 854. For further discussion of access to grand jury transcripts, see chap 14.

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V. CIVIL GRAND JURY

§9.26 A. Scope of Inquiry

In addition to its criminal function, each regular grand jury has the power to investigate the operation, management, and fiscal affairs of the county and the cities within the county. Pen C §§925-925a. It may also look into all districts, joint power agencies, redevelopment agencies, special purpose assessing or taxing districts, and local agency formation commissions located partially or wholly within its county. Pen C §§925-925a, 933.1, 933.5. This examination may result in recommendations on the abolishment or creation of offices, or a change in the equipment used and the manner in which the duties of these agencies are performed. Pen C §928.

Ø **Note:** Some counties have established two grand juries, one for civil functions and the other for criminal cases. Pen C §904.6. The second grand jury does not have jurisdiction to carry out civil functions. 76 Ops Cal Atty Gen 181 (1993).

Persons called before the civil grand jury enjoy the same privileges, when applicable, as persons summoned to a criminal grand jury. On the privilege against self-incrimination, see §9.17. There are immense practical problems for a public official who asserts privileges not to testify, but the privileges exist.

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B. Accusations Against Local Officers

§9.27 1. Authority; Grounds

The grand jury has the authority to file an accusation against any locally elected or appointed public officer, charging that person with willful or corrupt misconduct in office. See Govt C §3060. The accusation must state the offense charged in ordinary and concise language (Govt C §3061), and must charge specific instances of misconduct. See *People v Harby* (1942) 51 CA2d 759, 125 P2d 874. The accusation may charge violation of a specific statutory duty. It may, but need not, cite the violation of a Penal Code section or a criminal ordinance. The accusation is processed as if it were a criminal case, and the allegation must be proved beyond a reasonable doubt. Govt C §3070. The sole consequence of a determination that an accusation is true is removal of the accused public officer from office.

The grand jury's accusation authority under Govt C §§3060-3074 is available against elected and appointed public officers of a general law county or city but may not be used against an employee of a charter city or county. Civil service removal procedures are the only way to remove employees of those jurisdictions from office. See *People v Hulburt* (1977) 75 CA3d 404, 142 CR 190 (removal from office of employee of charter county); *People v Bailey* (1916) 30 CA 581, 158 P 1036 (removal from office of employee of charter city).

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§9.28 2. Service of Accusation on Defendant

The grand jury procedures for deliberating on an accusation against a public officer are similar to those followed when the prosecutor asks for an indictment. Testimony is taken in secret, evidence is produced by the prosecutor, and the grand jury deliberates alone. See Pen C §939. The number of grand jurors who must concur in the indictment for it to be found and endorsed "a true bill" depends on the required number of members of the grand jury (Pen C §940):

- Twelve grand jurors are required to concur in counties in which the required number of grand jurors is 19.
- Fourteen grand jurors are required to concur in counties in which the required number of members of the grand jury is 23 (*i.e.,* Los Angeles).
- Eight grand jurors are required to concur in a county in which the required number of grand jurors is 11 (counties with a population of 20,000 or less).

After the grand jury returns an accusation, the foreperson delivers it to the prosecutor (unless the prosecutor is the public officer being accused). Govt C §3062. The prosecutor serves the defendant with a copy of the accusation and a written notice asking the defendant to appear in the superior court of the county, at a time stated in the notice, to answer the accusation. Govt C §3063. The original accusation is then filed with the court clerk. Govt C §3063. If an accusation has been returned against the county prosecutor, it is served on the prosecutor by someone who has been appointed to do so by a superior court judge. Govt C §3073.

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§9.29 3. Accusation; Trial Court Procedure

The defendant must appear in court at the time stated in the notice to answer the accusation. If the defendant fails to appear, the court may proceed to hear the evidence against the defendant in his or her absence. Govt C §3064. When the defendant does appear, he or she may (Govt C §§3065, 3069):

- Object to the legal sufficiency of the accusation;
- Deny the truth of the accusation; or
- Plead guilty to the accusation.

If the defendant denies the accusation, he or she has the right to a jury trial following the rules of evidence and procedure used in the trial of a felony criminal case. Govt C §3070. This means that the prosecutor must prove the case against the defendant beyond a reasonable doubt, and the defendant cannot be called to the stand by the prosecutor and made to testify against himself or herself.

If the defendant admits the accusation, the court must pronounce judgment that the defendant shall be removed from office. Govt C §§3069, 3072.

If the accusation is against the county prosecutor, the case is prosecuted by a special prosecutor appointed by the judge, by the prosecutor of a neighboring county, or by the Attorney General at the request of a superior court judge (Govt C §3073), usually the presiding judge.

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§9.30 C. Final Report

At the end of the fiscal or calendar year, the grand jury writes a report on the county government matters that it investigated, which must contain the grand jury's findings and recommendations. Pen C §933. The grand jury may also make interim reports on matters that it feels are particularly pressing. See Pen C §§925-925a.

The presiding judge must make sure that no part of the report exceeds the jurisdiction of the grand jury. See *McClatchy Newspapers v Superior Court* (1988) 44 C3d 1162, 245 CR 774 (court upheld superior court's decision to strike certain sections from proposed public report and to seal evidentiary materials that report sought to disclose).

The final report may then be given to county officers. Responses by governing boards and selected county officials must be submitted to the presiding judge. Pen C §933(b).

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VI. GRAND JURY'S SUBPOENA POWER

§9.31 A. Subpoena

Whether the grand jury is meeting in its civil capacity to investigate city or county government, in its criminal capacity to hear evidence and/or vote on an indictment, or in its quasi-criminal capacity to hear evidence of an accusation against a public officer, it has the power to ask both the prosecutor and the superior court to subpoena witnesses. Pen C §939.2. This request is generally granted, and a witness, or even a person who may be the subject of an investigation, can be subpoenaed to come before the grand jury. The questioning of these witnesses is usually done by the prosecutor, and is transcribed by a court reporter. A motion made in the superior court to modify or quash a subpoena may be made in advance of compliance.

The reach of a grand jury subpoena authorized by §939.2 is statewide. Attendance of out-of-state witnesses is specifically subject to Pen C §§1334-1334.6 (Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases) discussed in §4.29.

A subpoena is not necessary for a prisoner-witness who is incarcerated in state prison. Penal Code §2621 provides for issuance of an order by the superior court to produce the prisoner, with differing requirements, depending on the prisoner's geographical location.

A subpoena is not used to obtain a federal prisoner's appearance before the grand jury. A state writ of habeas corpus ad testificandum is the proper vehicle. Compliance by the federal government is discretionary, but the writs are usually honored. *Curran v U.S.* (D Del 1971) 332 F Supp 259.

A subpoena to federal employees or agencies presents procedural and jurisdictional problems. Procedures for Department of Justice employees are in 28 CFR pt 16. Departments and agencies have varying systems, some of which are hospitable to receipt of state process. See 5 USC §301; 44 USC §3101. If federal officers refuse to comply based on lawfully promulgated federal regulations, it is doubtful that the subpoena can be enforced. *U.S. ex rel Touhy v Ragen* (1951) 340 US 462, 95 L Ed 417, 71 S Ct 416; *Swett v Schenk* (9th Cir 1986) 792 F2d 1447, 1451.

Obtaining witnesses from out of the country requires seeking federal court assistance and presents difficult (and unadjudicated) questions.

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§9.32 B. Subpoena Duces Tecum

A subpoena duces tecum may be attacked in advance of compliance by a motion to quash in the superior court. Because of the secret nature of grand jury proceedings, any hearing on a motion to quash the subpoena may be closed, and documents filed in connection with the motion may be sealed, to the extent necessary to prevent disclosure of matters occurring before the grand jury. *Los Angeles Times v Superior Court* (2003) 114 CA4th 247, 251, 7 CR3d 524.

A criminal grand jury subpoena is not defective even when it is served without the good cause affidavit required by CCP §§1985 and 1987.5. *Michael B. v Superior Court* (2002) 103 CA4th 1384, 127 CR2d 454.

A person whose records are seized under a grand jury subpoena duces tecum can bring a Pen C §1538.5 motion to challenge the admissibility of the evidence obtained. *People v Blair* (1979) 25 C3d 640, 159 CR 818. See chap 16 on search and seizure motions.

When a grand jury subpoena duces tecum is to be used to obtain financial records from a financial institution, the prosecutor must comply with Govt C §7476(b)(1).

Although the grand jury's subpoena power is great, it is not unlimited. In *People v Superior Court* (2003) 107 CA4th 488, 492, 132 CR2d 144, a civil grand jury requested access to juvenile dependency records but refused to explain why it needed them, citing provisions that prohibit grand jurors from disclosing information about their investigations. The court denied the request, holding that the public's interest in access to the records did not outweigh their confidentiality. *People v Superior Court, supra*.

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§9.33 VII. SUING GRAND JURY MEMBERS

The accusatory language and factual allegations set out in a formal accusation naming specific individuals are privileged. Grand jurors cannot be held personally liable for voting to return an accusation against an individual. *Gillett-Harris-Duranceau & Assocs. v Kemple* (1978) 83 CA3d 214, 220, 147 CR 616. But defamatory language in a grand jury report concerning unindicted persons, issued by the grand jury while engaged in its "watchdog" function, is not privileged. 83 CA3d at 221; Pen C §930. See *Brooks v Binderup* (1995) 39 CA4th 1287, 46 CR2d 501 (cause of action allowed against individual members of grand jury).

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10

CLIENT INTERVIEW

E. THOMAS DUNN, JR.
ALAN J. CRIVARO

I. CLIENT INTERVIEW FORM §10.1

II. HOW INTERVIEW QUESTIONS RELATE TO COUNSEL'S CASE AND TO BOOK §10.2

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Source: Criminal Law/California Criminal Law Procedure and Practice/10 CLIENT INTERVIEW/§10.1 I. CLIENT INTERVIEW FORM

§10.1 I. CLIENT INTERVIEW FORM

Before conducting the initial interview, the authors recommend that, when practicable, the attorney give or send the prospective client a questionnaire. A suggested form follows. Some attorneys prefer to fill out the form themselves, using it to organize their interview with the client. In the authors' experience, however, allowing the client time to complete the form before the interview usually results in more complete and accurate responses.

To protect the attorney-client privilege, the attorney or the attorney's secretary should caution the client not to share the form with anyone else or to bring any other person to the interview unless an interpreter is required. Additional new-client information is in §§1.8 (first interview), 1.9 (jail kit), 3.13 (interviewing the client), 3.14-3.19 (fees and retainer agreements), 3.20-3.22 (accepting employment), 2.8 (prescreening for conflicts of interest), and 32.12 (checklist of possible defenses).

CLIENT INTERVIEW FORM

Date _____

Name _____

Address _____ Telephone_____

(Number, street, city, and zip code)

Birthdate _____ Social Security No. _____

E-mail Address_____

Education

_____

(Highest grade completed) (School names)

Vocational Training

_____

(Skill)_____ (School name)

Driver's License No. _____ Issuing State _____

Auto Model/Make _____ Automobile License No. _____

Have you contacted another attorney about this case? Please provide details.

_____

_____

Do you have any outstanding warrants for your arrest? Please provide details.

_____

_____

Is English your native language? _____ If not, what is? _____ Do you need an interpreter? _____

Are you a U.S. citizen? _____ If not, what is your immigration status? _____

Do you have other cases pending? _____

Are you now on probation or parole? _____

If you are on probation or parole, please list the name and telephone number of your probation or parole officer:

List all prior arrests and whether convicted or not.

Offense	Arresting Agency	Date	Disposition

_____

_____

_____

_____

FAMILY

Name Address Telephone Birthdate Where Employed

Father

_____

Mother (Maiden)

_____

Stepfather

_____

Stepmother

_____

Brothers/Sisters

_____

_____

_____

_____

Children/Stepchildren

_____

_____

_____

_____

PREVIOUS RECORD

Have you ever been referred to adult or juvenile probation or parole? _____

Agency Location Date

_____

_____

_____

_____

Have you ever been in a jail, prison, or mental hospital for juveniles or adults? _____

Name of Institution Date Why were you there?

_____

_____

_____

_____

Important: Give complete names and mailing addresses for the next three categories.

MARITAL HISTORY

Married to: Date Married Date Sep/Div

_____

_____

_____

(Spouse's current address/telephone)

_____

(Spouse's current address/telephone)

_____

EMPLOYMENT HISTORY (List present or last employment first)

From/To	Name of Employer	Type of Business

_____

_____

(Position held/Salary)

_____

(Address)

_____

(Telephone)

From/To	Name of Employer	Type of Business

_____

_____

(Position held/Salary)

_____

(Address)

_____

(Telephone)

LIST PERSONAL REFERENCES (Persons who know you other than relatives)

Name	Address	Telephone

_____

_____

_____

_____

DESCRIPTION OF CHARGED OFFENSE:

[This space is left blank for your attorney to fill out.]

THE ARREST: SEARCHES; STATEMENTS TO POLICE: Did anything unusual happen when you were arrested? Were you, anyone with you, or any place searched? Did the police take anything? Did you make a statement to the police? What were the contents of your statements?

_____

_____

PHYSICAL, MENTAL, EMOTIONAL, MARITAL, DRUGS, AND/OR ALCOHOL PROBLEMS: Have you had a problem in any of the above areas? Yes __ No __

If yes, please explain:_____

_____

Are you currently receiving medical treatment or are you seeing a counselor or therapist? Yes __ No __

Name	Address	Telephone

_____

WITNESSES: Please list all the names, addresses, and telephone numbers of people who witnessed the alleged crime or who can give information about it.

Name	Address	Telephone

_____

_____

_____

_____ _____

(Date) (Signature of client)

If someone helped you to complete this questionnaire, please write that person's name, address, and telephone number below.

Name Address Telephone

_____

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§10.2 II. HOW INTERVIEW QUESTIONS RELATE TO COUNSEL'S CASE AND TO BOOK

Use the questions below to spot issues in the case.

1. Does the defendant have a codefendant (someone also charged with committing the same crime as the defendant)?

If so, obtain as much information as you can about the codefendant.

Consider making a severance motion (see chap 7).

Determine if the codefendant has made any statements. If so,

Obtain a copy (see chap 11).

Consider a severance motion based on *Aranda-Bruton* (see §§7.40-7.41).

If involuntary, make a motion to exclude (see §§23.47-23.48).

Consider whether it would be favorable to the defendant to testify against the codefendant in exchange for a dismissal, or some sort of favorable plea bargain (see §§26.36-26.50 (plea bargaining) and chap 49 (immunity).

If there is unfavorable publicity concerning the codefendant, consider a change of venue motion (see chap 15), or a severance motion (see §§7.27-7.42).

Be aware that the codefendant may testify against the defendant.

Be aware that the codefendant may tell authorities what the defendant tells him or her; warn the defendant not to talk to the codefendant about the case.

2. Was the defendant arrested on the same day the crime was committed, or later?

Obtain all details about the date the crime occurred, the date of arrest, when the complaint or indictment was issued, and where the defendant was during that time period. Was the defendant at the same address? At the same job? In jail? Did law enforcement personnel attempt to arrest the defendant?

If there was sufficient delay between the time of the crime and the time of arrest, or between the time of the crime and issuance of a charging document, consider making a speedy trial or due process motion (see chap 19).

Consider making a motion to dismiss based on running of the statute of limitations (see §§19.13-19.16).

3. Did the defendant make a statement to the police?

Was the statement oral or written, taped, or videotaped? If so, obtain a copy.

Consider making a motion to exclude the statement if a *Miranda* violation occurred (see §§23.34-23.46).

Consider making a motion to exclude the statement if it was involuntary (see §§23.47-23.48).

Consider making a Pen C §1538.5 motion if the statement was the result of an illegal search and seizure (see §§23.7-23.8).

Can the prosecution prove corpus delicti? If not, there may not be enough evidence for conviction (see §§23.22-23.23).

4. Was a search involved?

Was a warrant served? (Obtain a copy.)

Was anything seized?

Was the search conducted by police or another law enforcement agency?

Does the defendant have an interest in the place searched or the thing seized that will entitle him or her to contest the official conduct?

Consider making a Pen C §1538.5 motion if the search, seizure, or detention was unreasonable (see chap 16).

5. Did the police take any bodily fluids from the defendant?

Did the police take defendant's bodily fluids, *e.g.,* blood, breath, urine, or semen? If so, obtain a copy of the report.

Consider having a sample of the fluids retested (see §55.21).

Consider making a motion to suppress the results if the fluids were illegally obtained (see §§55.25-55.30), if they were destroyed before the defense could retest them (see §11.6), or if the specific forensic test performed on them was not reliable

enough to be accepted by the scientific community (see §§31.12-31.14).

6. Was an informant involved?

If so, request discovery of the informant's identity. If the prosecution refuses the request, consider a motion to discover the informant's identity (see chap 17). If the undisclosed informant provided probable cause for a search warrant, consider making a *Luttenberger* discovery motion to ascertain whether there are grounds to traverse the search warrant (*i.e.*, inquire whether any information in the search warrant affidavit is false) (see §16.19).

Move to dismiss if the prosecution did not take reasonable steps to keep in touch with a material informant and the defense is now unable to find the informant (see §17.18).

7. Did the police do anything that the defendant thinks was wrong?

Consider a motion to dismiss if there was discriminatory enforcement of the law (see §§18.21-18.25). A discovery motion to find out information to support the motion to dismiss should be made (see §§18.18-18.20).

Consider a motion to dismiss if there was retaliatory prosecution (see §§18.32-18.37).

Consider a motion to dismiss if law enforcement conduct interfered with the defendant's right to counsel (see §3.29).

Consider a motion to dismiss if the defendant was entrapped (see CALCRIM 3408-3409).

Consider a motion to dismiss if the prosecution, in bad faith, destroyed or did not preserve material evidence (see §§11.27-11.28).

Consider a motion to discover information from a law enforcement or custodial officer's personnel file on alleged use of excessive force, ethnic or racial bias, or falsifying information when those issues are relevant to the case (see §§11.19-11.24).

8. What is the defense?

Find out details concerning the defense. Get names, addresses, and phone numbers of witnesses or of people who will be able to help you find them.

Have the defendant sign release forms if necessary (see sample forms in California Criminal Law Forms Manual §§1.29-1.30 (2d ed Cal CEB 2005).

If the defendant has an alibi, get the names, addresses, and phone numbers of witnesses. Have an investigator contact them immediately.

If defendant claims self-defense, defense of others, or defense of property, and was injured, take photos of him or her right away.

Find out whether the prosecution witnesses are credible. Consider discovery about their criminal history, and having an investigator find out more about them.

If the defendant claims that a third person committed the crime, find out as many details as possible, and have an investigator begin verifying the defendant's claims right away.

9. Does the defendant need any examinations?

Does the defendant need a mental or physical examination? Is a specialist, *e.g.,* a neurologist, required? Arrange for appropriate tests (see §3.6 on court payment for ancillary services for an indigent client).

10. Where did the crime occur?

Is the case in the proper jurisdiction and proper venue (see §15.13)?

11. Is the defendant on probation or parole?

If the defendant is on probation or parole, he or she may be in violation (see chaps 46-47); if the defendant is on parole, a no-bail hold will probably be placed on him or her (see §46.7).

Consider the ramifications of the pending criminal case on any probation or parole conditions (see chaps 46-47).

If a plea bargain will be arranged, consider including the probation or parole violation in those negotiations (see chaps 46-47).

12. Does the defendant have any prior convictions?

Priors can add a great deal of time to a defendant's sentence. Send for copies of the priors immediately. You may also have to arrange to obtain a copy of the transcript of the defendant's plea (see §24.32).

Consider challenging the truth or validity of a prior (see §24.29).

Consider challenging a prior as unconstitutional (see §§24.30-24.39) or because the defendant was not advised of or did not waive required direct consequences of the conviction (see §§26.10-26.17).

Consider the defendant's sentencing exposure for purposes of plea bargaining (see chaps 36-37).

13. Does the defendant have any pending cases?

If the defendant has pending criminal cases, is he or she represented on them? If so, that attorney should be contacted. You should work with that attorney so that all are kept informed about all cases.

Do not make a plea bargain for the defendant that does not include all of his or her pending cases, unless that is impossible.

14. Is the defendant already represented by another lawyer on this case?

Find out if the defendant wants to continue to be represented by that lawyer. If so, stop the interview (see §2.35). If not, have the defendant sign a substitution of attorney form (a sample form is in Crim Law Forms Man §3.3). After the interview, contact the other lawyer and obtain the client's file (see §2.20).

15. Was a lineup held?

Find out all details about the lineup, such as when and where it was held, whether a lawyer counseled the defendant at the lineup, and how the lineup was conducted.

Consider challenging the lineup either at the preliminary hearing or at trial (see §§22.21-22.31).

Consider holding your own lineup (see §22.17).

16. Is the defendant in custody?

Find out if the defendant will be able to make bail. Private counsel should obtain details necessary to help the defendant make bail. Counsel may want to call a duty judge to see if he or she will lower bail (see the list of phone numbers in §5.2).

Counsel may want to arrange for the local own recognizance (O.R.) project to interview the defendant in time to make a presentation to the court (see §5.11).

17. Does the defendant have a professional license?

Find out the defendant's profession, and, if he or she has a professional license, determine what effect the criminal case may have on that license (see chap 53).

18. Is the defendant a U.S. citizen?

If the defendant is not a U.S. citizen, the criminal case may have immigration consequences (see chap 52).

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11

DISCOVERY

ALBERT J. MENASTER

I. OVERVIEW §11.1

II. CHECKLIST: SPECIAL DEFENSE AND PROSECUTION DISCOVERY MOTIONS AND PROCEDURES AVAILABLE UNDER "OTHER" STATUTES AND THE CONSTITUTION §11.2

III. CALIFORNIA'S STATUTORY DISCOVERY SCHEME: PEN C §§1054-1054.10
- A. Discovery in General §11.3
- B. Discovery by Defense
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§11.1 I. OVERVIEW

Discovery is a crucial part of counsel's preparation of a case. In criminal cases, discovery is available based only on the reciprocal discovery scheme detailed in Pen C §§1054-1054.10, other express statutory provisions, or as mandated by the U.S. Constitution. Pen C §1054(e). See *Verdin v Superior Court* (2008) 43 C4th 1096, 1116, 77 CR3d 287.

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§11.2 II. CHECKLIST: SPECIAL DEFENSE AND PROSECUTION DISCOVERY MOTIONS AND PROCEDURES AVAILABLE UNDER "OTHER" STATUTES AND THE CONSTITUTION

This section lists discovery motions and procedures available through statutes (other than Pen C §§1054-1054.10) or the U.S. Constitution.

Statute-based discovery

- Motion to discover a law enforcement or custodial officer's personnel file (*Pitchess* motion). Evid C §§1043-1047; Pen C §§832.7-832.8; see §§11.19-11.24. A sample *Pitchess* motion is in California Criminal Law Forms Manual §11.12 (2d ed Cal CEB 2005).
- Motion to disclose official information and/or the identity of a confidential informant. Evid C §§1040-1042, 915; see chap 17. A sample motion to disclose the identity and location of the informant, or to dismiss, is in Crim Law Forms Man §17.1.
- Motion to disclose required information concerning in-custody informants. See §51.13.
- Subpoena duces tecum for information possessed by third parties. See §§4.39, 11.25. A sample Judicial Council form subpoena duces tecum is in Crim Law Forms Man §4.1.
- California Public Records Act requests. Govt C §§6250-6265. See chap 12.
- Conditional examinations or motions to preserve witness's testimony through a deposition. See Pen C §§1335-1345, 1346-1347.5, 1349-1362, 2622. For discussion, see §§11.25A, 31.20. See also sample motion for conditional examination in Crim Law Forms Man §11.17.

Constitutionally mandated discovery

- Motion to discover evidence favorable to the accused (*Brady* discovery). See §11.26. The sample defense motions in Crim Law Forms Man §§11.1-11.3 include requests for *Brady* discovery.
- Motion to produce reports of other investigations to establish evidence that a third person was implicated in the offense(s) with which defendant is charged. See *People v Hall* (1986) 41 C3d 826, 226 CR 112; *People v Littleton* (1992) 7 CA4th 906, 9 CR2d 288; *City of Alhambra v Superior Court* (1988) 205 CA3d 1118, 252 CR 789.
- Motion to obtain real evidence from prosecution for testing or retesting. See *Walters v Superior Court* (2000) 80 CA4th 1074, 95 CR2d 880; *Prince v Superior Court* (1992) 8 CA4th 1176, 10 CR2d 855. See the sample defense motion for transfer of evidence for retesting in Crim Law Forms Man §11.10.
- *Hammon-Reber* motions to discover the psychiatric records of a witness. *People v Hammon* (1997) 15 C4th 1117, 65 CR2d 1; *People v Reber* (1986) 177 CA3d 523, 223 CR 139. See §11.29.
- Motion for sanctions based on failure to preserve, or destruction of, material evidence (*Trombetta-Youngblood* motions). See §§11.27-11.28. See sample *Trombetta-Youngblood* motion in Crim Law Forms Man §11.11.
- Motion to discover records revealing discriminatory law enforcement (*Murgia* motions). See §§18.16-18.20. See sample *Murgia* discovery motion in Crim Law Forms Man §18.13.
- Motion for defense lineup (*Evans* motion). See §22.17 and sample *Evans* motion in Crim Law Forms Man §22.3.

For a number of sample discovery motions, see California Criminal Law Forms Manual, chap 11 (2d ed Cal CEB 2005).

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III. CALIFORNIA'S STATUTORY DISCOVERY SCHEME: PEN C §§1054-1054.10

§11.3 A. Discovery in General

Application of discovery statute. Under the reciprocal discovery provisions of Cal Const art I, §30, and Pen C §§1054-1054.10, both the prosecution and the defense are entitled to discovery. See *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231 (reciprocal discovery is constitutional). Sections 1054-1054.10 apply to both misdemeanor and felony cases. *Hobbs v Municipal Court* (1991) 233 CA3d 670, 284 CR 655, disapproved on other grounds in *People v Tillis* (1998) 18 C4th 284, 295, 75 CR2d 447.

Purpose of discovery. The discovery scheme codified in Pen C §§1054-1054.10 is intended to promote the ascertainment of truth; to save court time; to protect victims and witnesses from danger, harassment, and undue delay (see Pen C §1054); and to prevent trial by ambush. *In re Littlefield* (1993) 5 C4th 122, 131, 19 CR2d 248. These objectives are consistent with the true purpose of a criminal trial: ascertainment of the facts. See *In re Littlefield, supra*.

Informal discovery. Although Pen C §§1054-1054.10 set out a list of requests and procedural steps counsel may take, discovery is generally conducted informally between the parties by unwritten request. Most courts, at least in populous counties, have a standing discovery order requiring the parties to turn over standard items (*e.g.,* police reports, names and addresses of anticipated witnesses, expert's reports, rap sheets) on request of the other party. Filing a formal discovery motion is usually necessary only when counsel seeks something not on the standing disclosure list, *e.g.,* a *Pitchess* motion for law enforcement personnel files. If a dispute arises over whether disclosure of a particular item is required by the standing order, it is usually resolved by the judge at a pretrial conference. Often there is a discovery compliance date, and the parties meet on that date to report how discovery is proceeding. If there are problems, the court may schedule further appearances to make sure they get resolved.

Once counsel receives the items required to be disclosed by the standing order, that disclosure may suggest the need for a formal discovery motion to request additional material.

An informal discovery request is required before formal court enforcement of discovery can be requested. See Pen C §1054(b). Informal discovery requests and responses should be backed up by adequate record keeping to avoid subsequent confusion about what was requested and produced, to provide a basis for sanctions if necessary, and to protect defense counsel from claims of ineffective assistance of counsel. See *People v Wright* (1990) 52 C3d 367, 413, 276 CR 731.

Proceedings in which reciprocal discovery provisions do not apply. Reciprocal discovery is not available in probation revocation hearings, because a revocation proceeding is not a criminal trial within the meaning of Pen C §1054.3. *Jones v Superior Court* (2004) 115 CA4th 48, 8 CR3d 687 (probationer had no obligation to provide discovery to prosecution in revocation proceeding). This does not mean, however, that the defense has no right to discovery of the prosecution's evidence in a probation revocation proceeding. In *County of Placer v Superior Court (Stoner)* (2005) 130 CA4th 807, 30 CR3d 617, the court of appeal held that the attorney representing the probationer in probation revocation proceedings may issue a subpoena duces tecum to obtain the probationer's probation file, and the trial court has authority under Pen C §1203.10 to permit the probationer to inspect his or her files.

Nor do the reciprocal discovery provisions apply in juvenile delinquency proceedings; the juvenile court does, however, have discretion to order reciprocal discovery. *In re Thomas F.* (2003) 113 CA4th 1249, 7 CR3d 19; *Clinton K. v Superior Court* (1995) 37 CA4th 1244, 44 CR2d 140; *Robert S. v Superior Court* (1992) 9 CA4th 1417, 1422, 12 CR2d 489. Reciprocal discovery is required in juvenile proceedings only if the juvenile court expressly and specifically makes a discovery order. *In re Thomas F.* (2003) 113 CA4th 1249, 7 CR3d 19.

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B. Discovery by Defense

§11.4 1. Summary of Discovery to Be Provided to Defense

If it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies, the prosecution is required to disclose to the defense (Pen C §1054.1):

> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
> (b) Statements of all defendants.
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
> (e) Any exculpatory evidence.
> (f) Relevant *written or recorded* statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial. [Emphasis added.]

The prosecution must also disclose this information when it is reasonably accessible to the prosecution. See *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248; *People v Little* (1997) 59 CA4th 426, 68 CR2d 907; see also §11.5. The prosecutor should find out at an early stage in the proceedings what information is in the possession of the investigating agency involved in the case; in any event, the prosecutor is presumed to have knowledge of all information gathered by the investigating agency. *In re Brown* (1998) 17 C4th 873, 879, 72 CR2d 698. The prosecutor needs this information to prepare effectively for trial and to comply with Pen C §1054.1 and any other relevant statutory or constitutional discovery requirements, particularly the obligation to give the defense exculpatory evidence. See *Kyles v Whitley* (1995) 514 US 419, 421, 131 L Ed 2d 490, 499, 115 S Ct 1555 (prosecutor has responsibility of gauging "likely net effect" of evidence and must make disclosure when there is "reasonable probability" that outcome will be changed by disclosure); *In re Brown* (1998) 17 C4th 873, 72 CR2d 698 (prosecutor's duty to inquire about lab results); *People v Little, supra* (prosecutor's duty to inquire about rap sheet information).

> Ø **Note:** The Third Appellate District has ruled that statements made during interviews of potential witnesses must be disclosed, even if those interviews were never put in writing. *Roland v Superior Court* (2004) 124 CA4th 154, 21 CR3d 151. However, the California Supreme Court has said that it did not suggest that a party has a duty to obtain a written statement from a witness just to have something to hand over in discovery. See *In re Littlefield* (1993) 5 C4th 122, 136, 19 CR2d 248.

For related discussions, see §§11.14 (work product; privileges as they relate to discovery), 8.10, 8.32 (discovery before preliminary hearing), and 49.20-49.21 (discovery concerning immunity).

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§11.5 2. Identity, Whereabouts, and Statements of Witnesses, Including Experts

Definition of "intends to call." The prosecution must reveal information about witnesses it "intends to call." Pen C §1054.1(a), (f). This means all witnesses a prosecutor reasonably anticipates calling at trial. *Izazaga v Superior Court* (1991) 54 C3d 356, 376 n11, 285 CR 231. For further discussion, see §11.10. The sooner this determination is made, the sooner prosecution obligations to disclose under *Izazaga* and Pen C §1054.1 are triggered. For discussion of constitutionally mandated witness discovery, see §11.8. For discussion of motions for disclosure of an informant's identity, see chap 17.

Ø **Note:** Prosecutors are officers of the court, and "good faith" should be exercised and gamesmanship avoided. See *People v Tillis* (1998) 18 C4th 284, 293, 75 CR2d 447.

Disclosure of whereabouts. Disclosure of witness identity without also disclosing whereabouts is not fair to the opposing party. The addresses of these witnesses must also be provided to the extent they are *known* or *reasonably accessible to* the prosecution. See *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248 (both prosecution and defense must disclose addresses if information is reasonably accessible). Information in the possession of law enforcement agencies that investigated or prepared the case against the defendant is reasonably accessible to the prosecution. 5 C4th at 135; *Teal v Superior Court* (2004) 117 CA4th 488, 491, 11 CR3d 784. However, the statutory discovery scheme does not apply to information possessed by third parties or agencies that have no connection to the investigation or prosecution of the criminal charge. *Teal v Superior Court, supra; People v Superior Court (Barrett)* (2000) 80 CA4th 1305, 1313, 96 CR2d 264.

Limits on disclosure of whereabouts. Although the prosecution is required to give defense counsel whereabouts information (see *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248), counsel may not disclose or permit disclosure of the address or telephone number of a victim or witness whose name was disclosed to counsel under Pen C §1054.1 to the defendant or anyone else, unless specifically permitted to do so by the court after a hearing and a showing of good cause (Pen C §1054.2(a)(1)). An attorney may, however, disclose or permit disclosure of such information to those employed or appointed to assist in the investigation of the case when disclosure is required for preparation of the case. The attorney must tell those to whom the information is given that any further dissemination of information about the victim or witnesses is prohibited without the court's permission. Pen C §1054.2(a)(2). Willful violation of these proscriptions is a misdemeanor. Pen C §1054.2(a)(3).

Ø **Note:** With a pro per defendant, the trial court must try to protect the address and telephone number of a victim or witness by providing for contact only through a court-appointed licensed private investigator, or by imposing other reasonable restrictions absent a showing of good cause. Pen C §1054.2(b).

To protect a witness when there is a specific showing of danger to the witness, the court may deny the defense *pretrial* discovery of the identities, addresses, and telephone numbers of witnesses, on the grounds in Pen C §§1054(d), 1054.2, and 1054.7. See *Alvarado v Superior Court* (2000) 23 C4th 1121, 1134, 99 CR2d 149 (witnesses to Mexican Mafia "hit" in serious danger). However, a witness may not testify anonymously (23 C4th at 1152), and once identity information is disclosed, a court may not restrict the defense from interviewing the victim or a witness absent a specific factual showing of danger, threats, or the like (Pen C §1054.7; *Reid v Superior Court* (1997) 55 CA4th 1326, 1335, 64 CR2d 714).

Ø **Note:** No court has yet considered whether any claim of danger to the witness would have to show danger from *defense counsel,* not the defendant, since §1054.2(a)(1) bars defense counsel from sharing prosecution witness information with the defendant unless specifically permitted to do so by the court after a hearing and a showing of good cause.

A prosecutor or law enforcement officer may not order a witness to refuse to talk to the defense. *People v Pitts* (1990) 223 CA3d 606, 872, 273 CR 757; *Walker v Superior Court* (1957) 155 CA2d 134, 139, 317 P2d 130. Counsel

should note, however, that access for an interview does not ensure a conversation, because witnesses cannot be compelled to talk to investigators. Continued pursuit of a witness who refuses to be interviewed may justify restrictive orders by the court. *Reid,* 55 CA4th at 1337 n4.

Interviewer must identify himself or herself to witness or victim. No attorney or investigator for either side may interview, question, or even speak to a victim or witness disclosed by the opposing party (see Pen C §§1054.1, 1054.3) without first stating whether he or she represents, or has been retained by, the prosecution or defense. The attorney or investigator must clearly identify him- or herself and provide the full name of the agency by whom he or she is employed. Before an interview or questioning in person can occur, the interviewer must display a business card, official badge, or other form of official identification. Pen C §1054.8(a). Failure to meet these requirements may result in discovery sanctions. Pen C §1054.8(b); see Pen C §1054.5 (sanctions).

Disclosure of statements and reports. The prosecution must disclose relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial. Pen C §1054.1(f). A police officer's rough notes (written or recorded) of interviews with these witnesses, as well as with the defendant, must be disclosed if they still exist. *Thompson v Superior Court* (1997) 53 CA4th 480, 485, 61 CR2d 785. However, if an officer destroys original notes after drafting a police report, the defendant has not been denied due process if (1) the notes were made for the purpose of transferring the data, (2) the officer acted in good faith in destroying the notes, and (3) the officer acted in accordance with normal procedure in destroying the original notes. *People v Coles* (2005) 134 CA4th 1049, 1053, 36 CR3d 484, quoting *Killian v U.S.* (1961) 368 US 231, 7 L Ed 2d 256, 82 S Ct 302. To prevail on appeal, the defendant must show not only that one of the above three elements is missing, but also that the notes were exculpatory within the meaning of *California v Trombetta* (1984) 467 US 479, 489, 81 L Ed 2d 413, 104 S Ct 2528 (evidence possessed exculpatory value apparent before destruction, and defendant was unable to obtain any comparable material by other reasonably available means). *Coles,* 134 CA4th at 1054.

> Ø **Note:** Rough notes may be particularly useful to the defense because they are usually made early in the investigation before suspicion has focused on the defendant. In addition, notes made contemporaneously at the time of investigation or interview may be more detailed and may lead to evidence that can be used for impeachment or for further investigation. Failure to disclose these notes under a valid discovery request, failure to preserve the notes, or destruction of the notes may lead to sanctions under Pen C §1054.5(b). Sanctions may also be imposed on a showing of failure to preserve favorable evidence (*Trombetta-Youngblood* motion). See §§11.27-11.28.

The prosecution's duty to disclose witness statements extends to any reports or statements of experts made in connection with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons that the prosecutor intends to offer in evidence at the trial. Pen C §1054.1(f). In addition to the expert's trial report, the prosecution should include any laboratory notes, diagrams, or computer printouts made when the tests were conducted. *Woods v Superior Court* (1994) 25 CA4th 178, 183, 30 CR2d 182; *Hines v Superior Court* (1993) 20 CA4th 1818, 25 CR2d 712. Although the "intends to offer" language of Pen C §1054.1(f) could be read as limiting the scope of discovery regarding expert witnesses, expert reports remain discoverable as exculpatory evidence even when the prosecution does not intend to offer them as evidence. See Pen C §1054.1(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. See also §11.26.

> Ø **Note:** Although witness statements must be disclosed only if relevant, no such qualification applies to the disclosure of defendants' statements; statements of all defendants must be disclosed. Pen C §1054.1(b)). See *People v Jackson* (2005) 129 CA4th 129, 170, 28 CR3d 136 (§1054.1(b) required prosecution to disclose all of defendant's statements intercepted by wiretap, not just statements from which evidence was derived).

No duty to disclose statement made by opposing witness. Unless it is otherwise discoverable because, for example, the information is exculpatory, the prosecution does not have a duty to disclose to the defense statements made to it by defense witnesses revealed under Pen C §1054.3 before their cross-examination. *Izazaga v Superior Court* (1991) 54 C3d 356, 377 n14, 285 CR 231; *Hubbard v Superior Court* (1997) 66 CA4th 1163, 1167, 78 CR2d 819. The prosecution also has no duty to disclose, before cross-examination, new *information* gathered as a result of previous discovery to be used during cross-examination to impeach a defense witness, unless it is otherwise discoverable under Pen C §§1054-1054.10, other statutory provisions, or the U.S. Constitution. *People v Tillis* (1998)

18 C4th 284, 287, 295, 75 CR2d 447 (prosecution cross-examination impeachment of defense expert witness allowed without previous disclosure to defense). However, both sides must reveal the names of new witnesses intended to be called to refute such new disclosures. See Pen C §1054.7; *People v Gonzalez* (2006) 38 C4th 932, 955, 44 CR3d 237; *People v Tillis* (1998) 18 C4th 284, 293, 75 CR2d 447; *People v Hammond* (1994) 22 CA4th 1611, 28 CR2d 180.

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§11.6 3. Real Evidence

The prosecution must disclose to the defense all relevant real evidence seized or obtained as a part of the investigation of the offenses charged, if it is in the possession of the prosecution or if the prosecution knows it is in the possession of the investigating agencies. Pen C §1054.1(c); see *In re Brown* (1998) 17 C4th 873, 72 CR2d 698; *In re Littlefield* (1993) 5 C4th 122, 135, 19 CR2d 248. The defense must seek access to any real evidence in the possession of the prosecution that was not disclosed following an informal request, through the statutory motion procedure. *Walters v Superior Court* (2000) 80 CA4th 1074, 1079, 95 CR2d 880; see §§11.13-11.18. The defense should examine real evidence, such as bullets and bodily fluids, early in the case to decide whether independent forensic testing of that evidence is needed.

Disclosure of child pornography evidence is limited. Neither attorney may disclose or permit disclosure to the defendant, or anyone else, copies of child pornography evidence, unless specifically permitted to do so by the court after a hearing and a showing of good cause. Pen C §1054.10(a). Nonetheless, court permission is not necessary for an attorney to disclose or permit to be disclosed copies of child pornography evidence to persons employed by the attorney or persons appointed by the court to assist in preparing the defendant's case if that disclosure is required for that preparation. The attorney must inform such persons that any further dissemination of the material, except as directed by the attorney or court, is prohibited. Pen C §1054.10(b).

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§11.7 4. Information on Arrests and Convictions

By statute, prosecutors must inquire about and make available to the defense information on the felony and misdemeanor convictions of material prosecution witnesses whose credibility is likely to be crucial to the outcome of the trial. Pen C §1054.1(d)-(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. See Evid C §§452.5(b), 788; *People v Duran* (2002) 97 CA4th 1448, 1460, 119 CR2d 272; *People v Little* (1997) 59 CA4th 426, 68 CR2d 907; *People v Santos* (1994) 30 CA4th 169, 35 CR2d 719.

The defense is also entitled to disclosure of any pending criminal cases against prosecution witnesses (*People v Martinez* (2002) 103 CA4th 1071, 1078, 127 CR2d 305; *People v Coyer* (1983) 142 CA3d 839, 191 CR 376; *People v Allen* (1978) 77 CA3d 924, 144 CR 6) and discovery of the probationary status of prosecution witnesses (*Millaud v Superior Court* (1986) 182 CA3d 471, 227 CR 222; *People v Coyer* (1983) 142 CA3d 839, 191 CR 376).

Ø **Note:** Information on arrests and convictions that is considered *Brady* discovery must be disclosed without a request. *People v Ruthford* (1975) 14 C3d 399, 121 CR 261, overruled on other grounds in *In re Sassounian* (1995) 9 C4th 535, 545, 37 CR2d 446; *In re Ferguson* (1971) 5 C3d 525, 532, 96 CR 594. See §11.26.

Although some cases have stated that the rap sheets themselves need not be disclosed (*People v Roberts* (1992) 2 C4th 271, 308, 6 CR2d 276; *People v Santos, supra*), much if not all of the information contained in the rap sheets is discoverable. Cal Const art I, §28(f); Evid C §452.5(b). While it is appropriate for the prosecutor to present the rap sheets to the court for in camera inspection, accompanied by argument about what information in them may be properly disclosed, as a practical matter it is often easier to simply disclose the rap sheets themselves. For further discussion of rap sheets, see §12.5.

Ø **Note:** Discoverable impeachment material is much broader than information about arrests and convictions. See *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418 (conduct underlying misdemeanor conviction may be admissible for impeachment); *In re Pratt* (1999) 69 CA4th 1294, 82 CR2d 260; *People v Hayes* (1992) 3 CA4th 1238, 1243, 5 CR2d 105. On discovery of impeachment material, see §11.26.

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§11.8 5. Constitutionally Mandated Discovery

The prosecution is required to disclose to the defense any evidence required to be disclosed under the U.S. Constitution. Pen C §1054(e). The following are examples:

- Evidence favorable to the accused (*Brady* discovery; see §11.26);
- Identity of confidential informant who is material witness on the issue of guilt and who can give evidence that might exonerate the defendant (see chap 17);
- Privileged psychiatric records (*Hammon-Reber* motions; see §11.29); and
- Records revealing discriminatory law enforcement (*Murgia* motions; see §§18.16-18.20).

In addition, the Constitution imposes a duty to preserve favorable evidence under certain circumstances (*Trombetta-Youngblood* motions; see §§11.27-11.28).

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C. Discovery by Prosecution

§11.9 1. Summary of Discovery to Be Provided to Prosecution

The prosecution is not entitled to any discovery except as provided by the reciprocal discovery scheme detailed in Pen C §§1054-1054.10, as provided by other express statutory provisions, or as mandated by the federal Constitution. Pen C §1054(e). Required defense disclosures are specifically laid out in Pen C §1054.3. Note that in response to *Verdin v Superior Court* (2008) 43 C4th 1096, 1116, 77 CR3d 287, the legislature amended Pen C §1054.3, effective January 1, 2010, to authorize the court to order a defendant or juvenile in a Welf & I C §602 proceeding to submit to testing by a prosecution-retained mental health expert whenever he or she has placed his or her mental state at issue. That statute, however, requires (1) a timely request by the prosecutor; (2) a hearing at which objections can be raised by the defense; and (3) a threshold determination by the trial court that the proposed tests bear some reasonable relation to the mental state placed in issue. Pen C §1054.3(b)(1). The constitutionality of the newly enacted statute has yet to be resolved. See 43 C4th at 1116 n9.

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§11.10 2. Identity, Whereabouts, and Statements of Witnesses, Including Experts

Definition of "intends to call" at trial. The defense must disclose to the prosecution the names and addresses of witnesses, other than the defendant, that it "intends to call" at trial. Pen C §1054.3(a). "Intends to call" has been defined as meaning "reasonably anticipates it is likely to call." *In re Littlefield* (1993) 5 C4th 122, 130, 19 CR2d 248; *Izazaga v Superior Court* (1991) 54 C3d 356, 376 n11, 285 CR 231.

Although the same definition of "intends" applies to both parties (see *People v Tillis* (1998) 18 C4th 284, 290, 75 CR2d 447), when it comes to determining whether it is reasonably anticipated that a witness will be called, the defense and the prosecution are not identically situated: The prosecution is always putting on a case-in-chief, whereas the defense is often not planning an affirmative defense, and whether a witness will be called depends on whether the witness's testimony is necessary for impeachment.

In *In re Littlefield* (1993) 5 C4th 122, 136, 19 CR2d 248, the supreme court held that the trial court correctly ruled that counsel reasonably anticipated calling a witness whom counsel's investigator had interviewed, who was present in the courtroom, and whom counsel asked the court to order to return on the day the case was trailed for trial. In that case, defense counsel's in-court conduct revealed his intention to be solid enough to warrant discovery of the witness's identity, despite defense counsel's protestations of uncertainty. *People v Tillis* (1998) 18 C4th 284, 293, 75 CR2d 447.

Information must be known or reasonably accessible to defense for disclosure to be required. The requirement of Pen C §1054.3 that the defense disclose the identity of witnesses whom the defense intends to call at trial includes a requirement that the defense provide this information to the extent it is known or reasonably accessible to the defense. Disclosure of witness identity without also disclosing whereabouts is not fair to the opposing party. *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248.

Written or recorded statements of disclosed witnesses. Defense counsel also has an obligation to disclose "any relevant written or recorded statements" of witnesses whose identity is disclosed. Pen C §1054.3(a). The court of appeal has ruled that oral statements made during interviews of potential witnesses must be disclosed, even though the interviews were never reduced to writing. *Roland v Superior Court* (2004) 124 CA4th 154, 21 CR3d 151. See *People v Lamb* (2006) 136 CA4th 575, 579, 40 CR3d 609 (accident-reconstruction expert's notes, calculations, and theories orally conveyed to defense counsel discoverable under §1054.3). However, the California Supreme Court has said that it did not suggest that a party has a duty to obtain a written statement from a witness just to have something to hand over in discovery. See *In re Littlefield* (1993) 5 C4th 122, 136, 19 CR2d 248.

Disagreements concerning the discoverability of defense statements may be determined at discovery compliance hearings before trial (Pen C §1054.5(b)), or at an in limine motion at trial (see *U.S. v Nobles* (1975) 422 US 225, 45 L Ed 2d 141, 95 S Ct 2160), depending on when the issue arises. Defense counsel can then make the tactical decision on whether to call the witness and reveal the information.

Defense witness statements and reports limited to those of witnesses intended to be called at trial, and include notes of defense interviews. The language of Pen C §1054.3(a) limits the discoverability of defense witness "statements" and "reports" to those of witnesses intended to be called at trial. *Hines v Superior Court* (1993) 20 CA4th 1818, 25 CR2d 712; *Sandeffer v Superior Court* (1993) 18 CA4th 672, 678, 22 CR2d 261. For example, the results of a defense expert's analysis of a semen sample were not discoverable by the prosecution unless the defense intended to call the expert as a witness. *Prince v Superior Court* (1992) 8 CA4th 1176, 10 CR2d 855. "Statements" discoverable under §1054.3 include the attorney's or investigator's rough written or recorded notes of interviews with defense witnesses who might testify at trial to the extent that they record the witness's words and not the impressions or opinions of the interviewer. *Thompson v Superior Court* (1997) 53 CA4th 480, 485, 61 CR2d 785. On work product and the attorney client privilege, see §11.14.

Type of expert witness reports that must be disclosed. The prosecution is entitled to documentation of the results of any examinations and tests, including handwritten notes, that memorialize the findings of the examination of an expert who will be a trial witness if the defense is offering the examination or test into evidence. *Hines v Superior Court* (1993) 20 CA4th 1818, 25 CR2d 712. Likewise, when the defense intends to call an expert as a witness, and the

expert, in forming his or her opinion, has relied on results of standardized tests he or she conducted, the defense must disclose the results of those tests to the prosecution if the tests will be offered into evidence. *Woods v Superior Court* (1994) 25 CA4th 178, 181, 30 CR2d 182. The opposition is not entitled before trial to subsidiary information on which the expert relied when counsel employing the expert does not intend to offer the subsidiary information in evidence. *Hines*, 20 CA4th at 1823.

Penal Code §1054.6 preserves statutory and constitutional privileges such as the attorney-client privilege (Evid C §954), and the psychotherapist-patient privilege (Evid C §1021). Consequently, statements a defendant makes to an expert retained or appointed to assist in the defense are protected by the attorney-client privilege (see Evid C §952) and are not subject to discovery even if that expert is disclosed as a witness. *Andrade v Superior Court* (1996) 46 CA4th 1609, 54 CR2d 504 (discovery denied of those portions of appointed psychologist's report reflecting defendant's statements about charged offenses); *Rodriguez v Superior Court* (1993) 14 CA4th 1260, 18 CR2d 120 (proper for defense to black out portions of psychologist's report on defendant's statements to experts). The attorney-client privilege is not waived by the defendant's intention to call the expert as a witness, by partial disclosure, or by the expert's reliance on the defendant's statement in formulating his or her opinion. *Andrade v Superior Court* (1996) 46 CA4th 1609, 1613, 54 CR2d 504.

> Ø **Note:** However, in *People v Jones* (2003) 29 C4th 1229, 1264, 131 CR2d 468, the defendant was held to have waived the attorney-client privilege for statements made to a psychologist when he placed his mental state in issue in the penalty phase of a capital trial and called the psychologist as a witness. The prosecution was therefore entitled to an unredacted report from the testifying psychologist.

In *People v Panah* (2005) 35 C4th 395, 459, 25 CR3d 672, the prosecutor disclosed a coroner's report on the morning of the coroner's trial testimony. The report had been prepared the previous Friday. The supreme court ruled that "the prosecution did not commit misconduct simply because it failed to ask [the coroner] to prepare the report sooner." It is unclear whether this means that either side may ask its experts to delay preparing their reports until the last second.

For discussion of work product and privileges, see §11.14.

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§11.11 3. Real Evidence

The defense must disclose to the prosecution any real evidence the defendant intends to offer in evidence at the trial. Pen C §1054.3(a). This real evidence will not necessarily be physical evidence connected to the crime.

If a defendant gives physical evidence to defense counsel, counsel has a duty to make that evidence available to the prosecution. *People v Superior Court (Fairbank)* (1987) 192 CA3d 32, 237 CR 158. See §2.26. The defendant may not conceal the existence of physical evidence of the crime, *e.g.,* the murder weapon, by delivering it, or having a third party deliver it, to counsel. *People v Lee* (1970) 3 CA3d 514, 526, 83 CR 715. Also, knowing concealment or destruction of evidence is a misdemeanor. Pen C §135. If, however, a defendant merely reveals the location of physical evidence to defense counsel, the information is protected by the attorney-client privilege. The attorney-client privilege also protects observations the attorney or the attorney's investigator makes as a result of privileged communications, but if the attorney removes or alters the evidence, counsel must disclose its existence and its original location and condition. *People v Meredith* (1981) 29 C3d 682, 690, 175 CR 612. The fact that the defendant disclosed the object's location or delivered it to the attorney remains privileged, but the object itself is not privileged. *People v Superior Court (Fairbank)* (1987) 192 CA3d 32, 35, 237 CR 158. In *Fairbank,* the court of appeal established a procedure for defense counsel to follow if he or she removes, alters, or comes into possession of physical evidence. Counsel must immediately disclose to the court the existence and counsel's actions with respect the evidence. The court must then take appropriate action to ensure that the prosecution has timely access to and information about the item and any alteration. 192 CA3d at 39.

The court must also take care to shield privileged communications and defense strategies from disclosure. 192 CA3d at 39. To avoid having the jury draw the inference that the defendant was the source of the evidence, the defense may be entitled to a stipulation that limits the amount of information the jury is given about how the prosecution learned about the existence of the evidence.

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§11.12 D. Nontestimonial Evidence

The prosecution and law enforcement agencies have the right to obtain "nontestimonial" evidence from a defendant, such as blood, breath, urine, handwriting, hair, and fingerprint samples, and to compel the defendant to participate in a physical or voice lineup. See *Schmerber v California* (1966) 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826 (compelling defendant to submit to blood test and use of results in DUI prosecution did not violate Fifth Amendment; privilege against self-incrimination applies only to compelled evidence of communicative nature); *Verdin v Superior Court* (2008) 43 C4th 1096, 1110, 77 CR3d 287; *People v Williams* (1969) 71 C2d 614, 79 CR 65.

Ø **Note:** In this context, the terms "testimonial" and "nontestimonial" are synonymous with "communicative" and "noncommunicative."

Although not subject to the Fifth Amendment, such forced disclosures arguably may be subject to the Fourth Amendment prohibition against unreasonable search and seizure. *Schmerber v California, supra*. But see *U.S. v Zimmerman* (9th Cir 2007) 514 F3d 851, 855 (while Fourth Amendment did not bar compelled DNA sample, forced blood draw may violate Religious Freedom Restoration Act of 1993). The procedures for obtaining such information are outside the statutory discovery scheme. See Pen C §1054.4. Bodily intrusions are discussed in California Judges Benchbook: Search and Seizure §2.11 (2d ed CJER-CEB 2002).

Ø **Note:** Because a standard psychiatric examination consists of an interview, it is communicative and the court does not have the discretion to order a defendant to submit to an examination by the prosecution's expert under Pen C §1054.4, even if the defendant puts his or her mental state at issue. *Verdin v Superior Court* (2008) 43 C4th 1096, 1114, 77 CR3d 287.

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§11.13 E. Counsel's Informal Request for Discovery

Counsel should begin the discovery process by making an informal request for discovery. An informal request is a prerequisite to court enforcement of any disclosure required by the statutory discovery scheme. Pen C §1054.5(b). Informal requests should be made as early as possible so that discoverable information may be easily obtained or, if not, court involvement or sanctions may be sought and obtained. When time limits are a problem, counsel should request an order shortening time or whatever other order is necessary. See *Hobbs v Municipal Court* (1991) 233 CA3d 670, 696, 284 CR 655, disapproved on other grounds in *People v Tillis* (1998) 18 C4th 284, 295, 75 CR2d 447.

In practice, the "informal request" ranges from an oral request for materials or a demand written on a complaint, information, or indictment, to a form listing the text of either Pen C §1054.1 or §1054.3. Counsel should always be aware of local practice and any standing order regarding what type of request is required. Written requests should be as specific as possible, separately describing each specific item. Sample informal requests are in California Criminal Law Forms Manual §§11.1 (defense), 11.4 (prosecution) (2d ed Cal CEB 2005). A sample acknowledgment of discovery is in Crim Law Forms Man §11.16. To avoid disputes about what actually occurred, the better practice is to make requests for discovery, even informal requests, in writing.

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§11.14 F. Work Product and Privileged Information

Work product. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information that are work product as defined in CCP §2018.030(a), or that are privileged under an express statutory provision, or as provided by the U.S. Constitution. Pen C §1054.6.

"Work product" is a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." CCP §2018.030(a). Work product that meets this definition is not discoverable under any circumstances. CCP §2018.030(a); *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 814, 68 CR3d 758. Work product does not include nonderivative or noninterpretative materials of an evidentiary nature such as written or recorded statements of prospective witnesses. *Thompson v Superior Court* (1997) 53 CA4th 480, 485, 61 CR2d 785 (defense raw written interview notes must be produced); *People v Williams* (1979) 93 CA3d 40, 63, 155 CR 414 (prosecutor's summary of victim's statements must be produced). A list of witnesses intended to be called is also not work product. *Hobbs v Municipal Court* (1991) 233 CA3d 670, 694, 284 CR 655, disapproved on other grounds in *People v Tillis* (1998) 18 C4th 284, 295, 75 CR2d 447.

Nevertheless, if an attorney's impressions, conclusions, or opinions are inextricably intertwined with a witness statement summary, the document may be absolutely protected in its entirety. See *Rico v Mitsubishi Motors Corp., supra*.

When a witness's recorded statement contains discrete elements of both the witness's statement and counsel's impressions, conclusions, or opinions (which may reveal counsel's strategy), counsel should consider an in camera hearing that excludes opposing counsel in order to determine whether the nondiscoverable portions can be excised. See Pen C §1054.7. This practice has the advantage of counsel's not having to rely on the legal acumen and/or good faith of the disclosing side as well as making a record (sealed for possible appeal; see Pen C §1054.7) for the possible review of a higher court. Alternatives are to redact the portions that involve work product, leaving it to opposing counsel to move for disclosure; to plan ahead so that work product is not included in the same report as discoverable information; or to compartmentalize the actual statements of any witness separately from impressions about those witnesses, in separate paragraphs or even separate pages of the report of the interview.

Privileged information. Privileged information in statements and reports does *not* have to be disclosed *at the time the witness is designated* (as distinguished from later at trial). *Andrade v Superior Court* (1996) 46 CA4th 1609, 1613, 54 CR2d 504; *Rodriguez v Superior Court* (1993) 14 CA4th 1260, 18 CR2d 120; see Pen C §1054.3. Once an expert takes the stand, however, his or her opinion, the bases for it, and any information that witnesses, including the defendant, gave to him or her may be subject to cross-examination if relevant as a basis for the expert's opinion. See *People v Coleman* (1989) 48 C3d 112, 151, 255 CR 813. For example, when the defense "definitely" intended to call a court-appointed psychiatrist at the penalty phase of a capital murder prosecution, disclosure was properly ordered (between guilt and penalty phases) of unredacted copies of reports that included the defendant's statements and conclusions drawn from them; the defendant waived any privilege with respect to those statements by putting his mental state in issue and announcing the intention to call the psychiatrist. *People v Jones* (2003) 29 C4th 1229, 1263, 131 CR2d 468.

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§11.15 G. Timing of Disclosures

Required discovery disclosures must be given to opposing counsel as soon as possible, but no later than 15 calendar days after they are requested, so that counsel does not face the possibility of sanctions (discussed in §11.17) for failing to turn over discovery. Pen C §1054.5(b).

A second deadline that may apply, depending on when the discovery request is made, is that discovery that is required to be given to opposing counsel must be made available at least 30 calendar days before trial, unless good cause is shown why disclosure should be denied, restricted, or deferred. Pen C §1054.7. The court, therefore, may permissibly require production of discoverable materials more than 30 days before trial. *Sandeffer v Superior Court* (1993) 18 CA4th 672, 677, 22 CR2d 261.

Ø **Note:** It is recommended that counsel receiving discovery acknowledge in writing what was received. A copy should be filed with the court.

If discovery that must be disclosed becomes known to, or comes into the possession of, a party within 30 calendar days before trial, disclosure must be made immediately unless good cause is shown why disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. Pen C §1054.7.

The duty of disclosure remains a continuing one (Pen C §1054.7) because, even in the best prepared cases, new relevant material surfaces or new meaning is acquired by items formerly thought to be insignificant.

The court may issue orders shortening time. See *Hobbs v Municipal Court* (1991) 233 CA3d 670, 696, 284 CR 655, disapproved on other grounds in *People v Tillis* (1998) 18 C4th 284, 295, 75 CR2d 447. In some courts, motions for an order shortening time are handled orally. Counsel should find out each judge's practice.

The reciprocal discovery provisions of Pen C §§1054-1054.10 apply to the penalty phase of a capital trial. *People v Gonzalez* (2006) 38 C4th 932, 955, 44 CR3d 237; *People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 1232, 23 CR2d 403. Defense and prosecution penalty phase evidence is discoverable before the guilt phase; it should be disclosed at least 30 days before trial. *People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 23 CR2d 403. See Pen C §1054.7. The trial court, however, may defer penalty phase discovery until after the guilt phase on a showing of good cause. For example, counsel may have a good faith explanation for why no decision has been made before trial on which, if any, witnesses to call at the penalty phase, or why disclosure would have a potential adverse effect on the guilt phase defense.

When the prosecutor turned a consultant's report over to the defense immediately after receiving it, no discovery violation occurred even though the disclosure was made 3 days before trial and the report was 113 pages long. The court of appeal stressed that there was nothing in the record suggesting that the prosecutor learned of the expert's opinion any earlier. *People v Rutter* (2006) 143 CA4th 1349, 1353, 49 CR3d 925. See also *People v DePriest* (2007) 42 C4th 1, 36, 63 CR3d 896 (nothing in record suggested that acquisition and disclosure of shoe print evidence, disclosed by prosecutor shortly before trial, was unreasonably delayed).

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§11.16 H. Ex Parte Discovery Orders

When the facts supporting a discovery request are privileged, the defendant may request an ex parte discovery order by filing a discovery motion and supporting declaration under seal. On receipt of such a request, the trial court may examine the documents in camera to determine "if the claim of confidentiality is justified and, if so, to what extent." *City of Alhambra v Superior Court* (1988) 205 CA3d 1118, 1129, 252 CR 789. The trial court should "make such orders as are appropriate to ensure that the maximum amount of information, consistent with protection of the defendant's constitutional rights, is made available to the party opposing the motion for discovery." *City of Alhambra v Superior Court, supra*. Other considerations, *e.g.,* the risk of destruction of evidence, might also justify seeking an ex parte discovery order. See, *e.g., People v Memro* (1985) 38 C3d 658, 673, 214 CR 832, overruled on other grounds in *People v Gaines* (2009) 46 C4th 172, 181 n2, 92 CR3d 627 (defendant sought ex parte discovery order allowing defense investigator to photograph hole, alleging that if warned in advance, police would repair hole).

In addition, at the request of either party, the trial court may permit all or a portion of the showing of good cause for the denial or regulation of disclosures to be made in camera. Pen C §1054.7; *People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 1239, 23 CR2d 403 (in capital case, defendant may make in camera request for delay in penalty phase discovery until after guilt phase). A verbatim record must be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing must be sealed and preserved in the records of the court, and must be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may, after trial and conviction, unseal any previously sealed matter. Pen C §1054.7. Under Evid C §1042, when the defendant moves for disclosure of the identity of a confidential informant, the prosecutor may assert the informant privilege. For discussion, see §17.13.

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Source: Criminal Law/California Criminal Law Procedure and Practice/11 DISCOVERY/§11.17 I. Motions for Sanctions

§11.17 I. Motions for Sanctions

Counsel must make an informal request of opposing counsel for the desired materials and information before being able to seek discovery through the courts. Pen C §1054.5(b). Sample informal discovery request forms are in California Criminal Law Forms Manual §§11.1 (defense), 11.4 (prosecution) (2d ed Cal CEB 2005). If, within 15 calendar days after counsel's informal request, opposing counsel fails to provide the materials and information requested, the requesting party may seek a court order, on noticed motion. Sample motions to compel discovery and for sanctions are in Crim Law Forms Man §§11.2-11.3 (defense), 11.6-11.7 (prosecution). There is also a sample opposition to a prosecution motion (Crim Law Forms Man §11.5). If the moving party shows that the opposing party has not complied with Pen C §1054.1 or §1054.3 and that the moving party complied with the informal discovery procedure provided in §1054.5(b), the court may make any order necessary to enforce Pen C §§1054-1054.10. Examples set out in §1054.5(b) include immediate disclosure; contempt proceedings (see *In re Littlefield* (1993) 5 C4th 122, 125, 19 CR2d 248 (use of contempt to enforce compliance with discovery order)); delaying or prohibiting the testimony of a witness or the presentation of real evidence; and continuance of the matter.

The court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. Pen C §1054.5(b). The giving of CALJIC 2.28, which permits the jury to consider the failure to timely produce evidence, has been held to be prejudicial error because the instruction provides no guidance on how the defense's tardy disclosure of statements given by alibi witnesses might legitimately affect the jury's deliberations. The instruction sanctions the defendant for counsel's failure; and injecting discovery compliance issues into the jury's evaluation of the evidence means that the parties will end up litigating what happened and why, resulting in minitrials on collateral issues. *People v Lawson* (2005) 131 CA4th 1242, 32 CR3d 634; *People v Cabral* (2004) 121 CA4th 748, 17 CR3d 456; *People v Bell* (2004) 118 CA4th 249, 12 CR3d 808. See also *People v Saucedo* (2004) 121 CA4th 937, 17 CR3d 692.

The comparable CALCRIM instruction, CALCRIM 306, merely provides, "In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure." It is unclear whether this instruction sufficiently addresses the concerns of the cases cited above. The Bench Notes to CALCRIM 306 cite them and continue to caution the court to "consider whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant." Bench Notes to CALCRIM 306. Therefore, in an appropriate case, defense counsel should object to CALCRIM 306 on due process grounds.

CALCRIM 306 also includes the following optional cautionary instruction to the jury: "[T]he fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime." Defense counsel should request that this clause be added if the court indicates that it plans to instruct the jury with CALCRIM 306.

There are two limits on the court's ability to sanction noncompliance with discovery. First, the court may prohibit the testimony of a witness only if all other sanctions have been exhausted. Pen C §1054.5(c). Second, the court may not dismiss a charge unless required to do so by the U.S. Constitution. Pen C §1054.5(c). Most discovery violations will not permit dismissal; the prosecution's failure to turn over unfavorable evidence does not permit dismissal as a discovery sanction. *People v Ashraf* (2007) 151 CA4th 1205, 1213, 60 CR3d 624. The statutory limitation on the dismissal of a charge as a sanction for a discovery violation also applies to dismissal of a special circumstance allegation. *People v Superior Court (Meraz)* (2008) 163 CA4th 28, 49, 77 CR3d 352.

Although it is proper in some instances for the trial court to bar defense evidence as a sanction for failure to comply with a proper discovery statute (*Michigan v Lucas* (1991) 500 US 145, 114 L Ed 2d 205, 111 S Ct 1743; *People v Jackson* (1993) 15 CA4th 1197, 19 CR2d 80), this ultimate sanction of preclusion of defense testimony or evidence may only be imposed if the following is shown *on the record* (*People v Edwards* (1993) 17 CA4th 1248, 22 CR2d 3):

- Intentional violation of a discovery order;
- Improper intent to gain a tactical advantage; and
- Exhaustion of all other less restrictive sanctions that would achieve the purposes of discovery.

See *People v Gonzales* (1994) 22 CA4th 1744, 28 CR2d 325 (preclusion of defense witness's testimony was

reversible error because prosecution showed no willful or prejudicial violation of discovery statute).

Ø **Note:** Sanctions under Pen C §1054.5 are available only before the close of testimony and for as long as the trial court has jurisdiction of a criminal case. Thereafter, any discovery violation is measured by a posttrial standard, which requires a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. *People v Zambrano* (2007) 41 C4th 1082, 1135 n13, 63 CR3d 297, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Bohannon* (2000) 82 CA4th 798, 805, 98 CR2d 488, disapproved on other grounds in *People v Zambrano, supra*.

Ø **Note:** The court of appeal has ruled that the failure to disclose the oral conclusions of a defense expert justified the sanction of barring the defense from presenting the defense expert in surrebuttal. The court of appeal also relied on the trial court's discretion under Evid Code §352 to bar surrebuttal evidence to prevent repetition of material already presented. Thus, it may be argued that availability of this sanction depends on whether the evidence has already been presented. *People v Lamb* (2006) 136 CA4th 575, 611, 40 CR3d 609.

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§11.18 J. Pretrial Review of Orders Granting Discovery

The prosecution may seek pretrial writ relief from an order granting a defendant's discovery motion. Pen C §1512(a).

The defense may seek a writ of mandate (CCP §§1084-1097) or prohibition (CCP §§1102-1105) from a court order denying its request for discovery. See *Hill v Superior Court* (1974) 10 C3d 812, 112 CR 257 (mandate); *Miller v Superior Court* (1979) 99 CA3d 381, 159 CR 456 (prohibition). Likewise, the defense may seek writ relief from a court order granting prosecution discovery on the ground that the trial court abused its discretion in granting the discovery. See *Funk v Superior Court* (1959) 52 C2d 423, 340 P2d 593; *Hubbard v Superior Court* (1997) 66 CA4th 1163, 1166, 78 CR2d 819. A sample petition for writ of mandate or prohibition is in California Criminal Law Forms Manual §42.1 (2d ed Cal CEB 2005).

Ø **Note:** Not complying with a discovery order, and seeking appellate review from a subsequent order of contempt, is not recommended. On contempt generally, see chap 58.

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IV. DISCOVERY UNDER OTHER STATUTES

A. *Pitchess* Motion: Motion to Discover Personnel File of Law Enforcement or Custodial Officer

§11.19 1. Purpose of *Pitchess* Motion

A discovery motion is required when the confidential personnel file of a peace or custodial officer may contain evidence relevant to the defense. This motion to discover an officer's personnel file or other police agency record that contains relevant information, such as the officer's alleged prior use of excessive force, ethnic or racial bias, falsifying information, or planting evidence, is called a *Pitchess* motion (*Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897). *Pitchess* discovery is often used in situations involving altercations between police officers and arrestees, but it is not limited to such circumstances. *People v Memro* (1985) 38 C3d 658, 679, 214 CR 832, overruled on other grounds in *People v Gaines* (2009) 46 C4th 172, 181 n2, 92 CR3d 627. In *Memro* itself, *Pitchess* discovery was sought to support the defendant's allegation that the police had coerced his confession. 38 C3d at 674.

The *Pitchess* ruling has been partly codified in Evid C §§1043-1046, which set out procedures for requesting disclosure of personnel records of peace and custodial officers, and which apply in all cases in which a party seeks disclosure of peace or custodial officer personnel records. Evid C §1043(a). The *Pitchess* procedure only applies to the discoverability of law enforcement personnel records. *Commission on Judicial Performance v Superior Court* (2007) 156 CA4th 617, 623, 67 CR3d 434 (*Pitchess* did not apply to records of Commission on Judicial Performance).

Pitchess motions are unaffected by the reciprocal discovery provisions of Proposition 115 because they are based on "other express statutory provisions" (Pen C §1054(e)). *Albritton v Superior Court* (1990) 225 CA3d 961, 275 CR 314. *Pitchess* discovery is also available in juvenile proceedings. *City of San Jose v Superior Court* (1993) 5 C4th 47, 19 CR2d 73.

Ø **Note:** The California Supreme Court has granted review in *Galindo v Superior Court* (review granted Mar. 25, 2009, S170550; superseded opinion at 169 CA4th 1332, 88 CR3d 73), which concerns whether a criminal defendant has a right to *Pitchess* discovery before the preliminary hearing.

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Source: Criminal Law/California Criminal Law Procedure and Practice/11 DISCOVERY/§11.20 2. Requirements

§11.20 2. Requirements

Written motion required. Counsel must file a written motion that contains these items (Evid C §§1043, 1046):

- A notice of motion;
- A supporting affidavit or declaration (see CCP §2015.5, which permits declarations to be filed in place of affidavits);
- A copy of the police reports setting forth the circumstances of the defendant's stop and arrest, if the motion alleges excessive force by the officer in connection with an arrest; and
- Proof of service.

A sample *Pitchess* motion is in California Criminal Law Forms Manual §11.12 (2d ed Cal CEB 2005).

Notice of motion. The notice of motion must include the following (Evid C §1043(b)):

- The name of the defendant and the criminal case for which the discovery is sought;
- The name of the peace or custodial officer whose records are sought;
- A description of the type of records sought;
- An allegation of a reasonable belief that the government agency identified in the request has the requested records; and
- The time and place the discovery motion will be heard.

Under general due process principles, the prosecutor, as a party to the underlying criminal case, is entitled to notice of the date, time, and place of the hearing on the *Pitchess* motion, but not its substance. *Alford v Superior Court* (2003) 29 C4th 1033, 1044, 130 CR2d 672.

Declaration or affidavit. To establish good cause for disclosure, the declaration or affidavit must allege specific facts showing that the records sought are material to the "subject matter involved in the pending litigation." Evid C §1043(b)(3). This materiality element requires a logical link between the pending charge and the proposed defense and articulation of how the requested discovery will support that proposed defense. *Warrick v Superior Court* (2005) 35 C4th 1011, 1021, 29 CR3d 2; *Giovanni B. v Superior Court* (2007) 152 CA4th 312, 319, 60 CR3d 469. If the court finds good cause, it must hold an in camera hearing to determine whether the requested materials are relevant. Evid C §1045(b). The trial court must grant an in camera hearing if the defendant demonstrates that "the scenario of alleged officer misconduct could or might have occurred." *Warrick v Superior Court* (2005) 35 C4th 1011, 1016, 29 CR3d 2, quoted in *Garcia v Superior Court* (2007) 42 C4th 63, 71, 63 CR3d 948. The declaration need not provide a motive for officer misconduct, nor does the scenario need to be corroborated or even necessarily credible or believable, but the scenario must be plausible in the context of the case documents and asserted defense. *Uybungco v Superior Court* (2008) 163 CA4th 1043, 1048, 78 CR3d 30 (citing *Warrick,* 35 C4th at 1019). See also *People v Galan* (2009) 178 CA4th 6, 12, 100 CR3d 103. Moreover, the court does not decide credibility. *Warrick v Superior Court* (2005) 35 C4th 1011, 29 CR3d 2.

Although the affidavit must "describe a factual scenario supporting the claimed officer misconduct," that scenario, "depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report" (35 C4th at 1024) or may consist of an "alternative version of what might have occurred." *Garcia v Superior Court* (2007) 42 C4th 63, 72, 63 CR3d 948. See also *Warrick v Superior Court* (2005) 35 C4th 1011, 1016, 29 CR3d 2. Examples of showings in affidavits sufficient to compel discovery include *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 85, 260 CR 520 (declaration containing specific allegations about police officers' use of force during arrest of defendant established good cause for disclosure); *Uybungco v Superior Court, supra* ("relatively low threshold" for establishing good cause to obtain in camera hearing met by declaration depicting a scenario that "might or could have occurred" and presented "an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges"); *People v Johnson* (2004) 118 CA4th 292, 12 CR3d 885 (declaration setting forth facts contradicting officer's account of offense in police report established that officer's truthfulness was material to case); *People v Hustead* (1999) 74 CA4th 410, 416, 87 CR2d 875 (declaration alleging that officer misstated information, that

defendant denied the officer's claims, and that credibility of officer would be in issue at trial was sufficient to compel discovery on evading arrest charge, when defendant claimed that police were lying). In *People v Thompson* (2006) 141 CA4th 1312, 46 CR3d 884, the Second District held that defense cannot simply say that the police are lying, but is also required to articulate an explanation for the events. This is inconsistent with the statement of the California Supreme Court in *Warrick v Superior Court* (2005) 35 C4th 1011, 1016, 29 CR3d 2, and in *Garcia v Superior Court* (2007) 42 C4th 63, 71, 63 CR3d 948, that the scenario described in the declaration, "depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." *Warrick,* 35 C4th at 1024

The supporting affidavit or declaration is ordinarily made by defense counsel on information and belief. *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 89, 260 CR 520. There is no requirement that there be an affidavit or a declaration from the defendant personally or any defense witness. *City of Santa Cruz v Municipal Court, supra*. The affidavit may be filed under seal to protect against revelation of privileged information. The sealed affidavit need not be served on the police officer who is the subject of the discovery motion or on the City Attorney representing that officer. The defense is required to make a showing that the information in the affidavit is in fact privileged as coming from the client or is core work product. The court is to consider that showing and determine whether the showing is sufficient to establish that the information is privileged. If the information is privileged, the court must order that the affidavit be sealed. If the court rules that the information is not privileged, the court must allow defense counsel to amend to include (or exclude) privileged information, rewrite the affidavit as a denial, or agree that the affidavit will not be sealed. However, this procedure need not be followed very often, because of the minimal showing necessary to compel the in camera review of the officer's personnel file. *Garcia v Superior Court, supra*.

Service. The motion must be served on the government agency that has custody of the records. Evid C §1043(a). The motion must be served at least 16 court days before the date set for the hearing on the motion when it is personally served. Evid C §1043(a); CCP §1005. Other methods of service require additional notice. See CCP §1005(b). For example, service by mail from inside California to an address in California extends the 16-day notice period by 5 calendar days. CCP §1005(b).

Ø **Note:** Defense counsel should serve the government *agency,* not counsel for the agency, with the *Pitchess* motion. The agency will then send a designated representative to court.

Informal request not required. *Pitchess* motions are governed by Evid C §§1043-1047, not by Pen C §§1054-1054.10. *People v Superior Court (Barrett)* (2000) 80 CA4th 1305, 1313, 96 CR2d 264; *Albritton v Superior Court* (1990) 225 CA3d 961, 275 CR 314. Therefore, defense counsel is not required to make an informal request as required by Pen C §1054.5 prior to making a *Pitchess* motion. See also *Alford v Superior Court* (2003) 29 C4th 1033, 1045, 130 CR2d 672.

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§11.21 3. Proceedings on Motion

At the court hearing on a *Pitchess* motion (*Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897), the following people are usually present: the defendant with defense counsel, the prosecutor, and a representative of the government agency, *e.g.,* the police department, usually either the city attorney or county counsel. The prosecutor is not a party to the motion and, therefore, is not entitled to argue the prosecutorial point of view. *Alford v Superior Court* (2003) 29 C4th 1033, 1045, 130 CR2d 672.

If the court finds good cause for discovery of the records, it must hold an in camera hearing, to determine whether the requested materials are relevant. Evid C §1045(b). Both the prosecution *and* the defense are excluded from the in camera hearing; only the officer and "any other persons [the officer] is willing to have present" are allowed in chambers under the in camera procedures of Evid C §915. *People v Woolman* (1974) 40 CA3d 652, 115 CR 324. See also *People v Superior Court (Biggs)* (1971) 19 CA3d 522, 97 CR 118. Typically, the officer and the custodian of records are the only ones present.

> Ø **Note:** The police and custodial officer personnel records usually sought in *Pitchess* motions are confidential. Pen C §§832.7-832.8. However, "the officer arguably has no legitimate privacy interest in a sustained citizen complaint of misconduct." *City of Los Angeles v Superior Court* (2002) 29 C4th 1, 30 n6, 124 CR2d 202.

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§11.22 4. Scope of Disclosure

If the court decides that the requested materials are relevant (Evid C §1045(a)-(c)), it must order disclosure. The "courts have generally refused to disclose verbatim reports or records… from peace officer personnel files, ordering instead… that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 84, 260 CR 520.

A supplemental motion will lie to obtain the verbatim reports. *Alvarez v Superior Court* (2004) 117 CA4th 1107, 1112, 12 CR3d 252. If, for example, the defense shows that a witness cannot be found, disclosure of the verbatim report is required to permit the defense to try to locate the witness. *People v Matos* (1979) 92 CA3d 862, 155 CR 293; *City of Azusa v Superior Court* (1987) 191 CA3d 693, 236 CR 621. If the defense finds the witnesses but those witnesses cannot recall what they said, the defense is entitled to the verbatim reports to refresh the recollections of the witnesses. *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897; *People v Matos, supra*; *City of Azusa v Superior Court, supra*. If the witnesses refuse to talk to the defense, the defense is entitled to the verbatim reports because the witnesses are unavailable to the defense. *Alvarez v Superior Court, supra*.

Ø **Note:** A supplemental motion seeking disclosure of additional information must comply with the notice requirements of Evid C §1043 and CCP §1005 (see §11.20) applicable to an initial *Pitchess* motion. *City of Tulare v Superior Court* (2008) 169 CA4th 373, 382, 86 CR3d 707.

The following information may not be disclosed (Evid C §1045(b)):

- Information concerning conduct that occurred more than 5 years before the event that is the subject of the current litigation;

Ø **Note:** This is subject to a *Brady* exception discussed in §11.26.

- The conclusions of officers investigating complaints filed against the officer whose records are sought; and
- Facts too remote to be of practical benefit.

Despite the 5-year limitation of Evid C §1045(b)(1), citizen complaints older than 5 years are subject to disclosure as *Brady* material (see §11.26) if the trial court finds them to be material and exculpatory after in-chambers review. *City of Los Angeles v Superior Court* (2002) 29 C4th 1, 12, 124 CR2d 202; *Abatti v Superior Court* (2003) 112 CA4th 39, 54, 4 CR3d 767. Such materials are subject to *Brady* disclosure even if the law enforcement agency holding the files is technically not on the prosecution "team," and the prosecution would therefore otherwise have no *Brady* duty to disclose them. 112 CA4th at 57.

Ø **Note:** "Results" of internal police investigations, such as disciplinary action, are discoverable under *Pitchess,* while the "conclusions" of the investigating officer made during such investigations are not. "Conclusions" means the thought processes of, and factual inferences and deductions drawn by, an investigating officer regarding such issues as witness credibility or the significance, strength, or lack of evidence. *City of Los Angeles v Superior Court* (2002) 29 C4th 1, 14, 124 CR2d 202; *City of San Jose v Superior Court* (1993) 5 C4th 47, 19 CR2d 73.

Pitchess discovery may include confidential reports transferred from a civilian police investigation agency established by law to the police department. Pen C §832.5; *San Francisco Police Officers' Ass'n v Superior Court* (1988) 202 CA3d 183, 188, 248 CR 297. Disclosure of personal information, such as the officer's home address or salary history, is ordinarily not discoverable in a *Pitchess* motion because such information would not be material to the criminal prosecution. See *Hackett v Superior Court* (1993) 13 CA4th 96, 16 CR2d 405 (Evid C §§1043-1047 create conditional privilege for personal information listed in Pen C §832.8).

The court must order that the records may not be used for any purpose other than in the underlying court proceeding. Evid C §1045(e); *Alford v Superior Court* (2003) 29 C4th 1033, 1042, 130 CR2d 672. The information disclosed may, on request, be provided to the officer who is the subject of the records. *Becerrada v Superior Court* (2005) 131 CA4th 409, 31 CR3d 735. Other parties to the case, including the prosecutor, do not have automatic

entitlement to *Pitchess* materials. *Alford,* 29 C4th at 1046. In addition, counsel for the agency or the officer may wish to request a protective order to protect the officer or agency from unnecessary annoyance, embarrassment, or oppression. Evid C §1045(d). To obtain such an additional protective order, there must be a noticed motion and a showing of good cause. *Chambers v Appellate Div.* (2007) 42 C4th 673, 680 n8, 68 CR3d 43; Evid C §1045(d). However, when complainant information has been ordered disclosed to counsel who, when later representing a different defendant, succeeds under *Pitchess* in discovering the same complainant information relating to the same officer, counsel may then refer to that derivative information uncovered as part of the earlier investigation. *Chambers v Appellate Div.* (2007) 42 C4th 673, 681, 68 CR3d 43.

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§11.23 5. Sanctions for Failure to Comply With Order of Disclosure

Pitchess discovery may require disclosure of information for which a privilege can be asserted under Evid C §1040(b)(2). However, the privilege "is not an unmixed blessing to law enforcement." *Kelvin L. v Superior Court* (1976) 62 CA3d 823, 830, 133 CR 325. Even if the government agency, *e.g.,* the police department, ordered to provide *Pitchess* discovery, makes a successful claim of privilege, its failure to comply with the discovery order subjects it to the adverse consequences provided in Evid C §1042(a), *i.e.,* an adverse order or findings of fact on any issue to which the privileged information is material. *Kelvin L v Superior Court, supra; People v Zamora* (1980) 28 C3d 88, 99 n7, 167 CR 573.

If the court overrules the claim of privilege, and the government agency refuses to disclose the information, the charges to which the undisclosed information pertains must be dismissed. *Dell M. v Superior Court* (1977) 70 CA3d 782, 144 CR 418. See also *People v Mejia* (1976) 57 CA3d 574, 129 CR 192 (dismissal required when state action has made material witness unavailable).

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§11.24 6. Appellate Review

The court's order on a *Pitchess* motion is reviewed for abuse of discretion. *People v Samayoa* (1997) 15 C4th 795, 827, 64 CR2d 400; *Uybungco v Superior Court* (2008) 163 CA4th 1043, 1049, 78 CR3d 30; *Haggerty v Superior Court* (2004) 117 CA4th 1079, 1086, 12 CR3d 467. To ensure meaningful appellate review, it is important that all parties follow proper *Pitchess* procedure. The court should be on the record during both the public and in camera proceedings and should make a full record of what documents or portions of the personnel file it examined, before granting or denying the *Pitchess* motion, in whole or in part. Statements made in camera by the custodian of records must be under oath. *People v Mooc* (2001) 26 C4th 1216, 1229 n4, 114 CR2d 482. If the custodian of records does not produce the entire personnel file, it must provide a record of what documents were withheld and why. *People v Wycoff* (2008) 164 CA4th 410, 414, 78 CR3d 907. The transcript of the in camera hearing and all copies of the documents should be sealed. See *People v Coddington* (2000) 23 C4th 529, 589, 97 CR2d 528, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069, 108 CR2d 409; *People v Mooc* (2001) 26 C4th 1216, 1228, 114 CR2d 482; *People v Guevara* (2007) 148 CA4th 62, 69, 55 CR3d 581.

When an appellate court rules that the trial court erred in denying a *Pitchess* motion *without* holding an in camera hearing, the proper remedy is a conditional reversal and remand directing the trial court to conduct an in camera hearing. *People v Gaines* (2009) 46 C4th 172, 180, 92 CR3d 627, overruling *People v Memro* (1985) 38 C3d 658, 685, 214 CR 832, to the extent that *Memro* suggests that outright reversal, not remand, is the appropriate remedy. If no discoverable material exists, the conviction is reinstated. If discoverable material exists, the defendant is entitled to it. To warrant reversal, the defendant must show prejudice from the denial of the material, *i.e.,* the defendant must show a reasonable probability of a different outcome had the material been disclosed. *Gaines,* 46 C4th at 180.

If the trial court prejudicially erred in denying *Pitchess* discovery *after* holding an Evid C §915/§1045 hearing, reversal is required. *People v Memro* (1985) 38 C3d 658, 685, 214 CR 832, overruled on other grounds in *People v Gaines* (2009) 46 C4th 172, 180, 92 CR3d 627.

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§11.25 B. Subpoena Duces Tecum

The criminal discovery procedures of Pen C §§1054-1054.10 do not regulate discovery of information in the possession of uninvolved third parties (*Teal v Superior Court* (2004) 117 CA4th 488, 491, 11 CR3d 784; *People v Superior Court (Broderick)* (1991) 231 CA3d 584, 282 CR 418), such as uninvolved prosecution or police agencies, hospitals (see *People v Superior Court (Barrett)* (2000) 80 CA4th 1305, 96 CR2d 264; *People v Superior Court (Mem. Med. Ctr.)* (1991) 234 CA3d 363, 286 CR 478), doctors (see *People v Superior Court (Broderick), supra*), public institutions, and private businesses. Therefore, a subpoena duces tecum (Pen C §§1326-1328) should be used to compel the production of relevant materials in the possession of a third party.

The following are examples of information from third parties that counsel may wish to obtain:

- Confidential records of a state agency investigating the child abuse with which the defendant is charged. *Pennsylvania v Ritchie* (1987) 480 US 39, 94 L Ed 2d 40, 107 S Ct 989.
- Child Protective Services records concerning the victim. *Lorenza P. v Superior Court* (1988) 197 CA3d 607, 242 CR 877 (defendant, mother of victim, had right to records under Welf & I C §827).

Ø **Note:** A defendant can obtain his or her own records under Welf & I C §10850 by submitting a release. *Lorenza P. v Superior Court, supra*.

- Reports prepared by a city's special investigation team about the crime. *Vela v Superior Court* (1989) 208 CA3d 141, 255 CR 921.
- Videotape of minor victim's parents engaging in sex acts similar to those it was alleged that defendant performed on minor victim. *Rubio v Superior Court* (1988) 202 CA3d 1343, 249 CR 419 (marital privilege gave way to defendant's constitutional rights).

Often the data sought through a subpoena duces tecum is arguably privileged. In that situation, the court becomes involved in the process. An in camera hearing is required. *Pennsylvania v Ritchie* (1987) 480 US 39, 60, 94 L Ed 2d 40, 59, 107 S Ct 989; see Pen C §1326(c). Such an in camera hearing, at least if the information sought concerns a critical prosecution witness, occurs during, not before, trial. *People v Hammon* (1997) 15 C4th 1117, 65 CR2d 1 (discussed in §11.29).

When the defense has issued a subpoena duces tecum to a nonparty, the court may order an in camera hearing to decide whether the defense is entitled to receive the documents. However, the court may not condition disclosure of the documents to the defense on the prosecution's receiving a copy of the documents. Disclosure of such documents to the prosecution is required only if and when the defense decides to use the documents at trial, under the provisions of Pen C §1054.3 (discussed in §§11.9-11.11). Pen C §1326(c); *Teal v Superior Court* (2004) 117 CA4th 488, 492, 11 CR3d 784.

The prosecution is not entitled to participate in any third party discovery efforts of the defense but *may* participate if the court so desires. *People v Superior Court (Humberto S.)* (2008) 43 C4th 737, 750, 76 CR3d 276.

Ø **Note:** It appears that motions for in camera hearings to weigh assertions of privilege against a defendant's constitutional rights in subpoenaed materials, such as in *Pennsylvania v Ritchie, supra,* survive Proposition 115 because such hearings effectuate rights mandated by the U.S. Constitution. See Pen C §1054(e); see also §11.26.

Defense counsel must be allowed access to confidential files when the trial court determines that they contain information that is favorable to the defendant and material on guilt or punishment. *In re Sassounian* (1995) 9 C4th 535, 543, 37 CR2d 446.

Subpoenas and subpoenas duces tecum may be challenged by a motion to quash; see discussion in §§4.43-4.44.

For further discussion of subpoenas duces tecum, see §§4.39-4.47. A Judicial Council Form is in California Criminal Law Forms Manual §4.1 (2d ed Cal CEB 2005).

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Source: Criminal Law/California Criminal Law Procedure and Practice/11 DISCOVERY/§11.25A C. Conditional Examination

§11.25A C. Conditional Examination

Circumstances permitting conditional examination. Because of the defendant's right of confrontation, depositions are not available as a matter of course in criminal prosecutions. See generally *People v Municipal Court (Runyan)* (1978) 20 C3d 523, 143 CR 609. Nevertheless, under certain circumstances, a witness may be conditionally examined before trial to preserve his or her testimony under procedures prescribed in Pen C §§1335-1345. The procedure is available only in the circumstances set forth in Pen C §1336. *Clark v Superior Court* (1961) 190 CA2d 739, 12 CR 191.

In any noncapital criminal prosecution, either the prosecution or the defense may have a witness conditionally examined by showing that the witness's testimony is material, and that the witness is (Pen C §§1335(a), 1336(a)):

- about to leave the state;
- so sick or infirm that the witness's ability to testify at trial is in doubt;
- sixty-five years of age or older; or
- a dependent adult.

If the prosecution is for a serious felony, as defined in Pen C §1335(c), or concerns a case of domestic violence, as defined in Pen C §1335(e), either the prosecution or the defense may have a material witness conditionally examined on a showing that the witness's life is in jeopardy. Pen C §§1335(b), 1336(b). In this context, the term "serious felony" includes the crimes listed as serious felonies in Pen C §1192.7(c) *and* violations of Health & S C §§11351, 11352, 11378, and 11379. Pen C §1335(c). The prosecutor or the defendant may also have a witness conditionally examined if the defendant has been charged with domestic violence and there is evidence that the defendant has dissuaded or attempted to dissuade the witness from testifying or cooperating with the prosecution. Pen C §1335(d).

In a capital case, the defense may apply to have a witness conditionally examined for any of the reasons listed in Pen C §1336(a) or (b). Pen C §1335(a). The prosecution may obtain a conditional examination of a witness in a capital case only on a showing that the witness's life is in jeopardy. Pen C §§1335(b), 1336(b); *People v Jurado* (2006) 38 C4th 72, 112, 41 CR3d 319.

Application. An application for a conditional examination must be made to the court with at least 3 days' notice to the opposing party or parties. Pen C §1338. But see *People v Frank* (1933) 132 CA 360, 363, 22 P2d 792 (in emergency, order shortening time may be obtained). It must be accompanied by an affidavit (or declaration (see CCP §2015.5)) that states the following (Pen C §1337):

- The nature of the offense charged;
- The current procedural posture of the case;
- The name and address of the witness;
- That the witness's testimony is material; and
- That one of the facts listed in Pen C §1336 permitting a conditional examination of the witness is true, or that, in a domestic violence case, the witness is being or has been intimidated or threatened and dissuaded from testifying or cooperating with the prosecution as described in Pen C §1335.

Ø **Note:** In *People v Jurado* (2006) 38 C4th 72, 113, 41 CR3d 319, the supreme court held that the prosecutor's declaration asserting his belief that the prospective witness had been part of a plot to commit an uncharged murder, and that the charged murder had been committed to prevent the victim from disclosing the plan, was sufficient to justify a conditional examination.

A sample motion for conditional examination is in California Criminal Law Forms Manual §11.17 (2d ed Cal CEB 2005).

Holding the examination. The examination takes place before a magistrate, who may issue a subpoena to secure the attendance of the witness. Pen C §§1339, 1342. The defendant has the right to be present in person and through counsel. Pen C §1340(a). The examination must be recorded by a verbatim reporter and may also be videotaped. Pen C §1343. The deposition is then sealed and transmitted to the court clerk. Pen C §1344. The deposition may be read

at trial at the request of either party on a showing that the witness is unavailable within the meaning of Evid C §240. Pen C §1345. Alternatively, if the examination was videotaped, the videotape may be shown to the jury. Pen C §1345.

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V. CONSTITUTIONALLY MANDATED DISCOVERY

§11.26 A. Evidence Favorable to Accused (*Brady* Discovery)

Due process requires disclosure of material evidence favorable to accused. Due process requires the disclosure to the defendant of "evidence favorable to an accused" that is "material either to guilt or to punishment." *U.S. v Bagley* (1985) 473 US 667, 676, 87 L Ed 2d 481, 490, 105 S Ct 3375; *Brady v Maryland* (1963) 373 US 83, 87, 10 L Ed 2d 215, 83 S Ct 1194; see Pen C §1054(e) (discovery required by U.S. Constitution must occur); *Izazaga v Superior Court* (1991) 54 C3d 356, 378, 285 CR 231. Evidence is "favorable" if it either helps the defendant or hurts the prosecution. *In re Miranda* (2008) 43 C4th 541, 575, 76 CR3d 172; *In re Sassounian* (1995) 9 C4th 535, 544, 37 CR2d 446; *People v Uribe* (2008) 162 CA4th 1457, 1471, 76 CR3d 829.

The duty to disclose material exculpatory evidence does not end when the trial is over. "[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v Pachtman* (1976) 424 US 409, 427 n25, 47 L Ed 2d 128, 141 n25, 96 S Ct 984. See *People v Johnson* (2006) 142 CA4th 776, 782, 48 CR3d 439 (prosecutor improperly withheld police reports of gang-related incident involving chief prosecution witness that occurred between defendant's first and second trials).

Ø **Note:** *Brady* discovery is a "one-way street"; there is no corresponding defense duty to give implicating evidence to the prosecution.

For general review of *Brady* discovery requirements, see *Kyles v Whitley* (1995) 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555.

Duty to disclose encompasses impeachment evidence. The U.S. Supreme Court has never drawn a distinction for *Brady* purposes between impeachment evidence, *i.e.,* evidence that reflects on the credibility of a witness, and evidence that is directly exculpatory. See *U.S. v Bagley* (1985) 473 US 667, 676, 87 L Ed 2d 481, 490, 105 S Ct 3375. The prosecutor's duty to disclose material evidence that is favorable to the accused includes the duty to disclose evidence that would impeach the testimony of material witnesses. *U.S. v Bagley*, *supra*. See also *Giglio v U.S.* (1972) 405 US 150, 153, 31 L Ed 2d 104, 108, 92 S Ct 763 (reversal required because prosecutor failed to disclose promise of leniency in exchange for testimony); *In re Miranda* (2008) 43 C4th 541, 580, 76 CR3d 172 (letter detailing confession of uncharged murder by material witness to defendant's culpability should have been disclosed to allow impeachment during penalty phase; death sentence vacated and guilty plea may be withdrawn); *People v Uribe* (2008) 162 CA4th 1457, 1471, 76 CR3d 829 (new trial motion should have been granted on basis of suppression of medical examination videotape of purported child victim that might have supported defense expert's opinion and impeached prosecution expert opinions).

Under Evid C §780, unless otherwise provided by statute, the jury may consider (and counsel may inquire about) "any matter that has any tendency in reason to prove or disprove" a witness's testimony. Required disclosure of impeachment materials is correspondingly broad. It includes felony convictions (Pen C §1054.1(d)), misdemeanor convictions (see Evid C §452.5, *People v Duran* (2002) 97 CA4th 1448, 1460, 119 CR2d 272), felony acts, misdemeanor acts, and noncriminal acts of dishonesty or moral turpitude that could reflect on the witness's credibility (*People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418). For examples of matters the jury may consider in determining credibility, see Evid C §780(a)-(g). The prosecutor has a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v Whitley* (1995) 514 US 419, 437, 131 L Ed 2d 490, 508, 115 S Ct 1555. See *U.S. v Price* (9th Cir 2009) 566 F3d 900, 903; *In re Brown* (1998) 17 C4th 873, 879 n3, 72 CR2d 698. See also *Tennison v City & County of San Francisco* (9th Cir 2009) 570 F3d 1078. But see *People v Panah* (2005) 35 C4th 395, 460, 25 CR3d 672, quoting from *In re Littlefield* (1993) 5 C4th 122, 135, 19 CR2d 248 (prosecutor "has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense."

Ø **Practice tip:** The *Brady* obligation may well require disclosure of reports and statements of experts and

witnesses the prosecutor does *not* intend to call at trial.

***Brady* disclosure is limited.** The prosecutor's constitutional obligation to disclose exculpatory information is limited to information that is both exculpatory and material. *Brady v Maryland* (1963) 373 US 83, 87, 10 L Ed 2d 215, 83 S Ct 1194. Exculpatory information is material only if a reasonable probability exists that disclosure would make a difference in the outcome of the trial. *In re Miranda* (2008) 43 C4th 541, 575, 76 CR3d 172; *City of Los Angeles v Superior Court* (2002) 29 C4th 1, 7, 124 CR2d 202; *People v Seaton* (2001) 26 C4th 598, 648, 110 CR2d 441. If the exculpatory value of information in the prosecutor's possession is not readily apparent, "disclosure is required only if the defense makes a specific request for it." *In re Steele* (2004) 32 C4th 682, 701, 10 CR3d 536. If the defense does make such a specific discovery request, the court may consider a resulting defense assumption about the nonexistence of that evidence and any associated inadequacy in trial preparation in assessing the materiality of nondisclosure. *People v Uribe* (2008) 162 CA4th 1457, 1472, 76 CR3d 829.

In addition, because the disclosure requirements of *Brady* are founded on the defendant's right to a fair trial, the prosecution is not required to disclose material impeachment evidence before plea bargaining. *U.S. v Ruiz* (2002) 536 US 622, 633, 153 L Ed 2d 586, 122 S Ct 2450. But see *In re Miranda* (2008) 43 C4th 541, 582, 76 CR3d 172 (leaving open issue of whether exculpatory evidence must be disclosed before defendant pleads guilty).

Ø **Note:** Prosecutors should resolve doubtful questions in favor of disclosure. *U.S. v Agurs* (1976) 427 US 97, 108, 49 L Ed 2d 342, 352, 96 S Ct 2392. The prudent prosecutor should have full and continual knowledge of what evidence is available or being produced in a case, and analyze its discoverability on an ongoing basis. *People v Robinson* (1995) 31 CA4th 494, 37 CR2d 183. The prosecution's failure to disclose *Brady* materials, even when negligent, can result in reversal. See *Merrill v Superior Court* (1994) 27 CA4th 1586, 33 CR2d 515; *People v Robinson, supra*. A prosecutor's intentional failure to disclose *Brady* materials may be misconduct. See *People v Garcia* (1993) 17 CA4th 1169, 1183, 22 CR2d 545; *People v Sons* (2008) 164 CA4th 90, 102, 78 CR3d 679 (sanctions and civil liability may be appropriate for *Brady*-related prosecutorial misconduct). An attorney must report his or her own misconduct to the State Bar when it was the basis in whole or in part of a reversal. Bus & P C §6068(o)(7). Courts are required to report attorneys found in contempt on grounds that warrant discipline and attorneys whose misconduct was the basis in whole or in part of a reversal. Bus & P C §6086.7(a)(1)-(2).

Defense is not required to make specific request for *Brady* disclosure. The duty to disclose exculpatory information does not depend on the defendant's request—the prosecution is required to disclose such information on its own, even in the absence of a request. *U.S. v Agurs* (1976) 427 US 97, 106, 49 L Ed 2d 342, 351, 96 S Ct 2392; *City of Los Angeles v Superior Court* (2002) 29 C4th 1, 8, 124 CR2d 202; *In re Ferguson* (1971) 5 C3d 525, 532, 96 CR 594. Prudent defense counsel, however, should make specific requests for material as soon as its existence is suspected, unless there are tactical reasons for not doing so. Defense counsel should always specifically ask for the identity and addresses of all percipient witnesses to the crime whether or not the prosecutor intends to call these witnesses, unless there are tactical reasons for not doing so. In this way, defense counsel is assured of the opportunity to learn of, and seek interviews with, any eyewitnesses whose testimony may point toward innocence, impeachment, or mitigation. Defense counsel cannot assume that the prosecution's investigating agencies have obtained all the useful information that these witnesses may possess. See, *e.g., U.S. v Cadet* (9th Cir 1984) 727 F2d 1453, 1468.

"Open file" policy may satisfy *Brady* obligation. Under proper circumstances, the prosecution may satisfy its *Brady* obligation through an "open file" policy that allows defense counsel to examine all materials regarding the case that are in the prosecutor's possession. When such a policy is in place, defense counsel may assume that the prosecution files contain all the evidence required to be disclosed. The prosecution cannot use an open file policy to impose impracticable or oppressive burdens on the defense. See *People v Zambrano* (2007) 41 C4th 1082, 1134, 63 CR3d 297, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209, citing *Strickler v Greene* (1999) 527 US 263, 283 n23, 144 L Ed 2d 286, 303 n23, 119 S Ct 1936.

Appellate review. The appellate court conducts an independent review to determine if a *Brady* violation occurred. *People v Uribe* (2008) 162 CA4th 1457, 1473, 76 CR3d 829. On appeal, evidence is considered "material" only if there is a reasonable probability that had it been disclosed to the defense the result would have been different. "Reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. *In re Sassounian* (1995) 9 C4th 535, 544 n6, 37 CR2d 446 (citing *U.S. v Bagley* (1985) 473 US 667, 682, 87 L Ed 2d 481, 494, 105 S Ct 3375).

See also *Kyles v Whitley* (1995) 514 US 419, 131 L Ed 2d 490, 115 S Ct 1555; *People v Uribe, supra*. The materiality of omitted evidence is assessed in the light of other evidence, not merely in terms of its probative value standing alone. *Kyles,* 514 US at 436. Compare *People v Dickey* (2005) 35 C4th 884, 907, 28 CR3d 647 (cumulative impeachment evidence held not material), with *In re Miranda* (2008) 43 C4th 541, 579, 76 CR3d 172 (letter could have effectively impeached prosecution witness and was wrongfully suppressed). See also *Silva v Brown* (9th Cir 2005) 416 F3d 980 (failure to disclose that plea agreement between prosecution and star witness required witness not to undergo psychiatric evaluation before testifying violated *Brady*); *In re Sodersten* (2007) 146 CA4th 1163, 1224, 53 CR3d 572 (failure to disclose tape-recorded statements of the two key trial witnesses that contained inconsistent statements, as well as admissions of lying and coercive interrogation of one of the witnesses, violated *Brady*).

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B. Duty to Preserve Favorable Evidence (*Trombetta-Youngblood* Motion)

§11.27 1. Nature of Motion

The law does not impose a duty on the prosecution to collect evidence that might be beneficial to the defense. Once collected, however, due process imposes on the prosecution a duty to preserve material, exculpatory evidence. *Arizona v Youngblood* (1988) 488 US 51, 58, 102 L Ed 2d 281, 109 S Ct 333; *California v Trombetta* (1984) 467 US 479, 488, 81 L Ed 2d 413, 104 S Ct 2528. If the prosecution fails to preserve such evidence, the defense may make a motion for sanctions, called a *Trombetta* or *Youngblood* motion. Because *Trombetta-Youngblood* motions are constitutionally mandated under the Due Process Clause and concern exculpatory evidence, they survive Proposition 115. See Pen C §1054(e).

The showing the defense must make to obtain relief varies, depending on whether the loss of the evidence was in bad faith. *People v Pastor Cruz* (1993) 16 CA4th 322, 20 CR2d 13. A defendant who can establish that the prosecution acted in bad faith in destroying or failing to preserve evidence is entitled to relief on a showing that the lost or destroyed evidence *might* have exonerated him or her. *Arizona v Youngblood, supra*. See also *Illinois v Fisher* (2004) 540 US 544, 157 L Ed 2d 1060, 124 S Ct 1200; *People v Memro* (1995) 11 C4th 786, 47 CR2d 219. If the defendant cannot establish bad faith (the usual case), the defendant is entitled to relief only on a showing that the lost or destroyed evidence was material and exculpatory. *California v Trombetta, supra*.

Material, exculpatory evidence is evidence that might be expected to play a significant role in the suspect's defense. It must possess an exculpatory value that was apparent before the evidence was destroyed or lost, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California v Trombetta, supra; Arizona v Youngblood, supra*. See also *People v Frye* (1998) 18 C4th 894, 942, 77 CR2d 25, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Arias* (1996) 13 C4th 92, 165 n28, 51 CR2d 770.

Trombetta-Youngblood motions are difficult to win because it is almost impossible to provide proof of bad faith short of showing deliberate destruction of an irreplaceable item of evidence that has an exculpatory nature apparent to the police who possess it. For examples of fruitless motions under *Trombetta-Youngblood* standards, see *People v Cooper* (1991) 53 C3d 771, 810, 281 CR 90 (neither *Trombetta* satisfied nor bad faith shown); *People v Daniels* (1991) 52 C3d 815, 855, 277 CR 122 (*Trombetta* not satisfied); *People v Griffin* (1988) 46 C3d 1011, 1021, 251 CR 643 (evidence consumed in testing; no due process violation).

When the *Trombetta-Youngblood* standards are satisfied, the trial court should impose appropriate sanctions based on the proved facts of each case. *People v Medina* (1990) 51 C3d 870, 893, 274 CR 849; see *People v Zamora* (1980) 28 C3d 88, 96, 167 CR 573. Sanctions include the exclusion of evidence or dismissal of the case. See *California v Trombetta* (1984) 467 US 479, 486, 81 L Ed 2d 413, 104 S Ct 2528. However, even if a federal due process violation is not shown, the trial court retains the discretion to impose the sanction of an adverse jury instruction. *People v Huston* (1989) 210 CA3d 192, 215, 258 CR 393.

The best result of a *Trombetta-Youngblood* motion may be that the court allows the defense to present evidence to the trier of fact that the prosecution, knowing that the evidence it had might exculpate the defendant, either failed to preserve it or destroyed it. *People v Cooper, supra; People v Cruz* (1993) 16 CA4th 322, 20 CR2d 13.

> Ø **Note:** When the defense is aware of particular evidence that it wants preserved, counsel should move for a protective court order. In that way, the defense can, *e.g.,* run a DNA test on a bodily fluid to prove that the defendant is innocent. Because the contents of a police evidence locker are the responsibility of the prosecutor and not that of some third party in possession (such as a court), pretrial protective orders or orders for inspection or testing of booked evidence may not be made ex parte or be confidential (*Walters v Superior Court* (2000) 80 CA4th 1074, 95 CR2d 880) and the statutory reciprocal discovery procedures apply. See §§11.3-11.18 (reciprocal discovery), 55.21 (retesting).

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§11.28 2. When to Make Motion; Method of Review

A motion for sanctions based on the destruction of evidence should be made in the trial court before the evidence at issue is introduced and after jeopardy has attached. *People v Taylor* (1977) 67 CA3d 403, 136 CR 640. Although the motion may be made before trial at the court's discretion, any such ruling is not binding on the trial judge. See *People v Rawlings* (1974) 42 CA3d 952, 959, 117 CR 651, disapproved on other grounds in *People v Chacon* (2007) 40 C4th 558, 565 n7, 53 CR3d 876; *People v Leighter* (1971) 15 CA3d 389, 394, 93 CR 136, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77, 123 CR 465; *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257, 61 CR 510. A sample *Trombetta-Youngblood* motion is in California Criminal Law Forms Manual §11.11 (2d ed Cal CEB 2005). The hearing on the motion is the same as any hearing on the admissibility of evidence.

The issue cannot generally be raised for the first time on a new trial motion. *People v Mayorga* (1985) 171 CA3d 929, 218 CR 830.

A *Trombetta-Youngblood* motion is not reviewable by pretrial writ; it is reviewed on appeal from an ensuing conviction. *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 117 CR 20. Although the issue of whether the denial of a *Trombetta-Youngblood* motion is reviewable on appeal following a guilty plea is unresolved, the weight of authority is that it is not. *People v Avalos* (1996) 47 CA4th 1569, 1576, 55 CR2d 450 (underlying question relates to guilt or innocence; therefore, issue does not survive guilty plea); *People v Aguilar* (1985) 165 CA3d 221, 224, 211 CR 333 (Pen C §1538.5(m) preserves issue after guilty plea when defendant makes unsuccessful motion to suppress tangible fruits of violation of evidence-preservation rule).

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§11.29 C. Motion to Obtain Privileged Psychiatric Records (*Hammon-Reber* Motion)

The defense may secure the privileged psychiatric medical records of prosecution witnesses if the defense can show good cause for discovery of the records. See *People v Gurule* (2002) 28 C4th 557, 592, 123 CR2d 345. See generally *Davis v Alaska* (1974) 415 US 308, 316, 39 L Ed 2d 347, 354, 94 S Ct 1105. The motion for the disclosure of these records is known as a "*Hammon-Reber* motion." These motions have survived Proposition 115 because they are mandated by the U.S. Constitution. Pen C §1054(e).

Defense counsel should have a subpoena duces tecum (see §§4.39, 11.25) for the records served on the person who has the records. The records should be subpoenaed so that they arrive before a hearing is held on their admissibility. This hearing occurs *during,* not before, trial. *People v Hammon* (1997) 15 C4th 1117, 1127, 65 CR2d 1.

When a defendant proposes to impeach a crucial prosecution witness with questions that call for privileged information, the trial court must balance the defendant's need for cross-examination against the state policies that the privilege is intended to serve. The court should consider the prosecution evidence, the proffered defense as presented in opening statements, cross-examination of the prosecution's witnesses, and any other evidence relevant to this determination. If the court finds that there may be good cause for disclosure, the court examines the records in camera and rules on whether and what parts of the records should be disclosed to the defense. Only records essential to vindicate the defendant's constitutional right may be disclosed. *People v Reber* (1986) 177 CA3d 523, 223 CR 139, disapproved on other grounds in *People v Hammon* (1997) 15 C4th 1117, 1123, 65 CR2d 1. In *Reber,* the defendants established good cause for discovery of the complaining witnesses' psychotherapy records, which contained evidence of psychotic or hallucinatory behavior relevant to their credibility. However, a mere contention that the victim received treatment for "some mental health problem" is insufficient to establish good cause for discovery of the victim's mental health records. *People v Pack* (1988) 201 CA3d 679, 248 CR 240. See also *Farrell L. v Superior Court* (1988) 203 CA3d 521, 250 CR 25 (magistrate properly refused to compel production of names of members of victim's counseling group because information was too tangential).

> Ø **Note:** Defense counsel should try through independent investigation to obtain some evidence of mental disorder to make the strongest case for a *Hammon-Reber* motion. When there is no prior access to records, however, it is unnecessary to allege the information sought with particularity. *People v Reber, supra*.

A copy of all the psychological records must be kept for appellate purposes. *People v Pack, supra*. A full record of the hearing must be made that sets out the showings that were made, what evidence was sought, and what was or was not disclosed and why, so that appellate review will be adequately informed.

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§11.30 VI. DISCOVERY OF RECORDS REVEALING DISCRIMINATORY LAW ENFORCEMENT (*MURGIA* MOTIONS)

Intentional and invidious discriminatory enforcement of the criminal law is a constitutional defect in the prosecution that is a defense to a criminal charge. *Murgia v Municipal Court* (1975) 15 C3d 286, 293, 124 CR 204. The defense is entitled to obtain discovery to support the later making of a motion to dismiss based on discriminatory enforcement. These discovery motions are commonly called *Murgia* motions. *Murgia* discovery motions are a form of constitutionally mandated discovery, brought under the Equal Protection Clause of the United States Constitution. See Pen C §1054(e). For discussion, see §§18.16-18.20. A sample *Murgia* motion is in California Criminal Law Forms Manual §18.13 (2d ed Cal CEB 2005).

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Source: Criminal Law/California Criminal Law Procedure and Practice/11 DISCOVERY/§11.31 VII. POSTJUDGMENT DISCOVERY

§11.31 VII. POSTJUDGMENT DISCOVERY

A prosecutor's duty to disclose substantial material evidence favorable to the accused even without a request does not end when the trial is over. *People v Garcia* (1993) 17 CA4th 1169, 22 CR2d 545 (failure to disclose, during pendency of appeal, exculpatory evidence going to credibility of key prosecution witness resulted in defense success on habeas).

When no case is pending before a court, the court lacks jurisdiction to entertain a discovery motion in the absence of statutory authority. *People v Gonzalez* (1990) 51 C3d 1179, 1256, 275 CR 729; *People v Ainsworth* (1990) 217 CA3d 247, 251, 266 CR 175. Penal Code §1054.9 provides that authority in cases in which the defendant has been sentenced to death or to life without the possibility of parole (LWOP). In other cases, the defendant is not entitled to discovery to obtain information that would support the filing of a petition for postconviction relief. It may be possible to obtain information from government agencies when discovery is unavailable through the California Public Records Act, discussed in chap 12. See *People v Gonzalez* (1990) 51 C3d 1179, 1261, 275 CR 729. Discovery is ordinarily available at the request of a party to noncapital habeas proceedings after an order to show cause has issued. *Board of Prison Terms v Superior Court (Ngo)* (2005) 130 CA4th 1212, 1242, 31 CR3d 70. The court may also order discovery on its own motion when the court believes discovery is necessary to "ensure a full and fair hearing." 130 CA4th at 1242. No discovery is permitted before the issuance of an order to show cause, because a habeas petition that does not state a prima facie claim for relief does not create a cause of action and does not therefore confer discovery jurisdiction on the court. *People v Gonzalez* (1990) 51 C3d 1179, 1258, 275 CR 729.

Ø **Note:** Both *Gonzalez* and *Ainsworth* were capital cases. After they were decided, the legislature enacted Pen C §1054.9 (see Stats 2002, ch 1105), which authorizes the court to order limited postconviction discovery in capital and LWOP cases even when no petition for postconviction relief is pending.

Postconviction discovery in LWOP and death penalty cases. When the defense is prosecuting a postconviction writ of habeas corpus, or a motion to vacate the judgment, in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, the court must order that the defendant be provided reasonable access to discovery materials if counsel has made a good faith, unsuccessful effort to obtain those materials from trial counsel. Pen C §1054.9(a). "Discovery materials" are materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial. Pen C §1054.9(b). Discovery materials include materials that (1) were provided at trial but have since been lost to the defendant; (2) the prosecution should have provided at the time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them. *In re Steele* (2004) 32 C4th 682, 695, 10 CR3d 536. Court of appeal cases further elucidating the scope of Pen C §1054.9 include *People v Superior Court (Maury)* (2006) 145 CA4th 473, 51 CR3d 670; *Kennedy v Superior Court* (2006) 145 CA4th 359, 51 CR3d 637; *Hurd v Superior Court* (2006) 144 CA4th 1100, 1106, 50 CR3d 893; and *Curl v Superior Court* (2006) 140 CA4th 310, 330, 44 CR3d 320. Either the trial or the reviewing court has jurisdiction over the discovery motion, but when execution is not imminent, the motion should first be filed in the trial court that rendered the underlying judgment. The motion may be filed before the habeas petition or motion to vacate is filed. *Steele,* 32 C4th at 691.

Access to physical evidence will be granted to the defendant for the purpose of examination only on a showing that there is good cause to believe that access to that physical evidence is reasonably necessary to the defendant's effort to obtain relief. Pen C §1054.9(c).

Ø **Note:** Penal Code §1405 (see discussion below), provides the exclusive procedure for obtaining access to physical evidence for purposes of postconviction DNA testing. Pen C §1054.9(c).

The defendant is responsible for the actual costs of examination or copying when access to discovery materials is granted. Pen C §1054.9(d).

Motion for DNA testing. A defendant convicted of a felony, after trial or plea of guilty or nolo contendere, and currently imprisoned, may make a written motion for the performance of DNA testing. The motion is made in the trial court that entered the judgment of conviction. Pen C §1405(a); *Richardson v Superior Court* (2008) 43 C4th 1040, 1053, 77 CR3d 226. The right to file the motion is absolute and cannot be waived. Pen C §1405(m). Counsel may be appointed for an indigent prisoner. Pen C §1405(b). Among other conditions for granting the motion, a prima facie showing must be made that the evidence sought to be tested is material to the issue of the prisoner's identity as the guilty party. Pen C §1405(f)(4); *Richardson,* 43 C4th at 1049. Once materiality is shown, the defendant also must show that there is a reasonable probability, *i.e.,* "a reasonable chance and not merely an abstract possibility," that the trial court verdict or sentence would have been more favorable had DNA test results been available. *Richardson,* 43 C4th at 1051; Pen C §1405(f)(5). An order granting the motion must identify the specific evidence to be tested and the DNA technology to be used. Pen C §1405(g). The cost of DNA testing ordered is to be borne by the state or the nonindigent prisoner, as the court may order in the interests of justice. Pen C §1405(i). An order denying a DNA testing motion is reviewed under an abuse of discretion standard. *Richardson,* 43 C4th at 1047.

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12

PUBLIC RECORDS

GARRICK A. BYERS

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§12.1 I. OVERVIEW

This chapter discusses (1) how to obtain records held by California state and local executive and administrative agencies (see §§12.2-12.15) and (2) court records other than juvenile court records (see §§12.16-12.22). On juvenile records, see chap 56.

This chapter does not cover access to public records through the following:

- Discovery. See chap 11.
- Subpoena duces tecum. See chap 11.
- *Pitchess* discovery of peace officer and custodial officer personnel records. See chap 11.
- The federal Freedom of Information Act (FOIA), which governs access to the records of federal agencies in California. Procedures for obtaining records that federal agencies maintain on individuals are found in 5 USC §552a and in the Code of Federal Regulations appropriate to the agency concerned. Details of what records are kept and how they may be obtained are published annually in the Federal Register. For further discussion of obtaining federal records, see Bouchard & Franklin, Guidebook to the Freedom of Information and Privacy Acts (2d ed 1986).

This chapter does not discuss sealing, expunging, or dismissing criminal or juvenile records. These subjects are discussed in chap 41.

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II. CALIFORNIA PUBLIC RECORDS ACT AND RELATED STATUTES

§12.2 A. General Description of Act

The main provisions of the California Public Records Act (CPRA) are in Govt C §§6250-6270. The CPRA broadly provides that, except as "exempted by law," public records must be available to the public for inspection. Govt C §6253(a). The CPRA was modeled on the federal Freedom of Information Act (FOIA) (5 USC §552). Accordingly, courts look at the judicial construction and legislative history of the FOIA in interpreting the CPRA. See *American Civil Liberties Union Found. v Deukmejian* (1982) 32 C3d 440, 447, 186 CR 235. In 2004, California voters enacted Cal Const art I, §3(b), enshrining a public right of "access to information concerning the conduct of the people's business." It has been said that §3(b) is "a constitutionalization of the CPRA." *Sutter's Place Inc. v Superior Court* (2008) 161 CA4th 1370, 1382, 75 CR3d 9.

There is no single source, nor any standard procedure, for obtaining California public records. Individual agencies are free to adopt their own procedures to provide public access to records, as long as the procedures are consistent with the goals of the act. Govt C §6253.4. Thus, procedures for obtaining access to public records can vary from agency to agency, from county to county, from city to city, and even within a single county or city. However, the state and local agencies listed in Govt C §6253.4(a) must establish written guidelines, post them conspicuously, and make them available free of charge. While other agencies are not required to have written CPRA guidelines, some do. Often a simple request for the records will suffice; if an informal request does not succeed, then counsel might proceed more formally under the CPRA.

Each agency is required to assist members of the public to obtain the information they are seeking. If a request is too vague to enable the public agency to identify the records being sought, the agency must make a reasonable effort to assist the individual requesting the record by, for example, eliciting additional, clarifying information or by describing the information technology used to store the records. Govt C §6253.1. Except for that provision, the purpose of which is to help the agency to identify the record sought, the CPRA contains no provision authorizing an agency to inquire into the reason the records are sought. Moreover, the CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested." Govt C §6250.

Subsequent sections of the CPRA, Govt C §§6275-6276.48, consist of alphabetical lists of cross-references to statutes throughout the California codes that provide exemptions from CPRA disclosure. These are sometimes pejoratively referred to as the "secrecy statutes." The purpose of these lists is "to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act." Govt C §6275.

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§12.3 B. Definition of Public Record

The CPRA defines "public records" in Govt C §6252(e):

> "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

Case law gives this statutory definition a very broad reading. "[I]f a record is kept by an officer because it is necessary or convenient to the discharge of his official duty, it is a public record." (Internal quotation marks and citation omitted.) *California State Univ., Fresno Ass'n v Superior Court* (2001) 90 CA4th 810, 824, 108 CR2d 870. The term "public record" includes (90 CA4th at 825)

> every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to "the conduct of the public's business" [is] exempt from this definition, *i.e.*, the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities.

Ø **Note:** The statutory definition makes the form of the record immaterial. For the definition of a writing, see Evid C §250; Govt C §6252(f).

Certain records of a county public defender's office are not public records. In *Coronado Police Officers Ass'n v Carroll* (2003) 106 CA4th 1001, 1015, 131 CR2d 553, the court ruled that a database compiled by a county public defender, which was intended for use in representing individual clients, did not consist of public records, because the information was not kept for the conduct of the public's business but for the defense of individual, private clients. As an alternative holding, the court ruled that even if the information was a public record, it was exempt under Govt C §6255 because any public interest in disclosure was outweighed by the public interest served by nondisclosure. 106 CA4th at 1012.

Ø **Note:** Although the term "public records" is found in other California code sections, *e.g.,* Govt C §6200 (misdemeanor for public officials to destroy public records without authorization), it is the Govt C §6252(e) definition that applies whenever the term is used in the CPRA. Govt C §6252(f). See *Cook v Craig* (1976) 55 CA3d 773, 782, 127 CR 712. See also 64 Ops Cal Atty Gen 317, 326 (1981) (noting that legislature "expressly chose not to adopt" definition of "record" used in §6200).

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C. Specific California Public Records That Can Be Sought Under Public Records Act or Other State Statutes

§12.4 1. Law Enforcement Records

This section discusses what records kept by police and other law enforcement agencies are available to the general public. See chap 11 for discussion of obtaining records through criminal discovery techniques, such as reciprocal discovery, *Pitchess* motions, or subpoenas.

CPRA access to investigatory records of law enforcement agencies is governed by Govt C §6254(f); this includes records of investigations by the prosecutor's office that do not pertain to the defendant's case. *Rivero v Superior Court* (1997) 54 CA4th 1048, 63 CR2d 213.

While Govt C §6254(f) governs access to law enforcement records, it also exempts a wide array of law enforcement records from disclosure, such as records of complaints, investigations, intelligence information, and security procedures. Thus, §6254(f), read with §6254's introductory clause, begins by stating a broad rule of nondisclosure and only then does it list exceptions to the rule of nondisclosure.

The list of exceptions to the general rule of nondisclosure, that is, the list of records that *can* be disclosed, begins by providing that unless "disclosure … would endanger the safety of a person involved in an investigation or … the successful completion of the investigation or a related investigation," law enforcement agencies must make available to the public the following information about individuals the agency has arrested (Govt C §6254(f)(1)):

- The full name and occupation of every individual arrested by the agency;
- The individual's physical description, including date of birth, color of eyes and hair, sex, height, and weight;
- The time and date of arrest and booking;
- The location of the arrest and the factual circumstances surrounding it;
- The amount of bail;
- The time and manner of release or the place where the individual is currently being held; and
- All charges on which the individual is being held, including any outstanding warrants from other jurisdictions and parole or probation holds.

Subject, again, to the same array of restrictions, law enforcement agencies must also make available the following information, as it has been recorded, about a crime itself (Govt C §6254(f)(2)):

- The time, date, and location of occurrence;
- The time and date of the report;
- The name and age of the victim (except for certain domestic violence and sex offenses; see discussion below);
- The factual circumstances surrounding the crime or incident; and
- A general description of any injuries, property, or weapons involved.

Additional information may be available to victims and their representatives, including insurance companies handling specified claims.

The name of the victim of specified domestic violence or sex offenses, including forced prostitution resulting from human trafficking, may be withheld at the request of the victim or a minor victim's parent or guardian. Govt C §6254(f)(2). A law enforcement agency may not disclose the address or telephone number of a victim or witness of the alleged offense to "any arrested person, or to any person who may be a defendant in a criminal action." Pen C §841.5(a). However, this is not intended to impair the defendant's right to access information through the normal discovery process. Pen C §841.5(b). Subject to §841.5(a), licensed private investigators (and those requesting information for "scholarly, journalistic, political or governmental purposes") can obtain "the current address of every individual arrested by the agency and the current address of the victim of a crime." Govt C §6254(f)(3). The addresses of the victims of specified crimes are exempt from disclosure. Govt C §6254(f)(3). Law enforcement employees

receiving reports alleging that the reporting person has been the victim of a sex offense, or was forced to commit an act of prostitution because he or she is the victim of human trafficking, must inform that person that his or her name will become a public record unless the person requests otherwise. Pen C §293.

Ø **Note:** A request for anonymity under the CPRA by an alleged victim of a sex offense does not make that person a "confidential witness" who can be excused from testifying at the alleged perpetrator's parole revocation hearing. *In re Miller* (2006) 145 CA4th 1228, 1235, 52 CR3d 256.

Other individuals involved in an investigation (*e.g.,* witnesses, the subject of the record, and informants) have no greater right of access to the record or information from it, under the CPRA, than does any other member of the public. See, *e.g.,* 65 Ops Cal Atty Gen 563 (1982), citing *Los Angeles Police Dep't v Superior Court* (1977) 65 CA3d 661, 135 CR 575.

Information from a law enforcement investigatory file that is exempt from disclosure under Govt C §6254(f) generally does not lose its exemption when the investigation is finished, even when no criminal charges were ever filed. *Haynie v Superior Court* (2001) 26 C4th 1061, 112 CR2d 80; *Williams v Superior Court* (1993) 5 C4th 337, 19 CR2d 882; *Rackauckas v Superior Court* (2002) 104 CA4th 169, 128 CR2d 234. Among the reasons for this is the ongoing need to protect witnesses, who might not come forward if they knew their names would be public when the investigation concludes.

Although Govt C §6254(f) exempts records of investigations and intelligence information from disclosure, a state agency cannot avoid its disclosure obligation by placing nonexempt data in a file labeled "intelligence" or "investigation." *American Civil Liberties Union Found. v Deukmejian* (1982) 32 C3d 440, 186 CR 235. The court held that §6254(f)'s "intelligence" exemption did not exempt from disclosure information that was compiled from public records, although it did exempt confidential and other private information. See also *Rubin v City of Los Angeles* (1987) 190 CA3d 560, 577, 235 CR 516 (local government had no "state secrets" exemption from disclosure under §6254(f)); *Uribe v Howie* (1971) 19 CA3d 194, 212, 96 CR 493 (nonexempt reports of pesticide usage compiled by county agriculture commissioner did not become exempt by being placed in file labeled "investigation" that was not currently being used for law enforcement or licensing investigation).

The CPRA cannot be used to obtain peace officer or custodial officer personnel records made confidential by Pen C §832.7(a), even though those records have been transferred to a county civil service commission that is hearing a disciplinary appeal. *The Copley Press, Inc. v Superior Court* (2006) 39 C4th 1272, 1284, 48 CR3d 183. However, Pen C §§832.7 and 832.8 do not exempt from disclosure the records of the Commission on Peace Officer Standards and Training containing names, employing departments, and hiring and termination dates of peace officers, provided the Commission may establish that information regarding particular officers or categories of officers should not be disclosed because disclosure would jeopardize the safety or efficacy of those officers. *Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 C4th 278, 64 CR3d 661. See also *International Fed'n of Prof'l & Technical Eng'rs, Local 21 AFL-CIO v Superior Court* (2007) 42 C4th 319, 337, 64 CR3d 693.

Other reasons for nondisclosure are discussed in §12.13. On procedures used to obtain records under the CPRA, see §12.10; on court enforcement of CPRA, see §12.15.

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§12.5 2. State and Local Summary Criminal History Information (Rap Sheets)

Treatment under CPRA. "Criminal offender record information" is generally exempt from disclosure under the CPRA. See Govt C §6276.12. However, other statutes may provide limited access in criminal cases.

Description. Each criminal justice agency in California must report to the Department of Justice (DOJ) specified personal identification and offense-related information about each arrest it makes. Pen C §§13100-13326. See Pen C §§13101 (defining criminal justice agency), 13102-13128 (describing information, *e.g.,* name, birth date, aliases, date of arrest, and charges, required for each offender), and 13150-13154 (describing events, *e.g.,* arrests and dispositions, that must be reported). This information, officially known as "criminal offender record information" (CORI) (see Pen C §13102), is commonly called a "rap sheet." Limitations on use of rap sheets are detailed in 11 Cal Code Regs §§701-708.

The DOJ maintains a central database containing master identification and criminal history records, including such information as "name, date of birth, physical description, fingerprints, photographs, date of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data." Pen C §11105(a). See generally Pen C §§11100-11112. See also Govt C §§15150-15167 (establishing criminal history information database known as California Law Enforcement Telecommunications System (CLETS)).

The FBI also maintains similar rap sheets by compiling criminal history information and exchanging data with other law enforcement agencies. See 28 USC §534. Rap sheets in the FBI's possession are exempt from disclosure to third parties under the federal Freedom of Information Act. *Department of Justice v Reporters Comm. for Freedom of the Press* (1989) 489 US 749, 103 L Ed 2d 774, 109 S Ct 1468.

In addition, many local law enforcement agencies maintain criminal history databases. See Pen C §§13100, 13102, 13300. In Los Angeles County, for example, the Consolidated Criminal History Information System (CCHIS) provides computerized criminal history information to the courts.

Those entitled to obtain rap sheets. Although an individual's rap sheet falls within the definition of a public record, it is considered confidential and is accessible only to specified individuals, including prosecutors. See Pen C §11105(b)(4). An attorney representing a defendant in a criminal case, or parole revocation or revocation extension proceeding, may obtain a rap sheet if access is authorized by statute or case law. See Pen C §§11105(b)(9) (access to statewide criminal history information) and 13300(b)(9) (access to local criminal history information).

Procedure for defense to obtain defendant's rap sheet. Defense counsel can obtain a copy of the defendant's rap sheet from the DOJ under Pen C §11105(b)(9). The DOJ will provide an application form for obtaining the rap sheet on request. To obtain a rap sheet, a fingerprint card signed by the defendant and the required fee payable to the California Department of Justice should be sent to the Record Review Unit, Department of Justice, P.O. Box 903417, Sacramento, CA 94203-4170. See http://ag.ca.gov/fingerprints/security.php.

Counsel should contact local agencies for information on local procedures for requesting a client's rap sheet as authorized by Pen C §13300(b).

Counsel may also be able to get the defendant's rap sheet from the prosecutor through an informal or formal discovery request. See *People v Little* (1997) 59 CA4th 426, 432 n2, 68 CR2d 907 (defense access to rap sheets does not relieve prosecution of discovery obligations). But see *People v Santos* (1994) 30 CA4th 169, 176, 35 CR2d 719 (prosecution need not disclose witnesses' actual rap sheets).

Defense access to victim and witness rap sheets. Victim and witness rap sheets may be available to the defense through the prosecutor's obligation to disclose evidence favorable to the defendant (see *U.S. v Agurs* (1976) 427 US 97, 107, 49 L Ed 2d 342, 352, 96 S Ct 2392; *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194; see also *Izazaga v Superior Court* (1991) 54 C3d 356, 378, 285 CR 231) and under California's statutory criminal discovery scheme, Pen C §§1054-1054.10. Defense counsel is specifically entitled to disclosure of "a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial." Pen C §1054.1(d). For additional discussion of the obligation to disclose *Brady* materials, see §§11.8, 11.26. For additional discussion of California's statutory discovery scheme, see §§11.3-11.18.

Public access to information about registered sex offenders (Megan's Law). As required by Pen C §290.46, the DOJ operates a website where the public can access the names and addresses or zip codes of certain registered sex offenders. See http://www.meganslaw.ca.gov. Use of the information disclosed on the website is authorized "only to protect a person at risk." Pen C §290.46(*l*)(1).

Unauthorized disclosure. A state employee who knowingly provides a rap sheet to a person not authorized to receive it and the unauthorized person who receives the rap sheet are each guilty of a misdemeanor. Pen C §§11141-11143, 13302-13304. Newspersons are exempt from prosecution under Pen C §11143. *McCall v Oroville Mercury Co.* (1983) 142 CA3d 805, 191 CR 280. However, the release of public records by another agency that, by coincidence, corresponds to information in a rap sheet is not a violation. *CBS Broad., Inc. v Superior Court* (2001) 91 CA4th 892, 110 CR2d 889.

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§12.6 3. Coroner's Inquest, Protocol, and Register

The coroner must inquire into the deaths specified in Govt C §27491, and notify law enforcement if that inquiry establishes reasonable grounds to suspect that a death was caused by a criminal act. Govt C §27491.1. The coroner's report on an autopsy, commonly called a protocol, is kept in the county coroner's office and is available to the public. See Govt C §27463. The coroner's register (or file) includes the name of the deceased, if known, identifying information, the circumstances of death, names of any witnesses, the cause of death, and the persons notified. The register is a public record generally open for public inspection. Govt C §§27463, 27463.5.

But some aspects of a coroner's investigation are not public records. If the coroner has obtained information made confidential by law (*e.g.,* medical and psychiatric records) that contains confidential communications of the deceased (see, *e.g.,* Evid C §§990-1007 (physician-patient privilege), 1010-1027 (psychotherapist-patient privilege)), then these remain confidential, unless introduced into evidence at a coroner's inquest. Govt C §27491.8(b). When the inquest is over, the court must seal the records if necessary to protect the confidentiality of the information. Govt C §27491.8(d).

When a death is caused by a law enforcement officer, law enforcement documents produced under a coroner's subpoena do not become part of the record of the inquest unless the law enforcement agency consents. Govt C §27498(b). Coroner and autopsy reports that constitute an investigation of a suspected crime in which the prospect of criminal law enforcement proceedings is concrete and definite are public records that are exempt from disclosure under this provision. *Dixon v Superior Court* (2009) 170 CA4th 1271, 1273, 88 CR3d 847.

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§12.7 4. Department of Motor Vehicles (DMV) Records

Public access to driver's license and other personal information in DMV records is sharply restricted. Under Veh C §1808(e), personal information is not publicly available unless the disclosure is in compliance with the Driver's Privacy Protection Act of 1994 (18 USC §§2721-2725). This Act restricts public access to personal information derived from motor vehicle records, including drivers' licenses and applications, except for certain specified purposes. For permissible purposes, see 18 USC §2721(b).

DMV records that are open to public inspection are listed primarily in Veh C §1808. The most important ones are the following:

- **Abstracts of conviction.** These are publicly available for 10 years for a driving under the influence violation, 7 years for a two-point violation, and 3 years for accidents and all other violations. Veh C §1808(b). They are also court records. See §12.19.
- **Information on driver's license suspensions and revocations.** These are, with some exceptions, public for 3 years after the end of the action or license reinstatement. Veh C §1808(c)-(d). They may also reflect court actions. See §12.19.
- **Registration records.** Only information disclosable under the Driver's Privacy Protection Act is available. Veh C §§1808.21-1808.23. See 13 Cal Code Regs §350.40.

Information that is generally exempt from disclosure includes the following:

- **Residential addresses.** Veh C §1808.21. But see Veh C §§1808.22-1808.23 for exceptions.
- **Physical and mental condition of driver's license applicants.** Veh C 1808.5; 55 Ops Cal Atty Gen 122 (1972).
- **Traffic accident reports.** Traffic accident reports are confidential. Veh C §§20012, 20014. They may also be privileged official records under Evid C §1040. *Vallejos v California Highway Patrol* (1979) 89 CA3d 781, 786, 152 CR 846. They may, however, be discoverable by the defendant in a criminal case. *State ex rel Dep't of Transp. v Superior Court* (1985) 37 C3d 847, 210 CR 219. Counsel whose client is accused of a driving offense is entitled to obtain the accident and supplemental reports from the law enforcement agency that has them. Veh C §20012.

Records concerning vehicle registration, title to motor vehicles, driver licensing, and dealers, dismantlers, and transporters are maintained by the DMV. Inquiries can be sent to Department of Motor Vehicles Division of Information Services (Registration Records/Histories Unit), P.O. Box 944247, Sacramento, CA 94244-2470, (916) 657-7827 (for law enforcement agencies).

The DMV must maintain records of convictions for as long as they (1) can be used as a basis for license suspension or revocation or (2) can be used with other records to establish that an individual is a "negligent driver." Veh C §1807.

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§12.8 5. Other California Public Records

Other information subject to disclosure, at least on a limited basis, includes:

- **Complaints against public employees.** While records of peace and custodial officers are available only through the *Pitchess* procedure discussed in chap 11, complaints against other public employees, and related records, may be available through the CPRA. For example, records of a school district employee were ordered disclosed in *Bakersfield City Sch. Dist. v Superior Court* (2004) 118 CA4th 1041, 13 CR3d 517. The court also held that neither the imposition of discipline nor a finding that a charge of misconduct was true was a prerequisite to disclosure when the alleged misconduct was substantial in nature and reasonable cause existed to believe the complaint was well founded.
- **School pupil records.** School pupil records are not exempt from disclosure under the CPRA. Access to these records is governed by Ed C §§49073-49079. Information concerning a student must be furnished in compliance with a court order or lawfully issued subpoena. The school district must make a reasonable effort to notify the parent or guardian and the pupil before complying with a subpoena. In the case of a court order, advance notice must be given if lawfully possible considering the requirements of the order. Ed C §49077.
- **Mental health records maintained by public entities.** An individual's mental health records that are maintained by a public agency, including evaluations related to court petitions, are generally exempt from disclosure. Govt C §6254(c). See Welf & I C §§5202, 5328. The records may be obtained by a subpoena duces tecum, although generally an in camera review and court order are required. See *People v Hammon* (1997) 15 C4th 1117, 65 CR2d 1.
- **Grand jury transcripts.** Transcripts of grand jury proceedings are available to the public 10 days after delivery to the defendant, unless the court orders otherwise to secure the defendant's right to a fair trial. Pen C §938.1(b). The defendant need show only a "reasonable likelihood" that the transcript's disclosure will prejudice his or her right to a fair trial to prevent disclosure. *Alvarez v Superior Court* (2007) 154 CA4th 642, 645, 64 CR3d 854. The grand jury cannot, however, disclose raw evidentiary materials gathered during a secret watchdog investigation. *McClatchy Newspapers v Superior Court* (1988) 44 C3d 1162, 245 CR 774. The court can seal a grand jury transcript, and related proceedings related to a motion to dismiss an indictment, when necessary to avoid impairment of the defendant's right to a fair trial, protect the privacy interests of others, and protect ongoing law enforcement investigations. *People v Jackson* (2005) 128 CA4th 1009, 1027, 27 CR3d 596.
- **Juvenile court and child protective agency records.** Access to juvenile court and child protective agency records is governed by Welf & I C §827.
- **Concealed weapon permits.** Access to concealed weapon permits is subject to the weighing process required by *CBS, Inc. v Block* (1986) 42 C3d 646, 230 CR 362. But Govt C §6254(u) exempts much information from those records. Exempt information includes where and when the applicant is vulnerable to attack, medical or psychological history of the applicant or family; and home address and phone numbers of peace officers and bench officers. The applicant's criminal history information must also be deleted. 62 Ops Cal Atty Gen 595 (1979).
- **Prisoner and prison records.** Regulations governing public access to information about prisoners and prisons can be found in 15 Cal Code Regs §§3260-3267. Anyone can telephone the California Department of Corrections and Rehabilitation's "Inmate Locater/ID-Warrants Unit" at (916) 445-6713, give a person's CDCR number or full name and date of birth and, if the person is in prison, receive the inmate's location and mailing address but not the prisoner's release date. This phone number is available 24 hours a day. An inquiry may also be faxed to the Identification Unit at (916) 322-0500. It may take up to 7 days to update location information for new or transferring prisoners. The warden is required to maintain case records as defined in Pen C §2081.5 and make them "available to the Board of Prison Terms" (now called the Board of Parole Hearings (Pen C §5075(a)). The California Supreme Court has said this implies that others, including the prisoner, are not authorized to receive those records. *People v Marshall* (1996) 13 C4th 799, 841, 55 CR2d 347. Likewise, the court in *Yarish v*

Nelson (1972) 27 CA3d 893, 901, 104 CR 205, cited Pen C §2081.5 in denying a media CPRA request for access to prison records.

Ø **Practice tip:** If the agency with the record says the record is not public, then check Govt C §§6275-6276.48 to verify.

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§12.9 D. Location and Accessibility of Records

The California Public Records Act (CPRA) (Govt C §§6250-6270) requires that public records be accessible to the public at all times during office hours. Govt C §6253(a).

Under Govt C §6253.1, the agency must take a number of specified steps to assist the requester in making "a focused and effective request that reasonably describes an identifiable record or records."

Unauthorized destruction of a public record can be a crime (Govt C §6200), but California state (Govt C §14750), city (Govt C §34090), and county (Govt C §26205.1) governments may empower their agencies to destroy specified records under certain conditions. See 64 Ops Cal Atty Gen 435 (1981). For example, tapes of police radio broadcasts need be kept only for 100 calendar days. Govt C §26202.6. In addition, Pen C §13103 allows any criminal justice agency to destroy original records if they have been copied according to rules given in the statute.

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E. Procedures for Obtaining Public Records

§12.10 1. Procedures Applicable to General Public

There is no standard method of obtaining California public records. Many agencies, including many law enforcement departments, place instructions for making requests for police reports and other CPRA information on their websites.

Certain designated agencies must post written guidelines for obtaining records in a conspicuous place and make copies of the procedure available on request. Govt C §6253.4(a). The agencies that are most relevant to criminal law are the departments of Motor Vehicles, Corrections and Rehabilitation (including the Division of Juvenile Justice), Justice, Health Care Services, Employment and Development, Social Services, Mental Health, Developmental Services, and Alcohol and Drug Abuse.

First, counsel should simply ask for the records and should not hesitate to ask for assistance. Govt C §6253(a). Be ready to pay any necessary fees if copies are desired. Govt C §6253(b). A written request is not necessary. See *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 1392, 107 CR2d 29.

If it becomes necessary to invoke the CPRA, the request should be, but does not have to be, in writing. Whether made orally or in writing, the request should "reasonably describe an identifiable record." Govt C §6253(b).

Ø **Note:** If a request is too broad or too vague to enable the agency to ascertain what record is sought, the agency must make reasonable efforts to help the requester formulate a request for an identifiable record. Govt C §6253.1.

Counsel who anticipates an objection (see §12.12) might address any possible objections in the written request.

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§12.11 2. Special Access by Prosecutor

Both the CPRA and other statutes and authorities grant special prosecutorial access to certain records. See, *e.g.,* Govt C §§6262-6265. Disclosure of records to the prosecutor does not make them available to the general public. Govt C §6265. On the effect of disclosure to the general public, see §12.14.

Under the CPRA, a state or local agency must grant a district attorney's request to inspect or copy any nonexempt public records. Govt C §6263. The general exemption from disclosure for "complaints to, or investigations conducted by, any state or local agency for licensing purposes" does not apply when a district attorney asks to inspect such records. Govt C §6262.

The prosecutor can petition the court for access to information a state or local agency refuses to disclose. Govt C §6264.

Other records to which the prosecutor has special access include:

- Juvenile court records of any delinquency proceeding (Welf & I C §827(a)(1)(B));
- Prison records (see 13 Ops Cal Atty Gen 180 (1949));
- Police or custodial officer personnel records, if being used in the course of an investigation of police or custodial officer conduct (Pen C §832.7);
- Child abuse information (Pen C §§11167, 11167.5, 11170; Welf & I C §827; see 65 Ops Cal Atty Gen 335 (1982)); and
- Information about present and past employers of victims, missing persons, potential witnesses, and persons for whom a felony arrest warrant has issued (Un Ins C §1095(i)).

When an agency refuses to honor a prosecutor's request to inspect and copy public documents not exempt under the CPRA, the prosecutor may petition the court for relief. Govt C §6264. The procedures appear to be the same for prosecutors as for other persons trying to obtain public records. See §12.10.

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§12.12 3. Agency Response to Public Records Request

When an agency receives a request for public records, it has 10 days to determine whether the information sought is disclosable in whole or in part. Govt C §6253(c). Once this determination is made, the agency must promptly notify the person who made the request of its decision and the reasons for it. If the request is granted, the agency must state the estimated date and time that the records will be made available. Govt C §6253(c). In unusual circumstances, the agency may extend the 10-day determination period up to 14 more days on written notice by the head of the agency, or by his or her designee, of the reasons for the extension and expected date of the determination. Govt C §6253(c).

If the agency concludes that the requested records are disclosable, the notification of determination must specify an estimated time and date when the records will be available. Govt C §6253(c).

If an agency maintains disclosable public records in electronic format, it must make those records available in that format on request. Govt C §6253.9. Except in specified circumstances, the cost to the requester is limited to the direct cost of producing an electronic copy of the record. Govt C §6253.9(a)-(b).

An agency that withholds records, in whole or in part, must explain the following in writing (Govt C §6255):

- Why the record is exempt from disclosure under a specific provision of the CPRA (see, *e.g.,* Govt C §§6254-6254.25); or
- Why, under the facts of the particular case, the public interest in not disclosing the record "clearly outweighs" the public interest in disclosure.

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§12.13 4. Reasons for Nondisclosure

If an agency refuses to disclose a record, it must give written notice of the reason for refusal. Govt C §6255(a). Government Code §6254 provides several general exemptions from disclosure, and Govt C §§6275-6276.48 list many specific statutory exemptions. The burden of showing a basis for exemption is on the withholding agency. *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 773, 192 CR 415. Even when a statutory exemption exists for some information in a record, if exempt and nonexempt information can be separated, the nonexempt portions may have to be disclosed. *American Civil Liberties Union Found. v Deukmejian* (1982) 32 C3d 440, 449, 186 CR 235.

Among the most important exemptions from disclosure are the following:

- Records pertaining to pending litigation. Govt C §6254(b).
- Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Govt C §6254(c).
- Records exempt from disclosure or for which disclosure is prohibited by federal or state law. Govt C §6254(k). This limitation includes privileged communications. See, *e.g., San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 192 CR 415 (trade secret privilege unsuccessfully asserted by contractor who provided the documents to public agency). Nondisclosure based on privilege is subject to the validity of the claim of privilege. See, *e.g., Board of Med. Quality Assur. v Hazel Hawkins Mem. Hosp.* (1982) 135 CA3d 561, 566, 185 CR 405.
- Correspondence of and to the Governor or employees of the Governor's office or in the custody of, or maintained by, the Governor's legal affairs secretary. Govt C §6254(*l*).
- Many law enforcement records. Govt C §6254(f), discussed in §§12.4-12.5.
- Information that would reveal the identity of applicants for concealed weapons permits. Govt C §6254(u), discussed in §12.8.

In addition to the specific exemptions in Govt C §6254, section 6255(a) permits an agency to refuse to disclose information if it concludes that in "the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Govt C §6255(a). The specific exemption provisions of Govt C §6254 are also permissive, and counsel can argue that the public interest would be better served by disclosure than by nondisclosure under the facts of the case. See Govt C §6254; 62 Ops Cal Atty Gen 402, 405 (1979).

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§12.14 5. Effect of Disclosure: Loss of Ability to Deny Subsequent Request for Disclosure

Once an agency discloses a particular record to one member of the public, it must usually be disclosed to all members of the public. Govt C §6254.5 (waiver); *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 780, 192 CR 415 (respondent disposal company waived any privacy interests by voluntarily submitting information to support and justify rate increase).

This rule does not apply when a statute (or case law) authorizes disclosure of a record only to a particular person or class of people, *e.g.,* to a criminal defendant (see Govt C §6260 (CPRA does not limit or impair any discovery rights in criminal cases); see also *In re Ricky B.* (1978) 82 CA3d 106, 113, 146 CR 828) or to a prosecutor (see §12.11). In such instances, disclosure to one does not require disclosure to all. See, *e.g., Rackauckas v Superior Court* (2002) 104 CA4th 169, 128 CR2d 234 (letter disclosed in confidence to members of another state agency did not lose exemption under Govt C §6254(f)).

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§12.15 6. Court Enforcement of the Right to Public Records

Anyone may obtain court review of an agency's denial of a request to inspect or copy a public record by seeking injunctive relief or a writ of mandate. Govt C §6258. The prosecutor will usually file under Govt C §6264, but anyone can use the general public's authorization of Govt C §6258. Private parties—but not governmental agencies—have the right to seek declaratory relief under §6258. *Filarsky v Superior Court* (2002) 28 C4th 419, 121 CR2d 844.

Counsel should file a verified petition in the court of the county where the records are located. Govt C §6259. The deadline for the agency's response is then set by the trial court. Govt C §6258. The trial court handles the matter as an order to show cause. Govt C §6259. The trial court's decision is not appealable but is reviewable by writ petition. Govt C §6259(c). The writ petition must be filed within 20 calendar days after service of written notice of entry of the trial court's order or, for good cause shown, within an extra 20 calendar days after that. Govt C §6259(c). Court costs and reasonable attorney fees may be awarded to a prevailing plaintiff or, if the plaintiff's case was frivolous, to the agency. Govt C §6259(d).

Refusal to obey the court's order of disclosure is punishable by contempt. Govt C §6259(c).

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III. COURT RECORDS

§12.16 A. General Rule of Availability

The CPRA does not apply to court records. See Govt C §6252(a). While a court has inherent power to control its own records, and no statute provides for access to court records, the right to inspect court records must be freely allowed. *Estate of Hearst* (1977) 67 CA3d 777, 782, 136 CR 821. See Cal Rules of Ct 2.500-2.507 ("reasonable" public access to electronic trial court records), 2.550(c) (court records presumed to be open). See also CCP §1904 (judicial records defined); Cal Rules of Ct 2.400-2.585 (trial court records).

"Court records" for the purpose of public access are documents that represent and reflect the official work of the court as well as various documents filed in or received by the court, including (1) documents showing scheduling and administration of cases; (2) assignment of judicial officers and administrators; (3) official court minutes; (4) all written orders, dispositions, and judgments; (5) official reports of oral proceedings; (6) pleadings and motions filed by the parties; and (7) evidence admitted in court proceedings. But preliminary drafts, personal notes, and rough records are not public records. *Copley Press, Inc. v Superior Court* (1992) 6 CA4th 106, 113, 7 CR2d 841. See Cal Rules of Ct 2.502(1).

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§12.17 B. Arrest Warrants, Search Warrants, and Supporting Affidavits

After filing a criminal complaint, the prosecutor usually asks a magistrate to issue an arrest warrant. The arrest warrant is available to the public in the court where it is filed, because it is a judicial record. See CCP §1904; *People v Landa* (1973) 30 CA3d 487, 491, 106 CR 329. However, affidavits in support of arrest warrants are frequently filed under seal. If so, a court order is usually necessary to obtain access.

Arrest warrant information is also contained in a variety of computerized files, such as those maintained in the California Law Enforcement Telecommunications System (CLETS) and the National Crime Information Center (NCIC). CLETS must "be used exclusively for … official business." Govt C §15153. Knowingly accessing and, without permission, making use of any data from a computer system is a crime. Pen C §502(c)(2). Likewise, a peace officer who misuses CLETS information is subject to discipline. See, *e.g., Gilbert v City of Sunnyvale* (2005) 130 CA4th 1264, 1281, 31 CR3d 297.

Search warrants (Pen C §§1523-1542) are not public records when issued but generally become so when returned or 10 days after issuance, whichever comes first. Pen C §1534(a). They are kept in the clerk's office of the court whose magistrate issued the warrant.

Affidavits in support of search warrants are generally subject to the same rules as the warrants themselves. But when it is deemed necessary to protect an informant's identity, the court can order portions of a search warrant affidavit, and occasionally even the warrant itself, sealed and thus not available to the public. *People v Hobbs* (1994) 7 C4th 948, 962, 30 CR2d 651. Subject to a narrow exception, the clerk of the court generally must be the custodian of such sealed records. *People v Galland* (2008) 45 C4th 354, 368, 86 CR3d 841.

When a search warrant has been executed and a return made to the court, but no case has been initiated, a computerized search of the clerk's files, guided by the address searched, will often yield the warrant, its supporting affidavit, and its return. These may also be records of the law enforcement agency that investigated the case or served the warrant. See §12.4.

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§12.18 C. Inspection or Administrative Warrants

An inspection warrant, also called an administrative warrant, is a court-approved authorization permitting government officials to conduct an inspection required or authorized by state or local laws or regulations. These warrants generally relate to building, electrical, fire, health, plumbing, labor, safety, or zoning and include certain inspections by agencies such as the Departments of Agriculture and Fish and Game. CCP §§1822.50-1822.60. An administrative warrant is generally required for regulatory inspections, but it need not be supported by probable cause to believe that a violation of the regulation has occurred. *Marshall v Barlow's, Inc.* (1978) 436 US 307, 56 L Ed 2d 305, 98 S Ct 1816. "Cause," as defined in CCP §1822.52, is required unless some other provision of law makes another standard applicable; a statement that consent has been refused, or that there are circumstances justifying failure to seek consent, is also required. CCP §1822.51. But if the inspection is based on the belief that a criminal law violation has occurred, an administrative warrant will not suffice, and the requirements of a criminal search warrant must be met. *Michigan v Tyler* (1978) 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942; *Salwasser Mfg. Co. v Municipal Court* (1979) 94 CA3d 223, 156 CR 292. Administrative warrants are kept in the files of the clerk of the court of origin.

Although inspection, or administrative, warrants are court records, the agency will also have copies, which can also be accessed under the CPRA.

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Source: Criminal Law/California Criminal Law Procedure and Practice/12 PUBLIC RECORDS/§12.19 D. Court Hearings, Records of Proceedings, and Filings

§12.19 D. Court Hearings, Records of Proceedings, and Filings

With only narrow—or specific statutorily defined—exceptions, criminal and civil trials and other live judicial proceedings are open to the public. CCP §124 (except as provided in Fam C §214 "or any other provision of law, the sittings of every court shall be public"); Cal Rules of Ct 2.550(c) (unless confidentiality is required by law, court records are presumed to be open). See also *Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 510, 78 L Ed 2d 629, 104 S Ct 819 (criminal trials); *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 86 CR2d 778 (civil trials).

Statutory exceptions to the rule of open *hearings* include Fam C §214 (certain family law proceedings), Evid C §915 (proceedings to determine certain privileges), Pen C §1054.7 (denial or regulation of discovery), Welf & I C §345 (dependency proceedings), and Welf & I C §676 (most delinquency proceedings). Case law also authorizes closed court proceedings in limited circumstances. See, *e.g., People v Marsden* (1970) 2 C3d 118, 84 CR 156 (authorizing in camera proceedings on adequacy of appointed counsel). On the contents of court minutes for in camera hearings and the disposition of examined documents, see Cal Rules of Ct 2.585.

Statutory exceptions to the rule on open *records* include Pen C §§987(c) (defendant's financial statements for requesting appointed counsel), 987.9 (application for funding for investigators and experts in death penalty case), 1203.03(b) (90-day observation reports), and 1203.05 (probation reports). On mental health records, see Welf & I C §5328(f) (specified records can be disclosed to "the courts, as necessary to the administration of justice"). On alcohol and drug treatment patient records, see 42 CFR §§2.61-2.67. On medical records in general, see 45 CFR §§164.500-164.534.

Other records can be sealed, in accordance with the elaborate procedure set forth in Cal Rules of Ct 2.550 and 2.551. See §12.22.

Files in freedom from parental custody and control, adoption, and juvenile court proceedings are statutorily exempt from disclosure except in specified circumstances. See Fam C §§7805 (confidentiality of freedom from parental custody and control records), 9200 (confidentiality of adoption records); Welf & I C §827 (confidentiality of juvenile court records). *Wescott v Yuba County* (1980) 104 CA3d 103, 106, 163 CR 385. Mental health proceedings under the Lanterman-Petris-Short Act (Welf & I C §§5000-5550) are, however, public records. 53 Ops Cal Atty Gen 25 (1970).

Court records usually are kept in files in the court clerk's office in the court in which the case was litigated. While a case is active, sometimes the file is kept by the judge or the judge's courtroom.

Criminal cases are indexed by the defendant's last name. With multiple defendants, the names are listed in alphabetical order. Each court maintains yearly indexes of its criminal cases by the defendants' last names. Govt C §69842. In felony cases, the clerk also maintains a register of actions and keeps minutes of all orders, judgments, and decrees. Govt C §§69844-69845. In misdemeanor and infraction cases, the clerk may instead keep a docket that records all proceedings and orders in each case. Pen C §1428. On record keeping generally, see Govt C §§69841-69848. On destruction of old court records, see Govt C §§68150-68153.

When requesting a record from a court file by mail, counsel should designate the file number, the defendant's name, the specific document(s) desired, the date on which the proceeding occurred or on which the document was filed, and any other information that will help the clerk locate the record. Counsel should also provide a self-addressed stamped envelope large enough to hold the requested documents. Counsel should tell the clerk when the record is needed; clerks often take 2 weeks or longer to send requested documents. Sometimes it is quicker for counsel to go to the court that has the records and obtain copies in person.

Because court reporter notes are not always transcribed, transcripts of proceedings taken down by a court reporter often do not exist in court files. There are some exceptions for proceedings that must be transcribed: Transcripts of preliminary hearings (Pen C §869(f)), grand jury proceedings (Pen C §938.1(b)), and felony pleas and sentencing hearings (Pen C §§859a(a), 1203.01) are kept in the court file.

The court clerk's record for a particular proceeding usually states only whether it was reported and the name of the reporter. Counsel who desires a transcription must then find out the contact information for the court reporter and

arrange for that person to transcribe the notes. Sometimes the reporter is willing to read portions to counsel so that counsel may determine whether a transcription is necessary. Transcription can be costly. If the defendant is indigent, or can afford a lawyer but not ancillary services, and if the transcript is not one to which he or she is entitled as of right, it may be necessary to apply to the court for transcription fees. See, *e.g., Corenevsky v Superior Court* (1984) 36 C3d 307, 319, 204 CR 165 (indigent defendant's right to effective assistance of counsel requires public funding of necessary ancillary services); *Tran v Superior Court* (2001) 92 CA4th 1149, 1153, 112 CR2d 506 (following *Corenevsky*; defendant's relatives had paid for lawyer). In moving for funding of ancillary services, counsel should follow the procedures outlined in §§18.10-18.12 for requesting appointment of an expert.

Ø **Note:** An increasing number of misdemeanor and infraction proceedings are being reported electronically by video and audio recordings. These can be more difficult to transcribe and can require longer advance notice.

Although not included in the CCP §1904 definition of judicial records, court files usually contain copies of motions and opposition to motions, and those too are considered public records. See *Estate of Hearst* (1977) 67 CA3d 777, 136 CR 821.

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§12.20 E. Probation Reports

A probation officer's report filed with the court may be inspected or copied freely by the general public for 60 days after the date judgment is pronounced or probation is granted. Pen C §1203.05(a). (This includes judgments of acquittal or dismissal.) After that, access for the general public is by a petition and court order only. Pen C §1203.05(b). When a member of the general public, such as a news organization, files a petition seeking a probation report, the subject of the report is entitled to notice and an in camera hearing on the release of his or her personal information. If the subject does not ask for a hearing, the court may release the entire report. If a hearing is held, the court must balance the subject's interest in the confidentiality of personal information against the potential benefit from its release, and then may exercise its discretion to redact personal information before releasing the remainder of the report. *People v Connor* (2004) 115 CA4th 669, 676, 9 CR3d 521. An order for the release of a probation report is appealable under Pen C §1237(b). 115 CA4th at 687.

The district attorney, the subject of the report, and any other authorized person may inspect or obtain a copy of the report at any time. Pen C §1203.05(d)-(f).

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§12.21 F. Juror Information

After a trial is over, court-ordered access to members of the jury by parties, and their attorneys and representatives, is quite restricted. See CCP §§206, 237. During the trial, juror names are available to the parties and to the public, unless the court, after a hearing, finds a compelling interest to keep these confidential or limited. CCP §237(a)(1). After the trial, all juror information is sealed. CCP §237(a)(2). Access to the court's records is allowed only on court order after a hearing, of which the juror is notified and at which the juror can make his or her views known. CCP §237(b).

After the verdict, trial counsel can discuss the jury deliberations and verdict with a jury member at a reasonable time and place if the juror consents. See CCP §§206, 237. Note that "reasonable time" is not restricted to immediately after the verdict. Counsel (or counsel's representative) who contacts a juror to discuss the deliberations or the verdict more than 24 hours after the verdict must (CCP §206(c)):

- Identify the case and the subject of the interview;
- Tell the juror what party he or she represents; and
- Inform the juror that he or she has:
- An absolute right not to discuss the deliberations or the verdict and
- A right to review and have a copy of any declaration that is to be filed with the court.

For discussion of posttrial interviews with jurors, see §33.46.

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§12.22 G. Standards and Procedures for Sealing Other Court Records

Records that are not required by law to be kept confidential, and that are not discovery motions and records, are presumed to be open but can be sealed in accordance with the procedure set forth in Cal Rules of Ct 2.550 and 2.551. Cal Rules of Ct 2.550(a), (c).

Ø **Note:** Since Rules 2.550 and 2.551 apply in criminal cases (Advisory Committee Comment to Rule 2.550) and do not apply to discovery motions and records, apparently a party seeking to seal a motion made under Pen C §§1054-1054.7 need not follow the procedure set forth in Rules 2.550 and 2.551. A *Pitchess* declaration, to protect lawyer-client privilege and attorney work product, can be filed under seal. *People v Garcia* (2007) 42 C4th 63, 71, 63 CR3d 948. It is unclear whether *Garcia* will extend to other statutory discovery methods such as subpoenas (see Pen C §1326) or motions to disclose the identity of an informant (see Evid C §1041).

Under Rules 2.550 and 2.551, a record must not be filed under seal without a court order, and a court order cannot issue solely because the parties agree. Cal Rules of Ct 2.551(a). The court may order that a record be filed under seal only if it expressly finds facts establishing that there is an overriding interest supporting the sealing that would be prejudiced if the records are not sealed, and that overcomes the public's right of access. The court must also find that the sealing is narrowly tailored and there is no less restrictive means to achieve the overriding interest. Cal Rules of Ct 2.550(d). This standard is based on the standard expounded in *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 86 CR2d 778 (Advisory Committee Comment to Rule 2.550), which was applied in *People v Jackson* (2005) 128 CA4th 1009, 1021, 27 CR3d 596 (trial court properly sealed search warrant and supporting affidavit).

A party requesting filing under seal must file a motion accompanied by a memorandum and a declaration. Cal Rules of Ct 2.551(b). The party must also lodge the subject records with the court under "conditional seal" in accord with prescribed procedures. Cal Rules of Ct 2.551(b)(4), (d).

Records filed publicly must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion to seal. Cal Rules of Ct 2.551(c).

A sealed record must not be unsealed except on court order. See Cal Rules of Ct 2.551(h).

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13

MOTION TO SET ASIDE INFORMATION OR INDICTMENT

MICHAEL McCORMICK

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Source: Criminal Law/California Criminal Law Procedure and Practice/13 MOTION TO SET ASIDE INFORMATION OR INDICTMENT/§13.1 I. OVERVIEW

§13.1 I. OVERVIEW

Defense counsel may file a motion in the trial court under Pen C §995(a)(2) to dismiss an information because of error that occurred at the preliminary examination (also called preliminary hearing). The general statutory grounds are that the defendant was not legally committed or that he or she was committed without reasonable or probable cause. Pen C §995(a)(2). Indictments may be attacked because they were not found, endorsed, or presented as prescribed in the Penal Code, or because a defendant was indicted without reasonable or probable cause. Pen C §995(a)(1). Case law has established a number of specific areas of review within these broad guidelines; they are discussed in §§13.6-13.23. Failure to challenge error that occurred at the preliminary examination by Pen C §995 motion waives that issue on appeal. Pen C §996; *People v Crandell* (1988) 46 C3d 833, 855, 251 CR 227.

A Pen C §995 motion may challenge one or more counts of an information or indictment (*People v Sherwin* (2000) 82 CA4th 1404, 98 CR2d 888), including penalty enhancement clauses (*People v Superior Court (Mendella)* (1983) 33 C3d 754, 191 CR 1) and special circumstance allegations (*People v Ghent* (1987) 43 C3d 739, 239 CR 82). Misdemeanors that are charged in an information or indictment may also be challenged. *People v Thiecke* (1985) 167 CA3d 1015, 213 CR 731. See also *Cook v Superior Court* (1970) 4 CA3d 822, 84 CR 664.

The Pen C §995 motion is normally based on the court reporter's transcript of the preliminary examination or grand jury proceedings. See *Stanton v Superior Court* (1987) 193 CA3d 265, 270, 239 CR 328; *People v Crudgington* (1979) 88 CA3d 295, 299, 151 CR 737. However, some issues have been reviewed under §995 on the basis of facts outside that record. See §13.4 for examples.

An accused has the right to a transcript of the testimony on which the information or indictment is based. Pen C §§869, 938.1. The reporter is required to deliver the original transcript and copies for the accused to the clerk within 10 days after the holding order or the finding of the indictment. Pen C §§869(e), 938.1(a).

The judge hearing the Pen C §995 motion sits as an appellate judge and reviews the decision of the magistrate (in the case of an information) or grand jury (in the case of an indictment). *People v Laiwa* (1983) 34 C3d 711, 718, 195 CR 503. The §995 judge is unable to reweigh the evidence; when the magistrate has made findings of fact that are supported by substantial evidence, those findings are conclusive. *People v Slaughter* (1984) 35 C3d 629, 638, 200 CR 448.

If defense counsel's Pen C §995 motion is denied, he or she may seek a writ of prohibition. If the grounds are that the defendant was committed without reasonable or probable cause, the petition must be filed within 15 calendar days after the order denying the motion. Pen C §999a. The 15-day time limit does not apply when the grounds of the §995 motion are that the defendant was committed illegally or that a substantial right was violated. To be reviewable by writ, a §995 motion on any ground must be made within 60 days after arraignment in the trial court, unless the defense was unaware of the issue or had no opportunity to raise it. Pen C §1510.

If the Pen C §995 motion is granted and the prosecution seeks pretrial review, it is usually by way of appeal. Pen C §1238(a)(1). If only certain counts are dismissed, the prosecution may appeal the dismissed counts or clauses and either proceed to trial on the remaining counts (*People v Superior Court (Caudle)* (1990) 221 CA3d 1190, 270 CR 751) or seek a stay of trial from the appellate court (see Cal Rules of Ct 8.112(c), 8.116).

The prosecution may also seek pretrial review through a writ of mandate when an appeal is inadequate. See *People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 257 CR 678. Another alternative available to the prosecution is to bypass pretrial review in favor of recharging the offense in a new felony complaint.

When there is a minor error in an information, the prosecutor may ask the Pen C §995 judge to remand the case to the committing magistrate to correct the errors alleged by the defendant. Pen C §995a(b)(1); *Caple v Superior Court* (1987) 195 CA3d 594, 241 CR 735. In addition, the parties may agree to have the §995 court act as a magistrate and conduct further proceedings. Pen C §995a(b)(1). A ruling on defense counsel's motion is then deferred until the proceedings before the magistrate are concluded. The usual effect is to defeat the §995 motion. The prosecutor may use this procedure only once for each information filed. Pen C §995a(b)(3).

Counsel should check local court rules for local Pen C §995 practice, or, if there are none, should consult the court

clerk of a judge who hears §995 motions, or local counsel. A common defense counsel practice is to set the date for a hearing on the motion at the defendant's arraignment in the trial court. Local rules then set deadlines for defense counsel to submit a supporting memorandum, and for the prosecutor to respond with an opposition memorandum. If no local rules apply, the deadlines in Cal Rules of Ct 4.111 apply.

The defendant must be present at the hearing, unless his or her presence has been waived. See Pen C §977(b). The judge may indicate which issues he or she considers most important. It is common for defense counsel to argue first, the prosecutor second, and defense counsel last. The arguments usually take no more than 10 to 20 minutes. The judge usually announces his or her decision immediately from the bench. On occasion, however, the judge may request additional memorandums and put the case over to a later date for decision. The most common issues are discussed in §§13.6-13.23.

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§13.2 II. CHART: DEADLINES

Action	Deadline	Authority
Setting Pen C §995 motion.	Most counties have local court rules that specify type of notice. It is most common at arraignment in the trial court to set motion for hearing. It can be set before or after entering plea.	See local court rules; if none apply, comply with Cal Rules of Ct 4.111.
Time for hearing on Pen C §995 motion.	No time set by statute or California Rules of Court. Usually heard about 1 month after the trial court arraignment.	See local court rules. See also Pen C §997, which requires motion to be heard when made unless court for cause postpones hearing (not followed in most counties).
Appellate review of Pen C §995 motion.	Available only if motion "made" (see §13.26) no later than 60 calendar days after defendant's arraignment in trial court (see §13.26), unless defendant was unaware of issue or had no opportunity to raise it.	Pen C §1510; *People v Ghent* (1987) 43 C3d 739, 239 CR 82. See also Pen C §996.
Prosecution review of dismissal at preliminary examination under Pen C §871.5.	Prosecutor must make Pen C §871.5 motion within 15 calendar days after dismissal.	Pen C §871.5.
Defendant's petition for writ of prohibition to review Pen C §995 ruling.	Defense counsel must file petition within 15 calendar days after Pen C §995 motion was denied if basis for relief is no reasonable or probable cause. 15-day rule does not apply if basis is improperly found indictment or illegal commitment.	Pen C §999a; *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109.
Defendant's petition for writ of habeas corpus to review Pen C §995 ruling.	No time given.	See Pen C §§1473-1508.
Prosecution appeal of Pen C §995 ruling.	Within 60 calendar days after ruling on motion.	Pen C §1238(a)(1); Cal Rules of Ct 8.308(a).
Prosecution's petition for writ of mandate to review Pen C §995 ruling.	No time given; however, it should be filed no later than deadline for filing appeal: within 60 calendar days after ruling on motion.	See *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 499, 165 CR 748 (civil case, but same reasoning should apply to criminal cases).

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III. NATURE OF PEN C §995 MOTION

§13.3 A. Challenging Information or Indictment

By Pen C §995 motion. Defense counsel may file a motion in the trial court under Pen C §995 to dismiss an information on the ground that the defendant was not legally committed by a magistrate (Pen C §995(a)(2)(A)) or was committed without reasonable or probable cause (Pen C §995(a)(2)(B)). An indictment is subject to dismissal in the trial court when it was not found, endorsed, and presented as prescribed in the Penal Code (Pen C §995(a)(1)(A)) or when a defendant was indicted without reasonable or probable cause (Pen C §995(a)(1)(B)).

A Pen C §995 motion may challenge one or more counts of an information or indictment. *People v Sherwin* (2000) 82 CA4th 1404, 98 CR2d 888. When an information or indictment charges a misdemeanor as well as a felony offense, a §995 motion may be used to challenge either or both types of offenses. See *People v Thiecke* (1985) 167 CA3d 1015, 213 CR 731. See also *Cook v Superior Court* (1970) 4 CA3d 822, 84 CR 664. Penalty enhancement allegations (*People v Superior Court (Mendella)* (1983) 33 C3d 754, 191 CR 1; *Huynh v Superior Court* (1996) 45 CA4th 891, 54 CR2d 336) and special circumstance allegations (*People v Ghent* (1987) 43 C3d 739, 239 CR 82) may also be challenged by a Pen C §995 motion.

By common law motion to dismiss. When defense counsel wishes to have the §995 judge go beyond the preliminary examination or grand jury transcript, counsel may set a common law motion to dismiss to be heard at the same time as the §995 motion. See *People v Crudgington* (1979) 88 CA3d 295, 300, 151 CR 737. See also *Bayramoglu v Superior Court* (1981) 124 CA3d 718, 729, 176 CR 487.

By habeas corpus. It is unclear whether a petition for writ of habeas corpus may be filed in place of a Pen C §995 motion. Because Pen C §1473 contains no restriction on use of the writ, it is probable that no limits exist. In practice, habeas is rarely used instead of a §995 motion, or instead of a §995 motion combined with a common law motion to dismiss.

There are two possible advantages to habeas. First, a writ of habeas corpus is not restricted to the record of the proceeding being challenged. The defendant can produce evidence beyond the record. Pen C §1484; *In re Clark* (1993) 5 C4th 750, 21 CR2d 509.

The second possible advantage of habeas is that it may give defense counsel the right to appellate review when it would not otherwise exist. Failure to make the Pen C §995 motion within 60 calendar days after the defendant's arraignment on an information or indictment precludes appellate review through a writ of prohibition, the normal avenue of appellate review, when the defendant claims that he or she was committed without reasonable or probable cause. Pen C §1510. The courts are divided on whether the 15-day rule applies to habeas. Compare *In re Flodstrom* (1954) 134 CA2d 871, 277 P2d 101, and *In re Joiner* (1960) 180 CA2d 250, 4 CR 667 (no discussion of time problem), with *Guerin v Superior Court* (1969) 269 CA2d 80, 75 CR 923, and *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109 (15-day rule of Pen C §999a defines time in which to seek habeas review of denial of defense §995 motion).

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§13.4 B. Evidence on Which Motion May Be Based and Decided; Obtaining Transcript

When the claim on the Pen C §995 motion was insufficient evidence to support the information or indictment, appellate courts have consistently held that review of the claim is limited to the reporter's transcript of the preliminary examination or grand jury proceedings. See, *e.g., People v Crosby* (1962) 58 C2d 713, 725, 25 CR 847 (indictment); *People v Crudgington* (1979) 88 CA3d 295, 299, 151 CR 737 (information). When the claim on the §995 motion was the violation of a substantial right, appellate courts have been inconsistent in their holdings on the reviewability of facts outside the record of the reporter's transcript. One line of cases holds that, to be reviewable under §995, the violation of the substantial right must appear on the face of the transcript; if it does not, the proper procedure is a nonstatutory motion to dismiss the information. See, *e.g., Currie v Superior Court* (1991) 230 CA3d 83, 90, 281 CR 250; *Stanton v Superior Court* (1987) 193 CA3d 265, 269, 239 CR 328. One appellate court took judicial notice of facts outside the reporter's transcript to resolve a claim of the violation of a substantial right (*People v Mackey* (1985) 176 CA3d 177, 186, 221 CR 405), a procedure available to an appellate court reviewing such a claim after a conviction (see, *e.g., People v Hayes* (1990) 52 C3d 577, 611 n3, 276 CR 874). Several decisions have referred with seeming approval to the superior court's receiving evidence outside the record of the preliminary examination when reviewing a claim of the violation of a substantial right. *People v Coleman* (1988) 46 C3d 749, 251 CR 83 (testimony on whether counsel was effective); *People v Superior Court (Greer)* (1977) 19 C3d 255, 263 n5, 137 CR 476 (potential bias or appearance of conflict of prosecutor at preliminary examination); *People v Pennington* (1991) 228 CA3d 959, 964, 279 CR 85 (conflict of interest of defense counsel). See also *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1022 n1, 13 CR2d 551 (failure of district attorney to present exculpatory evidence at grand jury proceedings).

Defense counsel should note that nothing in the language of Pen C §995 itself precludes the trial court from receiving evidence outside the record of the preliminary examination or grand jury proceedings. Although it is clearly appropriate to enforce such a limit when the claim is insufficiency of the evidence presented to the magistrate, it is not necessarily appropriate to enforce such a limit when the claim is the violation of a substantial right, because the right can be denied in ways that do not appear on the face of the transcript. Defense counsel can use the authorities cited in the previous paragraph to support an argument that the court should consider evidence outside the record of the preliminary examination. This approach has a distinct tactical advantage. Raising the violation of a substantial right on a §995 motion entitles the defendant to a presumption of prejudice from the error, whereas raising it in a nonstatutory motion does not. Compare *People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83, with *Stanton v Superior Court* (1987) 193 CA3d 265, 239 CR 328.

The defendant has a statutory right to a transcript of the testimony on which the information or indictment is based. Pen C §§869, 938.1. In *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829, the Sixth District ruled that the defendant is entitled to a transcript of nontestimonial portions of proceedings before a grand jury that could have a bearing on the grand jury's probable cause determination, including "transcripts of all communications between the prosecutor and the grand jury, the prosecutor's opening and closing remarks and argument, and all responses to requests by the grand jury for read-backs of witness testimony, as well as the superior court's answers to grand jurors' questions." 78 CA4th at 407. See also *Dustin v Superior Court* (2002) 99 CA4th 1311, 122 CR2d 176 (in death penalty case, Pen C §190.9 entitles defendant to transcript of all portions of grand jury proceedings).

The reporter is required to deliver the original transcript and copies for the accused to the clerk within 10 days after the holding order or the finding of the indictment. Pen C §§869(e), 938.1(a). The 10 days for the delivery of the transcript of the grand jury proceedings may be extended by 20 calendar days for good cause. Pen C §938.1(a).

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§13.5 IV. IMPORTANCE OF MAKING PEN C §995 MOTION

To render effective assistance within the meaning of the Sixth Amendment, defense counsel is required to investigate the merits of a Pen C §995 motion and then make reasonable tactical decisions based on that investigation. *People v Maguire* (1998) 67 CA4th 1022, 79 CR2d 573 (counsel ineffective for failing to bring meritorious §995 motion before advising client to plead guilty).

Errors at the preliminary examination or before the grand jury are normally not reviewable by pretrial writ or by appeal from a judgment of conviction unless defense counsel first raised them by making a §995 motion. Pen C §996; *People v Harris* (1967) 67 C2d 866, 870, 64 CR 313. An exception is made if the issues are otherwise substantially raised in the trial court. *People v Phillips* (1985) 41 C3d 29, 45, 222 CR 127.

On pretrial writ review, prejudice is presumed from errors at the preliminary examination (*People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83; *People v Pompa-Ortiz* (1980) 27 C3d 519, 529, 165 CR 851) or grand jury proceedings (*Dustin v Superior Court* (2002) 99 CA4th 1311, 1325, 122 CR2d 176). On appeal after trial, prejudice is not presumed (see, *e.g., People v Cabrera* (2007) 152 CA4th 695, 701, 61 CR3d 373); to obtain reversal of the conviction, the defendant must show that the irregularities at the preliminary examination or grand jury proceedings resulted in an unfair trial or other prejudice. *People v Coleman, supra* (ineffectiveness of counsel at preliminary examination not shown to have prejudiced defendant at trial); *People v Pompa-Ortiz, supra* (erroneous closing of preliminary examination to the public did not deprive defendant of fair trial). Defense counsel should therefore usually seek review of the denial of a §995 motion by pretrial writ.

Ø **Note:** A tactical point for defense counsel to consider is whether bringing a Pen C §995 motion will alert the prosecution to additional, and perhaps more serious, crimes supported by the evidence at the preliminary examination, and thus lead to adverse amendment of the information. See discussion of Pen C §739 in §13.7.

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V. GROUNDS FOR MAKING PEN C §995 MOTION

A. Information or Indictment Not Based on Reasonable or Probable Cause (Sufficiency of Evidence)

§13.6 1. Standard of Review

An accused may be held to answer (or an indictment may be returned) if the evidence presented to the magistrate (or the grand jury) provides probable cause to believe that the accused committed the crime. The supreme court explained the probable cause standard in *Rideout v Superior Court* (1967) 67 C2d 471, 474, 62 CR 581:

> Evidence that will justify a prosecution need not be sufficient to support a conviction. [Citations.] Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citations and internal quotation marks omitted.] An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

Although the magistrate at the preliminary examination, or the grand jury, is able to weigh the evidence, the judge hearing the Pen C §995 motion sits strictly as an appellate judge reviewing the magistrate's or grand jury's determinations. *People v Laiwa* (1983) 34 C3d 711, 718, 195 CR 503; *People v Pic'l* (1982) 31 C3d 731, 737, 183 CR 685. Perhaps the most frequently quoted language describing the manner in which a §995 judge reviews the sufficiency of the evidence is in *Rideout v Superior Court, supra*:

> A reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate, and, if there is some evidence to support the information, the court will not inquire into its sufficiency. [Citations.] Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information.

This standard was reaffirmed in *People v Slaughter* (1984) 35 C3d 629, 637, 200 CR 448. It should be noted that at least one appellate court has questioned whether application of the standard is appropriate when the crime at issue was not charged in the complaint and the magistrate therefore did not pass on the sufficiency of the evidence at the preliminary examination. *People v Soto* (1977) 74 CA3d 267, 277, 141 CR 343.

For discussion of the standards used by the magistrate and the grand jury, see §§9.21 (requirement for issuing an indictment), 8.38 (requirement for a holding order), 13.34 (standard on Pen C §871.5 motion to reinstate charges).

On appeal, the trial court judge's ruling is ignored; the appellate court directly reviews the magistrate's or the grand jury's findings. *People v Laiwa, supra* (applying same standards that trial court used); *Alvarado v Superior Court* (2007) 146 CA4th 993, 999, 53 CR3d 416. In reviewing the magistrate's findings, all contradictions in the evidence and relevant presumptions are resolved in favor of the magistrate, whose express or implied findings must be upheld if supported by substantial evidence. If there are no express findings, it is implied that the court made whatever findings are necessary to support the order. *Alvarado v Superior Court, supra*; *People v Molina* (1994) 25 CA4th 1038, 1041, 30 CR2d 805.

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§13.7 2. Challenging Sufficiency of Evidence

Defense counsel may challenge all or part of an information or indictment on the ground that the evidence is insufficient to show the requisite probable cause. Such a challenge should specify the insufficiency. If a misdemeanor is charged in the information, sufficient cause must also have been proved for it at the preliminary examination. *People v Thrasher* (2009) 176 CA4th 1302, 98 CR3d 693; *People v Thiecke* (1985) 167 CA3d 1015, 213 CR 731.

Defense counsel seeking to have an information or indictment set aside on the ground that the evidence is insufficient must show that there is no evidence, direct or circumstantial, from which any reasonable inference supporting the charge being challenged might be drawn. *Williams v Superior Court* (1969) 71 C2d 1144, 1148, 80 CR 747; *People v Casillas* (2001) 92 CA4th 171, 178, 111 CR2d 651. If two reasonable inferences can be drawn from the evidence, the reviewing court is bound by the magistrate's conclusions and cannot grant a Pen C §995 motion merely because the evidence is also susceptible of another, equally reasonable, interpretation. *People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 257 CR 678.

In defense terms, counsel making this argument may ask the §995 court to satisfy itself of several things before upholding the charging document or count being challenged:

- The preliminary examination or grand jury transcript must contain some evidence to support each element of the charged offense or clause. *Garabedian v Superior Court* (1963) 59 C2d 124, 28 CR 318; *Barber v Superior Court* (1991) 1 CA4th 793, 795, 2 CR2d 403.
- The inferences drawn from the evidence must be reasonable. If they are "speculative," it is the reviewing judge's duty to discard those that "derive their substance from guesswork, speculation, or conjecture." *Birt v Superior Court* (1973) 34 CA3d 934, 938, 110 CR 321.
- When reviewing the sufficiency of the evidence, the court also has the duty to "resolve the issue in light of the *whole record*" and "may not limit [its] appraisal to isolated bits of evidence" selected by the prosecution. *People v Johnson* (1980) 26 C3d 557, 577, 162 CR 431. This rule comes in handy when related circumstances tend to neutralize the incriminating nature of a particular piece of evidence.
- The evidence supporting the information or indictment must have been admissible. If inadmissible evidence was received over objection, the reviewing judge should disregard it and weigh the sufficiency of the evidence by reference to the remaining evidence. See *Whitman v Superior Court* (1991) 54 C3d 1063, 1068, 2 CR2d 160; *People v Jimenez* (1995) 38 CA4th 795, 801, 45 CR2d 466.

Most of the same rules of evidence concerning the sufficiency of the evidence at trial apply to the sufficiency of the evidence required on Pen C §995 review, but there are some exceptions. For example, a holding order may be based on the uncorroborated testimony of an accomplice (*People v Miranda* (2000) 23 C4th 340, 96 CR2d 758) or on hearsay evidence testified to by a qualified peace officer, including an honorably retired officer (Pen C §872(b)).

For further discussion of the evidence on which a holding order may be based, see §§8.27-8.30. The evidence on which an indictment may be based is discussed in §9.23. Some of the most common §995 issues concerning sufficiency of the evidence are discussed in §13.9.

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§13.8 3. Holding Order or Indictment Based on Illegally Obtained Evidence

Holding order. An accused will be deemed committed without probable cause if the only evidence presented at the preliminary examination or grand jury proceeding that connects him or her to the crimes charged was seized in violation of applicable principles of search and seizure law. *People v Lilienthal* (1978) 22 C3d 891, 897, 150 CR 910; *People v Scoma* (1969) 71 C2d 332, 78 CR 491; *People v Sherwin* (2000) 82 CA4th 1404, 1408, 98 CR2d 888.

In reviewing the legality of a search or seizure, a reviewing judge should accept as true the evidence supporting the magistrate's decision (see *People v Lawler* (1973) 9 C3d 156, 160, 107 CR 13) but should determine independently whether the magistrate's application of search and seizure law to those facts was correct (see *People v Leyba* (1981) 29 C3d 591, 174 CR 867). If other competent evidence can be found in the transcript to support the information or count, the magistrate's ruling will be deemed "harmless," and a Pen C §995 motion will not lie to cure the error. See *People v Lilienthal, supra*.

If defense counsel failed to object to the use of the evidence at the preliminary examination, that issue is waived on §995 review. *Robison v Superior Court* (1957) 49 C2d 186, 316 P2d 1; *People v Anderson* (1989) 210 CA3d 24, 28, 258 CR 125. See also *People v Hathcock* (1973) 8 C3d 599, 621, 105 CR 540. Such a failure may constitute ineffective assistance of counsel, if it results in waiver of the search and seizure issue. See *People v White* (1981) 118 CA3d 767, 773, 173 CR 575. For discussion of when to notice a Pen C §1538.5 motion in a felony case, see §16.7. For discussion of ineffective assistance of defense counsel at the preliminary examination, see §13.23. For discussion of the differences between the §995 hearing and the §1538.5 hearing in the trial court, and the effect of the timing of these motions, see §16.25.

Indictment. In cases involving indictments, the defendant will not have had the opportunity to object to an illegal search or seizure. Thus, there is no waiver of the right to challenge the illegality of the search or seizure. If the illegality is not apparent on the face of the grand jury record, however, the search is presumed legal despite the fact that the defendant had no opportunity to develop essential facts concerning the search. *People v Prewitt* (1959) 52 C2d 330, 335, 341 P2d 1. However, the defendant may move in the trial court to suppress evidence under Pen C 1538.5(i). If that motion is granted but neither the court nor the prosecution dismisses the case, the defendant may then pursue a §995 motion challenging the indictment. *People v Sherwin* (2000) 82 CA4th 1404, 98 CR2d 888.

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Source: Criminal Law/California Criminal Law Procedure and Practice/13 MOTION TO SET ASIDE INFORMATION OR INDICTMENT/§13.9 4. Common Sufficiency of Evidence Issues

§13.9 4. Common Sufficiency of Evidence Issues

If no evidence is presented on a count, a Pen C §995 motion should be granted for that count. *People v Pitts* (1990) 223 CA3d 606, 902, 273 CR 757; *Somers v Superior Court* (1973) 32 CA3d 961, 108 CR 630.

If there is an insufficient showing of any element of a crime or enhancement allegation, the §995 motion should be granted for that count or enhancement allegation. For example, appellate courts have held that §995 motions should have been granted when the prosecution failed to prove:

- Knowledge of injury to another in a hit-and-run case (*Garabedian v Superior Court* (1963) 59 C2d 124, 28 CR 318);
- Trick or fraud in a forgery case (*People v Looney* (2004) 125 CA4th 242, 22 CR3d 502);
- Use of the firearm to further the underlying crime in a case charging the Pen C §12022.5 enhancement (*Alvarado v Superior Court* (2007) 146 CA4th 993, 1000, 53 CR3d 416);
- The existence of the gang in a case charging the street gang enhancement (*Salazar v Superior Court* (2000) 83 CA4th 840, 100 CR2d 120);
- Malice aforethought in a murder case (*People v Caffero* (1989) 207 CA3d 678, 255 CR 22);
- Intent to steal at the time of taking in a robbery case (*Rodriguez v Superior Court* (1984) 159 CA3d 821, 205 CR 750);
- Locking of doors in an automobile burglary case (*People v Woods* (1980) 112 CA3d 226, 169 CR 179);
- Prior theft conviction needed to elevate the crime to a felony in a petty theft case (*Bradwell v Superior Court* (2007) 156 CA4th 265, 67 CR3d 163);
- Prior felony conviction in an ex-felon with a firearm case (*Levy v Superior Court* (1973) 31 CA3d 427, 107 CR 384);
- Intent to sell in a possession of drugs for sale case (*People v Upton* (1968) 257 CA2d 677, 65 CR 103); and
- Dominion and control in a drug possession case (*People v Monson* (1967) 255 CA2d 689, 692, 63 CR 409).

See also *People v Burnett* (1999) 71 CA4th 151, 168, 83 CR2d 629, in which conviction was reversed because the evidence presented at trial related to a completely different incident from that shown at the preliminary examination.

Appellate courts also have held that §995 motions should have been granted when the prosecution's proof failed to connect the defendant sufficiently with the crime, *e.g.,* the defendant's fingerprints were merely inside the car used to transport burglars away from a burglarized house (*Birt v Superior Court* (1973) 34 CA3d 934, 110 CR 321); the defendant was merely present at or near the scene of the crime (*Pinell v Superior Court* (1965) 232 CA2d 284, 287, 42 CR 676; *Malleck v Superior Court* (1956) 142 CA2d 396, 397, 298 P2d 115); or the defendant merely "looked like" the perpetrator (*Vukman v Superior Court* (1981) 116 CA3d 341, 344, 172 CR 44, disapproved on other grounds in *People v Cuevas* (1995) 12 C4th 252, 275 n5, 48 CR2d 135).

> Ø **Note:** In *Williams v Superior Court* (1969) 71 C2d 1144, 1147, 80 CR 747, the supreme court observed that the "probable cause" needed to uphold an information was the same as that needed to justify an arrest. Cases holding that a police officer lacked probable cause for an arrest can be cited in support of arguments in §995 motions that the evidence at the preliminary examination was insufficient. See, *e.g., In re Justin B.* (1999) 69 CA4th 879, 81 CR2d 852.

At the preliminary examination or grand jury proceedings, the prosecution may not rely solely on a defendant's extrajudicial statement but must produce independent proof of the corpus delicti. *Rayyis v Superior Court* (2005) 133 CA4th 138, 35 CR3d 12. Therefore, an information or indictment must still be set aside if the prosecution fails to produce independent proof of the corpus delicti. *People v Herrera* (2006) 136 CA4th 1191, 39 CR3d 578 (evidence insufficient to establish corpus); *Creutz v Superior Court* (1996) 49 CA4th 822, 56 CR2d 870 (evidence used was inadmissible to prove corpus). For further discussion of the corpus delicti rule, see §23.22.

If a Pen C §1538.5 motion is heard at the same time as the preliminary examination, and the corpus is insufficient

without evidence suppressed under that motion, there should be no holding order. *Jackson v Superior Court* (1977) 74 CA3d 361, 142 CR 299, disapproved on other grounds in *People v Chavers* (1983) 33 C3d 462, 470, 189 CR 169 (after gun suppressed, evidence insufficient to support charge of ex-felon in possession of gun). Similarly, if an in-court identification at the preliminary hearing is suppressed as the fruit of a prior illegal lineup, the complaint should be dismissed unless other evidence establishes the defendant committed the crime charged. *People v Malich* (1971) 15 CA3d 253, 93 CR 87, disapproved on other grounds in *People v Medina* (1972) 6 C3d 484, 489, 99 CR 630.

When the prosecution introduces hearsay testimony of a police officer (or an honorably retired officer) under Pen C §872(b), but it is inadmissible because the testifying officer did not personally investigate the case, because the officer lacks the required law enforcement experience or training, or because the testimony is double hearsay, the §995 motion must be granted unless other admissible evidence supports the information. *Whitman v Superior Court* (1991) 54 C3d 1063, 2 CR2d 160; *Montez v Superior Court* (1992) 4 CA4th 577, 5 CR2d 723. See detailed discussion in §8.13.

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§13.10 B. Defendant Not Legally Committed by Magistrate

Defense counsel may attack an information because of an error committed by the magistrate that resulted in an illegal commitment despite the sufficiency of the evidence to support the charges, or in addition to a challenge to the sufficiency of the evidence. See Pen C §995(a)(2)(A). The grounds for challenging the legality of a commitment are set out in Pen C §995 and discussed in §§13.11-13.21.

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§13.11 1. Preliminary Examination Held Beyond Time Limits

There are two requirements concerning time limits for holding preliminary examinations. First, a defendant's preliminary examination must be started within the time limits specified in Pen C §859b, discussed in §8.16. *Serrato v Superior Court* (1978) 76 CA3d 459, 142 CR 882. Second, a preliminary examination, once begun, must be completed without interruption by other significant court business, absent good cause shown by affidavit. Pen C §861; *Stroud v Superior Court* (2000) 23 C4th 952, 98 CR2d 677; *Kruse v Superior Court* (2008) 162 CA4th 1364, 1373, 76 CR3d 664 (interruption not for good cause when it was due to problems transporting defendant to court). For further discussion of the time limits for holding a preliminary examination, see §§8.13-8.20.

Historically, the rule had been that if a preliminary hearing was set outside the §859b time limit, and the defendant was not released, the resulting commitment was unlawful, and the case had to be dismissed under Pen C §995. *Serrato v Superior Court, supra*. In *People v Standish* (2006) 38 C4th 858, 866, 43 CR3d 785, however, the supreme court held that if a magistrate, on a finding of good cause, continues the preliminary hearing beyond the 10-day limit as proscribed by §859b, the court must release the defendant on his or her own recognizance. However, the court also held that a magistrate's failure to release the defendant on his or her own recognizance does not require dismissal of the information under §995 unless the court determines the error "reasonably might have affected the outcome of the preliminary examination." *People v Standish, supra*.

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§13.12 2. Rights to Counsel and Self-Representation

The rights to counsel and to appointed counsel at the preliminary examination are guaranteed not only by statute (Pen C §§859, 860, 987) but also by the Sixth and Fourteenth Amendments (*Coleman v Alabama* (1970) 399 US 1, 26 L Ed 2d 387, 90 S Ct 1999).

When a magistrate arraigns a defendant on a felony complaint, the magistrate must inform him or her of the right to an attorney and must allow the defendant a reasonable time to obtain one. If the defendant cannot afford to retain an attorney, the court must appoint one. Pen C §§859, 860. If a magistrate fails to implement a defendant's right to counsel as mandated by Pen C §§859, 860, a subsequent commitment order is illegal. See, *e.g., Bogart v Superior Court* (1963) 60 C2d 436, 34 CR 850.

The right to counsel includes the right to the effective assistance of counsel at the preliminary examination. *People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83. See §13.23. It also includes the right to representation by an attorney who does not have a conflict of interest, such as one based on prior representation of a prosecution witness. *People v Pennington* (1991) 228 CA3d 959, 964, 279 CR 85.

The federal constitutional right to self-representation under *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525, applies at the preliminary examination. *People v Matthews* (1986) 183 CA3d 458, 461, 228 CR 316; *Curry v Superior Court* (1977) 75 CA3d 221, 229, 141 CR 884. Even a defendant initially represented by counsel may invoke this right midway through a proceeding; if the defendant does so, the court on its own motion must inquire into the defendant's reasons and may weigh any ensuing disruption or delay. *People v Windham* (1977) 19 C3d 121, 128, 137 CR 8. Thus, the magistrate may not summarily deny as untimely a request for self-representation made midway through the preliminary examination, particularly when defendant is not requesting a continuance. *Moon v Superior Court* (2005) 134 CA4th 1521, 36 CR3d 854. For discussion of *Faretta,* see §§3.7-3.10.

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§13.13 3. Defense Right to Cross-Examine

Preliminary examinations usually involve only prosecution evidence and defense cross-examination of prosecution witnesses on the subject matter of their direct examination. See Pen C §865. A motion to suppress under Pen C §1538.5, made at the preliminary examination, is a prerequisite to cross-examination on search and seizure issues. *People v Williams* (1989) 213 CA3d 1186, 262 CR 303.

Although the preliminary examination is not to be used for purposes of discovery (Pen C §866(b)), restriction or denial of a defendant's right to cross-examine a witness at a preliminary examination may deny the defendant a substantial right and may therefore result in a successful Pen C §995 motion. See, *e.g., Jennings v Superior Court* (1967) 66 C2d 867, 877, 59 CR 440 (restriction of cross-examination of arresting officer on defense (entrapment) deprived defendant of fair hearing); *Hines v Superior Court* (1988) 203 CA3d 1231, 251 CR 28 (restriction of cross-examination of officer on material issue (surveillance) deprived defendant of substantial right). See also *Mills v Superior Court* (1986) 42 C3d 951, 232 CR 141; *People v Rivas* (1985) 170 CA3d 312, 324, 216 CR 477.

Not every restriction of cross-examination is considered a denial of a substantial right sufficient to merit a dismissal under Pen C §995. "An information will not be set aside merely because of some minor irregularity or error… at the preliminary examination." *People v Sheets* (1967) 251 CA2d 759, 767, 59 CR 777.

The difference between a *minor error* and *the denial of a substantial right* has generated a good deal of litigation. A general guideline is that when the subject of defense counsel's cross-examination concerns the allegations in the complaint, and is aimed at establishing an affirmative defense, or defeating the prosecution's case, restrictions will be deemed to have denied the defendant a substantial right. See *People v Konow* (2004) 32 C4th 995, 1023, 12 CR3d 301; compare *Jennings v Superior Court, supra,* and *Hines v Superior Court, supra,* with *People v Stone* (1983) 139 CA3d 216, 188 CR 493 (no error in disallowing defense cross-examination of police officer on his credibility because it would have affected weight only of his direct testimony).

Penal Code §872(b) allows a finding of probable cause to be based on the hearsay testimony of a police officer, including an honorably retired officer, with certain qualifications of experience and training. Construing this provision, the supreme court has held that (1) the testifying officer must be one of the investigating officers on the case, and (2) double hearsay is not admissible. *Whitman v Superior Court* (1991) 54 C3d 1063, 1072, 2 CR2d 160. The supreme court has also held that the provision permits the testifying officer to recount a translated statement. The translation is usually considered a statement of the original declarant rather than double hearsay. *Correa v Superior Court* (2002) 27 C4th 444, 117 CR2d 27. For further discussion of Pen C §872(b), see §8.30.

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§13.14 4. Defense Right to Present Evidence

The defense has the right to present substantial exculpatory evidence by calling its own witnesses at the preliminary examination. Pen C §866; *e.g., People v Mower* (2002) 28 C4th 457, 473 n5, 122 CR2d 326 (medical defense to marijuana charges). Section 866, however, requires the defense, at the request of the prosecution, to make an offer of proof that the testimony of the proffered witness, if believed, would be reasonably likely to establish an affirmative defense; negate an element of the crime charged; impeach the testimony of a prosecution witness; or impeach the statement of a declarant testified to by a prosecution witness. See *People v Erwin* (1993) 20 CA4th 1542, 25 CR2d 348 (Pen C §995 motion should have been granted after magistrate precluded testimony from defense witness for whom defense counsel had made adequate offer of proof); *People v Buckley* (1986) 185 CA3d 512, 228 CR 329 (no error in denying defense calling of witnesses whose testimony would have been cumulative and was for discovery purposes only).

Ø **Note:** Under Pen C §872(b), the defendant has the right to call a police officer to testify to hearsay that is *favorable* to the defense, such as the defendant's exculpatory statement. *Nienhouse v Superior Court* (1996) 42 CA4th 83, 49 CR2d 573.

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§13.15 5. Defendant Was Mentally Incompetent at Preliminary Examination

The defendant has a due process right to be mentally competent at the time of the preliminary examination. *Hale v Superior Court* (1975) 15 C3d 221, 228, 124 CR 57. If the defendant is found mentally incompetent in Pen C §1368 proceedings that began shortly after the information was filed, a motion under Pen C §995 lies to set aside the information on the ground that the defendant was denied a substantial right. *Miller v Superior Court* (1978) 81 CA3d 132, 134, 146 CR 253; *Chambers v Municipal Court* (1974) 43 CA3d 809, 118 CR 120. See also *People v Cadogan* (2009) 173 CA4th 1502, 1511, 93 CR3d 881. But see *Booth v Superior Court* (1997) 57 CA4th 91, 66 CR2d 758 (incompetence must appear on face of record of preliminary examination). Even a defendant found mentally competent in such proceedings may base a motion under §995 on alleged mental incompetence at the time of the preliminary examination; in such a case, the defendant is entitled to an evidentiary hearing on the issue. *Bayramoglu v Superior Court* (1981) 124 CA3d 718, 176 CR 487. In *People v Duncan* (2000) 78 CA4th 765, 93 CR2d 173, the court held that a defendant found incompetent months after the preliminary hearing could bring the issue of his competence at the time of the preliminary examination before the court by filing a nonstatutory motion to dismiss.

Ø **Note:** If a defendant is found to have been mentally incompetent at the time of the preliminary examination, testimony from that proceeding is not admissible as former testimony in later proceedings, because the defendant is not considered to have had the opportunity to cross-examine the declarant effectively, as required by Evid C §1291(a)(2). *Stevenson v Superior Court* (1979) 91 CA3d 925, 154 CR 476.

For further discussion of mental incompetence at the preliminary examination, see §§48.14, 48.20.

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§13.16 6. Reduction of Felony to Misdemeanor and Dismissal of Complaint in Interest of Justice

Some crimes, commonly called "wobblers," are punishable either as felonies or as misdemeanors. Other crimes, commonly called "straight" felonies, are punishable only as felonies. The magistrate may reduce a wobbler to a misdemeanor at the preliminary examination even though the prosecutor has charged it as a felony. Pen C §17(b)(5). The prosecutor may not circumvent the magistrate's ruling by recharging the offense as a felony in the trial court. *Malone v Superior Court* (1975) 47 CA3d 313, 318, 120 CR 851. If the prosecution dismisses the resulting misdemeanor, it cannot be refiled as a felony without the magistrate's consent. See *Malone v Superior Court, supra*. If the prosecution wants review of the magistrate's decision under Pen C §17(b)(5) to reduce a wobbler to a misdemeanor, it may not move to reinstate the complaint under Pen C §871.5 but it may have the right to petition for relief by writ. *People v Williams* (2005) 35 C4th 817, 832, 28 CR3d 29. For further discussion of Pen C §17(b)(5), see §8.40.

The defendant is denied a substantial right when a magistrate refuses to reduce a wobbler charged as a felony to a misdemeanor under §17(b)(5) on the stated ground that the defendant did not agree to plead guilty to the reduced charge. *Hartman v Superior Court* (1982) 135 CA3d 205, 185 CR 182.

A magistrate has no power to reduce a straight felony to a misdemeanor. *People v Superior Court (Feinstein)* (1994) 29 CA4th 323, 328, 34 CR2d 503. See Pen C §17(b)(5). Such an order may be set aside on a prosecution motion to compel the reinstatement of the complaint under Pen C §871.5. *People v Superior Court (Feinstein), supra*.

At the preliminary examination, the magistrate may dismiss the complaint in furtherance of justice under Pen C §1385 on "his or her own motion or upon the application of the prosecuting attorney." The defendant does not have the right to make a motion under the statute, but may nonetheless "informally suggest" that the magistrate consider dismissal on the magistrate's own motion. *People v Konow* (2004) 32 C4th 995, 1022, 12 CR3d 301. A magistrate's erroneous and prejudicial failure to consider such a suggestion to dismiss the complaint denies the defendant a substantial right at the preliminary examination and requires dismissal of the information under Pen C §995. *People v Konow, supra*.

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§13.17 7. Factual Findings

At the conclusion of the preliminary examination, defense counsel may ask the magistrate to make findings of fact in support of the dismissal of charges in the complaint. A finding of fact is not a conclusion of law, *i.e.,* the application of the magistrate's view of the law to the evidence. *Pizano v Superior Court* (1978) 21 C3d 128, 133, 145 CR 524. Rather, it is a factual determination made by the magistrate after weighing the evidence, drawing factual inferences, and resolving any conflicts in the evidence, as well as by resolving questions of witness credibility. *Cooley v Superior Court (Marentez)* (2002) 29 C4th 228, 258, 127 CR2d 177.

Factual findings need to be express, because the courts generally will not find facts implied in a magistrate's ruling. *People v Superior Court (Gibson)* (1980) 101 CA3d 551, 161 CR 923.

Although Pen C §739 gives a prosecutor the power to recharge in the information an offense for which there was no holding order, as long as the charge is supported by evidence taken before the magistrate, §739 does not allow the prosecutor to override a magistrate's factual findings. If a magistrate makes a factual finding that is fatal to a charge, and a prosecutor refiles it in the information, it should be dismissed under Pen C §995. See, *e.g., Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289 (magistrate made factual finding that he did not believe complaining witness in rape case concerning allegation that force was used, and held defendants to answer to statutory rather than forcible rape; prosecutor's subsequent recharge of forcible rape in information not allowed).

The cases are in conflict on the question of whether it is error for a magistrate to refuse to issue factual findings based on facts presented at the preliminary examination, but not charged in the complaint. *People v Brice* (1982) 130 CA3d 201, 181 CR 518, holds that it is error, but *People v Estrada* (1987) 188 CA3d 1141, 233 CR 754, disagrees.

Although findings of fact must be sustained if supported by substantial evidence, a finding of lack of probable cause, unsupported by any factual findings, is subject to review as an issue of law. *People v Slaughter* (1984) 35 C3d 629, 200 CR 448. See also *Walker v Superior Court* (1980) 107 CA3d 884, 890, 166 CR 209; *People v Superior Court (Gibson)* (1980) 101 CA3d 551, 161 CR 923. Once a magistrate makes a factual finding, that finding is not subject to §995 review, whether fatal to the credibility of either prosecution or defense evidence. See *Jones v Superior Court, supra*; *People v Childs* (1991) 226 CA3d 1397, 1405, 277 CR 456.

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§13.18 8. Identity of Informant

Either disclosure of an informant's identity, or dismissal of the case, is required at the preliminary examination when the defendant makes an adequate showing that an informant may be a material witness on the issue of guilt or innocence. *People v Partlow* (1978) 84 CA3d 540, 148 CR 744. When disclosure at the preliminary examination is warranted but denied, the defendant has been denied a substantial right, and the ensuing commitment is thus unlawful. *Theodor v Superior Court* (1972) 8 C3d 77, 104 CR 226.

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§13.19 9. Failure to Provide Discovery Before or During Preliminary Examination

Penal Code §§1054(e) and 1054.5(a) make Pen C §§1054-1054.7 the "exclusive" means of discovery in criminal cases, except for discovery provided for by express statutory provisions, and mandated by the U.S. Constitution. Under Pen C §1054.5(b), the prosecution need not turn over discovery until 15 calendar days after a demand is made; thus, by implication, the production of pre-preliminary examination discovery not covered by another express statute or by the U.S. Constitution is not required unless the 15-day deadline precedes the hearing.

The Due Process Clause of the Fourteenth Amendment requires the prosecution to disclose all matters favorable to the defendant without request. *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. This requirement operates wholly independently of the statutory scheme of Pen C §1054.5; the prosecutor is obligated to disclose such evidence voluntarily, without a request from the defense. *Izazaga v Superior Court* (1991) 54 C3d 356, 378, 285 CR 231. Failure to provide timely discovery of such evidence, before the preliminary examination, when the prosecution was aware of the evidence, deprives a defendant of due process and can be grounds for a Pen C §995 motion, as long as an appropriate record was made at the preliminary examination. *People v Mackey* (1985) 176 CA3d 177, 221 CR 405. See also *Currie v Superior Court* (1991) 230 CA3d 83, 96, 281 CR 250 (prosecution has duty to disclose police reports of misconduct by prosecution witness before preliminary examination).

Pitchess discovery motions remain operative because they are authorized by Evid C §§1043-1047. *Albritton v Superior Court* (1990) 225 CA3d 961, 275 CR 314. Other motions authorized by statute that remain operative include motions to disclose official information and motions to disclose informants' identities. Evid C §§1040-1042. For discussion of motions to disclose informants, see chap 17.

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§13.20 10. Failure to File Information Within 15 Days After Holding Order

The prosecution must file an information in the trial court within 15 calendar days after a magistrate's holding order issues; failure to do so constitutes a ground to set aside the information. Pen C §1382(a)(1). Dismissal, however, is not automatic; the defendant must move for dismissal; otherwise, it is considered waived. *People v Ganger* (1950) 97 CA2d 11, 217 P2d 41. See also *People v Trujillo* (1977) 67 CA3d 547, 552, 136 CR 672.

Ø **Note:** An arraignment date can be set at a later time, because that date is not tied to the filing of the information. *Ciaccio v Superior Court* (1984) 156 CA3d 130, 202 CR 674.

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§13.21 11. Chart: Issues That Need Not or Cannot Be Reviewed by Pen C §995 Motion

Issue	Authority
Magistrate's finding of fact is binding on trial court judge reviewing information (prosecutor may be able to recharge in new complaint; see §§13.31-13.45).	*Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289.
Juvenile court's order remanding juvenile to criminal court for treatment as adult not ground for Pen C §995 motion; defense counsel may challenge by writ of prohibition.	*People v Chi Ko Wong* (1976) 18 C3d 698, 135 CR 392.
Claim of former jeopardy (not ground for Pen C §995 motion; defense counsel should plead under Pen C §1017).	*People v Mims* (1955) 136 CA2d 828, 289 P2d 539.
Violation of proscription against double prosecution under Pen C §654 (not ground for Pen C §995 motion; defense counsel should plead under Pen C §1017).	*People v Martinson* (1960) 179 CA2d 164, 3 CR 449.
Misjoinder of counts (not ground for Pen C §995 motion; defense counsel may challenge only by demurrer under Pen C §1004(3)).	*People v Brooks* (1985) 166 CA3d 24, 30, 210 CR 90; *People v Cummings* (1959) 173 CA2d 721, 343 P2d 944.
Magistrate's refusal to hear speedy trial motion unless that refusal is erroneous and prejudicial. (Magistrate has discretion to hear motion at preliminary examination, which does allow review by Pen C §995 motion; defense counsel may also challenge by separate motion in trial court; see §19.33.)	*People v Konow* (2004) 32 C4th 995, 1021, 12 CR3d 301.
Motion to reduce or dismiss charges based on prosecution's failure to provide defense with substantial material evidence favorable to accused (not properly considered by Pen C §995 motion because goes outside record of preliminary examination; should be brought as common law motion to dismiss).	*Stanton v Superior Court* (1987) 193 CA3d 265, 270, 239 CR 328.

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§13.22 C. Errors Peculiar to Indictments

See §9.11 for a checklist of possible challenges to an indictment.

An indictment must be set aside when it is not found as prescribed "in this code." Pen C §995(a)(1)(A). An indictment is not found as prescribed in the code if it was not concurred in by the requisite number of grand jurors. *People v Fujita* (1974) 43 CA3d 454, 117 CR 757. Note that the number of grand jurors needed to lawfully return an indictment varies from county to county. If a county has 23 grand jurors, 14 are needed to return an indictment. If the county has only 11 grand jurors, 8 are needed to indict. In other counties, 12 grand jurors must agree for an indictment to be lawful. Pen C §940.

It has been suggested that an indictment may be invalid under Pen C §995 if unauthorized individuals attended the grand jury proceedings in violation of Pen C §939. See *People v Rojas* (1969) 2 CA3d 767, 82 CR 862 (presence of one witness during testimony of another witness may violate due process). But see *People v Jablonski* (2006) 37 C4th 774, 800, 38 CR3d 98 (defendant not prejudiced by "technical violation" of Pen C §939 caused by mere presence of deputy district attorneys for training purposes); *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 436 n15, 92 CR2d 829 (observing that presence of unauthorized persons was deleted as express ground for Pen C §995 motion in 1927). An indictment is not, however, invalid for failure to comply with Pen C §943, which requires the names of witnesses before the grand jury to be endorsed on the indictment. *People v Carella* (1961) 191 CA2d 115, 124, 12 CR 446.

Penal Code §939.6 limits the evidence that may be presented to the grand jury to evidence that would be admissible at trial in a criminal case, but it also provides that the introduction of inadmissible evidence will not void an indictment if "sufficient competent evidence to support the indictment was received by the grand jury." Pen C §939.6(b). Nevertheless, defendants have a right to due process during grand jury proceedings; failure to meet due process requirements can be challenged by a §995 motion. See also *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1022 n1, 13 CR2d 551. In *People v Backus* (1979) 23 C3d 360, 393, 152 CR 710, the supreme court explained:

> [W]hen the extent of incompetent and irrelevant evidence before the grand jury is such that, under the instructions and advice given by the prosecutor, it is unreasonable to expect that the grand jury could limit its consideration to the admissible, relevant evidence [citations], the defendants have been denied due process and the indictment must be dismissed notwithstanding Penal Code section 939.6.

Further, incomplete instructions by the prosecutor on the elements of the crime may have the effect of denying the defendant due process at the grand jury proceedings even if the evidence is sufficient to support the indictment. *People v Gnass* (2002) 101 CA4th 1271, 125 CR2d 225 (prosecutor failed to instruct jury on "knowing" and "willful" elements).

Practice differs on the vehicle for challenging the prosecutor's failure to inform the grand jury of the existence and nature of exculpatory evidence as required by Pen C §939.7 (sometimes called a *Johnson* motion, based on *Johnson v Superior Court* (1975) 15 C3d 248, 124 CR 32). In some counties, the defense may raise this issue by §995 motion. In other counties, counsel sets a separate motion to attack this type of error. See, *e.g.*, *Berardi v Superior Court* (2007) 149 CA4th 476, 497, 57 CR3d 170 (motion granted when prosecutor misstated information to strengthen case and omitted evidence that directly contradicted key witness). For discussion of Pen C §939.7, see §9.19.

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§13.23 D. Defense Attorney Ineffective at Preliminary Examination

An information may be set aside under Pen C §995 if defense counsel did not render effective assistance at the preliminary examination. *People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83; *People v White* (1981) 118 CA3d 767, 772, 173 CR 575.

To prevail on a claim that counsel was ineffective, the defendant must show that counsel's performance fell "below an objective standard of reasonableness… under prevailing professional norms" and that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Ledesma* (1987) 43 C3d 171, 216, 218, 233 CR 404, quoting *Strickland v Washington* (1984) 466 US 668, 688, 80 L Ed 2d 674, 694, 104 S Ct 2052.

For further discussion of ineffective assistance of counsel, see §§2.20-2.21, 3.27-3.28.

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§13.24 VI. WHEN OBJECTION REQUIRED AT PRELIMINARY EXAMINATION TO PRESERVE ISSUE

There is little law on when an objection is required at the preliminary examination in order for defense counsel to be able to raise an issue by Pen C §995 motion. To be safe, counsel should usually make all applicable objections. See, *e.g., People v Rosales* (1984) 153 CA3d 353, 200 CR 310 (propriety of admission into evidence of palm print illegally seized held not reviewable by §995 motion, because counsel—even though found to have been ineffective—failed to object).

Clearly, a reviewing judge will not set aside an information based on a motion not made at the preliminary examination, *e.g.,* a Pen C §1538.5 motion or a motion to discover the identity of an informant. See *People v Hathcock* (1973) 8 C3d 599, 621, 105 CR 540; *People v Anderson* (1989) 210 CA3d 24, 28, 258 CR 125. It is unclear, however, whether an objection must have been made at the time when it is claimed that the defendant was deprived of a "substantial right."

Ø **Note:** Statute of limitations issues may be raised by §995 motion without an objection at the preliminary examination. See §19.13.

In most reported cases, either defense counsel objected (see, *e.g., Murphy v Superior Court* (1961) 188 CA2d 185, 10 CR 176) or it is unclear from reading the case whether counsel objected. It is obviously more likely that a defense §995 motion based on restriction of cross-examination will succeed if the defense objected at the preliminary examination than if counsel did not. Conversely, it is common for attorneys to attack an information because an element of the offense was not proven at the preliminary examination when an objection was not made to the holding order. An objection is not required to preserve sufficiency of the evidence at trial as an issue on appeal from a conviction. *Bunnell v Superior Court* (1975) 13 C3d 592, 604, 119 CR 302. The same rule undoubtedly applies when sufficiency of the evidence at the preliminary examination is raised as an issue on a motion under §995.

Courts may use one standard if an objection was made and another if there was none. See *Reid v Superior Court* (1983) 140 CA3d 624, 629, 189 CR 644, which discusses the two standards used to review a claim of conflict of interest based on representation of codefendants by the same attorney. If the defendant who claims error objected at the preliminary examination, no prejudice need be shown. If the defendant did not object, the defense must prove that an actual conflict of interest existed that adversely affected the lawyer's performance.

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VII. TIME AND MANNER OF MAKING MOTION

§13.25 A. Setting Motion

Neither the Penal Code nor the California Rules of Court specifically require notice of the Pen C §995 motion. California Rules of Court 4.111, however, requires that all pretrial motions in criminal cases be accompanied by a supporting memorandum, and be served and filed 10 calendar days before the date set for the hearing. In addition, local rules often have express requirements for memorandums and for notice of the motion exceeding 10 calendar days. See, *e.g.,* San Francisco Ct R 16.10 (15 calendar days).

It is common for defense counsel to announce at the defendant's arraignment in the trial court that counsel intends to make a Pen C §995 motion, and to set a date for the hearing on the motion. Defense counsel should inquire about local practice from local attorneys or the court clerk. In Alameda County, for example, defense counsel usually makes an oral request for a hearing date at the defendant's arraignment in the trial court.

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§13.26 B. Time When Motion Made and Heard

Although Pen C §997 provides that the Pen C §995 motion may be made before or after the plea, defense counsel must make the motion no later than 60 calendar days after defendant's arraignment in the trial court to be able to seek pretrial appellate review of the ruling on the motion. Pen C §1510. Therefore, defense counsel should set the motion well within the 60-day deadline to avoid any difficulties. The easiest approach is to select a §995 hearing date within the 60-day limit at the time counsel appears with the defendant for arraignment in the trial court. See §13.41 on habeas corpus procedure following denial of a §995 motion.

A question naturally arises about what acts constitute "making the motion." In *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109, the appellate court construed that phrase (for Pen C §1510 purposes) to mean something more than a request at arraignment "to reserve a 995." The court noted that "[a] motion is an application to the court for an order. [CCP §1003.] The applicant must, in some way, communicate to the court what order is desired and upon what grounds." 76 CA3d at 734.

Another issue in this context is what constitutes an "arraignment." Penal Code §988 states that it "consists in reading the accusatory pleading to the defendant and delivering to him a true copy thereof, and of the endorsements thereon, if any, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the accusatory pleading." Section 988 makes no reference to the actual entry of a plea by the defendant; thus in *Chartuck v Municipal Court* (1975) 50 CA3d 931, 123 CR 816, a case concerning application of the speedy trial statute, Pen C §1382, the appellate court found that arraignment occurs whether or not the defendant enters a plea. This finding conflicts with *Simpson v Municipal Court* (1975) 45 CA3d 112, 119 CR 184, which found that entry of a plea was an integral part of arraignment, at least for §1382 purposes. Another case that dealt with §1382, *Valdes v Municipal Court* (1977) 69 CA3d 434, 438, 138 CR 50, distills *Chartuck* and *Simpson* to the obvious: Arraignment has occurred, at the very earliest, when the defendant is asked to enter a plea and, at the very latest, when defendant enters a plea. Of academic interest perhaps is the fact that Pen C §997 requires the §995 motion to be heard "at the time it is made, unless for cause the court postpones the hearing to another time." Local rules setting up briefing schedules appear to conflict with this provision, but no authority exists to determine the effect of this conflict, if such it be.

It is unclear how long before trial the motion must be made. The statute merely requires that the motion must be made "prior to trial," (Pen C §997), and the trial court has discretion to refuse to hear an untimely motion. See *People v Arjon* (2004) 119 CA4th 185, 190, 14 CR3d 129 (trial court did not abuse discretion in refusing to hear renewed §995 motion made 1 hour before jury trial was set to begin).

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§13.27 C. Supporting Memorandum and Response

A supporting memorandum must be filed in support of all pretrial motions in criminal cases. Cal Rules of Ct 4.111. Local rules sometimes prescribe the format of Pen C §995 motions. More commonly, local practice has established a routine format for them. Counsel may wish to review §995 motions either found in court files or obtained from local prosecutors or defense counsel. See the sample forms in California Criminal Law Forms Manual, chap 13 (2d ed Cal CEB 2005).

The §995 motion must adequately apprise the court of its basis. *Smith v Superior Court* (1978) 76 CA3d 731, 734, 143 CR 109. Defense counsel's memorandum usually sets forth a concise statement of facts pertinent to the issues raised. Counsel should cite to page (and optionally, line) numbers of the reporter's transcript of the preliminary examination to support references to testimony taken before the magistrate. Doing so may be required by local court rules, which should be checked.

The statement of facts is usually followed by argument, supported by citation to pertinent statutory and case law. Given the numerous bases under modern law available to invalidate a holding order, it appears that more than mere recitation of statutory grounds is required. See *Thompson v Superior Court* (1968) 262 CA2d 98, 102, 68 CR 530. The better practice (which is most often used) is to prepare a specific and detailed legal argument stating the legal and factual bases for the §995 motion, with references to specific statutes and cases.

A statement of issues may be set forth or, alternatively, the arguments may be clearly divided into as many parts as there are issues. Because so few strictures are connected with §995 motions, the best approach to their content is the logical one: Counsel should present the facts and issues clearly, and argue them logically and concisely.

The prosecutor may submit a memorandum in opposition to the defense motion, using the same format. See the sample opposition to motion to dismiss under §995 in Crim Law Forms Man §13.3. As a rule, the prosecution may not raise legal theories in its response that it did not advance at the preliminary examination. See *Booth v Superior Court* (1997) 57 CA4th 91, 95, 66 CR2d 758; *People v Iocca* (1974) 37 CA3d 73, 78, 112 CR 102.

A local rule may state deadlines for defense counsel and the prosecutor to file their briefs before the hearing. If no local court rules apply, counsel should check local practice.

Ø **Note:** California Rules of Court 4.111(b) permits the court to consider a motion filed without a supporting memorandum to be meritless.

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§13.28 D. Renewing Motion

Normally, only one Pen C §995 motion may be made by the defense in any one action. Therefore, all known bases for setting aside an information or indictment should be urged in the motion.

Ø **Note:** Of course, when a case is recharged, and a new information filed, a §995 motion is again available. Pen C §§995, 1387. See also *People v Methey* (1991) 227 CA3d 349, 355, 277 CR 777.

Reversal on appeal does not usually give defense counsel the right to another §995 motion, because reversal returns a defendant to the same position he or she held before conviction, *i.e.,* facing trial after having made his or her pretrial motions. *People v Dorsey* (1973) 34 CA3d 70, 73, 109 CR 712, disapproved on other grounds in *Bunnell v Superior Court* (1975) 13 C3d 592, 602 n4, 119 CR 302.

A second motion may be justified by changed circumstances or newly discovered information. *People v Sherwin* (2000) 82 CA4th 1404, 1411, 98 CR2d 888 (permitting renewal of §995 motion after suppression of much of evidence presented to grand jury). See also *In re Kowalski* (1971) 21 CA3d 67, 70, 98 CR 444.

No cases have dealt with the effect of substitution of counsel on renewal of a §995 motion. Defense counsel who has substituted into a case in which a valid §995 issue exists should attempt to make the motion again, if former counsel did not raise the issue in his or her §995 motion. However, at least when the substitution or the motion itself is not based on the former counsel's incompetence, the new attorney is arguably subject to the same procedural bars to renewal of the motion as could have been urged against his or her predecessor. *People v Trujillo* (1977) 67 CA3d 547, 555, 136 CR 672 (new attorney's motion to withdraw stipulation entered into by defendant's previous attorney was denied; court said second attorney "steps into the place of his predecessor").

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§13.29 E. Hearing on Pen C §995 Motion

Practice differs among counties, but it is common in the larger counties, such as Alameda, for one judge to be assigned to hear all Pen C §995 motions, and for them to be heard on a set day of the week at a set time.

At the hearing on the motion, the defendant must be present unless his or her presence has been waived. See Pen C §977(b). The judge may indicate which issues he or she considers most important. It is common for defense counsel to argue first, the prosecutor second, and defense counsel last. The arguments usually take no more than 10 to 20 minutes.

The judge usually announces his or her decision immediately from the bench. On occasion, however, the judge may request additional memorandums and put the case over to a later date for decision.

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VIII. EFFECT OF COURT'S PEN C §995 RULING

§13.30 A. Bail

If a Pen C §995 motion is granted as to all charges, the court must order bail exonerated within 15 calendar days after the charges are dismissed. Pen C §§997, 1303. If the defendant is recharged within that 15-day period with a public offense arising from the same act or omission that gave rise to the dismissed charges, the bail must be applied to the new offense. Pen C §1303.

No authority has been found with regard to the possibility of partial transfer of bail when one or more counts of an action—but not all—are dismissed under §995. The logic of Pen C §§997 and 1303, however, dictates that, to the extent bail is exonerated after dismissal of a count or counts, that amount should be transferred to offenses recharged within the 15-day period.

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§13.31 B. Subsequent Proceedings; When Two-Dismissal Rule Applies

The dismissal of a case under Pen C §995 terminates the criminal action. Therefore, when charges are refiled after a §995 dismissal, the refiled charges constitute a new action. See *Ziesmer v Superior Court* (2003) 107 CA4th 360, 364, 132 CR2d 130. In this situation, the defendant may challenge a judge whom he did not challenge in the earlier action. *Ziesmer v Superior Court, supra*. When a felony, or a misdemeanor charged together with a felony, has been twice dismissed under Pen C §§859b, 861, 871, 995, or 1381-1388 (the two dismissals do not have to be under the same statute), those dismissals are a bar to any other prosecution, unless an exception noted in the statute, or in Pen C §1387.1, exists. The exceptions may apply to either or both dismissals. Pen C §1387. One dismissal of a misdemeanor not charged together with a felony is a bar to any other prosecution of that misdemeanor. Pen C §1387.

If an information has been dismissed once, a dismissal at the second preliminary examination is a second dismissal. *Dunn v Superior Court* (1984) 159 CA3d 1110, 206 CR 242.

The following exceptions to the two-dismissal rule are in Pen C §1387 itself:

- Substantial new evidence has been discovered that could not have been previously discovered by the exercise of diligence.
- Dismissal occurred because of intimidation of a witness.
- Dismissal occurred because the complaining witness failed to appear in a prosecution for an offense defined in Pen C §§243, 262, 273.5, or 273.6, or for a misdemeanor offense based on an act of domestic violence as defined in Pen C §13700(a)-(b), if the witness had been subpoenaed (this rule only applies within 6 months after the original dismissal and may be invoked only once in any action).
- Dismissal occurred before the preliminary examination so that the case could be brought by indictment.
- Dismissal occurred because the preliminary examination was not held within 60 days after the date of arraignment or plea, if good cause is shown for the delay.
- The "second dismissal" was a Pen C §739 refiling in the trial court of the first dismissal by the magistrate at the preliminary examination; and
- A §995 motion was granted because of the following:
- Present insanity of defendant;
- Lack of counsel after defendant elected to represent himself or herself;
- Ineffective assistance of counsel (note, however, that a §995 motion brought on the ground of "ineffective counsel" owing to the magistrate's wrongful denial of a continuance is considered *judicial* error and therefore does count toward the Pen C §1387 two-dismissal rule (*Brazell v Superior Court* (1986) 187 CA3d 795, 232 CR 246));
- Defense counsel's conflict of interest;
- Violation of time deadlines based on unavailability of defense counsel; or
- Defendant's motion to withdraw a waiver of the preliminary examination.

The following are also exceptions to the two-dismissal rule of Pen C §1387:

- One dismissal was reversed on appeal. CCP §916; *People v Murphy* (1969) 70 C2d 109, 116, 74 CR 65.
- One dismissal was set aside by a motion to reinstate the complaint under Pen C §871.5. *Ramos v Superior Court* (1982) 32 C3d 26, 36, 184 CR 622.

When a defendant is charged with a violent felony as defined in Pen C §667.5(c), the prosecution is given a third opportunity to file the charges when a previous dismissal was caused by "excusable neglect." Pen C §1387.1(a). Excusable neglect in this context "includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses." Pen C §1387.1(b). See, *e.g., People v Massey* (2000) 79 CA4th 204, 211, 93 CR2d 890 (reasonable efforts to locate and secure attendance of witnesses constitute "excusable neglect"). This exception does not apply when the conduct of the prosecution "amounted to bad faith." Pen C §1387.1(a). It also does

not apply if the previously dismissed charges were not violent felonies; the prosecution may not avoid the two-dismissal rule by charging a violent felony for the first time in the third accusatory pleading. *People v Salcido* (2008) 166 CA4th 1303, 1313, 83 CR3d 561.

Defense counsel may challenge the improper recharging of a felony (or misdemeanor charged in conjunction with a felony) under Pen C §1387 by moving to dismiss the complaint at the preliminary examination. See *Miller v Superior Court* (2002) 101 CA4th 728, 124 CR2d 591 (discussing procedures for motion). If the magistrate denies the motion to dismiss, defense counsel may challenge that ruling by moving to dismiss the information under §995. See *Ramos v Superior Court, supra*; *Miller v Superior Court, supra*.

The defendant may also seek relief through a petition for writ of habeas corpus. See *In re Begerow* (1902) 136 C 293, 68 P 773. See also §31.46.

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IX. REVIEW UNDER PEN C §871.5

§13.32 A. When Pen C §871.5 Motion Is Available

A prosecutor may challenge a magistrate's dismissal of a complaint, count, or special circumstances allegation under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1387, or 1389, or Veh C §41403, by noticing a motion in the trial court to compel the magistrate to reinstate the complaint, or the portion that was dismissed, and to reinstate the defendant's custodial status. Pen C §871.5(a); *Ramos v Superior Court* (1982) 32 C3d 26, 36, 184 CR 622. Section 871.5 motions are available only to review legal rulings; they cannot be used to review factual findings. *People v Dawson* (2009) 172 CA4th 1073, 1087, 91 CR3d 841; *People v Childs* (1991) 226 CA3d 1397, 1405, 277 CR 456. Section 871.5 motions are not available to review rulings under the authority of Pen C §17(b)(5) to reduce a wobbler to a misdemeanor (*People v Williams* (2005) 35 C4th 817, 28 CR3d 29), but are available to review unauthorized rulings to reduce a straight felony to a misdemeanor (*People v Superior Court (Feinstein)* (1994) 29 CA4th 323, 34 CR2d 503).

The prosecution may seek §871.5 review even when the complaint cannot be refiled. See Pen C §871.5(a).

Ø **Note:** A Pen C §871.5 motion is available even if the case has been dismissed twice because of successful Pen C §1538.5 motions. Penal Code §1538.5(p) provides that, after a second successful motion to suppress evidence, the prosecution may not refile the complaint or seek an indictment without new evidence. However, there is no prohibition in §1538.5(p) against bringing a §871.5 motion to challenge the order dismissing the charges. *People v Toney* (2004) 32 C4th 228, 233, 8 CR3d 577. Nor does the two-dismissal rule of Pen C §1387 bar reinstatement of a complaint through a §871.5 motion. 32 C4th at 235. See *Ramos v Superior Court, supra*.

Review under §871.5 is the only method of review available to the prosecution when a case is dismissed by a magistrate at the preliminary examination. *People v Mimms* (1988) 204 CA3d 471, 479, 251 CR 672. Section 871.5 relief is *not* available after dismissal of a portion of a complaint, if it can be charged in the information under Pen C §739. See discussion of §739 in §13.37. If the prosecution's §871.5 motion is successful, the complaint may be reinstated. *People v Mayo* (1986) 185 CA3d 389, 395, 229 CR 762. See also *People v McGlothen* (1987) 190 CA3d 1005, 235 CR 745 (court discussed meaning of adverse findings of fact in context of §871.5 review of magistrate's dismissal of homicide case; see further discussion in §13.35).

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§13.33 B. Noticing and Preparing Pen C §871.5 Motion

A prosecutor must make the Pen C §871.5 motion in the trial court within 15 calendar days after the dismissal. Pen C §871.5(a). This requirement is jurisdictional. *People v Dethloff* (1992) 9 CA4th 620, 11 CR2d 814 (superior court was without jurisdiction to proceed on motion filed 20 days after dismissal). A hearing on the motion, however, need not occur within the 15-day period. *People v Dianda* (1986) 178 CA3d 174, 223 CR 635. One reason for this practice is that the transcript of the preliminary examination frequently is not ready within 15 calendar days after the dismissal. On this setting date, the court sets briefing dates (prosecution's opening, defendant's response, and prosecution's reply) and a hearing date for the motion.

Notice must be given to the magistrate who ordered the dismissal, and to the defendant. Pen C §871.5(a)-(b). The prosecutor must file a written request for a transcript of the preliminary examination within 10 calendar days after the dismissal. Copies of the transcript must be provided to the prosecutor and all defendants, without cost, in the manner prescribed in Pen C §869. Pen C §871.5(d).

A sample motion to compel reinstatement of the complaint under §871.5, and a supporting memorandum, are in California Criminal Law Forms Manual §§13.4, 13.6 (2d ed Cal CEB 2005).

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§13.34 C. Pen C §871.5 Hearing

Penal Code §871.5 hearings usually are not held within 15 calendar days after dismissal (see Pen C §871.5(a)) but are held at a later time set by the court. See §13.33. The manner in which the hearing is conducted is not prescribed in §871.5, so practice varies from county to county. In Alameda County, for example, oral argument on the motions is similar to that for Pen C §995 motions, except that the prosecutor, as the moving party and the party whose brief was filed first, is the first to argue, followed by defense counsel, with rebuttal by the prosecutor. The judge generally rules immediately from the bench.

In a §871.5 hearing, the trial court sits as a reviewing court and is bound by the magistrate's findings of fact as long as they are supported by substantial evidence. See *People v San Nicolas* (2004) 34 C4th 614, 654, 21 CR3d 612; *People v Slaughter* (1984) 35 C3d 629, 633, 200 CR 448. The trial judge must find a dismissal to be erroneous as a matter of law when the evidence provides a rational basis for believing that the defendant is guilty, as long as the magistrate's ruling did not involve a finding of fact. *People v Slaughter, supra; People v Plumlee* (2009) 166 CA4th 935, 83 CR3d 172. The reasonableness of a search or seizure is an issue of law, but a determination about reasonableness is usually based on findings of fact that are binding on the reviewing court under Pen C §1538.5(i). See *People v Rosales* (1989) 211 CA3d 325, 259 CR 503.

If the motion to reinstate the complaint is granted, the court may order the magistrate to resume proceedings. On occasion, if the order is a complicated one, the judge may require the prosecution to prepare an order for the judge's signature.

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§13.35 D. Proceedings Following Reinstatement

If the judge who reviews a magistrate's dismissal at the preliminary examination orders the complaint, or a portion of it, reinstated, the magistrate must comply with that order within 10 calendar days after the order is made. Pen C §871.5(e). If prejudice can be shown, a magistrate's failure to reinstate the complaint within the 10-day period will result in a successful Pen C §995 motion. *People v Mesaris* (1988) 201 CA3d 1377, 247 CR 708 (rule stated, but §995 grant reversed because defendant failed to show actual prejudice from delay).

As an alternative to or in addition to reinstatement of the complaint and resumption of proceedings, the reviewing court may order the magistrate to hold the defendant to answer. See *People v Childs* (1991) 226 CA3d 1397, 1408, 277 CR 456. If the court so orders, the magistrate may not reopen proceedings to make factual findings. 226 CA3d at 1409.

The defendant may choose to waive the right to be committed by a magistrate, and consent to the filing of an information, or amended information, containing the reinstated charge or charges. The defendant must personally waive that right for the waiver to be effective. See Pen C §871.5(g).

Defense counsel's only remedy to reinstatement is to challenge the subsequent information by a §995 motion after the new or amended information is filed. Pen C §871.5(f).

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§13.36 E. Effect of Denial of Pen C §871.5 Motion

A decision under Pen C §871.5 in favor of the defense is a bar to a refiling of the dismissed complaint or portion of the complaint. Pen C §871.5(c). However, Pen C §1238(a)(9) permits the prosecutor to appeal a ruling refusing reinstatement. See Pen C §871.5(f).

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§13.37 X. CHARGING AND RECHARGING UNDER PEN C §739

If a magistrate makes a holding order following a preliminary examination, the prosecutor can file an information in the trial court charging any offense named in the holding order or any transactionally related offense shown by the evidence at the preliminary examination. Pen C §739; *Parks v Superior Court* (1952) 38 C2d 609, 612, 241 P2d 521. This includes offenses and clauses that were dismissed by the magistrate, unless the dismissal was based on factual findings by the magistrate. *Pizano v Superior Court* (1978) 21 C3d 128, 133, 145 CR 524; *Jones v Superior Court* (1971) 4 C3d 660, 666, 94 CR 289; *People v Casillas* (2001) 92 CA4th 171, 177, 111 CR2d 651. See §13.17 on factual findings. The prosecutor may not recharge by information an offense barred by the magistrate's factual, as opposed to legal, findings. *Jones v Superior Court, supra*.

Ø **Note:** If there is no holding order, the prosecutor cannot file an information at all. Pen C §739. See *People v Luna* (1983) 140 CA3d 788, 793 n3, 189 CR 792.

Although a prosecutor can recharge a count or clause in an information in the trial court under §739 after it has been dismissed once by a magistrate, the prosecution is precluded from doing so by Pen C §1387 if it has been dismissed twice by a magistrate. *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622; *Dunn v Superior Court* (1984) 159 CA3d 1110, 206 CR 242. If a prosecutor wishes to eliminate the effect of a second dismissal, he or she may challenge it under Pen C §871.5. Review under §871.5, however, is binding on the prosecutor; if the reviewing judge finds that the magistrate was correct, the prosecution cannot refile the dismissed action, count, or clause. *Ramos v Superior Court, supra*.

The prosecutor cannot challenge a magistrate's dismissal under §871.5 if the crime or other allegation can be recharged by information in the trial court under Pen C §739. See Pen C §871.5(a) (motion limited to dismissed counts and allegations "which may not be charged by information under the provisions of Section 739").

An indictment may not be amended "so as to change the offense charged." Pen C §1009.

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§13.38 XI. CHART: AVAILABILITY AND COMPARISON OF PEN C §§739, 871.5

Event	Availability of Pen C §871.5	Availability of Pen C §739
Entire complaint dismissed for first time by magistrate.	Available (Pen C §871.5(a); *People v Childs* (1991) 226 CA3d 1397, 1405, 277 CR 456; *People v Mimms* (1988) 204 CA3d 471, 479, 251 CR 672) if complaint dismissed under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or under Veh C §41403, and by legal, not factual, ruling.	Not available. Pen C §739.
Portion of complaint dismissed for first time by magistrate.	Available if portion dismissed under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or under Veh C §41403, and if that portion cannot be charged in information under Pen C §739. Pen C §871.5(a).	Available if portion dismissed was shown at preliminary examination to have been committed, and was transactionally related to one of charges for which defendant was held to answer, and was dismissed by legal, not factual, ruling. Pen C §739; *Jones v Superior Court* (1971) 4 C3d 660, 666, 94 CR 289; *Parks v Superior Court* (1952) 38 C2d 609, 612, 241 P2d 521.
Crime not charged in complaint, but proved at preliminary examination.	Not available. Pen C §871.5(a).	Available if uncharged crime is transactionally related to one of charges for which defendant was held to answer. Pen C §739; *Jones v Superior Court, supra; Parks v Superior Court, supra*.
Portion of complaint dismissed for second time by magistrate.	Available if portion dismissed under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or under Veh C §41403, and by legal, not factual, ruling. Pen C §871.5(a); *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622.	Not available. *Ramos v Superior Court, supra; Dunn v Superior Court* (1984) 159 CA3d 1110, 206 CR 242.

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§13.39 XII. REMANDING CASE TO MAGISTRATE; CORRECTING ERRORS IN TRIAL COURT

A prosecutor may ask the judge reviewing a Pen C §995 motion to remand a case to the magistrate to correct errors alleged by the defendant, if the court finds the errors to be "minor errors of omission, ambiguity, or technical defect which can be expeditiously cured or corrected without a rehearing of a substantial portion of the evidence." Pen C §995a(b)(1). The prosecutor must make such a request before a ruling on the §995 motion. If the parties agree, further proceedings may be conducted in the trial court. Pen C §995a(b)(1).

Appellate courts have restricted the use of remands under Pen C §995a(b)(1). For example, a magistrate's erroneous ruling on an evidentiary issue has been held not to constitute an error within the ambit of the statute (*Tharp v Superior Court* (1984) 154 CA3d 215, 201 CR 131 (magistrate precluded cross-examination testing validity of search warrant); *Loverde v Superior Court* (1984) 162 CA3d 102, 208 CR 134 (magistrate denied motion to suppress evidence under Pen C §1538.5)); and an error of omission has been determined to be "minor" only when it is "comparatively unimportant" in relation to the balance of the evidence needed for the holding order (*Garcia v Superior Court* (2009) 177 CA4th 803, 806, 99 CR3d 488 (no remand on Pen C §148 charge to cure failure to elicit from officer that he commanded defendant to stop); *Caple v Superior Court* (1987) 195 CA3d 594, 241 CR 735 (remand on drug charges to cure failure to elicit from officer that defendant admitted he owned car in which drugs were found)).

When making a remand order, the Pen C §995 court must specify which minor errors it finds could be expeditiously cured or corrected. Pen C §995a(b)(1). Because the remand does not extend the time for trial (Pen C §995a(b)(3)), it is recommended that the remand order specify a date for the case to be returned to the trial court. Under Pen C §995(b)(2), the further proceedings may include the taking of testimony and are deemed to be part of the preliminary examination. Accordingly, the magistrate should hold a hearing with a court reporter present and should order that a transcript be prepared and sent to the reviewing court and the parties. See Pen C §869.

A ruling on defense counsel's §995 motion is deferred until the proceeding to correct errors under Pen C §995a(b)(1) is completed. Pen C §995(b). The usual effect is to defeat the §995 motion.

The prosecutor may invoke §995a(b)(1) only "once for each information filed." Pen C §995a(b)(3). Although case law has not clarified this language, it appears that a prosecutor may use the §995a(b)(1) procedure again in the same case if the first information is dismissed and an indictment or second information is filed.

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XIII. REMEDIES FOLLOWING RULING ON PEN C §995 MOTION

A. If Motion Is Denied

§13.40 1. Pretrial Petition for Writ of Prohibition

Defense counsel may seek review of an adverse ruling on a Pen C §995 motion by filing a petition for writ of prohibition. Pen C §999a. Counsel should seek a pretrial writ whenever the issue has substantial merit, because prejudice is presumed when review is sought before trial. Although the defendant is not required to seek writ relief to preserve the issue presented in an unsuccessful §995 motion for appeal (*People v Webster* (1991) 54 C3d 411, 435, 285 CR 31), if the defendant waits until after trial to challenge a §995 ruling, he or she must show prejudice (*People v Pompa-Ortiz* (1980) 27 C3d 519, 529, 165 CR 851). See also *People v Douglas* (1990) 50 C3d 468, 506, 268 CR 126. Thus, for example, a violation of Pen C §859b's 2-day requirement should be challenged by petition for writ following denial of the §995 motion, because on appeal the defense will most likely be unable to show the necessary prejudice to succeed. See *People v Castaneda* (1987) 190 CA3d 961, 235 CR 740.

A petition for writ of prohibition must be filed within 15 calendar days after denial of the §995 motion, if the basis for the petition is lack of reasonable or probable cause to support an information or indictment. Pen C §999a. The 15-day rule does not apply if the basis for seeking relief is an otherwise improperly found indictment or information. *People v Superior Court (Brent)* (1992) 2 CA4th 675, 683, 3 CR2d 375; *Ondarza v Superior Court* (1980) 106 CA3d 195, 197, 164 CR 892. When the 15-day rule does not apply, appellate review appears limited only by Pen C §1510.

Ø **Note:** A petition challenging an abuse of discretion in remanding a case to the magistrate under the authority of Pen C §995a(b) must also be filed within 15 calendar days after the trial court's ruling. Pen C §999a.

Petitions for writs grounded on any theory may be reviewed only if the §995 motion was made within 60 calendar days after the defendant's arraignment, unless the defendant was unaware of the issue or had no opportunity to raise it. Pen C §1510. For discussion of what constitutes "making a motion" and "arraignment," see §13.26.

When the issues raised in a petition for writ of prohibition apply to fewer than all counts in an information, a potential procedural morass develops. Normally, the appellant asks the trial court to stay proceedings or, more colloquially, to continue the matter to be set for trial. If the trial court refuses, the appellant may request a stay from the appellate court at the time of filing the petition for writ of prohibition. See Cal Rules of Ct 8.112, 8.116 (writ of supersedeas), 8.486 (writ of prohibition). A petition for writ of prohibition does not automatically stay proceedings, and a stay is normally granted only on a showing of good cause. Appeals and Writs in Criminal Cases §8.4 (3d ed Cal CEB 2007).

A sample petition for writ of mandate or prohibition is in California Criminal Law Forms Manual §42.1 (2d ed Cal CEB 2005). For discussion of how to count calendar days, see §1.16.

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§13.41 2. Pretrial Petition for Writ of Habeas Corpus

As an alternative to bringing a pretrial writ of prohibition, defense counsel may petition for a writ of habeas corpus following denial of his or her Pen C §995 motion. Pen C §1487(7); *People v Manson* (1976) 61 CA3d 102, 170, 132 CR 265. The grounds for bringing a petition for habeas corpus in Pen C §1487 are so broad that they encompass those set out in §995.

The petition can be filed in the superior court, the court of appeal, or the California Supreme Court. Cal Const art VI, §10. See also Pen C §1508. However, because the appellate courts are not well equipped to resolve evidentiary questions, a habeas corpus petition that is not filed in conjunction with an appeal from the judgment of conviction should be filed first in the superior court. *In re Hochberg* (1970) 2 C3d 870, 87 CR 681. Even if the court of appeal does not summarily deny a habeas petition filed in the first instance in the reviewing court, it will most likely make any order to show cause returnable in the superior court. *In re Hochberg, supra*. The defendant cannot appeal the trial court's denial of a habeas petition but should instead file a new original petition in the court of appeal. See, *e.g., In re Joiner* (1960) 180 CA2d 250, 4 CR 667. Review of the denial of a habeas corpus petition in the court of appeal may be obtained by filing a petition for review in the supreme court (Pen C §1506; *In re Michael E.* (1975) 15 C3d 183, 193 n15, 123 CR 103), or by filing another petition invoking the high court's original habeas jurisdiction (*In re Catalano* (1981) 29 C3d 1, 171 CR 667).

The prosecutor may seek review of a trial court's final order made on the return of a writ of habeas corpus favorable to the defendant by appealing to the court of appeal. Pen C §1506.

For further discussion of habeas corpus proceedings, see §§42.22-42.34; Appeals and Writs in Criminal Cases, chaps 9-10 (3d ed Cal CEB 2007).

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§13.42 3. No Defense Right to Pretrial Appeal of Pen C §995 Ruling; Preserving Issue for Posttrial Appeal

Defense counsel has no right to pretrial *appeal* of the denial of a Pen C §995 motion. Pretrial relief is through either a petition for writ of prohibition (see §13.40) in the court of appeal or a petition for writ of habeas corpus in the trial or appellate court (see §13.41).

Defense counsel may raise errors that occurred at the preliminary examination, or before the grand jury on posttrial appeal, but only if they were first raised by §995 or other appropriate trial court motion, unless the defendant can show that he or she was deprived of a fair trial or otherwise suffered prejudice as a result of an error committed before the holding order issued. Pen C §996; *People v Pompa-Ortiz* (1980) 27 C3d 519, 529, 165 CR 851.

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B. If Motion Is Granted

§13.43 1. Appeal

The prosecution may appeal the granting of a motion under Pen C §995, whether directed to one of several counts or to the whole indictment or information. Pen C §1238(a)(1); *People v Shirley* (1978) 78 CA3d 424, 430, 144 CR 282; *People v Fraijo* (1977) 78 CA3d 977, 980, 144 CR 424. The prosecution may also appeal from the granting of a writ of habeas corpus. Pen C §1506. See §13.41. The time limits for filing appeals in felony cases are in §44.2.

If fewer than all counts are dismissed and appealed, the prosecution may at the same time proceed to trial on any remaining counts. *People v Franc* (1990) 218 CA3d 588, 592, 267 CR 109.

The prosecution may appeal counts dismissed as a result of a §995 motion, and recharge an offense growing out of the same conduct, by filing a new felony complaint. However, the prosecutor must eventually elect between maintaining the appeal and proceeding under the new accusatory pleading. That election must be made at the time the defendant is arraigned on the new accusatory pleading in felony court. *Anderson v Superior Court* (1967) 66 C2d 863, 867, 59 CR 426; *People v Franc, supra*.

Ø **Note:** If the court grants defense counsel's §995 motion striking an enhancement clause, and the prosecution (through the Attorney General) appeals, but the appellate court does not stay the trial (see Cal Rules of Ct 8.112, 8.116), and the defendant refuses to waive time for trial, then the defendant will be tried without the enhancement clause, which will render the appeal moot. See Pen C §1242 (appeal by prosecution does not stay judgment for defendant).

The prosecution may be able to seek a writ either instead of (see, *e.g., People v Superior Court (Greer)* (1977) 19 C3d 255, 137 CR 476) or in addition to appealing (*People v Superior Court (Engert)* (1982) 31 C3d 797, 800, 183 CR 800; *People v Superior Court (Brodie)* (1975) 48 CA3d 195, 198, 121 CR 732). For discussion, see §13.44.

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§13.44 2. Writ of Mandate

A petition for writ of mandate is available to the prosecution as an alternative to an appeal when the issue in question is appealable but an appeal would be inadequate because the matter requires quicker resolution than is possible by appeal. See *People v Superior Court (Greer)* (1977) 19 C3d 255, 137 CR 476. When the prosecution's remedy for dismissal of part of an information on a Pen C §995 motion is an appeal under Pen C §1238(a)(1), but a trial date is set, the prosecution should seek a writ. *People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 257 CR 678 (writ issued); *People v Superior Court (Deardorf)* (1986) 183 CA3d 509, 228 CR 137 (writ issued).

The prosecution may file both a petition for writ and an appeal, and allow the appellate court to select the appropriate vehicle for review. See *People v Superior Court (Brodie)* (1975) 48 CA3d 195, 198, 121 CR 732. An example of this situation is when the defendant is in custody and refuses to waive time for trial. This is all the more true when the issue to be resolved involves acts claimed to be in excess of jurisdiction. *People v Superior Court (Brodie), supra* (trial court acted in excess of jurisdiction by misapplying Pen C §190.2; appellate court allowed prosecutor to charge prior murder conviction as special circumstance). In *People v Superior Court (Day)* (1985) 174 CA3d 1008, 1014, 220 CR 330, the prosecution's writ of mandate successfully challenged the trial court's §995 ruling that the prosecution could file only a voluntary manslaughter charge, not a murder charge, in the trial court.

The above examples should be distinguished from cases in which the prosecutor does not have the right to appeal. If no appellate right exists, a petition for writ will not lie. See *People v Superior Court (Stanley)* (1979) 24 C3d 622, 156 CR 626. See also Appeals and Writs in Criminal Cases §7.10 (3d ed Cal CEB 2007).

For further discussion of writs of mandate, see §§42.3-42.21.

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§13.45 3. Recharge

The general rule is that a matter dismissed as a result of a Pen C §995 motion may be recharged if there has been no previous dismissal. Pen C §1387. For further discussion of the two-dismissal rule, including exceptions, see §13.31.

When offenses were originally charged jointly, but then severed by a §995 motion, and the basis for joinder was the permissive provisions of Pen C §954, *i.e.,* offenses of the same class of crime, there is no bar to trying the offenses in separate proceedings. In other words, the discharged offense may be recharged in a separate accusatory pleading.

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§13.46 4. Dual Remedies: Recharge and Appeal

The prosecution may recharge dismissed counts in a new complaint (when recharge is available; see §13.37), and simultaneously appeal a Pen C §995 dismissal. An election between the appeal and the new complaint must be made at arraignment on the new accusations in felony court. If no election is made, the appeal is waived. *Anderson v Superior Court* (1967) 66 C2d 863, 867, 59 CR 426. See §13.43.

The two-dismissal rule of Pen C §1387 on recharging (in general, a felony complaint cannot be refiled after two dismissals) often causes a prosecutor to appeal as well as recharge. If the prosecutor recharges without appealing, and the recharged case is dismissed for a second time, for example, under Pen C §859b or §861, further prosecution is barred, and the prosecutor has no avenue of review.

For further discussion of charging and recharging alternatives, see §§13.31, 13.37-13.38.

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14

PRETRIAL AND TRIAL PUBLICITY; ACCESS TO COURTS AND COURT FILES

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§14.1 I. OVERVIEW

This chapter discusses the mandate of Cal Const art I, §15, and the Sixth Amendment that the accused in a criminal case be granted a public trial in light of the constitutional protections for freedom of the press contained in Cal Const art I, §2, and the First Amendment. These two core constitutional guaranties of a public trial and freedom of the press have led to the evolution of complex constitutional doctrines as they are both analyzed in the context of the further California constitutional rights to due process and to a jury trial (see Cal Const art I, §§7, 15, 16), and in view of federal due process and fair trial rights of the Fifth and Sixth Amendments, made applicable to the states through the Fourteenth Amendment.

Ø **Note:** For discussion of change of venue due to publicity, see chap 15.

While publicity may prejudice the integrity of a trial, criminal trials involve matters of public interest, and the accused has the constitutional right to have the public, including members of the press, present for proceedings. Freedom of the press, and statutes providing public access to courts and court records, ensure transparency in the judicial process. While most cases generate little or no publicity, when a given case garners public and media interest, that scrutiny may be a matter of concern not only to the court, but also to the lawyers and the parties they represent. Concerns about press or public access to certain files, documents, or proceedings may require counsel and the court to consider a limit on public access. A "megacase" may involve the constant presence of the working press as well as persistent attempts to allow cameras (both still and video) into the courtroom and to obtain statements or other information from the parties and counsel.

Media scrutiny requires that counsel monitor the accuracy and characteristics of the media coverage. In addition, if a change of venue will be sought, counsel will need to take steps early in the case to gather basic information on the nature, content, quantity, and placement of the media coverage of the case. This will likely require contacting media outlets, clipping services, change of venue experts, and the like. Counsel may choose to make an extrajudicial statement to the media, issue a press release, or maintain contact with members of the press in an effort to educate the public, or to try to ensure balance in the coverage. Counsel's media contacts are regulated, and counsel should be aware that Cal Rules of Prof Cond 5-120(A) requires that statements to the press not have a substantial likelihood of materially prejudicing the case. See also ABA Model Rules of Prof Cond 3.6. Media attention not only requires counsel to know about the legal and ethical rules governing counsels' conduct, but also about how to deal with the press, how to obtain sealing and closure orders, and how to deal with the litigation that can result from a court decision to exclude the media from obtaining documents, or access to a hearing.

Courts must consider how best to provide both public and media access to court proceedings, and information about cases and court processes, while ensuring the protection of individuals' constitutional and statutory rights. See Hannaford-Agor, *When All Eyes Are Watching: Trial Characteristics and Practices in Notorious Trials,* 91 Judicature 197 (2008). A variety of publications has addressed this balancing act. See, *e.g., Best Practices in Building Public Trust and Confidence: Working With the Media*, from the National Center for State Courts, available on the center's website at http://www.ncsconline.org.

Counsel (and courts) dealing with well-publicized cases should review authoritative material on working with the media, on the impact of publicity, and on the relationship between the court process and the media. See, *e.g.,* National Jury Project, Jurywork: Systematic Techniques (2d ed 1983); Hayslett, *Anatomy of a Trial: Public Loss, Lessons Learned from* The People vs. O.J. Simpson (2008); Cushner et al., *Spreading the News: Communicating With the Media During High-Profile Trials,* 93 Judicature 52 (2009); Duncan, *Pretrial Publicity in High Profile Trials; An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy,* 34 Ohio NU L Rev 755 (2008); Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials,* 39 Loy LA L Rev 1167 (2007); Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice,* 29 Campbell L Rev 497 (Spring 2007); Arbuthnot, Myers & Leach, *Linking Juror Prejudgment and Pretrial Publicity Knowledge: Some Methodological*

Considerations, 20 Am J Forensic Psych 52 (2002); Allen Chair Symposium 2000, *Trying Cases in the Media: Legal Ethics, Fair Trials and Free Press,* 34 U Rich L Rev 1095 (2001); Bruschke & Loges, Free Press v. Fair Trials (2004); and Fulero, *Empirical and Legal Perspectives on Pre-Trial Publicity: Effects and Remedies,* 26 Law & Human Behavior (2002).

This chapter provides an introduction to the complications involved in high-publicity cases, or cases that otherwise require attempting to curtail public access to court records or proceedings for specific purposes. Counsel will want to become familiar with remedies available when a case is subject to a heightened level of attention, including change of venue (see chap 15); a continuance to permit abatement of the publicity or media attention (see chap 20); closing pretrial proceedings to the public (see §§14.12-14.19); sealing of transcripts or other documents pertinent to the proceedings (see §§14.11-14.11A); and the issuance of restraining orders, gag orders, or other orders aimed at curtailing the dissemination of information (see §§14.19A-14.26). See *Sheppard v Maxwell* (1966) 384 US 333, 357, 16 L Ed 2d 600, 86 S Ct 1507 (discussion of available remedies). The consequences of publicity will not only involve the sorts of remedies just discussed, but may also affect the questions in voir dire (see chap 15 on the use of public opinion surveys before trial), the decision whether to request sequestered voir dire (see §14.14), and the decision to request sequestration of the jury. In addition, specific jury instructions address publicity and media coverage. See chap 32. Media attention can also affect a case in other specific ways. In eyewitness identification cases, for example, media dissemination of photographs or videos, and case details, raises issues that are not related to venue or to the concerns that commonly arise with media coverage. See Devenport et al., *Perspectives on Jury Decision-Making: Cases with Pretrial Publicity and Cases Based on Eyewitness Identification*, published in Durso, Handbook of Applied Cognition (1999). For further discussion of eyewitness identification issues, see chap 22.

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§14.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Counties may have specific time requirements not otherwise required by the Penal Code.

Type of Motion	When Defendant Makes Motion	When Prosecutor Makes Motion
Motion to keep grand jury transcript sealed. Pen C §938.1(b). See also *Daily Journal Corp. v Superior Court* (1999) 20 C4th 1117, 86 CR2d 623; *Alvarez v Superior Court* (2007) 154 CA4th 642, 64 CR3d 854.	Within 10 calendar days after receipt of transcript. **Note:** In some cases, as when privileged information is involved, the motion should be made as soon as possible.	Within 10 calendar days after receipt of transcript by defendant.
Motion for pretrial publicity order. *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225.	Any time after arrest and before trial, *e.g.,* at arraignment, the preliminary hearing, or again in superior court in felony case.	Any time after complaint is filed or defendant arrested.
Motion to modify pretrial publicity order. *Younger v Smith, supra*.	Any time after order is made.	Any time after order is made.
Motion to seal pleadings. *Rosato v Superior Court* (1975) 51 CA3d 190, 124 CR 427. See Cal Rules of Ct 2.550-2.551.	Made when defendant files motion requiring sealing.	Made when prosecutor makes motion requiring sealing, or responds to motion made by the defense under seal.
Motion for witnesses not to converse during preliminary hearing, and to remain outside while other witnesses are testifying. Pen C §867.	Usually made at beginning of hearing.	Usually made at beginning of preliminary hearing.
Motion to exclude public from preliminary hearing. Pen C §§868 (defense), 868.7 (prosecution).	At beginning of preliminary hearing.	At beginning of preliminary hearing.
Motion to seal preliminary hearing transcript. *Cromer v Superior Court* (1980) 109 CA3d 728, 167 CR 671. See Cal Rules of Ct 2.550-2.551.	At close of preliminary hearing.	At close of preliminary hearing.
Motion for change of venue. Pen C §1033; Cal Rules of Ct 4.151; *People v Riggs* (2008) 44 C4th 248, 278, 79 CR3d 648.	At least 10 days before trial, unless good cause shown.	At least 10 days before trial, unless good cause shown.
Motion for sequestered individual jury voir dire. *Haraguchi v Superior Court* (2008) 43 C4th 706, 718, 76 CR3d 250. But see CCP §223 (manner of voir dire resides with court); *People v Box* (2000) 23 C4th 1153, 1173, 99 CR2d 69 (denial of sequestered voir dire reviewed for abuse of discretion); *People v Waidla*	Before jury voir dire begins.	Before jury voir dire begins.

(2000) 22 C4th 690, 713, 94 CR2d 396.		
Request that judge instruct jury to disregard media reports about case during trial. Pen C §1122(a).	Court is required sua sponte to give this instruction after jury has been sworn and before People's opening statement.	If court does not give instruction, prosecutor should request it before giving his or her opening statement.
Request for jury instruction, or submission of proposed instruction on pretrial publicity. Pen C §1093.5.	Required before argument begins.	Required before argument begins.
Motion to sequester jury. Pen C §1121; see *People v Ayers* (1975) 51 CA3d 370, 380, 124 CR 283.	No set time; probably any time before jury begins to deliberate.	No set time; probably any time before jury begins to deliberate.

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Source: Criminal Law/California Criminal Law Procedure and Practice/14 PRETRIAL AND TRIAL PUBLICITY; ACCESS TO COURTS AND COURT FILES/§14.3 III. CHECKLIST: MINIMIZING PREJUDICIAL PUBLICITY

§14.3 III. CHECKLIST: MINIMIZING PREJUDICIAL PUBLICITY

- Change of venue. Pen C §§1033-1038; Cal Rules of Ct 4.150-4.155; *People v Riggs* (2008) 44 C4th 248, 278, 79 CR3d 648; *Maine v Superior Court* (1968) 68 C2d 375, 383, 66 CR 724.
- Closed preliminary hearing. Pen C §868; *Press-Enterprise Co. v Superior Court (Press-Enterprise II)* (1986) 478 US 1, 92 L Ed 2d 1, 106 S Ct 2735; *Waller v Georgia* (1984) 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210.
- Closed trial. See *People v Tugwell* (1917) 32 CA 520, 525, 163 P 508.
- Continuance. Pen C §1050.
- Court trial. Pen C §689.
- Applications for discretionary funds for defense of indigent defendant in capital case or under Pen C §987. Application sealed and in camera hearing. Pen C §987.9.
- Order forbidding all parties and witnesses from discussing the case with the press. *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225.
- Order forbidding the news media from reporting information about the case. *Younger v Smith, supra*.
- Order sealing grand jury transcript until after trial. *Press-Enterprise v Superior Court (Press-Enterprise III*) (1994) 22 CA4th 498, 27 CR2d 708; *Alvarez v Superior Court* (2007) 154 CA4th 642, 64 CR3d 854.
- Order sealing grand jury transcript when no indictment returned, or when "discretionary disclosure" requested. *Daily Journal Corp. v Superior Court* (1999) 20 C4th 1117, 86 CR2d 623.
- Motions or pleadings filed under seal. Cal Rules of Ct 2.550-2.551, 2.580, 2.585; *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1217, 86 CR2d 778; *Rosato v Superior Court* (1975) 51 CA3d 190, 124 CR 427.
- Order sealing preliminary hearing transcript. *Press-Enterprise v Superior Court* (*Press-Enterprise III*) (1994) 22 CA4th 498, 27 CR2d 708; see Cal Rules of Ct 2.550.
- Sealing warrants or pleadings. *People v Hobbs* (1994) 7 C4th 948, 30 CR2d 651 (prosecution sealing of warrant); *Oziel v Superior Court* (1990) 223 CA3d 1284, 1295, 273 CR 196 (psychotherapist's motion concerning videotape of search conducted of his office). See Cal Rules of Ct 2.550-2.551.
- Sequestering the jury. Pen C §1121. See *People v Ayers* (1975) 51 CA3d 370, 124 CR 283.
- Pre-voir dire conference to determine topics to be covered and whether to use standard or case-specific questionnaire. See Cal Rules of Ct 4.200, 4.201; Juror Questionnaire for Criminal Cases/Capital Case Supplement (Judicial Council Form MC-002). See also *People v Navarette* (2003) 30 C4th 458, 486, 133 CR2d 89 (court has ultimate authority over questionnaire contents).
- Voir dire of jurors to reject individual jurors who are prejudiced because of publicity (see CCP §229), and to educate jurors on any misinformation in the press and their duty to be fair (see *People v Daniels* (1991) 52 C3d 815, 853, 277 CR 122).

Ø **Note:** Some courts have adopted local rules concerning publicity, *e.g.,* that no one in the courthouse may wear an item or exhibit a sign that might tend to influence a juror in a particular case, or that vehicles entering or leaving particular court parking lots may not be photographed.

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Source: Criminal Law/California Criminal Law Procedure and Practice/14 PRETRIAL AND TRIAL PUBLICITY; ACCESS TO COURTS AND COURT FILES/§14.4 IV. ETHICAL GUIDELINES FOR LAWYERS: CAL RULES OF PROF COND 5-120

§14.4 IV. ETHICAL GUIDELINES FOR LAWYERS: CAL RULES OF PROF COND 5-120

An attorney who is investigating or litigating a matter is prohibited from making an extrajudicial statement that a reasonable person would expect to have disseminated through public communication if the attorney knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Cal Rules of Prof Cond 5-120(A). The rule applies equally to prosecutors and criminal defense counsel. Comment to Rule 5-120.

Ø **Note:** Critics of Rule 5-120 have indicated their concern that, although lawyers may be more restrained in their approach to the media as a result of Rule 5-120, others, *e.g.,* police officers, family members of the accused, or the victim, still have the unmuzzled right to comment about court proceedings.

Several categories of information are exempt from Rule 5-120. A lawyer may disclose the following (Rule 5-120(B)):

- The claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;
- Information in a public record;
- The fact that an investigation of the matter is in progress; and
- The scheduling or result of any step in the litigation.

An attorney may also disclose the following (Rule 5-120(B)):

- A request for assistance in obtaining evidence and information necessary to the litigation; and
- A warning of danger concerning the behavior of a person involved, when there is reason to believe there is a likelihood of substantial harm to an individual or the public interest.

In a criminal case, an attorney may also disclose these items (Rule 5-120(B)):

- The identity, residence, occupation, and family status of the accused;
- Information necessary to aid in apprehending the accused;
- The fact, time, and place of arrest; and
- The identity of the investigating and arresting officers or agencies and the length of the investigation.

Rule 5-120(C) contains a "safe harbor" provision allowing statements to be made to protect a client against (presumably adverse) publicity by someone else. The following factors may be taken into account in determining whether the rule has been violated (see the Discussion to Rule 5-120):

- Whether the extrajudicial statement contains clearly inadmissible evidence and is made for the purpose of proving or disproving a material fact in issue;
- Whether the statement is false, deceptive, or in violation of Bus & P C §6068(d) (prohibiting lawyers from deviating from the truth or misleading a court or judicial officer);
- Whether the statement violates a lawful gag order or other protective rule; and
- The timing of the statement.

The constitutionality of this rule has yet to be tested at the time of this update, but it is fair to say that the rule is controversial. *Gentile v State Bar* (1991) 501 US 1030, 115 L Ed 2d 888, 111 S Ct 2720, is particularly relevant. In that case, a divided U.S. Supreme Court discussed the imposition of discipline on a criminal defense lawyer under a Nevada Supreme Court rule that the court found was "almost identical" to ABA Model Rules of Prof Cond 3.6. The Nevada safe harbor rule was held void for vagueness, at least as it had been interpreted by the Nevada Supreme Court. 501 US at 1048.

Ø **Note:** Until further litigation clarifies aspects of the California rule, there may be legitimate questions about the

true breadth of 5-120(C). Current commentary, which provides vastly ranging views on the meaning of the safe harbor provision, clearly will not substitute for careful legal research whenever counsel has a question about his or her speech rights under Rule 5-120. The State Bar maintains an ethics hotline and publishes a Compendium of the Rules of Professional Conduct. The ABA Criminal Justice Section's Standards for Fair Trial and Free Press are available on the section's website at http://www.abanet.org/crimjust/standards/fairtrial_toc.html. ABA ethics information is also available through the ABA's Center for Professional Responsibility; their home page is at http://www.abanet.org/cpr/home.html. The National Center for State Courts also offers a number of online publications that explore the relationship between media coverage and jury decision-making; their home page is at http://www.ncsconline.org.

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V. APPROACHES TO TALKING TO THE MEDIA

§14.4A A. In General

There are rules by which reporters generally operate. Chief among these is whether the lawyer is talking on the record or off the record. Counsel must learn the ground rules for interviews. Reporters with a strong sense of professionalism will honor requests that the reporter describe the "angle" counsel would like taken in a given piece of reporting. Similarly, print reporters are usually careful to adhere to requests that a conversation be considered off the record and for background only. Relations with the electronic media tend to be somewhat different, although the fundamental questions remain the same. Media outlets may organize themselves into pools, with pool producers who direct part of the coverage. Some courts and media outlets have written agreements about how coverage will be "managed," and counsel should be familiar with such practices. Often a lawyer will be asked whether she or he is willing to appear "on air," or "on tape." Early in a case, it is usually best to refuse all requests for interviews, stating that a decision about whether to hold a press conference is pending, and indicating that as soon as the decision is made, the reporter will be notified.

Counsel may find it hard to obtain reliable guaranties that an editor or producer will agree either to air or publish a comment made by a lawyer on a given case. The easiest way to try to obtain some control over what information is disseminated is to prepare a statement in writing and read it at a press conference, or at a time when the lawyer has organized her or his thoughts sufficiently to present a coherent, brief, newsworthy, and "legal" statement. The written statement can then be distributed to members of the media as well.

Large prosecutors' offices have media spokespersons, as do some criminal defense organizations and large law firms. Consultation with experienced media spokespersons will enhance a lawyer's understanding of the practices governing the dissemination of information to the media, and may assist an inexperienced lawyer in outlining a plan through which to deal with the media.

A list of publications available to courts and counsel on dealings with the media is available on the website of the National Center for State Courts at http://www.ncsconline.org.

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§14.5 B. Defense Relations With the Media

Various approaches may be taken to media relations. Some counsel believe that, because of the importance that the media plays in affecting public opinion, failure to participate in media "dialogue" puts the client at a disadvantage. Other lawyers disagree, and prefer not to respond to media inquiries.

Preparation is the key to successful relations with the media. A number of topics may be addressed by defense counsel in early statements to the press: humanizing the accused by giving a brief description of his or her circumstances; indicating when advisable that the case is defensible, or that certain key facts have not yet emerged; appealing, in the appropriate case, for witnesses to come forward; and responding, when appropriate, to accusations or statements that are demonstrably incorrect.

It is important to have some dialogue with a reporter in advance of an interview to set the ground rules. It is usually best to have prepared in advance a short, concise statement because the media tend to use only very short quotes, which means that your entire statement may result in a single quotation, perhaps out of context, on a news broadcast or in a newspaper article. While there are often good reasons for responding to prejudicial publicity in a forceful manner, defense counsel should exercise caution. Generating additional media coverage may hinder obtaining a change of venue because the prosecution may emphasize the defense's responsibility for publicity. Speaking to the media may not counteract the prejudice and may lead to repetition of the prejudicial material. For example, a conclusory denial of guilt does little to offset damaging publicity while encouraging rejoinders by the prosecution, victims, and others. The possibility exists that a response may violate the rules of professional conduct. When deciding what to tell the press, counsel should review the following:

- Cal Rules of Prof Cond 5-120 (see §14.4);
- Cal Rules of Ct 1.150 (see §14.10);
- ABA Model Rules of Prof Cond 3.6;
- *Gentile v State Bar* (1991) 501 US 1030, 115 L Ed 2d 888, 111 S Ct 2720 (discusses defense counsel's dealings with press); and
- The issue of privilege concerning statements of counsel (see Barnhorst, *Statements to the Press: Does the Absolute Privilege Absolutely Not Apply?* 5 Cal Litigation 39 (Fall 1991)).

See generally the Notorious Cases Resource Guide available from the National Center for State Courts at http://www.ncsconline.org.

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§14.6 C. Prosecution Relations With the Media

Prosecutors have the difficult task of balancing the right of the individual accused of a crime to receive fair and impartial treatment with the public's right to receive information about the public prosecutor's actions in criminal cases. Prosecutors are also subject to the regulations in Cal Rules of Prof Cond 5-120 (discussed in §14.4).

Some prosecution offices have internal guidelines dealing with the news media. Also, most major district attorney offices issue numerous training circulars on practices associated with high-publicity cases. These circulars are available to lawyers in the Attorney General's office, the various district attorney offices, and criminal divisions of the city attorney's office. A prosecutor should not exploit his or her office by seeking personal publicity in connection with a case before, during, or after trial. ABA Standards for Criminal Justice: Prosecution Function (1993 revision), Parts I, II, V. In addition, under the ABA Standards, prosecutors are not to make public comments critical of a verdict. Prosecution Function, Standard 3-5.10.

Ø **Note:** Under ABA Model Rules of Prof Cond 3.6(b), a violation of the general guidelines listed in Rule 3.6(b) may provide the defense with grounds for a change of venue. See chap 15.

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§14.7 D. Grand Jury

All grand jurors are prohibited from disclosing the fact of an indictment until a defendant is arrested. Pen C §924. They are also prohibited from disclosing evidence presented to the grand jury and from discussions among grand jury members. Pen C §924.1. See also chap 9 on the grand jury.

Ø **Note:** Significant litigation concerning grand jury secrecy was conducted in relation to a well-publicized Orange County bankruptcy case. Lawyers interested in legal developments in this area should review that litigation. See *Daily Journal Corp. v Superior Court* (1999) 20 C4th 1117, 86 CR2d 623. The authors are also aware of litigation concerning defense requests to maintain certain grand jury transcripts under seal on the basis of the contention that a lawyer for the newly indicted defendant testified before the grand jury and, in doing so, disseminated confidential communications in violation of the attorney-client privilege. See Evid C §954. Because of the procedures surrounding assertion of the attorney-client privilege and the making of objections to the publication of confidential communications (see Evid C §§917, 952), defense counsel argued that the grand jury transcripts were not subject to release under Pen C §938.1 and had to be maintained under seal pending a resolution of claims of privilege. Restrictions on media access to records of ancillary grand jury proceedings, such as motions to quash witness subpoenas, were addressed in *Los Angeles Times v Superior Court* (2003) 114 CA4th 247, 250, 7 CR3d 524, in which the court noted that the policies militating in favor of grand jury secrecy will likely shield such records from media access. Admonishments that restricted grand jury witnesses from discussing testimony or the subject of the grand jury's inquiry with the press were upheld against claims by media organizations that those admonishments infringed on the First Amendment. *San Jose Mercury News, Inc. v Criminal Grand Jury* (2004) 122 CA4th 410, 417, 18 CR3d 645. In *Alvarez v Superior Court* (2007) 154 CA4th 642, 656, 64 CR3d 854, the court recognized a limited, qualified right of the press and public to access grand jury transcripts after indictment, holding that a defendant moving to keep a grand jury transcript sealed until the completion of his trial needed to show only a "reasonable likelihood" that he would not receive a fair trial if the transcripts were released, rather than a "substantial probability" of prejudice. See Pen C §938.1(b).

Under the federal rules (Fed R Crim P 6(e)(6)),

> [r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

This rule has been used as a guide in California. See *Los Angeles Times v Superior Court* (2003) 114 CA4th 247, 260, 7 CR3d 524.

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VI. ACCESS TO COURT RECORDS

§14.8 A. Introduction

There is a slight, though significant, difference between, on the one hand, what courts have interpreted as the right of public access to criminal proceedings and the accused's right to a public trial within the meaning of the Sixth Amendment of the U.S. Constitution (see also Cal Const art I, §§3(b), 15) and, on the other hand, the right of access to court files and documents. Generally speaking, as noted below, pertinent law and public policy favor a public right of access to court documents. Nonetheless, situations exist in which litigants, their lawyers, and the courts have an interest in either delaying the opening of filings to public scrutiny, or even denying such access until the conclusion of appellate proceedings. An example of legally permitted delay is found in Pen C §987.9, which permits the defense in a capital case to make a confidential application for ancillary funds. However, the statutory scheme provides some right of access by the Attorney General when appellate, or collateral, litigation necessitating review of the pertinent documents is under way. See Pen C §987.9.

The state courts' "inherent and implied power to control judicial proceedings in order to insure the orderly administration of justice" provides them with "both the authority and the duty to issue … protective and seal orders" in the appropriate case and on a sufficient showing. *Rosato v Superior Court* (1975) 51 CA3d 190, 206, 124 CR 427. But see Cal Rules of Ct 2.550 (formal sealing procedure required, including specific sealing order). Further, notwithstanding the public's right of access to information about governmental functions (see Cal Const Art I, §3(b)), that right may have to cede to a defendant's right to fair trial. *Alvarez v Superior Court* (2007) 154 CA4th 642, 656, 64 CR3d 854. It should be noted that the courts' power to seal pleadings has been examined mainly against the background of a contention that the right to a fair trial might be damaged by publication or public filing of documents. Issues concerning the sealing of documents may also be raised when a lawyer makes a showing that confidential communications, within the meaning of Evid C §952 (confidential communications between client and lawyer), might be exposed to public view in the absence of a sealing order. Issues may also arise where disclosure of material concerning an information might be affected if not sealed (see Evid C §§1040-1041), or material from the personnel files of peace or custodial officers might be open to public viewing (Evid C §§1043-1047).

In addition to concerns about the effects of publicity related to the exposure of the contents of pleadings or specific court files, other concerns related to the dissemination of delayed or deferred discovery may cause the sealing of particular court documents. Penal Code §1054.7 allows a court to shield discovery from transmission between the parties, and thus, presumably from publication, when there are "threats or possible danger to a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." Discovery statutes have also been interpreted to allow specific classes of witness names to be excised, thus raising the need for care and caution in the public filing of documents that include those otherwise protected names found via discovery. See *Alvarado v Superior Court* (2000) 23 C4th 1121, 99 CR2d 149.

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§14.8A B. Court Files

Court records are presumptively open. Cal Rules of Ct 2.550(c). See also Cal Const art I, §3(b). This is true even though they are specifically exempt from the California Public Records Act (CPRA) (Govt C §§6250-6270). *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1217, 86 CR2d 778; *McClatchy Newspapers v Superior Court* (1988) 44 C3d 1162, 1183, 245 CR 774; *Copley Press, Inc. v Superior Court* (1992) 6 CA4th 106, 111, 7 CR2d 841.

Court files commonly include all written motions, orders, plea agreements, pretrial release information, minutes, official reports, and calendars involving the case. *Copley Press, Inc. v Superior Court* (1992) 6 CA4th 106, 113, 7 CR2d 841. Physical evidence may or may not be listed in the court file; it is usually kept in a special evidence room. Search warrants are usually kept in a separate warrant file in the clerk's office. Court files sometimes include juror questionnaires, at least of jurors called to the jury box. *Lesher Communications, Inc. v Superior Court* (1990) 224 CA3d 774, 274 CR 154.

> Ø **Note:** Because of potential public access to jury questionnaires, counsel should consider requesting that jury questionnaires be kept confidential, or that jurors be allowed to answer sensitive questions in private, and that personal identifying information about them not be put on the questionnaire. See *Copley Press, Inc. v Superior Court, supra* (jurors should be advised of right to answer sensitive questions in confidence, and information such as phone numbers that is part of determining qualifications but not part of voir dire should not be disclosed); *Pantos v City & County of San Francisco* (1984) 151 CA3d 258, 198 CR 489 (promise of confidentiality to jurors may outweigh interest in disclosure). See also *People v Rhodes* (1989) 212 CA3d 541, 261 CR 1 (posttrial disclosure of names and addresses to defendant may be limited to strict showing of need).

Federal cases have applied the *Press-Enterprise* rules to plea agreements (*Washington Post v Robinson* (DC Cir 1991) 935 F2d 282), pretrial release information (*Seattle Times Co. v U.S. Dist. Court* (9th Cir 1988) 845 F2d 1513), search warrant material, including affidavits (*Times Mirror Co. v U.S.* (9th Cir 1989) 873 F2d 1210, 1214, 1218), and transcripts of a hearing when the release of that transcript could compromise law enforcement interests. *U.S. v Brown* (WD Texas 2006) 447 F Supp 2d 666.

See also §12.21 on juror information.

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§14.9 C. Publication of Identity of Sexual Assault Victims

The general rule espoused by the U.S. Supreme Court has been that if the media lawfully obtain information about the victim and if the matter is of public significance, state law cannot constitutionally prohibit its publication. *Florida Star v B.J.F.* (1989) 491 US 524, 105 L Ed 2d 443, 109 S Ct 2603. See also *Smith v Daily Mail Publ'g Co.* (1979) 443 US 97, 61 L Ed 2d 399, 99 S Ct 2667 (juvenile's identity obtained through witnesses); *Cox Broad. Corp. v Cohn* (1975) 420 US 469, 43 L Ed 2d 328, 95 S Ct 1029 (victim's identity found in public documents).

The prosecution may assist victims in sexual assault cases by informing them of their right to have their names withheld from disclosure when access to investigation reports is sought under the Public Records Act (Govt C §6254). The court also may grant anonymity to sex offense victims. Pen C §§293, 293.5.

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§14.10 D. Extended Coverage Provisions (Recording and Broadcasting)

Restrictions exist on media recording or broadcasting of proceedings by the use of television, radio, photographic, or recording equipment (sometimes called "extended coverage"). Cal Rules of Ct 1.150.

A media request for extended coverage is made to the court on Judicial Council Form MC-500 (Media Request to Photograph, Record, or Broadcast). The form must be filed at least 5 court days before the proceeding to be covered, unless good cause is shown for an exception, and must be accompanied by a completed proposed order on Judicial Council Form MC-510 (Order on Media Request to Permit Coverage). Cal Rules of Ct 1.150(e)(1). The court may hold a hearing on the request, or rule on the request without a hearing. Cal Rules of Ct 1.150(e)(2). The court has the discretion to permit, refuse, limit, or terminate media coverage. Cal Rules of Ct 1.150(e). The factors to be considered by the court in ruling on the request are listed in Cal Rules of Ct 1.150(e)(3). See, *e.g., People v Dixon* (2007) 148 CA4th 414, 56 CR3d 33 (applying Rule 1.150 to proceeding under Sexually Violent Predator Act (SVPA)). Courts can limit the broadcast of taped trial proceedings until after jury deliberations to avoid potential misconduct by jurors tempted to talk about the case with others who viewed the telecast. *KFMB-TV Channel 8 v Municipal Court* (1990) 221 CA3d 1362, 271 CR 109.

For an empirical review of what California courts have done with former Cal Rules of Ct 980 (now see Cal Rules of Ct 1.150), see Cameras in the Courtroom: Report on Rule 980, Administrative Office of the Courts (2000). See also Cohn & Dow, Cameras in the Courtroom: Television and the Pursuit of Justice (2002); Haggerty, In the Court of Public Opinion: Winning Your Case with Public Relations (2003).

Certain portions of a trial may not be photographed, recorded, or broadcast, even when extended coverage has been allowed. They are: proceedings held in chambers or that are closed to the public; jury selection; jurors and spectators; and conferences between attorneys for the parties and their clients, witnesses, assistants, each other, and the court. Cal Rules of Ct 1.150(e)(6).

> Ø **Note:** In a high-profile case, counsel should consider requesting that other coverage be banned, such as pictures of the defendant in manacles and jail garb or, when identification of the defendant is an issue, any pictures of the defendant.

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E. Sealing Court Records and Restricted Access

§14.11 1. Grand Jury Transcripts

A grand jury transcript is unavailable to the public until 10 days after its delivery to the defendant or his or her attorney. Pen C §938.1(b). The language used in §938.1(b) states that the standard for sealing is "a reasonable likelihood" of prejudice, a standard identical to that used for a change of venue, less than "more probable than not" (see §15.4). The Fourth District, in *Press-Enterprise v Superior Court* (*Press-Enterprise III*) (1994) 22 CA4th 498, 503, 27 CR2d 708, did not decide whether the "reasonable likelihood" or the "substantial probability" (a somewhat harder test to meet) standard applies to sealing all or part of a grand jury transcript. *Press-Enterprise III* had claimed that the reasonable-likelihood test was unconstitutional and that the court should use the substantial-probability standard. Because the trial court's findings and the showing made by the defendant were inadequate to support sealing under either standard, it was unnecessary for the court to decide which standard to apply. Subsequently, in *Alvarez v Superior Court* (2007) 154 CA4th 642, 653, 64 CR3d 854, the First District held that the standard for sealing is the "reasonable likelihood of prejudice" standard under Pen C §938.1(b).

Ø **Note:** If the court will not accept the "reasonable likelihood" standard, the lessons from *Press-Enterprise III* are as follows: First, counsel must make a strong argument that unsealing will be very prejudicial based not on speculation but on evidence from such elements as content analysis of the extant publicity and the contents of the transcript, opinion testimony, and a community survey. Second, counsel should be aware that the *Press-Enterprise III* court said that the sealing analysis is based on some of the same factors pertinent to a change of venue motion. Third, there must be a careful consideration of reasonable alternatives, such as partial sealing, venue change, delay, careful voir dire, and the like. The trial judge must be educated as to the need to make appropriate findings. Finally, the overall standard for demonstrating prejudice is undecided, despite the clear language of §938.1(b). However, it is clear that the presumption in favor of public filings can be trumped when the court has sufficient evidence or when the records at issue "are required to be kept confidential by law." See Cal Rules of Ct 2.550(a), (c).

Thereafter, the entire transcript or any part of it may remain sealed if the court finds a reasonable likelihood that it might prejudice the defendant's right to a fair and impartial trial. Pen C §938.1(b).

If the court does decide to seal all or part of the transcript, it may be sealed only until after the trial is over. See Pen C §938.1(b); *Alvarez v Superior Court* (2007) 154 CA4th 642, 645, 64 CR3d 854; *Rosato v Superior Court* (1975) 51 CA3d 190, 207, 124 CR 427.

Courts do not have the discretion to order grand jury transcripts unsealed when no statutory permission exists, *i.e.,* there is no discretionary "power" to release otherwise sealed transcripts. *Daily Journal Corp. v Superior Court* (1999) 20 C4th 1117, 86 CR2d 623; *Goldstein v Superior Court* (2008) 45 C4th 218, 221, 85 CR3d 213.

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§14.11A 2. Sealing Court Records

Unless confidentiality is required by law, court records are presumed to be open. Cal Rules of Ct 2.550(c). However, in performance of its duty to control adverse publicity to protect a defendant's right to a fair trial, the court may order removed from public scrutiny material that could result in publicity so inherently prejudicial as to endanger that right. *People v Jackson* (2005) 128 CA4th 1009, 1021, 27 CR3d 596.

Ø **Note:** Possible danger to the defendant or others may also justify sealing documents or redaction. See, *e.g.*, *In re Copley Press, Inc.* (9th Cir 2008) 518 F3d 1022, 1028.

A record must not be filed under seal without a court order. A record may not be filed under seal solely on the basis of the agreement or stipulation of the parties. Cal Rules of Ct 2.551(a). A noticed motion or application, accompanied by a supporting memorandum and a declaration, is required. Cal Rules of Ct 2.551(b). The party requesting that a record be filed under seal must lodge it with the court when the motion is made, unless good cause exists for not lodging it, or the record has previously been lodged. Pending the determination of the motion, the lodged record remains conditionally under seal. Cal Rules of Ct 2.551(b)(4).

A court may order that a record be filed under seal only if it expressly finds facts that establish all of the following (Cal Rules of Ct 2.550(d)):

- There exists an overriding interest that overcomes the right of public access to the record;
- The overriding interest supports sealing the record;
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- The proposed sealing is narrowly tailored; and
- No less restrictive means exist to achieve the overriding interest.

An order sealing the record must specifically set forth the facts that support the findings. Only those documents and pages or, if reasonably practicable, portions of those documents and pages that contain the material that needs to be placed under seal may be sealed. All other portions of each document or page must be included in the public file. Cal Rules of Ct 2.550(e). See, *e.g., People v Jackson* (2005) 128 CA4th 1009, 27 CR3d 596 (trial court properly sealed portions of indictment, including redaction of names of unindicted purported co-conspirators, but remainder of indictment ordered unsealed by court of appeal).

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VII. ACCESS AND RIGHT TO PUBLIC HEARINGS, AND RIGHT TO CLOSE THEM

§14.12 A. Which Criminal Proceedings Are Presumptively Open

The press and public have the First Amendment right to attend criminal proceedings, while criminal defendants have the Sixth Amendment right to a fair trial, which can include closing proceedings to the public. Balancing these interests is not always easy. *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 49 L Ed 2d 683, 96 S Ct 2791. In California, the public can also arguably rely on Cal Const art I, §3(b), in claiming a right of access to court proceedings. For further discussion, see §§14.13-14.19.

Two questions determine whether a criminal proceeding should be presumptively open (*Press-Enterprise Co. v Superior Court (Press-Enterprise II)* (1986) 478 US 1, 8, 92 L Ed 2d 1, 9, 106 S Ct 2735): First, has it historically been open to the press and public? Second, does public access play a significant positive role in the functioning of the particular process in question?

Criminal trials have been held to be presumptively open to the public, and therefore to the media. CCP §124; *Press-Enterprise Co. v Superior Court (Press-Enterprise I)* (1984) 464 US 501, 508, 78 L Ed 2d 629, 637, 104 S Ct 819; *Richmond Newspapers, Inc. v Virginia* (1980) 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814. Voir dire, like other parts of a criminal trial, is presumptively open to the press and public. *Press-Enterprise I, supra*. On closed or sequestered voir dire, see §§14.14, 14.29, 29.18, 54.25.

The right to a public trial extends to the preliminary hearing. Pen C §868 (preliminary hearings are open and public). See also *Waller v Georgia* (1984) 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210 ("public trial" language of Sixth Amendment, concerning defense rights, covers preliminary hearings).

Ø **Note:** The issue of public access to commitment proceedings under the Sexually Violent Predator Act (SVPA) (Welf & I C §§6600-6609.3) remains open. See *People v Dixon* (2007) 148 CA4th 414, 429, 56 CR3d 33.

The media's right of access is a corollary to the public's right to open judicial proceedings. *Ukiah Daily Journal v Superior Court* (1985) 165 CA3d 788, 790, 211 CR 673. Decisions have given great weight to the media's First Amendment right of access. See *Press-Enterprise Co. v Superior Court (Press-Enterprise II)* (1986) 478 US 1, 92 L Ed 2d 1, 106 S Ct 2735; *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613; *Ukiah Daily Journal v Superior Court, supra*.

Ø **Note:** Film or electronic media coverage is allowed only on written court order. Cal Rules of Ct 1.150(e).

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§14.13 B. Parties' Right to Public Hearings

It is often difficult to convince a trial court to close hearings or seal documents, but there are good reasons to attempt to do so. First, it demonstrates good faith in attempting to reduce prejudicial pretrial publicity. Second, from the defendant's perspective, it begins to build the case for a change of venue by sensitizing the court to the problems. Third, even if a change of venue is not granted, it reduces the local prejudice, not only because of whatever measures the court may take, but also because it often restrains the media in their coverage. Finally, before sealing records or closing hearings, the court is required to consider whether there are less drastic remedies that will protect the defendant's fair trial rights while also protecting First Amendment values. Thus, the court must consider such remedies as delay, improved voir dire procedures, and change of venue. If the court identifies one or more of these remedies as an alternative to closing or sealing, the defendant is in a strong tactical position to obtain that remedy later in the trial.

In presenting the motion, counsel should do more than simply describe pervasive media coverage and make conclusory assertions about the effect of that coverage. Counsel should also provide evidence of the extensive pretrial publicity and its impact on the community. If possible, this should be done by content analysis of the publicity and a community survey, similar to what is done in a change of venue motion. See *People v Prince* (2007) 40 C4th 1179, 1210, 57 CR3d 543 (public opinion survey and publicity content in support of change of venue motion).

The prosecution has the right to a public trial. Cal Const art I, §29. The defense has the right to a public trial. US Const amends VI, XIV; Cal Const art I, §15. This right extends to preliminary hearings. *Waller v Georgia* (1984) 467 US 39, 81 L Ed 2d 31, 104 S Ct 2210. The public also has a right of access to information "concerning the conduct of the people's business." Cal Const art I, §3(b).

The defendant's right to a public trial may be at least as extensive as the media's; *Waller* held that closure of a trial over a defendant's objection requires the same stringent showing set out in the *Press-Enterprise I* case (*Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 78 L Ed 2d 629, 104 S Ct 819). *Waller v Georgia* (1984) 467 US 39, 47, 81 L Ed 2d 31, 39, 104 S Ct 2210. See *People v Prince* (2007) 40 C4th 1179, 1279, 57 CR3d 543. The proponent of closure must show evidence of an overriding or compelling interest in closure, a substantial probability that that interest will be prejudiced or harmed if closure is not granted, that closure is no broader than necessary, and that no other reasonable alternative exists. See *In re Copley Press, Inc.* (9th Cir 2008) 518 F3d 1022, 1028.

> Ø **Note:** The standard for closure is probably the same under either the First or Sixth Amendment. The court in *Waller v Georgia, supra,* held that a defendant has a right to *open* a hearing on a motion to suppress evidence. The court used First Amendment cases to support its holding, which was based on the Sixth Amendment.

Under certain circumstances, such as when certain identified spectators are excluded, an issue of "partial closure" may arise. See, *e.g., People v Esquibel* (2008) 166 CA4th 539, 551, 82 CR3d 803.

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§14.14 C. Defense Right to Close Trial

The public's right to attend a criminal trial is only a qualified right. *Press-Enterprise Co. v Superior Court (Press-Enterprise I)* (1984) 464 US 501, 509, 78 L Ed 2d 629, 638, 104 S Ct 819; *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613; *Richmond Newspapers, Inc. v Virginia* (1980) 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814.

The party seeking to close a criminal hearing bears a heavy burden to achieve it: The courtroom may be closed only if the court makes specific findings that there is a "substantial probability" that the defendant's right to a fair trial would be prejudiced by publicity, and that reasonable alternatives to closing cannot adequately protect his or her rights. *Press-Enterprise Co. v Superior Court (Press-Enterprise II*) (1986) 478 US 1, 14, 92 L Ed 2d 1, 14, 106 S Ct 2735. This standard applies both to the defense and to the prosecution. See *Press-Enterprise II, supra; People v Alfaro* (2007) 41 C4th 1277, 1307, 63 CR3d 433. If the court grants a motion to close the trial, the court must state on the record its reasons for doing so. *Press-Enterprise II, supra*.

A defendant may seek to close all or part of a trial if either pretrial publicity or the presence of spectators, or both, pose a significant threat to his or her right to receive a fair trial. Spectator misconduct can violate a defendant's constitutional rights if it is so inherently prejudicial that it poses an unacceptable risk of impermissible factors coming into play. *People v Houston* (2005) 130 CA4th 279, 311, 29 CR3d 818 (court's admonitions cured any inherent prejudice presented by spectator displays of buttons and placards bearing murder victim's likeness during husband's murder trial). See, *e.g., Holbrook v Flynn* (1986) 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (although courtroom arrangements may create risk of prejudice, no such risk was actually created by presence of four uniformed guards); *Woods v Dugger* (11th Cir 1991) 923 F2d 1454 (unacceptable risk of unfair trial posed by attendance of large number of uniformed prison guards in small rural community where defendant was being tried for killing prison guard); *Norris v Risley* (9th Cir 1990) 918 F2d 828 (presence of spectators wearing "Women Against Rape" buttons at trial created unacceptable risk that rape defendant would be convicted on the unsworn "evidence" conveyed by their message). See also *Sheppard v Maxwell* (1966) 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507 (massive publicity before and during trial, and courtroom packed with journalists, denied due process); *Estes v Texas* (1965) 381 US 532, 14 L Ed 2d 543, 85 S Ct 1628 (live televising of pretrial and trial proceedings rendered trial unfair); *Irvin v Dowd* (1961) 366 US 717, 6 L Ed 2d 751, 81 S Ct 1639 (publicity creating "deep and bitter" community prejudice so that 90 percent of prospective jurors had an opinion about the case rendered trial unfair).

> Ø **Note:** The U.S. Supreme Court has not addressed the question of when the effect of spectator conduct, as opposed to a state-sponsored courtroom practice, is so inherently prejudicial as to violate the defendant's right to a fair trial. See *Carey v Musladin* (2006) 549 US 70, 73, 166 L Ed 2d 482, 487, 127 S Ct 649 (state court decision that buttons depicting murder victim worn by spectators during husband's murder trial did not brand defendant with unmistakable mark of guilt was not contrary to nor unreasonable application of clearly established federal law).

When certain sex offenses are charged, both the trial and the preliminary hearing can be closed during the testimony of the victim when he or she is a minor under age 16 or is a dependent person with a substantial cognitive impairment. Pen C §859.1. See Pen C §288(f)(3) ("dependent person" defined). See also §14.16.

The media's right to attend voir dire (*Press-Enterprise I,* 464 US 501, 510, 78 L Ed 2d 629, 638, 104 S Ct 819*;* see §14.12) can conflict with the court's discretion to allow sequestered questioning of jurors in capital cases. See *Hovey v Superior Court* (1980) 28 C3d 1, 80, 168 CR 128; *Ukiah Daily Journal v Superior Court* (1985) 165 CA3d 788, 211 CR 673. Sequestration ("*Hovey* voir dire") has been perceived as strongly disfavored. Code of Civil Procedure §223 (enacted after the *Hovey* and *Ukiah* cases) requires voir dire to be conducted in the open when "practicable." This provision is constitutional. *People v Boulerice* (1992) 5 CA4th 463, 7 CR2d 279. The California Supreme Court has recommended sequestered voir dire as a means to address pretrial publicity concerns (see *Haraguchi v Superior Court* (2008) 43 C4th 706, 717, 76 CR3d 250) and, in practice, some counties still routinely allow sequestered voir dire in

death cases. Moreover, many trial judges will use sequestered, individualized voir dire when a juror expresses privacy concerns or indicates detailed knowledge of the case.

On circumstances in which specific questions and answers might be treated confidentially on voir dire, see §14.8A. On voir dire in death penalty cases, see §54.25. On in camera voir dire, see §29.18.

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§14.15 D. Defense Right to Close Suppression Hearing

When a defendant seeks to close a hearing on a motion to suppress evidence, there is an obvious tension between the right of access of the public and press, and the court's duty to ensure that publicity about prejudicial, and perhaps inadmissible, evidence does not impair the defendant's right to a fair trial. No California case after *Press-Enterprise Co. v Superior Court* (*Press-Enterprise II*) (1986) 478 US 1, 92 L Ed 2d 1, 106 S Ct 2735, which set the standard for closing hearings in criminal cases (see discussion in §§14.12, 14.14), has directly addressed the conflict between a defendant's rights and the rights of the press, when the dispute concerns closing a pretrial proceeding to suppress evidence. In an earlier case, *Allegrezza v Superior Court* (1975) 47 CA3d 948, 121 CR 245, the court had held that the defendant's right to a fair trial must prevail when the press seeks access to a hearing on a motion to suppress a confession in a murder prosecution. See also *Oziel v Superior Court* (1990) 223 CA3d 1284, 273 CR 196 (property seized pursuant to search warrant might be kept from public if interest in disclosure was outweighed by privacy interest of psychotherapist (not the accused) from whom it was seized).

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§14.16 E. Closing Preliminary Hearing

Excluding individuals. The magistrate can exclude potential and actual witnesses on the motion of either party. Pen C §867. Either party can also challenge the exclusion of a person under §867. The court may also exclude a particular spectator who is intimidating a witness (Pen C §686.2), but this statute may not be invoked against either the press or the defendant. The court also has the general authority to preserve order (CCP §177), and so may exclude spectators who are disruptive.

Closing hearing to public. The court may grant a defendant's motion to close the preliminary hearing if the court makes specific findings on the record that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." The defendant must show a "substantial probability" that an open hearing would offset the right to a fair trial, and remedies short of closure must be explored first. *Press-Enterprise Co. v Superior Court (Press-Enterprise II)* (1986) 478 US 1, 13, 92 L Ed 2d 1, 13, 106 S Ct 2735. This standard supersedes the standard of Pen C §868, which permits closure only when necessary to protect the defendant's right to a fair and impartial trial. *KFMB-TV Channel 8 v Municipal Court* (1990) 221 CA3d 1362, 1365, 271 CR 109.

At the prosecutor's request, the magistrate can close proceedings during the testimony of a sexual assault victim who is a minor or is a dependent person with a substantial cognitive impairment when no alternative procedures are available to avoid the perceived psychological harm to the victim from testifying in public. Pen C §868.7(a)(1); see Pen C §288(f)(3) ("dependent person" defined). On motion of the prosecutor, the magistrate can also close proceedings during testimony of a witness whose life would be at substantial risk in appearing before the general public. Pen C §868.7(a)(2). Consistent with *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 73 L Ed 2d 248, 102 S Ct 2613 (see §14.14), the court may close the hearing for this testimony only after making particularized findings of need, and after considering alternatives. If the hearing is closed for these reasons, the transcript must be made available to the public as soon as is practicable. Pen C §868.7.

The court is also authorized to close "any criminal proceeding" to protect the reputation of a victim of certain sex crimes, when the victim is a minor under age 16 or is a dependent person with a substantial cognitive impairment. Pen C §859.1. While §859.1 has not been construed by the courts in light of either the First or the Sixth Amendment rights to an open proceeding, in *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 608, 73 L Ed 2d 248, 258, 102 S Ct 2613, the Supreme Court acknowledged that safeguarding the physical and psychological well-being of a minor was a compelling interest that could justify closure if the decision were made on a case-by-case basis. The factors that Pen C §859.1(b) directs the court to consider in determining whether to close a preliminary hearing appear to meet the concerns of *Globe Newspaper Co.*

People allowed to attend despite closure. If the preliminary hearing is closed, the prosecutor may make a motion to allow the victim's family into the courtroom. Pen C §868. The court must grant the motion unless exclusion is necessary to protect the defendant's right to a fair trial, or evidence establishes that the family's presence is reasonably likely to affect the content of a witness's testimony. Pen C §868. In every case, the prosecuting witness may select a supporting person who is not a witness to be present during the prosecuting witness's testimony. Pen C §868. If the crime charged is one specified in Pen C §868.5(a), the prosecuting witness is entitled to have two supporting persons present. One of them may be a witness. The testimony of a support person who is also a witness must be presented before the testimony of the prosecuting witness, who must be excluded from the courtroom during that testimony. Pen C §868.5.

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§14.17 F. Juvenile Delinquency Proceedings

Some juvenile delinquency proceedings involving specified serious offenses may be opened to the public on the same basis as adult criminal cases. Welf & I C §676. When §676 applies, it includes access to fitness hearings (Welf & I C §707; *Tribune Newspapers W., Inc. v Superior Court* (1985) 172 CA3d 443, 218 CR 505) and competency determinations (*Cheyenne K. v Superior Court* (1989) 208 CA3d 331, 256 CR 68).

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§14.18 G. Grand Jury Proceedings

Criminal proceedings before a grand jury are closed except to the individuals specified in Pen C §939. On the request of the grand jury and the prosecutor, the superior court may order the grand jury to conduct its investigation in public sessions. Pen C §939.1.

See chap 9 on the grand jury, and §14.11 on sealing the grand jury transcript.

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§14.19 H. Related Civil Proceedings

When civil restraining orders or forfeitures are sought before criminal charges are brought, the potential for adverse pretrial publicity must be considered by the defendant or soon-to-be defendant. Access by the media to civil proceedings is discussed in *Cincinnati Gas & Elec. Co. v General Elec. Co.* (6th Cir 1988) 854 F2d 900. See chap 57 on asset forfeiture.

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VIII. REMEDIES

A. Pretrial and Trial Publicity Orders (Protective, Restraining, or "Gag" Orders)

§14.19A 1. Collecting Media Information

Counsel should keep track of media contacts and published stories (including broadcast media and Internet coverage) as soon as he or she enters a case, to support a possible later request for court restriction on comment to the press (see §§14.20-14.26) or closure of court hearings (see §§14.12-14.19), or to prepare for change of venue litigation (see chap 15). One option is to enlist a clipping service to keep track of published articles. Some services will also monitor broadcasts to ensure that all necessary material is obtained; the cost is fairly high. Alternatively, counsel may organize an effort to clip all published articles and obtain all scripts of radio and television reporting or commentary and related audio- and videotapes of coverage. Some attorneys subpoena this material. If resources permit, the task of collecting media information and establishing agreements (formal and informal) with the media may be guided by a trial consultant or media relations consultant.

Ø **Note:** It is important to request radio and television tapes close to the time of broadcast because many stations destroy or recycle their tapes.

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§14.20 2. Scope of Order; Procedure

A pretrial publicity order may prohibit discussions of the merits of a case, the evidence, arguments to be adduced by either side, trial tactics, or strategy. *Sheppard v Maxwell* (1966) 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507. It may also proscribe extrajudicial statements that divulge prejudicial matters such as the defendant's refusal to submit to interrogation or polygraph examination, the identity of prospective witnesses or their probable testimony, any statements by the defendant to the police, or an individual's belief in the defendant's guilt or innocence. *Sheppard v Maxwell, supra*.

A motion requesting a protective order should be served on all parties whom the order would affect and should be filed with the court. The motion should be drafted to limit dissemination of information as much as possible. See the defense motion to close the preliminary hearing, to seal the preliminary hearing transcript, and for a protective order in California Criminal Law Forms Manual §8.1 (2d ed Cal CEB 2005).

> Ø **Note:** Often the request for a gag order is made too late to be effective. For example, if the prosecutor, police chief, and political leaders have announced the charges at a press conference, a subsequent gag order is of limited use in mitigating prejudice resulting from the press conference. Defense counsel should consider trying to limit prejudice by seeking a gag order or other remedy as soon as possible, as well as alerting the court, prosecution, and law enforcement of the problems posed by prejudicial publicity. Such advisements, if ignored, will also lend support to a change of venue as the case proceeds.

See §§14.21-14.24 on use of gag orders for different groups of people.

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§14.21 3. Restraining Defense

Orders restraining parties ("gag orders") to a criminal proceeding may be directed to the defendant and the defense attorney. See *People v Watson* (1971) 15 CA3d 28, 92 CR 860. However, a pretrial order may not prohibit the defendant from describing the charge against him or her and unequivocally asserting his or her innocence. See *Hamilton v Municipal Court* (1969) 270 CA2d 797, 802, 76 CR 168. The standard for determining whether a gag order can be imposed on the defense appears to be the same as that used for orders restraining the prosecution. See *People v Watson* (1971) 15 CA3d 28, 39 n2, 92 CR 860 (court used same standard for prosecution and defense in gag order).

Ø **Note:** Differing standards for the defense and the prosecution may be appropriate in light of the First Amendment analysis in *Levine v U.S. Dist. Court* (9th Cir 1985) 764 F2d 590.

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§14.22 4. Restraining News Media

Generally, pretrial publicity orders that attempt to directly restrain the media have not met with much success. See, *e.g., Hunt v NBC, Inc.* (9th Cir 1989) 872 F2d 289 (defendant, alleged member of Billionaire Boys Club, failed in attempt to enjoin telecasting of NBC docudrama "Billionaire Boys Club" before his pending trial for murder); *KCST-TV Channel 39 v Municipal Court* (1988) 201 CA3d 143, 246 CR 869 (okay for television station to broadcast artist's rendering of defendant made at his arraignment despite numerous cases against him still under investigation); *Sun Co. v Superior Court* (1973) 29 CA3d 815, 826, 105 CR 873 (court cannot restrict freedom of speech unless necessary to prevent clear and present danger to fair administration of justice).

The news media have attacked gag orders as a prior restraint on First Amendment rights. These orders are usually held to be unconstitutional because of the availability of other means to protect a defendant's right to a fair trial, such as change of venue, continuance, closed preliminary hearing, careful jury voir dire, and proper instructions. *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 49 L Ed 2d 683, 96 S Ct 2791.

Ø **Note:** Courts have had more success in indirectly restraining the media—by restricting defendants, lawyers, law enforcement officers, and other sources from telling the media about the case, by closing pretrial proceedings to the public, and by sealing hearing transcripts—than in directly restraining the media.

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§14.23 5. Restraining Prosecution

A judge may issue an order restraining the prosecution from discussing a case with the news media if there is a "reasonable likelihood" that information about the case would make it difficult to impanel an impartial jury and would tend to prevent a fair trial. *Younger v Smith* (1973) 30 CA3d 138, 160, 106 CR 225.

Defense counsel may wish to seek an order restraining the prosecution from discussing a case with the news media if there is significant prejudicial evidence about a defendant that may be inadmissible at trial, such as prior criminal convictions that may be constitutionally invalid, or the fruits of a search and seizure that may be invalid.

A federal district court case held that the restraints imposed on the prosecutor can be more stringent than those applicable to the defense. *Levine v U.S. Dist. Court* (9th Cir 1985) 764 F2d 590, 599, 602. Federal cases other than U.S. Supreme Court cases are not binding on California state courts. *People v Henderson* (1990) 220 CA3d 1632, 270 CR 248; *Elliott v Albright* (1989) 209 CA3d 1028, 257 CR 762.

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§14.24 6. Restraining Witnesses and Others

Court orders can restrain a wide range of persons besides the parties in a trial. *Sheppard v Maxwell* (1966) 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507 (witnesses, court staff, and law enforcement officers coming under court's jurisdiction); *Hamilton v Municipal Court* (1969) 270 CA2d 797, 800, 76 CR 168 (order directed to "all law enforcement agencies, to the Regents of the University of California and their agents and employees and to the Associated Students of the University of California, their members and affiliated organizations"). In addition, the grand jury, and a prosecutor reiterating a grand jury admonishment to a witness, may curtail contacts of a grand jury witness with the media. See, *e.g., San Jose Mercury News, Inc. v Criminal Grand Jury* (2004) 122 CA4th 410, 413, 18 CR3d 645.

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§14.25 7. Enforcement: Contempt

The willful violation of a valid pretrial publicity order is an indirect or constructive contempt of court, punishable as a misdemeanor under Pen C §166(a)(4). *Hamilton v Municipal Court* (1969) 270 CA2d 797, 800, 76 CR 168. Because a pretrial publicity order is enforceable only with respect to disseminations that the court may constitutionally forbid, a technical but innocuous violation of the order that has no tendency to prejudice a pending criminal prosecution is not punishable as contempt. *Younger v Smith* (1973) 30 CA3d 138, 150, 106 CR 225. On contempt, see chap 58.

Ø **Note:** Another possible technique for enforcement of a pretrial publicity order is a complaint made to the State Bar alleging a violation of Cal Rules of Prof Cond 5-120. Although there is no known reported case of discipline for a violation of this rule, it is possible that discipline may be imposed for a violation of Rule 5-120. When charges have not yet been filed in the criminal case, the prosecutor may be concerned that the filing of such a complaint would lead to recusal.

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§14.26 8. Review of Order

The usual method of attacking a protective order, or denial of a request for a protective order, is to petition for a writ of mandate or prohibition (in the alternative), seeking vacation, modification, or issuance of the order. Another method of attacking a protective order is to challenge it on appeal from a contempt citation. *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225.

When a protective order is reviewed on appeal from a contempt citation, the appellate court must decide whether (1) it was justified under the circumstances, (2) the language in the order was explicit and specific, and (3) the violation threatened the impartiality of the forum. See *Younger v Smith, supra*.

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§14.27 B. Change of Venue; Continuance

The "extent and nature of the publicity" is one of the five controlling factors to be considered on a motion for change of venue. *People v Balderas* (1985) 41 C3d 144, 222 CR 184. It is not error for a court to consider just this factor alone, so long as the focus remains on the central inquiry: "whether it was reasonably likely that pretrial publicity had caused potential jurors to form such fixed opinions of defendant's guilt that they could not render an impartial verdict." *People v Lewis* (2008) 43 C4th 415, 450, 75 CR3d 588. Courts also may consider the passage of time between the pretrial publicity and the actual trial, which lessens actual prejudice. *People v Riggs* (2008) 44 C4th 248, 280, 79 CR3d 648; *Lewis,* 43 C4th at 449. When jurors express only a vague recollection of pretrial publicity, a finding of prejudice is less likely. 43 C4th at 450.

A motion to continue the trial until the effects of adverse publicity have subsided may also be filed, although few judges are willing to delay a trial long enough to cure the problem. See Pen C §1050. See also *Maine v Superior Court* (1968) 68 C2d 375, 387, 66 CR 724; *Silverthorne v U.S.* (9th Cir 1968) 400 F2d 627, 634. On continuances, see chap 20. On change of venue motions, see chap 15.

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§14.28 C. Court Trial

Judges are trained to base their opinions on proper evidence and are less likely to be swayed by publicity than a jury might be. After considering the alternatives, counsel who is persuaded that a court trial is the best option may wish to waive jury with the proviso that waiving jury requires the express consent of the defendant, defense counsel, and the prosecutor. Cal Const art I, §16; *People v Holmes* (1960) 54 C2d 442, 5 CR 871. On court trials, see chap 28.

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Source: Criminal Law/California Criminal Law Procedure and Practice/14 PRETRIAL AND TRIAL PUBLICITY; ACCESS TO COURTS AND COURT FILES/§14.29 D. Jury Voir Dire

§14.29 D. Jury Voir Dire

In cases involving substantial pretrial publicity, thorough voir dire of jurors is essential in selecting an impartial jury or in determining that a change of venue is required. *Morgan v Illinois* (1992) 504 US 719, 119 L Ed 2d 492, 112 S Ct 2222 (part of guaranty of an impartial jury is adequate voir dire to identify unqualified jurors); *Ross v Oklahoma* (1988) 487 US 81, 101 L Ed 2d 80, 108 S Ct 2273 (Sixth and Fourteenth Amendments guarantee right to fair and impartial jury); *People v Riggs* (2008) 44 C4th 248, 278, 79 CR3d 648 (voir dire demonstrated that jury could be impartial); *Hollywood v Superior Court* (2008) 43 C4th 721, 733, 76 CR3d 264 (voir dire is an appropriate means to ensure a fair trial given pretrial publicity); *People v Bittaker* (1989) 48 C3d 1046, 1086, 259 CR 630 (right to voir dire is means to achieve end of impartial jury). See also *People v Williams* (1989) 48 C3d 1112, 1127, 259 CR 473 (voir dire demonstrated change of venue necessary). See also Murphy, Loveland, & Munsterman, A Manual for Managing Notorious Cases (1992), prepared by the National Center for State Courts.

On completion of the court's initial voir dire examination, "counsel for each party shall have the right to examine … any or all of the prospective jurors." CCP §223. Although the court may specify the maximum amount of time that counsel can spend in the voir dire process, and the court can exercise its discretion in governing the manner in which voir dire is conducted to focus solely on the exercise of challenges for cause and not peremptory challenges, many trial lawyers have nonetheless welcomed the return of voir dire as a matter of statutory right. Section 223 also directs that voir dire be conducted in the presence of all other jurors when "practicable," even in capital cases.

> Ø **Note:** Counsel may want to submit a jury questionnaire for use during voir dire. See discussion in §29.17. Counsel should review Cal Rules of Ct 4.200 on the pre-voir dire conference, and Juror Questionnaire for Criminal Cases/Capital Case Supplement (Judicial Council Form MC-002).

Regardless of who conducts voir dire, due process requires that questioning be extensive enough to impanel an impartial jury. *Mu'Min v Virginia* (1991) 500 US 415, 114 L Ed 2d 493, 111 S Ct 1899; *Silverthorne v U.S.* (9th Cir 1968) 400 F2d 627.

When sensitive questions are involved, counsel should consider asking for individual voir dire out of the other jurors' presence so that the questioning itself does not prejudice them. See *People v Visciotti* (1992) 2 C4th 1, 5 CR2d 495 (individual jurors sequestered during death-qualification portion of voir dire); *Hovey v Superior Court* (1980) 28 C3d 1, 168 CR 128 (same). See also §§14.14, 29.18, 54.25. The ABA Standards for Criminal Justice: Fair Trial and Free Press, Standard 8-3.5(a) (3d ed 1992), "selecting the jury," recommends that jurors be examined individually in specific contexts.

> Ø **Note:** The media are entitled to a transcript of closed jury voir dire proceedings, *except* those portions sealed by the court because they are considered to be sensitive and deserving of privacy protection. *Press-Enterprise Co. v Superior Court* (*Press-Enterprise I*) (1984) 464 US 501, 78 L Ed 2d 629, 104 S Ct 819.

Sample jury voir dire questions that relate particularly to pretrial publicity can include the following:

1. Do you watch television news? What channels, and at what times of day?
2. Do you listen to radio news? What stations, and what programs?
3. Do you subscribe to a newspaper, or buy one regularly? Which newspaper?
4. Do you read stories about pending criminal cases in the print media or online?
5. Have you heard, seen, or read anything about this case?
6. What specifically do you recall hearing, seeing, or reading?
7. What information do you feel you have about this case as a result of media sources of information?
8. Have you discussed what you saw, heard, or read with anyone?
9. Can you explain why you read, saw, or heard the particular story?

10. Did you pay attention to, listen to, or see other stories on the same case?
11. Based on what you have seen, heard, or read, what are your opinions about the facts of this case?
12. What are your opinions about the accused?
13. Based on what you believe you know from media sources, what is your opinion about the case?
14. Do you believe that the accused is likely guilty?
15. Do you believe that what you read, see, or hear in media sources is likely to be accurate?
16. Have you ever known the media to report inaccurately about a case?
17. Do you believe that your opinion about this case is such that you could not set aside your views and judge the case exclusively on what you have heard in this courtroom, as opposed to what you have heard, read, or seen in a media source?

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§14.30 E. Jury Instructions

Although Pen Code §1122(a) requires jurors to be admonished at least once after their selection not to read or listen to media accounts of a case, failure to repeat the instruction is not error. *People v Henderson* (1965) 235 CA2d 318, 45 CR 198. Counsel should request instructions on this issue. CALCRIM's cautionary admonitions on jury conduct instruct the jury not to "read, listen to, or watch any news report or commentary about the case," conduct outside research, or visit the crime scene. CALCRIM 101. See also CALCRIM 201 (no outside investigation). Counsel may also prefer to draft an instruction or rely on the language of Pen C §1122(a). See, *e.g.,* Devitt et al., Federal Jury Practice and Instructions (4th ed 1992):

> There has been a substantial amount of publicity about this case (and about the defendant) in the newspapers, and also on radio and television. Some of this publicity may have come to the attention of some of you. You of course must lay aside and completely disregard anything you may have read or heard about the case outside the courtroom, and your verdict must be based solely on the evidence presented in court, in accordance with the court's instructions.

See also the instruction in *U.S. v Lewis* (8th Cir 1984) 738 F2d 916, 922 n3.

Ø **Note:** You may want to ask the court to admonish the jury concerning publicity about the trial at the beginning of the case, before voir dire.

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§14.31 F. Sequestering Jury

Trial judges have the discretion to sequester juries during the entire trial (Pen C §1121) or only during deliberations (Pen C §1128). The California Supreme Court has declined to prescribe guidelines for the exercise of this discretion, and has rejected arguments that sequestration should be mandatory in capital cases. *People v Gallego* (1990) 52 C3d 115, 198, 276 CR 679; *People v Bunyard* (1988) 45 C3d 1189, 1220, 249 CR 71. A party's motion to sequester the jury should identify special existing problems that make seclusion appropriate. *People v Morales* (1989) 48 C3d 527, 257 CR 64; *People v Bunyard* (1988) 45 C3d 1189, 249 CR 71.

Because sequestering jurors imposes a substantial inconvenience on them, as well as greatly increasing the cost of trial, it is not often ordered.

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15

CHANGE OF VENUE

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§15.1 I. OVERVIEW

The word "venue" refers to the territorial jurisdiction in which a case may be brought to trial. See Pen C §§691(c), 777. Venue can be conferred by statute or by the consent of the parties. *Casey v Superior Court* (1989) 207 CA3d 837, 843, 255 CR 81. Territorial jurisdiction is different from personal and subject matter jurisdiction, which are discussed in §15.3. A related concept, vicinage, concerns a defendant's right to a jury selected from inhabitants of the area in which the crime was committed. The boundaries of the vicinage are ordinarily coterminous with the boundaries of the county within which at least some act preliminary to or requisite to the offense charged occurred. *People v Alvarado* (2006) 144 CA4th 1146, 1152, 50 CR3d 923. Vicinage is discussed in §29.6.

The grounds for a motion to change venue are set forth in Pen C §1033. The defense can move to change venue to another county when it appears reasonably likely that a fair and impartial trial cannot be had in the county. Pen C §1033(b). The prosecution or the court on its own motion can move to change venue if all jury panels have been exhausted. Pen C §1033(b). The procedures to be followed in bringing the motion are in Cal Rules of Ct 4.150-4.155.

Ø **Note:** Penal Code §1033 applies to "criminal cases tried in superior court," not just to felony cases. See *Steffen v Municipal Court* (1978) 80 CA3d 623, 145 CR 782. However, changes of venue in misdemeanor cases are very rare.

In *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409, the California Supreme Court overruled several cases that had held that the vicinage right was an aspect of due process made applicable to the states through the Fourteenth Amendment. Consequently, a change of venue that violates the defendant's vicinage right is reviewable as an error of state law, not as a violation of the federal Constitution. On the difference between state law and federal constitutional standards for reversal, see §44.36.

The most common change of venue motion is the defense motion to change venue because of extensive pretrial publicity prejudicial to the accused. It may be brought before trial, or it may be raised for the first time during jury selection or after the jury has been selected but before it is sworn. *Odle v Superior Court* (1982) 32 C3d 932, 943, 187 CR 455. It is rare for the prosecution to request a change of venue. It might make such a request after reversal of the conviction on appeal in a case that was tried outside the county in which the offense took place. The judge may grant a prosecution motion to change venue or may order a change of venue on its own motion if it finds that the conditions that originally required the venue change no longer apply. Pen C §1033.1. See §15.32A for discussion of §1033.1.

Ø **Note:** In unusual cases, the change of venue motion may be brought for issues apart from case-specific pretrial publicity. For example, after the supreme court reversed his conviction for capital murder in *People v Croy* (1985) 41 C3d 1, 221 CR 592, defendant Hootie Croy successfully moved to change venue on the basis of historical and continuing prejudice against Indians in one of the Gold Rush counties.

When a judge grants a motion for change of venue, he or she must inform the presiding judge of his or her court. The presiding judge then notifies the Administrative Director of the Courts of the change of venue, and the Director advises the transferring court which courts would not be unduly burdened by the trial of the case. Cal Rules of Ct 4.152(1). The parties also may make suggestions. The presiding judge of the transferring court, or his or her designee, then determines the court in which the case is to be tried. Cal Rules of Ct 4.153(1). See §15.28. The only aspect of the case actually transferred to another county, however, is the trial itself. Pen C §1033. All pretrial proceedings are heard in the transferring court except when it is evident that a particular proceeding must be heard by the judge who is to preside over the trial. Pen C §1033. See Cal Rules of Ct 4.150(b).

Ø **Note:** In any case involving substantial pretrial publicity, counsel should carefully review chap 14 (Pretrial and Trial Publicity) and consider chaps 14 and 15 together for an overall approach to dealing with high-profile cases.

The transferring court, with the consent of all defendants, can order a jury to be selected in the new county and moved to the county in which the action originated. Pen C §1036.7. See Cal Rules of Ct 4.153(1).

A motion to change venue should be viewed as one that must be won in the trial court because reversal on an application for pretrial writ or on appeal on this ground is unlikely, unless it is clear that the trial court erred in its ground for the ruling. See §15.38.

Ø **Note:** Although there have been few published writ cases on venue in recent years (the last was *Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777 (the Rodney King case)), there have been some unpublished decisions, including several either ordering a change of venue or ordering a rehearing.

National Jury Project, Jurywork: Systematic Techniques (2005) is a good starting point for researching venue.

Another source is California Death Penalty Defense Manual (CACJ-CPDA 2004); see http://www.cacj.org for ordering information.

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§15.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Counties may have specific time requirements not otherwise required by the Penal Code.

Grounds for Motion	When Defendant Makes Motion	When Prosecutor Makes Motion or Responds
Defendant cannot receive fair trial.	Before trial. *Odle v Superior Court* (1982) 32 C3d 932, 944, 187 CR 455. See §15.18 for requirements.	Responds on date of hearing on motion. Cal Rules of Ct 4.151.
Jury panels exhausted.	No requirements. Pen C §1033(b).	No requirements for responding. (Prosecutor can also make motion.) Pen C §1033(b).

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§15.3 III. VENUE AND JURISDICTION DISTINGUISHED

"Venue" and "jurisdiction" are sometimes used interchangeably. See, *e.g.,* Pen C §1462.2, which uses "jurisdiction" instead of "venue." Venue means the territorial jurisdiction in which a case may be brought to trial and which can be conferred by consent of the parties. *People v Douglas* (1990) 50 C3d 468, 497, 268 CR 126 (territorial jurisdiction existed in county where murder was arranged and where defendant met victims and accomplice); *People v Crise* (1990) 224 CA3d Supp 1, 274 CR 242 (conviction reversed because defendant tried under Health & S C §11550 in county unrelated to one where conduct occurred). Territorial jurisdiction can refer to a county or a judicial district within a county. Pen C §691(c).

In contrast, jurisdiction refers to the inherent power of a court to hear and determine a case. Jurisdiction is composed of two elements, personal and subject matter jurisdiction. *Burns v Municipal Court* (1961) 195 CA2d 596, 599, 16 CR 64. Subject matter jurisdiction refers to a court's inherent power to hear and determine a case of a particular class. Original subject matter jurisdiction is conferred on California courts by Cal Const art VI, §10. Subject matter jurisdiction can neither be waived nor be conferred by consent or stipulation. *Griggs v Superior Court* (1976) 16 C3d 341, 344 n2, 128 CR 223. Any judgment without subject matter jurisdiction is void. *Taliaferro v County of Contra Costa* (1960) 182 CA2d 587, 6 CR 231.

Several statutes confer venue on more than one jurisdiction. See, *e.g.,* Pen C §784.7 (when defendant commits specified sex offenses against same victim in more than one county, any county in which any offense took place has venue); Pen C §790(a) (venue in homicide case may be in county where homicide occurs, victim dies, or body found); Pen C §790(b) (defendant charged with multiple murders and multiple murder special circumstance may be tried in any county in which venue exists under §790(a)). Construing §784.7, the supreme court concluded that the vicinage right implicit in Cal Const art I, §16 does not limit the legislature's power to designate the place for trial of a criminal offense as long as there is "a reasonable relationship or nexus between the place designated for trial and the commission of the offense." *Price v Superior Court* (2001) 25 C4th 1046, 1075, 108 CR2d 409. See also *Stevenson v Lewis* (9th Cir 2004) 384 F3d 1069, 1072 (state court decision that Vicinage Clause of Sixth Amendment does not apply to states was neither contrary to nor unreasonable application of clearly established federal law as determined by U.S. Supreme Court).

If an objection to improper venue is not raised before commencement of trial, it is waived. *People v Simon* (2001) 25 C4th 1082, 1086, 108 CR2d 385. Improper venue can be challenged by demurrer. Pen C §1004(1). See *People v Jochinsky* (1895) 106 C 638. It can also be raised at the preliminary hearing. *People v Remington* (1990) 217 CA3d 423, 266 CR 183. In *People v Posey* (2004) 32 C4th 193, 210, 8 CR3d 551, the supreme court held that venue is a question of law to be determined by the court before trial (overruling or disapproving numerous cases holding that venue is question of fact for jury). This rule applies prospectively only. 32 C4th at 216. The prosecution has the burden of establishing the facts underlying the venue by a preponderance of the evidence. See 32 C4th at 213.

> Ø **Note:** Counsel should carefully review *Posey*, which discusses in detail the statutory definitions of venue for given crimes.

The supreme court has observed that "the term 'jurisdiction' is notoriously subject to confusion." *People v Simon* (2001) 25 C4th 1082, 1096 n7, 108 CR2d 385. For a review of the terms "subject matter jurisdiction," "territorial jurisdiction," and "venue" as used in California, see 25 C4th at 1094. See also 4 Witkin & Epstein, California Criminal Law, *Jurisdiction and Venue* §§1-12, 19-26, 45-87 (3d ed 2000).

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IV. CHANGE OF VENUE MOTION BASED ON FAIR AND IMPARTIAL TRIAL REQUIREMENT

A. Legal Standard for Change of Venue Because No Fair and Impartial Trial Can Be Had

§15.4 1. Reasonable Likelihood Standard

A defendant is entitled to an impartial jury. US Const amend VI; Cal Const art I, §16. The court in *Maine v Superior Court* (1968) 68 C2d 375, 383, 66 CR 724, established the standard for granting change of venue motions (adopting the standard set out in *Sheppard v Maxwell* (1966) 384 US 333, 362, 16 L Ed 2d 600, 620, 86 S Ct 1507):

> A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

Penal Code §1033 codifies the standard of reasonableness laid down in *Maine*. *People v Bonin* (1988) 46 C3d 659, 672, 250 CR 687, overruled on another ground in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656. It provides that only the defendant, not the court or prosecution, can move for change of venue on the ground that there is a reasonable likelihood that an unfair trial will occur. *People v Powell* (1891) 87 C 348, 360, 25 P 481; *Jackson v Superior Court* (1970) 13 CA3d 440, 442, 91 CR 565.

The California Supreme Court has settled on five factors that the trial court should take into account in deciding whether the reasonable likelihood standard has been met: (1) the nature and gravity of the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. These factors are discussed in §§15.5-15.10. In addition, if the motion is made after jury selection, the court should take into account the responses of jurors during voir dire to learn whether the potentially prejudicial publicity has, in fact, affected the defendant's ability to obtain an impartial jury. *People v Staten* (2000) 24 C4th 434, 449, 101 CR2d 213; *People v Bean* (1988) 46 C3d 919, 942, 251 CR 467. See also *People v Cooper* (1991) 53 C3d 771, 807, 281 CR 90; *People v Jennings* (1991) 53 C3d 334, 361, 279 CR 780.

Because the defendant is the party seeking the change of venue, the defendant bears the burden of proof. *People v Bonin* (1988) 46 C3d 659, 673, 250 CR 687, overruled on another ground in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656. Actual prejudice need not be shown before trial. *People v Williams* (1989) 48 C3d 1112, 1126, 259 CR 473. See *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181, 1211. Only a reasonable likelihood that a fair trial cannot be had must be shown. Reasonable likelihood has been defined as less than "more probable than not" (*People v Williams, supra*), but more than "merely possible" (*People v Bonin, supra*).

When a pretrial petition for writ of mandate is filed challenging a court's change of venue ruling, the reviewing court independently reviews the evidence presented to the trial court to satisfy itself that the defendant will obtain a fair and impartial trial. *Maine v Superior Court* (1968) 68 C2d 375, 382, 66 CR 724. See discussion in §15.36. Actual prejudice need not be shown before trial, only on appeal. On appeal after conviction, a defendant must show both error and prejudice. *People v Fauber* (1992) 2 C4th 792, 817, 9 CR2d 24; *People v Edwards* (1991) 54 C3d 787, 807, 1 CR2d 696. For further discussion, see §15.38.

Ø **Note:** Although, in arguing for a change of venue, counsel's primary focus should be on state law; counsel should take care, as with other claims, to federalize the issue. To preserve it for the federal courts, defense counsel must argue that failure to grant a change of venue will violate the defendant's right to an impartial jury under the Sixth and Fourteenth Amendments to the U.S. Constitution and to due process under the Fourteenth Amendment. In death penalty cases, counsel should also state the relevant Eighth Amendment grounds.

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2. The Five Factors

§15.5 a. Use of Five Factors

When a motion for change of venue is brought before trial, the court must necessarily predict whether jurors called to hear the case are going to have been adversely affected by the publicity. Any considerations that assist the court in answering this question are relevant. The supreme court has repeatedly classified these considerations into the five categories discussed below. Note, however, that some of the supreme court's decisions have lumped the status of the victim and of the defendant together as a single category, and some decisions have added, as an additional category, whether the case has generated any political controversy. See *e.g., People v Hamilton* (1989) 48 C3d 1142, 259 CR 701; *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492. This factor is not required, however; it is used only when present in the case, as a factor supporting a change of venue. For examples of cases in which the political controversy surrounding the crime played a major role in the decision to change venue, see *Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777, and *Smith v Superior Court* (1969) 276 CA2d 145, 80 CR 693. See also §15.10A.

The courts weigh each factor as it affects the need for a change of venue. In weighing each factor, the courts ask whether the factor (1) supports a change of venue, (2) supports retention of the case in the venue, or (3) is neutral with respect to venue. The court then balances the factors against each other. If most of the factors point in a certain direction, either for or against a change of venue, the court generally rules in a like fashion. *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492; *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455; *Martinez v Superior Court* (1981) 29 C3d 574, 174 CR 701. At the same time, it is clear that strong prejudice found in consideration of even one of these factors can be enough to require a change of venue. *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724.

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§15.6 b. First Factor: Nature and Gravity of Offense

The "nature" of an offense refers to the peculiar facts or aspects of a crime that make it sensational, or otherwise bring it to the consciousness of the community. Its "gravity" refers to its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict. *People v Hamilton* (1989) 48 C3d 1142, 1159, 259 CR 701; *Martinez v Superior Court* (1981) 29 C3d 574, 582, 174 CR 701. This factor weighs heavily in favor of a change of venue in capital cases. *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492; *Martinez v Superior Court, supra*. However, this factor alone does not require a change of venue. *People v Ramirez* (2006) 39 C4th 398, 432, 46 CR3d 677 (no change of venue in "Night Stalker" case); see *People v Jenkins* (2000) 22 C4th 900, 95 CR2d 377.

The more sensational the portrayal of facts of a case, the more likely it is that jurors will notice, remember, and be prejudiced by publicity. *Corona v Superior Court* (1972) 24 CA3d 872, 877, 101 CR 411. But see *People v Staten* (2000) 24 C4th 434, 449, 101 CR2d 213, which contrasted a multiple murder of parents in Los Angeles County to better-known and similar cases, like that of the Menendez brothers. Cases that involve mass murders or serial killings are more likely to engender the kind of publicity that requires a change of venue. The same is true of cases that have racial or sexual overtones. See the cases cited in *People v Hamilton* (1989) 48 C3d 1142, 1159, 259 CR 701. However, this does not mean that all crimes with facts that capture the public interest will require a change of venue, because this factor must be considered in conjunction with the others. *People v Zambrano* (2007) 41 C4th 1082, 1124, 63 CR3d 297, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (case featured on *America's Most Wanted*); *People v Jennings* (1991) 53 C3d 334, 363, 279 CR 780; *People v Harris* (1981) 28 C3d 935, 171 CR 679.

Prosecutors may argue that the nature of the case will be equally bad wherever the case might be moved. Thus, a cop-killing will still be a cop-killing in the new venue. As the supreme court said in *People v Edwards* (1991) 54 C3d 787, 808, 1 CR2d 696, about the killing of one girl and attempted murder of another, "Prospective jurors would sympathize with the girls' fate whether the trial is held in Santo Domingo in the Dominican Republic, Orange County, or any other county in California. The horrendous crime, not the locale or trial, evokes the sympathy." Defense lawyers may respond that the local notoriety of the case—"our" cop and local girls as victims—increases the prejudice. Besides, the argument would virtually mean that the more horrible the nature of the crime, the *less* need for a change of venue.

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§15.7 c. Second Factor: Nature and Extent of News Coverage

Extent of publicity. The *extent* of news coverage is quantitatively measured by items like the number of newspaper articles (and electronic coverage, including television, radio, and Internet), their pattern, their prominence, and other factors such as the number of pictures, editorials, and letters to the editor. The *nature* of publicity is qualitatively measured. If coverage has been inflammatory or sensational in nature, a venue change is more likely to be granted. *Corona v Superior Court* (1972) 24 CA3d 872, 877, 101 CR 411. Coverage that has featured pictures of the scene or the victim and has contained detailed descriptions of the crime using graphic language weighs in favor of a change of venue. *Martinez v Superior Court* (1981) 29 C3d 574, 582, 174 CR 701. The same is true when there have been editorials about the crime and its ramifications *People v Hamilton* (1989) 48 C3d 1142, 1156, 259 CR 701. In contrast, straightforward factual coverage does not argue in favor of a change of venue. *Odle v Superior Court* (1982) 32 C3d 932, 941, 187 CR 455.

Extensive publicity, even if factual in nature and noninflammatory, can weigh in favor of a change of venue. *Martinez v Superior Court* (1981) 29 C3d 574, 580, 174 CR 701. Whether it does so depends on how typical the coverage is for that type of crime. A venue change is unlikely based only on this factor if the coverage is typical of the amount one would expect from a crime of that nature. *People v Ainsworth* (1988) 45 C3d 984, 1000, 248 CR 568. For the best description of the type of publicity that, even though extensive, does not in and of itself require a change of venue, see *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455.

Nature of publicity. The *nature* of the publicity focuses on the analysis of its content. Major problems arise when the coverage is, first, inflammatory, involving emotionally charged language such as "execution-style killing." See *Williams v Superior Court* (1983) 34 C3d 584, 589, 194 CR 492, for the best examples of inflammatory and other prejudicial publicity.

Second, the coverage may be inaccurate. That could be prejudicial, for example, if it had been reported that the defendant had confessed or had a prior record of violence, but this was not true. Third, certain facts reported in the media may be inadmissible at trial, such as an excluded confession or the defendant's criminal record. Such coverage can be highly prejudicial.

Finally, extensive publicity that is noninflammatory and factual in nature, that is accurate, and that is admissible at trial may still provide support for a change of venue if heavily guilt oriented. *Williams v Superior Court* (1983) 34 C3d 584, 590, 194 CR 492; *Corona v Superior Court* (1972) 24 CA3d 872, 877, 101 CR 411.

> Ø **Note:** It was not error to refuse to change venue in the highly publicized "Night Stalker" case when the extent of coverage was not unprecedented in Los Angeles County and defendant did not show that the coverage was unfair or biased against him or revealed incriminating facts. *People v Ramirez* (2006) 39 C4th 398, 432, 46 CR3d 677.

This is because legal procedures essential to a fair adjudication of guilt require that the jury's verdict be based on evidence received in open court, not from outside sources. *Sheppard v Maxwell* (1966) 384 US 333, 351, 16 L Ed 2d 600, 613, 86 S Ct 1507. Coverage of the evidence and conclusory statements of guilt from officials may erode the defendant's presumption of innocence, forcing the defendant to disprove his or her guilt.

When pretrial publicity has been geographically widespread and pervasive throughout the state, however, a court may deny change of venue on the sensible ground that it would do no good. *People v Davis* (2009) 46 C4th 539, 578, 94 CR3d 322 (second motion to change venue after case was moved from Sonoma to Santa Clara County); *People v Venegas* (1994) 25 CA4th 1731, 1738, 31 CR2d 114; *People v Manson* (1976) 61 CA3d 102, 174, 132 CR 265. Nevertheless, even in the face of widespread state and even national publicity, it may be necessary to change venue where the case has high local notoriety. That is the difference between the Oklahoma City bombing case and the "Unabomber" case. There was high local notoriety to the people of Oklahoma in the former, but far less so in Sacramento, where the "Unabomber" was tried.

A change of venue is more apt to be granted when the coverage has continued up to trial. *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492. The reverse is true: Even when the coverage was extensive at the time of the offense, a change of venue is unlikely if publicity has abated by the time of trial. *People v Jennings* (1991) 53 C3d 334, 363, 279 CR 780; *People v Adcox* (1988) 47 C3d 207, 231, 253 CR 55; *Odle v Superior Court, supra*.

> Ø **Note:** Periodically, very well-publicized cases are tried without resulting in conviction, both in counties with large jury pools (*e.g., People v [O.J.] Simpson*) and in counties with significantly smaller jury pools (*e.g., People v [Michael] Jackson*). Arguments using these cases as examples may prove initially effective in advancing the claim

that notwithstanding the amount of publicity, not guilty verdicts are possible. However, analysis of the publicity in cases involving well-known figures demonstrates that the publicity often raises questions about the strength of the state's evidence. Moreover, well-publicized cases involving public figures can result in conviction (*e.g.,* the Martha Stewart prosecution).

Presumption of prejudice in extreme case. In an extreme case, prejudice may be presumed when the community has been saturated with prejudicial and inflammatory media coverage about the crime. In determining whether prejudice should be presumed, the court should consider whether (*Daniels v Woodford* (9th Cir 2005) 428 F3d 1181, 1211):

- There has been a "barrage of inflammatory publicity immediately prior to trial, amounting to a huge… wave of public passion";
- News coverage was primarily factual, which tends to be less inflammatory than editorials or cartoons; and
- News coverage contained inflammatory or prejudicial material not admissible at trial.

For example, on habeas the Ninth Circuit disagreed with the California Supreme Court decision in *People v Daniels* (1991) 52 C3d 815, 277 CR 122, and held that a presumed finding of prejudice was compelled when, among other things, the murders of two police officers generated extensive and nearly continuous publicity immediately after the shootings and again before the trial, and media accounts described the shooter as an African-American paraplegic and identified the petitioner as the killer from the very beginning. Under these facts, the failure to change venue from Riverside County deprived the defendant of due process. See *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181, 1211. However, prejudice is to be presumed only in *extraordinary* cases. *People v Prince* (2007) 40 C4th 1179, 1216, 57 CR3d 543.

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§15.8 d. Third Factor: Size and Character of Community

The greater the size of the community from which the jury panel is drawn, the less the chance that a change of venue motion will be granted. See *People v Howard* (1992) 1 C4th 1132, 1167, 5 CR2d 268 (court observed that Tulare County, with 253,000 residents, was 20th most populous county among the 58 in the state and that most recent successful venue motions have involved communities with substantially smaller populations); *People v Edwards* (1991) 54 C3d 787, 806, 1 CR2d 696 (Orange County); *People v Ramirez* (2006) 39 C4th 398, 46 CR3d 677 (Los Angeles County). Stanislaus County, however, with a population comparable to Tulare County's, has been considered a smaller county for purposes of venue changes. See *Fain v Superior Court* (1970) 2 C3d 46, 84 CR 135; *In re Miller* (1973) 33 CA3d 1005, 109 CR 648; *Griffin v Superior Court* (1972) 26 CA3d 672, 103 CR 379. This theme has been echoed in several recent decisions, including *People v Staten* (2000) 24 C4th 434, 101 CR2d 213 (Los Angeles County), and *People v Welch* (1999) 20 C4th 701, 85 CR2d 203 (Alameda County).

Numbers alone, however, are not conclusive on whether venue should be changed. See, *e.g., People v Adcox* (1988) 47 C3d 207, 253 CR 55, in which a change of venue from Tuolumne County, a very small county, was denied. The key to analyzing this issue is whether it can be shown that the size neutralizes or dilutes the impact of adverse publicity. *People v Jennings* (1991) 53 C3d 334, 363, 279 CR 780. Changes of venue are occasionally made from large counties when warranted by the facts of the case. See, *e.g., Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777 (venue change from Los Angeles County; Rodney King case); *Smith v Superior Court* (1969) 276 CA2d 145, 80 CR 693 (same). For the size of the counties from which venue has been changed, see the chart in §15.39.

Ø **Note:** Trial court judges are able to be more sensitive to population size and other factors. As a practical matter, changes of venue are generally obtained in the trial court or not at all, whether in postconviction appeals or pretrial writs. To some extent, appellate decisions are misleading because, especially in postconviction cases, the appellate standard for reversal of the trial court's decision ("actual prejudice") on venue is more rigorous than in a writ case. See §15.38.

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§15.9 e. Fourth Factor: Status of Defendant in Community

If there is something about the defendant that makes him or her peculiarly subject to the hostility of the local community, venue is more likely to be changed. *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492 (defendant was a nonresident and an African-American—only 402 of county's 117,000 residents were African-Americans); *Frazier v Superior Court* (1971) 5 C3d 287, 293, 95 CR 798 (widespread distrust of hippies). However, the fact that the defendant is a member of a minority group or a nonresident of the county does not always weigh in favor of a venue change. The court also considers how the community reacts to these factors. See *People v Fauber* (1992) 2 C4th 792, 818, 9 CR2d 24 (although portrayed as a "new Mexican resident," there was nothing to show that defendant was member of any organization or group that aroused community hostility); *People v Adcox* (1988) 47 C3d 207, 253 CR 55 (although nonresident of county, defendant was otherwise undistinguished). In *People v Jenkins* (2000) 22 C4th 900, 944, 95 CR2d 377, the court specifically commented on the defendant's lack of prominence in upholding the denial of the change of venue.

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§15.10 f. Fifth Factor: Status of Victim in Community

The status of the victim in the community can arouse community passions against the defendant, arguing in favor of a change of venue. See, *e.g., Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492 (victim was member of prominent family of good reputation); *Frazier v Superior Court* (1971) 5 C3d 287, 95 CR 798 (victim was well-known physician whose funeral was one of largest in county's history); *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724 (community raised funds out of sympathy for victims' families).

For either the victim's or the defendant's status to weigh in favor of a change of venue, the status factor must be unique to the county of original venue so that its effect would not be present in a different venue. *People v Pride* (1992) 3 C4th 195, 225, 10 CR2d 636 (mere fact that jury would feel sorry for victim or her family is of little weight if jurors in any county in which case were tried would have same feelings); *People v Price* (1991) 1 C4th 324, 392, 3 CR2d 106.

There is some confusion in the law about whether the victim must have been prominent before death for this factor to support a change of venue. Cases like *People v Harris* (1981) 28 C3d 935, 948, 171 CR 679, suggest that prior prominence is required: "Although the murdered boys were popular among their friends and their families were respected in their neighborhood, there is no indication the victims or their families were 'prominent.'"

In *Odle v Superior Court* (1982) 32 C3d 932, 940, 187 CR 455, the supreme court suggested that posthumous celebrity status is sufficient to support a change of venue. In *Martinez v Superior Court* (1981) 29 C3d 574, 584, 174 CR 701, the court held that employment as a brakeman by the largest single employer in Roseville, the Southern Pacific Railroad, created victim prominence deriving from the status of his employer.

> Ø **Note:** Defense counsel should argue that the status of the victim should affect the need to change venue only to the extent that the victim's status generates prejudicial pretrial publicity and that status may arise either before death or after. The local posthumous status of the victim may be far more prejudicial to the fair trial rights of a criminal defendant (see, *e.g., People v Davis* (2009) 46 C4th 539, 94 CR3d 322 (victim was child)) than the predeath prominence of a victim (see, *e.g., Frazier v Superior Court* (1971) 5 C3d 287, 95 CR 798 (victim was well-known doctor); *Martinez v Superior Court* (1981) 29 C3d 574, 584, 174 CR 701 (victim worked for county's largest employer)).

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§15.10A 3. Additional Factors Considered by Court

Political or controversial factors. Political or controversial factors are not required for a change of venue, but if present will support a change, because they may cause jurors to decide the case on issues other than the defendant's guilt. At the appellate level, these factors may be seen in such matters as one of the trial attorneys running for office (*Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724), the kind of political controversy surrounding the beating of Rodney King (*Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777), or media reports that the case has imposed a heavy financial burden on the community (*People v Tidwell* (1970) 3 C3d 62, 71, 89 CR 44; see also *Frazier v Superior Court* (1971) 5 C3d 287, 95 CR 798; but see *People v Price* (1991) 1 C4th 324, 3 CR2d 106). At the trial level, such issues as local reaction to recent outbreaks of gang violence, concern about excessive numbers of parolees like the defendant coming to the community, protesters at the courthouse, a history of local hostility toward Native Americans, and the recent formation of local groups like MADD may weigh in decisions to grant changes of venue.

Death penalty. While the California Supreme Court has rejected a rebuttable presumption rule for venue changes in capital cases, the fact that the defendant is charged with the death penalty weighs heavily in favor of a venue change, as part of the gravity-of-the-crime test. *Martinez v Superior Court* (1981) 29 C3d 574, 174 CR 701. But see *People v Staten* (2000) 24 C4th 434, 101 CR2d 213, which involved capital offenses, but also a large county (Los Angeles). Counsel should review federal rulings on change of venue issues to ensure that the issues are properly "federalized" and be familiar with the level of deference accorded to state court findings and rulings on change of venue issues. See, *e.g., Patton v Yount* (1984) 467 US 1025, 81 L Ed 2d 847, 104 S Ct 2885.

Comments on guilt by government officials. California Rules of Professional Conduct 5-120(A) bans extrajudicial statements by attorneys "that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The ABA Standards for Criminal Justice: Fair Trial and Free Press (see http://www.abanet.org/crimjust/standards/fairtrial_toc.html), Standard 8-1.1(a), has a similar proscription, and Standard 8-1.1(b) specifically prohibits statements on a variety of topics, including a suspect's prior criminal record, the guilt of the defendant or the merits of the case or evidence, any confession or admission or failure to make a statement, and inadmissible evidence. Such statements by the prosecution can strongly support a change of venue. Prosecutors should avoid making such statements and should encourage law enforcement not to volunteer prejudicial facts or opinions, lest they be responsible for a change of venue. Note, too, that when much of the publicity is generated by the defense, prosecutors can use this fact to oppose a change of venue.

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B. Proceedings in Trial Court on Motion

1. Tactical Considerations

a. Defense Tactics

§15.11 (1) Deciding Whether to Make Motion

The defense must first consider whether it wants to seek a change of venue. The subject usually comes up at the beginning of a case, when media attention is focused on the defendant and publicity is generally unfavorable. Defendants are frequently upset about this and may demand that counsel seek a change of venue. Before rushing to file a change of venue motion, however, the defense attorney should consider a number of factors that weigh against requesting a change of venue:

- It is common for extensive, unfavorable publicity at the beginning of a case to all but disappear after the first court appearance, reviving briefly during the preliminary examination and trial. This type of publicity is usually insufficient to mandate a venue change. *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455.
- The defense may not obtain his or her choice for a new venue. The case may be changed from a larger, more liberal jurisdiction to a more conservative one. In addition, there may be factors in the case that a local jury is better equipped to understand than a jury from another county, such as racial tension between minorities and the police.
- Trying a case in another county has some practical disadvantages. An in-custody defendant may be isolated from his or her friends and family because of the distance. It is much more difficult for witnesses to get to court. Counsel may have difficulty finding temporary office space and may lack the ability to write the "overnight motions" that are often required during trial. Trying a case "from a suitcase" is an onerous experience, and the logistical difficulties should not be underestimated.

What these factors suggest is that in a number of situations it is not in the client's best interest to change venue, even in high-publicity cases. See *Odle v Superior Court, supra*.

In both private and publicly funded cases, defense counsel should carefully assemble information pertinent to assessing whether a change of venue should be brought from the time of his or her first involvement in a case. In a publicly funded case, counsel should plan to make timely and early requests for funding of venue-related research, particularly in the form of public opinion surveys (discussed in §§15.12, 15.20). See Cotsirilos & Philipsborn, *A Change of Venue Road Map,* NACDL Champion (July 1986); to obtain this article, contact the National Association of Criminal Defense Lawyers (NACDL) at their website: http://www.nacdl.org. See also California Death Penalty Defense Manual, available from the California Attorneys for Criminal Justice on their website at http://www.cacj.org/Publications.aspx. With the advent of the Internet, counsel can readily assemble documentation of the publicity attending a case to support the necessity for ancillary funds. See Cushner et al., *Spreading the News: Communicating With the Media During High-Profile Trials,* 93 Judicature 52 (2009), on collecting information about the nature and pervasiveness of coverage.

There are tactical reasons for counsel to address issues of pretrial publicity and a possible change of venue motion early in the proceedings. If the case is to remain in the local venue, prejudice must be minimized. Sensitizing the court and other parties to the cost of a venue change may help and will also place responsibility for minimizing prejudice should the motion become necessary.

One of the problems with a venue motion is that it often generates very adverse publicity both with respect to the prejudicial aspects of the coverage and to the fact that residents believe that the defendant is guilty. The motion for a change of venue may help with other issues, however, such as achieving better voir dire conditions or obtaining a severance. In some instances, defendants who were unwilling to accept a plea offer may reconsider after a venue hearing that emphasizes the worst aspects of the case and the community's reaction to it.

Ø **Note:** Even when counsel decides not to move for change of venue before trial, he or she should prepare to make the motion during voir dire if it appears at that time that an impartial jury cannot be impaneled. If made during voir dire, the motion should be repeated at the end of the jury selection and before the swearing in of the jury as well, to preserve the record. Counsel must make it clear that the jury as seated is unacceptable, should exhaust all peremptory challenges (or explain why they are not being exhausted), and should request additional peremptory challenges, or risk waiving the venue issue. Counsel should also consider carefully documenting ways in which adverse publicity affected the case, for presentation in further motions made during trial or during a

motion for new trial.

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§15.12 (2) Defense Use of Public Opinion Surveys

Counsel should consider conducting a professional "public opinion" survey, or poll, to show the effects of publicity on the jury pool. These results can both assist counsel in determining if a change of venue is advisable, and support the motion if it is to be made. Without such a community survey, it is much more likely that the trial court will wait until jury voir dire before deciding whether to change venue. *People v Daniels* (1991) 52 C3d 815, 277 CR 122; *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455. Because experienced venue pollsters design venue studies according to the legal principles that govern venue decisions, many attorneys consider such studies crucial to a successful motion. For further discussion of public opinion surveys, see §15.20.

The survey should be completed a few weeks before the venue hearing so that the results will not be dated. The prosecution may wish to conduct its own survey, but the results are likely to be fairly close to those of the defense survey if they were both professionally done. The real issue is not the percentage who recognize the case and claim to have prejudged it, but what those numbers mean to the defendant's fair trial rights.

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§15.13 (3) Steps to Reduce Publicity

Even when counsel in a high publicity case decides not to make a change of venue motion before trial, counsel should still take steps to reduce prejudicial publicity. A first step is to ask the prosecutor and law enforcement to stop releasing prejudicial information about the case. If this is not accomplished voluntarily, counsel may seek a gag order. See discussion of gag orders in §§14.19A-14.26.

Defense counsel face a dilemma in deciding whether to talk to the media. On one hand, speaking about the case may contribute to further coverage of the case, and may allow the judge to blame counsel for fueling prejudicial publicity. On the other hand, counsel may be able to make positive statements about the case that will defuse earlier negative publicity.

Counsel may ask that police reports, grand jury transcripts, and other material be sealed, at least materials that contain inculpatory, inadmissible, or inflammatory matters. See discussion in §14.11. A similar request can be made for pleadings that refer to case reports or evidence.

Counsel may request that hearings be closed, in whole or in part. See discussion in §§14.12-14.16. In the alternative, counsel may ask that no electronic media be permitted in the courtroom, and that, to the extent practicable, no pictures be taken of the defendant.

Once counsel is assigned a trial judge, counsel should sensitize the judge to the potential for damaging the defendant's fair trial rights. This may be done through a brief with some of the same materials and case law that counsel would otherwise have introduced in a change of venue motion.

See also the checklist of alternatives to a change of venue motion in §15.40.

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§15.14 (4) Documenting Media Coverage

Irrespective of whether a change of venue motion will be filed, in high publicity cases, counsel should systematically document all media coverage from the beginning of the case to the end. Copies of newspaper articles showing the date of publication, name of newspaper, and page number should be obtained, and counsel should obtain circulation figures for these papers. Often, hiring a "clipping" service to do this is advisable. There are clipping services that cover radio and television as well. There can be substantial charges for these services, especially for clips of television coverage. The Internet is also an alternative means of assembling, and monitoring, media coverage. Most newspapers now post articles online, or make items available through Web-accessible listservs.

If counsel decides to personally obtain articles from major newspapers, such articles may be located on the Internet by using a few key words from the case, then downloaded. Video information is also available on the Internet. All papers with any significant circulation in the county should be monitored. Radio and television stations that cover news in the area should be contacted. They will often provide logs showing the time that stories about counsel's case were aired and the duration of the story. Radio stations often provide scripts of news items and recordings of the broadcast. Television stations may provide recordings of their coverage. If these items are not provided voluntarily, they should be subpoenaed. Recorded media are routinely destroyed or recycled, so counsel should try to obtain them as soon as possible. The organized and indexed volumes of publicity, along with a content analysis, will probably be exhibits in any motion for change of venue.

> Ø **Note:** As noted above, the Internet is a useful source of information about cases, and information about a case or defendant may appear on the Internet in forms other than online versions of newspaper articles. Internet sources include chat rooms, blogs, sites devoted to the victim or other aspects of the case, nonscientific surveys, unpublished news items, transcripts, and other items. Internet sites often log the number of "hits," which may help document the amount of interest generated. Internet sites can also document the extent of community knowledge of the details of a given case. Counsel should also check for items such as "missing" posters, reward notices, T-shirts, signs, and similar objects.

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§15.15 (5) Making Motion

Although change of venue motions are not rare, many experienced criminal attorneys have never handled one. Counsel bringing their first change of venue motion may obtain useful assistance from professional colleagues or organizations. Some social scientists as well as some trial consultants have extensive experience with this issue and can be very helpful in deciding whether the motion should be made, what interim steps should be taken, and how to present the issues to the court if counsel decides to proceed with the motion. Such an expert can prepare an analysis of the publicity, provide a declaration to help secure funding, design and have administered a public opinion survey to measure prejudice, and prepare and present testimony at an evidentiary hearing. The expert should be contacted as early as possible in the proceedings to obtain the maximum benefit from his or her services. Some counsel and certain experts may suggest the use of more than one survey in a given case, particularly if it appears that the jury pool's opinion of guilt is likely to have increased as a result of persistent publicity. Having a measure of the change in community and jury pool attitudes toward a particular case may prove important in a specific case.

Generally, it is in the defendant's best interest to have the trial court rule on a change of venue motion before jury selection. Courts frequently want to defer ruling on the motion until after voir dire. For further discussion, see §15.22. Typically, the court will say that the motion is denied without prejudice and may be renewed during or after voir dire. Indeed, failure to renew a motion for change of venue after voir dire may waive the issue. *People v Hart* (1999) 20 C4th 546, 598, 85 CR2d 132. This is true even when additional information bearing on prejudicial publicity arises during voir dire. *People v Jenkins* (2000) 22 C4th 900, 945, 95 CR2d 377. There are several reasons why waiting until during or after voir dire is undesirable from the defense perspective. During voir dire, prospective jurors are apt to minimize their exposure to publicity and deny that they have formed an opinion because of it. Moreover, the defendant will not have adequate opportunity to seek pretrial review of the court's decision by way of writ after jury selection. And appellate courts will be reluctant to stay trial court proceedings so late in the process and will probably simply refuse to review the issue before trial. Finally, it is extremely difficult to have an adverse venue decision reversed on appeal. See §15.38. Thus, defense counsel should press the trial court to grant a change of venue motion at the pretrial hearing. If the motion is denied, review of that decision by way of writ should be sought immediately. Counsel should urge the court to grant the motion, presenting an analysis based on the five factors discussed in §§15.6-15.10. A few of the arguments that can be included under the five factors are set out below. Note that some can be used to illustrate more than one factor.

Nature and gravity of offense:

- The crime is heinous and has therefore created a great deal of desire in the community for revenge. *People v Tidwell* (1970) 3 C3d 62, 66, 89 CR 44.
- The accounts were capable of eliciting a hostile response from their audience, including terms like "sexual assault," "rape," "bullet-ridden body," and "execution-style killing." *Williams v Superior Court* (1983) 34 C3d 584, 590, 194 CR 492.

Nature and extent of news coverage:

- Prejudicial publicity is pervasive throughout the community. *Corona v Superior Court* (1972) 24 CA3d 872, 875, 101 CR 411.
- News coverage has been inaccurate and biased against the defendant. See *People v Gomez* (1953) 41 C2d 150, 161, 258 P2d 825 (deploring inaccurate news story, but finding no prejudice to defendant under circumstances).
- Although news coverage has been accurate, it has engendered a feeling that the defendant must be guilty. *Corona v Superior Court, supra*.
- Inadmissible evidence has been reported. *Marshall v U.S.* (1959) 360 US 310, 312, 3 L Ed 2d 1250, 1252, 79 S Ct 1171; *Maine v Superior Court* (1968) 68 C2d 375, 386, 66 CR 724.
- News coverage has continued unabated. *Martinez v Superior Court* (1981) 29 C3d 574, 174 CR 701; *People v Tidwell* (1970) 3 C3d 62, 76, 89 CR 44.
- News coverage is limited to the community where the crime was allegedly committed; there has been little or no publicity in other counties. See, *e.g., Steffen v Municipal Court* (1978) 80 CA3d 623, 145 CR 782.
- Publicity concerning the place where defendant was arrested has dominated the news media for several years and is prejudicial to defendant's case. *Steffen v Municipal Court, supra*.
- The broadcast of defendant's confession was so prejudicial that it requires a change of venue. *Rideau v*

Louisiana (1963) 373 US 723, 10 L Ed 2d 663, 83 S Ct 1417.

Status of defendant in community:

- The defendant is not well accepted in the community. *Frazier v Superior Court* (1971) 5 C3d 287, 294, 95 CR 798 (defendant a "hippie").
- The defendant is a member of a minority group that is quite small in the county, and the victim is a member of the majority group. See *Williams v Superior Court* (1983) 34 C3d 584, 591, 194 CR 492 (white victim, African-American defendant).

Status of victim in community:

- The victim is a prominent community leader. *People v Tidwell* (1970) 3 C3d 62, 65, 89 CR 44.
- The community has raised funds out of sympathy for the victim or the family. *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724.
- The defendant is a member of a minority group that is quite small in the county, and the victim is a member of the majority group. See *Williams v Superior Court, supra* (white victim, African-American defendant).
- The victim is prominent in the community because of his or her employer. See *Martinez v Superior Court* (1981) 29 C3d 574, 584, 174 CR 701.

Size and character of community:

- The community has raised funds out of sympathy for the victim or the family. *Maine v Superior Court*, *supra*.
- The community is small, and the chance of obtaining jurors who know nothing of the case, or who are unprejudiced, is slight. See *Maine,* 68 C2d at 386.
- Jurors will probably feel pressure from the community to avenge the deaths of the victims. *Corona v Superior Court, supra*.

Ø **Note:** Include in the above category elements in the publicity that showed the small-town response to the crime, such as flying the flag at half-mast, reports of gossip and rumors, widespread participation by the community in a victim search or memorial service, and comments posted in response to online newspaper articles. A survey can be used to demonstrate the community response. See §15.20.

Political or controversial factors:

- One or both attorneys in the case are running for political office. *Williams v Superior Court* (1983) 34 C3d 584, 594, 194 CR 492; *Maine v Superior Court* (1968) 68 C2d 375, 388, 66 CR 724.
- The case has raised political or other controversial issues. See *Smith v Superior Court* (1969) 276 CA2d 145, 149, 80 CR 693.
- High level of political controversy generated by the case. See *Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777.

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§15.16 b. Prosecution Tactics

Position on motion. It is usually in the People's best interest to oppose change of venue motions made by the defense. A change of venue is expensive. The cost of the proceeding is borne by the county of original venue and is understandably higher than if the case were to be tried locally. Also, the inconvenience of trying a case in another county is usually felt more strongly by the prosecution. Although a prosecutor can usually arrange for office support with the district attorney of the new county, it is the prosecutor who usually has the most witnesses. It is more difficult to interview witnesses and schedule their testimony when they have to travel long distances to court. The prosecution can also argue that moving the trial may impose a substantial burden on victims and their families as well as lead to a significant delay in the trial.

In some cases, strong evidence exists that the defendant cannot have a fair trial in the county of original venue. In that situation, a prosecutor should consider agreeing to a change of venue to prevent possible reversal on appeal. The fair trial problem may not become clear until voir dire, however, so a prosecutor may well be justified in opposing the motion until that time. The prosecutor should argue that even if many are prejudiced, the court needs only 20 or so jurors, and in a county with a large population, that should prove easy to do. The prosecutor may also suggest better voir dire procedures to cope with any problems. Other steps less drastic than a change of venue that may be taken to deal with any community prejudice include questionnaires, individualized and sequestered voir dire or questioning in small groups, delay, and intracounty transfer. A strong case for a prosecutor opposing a change of venue arose in *People v Harris* (1981) 28 C3d 935, 950, 171 CR 679, in which the California Supreme Court held that although most prospective jurors will have an opinion about high-profile cases, "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on evidence presented in court." Thus, even a survey showing that most prospective jurors believe the defendant is guilty is insufficient to require a change of venue absent a showing that prospective jurors cannot set aside their beliefs and decide the case fairly.

When publicity should be documented. In highly publicized cases, prosecutors should undertake the same steps of documenting publicity as defense counsel (discussed in §15.14). The prosecution may also want to undertake its own opinion survey, or consult with an expert who can evaluate the reliability of the defense survey. See §§15.12, 15.20 on public opinion surveys. Experts have raised questions about the impact of publicity on jury pools, and some hearings in change of venue cases have focused on the current state of knowledge about this issue.

Prosecutors should consider taking steps to minimize the kind of publicity that could lead to a venue change. This is not to suggest that the public's "right to know" should be compromised, but law enforcement agencies can be cautioned to avoid inflammatory statements and instead to provide only factual information about the crime and its investigation.

Factors against change of venue. The following are several of the factors that are important in urging a court *not* to change venue:

- The offense is so minor that it has engendered little community interest. See *People v Mendonsa* (1982) 137 CA3d 888, 895, 187 CR 363 (crime not grave; penalty not high; community interest not prejudicial); *Clifton v Superior Court* (1970) 7 CA3d 245, 252, 86 CR 612.
- The victim's standing in the community will not influence a local jury. See *Odle v Superior Court* (1982) 32 C3d 932, 940, 187 CR 455 (victims both private persons but one became posthumous celebrity).
- The community is so large that the court will probably be able to select jurors who have not heard of the case. *Odle v Superior Court, supra; People v Harris* (1981) 28 C3d 935, 949, 171 CR 679.
- News coverage has abated. *Odle v Superior Court, supra* (2 years since crime); *People v McCracken* (1952) 39 C2d 336, 343, 246 P2d 913 ("public feeling" died down in 11 weeks).
- News reporting has been accurate; nothing has been reported that is not factual. *Odle v Superior Court* (1982) 32 C3d 932, 936 n2, 187 CR 455; *People v Whalen* (1973) 33 CA3d 710, 716, 109 CR 282.
- News coverage has been infrequent and in newspapers with small circulation. See *Odle v Superior Court* (1982) 32 C3d 932, 940, 187 CR 455 (inflammatory articles received limited circulation).
- News coverage is so widespread that there is no county in California in which coverage would be any less prejudicial. *People v Manson* (1976) 61 CA3d 102, 175, 132 CR 265.
- Although news coverage has been prejudicial, surveys or voir dire of jurors indicate that unbiased jurors are available. *People v Mendonsa* (1982) 137 CA3d 888, 895, 187 CR 363; *People v Martinez* (1978) 82 CA3d 1, 14, 147 CR 208. It is not necessary that jurors be ignorant of prejudicial publicity, or that they not have formed an opinion concerning defendant's culpability. It is only necessary that they be willing to set aside all impressions and base their verdict only on the evidence presented in court. *People v Harris* (1981) 28 C3d 935, 949, 171 CR

679.

Urging later ruling on motion. Prosecutors who have decided to oppose a pretrial change of venue motion may want to urge the court to deny it without prejudice, and allow the defendant to renew it during voir dire if juror responses suggest they have been prejudiced by publicity. Juror responses on voir dire can provide the basis for rejection of an unfair pretrial publicity claim. See, *e.g., People v Coleman* (1989) 48 C3d 112, 255 CR 813. Both sides can use the opinion in *Odle v Superior Court, supra,* to help form their arguments; the prosecution will find their best arguments in the majority opinion, the defense will find theirs in the dissent written by then Chief Justice Bird. See §15.19 for discussion of evidence to oppose the motion.

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§15.17 2. Timing of Bringing Change of Venue Motion

Except for good cause shown, a motion for change of venue must be filed at least 10 days before the date set for trial. Cal Rules of Ct 4.151(a). See *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724. See also *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492; *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455; *Frazier v Superior Court* (1971) 5 C3d 287, 95 CR 798. If the motion is denied, it should be renewed during or after voir dire. *Odle v Superior Court, supra*. See, *e.g., People v Pride* (1992) 3 C4th 195, 10 CR2d 636. Failure to renew a previously denied motion after voir dire may waive the right to challenge the court's ruling on appeal. Compare *People v Howard* (1992) 1 C4th 1132, 1166, 5 CR2d 268, with *People v Bean* (1988) 46 C3d 919, 941, 251 CR 467, and *People v Jennings* (1991) 53 C3d 334, 359, 279 CR 780. In *Howard,* the court found no waiver because the motion was renewed. In *Bean* and *Jennings,* the motions were not renewed but the court reached the issue of denial of the motion on the merits and did not discuss the issue of waiver.

Although a motion to change venue based on prejudicial publicity can be made for the first time during or after voir dire if the voir dire discloses the prejudice (*Odle v Superior Court, supra*), there are several practical reasons such timing should be avoided. First, counsel will face serious problems in obtaining other evidence to support such a motion on short notice. Second, the trial court will probably be reluctant to grant the motion after investing time in selecting a jury. Third, as a practical matter it is unlikely that a trial judge who may have just denied a challenge to a juror for cause based on prejudice stemming from publicity will grant a motion to change venue a short time later. Finally, counsel will not have time to seek pretrial writ review of a decision denying the motion.

As a practical matter, the motion should be heard 3 weeks or so before trial. See Cal Rules of Ct 4.151(a). If brought earlier, the survey and the publicity review will be less comprehensive and may be too dated. A greater concern is that, if the motion is presented too close to the trial date, the court will be more likely to wait until voir dire to decide the venue issue. Once prospective jurors have been called and scheduling commitments have been made, the court may wish to follow its natural inclination to try to pick a jury in spite of the evidence presented at the venue hearing.

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§15.18 3. Format and Filing of Change of Venue Motion

A motion to change venue must be in writing. Cal Rules of Ct 4.150-4.151. The motion typically consists of five parts:

- A notice of motion (see Cal Rules of Ct 4.151) setting the case for an evidentiary hearing on the motion.
- A supporting memorandum (see Cal Rules of Ct 4.111) that contains a statement of facts summarizing the pretrial publicity in light of the five factors discussed in §§15.6-15.10, and a legal argument that applies the reported decisions to those facts. The statement of facts is extremely important and should re-create in detail the publicity concerning the case and its prejudicial import.
- A declaration under penalty of perjury, or affidavit (CCP §2015.5), in support of the motion is required. Cal Rules of Ct 4.150-4.151. The declaration should serve the function of giving the factual basis for the motion; a declaration that just states an opinion that the defendant cannot receive a fair trial is inadequate. *People v Congleton* (1872) 44 C 92, 95. In practice, the declaration is frequently made by counsel and analyzes the publicity in light of the five factors discussed in §§15.6-15.10. The declaration, however, may be done by a social scientist. A declaration filed in a California case by an expert social scientist, weaving together the law, a content analysis of the publicity, an explanation of the survey results, and a consideration of alternative remedies is reproduced in National Jury Project, Jurywork: Systematic Techniques, §7.08[2] (2d ed 1983). The change of venue motion was granted in that case.

  Ø **Note:** A declaration from a prominent member of the local community or a person respected as an observer of local court proceedings can supply the local trial court, as well as a reviewing court, with an informed perspective on the impact of the case in the local community.

- Exhibits of actual publicity in the case; if a jury pool survey was done, that can also be attached as an exhibit.
- Proof of service (Cal Rules of Ct 4.111; CCP §1013a).

Except for good cause shown, the motion must be filed with the court at least 10 days before the date set for trial and served on the prosecutor at least 10 days before the hearing on the motion. Cal Rules of Ct 4.150-4.151.

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§15.19 4. Prosecutor's Response

A prosecutor may oppose a motion for change of venue that was made on grounds that the defendant cannot obtain a fair trial, or that all jury panels have been exhausted, by filing counteraffidavits. Cal Rules of Ct 4.151(a). Counterdeclarations may be substituted for counteraffidavits. CCP §2015.5. Although Cal Rules of Ct 4.151 states that the counterdeclarations or counteraffidavits may be filed at the hearing on the motion, the better practice is to file and serve them earlier. On form and filing requirements for motions, see Cal Rules of Ct 4.111, discussed in §18.5.

The prosecutor may also file a qualified public opinion survey. On public opinion surveys, see §§15.12, 15.20. On evidence that may be introduced at the change of venue hearing, see §15.21.

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§15.20 5. Public Opinion Surveys

There is increasing use of qualified public opinion surveys that directly measure the attitudes of potential jurors. This type of evidence was expressly sanctioned by the supreme court in *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724. A "qualified" survey means a survey that is well conceived, impartially conducted, and accurately recorded. *Corona v Superior Court* (1972) 24 CA3d 872, 882, 101 CR 411. Public opinion surveys are used to provide the court with two major forms of information. First, the survey shows the percentage of the surveyed population that recognizes the case. In specific surveys, efforts will be made to reach a representative cross-section of the jury-eligible population so that the integrity of the public opinion survey can be defended on the basis that it has reached those likely to serve on the county's juries. Second, the survey will be designed to measure the opinion of guilt held by the persons surveyed, thereby describing for the court the percentage of the population that believes that the accused is actually guilty of the crime. Sophisticated surveys may also be designed to describe specific details of the case taken into account by those surveyed in arriving at their opinions of guilt.

Ø **Note:** Testimony of witnesses that other members of the community refused to tell defense representatives that they could not give defendant a fair trial because they did not want venue changed is also admissible. See, *e.g., People v McKay* (1951) 37 C2d 792, 796, 236 P2d 145. See also *People v Suesser* (1901) 132 C 631, 635, 64 P 1095.

Ø **Note:** Standards for venue surveys have been promulgated by the American Society of Trial Consultants. *Guidelines for Survey Research in Connection With Motions to Change Venue* is available to members on the society's website at http://www.astcweb.org.

Counsel for indigent defendants may wish to apply to the court to authorize payment of experts to conduct a survey or do other necessary work concerning juror attitudes. The cost varies, but such surveys often cost upwards of $10,000 plus design costs if a survey expert is retained. In very high-profile cases, a comparative survey may be needed, *i.e.,* one that compares levels of prejudice in the local county with levels of prejudice in one or more outside counties. A comparative survey is useful when publicity has been massive both in and out of the local community, and when a venue issue may be that there will be prejudice wherever the case is tried, given its nature, *e.g.,* serial murders, cop killing, murder with sexual overtones, or murder of children. See §§18.10-18.12 on applications for the appointment of experts. For more detailed discussion of authorization of payment, including a list of cases by county in which expert services concerning the jury have been allowed, and the type of services, see National Jury Project, Jurywork: Systematic Techniques, App A (2d ed 1983). There is general discussion of change of venue motions in Jurywork, chap 8. For examples of cases in which surveys have been used, see *People v Pride* (1992) 3 C4th 195, 10 CR2d 636, and *People v Howard* (1992) 1 C4th 1132, 1168, 5 CR2d 268. Lower-cost alternatives to public opinion surveys are discussed in the California Death Penalty Defense Manual (CACJ-CPDA 2004). Note that recent case law suggests that poll results published in journals may be insufficient because the courts cannot gauge the adequacy of the polling and research methods employed. *Ramdass v Angelone* (2000) 530 US 156, 172, 147 L Ed 2d 125, 139, 120 S Ct 2113. A chart with information about post-*Maine* change of venue cases is in §15.39.

The trial court has the discretion to grant or deny funds to appointed counsel for a public opinion survey, but it cannot refuse to exercise discretion on the theory that voir dire of the jury is a better method of assessing the need to change venue. *People v Daniels* (1991) 52 C3d 815, 851, 277 CR 122. As the court points out in *Daniels,* a failure to exhaust peremptory challenges may waive the venue issue. For extensive discussion of how one gathers data for pretrial motions on juror bias, see Jurywork, chap 8.

Ø **Note:** In *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181, 1211, the Ninth Circuit disagreed with *People v Daniels* (1991) 52 C3d 815, 277 CR 122, finding that under the extreme circumstances of the case a finding of presumed prejudice was compelled and therefore due process was violated by not granting a change of venue. The Ninth Circuit also commented that, inexplicably, the trial court had denied the defense funding for ancillary services until it was too late for these services to be used.

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6. Nature of Hearing on Change of Venue Motion

§15.21 a. Presentation of Evidence

The defendant has the burden of proof and must be prepared to show facts supporting a request for change of venue. The question to be determined is whether, because of the dissemination of potentially prejudicial material, a reasonable likelihood exists that, without a change of venue, a fair trial cannot be had. A showing of actual prejudice is not required. "Reasonable likelihood" refers to a lesser standard of proof than "more probable than not." *People v Hamilton* (1989) 48 C3d 1142, 1156, 259 CR 701. When the issue is raised before trial, any doubt about the need for a change of venue must be resolved in favor of a venue change. *Williams v Superior Court* (1983) 34 C3d 584, 588, 194 CR 492. Usually, it is the publicity itself from which this inference can be made.

Ø **Note:** Defense counsel should prepare a summary of the content and the extent of publicity in addition to presenting the coverage itself.

If a public opinion survey was conducted, it too can be considered in evaluating juror impartiality. *Maine v Superior Court* (1968) 68 C2d 375, 383, 66 CR 724. See §§15.12, 15.20 on public opinion surveys. Counsel should analyze this publicity in light of the factors discussed in §§15.5-15.10A.

Ø **Note:** Counsel should bear in mind the difference between a challenge for cause to a particular juror and a motion to change venue, which challenges the entire panel. The fact that all jurors are qualified does not control the venue decision, which is far more searching and requires consideration of the responses of jurors who do not ultimately become members of the trial panel as well as those who do. *Odle v Superior Court* (1982) 32 C3d 932, 944, 187 CR 455.

There is little case law concerning the nature of the hearing on the motion. In practice, the evidence usually consists of counsel's declaration or affidavit, the exhibits filed with the motion, and the testimony of witnesses at the hearing. See *People v Pride* (1992) 3 C4th 195, 10 CR2d 636 (live testimony of expert); *People v Fauber* (1992) 2 C4th 792, 9 CR2d 24 (exhibits of media coverage); *Corona v Superior Court* (1972) 24 CA3d 872, 877, 101 CR 411 (public opinion surveys, opinion testimony offered by individuals, and court's own evaluation of nature, frequency, and timing of material involved are admissible); Cal Rules of Ct 4.151. Sophisticated hearings often involve testimony by the polling expert who conducted the survey, as well as a qualified social science expert who can testify about specific aspects of the survey research that tend to demonstrate that the case has acquired such a meaning in the given county that the trial should be moved. The expert may also be able to present a content analysis of the publicity, using legal and social science criteria; analyze other issues, such as the size and nature of the community and the extent and impact of media exposure; weigh alternative remedies; and express an opinion on the ultimate question of the need to change venue.

Ø **Note:** Counsel should be aware that there is a substantial social science literature on change of venue issues, including the impact of pretrial publicity, the effectiveness of voir dire and judicial instructions in protecting criminal defendants against prejudicial coverage, and related topics. In addition to publications that specialize in media and jury trials, publications such as *Judicature* also update relevant scholarship. The National Center for State Courts (see http://www.ncsconline.org) also maintains a list of publications on the media and the courts. Experts testify both for the prosecution and for the defense, interpreting the evidence of venue from different perspectives. If counsel hires an expert to assist with the motion, he or she should be familiar with this literature and should be able to address the strengths and weaknesses of arguments favoring various interpretations of the data.

Counsel should be sure that the declaration or affidavit and exhibits filed with the motion are admitted into evidence at the hearing. If opposing counsel is unwilling to stipulate to their admission, the witnesses necessary to establish the foundation for their admission should testify. For example, to introduce television station program recordings, a television station employee (such as the custodian of records or director of programming) who qualifies under the business records exception to the hearsay rule (Evid C §1271) will be needed to testify that a particular recording is the one actually aired, and about the channel on which it was aired and the dates and times it was shown. When possible, counsel should introduce recordings of the broadcasts themselves into evidence, and should be prepared to introduce transcripts of those recordings. Cal Rules of Ct 2.1040. Counsel should provide the court with a means of viewing the recording. For further discussion of introducing into evidence radio and television broadcasts, see *People v Welch* (1972) 8 C3d 106, 112, 104 CR 217; *In re Miller* (1973) 33 CA3d 1005, 1013, 109 CR 648.

Counsel should make sure that evidence of all available media coverage is part of the record: copies of newspaper articles; logs of radio and television coverage; transcripts of broadcast media coverage; audiotapes of radio coverage; and videotapes of television coverage. Each of these should be identified by source and date. There should be evidence of newspaper circulation and its geographical coverage, and equivalent evidence for the broadcast media.

Ø **Note:** In practice, the cost of acquisition of electronic coverage, the court time required to play and listen to it, and the fact that electronic coverage generally tracks what was in the newspapers (which are cheaper and easier to work with) make it impractical to invest much time or money in presenting the court with the electronic coverage, particularly the tapes themselves. A more useful approach is to do the quantitative analysis using just the station logs and to present a brief sampling of the television coverage to illustrate its powerful and emotional elements. However, presenting evidence in its native electronic format during hearings will give the court a sense of the nature and effect of media coverage in a form other than the traditional bound paper submissions.

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§15.22 b. Trial Court Response

There is conflicting language on the proper trial court response to a pretrial change of venue motion. The law appears to be that any doubt regarding a pretrial change of venue motion should be resolved in favor of a venue change. *Williams v Superior Court* (1983) 34 C3d 584, 588, 194 CR 492. Yet, in *Odle v Superior Court* (1982) 32 C3d 932, 943, 187 CR 455, the court sanctioned a trial court's denial of a defense pretrial change of venue motion in part because the denial would allow the trial court during jury voir dire to make a realistic evaluation of the effect, if any, of pretrial publicity. The court in *Williams*, however, said that its decision in *Odle* had not established a preference for a change of venue motion to be made at voir dire. *Williams v Superior Court* (1983) 34 C3d 584, 588 n2, 194 CR 492. The rules of court do not clarify this issue. Under Cal Rules of Ct 4.151(b), the transferring court is directed to consider attempting to impanel a jury before ordering a change of venue. The commentary to the section, however, undermines that language by stating that Rule 4.151(b) does *not* mean that the trial court should always attempt to impanel a jury.

The trial court should wait until voir dire to determine a change of venue motion only when it is not satisfied that prejudice was shown at the pretrial evidentiary hearing. Postponing the decision until after voir dire cannot be justified by the court's belief that, as a general proposition, voir dire is a better method to determine prejudice.

In addition, waiting until voir dire risks confusing the standard applicable to determining a change of venue motion with the standard applicable to determining whether a particular juror is biased. Some judges and prosecutors apparently hold the view that if 12 jurors plus alternates can be found at voir dire who can survive a challenge for cause, there is no need to grant a change of venue. However, the test that should be applied in deciding a change of venue motion "is separate from, and requires a far more searching analysis than, the decision to qualify a particular juror." *Odle v Superior Court* (1982) 32 C3d 932, 944, 187 CR 455. The lengths to which the trial court has to go to select a jury panel is also a significant factor in determining whether a change of venue should be granted. 32 C3d at 945.

It is important to remember that the standards used by appellate courts in reviewing change of venue motions are generally laid out in postconviction appeals, *i.e.,* after the change was denied and the defendant was convicted. Eighty-five of the 101 appellate decisions since the California law changed in *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724, were decided in appeals, with just 16 decisions on applications for a writ of mandate (see §15.39). Thus, much of the language in those decisions is not the proper standard for a trial court judge to apply in a pretrial motion. Under *Maine* (a writ case), a showing of actual prejudice is not required (68 C2d at 380). It would be impossible to show actual prejudice because no trial has occurred, and rarely has there been any voir dire. In the postconviction appeal, however, the standard "is retrospective and the test is whether the accused did, in fact, receive a fair and impartial trial." *People v Frogge* (1969) 270 CA2d 106, 112, 75 CR 517. The defendant must show "that the error was prejudicial, *i.e.,* that a fair trial was not *in fact* had" (*People v Cooper* (1991) 53 C3d 771, 806, 281 CR 90), and that the prospective jurors had "fixed opinions as a result of pretrial publicity" (*People v Bonin* (1988) 46 C3d 659, 673, 250 CR 687, overruled on another ground in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656). Some trial court judges confuse the two standards, requiring a showing of "fixed opinions" or "actual prejudice" to grant a change of venue, because that sort of language is found in many of the appellate decisions. Counsel must clarify to the court that the "reasonable likelihood" standard, which is less than a preponderance, with doubt resolved in favor of granting the change, is the appropriate standard to apply before trial. See Pen C §1033(a).

California appellate courts have ordered a change of venue in just 17 of 101 cases, the last time occurring in 1991 in *Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777 (the Rodney King case). However, at the trial level, courts frequently grant such motions. The experience of one of the authors, who has testified as an expert witness on venue issues in 98 criminal cases tried in California state court, is that the motion was granted in 45 cases, or 46 percent of the time.

> Ø **Note:** As a practical matter, defense counsel will tend to cite language from the writ cases (*e.g., Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492), and prosecutors will cite language from the postconviction cases (*e.g., People v Harris* (1981) 28 C3d 935, 171 CR 679).

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7. Further Actions if Pretrial Motion Is Denied

§15.23 a. Pretrial Writ Review

The defendant may seek writ review of denial of a pretrial motion to change venue. *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724; *Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777 (Pen C §§1049.5, 1050 do not eliminate defendant's right to pretrial writ review of venue motion denial). Writs are discussed in §§15.35-15.36. The advantage to the defense of seeking pretrial writ relief is that prejudice may be presumed before trial. In addition, an appellate court is less likely to be sympathetic to the venue issue when it forces a retrial, often years later, with the added expense and difficulty entailed.

The prosecution has the right to obtain pretrial writ review of alleged error in the granting of a motion for change of venue only if it can show that the trial court exceeded its jurisdiction and that the need for review outweighs the risk of harassment of the accused. *People v Superior Court (Stanley)* (1979) 24 C3d 622, 626, 156 CR 626.

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§15.24 b. Requesting Expanded Jury Voir Dire

Whenever counsel is concerned about the effect of pretrial publicity on juror attitudes, he or she should move the trial court for expanded voir dire on that issue. CCP §223; *Tapia v Superior Court* (1991) 53 C3d 282, 299, 279 CR 592 (concerns about publicity constitute good cause for expanded voir dire). Possible requests are as follows:

- For a detailed questionnaire, which can expedite questioning and avoid tainting the pool;
- For individualized and sequestered *"Hovey"* voir dire (*Hovey v Superior Court* (1980) 28 C3d 1, 168 CR 128), at least regarding pretrial publicity and sensitive information disclosed in the questionnaires (see *People v Visciotti* (1992) 2 C4th 1, 50, 5 CR2d 495 (trial courts have discretion to conduct sequestered voir dire);
- For partially attorney-conducted voir dire;
- For open-ended questioning;
- That panel members, before they fill out questionnaires or are voir dired, not be preinstructed on the presumption of innocence, judging the case solely on the evidence presented in court, being fair and impartial, and so forth (These preinstructions can teach the panel what the "correct" answers are. Instead, there should be preinstruction that there are no right or wrong answers and that emphasizes the requirement that jurors completely disclose all relevant information. After voir dire, the jury may be fully preinstructed.);
- For extra peremptory challenges (see §15.27);
- For a reasonable time to conduct voir dire;
- That the court liberally grant challenges for cause to excuse prospective jurors who have been exposed to prejudicial pretrial publicity, even when such panel members assure the court they can be fair and impartial; and
- That the court should not heavily rely on the answers to leading questions such as "Can you be fair and impartial?" or "Can you put aside any opinions you may have and decide this case solely on the evidence you hear in court?" to decide the fairness of a juror or of the jury pool.

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§15.25 c. Renewing Motion After Voir Dire

The defendant has the right to renew a pretrial motion to change venue after jury voir dire. *Williams v Superior Court* (1983) 34 C3d 584, 588 n2, 194 CR 492; *Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455; *Powell v Superior Court* (1991) 232 CA3d 785, 793, 283 CR 777. Moreover, the rule may be that the defendant must renew the motion after voir dire in order to preserve the issue for appeal. Contrast *People v Jenkins* (2000) 22 C4th 900, 945, 95 CR2d 377 (motion must be renewed after voir dire to cover occurrences during voir dire), with *People v Bean* (1988) 46 C3d 919, 941, 251 CR 467, and *People v Jennings* (1991) 53 C3d 334, 359, 279 CR 780 (defendants failed to renew motion, yet supreme court considered issue on appeal without discussion of waiver). The defendant should renew the motion to avoid any possibility of waiving the issue for appeal.

When a motion for change of venue is renewed after voir dire, defense counsel should ensure that all of the material submitted in support of the pretrial motion is resubmitted in support of the renewed motion. Alternatively, counsel can ask the trial court to take judicial notice of that material if it was moved into evidence at the hearing on the pretrial motion. Evid C §452. That evidence should be supplemented with proof of any additional publicity that has occurred in the interim. Counsel may also want to have an opinion poll conducted immediately before voir dire, and introduce the results of that poll. See §§15.12, 15.20 on public opinion polls.

> Ø **Note:** Counsel may also provide the court with a summary or content analysis of juror questionnaires, voir dire, or both.

Defense counsel should anticipate that jurors will state that they either are unaware of any publicity, have not been affected by it, or can set aside any previously formed opinion and make their decision only on the basis of the evidence presented in court. This means that the motion is usually renewed after the trial court has qualified 12 jurors to try the case, having denied challenges for cause based on exposure to pretrial publicity. Renewing a previously denied motion in this context is a daunting task, but there are at least two points that defense counsel can urge.

First, the fact that jurors can survive a challenge for cause does not necessarily mean that the defense has failed to show a reasonable likelihood that the defendant cannot receive a fair trial. For extended discussion of the difference in standards between challenges for cause and change of venue motions, see *Odle v Superior Court* (1982) 32 C3d 932, 943, 187 CR 455. For discussion of how jurors' responses should be analyzed to determine whether a change of venue motion should be granted, see *People v Williams* (1989) 48 C3d 1112, 1129, 259 CR 473 (denial of change of venue reversed on appeal despite fact that jurors who sat on case said they could disregard publicity and be fair).

Second, the appellate decisions recognize that statements by jurors that they can set aside the effects of any pretrial publicity should not be taken at face value, and are not conclusive. *Odle v Superior Court* (1982) 32 C3d 932, 945, 187 CR 455; *Frazier v Superior Court* (1971) 5 C3d 287, 294, 95 CR 798; *People v Tidwell* (1970) 3 C3d 62, 73, 89 CR 44; *Maine v Superior Court* (1968) 68 C2d 375, 380, 66 CR 724; *Corona v Superior Court* (1972) 24 CA3d 872, 877, 101 CR 411.

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§15.26 d. Exhaustion of Peremptory Challenges

The defense's failure to exhaust its peremptory challenges will be taken by the reviewing court as an indication that the jury, as impaneled, was fair (see *People v Daniels* (1991) 52 C3d 815, 854, 277 CR 122; *People v Leonard* (2007) 40 C4th 1370, 1396, 58 CR3d 368), and that factor may then be used by the reviewing court to sustain the trial court's denial of the venue motion (see *People v Alfaro* (2007) 41 C4th 1277, 1322, 63 CR3d 433; *People v Prince* (2007) 40 C4th 1179, 1215, 57 CR3d 543; *People v Fauber* (1992) 2 C4th 792, 820, 9 CR2d 24).

Ø **Note:** In an extreme case, prejudice must be presumed. See *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181, 1211 (counsel had not exhausted peremptory challenges); *People v Prince* (2007) 40 C4th 1179, 1216, 57 CR3d 543 (prejudice presumed only in extraordinary cases).

Despite this rule, counsel may decide not to exhaust all peremptory challenges. The chances of obtaining a reversal on appeal based on denial of a change of venue motion are very small. Thus, counsel must endeavor to select the best jury that can be obtained under the circumstances. If counsel concludes at some point that a worse jury might result if all peremptory challenges are used, counsel faces a dilemma. Does counsel preserve the issue for appeal, or select the best jury under the circumstances? The best solution is to explain on the record that, although counsel does not feel that a fair trial can be had in the existing venue, and that counsel is not satisfied with this jury, counsel nevertheless feels that this is the best jury that can be selected under the circumstances. It is for this reason counsel is not exercising the remaining peremptory challenges. Counsel should then ask for additional peremptory challenges and renew the motion to change venue. While this approach is reasonable, it does entail some risk in light of case law.

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§15.27 e. Seeking Additional Peremptory Challenges

Counsel should consider asking for additional peremptory challenges before or during voir dire when counsel believes that many members of the jury panel have been tainted by pretrial publicity. Making the motion underscores counsel's concerns about the prejudicial effect of the publicity on the actual trial jury, and may, therefore, influence the reviewing court.

Further, denial of the motion represents an independent ground for appeal. The test for reviewing denial of a request for additional peremptory challenges, however, is virtually identical to that for reviewing a change of venue motion, so viewed from a strictly legal sense, making the motion adds little to improve the chance of success on appeal. The test on appeal for ruling on this issue is whether "in the absence of such additional challenges [the defendant] is reasonably likely to receive an unfair trial before a partial jury." *People v Bonin* (1988) 46 C3d 659, 679, 250 CR 687, overruled on another ground in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656.

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C. Proceedings After Change of Venue Motion Is Granted

§15.28 1. Notifying Administrative Director of Courts

Once a court has granted a change of venue, its presiding judge, or his or her designee, must notify the Administrative Director of the Courts. Cal Rules of Ct 4.152(1). The Administrative Director must suggest one or more counties to which venue should be transferred. Cal Rules of Ct 4.152(1). However, the trial judge does not have to select one of those suggestions. See Cal Rules of Ct 4.152-4.153.

Ø **Note:** In counties with more than one superior court, the case may be administratively transferred to another superior court in that county without a change of venue. See §15.34.

In misdemeanor cases, a court may transfer a case to another court within the county (*Muller v Justice Court* (1954) 129 CA2d 570, 277 P2d 866) or to another county (Pen C §1035; *Steffen v Municipal Court* (1978) 80 CA3d 623, 145 CR 782). Changes of venue in misdemeanor cases, however, are unusual. But see *Steffen v Municipal Court, supra*.

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§15.29 2. Hearing to Determine New Venue

Before selecting a new county, a court must hold an evidentiary hearing. *People v Cooper* (1991) 53 C3d 771, 805, 281 CR 90; *McGown v Superior Court* (1977) 75 CA3d 648, 142 CR 262. At that hearing, the parties may agree on a new venue or may disagree and produce evidence regarding issues such as the extent of pretrial publicity in the intended transferee judicial district or county and the hardship involved in trying the case there. See *People v Davis* (2009) 46 C4th 539, 94 CR3d 322. Publicity in a prospective transferee county that might not be sufficient to persuade a court to change venue from that county may be sufficient to persuade the court *not* to select that county as the transferee county. 46 C4th at 574.

The usual practice is for the judge to inform the parties of the available counties and set a date for hearing. At the hearing, the parties state their preference and either agree on a new county, or present evidence to support their choice or to persuade the court against one or more of the other possibilities.

The decision on where to transfer a case lies within the trial court's discretion. In making this decision, "the conservation of judicial resources and public funds are important factors in deciding between various possible venue sites." *People v Davis* (2009) 46 C4th 539, 574, 94 CR3d 322; *People v Cooper* (1991) 53 C3d 771, 805, 281 CR 90. The court is entitled to select any venue in the state and is not limited to the counties selected by the Administrative Director of the Courts. See Cal Rules of Ct 4.152-4.153. The proximity of the new venue to the county of original venue is also important because the closer the new county, the more convenient for witnesses, attorneys, and others interested in attending the trial who live in the original venue. *People v Davis, supra*.

Counsel for both sides should ask that the hearing to determine the new venue be held after they have had sufficient time to consider which of the venue sites suggested by the Administrative Director is the most appropriate, or whether some other county would be better. Counsel should ascertain the nature and extent of publicity in those sites and the probable characteristics of the jurors who would hear the case. Factors of a more practical nature, such as the availability of office space, living arrangements, whether counsel might be able to commute from his or her home, convenience to witnesses, appropriate jail housing (particularly when there are security concerns), and the ability to consult with a client in custody in the proposed venue, should also be considered. Counsel can then make an informed choice of new venue and should then contact opposing counsel to see whether an agreement can be reached on the new venue. If no stipulation is possible, counsel should formulate arguments in favor of the preferred site and, in the appropriate case, should be prepared to present evidence indicating that holding the trial in the proposed host county will not improve the chances of seating a fair and impartial jury.

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§15.30 3. Procedures if Case Is Moved to Another County

Even after a change of venue has been ordered and a new venue selected, all further proceedings in the case short of trial remain in the transferring court. Only the trial itself is transferred. Pen C §1033(a). The only exception occurs when a particular proceeding must be heard by the judge who is to preside over the trial and that judge is not a judge from the transferring court. Pen C §1033(a); Cal Rules of Ct 4.150(b). In this event, all other proceedings should be completed, and the matter to be heard by the trial judge should be reserved for the court of new venue.

The court of new venue (the "receiving court") proceeds as if the case had been commenced there originally. Cal Rules of Ct 4.154. Generally, the only remaining proceeding is the trial itself and the associated in limine motions.

California Rules of Court 4.152 states that a judge from the transferring court must try the case in the new venue unless, after a request from the presiding judge of the transferring court, the Chief Justice of California assigns another judge to the transferring court. This procedure not only solves some of the cost allocation problems, but also allows in limine and other motions usually heard by the trial judge to be heard in the transferring court before the defendant is transferred.

The defendant is transferred to the county of new venue after all pretrial proceedings have been completed in the court of original venue. Pen C §1036. If there is a period of time between the conclusion of pretrial proceedings and the start of trial, counsel for the defendant should seek a stipulation of all parties, and orders from both the old and new courts, that the defendant will not be transferred until just before trial. The orders should be given to the head of the law enforcement agency with custody of the defendant. Otherwise, counsel may find his or her client in custody some distance away during a period when counsel needs to see the client frequently.

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§15.31 4. Procedures if Jury Is Chosen in Another Venue to Sit in Original County

After ordering a change of venue, the court, rather than transfer the case to another county or judicial district, can have a jury selected in the county or judicial district to which the case would otherwise have been transferred, and have that jury come to the original venue for trial. Pen C §1036.7. See Cal Rules of Ct 4.153(1). A motion to use this procedure can be made by the court or a party. All parties must agree to the procedure and the court must determine that it is in the interests of the administration of justice. Pen C §1036.7. The court must also give particular consideration to the convenience of the jurors. Cal Rules of Ct 4.153(1).

Ø **Note:** Although the decision to import a jury is made by agreement after the motion to change venue is granted, as a practical matter, an agreement to accept importation made before the court's decision on venue may encourage the court to grant the change.

Bringing a jury into the original venue county would appear to solve a number of the practical problems associated with a venue change. It may, however, create as many problems as it solves:

- Because the statute says that the jury must be selected "in" the county to which venue would otherwise have been transferred, venue still must be physically changed to select the new jury. Then, the new jury must be physically moved back to the county of original venue.
- The jurors from the other venue will be greatly inconvenienced. Unless they live in a county that is a short distance from the county of original venue, they will either have a long drive or bus trip before and after court each day, or will have to live in the county of original venue during the pendency of the trial. All parties should seriously consider whether they want to try a case to a jury that has been subjected to this kind of hardship. See Cal Rules of Ct 4.153(1) (after change of venue has been ordered, court should give particular consideration to jurors' convenience in determining whether to use §1036.7 procedure).
- This procedure is not without cost to the county, particularly if jurors are given lodging.
- If jurors are transported back and forth each day, court time may have to be shortened to allow for the extra travel time. This will mean a longer trial, which means higher costs. Moreover, additional delays are bound to occur because of problems associated with the transportation itself.

In short, while this alternative may seem attractive, it does have limitations.

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§15.32 5. Setting Aside Order Changing Venue

After pretrial motions have been made and before the defendant or the case file is transferred to the new county for trial, the court may set aside its order changing venue on the ground that the conditions that originally required the order to change venue no longer apply. Pen C §1036.5. There are no reported decisions on the application of this statute. The parties must be notified before an order is set aside, so there is presumably a right to a hearing.

The plain language of §1036.5 suggests that the court has no power to enter such an order after the defendant has been ordered transferred to the new county, or after the case file has been transferred to the new county. Under Cal Rules of Ct 4.153, a certified copy of order of transfer and any pleadings, documents, or other papers or exhibits necessary for trying the case must be transmitted to the receiving court once the motion to change venue is granted. The order for change of venue must also be entered in the minutes of the transferring court. However, the rule no longer provides that the case file be transmitted to the receiving court "immediately" after the order is entered in the minutes of the transferring court. The transferring court would then have time to set aside its order under §1036.5.

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§15.32A 6. Motion for Return of Action to Original Place of Trial

When a trial has been moved to another county, the defendant has been convicted, and the conviction has been reversed on appeal, the court, on its own motion or that of either party, can order the return of the action to the original place of trial if the conditions that required a change of venue no longer apply. Pen C §1033.1. Notice of a hearing to determine whether the conditions have substantially changed must be sent to all parties. Pen C §1033.1(b) Unless the defendant and defense counsel consent to the return, the burden is on the prosecution to establish that the conditions that originally required the order to change venue no longer apply. Pen C §1033.1(b).

Because the burden is on the prosecution, the prosecutor would want to show that so much time has passed that memories and prejudice have faded. This could be shown by the absence of recent media coverage or with a community survey. In effect, the prosecutor will be arguing against the current existence of the five *Maine* factors (discussed in §§15.5-15.10), given the many years since the original trial.

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V. OTHER GROUNDS FOR CHANGE OF VENUE

§15.33 A. Jury Panel Exhausted

When all jury panels have been exhausted, and it appears impossible to secure a jury to try a the case, the court must order a change of venue. Pen C §1033(b). See §15.29 on selecting a new forum.

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§15.34 B. Parties' and Court's Convenience

In counties with more than one superior court, the presiding judge may transfer a case from one court to another within the county. Pen C §691(c). In addition, following the former practice in municipal court (see former Pen C §1035(a)(1)), it seems possible that the court could transfer a case to another court within the same county for the convenience of both counsel and the court. But see *People v Guzman* (1988) 45 C3d 915, 937, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. (Defendant "may not change venue merely as a convenience. Absent a showing that there is a reasonable likelihood of an unfair trial, a community retains the right to try its own crimes.")

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VI. PROCEEDINGS IN APPELLATE COURTS

A. Pretrial Review of Trial Court Ruling

§15.35 1. Availability of Pretrial Review

A defendant may seek pretrial review of denial of a motion for change of venue through a petition for writ of mandate. *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724. The prosecution also may seek pretrial review, but must show that the trial court acted in excess of its jurisdiction and that the need for review outweighs the risk of harassment of the accused. *People v Superior Court (Stanley)* (1979) 24 C3d 622, 626, 156 CR 626.

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§15.36 2. Pretrial Standards of Review and Reversibility

The test used by the reviewing court is the same as that used by the trial court. *Maine v Superior Court* (1968) 68 C2d 375, 383, 66 CR 724. That standard is set out in §15.4. The appellate court must make an independent evaluation of the defendant's claim for change of venue, to determine whether the evidence establishes a reasonable likelihood that a fair trial cannot be obtained. *Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492; *Odle v Superior Court* (1982) 32 C3d 932, 937, 187 CR 455; *Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724. When the issue is raised before trial, any doubt about the need to move the case to another county should be resolved in favor of a venue change. *Martinez v Superior Court* (1981) 29 C3d 574, 174 CR 701.

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B. Review of Trial Court Ruling on Appeal

§15.37 1. Actions Necessary to Preserve Issue on Appeal

A motion for change of venue cannot be raised for the first time on appeal; the motion must have been made in the trial court. *People v Hillery* (1974) 10 C3d 897, 900, 112 CR 524. It is not necessary, however, to seek pretrial review of denial of the motion in order to preserve the issue for appeal (*People v Tidwell* (1970) 3 C3d 62, 68, 89 CR 44), although seeking such review is advisable because of the difficulty of obtaining a reversal on appeal.

When a motion for change of venue is made before trial and denied, it should be renewed after voir dire to avoid any possibility of waiver on appeal. See discussion in §15.25. Counsel should also either exhaust all peremptory challenges or explain why they were not exhausted. See §15.26. Finally, counsel should consider asking for additional peremptory challenges. See §15.27.

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§15.38 2. Showing Required for Reversal on Appeal

A defendant who appeals the denial of a change of venue motion after trial must show both error and prejudice. To show error, the defendant must establish that at the time of the motion, it was reasonably likely that he or she would not receive a fair trial. In determining whether the error was prejudicial, the question for the reviewing court is whether it is reasonably likely that the defendant in fact did not receive a fair trial in the court in which the case was tried. *People v Leonard* (2007) 40 C4th 1370, 1393, 58 CR3d 368; *People v Pride* (1992) 3 C4th 195, 224, 10 CR2d 636. See also *People v Fauber* (1992) 2 C4th 792, 819, 9 CR2d 24; *People v Edwards* (1991) 54 C3d 787, 807, 1 CR2d 696; *People v Cooper* (1991) 53 C3d 771, 805, 281 CR 90; *People v Jennings* (1991) 53 C3d 334, 359, 279 CR 780; *People v Balderas* (1985) 41 C3d 144, 177, 222 CR 184. The reviewing court must uphold the trial court's findings of fact if they are supported by substantial evidence; it independently reviews the trial court's ultimate determination. *People v Pride, supra*.

> Ø **Note:** Although the California cases do not as a rule address this issue, the right to a fair trial is an aspect of due process under the Fourteenth Amendment to the U.S. Constitution, and the right to an impartial jury is an aspect of the Sixth Amendment right to jury trial, also guaranteed by the Fourteenth Amendment. Thus, if trial counsel has federalized the change of venue issue in the trial court, appellate defense counsel can argue that the reviewing court should apply the standard for federal constitutional error set out in *Chapman v California* (1967) 386 US 18, 24, 17 L Ed 2d 705, 87 S Ct 824. Furthermore, the failure to provide an impartial jury is arguably structural error, requiring reversal without a showing of prejudice. See *Arizona v Fulminante* (1991) 499 US 279, 309, 113 L Ed 2d 302, 111 S Ct 1246. For further discussion, see §44.36.

In answering these questions, the reviewing court must consider not only the "five factors" discussed in §§15.5-15.10, but also the jurors' statements during voir dire on the effects of pretrial publicity. *People v Ainsworth* (1988) 45 C3d 984, 248 CR 568; *People v Harris* (1981) 28 C3d 935, 949, 171 CR 679. The responses of the actual jurors during voir dire are available; thus, there is no need to resolve doubts about the *potential* effect of publicity on jurors in favor of a venue change. *People v Jennings* (1991) 53 C3d 334, 363, 279 CR 780; *People v Williams* (1989) 48 C3d 1112, 1126, 259 CR 473.

The test for the need for a change of venue is different from the test for a challenge for cause based on exposure to pretrial publicity. All members of a jury may survive challenges for cause, even when they are aware of prejudicial information or have opinions about the case. That same level of prejudice, however, may require a change of venue. Nevertheless, as a practical matter, reviewing courts will be heavily influenced by juror statements of impartiality. See, *e.g., People v Howard* (1992) 1 C4th 1132, 1168, 5 CR2d 268; *People v Cooper* (1991) 53 C3d 771, 807, 281 CR 90; *People v Jennings* (1991) 53 C3d 334, 361, 279 CR 780; *People v Ainsworth* (1988) 45 C3d 984, 1002, 248 CR 568. For an example of the rare case in which a reversal was obtained despite juror claims of impartiality, see *People v Williams* (1989) 48 C3d 1112, 259 CR 473.

> Ø **Note:** Because of the difficulty of obtaining reversal on appeal, trial counsel are well advised both to bring a motion to change venue before trial and to seek pretrial review through a petition for writ of mandate.

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Source: Criminal Law/California Criminal Law Procedure and Practice/15 CHANGE OF VENUE/§15.39 VII. CHART: CALIFORNIA APPELLATE DECISIONS AFTER MAINE V SUPERIOR COURT

§15.39 VII. CHART: CALIFORNIA APPELLATE DECISIONS AFTER *MAINE V SUPERIOR COURT*

This chart lists appellate decisions applying the standard established by *Maine v Superior Court* (1968) 68 C2d 375, 383, 66 CR 724, for granting change of venue motions.

Chronological Order	Case Name/Citation	County	Population*	Writ or Postconviction	Death Penalty Case	Survey	Number of Newspaper Articles	Case Transferred
1	*Maine v Superior Court* (1968) 68 C2d 375, 66 CR 724	Mendocino	51,200	Writ	Yes	No	Unknown	Yes
2	*People v McKee* (1968) 265 CA2d 53, 71 CR 26	Sacramento	631,000	PC	No	No	1	No
3	*People v Risenhoover* (1968) 70 C2d 39, 73 CR 533	Fresno	413,000	PC	Yes	No	1 (a)	No
4	*People v Frogge* (1969) 270 CA2d 106, 75 CR 517	Kern	343,000	PC	No	No	Unknown	No
5	*People v Miller* (1969) 71 C2d 459, 78 CR 449	Sacramento	631,000	PC	Yes	No	Unknown	No
6	*People v O'Brien* (1969) 71 C2d 394, 79 CR 313	Los Angeles	7,032,000	PC	Yes	No	Unknown	No
7	*Smith v Superior Court* (1969) 276 CA2d 145, 80 CR 693	Los Angeles	7,032,000	Writ	No	No	290	Yes
8	*Clifton v Superior Court* (1970) 7 CA3d 245, 86 CR 612	Humboldt	100,000	Writ	Yes	No	Unknown	Yes
9	*Fain v Superior Court* (1970) 2 C3d 46, 84 CR 135	Stanislaus	184,000	Writ	Yes	No	Unknown	Yes
10	*Lansdown v Superior Court* (1970) 10 CA3d 604, 89 CR 154	Kern	329,000	Writ	No	Yes	Unknown	Yes
11	*People v Floyd* (1970) 1 C3d 694, 83 CR 608, disapproved on other grounds in *People v Wheeler* (1978) 22 C3d 258, 148 CR 890	Los Angeles	7,032,000	PC	Yes	No	0	No
12	*People v Quinlan* (1970) 8 CA3d 1063, 88 CR 125	San Luis Obispo	106,000	PC	No	No	Unknown	No
13	*People v Tidwell (William)* (1970) 3 C3d 62, 89 CR 44; *People v Tidwell (Robert Wayne)* (1970) 3 C3d 82, 89 CR 58	Lassen	17,500	PC	Yes	Yes	Unknown	Yes (both cases)
14	*Frazier v Superior Court* (1971) 5 C3d 287, 95 CR 798	Santa Cruz	123,790	Writ	Yes	No	Unknown	Yes
15	*People v Blake* (1971) 21 CA3d 211, 98 CR 409	Butte	102,000	PC	No	No	Unknown	No
16	*Corona v Superior Court* (1972) 24 CA3d 872, 101 CR 411	Sutter	42,000	Writ	Yes	Yes	Unknown	Yes
17	*Griffin v Superior Court* (1972) 26 CA3d 672, 103 CR 379	Stanislaus	184,000	Writ	Yes	No	39 (d)	Yes
18	*People v Salas* (1972) 7 C3d 812, 103 CR 431	Sacramento	637,000	PC	Yes	No	6 (b)	No
19	*People v Welch* (1972) 8 C3d 106, 104 CR 217	Kern	343,000	PC	Yes	No	15 (c)	No
20	*In re Miller* (1973) 33 CA3d 1005, 109 CR 648	Stanislaus	195,000	PC	Yes	No	Unknown	Yes
21	*People v Hathcock* (1973) 8 C3d 599, 105 CR 540	Fresno	413,000	PC	Yes	No	Unknown	No
22	*People v Murphy* (1973) 35 CA3d 905, 111 CR 295	Orange	1,420,386	PC	No	No	Unknown	No
23	*People v Preston* (1973) 9 C3d 308, 107 CR 300	Marin	204,800	PC	Yes	No	28 (e)	No

24	*People v Sommerhalder* (1973) 9 C3d 290, 107 CR 289	Marin	204,800	PC	Yes	Yes	28	No
25	*People v Whalen* (1973) 33 CA3d 710, 109 CR 282	Tulare	200,000	PC	Yes	No	Unknown	No
26	*People v Barger* (1974) 40 CA3d 662, 115 CR 298	Alameda	1,000,000	PC	No	No	Unknown	No
27	*People v Hillery* (1974) 10 C3d 897, 112 CR 524	Kings	49,954	PC	Yes	No	Unknown	Waived
28	*People v Langley* (1974) 41 CA3d 339, 116 CR 80	Shasta	77,640	PC	No	No	Unknown	No
29	*Bunnell v Superior Court* (1975) 13 C3d 592, 119 CR 302	Santa Clara	1,100,000	Writ	No	No	13	No
30	*People v Witt* (1975) 53 CA3d 154, 125 CR 653	Tulare	200,000	PC	No	No	7 (a)	No
31	*People v Manson* (1976) 61 CA3d 102, 132 CR 265	Los Angeles	7,000,000	PC	Yes	No	188 (a)	No
32	*People v Jacla* (1978) 77 CA3d 878, 144 CR 23	Solano	195,000	PC	No	No	1	No
33	*People v Martinez* (1978) 82 CA3d 1, 147 CR 208	Kern	337,000	PC	Yes	Yes	Unknown	No
34	*Steffen v Municipal Court* (1978) 80 CA3d 623, 145 CR 782	San Mateo	575,000	Writ	No	No	Unknown	Yes
35	*People v Caldwell* (1980) 102 CA3d 461, 162 CR 397	Contra Costa	611,800	PC	No	No	Unknown	No
36	*Lucero v Superior Court* (1981) 122 CA3d 484, 176 CR 62	San Bernardino	750,000	Writ**	Yes	No	Unknown	No
37	*Martinez v Superior Court* (1981) 29 C3d 574, 174 CR 701	Placer	106,500	Writ	Yes	Yes	97	Yes
38	*People v Harris* (1981) 28 C3d 935, 171 CR 679	San Diego	1,700,000	PC	Yes	No	Unknown	No
39	*People v Jurado* (1981) 115 CA3d 470, 171 CR 509	Merced	122,600	PC	No	No	19	No
40	*People v Szeto* (1981) 29 C3d 20, 171 CR 652	San Mateo	588,000	PC	No	No	1	No
41	*Young v Superior Court* (1981) 126 CA3d 167, 178 CR 394	San Luis Obispo	155,435	Writ	No	No	Unknown	Yes
42	*Odle v Superior Court* (1982) 32 C3d 932, 187 CR 455	Contra Costa	666,000	Writ	Yes	No	150 (a)	No
43	*People v Boyce* (1982) 128 CA3d 850, 180 CR 573	Los Angeles	7,000,000	PC	No	No	Unknown	No
44	*People v Mendonsa* (1982) 137 CA3d 888, 187 CR 363	Contra Costa	666,000	PC	No	No	Unknown	No
45	*Williams v Superior Court* (1983) 34 C3d 584, 194 CR 492	Placer	117,000	Writ	Yes***	Yes	157 (f)	Yes
46	*People v Clay* (1984) 153 CA3d 433, 200 CR 269	San Francisco	678,974	PC	No	No	Unknown	No
47	*People v Balderas* (1985) 41 C3d 144, 222 CR 184	Kern	405,600	PC	Yes	Yes	Unknown	No
48	*People v Anderson* (1987) 43 C3d 1104, 240 CR 585	Riverside	600,000	PC	Yes	No	15	No
49	*People v McGhee* (1987) 193 CA3d 1333, 239 CR 28	Sacramento	806,100	PC	No	No	Unknown	No
50	*People v Adcox* (1988) 47 C3d 207, 253 CR 55	Tuolumne	36,555	PC	Yes	No	10	No
51	*People v Ainsworth* (1988) 45 C3d 984, 248 CR 568	Sacramento	738,500	PC	Yes	No	Unknown	No
52	*People v Bean* (1988) 46 C3d 919, 251 CR 467	Sacramento	806,100	PC	Yes	Yes	Unknown	No
53	*People v Bonin* (1988) 46 C3d 659, 250 CR 687	Orange	2,000,000	PC	Yes	No	Unknown	No
54	*People v Hernandez* (1988) 47	Los Angeles	7,032,000	PC	Yes	No	16	No

	C3d 315, 253 CR 199							
55	*People v Coleman* (1989) 48 C3d 112, 255 CR 813	Sonoma	299,681	PC	Yes	Yes	Unknown	No
56	*People v Edelbacher* (1989) 47 C3d 983, 254 CR 586	Fresno	551,200	PC	Yes	Yes	21	No
57	*People v Hamilton* (1989) 48 C3d 1142, 259 CR 701	Tulare	250,000	PC	Yes	Yes	20	No
58	*People v Murtishaw* (1989) 48 C3d 1001, 258 CR 821	Kern	405,600	PC	Yes	Yes	Unknown	No
59	*People v Williams* (1989) 48 C3d 1112, 259 CR 473	Placer	117,000	PC	Yes	No	50 (a), (f)	Yes
60	*People v Douglas* (1990) 50 C3d 468, 268 CR 126	Orange	2,000,000	PC	Yes	No	9 (g)	No
61	*People v Gallego* (1990) 52 C3d 115, 276 CR 679	Contra Costa	666,000	PC	Yes	No	Unknown	No
62	*People v Kelly* (1990) 51 C3d 931, 275 CR 160	Riverside	820,600	PC	Yes	No	4	No
63	*People v Cooper* (1991) 53 C3d 771, 281 CR 90	San Diego	2,248,500	PC	Yes	No	Unknown	No
64	*People v Daniels* (1991) 52 C3d 815, 277 CR 122 (j)	Riverside	600,000	PC	Yes	No	Unknown	No
65	*People v Edwards* (1991) 54 C3d 787, 1 CR2d 696	Orange	2,053,700	PC	Yes	Yes	Unknown	No
66	*People v Jennings* (1991) 53 C3d 334, 279 CR 780	Fresno	580,200	PC	Yes	Yes	6	No
67	*People v Price* (1991) 1 C4th 324, 3 CR2d 106	Humboldt	108,024	PC	Yes	No	Unknown	No
68	*People v Sully* (1991) 53 C3d 1195, 283 CR 144	San Mateo	616,600	PC	Yes	Yes	193	No
69	*Powell v Superior Court* (1991) 232 CA3d 785, 283 CR 777	Los Angeles	8,863,164	Writ	No	Yes	Unknown	Yes
70	*People v Fauber* (1992) 2 C4th 792, 9 CR2d 24	Ventura	619,300	PC	Yes	No	7	No
71	*People v Howard* (1992) 1 C4th 1132, 5 CR2d 268	Tulare	253,000	PC	Yes	Yes	Unknown	No
72	*People v Pride* (1992) 3 C4th 195, 10 CR2d 636	Sacramento	875,800	PC	Yes	Yes	23	No
73	*People v Proctor* (1992) 4 C4th 499, 15 CR2d 340, aff'd sub nom *Tuilaepa v California* (1994) 512 US 967, 129 L Ed 2d 750, 114 S Ct 2630	Shasta	122,100	PC	Yes	Yes	26 (b)	No
74	*People v Cummings* (1993) 4 C4th 1233, 18 CR2d 796	Los Angeles	8,085,000	PC	Yes	No	51	No
75	*People v Webb* (1993) 6 C4th 494, 24 CR2d 779	San Luis Obispo	200,000	PC	Yes	Yes	19	No
76	*People v Venegas* (1994) 25 CA4th 1731, 31 CR2d 114	Del Norte	28,000	PC	No	Yes	0 (h)	No
77	*People v Sanders* (1995) 11 C4th 475, 46 CR2d 751	Los Angeles	7,477,503	PC	Yes	No	Unknown	No
78	*People v Williams* (1997) 16 C4th 635, 66 CR2d 573	Los Angeles	8,155,300	PC	No	No	4	No
79	*People v Bolin* (1998) 18 C4th 297, 75 CR2d 412	Kern	543,477	PC	Yes	No	Unknown	No (i)
80	*People v Dennis* (1998) 17 C4th 468, 71 CR2d 680	Santa Clara	1,400,000	PC	Yes	No	Unknown	No
81	*People v Massie* (1998) 19 C4th 550, 79 CR2d 816	San Francisco	741,300	PC	Yes	No	Unknown	No
82	*People v Hart* (1999) 20 C4th 546, 85 CR2d 132	Riverside	900,000	PC	Yes	No	3	No
83	*People v Hayes* (1999) 21 C4th 1211, 91 CR2d 211	Santa Cruz	214,000	PC	Yes	No	Unknown	No

84	*People v Welch* (1999) 20 C4th 701, 85 CR2d 203	Alameda	1,252,400	PC	Yes	Yes	Unknown	No
85	*People v Jenkins* (2000) 22 C4th 900, 95 CR2d 377	Los Angeles	9,000,000	PC	Yes	No	93	No
86	*People v Staten* (2000) 24 C4th 434, 101 CR2d 213	Los Angeles	638,000 (in judicial district)	PC	Yes	No	"Few"	No
87	*People v Weaver* (2001) 26 C4th 876, 111 CR2d 2	Kern	450,000	PC	Yes	Yes	12	No
88	*People v Maury* (2003) 30 C4th 342, 133 CR2d 561	Shasta	137,000	PC	Yes	Yes	Unknown	No
89	*People v Navarette* (2003) 30 C4th 458, 133 CR2d 89	Los Angeles	9,000,000	PC	Yes	No	4	No
90	*People v Coffman* (2004) 34 C4th 1, 44, 17 CR3d 710	San Bernardino	1,240,000	PC	Yes	Yes	150+	No
91	*People v Panah* (2005) 35 C4th 395, 447, 25 CR3d 672	Los Angeles	1,000,000+ (San Fernando Valley)	PC	Yes	No	18+	No
92	*People v Vieira* (2005) 35 C4th 264, 25 CR3d 337	Stanislaus	450,000+	PC	Yes	Yes	Unknown	No
93	*People v Ramirez* (2006) 39 C4th 398, 46 CR3d 677	Los Angeles	8,292,800	PC	Yes	Yes	Unknown	No
94	*People v Prince* (2007) 40 C4th 1179, 57 CR3d 543	San Diego	2,000,000	PC	Yes	Yes	270 newspaper articles; similar TV coverage	No
95	*People v Leonard* (2007) 40 C4th 1370, 58 CR3d 368	Sacramento	1,000,000+	PC	Yes	Yes	556 TV segments; 130 newspaper articles	No
96	*People v Zambrano* (2007) 41 C4th 1082, 63 CR3d 297, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209	Alameda	1,300,000	PC	Yes	No		No
97	*People v Alfaro* (2007) 41 C4th 1277, 63 CR3d 433	Orange	2,512,200	PC	Yes	No	20	No
98	*People v Lewis* (2008) 43 C4th 415, 75 CR3d 588	Los Angeles	9,087,400	PC	Yes	No	39	No
99	*People v Davis* (2009) 46 C4th 539, 94 CR3d 322	Santa Clara	1, 600,000	PC	Yes	Yes	Extensive	No
100	*People v Farley* (2009) 46 C4th 1053, 96 CR3d 191	Santa Clara	1,500.000	PC	Yes	No		No

Notes: (a) Are or could be additional articles; (b) approximate; (c) broadcasts—no count of newspaper articles; (d) plus an additional 11 articles over 10 previous years; (e) count taken from venue issue in codefendant's case (*Preston*); (f) includes some number of radio broadcasts; (g) plus an additional 43 articles from 5 years earlier; (h) motion based on community prejudice against inmates; (i) appeal barred, but IAC issue; (j) habeas granted in *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181.

*At time of case.

**2 1/2 weeks of voir dire.

***Initially charged as death penalty.

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§15.40 VIII. CHECKLIST: ALTERNATIVES TO CHANGE OF VENUE

Counsel should observe the requirements of Cal Rules of Prof Cond 5-120 on extrajudicial statements to the press, and should insist that others bound by Rule 5-120 follow it as well. It may be necessary to obtain the court's cooperation to discourage local law enforcement from releasing prejudicial material to the media. Law enforcement is usually the source of a substantial portion of the most prejudicial news reports. See §14.4 for discussion of the rule and its requirements.

- Continuance. Pen C §1050; *People v Laursen* (1972) 8 C3d 192, 104 CR 425. See also chap 20.
- Close preliminary hearing to public. Pen C §868; *San Jose Mercury News v Municipal Court* (1982) 30 C3d 498, 179 CR 772. See also §§14.16, 8.21-8.22.
- Counsel may consider waiving preliminary hearing (Pen C §§738, 860), and the prosecutor may consider proceeding by way of indictment (Cal Const art I, §14; Pen C §§737-740, 889, 949). Other hearings, such as a competency hearing or a venue hearing, could also be closed. Even if the entire hearing cannot be closed to the public, portions of the hearing dealing with the most prejudicial material may be closed. See *Telegram-Tribune, Inc. v Municipal Court* (1985) 166 CA3d 1072, 213 CR 7; *Cromer v Superior Court* (1980) 109 CA3d 728, 167 CR 671.
- Order forbidding all counsel, parties, and witnesses from discussing case with press (gag order). *Younger v Smith* (1973) 30 CA3d 138, 156, 106 CR 225. See also §§14.19A-14.26. Note that counsel may be more successful in eliminating or reducing extended media coverage, such as the televising or photographing of courtroom events. Further, many times damage to the defense case occurs early in the process when the defendant is arrested and statements to the press were highly prejudicial. A later gag order then prevents the defense from responding to those early statements, to continuing comments from law enforcement, and perhaps to statements from counsel for the victim's family.
- Order forbidding news media from reporting information about case (also called gag order). These are rarely successful. See *Younger v Smith, supra;* discussion in §14.22.
- Seal records. See §14.11.
- Waive jury.
- Jury questionnaires. See §15.24.
- Individualized, sequestered jury voir dire. See §14.31.
- Extra peremptory challenges of jurors. See §15.27.
- Use voir dire of jurors both to reject individual jurors who are prejudiced and to educate jurors concerning any misinformation or prejudice and their duty to be fair. *People v Williams* (1981) 29 C3d 392, 174 CR 317. See also §14.29.
- Agree in advance to import jury if court grants change of venue motion. See §15.31.
- In counties with more than one judicial district, agree to transfer case to a different district.
- When prejudicial publicity is focused in just one part of the county, agree to exclude from the jury pool those individuals with ZIP codes in that area.

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16

SEARCH AND SEIZURE MOTIONS

BRIAN J. MATTHEWS

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§16.1 I. OVERVIEW

This chapter delineates the basic procedure for motions to suppress evidence on Fourth Amendment grounds in California state courts. For an outline of substantive Fourth Amendment jurisprudence, see California Judges Benchbook: Search and Seizure (3d ed CJER-CEB 2010). California search and seizure procedure is codified in Pen C §1538.5. A summary of the procedural stages through which a search and seizure motion may proceed is set out in *People v Laiwa* (1983) 34 C3d 711, 195 CR 503. All Pen C §1538.5 motions must be in writing, and must be accompanied by a supporting memorandum and a proof of service. Pen C §1538.5(a)(2). On form and format requirements for a supporting memorandum, see Cal Rules of Ct 3.1113. In *People v Williams* (1999) 20 C4th 119, 83 CR2d 275, the California Supreme Court set forth requirements for inclusion in the motion. See §16.9.

Section 1538.5 authorizes a defendant to move for suppression of any evidence, tangible or intangible, that is the product of an illegal search and seizure, or for return of property that has been illegally seized. Section 1538.5 is not available to challenge illegal confessions or identifications, unless they were the result of an illegal search and seizure. See *People v Mattson* (1990) 50 C3d 826, 268 CR 802. On motions to suppress illegally obtained confessions and admissions, see chap 23; on motions to suppress unduly suggestive identifications, see chap 22.

Misdemeanor cases. At arraignment, in misdemeanor cases, defense counsel may set a date for a Pen C §1538.5 motion. It must be heard before trial (Pen C §1538.5(g)), unless there was no opportunity to make the motion before trial or the defendant was unaware of the grounds for the motion (Pen C §1538.5(h)). See the sample motions and supplemental memorandums in California Criminal Law Forms Manual §§16.1-16.4 (2d ed Cal CEB 2005). If the motion is granted or denied, the losing party may appeal to the appellate division of the superior court. Pen C §1538.5(j). The notice of appeal must be filed within 30 calendar days after the judge's statement that the motion is granted or denied or that the appeal is void. Cal Rules of Ct 8.853(a). Review beyond the superior court appellate division is discretionary. Cal Rules of Ct 8.1000-8.1018. An alternative method of review available to defense counsel if the motion is denied is to appeal from a resulting conviction, whether by trial or by a plea of guilty or no contest. Pen C §1538.5(m); *People v Callahan* (1997) 54 CA4th 1419, 63 CR2d 684. Note that the right to appeal the denial of a suppression motion may be waived as part of a plea agreement. *People v Berkowitz* (1995) 34 CA4th 671, 40 CR2d 150.

Felony cases. In felony cases, defense counsel may challenge an illegal search and seizure at the preliminary examination if the prosecution seeks to introduce illegally seized evidence. If the magistrate denies the motion to suppress evidence in whole or in part, the defense is entitled to have the motion heard again at a "special hearing" in felony court.

> Ø **Note:** In counties in which the superior court is divided into departments, a department of the superior court is designated to try infractions and misdemeanors and to conduct preliminary examinations in felony cases. When a superior court judge conducts a preliminary examination, he or she sits as a magistrate. Throughout this chapter, the term "misdemeanor court" will be used to refer to a superior court department sitting to try misdemeanors or to conduct preliminary examinations in felonies, *i.e.,* exercising the jurisdiction formerly conferred on the municipal court; the term "felony court" will be used to refer to the superior court when it presides over a felony prosecution following an indictment or a holding order at a preliminary examination.

At the special hearing, the felony court makes an independent determination of the legal issues posed, although the court is bound by any factual findings about the evidence or property made by the magistrate, unless those findings are affected by new evidence presented at the special hearing. Pen C §1538.5(i). This special hearing is not a de novo hearing, and the defense is limited to the transcript of the preliminary examination and to evidence that reasonably could not have been presented to the magistrate. Pen C §1538.5(i). See *People v Drews* (1989) 208 CA3d 1317, 256 CR 846. The prosecution, too, may present only evidence that could not reasonably have been presented at the preliminary examination, except that, unlike the defense, the prosecution may *recall* witnesses who testified at the preliminary examination. Pen C §1538.5(i). See *People v Hansel* (1992) 1 C4th 1211, 4 CR2d 888.

In addition to a special hearing in the felony court under §1538.5(i), defense counsel may seek review of an adverse

ruling by the magistrate as part of a Pen C §995 motion. Further pretrial review is by writ of mandate or prohibition. Pen C §1538.5(i). Alternatively, defense counsel may challenge the denial of a suppression motion on appeal following a conviction by plea or by judge or jury. Pen C §1538.5(m).

> Ø **Note:** A defendant who pleads guilty after the magistrate denies a motion to suppress evidence before the preliminary hearing cannot seek appellate review of the denial of the suppression motion unless the motion was renewed in the superior court when the court was not acting as a magistrate. *People v Richardson* (2007) 156 CA4th 574, 67 CR3d 552; *People v Garrido* (2005) 127 CA4th 359, 25 CR3d 494.

If the defense made no Pen C §1538.5 motion at the preliminary examination, it is entitled to fully litigate the validity of the search and seizure, including any relevant witnesses and evidence. Pen C §1538.5(i). Counsel should definitely not bring a search and seizure motion at the preliminary examination if discovery and investigation are not yet complete enough to establish all possible grounds for the motion. Strategic considerations in deciding whether to make a suppression motion at the preliminary examination are discussed in §16.7.

If the magistrate dismisses a case at the preliminary examination because insufficient evidence remained (after the suppression of illegally obtained evidence) to support a holding order, the prosecutor may (1) accept the discharge, refile the charge, and seek another preliminary examination; (2) seek an indictment; or (3) move within 15 calendar days to reinstate the complaint under Pen C §871.5. If the §871.5 motion is decided against the prosecutor, he or she may not refile. If it is decided in the prosecutor's favor, the magistrate must reinstate the complaint and issue a commitment (also called a *holding* or *bindover*) order. A prosecutor may also bring a §871.5 motion when the §1538.5 motion was granted, but only a portion of the complaint was dismissed.

If, in a felony case, the defendant's §1538.5 motion is granted twice, the prosecution may not file a new complaint or seek an indictment to relitigate the suppression issue unless the prosecution discovers new evidence that was not reasonably discoverable at the time of the second motion to suppress. Pen C §1538.5(p). If the case is again dismissed because the remaining evidence was insufficient, there can be no further prosecution for the same offense, except in the circumstances detailed in Pen C §1387. However, the prosecution may bring a Pen C §871.5 motion to reinstate the complaint if there is a second dismissal after a second successful suppression motion. See *People v Toney* (2004) 32 C4th 228, 233, 8 CR3d 577. See also §13.32.

If a case is dismissed after a §1538.5 hearing, the prosecutor may appeal. Pen C §1238(a)(7). If the defendant's motion is granted in the felony court, but the charge is not dismissed, the prosecution may seek pretrial review by writ of mandate or prohibition. This must be preceded by a notice of intention to file the petition. Pen C §1538.5(o).

Evidentiary hearing. At any hearing under §1538.5, whether in misdemeanor or felony court, the Evidence Code applies. *Jauregi v Superior Court* (1999) 72 CA4th 931, 939, 85 CR2d 553; *People v Sahagun* (1979) 89 CA3d 1, 17, 152 CR 233. Note, however, that testimony that would be hearsay, if it were offered for the truth of the matter asserted, may well be admissible on the issue of probable cause, if it is offered only to assess whether the information apparent to the police officer was sufficient to justify the intrusion. *People v Magana* (1979) 95 CA3d 453, 462, 157 CR 173. In such situations, defense counsel may object to the evidence being admitted for any other purpose.

The moving party has the burden of proof and the burden of going forward. Thus, if there was no warrant, the defense must initially prove (commonly done by stipulation) that the police acted without a warrant. Once the defendant has done so, the burden shifts to the prosecution to justify the intrusion. *People v Williams* (1999) 20 C4th 119, 83 CR2d 275; *People v Superior Court (Keithley)* (1975) 13 C3d 406, 118 CR 617. If asked to do so by the prosecutor or the court, the defendant must also show that he or she had a reasonable expectation of privacy in the place or object searched. *In re Lance W.* (1985) 37 C3d 873, 210 CR 631.

When the police acted under the authority of a warrant, defense counsel must produce all necessary evidence and testimony to support the motion. When counsel's legal argument is based in part on whether the warrant was supported by probable cause, defense counsel must move a certified copy of the warrant, or the affidavit or return, into evidence, if the prosecution has not done so.

After both sides have presented all witnesses and evidence, counsel may argue the motion. The judge may announce a decision immediately, take it under submission, or request further research from the attorneys before making a decision. Counsel may also request an opportunity to further research and brief issues raised by the evidence.

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Source: Criminal Law/California Criminal Law Procedure and Practice/16 SEARCH AND SEIZURE MOTIONS/§16.2 II. CHART: DEADLINES

§16.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many counties have specific time requirements not otherwise required by the Penal Code.

Action	Deadline in Misdemeanor Cases	Deadline in Felony Cases
Make and hear Pen C §1538.5 motion.	Before trial (Pen C §1538.5(g)), unless no opportunity earlier, or defendant unaware of grounds for motion (Pen C §1538.5(h)). Motion may be made and heard before trial in misdemeanor case only if made in writing and accompanied by supporting memorandum and proof of service. Pen C §1538.5(a)(2).	***Misdemeanor court:*** Motion may be made at preliminary examination only if defendant has personally served prosecution with written motion, accompanied by supporting memorandum, at least 5 *court* days before preliminary examination. Pen C §1538.5(f)(2). Any written response by prosecution about §1538.5 hearing at preliminary examination must be filed with court and personally served on defense counsel at least 2 *court* days before hearing. Pen C §1538.5(f)(3). ***Felony court:*** Before trial (Pen C §1538.5(i)), unless no opportunity earlier or defendant unaware of grounds for motion (Pen C §1538.5(h)). Defendant must give written notice to prosecution at least 10 *court* days before hearing. Any written response by prosecution must be filed with court and served on defense at least 2 *court* days before hearing. Pen C §1538.5(i).
Review denial of Pen C §1538.5 motion before trial.	Writ available only if motion was filed or heard within 45 calendar days after arraignment unless defendant was unaware of issue or had no opportunity to raise it. Pen C §1510. See CCP §1005.5 (motion is made when it is filed). But see Pen C §1538.5(j). Review available by appeal to superior court appellate division. Pen C §1538.5(j). Notice of appeal must be filed within 30 calendar days after judge's statement that motion was denied. Cal Rules of Ct 8.853(a).	Writ available only if motion was filed or heard within 60 calendar days after arraignment. Pen C §1510. ***Review of Pen C §1538.5 motion made at preliminary examination:*** By Pen C §995 motion in felony court before trial. Section 1538.5 special hearing before trial is also available. Pen C §1538.5(i). ***Review of Pen C §995 motion:*** Writ of prohibition must be filed in appellate court within 15 calendar days after motion was denied. Pen C §999a.
Prosecutor refiles felony case after magistrate dismisses it at preliminary examination.		No time limits other than constitutional speedy trial and due process.
Prosecutor files		Must be filed within 15 calendar days

motion to reinstate complaint (Pen C §871.5).		after magistrate's commitment or dismissal order. Pen C §871.5.
Review grant of Pen C §1538.5 motion before trial.	Review available by appeal to superior court appellate division. Pen C §1538.5(j). Notice of appeal must be filed within 30 calendar days after judge's statement that motion was granted. Cal Rules of Ct 8.853(a).	***Motion granted at preliminary examination, and defendant not held to answer:*** Prosecutor can file new complaint, seek grand jury indictment, or move to reinstate complaint under Pen C §871.5. Pen C §1538.5(j). ***Motion granted at preliminary examination, but defendant held to answer:*** Search and seizure ruling binding unless prosecution requests §1538.5 hearing in felony court within 15 calendar days after preliminary examination. Pen C §1538.5(j). ***Motion granted at hearing in felony court, and case is not dismissed:*** Petition for writ of mandate or prohibition filed within 30 calendar days after defendant's motion granted. Pen C §1538.5(o). If felony court §1538.5 hearing is held less than 30 calendar days before trial, prosecutor must file notice of intention to file petition for writ in felony court on or before trial date or within 10 calendar days after §1538.5 hearing, whichever occurs last. Pen C §1538.5(o). An alternative to filing petition for writ if prosecution has additional evidence not presented at hearing is to show good cause at trial why evidence was not presented at hearing and why ruling at hearing should not be binding. Pen C §1538.5(j).

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III. MAKING THE MOTION

§16.3 A. What May and May Not Be Suppressed

As Pen C §1538.5 states, the defense may move for return of property or for suppression of any tangible or intangible evidence obtained as a result of an unlawful search and seizure.

A §1538.5 motion is generally unavailable to suppress statements obtained in violation of US Const amends V and VI or *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, nor is it available to litigate the suggestiveness of identification procedures such as lineups or showups (*People v Galan* (1985) 163 CA3d 786, 796, 209 CR 837), because these do not involve searches or seizures. See *People v Massey* (1976) 59 CA3d 777, 781, 130 CR 581. Such issues may arise in §1538.5 motions, however, when they are inextricably bound up with Fourth Amendment determinations. For example, the question of whether a confession was obtained in violation of the U.S. Constitution, *e.g.,* a claim that it was involuntary under the Fifth Amendment, may be decided by the court in a §1538.5 hearing to rule on the admissibility of physical evidence that was discovered as a result of the confession. However, a §1538.5 motion may not be used to suppress the confession itself. *People v Mattson* (1990) 50 C3d 826, 851, 268 CR 802. See §§23.7-23.8; Evid C §402(b). Thus, because a "technical," noncoercive violation of *Miranda* is not considered an actual infringement of constitutional rights (*Oregon v Elstad* (1985) 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285), evidence seized as a result of such a violation is not subject to suppression (*U.S. v Patane* (2004) 542 US 630, 633, 159 L Ed 2d 667, 673, 124 S Ct 2620; *People v Whitfield* (1996) 46 CA4th 947, 54 CR2d 370). The tangible fruits of a confession coerced in violation of the Fifth Amendment, however, are subject to suppression. *People v Vasila* (1995) 38 CA4th 865, 45 CR2d 355.

Observations that result from a Fourth Amendment violation are subject to suppression under §1538.5 (*People v Massey* (1976) 59 CA3d 777, 130 CR 581), as are statements or testimony obtained as the result of an unlawful detention, arrest, or search (*People v Superior Court (Sosa)* (1982) 31 C3d 883, 185 CR 113; *People v Johnson* (1969) 70 C2d 469, 74 CR 889). The mere fact that a defendant was unlawfully arrested, however, does not necessarily mean that any statement that is obtained while he or she is unlawfully in custody is inadmissible. The court will consider attenuation of the taint, the extent to which the illegality was connected to obtaining the statement. *People v Gonzalez* (1998) 64 CA4th 432, 443, 75 CR2d 272. Although a suppression motion under §1538.5 may not be used to challenge the suggestiveness of an identification, it may seek the suppression of an identification that is the product of an illegal search and seizure. *People v Teresinski* (1982) 30 C3d 822, 180 CR 617.

While the body or identity of a defendant in a criminal proceeding is never itself suppressible as the fruit of an unlawful arrest or search (*INS v Lopez-Mendoza* (1984) 468 US 1032, 1039, 82 L Ed 2d 778, 786, 104 S Ct 3479), evidence obtained from a defendant, such as fingerprints, as the result of an unlawful search or arrest for an investigative purpose is subject to exclusion. See *U.S. v Garcia-Beltran* (9th Cir 2004) 389 F3d 864, 866.

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§16.4 B. Other Uses of Suppressed Evidence

Evidence that has been previously suppressed cannot be used to revoke probation. *People v Zimmerman* (1979) 100 CA3d 673, 161 CR 188. See *Schlick v Superior Court* (1992) 4 C4th 310, 314, 14 CR2d 406. However, illegally obtained evidence that has not been suppressed may be considered when the court decides whether to revoke probation, unless the illegality is egregious. Compare *People v Washington* (1987) 192 CA3d 1120, 236 CR 840 (police conduct affronted sense of justice), with *People v Harrison* (1988) 199 CA3d 803, 245 CR 204 (conduct not egregious). Note that the exclusionary rule does not apply to parole revocation hearings. *Pennsylvania Bd. of Probation & Parole v Scott* (1998) 524 US 357, 141 L Ed 2d 344, 118 S Ct 2014.

Illegally seized evidence previously suppressed under Pen C §1538.5 may be used to impeach the defendant. *People v Moore* (1988) 201 CA3d 877, 247 CR 353. It may *not* be used, however, to impeach a defense witness. *James v Illinois* (1990) 493 US 307, 107 L Ed 2d 676, 110 S Ct 648.

Evidence suppressed under §1538.5 may also be considered by the court at sentencing. *People v Brewster* (1986) 184 CA3d 921, 229 CR 352.

Rulings on §1538.5 motions may be relitigated when a case is dismissed and refiled, unless the defense has received two favorable rulings under Pen C §1538.5(p). Pen C §1538.5(j). Evidence previously suppressed may be used by the prosecution in a new and different case. *People v Coe* (1991) 228 CA3d 526, 279 CR 362. See also *People v Meredith* (1992) 11 CA4th 1548, 15 CR2d 285 (federal suppression not binding on state court); *People v Torres* (1992) 6 CA4th 1324, 1329, 8 CR2d 332 (proper to relitigate §1538.5 ruling when case refiled in another county).

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C. When to Make Motion

§16.5 1. General Practice for Setting Pen C §1538.5 Hearing

In some counties, counsel commonly sets a date for hearing on a Pen C §1538.5 motion at arraignment in both misdemeanor and felony courts. Although the motion may be reserved at arraignment, it may be better practice to set the motion for a specific future date if the practitioner is uncertain at arraignment whether a motion should be made. This practice encourages the practitioner to review the case promptly and carefully to see whether grounds exist for a motion. If not, it is usually a simple matter to withdraw the motion that was set.

Ø **Note:** In addition to the rules discussed in §§16.6-16.7, counsel should consult local court rules for any special time requirements. Notice requirements are discussed in §16.9.

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§16.6 2. When to Hold §1538.5 Hearing in Misdemeanor Cases

In misdemeanor cases, the Pen C §1538.5 motion must be made and heard before trial. Pen C §1538.5(g). In addition, if pretrial writ review of the court's ruling is sought, either the motion must have been filed or the hearing must have been held within 45 calendar days after arraignment. Pen C §1510; CCP §1005.5. The arraignment is not complete until a plea is entered. Pen C §§988, 1024.

Ø **Note:** Penal Code §1538.5(j) permits filing a direct appeal in misdemeanor cases as long as the Rules of Court are complied with. The tension between Pen C §1538.5(j) and Pen C §1510 has not been authoritatively resolved. Some prosecutors have argued that §1510 should apply to appeals as well as writs, despite §1538.5(j).

The defense is entitled to a continuance of up to 30 calendar days if time is needed to prepare for a §1538.5 hearing. Pen C §1538.5(*l*).

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§16.7 3. When to Hold §1538.5 Hearing in Felony Cases

Two procedures. In felony cases, the defense is entitled to *one* of the following (Pen C §1538.5(i)):

- A fully litigated search and seizure hearing at the preliminary examination, followed by a limited special hearing after the defendant is held to answer; or
- A single fully litigated search and seizure hearing, held in the felony court.

Search and seizure motion first made at preliminary examination. If the defense moves to suppress evidence at the preliminary examination, it is limited to challenging evidence that the prosecution seeks to introduce at that hearing. Pen C §1538.5(f)(1). The motion must be in writing and it must be filed with the court and served on the prosecution at least 5 *court* days before the hearing. If the defense was unaware of the evidence or the grounds for suppression before the preliminary examination, the court may grant a continuance of at least 5 *court* days for the purpose of filing and serving the motion. Pen C §1538.5(f)(2). Any written response by the prosecution must be filed with the court and served on the defendant or defense counsel at least 2 *court* days before the hearing. Pen C §1538.5(f)(3).

After a search and seizure hearing is held at the preliminary examination, the defense is entitled to another hearing in the felony court, but, unless all parties agree otherwise, the evidence on which it is decided is circumscribed. The defense is limited to the transcript of the testimony at the preliminary examination, and to additional evidence that could not reasonably have been presented there. See *People v Drews* (1989) 208 CA3d 1317, 256 CR 846. The prosecution is subject to the same evidentiary limitations as the defense, except that it may *recall* any witnesses who testified at the preliminary examination. Pen C §1538.5(i). See *People v Hansel* (1992) 1 C4th 1211, 4 CR2d 888 (district attorney can recall witnesses even though defendant presents no new evidence). If the prosecution objects to defense evidence on the ground that it could reasonably have been presented at the preliminary examination, the defendant is entitled to have the issue determined at an in camera hearing, the purpose of which is to protect the attorney-client privilege and thus preclude improper prosecutorial discovery. Pen C §1538.5(i). See *People v Drews* (1989) 208 CA3d 1317, 1324, 256 CR 846.

In ruling on a renewal of a suppression motion made at the preliminary examination, the felony court independently decides the legal issues before it, but it is bound by any factual findings the magistrate has made concerning evidence or property. Pen C §1538.5(i); *People v Memro* (1995) 11 C4th 786, 846, 47 CR2d 219 (court defers to factual findings but independently determines whether search violated Fourth Amendment); *People v Trujillo* (1990) 217 CA3d 1219, 1224, 266 CR 473 (to extent testimony at motion is uncontradicted, felony court faces pure questions of law); *Anderson v Superior Court* (1988) 206 CA3d 533, 544, 253 CR 651 (magistrate's ruling that police officer who testified was more credible than defendant resolved question of consent to search); *People v Ramsey* (1988) 203 CA3d 671, 250 CR 309 (in §1538.5(i) hearing on transcript, felony court will draw all inferences in support of magistrate's factual findings if supported by substantial evidence). The felony court judge is not bound by the magistrate's factual findings, however, if it finds that the evidence presented at the hearing in the felony court would have "affected" the magistrate's finding. The test, which is an objective one, calls only for a probable material influence in or modification of the prior finding, and the court can make such a determination only after hearing the new evidence. *People v Bishop* (1993) 14 CA4th 203, 212, 17 CR2d 657.

If the defense prefers to raise search and seizure issues for the first time in the felony court, he or she should exercise some care in questioning witnesses about search issues at the preliminary examination. In some situations, a court can, on the basis of the evidence presented, deem a "de facto" or "constructive" suppression motion to have been brought at the preliminary examination, even when defense counsel intends to reserve the motion. See *Anderson v Superior Court* (1988) 206 CA3d 533, 253 CR 651 (defendant testified at preliminary examination solely on issue of consent, and magistrate ruled on issue).

Search and seizure motion first made in felony court. If the defense made no Pen C §1538.5 motion at the preliminary examination, it is entitled to litigate the validity of a search and seizure at a hearing in the felony court. Pen C §1538.5(i). At this hearing, the defense may challenge any evidence in the case, in contrast to a motion made at a

preliminary examination, which can challenge only the evidence the prosecution chooses to present. Pen C §1538.5(f).

Timing of special hearing. The §1538.5 motion, whether a "first" or "second" search and seizure motion, must be made and heard before trial, and at least 10 court days after notice to the prosecution, unless the prosecution is willing to waive this requirement. Pen C §1538.5(i). Any written response by the prosecution must be filed with the court and served on the defense at least 2 court days before the hearing. Pen C §1538.5(i). In addition, if writ review of the ruling is sought, either the motion must have been filed, or the hearing held, within 60 calendar days after arraignment. Pen C §1510. Again, note that arraignment is not complete until a plea is entered.

Tactics. The defense should weigh the advantages and disadvantages of making a suppression motion at the preliminary examination. There are several advantages to making the §1538.5 motion before a holding order issues. Although discovery is disallowed as a legitimate purpose of the preliminary examination (Pen C §866(b)), a suppression motion at the preliminary examination may nonetheless expand the scope of an otherwise streamlined hearing and provide incidental discovery benefits. For one thing, it appears that, for purposes of a suppression motion, the prosecution cannot rely on hearsay statements under Pen C §872(b), which permits a holding order to be based on police hearsay statements. See discussion in §8.30. Second, a suppression motion is not limited by Pen C §866, which restricts the defense at preliminary examination to presenting only evidence that goes to an affirmative defense, negates an element of the offense charged, or impeaches prosecution evidence and requires an offer of proof at the prosecutor's demand. See discussion in §8.13. Third, given the other demands placed on it at the preliminary examination, the prosecution is often less prepared to address suppression issues or to prepare its witnesses thoroughly on those issues. Finally, if a prosecution witness important to the search issue is not called to testify at the preliminary examination, and the §1538.5 hearing is thus held without his or her testimony, the prosecutor cannot call the witness in felony court without a showing that he or she could not reasonably have been presented at the preliminary examination. Pen C §1538.5(i).

There are some corresponding disadvantages, but even they may be offset to a certain extent. Although only evidence on which the prosecution seeks to rely can be challenged at the preliminary examination (Pen C §1538.5(f)), that fact alone may permit a full evidentiary hearing in the felony court, because evidence relating to the validity of a search and seizure concerning such evidence could not reasonably have been presented at the preliminary examination. If the relevant facts are fully presented at the preliminary examination, and there are no factual findings about credibility to hamper the felony court in giving a full consideration to the merits of the motion, the defense should not be significantly handicapped in arguing the motion on the basis of the transcript from the preliminary examination.

There are two situations in which a suppression motion at the preliminary examination is probably ill-advised. The first is when there is inadequate time for discovery or investigation or preparation before the preliminary examination. Although this may enable the presentation of new evidence at a subsequent Pen C §1538.5(i) hearing in the felony court, the practitioner runs the risk of the court disallowing such evidence, if the court finds that it could reasonably have been presented at the earlier hearing. *People v Bennett* (1998) 68 CA4th 396, 80 CR2d 323 (defense cannot present theories of suppression in felony court that were noticed but abandoned at preliminary examination); *People v Drews* (1989) 208 CA3d 1317, 1324, 256 CR 846 (upholding finding that witnesses could have been presented at preliminary examination). The second is when the motion depends on a judicial assessment of credibility, because an adverse factual finding by the magistrate will bind the felony court. In this situation, the practitioner will need to carefully consider whether the magistrate or the felony court is likely to provide the more hospitable forum.

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§16.8 4. Motion at Trial or Renewal of Motion

A court has no jurisdiction to reconsider a pretrial suppression motion that has been made, argued, and decided on its merits, even if the court decides that its earlier ruling was wrong. *Madril v Superior Court* (1975) 15 C3d 73, 123 CR 465; *People v Sotelo* (1996) 47 CA4th 264, 54 CR2d 643. This is so even when there is newly discovered evidence or a change in the law. *People v Dubose* (1971) 17 CA3d 43, 47, 94 CR 376. The only remedy here is to make a motion at trial under Pen C §1538.5(h).

A defendant has the right to make a Pen C §1538.5 motion "during the course of trial" if no opportunity for the motion existed before trial, or if the defense was previously unaware of the grounds for the motion. Pen C §1538.5(h); *People v Minjares* (1979) 24 C3d 410, 153 CR 224 (motion renewed at trial because testimony on which earlier §1538.5 ruling was based, that evidence was in plain view, was superseded by new testimony that evidence, although in plain view, was in *opaque* zipped tote bag). The courts have ruled, however, that no motion may be brought under this exception if the defense did not but *should* have known of the grounds of the motion before trial. *People v Martinez* (1975) 14 C3d 533, 121 CR 611 (counsel could have learned grounds "by interviewing his client"). A trial court exceeds its jurisdiction if it grants such a motion when neither exception exists. *People v Takencareof* (1981) 119 CA3d 492, 496, 174 CR 112, disapproved on other grounds in *People v Towne* (2008) 44 C4th 63, 85, 78 CR3d 530.

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§16.9 D. Notice; Form of Motion; Grounds for Motion

Notice. Ten *court* days' written notice must be served on the prosecutor before a Pen C §1538.5 special hearing is held. Pen C §1538.5(i). An exception applies to motions brought at the preliminary examination: for those motions, the notice requirement is 5 court days. Pen C §1538.5(f)(2). Although the Penal Code requires written notice accompanied by a supporting memorandum in misdemeanor cases, it does not specify how much notice is required; thus, papers must be filed 10 court days before the hearing (Cal Rules of Ct 4.111(a)).

Preparing the moving papers. The statute requires that the motion be made in writing, accompanied by a supporting memorandum and proof of service. The memorandum must specify in detail the items of property or evidence sought to be suppressed or returned, including intangible items such as police observations. The memorandum must also set forth the factual basis and legal authorities that demonstrate why the motion should be granted. Pen C §1538.5(a)(2). When the basis of a suppression motion is a warrantless search and seizure, the defense adequately sets forth the requisite factual basis and legal authorities in the first instance by simply asserting the absence of a warrant and making a prima facie showing to support that assertion. *People v Williams* (1999) 20 C4th 119, 130, 83 CR2d 275. Because the prosecution has the burden of proving that a warrantless search and seizure was reasonable in the circumstances, the defense need not guess at what justifications the prosecution will offer. Only after the prosecution has offered its justifications, either in a written response before the hearing or at the time of the hearing, does the defense need to answer with its arguments why the justification is inadequate. *People v Williams, supra*.

When the defense challenge is to some specific aspect of the search and seizure other than the lack of the warrant, however, the defense must specify the nature of that challenge at the outset so that the party opposing the motion has fair notice of the moving party's argument and the opportunity to present responsive evidence. 20 C4th at 135. If the court decides that the prosecution has not had adequate notice of a defense challenge, the court should grant a continuance to allow the prosecution to offer additional evidence. 20 C4th at 134.

Although the prosecution bears the burden of justifying a warrantless intrusion, the burden falls on the defense to show that a search and seizure conducted pursuant to a warrant is invalid. In this situation, the defense must specify in its moving papers the factual basis and legal authorities for its challenge. Defense counsel must move the warrant, affidavit, and return into evidence at the hearing before it becomes part of the record. Appellate attorneys have sometimes been confronted with a situation in which, although a search warrant existed, it was not offered or received in evidence at the hearing on the §1538.5 motion.

Form of motion. The form and format of motion papers in criminal cases are governed by Cal Rules of Ct 2.100-2.119. For discussion, see §18.5. Local court rules may impose additional requirements for the form of the motion. The rules may vary in their specificity and in local interpretation of what they require; thus, the practitioner in an unfamiliar jurisdiction may wish to consult a local practitioner in the public defender's office or in private practice on how to interpret a given local rule. Although sanctions may be imposed for failure to comply with local rules, the sanctions may not include depriving the defendant of the opportunity to fully litigate his or her search and seizure claim because counsel failed to meet local pleading requirements. *People v Smith* (2002) 95 CA4th 283, 301, 115 CR2d 483.

> Ø **Note:** Although Cal Rules of Ct 3.20 preempts local rules on motion practice in civil matters, criminal proceedings are explicitly excluded from the preemption. Cal Rules of Ct 3.20(b)(2).

Grounds for motion. The defendant is entitled to one full opportunity to litigate the legality of a search and seizure in the trial court. See *Lorenzana v Superior Court* (1973) 9 C3d 626, 640, 108 CR 585. Consequently, the motion to suppress should specify the facts on which it is based and include every legal theory on which it relies. *People v Brooks* (1980) 26 C3d 471, 483, 162 CR 177.

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§16.10 E. Effect of Timing of Motion on Possibility of Appellate Review

Denial of a Pen C §1538.5 motion is reviewable by pretrial writ only if the motion was "made" within 45 calendar days after arraignment in a misdemeanor case or within 60 calendar days after arraignment on the information or indictment in a felony case. Pen C §1510. Note that arraignment is not complete until a plea is entered (Pen C §§988, 1024) and that a motion is "made" when the moving papers are filed (CCP §1005.5). "Reserving" or "noticing" the motion does not suffice. *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109.

Ø **Note:** Penal Code §1538.5(j) permits filing of a direct interlocutory appeal in misdemeanor cases as long as the Rules of Court are observed. The tension between Pen C §1538.5(j) and Pen C §1510 has not been authoritatively resolved. Section 1510 limits "review" to suppression motions filed within 45 days after arraignment. Some prosecutors have argued that §1510 should apply to appeals as well as writs, despite §1538.5(j). The better view seems to be that §1538.5(j), as the more recent and specific enactment, controls. Section 1510 appears in the chapter of the Penal Code pertaining specifically to writs.

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IV. REASONABLE EXPECTATION OF PRIVACY (STANDING)

§16.11 A. Reasonable Expectation of Privacy as Prerequisite to Fourth Amendment Claim

To assert a Fourth Amendment claim, the defendant must have a reasonable expectation of privacy in the place searched or the items seized. Many state and federal courts use the term "standing" to describe this concept. However, the California Supreme Court has indicated that "mention of 'standing' should be avoided when analyzing a Fourth Amendment claim," noting that the U.S. Supreme Court "has largely abandoned the use of the word" to describe a "reasonable expectation of privacy." *People v Ayala* (2000) 23 C4th 225, 254 n3, 96 CR2d 682. Cases that analyze reasonable expectation of privacy using the term "standing" remain good law, however.

The rule is most often stated as follows: Did the challenged search and seizure violate the rights of the defendant who seeks to exclude evidence obtained during it (*Rakas v Illinois* (1978) 439 US 128, 138, 58 L Ed 2d 387, 398, 99 S Ct 421), and did the police violate any legitimate expectation of privacy or security held by the defendant (*Minnesota v Olson* (1990) 495 US 91, 109 L Ed 2d 85, 110 S Ct 1684; *Rawlings v Kentucky* (1980) 448 US 98, 106, 65 L Ed 2d 633, 642, 100 S Ct 2556)? A subjectively held expectation of privacy in the place searched or the thing seized is not enough; it must also be a "legitimate" expectation, one that "society is prepared to consider reasonable." *U.S. v Jacobsen* (1984) 466 US 109, 113, 80 L Ed 2d 85, 94, 104 S Ct 1652.

The defendant has the burden of establishing a reasonable expectation of privacy in the premises searched or the items seized. *Rawlings v Kentucky* (1980) 448 US 98, 104, 65 L Ed 2d 633, 642, 100 S Ct 2556. The defense must include a standing allegation in its moving papers. The allegation may be simple:

The complained-of search and seizure violates defendant's Fourth Amendment rights under the United States Constitution.

When a defendant's moving papers do not include a reasonable expectation of privacy allegation, the prosecutor may at the first opportunity move to drop the motion from the calendar for want of jurisdiction. The defense response to a prosecutor's challenge to standing should be proof of the reasonable expectation of privacy allegations in the moving papers. See *People v Ruster* (1974) 40 CA3d 865, 874, 115 CR 572, disapproved on other grounds in *In re Hoddinott* (1996) 12 C4th 992, 1005, 50 CR2d 706.

When a defendant does allege a reasonable expectation of privacy, the prosecutor may challenge the claim at the beginning of the suppression hearing. See *Rakas v Illinois* (1978) 439 US 128, 131 n1, 58 L Ed 2d 387, 393 n1, 99 S Ct 421. Otherwise, the issue may be waived. See *Steagald v U.S.* (1981) 451 US 204, 208, 68 L Ed 2d 38, 43, 101 S Ct 1642; *Rodriguez v Superior Court* (1988) 199 CA3d 1453, 245 CR 617. But see *People v Thompson* (1990) 221 CA3d 923, 270 CR 863 (because reasonable expectation of privacy is part of defendant's affirmative burden, it cannot be waived). The court can also raise the issue at the hearing. *People v Dasilva* (1989) 207 CA3d 43, 47, 254 CR 563.

Although the court has the discretion to require the defense to prove the existence of a reasonable expectation of privacy before proceeding, the U.S. Supreme Court in *Rakas v Illinois* (1978) 439 US 128, 131, 58 L Ed 2d 387, 398, 99 S Ct 421, indicated that the issue of reasonable expectation of privacy should be "subsumed under substantive Fourth Amendment doctrine" and not be considered as distinct from the merits of a defendant's Fourth Amendment claims. Thus, it will generally be best to determine reasonable expectation of privacy by the usual method: "The prosecution begins and the defense concludes." Only in an appropriate case, as when only a third party's rights appear to have been implicated and the presentation of the prosecution's evidence would be overly time-consuming, might it be more expeditious to begin by examining the defendant's interest in or relationship to the place searched. *People v Contreras* (1989) 210 CA3d 450, 258 CR 361.

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§16.12 B. Effect on Reasonable Expectation of Privacy (Standing) [Deleted]

Section deleted. See §16.11.

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§16.13 C. List: California and U.S. Supreme Court Cases on Reasonable Expectation of Privacy (Standing)

The following cases are a starting point for research on reasonable expectation of privacy, which is very dependent on the nuances of the facts in each case.

California cases

People v Parson (2008) 44 C4th 332, 346, 79 CR3d 269 (no reasonable expectation of privacy in abandoned hotel room; intent to abandon is determined by objective factors, not defendant's subjective intent).

In re Jaime P. (2006) 40 C4th 128, 51 CR3d 430 (officer must have prior knowledge that minor is subject to probationary search condition to justify otherwise unlawful search).

People v Carter (2005) 36 C4th 1114, 32 CR3d 759 (driver of stolen vehicle lacked legitimate expectation of privacy to contest search of that vehicle).

People v Valdez (2004) 32 C4th 73, 121, 8 CR3d 271 (passenger had no reasonable expectation of privacy in area under driver's side seat and could not challenge seizure of gun found there).

People v Sanders (2003) 31 C4th 318, 2 CR3d 630 (parolee has reasonable expectation of privacy in residence; search by police who are unaware that individual is on parole cannot be justified by subsequent discovery of parole status). See also *People v Bowers* (2004) 117 CA4th 1261, 1264, 13 CR3d 15 (probation search condition did not justify warrantless search when police officer who conducted search was unaware of condition). But see *People v Middleton* (2005) 131 CA4th 732, 31 CR3d 813 (search lawful when police had determined motel room was registered to active parolee; specific knowledge of search condition not required); *People v Hill* (2004) 118 CA4th 1344, 13 CR3d 719 (search lawful when police had mistaken belief that defendant was on parole when he was really on probation).

People v Maury (2003) 30 C4th 342, 133 CR2d 561 (no reasonable expectation of privacy in content of phone calls defendant made to private organization that ran "secret witness program" designed to receive information about crimes from anonymous callers).

People v Camacho (2000) 23 C4th 824, 98 CR2d 232 (police officers who walked into side yard of defendant's house and looked into his open window violated his reasonable expectation of privacy). Compare *Camacho* with *People v Shaw* (2002) 97 CA4th 833, 118 CR2d 678 (no reasonable expectation of privacy in common backyard of apartment building).

People v Robles (2000) 23 C4th 789, 797, 97 CR2d 914 (search of residence of probationer's roommate violated roommate's reasonable expectation of privacy when police were unaware of probationer's status before the search). But see *People v Woods* (1999) 21 C4th 668, 676, 88 CR2d 88 (police who do have knowledge of cotenant's search and seizure conditions may search areas of residence over which cotenants have joint control).

People v Reyes (1998) 19 C4th 743, 80 CR2d 734 (particularized suspicion not required for parole search). But see *People v Sanders* (2003) 31 C4th 318, 2 CR3d 630 (summarized above); *People v Cervantes* (2002) 103 CA4th 1404, 127 CR2d 468 (evidence will be excluded if search and seizure was arbitrary, capricious, or harassing).

People v Roybal (1998) 19 C4th 481, 79 CR2d 487 (no reasonable expectation of privacy in plastic bag hidden in cinder block exterior wall surrounding defendant's mother's backyard).

People v Reyes (2009) 178 CA4th 1183, 101 CR3d 109 (addressee had no reasonable expectation of privacy in outside of envelope).

People v Reyes (2009) 172 CA4th 671, 91 CR3d 415 (participant in conversation intercepted pursuant to federal wiretap order may move for suppression of conversation).

People v Hughston (2008) 168 CA4th 1062, 85 CR3d 890 (reasonable expectation of privacy in tarp structure equivalent to large tent).

People v Tolliver (2008) 160 CA4th 1231, 1236, 73 CR3d 375 (no reasonable expectation of privacy in automobile paid for by defendant when his name was not on pink slip, and registration and insurance were not in his name).

In re Lisa G. (2004) 125 CA4th 801, 23 CR3d 163 (students in public schools have legitimate expectation of privacy in personal effects brought to school); *In re Cody S.* (2004) 121 CA4th 86, 16 CR3d 653 (same).

In re Rudy F. (2004) 117 CA4th 1124, 1131, 12 CR3d 483 (minor who lived with sister (who was legal guardian) had legitimate expectation of privacy in entire residence and had standing to contest search of sister's bedroom).

People v Stewart (2003) 113 CA4th 242, 252, 6 CR3d 249 (tenant who had key and unlimited access to main house had reasonable expectation of privacy in house even though he lived in mobilehome on property).

People v Dachino (2003) 111 CA4th 1429, 1432, 4 CR3d 691 (person's expectation of privacy in place where police seize item is same whether person admits or denies ownership of item). See also *People v Dees* (1990) 221 CA3d 588, 594, 270 CR 554.

People v Satz (1998) 61 CA4th 322, 71 CR2d 433 (no reasonable expectation of privacy in hotel room obtained with stolen credit card).

People v Thompson (1996) 43 CA4th 1265, 51 CR2d 334 (tenant retains reasonable expectation of privacy in rented premises even if subject to restraining order directing tenant to stay away).

People v Allen (1993) 17 CA4th 1214, 21 CR2d 668 (defendant's statement to police that he did not live in place searched was not conclusive; he could put on evidence of reasonable expectation of privacy).

People v Melnyk (1992) 4 CA4th 1532, 6 CR2d 570 (car thief cannot object to search of stolen car).

People v Moreno (1992) 2 CA4th 577, 3 CR2d 66 (babysitter has reasonable expectation of privacy to challenge search of residence).

People v Dees (1990) 221 CA3d 588, 270 CR 554 (when prosecutor has sought holding order based on police testimony that defendant had admitted ownership of car, prosecution cannot contest reasonable expectation of privacy even though defense witnesses testify that defendant had no connection to car).

People v Koury (1989) 214 CA3d 676, 262 CR 870 (estranged husband has reasonable expectation of privacy to challenge search of wife's home, where he regularly visits overnight, has key, and keeps belongings).

People v Workman (1989) 209 CA3d 687, 257 CR 753 (possessory interest in documents seized existed at some point in past but before search took place, thus no reasonable expectation of privacy in documents).

People v Dasilva (1989) 207 CA3d 43, 254 CR 563 (disclaimer of proprietary interest in area searched or evidence discovered ends privacy expectation; appellate court refused to follow lower federal cases holding that defendant may disclaim ownership yet raise expectation of privacy).

People v Glick (1988) 203 CA3d 796, 250 CR 315 (driver could challenge detention as unreasonable, even though it was subsequently determined that he was in stolen car).

People v Carvajal (1988) 202 CA3d 487, 249 CR 368 (evidence that defendant was driving truck with owner's permission and possessed keys to both ignition and camper shell was sufficient to demonstrate reasonable expectation of privacy to challenge search of camper shell).

People v Hernandez (1988) 199 CA3d 1182, 245 CR 513 (person not allowed to use another's bedroom where drugs were found has no reasonable expectation of privacy and cannot challenge their seizure, even though he occupied another bedroom in same house).

Federal cases

Brendlin v California (2007) 551 US 249, 251, 168 L Ed 2d 132, 136, 127 S Ct 2400 (passenger may challenge constitutionality of traffic stop).

Samson v California (2006) 547 US 843, 165 L Ed 2d 250, 126 S Ct 2193 (search of California parolee without particularized suspicion was permissible; approving *People v Reyes* (1998) 19 C4th 743, 80 CR2d 734).

Illinois v Caballes (2005) 543 US 405, 160 L Ed 2d 842, 125 S Ct 834 (use of well-trained narcotics-detection dog does not implicate legitimate privacy interests).

Minnesota v Carter (1998) 525 US 83, 142 L Ed 2d 373, 119 S Ct 469 (no reasonable expectation of privacy for "visitors" who were in apartment for 2½ hours to package cocaine).

Minnesota v Olson (1990) 495 US 91, 109 L Ed 2d 85, 110 S Ct 1684 (overnight guest has reasonable expectation of privacy regarding search of room he occupies).

O'Connor v Ortega (1987) 480 US 709, 94 L Ed 2d 714, 107 S Ct 1492 (government employee could challenge warrantless search of office during investigation of employee's malfeasance).

U.S. v Payner (1980) 447 US 727, 65 L Ed 2d 468, 100 S Ct 2439 (defendant had no reasonable expectation of privacy in hotel room or in another's briefcase).

Michigan v Tyler (1978) 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (prosecutor failed to object to codefendant's

reasonable expectation of privacy to raise search issue).

U.S. v Padilla (1993) 508 US 77, 123 L Ed 2d 635, 113 S Ct 1936 (passenger may object to search of car only if passenger has joint control or dominion over vehicle); *Rakas v Illinois* (1978) 439 US 128, 58 L Ed 2d 387, 99 S Ct 421 (same).

Rawlings v Kentucky (1980) 448 US 98, 65 L Ed 2d 633, 100 S Ct 2556 (no expectation of privacy in goods put in another's purse).

Combs v U.S. (1972) 408 US 224, 33 L Ed 2d 308, 92 S Ct 2284 (case remanded to allow defendant to show reasonable expectation of privacy in farm shed).

Alderman v U.S. (1969) 394 US 165, 22 L Ed 2d 176, 89 S Ct 961 (defendant could not challenge wiretap directed at nonparty).

Mancusi v DeForte (1968) 392 US 364, 20 L Ed 2d 1154, 88 S Ct 2120 (defendant had reasonable expectation of privacy in office shared by several people, including defendant).

Bumper v North Carolina (1968) 391 US 543, 20 L Ed 2d 797, 88 S Ct 1788 (defendant could challenge search of grandmother's home where he lived).

Simmons v U.S. (1968) 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967 (defendant's testimony that suitcase similar to one he owned established reasonable expectation of privacy, even though suitcase located in home of another).

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§16.14 D. Application of Federal Search and Seizure Law in California

Important issues in this area are how one knows when the remedy of the federal exclusionary rule is available to a criminal defendant and what the hierarchy is of constitutional interpretations.

All state courts are bound by the U.S. Supreme Court's interpretations of the federal Constitution. *People v Bradley* (1969) 1 C3d 80, 86, 81 CR 457. Absent a controlling federal precedent, a California Supreme Court decision interpreting the federal Constitution will bind all inferior courts. When neither the U.S. Supreme Court nor the California Supreme Court has decided a federal issue, the appropriate controlling authority is a decision by an intermediate California court of appeal interpreting the U.S. Constitution. See *People v Birks* (1998) 19 C4th 108, 116, 77 CR2d 848; *Mary M. v Los Angeles* (1991) 54 C3d 202, 212, 285 CR 99.

State courts are not bound by decisions of lower federal courts on federal questions, even if they conflict with state decisions. *In re Javier A.* (1984) 159 CA3d 913, 924, 206 CR 386. However, lower federal court decisions are "persuasive." *People v Bradley, supra*. Decisions of the Ninth Circuit Court of Appeals are entitled to no more weight than are decisions of other lower federal courts, even though California is in the Ninth Circuit. *Debtor Reorganizers, Inc. v State Bd. of Equalization* (1976) 58 CA3d 691, 696, 130 CR 64.

Thus, the law regarding the remedy of the federal exclusionary rule will first be found in U.S. Supreme Court decisions, then in California Supreme Court decisions, and finally in California Court of Appeal decisions.

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§16.15 V. PROSECUTION RESPONSE

The proper prosecution response to a defense motion to suppress the fruits of a warrantless search and seizure under Pen C §1538.5 is to present evidence tending to justify the intrusion. The defense generally need not specify the grounds of its challenge to a warrantless intrusion beyond alleging the absence of a warrant until such time as the prosecution indicates which theories of justification it will rely on. *People v Williams* (1999) 20 C4th 119, 83 CR2d 275. See §16.9. Although the prosecution is not required under §1538.5 to respond in writing (*In re Justin K.* (2002) 98 CA4th 695, 120 CR2d 546; *People v Britton* (2001) 91 CA4th 1112, 111 CR2d 199), local rules in some jurisdictions may require a written response. Sanctions may be imposed for noncompliance, but they may not deprive the defendant of the right to an evidentiary hearing. See Pen C §1538.5(i); *People v Smith* (2002) 95 CA4th 283, 301, 115 CR2d 483 (defendant entitled to full hearing on merits of motion to suppress). The motion must be decided on the evidence presented and not on the pleadings of either party. Pen C §1538.5(i). A sample written opposition to a defense §1538.5 motion is in California Criminal Law Forms Manual §16.5 (2d ed Cal CEB 2005).

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VI. EVIDENTIARY HEARING

§16.16 A. Burdens of Proof and of Going Forward

The initial burden of going forward lies with the moving party, which is usually the defense. An exception to this general rule arises when evidence has been suppressed at a preliminary examination, and the prosecution moves for its admission at a hearing under Pen C §1538.5(j).

The moving party has the burden of going forward with the proof of each fact essential to establish the right to the relief sought. The defense must thus prove standing, and establish the invalidity of a search and seizure made pursuant to a warrant or establish that the search and seizure was undertaken without a warrant. See §§16.11, 16.13 on proof of standing. Once the defense has shown the absence of a warrant, the burden shifts to the prosecution to justify the intrusion. *Badillo v Superior Court* (1956) 46 C2d 269, 294 P2d 23; *People v Contreras* (1989) 210 CA3d 450, 258 CR 361. A defendant meets this obligation on presentation of a prima facie showing that the police acted without a warrant. Procedurally speaking, a defendant need not guess what the prosecution's justification for the warrantless search will be. *People v Williams* (1999) 20 C4th 119, 83 CR2d 275. Nonetheless, defense counsel should naturally seek to anticipate the prosecutor's argument. When there is a warrant, it is presumed to have been lawfully issued and executed (Evid C §664), and the defense bears the burden of proving that the resulting search and seizure was invalid. *People v Amador* (2000) 24 C4th 387, 393, 100 CR2d 617. However, the prosecution may still bear the burden of proof when a search and seizure is challenged as being beyond the scope of the warrant. *People v Murray* (1978) 77 CA3d 305, 310, 143 CR 502 (prosecution bears burden of justifying seizure of items not specified in warrant, which were purportedly in plain view).

With respect to "secondary" or "derivative" evidence, *i.e.,* evidence that was subsequently obtained through evidence directly seized by illegal conduct, the defendant bears the initial burden of making a prima facie case that the secondary evidence was causally linked to the primary illegality, and the burden then shifts to the prosecution to justify the seizure. *People v Williams* (1988) 45 C3d 1268, 248 CR 834.

In a typical search and seizure motion, the defense is the moving party, claiming that the search was made without a warrant. In this situation, when the moving papers have provided a specific description of the evidence to be suppressed, it is better practice for the prosecution to stipulate that there was no warrant, and to proceed with the presentation of evidence. This practice is efficient and fulfills the responsibility of counsel, as officers of the court, not to waste the court's time. If possible, the defense should establish before the hearing whether the prosecutor will stipulate to the lack of a warrant.

Common ways of showing that there was no search warrant include:

- Calling a police officer from the case to ask whether there was a warrant;
- Calling a court clerk who is required to keep returns on warrants that have been served; and
- Having the defendant or a defense witness take the stand for the limited purpose of testifying that there was no warrant.

Alternatively, counsel can either request a continuance to obtain evidence that there was no warrant, or ask the court to order the prosecutor to subpoena the arresting officer.

The standard of proof at a suppression hearing is by preponderance of the evidence. *People v James* (1977) 19 C3d 99, 106 n4, 137 CR 447; *People v Superior Court (Cowman)* (1971) 18 CA3d 316, 95 CR 757. Therefore, when a search and seizure is without a warrant, factual testimony is in conflict, and the testimony on each side is equally credible, the motion should be granted. *People v Dickerson* (1969) 273 CA2d 645, 78 CR 400.

Following the presentation of evidence at the Pen C §1538.5 hearing, the court should allow oral argument, supplemental memorandums, or both, to give counsel an opportunity to make a clear and complete record for possible appeal. Both sides should advance whatever theories should be raised on appellate review, because new theories cannot be advanced for the first time in the appellate courts (*Mestas v Superior Court* (1972) 7 C3d 537, 102 CR 729) unless the factual record is sufficient to decide the newly raised issue as a matter of law (see *Green v Superior Court*

(1985) 40 C3d 126, 219 CR 186). Once the prosecution offers a justification for a warrantless search and seizure, the defense must respond by specifically pointing out any inadequacies in that justification. "Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal." *People v Williams* (1999) 20 C4th 119, 136, 83 CR2d 275.

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B. Defense Search and Seizure Motion

§16.17 1. Warrantless Search

A warrantless search and seizure is presumed to be unlawful, and the burden of justifying it falls on the prosecution. *People v Williams* (1999) 20 C4th 119, 136, 83 CR2d 275; *People v Superior Court (Keithley)* (1975) 13 C3d 406, 118 CR 617. This rule also applies when there is a warrant, if the challenged evidence was not specified in the warrant (*People v Murray* (1978) 77 CA3d 305, 143 CR 502 (prosecution has burden of justifying seizure of items not specified in warrant that were purportedly in plain view)), or if the search exceeded the scope of the authority conferred by the warrant. See §16.18 on the defendant's initial burden of going forward.

Ø **Note:** Exceptions exist to the warrant requirement. Examples include a search incident to arrest (*Chimel v California* (1969) 395 US 752, 762, 23 L Ed 2d 685, 693, 89 S Ct 2034); the automobile exception under which police may search an automobile and the containers within it without a warrant when they have probable cause to believe the automobile contains contraband or evidence (*California v Acevedo* (1991) 500 US 565, 580, 114 L Ed 2d 619, 111 S Ct 1982; *People v Superior Court (Nasmeh)* (2007) 151 CA4th 85, 100, 59 CR3d 633); and the "special needs" exception under which a warrant is not required when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable (*Griffin v Wisconsin* (1987) 483 US 868, 873, 97 L Ed 2d 709, 107 S Ct 3164).

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2. Search With Warrant

§16.18 a. Burden on Defense

A search and seizure conducted under authority of a warrant is presumed to be lawful, and the burden is on the defense to establish either that the warrant is invalid or that it was unlawfully executed. Defense counsel must locate and subpoena all necessary witnesses, and establish the salient facts on direct examination.

When the basis for suppression appears on the face of the warrant or the application for the warrant (*i.e.,* whether an affidavit or sworn testimony supplied probable cause for issuing a warrant, or whether the warrant itself satisfied constitutional and statutory requirements), the defense normally tries to satisfy its burden through legal argument based on those documents. In that event, defense counsel must move into evidence the warrant, affidavit, and return (or just the warrant if only the warrant itself is challenged); otherwise, there will be no evidence on which to base a ruling.

Even if a warrant is later declared invalid, courts will generally not suppress the fruits of a search performed under authority of the warrant, if the officer serving the warrant relied in good faith on the warrant's validity. *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405; *People v Camarella* (1991) 54 C3d 592, 286 CR 780. The rationale is that no police misconduct is deterred when a warrant has been sought and issued by a magistrate. The government has the burden of establishing "objectively reasonable" reliance. *U.S. v Leon, supra; People v Camarella, supra*.

In limited situations such good faith reliance cannot be established as a matter of law, whereupon the evidence may be suppressed. *U.S. v Leon* describes four of those situations (*U.S. v Leon* (1984) 468 US 897, 923, 82 L Ed 2d 677, 699, 104 S Ct 3405; *People v Camarella* (1991) 54 C3d 592, 596, 286 CR 780):

- The issuing magistrate was misled by information that the affiant officer knew or should have known was false;
- The magistrate wholly abandoned the judicial role of neutrality and disinterest;
- The affidavit was so lacking in indications of probable cause that it would be entirely unreasonable for an officer to believe probable cause existed; and
- The warrant was so facially deficient in failing to particularize the place to be searched or things to be seized that the executing officers could not reasonably presume it to have been valid.

In *Camarella,* the court held that the phrase "it would be 'entirely unreasonable' for an officer to believe" that probable cause existed means that a reasonable and well-trained officer "would have *known* that his affidavit failed to establish probable cause and that he should not have applied for the warrant." 54 C3d at 605. That a magistrate issued a warrant, which is a constant in such cases, is irrelevant. 54 C3d at 605.

The good faith exception is also unavailable to save a warrant based on illegally seized evidence. *People v Machupa* (1994) 7 C4th 614, 29 CR2d 775. Note, however, that the defendant must be able to establish standing to challenge the underlying illegality. *People v Madrid* (1992) 7 CA4th 1888, 1900, 9 CR2d 798. If sufficient evidence remains, after omitting the objectionable information from the warrant application, to support probable cause, the warrant will stand. *People v Weiss* (1999) 20 C4th 1073, 86 CR2d 337. Note also that such an affidavit is not entitled to ordinary deference. See discussion in §16.21.

The good faith exception applies to service of both bench warrants and search warrants. *People v Palmer* (1989) 207 CA3d 663, 255 CR 55.

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Source: Criminal Law/California Criminal Law Procedure and Practice/16 SEARCH AND SEIZURE MOTIONS/§16.19 b. Controverting (or Traversing) Warrant

§16.19 b. Controverting (or Traversing) Warrant

To "traverse" a warrant means to inquire whether any information in the search warrant affidavit is false. A motion to traverse a warrant is to be distinguished from a motion to quash the warrant, which challenges the sufficiency of the affidavit on its face, assuming the truth of the averments within it, a challenge that will rarely get around the good faith exception. When there is reason to believe that the information in the affidavit that was used to procure a search warrant is false, the defense has a "limited right" to challenge the truth of statements in the affidavit (*People v Panah* (2005) 35 C4th 395, 456, 25 CR3d 672; *People v Lewis* (2006) 39 C4th 970, 988, 47 CR3d 467) and may move to traverse the warrant under *Franks v Delaware* (1978) 438 US 154, 155, 57 L Ed 2d 667, 672, 98 S Ct 2674. See also *Theodor v Superior Court* (1972) 8 C3d 77, 103, 104 CR 226.

Before a hearing on a motion to traverse a warrant is required, defense counsel must give notice, setting forth "with some specificity, [the] reasons for contending that the affidavit is inaccurate." *Theodor v Superior Court* (1972) 8 C3d 77, 103, 104 CR 226. To obtain a hearing on a *Franks* motion, the defendant must make a substantial preliminary showing that (*Franks v Delaware, supra*; *People v Lewis* (2006) 39 C4th 970, 988, 47 CR3d 467):

- The affidavit in support of the warrant contained a false statement;
- The statement was made knowingly or in reckless disregard of the truth; and
- The statement was material, *i.e.,* necessary to the magistrate's finding of probable cause.

Material omissions from a warrant affidavit may be treated in the same way as material misstatements of fact. *People v Luttenberger* (1990) 50 C3d 1, 15 n4, 265 CR 690.

The motion should specify the portion of the affidavit alleged to be false and should be accompanied by supporting reasons. Affidavits or "other reliable statements of witnesses" should be attached if they are available and, if not, the motions should provide a satisfactory explanation for their absence. *Franks v Delaware* (1978) 438 US 154, 171, 57 L Ed 2d 667, 681, 98 S Ct 2674. See also *People v Box* (1993) 14 CA4th 177, 183, 17 CR2d 504. If the defendant establishes material falsity at the hearing and if the remaining facts in the affidavit are insufficient to establish probable cause, the warrant must be quashed and the evidence seized through the warrant must be suppressed. *Franks v Delaware, supra*.

> Ø **Note:** While *Franks* identifies a defendant's important right to test the validity of the search warrant, it does not give a defendant an "unlimited right to access all information possibly needed to meet the preliminary showing requirement." *U.S. v Napier* (9th Cir 2006) 436 F3d 1133, 1136.

At the hearing on the motion, defense counsel must also test the veracity of the affidavit by demonstrating its error or falsehood. *Theodor v Superior Court, supra*. The defense has the burden of producing evidence that establishes by a preponderance of the evidence that a false statement was intentionally or recklessly included in the affidavit, and that the false statement was material to the finding of probable cause. Material omissions are treated analogously: An omission is material if its absence makes the warrant affidavit substantially misleading. When material information has been omitted recklessly or with an intent to deceive the magistrate, it is added back, and the affidavit is retested for probable cause. *People v Lopez* (1985) 173 CA3d 125, 133, 218 CR 799.

If the defense has cast a reasonable doubt on the veracity or completeness of material statements made by the affiant, on the existence of the informant, or on the informant's prior reliability, the court must hold an in camera hearing. See *People v Estrada* (2003) 105 CA4th 783, 129 CR2d 589 (in absence of response by prosecution, defendant's sworn denial that transaction described by affiant occurred cast sufficient doubt on veracity of affiant to require in camera hearing). At the in camera hearing, the court may examine the informant to determine whether the affidavit contains false or reckless statements or omissions. *People v Brown* (1989) 207 CA3d 1541, 256 CR 11.

If the court finds false statements or material omissions in the affidavit and that, after deleting the false statements or adding the omitted information, there is insufficient probable cause to support the search and seizure, the warrant must be quashed. *Franks v Delaware* (1978) 438 US 154, 156, 57 L Ed 2d 667, 672, 98 S Ct 2674; *People v Luttenberger*

(1990) 50 C3d 1, 10, 265 CR 690.

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§16.19A c. Obtaining Information About Informant Who Provides Probable Cause for Warrant (*Luttenberger* Motion)

If the affidavit used to procure the search warrant was based on statements made by an undisclosed informant, it may be impossible to make the preliminary showing required to get a *Franks* hearing (*Franks v Delaware* (1978) 438 US 154, 156, 57 L Ed 2d 667, 672, 98 S Ct 2674; see §16.19) without disclosing information about the informant. However, the prosecution is not required to disclose the identity of an informant who furnished information on probable cause if the informant is not a material witness to guilt or innocence. *People v Hobbs* (1994) 7 C4th 948, 959, 30 CR2d 651; *People v Luttenberger* (1990) 50 C3d 1, 13, 265 CR 690. Disclosure of the informant's identity is not required even when the entire affidavit has been sealed to protect the informant's identity. *People v Hobbs, supra*.

The solution to this dilemma in California has been to permit discovery of information that could be used in traversing a warrant on a lesser showing than that required to obtain a *Franks* hearing. *Luttenberger,* 50 C3d at 16. The defendant may wish to request information on (1) the informant's relationship with law enforcement, reliability, and criminal history; (2) payments for information or promises of leniency; and (3) a copy of any statement the informant made in connection with the case.

Although the defendant need not make the "substantial preliminary showing" necessary to obtain a *Franks* hearing, a *Luttenberger* motion "must offer evidence casting some reasonable doubt on the veracity of material statements made by the affiant." This evidence could consist of a minimal showing of inconsistencies on the face of the affidavit or the search warrant, or some reason to believe that the informant does not exist or that the affiant misrepresented the informant's reliability or the nature of the information that was provided. 50 C3d at 21.

> Ø **Note:** Remember that the rule in *Franks* protects the defendant from material falsehoods on the part of the *affiant*, not from material falsehoods on the part of the *informant* (unless it can be shown that the affiant recklessly ignored information that should have alerted him or her to the fact that the informant's information was false).

If the trial court finds that the defendant has made the required showing, the court then examines the requested documents in camera to determine if any of them are material and to delete information that could disclose the informant's identity from any documents that will be given to the defense. 50 C3d at 19.

> Ø **Note:** If information obtained by a *Luttenberger* motion indicates that the informant may have been a material witness on the issue of guilt or innocence, the defendant should move to disclose the informant's identity.

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§16.19B d. Procedure When Affidavit in Support of Warrant Is Sealed in Its Entirety (*Hobbs* Motion)

In *People v Hobbs* (1994) 7 C4th 948, 959, 30 CR2d 651, the supreme court recognized that, when the entire affidavit has been sealed to prevent disclosure of the informant's identity, the defendant may not be able to make even the minimal showing required by *People v Luttenberger* (1990) 50 C3d 1, 13, 265 CR 690. See §16.19A. In this situation, a motion to quash or traverse the search warrant triggers the trial court's duty to conduct an in camera hearing. The prosecution may present testimony at this hearing. After examining the warrant and any supporting materials, and considering any testimony, the trial court's first duty is to decide whether (1) sufficient grounds exist for maintaining confidentiality of the informant's identity, and (2) whether the affidavit is properly sealed in whole or in part. *People v Hobbs* (1994) 7 C4th 948, 972, 30 CR2d 651. If the court finds that the affidavit was properly sealed, it next considers the motion to quash or traverse the warrant. If it finds no support in the materials before it for granting the defendant's motion, the court simply denies the motion. If, however, the court concludes that a reasonable probability exists that the defendant would succeed on a motion to quash or traverse the warrant, the court must give the prosecution the opportunity to choose whether it prefers to disclose the information in the sealed materials or to suffer the entry of an adverse order on the motion. 7 C4th at 974. The court must retain any sealed materials in the court record to facilitate review on appeal. 7 C4th at 975. See also *People v Martinez* (2005) 132 CA4th 233, 33 CR3d 328 (trial court should have filed confidential attachment in sealed condition along with search warrant and related affidavit following in camera hearing instead of returning attachment to police investigator).

Unlike the *Luttenberger* procedure, in which deciding whether to examine the requested documents in camera remains a matter of trial court discretion (*People v Luttenberger* (1990) 50 C3d 1, 21, 265 CR 690), an in camera hearing under *Hobbs* is required whenever the defendant moves to quash or traverse a search warrant based on a sealed affidavit. *People v Galland* (2004) 116 CA4th 489, 10 CR3d 350.

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§16.20 3. Whether Derivative Evidence Is "Fruit of the Poisonous Tree"

Evidence obtained directly through an unlawful search must be suppressed if the defendant has standing to challenge the search. See Pen C §1538.5. Evidence that is the indirect product of an unlawful search is also subject to suppression if the defense can show that the "secondary" or "derivative" evidence has been "tainted" by the initial illegality. The defense meets this burden by making a prima facie showing of a causal connection between the illegal search and the indirectly obtained evidence. *Wong Sun v U.S.* (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct 407; *People v Williams* (1988) 45 C3d 1268, 248 CR 834. Once the defense makes such a showing, the burden shifts to the prosecution to show that the taint has dissipated. The prosecution can invoke three doctrines to save presumptively tainted evidence from suppression: attenuation, independent source, and inevitable discovery.

To attenuate means to stretch thin. If the court finds that the discovery of the evidence is so far removed from that illegality that the deterrent effect of the exclusionary rule no longer justifies its cost, then the exclusionary rule does not apply even though the evidence in question would not have been found "but for" the primary illegality. *U.S. v Ceccolini* (1978) 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054. Three primary factors apply to an analysis of whether derivative evidence is "attenuated": (1) the time lapse between the illegality and the discovery of the evidence; (2) the presence of intervening factors, like *Miranda* warnings; and, particularly, (3) the purpose and flagrancy of the official misconduct. *Brown v Illinois* (1975) 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254; *People v Boyer* (2006) 38 C4th 412, 42 CR3d 677.

A warrant that is obtained after the police acted illegally is not necessarily tainted if it if based on a genuinely independent source, *i.e.,* if "no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant or the magistrate's decision to grant it." *Murray v U.S.* (1988) 487 US 533, 540, 101 L Ed 2d 472, 482, 108 S Ct 2529; *People v Weiss* (1999) 20 C4th 1073, 1082, 86 CR2d 337 (suppression not warranted unless illegal information would have affected "in a substantive manner" magistrate's decision to issue warrant, though in such case redacted affidavit not entitled to ordinary deference).

Taint may also be dissipated if the prosecution can prove inevitable discovery, *i.e.,* a "reasonably strong probability" that the evidence would have been discovered regardless of the Fourth Amendment violation. *People v Superior Court (Tunch)* (1978) 80 CA3d 665, 681, 145 CR 795. Significant factors include whether a broad-based police investigation was afoot at the time (*Nix v Williams* (1984) 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501) and the likelihood that usual and commonplace police procedures would have led to the evidence in any event (*People v Boyer* (2006) 38 C4th 412, 42 CR3d 677).

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§16.21 4. Using Transcripts as Evidence

If the Pen C §1538.5 motion in a felony case was made at the preliminary examination, Pen C §1538.5(i) requires that the transcript be admitted at the §1538.5 special hearing.

A transcript of any other hearing, however, may not be admitted at a §1538.5 hearing unless both sides stipulate to its admission (*People v Neighbours* (1990) 223 CA3d 1115, 273 CR 32) or some evidentiary rule allows it to be admitted. When a transcript is thus admitted, counsel must renew objections made at the earlier hearing; otherwise, the entire transcript will be admitted in evidence, including testimony that was kept out because of an objection at the earlier hearing. *People v Williams* (1992) 3 CA4th 1535, 5 CR2d 372.

Ø **Note:** Counsel who does not wish to stipulate to admission of a transcript of an earlier proceeding should say so clearly. *People v Satchell* (1978) 81 CA3d 347, 146 CR 307 (defense counsel's statement that he "would have preferred that the officer testify anew" was construed as stipulation to use of transcript; not considered to be objection).

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§16.22 5. Evidentiary Rules and Production of Evidence

The rules of evidence used at a Pen C §1538.5 hearing are those of the Evidence Code. *Jauregi v Superior Court* (1999) 72 CA4th 931, 939, 85 CR2d 553.

An officer can conduct a search or make an arrest without a warrant on the basis of information received from another officer or official police channels. *People v Ramirez* (1997) 59 CA4th 1548, 1553, 70 CR2d 341. See also *People v Gomez* (2004) 117 CA4th 531, 541, 12 CR3d 398 (officers can work together to build "collective knowledge," which may be used to establish probable cause). Testimony offered solely on the issue of probable cause, which would be hearsay if offered for the truth of the matter asserted, is *not* hearsay, and is admissible. For example, if a police officer testifies to the reported description of an alleged robber, the testimony is not admitted to prove that the robber was as described; it is offered to show that the officer did (or did not) have probable cause to detain, search, or arrest the defendant. See *People v Magana* (1979) 95 CA3d 453, 157 CR 173. However, when the officer does *not* have personal knowledge of the facts that provide probable cause, the evidence at the §1538.5 hearing must establish that it was reasonable for the officer to rely on the information. See, *e.g., People v Gomez, supra; People v Ramirez* (1997) 59 CA4th 1548, 1554, 70 CR2d 341 (information should be factual rather than conclusory, should include specific and articulable facts, and should be reliable). This rule, which derives from *People v Harvey* (1958) 156 CA2d 516, 319 P2d 689, and *People v Madden* (1970) 2 C3d 1017, 88 CR 171, is known as the *Harvey-Madden* rule. At a §1538.5 suppression hearing, a party may not use affidavits in lieu of live testimony to present its case. *People v Johnson* (2006) 38 C4th 717, 723, 42 CR3d 887.

All evidence relied on at the hearing should be marked, described, or exhibited with enough clarity that a reviewing court will be able to understand what evidence was admitted, and what items or portions were being referred to during the hearing. As with any evidentiary hearing, diagrams used in the hearing should be adequately marked and gestures described, so that a person reading the transcript and looking at the diagram can understand what the testimony referred to.

Counsel may introduce physical items into evidence, *e.g.,* diagrams, photographs, and clothing, when it is appropriate for resolving or clarifying a fact in issue. It may sometimes be appropriate to move and receive into evidence, for purposes of the §1538.5 hearing, the very evidence that the defense is moving to suppress. (If the defense wishes to introduce evidence held by the police or prosecution, it should make arrangements in advance to have it in court. A request may suffice. If that arrangement proves ineffective, a subpoena duces tecum should be used.) It is good practice, although not required, when evidence is offered for a limited purpose, for counsel to specify what that purpose is. For example, the defense might introduce seized heroin so that the judge might decide whether it was reasonable for an officer to claim that it felt like a weapon in a pat search.

When a warrant is involved, defense counsel should be sure to move into evidence the portions that are necessary to the court's decision (the warrant, affidavit, and/or return on the warrant).

When a defendant testifies at a §1538.5 hearing, that testimony may not be used at trial except to impeach the defendant. *Simmons v U.S.* (1968) 390 US 377, 394, 19 L Ed 2d 1247, 1259, 88 S Ct 967. The purpose of the defendant's testimony at the hearing should therefore be considered and carefully limited so as to restrict the scope of cross-examination. For example, if the defendant will testify on whether consent was given, counsel should state that purpose at the outset so that cross-examination does not extend into the area of the charged crime itself. Counsel should also advise the defendant not to volunteer information or stray beyond the stated limited purposes of his or her testimony, so as not to inadvertently open new areas for cross-examination. Judges vary considerably in the latitude they permit on cross-examination under the rubric of "challenging credibility." Counsel may wish to clarify beforehand what latitude the court will permit. If cross-examination is permitted to expand dangerously, defense counsel must decide whether to withdraw the defendant as a witness and have the direct examination stricken, or to go ahead, giving the prosecutor the opportunity to elicit incriminating testimony.

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§16.23 VII. REVIEW OF PEN C §1538.5 RULING IN MISDEMEANOR CASES

Review of a Pen C §1538.5 motion in a misdemeanor case, whether granted or denied, is by appeal to the appellate division of the superior court. Pen C §1538.5(j). The notice of appeal must be filed within 30 calendar days after the judge's statement that the motion is granted or denied. Cal Rules of Ct 8.853(a). If the notice is not filed within that time, the appeal is void. See Cal Rules of Ct 8.812.

California Rules of Court 8.800-8.817 (general rules applicable to appellate division proceedings), 8.850-8.873 (appeals and records in misdemeanor cases), and 8.880-8.891 (briefs, hearings, and decisions) govern such appeals. In the case of a defense appeal from a denial of a motion to suppress, the trial court has discretion to stay further proceedings pending the appellate outcome. In the case of a prosecution appeal from the grant of a motion to suppress, the trial court is obligated to stay further proceedings pending the appellate outcome. Pen C §1538.5(*l*). See *People v Gallagher* (2009) 171 CA4th Supp 1, 4, 90 CR3d 695. A petition for a writ of mandamus is unavailable as a means of review. Both the defense and the prosecution may seek review beyond a superior court appellate ruling only by asking the court of appeal to certify the case to itself for further review. Cal Rules of Ct 8.1000-8.1018. This review is discretionary. See Cal Rules of Ct 8.1005. On certification to the court of appeal, see §43.35.

Ø **Note:** Penal Code §1538.5(j) permits filing of a direct appeal in misdemeanor cases as long as the Rules of Court are followed. The tension between Pen C §1538.5(j) and Pen C §1510 has not been authoritatively resolved. Section 1510 limits "review" to suppression motions filed within 45 calendar days after arraignment. Some prosecutors have argued that §1510 should apply to both appeals and writs, despite §1538.5(j). The better view seems to be that §1538.5(j), as the more recent and specific enactment, controls. Section 1510 appears in the chapter of the Penal Code pertaining specifically to writs.

Ø **Note:** It is possible to file a petition for a writ of habeas corpus challenging wrongful failure to certify a case. See *In re Wallace* (1970) 3 C3d 289, 292, 90 CR 176; *In re Eichorn* (1998) 69 CA4th 382, 387, 81 CR2d 535. Relief on this ground appears to be highly unusual.

Once a court of appeal has ruled on a case, it follows the same course as a felony appeal: Either counsel may request a rehearing in the court of appeal and review in the California Supreme Court. Cal Rules of Ct 8.500-8.516.

Another review remedy available to the defense if a §1538.5 motion is denied is to proceed to trial or plea bargain and to appeal a resulting conviction. The defendant is entitled to such an appeal after conviction, whether by trial, plea of guilty, or plea of no contest. Pen C §1538.5(m); *People v Callahan* (1997) 54 CA4th 1419, 63 CR2d 684. No certificate of probable cause is required for such an appeal. *People v Peterson* (1973) 9 C3d 717, 720 n1, 108 CR 835. Note, however, that a defendant may waive this appeal right as part of a plea agreement. *People v Berkowitz* (1995) 34 CA4th 671, 40 CR2d 150.

For further discussion of review of misdemeanor search and seizure rulings, see Appeals and Writs in Criminal Cases §§1.17, 3.49 (3d ed Cal CEB 2007).

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VIII. DEFENSE OPTIONS WHEN PEN C §1538.5 MOTION IS DENIED AT PRELIMINARY EXAMINATION

§16.24 A. Types of Review Available

If the defendant is held to answer at the conclusion of the preliminary examination and a search and seizure motion was made and denied (see §8.31), two challenges to the evidence are then available: a motion to dismiss under Pen C §995, and a special hearing under Pen C §1538.5(i). *People v Laiwa* (1983) 34 C3d 711, 195 CR 503. See §16.7 on the Pen C §1538.5 motion available in this situation.

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§16.25 B. Pen C §995 Motion Compared With Pen C §1538.5 Motion After Preliminary Examination

If a Pen C §1538.5 motion was heard and denied at the preliminary examination, and if the holding order (also called a bindover) concerning one or more counts could not stand without the challenged evidence, review of the motion is available through Pen C §995. A §995 motion is a review of the magistrate's action and is based solely on the transcript of the preliminary examination; no new evidence may be heard or considered. *People v Sahagun* (1979) 89 CA3d 1, 20, 152 CR 233. Moreover, the judge ruling on the §995 motion is bound to defer to the preliminary examination magistrate on all factual matters. The §995 judge must review the magistrate's legal ruling and uphold it if the record supports it. *People v Alonzo* (1993) 13 CA4th 535, 16 CR2d 656. See chap 13 on §995 motions.

For tactical reasons, the defense may in some cases find it more advantageous to forgo raising the search and seizure issue at the preliminary examination and subsequent §995 review in favor of challenging the evidence exclusively at a §1538.5 special hearing after arraignment on the information. See discussion of those reasons in §16.7.

Whether counsel decides to bring a §995 motion, a §1538.5 motion, or both, counsel should clearly indicate on each motion which type it is because the type of review available differs, depending on the type of motion. See §§16.35-16.37 (defense review), 16.32-16.34 (prosecution review).

Ø **Note:** It is unclear what effect a §1538.5 motion by a codefendant at the preliminary examination has on a defendant's right to make a "first" §1538.5 motion. See *People v Nelson* (1981) 126 CA3d 978, 981, 179 CR 195. It can be argued that a person who is not a party to a motion is not bound by its result. Defense counsel not joining in a codefendant's §1538.5 motion at the preliminary examination should make a clear record at that examination that he or she is not joining in the motion and why, *e.g.,* investigation has not been completed.

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IX. PROSECUTION OPTIONS WHEN MOTION IS GRANTED AT PRELIMINARY EXAMINATION

A. Case Dismissed Following Successful Defense Pen C §1538.5 Motion at Preliminary Examination

§16.26 1. Two-Dismissal Rule

If a magistrate dismisses a case under Pen C §871 because insufficient evidence remains to hold the defendant to answer after illegally obtained evidence is suppressed, and the prosecutor chooses not to challenge the dismissal under Pen C §871.5, that dismissal counts as one dismissal under Pen C §1387. Two dismissals of a case are usually a bar to any further prosecution for the same offense. Pen C §§1387, 1538.5(p). There are, however, limited circumstances that allow the prosecutor to refile even after two dismissals. See discussion in §§25.45-25.46. Review under §871.5 is discussed in §16.30.

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§16.27 2. Discharge and Refile

When the granting of a Pen C §1538.5 motion at the preliminary examination results in discharge of the entire case, the prosecution may elect to (1) refile the charges and obtain another preliminary examination, (2) seek an indictment, or (3) move under Pen C §871.5 to reinstate the complaint. Pen C §1538.5.

If the People elect to refile or seek an indictment, the ruling on the §1538.5 motion at the first preliminary examination is not binding in the subsequent proceeding. Pen C §1538.50. However, if the judge who granted the motion at the first hearing is available, the suppression motion must be relitigated before that judge. Pen C §1538.5(p). The prosecution may not circumvent this requirement by filing an affidavit of prejudice under CCP §170.6. *Barnes v Superior Court* (2002) 96 CA4th 631, 117 CR2d 621.

If the second motion to suppress is also granted and the magistrate dismisses the complaint because the remaining evidence is insufficient, the prosecution may not file a new complaint or seek reindictment unless it obtains additional evidence relating to the motion that was not reasonably discoverable at the second suppression motion. Pen C §1538.5(p). However, the prosecution may file a motion to compel the magistrate to reinstate the complaint under Pen C §871.5(a). *People v Toney* (2004) 32 C4th 228, 232, 8 CR3d 577 (Pen C §1538.5(p) bars only refiling complaint or seeking indictment without new evidence; it does not prevent prosecution from relitigating validity of search and seizure in §871.5 motion).

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§16.28 B. Motion Granted but Defendant Held to Answer

Motion granted on all charges; **defendant held to answer to all charges on basis of other evidence.** When a search and seizure motion is granted at the preliminary examination but the defendant is held to answer to the charges because enough other evidence remains on which to base a holding order, the prosecution is bound by the magistrate's search and seizure ruling unless the prosecution requests a de novo search and seizure hearing. Pen C §1538.5(j). For further discussion of this de novo hearing, see §16.32.

Motion granted; **some counts dismissed, but defendant held to answer to other counts.** A defendant may be charged with more than one count, and fewer than all counts may be dismissed at the preliminary examination on the basis of the Pen C §1538.5 motion, either because the search and seizure motion did not relate to all counts or because there was sufficient other evidence on which to base a holding order. When this occurs, a de novo search and seizure hearing is appropriate only for the count or counts on which the defendant was held to answer. A de novo ruling favorable to the prosecution allows the evidence to be used only on those counts and will not result in reinstatement of the dismissed count or counts. See Pen C §1538.5(j). The prosecution has two options regarding the dismissed count or counts. One option is to file a new complaint or seek an indictment (*People v Belknap* (1974) 41 CA3d 1019, 116 CR 664; see also discussion in §16.30), which may also mean dismissing the charges to which the defendant was held to answer in order to avoid potential Pen C §654 problems (discussed in §§37.43-37.50). The other option is to file a motion under Pen C §871.5 on the dismissed counts (see §16.30), and challenge the counts to which the defendant was held to answer with a de novo search and seizure hearing.

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§16.29 C. Motion Denied but Magistrate Ruled Against Prosecution on Issue

If a magistrate at a preliminary examination rules against the prosecution on an aspect of the Pen C §1538.5 motion but nevertheless denies the defense motion, the adverse ruling becomes binding on the prosecution unless the prosecution files a notice seeking review under Pen C §1538.5(j). *Eiseman v Superior Court* (1971) 21 CA3d 342, 98 CR 342.

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§16.30 D. Motion to Reinstate Complaint (Pen C §871.5)

When the granting of a Pen C §1538.5 motion at the preliminary examination results in discharge of the entire case, or a portion of it, the prosecution may move within 15 calendar days to reinstate the complaint under Pen C §871.5. *Vlick v Superior Court* (1982) 128 CA3d 992, 180 CR 742. To "make" such a motion actually means to file the motion within 15 calendar days after the discharge. *People v Dianda* (1986) 178 CA3d 174, 223 CR 635.

If the Pen C §871.5 motion is decided against the prosecution, the prosecution may not refile the dismissed action. Pen C §871.5(c). If the motion is decided in favor of the prosecution, the magistrate must reinstate the complaint and issue a commitment (holding or bindover) order.

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§16.31 E. Motion for De Novo Special Hearing (Pen C §1538.5(j))

If a Pen C §1538.5 motion is granted at the preliminary examination, and the defendant is held to answer, the prosecution may obtain a new Pen C §1538.5 hearing. Pen C §1538.5(j); *People v Ramirez* (1992) 6 CA4th 1583, 8 CR2d 529. The prosecution's right to a de novo hearing of a suppression motion under Pen C §1538.5(j), a right that defendants do not have under Pen C §1538.5(i), gives the prosecution an unfair advantage but offsets an advantage given to the defendant, who is permitted to surprise the prosecution at the preliminary hearing by moving to suppress evidence without prior notice. *People v Weaver* (1996) 44 CA4th 154, 51 CR2d 602.

The prosecution must request a new §1538.5 motion within 15 calendar days after the preliminary examination; otherwise, that ruling becomes binding on the prosecution. Pen C §1538.5(j). If the prosecution fails to request a de novo hearing under §1538.5(j), the original ruling is binding on the prosecution, even if the case is dismissed and subsequently refiled. *People v Jackson* (2002) 96 CA4th 1265, 117 CR2d 886.

This special hearing is a de novo hearing. Pen C §1538.5(j). The hearing is not available if two defense §1538.5 motions have been granted, unless new evidence is found that was not reasonably discoverable earlier. Pen C §1538.5(j). A sample prosecution request for a search and seizure hearing under §1538.5(j) is in California Criminal Law Forms Manual §16.7 (2d ed Cal CEB 2005).

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X. APPELLATE REVIEW OF RULINGS IN FELONY CASES

A. Review Sought by Prosecution

§16.32 1. Dismissal Following Special Hearing

If the court grants a motion to suppress evidence, and the prosecution is unable to proceed without the suppressed evidence, the court should dismiss the action under Pen C §1385 on its own motion. *People v Laiwa* (1983) 34 C3d 711, 722, 195 CR 503. If the prosecutor moves to dismiss, the dismissal is not appealable. *People v Gallagher* (2009) 171 CA4th Supp 1, 90 CR3d 695. However, the case may then be refiled under Pen C §1538.5(j), if the defendant's search and seizure motion has not been granted twice (Pen C §1538.5(p)). See *People v Caserta* (1971) 14 CA3d 484, 92 CR 382.

The legislative amendment to §1538.5(j) that allows the prosecution to refile charges and relitigate the §1538.5 motion de novo is constitutional. *People v Gallegos* (1997) 54 CA4th 252, 62 CR2d 666. The defense has the right to have the relitigation of the motion heard by the same judge who initially granted the motion if that judge is available. Pen C §1538.5(p); *Soil v Superior Court* (1997) 55 CA4th 872, 64 CR2d 319.

Under Pen C §1238(a)(7), the prosecution may appeal the dismissal of an information after the granting of a motion to suppress, even if the court of appeal has summarily denied a writ petition filed by the prosecution, as long as the denial was not a decision on the merits; a decision on the merits, even without a written opinion, precludes a prosecution appeal. *People v Allison* (1988) 202 CA3d 1084, 249 CR 218.

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§16.33 2. Motion Granted but No Dismissal Following Special Hearing

When a defense motion is granted at a Pen C §1538.5 special hearing, a dismissal ordinarily will not occur unless the prosecutor announces the inability to proceed without the suppressed evidence. (The judge usually asks the prosecutor if he or she can proceed without the suppressed evidence; if the prosecutor says no, the judge dismisses the case.) When the charge is not dismissed (*i.e.,* when some evidence is suppressed but enough remains to try the case), the prosecution may seek review by way of a petition for writ of mandate and/or prohibition, which is preceded by the prosecution's filing a notice of intention to file the petition. Pen C §1538.5(o).

In these circumstances, the court must order an in-custody defendant released on his or her own recognizance unless it is a homicide case. Pen C §1538.5(k).

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§16.34 3. Review in Defense Appeal

If evidence is suppressed at a de novo Pen C §1538.5 hearing, and the defendant is convicted at trial without the suppressed evidence and then appeals the conviction, the prosecution may challenge the granting of the suppression motion in the same appeal. Pen C §1252; *People v Smith* (1983) 34 C3d 251, 193 CR 692. Defense counsel should keep this in mind when deciding whether to appeal such a conviction.

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B. Review Sought by Defense

1. Pretrial Writ Review

§16.35 a. Court of Appeal

Following denial of a Pen C §1538.5 motion at a special hearing, defense counsel may seek review by filing a petition for writ of mandate and/or prohibition in the court of appeal. Pen C §1538.5(i). Defense attorneys probably make more procedural errors in this process than in any other part of the §1538.5 procedure.

A petition for writ review of denial of a §1538.5 motion must be filed within 30 calendar days after the order denying the motion. Pen C §1538.5(i). Penal Code §1510 requires that the motion must have been made within 60 calendar days after arraignment; that it must have been complied with; and that the petition should state that it has been complied with, or, if it has not, should set out good cause for failure to meet this requirement.

Along with the petition, counsel must file with the clerk of the court of appeal a transcript of the §1538.5 hearing, plus copies of all written motions of both sides, all relevant pleadings, all supporting memorandums filed in the motion, any written dispositive orders, and copies of all documentary exhibits admitted at the hearing. Cal Rules of Ct 8.486(b); *Sherwood v Superior Court* (1979) 24 C3d 183, 154 CR 917. The supporting documents required by Cal Rules of Ct 8.486 may either be submitted in a separate volume or attached at the end of the petition. Cal Rules of Ct 8.486(c). When they are lengthy, it is common in some districts to just file (or "lodge") one copy with the court; counsel should check local practice.

When exhibits other than documents were introduced at the hearing, the petition should describe them and state that they will be transmitted to the reviewing court under Cal Rules of Ct 8.224. Counsel must file a notice with the superior court clerk, specifying which exhibits should be sent to the court of appeal. Cal Rules of Ct 8.224(a).

A transcript of the §1538.5 hearing may be ordered directly from the court reporter without an order signed by the judge, unless counsel wishes to request, in an indigent case, that the transcript be prepared at court expense. Pen C §1539(b). The transcript should be ordered immediately after the ruling on the motion, in order to give the reporter time to prepare it. If the transcript is not yet available to file with the petition, a copy of the request for the transcript should be filed with the court of appeal, along with a declaration stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date before counsel has requested the reviewing court to act in finally disposing of the case. Cal Rules of Ct 8.486(b)(3)(B). If the transcript is unavailable, *e.g.,* lost or destroyed, or, more likely, if the court reporter is ill, a declaration must be filed stating why the transcript is unavailable; the declaration must contain a summary of the proceedings, including the parties' arguments, and the basis for the court's decision, if given. Cal Rules of Ct 8.486(b)(3)(A).

An original and four copies of the petition must be filed with the court of appeal. Cal Rules of Ct 8.44(b). The rules for form and filing of the petition are the same as for appeals. Cal Rules of Ct 8.4. These rules govern even such matters as color of the cover and covering staples. See Cal Rules of Ct 8.40, 8.204. For more detailed coverage and for sample format, see Appeals and Writs in Criminal Cases, chaps 7-8 (3d ed Cal CEB 2007).

Counsel must serve a copy of the petition on the respondent court, the prosecutor, and the Attorney General. The petition must contain proof of service. Cal Rules of Ct 8.25(a). It is common in some counties for defense counsel to personally serve the petition and obtain the signature of each person served for filing with the court of appeal.

The petitioner should ask for a stay of trial. Counsel should comply with the Pen C §1050 requirements discussed in chap 20. There is seldom a problem in obtaining a stay from the trial court as long as the defendant waives his or her speedy trial rights. When the trial court will not grant a stay, defense counsel should ask the appellate court for a stay of trial. Counsel should *not* request a stay of all proceedings because this would prevent any action at all from taking place in the trial court, even, for example, a motion to reduce bail. If a request for a stay is bound with or part of the writ petition, the words "STAY REQUESTED" must be prominently displayed *on the cover* of the petition. Cal Rules of Ct 8.116. See Appeals & Writs §8.4.

Court of appeal review of such a petition for writ is discretionary and, in most cases, is not granted. The court's

decision to deny review is not a ruling on the merits. *People v Medina* (1972) 6 C3d 484, 99 CR 630.

If the court of appeal allows briefing and argument and decides the cause in a full written opinion, the ruling is the law of the case and is binding in a postconviction appeal. *Kowis v Howard* (1992) 3 C4th 888, 894, 12 CR2d 728. The law of the case does not apply to summary denials. *People v Medina, supra*.

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§16.36 b. California Supreme Court

If pretrial review is summarily denied by the court of appeal, the defense may petition for review in the California Supreme Court. *People v Medina* (1972) 6 C3d 484, 99 CR 630. The petition must be filed within 10 calendar days after denial in the court of appeal is final. Cal Rules of Ct 8.500(e)(1). The petition may ask as an alternative to a hearing that the court of appeal be ordered to issue an alternative writ and hear the matter on its merits. See Cal Const art VI, §12. See also California Criminal Law Forms Manual §42.2 (2d ed Cal CEB 2005) (sample petition).

Attachments to the petition that may be filed or lodged in the state supreme court are delineated in Cal Rules of Ct 8.504(e)(1).

When petitioning the supreme court for review after an adverse ruling on the merits in the court of appeal, defense counsel may wish to remind the supreme court that the court of appeal's decision will probably become the law of the case in a later appeal if a hearing is not granted. See *People v Medina, supra*.

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§16.37 2. Postconviction Appeal

If a defense Pen C §1538.5 motion is denied and the defendant is convicted, the defense may raise the search issue on appeal, whether the conviction was by trial or plea. A certificate of probable cause is not required to appeal §1538.5 issues following a plea of guilty or no contest. Cal Rules of Ct 8.304(b). There is no requirement that the §1538.5 motion have been made within a specific time period to be able to bring an appeal. Pen C §1538.5(m).

Section 1538.5(m) allows an appeal only if at "some stage of the proceedings" the defendant moved for the suppression of evidence. This has been interpreted to require the defendant to seek review of the magistrate's decision in a special hearing in the superior court or to raise the issue in a Pen C §995 motion. *People v Lilienthal* (1978) 22 C3d 891, 150 CR 910 (motion to suppress made during preliminary examination in felony case does not preserve issue for appeal after conviction); *People v Burns* (1993) 20 CA4th 1266, 25 CR2d 230. Consolidation of the municipal and superior courts did not change this rule. *People v Hoffman* (2001) 88 CA4th 1, 105 CR2d 372. See also *People v Richardson* (2007) 156 CA4th 574, 67 CR3d 552; *People v Garrido* (2005) 127 CA4th 359, 25 CR3d 494; *People v Hinds* (2003) 108 CA4th 897, 134 CR2d 196.

When an appeal is from conviction by a plea, the notice of appeal must specify that denial of the suppression motion is the ground for the appeal. Otherwise, the notice of appeal is not operative. Cal Rules of Ct 8.304(d).

The harmless error rule is never applicable when a search issue is raised on appeal from conviction by plea. *People v Miller* (1983) 33 C3d 545, 189 CR 519; *People v LeBlanc* (1997) 60 CA4th 157, 70 CR2d 195. However, it is applicable on appeal following conviction at trial. On postconviction appellate procedure, see chaps 43-44.

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17

MOTION TO DISCLOSE INFORMER'S IDENTITY

GARRICK A. BYERS

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Source: Criminal Law/California Criminal Law Procedure and Practice/17 MOTION TO DISCLOSE INFORMER'S IDENTITY/§17.1 I. OVERVIEW

§17.1 I. OVERVIEW

This chapter discusses discovery of an informer's identity and whereabouts. The prosecution has a qualified privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a law of the United States, of California, or of a California public entity. Evid C §§1041-1042. The policies served by this privilege are "to encourage citizens to report crimes regardless of their motives for doing so and to avoid inhibiting law enforcement's necessary use of professional informants." *People v Navarro* (2006) 138 CA4th 146, 163, 41 CR3d 164. A motion to disclose an informer's identity is a special discovery request, a subset of the general discovery process. The privilege conferred by Evid C §1041 is an "express statutory provision" under which discovery is permitted by Pen C §1054(e). *People v Jackson* (2003) 110 CA4th 280, 290, 1 CR3d 561. On discovery in criminal cases generally, see chap 11. Reliability of informers is discussed in chap 16.

A motion to discover an informer's identity is a request for the court to order the prosecution to disclose the identity and the present whereabouts, along with other pertinent information, of an informer who has given the police information relevant to the defendant's case.

Disclosure is required only if the informer is a material witness on the issue of guilt who could give evidence that might exonerate the defendant. *Eleazer v Superior Court* (1970) 1 C3d 847, 852, 83 CR 586; *Honore v Superior Court* (1969) 70 C2d 162, 168, 74 CR 233. An informer's identity generally does *not* need to be disclosed if it is sought only to aid the defense in attacking probable cause for a search warrant or to make an arrest. Evid C §1042; *People v Hobbs* (1994) 7 C4th 948, 959, 30 CR2d 651. On probable cause for a search warrant, see chap 16.

Although either party may calendar a matter for hearing on the subject of disclosure of the informer's identity, the prosecution rarely does so. See §17.10. Defense counsel who wishes to make the motion might want to make an informal request for the information under Pen C §1054.5(b). Although no case has held that an informal request is a prerequisite to a formal motion under Evid C §1040, the prosecution may voluntarily disclose. Then, if no disclosure is made, counsel can make a formal motion.

If the informer is to be a prosecution witness at trial, no case has decided if the prosecution can simply invoke the privilege to withhold disclosure, despite Pen C §1054.1's disclosure requirement, or can take this initiative by moving to delay or withhold disclosure under Pen C §1054.7 and Evid C §1042.

While the prosecution must disclose the witnesses it plans to use at trial, and must disclose exculpatory evidence (Pen C §1054.1), no case or statute requires the prosecution to disclose a material witness who it deems is not exculpatory and whom it does not intend to call at trial. If such a material witness is an informer, the defense will generally have to use a motion to disclose the informer.

The privilege does not prevent the informer from disclosing his or her own identity. Evid C §1041(c). The privilege also does not apply if a person is called as a witness and asked if he or she is an informer. Law Revision Comment to Evid C §1041.

> Ø **Note:** Evidence Code §1041 uses the term "informer." Compare with Pen C §1127a, which uses the term "informant." Cases sometimes distinguish between a "citizen informer" and a "paid informant" (see, *e.g., People v Terrones* (1989) 212 CA3d 139, 147, 260 CR 355), but the terminology is not consistent (see, *e.g., People v Gonzalez* (2006) 38 C4th 932, 949, 44 CR3d 237 ("citizen informants"); *People v Cribas* (1991) 231 CA3d 596, 603, 282 CR 538 ("paid informer")). Thus, "informer" and "informant" without further attribution, such as "citizen" or "paid," must be considered interchangeable, synonymous words. The difference between a paid and unpaid informer or informant is in the assessment of reliability and not in the standards for disclosure of identity.

"In-custody informants" whose testimony is based on statements that the defendant allegedly made while both were in custody are the subject of special rules set out in Pen C §1127a. See §17.14.

The following issues related to informants are *not* covered in this chapter:

- The defense may challenge the informant's reliability as it relates to probable cause. *Illinois v Gates* (1983) 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317; *Franks v Delaware* (1978) 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674.

See chap 16.

- The defense may seek discovery of search warrant affidavits and related documents that were sealed by the court. See *People v Galland* (2008) 45 C4th 354, 86 CR3d 841; *People v Hobbs* (1994) 7 C4th 948, 30 CR2d 651. See chap 16.
- The defense may seek discovery of information that the prosecution claims is privileged as official information. Evid C §1040. See *People v Haider* (1995) 34 CA4th 661, 665, 40 CR2d 369 (collecting cases on locations of surveillance sites).

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§17.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart as many counties have specific time requirements.

Action	Deadline	Authority
Defense informally requests informer's identity (see also §17.8).	Probably optional. Counsel should leave time to make formal motion if necessary.	Pen C §1054.5(b).
Formal motion, with memorandum, to discover informer's identity.	Served and filed at least 10 court days, and with proof of service at least 5 court days, before the hearing.	Cal Rules of Ct 4.111(a).
Response to motion to disclose informer's identity.	Served and filed at least 5 court days before the hearing.	Cal Rules of Ct 4.111(a).
Reply to response to motion to disclose informer's identity.	Served and filed at least 2 court days before the hearing.	Cal Rules of Ct 4.111(a).
Prosecution request for in camera hearing.	Before prosecutor files petition for writ, or suffers a dismissal for refusal to disclose; otherwise, prosecutor may be precluded from having in camera hearing.	Compare *Williams v Superior Court* (1974) 38 CA3d 412, 425, 112 CR 485 (no hearing on remand), with *Goodlow v Superior Court* (1980) 101 CA3d 969, 977, 162 CR 121 (hearing allowed on remand), and *People v Viramontes* (1978) 85 CA3d 585, 149 CR 607 (prosecutor waived issue by not requesting in camera hearing in trial court).

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III. DEFENSE MOTION

§17.3 A. Defendant's Right to Seek Discovery

A defendant is entitled to seek discovery of the name and present whereabouts of a "confidential informant" who (1) is a material witness on the issue of guilt and (2) can give evidence that might exonerate the defendant if there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. Evid C §1042(a), (d); *Eleazer v Superior Court* (1970) 1 C3d 847, 852, 83 CR 586; *Honore v Superior Court* (1969) 70 C2d 162, 167, 74 CR 233.

Sometimes the prosecution will simply reveal the informer's identity and location on request. If not, the defendant will need to make a motion to disclose the identity of the informer. This is a discovery motion grounded in the Sixth Amendment right to confront witnesses and the due process right to a fair trial. *Price v Superior Court* (1970) 1 C3d 836, 83 CR 369; *Honore v Superior Court, supra; People v Garcia* (1967) 67 C2d 830, 64 CR 110; *People v McShann* (1958) 50 C2d 802, 330 P2d 33. See also *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194; *Roviaro v U.S.* (1957) 353 US 53, 1 L Ed 2d 639, 77 S Ct 623.

The defendant bears the burden of making a prima facie showing of materiality, and discharges that burden by demonstrating a "reasonable possibility" that the informer could give evidence that could result in the defendant's exoneration. *Theodor v Superior Court* (1972) 8 C3d 77, 88, 104 CR 226.

Circumstances in which courts have ordered disclosure include the following:

- The informer was a participant in the charged offense. *People v McShann* (1958) 50 C2d 802, 806, 330 P2d 33 (at police request, informant set up and made controlled buy).
- The informer was a percipient witness to the charged offense's immediate antecedents or aftermath. *Price v Superior Court* (1970) 1 C3d 836, 839, 83 CR 369 (informant had personal knowledge that defendant had weapon matching the weapon used in crime, and heard defendant admit shooting); *People v Lee* (1985) 164 CA3d 830, 837, 210 CR 799 (informant had seen defendant possess and sell drugs); *People v Coleman* (1977) 72 CA3d 287, 298, 139 CR 908 (informant saw heroin inside apartment and made phone call to ascertain that heroin was still there). A percipient witness with evidence favorable to the defendant is required to be disclosed under *Brady v Maryland, supra*. *People v Robinson* (1995) 31 CA4th 494, 499, 37 CR2d 183.
- While neither a participant nor a percipient witness, the informer was a material witness on the issue of the defendant's guilt who could give evidence that might exonerate the defendant. *Williams v Superior Court* (1974) 38 CA3d 412, 421, 112 CR 485. See *Twiggs v Superior Court* (1983) 34 C3d 360, 194 CR 152 (informant material to defense of entrapment); *People v Lee, supra* (informant had seen defendant possess and sell drugs); *People v Viramontes* (1978) 85 CA3d 585, 149 CR 607 (two separate informants told police that defendant was dealing drugs at specified address).

The defendant has a right to learn not just the name of the informer but also the informer's present whereabouts. See §17.18.

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§17.4 B. Remedy for Refusal to Disclose

While the motion is made for disclosure of the identity of the informer, counsel should consider asking, in the motion, for an alternative remedy if the prosecution refuses to disclose. Remedies are discussed in §17.19.

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§17.5 C. Facts in Case That Alert Counsel to Need for Motion

Usually, defense counsel learns of the existence of a confidential informer through discovery materials, such as police reports, provided by the prosecution. On discovery generally, see chap 11. Sometimes the search warrant affidavit states that it contains information from a "confidential informer." Sometimes the affidavit and supporting documents are fully or partially sealed by the magistrate to protect the identity of a confidential informer. See, *e.g., People v Seibel* (1990) 219 CA3d 1279, 1296, 269 CR 313; *Swanson v Superior Court* (1989) 211 CA3d 332, 339, 259 CR 260.

Although the defendant is not entitled to disclosure of the identity of an informer who merely provided authorities with information that furnished probable cause (see *People v Hobbs* (1994) 7 C4th 948, 959, 30 CR2d 651), it is common that an informer on probable cause is also a material witness on the issue of guilt. Procedures for discovery when the affidavit in support of a search warrant is wholly or partially sealed are described in *People v Hobbs, supra,* and *People v Luttenberger* (1990) 50 C3d 1, 21, 265 CR 690, discussed in §§16.19A-16.19B. See also *People v Galland* (2008) 45 C4th 354, 86 CR3d 841 (discussing custody of sealed affidavit). On requirements for a motion to traverse a search warrant, see §16.19.

Occasionally, defense counsel first becomes aware of the existence of an informer through interviews with the defendant or case investigation.

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§17.6 D. Format, Service, and Filing Requirements

General motion procedures apply. Evidence Code §1042(d) requires the court to hold a hearing on the defendant's "demand" for disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt. There are no other special statutory procedures for making this motion.

Format. A motion to disclose the informant's identity should be composed of a notice of motion directed to the court and the prosecution, the motion, and a supporting memorandum. See Cal Rules of Ct 4.111 (pretrial motion in criminal cases must be accompanied by supporting memorandum); Cal Rules of Ct 2.100-2.119 (form and format of papers presented for filing). Also, counsel should attach necessary supporting documents, such as the search warrant and affidavit or the police report, and declarations or affidavits of relevant people in support of the motion. The motion should not be made on mere information and belief. *People v Oppel* (1990) 222 CA3d 1146, 1153, 272 CR 340 (defendant presented only counsel's declaration on information and belief, but no evidence suggesting that unnamed informant had information that might help his case; court thus properly refused to disclose informant's identity). For discussion of requirements for motions generally, see §18.5. A sample motion to disclose the identity and location of the informant is in California Criminal Law Forms Manual §17.1 (2d ed Cal CEB 2005).

Service and filing. A copy of the motion must be filed and served on each attorney of record and any unrepresented party at least 10 court days before the hearing, and proof of service must be filed at least 5 court days before the hearing. Cal Rules of Ct 4.111(a). See discussion of service in §18.7. The court may order different deadlines, or local court rules may apply. Cal Rules of Ct 4.111(a). For more information on filing, see §18.6.

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§17.7 E. Making the Required Showing; Supporting Memorandum

The parties "may" present evidence at the hearing. Evid C §1042(d).

Ø **Note:** Because defense counsel should anticipate that the prosecution will claim the privilege, the memorandum should address the required evidentiary hearing on the disclosure motion.

The defendant bears the burden of demonstrating that the informant would be a material witness on the issue of guilt, and that nondisclosure would deprive the defendant of a fair trial. That burden is discharged when the defendant demonstrates a reasonable possibility that the informant could give evidence on the issue of guilt that might result in exoneration. *People v Borunda* (1974) 11 C3d 523, 527, 113 CR 825, quoting *People v Garcia* (1967) 67 C2d 830, 839, 64 CR 110.

Normally, this showing includes "an articulation of a theory of defense based upon defense or prosecution evidence … or upon declarations filed in support of the motion to disclose." *People v Sewell* (1970) 3 CA3d 1035, 1039, 83 CR 895. While a specific articulation of a defense is not required (*People v Tolliver* (1975) 53 CA3d 1036, 1048, 125 CR 905), there must be more than speculation. *People v Sewell, supra*. Because the defendant must present some evidence, a declaration on information and belief, without more, is insufficient. *People v Oppel* (1990) 222 CA3d 1146, 1153, 272 CR 340. However, it is not necessary for the defense to produce its *own* evidence: A reasonable inference from the prosecution's evidence is sufficient. *People v Otte* (1989) 214 CA3d 1522, 1536, 263 CR 393. The defense can also incorporate items such as affidavits supporting search warrants. See, *e.g., Williams v Superior Court* (1974) 38 CA3d 412, 416, 112 CR 485. It appears that even if the pre-evidentiary-hearing showing is insufficient, sufficient evidence can be produced at the hearing itself. See Evid C §1042(d).

Usually, at least three factual questions should be addressed in the supporting memorandum (see, *e.g., People v Hardeman* (1982) 137 CA3d 823, 832, 187 CR 296; *Goodlow v Superior Court* (1980) 101 CA3d 969, 976, 162 CR 121; *Williams v Superior Court* (1974) 38 CA3d 412, 423, 112 CR 485):

(1) What was the informant's vantage point in time and space?

(2) What crime is alleged in the present accusatory pleading?

(3) What is the proffered defense theory of the informant's materiality?

Ø **Note**: No case permits the defense to make the required evidentiary showing under seal. However, the California Supreme Court has held that the required affidavit in a *Pitchess* motion for discovery of police personnel records may be made under seal. *Garcia v Superior Court* (2007) 42 C4th 63, 63 CR3d 948.

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§17.8 F. Time to Make Defense Motion

In general. Defense counsel should move for disclosure of an informant's identity as soon as possible. The hearing may be protracted if there is an in camera hearing, and if the motion is successful, defense counsel may need time to conduct further investigation. An order shortening time may be necessary to deal with any speedy trial or other problems. See Cal Rules of Ct 4.111(a). Speedy trial deadlines for preliminary hearings and trial are discussed in chap 19.

Ø **Note:** No case has decided if the informal discovery procedures of Pen C §§1054-1054.7 must be used before a formal motion to disclose the identity of an informant. It seems unlikely, since disclosure of an informant involves a separate statutory procedure (see Pen C §1054(e)), but defense counsel may wish to make an informal request out of caution, and because the prosecutor may voluntarily disclose.

Before preliminary hearing. The defense may move for disclosure before the preliminary hearing if the undisclosed information would have an impact on probable cause to hold the defendant to answer. See, *e.g., People v Goliday* (1973) 8 C3d 771, 779, 106 CR 113 (prosecution owed duty to disclose identity of two eyewitness informers at preliminary hearing).

After trial has begun. Discovery of exculpatory or favorable information can be compelled during trial. *Izazaga v Superior Court* (1991) 54 C3d 356, 377, 285 CR 231. Seeking disclosure of an informant's identity during trial is particularly appropriate when there was no opportunity to make the motion before trial, or when the motion is in the nature of a motion for reconsideration made after the evidence is not what was expected. See, generally, 2 Witkin, California Evidence, chap IX, §314 (4th ed 2000).

Before probation revocation. Discovery is available before a hearing to revoke probation (and perhaps parole) because it is constitutionally compelled, even though it is not specifically mentioned in the discovery chapter of the Penal Code. *Goodlow v Superior Court* (1980) 101 CA3d 969, 973, 162 CR 121.

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§17.9 G. Relationship to Pen C §1538.5 Motion

The identity of an informant generally need not be disclosed if it is sought only to aid the defense in attacking probable cause for search and seizure. Evid C §1042; see *People v Luttenberger* (1990) 50 C3d 1, 13, 265 CR 690. *Luttenberger* discovery may, however, disclose that an informant who provided information relevant to probable cause is also a material witness on guilt or innocence. Note also that, when the trial court holds an in camera hearing on a motion to quash or traverse a warrant because the affidavit in support of a search warrant is completely sealed, one of the required determinations the trial court must make is whether the informant's identity must be disclosed because the informant is a material witness on guilt or innocence. *People v Hobbs* (1994) 7 C4th 948, 972, 30 CR2d 651. For further discussion of *Luttenberger* and *Hobbs*, see §§16.19A-16.19B.

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§17.10 IV. PROSECUTION MOTION TO DENY, RESTRICT, OR DEFER

If the prosecutor intends to call a witness at trial, including an informant, the prosecutor must disclose the witness's name, address, and relevant statements. Pen C §1054.1. The prosecutor can move to deny, restrict, or defer disclosure in the event of threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. Pen C §1054.7; *People v Jackson* (2003) 110 CA4th 280, 290, 1 CR3d 561. If law enforcement is still "using" the informant, then premature disclosure of identity may compromise other investigations. No case has decided if the prosecution can simply withhold this information by invoking the privilege of Evid C §1041.

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V. PROSECUTION RESPONSE TO DEFENSE MOTION

§17.11 A. Prosecutor's Three Lines of Argument

There are usually three lines of prosecution argument made in response to a defense request for disclosure of an informant's identity. First, the prosecutor can argue that the law does not require that the informant's identity be disclosed for any of the various reasons summarized in §17.12, among others. If this argument is successful, disclosure is not required. See discussion in §17.12. Second, the prosecutor can claim the Evid C §1041 privilege against disclosure. See discussion in §17.13. Third, the prosecutor can ask that disclosure be denied, restricted, or delayed under Pen C §1054.7.

Ø **Note:** If the first two arguments are not successful, then, whether or not the third argument is made, the prosecutor should usually ask for an in camera hearing under Evid C §1042(d).

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§17.12 B. Arguing That Informant's Identity Need Not Be Disclosed

A motion to disclose the informant's identity will be denied in the following situations:

- *The informant is not a material witness on the issue of the defendant's guilt of the charged offense*. This is the most common reason for denying the motion. See, *e.g., People v Wilks* (1978) 21 C3d 460, 469, 146 CR 364 (informant provided only partial justification for defendant's detention); *People v Dimitrov* (1995) 33 CA4th 18, 29, 39 CR2d 257 (informant made controlled buy at defendant's apartment 2 days before search warrant was executed); *People v Consuegra* (1994) 26 CA4th 1726, 1736, 32 CR2d 288 (preliminary-hearing evidence of surveillance without indication of cause does not support disclosure of informant who may have caused it); *People v Austin* (1994) 23 CA4th 1596, 1610, 28 CR2d 885, disapproved on other grounds in *People v Palmer* (2001) 24 C4th 856, 861, 103 CR2d 13 (informant who introduced undercover officer to defendant may not be material witness in transaction made weeks later); *In re Benny S.* (1991) 230 CA3d 102, 108, 281 CR 1 (informant gave information on sale of drugs from car, not on charged offense, which was possession of drugs); *People v Fried* (1989) 214 CA3d 1309, 1314, 263 CR 237 (informants gave information that defendants were selling marijuana and cocaine from their home; disclosure denied because informant could give no information on charged offense, which was possession of marijuana in house).
- *The defense seeks the informant's identity only to attack probable cause to arrest or to issue a search warrant*. Evid C §1042. See *Theodor v Superior Court* (1972) 8 C3d 77, 88, 104 CR 226; *People v Hardeman* (1982) 137 CA3d 823, 830, 187 CR 296. See also chap 16.
- *The defense admits knowing the informant's identity*. *People v Moran* (1970) 1 C3d 755, 761, 83 CR 411; *People v Tolliver* (1975) 53 CA3d 1036, 1043, 125 CR 905; *People v Smith* (1959) 174 CA2d 129, 132, 344 P2d 435.

Ø **Note:** Even if the defendant knows the informant's identity, the defense may still seek disclosure of the informant's location. See §17.18.

- *The defense speculates that an earlier informant who provided probable cause to issue a warrant was also present when the warrant was served, if the defense obviously already knows who was present when the warrant was served. People v Hardeman, supra*.
- *The informant's identity is unknown to the police, but the informant is presumed reliable because of the circumstances*. See *People v Ramirez* (1996) 41 CA4th 1608, 49 CR2d 311 (anonymous tip sufficient to provide officers with reasonable suspicion to detain defendant because detaining officers had several forms of direct corroboration of information). See also *People v Callen* (1987) 194 CA3d 558, 562, 239 CR 584 (police received information from anonymous caller on "Crimestoppers" telephone hotline; held that requiring police to discover caller's identity would be onerous burden on law enforcement).
- *The person who gave the information is not an "informant."* See *People v Guereca* (1987) 189 CA3d 884, 889, 234 CR 690 (undercover police officer made buy with person who did not know of officer's job; nonpolice witness was material witness but was not informant; no duty to provide information on witness's current location).

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§17.13 C. Claiming Evid C §1041 Privilege

Under Evid C §1041, the privilege against disclosure of an informant's identity may be claimed when:

- An informant furnishes information purporting to disclose a violation of law (Evid C §1041);
- The information is furnished to a law enforcement officer or agency, or related entity (Evid C §1041(b));
- The information is furnished in confidence (Evid C §1041(b); see *People v Otte* (1989) 214 CA3d 1522, 263 CR 393 (test is not informant's state of mind, but whether investigation is of type such that disclosure would cause public interest to suffer)); and
- There is a need to preserve the confidentiality of the informant's identity that outweighs the need for disclosure, or disclosure is prohibited by a federal or state statute (Evid C §1041(a)).

The scope of the privilege includes protecting any information that could tend to disclose the informant's identity. Evid C §1042(d); *People v Hobbs* (1994) 7 C4th 948, 962, 30 CR2d 651.

The privilege may be claimed by a "public entity" (Evid C §1041(a)), which usually means the law enforcement agency that has the informant's identity. California Trial Objections §43.7 (Cal CEB Annual).

The privilege is waived if a person authorized to disclose the informant's identity does disclose it. Evid C §1041(a)(2). The informant's identity may be disclosed even if the prosecution is opposed to the disclosure. Evid C §1041(c). The privilege does not apply if a person is called as a witness and asked if he or she is the informant. Law Revision Comment to Evid C §1041. However, the privilege is not waived by disclosure of the informant's identity at an in camera hearing. Evid C §1042(d).

The rationale for the privilege is a strong public interest in encouraging people to report illegal activities. Informants may be hesitant to cooperate if they believe they may be exposed to reprisals. *People v Lee* (1985) 164 CA3d 830, 835, 210 CR 799. Informants are more likely than the ordinary person to become homicide victims. See *People v Towler* (1982) 31 C3d 105, 116 n4, 181 CR 391. The privilege of nondisclosure gives the informant some protection against reprisals and maintains his or her continued usefulness to law enforcement. See *People v McShann* (1958) 50 C2d 802, 806, 330 P2d 33. Trial courts must be careful in assessing danger to informants. *John Z. v Superior Court (PG&E)* (1991) 1 CA4th 789, 791, 2 CR2d 556; *People v Otte* (1989) 214 CA3d 1522, 1534 n8, 263 CR 393. See *People v Navarro* (2006) 138 CA4th 146, 162, 41 CR3d 164.

Although the privilege against disclosure of an informant's identity is sometimes argued together with the privilege for official information, they are different motions. Compare Evid C §1040 with Evid C §§1041-1042; see *People v Superior Court (Biggs)* (1971) 19 CA3d 522, 97 CR 118 (defendant who had been informant wanted reports he had made to Bureau of Narcotics Enforcement).

> Ø **Note:** If a claim of privilege is sustained in a criminal proceeding, Evid C §1042(a) requires the court to make an order or finding of fact adverse to the "public entity bringing the proceeding" (*i.e.,* the prosecution) on any issue to which the privileged information is material. This is true whether the privilege is an informant's identity or any other official secret or privilege.

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§17.14 VI. IN-CUSTODY INFORMANTS TESTIFYING AS WITNESSES

There are special rules for in-custody informants who are neither codefendants, co-conspirators, nor percipient witnesses, concerning statements made by the defendant while both the defendant and the informant were held in a correctional institution. Pen C §1127a.

When the prosecutor calls an in-custody informant as a witness during trial, the prosecutor must file with the court, contemporaneously with calling the witness, a written statement setting out all consideration promised to or received by the informant. Pen C §1127a(c). "Consideration" is defined in Pen C §1127a(d). The in-custody informant's statement must be given to the defense before trial. Pen C §1127a(c). No specific pretrial deadline for providing the statement to the defense is given in §1127a(c); presumably the time limits for informal discovery under Pen C §1054.5 would apply. Nothing in §1127a, however, prevents the defense from seeking discovery about the in-custody informant outside the guidelines of that section. Pen C §1127a(c).

Other special rules concerning in-custody informants are:

- The amount of money law enforcement may pay in-custody informants is limited. Pen C §4001.1.
- Law enforcement and their informants are prohibited from deliberately trying to elicit incriminating statements from defendants. Pen C §4001.1.
- Victims of "in-custody informants," as defined by §1127a, must be notified when the informant is given consideration for testifying. Pen C §1191.25.
- The defendant has the right to a cautionary instruction on the testimony of an in-custody informant. Pen C §1127a(b). The defense must request that the instruction be given, however; the court need not give it sua sponte. *People v Carrera* (1989) 49 C3d 291, 314, 261 CR 348.
- If the state places a cooperating informant in a cell with the defendant after the defendant's right to counsel has attached, and the informant induces the defendant to talk about the crime charged, the defendant's Sixth Amendment right to counsel may have been violated, in which case the statements must be excluded. *Massiah v U.S.* (1964) 377 US 201, 206, 12 L Ed 2d 246, 250, 84 S Ct 1199; *Randolph v California* (9th Cir 2004) 380 F3d 1133, 1143.

See also §§49.16 (immunity for in-custody informants), 49.17 (immunity under Health & S C §11367).

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VII. HEARINGS ON MOTION

§17.15 A. First Hearing: Defense Must Show Materiality

When the defense moves for disclosure of the identity of the informant on the ground that the informant is a material witness on the issue of guilt, the court must conduct a hearing at which all parties can present evidence. Evid C §1042(d). This hearing is held in open court but outside the presence of the jury.

The defense has the burden of showing a reasonable possibility that the informant might give exonerating testimony. *Twiggs v Superior Court* (1983) 34 C3d 360, 194 CR 152; *People v Otte* (1989) 214 CA3d 1522, 1535, 263 CR 393. If the defense shows that the informant was a participant or a percipient witness to the offense, the burden is met. *People v Goliday* (1973) 8 C3d 771, 777, 106 CR 113; *Theodor v Superior Court* (1972) 8 C3d 77, 88, 104 CR 226.

Many informant-disclosure cases have noted that "might" and "possibility" are words that "have vague and almost limitless perimeters that must be determined on a case-by-case basis." See, *e.g., Williams v Superior Court* (1974) 38 CA3d 412, 421, 112 CR 485. The defense must show more than mere speculation (*People v Sewell* (1970) 3 CA3d 1035, 1039, 83 CR 895) or a mere desire to cross-examine an informant who might have some information about the case. *People v Duval* (1990) 221 CA3d 1105, 1114, 271 CR 240.

If the court does find that the informant is not a material witness on the issue of guilt, the motion must be denied. See, *e.g., People v Hardeman* (1982) 137 CA3d 823, 828, 187 CR 296.

If the court finds at this hearing that the informant is a material witness, the court will order disclosure of the informant's identity and present whereabouts unless the prosecution requests an in camera hearing under Evid C §1042(d). See §17.16.

If the prosecution does not seek an in camera hearing but still refuses to disclose the informant's identity, defense counsel should move for dismissal or other appropriate remedy. Evid C §1042.

If the prosecutor seeks writ relief after a judge's ruling that the informant's identity must be disclosed, rather than requesting an in camera hearing first, the prosecutor may be precluded from thereafter having an in camera hearing. The courts of appeal are divided on this issue. Compare *Williams v Superior Court* (1974) 38 CA3d 412, 425, 112 CR 485 (no hearing on remand), with *Goodlow v Superior Court* (1980) 101 CA3d 969, 977, 162 CR 121 (hearing allowed on remand), and *People v Ingram* (1978) 87 CA3d 832, 840, 151 CR 239 (appeal; hearing allowed on remand).

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§17.16 B. In Camera Hearing

Evidence Code §1042(d) provides that if the privilege is claimed during the open-court hearing, the prosecution can request that the court hold an in camera hearing. At the in camera hearing, the prosecution has the opportunity to establish that nondisclosure would not compromise a defendant's due process rights even when the defendant has established a prima facie case for disclosure. *People v Lanfrey* (1988) 204 CA3d 491, 502, 251 CR 189.

The persons present at the in camera hearing are the judge, a court reporter, the prosecutor, the law enforcement recipient of the confidential information (often the search warrant's affiant), and, normally, the informant. All witnesses must be sworn. *People v Lee* (1985) 164 CA3d 830, 210 CR 799. Although the defense may not participate at the hearing (*People v Galante* (1983) 143 CA3d 709, 712, 192 CR 184), defense counsel may submit to the court a set of interrogatories that it wants the court to ask the informant. See *People v Lewis* (2009) 172 CA4th 1426, 1438 n9, 92 CR3d 191 (motion to disclose police observation post). The in camera hearing may be videotaped. *People v Flannery* (1985) 164 CA3d 1112, 1121, 210 CR 899. Physical evidence may be considered. *People v Levine* (1984) 152 CA3d 1058, 1070, 199 CR 756 (tape recording).

The primary objective of an Evid C §1042(d) in camera hearing is to determine whether a reasonable possibility exists that nondisclosure might deprive the defendant of a fair trial—*i.e.,* whether the informant might have knowledge of facts that would tend to exculpate the defendant. *Honore v Superior Court* (1969) 70 C2d 162, 168, 74 CR 233; *People v Tolliver* (1975) 53 CA3d 1036, 1044, 125 CR 905. But see *People v Lanfrey* (1988) 204 CA3d 491, 502, 251 CR 189 (no showing that informant would testify to self-defense); *People v McCarthy* (1978) 79 CA3d 547, 554, 144 CR 822 (disclosure not required when trial court reasonably concluded that informant's testimony would be incriminating).

The prosecutor often begins the hearing with an indication of the prosecution's objective, conducts a foundational examination of each witness, and invites the court to conduct the exploratory examination of the witnesses.

The law enforcement recipient of the information often testifies to the confidential nature of the communication from the informant, explains why the informant's confidentiality must be preserved, and identifies the informant in those cases in which the informant will testify. The informant often testifies to his or her identity and knowledge of the facts about the particular accusations against the defendant. An informant who is an eyewitness to the offense generally must testify at the in camera hearing. *People v Ruiz* (1992) 9 CA4th 1485, 12 CR2d 234. Otherwise, there is no absolute requirement that the informant testify. *People v Dimitrov* (1995) 33 CA4th 18, 30, 39 CR2d 257; *People v Fried* (1989) 214 CA3d 1309, 1314, 263 CR 237; *People v Alderrou* (1987) 191 CA3d 1074, 236 CR 740. See also *U.S. v Ordonez* (9th Cir 1984) 737 F2d 793, 809 (discusses importance of having informant testify at in camera hearing).

At the conclusion of the hearing, the reporter should transcribe a copy of the notes. That copy should be sealed with any exhibits introduced, and delivered to the judge's clerk. Defense counsel should ensure this is done. The court should state for the record whether it finds the witnesses credible and whether it finds that nondisclosure could possibly deprive the defendant of a fair trial. See *People v Flannery* (1985) 164 CA3d 1112, 210 CR 899; California Trial Objections §44.10 (Cal CEB Annual).

A sample motion objecting to in camera hearing procedures is in California Criminal Law Forms Manual §17.2 (2d ed Cal CEB 2005).

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§17.17 C. Third Hearing; Resolution of Claim of Privilege

The proceeding following the in camera hearing is held in open court with all parties present. The court typically first summarizes its findings based on the in camera hearing.

The court then hears argument from counsel and resolves the questions of the claim of privilege and whether nondisclosure would deprive the defendant of a fair trial. The court does this on the basis of the evidence received both in open court and in camera. If the privilege was properly claimed (see Evid C §1041), and if nondisclosure would not deprive the defendant of a fair trial, the motion should be denied. Evid C §1042(d). If the court rules that the privilege does not apply or that nondisclosure "might deprive the defendant of a fair trial," the motion must be granted. Evid C §1042(d).

If the court grants the motion, defense counsel should demand at that time that the prosecution elect between disclosure and dismissal or reduction of the charge to one on which the informant's testimony would not be material. See *People v Rodgers* (1976) 54 CA3d 508, 517, 126 CR 719. See §17.19.

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§17.18 D. Hearing on Requirement That Informant's Present Location Be Revealed (*Eleazer* Hearing)

If the court orders disclosure, the prosecution must provide all information necessary to assist the defense in locating the informant. *People v Goliday* (1973) 8 C3d 771, 782, 106 CR 113; *Eleazer v Superior Court* (1970) 1 C3d 847, 851, 83 CR 586. The informant's last-known address may be insufficient.

If the prosecution does not know the current whereabouts of the informant, or if the defense cannot locate the informant after being given an address by the prosecution, the court may conduct a hearing on the reasonableness of the prosecution's good faith efforts to maintain contact with the informant. *Twiggs v Superior Court* (1983) 34 C3d 360, 365, 194 CR 152; *People v Cheatham* (1971) 21 CA3d 675, 678, 98 CR 670; *People v Goodman* (1971) 20 CA3d 284, 287, 97 CR 534.

The court may refuse to order the prosecution to reveal to defense counsel the address (see Pen C §§1054(d), 1054.7) and even the identity (see *Montez v Superior Court* (1992) 5 CA4th 763, 7 CR2d 76) of a witness whose life is in danger. But see *Alvarado v Superior Court* (2000) 23 C4th 1121, 1148, 99 CR2d 149, in which three inmates were afraid for their safety after giving statements implicating defendants in the murder of another inmate. The court held that the defendants were entitled to learn the witnesses' identities, despite their fears, because, as was not true in *Montez,* their truthfulness and veracity were at issue and disclosure would assist in vindication of the defendants' Sixth Amendment confrontation rights. No California case has ruled on whether these rules also apply to informants.

The defense may seek dismissal for the prosecution's unexcused failure to provide sufficient information to locate the informant. See *Eleazer v Superior Court, supra*. See §17.19.

If the defense fails to seek timely relief from the prosecutor's noncompliance with a discovery order regarding an informant, then the issue is waived on appeal. *People v Gonzalez* (1990) 51 C3d 1179, 1214, 275 CR 729.

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§17.19 VIII. PROSECUTION'S REFUSAL TO DISCLOSE IDENTITY OF INFORMANT ALMOST ALWAYS REQUIRES ADVERSE FINDING, AND OFTEN DISMISSAL OR REDUCTION OF CHARGES

Unless federal law prohibits disclosure, if the court sustains a privilege claim, the court must make an order or finding of fact adverse to the prosecution as required by law on any issue to which the privileged information is material. Evid C §1042(a).

The adverse finding is generally dismissal or reduction of charges and is compelled by the Due Process Clause of the Fourteenth Amendment. See *U.S. v Raddatz* (1980) 447 US 667, 679, 65 L Ed 2d 424, 435, 100 S Ct 2406 (due process is basis for requiring government to disclose informant's identity at trial when identity shown to be relevant and helpful to defense); *Roviaro v U.S.* (1957) 353 US 53, 61, 1 L Ed 2d 639, 645, 77 S Ct 623 (judgment reversed for failure to reveal informant's identity, in part because of "fundamental requirements of fairness"; dismissal of case is appropriate remedy in trial court); *People v Borunda* (1974) 11 C3d 523, 527, 113 CR 825 (dismissal of only charge: possession of heroin); *People v Goliday* (1973) 8 C3d 771, 783, 106 CR 113 (dismissal of counts for sale of drugs, but not of counts for possession for sale). The adverse finding may be reduction to a lesser charge for which the informant is not a material witness. See, *e.g., People v Long* (1974) 42 CA3d 751, 758, 117 CR 200 (charge of possession of heroin for sale reduced to simple possession).

Ø **Practice tip:** Defense counsel should request the adverse finding; the court may not impose one otherwise.

It is common that the informant is material to a prior drug sale but not material to a later mere possession or possession with intent to sell. See, *e.g., People v Goliday* (1973) 8 C3d 771, 783, 106 CR 113. In that or a similar situation, the court will likely dismiss only the sales count. If there is no possession or possession with intent count, the court may suggest that the prosecutor amend the pleading to add a possession count, and wait to dismiss the sales count until after the complaint or information has been amended. *People v Goliday, supra*; *People v Long* (1974) 42 CA3d 751, 758, 117 CR 200 (proper remedy is reduction to possession).

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§17.20 IX. APPELLATE REVIEW OF ORDER CONCERNING INFORMANT

The trial court's ruling on a motion to disclose the informant's identity is generally subject to review in the appellate courts by writ (see, *e.g., Theodor v Superior Court* (1972) 8 C3d 77, 104 CR 226; chap 42) or by appeal (see, *e.g., People v Gordon* (1990) 50 C3d 1223, 1245, 270 CR 451, overruled on other grounds in *People v Edwards* (1991) 54 C3d 787, 835, 1 CR2d 696; chaps 43-44). Failure to move for disclosure in the trial court, however, precludes raising the issue on appeal. *Priestly v Superior Court* (1958) 50 C2d 812, 819, 330 P2d 39; *People v Pendergrass* (1986) 182 CA3d 63, 67, 226 CR 851.

Ø **Warning:** A plea of guilty or no contest generally forecloses appellate review of the trial court's order denying a motion to disclose an informant's identity. *People v Hobbs* (1994) 7 C4th 948, 957 n1, 30 CR2d 651; *People v Ivester* (1991) 235 CA3d 328, 341, 286 CR 540 (habeas corpus); *People v Castro* (1974) 42 CA3d 960, 963, 117 CR 295 (appeal).

If an in camera hearing was held, the trial court clerk should send the sealed transcript of the in camera proceeding to the appellate court, and the appellate court should review the sealed transcript in camera. See Evid C §1042(d).

The standard of review is not settled. See *Gordon,* 50 C3d at 1246 (suggesting de novo or abuse of discretion standard, but upholding trial court's ruling by any standard).

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18

SELECTED PRETRIAL MOTIONS

THOMAS J. BARNI
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§18.1 I. OVERVIEW

Pretrial motion practice is an essential part of criminal law practice. A "motion" is an application for an order. CCP §1003. Motions may be oral or written and may be set orally in court, *e.g.,* at arraignment, or they may be filed with the court clerk and a hearing date selected at that time, depending on local rules of court, local custom, and the circumstances of the motion. Written pretrial motions should conform to the requirements of Cal Rules of Ct 4.111, discussed in §§18.2, 18.5. The moving party is responsible for setting the motion for a hearing. See Cal Rules of Ct 4.111. Once made, a motion is disposed of at a hearing at which the moving party has the burden to support the motion by proof (Evid C §500; *People v Lopez* (1997) 52 CA4th 233, 251, 60 CR2d 511; *People v Carson* (1970) 4 CA3d 782, 785, 84 CR 699) and to require a ruling from the court. See *People v Obie* (1974) 41 CA3d 744, 750, 116 CR 283, disapproved on other grounds in *People v Rollo* (1977) 20 C3d 109, 120 n4, 141 CR 177.

This chapter discusses procedures common to pretrial motions generally. See §§18.2, 18.5-18.9. This chapter also discusses pretrial motions for appointment of experts (see §§18.10-18.15); dismissal based on discriminatory prosecution (*Murgia* motions) (see §§18.16-18.25); recusal of the prosecutor (see §§18.26-18.31); dismissal based on vindictive prosecution (see §§18.32-18.37); and AIDS testing of the defendant or a minor charged with a crime (see §18.38).

Other pretrial motions are discussed in other chapters. The checklist in §18.4 includes cross-references to those discussions. Although the checklist in §18.4 contains the most common pretrial motions, neither defense attorneys nor prosecutors should feel constrained by the list. Counsel should fashion motions to fit their cases and should keep track of motions discussed in the advance sheets as a source of ideas.

Ø **Note:** Although many pretrial motions are made orally, either because of local practice or because of the circumstances of the case, it is better practice for defense counsel to submit written motions, and for prosecutors to respond either orally or in writing. A filed document tends to make the judge think that counsel is serious about the position taken. Further, written documents provide the authority for the judge to rule on the motion as well as a clear record of counsel's contentions in case of appeal.

For forms for pretrial motions, see California Criminal Law Forms Manual (2d ed Cal CEB 2005).

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II. PRETRIAL MOTION PRACTICE

§18.2 A. Chart: Timing of Pretrial Motions

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many courts have specific time requirements not otherwise required by the California Rules of Court. Note that a local court rule must be adopted in accordance with the statutes governing the promulgation and adoption of local rules to be valid. See, *e.g., Hall v Superior Court* (2005) 133 CA4th 908, 35 CR3d 206 (trial court's practice of requiring all motions to be filed and heard 30 days before trial was invalid). For discussion of specific time requirements for particular pretrial motions, see the discussion of each motion in other parts of this book.

Moving party sets date for hearing on pretrial motion	In notice of motion	Cal Rules of Ct 4.111
Serve and file notice of motion	At least 10 court days before date set for hearing	Cal Rules of Ct 4.111(a)
Serve and file response to motion	At least 5 court days before date set for hearing	Cal Rules of Ct 4.111(a)
Serve and file reply (optional)	At least 2 court days before date set for hearing	Cal Rules of Ct 4.111(a)

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§18.3 B. Relying on Authority

Stare decisis. Published decisions of the California Supreme Court take precedence over published decisions of California courts of appeal concerning the same issue when the facts are not distinguishable. *Auto Equity Sales, Inc. v Superior Cour*t (1962) 57 C2d 450, 455, 20 CR 321; *People v Linkenauger* (1995) 32 CA4th 1603, 1613, 38 CR2d 868. A court of appeal is not bound to follow a prior decision of another district or division. *Estate of Cleveland* (1993) 17 CA4th 1700, 1709, 22 CR2d 590. For the doctrine of stare decisis to apply, the issue in question must have been considered and decided by the court. *People v Heitzman* (1994) 9 C4th 189, 209, 37 CR2d 236; *People v Donaldson* (1995) 36 CA4th 532, 538, 42 CR2d 314. With limited exception (see Cal Rules of Ct 8.1115(b)), parties must not cite unpublished opinions (Cal Rules of Ct 8.1115(a)), including opinions of the court of appeal superseded by a grant of review, rehearing, or other action (Cal Rules of Ct 8.1105(e)). See *People v Williams* (2009) 176 CA4th 1521, 1529, 98 CR3d 770.

All state courts are bound by decisions of the U.S. Supreme Court interpreting the federal Constitution. *People v Bradley* (1969) 1 C3d 80, 86, 81 CR 457. In the absence of a controlling precedent, a decision of the California Supreme Court interpreting the federal Constitution will control and bind all inferior courts. When neither the U.S. Supreme Court nor the California Supreme Court has decided a federal issue, the appropriate controlling authority is a decision by an intermediate California court of appeal, interpreting the federal Constitution. See *Auto Equity Sales, Inc. v Superior Court, supra*.

Decisions of lower federal courts are not binding on California courts but when pertinent to the court's analysis of an issue, "they are entitled to great weight." *In re De Leon* (2004) 117 CA4th 1116, 1121, 13 CR3d 310. See also *People v Bradley, supra*. Decisions of the Ninth Circuit Court of Appeals are entitled to no more weight than the decisions of other lower federal courts, even though California is in the Ninth Circuit. *Debtor Reorganizers, Inc. v State Bd. of Equalization* (1976) 58 CA3d 691, 696, 130 CR 64; *People ex rel Renne v Servantes* (2001) 86 CA4th 1081, 1090, 103 CR2d 870.

Law of the case. An appellate decision in a case usually binds the parties, even if it is not published. For example, if a reviewing court renders a decision on the merits, after issuance of an order to show cause and argument, in a proceeding for a writ of mandamus or prohibition, that decision becomes the law of the case. *People v Veitch* (1982) 128 CA3d 460, 465, 180 CR 412. Summary denial of a writ petition, however, has no preclusive effect. *People v Durrett* (1985) 164 CA3d 947, 955, 210 CR 874. The law of the case doctrine applies to all proceedings in the same case unless adherence to the doctrine would result in an unjust decision. *People v Stanley* (1995) 10 C4th 764, 787, 42 CR2d 543. On the related doctrines of res judicata and collateral estoppel, see *People v Barragan* (2004) 32 C4th 236, 252, 9 CR3d 76. See also §§26.29-26.33 on res judicata and collateral estoppel.

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Source: Criminal Law/California Criminal Law Procedure and Practice/18 SELECTED PRETRIAL MOTIONS/§18.4 C. Checklist: Common Pretrial Motions

§18.4 C. Checklist: Common Pretrial Motions

Suppression motions

- Suppress evidence because of illegal search and seizure. Pen C §1538.5; see chap 16.
- Suppress evidence or testimony for failure to comply with discovery requirements. See chap 11.
- Suppress testimony based on evidence lost or destroyed by prosecution (*Trombetta-Youngblood* motion). See chap 11.
- Quash subpoena. See §§4.32-4.35.

Discovery motions

- General discovery motion. See chap 11.
- Discover information concerning police officer's past misconduct (*Pitchess* motion). See chap 11.
- Disclose informant's identity. See chap 17.
- Discover evidence to support defense of discriminatory enforcement (*Murgia* motion). See §§18.16-18.25.
- Appointment of experts. See §§18.10-18.15.
- Obtain transcript of prior trial or hearing. See *People v Hosner* (1975) 15 C3d 60, 123 CR 381.
- Compel production of, *e.g.,* fingerprints, blood, breath, urine, and voice. See *People v Collie* (1981) 30 C3d 43, 55 n7, 177 CR 458.
- Preserve police tape. See §§8.32, 17.8.

Motions to dismiss

- Demurrer. See chap 7.
- Dismiss all or part of information or indictment. Pen C §995; see chap 13.
- Dismiss indictment because prosecutor did not inform grand jury of existence and nature of exculpatory evidence (*Johnson* motion). *Johnson v Superior Court* (1975) 15 C3d 248, 269, 124 CR 32; see *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1033 n3, 13 CR2d 551, and discussion in §9.19.
- Dismiss in interest of justice. Pen C §1385(a); see chap 25.
- Dismiss on basis of prosecution interference with right to counsel. *Barber v Municipal Court* (1979) 24 C3d 742, 756, 157 CR 658.
- Dismiss on basis of discriminatory enforcement. See §§18.21-18.25.
- Dismiss on basis of failure to prevent deportation of material witness. See §52.34.
- Dismiss on basis of retaliatory prosecution. See §§18.32-18.37.
- Dismiss on basis of denial of speedy trial. See chap 19.
- Dismiss on basis of prosecution's failure to maintain contact with witness (*Eleazer* motion). See §17.18.

Miscellaneous motions

- Change venue. See chap 15.
- Severance or joinder. See chap 7.
- Close courtroom; seal records. See chap 14.
- Sequester jurors. See chap 14.
- Continuance. See chap 20.
- "Gag" order. See chap 14.

- Exclusion of cameras from courtroom; pooling agreements. See chap 14.
- For interpreter. See §52.7.
- Bail or O.R. release. See chap 5.
- Enforce plea bargain. See §26.50.
- Hold opposing or co-counsel in contempt. See chap 58.
- Be relieved as counsel. See chap 3.
- Amend information. See chap 7.
- Recuse prosecutor. See §§18.26-18.31.
- Reduce felony to a misdemeanor. Pen C §17(b); see §8.40.
- Challenge judge. See chap 21.
- Substitute counsel (*Marsden* motion). See §§3.25-3.28.
- Grant of immunity. See chap 49.
- For court reporter. *In re Armstrong* (1981) 126 CA3d 565, 570, 178 CR 902.
- Psychiatric examination of defendant. See §§48.3-48.22, 48.46.
- Perpetuate testimony (conditional examination). See Pen C §§1335-1345, 1349-1362. See §§11.25A, 31.20, 54.15.

Ø **Note:** For other common motions not listed here, see checklist for in limine and trial motions in §31.3.

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D. Form, Service, and Filing of Pretrial Motions

§18.5 1. Form of Motion

Components of motion. A pretrial motion filed in a criminal case should include the following parts unless other requirements are set out for that motion by statute or by local rules of court: notice of motion (see CCP §1010); memorandum (Cal Rules of Ct 4.111); and proof of service (Cal Rules of Ct 4.111; see CCP §1013a). An order is frequently attached for the judge's signature.

Format of papers. Detailed rules for the format of papers presented for filing in the trial court are in Cal Rules of Ct 2.100-2.119. Recycled paper must be used for all originals filed with the court and copies of papers, documents, and exhibits, whether filed with the court or served on other parties. Cal Rules of Ct 2.101. See generally California Criminal Law Forms Manual, chap 1 (2d ed Cal CEB 2005) for form and format of court papers, including physical form of paper, margins, page numbering, exhibits, and first-page format.

Ø **Note:** The trial court rules in Cal Rules of Ct Title 2 apply to all cases in the trial courts unless specified otherwise by statute or another rule. Cal Rules of Ct 2.2. Consequently, although written pretrial motions are less common in misdemeanor cases than in felony cases, an attorney filing a written motion in a misdemeanor case should also comply with these rules.

Notice of motion. The first page of the notice of motion should give the court and cause, and the name, address, phone number, fax number, e-mail address, and State Bar membership number of the attorney making the motion. Cal Rules of Ct 2.111 (contains specific line numbers on which this information is to appear). The number of the case should be to the right and opposite the title of the case. Immediately below the case number should be the title of the motion (the order being sought). Cal Rules of Ct 2.111(6). Below the title of the motion should be the date, time, and location (if known) of the hearing on the motion; a description of any documents attached to the notice of motion (*e.g.,* supporting memorandum, declaration); and any trial date.

The pages should be firmly bound together at the top (Cal Rules of Ct 2.113) and consecutively paginated at the bottom unless a rule provides otherwise for a particular type of document (Cal Rules of Ct 2.109). The pages must have two standard-sized prepunched holes, centered 2½ inches apart, and ⅝ inch from the top of the paper. See Cal Rules of Ct 2.115.

Ø **Note:** Some local rules of court require the caption to show the length of time required to hear the motion and whether the defendant is in or out of custody.

If there are multiple parties, the caption should identify the moving party and the nature of the motion. See Cal Rules of Ct 2.111(6). If other papers have been filed concerning the motion, it is preferable for counsel to use a title that differentiates among them.

Ø **Note:** On a showing of good cause, the court can permit the filing of papers that do not comply with Cal Rules of Ct 2.100-2.119. Cal Rules of Ct 2.118(c).

The substantive portion of the notice of motion should state the order being sought and the grounds for the request. Although this is not required in criminal cases, it is required in civil law and motion matters (Cal Rules of Ct 3.1110) and is commonly included in criminal cases. Check local rules for any special requirements.

Supporting memorandum. All pretrial motions must be accompanied by a supporting memorandum. Failure to file the memorandum can be considered an admission that the motion is without merit. Cal Rules of Ct 4.111(b). Because no rule of court sets forth the contents of the supporting memorandum in criminal cases, counsel should follow the rule for civil cases (Cal Rules of Ct 3.1113) if no local rules apply. See Cal Rules of Ct 2.2. This civil rule provides that a supporting memorandum must contain "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." Cal Rules of Ct 3.1113(b). Case citations must include the year of decision and the volume and page number of the official report.

See Cal Rules of Ct 3.1113(c). The attorney should integrate the facts of the case into the memorandum.

Ø **Note:** Although Cal Rules of Ct 3.1113(f) requires counsel in civil cases to include a table of contents and table of authorities if the memorandum exceeds 10 pages, and an opening summary of argument if it exceeds 15 pages, this portion of Rule 3.1113 is not commonly followed in criminal cases.

Factual support for motion. The motion must allege the specific facts that, if proved, would entitle the moving party to the relief sought. These facts are alleged by declarations or affidavits, exhibits, or reference to documents in the court's file, not by putting a statement of facts in the supporting memorandum. Declarations (see CCP §2015.5) and affidavits (see CCP §2003) are interchangeable (see CCP §2015.3) and are used to state the facts the motion is based on (see Evid C §§135, 225), to fill factual gaps in the record, and as a substitute for sworn oral testimony (see CCP §2002). See forms in Crim Law Forms Man §§18.3-18.4.

Ø **Note:** The declarant or affiant can be cross-examined on request by the opponent at the hearing on the motion. *People v Williams* (1973) 30 CA3d 502, 509, 106 CR 324; *People v Estrada* (2003) 105 CA4th 783, 792, 129 CR2d 589.

Ordinarily, the documents providing evidentiary support for a motion should show that the facts alleged can be proved by admissible evidence. Thus, declarations should usually be based on the declarant's personal knowledge. There are exceptions, however. For example, a *Pitchess* motion can be based on a declaration of counsel sworn on "information and belief," *i.e.,* hearsay (see Evid C §1043(b)(3)).

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§18.6 2. Setting Motion for Hearing

Any pretrial motion that is not subject to a specific deadline should be brought as soon as practicable after counsel discovers the grounds for the motion, and if possible, should be set for hearing far enough in advance of trial to permit the matter to be resolved without any disruption to the trial schedule. See, *e.g., People v Windham* (1977) 19 C3d 121, 128 n5, 137 CR 8 (*Faretta* motion is pretrial motion and should be brought within a reasonable time before trial); *People v Nicholson* (1994) 24 CA4th 584, 591, 29 CR2d 485 (same).

The moving party must set the motion for hearing. Written pretrial motions in criminal cases must be filed with the court at least 10 court days before the hearing on the motion; proof of service must be filed at least 5 court days before the hearing on the motion; respondent must serve and file his or her response at least 5 court days before the hearing; and any reply from the moving party must be served and filed at least 2 court days before the hearing. Cal Rules of Ct 4.111(a). If local court rules set different time limits, these take precedence over the Cal Rules of Ct 4.111 requirements. Cal Rules of Ct 4.111(a). Counsel should check local rules in each county in which he or she practices. In addition, some courts limit motions to a particular day of the week.

If an attorney needs to have a hearing on a motion sooner than the 10 days set by Rule 4.111, counsel should apply for an order shortening time. If possible, counsel should obtain opposing counsel's stipulation and attach that to the application. The application may be typed at the end of the notice of motion or on a separate sheet attached to and served with the moving papers. The application for an order shortening time should be accompanied by a declaration. See Cal Rules of Ct 3.1300(b) (declaration showing good cause must accompany application for order shortening time in civil law and motion cases). Because applications for orders shortening time are made ex parte, counsel should be sure to notify opposing counsel. See Cal Rules of Ct 3.1204. See also California Criminal Law Forms Manual §18.9 (2d ed Cal CEB 2005). Many courts allow the request to be made orally at the time the motion is set in court, and rule on it at that time.

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§18.7 3. Service and Filing Requirements

Pretrial motions may be filed with the criminal court clerk, or with the clerk of the court where the motion will be heard, depending on local practice. Whether filing the papers with the court in person or by mail, counsel should include a copy to be conformed by the clerk and returned to counsel. A return stamped envelope should be enclosed if papers are mailed. The conformed copy is counsel's proof of the fact and date of filing of the motion.

Ø **Note:** When serving a prosecutor or public defender in a large office by mail, put the deputy's name on the envelope to expedite its timely delivery.

Service should be made on each attorney of record and any unrepresented party. Service may be accomplished by mailing a copy of the motion under CCP §§1012-1013a or by serving the papers personally or by substituted service under CCP §1011. Sample forms (proof of service by mail; personal service) are in California Criminal Law Forms Manual §§18.6-18.9 (2d ed Cal CEB 2005).

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§18.8 E. Responding to Pretrial Motion

The response must be filed at least 5 court days before the hearing. Cal Rules of Ct 4.111(a).

The response to a pretrial motion consists of a supporting memorandum and a proof of service. See Cal Rules of Ct 4.111; CCP §1013a. It may also include declarations or affidavits. See CCP §§2003, 2009, 2015.5. The opposition memorandum is prepared in the same format as those done by the moving party. It is captioned the same as other court papers.

Ø **Note:** Counsel should be sure to note on the response that it is an opposition to the motion. See the sample form in California Criminal Law Forms Manual §18.11 (2d ed Cal CEB 2005).

If the moving party did not summarize the case for the hearing judge, the opposing party may wish to do so, and can correct inaccuracies in the moving party's statement of facts. The memorandum should be organized so that the judge can easily compare the points made in the moving party's memorandum with the respondent's opposition arguments. An opposition memorandum may also state objections to all or part of the moving party's declarations or affidavits. Generally, the same objections that may be made to testimony and exhibits at a trial may be directed to declarations. See CCP §2002; *McLellan v McLellan* (1972) 23 CA3d 343, 359, 100 CR 258; *Mayo v Beber* (1960) 177 CA2d 544, 551, 2 CR 405.

The form of any declarations or affidavits filed with the response is the same as those prepared by moving party's counsel; the opposition memorandum and declarations or affidavits are also in the same form as the ones that accompany the motion. See §18.5. See also the forms in Crim Law Forms Man, chap 18.

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§18.9 F. Reply by Moving Party

The moving party is not required to file a reply to the opposition memorandum. But if one is filed, it should be captioned like the other papers and accompanied by proof of service. It must be served and filed at least 2 court days before the hearing. Cal Rules of Ct 4.111(a). The reply consists of a memorandum in the same form as the response. Its title should indicate that it is a reply, *e.g.,* "Reply to Opposition Memorandum."

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III. SELECTED PRETRIAL MOTIONS

Ø **Note:** Most pretrial motions are treated separately in other chapters. See the checklist of pretrial motions and cross-references in §18.4.

A. Motion for Appointment of Expert

§18.10 1. Nature of Motion

Although either side may move for the appointment of an expert in a criminal trial, and the court may appoint an expert on its own motion (see Evid C §730), with an indigent defendant, the motion is almost always made by defense counsel. See *Torres v Municipal Court* (1975) 50 CA3d 778, 783, 123 CR 553. The right to effective assistance of counsel entitles indigent defendants access to public funds for expert services. *Ake v Oklahoma* (1985) 470 US 68, 76, 84 L Ed 2d 53, 61, 105 S Ct 1087; *Corenevsky v Superior Court* (1984) 36 C3d 307, 319, 204 CR 165. Counsel for an indigent defendant may move for appointment of an expert by the court, to be compensated by public funds. See Evid C §§730-731. See California Criminal Law Forms Manual §11.8 (2d ed Cal CEB 2005) (motion for in-chambers appointment of defense expert).

The court has the authority to appoint an expert when it appears to the court that expert evidence is or may be required. Evid C §730. The burden is on the indigent defendant to show that expert services are necessary to his or her defense. *People v Guerra* (2006) 37 C4th 1067, 1085, 40 CR3d 118. On establishing indigency, see §3.3.

The court has the discretion to fix compensation for the expert's services (Evid C §730), which are a charge against the county (Evid C §731(a)). An appointment under §730 does not preclude a party from producing other expert evidence on the same fact or matter, but these experts must be paid by the party calling them. Evid C §733.

Ø **Note:** Under the Uniform Act on Blood Tests to Determine Paternity (Fam C §§7550-7558), a special set of statutes regulates the appointment and compensation of experts when the defendant's blood type is in issue. See Fam C §7556; *People v Lindsey* (1978) 84 CA3d 851, 862, 149 CR 47 (discussing former Evid C §896).

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§18.11 2. Timing of Motion

The request for the appointment of an expert for an indigent defendant should be made by written motion before trial. See Cal Rules of Ct 4.111. When counsel first becomes aware of the need for expert testimony during trial, the motion may be made during trial. *People v De La Plane* (1979) 88 CA3d 223, 238, 151 CR 843.

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§18.12 3. Burden of Proof

Although the decision to appoint an expert is within the court's discretion (*Torres v Municipal Court* (1975) 50 CA3d 778, 784, 123 CR 553), equal protection requires that the court appoint an expert needed to assist an indigent defendant when the defendant shows a need for such an appointment. *People v Faxel* (1979) 91 CA3d 327, 330, 154 CR 132. The motion must state the basic facts necessary to persuade the court that the expert is required for preparation of the defense. *People v Hurley* (1979) 95 CA3d 895, 899, 157 CR 364; *Torres v Municipal Court* (1975) 50 CA3d 778, 785, 123 CR 553. Specific factors applicable to the case should be relied on, rather than general assertions that the case is complex. See *People v Hurley, supra*. For example, in an eyewitness case, counsel might point out unusual factors, such as cross-racial identification or limited lighting conditions. *People v McDonald* (1984) 37 C3d 351, 369, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. The court cannot deny a request for an expert solely because no one with the expertise requested is on the trial court's "approval" panel. *Doe v Superior Court* (1995) 39 CA4th 538, 546, 45 CR2d 888.

Ø **Note:** Information that does not have to be disclosed to the prosecutor should be given to the judge in camera out of the prosecutor's presence. See *People v Faxel* (1979) 91 CA3d 327, 330 n1, 154 CR 132 (dictum). Some judges routinely allow ex parte hearings for this purpose. Others require some showing that a privilege, such as the defendant's privilege against self-incrimination, will be affected if the prosecutor is present. A sample motion for in camera appointment of a defense expert is in California Criminal Law Forms Manual §11.8 (2d ed Cal CEB 2005).

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§18.13 4. Effect of Appointment on Confidentiality

Because nonindigent defendants will be hard-pressed to demonstrate the need for a court-appointed expert, experts are usually appointed by the court in criminal cases only after a finding that the defendant is indigent. See *Torres v Municipal Court* (1975) 50 CA3d 778, 783, 123 CR 553. Once this finding is made, the results of the court-appointed expert's examination of the defendant are confidential if the appointment is made under Evid C §952, dealing with confidential communications between client and lawyer. See Evid C §1017.

Communications with a defense expert who will not be called to testify at trial do not have to be given to the prosecutor under Pen C §1054.3, because the expert's knowledge about the case is privileged. See *Finley v Superior Court* (1972) 29 CA3d 342, 348, 104 CR 699; *People v Goldbach* (1972) 27 CA3d 563, 568, 103 CR 800. However, reports or statements of experts made in connection with the case are discoverable if the party intends to call the expert as a witness at trial. Pen C §§1054.1 (prosecution), 1054.3 (defense). These include the results of physical or mental examinations, scientific tests, experiments, or comparisons that the party intends to offer in evidence at trial.

Section 1054.3 does not require disclosure of communications that are within the scope of the attorney-client privilege. *Rodriguez v Superior Court* (1993) 14 CA4th 1260, 1267, 18 CR2d 120. In *Rodriguez,* the court held that the defendant's statements to a psychologist made at defense counsel's request for the purpose of evaluating the defendant to determine what defenses were available came within the attorney-client privilege and were not subject to pretrial discovery, even though the psychologist was designated as a defense witness. *Rodriguez v Superior Court, supra*. See §11.14 for further discussion of the relationship between reciprocal discovery and privilege.

Ø **Note:** Defense counsel should strike any privileged statements by the defendant (*e.g.,* statements to a psychiatrist) from the report before giving it to the prosecutor.

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§18.14 5. Appointment of Experts in Capital Cases

Penal Code §987.9 allows an indigent defendant in a capital case, and cases under Pen C §190.05, to seek funds through the court for the payment of experts, investigators, and others for the "preparation" or "presentation" of the defense. Application for these funds is by affidavit or declaration and must state in some detail why the funds are reasonably necessary for preparation or presentation of the defense. See Pen C §987.9; CCP §2015.5. The fact of the application and its contents are confidential. Pen C §987.9.

The application is heard by a judge of the court other than the one who will preside over the case at trial. Pen C §987.9. The judge who hears the application must rule on the reasonableness of the request at an in camera hearing. The court "shall be guided by the need to provide a complete and full defense for the defendant." Pen C §987.9.

Counsel should ensure that the court clerk seals the request and makes no record of the hearing or order in the court's minutes. A sample form for a §987.9 request and order is in California Criminal Law Forms Manual §54.1 (2d ed Cal CEB 2005). See §54.11 for further discussion of a capital defendant's right to funds for ancillary defense services.

> Ø **Note:** If defense counsel fails to follow the procedures set forth in Pen C §987.9 with respect to confidentiality, a subsequently convicted defendant will have to demonstrate both a lack of a tactical reason for not keeping the appointment confidential and prejudice. See, *e.g., People v Blair* (2005) 36 C4th 686, 726, 31 CR3d 485 (prosecution learned of expert's unfavorable conclusions when appointment was not confidential and then called him as rebuttal witness at guilt phase).

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§18.15 6. Appellate Review

The decision on the need for the appointment of an expert under Evid C §730 lies within the trial court's discretion, and the trial court's decision will not be set aside absent an abuse of that discretion. *Corenevsky v Superior Court* (1984) 36 C3d 307, 321, 204 CR 165; *People v Young* (1987) 189 CA3d 891, 904, 234 CR 819; *People v Hurley* (1979) 95 CA3d 895, 899, 157 CR 364.

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B. *Murgia* Motion: Dismissal Based on Discriminatory Prosecution

§18.16 1. Nature of Motion

Discriminatory prosecution denies the defendant the equal protection of the law guaranteed by the Fourteenth Amendment. See *Baluyut v Superior Court* (1996) 12 C4th 826, 832, 50 CR2d 101. A criminal defendant may obtain dismissal of the criminal charges brought by the government on the ground that the prosecution is being conducted in an arbitrary or discriminatory manner.

Known as a *Murgia* motion (see *Murgia v Municipal Court* (1975) 15 C3d 286, 291, 124 CR 204), the procedure usually involves two motions:

First, the defense moves to obtain discovery, typically records relating to other arrests or prosecutions for the same offense, that would prove that the government is acting in an impermissibly discriminatory manner. See, *e.g., Griffin v Municipal Court* (1977) 20 C3d 300, 306, 142 CR 286 (defendants prosecuted for mistreating prisoner sought discovery of all police department records of investigations into alleged police brutality over 10-year period); *Bortin v Superior Court* (1976) 64 CA3d 873, 876, 135 CR 30 (defendant sought to support his claim that no other persons were prosecuted for offense with which he was charged). A sample *Murgia* discovery motion is in California Criminal Law Forms Manual §18.13 (2d ed Cal CEB 2005).

Second, assuming that the discovery establishes that the prosecution is discriminatory, the defendant moves to have the charges dismissed. A dismissal based on discriminatory prosecution is a final dismissal. *Yick Wo v Hopkins* (1886) 118 US 356, 374, 30 L Ed 220, 227, 6 S Ct 1064.

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§18.17 2. Standing

A *Murgia* motion may be brought by any criminal defendant in any criminal action. *Murgia v Municipal Court* (1975) 15 C3d 286, 303, 124 CR 204. The defendant must show that he or she was arbitrarily discriminated against on the basis of an unjustifiable standard.

To succeed in a *Murgia* discovery motion, however, the defendant must usually be a member of the group against which discrimination is claimed. See, *e.g., Murgia v Municipal Court, supra* (motion alleging selective enforcement of law, targeting members and supporters of particular labor organization, was brought by member of the labor organization); *People v Ochoa* (1985) 165 CA3d 885, 887, 212 CR 4 (motion alleging that prisoners who belonged to racial minorities were disproportionately prosecuted for possession of weapons under Pen C §4502 was brought by two prisoners, one Hispanic and one African-American). In *Griffin v Municipal Court* (1977) 20 C3d 300, 302, 142 CR 286, however, a white defendant who claimed he would not have been prosecuted if he had acted alone or if his partner (codefendant) had not been black was considered to have made a proper showing for discovery.

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3. Discovery Motion

§18.18 a. Timing of Motion

As a practical matter, because the discovery requested is usually essential to prove the discrimination claim and the ultimate goal of a *Murgia* motion is to obtain a dismissal of the charges, the motion for discovery should be brought as early as possible.

Because *Murgia* discovery motions are based on the U.S. Constitution (*Murgia v Municipal Court* (1975) 15 C3d 286, 294, 124 CR 204), they are not subject to the discovery provisions of the Penal Code. Pen C §1054(e). On discovery in criminal cases, generally, see Pen C §§1054-1054.10, discussed in chap 11.

Under Pen C §1054.5(b), a party seeking discovery must ordinarily make an informal discovery request and then wait 15 days before seeking court enforcement. However, because *Murgia* discovery is needed to support the motion to dismiss, and because it does not involve discovery of trial witnesses or their possible testimony, it may be argued that the court may order *Murgia* discovery even if the defendant does not seek informal discovery first.

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§18.19 b. Burden of Proof

A criminal defendant making a *Murgia* discovery motion has the burden of proof. *Murgia v Municipal Court* (1975) 15 C3d 286, 298, 124 CR 204; *People v Superior Court (Baez)* (2000) 79 CA4th 1177, 1187, 94 CR2d 706. The defendant's threshold burden is a rigorous one, which recognizes judicial deference to prosecutorial discretion and which is intended to be a barrier to litigation of insubstantial claims. *U.S. v Armstrong* (1996) 517 US 456, 463, 134 L Ed 2d 687, 116 S Ct 1480. To meet this burden, the defendant must produce "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." *People v Superior Court (Baez)* (2000) 79 CA4th 1177, 1189, 94 CR2d 706, quoting *U.S. v Armstrong* (1996) 517 US 456, 468, 134 L Ed 2d 687, 700, 116 S Ct 1480. In other words, the defendant must make a credible showing of different treatment of similarly situated persons. 517 US at 470. The federal constitutional standard articulated in *Armstrong* is mandated by Pen C §1054(e), which provides that no discovery can occur in criminal prosecutions unless it is authorized by an express statutory provision or required by the U.S. Constitution. *People v Superior Court (Baez)* (2000) 79 CA4th 1177, 1187, 94 CR2d 706.

The defense may meet its threshold burden with a showing that similarly situated individuals were not prosecuted. 79 CA4th at 1191. For example, the defendant in *Baez* met the requirement of producing "some evidence" of discriminatory prosecution. The *Baez* defendant was the executive director of a medical marijuana center, was receiving government housing assistance, and was indicted for grand theft and numerous marijuana counts. He submitted three affidavits supporting his claim that he had been singled out from similarly situated individuals for criminal prosecution rather than administrative proceedings.

In contrast, in *People v Williams* (1996) 46 CA4th 1767, 1776, 54 CR2d 521, the defendant accused of beating Reginald Denny was unsuccessful in obtaining records concerning the prosecution of Los Angeles police officers, such as those in the Rodney King case, who committed batteries but were not prosecuted. Likewise, in *U.S. v Armstrong, supra,* a defense study, newspaper articles, and anecdotal hearsay did not meet the defense burden of showing different treatment of similarly situated individuals.

If the defense shows plausible justification for discovery, the prosecution has the opportunity to make an evidentiary showing in opposition. See *People v Moya* (1986) 184 CA3d 1307, 1310, 229 CR 402 (prosecutor's evidentiary showing was strong enough to overcome defendant's showing).

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§18.20 c. Appellate Review

Defense review. The defense may seek pretrial writ review of denial of a *Murgia* discovery motion. *People v Serna* (1977) 71 CA3d 229, 235, 139 CR 426. The standard of review is abuse of discretion. *People v Superior Court (Baez)* (2000) 79 CA4th 1177, 1195, 94 CR2d 706.

A trial court's refusal to grant discovery when the defendant was entitled to it may result in a reversal on appeal (*People v Hertz* (1980) 103 CA3d 770, 780, 163 CR 233) and may result in dismissal of the charges without the reviewing court reaching the question of whether the prosecution was discriminatory. See *People v Hertz* (1980) 103 CA3d 770, 780, 163 CR 233 (motion heard at preliminary hearing but magistrate failed to preserve reviewable record of in camera hearing; Pen C §995 motion grant upheld on appeal). See also *People v Ochoa* (1985) 165 CA3d 885, 889, 212 CR 4 (failure of prosecution to comply with discovery order led to dismissal).

Prosecution review. The prosecution may seek an extraordinary writ before trial to obtain review of the trial court's granting of a *Murgia* discovery order. Pen C §1512(a). The standard of review is abuse of discretion. *People v Superior Court (Baez)* (2000) 79 CA4th 1177, 1187, 94 CR2d 706.

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4. Motion to Dismiss

§18.21 a. Burden of Proof

The defense burden for a motion to dismiss based on discriminatory prosecution is by a preponderance of the evidence. *Miller v Superior Court* (2002) 101 CA4th 728, 748, 124 CR2d 591; *People v Smith* (1984) 155 CA3d 1103, 1129, 203 CR 196; *People v Gray* (1967) 254 CA2d 256, 265, 63 CR 211.

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§18.22 b. Required Showing

To obtain dismissal based on discriminatory prosecution, the defendant must show that he or she was deliberately singled out for prosecution on the basis of an invidious criterion, typically the defendant's membership in a particular group, and that the prosecution would not have occurred but for the discriminatory design of the prosecution. *People v Superior Court (Hartway)* (1977) 19 C3d 338, 348, 138 CR 66. See also *Wayte v U.S.* (1985) 470 US 598, 607, 84 L Ed 2d 547, 555, 105 S Ct 1524. The defendant is not required to show that the police or prosecutors had the specific intent to punish the defendant for his or her membership in the group. The "intent that must be shown is simply intent to single out the group or a member of the group on the basis of that membership for prosecution that would not otherwise have taken place." *Baluyut v Superior Court* (1996) 12 C4th 826, 835, 50 CR2d 101.

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§18.23 c. Nature of Evidence

Evidence of prosecutorial discrimination may be shown in two ways: (1) direct proof of a plan to discriminate or (2) statistical data on prosecutorial conduct showing that certain offenses are prosecuted only against a particular group. *Murgia v Municipal Court* (1975) 15 C3d 286, 305, 124 CR 204 (correspondence, memorandums, and minutes of meetings held by prosecutor with local farmers and sheriff's deputies were held to be discoverable to establish direct proof of plan to discriminate against members of United Farm Workers Union). In addition, data on other prosecutions for the same offense may be used to establish a pattern of discrimination. See, *e.g., Baluyut v Superior Court* (1996) 12 C4th 826, 830, 50 CR2d 101 (arrest reports spanning 2-year period showed police decoy operation "designed to ferret out homosexuals or those who were likely to engage in homosexual acts").

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§18.24 d. Timing of Motion

A motion to dismiss based on discriminatory prosecution should be brought before trial. *People v Superior Court (Hartway)* (1977) 19 C3d 338, 348, 138 CR 66; *Murgia v Municipal Court* (1975) 15 C3d 286, 293 n4, 124 CR 204; *People v Smith* (1984) 155 CA3d 1103, 1129, 203 CR 196. See *People v Hertz* (1980) 103 CA3d 770, 774, 163 CR 233.

If the motion is denied before the preliminary hearing is held, it should be renewed before trial; failure to renew it may be deemed a waiver. See *People v Gallegos* (1960) 180 CA2d 274, 277, 4 CR 413.

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§18.25 e. Appellate Review

Prosecution review. If a case is dismissed before trial based on discriminatory prosecution, it is a final dismissal. *Yick Wo v Hopkins* (1886) 118 US 356, 373, 30 L Ed 220, 227, 6 S Ct 1064. The prosecution can appeal under Pen C §§1238(a)(8), 1466(1)(B). See *People v Ochoa* (1985) 165 CA3d 885, 887, 212 CR 4.

Defense review. The defense may obtain review of denial of a motion to dismiss on appeal after trial. *People v Smith* (1984) 155 CA3d 1103, 1133, 203 CR 196. A pretrial petition for writ of prohibition/mandate is another remedy that might be considered.

Application of the wrong burden of proof by the trial court has been tested by the harmless error test. *People v Smith, supra* (trial court used clear and convincing evidence rather than preponderance of evidence as burden of proof).

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C. Motion to Recuse Prosecutor

§18.26 1. Nature of Motion

In a criminal action, the defense may move to recuse (or disqualify) the prosecutor on the ground of a conflict of interest that would make it unlikely that the defendant would receive a fair trial. Pen C §1424(a)(1); see Cal Const art I, §7. *Hambarian v Superior Court* (2002) 27 C4th 826, 833, 118 CR2d 725; *People v Snow* (2003) 30 C4th 43, 86, 132 CR2d 271. The conflict must be caused by factors extraneous to the prosecutor's official duty. *People v Superior Court (Martin)* (1979) 98 CA3d 515, 521, 159 CR 625. Although both actual and apparent conflicts can form the basis for recusing the prosecution, for the motion to be granted, the likelihood that the defendant will not receive a fair trial must be actual, not merely apparent. *People v Eubanks* (1996) 14 C4th 580, 592, 59 CR2d 200. See *People v Petrisca* (2006) 138 CA4th 189, 196, 41 CR3d 182 (conflict must be so grave that it is unlikely defendant will receive fair trial). A mere subjective impression of impropriety does not support recusal. *Haraguchi v Superior Court* (2008) 43 C4th 706, 719, 76 CR3d 250. See *Hollywood v Superior Court* (2008) 43 C4th 721, 735, 76 CR3d 264.

Recusal is rarely granted. See, *e.g., People v Hamilton* (1989) 48 C3d 1142, 1156, 259 CR 701; *People v Huston* (1989) 210 CA3d 192, 216, 258 CR 393.

Ø **Note:** A recusal motion is more likely to be granted when the facts are closely akin to a case in which recusal was previously successful. See §18.30.

The motion may be directed to an individual prosecutor or to the entire prosecutor's office in the county in which the action has been brought. See *People v Hernandez* (1991) 235 CA3d 674, 680, 286 CR 652. If the motion is granted, a substitute prosecutor is brought in to handle the case, *i.e.,* another deputy district attorney if only an individual deputy is recused, or a deputy attorney general or special prosecutor if the entire office is recused. See Pen C §1424. See also §2.16.

A sample motion to disqualify the prosecutor's office for bias and prejudice is in California Criminal Law Forms Manual §18.12 (2d ed Cal CEB 2005).

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§18.27 2. Standing

The only persons seeking to recuse the prosecution in published cases have been the defendants who claimed a conflict of interest concerning themselves. See cases cited in §18.30.

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§18.28 3. Timing of Motion

A recusal motion should be brought as soon as defense counsel is aware of the conflict. It can be made before the preliminary hearing. *Trujillo v Superior Court* (1983) 148 CA3d 368, 370, 196 CR 4. See also *People v Municipal Court (Henry)* (1979) 98 CA3d 690, 692, 159 CR 639. The motion must be served on the prosecutor and on the Attorney General at least 10 court days before the hearing. Pen C §1424.

A recusal motion may be renewed on a change of circumstances. *People v Superior Court (Hollenbeck)* (1978) 84 CA3d 491, 503, 148 CR 704. The motion may also be renewed in connection with a motion to dismiss under Pen C §995 if a motion to recuse was made at the preliminary hearing. *Trujillo v Superior Court, supra*.

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§18.29 4. Burden of Proof

A defendant seeking to recuse a prosecutor or a prosecutor's entire office has a two-part burden of proof. First, he or she must demonstrate the existence of a conflict. This is done by showing circumstances that demonstrate "a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." *Haraguchi v Superior Court* (2008) 43 C4th 706, 713, 76 CR3d 250; *People v Conner* (1983) 34 C3d 141, 148, 193 CR 148. Second, the defendant must show that the conflict is "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." *Haraguchi v Superior Court, supra*; *People v Vasquez* (2006) 39 C4th 47, 55, 45 CR3d 372.

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§18.30 5. Illustrative Cases

Recusal is rarely granted. See, *e.g., People v Hamilton* (1989) 48 C3d 1142, 1156, 259 CR 701; *People v Huston* (1989) 210 CA3d 192, 216, 258 CR 393. Recusal motions are more likely to be granted when the facts are closely akin to a case in which recusal was previously successful. The following cases illustrate factual scenarios in which a trial court *granted* (or should have granted) a motion to disqualify the prosecutor or the prosecutor's office:

- In *People v Vasquez* (2006) 39 C4th 47, 55, 45 CR3d 372, the supreme court held that the trial court should have granted the defense motion to recuse the entire district attorney's office because the record showed a reasonable possibility that the prosecutor was not exercising her discretionary functions in an evenhanded manner. The recusal motion had been based on the fact the defendant's stepfather was a prosecutor in the office and his mother was an administrator in the office. The defense argued that the prosecution was overzealous to avoid the appearance of impropriety.

  Ø **Warning:** Defense counsel must seek pretrial review of a trial court's denial of a motion to recuse the district attorney's office. On pretrial review, the showing of a *likelihood* of unfair treatment will suffice for reversal. In contrast, raising the issue after a conviction requires showing a due process violation or prejudice for reversal. See, *e.g.*, *People v Vasquez, supra*.

- In *People v Eubanks* (1996) 14 C4th 580, 598, 59 CR2d 200, the supreme court held that the trial court would not have abused its discretion by finding a grave conflict of interest requiring recusal of an entire district attorney's office. The recusal motion had been based on the district attorney's approval of allowing the victim to pay part of the investigation costs of the criminal case. The victim, a computer program company, recommended and paid for an independent expert to assist the district attorney's investigators in the execution of a search warrant seeking stolen trade secrets in the database of the defendant's computer at a competitive company. The court considered whether private financial considerations would make it likely that an interested party could influence or control the prosecution's discretionary decisions.
- In *Millsap v Superior Court* (1999) 70 CA4th 196, 203, 82 CR2d 733, although the court refused to recuse the entire district attorney's office from prosecuting the defendant, it did recuse two deputy district attorneys from prosecuting the defendant for solicitation of their murders.
- In *People v Hernandez* (1991) 235 CA3d 674, 679, 286 CR 652, only the deputies who prosecuted the victim in an earlier case had to be recused, not the entire district attorney's office.
- In *People v Lepe* (1985) 164 CA3d 685, 688, 211 CR 432, the defendant, charged with assault on two individuals and infliction of great bodily injury on a third, had been represented by the district attorney (before assuming office) in a prior case with similar charges. The district attorney and the entire district attorney's office were recused because the district attorney was assumed to have obtained confidential information from the defendant while representing him, a risk of disclosure existed with respect to that information, and the defendant intended to call the district attorney as a witness.

  Ø **Note:** That a prosecutor may testify at the trial is not enough, standing alone, to warrant recusal of the entire district attorney's office. See *People v Hernandez* (2003) 30 C4th 835, 853, 134 CR2d 602; *People ex rel Younger v Superior Court (Rabaca)* (1978) 86 CA3d 180, 193, 150 CR 156; *People v Superior Court (Hollenbeck)* (1978) 84 CA3d 491, 500, 148 CR 704.

The following cases illustrate factual scenarios in which a trial court or appellate court *denied* a defendant's motion to recuse the prosecutor or the prosecutor's office:

- In *People v Superior Court (Humberto S.)* (2008) 43 C4th 737, 746, 76 CR3d 276, the trial court had recused specified Los Angeles County deputy district attorneys who had made significant efforts to prevent disclosure of the alleged victim's medical and psychotherapy records after their subpoena by a minor charged with sexual

abuse. The supreme court ruled that the trial court's decision was an abuse of discretion as it rested on an error of law, *i.e.*, that the prosecutors' efforts amounted to representation of a third party.

- In *Hollywood v Superior Court* (2008) 43 C4th 721, 76 CR3d 264, the supreme court upheld the trial court's refusal to recuse the lead prosecutor. The trial court concluded that the prosecutor did not labor under any conflict despite the fact that, while the defendant was a fugitive, he had consulted with the makers of a major motion picture that was based on the defendant's story.
- In *Haraguchi v Superior Court* (2008) 43 C4th 706, 713, 76 CR3d 250, the supreme court upheld the trial court's refusal to recuse the lead prosecutor. The trial court concluded that the fact that the prosecutor in a rape case had published a novel about a fictitious prosecutor handling a fictitious, but similar, date rape case did not create a material conflict.
- In *People v Cannedy* (2009) 176 CA4th 1474, 98 CR3d 596, the court of appeal found that the trial court abused its discretion in recusing the entire district attorney's office on the basis of the fact that a support staff employee of the office might be a witness, when the office was a very large one and less drastic alternatives existed. The trial court erroneously applied a "potential conflict" standard in granting the defense motion.
- In *People v Petrisca* (2006) 138 CA4th 189, 41 CR3d 182, the appellate court reversed a trial court ruling and found no grave conflict of interest in a Los Angeles County murder case in which the victim was the mother of a prosecutor in that county.
- In *People v Turner* (1994) 8 C4th 137, 163, 32 CR2d 762, the supreme court upheld the trial court's refusal to recuse the trial prosecutor after the defendant was granted a new trial because of a *Batson-Wheeler* violation by the same prosecutor.
- In *People v Breaux* (1991) 1 C4th 281, 295, 3 CR2d 81, the trial court was held not to have abused its discretion by denying a motion to recuse although the trial prosecutor belonged to the same social club as the victim, and the prosecutor's wife knew the victim.
- In *People v Hamilton* (1989) 48 C3d 1142, 1156, 259 CR 701, the supreme court denied the defendant's motion to recuse the district attorney's office. The basis of the recusal motion was that defense counsel had filed a complaint with the State Bar against the deputy district attorney who sent an investigator to talk to the defendant, at the defendant's request.
- In *People v Hamilton* (1988) 46 C3d 123, 141, 249 CR 320, a different case from the one just above, the supreme court upheld the trial court's refusal to recuse a district attorney's office on the grounds that an assistant district attorney had previously represented the accomplice on another case tried before the defendant met the accomplice. The court found no evidence of animosity on the part of anyone in the prosecutor's office as the result of the prior representation.
- In *People v Lopez* (1984) 155 CA3d 813, 827, 202 CR 333, a new deputy district attorney who had represented the defendant during the preliminary hearing while in private practice, and had withdrawn before arraignment on the information, declared that he would not discuss the defendant's strategy with anyone in the district attorney's office nor divulge any client-attorney confidences. The district attorney prosecuting the defendant stated that he had not communicated with the defendant's former attorney and would not seek any help from him. These declarations were sufficient to defeat the defendant's motion to recuse the entire district attorney's office.

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§18.31 6. Appellate Review

When the trial court grants a defendant's motion to recuse the prosecutor, the prosecutor may challenge the recusal order by an immediate appeal. Pen C §§1424, 1466(1)(A); *People v Lepe* (1985) 164 CA3d 685, 688, 211 CR 432. An appeal works an automatic stay of the recusal order. Pen C §1424. What happens to the trial, however, is unclear. The statute does not state whether a criminal trial may proceed while the recusal issue is on appeal. The following cases are somewhat analogous to this situation: *People v Sonoqui* (1934) 1 C2d 364, 366, 35 P2d 123 (while prosecution's appeal of grant of new trial is pending, new trial cannot proceed); *In re Lee G.* (1991) 1 CA4th 17, 25, 1 CR2d 375 (recusal of county counsel, representing petitioner, did not stay proceedings in juvenile dependency case); *People v Franc* (1990) 218 CA3d 588, 592, 267 CR 109 (homicide trial proceeded while dismissed special circumstance was on appeal); *People v Bogart* (1970) 7 CA3d 257, 263, 86 CR 737 (prosecution can appeal dismissal of some charges in information while trial proceeds on unaffected charges). If a party moved for, or the court sua sponte considered, a stay, it would seem that pendency of an appeal would be good cause for continuing the case beyond the normal statutory time for trial. See, *e.g., People v Superior Court (Gonzales)* (1991) 228 CA3d 1588, 1592, 279 CR 679 (prosecution's writ petition on judicial recusal issue constituted good cause to delay trial beyond Pen C §1382 limits, despite defendant's objections).

If trial actually did proceed, presumably the district attorney would prosecute because the appeal stayed the recusal order. Pen C §1424. If the defendant did not renew the objection, a waiver might be found. *People v Johnson* (1980) 105 CA3d 884, 891, 164 CR 746 (defendant can waive objection to being prosecuted by own former attorney).

When the prosecution has a clear right to appeal (but this is not a speedy, plain, and adequate remedy), writ relief may be available. See, *e.g., People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 1112, 257 CR 678 (dismissal of special circumstances; delay of homicide trial not warranted, but "complications" would ensue if trial proceeded while appeal undecided).

The trial court's ruling on the denial of a motion to recuse is reviewed under a deferential abuse of discretion standard. *Haraguchi v Superior Court* (2008) 43 C4th 706, 709, 76 CR3d 250. The trial court's findings of fact are reviewed under the substantial evidence test, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious. 43 C4th at 711. See *Hollywood v Superior Court* (2008) 43 C4th 721, 728, 76 CR3d 264 (same standard applies in capital case). A trial court decision based on an error of law constitutes an abuse of discretion. *People v Superior Court (Humberto S.)* (2008) 43 C4th 737, 746, 76 CR3d 276.

A trial court's denial of a motion to recuse that does not result in a due process violation will not be reversed on appeal without a showing of prejudice. *People v Vasquez* (2006) 39 C4th 47, 66, 45 CR3d 372.

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D. Vindictive (Retaliatory) Prosecution

§18.32 1. Nature of Motion

Vindictive prosecution, also called retaliatory prosecution, occurs when a prosecutor files more serious charges against a defendant after the defendant's exercise of a legal right or a defense against the original charge. A vindictive prosecution may also occur when separate charges brought against a criminal defendant are unrelated to the pending charge. See, *e.g., U.S. v Jenkins* (9th Cir 2007) 504 F3d 694, 700. The defense usually challenges vindictive prosecution by a motion to dismiss. See *People v Edwards* (1991) 54 C3d 787, 828, 1 CR2d 696. See also *U.S. v Groves* (9th Cir 1978) 571 F2d 450, 453; *U.S. v DeMarco* (9th Cir 1977) 550 F2d 1224, 1227. Once the defense makes a prima facie showing that the prosecution increased the charges in response to the defendant's exercise of a procedural right, the prosecution has the burden of dispelling the *appearance* of vindictiveness as well as actual vindictiveness. *Twiggs v Superior Court* (1983) 34 C3d 360, 371, 194 CR 152. See also *U.S. v Groves, supra*; *U.S. v Ruesga-Martinez* (9th Cir 1976) 534 F2d 1367, 1369.

Vindictive prosecution motions are based on *Blackledge v Perry* (1974) 417 US 21, 27, 40 L Ed 2d 628, 634, 94 S Ct 2098. Following the defendant's successful appeal of a misdemeanor assault conviction, the prosecutor obtained an indictment charging the defendant with assault with intent to kill, a felony. The new indictment was based on the same facts as the misdemeanor charge. The defendant pleaded guilty to the felony charge and received a stiffer sentence than he would have received as a result of the misdemeanor conviction. The Supreme Court overturned the conviction on due process grounds. 417 US at 28.

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§18.33 2. Timing of Motion

A motion to dismiss for vindictive prosecution should be raised before trial. *Twiggs v Superior Court* (1983) 34 C3d 360, 373, 194 CR 152; *Barajas v Superior Court* (1983) 149 CA3d 30, 34, 196 CR 599. The only way to raise the issue for the first time on appeal is through a claim of ineffective assistance of counsel. See *People v Tirado* (1984) 151 CA3d 341, 354, 198 CR 682, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1089, 1097, 81 CR2d 301.

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§18.34 3. Standing

Only a defendant who is the target of the retaliatory or vindictive prosecution has standing to bring the motion. See the cases cited in §18.36.

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§18.35 4. Burden of Proof

After jeopardy has attached. The defendant has the initial burden of showing that he or she was recharged following the exercise of a legal right, and that the new charges subject him or her to a potentially greater punishment. This showing creates a presumption of vindictiveness, which the prosecution must rebut by showing that the increase in the severity of the new charge was not motivated by vindictiveness. To rebut the presumption, the prosecution must dispel the *appearance* of vindictiveness as well as the inference of actual vindictiveness. *Twiggs v Superior Court* (1983) 34 C3d 360, 371, 194 CR 152. See also *In re Bower* (1985) 38 C3d 865, 878, 215 CR 267; *U.S. v Alvarado-Sandoval* (9th Cir 1977) 557 F2d 645; *U.S. v Ruesga-Martinez* (9th Cir 1976) 534 F2d 1367, 1369.

Cases in which the prosecution was held to have rebutted the presumption of vindictiveness include:

- *U.S. v Griffin* (9th Cir 1980) 617 F2d 1342, 1347 (combination of circumstances showed that decision to file additional charges was unrelated to defendant's motion to dismiss first indictment);
- *U.S. v Preciado-Gomez* (9th Cir 1976) 529 F2d 935, 940 (presumption dispelled by evidence that more serious charge arose from discovery of additional evidence);
- *Robinson v Superior Court* (1986) 181 CA3d 746, 226 CR 724 (prosecutor rebutted presumption with showing that trial court's evidentiary ruling was reason for filing additional counts); and
- *In re Anthony M.* (1976) 64 CA3d 464, 543, 134 CR 540 (more stringent dispositional order after rehearing justified by deterioration of minor's behavior).

Before jeopardy has attached. No presumption of vindictiveness arises when the prosecution adds counts or enhancements before trial. *People v Lucious* (1984) 153 CA3d 416, 422, 200 CR 251. See also *Blackledge v Perry* (1974) 417 US 21, 28, 40 L Ed 2d 628, 634, 94 S Ct 2098. In the pretrial context, the defense must present evidence showing that the prosecutor's decision to file additional or more serious charges was motivated by a desire to punish the defendant for exercising a legal right. *U.S. v Goodwin* (1982) 457 US 368, 384, 73 L Ed 2d 74, 87, 102 S Ct 2485; *People v Bracey* (1994) 21 CA4th 1532, 1549, 26 CR2d 730. Reasons that have been held to justify an increase in the original charge include:

- Discovery of additional evidence. *U.S. v Preciado-Gomez* (9th Cir 1976) 529 F2d 935, 940;
- Impossibility of filing the additional charges with the original ones. *Blackledge v Perry* (1974) 417 US 21, 29 n7, 40 L Ed 2d 628, 635 n7, 94 S Ct 2098;
- Misconduct by the defendant after the original charge. *In re Anthony M.* (1976) 64 CA3d 464, 469, 134 CR 540; and
- Pretrial decision to file a second complaint based on a separate offense even though the decision followed the defendant's exercise of a right. *People v Lucious* (1984) 153 CA3d 416, 200 CR 251; *People v Tirado* (1984) 151 CA3d 341, 349, 198 CR 682, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1089, 1097, 81 CR2d 301.

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§18.36 5. Showing Vindictiveness

The evidence in support of a motion to dismiss based on retaliatory prosecution should consist of affidavits or declarations detailing the sequence of events leading to the filing of the new charge as well as testimony given at the hearing on the motion. See *Twiggs v Superior Court* (1983) 34 C3d 360, 369, 194 CR 152 (supreme court impliedly criticized trial court's acceptance of prosecutor's unsworn explanation for new charges). See also §18.5 on cross-examination of declarants and affiants.

The required threshold showing on legal rights exercised before trial is unclear. In *U.S. v Goodwin* (1982) 457 US 368, 380, 73 L Ed 2d 74, 84, 102 S Ct 2485, the Supreme Court held that there should be no presumption of vindictiveness before trial. In *Goodwin*, the prosecutor filed a superseding indictment containing a felony charge after the defendant asserted his right to a jury trial on the original misdemeanor counts. 457 US at 370, 73 L Ed 2d at 83. The Court pointed out that the prosecutor does not necessarily file all charges in the first charging document and that to allow a presumption after charging and before trial would restrict the prosecutor's ability to assess cases. 457 US at 382, 73 L Ed 2d at 85.

California cases have reached a similar result. See *People v Bracey* (1994) 21 CA4th 1532, 1544, 26 CR2d 730 (prosecutor refiled previously dismissed drug charges after defendant did not receive state prison sentence at probation violation hearing based on same drug charge); *People v Matthews* (1986) 183 CA3d 458, 464, 228 CR 316 (after failed plea negotiations, enhancements properly added during normal course of pretrial proceedings); *People v Lucious* (1984) 153 CA3d 416, 200 CR 251 (wait of several months before filing second set of similar charges acceptable); *People v Tirado* (1984) 151 CA3d 341, 349, 198 CR 682, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1089, 1097, 81 CR2d 301 (prosecutor properly waited to see what sentence defendant would receive on unrelated case).

When the alleged prosecutorial vindictiveness occurred after trial, a presumption of vindictiveness arises when a defendant makes a prima facie showing that the prosecution increased the charges in response to the defendant's exercise of a procedural right. *In re Bower* (1985) 38 C3d 865, 873, 215 CR 267 (prosecutor and defense attorney agreed to maximum second degree murder theory; conviction reduced to second degree); *Twiggs v Superior Court* (1983) 34 C3d 360, 368, 194 CR 152 (after mistrial, prosecutor offered defendant plea bargain, which he refused; prosecutor then charged five additional Pen C §667.5 priors; reversed); *People v Hudson* (1989) 210 CA3d 784, 258 CR 563 (after defendant withdrew plea to misdemeanor, prosecutor recharged as felony; reversed).

Once the defense meets its burden, the prosecution assumes the burden of proving that the increase in the severity of the new charge was not motivated by vindictiveness. *Robinson v Superior Court* (1986) 181 CA3d 746, 749, 226 CR 724 (prosecutor justified charging additional counts after motion for new trial was granted by showing that new charges were result of trial court's evidentiary rulings); *U.S. v Griffin* (9th Cir 1980) 617 F2d 1342, 1347. If the prosecution fails to dispel the appearance of vindictiveness as well as actual vindictiveness, the court should grant the defendant's motion. *Twiggs v Superior Court* (1983) 34 C3d 360, 371, 194 CR 152.

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§18.37 6. Appellate Review

Appellate review of denial of a motion to dismiss based on vindictive prosecution may be obtained before trial by a petition for writ of prohibition/mandate (*Twiggs v Superior Court* (1983) 34 C3d 360, 369, 194 CR 152) or by a petition for writ of habeas corpus (*In re Bower* (1985) 38 C3d 865, 872, 215 CR 267; *In re David B.* (1977) 68 CA3d 931, 934, 137 CR 577), depending on the procedural posture of the case. See chap 42 on writs. After trial, the issue can be raised on appeal. *People v Johnson* (1991) 233 CA3d 425, 448, 284 CR 579.

The prosecutor can seek judicial review of the granting of the motion through an appeal under Pen C §1238(a)(8) or §1466(1)(A). See *People v Watson* (1983) 146 CA3d 12, 193 CR 849. If the dismissal was by way of a Pen C §995 motion, the prosecution can appeal under Pen C §1238(a)(1). *People v Haney* (1984) 156 CA3d 109, 114, 202 CR 579.

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§18.38 E. Petition for AIDS Testing

Both the Penal Code (Pen C §1524.1) and the Health and Safety Code (Health & S C §§121050-121070) provide for AIDS (acquired immune deficiency syndrome) testing of criminal defendants and minors charged with crimes. Some conflicts exist between these sections and, in a conflict, Health & S C §§121050-121070 prevail. Health & S C §121050.

Under the Health and Safety Code, if the alleged victim makes a written request for the testing, any defendant or minor charged with specified sex crimes (Pen C §§261, 261.5, 262, 266b, 266c, 286, 288, or 288a) may be ordered tested for the AIDS virus and other communicable diseases. After a motion by the prosecutor or the alleged victim, the court must order the defendant or minor to provide two specimens of blood for testing if the court finds that probable cause exists to believe that a *possible* transfer of blood, saliva, semen, or other bodily fluid took place between the defendant or minor and the alleged victim in the specified criminal act. Health & S C §121055. See generally Health & S C §§121050-121070. Testing is also required if a peace officer, firefighter, emergency medical person, custodial officer, custody assistant, or other specified person working in a detention facility came in contact in a specified way with the bodily fluids of a criminal defendant or a juvenile charged with a crime. Health & S C §121060.

> Ø **Note:** Although Health & S C §§121055 and 121060 require that the defendant or juvenile provide blood specimens, testing for the AIDS virus may take the form of either a blood test or saliva test. See Pen C §1524.1(b)(1).

Under the Penal Code, the court may issue a search warrant to test the blood or saliva or a criminal defendant or minor charged with a crime for the AIDS virus when requested by the victim and when the court finds, after a hearing, that there is probable cause to believe that any bodily fluid capable of transmitting the AIDS virus has been transferred from the defendant to the victim, and that the accused committed the charged offense. Probable cause can be found either at a preliminary hearing or at the hearing on the motion to force the defendant to be tested for the AIDS virus. The same procedures are used for victims of specified uncharged offenses. Pen C §1524.1(b)(2).

> Ø **Note:** It is a crime to file a false sexual assault report in order to force a person to be tested for AIDS. It is also a crime to disclose test result information obtained as a result of complying with Pen C §1524.1. Pen C §1524.1(h).

Postconviction AIDS testing is required for persons convicted of specified sex offenses. Pen C §§1202.1, 1202.6. See discussion in §35.26.

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19

RIGHT TO SPEEDY TRIAL

NANCY BREWER

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§19.1 I. OVERVIEW

Delay in the investigation or prosecution of a criminal matter may violate a defendant's constitutional or statutory rights. A defendant may seek an order terminating a criminal action or for other sanctions because of a delay in the prosecution of the case. Pen C §686. The nature of the showing that a defendant must make in support of a motion to dismiss depends on the basis of the defense claim. Similarly, the prosecution also has a right to a speedy trial. Cal Const art I, §29. See *People v Cole* (2004) 33 C4th 1158, 1188, 17 CR3d 532.

Constitutional issues. Regarding constitutional violations based on prosecutorial delay, a criminal prosecution may be divided into two fundamental stages:

- *Preaccusation delay* occurs between the time of the commission of the offense and the time the defendant is charged or arrested, whichever comes first. Delay occurring during this period is governed by the due process clauses of the federal and state constitutions. US Const amends V, XIV; Cal Const art I, §7.
- *Postaccusation delay* occurs after the filing of the accusatory pleading or the arrest of the defendant. Delay during this period is subject to the speedy trial provisions of the federal and state constitutions. US Const amends VI, XIV; Cal Const art I, §15.

A defendant seeking dismissal should identify the period in which the delay occurred and the basis of the claim in the pleadings because the character of proof that must be offered at the hearing on the motion varies with the basis of the claim. See *People v Allen* (1979) 96 CA3d 268, 158 CR 54.

Statutory issues. The other aspect of speedy trial requirements is statutory. The statutes that prescribe deadlines concern these areas:

- Statutes of limitations (Pen C §§799-805);
- Arraignment on complaint (Pen C §§825, 849);
- Preliminary hearings (Pen C §§859b, 861);
- Filing of an information in the superior court (Pen C §1382); and
- Trial (Pen C §§1381, 1381.5, 1382, 1389).

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Source: Criminal Law/California Criminal Law Procedure and Practice/19 RIGHT TO SPEEDY TRIAL/§19.2 II. CHART: DEADLINES

§19.2 II. CHART: DEADLINES

Action	Deadline	Authority
Misdemeanor defendant *in custody* at time of arraignment *or* entry of plea must be brought to trial.	In general, within 30 calendar days after arraignment or entry of plea, whichever occurs later, unless defendant requests or consents to delay beyond time period, enters general time waiver, or fails to appear for trial. There are specific requirements following failure to appear, mistrial, new trial order, finding of competency to stand trial, and appeal.	Pen C §1382(a)(3).
Misdemeanor defendant *not in custody* at time of arraignment must be brought to trial.	Within 45 calendar days after arraignment or entry of plea, whichever occurs later, unless defendant requests or consents to delay beyond time period, enters general time waiver, or fails to appear for trial. There are specific requirements following failure to appear, mistrial, new trial order, finding of competency to stand trial, and appeal.	Pen C §1382(a)(3).
Felony information must be filed.	Within 15 calendar days after order holding defendant to answer.	Pen C §1382(a)(1).
Felony defendant, whether in or out of custody, must be brought to trial.	Within 60 calendar days after arraignment on indictment or information, unless defendant requests or consents to date beyond 60-day period, enters general time waiver, or fails to appear for trial.	Pen C §1382(a)(2).
Felony or misdemeanor defendant who has consented that trial be continued to date beyond statutory time limits without general time waiver must be brought to trial.	Within 10 days after date he or she announces ready for trial and/or objects to further delay.	Pen C §1382(a)(2)(B), (3)(B).
California defendant serving term in state prison, or county jail term of more than 90 days, who makes valid demand to be brought to trial on pending state case must be brought to trial.	Within 90 calendar days after delivery of demand to district attorney.	Pen C §1381; see *People v Contreras* (2009) 177 CA4th 1296, 1300, 99 CR3d 759.
Person serving term in federal prison in California who makes valid demand to be brought to trial in pending state case must be brought to trial.	Within 90 calendar days after prosecutor's receipt of assent of federal authorities to release prisoner for trial on California charges.	Pen C §1381.5.
Person serving term in state that is signatory to Interstate Compact on Detainers against whom detainer has been	Within 180 days after delivery of demand to prosecuting attorney and court.	Pen C §1389.

lodged and who has made valid demand for trial.

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III. CONSTITUTIONAL CLAIMS

§19.3 A. Preaccusation Delay: Due Process

A delay between the time a crime is committed and the time a person is arrested or charged, whichever comes first, is to be tested not by the rules applicable to speedy trials but by whether the person was denied due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution or art I, §7, of the California Constitution, or both. *People v Nelson* (2008) 43 C4th 1242, 1250, 78 CR3d 69. Under the California Constitution, the test for determining whether the right to due process has been violated is the same as the test for determining whether the right to speedy trial has been violated: Whether the delay is negligent or intentional, actual prejudice to the defendant is weighed against such justification as may be proved. *Jones v Superior Court* (1970) 3 C3d 734, 741 n1, 91 CR 578.

The test may not be the same under the federal Constitution. The California Supreme Court has noted, and some lower federal courts have held, that the Due Process Clause of the federal Constitution is not violated unless, in addition to the prejudice requirement, it is also shown that the delay was undertaken to gain a tactical advantage over the defendant. See *People v Catlin* (2001) 26 C4th 81, 107, 109 CR2d 31; *U.S. v Puett* (11th Cir 1984) 735 F2d 1331, 1334 (erroneously citing *U.S. v Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455, as so holding). In the absence of evidence of deliberate delay, a defendant asserting a violation of the right to due process will wish to invoke the protections of the California Constitution.

No matter which constitution is involved, to determine whether the due process right has been violated, the court must first determine whether the defendant has established *any* prejudice whatsoever. *People v Nelson, supra*; *People v Catlin, supra*. The moving party, *i.e.,* the defendant, bears the burden of establishing *actual* prejudice. *U.S. v Lovasco* (1977) 431 US 783, 52 L Ed 2d 752, 97 S Ct 2044; *Serna v Superior Court* (1985) 40 C3d 239, 219 CR 420 (misdemeanors); *Scherling v Superior Court* (1978) 22 C3d 493, 505, 149 CR 597 (felonies); *People v Allen* (1979) 96 CA3d 268, 274, 158 CR 54 (felonies). No matter how long the delay, prejudice will not be presumed. *People v Nelson, supra* (cold hit DNA test resulted in prosecution 26 years after murder). However, any showing of prejudice, no matter how slight, will be sufficient to shift the burden to the prosecution to justify the delay. *People v Lowe* (2007) 40 C4th 937, 942, 56 CR3d 209; *People v Martinez* (2000) 22 C4th 750, 766, 94 CR2d 381.

If justification is presented, the court must engage in a balancing test to decide whether the justification for the delay outweighs the prejudice to the defendant. *People v Nelson* (2008) 43 C4th 1242, 1251, 78 CR3d 69. See, *e.g.*, *People v New* (2008) 163 CA4th 442, 77 CR3d 503 (32-year delay in prosecuting defendant for murder of his first wife).

A due process claim may be made even if the action was brought within the period of the applicable statute of limitations (Pen C §§799-805). *U.S. v Marion* (1971) 404 US 307, 324, 30 L Ed 2d 468, 480, 92 S Ct 455; *People v Archerd* (1970) 3 C3d 615, 639, 91 CR 397.

A sample defense motion to dismiss on due process grounds is in California Criminal Law Forms Manual §19.1 (2d ed Cal CEB 2005).

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B. Postaccusation Delay: Speedy Trial

§19.4 1. Federal and State Constitutions Apply

An "accused" is entitled to protection under the speedy trial provisions of US Const amend VI, XIV, and/or Cal Const art I, §15. The tests used under the federal and state constitutions are different, as is the time when the right attaches. See *Serna v Superior Court* (1985) 40 C3d 239, 219 CR 420; *People v Hannon* (1977) 19 C3d 588, 605, 138 CR 885.

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Source: Criminal Law/California Criminal Law Procedure and Practice/19 RIGHT TO SPEEDY TRIAL/§19.5 2. United States Constitution

§19.5 2. United States Constitution

When Sixth Amendment speedy trial right attaches. For the Sixth Amendment speedy trial right to attach, the defendant must be an "accused." The U.S. Supreme Court has defined an "accused" as one who is subject to "formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *U.S. v Marion* (1971) 404 US 307, 320, 30 L Ed 2d 468, 478, 92 S Ct 455.

In applying *U.S. v Marion* to the system of criminal charging used in California, which differs from that of the federal system, the California Supreme Court has held that the federal speedy trial right attaches in *misdemeanor* cases when a defendant is arrested or when the misdemeanor complaint is filed, whichever comes first. *Serna v Superior Court* (1985) 40 C3d 239, 262, 219 CR 420. In *felony* cases, the federal speedy trial right attaches on a holding order following a preliminary hearing, or when an indictment is filed. *People v Martinez* (2000) 22 C4th 750, 94 CR2d 381; *People v Hannon* (1977) 19 C3d 588, 605, 138 CR 885. The filing of a felony complaint is not sufficient to trigger federal speedy trial protection on the charged crimes. *People v DePriest* (2007) 42 C4th 1, 26, 63 CR3d 896. Therefore, in felony cases, only Cal Const art I, §15, is clearly available to challenge delay that occurs between the filing of a criminal complaint and the magistrate's holding order. See *People v Horning* (2004) 34 C4th 871, 895, 22 CR3d 305; *People v Hannon, supra*. See §19.6.

Applying federal speedy trial analysis. Federal speedy trial evaluation is done on a case-by-case basis. The U.S. Supreme Court has identified four factors that, among any other relevant circumstances, should be considered and balanced when the court evaluates a claimed violation of the federal constitutional speedy trial right (*Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182):

- Length of the delay;
- Reason for the delay;
- Defendant's assertion of the right; and
- Prejudice to the defendant.

A problem when addressing federal speedy trial analysis is the use of the term "presumptively prejudicial." The phrase is actually used in *two* different contexts in federal law. The first refers to the amount of delay that will be deemed unreasonable enough to "trigger" an inquiry into whether the Sixth Amendment has been violated. Not every delay, even if prejudicial, will violate the right to speedy trial, and the defendant cannot complain if he or she has been prosecuted with "customary promptness." *Doggett v U.S.* (1992) 505 US 647, 652, 120 L Ed 2d 520, 528, 112 S Ct 2686. The second use of the term refers to a delay that is long enough to warrant a presumption that the defendant has been prejudiced in ways that cannot be demonstrated and thus to require dismissal without a specific showing of prejudice in the absence of justification for the delay. 505 US at 656, 120 L Ed 2d at 531.

In *Serna v Superior Court, supra,* the California Supreme Court held that a misdemeanor defendant need not establish "actual prejudice" as a prerequisite to a *Barker v Wingo* hearing if the postcomplaint prearrest delay exceeds 1 year. The issue left open by the courts is this: In a case in which the prosecution cannot justify the delay, what length of delay warrants dismissal without any additional showing of "actual prejudice" by a defendant?

Beyond the necessary showing of a presumptively prejudicial delay in the triggering sense, the U.S. Supreme Court has stated that a showing of prejudice is not an *essential* prerequisite to demonstrating a violation of the Sixth Amendment. *Moore v Arizona* (1973) 414 US 25, 38 L Ed 2d 183, 94 S Ct 188. However, if actual prejudice cannot be shown, the *reason* for the delay becomes crucial. If the government has prosecuted with reasonable diligence, and the delay is consequently not lengthy, there will usually not be a Sixth Amendment violation in the absence of actual prejudice, while, if the delay was intentional or in bad faith, dismissal will almost always be required, even if the delay is not as long and whether or not there is prejudice. See *U.S. v Beamon* (9th Cir 1993) 992 F2d 1009; *People v Horning* (2004) 34 C4th 871, 891, 22 CR3d 305. If the delay is negligent, the case for dismissal even in the absence of prejudice becomes stronger as the length of the delay increases. *Doggett v U.S., supra* (finding negligent delay of 8½ years in serious felony case required dismissal without showing of actual prejudice, leaving open whether shorter

delay would also require dismissal).

See §19.37 for discussion of sanctions.

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§19.6 3. California Constitution

Under Cal Const art I, §15, a person becomes an accused when an accusatory pleading is filed or on arrest, whichever occurs first. An accusatory pleading includes felony and misdemeanor complaints, informations, and indictments. *People v Hannon* (1977) 19 C3d 588, 604, 138 CR 885. See also Pen C §691(c) (defining accusatory pleading). The same test is used for both due process and speedy trial claims, *i.e.,* any prejudice to the defendant resulting from the delay must be weighed against any justification for the delay. *Scherling v Superior Court* (1978) 22 C3d 493, 505 n9, 149 CR 597. See also *People v Hill* (1984) 37 C3d 491, 496, 209 CR 323. Prejudice is a factual question to be determined by the trial court. See *People v Cave* (1978) 81 CA3d 957, 147 CR 371. The defendant has the burden to show actual prejudice, and there is no presumption of prejudice. *People v Martinez* (2000) 22 C4th 750, 94 CR2d 381; *People v Horning* (2004) 34 C4th 871, 895, 22 CR3d 305. The defendant claiming the speedy trial violation under the California Constitution must show that the delay has impaired the ability to defend against the charged crime, because, for example, a witness has become unavailable, evidence has been lost, or a witness's memory has faded. *People v Lowe* (2007) 40 C4th 937, 946, 56 CR3d 209.

Ø **Note:** Although the application of the speedy trial protections of the California and U.S. constitutions are coextensive in *misdemeanor* cases, the California Constitution is effective in *felony* cases before the U.S. Constitution applies. See discussion in §19.5.

The state constitution speedy trial test is somewhat more favorable to the defendant than is the federal test, because only two factors must be balanced: actual prejudice and justification. Thus, an unjustified delay that causes actual prejudice should almost always result in dismissal under the California Constitution, even if other factors might weigh against dismissal under the U.S. Constitution. Accordingly, when actual prejudice can be proven, relief should be sought primarily under the California Constitution. When actual prejudice cannot be proven, relief must be sought under the U.S. Constitution, because actual prejudice is not an essential showing. However, in a felony case, delay that occurs between the complaint and the holding order is not protected under the U.S. Constitution. See discussion in §19.5. Of course, if the delay implicates both the state constitutional right and the federal constitutional right, both issues should be raised.

See §§19.7-19.12 for discussion of raising speedy trial issues, and see §19.37 for discussion of sanctions.

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§19.7 C. Motion to Dismiss: Oral or Written

A violation of the defendant's right to a speedy trial is customarily raised in a pretrial motion to dismiss. Because of the complexity of the issues involved in challenging delay on constitutional grounds, it is more effective to file a written motion to dismiss, accompanied by a supporting memorandum. See Cal Rules of Ct 4.111(b). It should include a detailed statement of facts supporting a finding of prejudice resulting from the delay, when prejudice must be shown. On facts that may be used to demonstrate prejudice, see §19.10. Defense counsel may want to include supporting affidavits or declarations outlining the prejudice suffered. See discussion of service and filing requirements for pretrial motions in §18.7. A sample defense motion to dismiss based on a speedy trial violation is in California Criminal Law Forms Manual §19.2 (2d ed Cal CEB 2005).

If counsel does not have enough time to file a written motion to dismiss, and a written motion is not required by local court rules or local practice, counsel may be able to make the motion orally. California Rules of Court 4.111(a) excepts pretrial motions when "specifically provided by law." It can be argued that because motions to dismiss are to be made as soon as possible after the relevant statutory time limit expires (see *People v Wilson* (1963) 60 C2d 139, 145 n3, 32 CR 44), they fall under the exception in this rule. Oral motions are most often used when counsel has little or no time before he or she must make the motion.

> Ø **Note:** When counsel has a few days to prepare the motion, he or she should consider either filing a written motion, together with an order shortening time signed by a judge, or calling the district attorney to let him or her know that the motion will be made and the grounds for it. This is particularly important if counsel expects to call witnesses.

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§19.8 D. Tactical Considerations in Bringing Motion to Dismiss

Raising a pretrial motion to dismiss based on a speedy trial violation can have drawbacks. First, if the defendant testifies, the prosecution will have a record that can be used to impeach future trial testimony or even form the basis for a future perjury charge should the defendant be less than truthful on the stand. On handling the ethical dilemma faced by the attorney who knows his or her client intends to commit perjury, see §2.30. Second, the hearing on the speedy trial motion may provide the prosecution with more discovery at an earlier stage of the proceedings than would otherwise be available.

Several alternative methods of proof are available and should be explored before subjecting the defendant to cross-examination (see *People v Williams* (1973) 30 CA3d 502, 510, 106 CR 324):

- An affidavit or declaration by defense counsel or defense witnesses may be made under penalty of perjury. The affiant or declarant must have personal knowledge of the facts related. *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233. Affidavits and declarations on information and belief are insufficient to establish necessary facts. *Brown v Superior Court* (1987) 189 CA3d 260, 265, 234 CR 416; *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721.
- Testimony by the defense investigator may be presented to show the impact of the delay on the defendant's ability to defend by showing the inability to locate key witnesses or pertinent evidence. Defense counsel should be prepared, however, to make a showing of the relevance of this unavailable evidence, *e.g.,* the nature of the expected testimony of the missing witness or the pertinence of the destroyed evidence. The defense investigator must also be prepared to show that the witness or evidence is missing because of the delay, *e.g.,* the witness whose address was listed in the police report has since moved with no forwarding address. If the defense cannot show that the evidence would have been available had the defendant been aware of the charges at an earlier time, the proffered prejudice may be found to be inconsequential. See the analysis in *People v Benavidez* (1979) 92 CA3d 264, 154 CR 552.

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E. Evidence to Prove Speedy Trial or Due Process Violation

§19.9 1. Rules of Evidence Apply but Are Subject to Greater Flexibility

At the hearing on a motion to dismiss, the normal rules of evidence presumably apply, subject to the greater flexibility generally allowed when the court is sitting as the sole trier of fact. See *People v Maki* (1985) 39 C3d 707, 217 CR 676, and *People v Winson* (1981) 29 C3d 711, 175 CR 621, relating to probation violation hearings. These motions may be made and decided on the basis of affidavits or declarations made on personal knowledge under penalty of perjury. See *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233; *People v Conrad* (1973) 31 CA3d 308, 107 CR 421. It is important to note, that the opposing party has the right to cross-examine the affiant or declarant on request; if the witness is not available, the witness's testimony may be stricken. See *People v Williams* (1973) 30 CA3d 502, 510, 106 CR 324. Counsel should subpoena the witnesses whose affidavits or declarations will be presented, although those witnesses may be placed on call, so that the witnesses can be presented if the prosecutor demands the right to cross-examination. Although defense counsel could check to see whether the prosecutor will want to cross-examine the witness, it may be the better practice not to alert the prosecutor to that right, because many attorneys faced with an affidavit or declaration simply overlook their right to cross-examination.

At the hearing on the motion, other competent relevant evidence is also admissible, including live testimony, documents, exhibits, and physical evidence. See, *e.g., People v Hannon* (1977) 19 C3d 588, 608, 138 CR 885.

When prejudice must be shown to support a finding of violation of a defendant's speedy trial rights (see §§19.3, 19.5-19.6), the defendant must support the claim of prejudice with competent evidence that shows both the prejudicial nature of the claim and that the prejudice was caused by the delay. *People v Sahagun, supra*.

Ø **Note:** Counsel should be sure to marshall all necessary evidence before the motion is heard, and subpoena all witnesses needed to testify (although they may be placed "on call"). Counsel should *not* rely on his or her opponent to have subpoenaed a particular witness if counsel needs that witness to support or attack a motion to dismiss.

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Source: Criminal Law/California Criminal Law Procedure and Practice/19 RIGHT TO SPEEDY TRIAL/§19.10 2. Proof of Prejudice

§19.10 2. Proof of Prejudice

Actual prejudice is an area in which defense counsel may be creative. Counsel should be alert to any impairment of the client's defense. Prejudice to a defendant caused by delay in bringing the case to trial, however, is not confined to the possible prejudice to his or her defense at trial (often resulting from the defendant's inability to recall incidents on the date in question). Inordinate delay, wholly aside from possible prejudice to the merits, may seriously interfere with the defendant's liberty, whether free on bail or not, and may disrupt employment, drain financial resources, curtail associations, result in public obloquy, and create anxiety in the defendant and his or her family and friends. Additionally, prejudice may be found from the inability of *prosecution* witnesses to clearly remember the facts because of the delay.

Ø **Note:** Counsel must show *specific* facts detailing prejudice. General allegations of loss of memory, missing witnesses, or lost evidence are generally insufficient. *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233. For California constitutional arguments, the initial showing of actual prejudice must demonstrate that the delay impaired the ability to defend against the charged crime. *People v Lowe* (2007) 40 C4th 937, 939, 56 CR3d 209.

The following are some of the types of prejudice to the defense that may occur:

- Loss of physical evidence by the police, defendant, or witnesses. *People v Hartman* (1985) 170 CA3d 572, 216 CR 641.
- Loss of a material witness. *People v Mirenda* (2009) 174 CA4th 1313, 1333, 95 CR3d 702; *People v Cave* (1978) 81 CA3d 957, 965, 147 CR 371.
- Faded memories of witnesses. *People v Hill* (1984) 37 C3d 491, 498, 209 CR 323. If witnesses' memories were not affected by the delay, there is no prejudice even if a long time has passed. *People v Morris* (1988) 46 C3d 1, 249 CR 119 (4 years), disapproved on other grounds in *In re Sassounian* (1995) 9 C4th 535, 37 CR2d 446.
- Loss of possible or potential concurrent sentences. *Smith v Hooey* (1969) 393 US 374, 378, 21 L Ed 2d 607, 611, 89 S Ct 575; *Barker v Municipal Court* (1966) 64 C2d 806, 813, 51 CR 921.

Ø **Note:** While the loss of the possibility of concurrent sentences is not sufficient on its own to establish an initial showing of actual prejudice in a California constitutional speedy trial motion (*People v Lowe, supra*), if the defense can show a prejudice that impaired the ability to defend, then the loss of a possible concurrent sentence is a prejudicial factor to be weighed in the balancing test.

- Prolonged incarceration. *Craft v Superior Court* (2006) 140 CA4th 1533, 1541, 44 CR3d 912.
- The client's inability to account for his or her whereabouts at the time the crime was committed because of the passage of time. *Ibarra v Municipal Court* (1984) 162 CA3d 853, 858, 208 CR 783; *People v Vanderburg* (1973) 32 CA3d 526, 108 CR 104.
- Loss of evidence potentially favorable to the defense, *e.g.,* the destruction of a dispatch tape because of the police department's internal policies. *Fowler v Superior Court* (1984) 162 CA3d 215, 208 CR 408.

The showing of prejudice must be artfully drawn, specific, and complete. See *Serna v Superior Court* (1985) 40 C3d 239, 250, 219 CR 420. Examples of showings held adequate by the appellate courts follow:

- In *Garcia v Superior Court* (1984) 163 CA3d 148, 209 CR 205, the defendant, charged with possession of drugs located during a booking search, submitted a declaration that four witnesses were present when she was arrested and searched at the scene and that one of the witnesses could not be located. The three other witnesses submitted declarations that they were present but had no recollection of the search because of the delay of more than a year.
- In *People v Hill, supra,* the prosecution eyewitnesses were able to make tentative in-court identifications, but their memories were "too uncertain to permit adequate cross-examination on the particulars of the person who attacked them."

In the following cases, the appellate courts upheld lower courts' rulings that the following showings were inadequate:

- In *Kaikas v Superior Court* (1971) 18 CA3d 86, 91, 95 CR 596, defense counsel made a claim of prejudice based on inability to locate two material witnesses; the court rejected this claim.
- The defendant's claim of prejudice based on the allegation that two potential witnesses were dead and four alibi witnesses were unavailable was rejected in *Blake v Superior Court* (1980) 108 CA3d 244, 250, 166 CR 470, because the defendant failed to articulate specific facts demonstrating the existence and unavailability of these witnesses.
- In *People v Posten* (1980) 108 CA3d 633, 166 CR 661, the defendant's allegation of prejudice based on the claim that the codefendant was not able to testify because he had been released from custody was rejected because there was no showing that his testimony would have been exculpatory.
- In *People v Benavidez* (1979) 92 CA3d 264, 154 CR 552, the defendant claimed an inability to remember where she was at the time of an alleged narcotic sale because of a 5-month delay. The court rejected this claim, stating there was no assertion that she would have remembered had the arrest occurred earlier.

See also *U.S. v Mills* (9th Cir 2002) 280 F3d 915 (showing that deceased witness who had told two people he would not let the defendant "take the fall" for charged offense found too speculative and indefinite to establish prejudice).

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§19.11 3. Justification for Delay

Justification for delay is relevant under all three of the constitutional tests discussed in §§19.5-19.6. Under both a due process analysis and a California constitutional speedy trial analysis, the burden shifts to the prosecution to attempt to justify the delay after the defense has made a showing of actual prejudice. Under the federal constitutional speedy trial test, justification is one of the four factors to be balanced. See §19.5.

To justify a delay, the prosecution must establish a valid "police purpose" necessitating the delay. *Penney v Superior Court* (1972) 28 CA3d 941, 953, 105 CR 162. This is an affirmative requirement; it cannot be met simply by showing an absence of deliberate purposeful or oppressive police conduct. *Penney v Superior Court, supra*. Limited resources, *e.g.,* too few police officers to serve all warrants, courtroom congestion, and inadequately staffed prosecutor or public defender offices, do not constitute valid reasons for delay. See *Barker v Wingo* (1972) 407 US 514, 531, 33 L Ed 2d 101, 117, 92 S Ct 2182; *Rhinehart v Municipal Court* (1984) 35 C3d 772, 781, 200 CR 916; *People v Johnson* (1980) 26 C3d 557, 571, 162 CR 431; *People v Flores* (2009) 173 CA4th Supp 9, 25, 92 CR3d 582; *People v Cole* (2008) 165 CA4th Supp 1, 11, 82 CR3d 699.

Neither negligence by police officers in gathering evidence or putting a case together for presentation to the district attorney nor incompetence of the district attorney in evaluating a case for possible prosecution can be considered valid police purposes. *Penney v Superior Court, supra*. A negligent delay, although not as serious as a deliberate one, will be weighed against the prosecution in all but federal due process analysis (*Barker v Wingo, supra*), as will a delay attributable to another branch of the state government rather than the district attorney's office. *People v Hill* (1984) 37 C3d 491, 497, 209 CR 323. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice will suffice to tip the scales towards finding a violation. *People v Nelson* (2008) 43 C4th 1242, 1256, 78 CR3d 69.

> Ø **Note:** The prosecution may be able to present evidence of justification for a delay in serving an arrest warrant by subpoenaing the police records that document attempts to serve the warrant. See Evid C §1271 (business records exception to hearsay rule).

An accused's own acts may be considered in determining justification for a delay. *People v Johnson, supra*. See *Vermont v Brillon* (2009) ___ US ___, 173 L Ed 2d 231, 241, 129 S Ct 1283. A delay that is directly attributable to the accused's own wrongful act may in and of itself justify the delay. *Barker v Wingo* (1972) 407 US 514, 530, 33 L Ed 2d 101, 116, 92 S Ct 2182. Some examples:

- A defendant who flees the jurisdiction of the court for the purpose of avoiding prosecution. *People v Perez* (1991) 229 CA3d 302, 279 CR 915. There are, however, federal appellate court decisions to the contrary. See, *e.g., Rayborn v Scully* (2d Cir 1988) 858 F2d 84. Of course, the U.S. Supreme Court held in *Barker v Wingo, supra,* that no single factor, which would appear to include the defendant's assertion of the right, can be determinative of the speedy trial issue. At any rate, a defendant who fails to appear, but does not leave the jurisdiction, has not waived his or her right to a speedy trial. *Ogle v Superior Court* (1992) 4 CA4th 1007, 6 CR2d 205.
- A defendant who gives an alias when being arrested on a new offense, so that subsequent checks do not show that he or she was in custody. *People v Almarez* (1985) 168 CA3d 262, 214 CR 105.
- A case that is refiled after the victim, who refused to prosecute the first time, is killed by the defendant. *People v Abraham* (1986) 185 CA3d 1221, 230 CR 325.

If the prosecution asserts that a delay was justified because of unsuccessful attempts to arrest the defendant, the defense has the right to cross-examine prosecution witnesses on attempts to serve the arrest warrant. See Evid C §1203. Cross-examination should focus on police failure to take investigative steps that would have led them to the defendant, *e.g.,* leaving cards or other notice of attempted service, contacting neighbors if there is no answer at the defendant's residence, checking available government records (*e.g.,* DMV or jail records), checking with the post office and utility companies, checking ownership of cars in the defendant's driveway, and attempting to serve the warrant at

different times of the day if the defendant's job was the reason for a regular pattern of absence. A defendant's failure to notify the DMV or postal authorities is also relevant.

In large metropolitan areas, once service is unsuccessful at the last-known address, it is customary to enter the warrant in a computer network and abandon subsequent attempts at service. Such a cursory effort can be highlighted to defense advantage by coupling the lack of investigation with a strong showing of availability in the defendant's declaration.

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§19.12 4. Attacking Showing of Justification

The defense can attack a showing of justification after it is made, or can anticipate the prosecutor's showing of justification in the motion to dismiss. On one hand, the advantage of waiting to see whether the prosecutor presents justification for the delay is that justification *must* be shown by the prosecutor; failure to do so weighs against the prosecution. On the other hand, by showing lack of justification at the beginning, the defense may make strengthen its case. However, it gives the prosecutor advance notice and the opportunity to investigate.

When proving lack of justification, counsel should show the defendant's availability for service of the arrest warrant and lack of knowledge of the warrant.

If defense counsel submits an affidavit or a declaration by the defendant to show availability for service and lack of knowledge of the warrant, it should be carefully limited to those issues. Such an affidavit or declaration is intended to demonstrate that the delay in service was unjustified and to remove the implication that the delay arose from the defendant's actions. The affidavit or declaration should include any of the following that are relevant:

- All information already known to the police and prosecution at the time the complaint was filed;
- Any facts that would have led the authorities to the defendant had minimal efforts been made to locate him or her;
- The defendant's address at the time of the offense, and any subsequent addresses up to the date of arrest, including notification to local postal authorities of address changes;
- Utilities listed in the defendant's name;
- The defendant's name and address in the phone book;
- Contacts with the local probation department;
- A driver's license or motor vehicle registration at the DMV;
- Any application for welfare or unemployment benefits;
- Voter registration;
- Any police contacts during the period the warrant was outstanding; and
- Any court appearances on unrelated charges.

The prosecutor has the right to cross-examine the affiant or declarant. If the witness is unavailable for cross-examination, his or her affidavit or declaration may be stricken. *People v Williams* (1973) 30 CA3d 502, 510, 106 CR 324.

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IV. STATUTORY CLAIMS

§19.13 A. Statute of Limitations

If a prosecution was not commenced within the period of time provided by the appropriate statute of limitations and the statute has not been tolled, then criminal proceedings must be terminated. *People v Zamora* (1976) 18 C3d 538, 134 CR 784. The statutes of limitations are in Pen C §§799-805.

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§19.14 1. Determining Applicable Statute of Limitations

The applicable statute of limitations is determined by reference to the maximum punishment possible under the statute.

If an offense is not punishable by death or imprisonment in a state prison, *i.e.,* if it is a misdemeanor, the statute of limitations is ordinarily 1 year. See Pen C §802; *People v Mincey* (1992) 2 C4th 408, 6 CR2d 822. For an offense punishable by imprisonment in a state prison for less than 8 years, the statute of limitations is ordinarily 3 years. Pen C §801. The statute of limitations that applies to a "wobbler" (a crime that may be charged either as a misdemeanor or as a felony) that is charged as a misdemeanor is determined by reference to the maximum felony sentence. Pen C §805(a). When a misdemeanor is charged as a felony because of prior convictions, the felony statute of limitations applies. Pen C §801; *People v San Nicolas* (1986) 185 CA3d 403, 229 CR 650. If an offense is punishable by imprisonment of 8 years or more, the statute of limitations is ordinarily 6 years. Pen C §800. There is no statute of limitations for an offense that is punishable by death, imprisonment in state prison for life, or imprisonment for life without possibility of parole, or for an offense involving embezzlement of public money. Pen C §799.

There are some exceptions to these rules. Prosecution for misdemeanor violations of Bus & P C §729 and Pen C §647.6 must be commenced within 2 years after the commission of the offense. Pen C §802. Fraud-related offenses, as listed in Pen C §803(c), have a 4-year period for commencement of the prosecution. Pen C §801.5. See, *e.g., People v Shetty* (2009) 174 CA4th 1488, 95 CR3d 355. Keep in mind that this means that a fraud-related wobbler offense, even when filed as a misdemeanor, may have a statute of limitations of 4 years. *People v Soni* (2005) 134 CA4th 1510, 36 CR3d 864. Other exceptions concern specified sex crimes against victims under 18 at the time of the offense (see Pen C §§801.1(a), 803(f)) and sex crimes when the suspect's identity is later conclusively established by DNA testing (see Pen C §803(g)). Although the statute of limitations generally begins when the offense is committed (Pen C §802), for some crimes it does not begin to run until the crime is discovered. Pen C §803(c). See also Pen C §803(h), which tolls the statute of limitations until essential evidence seized under warrant is made available to the prosecution. A law that attempts to revive a previously time-barred prosecution violates the Ex Post Facto Clause of the U.S. Constitution. *Stogner v California* (2003) 539 US 607, 609, 156 L Ed 2d 544, 550, 123 S Ct 2446. Counsel should also be aware that there may be a separation of powers violation on a refiled case, if the legislature amended the statute of limitations after the previous dismissal was final. See *People v Bunn* (2002) 27 C4th 1, 115 CR2d 192; *People v King* (2002) 27 C4th 29, 115 CR2d 214.

For purposes of the statute of limitations and except as otherwise provided by statute, a prosecution is commenced when one of the following occurs: An indictment or information is filed; a complaint charging a misdemeanor or infraction is filed; the defendant is arraigned on a complaint that charges the defendant with a felony; or an arrest warrant or bench warrant is issued. Pen C §§804, 806. Prosecution of a minor in an adult court for statute of limitations purposes begins with the filing of an accusatory pleading, such as an indictment, in the adult court. *People v Aguirre* (1991) 227 CA3d 373, 381, 277 CR 771 (indictment). Note *People v Superior Court (Gevorgyan)* (2001) 91 CA4th 602, 615, 110 CR2d 668, disapproved on other grounds in *Guillory v Superior Court* (2003) 31 C4th 168, 178 n5, 1 CR3d 879, limiting *Aguirre* solely to the application of the statute of limitations (indictment of juveniles not permitted in current statutory scheme).

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§19.15 2. Burden of Showing Prosecution Is Not Barred by Statute of Limitations; Pleading Requirements

An accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations. *In re Demillo* (1975) 14 C3d 598, 601, 121 CR 725; *People v Crosby* (1962) 58 C2d 713, 724, 25 CR 847. The prosecution has the burden, at the preliminary hearing or before the grand jury, and at trial, of proving that prosecution is not barred by the statute of limitations.

An accusatory pleading that seeks to avoid the bar of the statute of limitations by pleading the "date of discovery" provision must allege facts showing (1) the date on which the offense was discovered; (2) how and by whom the offense was discovered; (3) lack of knowledge, both actual or constructive, before the date of discovery; and (4) the reason the offense was not discovered earlier. *People v Zamora* (1976) 18 C3d 538, 564 n26, 134 CR 784.

The prosecution may also attempt to show that the statute of limitations was tolled (*i.e.,* in certain circumstances, the statute of limitations may be extended by the period of time that such circumstances are in existence). Pen C §803. The statute is tolled by any period of time during which a prosecution for the same conduct is pending in a state court (Pen C §803(b)), and by the period of time the defendant is absent from the state, up to a maximum tolling of 3 years (Pen C §803(d)). See *People v Whitfield* (1993) 19 CA4th 1652, 1658, 24 CR2d 210. The prosecution must produce evidence to establish how long the statute was tolled. *People v Le* (2000) 82 CA4th 1352, 98 CR2d 874.

At the preliminary hearing and before the grand jury, the prosecution has the burden of establishing probable cause that the prosecution is not barred by the statute of limitations. *People v Lopez* (1997) 52 CA4th 233, 249, 60 CR2d 511. When the defendant makes a pretrial motion to dismiss on the grounds that the statute of limitations has run, the defendant has the burden of proving that the statute of limitations has run as a matter of law. *People v Moore* (2009) 176 CA4th 687, 97 CR3d 844; *People v Lopez, supra*. If the defense is successful, the case is dismissed. The prosecution has the burden during trial of proving by a preponderance of the evidence that the statute of limitations has not expired. *People v Lopez, supra*.

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§19.16 3. Raising Issue of Failure to Comply With Statute of Limitations; Waiver

Failure to comply with the appropriate statute of limitations is a jurisdictional question. C*owan v Superior Court* (1996) 14 C4th 367, 58 CR2d 458; *People v McGee* (1934) 1 C2d 611, 36 P2d 378. Accordingly, a claim of violation of the statute of limitations may be raised by a demurrer under Pen C §1004(4) or §1004(5), by a motion under Pen C §995, by a motion in arrest of judgment under Pen C §1185, or by a writ of habeas corpus. See *People v Crosby* (1962) 58 C2d 713, 722, 25 CR 847.

Failure to comply with the appropriate statute of limitations may be raised on appeal without first having been raised in the trial court. See, *e.g., People v Williams* (1999) 21 C4th 335, 87 CR2d 412. It may also be raised on a Pen C §995 motion without being raised as an issue at the preliminary hearing. *People v Zamora* (1976) 18 C3d 538, 565 n26, 134 CR 784.

Although the statutes of limitations are jurisdictional, a defendant can expressly waive one that is applicable to plead guilty to a lesser charge for which the statute has run. When it is to a defendant's benefit, he or she may want to obtain a jury instruction for a lesser charge for which the statute of limitations has run. See *Cowan v Superior Court, supra* (when defendant expressly waived statute of limitations, it was error for court to set aside his plea to lesser included offense, on waiving statute of limitations, which had run on manslaughter).

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§19.17 B. Time for Arraignment

Time requirements for arraignment are primarily discussed in §6.8. The basic arraignment time requirement in criminal cases is that the defendant must be brought before a magistrate for arraignment and bail-setting without any unnecessary delay, and in any event within 2 days after arrest, excluding nonjudicial days. Pen C §849(a) (arrest without warrant), §825 (arrest with warrant); *People v Thompson* (1980) 27 C3d 303, 329, 165 CR 289; *People v Haydel* (1974) 12 C3d 190, 199, 115 CR 394. An arraignment should take place within 48 hours after arrest. *County of Riverside v McLaughlin* (1991) 500 US 44, 56, 114 L Ed 2d 49, 63, 111 S Ct 1661.

Even if the defendant is brought to court within 2 days, the arraignment may have been illegally delayed if the 2-day delay was not *necessary*. *People v Powell* (1967) 67 C2d 32, 59 CR 817; *Dragna v White* (1955) 45 C2d 469, 289 P2d 428. The only delays that may be deemed "necessary" are those needed to complete the arrest, book the accused, transport the accused to court, determine which charge to file, and complete the administrative tasks necessary for filing a formal pleading. Delay is *not* permissible for further investigation. *People v Williams* (1977) 68 CA3d 36, 43, 137 CR 70; *People v Thompson, supra*.

> Ø **Note:** See discussion in §6.23 of the constitutional requirements on probable cause determinations for persons arrested without a warrant. Counsel should be sure to object on constitutional as well as statutory grounds. See *People v Turner* (1994) 8 C4th 137, 32 CR2d 762.

If the defendant suffers prejudice owing to delay concerning any of these deadlines, the defendant may seek sanctions. *People v Valenzuela* (1978) 86 CA3d 427, 432, 150 CR 314. For discussion of sanctions, see §19.37.

Relief from prearraignment delay is usually sought when the detention resulted in the defendant's inability to obtain evidence to support his or her defense. See, *e.g., People v Valenzuela* (1978) 86 CA3d 427, 150 CR 314. Confessions obtained during a prolonged detention are also subject to attack. See, *e.g., People v Pettingill* (1978) 21 C3d 231, 244, 145 CR 861 (court relied on illegal detention and *Miranda* violation). When evidence was seized or statements were taken during the delay, the appropriate remedy for a violation of the *McLaughlin* 48-hour "rule" is exclusion of the evidence if the evidence was a "fruit of the poisonous tree." *Anderson v Calderon* (9th Cir 2000) 232 F3d 1053, 1071, overruled on other grounds in *Bittaker v Woodford* (9th Cir 2003) 331 F3d 715, 728. To determine whether a statement was a fruit of the poisonous tree, the court must decide (1) whether the statement was voluntary, not simply whether it occurred during the detention; and (2) whether it was either (a) the causal product of the violation, or (b) sufficiently an act of free will to disconnect it from the primary taint. 232 F3d at 1072. See also *People v Thompson* (1980) 27 C3d 303, 165 CR 289 (unnecessary delay in arraigning defendant is a factor to consider in determining whether confession made during period of delay was involuntary); *Rogers v Superior Court* (1955) 46 C2d 3, 10, 291 P2d 929 (defendant must show that confession is "a necessary product of the illegal detention"). To obtain relief, the defense must show either that an illegal detention occurred and that the detention produced the confession or that an essential connection existed between the detention and the confession. *People v Turner* (1994) 8 C4th 137, 32 CR2d 762 (3-day delay not unreasonable, because of complexity of case, and defendant did not show that delay resulted in challenged statements); *People v Carrera* (1989) 49 C3d 291, 324, 261 CR 348 (3-day delay illegal; defendant's "but for" argument insufficient).

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Source: Criminal Law/California Criminal Law Procedure and Practice/19 RIGHT TO SPEEDY TRIAL/ C. Preliminary Hearing/§19.18 1. Time Limits; Remedy for Failure to Comply With Pen C §859b

C. Preliminary Hearing

§19.18 1. Time Limits; Remedy for Failure to Comply With Pen C §859b

The preliminary hearing of a defendant who has been in custody for 10 or more court days solely on a felony complaint must be held within 10 *court* days after the defendant was arraigned or entered a plea, whichever occurred later, or within 10 court days after reinstatement of criminal proceedings under Pen C §§1367-1376. Pen C §859b. There may be a continuance beyond the 10-court-day period only if the defendant personally waives that limit (Pen C §859b(a); *Irving v Superior Court* (1979) 93 CA3d 596, 155 CR 654) or if the prosecution establishes good cause for a continuance under Pen C §1050 (Pen C §859b). See §19.19 for discussion of releasing the defendant as a remedy when good cause is shown.

Ø **Note:** Once a defendant has waived the 10-day rule, the 60-day rule, or both, there is no provision for withdrawal of that waiver. The only protection is the state constitutional speedy trial right. *People v Love* (2005) 132 CA4th 276, 34 CR3d 6.

In general, good cause for delaying a preliminary hearing is the same as good cause for delaying a trial under Pen C §1050. See §19.27 on good cause. However, §859b itself defines good cause for continuing a preliminary hearing as including the unavailability of a prosecuting attorney assigned to a case prosecuted under Pen C §187, §11165.1(a), or §11165.6 (concerning domestic violence). A delay under this provision can be for no more than 3 court days. Pen C §859b(b).

Ø **Note:** Because Pen C §872(b) permits hearsay to be introduced at a preliminary hearing, it will often be impossible for the prosecution to show that a delay in holding the preliminary hearing was justified by the unavailability of a witness.

If the defendant is *not* in custody, or if the hearing is being continued for good cause, the preliminary hearing must be set within 60 calendar days after arraignment or plea; otherwise, the case must be dismissed. Pen C §859b(b). There is no "good cause" exception to the 60-day period; it may be exceeded only with the defendant's *personal* consent. This is true even if good cause pursuant to Pen C §1050.1 is found regarding a jointly charged codefendant. *Ramos v Superior Court* (2007) 146 CA4th 719, 727, 53 CR3d 189. However, if a complaint is dismissed because of a violation of the 60-day rule, and there was good cause for the delay, an additional filing of charges is permitted under Pen C §1387(c)(1). For further discussion of Pen C §1387, see §25.45.

When the time requirements of Pen C §859b have been met, it is unclear whether the court has authority to dismiss an action merely because the prosecution fails to show good cause for a continuance under Pen C §1050. The court in *People v Henderson* (2004) 115 CA4th 922, 940, 9 CR3d 655, stated that in those circumstances, the trial court "must nevertheless postpone the hearing to another date within the statutory period." However, the Advisory Committee Comment to Cal Rules of Ct 4.115(b) states that that conclusion appears to be dicta and may be contrary to the plain language of Pen C §1050.

No case has discussed what time limit will apply if a defendant in custody consents to a delay beyond the 10-court-day period. Unlike Pen C §1382, there is no defined "trailing period" following a consensual delay. However, case law interpreting §1382 *before* the 10-day "trailing period" was added to that statute would suggest that the defendant has a right to have the preliminary hearing begin on the continued date unless good cause is shown for further delay. See *People v Weiss* (1958) 50 C2d 535, 559, 327 P2d 527; *Tudman v Superior Court* (1972) 29 CA3d 129, 105 CR 391.

Ø **Note:** Either party can request a continuance *within* the initial 10-court-day period without a showing of good cause. Pen C §1050(k).

The 10-court-day and 60-calendar-day rules are statutory, requiring no showing of prejudice by the defendant to obtain a dismissal if their provisions are violated. See Pen C §859b.

If a case is continued beyond the 10-day limit *without* good cause, consent, or waiver, the case must be dismissed

and the defendant discharged if the defendant has been in custody for 10 or more court days solely on that complaint. Pen C §859b.

If there is good cause to delay the preliminary hearing of one of two or more joined defendants, then, on motion of the prosecutor, there is good cause to delay the proceedings for all joined defendants. Pen C §1050.1; see discussion in §20.20.

When a defendant moves to represent him- or herself and the court concludes that a hearing is necessary to determine the defendant's mental capacity to waive counsel, the §859b time limits are tolled according to *Curry v Superior Court* (1977) 75 CA3d 221, 141 CR 884. *Curry*, however, was decided before the good cause exception was added to §859b; this situation would probably now be considered good cause rather than "tolling" the statute.

A magistrate may postpone a preliminary hearing for 1 court day to accommodate the physical, mental, or emotional needs of a child age 10 years or younger or a dependent person. Pen C §861.5. See Pen C §288(f)(3) ("dependent person" defined).

When a defendant asserts both the right to counsel and to have a preliminary hearing within 10 days, and the preliminary hearing is postponed beyond the 10-day period to allow the defendant to obtain counsel, the constitutional right to counsel prevails over the statutory speedy trial right, and the defendant is not entitled to a dismissal on speedy trial grounds. *People v Kowalski* (1987) 196 CA3d 174, 179, 242 CR 32.

The general rule is that a preliminary hearing must be completed in one session. Pen C §861. See discussion of the rule and exceptions in §8.18.

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§19.19 2. Release of Defendant When Good Cause for Continuance Shown Under Pen C §859b

If a preliminary hearing is delayed beyond the 10-court-day limit *with* good cause and the defendant has been in custody 10 or more court days solely on that felony complaint, the defendant must usually be released from custody on his or her written promise to appear. Pen C §859b. See *People v Standish* (2006) 38 C4th 858, 43 CR3d 785.

Section 859b lists specific exceptions to the release requirement, which are, in brief: (1) The defendant has requested the delay, (2) the defendant is charged with a capital crime; (3) a witness is unavailable because of actions by the defendant; (4) the delay is caused by illness of counsel; (5) counsel is unexpectedly engaged in a jury trial; or (6) an unforeseen conflict of interest has required the appointment of new counsel.

In *In re Samano* (1995) 31 CA4th 984, 37 CR2d 491, a divided court created an exception to the release requirement that is not in §859b. In *Samano,* the court considered a defendant to have requested a continuance only because good cause had been found for a continuance for his codefendant; the defendant, therefore, was held not to be entitled to be released from custody, even though that is not an exception listed in §859b.

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§19.20 D. Filing of Information After Preliminary Hearing

If an information is not filed in superior court within 15 calendar days after a defendant has been held to answer by a magistrate, the case must be dismissed unless good cause is shown. Pen C §1382(a)(1). This requirement can be waived if, for example, the defendant specifically requests a later date to file the information (*People v Murray* (1967) 247 CA2d 730, 56 CR 21) or if the defendant fails to move for dismissal promptly (*People v McGhee* (1987) 193 CA3d 1333, 239 CR 28). Failure to object *to a late arraignment date,* however, does not operate to waive the right to a timely filing of the information. *Ciaccio v Superior Court* (1984) 156 CA3d 130, 202 CR 674. If the original information is filed within 15 days, the fact that an amended information is filed after the 15-day period does not entitle the defendant to a dismissal. *People v Cryder* (1949) 90 CA2d 194, 202 P2d 765. See §19.37 on sanctions.

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E. Trial and Posttrial

§19.21 1. Statutory Deadlines for Trials in Felony Cases

The general rule is that a defendant charged with a felony must be brought to trial within 60 calendar days after his or her arraignment on an indictment or information, or the reinstatement of criminal proceedings under Pen C §§1367-1376. Pen C §1382(a)(2); *Rice v Superior Court* (1975) 49 CA3d 200, 122 CR 389. The deadline is the same for in-custody and out-of-custody defendants. See Pen C §1382(a)(2).

The trial court itself is specifically required to set all felony cases for trial within 60 calendar days after the defendant's arraignment in superior court unless a showing of good cause is made under Pen C §1050 for setting a later trial date. Pen C §1049.5. If the court sets a trial date beyond the 60-day limit, it must hold a hearing as prescribed by §1050 and put on the record the facts that justify the finding of good cause. Pen C §1049.5. Section 1049.5 applies to all felony cases, regardless of the date the crime was committed. *Tapia v Superior Court* (1991) 53 C3d 282, 299, 279 CR 592.

There are several differences between Pen C §§1049.5 and 1382(a)(2):

- First, although a defendant may waive the 60-day requirement of Pen C §1382 (Pen C §1382(a)(2)(A)-(B)), only a finding of good cause allows the court to avoid the 60-day limit of §1049.5;
- Second, §1049.5 applies to the prosecution as well as to the defense; and
- Third, the only remedy for violation of §1049.5 is through writ, to obtain an order that the superior court "proceed… without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses" (Pen C §1511), while dismissal is the remedy for violation of Pen C §1382 and can also be sought by writ review. See *Rhinehart v Municipal Court* (1984) 35 C3d 772, 776, 200 CR 916.

In felony cases, the trial court is only able to appoint counsel (whether the Public Defender or court-appointed private counsel) who represent on the record that they will be ready to proceed with the preliminary hearing and trial within the Penal Code's time requirements. Pen C §987.05. The trial court may make exceptions only when the court finds that counsel could not be ready within 60 days given the nature of the case, even if counsel were to diligently devote "constant" efforts to the case. Pen C §987.05. Because §987.05 applies only to appointed counsel and not to retained counsel, there are serious equal protection problems with the statute. One approach to the problem is for the deputy public defender assigned a case to prepare that case and any other cases assigned to him or her for trial on the same date, and tell the court which cases would be ready for trial but for the fact they are assigned to the same attorney. If the defendant does not waive his or her speedy trial right, the court should follow the guidelines in *People v Johnson* (1980) 26 C3d 557, 162 CR 431, discussed in §19.25, to try to bring the case to trial within the statutory speedy trial deadline. See discussion in *People v Superior Court (Alexander)* (1995) 31 CA4th 1119, 37 CR2d 729.

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§19.22 2. Statutory Deadlines for Trials in Misdemeanor Cases

A defendant charged with a misdemeanor who was in custody when arraigned or entering a plea, whichever comes later, must be brought to trial within 30 calendar days after arraignment or plea, whichever occurs later. Pen C §1382(a)(3). A defendant charged with a misdemeanor in all other cases must be brought to trial within 45 calendar days after the date of arraignment or plea, whichever occurs later. Pen C §1382(a)(3). Regardless of custodial status, a defendant charged with a misdemeanor must be brought to trial within 30 days after the date of restoration of criminal proceedings under Pen C §§1367-1376. Pen C §1382(a)(3).

Ø **Note:** The time for trial is based on the defendant's custody status at the time of arraignment or plea, *not* on custody status after that. *People v Baca* (1989) 211 CA3d 675, 259 CR 566.

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§19.23 3. Statutory Deadlines When New Trial Is Granted

In felony cases in which the cause is to be tried again following a mistrial, a new trial is required within 60 calendar days after the following (Pen C §1382(a)(2)):

- The date the mistrial was declared;
- The date of entry of the order granting a new trial from which an appeal is not taken;
- The date of filing of the remittitur in the trial court following an appeal; or
- The date a writ or order that in effect grants a new trial is filed in the trial court and served on the prosecutor.

Ø **Note:** When the defendant pleads guilty in a felony case before a preliminary hearing was held, and a writ or an order reverses that judgment, a new trial is required within 90 calendar days after the writ or order is filed in the trial court and served on the prosecutor. Pen C §1382(a)(2).

In misdemeanor cases, a new trial is required within 30 calendar days after the following (Pen C §1382(a)(3)):

- The date the mistrial was declared;
- The date of entry of the order granting a new trial when no appeal is taken;
- The date remittitur was filed in the trial court following an appeal;
- The date of the reinstatement of criminal proceedings once a defendant is found competent (see Pen C §§1367-1376); or
- The date judgment on appeal becomes final, if a new trial is to be held in the superior court.

If one of these deadlines is not met, the remedy is dismissal. Pen C §1382(a). Dismissal is not required, however, when the deadlines are waived by the defendant, as described in Pen C §§1382(a)(2)(A)-(B) (felony cases), 1382(a)(3)(A)-(B) (misdemeanor cases).

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§19.24 4. Waiver of Statutory Deadline

The defendant can waive the deadline for trial to begin, either by entering a general time waiver (Pen C §1382(a)(2)(A)) or by requesting or consenting to a trial date beyond the statutory deadline (sometimes called a "limited" time waiver) (Pen C §1382(a)(2)(B)).

When a defendant has entered a general waiver and then, after notice and in open court, withdraws that waiver, the defendant must be brought to trial within 60 calendar days after that withdrawal in a felony case, or within 30 days in a misdemeanor case. Pen C §1382(a)(2)(A), (a)(3)(A); *People v Wilson* (1963) 60 C2d 139, 32 CR 44. See *Arias v Superior Court* (2008) 167 CA4th Supp 1, 84 CR3d 264 (withdrawal of general time waiver by court filing, not in open court). Unlike the limited time waiver described in §19.26, there is no 10-day "grace period" for bringing a defendant to trial following expiration of the time period. *Baustert v Superior Court* (2005) 129 CA4th 1269, 1276, 29 CR3d 208. A defendant may also waive the right to a speedy trial by failing to make a prompt motion to dismiss after the time limit has expired. See §19.32.

> Ø **Warning:** When consenting to a trial date beyond the statutory deadline, counsel should be explicit in stating that *no* general waiver is being entered, if that is the case. Counsel should be aware that some courts do not accept limited time waivers. For discussion of limited time waivers, see §§19.26-19.27.

The prosecution and the defense may agree that the prosecution will not require the defense to establish "good cause" for a continuance in exchange for agreement by the defense to waive time at a future date should the prosecution need a further continuance. Because of the agreement by the defense to waive time, the date to which the prosecution's continuance is granted will begin a new 10-day trailing period if the defense announces that it is ready for trial on that date. *People v Haendiges* (1983) 142 CA3d Supp 9, 191 CR 785.

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§19.25 5. Defendant Requests or Consents to Trial Date Beyond 60 Days

The defendant in a felony or misdemeanor case can request or consent to a trial date beyond the initial statutory period. Pen C §1382(a)(2)(B), (a)(3)(B). The consent may be express or implied, and thus a failure to object to delay beyond a statutory period constitutes consent to that delay, whether or not such a consent was actually intended. *People v Wilson* (1963) 60 C2d 139, 32 CR 44. If defense counsel is not present, however, when the court continues the case, no consent can be implied. *People v Superior Court (Alexander)* (1995) 31 CA4th 1119, 37 CR2d 729. An unrepresented defendant will not be found to have consented to a delay by a mere failure to object unless the court has explained to him or her both the applicable speedy trial rights and the effect of a failure to object. *People v Byrd* (1991) 233 CA3d 806, 810, 285 CR 128.

When a defendant requests or consents to a trial date beyond the initial period without a general time waiver, or on the withdrawal of a general time waiver, the defendant must be brought to trial on that date or within 10 calendar days thereafter. Pen C §1382(a)(2)(B), (a)(3)(B). Note, however, that, if a case is continued beyond the initial period *for good cause,* there is no 10-day period, and the defendant must be tried on the date set unless good cause is shown for *further* delay. *Tudman v Superior Court* (1972) 29 CA3d 129, 105 CR 391.

As a rule, the statutory right to speedy trial is not personal to the defendant and can be waived by counsel. *Townsend v Superior Court* (1975) 15 C3d 774, 126 CR 251. This is true even when the defendant is represented by the public defender or other appointed counsel and appointed counsel's calendar congestion is the cause of the delay *if* there is no personal objection by the defendant to the continuance. *Barsamyan v Appellate Div.* (2008) 44 C4th 960, 981, 81 CR3d 265. If the defendant expressly objects to a continuance requested by appointed counsel solely to accommodate conflicting obligations to other clients, the calendar conflict does not constitute good cause for delay. *People v Johnson* (1980) 26 C3d 557, 566, 162 CR 431 (delay does not benefit defendant when calendar conflict is caused by state's failure to supply sufficient resources to protect right to speedy trial).

In *Johnson,* the California Supreme Court set forth the procedures that a court must follow when faced with this problem. The first question is whether the problem even exists. There is a problem *only* when appointed counsel is requesting a delay of trial *solely* because of a calendar conflict (*i.e.,* counsel is otherwise prepared for trial and is not requesting a delay to benefit the defendant) *and* the defendant objects to the delay.

In such a case, if the defendant is represented by a public law office or appointed firm, the court should first inquire if there is any other member of the office or firm who can bring the case to trial within statutory time limits. If not, then the court should inquire whether some other counsel could be appointed who could bring the case to trial within statutory time limits. If no other counsel can be obtained, then the court should continue the trial *without* relieving counsel. On a subsequent motion to dismiss, the court must conduct a hearing to determine whether the calendar conflict was the result of the state's failure to supply sufficient resources to protect the defendant's right to speedy trial. If the fault is the state's, then the motion to dismiss should be granted. *People v Johnson, supra*.

Two points should be emphasized. It is *not* proper to relieve counsel unless (1) the defendant is objecting to delay; and (2) the newly appointed attorney can bring the case to trial *within* statutory time limits. See *People v Superior Court (Alexander)* (1995) 31 CA4th 1119, 1132, 37 CR2d 729.

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§19.26 6. Limited Time Waiver and 10-Day "Trailing Period"

In both felony and misdemeanor cases, the defendant may consent to delay beyond the initial statutory period (30, 45, or 60 days) without entering a general time waiver. Compare Pen C §1382(a)(2)(A) (general waiver) with Pen C §1382(a)(2)(B) (consent to setting trial date beyond deadline).

Ø **Example:** Counsel who consents to a *specified* trial date beyond the initial statutory period has not entered a general time waiver. But see *People v Griffin* (1991) 235 CA3d 1740, 1 CR2d 620, discussed below. On general time waivers, see §19.24.

When the defendant has waived time to a specific date, a 10-day period in which trial must commence begins on the last day to which the defendant has consented that trial be delayed. This period is known as a "trailing period" or a "grace period." Pen C §1382(a)(3)(B).

Ø **Note:** Counsel who appears for two or more limited time waiver trials on the same day will be found to have given implied consent to a postponement in the cases not sent out. Once one of the competing cases is sent to the trial department for trial, counsel no longer can be considered ready to proceed in the remaining cases set for the same day. *Barsamyan v Appellate Div.* (2008) 44 C4th 960, 970, 81 CR3d 265 (calendar conflict in misdemeanor case).

The cases are split on what action by the defendant is sufficient to start the 10-day period running. In *Stephens v Municipal Court* (1986) 180 CA3d 189, 194, 225 CR 508, the court of appeal stated that merely announcing readiness for trial does *not* commence the statutory period and that a formal objection to any delay is necessary for the 10-day period to run. This view was rejected in *Bryant v Superior Court* (1986) 186 CA3d 483, 498, 230 CR 777, which held that an announcement of readiness was enough in a court that understood that such an announcement constituted an objection to delay. Because a trial court may follow either *Stephens* or *Bryant,* and, more important, a reviewing court may follow either case no matter which decision the trial court follows, the better practice is to *both* announce readiness for trial *and* object to further delay, which will guarantee that the 10-day period commences.

It is certain that failure to object to a delay ordered *beyond* the 10-day period will constitute consent to that delay and a waiver of the right to speedy trial. *People v Wilson* (1963) 60 C2d 139, 146, 32 CR 44. It is not clear from *Stephens,* however, whether that court would find that a defendant's failure to object to a delay ordered after the 10-day period begins to a date *within* that period would constitute consent to the later date. For example, if the defendant objects on October 1 to a delay to October 4, but then does not object to a delay to October 6, has the defendant consented to the October 6 date, allowing a new 10-day period to commence when the defendant next objects? The better practice would be for the defendant to object to any delay that the defendant is not requesting, so that no imputation of consent or waiver can be made.

In this context, it is imperative that counsel be aware of the decision of the court of appeal in *People v Griffin* (1991) 235 CA3d 1740, 1 CR2d 620. Many attorneys are accustomed to "stipulating" that trial be set on a particular date, with an agreement that it will be the beginning of a "trailing period" of something other than the 10 days provided by Pen C §1382 (*e.g.,* a case is continued to October 1 as "0 of 30," meaning that a 30-day trailing period would apply). In *Griffin,* it was held that such an agreement constitutes *consent* to the delay to the final agreed-on date, and thus the final day of the agreed-on period (in this example, October 31) is not the *end* of the statutory speedy trial period, but only its *beginning*. 235 CA3d at 1746. In the above example, by calling October 1 "0 of 30," the defendant actually *agreed* to a delay to October 31. An additional 10-day period would thus begin on October 31 (but only if the defendant announced ready for trial, and probably also objected to delay, on October 31). The *Griffin* court stated that the parties cannot agree to alter the statutory 10-day period. 235 CA3d at 1746. Thus, "stipulations" that a particular date is "Day 7 of 10" (*e.g.,* if, in fact, the date is not 7 days after an objection to delay) are invalid. For further discussion of the complexities of determining how the 10-day statutory grace period affects the last day available for trial, see *Medina v Superior Court* (2000) 79 CA4th 1280, 94 CR2d 770.

Ø **Note:** Parties can agree to waive the 10-day grace period and thereby agree to a last day that is truly the last day for trial. *Bailon v Superior Court* (2002) 98 CA4th 1331, 1347 n9, 120 CR2d 360.

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7. Other Exceptions to Statutory Time Limits

§19.27 a. Good Cause

Dismissal is required only if a defendant is not brought to trial within statutory time limits without good cause. Pen C §1382(a). What constitutes good cause for delay depends on the circumstances of each case. *People v Johnson* (1980) 26 C3d 557, 570, 162 CR 431; *Jensen v Superior Court* (2008) 160 CA4th 266, 274, 72 CR3d 594. In considering a motion to dismiss based on lack of good cause for a continuance beyond the statutory time limits, the court may consider all relevant information that is timely presented by the parties. *Mendez v Superior Court* (2008) 162 CA4th 827, 836, 76 CR3d 538. Good cause can be based on many reasons, as shown by the following examples.

Ø **Note:** If the prosecution establishes good cause to delay an arraignment, preliminary hearing, or trial as to one defendant, that also constitutes good cause as to all defendants joined in that proceeding. Pen C §1050.1.

Unavailable witness. Counsel requesting a continuance to secure a witness must show:

- Diligence in trying to obtain the presence of the witness in court by legal means;
- That the witness's testimony is relevant, not cumulative, and that the facts cannot otherwise be proven; and
- That the witness will be available within a reasonable period of time. See *Owens v Superior Court* (1980) 28 C3d 238, 250, 168 CR 466; *Brown v Superior Court* (1987) 189 CA3d 260, 264, 234 CR 416.

Ø **Note:** The court should consider the general convenience and prior commitments of all witnesses, including peace officers. Pen C §1050(g)(1). However, bear in mind that Pen C §1050 merely provides guidelines for courts to use when ruling on motions to continue; *Owens* requirements must still be satisfied to determine that a witness's unavailability constitutes good cause for a continuance past a statutory speedy trial deadline. *Baustert v Superior Court* (2005) 129 CA4th 1269, 1279, 29 CR3d 208.

Ordinarily, a party will have shown diligence in securing the attendance of a witness in court if the witness has been personally served with a subpoena. The remedy for the witness's disobedience of the subpoena is punishment for contempt, not dismissal of the case. *Mendez v Superior Court* (2008) 162 CA4th 827, 76 CR3d 538. However, a problem can arise with the attendance of a peace officer witness if the subpoena has been served on the officer's superior or a designated agent as authorized by Pen C §1328(c). See, *e.g.*, *Jensen v Superior Court, supra*. Note that while Pen C §1328d permits a witness to be subpoenaed without personal service, *e.g.,* by mail, that statute specifically provides that the witness's failure to appear in such a case will not justify a delay of the matter beyond the time limits of Pen C §§859b and 1382.

Problems involving counsel. Delays attributable to the defendant or counsel that are not attributable to the state can constitute good cause. See, *e.g., People v Johnson* (1980) 26 C3d 557, 572, 162 CR 431 (calendar conflicts caused by state's failure to supply sufficient assigned counsel was *not* good cause); *Pagnini v Superior Court* (1984) 163 CA3d 142, 209 CR 208 (defendant's pending pretrial writ petition was good cause for failure to timely bring him to trial); *People v Da Silva* (1983) 145 CA3d 872, 193 CR 811 (delays caused by defendant's refusal to cooperate with counsel were good cause for failure to timely bring him to trial).

Ø **Note:** The supreme court has granted review in *People v Sutton* (review granted Oct. 28, 2008, S166402; superseded opinion at 165 CA4th 646, 81 CR3d 195), which concerns the following issue: Were defendants' speedy trial rights violated when defense counsel announced ready but that he might be in another trial, and the court continued trial for 6 days over defendants' personal objection, and if so, was the error prejudicial?

Peremptory challenge against judge. The filing of a peremptory challenge by either side against a judge may constitute good cause for delaying trial. *Bryant v Superior Court* (1986) 186 CA3d 483, 501, 230 CR 777 (challenge filed by prosecution); *People v Reed* (1982) 133 CA3d Supp 7, 184 CR 606 (challenge filed by defendant).

Absence of judge. The predictable unavailability of any judge to try the case owing to a local judicial conference is

not good cause. *Lewis v Superior Court* (1981) 122 CA3d 494, 176 CR 80. However, a judge's one-day absence to fulfill a long-standing committee responsibility at a distant location during a lengthy preliminary hearing was held to constitute good cause, especially when the defendants raised no protest to the delay until it was too late for the court to remedy the conflict. *Stroud v Superior Court* (2000) 23 C4th 952, 974, 98 CR2d 677.

Court congestion. Ordinarily, court congestion is not good cause for delay. If there are so many criminal cases that they all cannot be tried within statutory time limits, good cause for delay may be found *only* when the number of cases is caused by an unexpected and extraordinarily large number of case *filings* in the court (as in the case of, *e.g.,* a riot or mass demonstration). This does *not* mean a large number of defendants requesting trial, if the number of cases *filed* has not increased dramatically. Additionally, civil cases cannot have been given priority over criminal cases, and the court must have notified the Chair of the Judicial Council of its calendar problems. *Arreola v Municipal Court* (1983) 139 CA3d 108, 114, 188 CR 529; *Perez v Superior Court* (1980) 111 CA3d 994, 999, 169 CR 45. See also Pen C §§1048, 1050(j); Govt C §68115(a)-(j).

Ø **Note:** The sheriff's failure to bring an in-custody defendant to court is not necessarily good cause. *Jackson v Superior Court* (1991) 230 CA3d 1391, 281 CR 545.

Court's ruling when no good cause. If the court finds that a party has not shown good cause for a continuance, the court must deny the motion to continue. Pen C §1050(e). If the prosecution delays trial beyond statutory time limits without good cause and over the defendant's objection, the court must grant a timely motion to dismiss. See Pen C §1382.

However, Pen C §1050 does not authorize the court to dismiss an action when the prosecution fails to show good cause for a continuance if the delay would not exceed statutory time limits. *People v Henderson* (2004) 115 CA4th 922, 934, 9 CR3d 655. See also Pen C §1050(*l*) ("this section is directory only and does not mandate dismissal"). In *Henderson,* the trial court found that the prosecutor failed to establish good cause for continuing the preliminary hearing, and dismissed the case when the prosecutor declared that he was unable to proceed. The requested delay would not have exceeded the time allowed for the preliminary hearing under Pen C §859b. The reviewing court upheld the trial court's conclusion that the prosecutor had failed to establish good cause for the delay under Pen C §1050, but reversed the order of dismissal. It concluded that neither Pen C §1050 nor §1050.5 (sanctions court may impose for violation of §1050) authorizes dismissal and that no other statutory provision authorizes dismissal when the delay would not continue the case beyond the statutory maximum and the defendant has shown no detriment from the delay. 115 CA4th at 936. Thus, although the court acknowledged that its decision placed trial courts in a difficult position (115 CA4th at 939), it held that the court "must postpone the hearing to another date within the statutory period," although not necessarily the date the prosecutor has requested (115 CA4th at 940). See also *People v Rubaum* (1980) 110 CA3d 930, 168 CR 291 (court has no power to deny prosecution's unjustified motion to continue trial unless delay would exceed Pen C §1382 time limits). But see *People v Alvarez* (1989) 208 CA3d 567, 577, 256 CR 289 (if prosecution cannot proceed after denial of continuance, trial court may dismiss under Pen C §871).

Either party may file a petition for writ of mandate or prohibition in the court of appeal challenging continuation of any hearing or trial without good cause when good cause is required by law. Pen C §1511.

Good cause is discussed at length in §§20.6-20.27.

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§19.28 b. Defendant Fails to Appear

In felony cases, when a defendant has been ordered to appear in superior court for a trial, or a hearing before trial, and fails to do so, resulting in a bench warrant being issued, a new 60-calendar-day period begins to run from the date on which the defendant next appears, unless the trial date was already set beyond the 60 days. Pen C §1382(b).

In misdemeanor cases, if the defendant has been ordered to appear at a hearing set before trial but fails to appear and a bench warrant issues, or if trial is delayed because of the defendant's neglect or failure to appear on the date set for trial, the defendant is deemed "rearraigned" on the date of the defendant's arraignment on a bench warrant or submission to the court. Pen C §1382(a)(3)(C). Note that this is different from the felony rule, which starts a new period if there is *any* failure to appear for any pretrial hearing.

The portion of the statute applicable to felonies specifically requires a warrant to be issued, and this seems to be required for misdemeanors as well under *People v Heath* (1981) 125 CA3d Supp 1, 178 CR 99. If a warrant is not issued or is held, then the provisions should be found inapplicable. In *Heath,* the court determined that the reason the defendant failed to appear was irrelevant, and that a new statutory period commenced as long as a bench warrant was validly issued. However, the same court has stated that the original time limits of Pen C §1382 may remain in effect if the trial judge finds that "the warrant was not justified under all the circumstances before him." *People v Reed* (1982) 133 CA3d Supp 7, 9 n1, 184 CR 606.

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§19.29 c. Change of Venue

A defendant who obtains a change of venue in a misdemeanor case delays the beginning of the statutory time to the date on which the defendant is arraigned in the new forum. See *Simpson v Municipal Court* (1975) 45 CA3d 112, 119 CR 184 (out-of-custody defendant in misdemeanor case). The same reasoning probably applies to felony cases.

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§19.30 8. Effect on Speedy Trial Deadlines of Amending Charging Document

For an amendment to an information to toll the running of the 60-day period (in felony cases) or 30- or 45-day period (in misdemeanor cases) prescribed by Pen C §1382, the amendment must go to the substance of the charges. *Perez v Superior Court* (1980) 111 CA3d 994, 169 CR 45 (felony case); *Matthews v Superior Court* (1973) 35 CA3d 589, 593, 110 CR 843 (felony case); *Hankla v Municipal Court* (1972) 26 CA3d 342, 358, 102 CR 896 (misdemeanor case). Allegations of prior convictions or included offenses are not considered substantial changes. *Hankla v Municipal Court, supra; Huerta v Superior Court* (1971) 18 CA3d 482, 485, 95 CR 748.

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§19.31 9. When Trial Begins in Relation to Statutory Speedy Trial Claims

Both the felony and misdemeanor speedy trial statutory periods end when the defendant is brought to trial. Commencement of trial within the context of Pen C §1382 has been defined as occurring when the case is called for trial by a judge who is available and ready to try the case to its conclusion, the court has committed its resources to the trial, and the parties are ready to proceed before a panel of jurors summoned and sworn. *Rhinehart v Municipal Court* (1984) 35 C3d 772, 780, 200 CR 916; *People v Duberry* (1988) 203 CA3d Supp 4, 249 CR 844.

Ø **Note:** This does not mean that the 12 jurors who will hear the case have been selected, but only that a panel of prospective jurors has been called and sworn.

A judge is not considered to have committed his or her resources to a trial if attempting to try a substantial part of two unrelated cases within the same time period. See *People v Cory* (1984) 157 CA3d 1094, 204 CR 117 (error, but no prejudice). In dicta, it has been opined that a court may be considered to have committed its resources to a case when the court has only some small part of another trial left to complete. See *Thomas v Superior Court* (1984) 162 CA3d 728, 208 CR 712.

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§19.32 10. Motion to Dismiss Because of Failure to Bring Case to Trial Within Pen C §1382 Deadlines; Waiver

Violation of the deadlines of Pen C §1382 entitles the defendant to a dismissal if the prosecution cannot show good cause for the delay. Pen C §1382(a); *Sykes v Superior Court* (1973) 9 C3d 83, 88, 106 CR 786. To invoke the right to a dismissal under §1382, the defendant must first object to a continuance beyond the applicable statutory period and thereafter must move to dismiss under §1382. A sample defense motion to dismiss for violation of statutory deadlines is in California Criminal Law Forms Manual §19.3 (2d ed Cal CEB 2005).

Ø **Note:** Remember that the required objection must be made at the time a case is continued beyond statutory time limits. Even if previous objections or motions to dismiss have been made, the right to speedy trial will have been waived if the statutory period is exceeded without objection. *Dulsky v Municipal Court* (1966) 242 CA2d 288, 292, 51 CR 381.

Counsel should not move to dismiss until *after* statutory time limits have expired, but should do so as soon thereafter as possible (*e.g.,* in a 60-day case, on day 61). A motion to dismiss made before expiration of the statutory time period, even if made on the day the statutory time limits expire, is premature, and the granting of the motion at that time could be reversed even if the case would have been delayed had the motion not been made. See *People v Martinez* (1956) 145 CA2d 361, 302 P2d 643. See also *People v Wilson* (1963) 60 C2d 139, 146, 32 CR 44.

Ø **Note:** If the statutory time limit expires without a trial date having been set, no objection is necessary. *Sykes v Superior Court, supra*. Counsel can move to dismiss as soon as the statutory period runs.

A defendant who fails to comply with these requirements can be considered to have waived the right to speedy trial. See Pen C §1382(a)(2)(A)-(B), (a)(3)(A)-(B) (waiver of statutory periods for trial). However, while the defendant's failure to move for dismissal will waive his or her statutory speedy trial right, a court is not prohibited from dismissing a case on that ground sua sponte. *People v Cole* (2008) 165 CA4th Supp 1, 10, 82 CR3d 699.

A defendant who is not represented by counsel cannot waive the statutory period unless the court has explained to the defendant his or her rights under Pen C §1382 and the effect of the waiver. Pen C §1382(c); *In re Smiley* (1967) 66 C2d 606, 630, 58 CR 579. If the defendant requests a delay beyond the applicable time limits with knowledge of those limits, however, the rule may not apply. *Callahan v Municipal Court* (1971) 17 CA3d 1011, 95 CR 423.

If the defendant caused the delay, the court may consider that fact when ruling on whether good cause exists for the delay. See examples in §§19.25-19.28. Delay for the defendant's benefit can also be considered good cause for delay. *People v Johnson* (1980) 26 C3d 557, 570, 162 CR 431; *People v Kowalski* (1987) 196 CA3d 174, 181, 242 CR 32. For discussion of the related topic of continuances, see chap 20.

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§19.33 F. California Prisoner Serving State Time, With Another State Case Pending

A defendant serving a term in a California state prison or county jail of more than 90 days, with other criminal charges pending in California, can demand that the new charge be brought to trial within 90 calendar days after delivery of demand on the district attorney for the county in which the matter is pending. Pen C §1381. The defendant must actually be in jail if the sentence was county jail, or in prison if the sentence was state prison. *People v Gutierrez* (1994) 30 CA4th 105, 35 CR2d 526; *People v Clark* (1985) 172 CA3d 975, 218 CR 481.

If the prisoner is not brought to trial or sentenced within the 90-day period, on motion of the defendant, defendant's counsel or the prosecutor, or on the court's own motion, the court must dismiss the action. Pen C §1381.

> Ø **Note:** Section 1381 does apply to a probation revocation proceeding when imposition of sentence was originally suspended; however, the consequence for noncompliance with the 90-day deadline is dismissal of the pending probation revocation proceeding, *not* dismissal of the underlying conviction. *People v Wagner* (2009) 45 C4th 1039, 1055, 90 CR3d 26.

Good cause for a delay beyond the 90-day period will not excuse compliance with §1381. *Crockett v Superior Court* (1975) 14 C3d 433, 121 CR 457. However, the prosecution is not precluded from refiling after a dismissal under §1381 as long as the two-dismissal rule of Pen C §1387 does not bar prosecution. *Crockett v Superior Court, supra; People v Eldridge* (1997) 52 CA4th 91, 60 CR2d 400; *People v Boggs* (1985) 166 CA3d 851, 212 CR 683.

It is strongly suggested that any written demand either be personally served on the district attorney, with proof of service executed and retained, or be sent certified mail with a return receipt requested. Often the hardest thing to prove in a Pen C §1381 case (as well as Pen C §§1381.5 and 1389) is that the prosecutor actually received the demand. See, *e.g., People v Contreras* (2009) 177 CA4th 1296, 1300, 99 CR3d 759. Without proof that the demand was received, the defendant's claim that it was given to the prosecutor will often be disbelieved. Also, if the prosecution is aware that the person is serving a prison term, it has an affirmative duty to notify him or her of the pending charges. *People v Cave* (1978) 81 CA3d 957, 147 CR 371.

A sample form demand letter is in California Criminal Law Forms Manual §19.5 (2d ed Cal CEB 2005).

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§19.34 G. Federal Prisoner in California With California State Case Pending

If a person serving a term in a federal correctional institution in California has a California state charge pending while serving the federal term, the prisoner may file a request with the prosecutor to be brought to trial on the state case. Pen C §1381.5.

If the prosecutor obtains assent from the federal authorities to release the defendant, the defendant must be brought to trial within 90 calendar days after receipt of the assent. If the prisoner is not brought to trial within the 90-day limit, on motion, the action must be dismissed. Pen C §1381.5. This event counts as one dismissal under Pen C §1387. See *Selfa v Superior Court* (1980) 109 CA3d 182, 189, 167 CR 153.

A sample form is in California Criminal Law Forms Manual §19.5 (2d ed Cal CEB 2005).

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§19.35 H. Out-of-State Prisoner With California Detainer

Penal Code §1389 is California's enactment of the Interstate Agreement on Detainers (IAD). This is the procedure that must be used if the defendant is a sentenced prisoner in another state, or is a sentenced federal prisoner outside California. See, *e.g.*, *Netzley v Superior Court* (2008) 160 CA4th 348, 72 CR3d 773. The procedures for making a demand under the IAD are detailed and explicit, and include a demand on the prosecution accompanied by a verification from the warden of the prisoner's status. See *Alabama v Bozeman* (2001) 533 US 146, 150 L Ed 2d 188, 121 S Ct 2079.

Any counsel representing a defendant who should make an IAD claim must carefully read the statute and comply with all its terms to the letter. Unlike dismissals under Pen C §§1381, 1381.5, or 1382, no refiling is permitted after a dismissal under §1389. See *People v Cella* (1981) 114 CA3d 905, 170 CR 915.

For further discussion, see §50.49; 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§301-303 (3d ed 2000).

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§19.36 V. WHEN SPEEDY TRIAL ISSUES SHOULD BE RAISED

Speedy trial issues (except statute of limitations issues, discussed in §19.16) must be raised in the trial court before trial by a motion to dismiss. See *People v McCoy* (1983) 147 CA3d 638, 195 CR 285. Ordinarily, motions to dismiss may be litigated at the preliminary hearing. See, *e.g., People v Hertz* (1980) 103 CA3d 770, 163 CR 233. It is undecided, however, whether a speedy trial motion may be litigated as a matter of right at the preliminary hearing or whether the magistrate has discretion to decide whether to permit the motion. Compare *People v Wright* (1969) 2 CA3d 732, 82 CR 859 (matter of right), with *Jackson v Superior Court* (1982) 135 CA3d 767, 185 CR 766, disapproved on other grounds in *People v Konow* (2004) 32 C4th 995, 1025 n10, 12 CR3d 301 (discretionary). See also §8.33. The advantage to litigating the motion at the preliminary hearing is that the motion can be heard more often: The motion can be made before the magistrate, renewed on a motion to dismiss under Pen C §995, and renewed de novo in the superior court. However, in some cases it may be more useful to use the preliminary hearing as a chance to develop prejudice from the delay (*e.g.,* witnesses' fading memories) without specifically alerting the other side that the issue may be litigated. (Remember that because the defendant is presumed to be innocent, the inability of prosecution witnesses to clearly remember the events is prejudicial because with clear memories the witnesses would presumably exonerate the defendant. See *People v Hill* (1984) 37 C3d 491, 496, 209 CR 323.) Of course, a fundamental consideration for counsel will be an assessment of whether the motion is more likely to be successful before the magistrate or in the superior court.

A magistrate's refusal to allow a speedy trial motion at the preliminary hearing does not result in an illegal commitment of the defendant, and so cannot be raised on a Pen C §995 motion. The issue should be raised in the superior court as a common-law motion to dismiss. *Jackson v Superior Court* (1982) 135 CA3d 767, 185 CR 766, disapproved on other grounds in *People v Konow* (2004) 32 C4th 995, 1025 n10, 12 CR3d 301.

Ø **Note:** When a speedy trial claim requires a demonstration of prejudice, the trial court has the discretion to defer hearing the motion until after the trial. *People v Martinez* (2000) 22 C4th 750, 94 CR2d 381.

Statutes of limitations are jurisdictional. A claim of such a violation may therefore be raised for the first time either before or after judgment. *People v Zamora* (1976) 18 C3d 538, 134 CR 784. See §19.16 for further discussion.

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§19.37 VI. SANCTIONS

Constitutional violations. When a defendant's Sixth Amendment speedy trial guaranty has been violated, the remedy is dismissal of the action. *Strunk v U.S.* (1973) 412 US 434, 37 L Ed 2d 56, 93 S Ct 2260. Dismissal of either a misdemeanor or a felony on constitutional grounds, including due process grounds, is a final, appealable order; the case cannot be recharged, and the prosecution's sole remedy is to seek review of the dismissal. *U.S. v Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455; *People v Pinedo* (2005) 128 CA4th 968, 27 CR3d 562.

Statutory violations. Penal Code §1387(a) limits the refiling of charges dismissed on statutory grounds (with the exception of Pen C §1389, noted in §19.35): A dismissal bars prosecution of an offense if it is a misdemeanor not charged together with a felony. A dismissal bars prosecution of an offense "if it is a felony or a misdemeanor charged together with a felony, and the offense has been previously terminated."

As a rule, the dismissal of a misdemeanor cannot be followed by another misdemeanor filing, and two dismissals of an offense bar further prosecution (except with violent felonies, in which one additional refiling is permitted by Pen C §1387.1 if one of the first two dismissals arose from "excusable neglect"). There are also exceptions for domestic violence cases and witness intimidation issues. See Pen C §1387. For further discussion of the "two-dismissal" rule in felony cases, see §25.45.

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VII. APPELLATE REVIEW

A. Defense Review of Speedy Trial Ruling

§19.38 1. Review of Motions to Dismiss Before Judgment and After Trial

A petition for writ of mandate and/or prohibition can be taken before trial to challenge the denial of a motion to dismiss. *Serna v Superior Court* (1985) 40 C3d 239, 263, 219 CR 420. Denial of a motion to dismiss can also be appealed after trial, but actual prejudice must be shown. *People v Wilson* (1963) 60 C2d 139, 32 CR 44. The defense cannot raise a speedy trial or due process issue for the first time on appeal, except for statute of limitations error (see §19.16).

There are several reasons for seeking a writ:

- When statutory speedy trial violations are involved in a felony case or one in which a misdemeanor is charged together with a felony (except for Pen C §1389 violations), defendants do not have to show actual prejudice in a writ petition, but they do in a posttrial appeal. *Serna v Superior Court, supra; People v Wilson, supra*.
- Once a trial has occurred, the prejudice shown before trial may be considered insignificant in light of overwhelming evidence of guilt presented at trial. *People v Pompa-Ortiz* (1980) 27 C3d 519, 165 CR 851.
- The trial court's findings on prejudice and justification for delay are factual ones and will not be overturned on appeal if they are supported by substantial evidence. Appellate courts have applied the "abuse of discretion" standard of review to the trial court's application of the balancing test. *People v Cave* (1978) 81 CA3d 957, 147 CR 371.

Ø **Note:** Superior courts must rule on pretrial writ petitions concerning a misdemeanor defendant's motion to dismiss that was made on speedy trial grounds and grant relief whenever a violation of constitutional speedy trial rights is established. *Serna v Superior Court, supra*.

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§19.39 2. Review of Motions to Dismiss in Misdemeanor Cases

Because in a misdemeanor case the granting of a motion to dismiss under Pen C §1382 is a bar to further proceedings, the defendant need not show prejudice on appeal. *People v Wilson* (1963) 60 C2d 139, 153 n5, 32 CR 44; *Avila v Municipal Court* (1983) 148 CA3d 807, 196 CR 286. Thus, although pretrial review is still preferred, review on appeal is essentially the same as by means of a pretrial writ petition.

There is a division among the courts on whether speedy trial issues are waived by a plea of guilty. Compare *Ricki J. v Superior Court* (2005) 128 CA4th 783, 792, 27 CR3d 494 (yes; Third District), *People v Aguilar* (1998) 61 CA4th 615, 71 CR2d 411 (yes; Second District), and *People v Egbert* (1997) 59 CA4th 503, 68 CR2d 913 (yes; Fourth District), with *Avila v Municipal Court, supra* (no; Second District).

Abuse of discretion is the standard of review of an order finding good cause for a continuance under Pen C §1382(a) when the defendant does not affirmatively show prejudice that implicates his or her federal constitutional right to a speedy trial. *People v Shane* (2004) 115 CA4th 196, 198, 8 CR3d 753.

In a felony case (or a misdemeanor charged together with a felony), a dismissal does *not* bar refiling, and thus on appeal the defendant must demonstrate prejudice as well as a violation of the statutory time limit. *People v Johnson* (1980) 26 C3d 557, 162 CR 431. It is generally difficult, if not impossible, to demonstrate prejudice from a statutory speedy trial violation, and thus pretrial writ review is almost always the preferable course in a felony case.

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§19.40 3. Review of Motions to Dismiss in Felony Cases Following Guilty Plea

A guilty plea prohibits a defendant from seeking appellate review of the denial of any speedy trial motion, statutory or constitutional, in a felony case. See *People v Hernandez* (1992) 6 CA4th 1355, 8 CR2d 324; *People v Hayton* (1979) 95 CA3d 413, 156 CR 426. It can be argued that *Hayton* and *Hernandez* are wrong, and that there are actually three different questions that must be asked to determine whether a defendant may successfully assert an issue on appeal in a felony matter:

(1) Penal Code §1237.5 bars review of issues that do not go to the "legality of the proceedings" following a guilty plea in a felony case. A statutory motion to dismiss in a felony case that can be refiled clearly does not go to the legality of the proceedings, and thus cannot be raised following a guilty plea. In contrast, it has been held that the denial of a statutory motion to dismiss that would bar further proceedings, even in a felony case (*i.e.,* Pen C §1389), is an issue going to the legality of the proceedings, which can be raised following a guilty plea. *People v Cella* (1981) 114 CA3d 905, 915, 170 CR 915. See also *People v Turner* (1985) 171 CA3d 116, 126, 214 CR 572; *People v Reyes* (1979) 98 CA3d 524, 531, 159 CR 572. Of course, a dismissal for violation of the constitutional speedy trial right equally bars refiling.

(2) A plea of guilty waives litigation of any issue that goes to the guilt or innocence of the defendant. *People v Ribero* (1971) 4 C3d 55, 63, 92 CR 692; *People v Shults* (1984) 151 CA3d 714, 719, 199 CR 33. A guilty plea does not waive issues that do not concern guilt or innocence. See *People v Laudermilk* (1967) 67 C2d 272, 282, 61 CR 644; *People v O'Daniel* (1987) 194 CA3d 715, 720, 239 CR 790. A motion to dismiss because of a constitutional speedy trial violation may not have anything to do with the defendant's guilt or innocence, because prejudice may be based on grounds other than impairment of the defendant's ability to meet the charges (*e.g.,* extended incarceration). Furthermore, prejudice is not a required showing under the federal Constitution. However, any issues concerning prejudice to the defense (*e.g.,* faded memories) involved in a constitutional speedy trial motion would be waived by a guilty plea.

(3) As discussed in §§19.3-19.6, to obtain reversal on appeal a defendant must usually demonstrate prejudice. However, the denial of a Pen C §1382 motion that would bar refiling if granted is prejudicial per se. *People v Wilson* (1963) 60 C2d 139, 152, 32 CR 44; *Avila v Municipal Court* (1983) 148 CA3d 807, 196 CR 286. The denial of other statutory motions that bar refiling if granted, *e.g.,* Pen C §1389, is also prejudicial per se. *People v Cella, supra*. Of course, a dismissal for violation of the constitutional speedy trial right also bars refiling. See §19.37.

A consideration of these applicable standards may call into question the validity of the rule set forth in *Hayton* and *Hernandez.* In fact, several cases have reached speedy trial issues after a guilty plea in felony cases in which the felony had been previously dismissed and no refiling was possible. *People v Bohlen* (1992) 4 CA4th 400, 5 CR2d 670; *People v Mayo* (1986) 185 CA3d 389, 229 CR 762. These cases did not discuss the appealability of the issue. However, given the existence of *Hayton* and *Hernandez,* counsel should be very cautious in entering a guilty plea following a motion to dismiss on speedy trial grounds. A "trial-like" proceeding (such as a submission to the court on a transcript or a stipulated set of facts, *i.e.,* a so-called slow plea) will prevent any claim of waiver and the application of Pen C §1237.5. However, the prejudice requirement will remain on appeal. Thus, a successful appeal of a motion to dismiss a felony under Pen C §1382, if the charge was not previously dismissed, may be extremely difficult even after such a "trial."

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§19.41 4. Review of Preliminary Hearing Speedy Trial Issues

The defense has the right to seek a writ of mandate or prohibition in the superior court if the magistrate sets a preliminary hearing beyond the time period specified in Pen C §859b (see §19.18) or continues the matter without a proper showing of good cause. Pen C §871.6. The purpose of seeking such a writ, however, is to require the preliminary hearing to proceed expeditiously, not to obtain dismissal of the case. See Pen C §871.6. These petitions have precedence over all other superior court matters, and, if a remittitur issues, that must take place within 3 days. Pen C §871.6.

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§19.42 5. Pretrial Review of Trial Date

The defense may file a petition for writ of mandate or prohibition to seek review of a trial set on a date beyond the statutory time limits. Pen C §1511 (trial delay; writ petition filed in court of appeal).

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§19.43 B. Prosecution Review of Speedy Trial Dismissal

If a defense motion to dismiss on constitutional speedy trial or due process grounds is granted before trial and the case is dismissed, the prosecution's only remedy is to seek review of that ruling, because the case cannot be recharged. *U.S. v Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455; *People v Glover* (1974) 40 CA3d 1006, 1011 n2, 115 CR 714, citing *Strunk v U.S.* (1973) 412 US 434, 440, 37 L Ed 2d 56, 61, 93 S Ct 2260. See also Pen C §§1238(a)(8), 1466(1).

If a defense motion to dismiss on statutory speedy trial grounds is granted in a felony case, and the case is dismissed, the prosecutor may:

- Appeal (Pen C §1238(a)(8); *People v Superior Court (Lewis)* (1970) 5 CA3d 698, 85 CR 327);

  Ø **Note:** Under Pen C §1238(b), an unsuccessful appeal after the first dismissal of a felony will preclude recharging. A petition for a writ of mandate may provide review of the trial court's ruling and avoid the bar of §1238(b).

- Seek review of the magistrate's ruling through Pen C §871.5 if the motion was made at the preliminary hearing; or
- Accept the dismissal and recharge the offense (see Pen C §1387) unless a showing is made of actual prejudice (*Crockett v Superior Court* (1975) 14 C3d 433, 437, 121 CR 457). On the "two-dismissal" rule in felony cases, see §25.45.

In misdemeanor cases, the only remedy following dismissal on statutory speedy trial grounds is appeal (Pen C §1466(1)), because no recharging is allowed after one dismissal unless the misdemeanor is charged together with a felony (Pen C §1387; *Marler v Municipal Court* (1980) 110 CA3d 155, 162, 167 CR 666, 670).

The prosecution has the right to seek a writ of mandate or prohibition in the superior court if the magistrate sets a preliminary hearing beyond the time period specified in Pen C §859b or continues the matter without a proper showing of good cause. Pen C §871.6.

The prosecution may file a petition for writ of mandate or prohibition to seek review of a trial set on a date beyond the statutory time limits. Pen C §1511 (trial delay; writ petition filed in court of appeal).

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MICHAEL C. McMAHON

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§20.1 I. OVERVIEW

Continuances present an alarming divergence between theory and practice. If the law were strictly and uniformly applied, continuances would be difficult to obtain. Pen C §1050 ("all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time"); Cal Const art I, §29 (guarantees right to speedy trial both to defense and to prosecution); Standards of Judicial Administration 2.2(j)-(m) (standards for time in which to resolve criminal cases). See also Pen C §1048 (order of priority for criminal cases). Attorneys who move for a continuance must demonstrate good cause for the request. Pen C §1050(e).

However, in counties with more "last-day" cases than available departments, continuances may be granted in an effort to prevent statutory speedy trial dismissals. This practice can have unfortunate consequences. When the rules are not consistently enforced, even good lawyers get sloppy. For example, motions may be made orally without notice based on factual representations made from the counsel table. Inconsistency also fosters the appearance of bias. It is against the background of uneven application and enforcement that any honest commentary on the law of continuances must begin.

Attorneys can do many things to avoid asking for a continuance. First, they should carry calendars whenever making court appearances so that they do not set cases at the same time or too close together. When a continuance is necessary, counsel should notify all other attorneys in the case and pro per defendants, and calendar the case for a continuance motion as early as possible. There are deadlines for requesting a continuance in most situations. See the chart in §20.2. The most important statute is Pen C §1050, which requires that a motion to continue any hearing or trial be made in writing, served on all parties, and filed at least 2 court days before the hearing. Penal Code §1050(b) also requires that, within 2 court days after learning of a scheduling conflict, attorneys requesting a continuance give written notice of which hearing or trial was set first to the calendar clerk of each relevant court. Unfortunately, both compliance with and enforcement of this rule is rare. Counsel should consult local court rules before requesting a continuance because local jurisdictions often have specific requirements not found in the Penal Code.

The moving party has the burden of going forward and the burden of proof to show good cause when requesting a continuance. *Owens v Superior Court* (1980) 28 C3d 238, 250, 168 CR 466 (prosecution); *People v Wilson* (1965) 235 CA2d 266, 273, 45 CR 267 (defendant). The moving party must present evidence in support of the motion. Evid C §§300, 500. Evidence includes "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Evid C §140. Counsel can submit testimony in the form of affidavits or declarations (Pen C §1050(b)), or, if good cause is shown, make an oral offer of proof (Pen C §1050(c)). Opposing counsel has the right to cross-examine affiants, declarants, or witnesses referred to in the offer of proof (see *People v Williams* (1973) 30 CA3d 502, 509, 106 CR 324); however, these people are often not present in the courtroom. Presumably, the moving party has the right to introduce the same type of evidence in rebuttal. See *People v Jenkins* (1880) 56 C 4.

Regardless of which party moved for a continuance, the defense must notify all defense witnesses, and the prosecution all its witnesses, of the request for a continuance, the date of the hearing, and the witnesses' right to be heard at that hearing. Pen C §1050(b). Again, this is a rule that is often ignored.

> Ø **Warning:** Counsel should resist the temptation to be casual about compliance with the governing statutes and rules of court. It is impossible to demand or expect strict compliance by the court and opposing counsel unless we ourselves have been compliant on a consistent basis.

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Source: Criminal Law/California Criminal Law Procedure and Practice/20 CONTINUANCES/§20.2 II. CHART: DEADLINES

§20.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many counties have specific time requirements not otherwise required by the Penal Code. Local rules, however, may augment but not conflict with applicable statutes.

Action	Deadline	Authority
Motion by defense counsel or prosecutor to continue any hearing or trial.	At least 2 court days before hearing or trial.	Pen C §1050(b).
Motion by prosecutor to continue arraignment, preliminary hearing, or trial of defendant because good cause shown for continuance of codefendant's case.	At least 2 court days before hearing or trial.	Pen C §§1050(b), 1050.1.
Continuance to secure counsel for arraignment.	Reasonable time.	Pen C §859.
Continuance to secure counsel for preliminary hearing.	Not less than 2 nor more than 5 calendar days.	Pen C §860.
Time to prepare case before arraignment.	Reasonable time: not less than 1 calendar day in felony cases nor more than 7 calendar days in misdemeanor cases.	Pen C §990.
Continuance to hear demurrer.	On filing, demurrers must be heard immediately unless "exceptional cause" is shown for continuance.	Pen C §1006.
Continuance to prepare to defend because charging instrument amended.	Reasonable time required if substantial rights of party would otherwise be prejudiced.	Pen C §1009.
Continuance to prepare for trial.	At least 5 calendar days must be allowed defendant to prepare for trial between time of entering plea and trial.	Pen C §1049; Veh C §40306.
Continuance because defense counsel is member of state legislature and certain conditions met.	Reasonable continuance not to exceed 30 calendar days.	Pen C §1050(h).
Continuance for defense counsel in misdemeanor case to prepare to file motion to return property or suppress evidence.	Up to 30 calendar days.	Pen C §1538.5(*l*).
Continuance for defense counsel to prepare for prosecutor's de novo Pen C §1538.5 hearing.	Up to 30 calendar days.	Pen C §1538.5(j).
Continuance for prosecutor when defendant or defense witness testifies at trial, unless prosecutor was, or with due diligence, should	Reasonable time for defense witness; no more than 1 day if defendant testifies.	Pen C §1051.

have been aware of evidence.		
Continuances limited when minor or person age 70 or over is alleged victim or minor is detained as material witness, or when crime involves certain specified violent sex offenses.	Continuance allowed only if court finds it necessary after hearing; trial must begin within 30 calendar days after arraignment unless good cause is shown for continuance.	Pen C §1048.
Continuance of preliminary hearing for in-custody defendant.	Preliminary hearing must be held, or case dismissed, within 10 court days after arraignment or plea or reinstatement of proceedings that had been suspended under Pen C §1367, whichever is later, unless defendant waives that right or prosecutor shows good cause for continuance; even with good cause, defendant to be released unless exceptions apply; even with good cause, case can be continued no more than 60 days after arraignment or plea unless defendant personally waives that right.	Pen C §859b.
Continuance of preliminary hearing for out-of-custody defendant.	Preliminary hearing must be held within 60 calendar days after arraignment or plea unless defendant personally waives that right.	Pen C §859b.
Continuance of preliminary hearing after it has started (continuous-session rule).	No continuance unless defendant personally waives that right, or prosecution shows good cause by affidavit or declaration for postponement; continuance can be for no more than 10 court days unless defendant personally waives right to continuous preliminary hearing or prosecutor establishes good cause for postponement beyond 10 court days; in no event can continuance be for more than 60 calendar days after date continuance motion is granted, unless with defendant's consent.	Pen C §861.

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III. TIME, FORM, AND SERVICE OF MOTION

A. Timeliness; Written and Oral Motions

§20.3 1. Pretrial

Counsel should bring a motion to continue any hearing or trial in a criminal proceeding "at the earliest possible time." Pen C §1050(a). The motion must be in writing and must be served, together with supporting declarations or affidavits, on all parties and filed at least 2 court days before the hearing to be continued. Pen C §1050(b). If the continuance is requested due to a calendar conflict, counsel must give written notice of which hearing was set first to the calendar clerk of each court. Pen C §1050(b). Witnesses must also be notified of the request for a continuance. Pen C §1050(b), discussed in §20.5. Failure to comply with §1050(b) subjects the moving party to a possible fine of up to $1000 and a disciplinary report to the State Bar. Pen C §§1050(c), 1050.5. Counsel should, however, carefully weigh all of the pros and cons before any request for sanctions other than an order denying the defective motion. The interests of the client are paramount.

Ø **Note:** The court may impose sanctions but may not dismiss the action. Pen C §1050.5(b).

A continuance motion should contain the reasons for the request, citation of authority supporting the request, and the length of delay desired. Written motions should be accompanied by affidavits or declarations detailing specific facts showing that a continuance is necessary. Pen C §1050(b). The affidavits or declarations should *not* be made on information and belief. See *Brown v Superior Court* (1987) 189 CA3d 260, 265, 234 CR 416. Counsel should be very clear when making any factual representations that are not based on personal knowledge. When appropriate, representations should be supported by a proof of service.

On a showing of good cause, the court may allow a continuance motion that does not comply with the notice requirements of §1050(b). Pen C §1050(c). See, *e.g., People v Jacobs* (2007) 156 CA4th 728, 735, 67 CR3d 615. When a continuance motion is made orally, the court must make two findings of good cause to grant it: first, that good cause exists to entertain an oral motion (Pen C §1050(d)), and second, that good cause exists to continue the hearing or trial (Pen C §1050(f)). The finding of good cause and facts supporting it must be entered in the court minutes. Pen C §1050(d), (f). Moving counsel may want to prepare an order granting the motion with the appropriate factual findings and conclusions of law.

Counsel making the motion orally, sometimes called an offer of proof, should be prepared to present the same information as in the written motion. Counsel may also present witnesses to testify to the specific facts that support the reasons for requesting a continuance. Before the hearing, counsel should learn what the trial judge's usual practice is when confronted with an oral rather than a written continuance motion.

Continuances of preliminary hearings are governed by Pen C §1050 (Pen C §859b), but there are additional requirements and conditions. On time requirements for preliminary hearings, see §§8.16-8.20.

A sample motion for continuance is in California Criminal Law Forms Manual §20.1 (2d ed Cal CEB 2005).

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§20.4 2. Trial

The same requirements on written motions for continuance before trial apply to continuance motions made during trial. Pen C §1050(b). As a practical matter, however, many motions for continuance during trial are made orally. In *Lee v Kemna* (2002) 534 US 362, 151 L Ed 2d 820, 122 S Ct 877 (federal petition for writ of habeas corpus filed by state prisoner), the Supreme Court held that a state court procedural rule requiring written continuance motions could not bar the defendant's underlying federal constitutional claim under the circumstances of the case.

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§20.5 B. Service on Parties; Notice to Witnesses

Opposing counsel must be served with the moving party's written notice of motion, and either affidavits or declarations detailing specific facts showing that a continuance is necessary, at least 2 court days before the hearing to be continued. Pen C §1050(b). Opposing counsel is not deemed to have been served with the continuance motion until he or she actually receives a copy of it or waives receipt. Pen C §1050(b). To obtain opposing counsel's waiver, counsel making the motion must notify opposing counsel of the motion, *e.g.,* by phone, and ask him or her to agree to waive the right to have the documents timely served. Pen C §1050(b). Of course, opposing counsel does not have to agree to this proposal, so counsel making the motion should try to effect personal service whenever possible. Also, if the continuance requested is due to a calendar conflict, counsel must give written notice of which hearing was set first to the calendar clerk of each court involved. Pen C §1050(b). Counsel should check to see whether local courts have enacted rules governing notice of calendar conflicts as allowed by Pen C §1050(b).

Counsel making the continuance motion, and opposing counsel, are responsible for notifying their own witnesses that the hearing or trial at which the witnesses were to testify may be continued. Counsel must also notify their witnesses of the date and time of the hearing on the continuance motion and that they have the right to be heard by the court concerning the request for a continuance. Pen C §1050(b). If this provision required notification of all *potential* witnesses, then it would be quite burdensome. However, the statute does not so specify; rather, it uses only the general term "witnesses" without further amplification. A reasonable construction of the statute is that a person is not actually a witness until his or her selection as such has been made by some decisional act of the attorney, such as issuance of a subpoena. Under this interpretation, only persons already selected as witnesses need be notified. This construction accords with the legislative intent expressed in Pen C §1050(a) that "substantial hardship to victims and other witnesses" be prevented. Obviously, the hardship to witnesses is caused by having to acquire transportation and adjusting work and family activities around scheduled court dates that are continued, causing new transportation and adjustment problems. This inconvenience to witnesses does not exist until these persons are committed to a scheduled date, *e.g.,* by subpoena. On the other hand, the duty to disclose witness statements to opposing counsel is triggered if counsel "reasonably anticipates" calling the witness. See Pen C §§1054-1054.7.

If the moving party does not comply with the service requirements discussed in this section, the court may impose sanctions unless the moving party shows good cause for failure to comply. Pen C §1050(c)-(d). Sanctions include one or both of the following (Pen C §§1050(c), 1050.5):

- Up to $1000 fine on counsel for moving party;
- Filing of report with appropriate disciplinary committee.

If the notice requirements of Pen C §1050(b) were not met, the court must hold a hearing to rule on whether there is good cause for having failed to comply with them. At the conclusion of the hearing, the court must state whether good cause was found and, if so, the facts proved that justify that finding. The finding and statement of facts must be entered in the minutes. The good cause showing for failure to comply with §1050(b)'s notice requirements is in addition to the good cause necessary for the continuance itself. Pen C §1050(d), (f); *People v Harvey* (1987) 193 CA3d 767, 771, 238 CR 516.

> Ø **Note:** Section 1050.5 does not authorize the magistrate to dismiss the action as a sanction for failure to provide proper notice under §1050(b). Pen C §1050.5(b).

On form and service of motions, see §§18.5-18.7. See sample motion for continuance in California Criminal Law Forms Manual §20.1 (2d ed Cal CEB 2005).

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§20.6 IV. GOOD CAUSE

Continuances in criminal cases are only to be made on a showing of good cause. Pen C §1050(b), (f). See also Cal Rules of Ct 4.115(b) (good cause required to trail the trial date); Pen C §§859b, 861 (good cause for continuing preliminary hearings); Cal Rules of Ct 4.113 (continuance of trial must be required by the ends of justice). The factual circumstances that may constitute good cause are discussed in §§20.7-20.27.

Ø **Note:** It is a mistake to believe that a case may be continued for trial within the 10-day grace period provided for in Pen C §1382 without a showing of good cause. The plain language of both Pen C §1050 and Cal Rules of Ct 4.115(b) require good cause for a continuance under §1050 during the 10-day grace period. Although a court may not dismiss a case during the 10-day grace period under §1382, the court must deny a request for a continuance during the 10-day grace period that does not comply with the good cause requirement under §1050. A dismissal is only appropriate after the 10 days have expired. The Advisory Committee Comment to Cal Rules of Ct 4.115 states:

> The decision in [*People v Henderson* (2004) 115 CA4th 922, 9 CR3d 655] states that when the prosecutor seeks a continuance but fails to show good cause under section 1050, the trial court "must nevertheless postpone the hearing to another date within the statutory period." (115 Cal.App.4th at p. 940.) That conclusion, however, may be contrary to the plain language of section 1050, which requires a court to deny a continuance if the moving party fails to show good cause. The conclusion also appears to be dicta, as it was not a contested issue on appeal. Given this uncertainty, the rule is silent as to the remedy for failure to show good cause for a requested continuance during the 10-day grace period. The committees note that the remedies under section 1050.5 are available and, but for the Henderson dicta, a court would appear to be allowed to deny the continuance request and commence the trial on the scheduled trial date.

Ø Firm and uniform enforcement of the requirement of "good cause" for all continuances during the 10-day grace period would have a dramatic impact on the administration of criminal justice and ensure that prosecutors do not file more cases than their staff can possibly handle.

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§20.7 A. Continuance to Secure Counsel; Defendant's Financial Statement

A defendant is entitled by statute to a continuance at arraignment to secure counsel (implicit in Pen C §859), and at the time set for preliminary hearing (Pen C §860). No specific time is set for the period of delay needed to secure counsel for arraignment, except that it must be reasonable. See Pen C §859. If a defendant cannot secure counsel for the preliminary hearing, it must be postponed "for not less than two nor more than five days." Pen C §860.

Even in the absence of a specific statute, the constitutional rights to counsel (US Const amend VI; Cal Const art I, §§14-15) and due process (US Const amend VI; Cal Const art I, §15) require that a defendant be given a reasonable continuance to secure counsel of his or her choice (*People v Courts* (1985) 37 C3d 784, 789, 210 CR 193; *People v Byoune* (1966) 65 C2d 345, 54 CR 749) if the defendant can show that he or she is financially able to secure counsel (*People v Lee* (1967) 249 CA2d 234, 241, 57 CR 281; see *People v Parks* (1964) 230 CA2d 805, 811, 41 CR 329).

A defendant's financial ability to hire an attorney is a fact to be determined by the trial court like any other fact, namely, by a hearing and the presentation of evidence. See *People v Lewis* (1971) 19 CA3d 1019, 1024, 97 CR 419 (hearing on defendant's ability to pay fine). In making this financial determination, the court may ask the defendant to submit a financial statement to the court. Pen C §987(c). Compare Govt C §27707 (court can require defendant to file financial statement under penalty of perjury to determine whether defendant "is financially able to employ counsel and qualifies for the services of the public defender") with Pen C §987(c) (court can require defendant to file financial statement under penalty of perjury to determine whether he or she is "able to employ counsel"). Under §987(c), this financial statement is inadmissible in any criminal proceeding except one for perjury based on false information in the form itself. The prosecutor may not receive a copy of this statement unless investigating an alleged offense of perjury based on false material in the form.

When a public defender has interviewed a defendant and found that person ineligible for public defender representation, the court cannot compel the public defender to reveal any financial information received from the defendant in confidence, because that information is protected by the attorney-client privilege. *People v Canfield* (1974) 12 C3d 699, 707, 117 CR 81. The court must rely on the financial statement procedure set out in §987(c), discussed above.

When the court has given a defendant a reasonable period of time in which to secure counsel, and the defendant does not make a good faith effort to obtain an attorney, the court is entitled to deny the defendant's motion for a continuance to obtain counsel. *People v Byoune* (1966) 65 C2d 345, 346, 54 CR 749; *People v Johnson* (1970) 5 CA3d 851, 858, 85 CR 485.

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Source: Criminal Law/California Criminal Law Procedure and Practice/20 CONTINUANCES/§20.8 B. Time to Prepare

§20.8 B. Time to Prepare

The right to counsel (US Const art VI; Cal Const art I, §15) includes the right to adequately prepare a defense (*People v Maddox* (1967) 67 C2d 647, 652, 63 CR 371), including the right to prepare and argue motions and objections before, during, and after trial. *Cooper v Superior Court* (1961) 55 C2d 291, 302, 10 CR 842; *People v Sarazzawski* (1945) 27 C2d 7, 17, 161 P2d 934. See also Pen C §1049 (5-day period to prepare for trial required after plea).

New counsel has the same right to a reasonable time to prepare as did previous counsel. See *People v Simpson* (1939) 31 CA2d 267, 88 P2d 175. If the defendant began a good faith effort to retain counsel a reasonable time before trial but was not able to obtain counsel until immediately before the trial date, it is error for the trial court to deny a continuance to allow counsel a reasonable time to prepare. *People v Courts* (1985) 37 C3d 784, 210 CR 193. For further discussion of substitution of counsel, see §§3.24-3.28.

A defendant representing himself or herself has the same right to a reasonable time to prepare as does the represented defendant. *People v McKenzie* (1983) 34 C3d 616, 194 CR 462; *People v Maddox* (1967) 67 C2d 647, 653, 63 CR 371; *People v Cruz* (1978) 83 CA3d 308, 325, 147 CR 740. The defendant has this right regardless of whether his or her former counsel had been prepared. *People v Wilkins* (1990) 225 CA3d 299, 275 CR 74. The court, however, may deny as untimely a request for self-representation made by a represented defendant so close to the trial date that the court would have to continue it to allow the defendant the necessary time to prepare (*People v Windham* (1977) 19 C3d 121, 137 CR 8; *People v Hill* (1983) 148 CA3d 744, 757, 196 CR 382; *People v Morgan* (1980) 101 CA3d 523, 531, 161 CR 664), unless the defendant shows reasonable cause for the lateness of the request (*People v Hernandez* (1985) 163 CA3d 645, 654, 209 CR 809 (defendant must show that event causing late request occurred recently and constitutes reasonable basis for dissatisfaction with present counsel's representation)). See also §§3.7-3.11 on self-representation.

> Ø **Note:** A prosecutor may argue that a late request to act as one's own counsel may be denied even when the defendant is not requesting a continuance. The law on this issue is unsettled.

Because the privilege against self-incrimination limits the state's power to compel a defendant to reveal information that may aid the prosecution except within the strict limits of discovery as outlined in Pen C §§1054-1054.7 (see *Prudhomme v Superior Court* (1970) 2 C3d 320, 85 CR 129), counsel should not have to specify in more than a general sense what he or she intends to do during the continuance. For example, it should be enough to allege the need to gather background information on the defendant for the penalty phase of a death penalty case without specifying the names of the specific persons intended to be interviewed. If the court insists on more detailed information in an area that counsel does not want to discuss for tactical reasons or because of the attorney-client privilege, counsel should consider requesting an ex parte in camera hearing that is completely confidential. See, *e.g., People v Cruz* (1978) 83 CA3d 308, 324, 147 CR 740 (in camera hearing conducted to decide whether pro per defendant should be granted continuance). See also *People v Worthy* (1980) 109 CA3d 514, 522 n2, 167 CR 402 (similar procedure suggested for showing foundation for motion to appoint expert to assist defense).

Minimum time requirements are prescribed by statute to allow counsel time to prepare the case:

- On arraignment, counsel has a right to a reasonable time to enter a plea or to demur—no less than 1 day for felonies and no more than 7 calendar days for misdemeanors. Pen C §990.
- If a demurrer is filed, argument must be heard immediately unless "exceptional cause" is shown for a continuance. Pen C §1006.
- If the complaint, information, or indictment is amended, counsel has the right to a reasonable continuance if defendant's substantial rights would otherwise be prejudiced. Pen C §1009. See §20.24.
- Counsel has a right to at least 5 calendar days between the time of entering a plea and trial to prepare. Pen C §1049; *People v Wilkins, supra*. See also Veh C §40306.

> Ø **Note:** If the court imposed jail as a sanction for attorney contempt, counsel should be entitled to a continuance

or a stay to allow time for the filing of a writ petition for review.

The right to a continuance beyond the limits of these statutes is determined by the scope of the constitutional right to counsel. The right to effective representation necessarily includes the right "not [to] be brought to trial too soon, *i.e.,* without adequate opportunity for preparation of his defense (citations omitted)." *People v Maddox* (1967) 67 C2d 647, 653, 63 CR 371 (forcing defendant to go to trial in less than 5 days required by §1049 denies defendant due process).

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§20.9 C. Absence of Witnesses

As explained in *Owens v Superior Court* (1980) 28 C3d 238, 250, 168 CR 466, to obtain a continuance owing to a missing witness, whether that witness is to testify on behalf of the prosecution or on behalf of the defense, the proponent of delay must advise the court of the identity of the witness and the gist of his or her testimony, and must demonstrate that

- The testimony is material;
- The testimony is noncumulative;
- The facts to be shown cannot otherwise be proven;
- The proponent of delay has exercised diligence to secure the presence of the witness in court by legal means; and
- The witness will be available within a reasonable length of time.

Although a court is to "consider" the convenience of witnesses in determining whether good cause for delay has been shown, and in selecting a trial date if good cause for delay is demonstrated (Pen C §1050(g)(1)), mere convenience alone does not constitute good cause for delay (Pen C §1050(e)). See *Cunningham v Municipal Court* (1976) 62 CA3d 153, 133 CR 18.

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§20.10 1. Particular and Obtainable Witness; Witness Available Within Reasonable Time

When counsel is moving for a continuance because a witness will be unavailable on the date set for hearing, counsel should identify the witness whose testimony is needed by name and address (see *People v Buckey* (1972) 23 CA3d 740, 744, 100 CR 551) and state how counsel can secure the witness's attendance within a reasonable time (*People v Collins* (1925) 195 C 325, 333, 233 P 97). See *People v Livingston* (1970) 4 CA3d 251, 255, 84 CR 237. For example, if the witness is absent because he or she is in the hospital or on vacation, counsel should establish that the condition exists and the expected end date.

When defense counsel seeks a continuance because a witness is unavailable, counsel should consider making the motion in camera so that the prosecutor is not given information on the witness's identity, unless the court has already ordered prosecutorial discovery of the witness under Pen C §§1054-1054.7. On when the defense must reveal witnesses, see chap 11 on discovery.

If counsel is unable to locate a witness's place of residence after having made reasonable efforts to do so (see §20.12), that is cause for a continuance for a reasonable period of time in which to locate the witness. See *People v Collins, supra; Harper v Lamping* (1867) 33 C 641; *People v Hanz* (1961) 190 CA2d 793, 798, 12 CR 282.

Counsel may obtain a continuance to secure a new witness when a witness relied on for testimony suddenly claims the privilege against self-incrimination. A witness who claims this privilege is deemed not reasonably obtainable. *People v Sandoval* (1977) 70 CA3d 73, 83, 138 CR 609. A witness does not have to be called to the stand at trial before a judge can determine that he or she would assert the privilege against self-incrimination, and that such an assertion is proper; such matters may be determined at a pretestimonial inquiry of the witness. *People v Cornejo* (1979) 92 CA3d 637, 658, 155 CR 238. For discussion of immunity for testimony, see chap 49.

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§20.11 2. Material or Necessary Testimony; Testimony Not Cumulative

When counsel is requesting a continuance to secure the testimony of a witness who was unavailable on the date set for hearing or trial, counsel must specify the testimony that he or she expects from the witness. See *People v Ah Fat* (1874) 48 C 61; *People v Carter* (1962) 208 CA2d 722, 724, 25 CR 527; *Young v Evans* (1944) 62 CA2d 365, 373, 144 P2d 651. Then, counsel must show that this testimony has a legitimate tendency to prove or disprove a fact that could influence the decision in the case. *People v Dunstan* (1922) 59 CA 574, 584, 211 P 813.

Proposed testimony is considered necessary if it is not cumulative of other testimony or evidence. *People v Wilson* (1965) 235 CA2d 266, 274, 45 CR 267. If the proposed testimony is cumulative only of the defendant's testimony, however, it is considered necessary. See *People v Ah Lee Doon* (1893) 97 C 171, 177, 31 P 933.

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§20.12 3. Due Diligence

When counsel is requesting a continuance to secure the testimony of a witness who was unavailable on the date set for hearing or trial, counsel shows due diligence in trying to obtain the witness by producing evidence that counsel used legal means to try to compel the witness's attendance. This information is usually proved through the attorney's or investigator's declarations. See Pen C §1050(b) (affidavits or declarations showing specific facts required).

The exercise of diligence to secure the presence of the witness in court by legal means is frequently open to dispute. For example, if an attorney has relied on the apparent cooperation of the witness without the service of a subpoena, it would appear that this is not the "legal means" required by the statute. So, if no attempt was made to subpoena the witness, his or her absence generally does not constitute good cause for a continuance. *Jensen v Superior Court* (2008) 160 CA4th 266, 271, 72 CR3d 594. However, when a witness is served with a subpoena but fails to appear, there is usually good cause for a continuance.

If counsel tried to subpoena the witness, counsel must show that the efforts to serve the witness were made within a reasonable time before the hearing. If the proponent of delay has waited until the last minute to attempt to subpoena the witness, who is then found to be unavailable, there is no diligence justifying delay. *People v Avila* (2005) 131 CA4th 163, 31 CR3d 441. The time to ascertain the availability of witnesses is when the trial date is set. *People v Collins* (1925) 195 C 325, 333, 233 P 97; *Brown v Superior Court* (1987) 189 CA3d 260, 264, 234 CR 416; *People v Rodriguez* (1971) 15 CA3d 481, 484, 93 CR 182 (1-day search not enough); *Pickett v Municipal Court* (1970) 12 CA3d 1158, 1162, 91 CR 315. Defense counsel's lack of effort to secure a witness is not excused on the ground that the defendant obstructed defense counsel from speaking with the witness, or was dilatory in informing counsel of the existence of the witness. See *People v Grant* (1988) 45 C3d 829, 843, 248 CR 444; *People v Valladares* (1984) 162 CA3d 312, 319, 208 CR 604. A court is also justified in denying a claim of due diligence when it finds that counsel employed "delaying tactics." *People v Fudge* (1994) 7 C4th 1075, 1105, 31 CR2d 321.

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Source: Criminal Law/California Criminal Law Procedure and Practice/20 CONTINUANCES/§20.13 D. Incapacity of Defendant, Counsel, or Judge; Defendant's Failure to Appear

§20.13 D. Incapacity of Defendant, Counsel, or Judge; Defendant's Failure to Appear

Defense. Physical incapacity of the defendant or defense counsel is good cause for a continuance. *People v Crovedi* (1966) 65 C2d 199, 53 CR 284 (illness of defense attorney). See also *People v Mickey* (1991) 54 C3d 612, 660, 286 CR 801 (motion properly denied because defense counsel was present in court and stated he did not feel well, but did not indicate he would be unavailable due to illness); *People v Avila* (2004) 117 CA4th 771, 11 CR3d 894 (no error in denying continuance to defendant with chronic back pain who was lucid, coherent, and rational); *People v Hanz* (1961) 190 CA2d 793, 796, 12 CR 282 (motion for continuance due to physical pain by pro per defendant properly denied because of testimony of physician that defendant was physically able to proceed).

When defense counsel cannot come to court, the court may continue the case either to a time when counsel can return or for a reasonable time to obtain other counsel. See *People v Crovedi, supra; People v Logan* (1854) 4 C 188.

Incapacity creates a factual issue for the court and may be determined on the basis of medical testimony. *People v Augustine* (1968) 265 CA2d 317, 329, 71 CR 384 (counsel's incapacity refuted by doctor's ex parte communication to trial judge); *People v Hanz, supra* (pro per defendant's incapacity refuted by doctor's testimony). See also §20.28 (form of proof).

When a defendant fails to appear for trial in a misdemeanor case, the court should proceed with the trial if the defendant previously authorized counsel to appear in the defendant's absence under Pen C §977(a). Pen C §1043(e). If there is no Pen C §977 form on file, the court may do the following (Pen C §1043(e)):

- Continue the case to another date;
- Revoke bail and order it forfeited, or order O.R. release status revoked;
- Issue a bench warrant; or
- Proceed to trial if the court finds that the defendant's absence is voluntary and that the defendant knew of the court date.

Ø **Note:** The court has the right to order the defendant to appear at trial for the purpose of identification despite a previous Pen C §977 waiver, unless there is a stipulation regarding identification. Pen C §1043. It would not appear that the court could order the defendant to appear at any time other than when an identification is being made. There is no ruling on whether the prosecution can refuse such a stipulation if offered by the defendant.

In felony cases, a trial cannot be started if the defendant is not present unless the defendant has waived his or her presence. Pen C §1043(a), (d). If, however, the defendant's absence occurs after the trial begins, and if the offense is not punishable by death, the judge can proceed with the case if the judge finds that the defendant is voluntarily absent. Pen C §1043(b)(2). See, *e.g., People v Concepcion* (2008) 45 C4th 77, 84 CR3d 418. The court can also proceed with a trial in the defendant's absence after the court orders the defendant removed from the courtroom because of disruptive or disrespectful behavior. Pen C §1043(b)(1). See discussion in §31.42 on removing the defendant from the courtroom.

Prosecution. When a prosecutor cannot begin a trial within the Pen C §1382 requirements because of illness, the prosecution must assign another deputy to try the case or risk dismissal. See *Batey v Superior Court* (1977) 71 CA3d 952, 139 CR 689 (prosecutor unable to try case because in trial on another case; case dismissed because prosecution made no attempt to assign case to another deputy). When a prosecutor becomes ill during trial, however, one appellate court suggested that the trial judge should hear evidence on the reason for the prosecutor's absence, make a finding on the record, and, if the judge finds good cause for a continuance, continue the trial for 2 or 3 days either for the same prosecutor to return or for a new deputy to take his or her place. *People v McJimson* (1982) 135 CA3d 873, 881, 185 CR 605. See the discussion in §20.15 of continuance because of prosecutor's other court commitments.

Court. When a judge is unable to continue hearing a trial, *e.g.,* because of illness, the presiding judge may assign another judge to proceed with the trial, or continue the case from day to day until a new judge is assigned by the chairperson of the Judicial Council or agreed on by stipulation of the parties. Pen C §1053.

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E. Other Court Commitments; Legislative Commitments

§20.14 1. Defense Attorney

When a defendant joins in requesting a continuance caused by defense counsel's court commitments on behalf of other clients, the court must grant the continuance until either defense counsel can appear or the defendant can obtain other counsel. *People v Manchetti* (1946) 29 C2d 452, 458, 175 P2d 533. A defendant should not be prejudiced by a situation for which he or she is not responsible. See *People v Manchetti, supra*. However, the defendant is entitled only to a reasonable continuance. See *People v Dowell* (1928) 204 C 109, 113, 266 P 807 (second continuance properly denied when defendant was previously told of conflict and was given 30 days to secure other counsel); *Stevens v Superior Court* (1988) 198 CA3d 932, 244 CR 94 (court appointed new counsel because original attorney required at least a 6-month delay).

Ordinarily, counsel alone controls whether a case will be continued. *People v Memro* (1995) 11 C4th 786, 852, 47 CR2d 219; *People v Kowalski* (1987) 196 CA3d 174, 242 CR 32; *People v Jackson* (1982) 129 CA3d 953, 181 CR 429. However, when a defendant affirmatively objects to a delay sought by *appointed* counsel not to benefit that defendant, but owing to counsel's conflicting obligations to another client, the attorney and defendant have a conflict as to this issue. *People v Johnson* (1980) 26 C3d 557, 572, 162 CR 431. A defendant who does not expressly object to a proposed continuance cannot claim improper waiver of his or her speedy trial rights. *Barsamyan v Appellate Div.* (2008) 44 C4th 960, 981, 81 CR3d 265. The right to a speedy trial is discussed in chap 19.

In *Johnson*, the California Supreme Court set forth a three-step procedure to be followed in this situation:

(1) If the appointed counsel is a member of a public defender's office, the court is to inquire if another person in the office could bring the case to trial within statutory time limits. (Presumably, this would also apply to a member of a firm, if another member of the firm could bring the matter to trial.)

(2) If another member of the office cannot do so, the court is to inquire whether some other attorney could bring the case to trial within statutory time limits. If so, the court can substitute counsel in order to protect the speedy trial right.

(3) If no feasible means can be found to protect the speedy trial right, the court is to grant counsel's motion to continue. If statutory time limits are exceeded, and a motion to dismiss is made, the court is to inquire whether the delay was caused by the State's failure to provide sufficient resources to protect the speedy trial right. If the court so finds, the case must be dismissed.

There are many unanswered questions concerning this procedure: Where is the burden of proof? What kind of evidence is to be considered? If the motion to dismiss is denied, is the delay to be considered justified by consent or good cause?

When a number of defendants not in custody and represented by the public defender demand jury trials within the Pen C §1382 time limits, this is not an exceptional circumstance that justifies delaying their trials even if there are not enough local judges to try all of the cases. *Arreola v Municipal Court* (1983) 139 CA3d 108, 188 CR 529.

Counsel is faced with a dilemma when he or she is unprepared to go to trial, but the trial court denies counsel's request for a continuance. Some attorneys refuse to participate in trial proceedings in that situation to protect the client from having incompetent representation; total lack of representation results in reversal on appeal. *Little v Superior Court* (1980) 110 CA3d 667, 168 CR 72; *People v Locklar* (1978) 84 CA3d 224, 148 CR 322. However, this conduct may result in State Bar discipline. See *People v McKenzie* (1983) 34 C3d 616, 631, 194 CR 462. The proper course for counsel is to proceed with the case to the best of his or her ability. The court pointed out that "[i]f counsel builds a careful record and can demonstrate that he has been compelled to proceed with a case in which he was unprepared through no fault of his own, the matter can then be raised through the proper procedural channels." 34 C3d at 632. For discussion of effective assistance of counsel, see §2.20. See §20.32 for discussion of sanctions.

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§20.15 2. Prosecuting Attorney

A prosecuting attorney who knows before trial that he or she may be unable to proceed to trial within the Pen C §1382 time limits because of a conflicting case should contact defense counsel to see whether the defendant will waive time under §1382. If the defendant will waive time, the prosecutor must then obtain the court's consent to a continuance. Pen C §1050(b). If the defendant will not waive time, the prosecution must reassign the case or risk dismissal. *Batey v Superior Court* (1977) 71 CA3d 952, 957, 139 CR 689. There is an exception for cases involving offenses listed in Pen C §§11165.1(a) (various sexual assault offenses), 11165.6 (child abuse or neglect), 187 (murder), 646.9 (stalking), 999b-999h (career criminal), and 13700 (domestic violence), in which the district attorney assigned to the case has another trial, preliminary hearing, or motion to suppress evidence in progress; good cause for a strictly limited continuance is allowed by statute. Pen C §1050(g). See also Pen C §§859b(b) (maximum continuance of preliminary hearing at prosecution request is 3 court days) and 1050(g) (maximum continuance of other hearings at prosecution request is 10 court days).

For discussion of the prosecutor's incapacity during trial, see §20.13.

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§20.16 3. Member of Legislature

When the attorney of record at the time of the defendant's first appearance in superior court is a member of the state legislature, and the legislature is in session or an interim committee of which counsel is a member is meeting or will meet within the next 7 days, the defense must be granted a reasonable continuance, not to exceed 30 calendar days. Pen C §1050(h).

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§20.17 F. Prejudicial Publicity

Prejudicial pretrial publicity that threatens a defendant's right to a fair trial may constitute a ground for a continuance. See *Sheppard v Maxwell* (1966) 384 US 333, 363, 16 L Ed 2d 600, 620, 86 S Ct 1507 (dictum). See also *Maine v Superior Court* (1968) 68 C2d 375, 387, 66 CR 724 (continuances may be an effective remedy in medium-sized and large cities, but not in small communities). On other remedies for prejudicial pretrial publicity, see §§14.19A-14.31.

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§20.18 G. Motion to Suppress

In a misdemeanor case, a defendant who intends to file a motion to return property or suppress evidence, and needs this time to prepare for the special hearing on the motion, is entitled to a continuance of up to 30 calendar days. Pen C §1538.5(*l*).

If the defendant's motion to return property or suppress evidence in a felony case is granted at the preliminary hearing, and the defendant is not held to answer, the prosecution may request a special hearing on the motion. In this event, the defendant is entitled as a matter of right to a continuance of the special hearing for up to 30 calendar days. Pen C §1538.5(j).

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§20.19 H. Desire to Try Felony First

When two separate cases arising from the same facts are pending against a defendant, one a felony and the other a misdemeanor, the prosecution may not obtain a continuance of the misdemeanor case to avoid disclosing evidence concerning it, or to preclude the defendant from entering a plea of res judicata or double jeopardy to the felony charge. *Zamloch v Municipal Court* (1951) 106 CA2d 260, 264, 235 P2d 25. This situation arises when the cases cannot be joined. See, *e.g., People v Saldana* (1965) 233 CA2d 24, 43 CR 312 (evidence that defendant at time of charged rape may have had marijuana cigarette in shirt pocket was insufficient connection to justify combined trial on both rape and possession of marijuana charges). For further discussion, see §§7.27-7.42 (joinder and severance), 26.23-26.27, 26.34 (pleas of double jeopardy, former acquittal, and former conviction).

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§20.20 I. Codefendants Joined

When the cases of two or more codefendants are joined, and the court for good cause continues the case of one codefendant, that constitutes good cause for continuing the remaining codefendants' cases. Pen C §1050.1; *In re Samano* (1995) 31 CA4th 984, 37 CR2d 491 (§1050.1 also applies to preliminary examinations).

Ø **Note:** A minor cannot be detained past the statutory time limits (Welf & I C §657; Cal Rules of Ct 5.774(b)) solely because a co-minor requests continuance. *A.A. v Superior Court* (2003) 115 CA4th 1, 6, 9 CR3d 1.

Only if it appears impossible for all codefendants to be prepared within a reasonable period of time can the cases be severed. Pen C §1050.1. If a defendant is in custody pending a preliminary hearing, and the case is continued over the defendant's objection for good cause shown to a date beyond 10 court days following arraignment, the defendant is generally entitled to be released from custody. See §20.31. Over a vigorous dissent, the *Samano* majority held that a codefendant who is objecting to delay is to be "deemed" to have *requested* the delay, so as to avoid this release requirement when §1050.1 applies. *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491.

For further discussion of joinder and severance, see §§7.27-7.42.

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§20.21 J. Judicial Diversion

The court does not have jurisdiction to continue a case before conviction over the prosecutor's objection in an effort to effect a nonstatutory diversion procedure whereby the defendant is promised a dismissal under Pen C §1385 (dismissal in furtherance of justice) if he or she satisfies requirements established by the judge. *People v Municipal Court (Gelardi)* (1978) 84 CA3d 692, 149 CR 30. For further discussion, see chap 27.

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§20.22 K. Court Unavailable

Court congestion is not good cause for a continuance when the defendant objects and the new date would exceed the time limits of Pen C §1382 for bringing a case to trial. See *Rhinehart v Municipal Court* (1984) 35 C3d 772, 782, 200 CR 916 (out-of-custody misdemeanor defendant with retained counsel); *People v Johnson* (1980) 26 C3d 557, 162 CR 431 (indigent, incarcerated felony defendant); *People v Flores* (2009) 173 CA4th Supp 9, 25, 92 CR3d 582 (out-of-custody misdemeanor defendant); *Arreola v Municipal Court* (1983) 139 CA3d 108, 188 CR 529 (indigent out-of-custody defendant).

When court congestion is not chronic but is caused by an extraordinary circumstance, *e.g.,* the death of a judge in a county with only two judges, the court may continue a case beyond the statutory speedy-trial time limits over the defendant's objection if the court notifies the chairperson of the Judicial Council that the case cannot be tried within the statutory time limits because no civil or criminal courts are available to try the case. See Pen C §1053 (trial court must notify Judicial Council chairperson). See also *People v Johnson* (1980) 26 C3d 557, 571, 162 CR 431 (extraordinary circumstances will justify delay of trial); *Hankla v Municipal Court* (1972) 26 CA3d 342, 364, 102 CR 896; *Herrick v Municipal Court* (1957) 151 CA2d 804, 807, 312 P2d 264.

Neither a shortage of trial judges caused by many local judges attending a nearby judicial training session (*Lewis v Superior Court* (1981) 122 CA3d 494, 176 CR 80) nor a mere showing that civil cases are causing court congestion is considered an exceptional circumstance justifying delay of a criminal trial (*Hankla v Municipal Court, supra; Herrick v Municipal Court, supra*).

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§20.23 L. Testimony of Defendant or Defense Witness

The prosecutor is entitled to a reasonable continuance on request when the defendant or a defense witness testifies at trial, unless the court finds that the prosecutor was, or with due diligence should have been, aware of such evidence. If the continuance is granted because of the defendant's testimony, it may not exceed 1 day. Pen C §1051.

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§20.24 M. Amending Pleadings

When the prosecutor amends pleadings, whether before or during trial, the defendant is entitled to a continuance if the defendant's substantial rights would otherwise be prejudiced. The continuance is to be for a reasonable time, "not longer than the ends of justice require." Pen C §1009; *People v Murphy* (1963) 59 C2d 818, 31 CR 306. On amending pleadings, see §§7.14-7.18.

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§20.25 N. Request for Continuance During Trial

A motion for continuance may be brought during trial when counsel is surprised by testimony, evidence, or other developments. Counsel should request the amount of time needed to interview witnesses, prepare a motion, or present rebuttal testimony. A continuance motion during trial will be considered untimely if the work to be done could have been accomplished before trial. *People v Bittaker* (1989) 48 C3d 1046, 1094, 259 CR 630.

Factors the court may consider in ruling on a motion for continuance include the benefit sought by the party seeking the continuance and the likelihood that such benefit will result. Additionally, the trial court should consider the burden a continuance will place on other witnesses and jurors and whether justice will be accomplished or defeated by granting the motion. Whether to grant a continuance motion made during trial is within the trial court's discretion, and its determination will ordinarily be upheld on appeal. *People v Beames* (2007) 40 C4th 907, 920, 55 CR3d 865. See, *e.g., People v Samayoa* (1997) 15 C4th 795, 840, 64 CR2d 400 (no abuse of discretion to deny defendant's request for continuance to prepare for cross-examination of prosecution expert); *People v Fudge* (1994) 7 C4th 1075, 1105, 31 CR2d 321 (no abuse of discretion to deny defendant's request for continuance to call defense witnesses—lack of diligence in trial preparation); *People v Gonzalez* (2005) 126 CA4th 1539, 25 CR3d 124 (no abuse of discretion to deny defense request to get its own gang expert). However, when a continuance is necessary to afford the defendant a fair trial, the trial court's denial of a motion for continuance may be an abuse of discretion. *Lee v Kemna* (2002) 534 US 362, 381, 151 L Ed 2d 820, 839, 122 S Ct 877 (trial court's denial of continuance to obtain previously subpoenaed alibi witnesses may have infringed right to present defense); *People v Cuccia* (2002) 97 CA4th 785, 118 CR2d 668 (when scheduled defense witness could not be found, trial court abused its discretion when it denied motion for brief continuance, thereby forcing defendant to testify out of order or rest his case).

In seeking a midtrial continuance to obtain the attendance of a witness, the party seeking the continuance has the burden of showing an exercise of due diligence, that the proffered testimony is material and not cumulative, and that the witness's attendance can be secured within a reasonable time. *People v Brown* (1994) 28 CA4th 591, 598, 33 CR2d 678.

If counsel is surprised by new testimony or evidence that should have been disclosed during discovery, counsel may want to move to exclude it or move for some other sanction instead of requesting a continuance. See Pen C §1054.5. For discussion of discovery, see chap 11.

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§20.25A O. Request for Continuance at Sentencing

Counsel may request a continuance after the trial court announces the sentence it intends to impose. See *People v Gonzalez* (2003) 31 C4th 745, 3 CR3d 676. The trial court is not required to issue a tentative opinion but must describe the sentence and the reasons that support any discretionary sentencing choices, and give counsel a reasonable opportunity to object before pronouncing judgment. See *People v Scott* (1994) 9 C4th 331, 351, 36 CR2d 627 (most sentencing errors waived by failure to object). When the sentence is unusual or particularly complex, a continuance will allow counsel time to research whether an objection is warranted or to request permission to submit written objections. See also *Turner v Calderon* (9th Cir 2002) 281 F3d 851, 895 (defendant, whose counsel was admittedly unprepared for sentencing hearing, was entitled to evidentiary hearing on claim of ineffective assistance of counsel).

Counsel may request a continuance when the trial judge is temporarily unavailable to preside at the sentencing hearing. Although a defendant does not have the right to be sentenced by the trial judge, it has been held to be an abuse of discretion for the sentencing judge to refuse a continuance of 3 days so that the defendant could be sentenced by the trial judge. See *People v Jacobs* (2007) 156 CA4th 728, 67 CR3d 615.

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§20.26 P. Cases Involving Sex Offenses and Cases Involving Minor Victims or Witnesses

When a minor is the alleged victim, when a minor is detained as a material witness, or when any person is the alleged victim of certain specified violent sex offenses, a continuance may be granted only if the judge finds, after a hearing, that a continuance is necessary. Pen C §1048(b). Moreover, the trial must begin within 30 calendar days after arraignment unless good cause is shown for a continuance. Pen C §1048(b). As a practical matter, Pen C §1048 does not appear to add anything to the general proof requirements for continuance. See Pen C §1050.

When the crime charged is listed in Pen C §11165.1(a), §11165.6, or §13700, and the prosecutor assigned to the case has another trial, preliminary hearing, or motion to suppress evidence in progress, that fact constitutes good cause for continuance of the §11165.1(a), §11165.6, or §13700 case. Pen C §1050(g). A continuance of up to 10 court days may be granted. Pen C §1050(g).

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§20.27 Q. Convenience of Parties; Stipulations

The court may not grant a continuance except on a showing of good cause. Pen C §1050(e). Convenience of the parties is not good cause for a continuance. Pen C §1050(e). Nor is the parties' stipulation to a new court date good cause in itself for the court to grant a continuance. Pen C §1050(e). A defendant may agree, however, that the prosecution may obtain a future continuance without a showing of good cause, as long as such an agreement is not required for the defendant to obtain an otherwise justified continuance. *People v Haendiges* (1983) 142 CA3d Supp 9, 13, 191 CR 785.

Ø **Note:** As a practical matter, many trial judges routinely find good cause without a written motion if counsel stipulate to a colorable basis for a continuance on the record.

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V. PROOF; COURT'S RULING

§20.28 A. Form of Proof

The moving party has the burden of proving that a continuance is required. See, *e.g., Owens v Superior Court* (1980) 28 C3d 238, 250, 168 CR 466 (prosecution); *People v Wilson* (1965) 235 CA2d 266, 273, 45 CR 267 (defense).

Continuance motions must be supported by evidence. Evid C §§300 (Evidence Code applies to all proceedings not excepted by statute), 500 (parties have burden of proving facts on which their claim for relief or defense is based); Cal Rules of Ct 4.113 (affirmative proof in open court is required to continue trial). Evidence includes "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Evid C §140. Counsel should submit testimony in the form of affidavits or declarations (Pen C §1050(b)) but may be able to make an oral offer of proof (see Pen C §1050(c)). It is unclear whether moving counsel can make affidavits or declarations on information or belief. Compare court holdings on the use of information and belief in other situations in *People v Leyshon* (1895) 108 C 440 and *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 151 CR 721 (writ petition; declaration cannot be made on information and belief when to be relied on for proof of facts), with *People v Municipal Court (Hayden)* (1980) 102 CA3d 181, 162 CR 347 (declaration in support of *Pitchess* motion may be made on information and belief).

Opposing counsel has the right to cross-examine the affiants or declarants at the hearing. See *People v Williams* (1973) 30 CA3d 502, 509, 106 CR 324. Presumably, opposing counsel has the right to introduce the same type of evidence in opposition to the motion for a continuance. See *People v Jenkins* (1880) 56 C 4 (prosecution used counteraffidavit).

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§20.29 B. Court's Ruling

In considering whether to grant a continuance motion, the court is to specifically consider the general convenience and prior commitments of all witnesses, including peace officers. Pen C §1050(g). Both the general convenience and prior commitments of each witness must also be considered in selecting a continuance date if the motion is granted. The facts as to inconvenience or prior commitments may be offered by the witness or by a party to the case.

However, neither the parties' convenience nor their stipulation to a continuance in itself constitutes good cause. Pen C §1050(e).

The continuance shall be granted only for the period of time necessary as shown by evidence considered at the hearing on the motion. Pen C §1050(i).

At the conclusion of the hearing, the court must state its ruling on the record. If good cause was found for a continuance, the court must state for the record the facts proved that justify that finding. Those facts must be entered in the court minutes. Pen C §1050(f). The court must also state for the record the facts proved that justify the length of the continuance, and have those facts entered in the court minutes. Pen C §1050(i).

Ø **Note:** The requirement that findings be included in the minutes is, in part, to facilitate appellate review. Nevertheless, appellate courts are reluctant to micromanage the calendar of the superior court and reversals are rare on that basis.

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VI. LENGTH OF CONTINUANCE

§20.30 A. Time Requirements

Continuances are to be granted only for the period of time shown to be necessary by the evidence considered at the hearing on the motion for continuance. Pen C §1050(i). Time requirements are sometimes prescribed by statute. See the chart in §20.2.

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§20.30A B. "Last Day" Cases

Courts should avoid calendaring or trailing criminal cases for trial to the last day permitted for trial under Pen C §1382 and must implement calendar management procedures to ensure that criminal cases are assigned to trial departments before the last day permitted for trial under §1382. Cal Rules of Ct 4.115(b).

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§20.31 C. Preliminary Hearings

A defendant in custody solely on a felony complaint is entitled to a preliminary hearing within 10 court days after arraignment, plea, or reinstatement of proceedings that had been suspended under Pen C §1367, whichever occurs later. Pen C §859b, discussed in §8.16. If the preliminary hearing is not held within that time, the judge must dismiss the case unless the defendant personally waives this right or the prosecutor establishes good cause for a continuance. Pen C §859b(a)-(b). For discussion of circumstances that may constitute good cause, see §§20.6-20.27. Even with good cause, a preliminary hearing may not be postponed more than 60 calendar days after the date of arraignment or plea unless the defendant personally waves that right. Pen C §859b.

When the defendant is out of custody, the case must be dismissed if the preliminary hearing is not held within 60 calendar days after the date of arraignment or plea unless the defendant personally waives the right to a preliminary hearing within that period. Pen C §859b.

After a preliminary hearing has started, it cannot be postponed for more than 10 court days unless the defendant personally waives the right to a continuous preliminary hearing or unless the prosecution establishes good cause in an affidavit or declaration (CCP §2015.5) for a postponement beyond the 10-court-day period. Pen C §861. A defense request for a continuance of the preliminary hearing to file a Pen C §1538.5(f)(2) motion is deemed a personal waiver of the defendant's right to a continuous preliminary hearing. Pen C §861(d). The maximum time that the court can postpone the preliminary hearing on the prosecutor's motion is 60 calendar days after the date the continuance motion is granted, unless by consent or motion of the defendant. Pen C §861.

> Ø **Note:** A formal continuance motion is not required to continue a preliminary hearing if it was originally set on a date less than 10 court days from the date of the defendant's arraignment, and counsel's request is that it be continued to a date no more than 10 court days after the date of arraignment. This exception applies to both prosecutors and defense counsel. Pen C §1050(k).

When the court grants the prosecutor a continuance either to begin a preliminary hearing or to continue it without the defendant's consent, the court must release the defendant from custody unless (Pen C §859b(b)):

- It is a capital case in which "the proof is evident and the presumption great" (Pen C §859b(b)(2));
- The continuance is needed to secure a witness necessary for the preliminary hearing who is unavailable because of the defendant's actions (Pen C §859b(b)(3));
- Counsel is ill or unexpectedly engaged in a jury trial (Pen C §859b(b)(4)-(5)); or
- Unforeseen conflicts require that new counsel be appointed (Pen C §859b(b)(6)).

For further discussion of continuances at the preliminary hearing, see §§8.17-8.18.

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§20.32 VII. SANCTIONS

If a party has not shown good cause for delay, or if the motion is untimely without good cause for the untimeliness, it is the court's duty to deny the motion to continue. This duty applies whether the motion to continue is made by the defense or the prosecution. *Oberholzer v Commission on Judicial Performance* (1999) 20 C4th 371, 399, 84 CR2d 466; *People v Alvarez* (1989) 208 CA3d 567, 577, 256 CR 289; *People v Lynch* (1971) 14 CA3d 602, 607, 92 CR 411; *People v Johnson* (1970) 5 CA3d 851, 860, 85 CR 485. If, however, the prosecution seeks or obtains an unjustified delay, the court cannot dismiss the prosecution on that basis. Pen C §1050.5(b); *Malengo v Municipal Court* (1961) 56 C2d 813, 816, 17 CR 10; *People v Rubaum* (1980) 110 CA3d 930, 934, 168 CR 291.

If the prosecutor chooses to proceed with a preliminary hearing without a necessary witness, defense counsel may request a dismissal at the conclusion of the hearing and ask that the defendant be discharged. See Pen C §871.

If the prosecutor produces insufficient evidence at trial, defense counsel may move for judgment of acquittal under Pen C §1118 or §1118.1.

Disciplinary proceedings. The court may file a report with the State Bar on an attorney's failure to comply with Pen C §1050(b) when the party moving for a continuance was the prosecuting or defense attorney. Pen C §1050.5(a)(2).

Fine. The court may fine an attorney who violates Pen C §1050(b) (discussed in §20.3) up to $1000. Pen C §1050.5(a)(1).

Contempt. The court may hold an attorney in contempt who refuses to proceed with a case at the court's direction after a motion for continuance is denied. See Pen C §166(a)(4). See also Pen C §1050.5(b). For further discussion of contempt, see chap 58.

Appointed attorneys in felony cases. When an attorney appointed in a felony case represents that he or she will be ready on the date set, the court may impose sanctions if counsel is not ready to proceed and cannot show "good cause." Pen C §987.05. Possible sanctions include contempt, removal from the case, fines, and denying public funds as compensation. This provision does not apply to prosecutors, retained counsel, or attorneys whom the court appoints without requiring a representation of readiness. Pen C §987.05.

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§20.33 VIII. EFFECT OF CONTINUANCE ON DEFENDANT'S CUSTODY STATUS

When a court grants a continuance, it has the same choices concerning the defendant's custody status as it otherwise does, unless a statute requires the defendant's release. See, *e.g.,* Pen C §859b(b), discussed in §20.31.

See discussion of Pen C §1050.1 in §20.20. See also chap 5 on bailable offenses and O.R. release.

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IX. REVIEW

§20.34 A. Pen C §995 Motion

Errors at the preliminary hearing are attacked by a Pen C §995 motion. Errors that concern the improper grant or denial of a continuance include the following:

- Improperly denying the defendant a continuance of the preliminary hearing so that he or she was unable to prepare properly for the hearing. *Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440.
- Improperly postponing the preliminary hearing past the statutory 10 court days. Pen C §859b. See *Burnett v Superior Court* (1974) 12 C3d 865, 874 n8, 117 CR 556; *People v Elliot* (1960) 54 C2d 498, 502, 6 CR 753, overruled on other grounds in *People v Pompa-Ortiz* (1980) 27 C3d 519, 528, 165 CR 851. In such cases, prejudice appears as a matter of law.
- Improperly postponing a preliminary hearing after it has started. Pen C §861 (one-session rule). See *Burnett v Superior Court, supra*; *People v Bucher* (1959) 175 CA2d 343, 346 P2d 202. Penal Code §861 appears to require dismissal for violation of its terms, thus mandating the grant of a Pen C §995 motion without an additional showing of prejudice. See *Stroud v Superior Court* (2000) 23 C4th 952, 963 n4, 98 CR2d 677. But see *People v Castagnola* (1972) 28 CA3d 882, 888, 105 CR 62 (brief continuance did not violate one-session rule, and assuming it did, defendant not prejudiced).

If defense counsel's §995 motion is granted, the information or indictment is set aside (Pen C §995) and the defendant is discharged (Pen C §997). However, the order setting aside the information or indictment is not a bar to refiling the same offense (Pen C §999), unless the case has been previously dismissed under §995 or other specified sections. Pen C §1387. For further discussion of §995 motions, see chap 13.

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§20.35 B. Writ

When the trial court grants a continuance in excess of its jurisdiction before or during trial, defense counsel may seek a writ of prohibition or mandate. The same remedy is available when the court denies a continuance. *Jennings v Superior Court* (1967) 66 C2d 867, 875, 59 CR 440.

Similarly, the prosecution may seek a writ of mandate or prohibition to review a trial court order beyond the time limits of Pen C §1049.5, or made without good cause when good cause is required for a continuance. Pen C §1511.

Both the prosecution and defense have the right to seek a writ of mandate or prohibition from the superior court to challenge a trial court order granting a continuance of a preliminary hearing. Pen C §871.6. This type of writ petition has precedence over all other cases pending in the superior court. If the writ is granted, the superior court must issue the remittitur within 3 court days after its decision becomes final. The losing party can then seek relief from the court of appeal. Pen C §871.6.

Ø **Note:** Whenever time permits, this procedure should be followed rather than the later motion to dismiss.

For further discussion of writs, see chap 42. See also Appeals and Writs in Criminal Cases, chaps 7-8 (3d ed Cal CEB 2007).

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§20.36 C. Appeal

The prosecution may not obtain review of the grant or denial of a continuance by appeal. Review is by writ of prohibition or mandate. Pen C §871.6. See §20.35.

The defense may obtain review of the grant or denial of a continuance by appeal from a judgment of conviction (*People v Wilson* (1963) 60 C2d 139, 32 CR 44) or by petition for writ of prohibition or mandate (Pen C §871.6). If a continuance was granted over defense objection, defense counsel must have both objected and moved to dismiss under Pen C §1382; otherwise, the error is waived. See *People v Wilson, supra*.

Ø **Note:** It is helpful for later appellate review for counsel to make a detailed record in the trial court concerning the purpose of the continuance, the good cause for it, and the anticipated harm (*i.e.,* prejudice) caused by its denial.

A court's order granting or denying a continuance will not generally be cognizable on appeal from the judgment unless the ruling also violated some other statute such as Pen C §1382 or caused demonstrable prejudice. See, *e.g., Lee v Kemna* (2002) 534 US 362, 151 L Ed 2d 820, 122 S Ct 877 (denial of continuance to obtain previously subpoenaed alibi witnesses may have infringed right to present defense).

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21

DISQUALIFICATION OF JUDGE

ALEX LANDON

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§21.1 I. OVERVIEW

Peremptory challenges. Defense counsel and prosecutors may keep a judge, court commissioner, or referee from hearing, in any action or special proceeding, any matter that involves a contested issue of fact or law by challenging him or her under CCP §170.6. (This chapter will use "judge" to refer to all three triers of fact.) This type of challenge is usually called a peremptory challenge. Although counsel is required to allege that the judge is prejudiced against him or her or against the party represented by counsel, there is no requirement that prejudice be proven. *Solberg v Superior Court* (1977) 19 C3d 182, 193, 137 CR 460.

There are requirements concerning when a judge may be challenged under CCP §170.6:

- A judge may be challenged only if he or she has *not* determined a contested issue of fact relating to the merits of the case. CCP §170.6(a)(2). See §§21.11-21.12.
- If a case is assigned from a master calendar court to a trial court (for trial to begin on that day), the challenge must be made to the judge supervising the master calendar no later than the time the case is assigned for trial. CCP §170.6(a)(2).
- If the case is not assigned from a master calendar court, and the judge who is to hear the matter is known 10 calendar days before the date set for the trial or hearing, the challenge must be made at least 5 calendar days before the trial or hearing date. CCP §170.6(a)(2).
- When a case has been assigned to a particular judge for all purposes, peremptory challenge of that judge must be made within 10 calendar days after notice of the assignment or within 10 calendar days before the party's appearance in court, if the party has not yet appeared. CCP §170.6(a)(2). See also *People v Hull* (1991) 1 C4th 266, 2 CR2d 526. The challenge can be presented either to the presiding judge or to the assigned judge. CCP §170.6(a)(2). Otherwise, a challenge is timely if it is filed before the hearing begins. CCP §170.6(a)(2); *Villarruel v Superior Court* (1973) 35 CA3d 559, 110 CR 861.
- Only one peremptory challenge can be made in any one case. CCP §170.6(a)(3). When there are codefendants, only one challenge can be made for the combined codefendants unless the codefendants are able to make a factual showing that their interests are substantially adverse. *Pappa v Superior Court* (1960) 54 C2d 350, 353, 5 CR 703; *Welch v Superior Court* (1974) 41 CA3d 50, 53, 115 CR 729. Code of Civil Procedure §170.6(a)(2) has been amended to allow the party who files an appeal that results in reversal of a final judgment of the trial court to exercise a challenge even though that side had previously done so.

Counsel may exercise a peremptory challenge either in writing under penalty of perjury or orally *under oath.* CCP §170.6(a)(2). It does not have to be noticed. CCP §170.6(a)(2). It must be substantially in the form set out in CCP §170.6(a)(5). The motion is filed or presented to the judge being challenged or, when the case is assigned from a master calendar court, to the master calendar judge. Suggested language for an oral motion for peremptory disqualification of a judge is in §21.20.

Challenges for cause. Either the defense or the prosecution may challenge a judge, court commissioner, or referee for cause. See CCP §§170.1, 170.5(a). Challenges for cause must allege one or more of the grounds for disqualification listed in CCP §170.1. See CCP §170.3(c)(1). There is no limit to the number of challenges for cause that may be made in a case (see CCP §170.1), and no requirement that counsel use a peremptory challenge before exercising a challenge for cause (see CCP §170.6(b)).

A challenge for cause that states the basis for the disqualification must be in writing, verified, and filed with the clerk or presented to the court, and a copy served on all parties. CCP §170.3(c)(1). The judge alleged to be disqualified, or his or her clerk, must be personally served. CCP §170.3(c)(1). A copy of the motion is usually filed with the presiding judge. The motion should be filed as soon as the information on which the challenge is based is known. CCP §170.3(c)(1).

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§21.2 II. CHART: DEADLINES

Action	Deadline	Authority
Peremptory Challenge:		
Attorney moves to disqualify judge peremptorily.	(1) Must be made before judge has presided at proceeding involving determination of contested issues of fact relating to merits. (2) When case not assigned from master calendar court, and identity of judge is known 10 calendar days before date set for trial or hearing, motion must be made at least 5 calendar days before that date. (3) When case is placed on master calendar for assignment, motion must be made no later than time when case is assigned for trial or hearing. (4) If directed to trial of cause that has been "assigned to a judge for all purposes," motion must be made by party within 10 calendar days after notice of all-purpose assignment. Motion is made to assigned judge or presiding judge. If party has not appeared when notice issues, motion must be made within 10 calendar days after party appears. (5) In court authorized to have no more than one judge, motion must be made before expiration of 30 calendar days after defendant's or attorney's first appearance.	CCP §170.6(a)(2).
Challenge for Cause:		
Judge disqualifies himself or herself.	Immediately on discovering facts leading to disqualification.	CCP §170.3.
Attorney moves to disqualify judge for cause.	Earliest practicable opportunity after discovery of facts constituting ground for disqualification.	CCP §170.3(c)(1).
Judge responds to attorney's motion to disqualify him or her for cause.	Within 10 calendar days after service of motion or filing, whichever is later, judge must file consent to disqualification, or verified answer.	CCP §170.3(c)(3).
Selecting judge to hear challenge for cause.	Parties have 5 calendar days after notification (presumably service) of judge's answer to agree on judge. If there is no agreement, judge is selected by Judicial Council chairperson.	CCP §170.3(c)(5).

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III. PEREMPTORY DISQUALIFICATION

§21.3 A. Who Can Be Disqualified; Effect of Disqualification Under CCP §170.6

Who can be disqualified. A judge, court commissioner, or referee may be challenged peremptorily. CCP §170.6(a)(1). This chapter uses "judge" to refer to all three triers of fact.

A CCP §170.6 disqualification is expressly limited to superior court judges. CCP §170.6(a)(1). A CCP §170.6 disqualification does not apply to superior court judges serving as judges of the appellate division (CCP §170.7) or to justices in the courts of appeal or supreme court (*Kaufman v Court of Appeal* (1982) 31 C3d 933, 184 CR 302).

Effect of disqualification. It is unclear whether a CCP §170.6 disqualification motion deprives a judge of jurisdiction in the fundamental sense of eliminating the judge's authority over the parties or subject matter. Some cases have held that any action taken by a disqualified judge on a contested matter after a peremptory challenge properly made and supported is in excess of jurisdiction and void. *Retes v Superior Court* (1981) 122 CA3d 799, 807, 176 CR 160 (writ granted); *In re Robert P.* (1981) 121 CA3d 36, 43, 175 CR 252 (court's order sustaining petition against minor in juvenile proceeding void and reversed). More recent cases, however, have held that the disqualified judge's actions are not void for lack of jurisdiction, but are at most voidable, and, unless the issue is preserved by timely objection, the error is waived and cannot be raised on appeal. *Stebbins v White* (1987) 190 CA3d 769, 782, 235 CR 656 (defendant waived error by withdrawing his disqualification motion); *In re Christian J.* (1984) 155 CA3d 276, 278, 202 CR 54 (minor waived right to raise issue on appeal, having never moved to disqualify judge and having acquiesced in judge's exercise of jurisdiction when prosecutor's disqualification motion was denied).

A CCP §170.6 disqualification motion prevents a judge from hearing any contested matter, even if it involves only questions of law. See §§21.11-21.12 on what is considered a contested matter for purposes of §170.6. A judge disqualified under §170.6, however, may not be prevented from hearing *uncontested* matters. See *Mezzetti v Superior Court* (1979) 94 CA3d 987, 990, 156 CR 802 (§170.6 challenge does not disqualify judge from hearing uncontested matters when no ruling is required).

> Ø **Note:** Regardless of whether the complaining party waives the error, a judge proceeding with a case after being disqualified may be subject to discipline. See *Wenger v Commission on Judicial Performance* (1981) 29 C3d 615, 643, 175 CR 420.

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§21.4 B. Who May Exercise Challenge; Grounds

Who may exercise challenge. Defense counsel, the defendant, or the prosecutor in a criminal case may disqualify a judge under CCP §170.6. A witness responding to a subpoena is not a party to the criminal case for purposes of §170.6 and therefore may not exercise a peremptory challenge. *Avelar v Superior Court* (1992) 7 CA4th 1270, 1274, 9 CR2d 536.

A party to a "special proceeding" is entitled to disqualify the judge under CCP §170.6. To qualify as a special proceeding for this purpose, the matter must be separate from, and not incidental to, the underlying action. 7 CA4th at 1275 (hearing on *Pitchess* motion is incidental to criminal case, so police department responding to subpoena duces tecum is not entitled to disqualify judge under §170.6). Special proceedings are limited to matters that were not actions or suits under the common law or equity practice. They are of statutory origin and provide new rights and remedies. *Le Louis v Superior Court* (1989) 209 CA3d 669, 678, 257 CR 458. The procedures governing issuance of search warrants, extradition, and disclosure of privileged medical records in Title 12 of the Penal Code (Pen C §§1473-1564) do not automatically qualify as special proceedings for purposes of peremptory challenges under §170.6 simply because Title 12 is titled "Special Proceedings of a Criminal Nature." *Avelar v Superior Court* (1992) 7 CA4th 1270, 1276, 9 CR2d 536. For example, an owner's motion under Pen C §1539 for return of property seized under a search warrant would be classified as a special proceeding if no criminal action were pending but would not be a special proceeding if it were an integral part of a pending action. 7 CA4th at 1277; *People v Superior Court (Aquino)* (1988) 201 CA3d 1346, 1349, 248 CR 50.

It is unclear whether a nonparty who is cited for contempt (*e.g.,* for failing to comply with a subpoena) may file a peremptory challenge to the judge assigned to preside over the contempt hearing. Compare *Bridges v Superior Court* (1939) 14 C2d 464, 473, 94 P2d 983, rev'd on other grounds sub nom *Bridges v California* (1941) 314 US 252, 275, 86 L Ed 192, 210, 62 S Ct 190 (person charged in contempt proceedings under CCP §1212 may challenge the judge), and *Avelar v Superior* Court (1992) 7 CA4th 1270, 1279 n9, 9 CR2d 536 (nonparty cited for contempt is entitled to file peremptory challenge under CCP §170.6), with *McClenny v Superior Court* (1964) 60 C2d 677, 689, 36 CR 459 (indirect contempt proceeding against *party* to domestic relations action is continuation of action and is not separate special proceeding for purposes of CCP §170.6(a)(3), even if it subjects contemnor to criminal sanctions).

Grounds. Although a motion to disqualify a judge under CCP §170.6 is referred to as a "peremptory" challenge, it must be supported by a statement under oath or penalty of perjury that the movant believes the judge to be prejudiced against that person or attorney or the interests of that person or attorney and, therefore, that a fair and impartial trial or hearing cannot be had before that judge. CCP §170.6(a)(2). In *Solberg v Superior Court* (1977) 19 C3d 182, 137 CR 460, the supreme court upheld the constitutionality of §170.6 as applied to criminal proceedings, in particular upholding the prosecutor's right to peremptorily challenge a judge. While reaffirming its disapproval of the practice of "blanket challenges" used routinely to disqualify a particular judge because of judicial philosophy or prior rulings, the court held that the practice does not violate the statute. 19 C3d at 195. A prosecutor's peremptory challenge of a judge may be invalidated as a violation of equal protection, however, if it can be shown to be based on group bias. *People v Superior Court (Williams)* (1992) 8 CA4th 688, 708, 10 CR2d 873.

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C. Number of Challenges

§21.5 1. One Motion for Each Side; Codefendants With Adverse Interests

A party or his or her attorney is usually entitled to only one peremptory challenge to disqualify a judge for prejudice in each case or special proceeding. CCP §170.6(a)(3). See overview of peremptory challenges in §21.1. This rule holds true even when the defendant is represented successively by different attorneys. See CCP §170.6(a)(3); *Pappa v Superior Court* (1960) 54 C2d 350, 5 CR 703; *People v Eaker* (1980) 100 CA3d 1007, 161 CR 417; *People v Escobedo* (1973) 35 CA3d 32, 40, 110 CR 550. On what constitutes a special proceeding, see §21.4.

When there is more than one party to a side, as when there are codefendants, only one motion for each side may be made unless counsel can demonstrate that the codefendants have substantially adverse interests. *Pappa v Superior Court* (1960) 54 C2d 350, 353, 5 CR 703; *People v Eaker, supra*. The fact that they are each represented by separate counsel is not conclusive. *Pappa v Superior Court, supra*. The burden is on the defendant seeking to exercise the additional challenge to show that his or her interests are substantially adverse to those of his or her codefendant. *Pappa v Superior Court, supra*.

A factual showing of adverse interest that meets Evidence Code requirements is required, *e.g.,* through the use of affidavits or testimony. *Welch v Superior Court* (1974) 41 CA3d 50, 115 CR 729 (defense counsel's statements in points and authorities inadequate). See also *People v Escobedo, supra*.

Counsel's testimony is sufficient to establish that the interests of the defendant and codefendant are totally adverse. *Avital v Superior Court* (1981) 114 CA3d 297, 302, 170 CR 588 (writ granted on basis of attorney's declaration characterizing defendant's position as "I didn't do it but the codefendant did do it"). In determining what information to provide to the court, defense counsel may provide minimal information in a declaration, with an offer to reveal more details, if deemed necessary, at an in camera hearing. *Avital v Superior Court, supra*.

For discussion of strategy considerations for defense counsel in codefendant cases, see §21.25.

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§21.6 2. One Motion in Any One Action

Ordinarily, a party or his or her attorney may not make more than one motion to disqualify under CCP §170.6 "in any one action or special proceeding." CCP §170.6(a)(3). A criminal action is defined as "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment." Pen C §683. It includes a retrial brought after a mistrial (*Pappa v Superior Court* (1960) 54 C2d 350, 353, 5 CR 703) and a hearing on probation and sentence (*People v Rojas* (1963) 216 CA2d 819, 824, 31 CR 417). See overview of peremptory challenges in §21.1.

When, however, a prosecution is dismissed before trial, and the prosecutor refiles the charges, the refiled case is a new action. Thus, a peremptory challenge is appropriate, whether or not the defendant used a peremptory challenge before the dismissal. *Paredes v Superior Court* (1999) 77 CA4th 24, 91 CR2d 350 (case dismissed under Pen C §1382); *Ziesmer v Superior Court* (2003) 107 CA4th 360, 366, 132 CR2d 130 (indictment dismissed under Pen C §995). But see, *e.g., Barnes v Superior Court* (2002) 96 CA4th 631, 642, 117 CR2d 621 (under Pen C §1538.5(p), when judge grants suppression motion, prosecutor must relitigate renewed motion before same judge). On supplemental proceedings, see §21.18.

Exception. There is one statutory exception to the rule that a party is entitled to only one peremptory challenge in an action. When a trial court's decision or final judgment is reversed on appeal, the party who obtained relief may bring a peremptory challenge if the trial judge whose decision was reversed is assigned to conduct the new trial, even if that party has already filed a peremptory challenge in the case. CCP §170.6(a)(2). The motion must be made within 60 days after the party or the party's attorney has been notified of the assignment. CCP §170.6(a)(2).

It is unclear whether a criminal action has begun at the time of the preliminary hearing. The court in *Le Louis v Superior Court* (1989) 209 CA3d 669, 678, 257 CR 458, held that the preliminary hearing is part of the criminal action that includes the trial and therefore that a CCP §170.6 challenge made at the preliminary hearing is the "one motion" allowed under CCP §170.6(a)(3) for the entire case. In *Flores v Superior Court* (1991) 226 CA3d 797, 277 CR 90, however, in considering whether a §170.6 challenge was timely, the court held that the criminal proceeding did not begin when the complaint was filed; it began only when the information was filed in the superior court. The court's reasoning in *Flores* supports an argument that a challenge made to the preliminary hearing magistrate does not count; counsel still retains the right to a §170.6 challenge in superior court.

If a party substitutes counsel, the new attorney has no right to exercise a peremptory challenge if the first attorney has already done so. *Pappa v Superior Court* (1960) 54 C2d 350, 355, 5 CR 703.

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D. Form, Notice, Content, and Proof of Motion

§21.7 1. Form and Notice of Oral and Written Motions

A motion to disqualify under CCP §170.6 may be oral or written and does not require notice. CCP §170.6(a)(2). If it is in writing, it must be in the form of an affidavit or declaration made under penalty of perjury. CCP §170.6(a)(2). If it is an oral statement, it must be made under oath, which means that counsel must be sworn before making the challenge. *People v St. Andrew* (1980) 101 CA3d 450, 456, 161 CR 634; CCP §170.6(a)(2). Counsel's statement that he or she is speaking under penalty of perjury, without being under oath, is insufficient. *People v St. Andrew, supra*. If an oral motion to disqualify a trier of fact is not made under oath, or accompanied by an affidavit or declaration under penalty of perjury, it may be denied. *People v Jones* (1991) 53 C3d 1115, 1129, 282 CR 465.

See the suggested language for an oral peremptory challenge in §21.20. A sample peremptory challenge form is in California Criminal Law Forms Manual §21.1 (2d ed Cal CEB 2005).

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§21.8 2. Content of Motion; No Proof Required

The content of a CCP §170.6 motion is sufficient if it states merely that the person making it believes that prejudice exists (even though it may not in fact exist), making a fair trial impossible. *People v Rodgers* (1975) 47 CA3d 992, 121 CR 346 (case reversed because motion improperly denied). No proof is required to support the affidavit, declaration, or statement of prejudice. CCP §170.6(a)(3). Belief in the judge's prejudice is asserted in writing under penalty of perjury, or under oath if made orally, and is assumed to be made in good faith. *People v Rodgers, supra*. Therefore, attorneys are not supposed to use peremptory challenges for delay or judge-shopping.

An affidavit or declaration under penalty of perjury must be in substantially the form set out in CCP §170.6(a)(5). CCP §170.6(a)(5)-(6). An oral statement under oath must include substantially the same contents as the affidavit or declaration. CCP §170.6(a)(6); *People v Jones* (1991) 53 C3d 1115, 282 CR 465. "Substantial" compliance with §170.6(a)(5) was found in an affidavit that failed to state the place of execution (*McCauley v Superior Court* (1961) 190 CA2d 562, 12 CR 119) and in an unsigned declaration (*Retes v Superior Court* (1981) 122 CA3d 799, 807, 176 CR 160). Errors that did not *substantially* comply with §170.6(a)(5) included neglecting to name the judge who was challenged in the affidavit even though a later motion attempted to cure the omission (*People v Kennedy* (1967) 256 CA2d 755, 759, 64 CR 345) and making an oral request without mentioning bias (*People v Boyden* (1960) 181 CA2d 48, 4 CR 869).

When timely compliance with a formality may be made, the court should allow the correction. *Retes v Superior Court, supra*.

Once the motion is timely filed and in proper form, the trial court must accept it without further inquiry. *Barrett v Superior Court* (1999) 77 CA4th 1, 91 CR2d 116.

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E. Time for Motion

§21.9 1. In General

A motion to disqualify a judge under CCP §170.6 is a pretrial motion. CCP §170.6(a)(2). The time period in which it must be made depends on the calendaring system in effect in the court in which the motion will be filed. CCP §170.6(a)(2). For discussion, see §§21.13-21.17. In addition, the motion must be made before the judge being challenged has presided at a proceeding involving a determination of contested issues of fact relating to the merits. CCP §170.6(a)(2). See discussion in §§21.11-21.12. There are also special rules that apply to supplemental proceedings (see §21.18) and to proceedings on retrial after reversal (see §21.18A).

A local rule of court that purports to impose different or additional limits on the time for making a §170.6 motion has no effect. Cal Rules of Ct 3.20. See Govt C §68070(a).

A judge's refusal to accept a peremptory disqualification must be challenged by a writ of mandate within 10 calendar days after service of written notice to the parties of entry of the court's order determining the question of disqualification. CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 276, 2 CR2d 526; *People v Broxson* (1991) 228 CA3d 977, 278 CR 917. See also §21.34.

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§21.10 2. Trier of Fact Must Not Have Determined Contested Issue of Fact

Counsel may challenge a judge under CCP §170.6 only if the judge has not presided at a proceeding involving a determination of contested issues of fact relating to the merits. CCP §170.6(a)(2). It is not always clear, however, whether a judge's particular determination was a decision involving contested fact issues relating to the merits. See §§21.11-21.12 for examples.

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§21.11 a. Examples: When Judge May Be Challenged Following Particular Judicial Determination

Courts in the following cases held that particular determinations or events did not involve contested factual issues relating to the merits and that it was therefore proper to allow the judge to be challenged under CCP §170.6 after the determination:

- Amended information. See *People v Hunter* (1977) 71 CA3d 634, 638 n2, 139 CR 560.
- Arraignment. *Moreira v Superior Court* (1989) 215 CA3d 42, 265 CR 437 (does not normally involve determination of contested issues of law or fact going to ultimate merits of action).
- Continuance motion. *Los Angeles Dep't of Pub. Social Servs. v Superior Court* (1977) 69 CA3d 407, 417, 138 CR 43. Note, however, that if a continuance is requested to try to circumvent the 10-day/5-day rule, a judge may deny the motion. *People v Richard* (1978) 85 CA3d 292, 298, 149 CR 344.
- Demurrer. *Zdonek v Superior Court* (1974) 38 CA3d 849, 113 CR 669, disapproved on other grounds in *Woodman v Superior Court* (1987) 196 CA3d 407, 241 CR 818.
- Hearing to determine competence of defense counsel. *People v Whitfield* (1986) 183 CA3d 299, 304, 228 CR 82.
- Denial of Pen C §995 motion. *Kohn v Superior Court* (1966) 239 CA2d 428, 48 CR 832. See also *People v Superior Court (Cooper)* (2003) 114 CA4th 713, 721, 7 CR3d 862.
- Pen C §1368 proceedings to determine defendant's competence to stand trial. *Waldon v Superior Court* (1987) 196 CA3d 809, 815, 241 CR 123.
- Discovery motion not related to merits of case. *Swift v Superior Court* (2009) 172 CA4th 878, 883, 91 CR3d 504 (civil case).
- Unsuccessful plea negotiations. It appears that a party can file a CCP §170.6 motion after the trial court has rejected a proposed plea agreement. *People v Montalvo* (1981) 117 CA3d 790, 796, 173 CR 51 (in determining whether to accept or reject proposed plea bargain, judge does not determine contested issues of fact; therefore, defendant's motion to disqualify judge who rejected proposed agreement was timely). See also *Fraijo v Superior Court* (1973) 34 CA3d 222, 225, 109 CR 909 (same). For further discussion, see §21.17A.
- Polygraph results shown judge. *In re Jose S.* (1978) 78 CA3d 619, 628, 144 CR 309.
- Summary revocation of probation. *Depper v Superior Court* (1999) 74 CA4th 15, 87 CR2d 563.

Ø **Note:** A judge should not honor a peremptory challenge in only one of two cases before him or her involving the same party; both should be granted to avoid the appearance of judicial impropriety. *Woods v Superior Court* (1987) 190 CA3d 885, 235 CR 687 (judge granted challenge in one of defendant's cases but denied challenge in case in which judge had heard contested issue of fact—a Pen C §1538.5 motion). On challenging judge after reversal on appeal, see §21.18A.

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§21.12 b. Examples: When Judge May Not Be Challenged Following Particular Judicial Determination

In the following cases, the reviewing courts found that a determination of contested factual issues relating to the merits had been made by a particular judge, and therefore precluded that judicial officer from being challenged under CCP §170.6:

- On retrial after mistrial declared. *People v Richard* (1978) 85 CA3d 292, 149 CR 344.
- On relitigation of motion to suppress evidence after court has granted motion. Pen C §1538.5(p); *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 806, 123 CR2d 31; *Barnes v Superior Court* (2002) 96 CA4th 631, 642, 117 CR2d 621; *Woods v Superior Court* (1987) 190 CA3d 885, 235 CR 687; *In re Abdul Y.* (1982) 130 CA3d 847, 851, 182 CR 146. See also *People v Superior Court (Cooper)* (2003) 114 CA4th 713, 718, 7 CR3d 862.
- After trial court has ruled on pretrial motion concerning admissibility of evidence. *People v Bean* (1988) 46 C3d 919, 948, 251 CR 467.
- After trial has begun. *People v Richard, supra*.
- When trial judge presides at probation revocation hearing. *People v Barnfield* (1975) 52 CA3d 210, 123 CR 859.

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3. Determining Timeliness Under Different Calendaring Systems

§21.13 a. Rule When Case Assigned From Master Calendar

If a motion to disqualify a judge under CCP §170.6 is directed to a case that is on a master calendar for assignment to a trial court, the motion must be made to the judge supervising the master calendar no later than the time the case is assigned for trial, *i.e.,* immediately on the announcement of the assignment. CCP §170.6(a)(2); see *People v Wilks* (1978) 21 C3d 460, 466, 146 CR 364; *Moreira v Superior Court* (1989) 215 CA3d 42, 265 CR 437.

Assignment for future trial from a master calendar department is not considered assignment from a master calendar for purposes of this rule. *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 1175, 17 CR2d 815; *People v Escobedo* (1973) 35 CA3d 32, 110 CR 550; *Villarruel v Superior Court* (1973) 35 CA3d 559, 110 CR 861. See also Cal Rules of Ct 10.950-10.951. For the master calendar rule to apply, there must be an assignment of a trial-ready case to a ready courtroom. *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 1177, 17 CR2d 815. The courtroom is considered "ready" if it is available or reasonably expected to become available shortly, *e.g.,* by that afternoon if the assignment is made in the morning. 4 C4th at 1177 n8. If the assignment is not considered one from a master calendar, and the judge's identity is known 10 days before the trial date, the 10-day/5-day rule applies. See §21.15. For discussion of the rule when less than 10 days remain, see §21.17.

An exception applies when neither the attorney nor the client is in court when the case is assigned. When this circumstance occurs, counsel may challenge the judge as soon as he or she discovers the judge's identity. See *People v Montalvo* (1981) 117 CA3d 790, 794, 173 CR 51 (§170.6 affidavit cannot be required before identity of trial judge is known). Also, when counsel has been misled about the identity of the judge to whom he or she is being assigned, counsel should be permitted to execute a §170.6 challenge as soon as the actual judge's identity is known. *People v Bonds* (1988) 200 CA3d 1018, 1022, 248 CR 5.

Ø **Note:** In the Central District of the Los Angeles County Superior Court, the master calendar rule of CCP §170.6(a)(2) cannot be imposed against misdemeanor defendants whose cases are being transferred for trial from one "direct set" courtroom to another within the district. See *Ruiz v Appellate Div.* (2004) 119 CA4th 282, 292, 14 CR3d 190. Although *Ruiz* appears to be limited to Los Angeles County, the reasoning should apply to any county that has a similar calendaring system.

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§21.14 b. Rule When Case Assigned to Judge for All Purposes

When a case is assigned to one judge "for all purposes," a CCP §170.6 challenge must be made to the assigned judge or the presiding judge within 10 calendar days after notice of the all-purpose assignment. CCP §170.6(a)(2). If a party has not yet appeared when the notice issues, however, the challenge may be made within 10 calendar days after counsel's first appearance in the case. CCP §170.6(a)(2). "Appearance" is probably defined as a general, not a special, appearance, because only the former submits the defendant to the court's jurisdiction. *La Seigneurie U.S. Holdings, Inc. v Superior Court* (1994) 29 CA4th 1500, 35 CR2d 175.

Counsel should evaluate whether the assignment is in fact an assignment to a judge for all purposes. The label used by the court does not necessarily control, although it is considered prima facie evidence. *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 1179, 17 CR2d 815. Two prerequisites must be met for the assignment to qualify as an all-purpose assignment. First, it must immediately pinpoint which judge is expected to preside at the trial. 4 C4th at 1180. If the case is assigned to a numbered department but not a named judge, the judge will nonetheless be considered "pinpointed" if (a) a particular judge regularly presides in that department, (b) the judge's identity is either known to the challenger or discoverable on reasonable inquiry, and (c) there is reasonable certainty that the judge will ultimately hear the case, *i.e.,* evidence is produced indicating that the case will likely remain in the department to which it was assigned. 4 C4th at 1180 n11.

The second prerequisite of an all-purpose assignment is that the judge be expected to process the entire case from the time of the assignment. 4 C4th at 1180. This does not mean that the assignment must be made at the very outset of the case; it can qualify as an assignment for all purposes if at the time of assignment substantial matters remain to be processed in addition to trial. 4 C4th at 1180 n12.

It is not clear at what point the 10 days begin to run in a felony case that begins with a complaint. Compare *Flores v Superior Court* (1991) 226 CA3d 797, 277 CR 90 (action did not commence and thus 10 days did not begin to run until information was filed in superior court), with *Le Louis v Superior Court* (1989) 209 CA3d 669, 257 CR 458 (preliminary hearing on felony complaint filed in municipal court is part of criminal action, and therefore §170.6 challenge made at preliminary hearing constitutes one motion allowed under CCP §170.6(a)(3) for entire case).

Courts cannot require counsel to follow the 10-days-after-assignment rule that applies to judges for all purposes when the assignment is in fact made only to a department and not to a particular judge. *Reygoza v Superior Court* (1991) 230 CA3d 514, 281 CR 390; *People v Superior Court (Gonzales)* (1991) 228 CA3d 1588, 279 CR 679.

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§21.15 c. Rule When Case Neither Assigned From Master Calendar Nor Assigned to Judge for All Purposes (10-Day/5-Day Rule)

When a case is neither assigned from a master calendar to a trial court for the trial to begin shortly nor assigned to a judge for all purposes, and the judge who is to hear the matter is known 10 calendar days before the date set for the trial or hearing, a motion to disqualify under CCP §170.6 must be made at least 5 calendar days before the trial or hearing date. CCP §170.6(a)(2). This requirement is called the 10-day/5-day rule and cannot be superseded by local rule. Govt C §68070; *People v Superior Court (Gonzales)* (1991) 228 CA3d 1588, 279 CR 679. See also *People v Superior Court (Lavi)* (1993) 4 C4th 1164, 1173 n5, 17 CR2d 815.

When a case is assigned from a master calendar department to a trial department well in advance of the trial date, rather than on or immediately before the trial date itself, the 10-day/5-day rule applies, and not the master calendar provision discussed in §21.13. *People v Superior Court (Lavi), supra*.

For the 10-day/5-day rule to apply, the trial judge need not be known with absolute certainty 10 days before the trial date; there need only be a reasonable assurance that the judge assigned to the case will in fact hear the case. 4 C4th at 1183. If the assignment is made to a department of a court rather than to a specific judge, the 10-day/5-day rule may still be triggered if a particular judge regularly presides over that department. 4 C4th at 1186. The court distinguished the facts of *Retes v Superior Court* (1981) 122 CA3d 799, 176 CR 160, in which the record indicated that the judge of the assigned department frequently transferred cases initially assigned to him.

Authorities are divided on whether the 10-day/5-day rule is triggered when an assignment is made to a particular department of a court, but not to a particular known judge. Compare *Mackey v Superior Court* (1990) 221 CA3d 1124, 270 CR 905 (assignment to particular department not assignment to judge for all purposes; 10-day/5-day rule applies), and *Reygoza v Superior Court* (1991) 230 CA3d 514, 281 CR 390 (local rule to evade *Mackey* invalid under Govt C §68070), with *Lawrence v Superior Court* (1988) 206 CA3d 611, 617, 253 CR 748 (assignment to particular department triggers 10-day/5-day rule, even though case might later be transferred to different judge for trial), and *Thomas Realty Co. v Superior Court* (1988) 199 CA3d 91, 244 CR 733 (assignment to department same as to particular judge; court said, however, that if different judge there on trial date, and no previous §170.6 challenge, new judge can be challenged).

It is not always clear what effect a continuance has on the 10-day/5-day rule. The following cases held that a motion to disqualify may be filed 5 calendar days before the date to which a trial or hearing is continued: *Zdonek v Superior Court* (1974) 38 CA3d 849, 852, 113 CR 669, disapproved on other grounds in *Woodman v Superior Court* (1987) 196 CA3d 407, 241 CR 818; *Woodman v Selvage* (1968) 263 CA2d 390, 394, 69 CR 687; *Eagle Maintenance & Supply Co. v Superior Court* (1961) 196 CA2d 692, 16 CR 745. One case, *People v Richard* (1978) 85 CA3d 292, 149 CR 344, limited relief in this situation to good faith, good cause continuances.

For discussion of the history and purpose of the 10-day/5-day and master calendar rules, see *People v Superior Court (Lavi), supra*.

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§21.16 d. Rule in One-Judge Courts

If the court in which an action is pending is authorized to have no more than one judge, CCP §170.6(a)(2) requires that the motion be made before the expiration of 30 calendar days after the date of the first appearance of the party or his or her attorney. The right to bring a peremptory challenge in this situation lapses 30 calendar days after the defendant's first appearance in court, whether or not defense counsel appears at that time. *People v Superior Court (Smith)* (1987) 190 CA3d 427, 235 CR 482.

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§21.17 e. Rule in Other Cases

If a case does not fit within the master calendar rule, the one judge for all purposes rule, or the 10-day/5-day rule, the challenge must be made before any juror's name is drawn (CCP §170.6(a)(2); *People v Eaker* (1980) 100 CA3d 1007, 1016, 161 CR 417) or, if there is to be no jury, before the counsel for "plaintiff" makes an opening statement or, if no such statement is made, before any witness is sworn or any evidence is taken. CCP §170.6(a)(2). If the motion is directed to a hearing other than a trial of a cause, it must be made before the hearing begins. CCP §170.6(a)(2).

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§21.17A F. Availability of Motion in Case Involving Plea Bargain

As noted in §21.11, when the trial judge rejects a proposed plea agreement, the case remains in a pretrial posture, and a peremptory challenge that meets the other requirements of CCP §170.6(a)(2) (see §§21.13-21.17) is timely. *People v Montalvo* (1981) 117 CA3d 790, 796, 173 CR 51. This is true even when the trial court has initially accepted the proposed agreement. *Fraijo v Superior Court* (1973) 34 CA3d 222, 225, 109 CR 909. Entry of a guilty plea, however, is the functional equivalent of a trial. *Smith v Municipal Court* (1977) 71 CA3d 151, 153, 139 CR 121. Thus, in *Smith,* the court held that a CCP §170.6 motion made after the defendant had entered a plea in accordance with the agreement was untimely. The court distinguished *Fraijo,* explaining that, when the trial court rejects the proposed agreement, the case remains in a pretrial posture. See also *People v Barnfield* (1975) 52 CA3d 210, 123 CR 859.

Neither party, however, has the right to challenge the trial judge under §170.6(a)(2) when a case is remanded for resentencing after appeal. *Peracchi v Superior Court* (2003) 30 C4th 1245, 135 CR2d 639. See also *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778 (implied term of plea bargain in which judge retains sentencing discretion is that defendant will be sentenced by judge who accepted plea).

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§21.18 G. Availability of Motion in Supplemental Proceedings

A recurrent issue concerns the availability of a CCP §170.6 challenge at a supplemental proceeding. When the judge who presided at trial is charged with conducting a hearing that is "a part or a continuation of the original proceedings," a peremptory challenge will be deemed untimely. *Jacobs v Superior Court* (1959) 53 C2d 187, 190 1 CR 9. See also *People v Barnfield* (1975) 52 CA3d 210, 215, 123 CR 859 (probation revocation hearing is continuation of original proceeding). Thus, in *Barnfield,* the defendant's peremptory challenge was denied as untimely because the judge conducting the probation revocation hearing was the same judge who presided at the trial and the original sentencing hearing.

When, however, a new judge is assigned to the supplemental proceeding, a litigant who has not previously exercised a peremptory challenge in the case may challenge the judge. *People v Smith* (1961) 196 CA2d 854, 856, 859, 17 CR 330. See also *Depper v Superior Court* (1999) 74 CA4th 15, 87 CR2d 563.

Note, however, that when a case is dismissed and refiled, the refiled case is considered a new proceeding for §170.6 purposes. See *People v Superior Court (Cooper)* (2003) 114 CA4th 713, 721, 7 CR3d 862 (after case refiled, judge who granted first Pen C §995 motion could be disqualified from hearing second §995 motion); *Ziesmer v Superior Court* (2003) 107 CA4th 360, 366, 132 CR2d 130 (judge who granted §995 motion could be disqualified after case refiled, because original action terminated with dismissal); *Paredes v Superior Court* (1999) 77 CA4th 24, 91 CR2d 350 (dismissal under Pen C §1382 terminated case; defendant could use peremptory challenge in refiled action even though codefendant had already used peremptory challenge before dismissal).

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§21.18A H. Availability of Motion in Retrial Following Reversal

A peremptory challenge may be made "following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, when the trial judge in the prior proceeding is assigned to conduct the new trial." CCP §170.6(a)(2). Case law construing §170.6(a)(2) has limited the availability of a postremand peremptory challenge to cases in which there is a remand for a new trial. Thus, in *Peracchi v Superior Court* (2003) 30 C4th 1245, 1258, 135 CR2d 639, the reviewing court held that no peremptory challenge was available when the sole task left for the trial court after remand was to resentence the defendant. The court in *State Farm Mut. Auto. Ins. Co. v Superior Court* (2004) 121 CA4th 490, 503, 17 CR3d 146, held that the defendant was not entitled to issue a peremptory challenge against a judge whose ruling was invalidated in pretrial mandate proceedings. See also *Geddes v Superior Court* (2005) 126 CA4th 417, 423, 23 CR3d 857. The court in *Burdusis v Superior Court* (2005) 133 CA4th 88, 34 CR3d 575, held that no basis existed for a peremptory challenge when remand was simply to permit the trial court to consider the record in accordance with new precedent and when remand resulted from reversal of an order that neither addressed the merits nor terminated the action.

Even though a party is normally limited to one peremptory challenge in an action (see §21.6), the statute permits the prevailing party on appeal to bring a peremptory challenge against the trial judge even if that party has already exercised a CCP §170.6 challenge. The motion must be made within 60 days after the party or the party's attorney has been notified of the assignment. CCP §170.6(a)(2). This same rule applies to challenges made after remittitur from a writ proceeding. *Overton v Superior Court* (1994) 22 CA4th 112, 114, 27 CR2d 274.

On making the motion after charges have been refiled following dismissal, see *Paredes v Superior Court* (1999) 77 CA4th 24, 91 CR2d 350, discussed in §21.6.

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§21.19 I. Availability of Motion in Juvenile and Civil Proceedings

A peremptory challenge for prejudice under CCP §170.6 is available in proceedings in juvenile court. *People v Superior Court (Tony S.)* (1975) 44 CA3d 904, 119 CR 125 (Welf & I C §602 case). Peremptory challenges are also available in civil cases. CCP §170.6(a)(1).

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§21.20 J. Stating Peremptory Challenge in Court (Attorney)

The following statement is based on CCP §170.6(a)(5) and is made after the attorney is sworn, usually by the court clerk:

Your Honor, I certify under penalty of perjury that I do not believe _ _[*my client*]_ _ can receive a fair and impartial trial or hearing before _ _[*you/_ _[state name of trier of fact*]_ _]_ _ because of _ _[*your/his/her*]_ _ prejudice against _ _[*me/him/her/his interest/her interest*]_ _. Therefore, under Code of Civil Procedure §170.6, I ask the Court to reassign this case to another judge for _ _[*state type of proceeding, e.g., trial*]_ _.

A sample peremptory challenge form is in California Criminal Law Forms Manual §21.1 (2d ed Cal CEB 2005). Note also that the court may have a form to be used for the challenge.

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K. Strategy Considerations

§21.21 1. Advantages

The biggest advantage of a CCP §170.6 challenge is that it does not require actual proof of bias or prejudice. See §21.8. The only requirement is an allegation of a good faith belief in prejudice. *Solberg v Superior Court* (1977) 19 C3d 182, 137 CR 460. A party's or a party's attorney's belief in prejudice is decisive, and there is usually no way to measure the sincerity of that belief.

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§21.22 2. Disadvantages

The first disadvantage of a CCP §170.6 challenge is that there is no assurance that the next judge assigned to the case will be more "desirable," unless the only available alternatives are well known to counsel. See *Solberg v Superior Court* (1977) 19 C3d 182, 196, 137 CR 460. If counsel uses the challenge for a contested hearing before trial, counsel has no further §170.6 challenges left for the trial judge.

Second, in a single-judge court, disqualification may result in a significant delay until an outside judge is brought into the case. Disqualification may also result in a change in the place and date of trial.

Third, some judges take a §170.6 challenge personally; challenging such a judge may create ill feelings between the attorney and the judge.

Ø **Note:** Defense attorneys can take some of the sting out of challenging a judge by having the client act as the declarant. Another possible approach, if the judge is known sufficiently in advance, is for counsel to file a written motion with the clerk before the first appearance. Often this results in the clerk's transferring the matter, thereby avoiding in-court proceedings on the motion.

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§21.23 3. Discovering Information About Judges

Information about judges is generally acquired through the experience of having appeared before them. Alternatively, there are some published sources of information on judges' backgrounds, *e.g.,* Bogen, Thompson, & Smith, California Courts and Judges, James Publishing Co., ordering information at http://www.jamespublishing.com, and Judicial Profiles, Daily Journal Corp., ordering information at http://www.dailyjournal.com. LexisNexis and Westlaw can be used to search newspaper and magazine articles on the jurist, and an Internet search can be run using the judge's name. A search of published appellate cases in which a trial judge has been reversed or affirmed on appeal may also provide some insight. Reports of bar association committees on judicial evaluations may provide additional information, as may local criminal law practitioners.

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§21.24 4. Judge's View of Peremptory Challenge (CCP §170.6)

Judges should be circumspect about any displeasure they feel at being challenged under CCP §170.6. An excessive reaction may be considered willful misconduct in office. *McCartney v Commission on Judicial Qualifications* (1974) 12 C3d 512, 116 CR 260. Similarly, judges may not refuse to appoint the public defender to cases because of anger over blanket challenges by the public defender. *Moreira v Superior Court* (1989) 215 CA3d 42, 265 CR 437. The best way to handle peremptory challenges is to view them like peremptory challenges to jurors.

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§21.25 5. Defense Considerations in Cases Involving Multiple Defendants

In a multidefendant proceeding, defense counsel should consider the following actions to avoid troublesome situations:

Agreeing on use of CCP §170.6 challenge. If more than one defendant appears in a case, only one §170.6 motion for each side is permitted unless the codefendants have substantially adverse interests. See discussion in §21.5. If one codefendant moves to disqualify a judge without the knowledge or consent of the other defendant, the burden is then on the defendant seeking to exercise an additional challenge to show that he or she has an adverse interest. This task may prove to be difficult or impossible. The problem may sometimes be circumvented if codefendants consult with each other before exercising a §170.6 challenge, so they can see whether it is possible to agree on how and when to exercise it.

Withdrawing CCP §170.6 motion. Occasionally, unknown to each other, both sides file simultaneous §170.6 motions. One party may wish to ask to withdraw its challenge and preserve it for later use. Some judges suggest that a unilateral withdrawal should not be permitted or, if the challenge is withdrawn, that the party's right to a §170.6 challenge should not be reinstated.

Arguing that challenge is no longer applicable, because case or party exercising challenge was dismissed. Even when the defendant who exercised a peremptory challenge is dismissed from the case before it is reassigned, the remaining defendants are unlikely to be successful in arguing either that the disqualified judge should be allowed to try the case or that their right to a §170.6 challenge should be reinstated. Unless the remaining defendant can show that his or her interests are adverse to the interests of the dismissed party (see §21.5), the dismissed party's motion will probably be treated as an exercise of the challenge for that side, and the judge will probably remain disqualified.

Arguing that the challenge was exercised before one defendant was a party. Counsel for a late-appearing defendant may argue that the challenge for the defense was exercised before he or she even became a party. Even in this situation, reinstatement of the right to a §170.6 challenge requires a showing that the newly joined defendant has adverse interests. See §21.5.

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§21.26 6. Tactical Timing of Motion

In multijudge courts, it is important to consider at what point before trial the motion should be exercised. For example, if a case is to be decided at a suppression hearing and the judge assigned to the hearing is notoriously biased against such motions, it would be wise to consider challenging that judge under CCP §170.6.

It is unclear whether the time for making a peremptory challenge in a felony case begins with the filing of a complaint or the filing of the information. See discussion in §21.14.

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Source: Criminal Law/California Criminal Law Procedure and Practice/21 DISQUALIFICATION OF JUDGE/ IV. DISQUALIFICATION FOR CAUSE/§21.27 A. Who Can Be Disqualified; Grounds; Exceptions

IV. DISQUALIFICATION FOR CAUSE

§21.27 A. Who Can Be Disqualified; Grounds; Exceptions

A judge, court commissioner, or referee can be challenged for cause. See CCP §§170.1, 170.5. Juvenile court judges and referees may also be challenged for cause. *In re Arthur S.* (1991) 228 CA3d 814, 279 CR 69. The following discussion uses "judge" to refer to all three triers of fact.

Code of Civil Procedure §170.1(a) specifies the following grounds for disqualification of a judge for cause in any matter:

- The judge has personal knowledge of disputed evidentiary facts concerning the proceeding. CCP §170.1(a)(1).
- The judge has been counsel for any party or has given advice to any party on matters involved in the present action, or in any previous action involving any of the same issues. CCP §170.1(a)(2). Whether a particular proceeding is part of an earlier action is a question of fact that counsel making the challenge must address. *In re Steven O.* (1991) 229 CA3d 46, 279 CR 868 (referee disqualified from hearing probation revocation because he was district attorney in underlying case); *In re Arthur S., supra* (proceeding deemed new Welf & I C §602 petition, not supplemental petition). When at issue, counsel must show that the judge actually participated in the disqualifying action. *People v Peralez* (1971) 14 CA3d 368, 92 CR 256 (former district attorney not disqualified, because evidence showed no actual participation in defendant's previous case).

Ø **Note:** A judge who served as a lawyer for a public agency that is a party to the proceeding is deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the agency concerning the factual or legal issues in the proceeding. CCP §170.1(a)(2)(C).

- The judge has a financial interest in the subject matter of the case or in a party to the case. CCP §170.1(a)(3). See also CCP §170.5(b) (defines financial interest).
- The judge, the judge's spouse, a person within the third degree of relationship to either of them (see CCP §170.5(d)), or the spouse of such a person is a party to the proceeding, or is an officer, director, or trustee of a party. CCP §170.1(a)(4).
- The judge or judge's spouse is related in a specified way to a lawyer or spouse of a lawyer in the proceeding or to someone associated in the private practice of law with one of the lawyers in the proceeding. CCP §170.1(a)(5). See also CCP §170.5(e) (defines private practice of law).
- The judge believes that his or her recusal would further the interests of justice, the judge believes that there is a substantial doubt concerning his or her capacity to be impartial, or a person aware of the facts might reasonably entertain a doubt concerning the judge's ability to be impartial. CCP §170.1(a)(6). See *In re Scott* (1991) 52 C3d 968, 277 CR 201 (judge, a cocaine user, should have recused himself from case in which defendant had sold him cocaine); *People v Enriquez* (2008) 160 CA4th 230, 244, 72 CR3d 718 (judge's comments gave rise to reasonable doubt as to whether he could be impartial in case); *Sincavage v Superior Court* (1996) 42 CA4th 224, 49 CR2d 615 (when judge in three-strikes case was active in prosecution of defendant's prior felonies and had stated earlier that she would recuse herself if she learned that was so, a person knowing these facts might reasonably doubt her impartiality on matters involving priors); *In re Steven O.* (1991) 229 CA3d 46, 279 CR 868 (judge pro tem was district attorney in underlying case; issue waived because no objection in trial court). But see *People v Chatman* (2006) 38 C4th 344, 42 CR3d 621 (mere fact that judge's daughter had been robbed at knifepoint many years earlier did not by itself support doubt of judge's ability to be impartial in similar criminal case; judges' widely varying experiences and backgrounds not directly related to case do not disqualify judges except in extreme circumstances).

Ø **Note:** Potential bias and prejudice in a challenge for cause must be clearly established by an objective standard. When making a challenge for cause, counsel must clearly articulate the potential bias and prejudice. The result seems to turn on the specific facts of each case.

- There is evidence of bias or prejudice toward a lawyer in the proceeding. CCP §170.1(a)(6). See discussion of bias in *People v Carter* (2005) 36 C4th 1215, 32 CR3d 838; *Pacific & S.W. Annual Conf. of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 86, 147 CR 44.
- The judge is unable to properly perceive the evidence or properly conduct the proceedings because of permanent or temporary physical impairment. CCP §170.1(a)(7).
- The judge was the trier of fact; he or she may not participate in any appellate review of the case. CCP §170.1(b).
- The judge has served or has prospective employment as a dispute resolution neutral with a party to the proceeding. CCP §170.1(a)(8).

An appellate court, on its own or a party's motion, may direct that trial court proceedings after appellate review of a case be heard by a different judge from the one whose judgment or order was reviewed by the court. CCP §170.1(c). See *People v Gulbrandsen* (1989) 209 CA3d 1547, 1562, 258 CR 75 (rule stated, but no showing that application of §170.1(c) was required).

A judge may not be challenged for cause because he or she does not belong to the same group, *e.g.,* race or religion, as the challenging party (CCP §170.2(a)), or because the judge has expressed a view on the legal or factual issues involved in the case (CCP §170.2(b)). A judge cannot be disqualified for having helped draft or pass a statute being interpreted or applied unless the judge believes that his or her previous involvement with the statute was so well known that it would raise a reasonable doubt of the judge's capacity to be impartial. CCP §170.2(c).

An attorney does not have to use his or her peremptory challenge before challenging a trier of fact for cause. See CCP §170.6(b); *Pacific & S.W. Annual Conf. of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 80, 147 CR 44.

Only one challenge for cause in a case may be filed by a party against a particular judge unless that party learns of new grounds for disqualification. CCP §170.4(c)(3).

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§21.28 B. Statement of Disqualification (Challenge for Cause)

Judges may disqualify themselves from hearing a case and must notify the presiding judge of their recusal. CCP §170.3(a)(1). If a judge does not disqualify himself or herself from hearing a case, the attorney for any party to the action may challenge the judge under CCP §170.1. The challenge must be made at the earliest practicable opportunity after counsel or the parties discover the facts constituting grounds for disqualification. CCP §170.3(c)(1). See *Alhusainy v Superior Court* (2006) 143 CA4th 385, 394, 48 CR3d 914 (16-day delay made motion untimely). Disqualification must be alleged in a written verified statement that objects to a named judge hearing any issue of fact or law in the action or proceeding, and that sets out the facts that support disqualification. CCP §170.3(c)(1). Counsel must personally serve the judge alleged to be disqualified, or his or her clerk, and must immediately serve a copy on all parties or their attorneys. Counsel should not state mere conclusions, or refer to a large transcript without citing to a specific page and line. *In re Morelli* (1970) 11 CA3d 819, 843, 91 CR 72, and cases cited.

It is not a ground for challenge that a judge appears adverse to one of the parties if that attitude is based on actual observation of the evidence. *Kreling v Superior Court* (1944) 25 C2d 305, 312, 153 P2d 734. See also CCP §170.2(b).

The procedure and manner of filing a statement of disqualification should be strictly followed to avoid an inadvertent waiver. For example, counsel should be sure to verify the statement of disqualification. Compare *Bompensiero v Superior Court* (1955) 44 C2d 178, 183, 281 P2d 250 (statement stricken in its entirety because unverified), with *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 236 CR 193 (substance of attorney's declaration, made under penalty of perjury, held sufficient to excuse lack of verification).

Ø **Note:** Counsel should bear in mind that if the challenged judge contests the disqualification, the judge who decides the question will not be required to hold an evidentiary hearing and may decide solely on the basis of documents already filed. CCP §170.3(c)(6). See §21.33. Therefore, it is incumbent on counsel to include the entire evidentiary basis for the challenge in the original papers rather than waiting to ascertain how the trial judge will defend before fleshing out the challenge.

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§21.29 C. Possible Responses by Judge Being Challenged

A challenged judge may respond in one of three ways:

- File a written verified answer admitting or denying the allegations and setting forth any additional information relevant to disqualification. CCP §170.3(c)(3);
- File a consent to the disqualification and notify the presiding judge to appoint a replacement. CCP §170.3(c)(3); or
- Strike the statement of disqualification on the ground that it was untimely filed or discloses no legal grounds for disqualification. CCP §170.4(b).

A judge who wishes to file a consent or an answer must do so within 10 calendar days after service or filing of the challenge, whichever is later. CCP §170.3(c)(3). The judge's power to strike the statement as legally insufficient must be exercised within the same 10-day period. *Lewis v Superior Court* (1988) 198 CA3d 1101, 1104, 244 CR 328. Failure to respond to the charge or strike the statement of disqualification within the 10 days allowed for an answer is treated as a consent. CCP §170.3(c)(4); *Lewis v Superior Court, supra*.

Although §170.4(b) allows a judge to strike a statement of disqualification that was untimely filed, it is unclear what constitutes an untimely challenge for cause. The only guideline appears to be the language in CCP §170.3(c)(1) that the statement is to be presented "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification."

Trial judges frequently respond to a challenge for cause by simply striking it as untimely or as failing to state grounds for disqualification under CCP §170.4(b). Neither the procedure by which the challenged judge determines the sufficiency of the challenge nor the underlying issue of bias may be reviewed on appeal. Because the procedure can be challenged only by a prompt petition for writ of mandate (see §21.34), counsel must be prepared to pursue writ remedies through the California Supreme Court in order to preserve any federal constitutional questions concerning bias for federal habeas corpus proceedings in the future. See chap 45 on federal habeas corpus. The clerk must send a copy of any statement or consent to all parties who have appeared in the action or proceeding, or to their attorneys. CCP §170.3(c)(3).

> Ø **Note:** When a judge finds that the ground for disqualification is not based on the judge's personal bias against a party, earlier participation in the case as an attorney, or status as a material witness in the case, the judge can ask the parties to waive the disqualification. CCP §170.3(b)(1).

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§21.30 D. Powers of Judge Either Disqualified or Being Challenged

When a statement of disqualification is filed, the judge loses authority to make orders or take other actions in the case, except those specified in CCP §170.4, until the question of disqualification has been decided. CCP §170.4(d). A challenged or disqualified judge may:

- Take any action necessary to maintain the court's jurisdiction until another judge is assigned. CCP §170.4(a)(1).
- Request another judge agreed on by the parties to act in the judge's place. CCP §170.4(a)(2).
- Hear and determine default matters. CCP §170.4(a)(3).
- In eminent domain matters, issue an order for possession before judgment. CCP §170.4(a)(4).
- Set proceedings for trial or hearing. CCP §170.4(a)(5).
- Conduct a settlement conference. CCP §170.4(a)(6).
- Strike the statement of disqualification as untimely or legally insufficient. CCP §170.4(b).
- Continue to preside over a hearing or trial that began before the statement of disqualification was filed. CCP §170.4(c).

Ø **Note:** For purposes of CCP §170.4(c), the trial or hearing is considered to have begun after the start of voir dire, the swearing of the first witness, or the submission of a motion for decision. In this situation, the challenged judge may continue to hear the matter but must refer the disqualification issue to another judge for decision in the meantime. See §21.31. If the challenged judge is ultimately disqualified, all orders and rulings in the case made after the challenge was made must be vacated. CCP §170.4(c)(1).

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§21.31 E. Procedure After Challenge for Cause and Any Response Filed

All questions about a judge's disqualification are to be heard and determined by some other judge agreed on by the parties or, if there is no agreement within *5 calendar days* after the challenged judge's answer, by a judge selected by the Judicial Council chairperson. CCP §170.3(c)(5).

A judge who is disqualified, despite the disqualification, can ask the judge who has been agreed on by the parties to sit in his or her place. CCP §170.4(a)(2).

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§21.32 F. Waiving Disqualification; Exceptions

The parties and their attorneys may stipulate to waive any disqualification unless the basis for the disqualification is (1) the judge's personal bias or prejudice against a party; (2) that the judge was an attorney in the case; or (3) that the judge was a material witness in the case. CCP §170.3(b)(2).

A stipulation waiving disqualification of a judge must state the basis for the disqualification, be signed by the parties and their attorneys, and be filed with the court. CCP §170.3(b)(1). The court may then proceed with the performance of all duties connected with the case with the same legal effect as if no disqualification existed. See CCP §170.3(b)(1).

Judges are not to try to induce a waiver, nor to try to discover which parties favored or opposed a waiver, but they may ask the parties if they wish to waive the disqualification. CCP §170.3(b)(3).

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§21.33 G. Hearing on Challenge for Cause

There is no absolute right to an evidentiary hearing on a motion to disqualify a judge. *Garcia v Superior Court* (1984) 156 CA3d 670, 680, 203 CR 290, disapproved on other grounds in *People v Jenkins* (1987) 196 CA3d 394, 241 CR 827. The judge hearing the motion may decide the question on the basis of the motion papers and such written arguments as the judge requests. CCP §170.3(c)(6). If a hearing is granted, the court must hear argument but is required to take evidence only if a party shows good cause for taking evidence. CCP §170.3(c)(6).

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§21.34 V. REVIEW OF DISQUALIFICATION ORDER

Review of orders concerning both peremptory challenges and challenges for cause can be accomplished only by a petition for writ of mandate, filed within 10 calendar days after service of written notice of entry of the court's order determining the question of disqualification. CCP §170.3(d); *People v Hull* (1991) 1 C4th 266, 276, 2 CR2d 526 (§170.3(d) applies to both peremptory challenges and challenges for cause). *People v Webb* (1993) 6 C4th 494, 24 CR2d 779. These orders are not appealable. CCP §170.3(d). See *People v Carter* (2005) 36 C4th 1215, 1243, 32 CR3d 838.

Ø **Note:** Although a disqualification order is not appealable, the inherent authority vested in the trial court to reconsider its own rulings may allow another judge of the court to correct an erroneous grant of a disqualification motion even when the original judge has no authority to vacate the erroneously granted order. See *Geddes v Superior Court* (2005) 126 CA4th 417, 425, 23 CR3d 857 (civil case). Furthermore, in the interests of justice under CCP §170.1(c), an appellate court on its own motion may direct that further proceedings be heard by a trial judge other than the judge who issued the order being reviewed. See, *e.g., Alhusainy v Superior Court* (2006) 143 CA4th 385, 48 CR3d 914. Only the parties to the proceeding may seek review of an order concerning a challenge. CCP §170.3(d). The prosecution is a party that may seek such review. *Flier v Superior Court* (1994) 23 CA4th 165, 169, 28 CR2d 383.

For further discussion of the use of writ petitions to review disqualification issues, see Appeals and Writs in Criminal Cases §7.24 (3d ed Cal CEB 2007).

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22

LINEUPS AND IDENTIFICATION

DOUGLAS W. OTTO
BRENTFORD J. FERREIRA

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§22.1 I. OVERVIEW

The prosecution usually presents eyewitness identification testimony as extremely reliable—the linchpin in determining the admissibility of identification testimony. See *U.S. v Field* (9th Cir 1980) 625 F2d 862. The defense is most likely to take a view more in keeping with that of Justice Felix Frankfurter in his book The Case of Sacco and Vanzetti (1927): "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy." In particular, when an eyewitness's identification of a stranger is based on a single, quick encounter, the witness's level of certainty about the identification may not always correlate to the accuracy of the identification. *People v Alvarado* (2006) 141 CA4th 1577, 1585, 47 CR3d 289 (citing this text). Everyone agrees that accurate eyewitness identifications both help to ensure that the innocent are not convicted and assist law enforcement in the timely and proper investigation of a crime.

It has long been recognized that a variety of circumstances can undermine the reliability of eyewitness identifications. As early as 1957, research showed that when an event is unexpected, an identification may be less reliable. See Bruner, *On Perceptual Readiness,* 64 Psych Rev 123 (1957); Burtt, Applied Psychology (1957). Likewise, strong emotions experienced either at the time of the observation or later when reporting the observation tend to increase the probability of error. See Anastasi, Fields of Applied Psychology (1964). Even when initial perceptions are good, the memory begins a rapid decline. See Clifford, *The Relevance of Psychological Investigation to Legal Issues in Testimony and Identification,* 1979 Crim L Rev 153 (1979).

As a result of these and other findings, extensive attention has been devoted to the reliability of eyewitness identification by both social scientists and law enforcement. For example, in 1999 and 2003, the National Institute of Justice, the research branch of the U.S. Department of Justice, issued reports that recognize nearly 20 years of psychological research that reveal "investigators' unintentional clues… negatively impact the reliability of eyewitness evidence." These same reports also discuss the merits of using "blind lineup" procedures in order to promote "reliability, fairness, and objectivity." See U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999), available at http://www.ncjrs.gov/pdffiles1/nij/178240.pdf, and U.S. Department of Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement (2003), available at http://www.innocenceproject.org/docs/NIJ%20training%20manual.pdf.

For a more detailed discussion of eyewitness identification, see Loftus, Doyle, & Dysart, Eyewitness Testimony: Civil and Criminal (4th ed 2008); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony of the Unreliability of Eyewitness Identification,* 29 Stan L Rev 969 (1977); Sobel, Vogelman, & Ruoof, Eyewitness Identification 2006 Edition (2005); Wells & Loftus, Eyewitness Testimony: Psychological Perspectives (1984); Schmechel, O'Toole, Easterly, & Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence,* 46 Jurimetrics (Winter 2006).

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§22.2 II. TERMS

Eyewitness identifications can be made at or near the crime scene or can be made later through the viewing of photographs or at an in-person lineup organized by law enforcement. The terms "lineup," "photo ID," and "showup" will be used as follows in this chapter:

- **Lineup.** A police identification procedure by which the suspect in a crime is exhibited, along with others with similar physical characteristics, before a victim or witness to see whether the suspect can be identified. To be valid, the lineup must meet certain standards and be free of undue suggestiveness. *U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.
- **Photo ID.** A procedure in which a photo of the suspect is shown to the witness for identification. The witness may either view a single photograph to confirm the identity of the suspect or select the suspect from a series of photographs of different individuals. Often "photo showup," "photographic lineup," "six-pack," "mug run," "photo spread," or "mug book" are used to describe this identification procedure.
- **Showup.** An in-the-field identification procedure as a result of exigent circumstances in which one or more suspects are exhibited to victims or witnesses. It is generally conducted close to the time and location of the incident, but is inherently suggestive.

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III. IDENTIFICATION PROCEEDINGS

A. Lineups

§22.3 1. Description of Lineups

Lineups are generally held by the local police agency at a police station or jail. The number of individual lineups held at any one session varies from one jurisdiction to another. Generally, lineups take place in a special viewing area with some barrier to prevent the lineup subjects from viewing the witnesses. The barrier may be one-way glass, lighting, screens, a peephole, or a combination of those things. The number of subjects in any lineup varies from jurisdiction to jurisdiction, but is normally from four to ten, with six being the most common number. The number and quality (similarity) of the subjects may be limited by the size of the custody population, since they are normally selected from the jail inmate population. Small jail populations create problems for law enforcement in obtaining enough subjects similar to the suspect for a legally sufficient lineup; therefore, many investigative agencies now conduct their lineups at large county jails in metropolitan areas. (The Los Angeles Police Department uses the Los Angeles County Jail, which is run by the Los Angeles Sheriff's Department, for its lineups.)

The subjects in a lineup are usually presented to the witness all at once. They may file onto the stage from a side entrance or become visible when a curtain opens or when the stage area is illuminated. At that time the subjects are often asked to turn, stopping at the four points of the compass, and to walk the length of the viewing area so that they present all profiles to the witnesses. The subjects may be asked to repeat certain words or phrases used during the commission of the crime (*People v Neely* (1999) 70 CA4th 767, 789, 82 CR2d 886; *Garcia v Superior Court* (1991) 1 CA4th 979, 2 CR2d 707), or to try on a certain item of clothing, such as a jacket or hat (*People v Stanton* (1969) 274 CA2d 13, 78 CR 771). The purpose of such try-ons is to simulate the appearance of the person who committed the crime and not to see if the clothing or object fits one of the people in the lineup. If one participant in the lineup is asked to do a particular thing, all subjects should be asked to do the same thing.

The theory of the lineup is that, by providing a closed environment with a number of similar choices, a fair identification can be obtained. Efforts are made to eliminate any suggestion of influence based on anything other than the view by the witness. Keeping this concept in mind may help the attorney anticipate and eliminate a situation that could cause problems.

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§22.4 2. Right to Counsel at Lineup

Defendants are entitled to counsel at a lineup or showup after the indictment or after the accusatory pleading has been filed. *U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926; *Gilbert v California* (1967) 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951. Under *Wade-Gilbert*, testimony by a witness who identified the accused at a lineup or showup that was held in violation of the right to counsel is inadmissible per se.

Defendants also have the right to counsel at precharging lineups. *People v Bustamante* (1981) 30 C3d 88, 177 CR 576. This is true despite passage of Cal Const art I, §24, part of Proposition 115, which declares that the California Constitution no longer provides a basis independent of the U.S. Constitution for the right to counsel. The court in *Raven v Deukmejian* (1990) 52 C3d 336, 276 CR 326, held art I, §24 to be an invalid revision of the California Constitution, and specifically cited *Bustamante* as a still-viable example of independent state grounds.

Despite *Bustamante,* evidence of identification at a preindictment lineup cannot be excluded on the ground that the defendant did not have counsel. Federal law controls on the issue of exclusion of evidence, and federal law allows exclusion only when a defendant was denied counsel at a lineup following indictment. See *Kirby v Illinois* (1972) 406 US 682, 32 L Ed 2d 411, 92 S Ct 1877 (states federal rule); *People v Cook* (2007) 40 C4th 1334, 1353, 58 CR3d 340; *People v Johnson* (1992) 3 C4th 1183, 1222, 14 CR2d 702. If counsel was not present, the remedy is a civil action for violation of a state constitutional right. If no advice was given on the right to counsel or if the right to counsel was denied and the suspect refused to participate in the lineup, the question arises whether the prosecution can be barred from using that refusal as evidence of guilt.

> Ø **Note:** The defendant can waive the right to counsel at a lineup. *U.S. v Wade* (1967) 388 US 218, 236, 18 L Ed 2d 1149, 1162, 87 S Ct 1926; *People v Wells* (1971) 14 CA3d 348, 354, 92 CR 191 (describing effective waiver). However, merely informing the defendant of his right to have counsel present at the lineup is insufficient to support a waiver of that right unless he is also told that an attorney will be appointed if he cannot afford one. A *Miranda* warning during interrogation, before the lineup, will not support a waiver of the right to counsel at the lineup. See *People v Banks* (1970) 2 C3d 127, 134, 84 CR 367. The defendant need not be informed of the obvious purpose of a lineup to make an effective waiver of the right to counsel. *People v Tribble* (1971) 4 C3d 826, 94 CR 613.

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§22.5 3. Advantages of Fair Lineup

A fair lineup represents the earliest, cheapest, and best way of protecting an innocent person. If the result of the lineup is a "no-ID" or a "mis-ID," it is possible that no charges will be filed. The prosecution has a strong interest in seeing that innocent people are not accused of a crime or held in jail. Misidentification also compromises the ability of law enforcement to properly investigate a crime, by both delaying the pursuit of truth and injecting a tone of unreliability into the investigation process.

When the suspect may be guilty, the prosecution wants to build the strongest possible case. An identification based on a fairly conducted lineup helps put any identification issue to rest. The prosecution enjoys a further benefit from a lineup in that it will often solidify the witness's recall of the events of the crime if the lineup participant is in fact identified.

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4. What Defense Counsel Should Do at Lineup

§22.6 a. Theory of Representation at Lineups; What to Bring

There are two divergent theories of how a defense attorney should approach a lineup; commentators disagree on which is better. One calls for the attorney to merely observe and take no action or make any objection to the lineup, in the hope of obtaining a tainted lineup, and then having the identification excluded at trial. The California Supreme Court, in *People v Bustamante* (1981) 30 C3d 88, 99 n7, 177 CR 576, overruled on other grounds based on Proposition 8 in *People v Johnson* (1992) 3 C4th 1183, 1222, 14 CR2d 702, adopted language from Justice Mosk's dissent in *People v Williams* (1971) 3 C3d 853, 860, 92 CR 6, that supports this choice: "At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness." This holding from *Bustamante* was cited as controlling in *People v Wimberly* (1992) 5 CA4th 773, 786, 7 CR2d 152.

The other theory calls for the attorney to object to any errors he or she believes are occurring. See *People v Stearns* (1971) 14 CA3d 178, 183, 92 CR 69 ("It is an idle gesture to give to a defendant the right to the presence of counsel at this stage of the criminal proceeding and not to require such counsel to take affirmative action at that time to protect the rights of the accused"). For example, this ensures that law enforcement officials at the lineup do not attempt to use undue influence by making statements such as, "Doesn't number 4 look familiar to you?" Although *U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926, discussed in §22.4, did not expressly define the role of defense counsel at a lineup, the court did indicate that counsel was required to assure meaningful confrontation and eliminate risks of abuse and unintentional suggestion, to prevent unfairness, and to preserve the defendant's basic right to a fair trial. If counsel is prevented from taking an active role, steps should be taken to preserve the *Wade* rationale. When objecting to the lineup procedure, counsel should clearly state (preferably in writing) any objections to the manner in which the lineup is conducted. Even if, after objection, the officers conducting the lineup refuse to make any changes to any aspect of the lineup process, putting objections on the record may be helpful at a later hearing to suppress any identification. The argument in favor of this theory of defense attorney participation at lineups is that, whether a client is guilty or innocent, the fairer the lineup, the better the chance that the client will not be identified. Both the People and the defense are better served by a fair lineup that genuinely tests the witness's recollection. On what defense counsel can do to help ensure a fair lineup, see discussion in §22.12.

Whichever approach is selected, counsel must be prepared to attend lineups on very short notice. Counsel should have a lineup folder in his or her briefcase that has everything needed: a summary of case law concerning lineups (such as a copy of this chapter), a seating chart, a characteristics chart, a sheet with choices for eyewitnesses to mark at the lineup, carbon paper, pens and pencils, and blank paper. See §22.13. A blank piece of paper with the typed caption "Lineup Objection" will add credibility to any written objection made at the lineup, and provide for a better presentation if a motion to suppress an identification is made later. Bringing a camera with high-speed film or a videotape camera, if permitted, can also assist in providing a record of what occurred in jurisdictions that do not routinely photograph lineups.

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§22.7 b. Lineup Team

It is preferable for counsel to bring at least one other person to lineups who can be a credible witness. The ideal person is either another lawyer or an investigator, but paralegals and law students are also possible candidates. The use of another person is most important in providing a witness to describe the event should a description be needed for any motions or at trial, or to photograph or videotape the lineup. Neither the defendant nor the attorney should be placed in the position of becoming a witness. See §2.18 on the attorney as witness.

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c. Activities Before Lineup Begins

§22.8 (1) In General

Defense counsel should arrive as early as possible (at least 1 hour early is recommended), sign in, note the arrival time, and contact the officer conducting the lineup (usually the investigating officer). If the lineup is being held before charges are filed, it provides an excellent opportunity for defense counsel to find out information from the investigating officer that may provide insight into issues or problems, and how seriously the police regard the client as a suspect. Also, the investigating officer may be able to tell counsel whether a prosecutor will be attending the lineup and may provide copies of police and crime reports, or at least give him or her the opportunity to read them.

It is absolutely imperative that counsel, whenever possible, speak to the client and prepare him or her for the lineup experience. The client will be nervous and everything possible should be done to eliminate the unexpected for the client.

There may also be time to do the following:

- Observe the witness or witnesses as they arrive, noting their physical and mental condition and with whom they arrive (*e.g.,* with a police officer, another witness) while correlating their name(s), physical appearance(s), and seating position(s);
- Have an investigator speak with each witness, write down the information, and ask the witness to sign it;
- Meet and speak with the prosecutor; and
- Observe the relationship between the witness and police.

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§22.9 (2) Procedure if Counsel Will Be Late in Arriving

If counsel will be delayed in arriving, he or she should make every effort to contact the police or the prosecutor to explain the reason for the delay, let law enforcement know that counsel represents the client and wishes to be present for the lineup, and give an estimated time of arrival. Otherwise, the lineup may be held in counsel's absence.

Counsel should obtain the name and phone number of the person spoken to. The police are required to wait a reasonable amount of time before beginning a lineup without counsel. *People v Keim* (1970) 8 CA3d 776, 87 CR 597 (starting lineup after waiting only half an hour was reversible error).

Ø **Note:** What constitutes a "reasonable delay" was not explained in *Keim.* Defense counsel's best course is good communication with law enforcement at the location where the lineup is being held and documentation of all interactions with law enforcement before the beginning of the lineup.

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§22.10 (3) Interviewing Client

If counsel is called by the accused before the lineup, or is able to interview the accused before the lineup takes place, counsel should tell him or her to consent to booking, including a face photograph and fingerprints. These procedures are not covered by the privilege against self-incrimination because they are considered noncommunicative. See *Schmerber v California* (1966) 384 US 757, 764, 16 L Ed 2d 908, 916, 86 S Ct 1826. The client should be told not to talk to *anyone* about the crime, and not to talk to the police or consent to any other police procedure without having defense counsel present. Defense counsel should then call the jail and talk to the watch captain, if possible. Counsel should tell the person spoken to that counsel is representing the defendant and does not want the police to talk to him or her and does not want any type of identification procedure conducted without counsel present. Counsel should write down the name and phone number of the person spoken to, and, depending on the jurisdiction, may want to send or have delivered a written confirmation of that conversation.

The chances of speaking with the accused are much greater if counsel arrives at least 1 hour before the scheduled lineup. Counsel who is able to interview the client before the lineup should discuss the lineup and advise the defendant to be natural and, most of all, listen to the officer's instructions. If the client does not speak English, counsel should arrange for all instructions to be given in the defendant's language as well as English; counsel should instruct the client to wait for the full translation before following any instruction.

Counsel should ask if the client has any injuries that might need to be covered during a lineup, *e.g.,* a limp, bandage, or scar. If the client is wearing the clothes in which he or she was arrested, counsel should ensure that the client is allowed to change into jail clothing like that of the other lineup subjects. See *People v Floyd* (1970) 1 C3d 694, 83 CR 608, disapproved on other grounds in *People v Wheeler* (1978) 22 C3d 258, 287 n36, 148 CR 890 (not unfair to force defendant to wear pants in which he was arrested in lineup, because they did not make him stand out).

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§22.11 (4) Client's Refusal to Participate in Lineup

If the client is considering not participating in the lineup, counsel should advise him or her that a refusal is admissible at trial. *People v Johnson* (1992) 3 C4th 1183, 1221, 14 CR2d 702. See also *People v Carter* (1972) 26 CA3d 862, 103 CR 327 (defendant's volunteered statement that he did not want to participate in lineup was admissible at trial even though he eventually did participate).

A suspect may be required to do things such as move or gesture, stand in front of a witness, model clothing, or speak for the purpose of a voice sample. The privileges in the federal and state constitutions in the Fifth Amendment and Cal Const art I, §15, do not apply, because they protect a person only from being forced to testify on criminal matters and do not bar the use of a person's physical attributes as evidence against the person. See *People v Williams* (1977) 68 CA3d 36, 137 CR 70; *In re Marshall K*. (1970) 14 CA3d 94, 92 CR 39.

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§22.12 (5) Defense Counsel's Actions to Help Ensure Fair Lineup

Counsel should observe and note everything that occurs at the lineup. If a prosecutor is present, counsel should discuss identification procedures with him or her. If not, counsel should see the investigating officer. In some counties, one officer conducts all lineups.

Defense counsel should read over the admonition and identification slip that will be given to the witness, and ask the prosecutor to substitute counsel's previously prepared form if the standard one used by law enforcement is unfair, *e.g.,* does not give the witness the option of positively stating that a participant in the lineup is not the person responsible for the crime. Most important, counsel should establish before the actual lineup whether multiple witnesses will attend. If so, counsel must assure that there are no opportunities for any witness to influence any other possible identification during the course of the lineup(s).

If defense counsel's verbal request for a change in the lineup is refused, counsel must ensure that both police and the prosecutor will remember the objection. To accomplish this, counsel should always have paper, a pen, and carbon paper, and should write out the verbal request that was refused and ask the police or prosecutor to sign it. If they refuse, counsel should note that fact on the paper, including the names of the people who refused. Copies should be given to the police and prosecutor at that time.

If counsel is given the opportunity to view the lineup before it is seen by witnesses, and counsel determines to try to make the lineup as fair as possible, he or she should actively make recommendations for changes when necessary.

> Ø **Note:** Because prevailing law holds that counsel is a mere observer at lineups (see *People v Wimberly* (1992) 5 CA4th 773, 7 CR2d 152), diplomacy and tact, not legalese and an overbearing attitude, are likely to be most helpful to the client.

Defense counsel should strive for the least amount of disparity possible between the appearance of lineup participants. Some of the possible factors to consider include the following:

Singling out individuals. Any action that takes place on the stage should be done equally by all participants. This includes trying on clothes, movement, and statements. Special care must be exercised if a witness requests that certain participants repeat some action or take some new action; all members of the lineup should do the same thing.

Language. Lineup participants who do not understand English will find it impossible to obey instructions on stage. Also, if the lineup participants are to repeat certain words, then participants must be selected who are similar not only in appearance, but also in voice. For example, although six people are similar looking, if the perpetrator of the crime has a New York accent, and only one of six lineup participants has a New York accent, it is not hard to conclude who will be picked from the lineup.

Clothing and objects. All try-ons should be conducted before the lineup begins to be sure the clothes or accessories fit properly.

All participants should be dressed the same. This does not mean that a witness may not identify clothing, only that a person should not be in the clothing when it is identified. By placing the clothing on a hanger, it can be presented to the witness.

It is preferable that participants in a lineup be in jail clothing because street clothes can create an outside influence that may unfairly affect the lineup. This is particularly true when the prime suspect is the only participant dressed in clothing similar to that worn by the perpetrator.

> Ø **Note:** Case law is not favorable to the defense on the need for similarity of clothing, so it is important for defense counsel to step in and try to make sure the participants are dressed in a similar way. Examples of convictions that were upheld despite great disparities in clothing are *In re Robert W.* (1977) 68 CA3d 705, 710, 137 CR 558 (although court criticized lineup, in which defendant was forced to wear victim's coat, which he was wearing when arrested, conviction not reversed); *People v McDaniels* (1972) 25 CA3d 708, 102 CR 444 (defendant was only one in lineup wearing same color shirt as perpetrator; no error); *People v Thomas* (1970) 5 CA3d 889, 86 CR 97 (suspect was barefoot and wore tattered blue denim shirt; two other participants wore white

and black pants with cummerbund; final two wore "dirty street clothing"; lineups were not "unnecessarily suggestive"); *People v Stanton* (1969) 274 CA2d 13, 15, 78 CR 771 (defendant, who was bare-chested before lineup, was required to wear green shirt that robber had worn during holdup; no error).

Height. Great disparity in height may result in reversal. See *Foster v California* (1969) 394 US 440, 22 L Ed 2d 402, 89 S Ct 1127 (error based in part on six-foot suspect in line with five-foot-five and five-foot-six persons). There are ways of trying to equalize height. For example, in *People v DeSantis* (1992) 2 C4th 1198, 9 CR2d 628, the defendant was asked to stand on books so that his five-foot-four-inch height was somewhat similar to the height of the other participants. The court had no trouble with this procedure because the witness could not see the books.

Race. The courts frequently find error when a defendant stands out in a lineup because of race. See, *e.g., People v Carpenter* (1997) 15 C4th 312, 366, 63 CR2d 1; *People v Caruso* (1968) 68 C2d 183, 65 CR 336 (defendant was only large, dark Italian-American male with wavy hair); *People v Hogan* (1968) 264 CA2d 254, 70 CR 448 (defendant was only African-American in lineup).

Unusual physical characteristics. Unique problems arise when a suspect is at the extreme end of any characteristic, such as when the suspect weighs 300 pounds or has a heavily scarred face. Attorneys should attempt to anticipate those problems and seek unique solutions. One method is to conceal the unique item from the witness's view. Clothing, hats, and tape can be used to conceal many unique features. Another method is to try to find lineup participants who are similar.

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§22.13 d. Defense Counsel's Activities During Lineup

Once the procedures for the lineup are fixed, defense counsel has two main areas of concern: the subjects in the lineup and the witnesses to the lineup. Of the two, it is usually more important for counsel to observe the witnesses than to observe the subjects in the lineup, because either the police will photograph or videotape the lineup, or counsel can have someone do it. A sample lineup characteristics chart is in California Criminal Law Forms Manual §22.1 (2d ed Cal CEB 2005). Counsel should find out ahead of time whether the police will photograph or videotape the lineup and, if not, arrange for another person to be present to do that. Counsel must ensure ahead of time that the police will allow the defense to photograph the lineup; if not, a court order should be requested.

There are a great many time pressures at a lineup. Things may be going very slowly when suddenly 15 witnesses arrive and counsel cannot keep track of what occurs in a short time. There are several devices that can help counsel save time in recording objections and observations. This is true whether counsel is alone or accompanied by an assistant.

Counsel should bring a piece of paper set up like a seating chart, with a box for each witness's seat. Each witness's name and a brief physical description can be written in the square representing where each witness is sitting. Be sure to write down whether the witness wears glasses, contact lenses, or a hearing aid.

Counsel should also bring a "characteristics chart" that has numbered places across the top for each person who will appear in the lineup, and a list of general physical characteristics down the left. Typical characteristics are hair color, hair style, skin color, eye color, height, age, distinguishing marks, special features, and voice. In this way, counsel can go down the list and record a complete description of the subjects in less time than starting from scratch. Room should be left on the chart to record any unusual occurrences during the lineup, such as someone turning left when told to turn right, laughing, grinning, etc.

Counsel should watch the witness(es) as each member of the lineup is asked to move or speak, and write down if the witness makes any entries on the identification sheet, when those entries are made, and any hesitation or erasures. Counsel should write down any attempt by a witness to communicate with anyone else before completing the identification form.

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§22.14 e. Defense Counsel's Activities After Lineup

It is crucial for counsel to be present at any post-lineup conference between police investigators and witnesses. Some investigating agencies make it common practice to ask witnesses questions about their identification or lack of identification of the defendant at the conclusion of the lineup. Defense counsel has the right to be present while this questioning occurs and can ask that the lineup identification be suppressed if counsel is not allowed to be present. *People v Williams* (1971) 3 C3d 853, 92 CR 6 (conviction reversed because defense counsel was excluded from immediate post-lineup police interrogation of witness). Compare *Williams* with *People v Carpenter* (1999) 21 C4th 1016, 90 CR2d 607 (identifications admissible; although counsel was excluded from post-lineup interviews, trial court could have credited detective's testimony that witnesses marked identification cards during lineup). Suppression of the lineup identification because of infringement of the right to counsel does not mean, however, that the witness will not be allowed to identify the defendant in court. An in-court identification will be allowed unless it was tainted by unduly suggestive and unnecessary lineup procedures. *Manson v Brathwaite* (1977) 432 US 98, 114, 53 L Ed 2d 140, 97 S Ct 2243; *People v DeSantis* (1992) 2 C4th 1198, 9 CR2d 628.

Ø **Note:** Counsel does not have the right to be present at interviews conducted after witnesses have left. *People v Mitcham* (1992) 1 C4th 1027, 5 CR2d 230; *People v Williams* (1971) 3 C3d 853, 857, 92 CR 6.

To be entitled to be present at a post-lineup police interview with a witness, defense counsel must ask to be present. *People v Perkins* (1986) 184 CA3d 583, 591, 229 CR 219 (after defense counsel left, deputy questioned victim who had failed to make identification; no error because defense counsel made no request to be present if such a session were held).

Counsel may wish to find out what factors the witness considered in making or not making an identification; how sure the witness is of the identification, *e.g.,* on a scale of 1-100; if the witness was shown photographs before the lineup; and what the police told the witness about who would be in the lineup.

The person conducting the lineup may provide defense counsel with copies of relevant lineup evidence, *e.g.,* any written identification card filled out by the witness. Counsel should provide the police investigator with a self-addressed stamped envelope to ensure that items that must be photocopied will later be sent to counsel. See the sample witness identification sheet in California Criminal Law Forms Manual §22.2 (2d ed Cal CEB 2005).

Once any post-lineup witness interviews are completed, counsel should see the client and tell him or her the results of the lineup. Then counsel should prepare a report summarizing what occurred. It should include the seating chart, the characteristics chart, and any additional information that was not written on them because of time constraints. All notes made at the lineup should be attached. Counsel should review any problems or errors in conducting the lineup and any attempts to correct those errors. Copies of material provided by the police or prosecutor, or objections or material given to them by defense counsel, should also be included. If counsel interviewed the client, or attempted to interview the client, that fact should be included. Notes from the actual interview with the client should be kept separate from other ID information because they are work product and not discoverable if defense counsel is called as a witness to the identification proceeding.

It is not unusual for defense counsel who attended a lineup to be called as a witness. Counsel should keep this in mind when preparing the lineup report, and make sure that it will be intelligible in several months or even years.

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§22.15 B. Photo Identifications

A photo identification is usually made from a group of loose photos, a folder containing five to ten photos, or a single photo. There is no right for counsel to be present at a photo identification proceeding. *U.S. v Ash* (1973) 413 US 300, 37 L Ed 2d 619, 93 S Ct 2568; *People v Rist* (1976) 16 C3d 211, 217, 127 CR 457; *People v Lawrence* (1971) 4 C3d 273, 93 CR 204.

The prosecution is not required to hold a physical lineup before holding a photographic lineup when the defendant is in custody. *People v Rist* (1976) 16 C3d 211, 217 n5, 127 CR 457.

In challenging the fairness of a photographic lineup, the burden is on the defendant to show that the lineup was so impermissibly suggestive "as to give rise to a very substantial likelihood of irreparable misidentification" and deprive him or her of due process. *Simmons v U.S.* (1968) 390 US 377, 382, 19 L Ed 2d 1247, 1252, 88 S Ct 967. See also *People v Avila* (2009) 46 C4th 680, 700, 94 CR3d 699. The unfairness must be a demonstrable reality, not merely speculation. *People v DeSantis* (1992) 2 C4th 1198, 1222, 9 CR2d 628. If the lineup is held to be fair, evidence of it is admissible. If the court finds the identification procedure suggestive, evidence of the identification itself may still be admitted if the trial court finds that it is reliable under the "totality of the circumstances." *Manson v Brathwaite* (1977) 432 US 98, 110, 53 L Ed 2d 140, 151, 97 S Ct 2243. A procedure that is unfair suggests the identity of the person in advance of identification by the witness. *People v Brandon* (1995) 32 CA4th 1033, 1052, 38 CR2d 751; *People v Sanders* (1990) 51 C3d 471, 508, 273 CR 537; *People v Hernandez* (1988) 204 CA3d 639, 251 CR 393. The factors to be considered include:

- The opportunity of the witness to view the criminal at the time of the crime;
- The witness's degree of attention;
- The accuracy of the witness's prior description of the criminal;
- The level of certainty demonstrated at the confrontation; and
- The time between the crime and the confrontation.

To be weighed against these factors is the corrupting effect of the suggestive identification. *Manson v Brathwaite* (1977) 432 US 98, 114, 53 L Ed 2d 140, 154, 97 S Ct 2243. See *People v Alvarado* (2006) 141 CA4th 1577, 1585, 47 CR3d 289 (when eyewitness identification of stranger is based on single, quick encounter, witness's level of certainty about identification may not correlate to accuracy of that identification; citing this text).

It is preferable for multiple photos to be of the same type, *e.g.,* all black and white or all color, all front view rather than one front and the rest side view, and all of the same size, not one photo of the defendant and five of a different size of others. However, failure to comply does not necessarily make the identification procedure too suggestive. *People v Holt* (1972) 28 CA3d 343, 104 CR 572, disapproved on other grounds in *Evans v Superior Court* (1974) 11 C3d 617, 625 n6, 114 CR 121. The other men or women in a photo lineup do not need to be nearly identical in appearance to the defendant. *People v Brandon* (1995) 32 CA4th 1033, 1052, 38 CR2d 751. A photo lineup is sufficiently neutral if the persons in the photos are similar in age, complexion, physical features, and build, and if the photo of the accused does not stand out. *People v Holt, supra*. See, *e.g., U.S. v Beck* (9th Cir 2005) 418 F3d 1008, 1012 (photo spread not impermissibly suggestive when all six pictures were of Caucasian males in same age range, with similar skin, eye, and hair coloring; each photo depicted a subject wearing distinctive glasses; four of six photos showed men with similar length hair, with two having somewhat shorter hair, and all except one were clean-shaven). The wearing of an item of apparel of the same color as that recalled by the witness does not by itself make a lineup unduly suggestive. *People v DeSantis* (1992) 2 C4th 1198, 1223, 9 CR2d 628. There should be no more than one picture of the defendant in the group. *People v Citrino* (1970) 11 CA3d 778, 90 CR 80. But see *People v Wimberly* (1992) 5 CA4th 773, 789, 7 CR2d 152 (sets of photographs each containing picture of defendant not impermissibly suggestive). When the photograph of the defendant was the only photograph among six that bore a name and an identification number directly below his picture, the effect was "plainly suggestive" and contributed to an impermissibly suggestive and prejudicial photo array. *People v Carlos* (2006) 138 CA4th 907, 912, 41 CR3d 873.

Single photo identifications are less reliable than those involving multiple photos. Compare *People v Evans* (1952) 39 C2d 242, 252, 246 P2d 636 (conviction reversed because victim's identification of defendant was based on suggestive questioning by police, single photo of defendant was shown, and defendant physically showed up; evidence was closely balanced), with *People v Greene* (1973) 34 CA3d 622, 646, 110 CR 160 (under circumstances of case, single photo identification not so impermissibly suggestive as to taint witness's courtroom identification of defendant as a matter of law), and *People v Hernandez* (1988) 204 CA3d 639, 251 CR 393 (tentative identification of defendant wearing hat in single photo admissible after tentative identification of defendant in multiphoto spread).

A recent approach gaining credibility in the research literature is the sequential presentation of photographs or even live lineups. While not required in California, sequential, as opposed to simultaneous, presentation can deter the eyewitness from making a "relative judgment," *i.e.,* selecting from among those shown the person who most closely resembles the witness's memory of the perpetrator. A sequential presentation is more likely to allow a witness to assess the resemblance of each person against his or her memory of the perpetrator. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads,* 22 Law & Human Behavior 603 (1998).

Permitting a victim or witness to view a videotape of a crime in progress before seeing a photo lineup is not so suggestive that it violates due process. *People v Ingle* (1986) 178 CA3d 505, 513, 223 CR 723 (video was independent evidence of identity, and image of suspect was not conclusive on issue of identity). When a video or surveillance photo is unclear, or the defendant's appearance has changed between the time of the crime and the trial, opinion testimony of persons having personal knowledge of the defendant's appearance at or before the time of the crime is permissible. *People v Mixon* (1982) 129 CA3d 118, 131, 180 CR 772. See Evid C §800(a).

An in-court identification of a defendant from a single photograph is "no more impermissibly suggestive than an in-court identification with the defendant personally sitting at the defense table in the courtroom." *People v Yonko* (1987) 196 CA3d 1005, 1008, 242 CR 269 (defendant "voluntarily absented himself" from trial; victim had previously identified defendant at preliminary hearing; ID of defendant from single photo not unduly suggestive).

Prosecutors should preserve the photographs shown to a witness. See *People v Hawkins* (1970) 7 CA3d 117, 86 CR 428 (preservation of photo spread presumed), and the format and order of presentation. The opportunity for defense counsel to view the photographs at a later date and to be able to demonstrate at trial the potential for error is necessary to adequately safeguard the rights of the accused. *People v Rist* (1976) 16 C3d 211, 127 CR 457. The defense should request this information through discovery. When a photo lineup is negligently lost or destroyed, identification based on the photo lineup is subject to suppression if the witness has no adequate independent recollection of the defendant from the time the crime occurred. *People v Ratliff* (1986) 41 C3d 675, 690, 224 CR 705.

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§22.16 C. One-Person Showups

When a suspect is quickly apprehended, law enforcement may either bring victims or witnesses to the location to view the suspect or bring the detainee back to where the victims or witnesses are located. This is done both to eliminate possible suspects and to make identifications while the details of the crime are fresh in the minds of the victims and witnesses. Safeguards required at photo IDs or lineups are not required at showups.

One-person showups are also called "cold shows" and in-the-field, one-person identifications. They normally occur close in time and location to the arrest and are permitted as an expeditious method of exonerating persons detained near the crime scene. See *People v Rodriguez* (1987) 196 CA3d 1041, 1049, 242 CR 386. Although a showup and the more formal lineup are similar, they serve different, though related, functions and involve different considerations. *People v Dampier* (1984) 159 CA3d 709, 712, 205 CR 728.

There is no right to counsel at one-person showups held promptly between witnesses and a suspect who is apprehended at or near the scene of the crime. *In re Richard W.* (1979) 91 CA3d 960, 971, 155 CR 11.

To detain a suspect for a showup, the officer must reasonably believe that some activity out of the ordinary was occurring or about to occur, and that the suspect was connected with the activity. The officer's suspicions must be objectively reasonable. *People v Rodriguez* (1987) 196 CA3d 1041, 1047, 242 CR 386.

Police cannot transport a person to the scene of the crime or another location to be identified if there is no probable cause to believe that he or she is the person responsible. *People v Harris* (1975) 15 C3d 384, 389, 124 CR 536. The "transportation detention" impermissibly intrudes on the detainee's constitutional rights because "ordinarily there exist less intrusive and more reasonable alternatives to pre-arrest transportation." 15 C3d at 391. There are exceptions in which transportation is reasonable. See, *e.g., In re Carlos M.* (1990) 220 CA3d 372, 383, 269 CR 447 (transportation of two rape suspects to hospital where victim was being treated was reasonable in circumstances, and identification was not impermissibly suggestive); *People v Courtney* (1970) 11 CA3d 1185, 1191, 90 CR 370 (officer transported suspect to station for investigation because of hostile crowd).

In determining whether a showup was impermissibly suggestive, the burden of proof is on the defendant to show that under the "totality of the circumstances" (*Stovall v Denno* (1967) 388 US 293, 302, 18 L Ed 2d 1199, 1206, 87 S Ct 1967), the showup gave rise to "a very substantial likelihood of irreparable misidentification" (*Simmons v U.S.* (1968) 390 US 377, 384, 19 L Ed 2d 1247, 1253, 88 S Ct 967; *People v Johnson* (1989) 210 CA3d 316, 322, 258 CR 347). Factors to be considered when determining whether a showup was impermissibly suggestive include (*Neil v Biggers* (1972) 409 US 188, 199, 34 L Ed 2d 401, 411, 93 S Ct 375; *People v Cowger* (1988) 202 CA3d 1066, 1072, 249 CR 240):

- The witness's opportunity to observe the suspect at the time of the crime;
- The witness's degree of attention;
- The accuracy of the witness's description of the suspect;
- The certainty shown by the witness at the confrontation; and
- The length of time between the crime and the confrontation.

Whether a showup has been held "promptly" after the commission of a crime depends on the circumstances. Compare *People v Nash* (1982) 129 CA3d 513, 517, 181 CR 145 (showup conducted 20 hours after crime reasonable under circumstances), with *People v Bisogni* (1971) 4 C3d 582, 586, 94 CR 164 (single-person showup of codefendant at station conducted many months after robbery unfair under circumstances; defendant's conviction reversed because of prejudicial effect on his alibi defense).

Occasionally, more than one suspect may be presented in the same showup. There is no requirement that the other persons closely resemble the defendant. *People v Rodriguez* (1987) 196 CA3d 1041, 1049, 242 CR 386. However, defense counsel must be careful to determine if multiple victims or witnesses were allowed to identify the suspect at the same time.

Defense counsel should be aware that an in-court identification of the defendant made at a preliminary hearing or at

trial with no prior out-of-court identification is the equivalent of a showup, particularly when the defendant is in jail clothing, and seated next to defense counsel. If there has been no identification proceeding, and identity is at issue, defense counsel should consider requesting a defense lineup before the preliminary hearing. See the discussion in §22.17. But see *People v Harris* (1985) 175 CA3d 944, 958, 221 CR 321 (trial counsel's failure to object to courtroom identification of defendant when no prior lineup had been held not ineffective assistance of counsel; witness was familiar with and had seen defendant on prior occasions). When a defendant is first identified in a lineup and then identified in a single-person showup, the procedure is less suggestive than when the reverse occurs. *People v Eaton* (1969) 275 CA2d 584, 80 CR 192 (three codefendants first identified in lineup while in jail clothing, and later ID'd in showup of three suspects while in civilian clothes); *People v Fields* (1969) 271 CA2d 500, 76 CR 358.

Ø **Note:** The spontaneous viewing of a defendant in the back of a patrol car did not taint an in-court identification in *People v Johnson* (1989) 210 CA3d 316, 322, 258 CR 347. The victim-witness had, before the spontaneous viewing, provided a description that matched the defendant perfectly.

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§22.17 D. Defense (*Evans*) Lineups

As indicated, defense counsel may request a lineup. A defense-requested lineup will be ordered if good cause is established. *Evans v Superior Court* (1974) 11 C3d 617, 114 CR 121. See *People v Williams* (1997) 16 C4th 153, 235, 66 CR2d 123. A sample *Evans* motion is in California Criminal Law Forms Manual §22.3 (2d ed Cal CEB 2005).

Defense counsel must show three necessary elements in the *Evans* motion:

(1) That the motion is timely (it should be made as soon after the arrest or arraignment as possible; an *Evans* motion made just before trial will probably be denied);

(2) That the eyewitness identification is a material issue; and

(3) That there is a reasonable likelihood of a mistaken identification, which a lineup would tend to resolve.

A defendant, however, is not entitled to a lineup as a matter of right. The need for a lineup will be balanced against the burden imposed by the lineup on the prosecution, the police, the court, and the witnesses. *Evans v Superior Court* (1974) 11 C3d 617, 625, 114 CR 121. See *People v Underwood* (1983) 139 CA3d 906, 911, 189 CR 105.

Whether to seek an *Evans* lineup is a difficult tactical decision and, therefore, counsel's to make. *People v Blomdahl* (1993) 16 CA4th 1242, 1248, 20 CR2d 491. It must be made early in the case, before all the facts are known and discovery is completed, and usually before the preliminary hearing. Counsel must weigh the possible benefits against the dangers. The following are some of the areas to consider:

- Factual and legal guilt of the client;
- Strength of the prosecution's case;
- Possibility that the police or prosecutor will subsequently hold a lineup; and
- Differences in a client's appearance from the description.

An *Evans* lineup is conducted by court order. Defense counsel may request that the order include special instructions on the way the lineup is conducted. Either party can object that the proposed lineup will be impermissibly suggestive.

If the defendant requests an *Evans* lineup, but then refuses to participate in it, the prosecution can request a jury instruction at trial on efforts to suppress evidence. CALCRIM 371; see also CALJIC 2.06. See *People v Johnson* (1992) 3 C4th 1183, 1235, 14 CR2d 702. There will probably be no error on appeal based on incompetence of counsel for defendant's failure to participate. *People v Harmon* (1989) 215 CA3d 552, 263 CR 623. If the defendant does not request an *Evans* lineup, the prosecutor may refer to that lack in questioning and argument. *People v Lewis* (2004) 117 CA4th 246, 249, 12 CR3d 1. In *Lewis*, the defendant opened the door to such comment by pointing out alleged deficiencies in the police lineups and photo lineups. 117 CA4th at 257. If a defendant has not opened the door and identity has not been seriously contested, the failure to request a lineup is not material and reference to such a failure could be found to be prejudicial. The People can compel a voice lineup; therefore, the defense is also entitled to a court-compelled voice lineup. *Garcia v Superior Court* (1991) 1 CA4th 979, 986, 2 CR2d 707. See also Cal Const art I, §30(c) (discovery is reciprocal). Voice lineups are discussed in §22.20.

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§22.18 E. Identification Secured or Improved Through Hypnosis

The testimony of a witness, other than the defendant, who has undergone pretrial hypnosis for the purpose of recalling events that are the subject of the witness's testimony is inadmissible under *People v Shirley* (1982) 31 C3d 18, 181 CR 243, unless it meets the following conditions (Evid C §795):

(1) The testimony is limited to those matters that the witness recalled and related prior to the hypnosis.

(2) The substance of the prehypnotic memory was preserved in a writing, audio recording, or video recording prior to the hypnosis.

(3) The hypnosis was conducted in accordance with all the following procedures:

(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information that was provided to the hypnotist concerning the subject matter of the hypnosis.

(B) The subject gave informed consent to the hypnosis.

(C) The hypnosis session, including the pre- and post-hypnosis interviews, was video recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the defense.

(4) Prior to admission of the testimony, the court holds a hearing pursuant to Section 402 at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness's prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness's prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.

Ø **Note:** Neither the rule of exclusion adopted in *Shirley* nor the procedural requirements of Evid C §795 apply to defendants. 31 C3d at 67; *People v Aguilar* (1990) 218 CA3d 1556, 1565, 267 CR 879, disapproved on other grounds in *People v Ervin* (2000) 22 C4th 48, 90, 91 CR2d 623. See *Rock v Arkansas* (1987) 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704 (blanket rule excluding testimony of hypnotized defendant violates Fifth Amendment).

The basis for the decision in *Shirley* was *People v Kelly* (1976) 17 C3d 24, 130 CR 144, which bars the introduction of evidence based on novel scientific techniques unless they have gained general acceptance in the relevant scientific community. The *Kelly* rule survived the adoption of the truth-in-evidence provision of the California Constitution (*People v Harris* (1989) 47 C3d 1047, 1093, 255 CR 352) and continues to set the standard for the admission of scientific evidence in California. *People v Leahy* (1994) 8 C4th 587, 599, 34 CR2d 663. Thus, it appears that the *Shirley* rule still bars the admission of posthypnosis testimony that does not meet the requirements of Evid C §795.

A witness who has undergone hypnosis is not barred from testifying about topics that are completely unrelated to the subject of the hypnosis. *People v Shirley* (1982) 31 C3d 18, 67, 181 CR 243. Nor is the witness barred from testifying about events recalled and related before the hypnotic session. *People v Alcala* (1992) 4 C4th 742, 770, 15 CR2d 432; *People v Hayes* (1989) 49 C3d 1260, 265 CR 132. However, evidence discovered by investigators acting on information obtained during a hypnotic session is not inadmissible. *People v Shirley, supra*.

Ø **Note:** A witness whose posthypnosis testimony is ruled inadmissible may be "unavailable as a witness" under Evid C §240(a)(2). Prehypnosis preliminary hearing testimony (if it exists) is then potentially admissible under Evid C §1291. See *People v Reed* (1996) 13 C4th 217, 52 CR2d 106.

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§22.19 F. Dog-Tracking Evidence

Some dog-tracking evidence has been held to be admissible in California if a proper foundation is laid and if corroborative evidence supports the accuracy of the tracking. *People v Gonzales* (1990) 218 CA3d 403, 413, 267 CR 138; *People v Craig* (1978) 86 CA3d 905, 915, 150 CR 676.

To lay a foundation, the following must be shown (*People v Malgren* (1983) 139 CA3d 234, 238, 188 CR 569, disapproved on other grounds in *People v Jones* (1991) 53 C3d 1115, 1144, 282 CR 465):

- The dog handler was qualified by training and experience to use the dog;
- The dog was adequately trained;
- The dog has been found to be reliable in tracking humans;
- The dog was placed on the track where circumstances indicated the guilty party to have been; and
- The trail had not yet become stale or contaminated.

The corroborative evidence that is required to support the accuracy of the tracking need not be independent evidence that links the defendant to the crime. *People v Gonzales* (1990) 218 CA3d 403, 414, 267 CR 138 (corroborative evidence need only support accuracy of tracking itself). Dog-tracking evidence has given rise to CALCRIM 374 and CALJIC 2.16. However, nationwide authority is conflicting on whether dog-tracking evidence is admissible. See Anno, *Evidence of Trailing by Dogs in Criminal Cases,* 81 ALR5th 563 (2000).

Dog scent identification lineups are more problematic. *People v Mitchell* (2003) 110 CA4th 772, 2 CR3d 49. Other jurisdictions have admitted scent lineup evidence based on criteria similar to dog-tracking evidence. Anno, *Dog Scent Discrimination Lineups,* 63 ALR4th 143 (1988). However, in *Mitchell* the court held that the proponent of evidence based on scent lineup procedures must show that the technique has gained acceptance in the scientific community under *People v Kelly* (1976) 17 C3d 24, 130 CR 144. *People v Mitchell, supra*.

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§22.20 G. Voice Identifications

Voice identification is real evidence, and a request to a defendant to provide voice identification evidence does not violate his right against self-incrimination or his right to privacy. See *People v Ellis* (1966) 65 C2d 529, 55 CR 385. Further, failure of a defendant to "display his voice" can be presented to a trier-of-fact to indicate consciousness of guilt, just as flight or the suppression of evidence can. 65 C2d at 536. In determining whether a voice identification was unduly suggestive, the court must decide whether it was reliable under the totality of the circumstances. *People v Clark* (1992) 3 C4th 41, 135, 10 CR2d 554. Factors to be considered include (*People v Gordon* (1990) 50 C3d 1223, 1242, 270 CR 451):

- The witness's opportunity to view (or hear) the person;
- The degree of the witness's attention;
- The accuracy of any prior description of the person (or voice);
- The level of certainty of the identification; and
- The time between the incident and the confrontation.

A single-voice identification may pose a danger of suggestiveness, but such lineups are not necessarily or inherently unfair. *People v Clark* (1992) 3 C4th 41, 136, 10 CR2d 554. The failure to object to voice identification evidence could give rise to a claim of ineffective assistance of counsel. See *People v Maury* (2003) 30 C4th 342, 415, 133 CR2d 561. A cautionary instruction similar to CALCRIM 315 (see CALJIC 2.92) on eyewitness identification should also be requested.

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IV. CHALLENGING EYEWITNESS IDENTIFICATION

§22.21 A. Summary of Defense Counsel's Remedies for Failure to Hold Lineup or for Tainted Identification Proceeding

When eyewitness identification is a central issue in a criminal prosecution, defense counsel must develop a plan for challenging that identification. Counsel must decide which identifications to attack, how to attack, and when to launch the attack in the course of the proceedings. These decisions must be made in the context of the entire defense strategy.

Failure to hold lineup. When identification is at issue but no identification proceeding has been held, defense counsel must decide whether to ask the prosecutor to hold a lineup, move for a defense lineup (see §22.17), or wait for an in-court identification. Each strategy has its own strengths and weaknesses. If the perpetrator's identity is at issue, the eyewitnesses are uncertain, corroborating evidence is scant or nil, the defendant steadfastly maintains innocence, and the prosecutor recognizes that the case has problems, then it may be appropriate to request a prosecution lineup very early in the case, shortly after arrest or arraignment. Ordinarily, however, if a decision is made to request a lineup, it should be by an *Evans* motion, which guarantees the defense more input into the lineup process. Failure to request an *Evans* lineup early in the proceedings is a factor in deciding to grant or deny the motion. If the client admits guilt, or if it seems likely that the client would be picked out at a lineup, it may be more effective to wait for an in-court identification. Defense counsel then has the option of attempting to discredit the in-court identification by arguing to the jury that the defendant was the only person in the courtroom who could have been selected as the perpetrator. See §22.29 for discussion of cross-examining the eyewitness in this situation.

> Ø **Note:** A defendant may claim on appeal that counsel's failure to request a lineup was ineffective assistance of counsel. Counsel who forgoes a lineup request should insert a memo in the file, detailing why the decision was a tactical choice. See *People v Blomdahl* (1993) 16 CA4th 1242, 1248, 20 CR2d 491.

Failure of a witness to appear at a scheduled prosecution lineup is not cause for the witness's first-time identification of the defendant at trial to be excluded. A cautionary jury instruction, however, should be given. *People v Fernandez* (1990) 219 CA3d 1379, 269 CR 116. In this situation, defense counsel may want to ask the prosecution to schedule another out-of-court lineup before the witness attempts to identify the defendant at trial. 219 CA3d at 1386.

Tainted identification procedure. In felony cases, if an identification proceeding occurred before a defendant's identification at the preliminary hearing, counsel can challenge the identification at that hearing and ask the magistrate to strike the in-court identification. *People v James* (1976) 56 CA3d 876, 128 CR 733. If there is a holding order, counsel can move to set aside the information (Pen C §995) based on the illegal identification procedure. See *People v Martin* (1970) 2 C3d 822, 827, 87 CR 709; *People v Malich* (1971) 15 CA3d 253, 93 CR 87, disapproved on other grounds in *People v Medina* (1972) 6 C3d 484, 489, 99 CR 630. Review of an identification submitted to the grand jury and forming a basis for an indictment can be challenged in superior court by a motion to set aside the indictment. Pen C §995.

Counsel may also consider a pretrial common law motion to suppress eyewitness identification evidence gathered in violation of the defendant's right to counsel or due process. *People v Lawrence* (1971) 4 C3d 273, 275 n1, 93 CR 204. Such a motion is a method of obtaining a pretrial ruling on evidence admissibility but is not binding on the court in trial. *People v Superior Court (Zolnay)* (1975) 15 C3d 729, 734, 125 CR 798. The motion can be raised at any pretrial hearing, including the preliminary examination. *People v James* (1976) 56 CA3d 876, 884, 128 CR 733. A common law motion to suppress performs the same function as an evidence objection; thus, the court may allow an oral motion to be made at trial. *People v Martin* (1970) 2 C3d 822, 828, 87 CR 709.

At trial, in both misdemeanor and felony cases, defense counsel may move to exclude any identification based on an earlier tainted out-of-court identification procedure. This method is the usual way of challenging out-of-court identification procedures. The motion is commonly made immediately before trial as an in limine motion in the trial

court. A sample motion is in California Criminal Law Forms Manual §22.4 (2d ed Cal CEB 2005). The issue is decided by the trial judge. See *People v Martin, supra*. See §22.25 for discussion of how the court makes this decision.

If the out-of-court identification procedure is ruled untainted, it can be introduced, and the witness can testify without showing an independent origin for the in-court identification. In addition, evidence of the prior identification can be introduced. The defense can offer evidence of any suggestiveness in the procedure. *People v Greene* (1973) 34 CA3d 622, 110 CR 160. The prosecution can ask for an instruction on the legality of the identification procedure. See §22.30.

If the court finds that the out-of-court identification procedure was tainted, the People may show, by clear and convincing proof, an independent source for the in-court identification. If an independent source is proven to the court's satisfaction, the eyewitness can testify to identity. The defense can then (1) introduce to the jury evidence of the taint, and (2) ask the court to instruct the jury that the identification procedure was tainted. See *People v Rodriguez* (1977) 68 CA3d 874, 137 CR 594.

If the issue is decided in the defendant's favor, and the court rules that there is no independent source for an in-court identification, no evidence is allowed concerning the identification of the defendant from the witness. See *People v Martin* (1970) 2 C3d 822, 831, 87 CR 709. If there is no other evidence on which to find the defendant guilty, the prosecutor may decide to dismiss the case. If jeopardy has attached before the motion is decided and the case is dismissed, the case cannot be tried again. See *Larios v Superior Court* (1979) 24 C3d 324, 329, 155 CR 374. If there is other evidence on which to base a conviction, the prosecutor will probably continue with the case.

> Ø **Note:** Defense counsel should wait until jeopardy has attached (see §26.24) before challenging the identification. The prosecutor should ask the judge to hear the motion before jeopardy attaches.

The defense can challenge denial of its motion on appeal from a guilty verdict. See *People v Castellano* (1978) 79 CA3d 844, 145 CR 264; *People v Davis* (1969) 270 CA2d 841, 76 CR 242. If the identification was excluded and the defendant was found guilty and appealed, the prosecution may ask the reviewing court to pass on rulings of the trial court adverse to the prosecution. See Pen C §1252.

The defendant can challenge the tainted identification of a codefendant if it prejudices him or her during trial. *People v Bisogni* (1971) 4 C3d 582, 94 CR 164 (codefendant shown to witnesses in highly suggestive single-person showup months after crime; defendant had apparently valid alibi; conviction reversed).

Burden of proving unfair identification procedure. A defendant bears the burden of showing the unreliability of an identification procedure. *People v DeSantis* (1992) 2 C4th 1198, 1222, 9 CR2d 628. The constitutional reliability of a lineup depends on two factors: (1) whether the identification procedure was unduly suggestive and unnecessary and, if so, (2) whether the identification itself was reliable when one considers the entire process. The court should take into account, *e.g.,* the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. If the court finds that the procedure was unduly suggestive and the identification was unreliable, the identification is constitutionally invalid. *People v Gordon* (1990) 50 C3d 1223, 1242, 270 CR 451. If a court finds that a challenged procedure is not impermissibly suggestive, the inquiry into the due process claim ends. *U.S. v Bagley* (9th Cir 1985) 772 F2d 482, 492; *People v Ochoa* (1998) 19 C4th 353, 412, 79 CR2d 408.

In determining whether a lineup was unduly suggestive, the court must consider whether anything caused a suspect to "stand out" from the others in the lineup in any way that would push the witness toward selecting that suspect. *People v Cook* (2007) 40 C4th 1334, 1355, 58 CR3d 340. The fact that the defendant alone appeared in both a photo lineup and a subsequent live lineup does not per se violate due process. *Cook,* 40 C4th at 1355; *People v DeSantis* (1992) 2 C4th 1198, 1224, 9 CR2d 628.

The standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not impermissibly suggestive. *People v Kennedy* (2005) 36 C4th 595, 608, 31 CR3d 160.

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B. Gathering Information

§22.22 1. Viewing Crime Scene

In preparation for attacking an eyewitness identification at trial, defense counsel should go to the scene of the crime under the same conditions as at the time of the offense. For example, if it was night and the moon was full, counsel should wait for a full moon. Counsel should also be sure that nothing has changed that might have affected the eyewitness's ability to see at that time, *e.g.,* a tree cut down or a fence raised or lowered. This is more often a problem when counsel in a felony case does not assume representation until months after the crime occurred. Defense counsel should look for any conditions that would have made it difficult or impossible for the eyewitness to have seen what he or she claims to have seen.

Defense counsel should also ascertain whether anything would have made it difficult for the eyewitness to make the reported observation, such as poor eyesight or hearing, or that the witness was listening to loud music at the time.

The prosecutor needs to verify these matters as well. Both counsel should bring an investigator along in case testimony is needed at trial. See §2.18 on the attorney as witness.

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§22.23 2. Interviewing and Investigating Witnesses

Defense counsel should try to have an investigator interview eyewitnesses as soon as possible after the crime. If possible, eyewitnesses should be interviewed before they have seen a lineup. This is the time to obtain a description of the suspect if one has not been previously recorded, or the time to explore a previously given description. When witnesses are interviewed closer to the time the crime happened, their memories are fresher. They may remember the names of others present or details that are helpful to the defense, which they may forget several months later. Because witnesses sometimes move away, the defense investigator should ask the witnesses for names and phone numbers of several people who will always know where to contact them.

If witnesses refuse to speak to the defense because the prosecution has forbidden it, counsel can subpoena the witness to court and have a judge tell the witness that he or she has the right to talk to the defense as well as to the prosecution. *Walker v Superior Court* (1957) 155 CA2d 134, 140, 317 P2d 130 (sheriff prohibited witness from talking to defense counsel). Defense counsel may ask the court to admonish or hold in contempt a prosecutor who tells a witness not to talk to the defense. See chap 58 on contempt.

When questioning witnesses, defense counsel should obtain the following information:

- A complete description of what the eyewitness saw, including a description of the suspect, of the crime, and of anything else that was happening at that time.
- Whether the witness saw the suspect before or after the crime.
- All information on out-of-court identification proceedings, including when they occurred, what kind, who was present, what police said to the witness, whether the witness made an identification of anyone or indicated that none of those shown was the suspect, and the degree of certainty of any identification.
- Whether the witness discussed the case with anyone, what others said about the case, whether the witness discussed the case with any other witnesses, and whether the witness knows if any other witness identified someone, and who that was.
- The conditions under which the eyewitness saw the suspect at the time of the alleged crime. If the witness wears glasses, was he or she wearing them at that time? What kind of light was available? Where was the suspect, and where was the witness? How long did the witness look at the suspect?
- Whether the witness discussed the case, including any identifications, with law enforcement or prosecutors, including how many times those discussions occurred and, for each discussion, the location, who was present, and any statements made by law enforcement or prosecutors to the witness about the identifications, the defendant, or the defendant's guilt or innocence.

Ø **Note:** Do not forget investigation and tests that may exonerate your client, such as having his or her fingerprints or bodily fluids compared with those connected to the crime.

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Source: Criminal Law/California Criminal Law Procedure and Practice/22 LINEUPS AND IDENTIFICATION/§22.24 C. Challenging Eyewitness Identification at Preliminary Hearing

§22.24 C. Challenging Eyewitness Identification at Preliminary Hearing

It is unusual for defense counsel to challenge eyewitness identification procedures at the preliminary hearing for three reasons: First, this issue is within the magistrate's discretion, and, if the lineup is upheld, will probably be upheld on Pen C §995 review. See chaps 8 (preliminary hearings) and 13 (Pen C §995 review). Second, rulings on evidentiary issues are not binding on the trial judge. *People v Leighter* (1971) 15 CA3d 389, 93 CR 136, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 123 CR 465. Finally, defense counsel does not have the absolute right to call witnesses at the preliminary hearing. See §8.13. If defense counsel believes that a dismissal is possible either at the preliminary hearing or on §995 review, however, the motion should be seriously considered.

Ø **Note:** If no prior identification of the defendant has been made, counsel is in effect consenting to a showup at the preliminary hearing, particularly if the defendant is in jail clothes or is the only person of his or her type in the courtroom. See §22.21 for discussion of this problem. One option is to obtain the magistrate's permission to have the defendant, in street clothes, sit in the audience. In any event, defense counsel should be sure to move to exclude eyewitnesses from the courtroom under Pen C §867 before the defendant arrives or is brought in. Other options are to stipulate to ID for purposes of the preliminary hearing only, or to waive the preliminary hearing if the prosecutor also agrees to waive it.

Defense counsel who wishes to cross-examine eyewitnesses at the preliminary hearing should consider subpoenaing them in case the prosecution plans to present its evidence through the hearsay provisions of Pen C §872(b), discussed in §8.30. If the prosecutor did not call the eyewitnesses, he or she will probably ask for an offer of proof that the proffered testimony "if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." Pen C §866(a). The defense should be able to make a successful offer of proof if defense investigation has yielded an inconsistent statement by the eyewitness because the defense has the right to impeach hearsay at the preliminary hearing. Pen C §872(b).

The defense should not call prosecution eyewitnesses who will leave the jurisdiction, because the prosecution may then be able to use the preliminary hearing testimony at trial in place of live testimony. See §8.47.

Ø **Note:** Prosecutors can request a deposition under Pen C §§1335-1345 to take the testimony of a witness who they know will leave the jurisdiction, whose life is in danger, who is so sick he or she probably will not be able to testify at trial, or who, in a domestic violence case, has been dissuaded from testifying or cooperating with the prosecution by the defendant through threats or intimidation. These conditional examinations are discussed in §11.25A.

If defense counsel chooses to challenge out-of-court identification procedures at the preliminary hearing, counsel must first present evidence showing that the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v U.S.* (1968) 390 US 377, 384, 19 L Ed 2d 1247, 1253, 88 S Ct 967. This showing can be made by questioning the eyewitnesses. If the court finds that the out-of-court eyewitness identification procedure was tainted, the prosecutor then has the opportunity to prove that the in-court identification is based on the eyewitness's independent recollection of the defendant at the time the crime was committed. If the court finds no independent basis for the in-court identification, defense counsel should move to exclude it. *People v George* (1972) 23 CA3d 767, 100 CR 427; *People v Citrino* (1970) 11 CA3d 778, 90 CR 80. For further discussion of these procedures, which are usually raised as in limine motions at trial, see §22.25.

A witness's failure to identify a defendant during an earlier identification procedure does not necessarily mean that the witness's in-court identification at the preliminary hearing must be stricken. See *People v Prado* (1982) 130 CA3d 669, 673, 182 CR 129 (victim failed to select defendant's photo during photo lineup, but identified defendant at preliminary hearing; lineup procedure upheld because victim selected defendant from four or five people at preliminary hearing and told police earlier that he was sure he would be able to identify defendant in person).

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§22.25 D. In Limine Motion at Trial

Defense counsel has the right to have a hearing on his or her lineup motion in the trial court before trial begins. See *People v Enos* (1973) 34 CA3d 25, 38, 109 CR 876 (error for court not to conduct hearing, but harmless; therefore no reversal); *People v Citrino* (1970) 11 CA3d 778, 782, 90 CR 80 (establishing rule). But see *People v George* (1972) 23 CA3d 767, 772, 100 CR 427 (criticizing rule).

Ø **Note:** Any objection to a suggestive in-court identification may be waived if the defendant refused to participate in a lineup. *People v Harmon* (1989) 215 CA3d 552, 568, 263 CR 623.

Defense counsel has the right to have this hearing held outside the presence of jurors. *People v Enos, supra; People v George, supra*. If defense counsel wishes to question prosecution witnesses, counsel must subpoena them to the hearing; the prosecutor will not do so unless by prior agreement. When there is more than one eyewitness, counsel should exclude all from the courtroom except the one testifying.

The defense has the burden of producing evidence that the identification procedure was tainted. *People v Stearns* (1971) 14 CA3d 178, 92 CR 69. The standard used by the trial court to decide whether an identification procedure was tainted is whether the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v U.S.* (1968) 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967. This test is primarily a factual one.

If the trial court finds that the identification procedure was tainted, the burden shifts to the prosecution to prove by clear and convincing evidence that the in-court identification was based on observations at the scene and was not tainted by the procedure. *People v Martin* (1970) 2 C3d 822, 87 CR 709 (conviction reversed). In ruling on this issue, the court examines whether "the identification itself was nevertheless reliable, under the totality of the circumstances, taking into account such factors as the witness's opportunity to view (or hear) the person, the degree of the witness's attention, the accuracy of any prior description of the person (or voice), the level of certainty of the identification, and the time between the incident and the confrontation." *People v Clark* (1992) 3 C4th 41, 135, 10 CR2d 554 (quoting from *People v Gordon* (1990) 50 C3d 1223, 1242, 270 CR 451); *People v Collins* (1971) 20 CA3d 601, 97 CR 821. See also *People v DeSantis* (1992) 2 C4th 1198, 1222, 9 CR2d 628.

The courts rarely find any taint. Defense counsel's best opportunity to win at this stage is if he or she were able, at an earlier time, *e.g.,* at the preliminary hearing or in an interview with the defense investigator, to get the eyewitness to state that his or her identification was based on the identification procedure and that he or she no longer has any independent recollection of the responsible party.

When taint is found but the identification is allowed, defense counsel can ask the court to instruct the jury that the identification procedure was tainted. Even if this is not allowed, counsel can introduce the same evidence before the jury that was introduced at the identification hearing and may persuade jurors that the identification is wrong.

In questioning prosecution eyewitnesses, defense counsel may inquire into the areas discussed in §22.23 and should also point out in argument to the court any of the following facts:

- The witness did not or was unable to identify the defendant, or identified the wrong person, on one or more occasions, *e.g.,* immediately after the crime, at an identification proceeding, or at the preliminary hearing.
- The witness's description to the police varies from the way the defendant actually appears.
- Discrepancies exist among the descriptions of several eyewitnesses; another person was identified by one or more of them; or the defendant was not identified by one or more of them.
- The witness had a very limited opportunity to observe the suspect.
- The witness has a reason to lie about the identity of the suspect.

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E. Challenging Eyewitness Identification Before Trier of Fact

§22.26 1. Lineup Held but Defendant Not Identified

A challenge to an eyewitness identification may be made at trial with or without a contemporaneous identification of the defendant at trial. Occasionally, an eyewitness fails to identify the defendant both at a lineup and at trial. In fact, the witness may have identified another person at the lineup. This situation rarely occurs in a one-defendant, one-witness case, but is rather common in cases involving four or more defendants, multiple counts, and many witnesses. The prosecutor may put on a witness to identify *A, B,* and *C,* but not *D*. Defense counsel who represents *D* may want to introduce the lineup to show that the witness was right about *A, B,* and *C* (thereby making the witness more reliable), but not about *D*. In fact, not only did the witness not identify counsel's client, but this reliable witness picked out someone else. Be aware of the trial dangers for *A, B,* and *C* in using this approach and for defendant *D* if in custody with *A, B,* or *C*.

A positive in-court identification of a defendant is admissible even though the victim did not identify the defendant at an earlier identification proceeding. See, *e.g., People v Dominick* (1986) 182 CA3d 1174, 1197, 227 CR 849 (defendant argued that lack of identification at videotape lineup tainted in-court identification at preliminary hearing; no error, and if there was it was harmless beyond reasonable doubt); *People v Prado* (1982) 130 CA3d 669, 673, 182 CR 129 (failure to positively identify appellant in photographic display did not taint in-court identification and went to weight rather than sufficiency of evidence). See also *People v Contreras* (1993) 17 CA4th 813, 822, 21 CR2d 496.

When the witness did not identify the defendant at the lineup, but makes an identification at trial, defense counsel generally covers the matter through cross-examination. Defense counsel should be prepared for an excuse by the witness, *e.g.,* that the light was poor or that the witness was too nervous, not close enough to the lineup, forgot his or her glasses, or feared the defendant.

An alternative to cross-examining the witness on the failure to identify at the lineup is to put on evidence of the lineup, by perhaps calling the officer who selected the members of the lineup and the police officer who obtained the identification card marked by the witness, or by showing a videotape of the lineup. Defense counsel may want to introduce the card itself into evidence. This approach may force the prosecutor to recall the witness to explain the failure to identify, or the prosecutor may choose to leave the whole issue alone.

It is generally good practice for prosecutors to ask the witness about his or her failure to identify the defendant at the lineup on direct examination or, at least, on redirect examination if defense counsel did not cross-examine on that issue. If defense counsel is the one to first present this information to jurors, they may get the impression that the prosecutor is not giving them the whole truth.

If an eyewitness fails to identify the defendant both at a lineup and at trial, and insufficient evidence remains to convict the defendant, defense counsel can move for a judgment of acquittal under Pen C §1118 or §1118.1.

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§22.27 2. Client Identified at Lineup; Procedure Held Lawful

When a defendant is identified at a lineup but not in court, the prosecutor may, when the requirements are met, introduce evidence of the prior identification under either Evid C §1235 or §1238. Section 1235 permits evidence of a prior identification if the witness's testimony at a hearing or trial is inconsistent with an earlier identification. Section 1238 allows evidence of an earlier identification if the witness testifies that the identification was made when the crime was fresh in the witness's memory and was a true reflection of his or her opinion at that time.

When a prior identification is not supported by an identification at trial, and there is no other evidence connecting the defendant with the crime, the out-of-court identification may still support a conviction if it passes the substantial evidence test of *People v Johnson* (1980) 26 C3d 557, 578, 162 CR 431. *People v Cuevas* (1995) 12 C4th 252, 48 CR2d 135. The *Johnson* substantial evidence test is that the evidence must be sufficient to prove the elements of the charged offense beyond a reasonable doubt to a rational jury. In practical terms, this means that trial counsel should introduce evidence of, and argue, specific factors that may have affected the probative value of the out-of-court identification to demonstrate that it is or is not sufficient to support a criminal conviction. In *Cuevas,* the court gives examples of circumstances that might affect an out-of-court identification's probative value, and those affecting a witness's failure to make an in-court identification. 12 C4th at 274.

If the witness identified the defendant at a preliminary hearing, that testimony is sufficient as a matter of law to support a conviction at trial, even though there is no identification at trial and no other evidence tending to connect the defendant with the crime. *People v Ford* (1981) 30 C3d 209, 215, 178 CR 196.

The situation that occurs in most trial matters is an identification at both the lineup and trial. On rare occasions, defense counsel may reach an agreement with the prosecutor that neither party will introduce the lineup or its results.

Even when the trial judge has found the identification procedure lawful, counsel may produce evidence of its unreliability to jurors because it goes to the weight of the evidence. *People v Diaz* (1967) 66 C2d 801, 58 CR 729 (pre-*Wade-Gilbert* case). Counsel, in effect, can present the same evidence and make the same arguments to jurors that were unsuccessful with the trial judge.

Defense counsel's primary tools in attacking an eyewitness identification are education of jurors during voir dire, opening statement, cross-examination of prosecution eyewitnesses (see §22.29), presentation of percipient or expert defense witnesses (see §22.28), special eyewitness jury instructions (see §22.30), and closing argument (see §22.31).

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3. Defense Witnesses and Strategies

§22.28 a. Possible Defense Witnesses

The following are possible defense witnesses and evidence that can be used to combat eyewitness identification:

- Defense eyewitnesses;
- Defense investigators who can testify to conditions at the scene that would have made the claimed identification difficult or impossible;
- Technicians who can testify that other indicia of identification, *e.g.,* footprints or fingerprints, do not belong to the defendant;
- Testimony from an expert on eyewitness identification (*People v McDonald* (1984) 37 C3d 351, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431);
- Alibi witnesses; and
- Impeachment evidence concerning the prosecution eyewitness, *e.g.,* a prior felony conviction or a reputation for lying.

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§22.28A b. Eyewitness Identification Expert

In *People v McDonald* (1984) 37 C3d 351, 361, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431, the California Supreme Court held that, under the facts of that case, it was an abuse of discretion not to allow the testimony of an eyewitness identification expert. However, the testimony of such an expert is limited to narrow circumstances: When eyewitness identification of the defendant is a key element of the prosecution case but is not substantially corroborated by reliable evidence and the proffered testimony is from a qualified expert. In this situation, although discretion remains with the trial court, it is usually error to exclude the testimony.

The *McDonald* decision virtually makes it obligatory for defense counsel to move to permit the testimony of an eyewitness identification expert in appropriate cases. That expert should be prepared to testify on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury. Also, the expert may be permitted to testify about empirical research that undermines a number of widespread lay misconceptions about eyewitness identification, *e.g.,* that the accuracy of a witness's recollection increases with the witness's certainty, that accuracy improves with stress, or that cross-racial factors are not significant. The expert will not be permitted to testify to the accuracy or to the truth or falsity of the identification testimony.

In *People v Sanders* (1995) 11 C4th 475, 46 CR2d 751, the California Supreme Court upheld the trial court's decision to exclude expert testimony on eyewitness identification, emphasizing that the decision to admit such testimony resides squarely in the trial court's discretion and is seldom reversible error. The court also held that, even if the decision to exclude the testimony was error, that error was harmless.

Defense counsel should consider making a request for expert eyewitness testimony early, but not too early, *i.e.,* not until all the inculpatory evidence is known. If the motion is granted, all police reports, defense interviews of percipient witnesses, and other information bearing on the identification issue should promptly be sent to the designated expert for review. The strategy for the presentation of such evidence must be developed on the basis of the facts in each individual case.

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Source: Criminal Law/California Criminal Law Procedure and Practice/22 LINEUPS AND IDENTIFICATION/§22.29 c. Cross-Examination of Identification Witness

§22.29 c. Cross-Examination of Identification Witness

There are at least four levels of identification:

(1) The witness knew the defendant before the alleged crime was committed and is sure that the defendant is the guilty party;

(2) The witness did not know the defendant but is sure that the defendant is the person responsible;

(3) The defendant looks similar to the person responsible; and

(4) The witness is unable to identify the defendant, but describes the person responsible in terms that match the defendant.

When the witness knows the party being identified, counsel should focus on the length of time since the parties last saw each other, any change in the appearance of the person being identified, the witness's opportunity to observe the person responsible at the time of the alleged crime, and whether the witness has a motive to lie.

If the witness had never seen the party being identified before the incident, defense counsel must evaluate how the trier of fact perceives the identification. It is very important not to turn a positive, but tentative, identification into a positive and sure one. Cross-examination on this type of witness might focus on the details of the responsible person's clothing and of the surroundings. If the witness responds "I don't know" or "I don't remember" to every such question, it may be reason to violate the rule of never asking a question without knowing the answer first. The trier of fact needs to be shown that this witness remembers nothing, yet claims to be able to identify the defendant.

Some witnesses will perceive that "I don't know" answers are hurting them, and may begin to answer with guesses. Defense counsel should be prepared for such answers by using a list of questions with provable answers concerning details like, *e.g.,* the color of the rug or how many people were present. The key is not the subject matter (on which corner is the stop sign) but rather that the witness, while under oath, gives a wrong answer to the question. (Prosecutors may, however, be able to successfully object to these questions as irrelevant to the factual issues. The defense may counter that the questions are for the purpose of testing the witness's memory and recollection.)

A first-time identification made in court may be attacked on the theory that it was a choice of one from a field of one. This is particularly true of defendants who are in custody. The trier of fact must be made aware that the witness has selected the only person in the courtroom who is in jail clothes, or the only person in handcuffs. Race or unique physical characteristics may also single out the defendant as the one to be identified. Unusual hair styles are typical of this problem. The attorney may choose to point this out in closing argument rather than cross-examination. See §22.17 for discussion of the decision to hold or request a lineup.

If, however, an in-court identification is based on a prior photo identification, lineup, or showup, then a somewhat different approach may be taken. An attorney may argue that the in-court identification has been tainted by the prior out-of-court identification (see §22.25). Although the cross-examination may be completely different, the theory is really the same: Because of some outside factor the witness had only one choice, that being the defendant.

When a witness is less than sure of an identification, he or she may testify that the person "looked just like," or "is very similar to," the defendant, or that the witness is "90 percent sure" that the defendant is the person responsible. This type of identification is very difficult to evaluate because the witness may give a stronger identification under cross-examination. Prior statements about the uncertainty may lessen this danger.

When a witness testifies only that the person responsible had certain very general characteristics, such as being "a young white woman" or "a tall black man," the attorney's decision concerning cross-examination is often based on the size of the class. The more people in the class, the less advisable it is for counsel to cross-examine. There is a risk that the witness will remember some special characteristic of the perpetrator on cross-examination, while without cross-examination on this issue, defense counsel can still argue that, because the number of people in the group, *e.g.,* "young white women," is so large, the witness's description should be discounted by the jury.

Ø **Note:** Great caution should be exercised in asking questions like "The person did not have a scar, did he?" The question may cause the witness to correctly recall otherwise forgotten facts.

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Source: Criminal Law/California Criminal Law Procedure and Practice/22 LINEUPS AND IDENTIFICATION/§22.30 4. Instructions

§22.30 4. Instructions

The trial court has the discretion to instruct on eyewitness testimony, but it is not required to give an eyewitness instruction absent a request. Bench Notes to CALCRIM 315; *People v Alcala* (1992) 4 C4th 742, 802, 15 CR2d 432; *People v Blair* (1979) 25 C3d 640, 663, 159 CR 818. The jury instructions on eyewitness identification are CALCRIM 315 and CALJIC 2.91-2.92. Counsel should also consult Lundy, FORECITE California (1994), and Rucker & Overland, California Criminal Practice, Motions, Jury Instructions and Sentencing (3d ed 2004).

The defense is entitled to special pinpoint instructions on identification on request if the instructions concern *theories* involving identification and not the particular facts of the case, if they address matters not covered by the instruction, and if identification is a crucial issue and there is no substantial corroborative evidence. *People v Wright* (1988) 45 C3d 1126, 248 CR 600 (discussing CALJIC 2.92; now see CALCRIM 315). See also *People v Fudge* (1994) 7 C4th 1075, 1110, 31 CR2d 321 (failure to give defense instruction was harmless error under facts of this case). A proper instruction on identification should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt on identification in a nonargumentative way that does not take a position on the impact of the factors. *People v Wright* (1988) 45 C3d 1126, 1143, 248 CR 600. Pinpoint instructions should not invade "the domain of either jury or expert witness." *People v Johnson* (1992) 3 C4th 1183, 1234, 14 CR2d 702. Explanation of the effect of the factors should be left to cross-examination, presentation of expert testimony, and argument. A modified version of CALJIC 2.92 that is more favorable to the defense is set out at 3 C4th at 1230 n12.

> Ø **Note:** CALCRIM 315 now sets out the issues addressed in CALJIC 2.92 as "questions" for the jury to consider when evaluating eyewitness testimony. CALCRIM 315 adds some new details not previously found in CALJIC 2.92, including questions relating to the witness's eyesight and level of attention and any prior identifications by the witness or prior failures of the witness to identify the defendant, as well as a restatement of the People's burden of proof. CALCRIM 315. The courts have not yet addressed the new level of detail in CALCRIM 315 or considered the need for other identification instructions when it is given.

The language of the many lineup cases, including *Wade* and *Gilbert* (see §3.2), can be an excellent source of material for special identification instructions. Other cases that may give some guidance, but must be read in light of *Wright* and *Johnson,* are *People v Hurley* (1979) 95 CA3d 895, 900, 157 CR 364, and *People v Brown* (1984) 152 CA3d 674, 678 n3, 199 CR 680.

While the court has a sua sponte duty to instruct on factors relevant to witness credibility (see Bench Notes to CALCRIM 226), there is no sua sponte duty to instruct on certain specific factors affecting credibility. The instruction that lists the factors for jurors to consider in evaluating a witness's credibility is CALCRIM 226. Defense counsel should request the appropriate bracketed (optional) factors in CALCRIM 226, such as those on the witness's "character for truthfulness." Other instructions that defense counsel may use to argue identification issues to the jury include instructions on:

- The credibility of an adult witness (CALCRIM 105; see also CALJIC 2.20) or a child witness (CALCRIM 330; see also CALJIC 2.20.1). See *People v McCoy* (2005) 133 CA4th 974, 978, 35 CR3d 366 (rejecting constitutional challenge to CALJIC 2.20.1).
- Discrepancies in testimony (CALCRIM 302; see also CALJIC 2.21.1).
- Weighing conflicting testimony (CALCRIM 302; see also CALJIC 2.22); the court must instruct on weighing contradictory evidence sua sponte unless corroborating evidence is required. See Bench Notes to CALCRIM 302, citing *People v Rincon-Pineda* (1975) 14 C3d 864, 884, 123 CR 119.
- Effect on witness's credibility of a felony conviction or a witness's other crime or misconduct (CALCRIM 316; see also CALJIC 2.23); although there is no sua sponte duty to give this instruction, it must be given on request. *People v Hernandez* (2004) 33 C4th 1040, 1051, 16 CR3d 880.
- The sufficiency of testimony of one witness (CALCRIM 301; see also CALJIC 2.27); the court has a sua sponte duty to give this instruction in every case. See Bench Notes to CALCRIM 301, citing *People v Rincon-Pineda*

(1975) 14 C3d 864, 884, 123 CR 119.

In practice, most published cases uphold trial court refusals to give defense eyewitness identification instructions. See, *e.g., People v Harris* (1989) 47 C3d 1047, 1097, 255 CR 352 (no error in trial court's refusal to give defense special instructions on cross-racial identification); *People v Martinez* (1989) 207 CA3d 1204, 1220, 255 CR 691 (defense special instructions properly refused because already covered by CALJIC 2.91-2.92; now see CALCRIM 315).

Because the defense is limited in being able to get the court to give an instruction explaining the effect of the factors in CALCRIM 315 and CALJIC 2.92 on the accuracy of the identification, increased emphasis should usually be given to other areas of attack. See discussion of other options in §22.27.

If the defendant fled, the prosecution should consider requesting the flight instruction. That instruction may be given if there is evidence identifying the person who fled as the defendant, and if that evidence is relied on as tending to show guilt. *People v Mason* (1991) 52 C3d 909, 943, 277 CR 166.

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§22.31 5. Closing Argument

For defense counsel, closing argument is a time to pull together the logic of the attack on the eyewitness identification that the prosecution has presented at trial. Counsel must evaluate the eyewitnesses. A witness should not be attacked as a liar if he or she is possibly making an honest mistake.

Most eyewitness issues are best argued within the context of reasonable doubt. The general instruction on eyewitness identification, CALCRIM 315, includes the instruction that the People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. Defense counsel should emphasize this language in closing argument to establish the relationship between identification issues and reasonable doubt. See *People v Wright* (1988) 45 C3d 1126, 1143, 248 CR 600. It is sometimes valuable to save trial eyewitness points for argument rather than make them during cross-examination. This approach provides the jury with new evidence and deprives the prosecutor of the opportunity of having the witness explain the discrepancy.

The trial court has discretion to allow defense counsel to argue information from articles on mistaken identification. *People v Farmer* (1989) 47 C3d 888, 922, 254 CR 508, overruled on other grounds in *People v Waidla* (2000) 22 C4th 690, 724 n6, 94 CR2d 396. The trial court's decision is usually upheld. See, *e.g., People v Farmer, supra; People v London* (1988) 206 CA3d 896, 909, 254 CR 59.

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§22.32 V. PROSECUTION PRESENTATION OF EYEWITNESS IDENTIFICATION

The key to a successful identification case is careful preparation. The prosecutor should do the following:

- Evaluate possible defenses;
- Review police and investigation reports;
- Visit the crime scene;
- Interview key eyewitnesses as soon as possible;
- Anticipate defenses and take them into account when planning strategy for the case;
- Decide whether to hold a lineup or photo identification proceeding if one has not already been held;
- Decide which witnesses to call at the preliminary hearing in a felony case; and
- Ascertain what additional investigation is needed from investigators, and which witnesses to subpoena for trial.

When eyewitness identification is the only thing to link a defendant to a crime, it is important to obtain as detailed a description of the perpetrator as possible from witnesses, and to consider holding some form of identification proceeding as soon as possible while the witnesses' recollections are still fresh. Some prosecutors prefer photo lineups because defense counsel does not have to be present. See *U.S. v Ash* (1973) 413 US 300, 37 L Ed 2d 619, 93 S Ct 2568; *People v Rist* (1976) 16 C3d 211, 216, 127 CR 457. A sample prosecution motion for lineup is in California Criminal Law Forms Manual §22.5 (2d ed Cal CEB 2005).

When identification is at issue but other evidence links the defendant to the crime, the prosecutor may choose not to hold a special identification proceeding in felony cases, because the victim will have the opportunity to identify the defendant at the preliminary hearing. It is crucial that the prosecutor evaluate and use this corroborating evidence to bolster the identification.

When an identification case will go to trial, the prosecutor should visit the scene of the crime with an investigator to make the observations discussed in §22.22 and then interview the eyewitness again.

At trial, the direct examination of eyewitnesses should usually be complete, but short, in order to hold the attention of jurors. Counsel should be sure to lay the proper foundation as to the date, time, place, lighting, and opportunity to view the crime and the defendant, and explore any problem areas such as the witness not wearing glasses at the time, the witness having had only a fleeting look, or the witness having had physical obstacles blocking his or her view.

The prosecutor should present evidence in addition to the identification to support a conviction. If there is no physical evidence or confession, there may be a motive for the crime, or the defendant may have committed similar offenses (see §§24.52-24.55). Evidence of identification of the defendant at a prior lineup, particularly shortly after the time of the crime, may be persuasive and should usually be introduced.

The defense may move to introduce testimony from an eyewitness identification expert. *People v McDonald* (1984) 37 C3d 351, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431, permits such testimony on the subject of factors that may influence the reliability of eyewitness identification, but not on the subject of the reliability of any particular identification. However, the *McDonald* case permits such testimony only if there is eyewitness identification testimony that is not substantially corroborated such that it has "independent reliability." *People v Sanders* (1995) 11 C4th 475, 508, 46 CR2d 751. If other evidence, such as physical evidence or incriminating statements by the defendant, corroborate the identification evidence, the prosecutor should oppose the motion.

The prosecutor should consider who could provide an alibi and interview these witnesses as soon as possible to find out whether an alibi will be presented and to prevent a fabricated alibi at the last minute. The defendant's work associates, friends, and family are the three most common sources of alibi witnesses.

If the witness or victim recants an earlier identification of the defendant as the perpetrator, and refuses to make an in-court identification, the earlier identification is admissible both to impeach the victim or witness and as substantive proof of the facts asserted in the earlier statement. Evid C §1235.

If the eyewitness is an accomplice, other corroborating evidence connecting the defendant to the crime will be

necessary. Pen C §1111. See also *People v Green* (1971) 3 C3d 981, 92 CR 494.

If the defendant presents a defense witness of whom the prosecutor is unaware, the prosecutor is entitled to a reasonable continuance. Pen C §1051. If the continuance is based on the defendant's testimony, it cannot exceed 1 day. Pen C §1051.

The defendant's refusal to participate in a lineup is admissible and may be commented on by the prosecutor in closing argument. See *People v Huston* (1989) 210 CA3d 192, 217, 258 CR 393 (comment by prosecutor that defendant refused to participate in lineup but then later appeared in lineup after altering appearance was proper). See also CALCRIM 371 (defendant's efforts to suppress evidence); CALJIC 2.06.

Prosecutors should be prepared to argue for the eyewitness identification. The specific details of the description given by the victim or witness should be pointed out. The different identifications of the defendant by the witness, *e.g.,* showup, followed by lineup, followed by in-court identification, should be highlighted. Corroborating evidence should be introduced. The prosecutor should be prepared for defense counsel's arguments on mistaken eyewitness identification. The defense in an eyewitness case will usually try to magnify small discrepancies in the testimony of eyewitnesses. It is important for the prosecutor to point this out to the jury. It is rarely productive to respond to every defense issue; the prosecutor should emphasize that the important fact is that the witness identified the defendant. If the witness knew the defendant, or had seen the defendant on prior occasions, that strengthens the identification. If the witness was a stranger to the defendant, the prosecutor can point out that there is no reason for the witness to lie.

Defense counsel frequently argue the weakness of eyewitness identification in general, on the basis of mistaken identifications discussed in local newspapers or magazines. See *People v Woodson* (1964) 231 CA2d 10, 15, 41 CR 487 (account from newspaper was related to jury of man convicted of crimes based on mistaken eyewitness identification). Judges commonly allow both counsel a great deal of latitude in argument, including references to mistaken eyewitness identification. However, prosecutors can object to such an argument if it purports to be expert evidence on eyewitness identification or if it is unrelated to the defendant's case. See *People v Williamson* (1977) 71 CA3d 206, 215, 139 CR 222 (excerpt of *Scientific American* article read to jurors, but defense attorney not allowed to tell jurors source of article or conclusions of author of article). See also the cases and discussion in §22.31. Prosecutors should also prepare a rebuttal to this type of argument.

Prosecutors should not overlook the advantages of constructing their own eyewitness identification instructions, or modifying CALCRIM 315 to include elements that favor the prosecution. See *People v Moore* (1954) 43 C2d 517, 524, 275 P2d 485. See also §32.25.

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§22.33 VI. PROSECUTION PRESENTATION OF VICTIM PHOTOGRAPHS

Photographic evidence can be compelling proof of what occurred when a crime was committed because it allows the trier of fact to travel back in time and see the results of criminal behavior. However, use of photographic evidence is constrained by due process considerations.

The prosecutor will probably want to show jurors pictures of dead victims. The use of photos of the deceased victim is within the trial court's discretion. See *People v Smithey* (1999) 20 C4th 936, 86 CR2d 243 (no error in trial court's admission of photos of victim's body or in prosecutor's reference to photos in penalty phase closing argument); *People v Thompson* (1988) 45 C3d 86, 114, 246 CR 245 (photograph of victim's face and of injuries admissible to show care taken during commission of crime, to refute defendant's contention that he had been drunk on night of crime). The trial court's decision to admit a victim photograph will stand unless the prejudicial effect of the photograph clearly outweighs its probative value. *People v Navarette* (2003) 30 C4th 458, 495, 133 CR2d 89. Although a photo or video taken while a murder victim was still alive may generate sympathy for the victim, especially during the penalty phase, the trial court may still admit such evidence if it is otherwise relevant. See *People v Walker* (1988) 47 C3d 605, 630, 253 CR 863 (use of victim's high school yearbook photo to aid witness in court in identifying victim permissible; photo was only one available to prosecutor)*; People v Thompson, supra* (photo of victim while alive admissible to show that victim was a live human being on night of crime); *People v Harris* (2005) 37 C4th 310, 332, 33 CR3d 509 (silent videotape of victim at child's party admissible to show victim owned and wore jewelry that the prosecution alleged was stolen during her murder). But see *People v Bonin* (1989) 47 C3d 808, 848, 254 CR 298 (showing photographs of victims to parents of victims in court at guilt phase of capital trial was error because defense had offered to stipulate to their identity; however, error was harmless).

When the issue is not the identity of the victim, but the credibility of an eyewitness concerning the age of the victim, a photograph of the victim as he or she appeared in life is admissible at the guilt phase of a capital trial. *People v Anderson* (2001) 25 C4th 543, 594, 106 CR2d 575. Photographs of victims as they appeared in life are always admissible at the penalty phase of a capital trial. *People v Anderson* (2001) 25 C4th 543, 594, 106 CR2d 575; *People v Lucero* (2000) 23 C4th 692, 714, 97 CR2d 871.

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§22.34 VII. APPELLATE REVIEW

Before trial. Through a Pen C §995 motion made in the superior court, the defense can seek review of a motion, made at the preliminary hearing, concerning an identification. A writ can be taken from the denial of a Pen C §995 motion. Pen C §999a. See chap 13 on §995 motions. For discussion of prosecution alternatives when a charge or case is dismissed at the preliminary hearing, see §§13.32-13.39, 13.43-13.46.

After trial. The defense can seek review of a trial ruling on the admissibility of identification evidence on appeal. See, *e.g., People v McDonald* (1984) 37 C3d 351, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. A conviction is reversible following trial only if the identification procedure was so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Simmons v U.S.* (1968) 390 US 377, 384, 19 L Ed 2d 1247, 1253, 88 S Ct 967. Although an objection is ordinarily required in the trial court (see *People v Morrow* (1969) 276 CA2d 700, 81 CR 201), the issue of an impermissibly suggestive identification procedure can be raised for the first time on appeal as the basis of a claim of incompetence of counsel (*People v Nation* (1980) 26 C3d 169, 161 CR 299; *People v Harris* (1985) 175 CA3d 944, 958, 221 CR 321).

If the defendant appeals, the prosecution may also seek review of the trial court ruling excluding an identification. See Pen C §1252.

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23

CONFESSIONS AND ADMISSIONS

HON. JOSEPH A. BRANDOLINO

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§23.1 I. OVERVIEW

Ø **Note:** The advice given to counsel in this chapter is the work of previous authors and CEB editors and does not necessarily reflect the views or advice of the current update author.

General approach to confessions and admissions. When criminal defendants make statements to investigating police officers, or sometimes to other private citizens, that tend to incriminate them, issues under the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Cal Const art I, §§13-15, become evident. The terms "confession" and "admission" are defined in §23.3. A checklist for spotting issues concerning a defendant's statement is in §23.5.

Prosecutors usually use inculpatory statements against the defendant during trial. Even what was originally meant to be an exculpatory statement will often tend to indicate guilt and will be used in court against the criminal defendant. For instance, statements made by the accused when arrested that were self-serving at the time may be inconsistent with trial testimony or with other exculpatory statements made to other witnesses.

Criminal cases that involve the potential trial use of statements by a defendant must be closely analyzed by both the prosecutor and defense counsel. A prosecutor must review each statement to determine how it may fit in with other evidence, *i.e.,* does it help or hinder the proof of guilt? If the decision to use a statement is made, potential admissibility problems must be researched. The prosecutor must also consider which statements he or she does not want the jury to hear. Legal authority both pro and con must be reviewed. The defense attorney must make the same analysis, but from the opposite point of view. The potential devastating effect that admissions of guilt can have on a client's defense makes a thorough study of the rules on admissions and confessions of primary importance.

Neither side should fall into the trap of thinking that only Fifth Amendment self-incrimination considerations apply. Admissibility of statements may also be closely related to the rules of search and seizure (Fourth Amendment), the right to counsel and speedy trial (Sixth Amendment), and due process and privilege considerations (Fifth and Fourteenth Amendments).

Neither prosecutors nor defense counsel should take police reports reflecting a confession or admission at face value. Both counsel should attempt to interview the police officers about the factors that might have motivated the defendant to make a statement as well as the circumstances under which the statement was obtained. Statements described by police officers as "confessions" are often no more than admissions. Other seemingly innocuous statements not considered important by the police, and therefore not included in the police reports, often exist. The attorneys must talk to the officers to determine the existence and significance of such statements.

No procedural difference between admissions and confessions. In the trial court, there is no difference in the procedural treatment of admissions and confessions. Any relevant statement by a defendant is generally admissible when offered by the prosecution against him or her. Evid C §1220. Confessions and admissions, whether obtained voluntarily or involuntarily, are now subject to the harmless error rule. *People v Cahill* (1993) 5 C4th 478, 20 CR2d 582.

Introducing statement. The truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)) abrogates the portion of the corpus delicti rule prohibiting admission of extrajudicial statements without independent proof. *People v Alvarez* (2002) 27 C4th 1161, 119 CR2d 903. See §§23.41-23.42 for further discussion of proof of corpus delicti.

Statements must be relevant (Evid C §350), properly authenticated (Evid C §§1400-1454), and come within some hearsay exception (for the prosecutor, usually Evid C §1220). Statements must also have been obtained in a manner that was not unconstitutional or otherwise illegal. The following are the most common means of attacking a defendant's statement:

- The defendant is not competent to make a voluntary statement.
- *Miranda* warnings were required but were not given.
- *Miranda* warnings were incorrectly given, or an ineffective or incomplete waiver was taken.
- Privilege applies to the defendant's statement.

- The defendant's right to counsel was violated.
- The defendant's statement was obtained during a delay in arraignment.
- The defendant's statement was obtained through physical or mental abuse.
- The defendant's statement resulted from an unlawful detention, arrest, or search (*i.e.,* some Fourth Amendment ground).

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§23.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many counties have specific time requirements not otherwise required by the Penal Code.

Action	Deadline	Authority
Motion to suppress statement because obtained as result of illegal search or seizure.	Same as any other Pen C §1538.5 motion. See deadlines in chap 16.	
Common law exclusion motion.	Usually brought as in limine motion in trial court because pretrial ruling not necessarily binding on trial judge. Although pretrial ruling is not always binding on trial judge, judge is not required to hold second hearing, and parties are not entitled to second hearing.	*People v Clark* (1992) 3 C4th 41, 118, 10 CR2d 554; *People v Superior Court (Zolnay)* (1975) 15 C3d 729, 125 CR 798; *People v Beasley* (1967) 250 CA2d 71, 77, 58 CR 485.
Introduction of defendant's statement inconsistent with trial testimony.	During prosecution's rebuttal case.	*People v May* (1988) 44 C3d 309, 243 CR 369.

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§23.3 III. CONFESSIONS AND ADMISSIONS: DEFINITIONS AND DIFFERENCES

A confession is a defendant's statement that contains a complete and express acknowledgment of all facts necessary to establish the defendant's guilt of the crime charged. *People v Morse* (1969) 70 C2d 711, 721, 76 CR 391. Assuming that there is independent evidence of the crime that satisfies any corpus delicti requirement (see §§23.41-23.42), a confession is, by definition, sufficient evidence to sustain a guilty verdict if believed by the jury. *People v Manson* (1977) 71 CA3d 1, 42, 139 CR 275; *People v Beach* (1963) 212 CA2d 486, 492, 28 CR 62.

Ø **Note:** Even a confession may be susceptible to more than one interpretation. The defendant may be able to give an exculpatory explanation of what was meant when making the statement, or give an exculpatory meaning to the statement by putting it in context.

If a defendant's statement contains facts that amount to a claim of mitigation, justification, or excuse, or fails to admit (at least by inference) every element of the offense, it is only an admission. See *People v McClary* (1977) 20 C3d 218, 142 CR 163, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 20 CR2d 582 (defendant admitted killing, but claimed it was accidental); *People v Maynarich* (1978) 83 CA3d 476, 481, 147 CR 823 (defendant admitted stabbing, but claimed that it was unintentional and the result of his consumption of alcohol). Mere admissions fail to express full responsibility for the crime and may show defense counsel where to concentrate in building a defense.

Any extrajudicial statement made by a defendant that tends to prove guilt when considered with the rest of the evidence is an admission, even though nonhearsay, and whether inculpatory or exculpatory. *People v Brackett* (1991) 229 CA3d 13, 280 CR 305.

Lawyers and judges alike sometimes have the mistaken notion that, for a defendant's statement to qualify as an exception to the hearsay rule, it must contain some admission of guilt; but this is not true. Evidence Code §1220 makes any statement of a party an exception to the hearsay rule if offered by an opposing party; this exception applies to both criminal and civil cases. Thus, a hearsay objection will not bar the prosecutor from introducing a statement made by a criminal defendant. However, even if the statement qualifies under a hearsay exception, such a statement must be relevant to be admitted, *i.e.,* the statement must have a tendency to prove or disprove a disputed fact of consequence to the action. Evid C §§210, 350.

For evidentiary purposes, the distinction between "confession" and "admission" has little practical significance.

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Source: Criminal Law/California Criminal Law Procedure and Practice/23 CONFESSIONS AND ADMISSIONS/§23.4 IV. HOW DEFENSE COUNSEL CAN PREVENT STATEMENTS BY DEFENDANT

§23.4 IV. HOW DEFENSE COUNSEL CAN PREVENT STATEMENTS BY DEFENDANT

When counsel is contacted by defendant. Defense counsel need remember only one basic rule of practice when consulted by a client during a criminal investigation: A client who is the subject of a criminal investigation or accusation must be advised not to speak about the case with *anyone* without first conferring with his or her attorney and having that attorney present before deciding whether to speak to someone else. The defendant should be told to tell the police he or she wants counsel present for any questions. Counsel should also call the police and advise them of the items set out in the next part of this section.

Counsel may also wish to furnish clients with an "alternative *Miranda* card" such as that suggested in Amsterdam, Trial Manual 5 for the Defense of Criminal Cases §51 (5th ed 1988):

My lawyer has instructed me not to talk to anyone about my case or anything else, and not to answer questions or reply to accusations. On advice of counsel and on the grounds of my rights under the Fifth and Sixth Amendments, I shall talk to no one in the absence of counsel. I shall not give any consents or make any waivers of my legal rights. Any requests for information or for consent to conduct searches or seizures or investigations affecting my person, papers, property, or effects should be addressed to my lawyer: _ _[*name, address, telephone number*]**_ _. I want all communications with the authorities henceforth to be made only through my lawyer. I request that my lawyer be notified and allowed to be present if any identification confrontations, tests, examinations, or investigations of any sort are conducted in my case, and I do not consent to any such confrontations, tests, examinations, or investigations.**

On the right to counsel as it concerns a defendant's statements, see §23.44.

When counsel is contacted by defendant's friends or relatives. When counsel's first contact comes from a relative of a suspect in custody, counsel should immediately call the appropriate arresting, investigative, and custodial agencies to request that any interrogation in progress immediately cease, and to advise them of the following:

- The client is represented by counsel;
- The client has been advised not to speak with anyone (if this has been done) without counsel present;
- The client should not be contacted or interrogated without counsel's consent; and
- Each agency should so inform any additional agency, including out-of-state or federal agencies, of counsel's request (see, *e.g.,* the interjurisdictional problems discussed in cases such as *People v Mattson* (1984) 37 C3d 85, 207 CR 278).

The police are not required to tell the defendant that counsel called when charges have not yet been filed. *Moran v Burbine* (1986) 475 US 412, 89 L Ed 2d 410, 106 S Ct 1135. See *People v Ledesma* (1988) 204 CA3d 682, 691, 251 CR 417. See also §23.44.

Given *Moran's* holding, counsel should immediately and persistently attempt to see a client in police custody to personally advise the client to remain silent. All rebuffed attempts to see a client should be thoroughly documented. It may still be that, in the appropriate case, due process considerations will convince a court to suppress that which *Miranda,* as interpreted by *Moran,* does not. It is also a misdemeanor to refuse an attorney's request to see a client in custody when the prisoner or a relative of the prisoner requested the attorney's assistance. Pen C §825. Although an aggressive detective may not wish to interrupt an interrogation, a jailer may allow the attorney to see the client before the detective gets there because of §825.

Ø **Note:** Penal Code §825 does not create an independent statutory exclusionary rule. *People v Ledesma, supra*.

When the defendant is not aware that a lawyer is attempting to stop the interrogation, his or her statements are still admissible unless the questioning police officers' actions somehow deprive the defendant of knowledge essential to the defendant's ability to understand the nature of his or her rights and the consequences of abandoning them. *Moran v Burbine, supra*; *People v Stephens* (1990) 218 CA3d 575, 267 CR 66.

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§23.5 V. SPOTTING ISSUES CONCERNING DEFENDANT'S STATEMENT

That a defendant in a criminal case has confessed does not end the issue. Both the defense and the prosecution must investigate the circumstances surrounding the taking of the defendant's statement. It is wrong to assume that police reports alone will indicate all possible grounds for suppression of a defendant's statements. Counsel must analyze the following:

The content and legality of the statement

- Is the statement reliable or truthful? See *People v Cox* (1990) 221 CA3d 980, 987, 270 CR 730.
- Is the statement relevant? See Evid C §§210, 350.
- How does the statement fit into counsel's case?
- Is there an innocent explanation for the statement, *e.g.,* the defendant misunderstood the question or was too drunk to understand it, or is the statement subject to more than one interpretation?
- Is there a hearsay objection? See §23.6.
- Was there a *Miranda* violation? See §§23.16-23.30.
- Did the police continue to interrogate after an invocation of *Miranda*? See §§23.23-23.25.
- Was the statement involuntary? See §§23.31-23.32.
- Even if the statement is legally voluntary, can defense counsel provide testimony to jurors that the confession is not worthy of belief because of the physical and psychological environment in which it was obtained? See *Crane v Kentucky* (1986) 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142.
- Was defendant's right to counsel violated? See §23.44.
- Was the statement a product of unlawful detention, arrest, search, or seizure? See §§23.9-23.10.
- Was the statement obtained during delay in arraignment? See §23.43.
- Was the statement privileged? See Jefferson's California Evidence Benchbook, chaps 37-46 (4th ed CJA-CEB 2009).

The credibility of the individual who heard the statement

- If a police officer took the statement, have any complaints of lying or coercing confessions been brought against the officer? See §§11.19-11.24 (*Pitchess* motions).
- Is a statement by the defendant being reported by an in-custody informant? If so, special rules apply. See Pen C §§1127a, 1191.25, 4001.1, discussed in §17.14.
- Is an in-custody informant acting in violation of *Massiah*? See §23.44.
- Is the witness a paid informant? If so, the witness can be impeached with proof of any benefits. See *People v Allen* (1978) 77 CA3d 924, 931, 144 CR 6. For further discussion of informants, see chaps 17 (Motion to Disclose Informant's Identity), 49 (Immunity for Testimony).
- If a non-police officer other than an in-custody informant heard the statement, does the witness have a motive to lie or a bias against the defendant? Can the witness be impeached, *e.g.,* with a prior felony conviction? Has the witness made contrary statements to others that can be used to impeach the witness? Is there evidence that can rehabilitate the witness? For further discussion, see Effective Introduction of Evidence in California, chaps 14-16 (character evidence), 19 (credibility) (2d ed Cal CEB 2000).

Ø **Note:** The prosecutor who promises a benefit to a witness to secure his or her testimony might consider having the witness testify to this fact on direct examination. This tactic avoids making it appear as if something underhanded was done and gets the impeaching information out of the way early, so that the substance of the witness's testimony can then be stressed.

The means and accuracy by which the statement was recorded

- If the statement is in writing, did the defendant sign it?

- If the statement was recorded, did the defendant waive his or her rights on the recording? Was the defendant told that the statement was being recorded? Was the recorder turned off at any time? Was the recording tampered with?
- If the statement was not put in writing or was not transcribed verbatim, can the accuracy of the verbal account of the statement be brought into question? In addition, voice inflection, hesitation, and emotion may change the meaning of the statement and may be open to argument.
- Do written notes exist of police officers or citizens who will testify to a defendant's statement that counsel can obtain through pretrial discovery? These notes may help in cross-examining the witness. Although there is no duty to preserve such notes (*People v Tierce* (1985) 165 CA3d 256, 264, 211 CR 325), their intentional destruction may violate the *Trombetta-Youngblood* rule (see *People v Goss* (1980) 109 CA3d 443, 454, 167 CR 224). Defense counsel should therefore request a court order forbidding the destruction of police officer notes as early in the proceedings as possible.

Ø **Note:** Prosecutors should encourage the use of recorded statements by law enforcement. Defense attorneys should argue that failure to record a statement makes the accuracy and meaning of the statement subject to question.

The defendant's capacity to confess

- Is the defendant developmentally disabled or mentally ill? See §23.32.
- Did the defendant have the capacity to refrain from making a statement to police? See *People v MacPherson* (1970) 2 C3d 109, 84 CR 129 (defendant did not have mental capacity to refrain from making admissions). See §23.32.
- Was the defendant insane or incompetent when he or she made the statement? On competence to stand trial, see §§48.7-48.22. On the insanity defense, see §§48.40-48.51.
- Was psychological coercion used on the defendant? See §23.32.
- Was the defendant incapacitated at the time the confession was made because of alcohol or drugs? See *People v Johnson* (1973) 32 CA3d 988, 1002, 109 CR 118 (defendant was under influence of sodium amytal). See also §§23.32, 48.26, 48.28-48.39.
- What is the defendant's primary language? See *People v Cortes* (1999) 71 CA4th 62, 83 CR2d 519. See also §23.20.
- Was there a combination of elements that an expert might testify would result in the statement not being the product of a rational intellect and free will? See *People v MacPherson, supra*. For example, low intelligence, lack of criminal sophistication, a chronic mental disorder, and being under the influence of alcohol or drugs might combine to make a statement involuntary. See §§23.31-23.32.

Other factors

- Is the defendant a public employee, licensee, or contractor who was given use immunity in exchange for the statement? See §23.26.
- Has the prosecutor violated ethical standards by contacting a represented defendant or by permitting law enforcement officers to do so? See §23.52.
- Is the defendant suspected of child abuse or neglect?

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VI. ISSUES REGARDING THE INTRODUCTION OF STATEMENTS

§23.6 A. Hearsay Problems

Hearsay exceptions available to the prosecution. Like any extrajudicial (*i.e.,* out-of-court) statement, a defendant's admissions or confessions are hearsay. Evid C §1200. Therefore, they would be inadmissible in court were it not for statutory exceptions to the hearsay rule that permit them to be introduced. These are some of the exceptions available to the prosecution:

- Evid C §1220. "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party."
- Evid C §1221. Adoptive admissions.
- Evid C §1222. Authorized admissions.
- Evid C §1223. A co-conspirator's admissions.

Hearsay exceptions available to the defense. The statutory exceptions that permit the prosecution to introduce a defendant's extrajudicial statements do not allow a defendant to introduce them for his or her own benefit. See Evid C §§1220-1223. As a matter of tactics, the prosecution may decide not to offer a defendant's statement that includes exculpatory elements to encourage the defendant to testify in his or her own defense. When defense counsel wishes to introduce the defendant's extrajudicial statement, exceptions other than §§1220-1223 must be used to make the statement admissible. These are some possibilities:

- Evid C §356. Under the "rule of completeness," whenever a part of an act, declaration, conversation, or writing is given in evidence, the adverse party is entitled to inquire into the rest of the act, declaration, conversation, or writing. The purpose of §356 is to keep evidence in context and to ensure that the trier of fact is not misled by hearing only a partial account of certain evidence.
- Pen C §872(b). Hearsay is admissible at the preliminary hearing to establish probable cause when testified to by qualified law enforcement officers. An honorably retired law enforcement officer may also relate statements of declarants made out of court and offered for the truth of the matter asserted when the statements were made when the honorably retired officer was an active law enforcement officer. See also Cal Const art I, §30(b).

Ø **Note:** The right to cross-examine a hearsay declarant under Evid C §1203 does not apply to hearsay offered at a preliminary hearing by a law enforcement officer pursuant to Pen C §872(b). Evid C §1203.1.

- Evid C §1236. Prior consistent statements.
- Evid C §1237. Past recollection recorded.
- Evid C §1240. Spontaneous statements.
- Evid C §1241. Contemporaneous statements.
- Evid C §1250. Statements of declarant's then-existing mental or physical state. *People v Morales* (1989) 48 C3d 527, 551, 257 CR 64.

Nonhearsay. Whether a particular statement is hearsay at all depends on whether it is offered for its truth. The admissibility of a defendant's out-of-court statement that is offered for a nonhearsay purpose may depend on relevancy alone. *People v Jackson* (1989) 49 C3d 1170, 1187, 264 CR 852 (capital case in which the defense was unconsciousness; defendant's statements to police were properly admitted as nonhearsay evidence because they were not offered for truth that defendant had shot victim, but as circumstantial evidence that defendant had a memory of the shooting). Audio or video recordings of the alleged crime itself are not hearsay and are generally admissible if properly authenticated. *People v Patton* (1976) 63 CA3d 211, 219, 133 CR 533. Recorded speech relevant to the defendant's degree of intoxication is admissible when his or her mental state is in issue. See *People v Filson* (1994) 22 CA4th 1841, 1848, 28 CR2d 335, disapproved on other grounds in *People v Martinez* (1995) 11 C4th 434, 452, 45 CR2d 905.

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§23.7 B. Relevance and Authentication

When a defendant's statements are to be used in trial against the defendant, they must also be authenticated. Evid C §§1400-1454. Authentication is the process of laying a foundation to show that the out-of-court statement, whether it is to be presented orally, in writing, or on a recording, is in fact what the proponent claims it to be, *i.e.,* a statement made by the defendant. See Evid C §1400.

For further discussion, see Effective Introduction of Evidence in California, chaps 11 (authentication), 45 (relevance) (2d ed Cal CEB 2000).

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§23.8 C. Secondary-Evidence Rule

The secondary-evidence rule (see Evid C §§1521-1523) generally allows the content of a writing to be proved by an original or by "otherwise admissible secondary evidence." Evid C §§1520-1521. Included in the definition of a writing (Evid C §250) are tape recordings (*People v Fujita* (1974) 43 CA3d 454, 472, 117 CR 757), motion pictures (*People v Enskat* (1971) 20 CA3d Supp 1, 3, 98 CR 646), and videotapes (*People v Moran* (1974) 39 CA3d 398, 114 CR 413).

Ø **Note:** Police failure to tape-record a defendant's statement does not make it inadmissible. *People v Holt* (1997) 15 C4th 619, 663, 63 CR2d 782; *People v Lucas* (1995) 12 C4th 415, 442, 48 CR2d 525.

For further discussion of the secondary-evidence rule, see Effective Introduction of Evidence in California, chaps 12-13 (2d ed Cal CEB 2000).

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VII. PROCEDURES REGARDING THE EXCLUSION OF STATEMENTS

A. Statements Related to Fourth Amendment Issues

§23.9 1. Statements Related to Fourth Amendment Violations May Be Raised by Pen C §1538.5 Motion

Statement suppression motions based solely on the theory that the statement is the product of an unlawful search or seizure must be litigated according to the procedures set out in Pen C §1538.5. *People v Johnson* (1969) 70 C2d 541, 545, 75 CR 401, modified on a related issue in *People v DeVaughn* (1977) 18 C3d 889, 899 n8, 135 CR 786; *People v Superior Court (Redd)* (1969) 275 CA2d 49, 52, 79 CR 704. See also *People v Mattson* (1990) 50 C3d 826, 858, 268 CR 802. The same is true of statements elicited solely as the result of an illegal detention or arrest. *People v Takencareof* (1981) 119 CA3d 492, 496, 174 CR 112, disapproved on other grounds in *People v Towne* (2008) 44 C4th 63, 85, 78 CR3d 530 (unlawful arrest). Likewise, §1538.5 must be used to suppress evidence obtained through a search or seizure based on an unlawfully obtained statement. *People v Superior Court (Zolnay)* (1975) 15 C3d 729, 735, 125 CR 798; *People v Warburton* (1970) 7 CA3d 815, 86 CR 894. See chap 16 on search and seizure motions and procedure.

When no search and seizure issue is involved, §1538.5 is not the proper procedural vehicle to use to suppress a statement. Examples of other grounds are inadmissible hearsay, voluntariness, *Miranda,* and privilege. If a §1538.5 hearing is mistakenly used, that ruling is not binding on the trial court and the issue is not preserved for appeal unless an objection is made at the time the evidence is offered at trial. *People v Jennings* (1988) 46 C3d 963, 975, 251 CR 278. For discussion of the procedures available to suppress statements when no Fourth Amendment issue is present, see §§23.11-23.14.

Frequently, statement issues are not easily categorized as search and seizure problems as opposed to voluntariness or *Miranda* problems. For example, a defendant may claim that his or her statement is the fruit of an illegal arrest and was involuntary because of the circumstances surrounding the arrest. An illegal arrest is but one factor in the voluntariness determination and does not necessarily render the statement inadmissible. See *People v Boyer* (1989) 48 C3d 247, 267, 256 CR 96, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394 (defendant's confession was erroneously admitted in violation of Fourth Amendment and *Miranda* because he was taken to police station for interrogation without probable cause to arrest, was lied to by police, and was interrogated despite his request for lawyer); *People v DeVaughn* (1977) 18 C3d 889, 898, 135 CR 786.

When a statement is properly challenged by the defense under Pen C §1538.5, the prosecution must adhere to §1538.5 procedures for review of any trial court order. The prosecution cannot ignore a §1538.5 ruling that a statement is inadmissible and then attempt to introduce the statement at trial (see Pen C §1538.5(d)), unless one of the exceptions in Pen C §1538.5(j) exists.

Section 1538.5 rulings on statements are binding on the trial court unless reversed by the pretrial appellate process set out in §1538.5. Pen C §1538.5(i)-(m); *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257, 61 CR 510.

A sample defense motion to suppress a statement as the product of a Fourth Amendment violation is in California Criminal Law Forms Manual §23.2 (2d ed Cal CEB 2005).

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§23.10 2. Burden to Be Satisfied in Pen C §1538.5 Motion Concerning Statement

In both federal and California state courts, statements obtained after an illegal Fourth Amendment action (a detention, arrest, search, or seizure) are inadmissible on Fourth Amendment grounds only if they constitute "fruit" of the illegal Fourth Amendment activity. *Wong Sun v U.S.* (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct 407. See, *e.g., Kaupp v Texas* (2003) 538 US 626, 155 L Ed 2d 814, 123 S Ct 1843 (per curiam). The exclusionary rule requires a causal connection between the illegal conduct and the evidence sought to be suppressed. *Dunaway v New York* (1979) 442 US 200, 218, 60 L Ed 2d 824, 839, 99 S Ct 2248; *New York v Harris* (1990) 495 US 14, 19, 109 L Ed 2d 13, 21, 110 S Ct 1640.

Even when a statement is shown to be the fruit of a Fourth Amendment violation, factors that intervene between the initial unlawful police act and the later confession or admission may "dissipate the taint," allowing the statement to be admissible. See, *e.g., Lozoya v Superior Court* (1987) 189 CA3d 1332, 1340, 235 CR 77 (no attenuation). Among the factors to consider are whether a *Miranda* admonition followed the Fourth Amendment violation and preceded the statements, the amount of time between the illegal police act and when the statements were made, the "purpose and flagrancy of the official misconduct," and any other intervening factors. The burden of showing admissibility rests on the prosecution. *Kaupp v Texas, supra*; *Brown v Illinois* (1975) 422 US 590, 603, 45 L Ed 2d 416, 427, 95 S Ct 2254; *People v DeVaughn* (1977) 18 C3d 889, 135 CR 786; *People v Gonzalez* (1998) 64 CA4th 432, 446, 75 CR2d 272.

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B. Statements Not Involving Fourth Amendment Issues

§23.11 1. Procedures for Raising Statement Errors Not Involving Fourth Amendment Issues

Non-Fourth Amendment violations, *e.g.,* voluntariness, *Miranda,* hearsay, and privilege objections, can be raised by one or more of the following methods:

Objection at preliminary hearing or at any pretrial hearing at which prosecution attempts to introduce statement. The defense should object to the use of a defendant's extrajudicial statement at every hearing at which the prosecution tries to introduce it. However, it is unclear that an objection always lies, *e.g.,* at a probable cause or bail hearing. See, *e.g., In re Martinez* (1970) 1 C3d 641, 649, 83 CR 382 (*Miranda* does not apply to parole revocation hearings).

Such an objection is made on foundational grounds under Evid C §402. Defense counsel may follow this objection by a request to litigate the objection immediately through voir dire examination of the witnesses or may ask the court to allow evidence on the question later in the hearing. However, a judicial decision made before trial is not binding on the trial court, and the prosecution may again offer the evidence, or the defense may again challenge the statement at trial. *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257, 266, 61 CR 510. The trial court has discretion to accept the prior ruling, however, and can preclude the parties from relitigating it depending on the circumstances. *People v Clark* (1992) 3 C4th 41, 118, 10 CR2d 554; *People v Smithson* (2000) 79 CA4th 480, 499, 94 CR2d 170 (due process does not require trial court to hold second full evidentiary hearing when defendant renews motion to suppress, as long as trial judge independently reviews record of preliminary hearing and allows defendant to submit any additional evidence not presented to magistrate).

Following a mistrial, a new judge assigned to the case may overrule the previous judge's pretrial ruling on the defendant's motion to suppress, as long as the defendant is given notice and an opportunity to be heard and the revised ruling is not arbitrary or made without reason. *People v Riva* (2003) 112 CA4th 981, 5 CR3d 649. For reasons of comity and public policy, trial judges should not reverse or modify other trial judges' rulings without a highly persuasive reason to do so. 112 CA4th at 992.

Penal Code §995 motion to set aside information or indictment. This motion is available when a foundational objection at the preliminary hearing was overruled and the resulting holding order was implicitly or explicitly based on the statement. It is also available to attack a statement on which the grand jury relied in reaching an indictment. See Pen C §995.

Pretrial common law motion to exclude. All non-Fourth Amendment statement issues may be litigated by common-law exclusion motions. *Griffin v Superior Court* (1972) 26 CA3d 672, 696, 103 CR 379. The major drawback to the common law motion is that it may result in prejudicial publicity. See discussion of pretrial publicity in chap 14. Common law motions, like all pretrial motions, should be filed, noticed, and heard before trial in accordance with Cal Rules of Ct 4.111, unless there are local pleading and notice requirements. Cal Rules of Ct 4.111; *Griffin v Superior Court, supra*. Such motions are heard at the discretion of the court because the court's rulings do not bind the trial judge. *People v Beasley* (1967) 250 CA2d 71, 77, 58 CR 485. No pretrial appellate or writ relief is available from an adverse ruling on a common law motion. *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 660, 117 CR 20. See also *People v Edelbacher* (1989) 47 C3d 983, 1005, 254 CR 586; *People v Jennings* (1988) 46 C3d 963, 975, 251 CR 278; *In re Juma P.* (1988) 204 CA3d 1228, 251 CR 739.

Unnoticed motion in limine and foundational objections during trial. A motion at trial to suppress a statement is much more common than a pretrial common law motion because it avoids possible prejudicial publicity and is made before the trier of fact. Motions challenging a statement made on the eve of trial or raised as an objection during trial, must be heard, on request, outside the jury's presence. Evid C §402(b); see *People v Massey* (1976) 59 CA3d 777, 780, 130 CR 581. The proper objection is lack of foundation. See California Trial Objections, chap 21 (Cal CEB Annual). Any hearing on the admissibility of a statement should be conducted out of the jury's presence. Evid C §405; *People v Torrez* (1987) 188 CA3d 723, 734, 233 CR 627 (trial court ruled that confession was inadmissible after

hearing in front of jury; no error, applying *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243, standard discussed at §44.36). A sample defense motion to exclude statement is in California Criminal Law Forms Manual §23.3 (2d ed Cal CEB 2005).

Ø **Note:** An objection made out of the jury's presence must be made again during trial when the evidence is presented unless the court has specifically agreed on the record that a renewed objection is unnecessary; otherwise, the issue has probably not been preserved for appeal. *People v Boyer* (1989) 48 C3d 247, 270 n13, 256 CR 96, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394.

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§23.12 2. Tactical Considerations in Choosing Appropriate Procedural Vehicle

Counsel may use one or more of the procedures listed in §23.11 to litigate the admissibility of a statement that does not involve a Fourth Amendment issue. Choice of procedure is largely a strategic decision, which may be influenced by many factors.

Extent of dispute regarding facts. If facts are not in dispute, leaving only legal issues for resolution, the motion is best heard in the forum with the time and inclination to carefully consider the issues. If, however, counsel expects sharp factual disputes to arise and fears that opposition witnesses may tailor their testimony to counsel's framing of the issues, it may be preferable to present the motion at the first unnoticed opportunity: the preliminary hearing in felony cases or the trial in misdemeanor cases. By proceeding at the preliminary hearing, counsel can obtain a transcript of relatively unrehearsed testimony from the opponent's witnesses. The transcript can be used to impeach these witnesses at later hearings if their testimony changes. Evid C §§770, 1235. Supplemental or contradictory testimony may be presented at the preliminary hearing or saved for a later court hearing, depending on counsel's view of the likelihood of prevailing in each hearing.

> Ø **Note:** Failure to move for suppression at the preliminary hearing does not constitute a waiver for trial purposes, but it will preclude raising the issue as part of a Pen C §995 dismissal motion or on a related writ.

Importance of statement to prosecution's case. If the prosecution's case depends substantially or entirely on introduction of the statement, timing of the motion can have dramatic effects on the outcome of a case. In a felony case, if the motion is heard before trial begins and results in a ruling favorable to the defense, the prosecution may wish to dismiss before trial to preserve the option of refiling if new evidence becomes available; refiling is precluded if the motion is heard during trial, because jeopardy has attached. US Const amend V, XIV; Cal Const art I, §15; *Richard M. v Superior Court* (1971) 4 C3d 370, 376, 93 CR 752. Conversely, if defense counsel anticipates a favorable ruling followed by dismissal, he or she will want to bring the motion during trial, not before. See chap 26 on when jeopardy attaches.

> Ø **Note:** This consideration does not apply in misdemeanor cases, because refiling is generally barred by Pen C §1387 after just one dismissal. See Pen C §1387(b) (exception for domestic violence offense when complaining witness failed to appear after being subpoenaed).

Effect of publicity on jury pool. Pretrial litigation does increase the possibility of publicity that could taint the jury pool. Counsel can move to close the hearing to the press and public and to seal the transcript of the hearing. *Allegrezza v Superior Court* (1975) 47 CA3d 948, 950, 121 CR 245. The prosecutor, however, has the right to a "public trial." Cal Const art I, §29.

Use in opening statement. Prosecutors often seek to discuss a defendant's "confession" in their opening statement. Defense counsel may seek to use a defendant's out-of-court statement in a positive way in their opening statement. The mention of a defendant's out-of-court statement in counsel's opening statement, before the trial court has ruled on the statement's admissibility, is risky. If the court finds the out-of-court statement inadmissible, the court may sanction the party that mentioned the statement. A mistrial is a possibility. It is therefore the better practice for counsel to seek an in limine ruling on the admissibility of a defendant's out-of-court statement before mentioning it in the opening statement.

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§23.13 3. Burden of Proof for Voluntariness and *Miranda* Issues

The defense has the burden of making the motion, which includes presenting evidence. The burden of proof in both voluntariness and *Miranda* questions is on the prosecution. *People v Dykes* (2009) 46 C4th 731, 751, 95 CR3d 78 (*Miranda*); *People v Duren* (1973) 9 C3d 218, 237, 107 CR 157 (voluntariness).

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§23.14 4. Standard of Proof for Voluntariness and *Miranda* Issues

The federal preponderance-of-the-evidence standard governs the standard of proof in California for voluntariness and *Miranda* issues. *People v Markham* (1989) 49 C3d 63, 71, 260 CR 273. The federal standard is set out in *Lego v Twomey* (1972) 404 US 477, 30 L Ed 2d 618, 92 S Ct 619.

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§23.15 C. Calling Defendant as Witness at Statement Suppression Hearing or at Pen C §1538.5 Hearing Challenging Statement

A defendant's testimony at a suppression hearing may not be used against him or her in the prosecution's case-in-chief at trial. *Simmons v U.S.* (1968) 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967. It may be used for impeachment. *People v Douglas* (1977) 66 CA3d 998, 1003, 136 CR 358. The decision to call a defendant to testify at a suppression hearing depends, therefore, on these factors:

- Whether defendant has any credible evidence to offer (if not, defendant should not testify);
- Whether any other witnesses can testify to the same information the defendant has to offer (if they can, they should testify instead of the defendant);
- The existence of prior inconsistent statements by the defendant (if there are any, there might be no point in the defendant's testifying, because the judge would probably find the defendant's present testimony incredible); and
- Whether the defendant will be testifying at the trial (if not, there is no need to worry about anything the defendant says at the suppression hearing being used for impeachment at trial).

Similarly, a defendant's testimony at a Pen C §1538.5 hearing challenging a statement cannot be used against the defendant in the prosecution's case-in-chief at trial (*Simmons v U.S., supra*), but it can be used for impeachment (*People v Douglas* (1977) 66 CA3d 998, 1003, 136 CR 358).

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VIII. *MIRANDA V ARIZONA*

§23.16 A. *Miranda* Rule

In general. Expanding on the constitutional protection against self-incrimination and the right to the assistance of an attorney, it has been held that an accused who is in custody must be informed of the rights to remain silent and to an attorney, including an appointed attorney if the defendant is indigent, before any questioning begins. *Miranda v Arizona* (1966) 384 US 436, 468, 16 L Ed 2d 694, 720, 86 S Ct 1602. Because a criminal suspect cannot be expected to exercise these rights unless he or she is first made aware of them, the *Miranda* court held that any evidence resulting from an unwarned in-custody interrogation of the defendant could not be used against the defendant in a criminal proceeding. Later cases have held that statements that violate *Miranda* may not be used in the prosecution's case-in-chief but may be used for impeachment as long as they were voluntarily made. *People v May* (1988) 44 C3d 309, 243 CR 369. Such statements may be used for impeachment even when the police officer deliberately fails to honor a suspect's request for counsel for the purpose of securing evidence for impeachment purposes. *People v Peevy* (1998) 17 C4th 1184, 1200, 73 CR2d 865. See §23.46 for further discussion. However, an officer's intentional violation of *Miranda* is a factor the court should consider in determining the voluntariness of a confession. *People v Neal* (2003) 31 C4th 63, 1 CR3d 650.

Limits on *Miranda*. The *Miranda* rule does not apply to every situation involving the questioning of a criminal suspect. Generally, three factors must be present: There must be (1) an interrogation, (2) by a police officer or the officer's agent, (3) while the suspect is in police custody. These factors are discussed in §§23.17-23.19. See also §23.25 for exceptions to the *Miranda* requirement.

For discussion of standing to raise *Miranda* violations, see §§23.33-23.37.

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§23.17 B. Requirement of Interrogation

An "interrogation" is either express questioning or other police actions that are reasonably likely to elicit an incriminating response. *Rhode Island v Innis* (1980) 446 US 291, 301, 64 L Ed 2d 297, 308, 100 S Ct 1682; *People v Underwood* (1986) 181 CA3d 1223, 1231, 226 CR 840. Whether particular questioning is in fact an interrogation depends on the "total situation," including the length, place, and time of the questioning, the nature of the questions, the conduct of the police, and all other relevant circumstances. *People v Morse* (1969) 70 C2d 711, 722, 76 CR 391.

This test is not always easy to apply. See, *e.g., People v Gallego* (1990) 52 C3d 115, 169, 276 CR 679 (inmate's recorded statements with visitors admissible); *People v Lewis* (1990) 50 C3d 262, 274, 266 CR 834 (defendant's statements made to police officer were casual conversation and not product of interrogation, even though defendant had been arrested and put in police car before making statements); *In re Curt W.* (1982) 131 CA3d 169, 178, 182 CR 266 (no interrogation unless police "should have known" that words or actions were reasonably likely to elicit an incriminating response); *People v Williams* (1982) 128 CA3d 981, 987, 180 CR 734 (no *Miranda* warnings required when statements were legally recorded by police, in a police vehicle, without questioning); *People v Jones* (1979) 96 CA3d 820, 827, 158 CR 415 (officer's questions to criminal suspect about medical treatment for suspect did not require *Miranda* warning because they were not intended to elicit incriminating response); *Beaty v Stewart* (9th Cir 2002) 303 F3d 975, 988 (defendant's confession to psychiatrist following group counseling program in jail was spontaneous, not result of interrogation).

Questions asked during booking that result in a confession usually require a decision on whether an interrogation occurred. See, *e.g., People v O'Sullivan* (1990) 217 CA3d 237, 265 CR 784 (deputy sheriff's comment, "I think I have something here," referring to discovery of drugs during booking search, was not functional equivalent of interrogation; comment was addressed to fellow deputy assisting with search, and defendant was never addressed directly); *People v Morris* (1987) 192 CA3d 380, 387, 237 CR 402 (booking officer went to defendant's cell to give him identifying wristband and asked him several questions for purposes of jail security, including "Who are you accused of killing?"; defendant's confession inadmissible); *U.S. v Salgado* (9th Cir 2002) 292 F3d 1169, 1172 (when defendant was in custody on state weapons charge, INS agent who questioned him about birthplace and citizenship to ascertain whether he was subject to administrative action for deportation was not required to give *Miranda* advisement).

To determine whether police conduct constituted an interrogation, the California Supreme Court seems to focus on police intent. See *People v Grant* (1988) 45 C3d 829, 842, 248 CR 444 (action not taken to elicit incriminating statements will not be considered an interrogation and thus no *Miranda* warnings required). The court apparently considers this type of issue a factual one and will not disturb the trial court's ruling unless it is palpably erroneous. *People v Siripongs* (1988) 45 C3d 548, 575, 247 CR 729.

When a represented defendant initiates contact with a detective after previously invoking *Miranda* and volunteers information, there is no interrogation. *People v Stephens* (1990) 218 CA3d 575, 581, 267 CR 66 (court found knowing waiver of right to counsel because detective advised defendant to make no statement without counsel, but defendant proceeded voluntarily without interrogation).

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§23.18 C. Requirement That Questioning Be by Police Officer or Agent

Civilians. Civilians who are not acting as agents of law enforcement need not advise a criminal suspect of his or her Fifth Amendment and Sixth Amendment rights before questioning, even when the suspect is in custody. Such un-Mirandized statements are admissible against the defendant in court. See *In re Deborah C.* (1981) 30 C3d 125, 131, 177 CR 852. Although store security guards are not law enforcement officers and therefore need not give *Miranda* warnings before questioning arrested shoplifters, giving a *Miranda*-type admonishment is usually encouraged by prosecutors because it can serve as evidence that the suspect's statements were voluntary and not coerced. However, if private security guards do give a suspect the *Miranda* advice, and the suspect chooses to remain silent, that silence cannot be used at trial to impeach the defendant's testimony. *People v Givans* (1985) 166 CA3d 793, 212 CR 762.

Police officers and those working for them. *Miranda* admonishments must be given before questioning when the interrogator is a police officer or someone working for or at the request of the police. *In re Eric J.* (1979) 25 C3d 522, 527, 159 CR 317. This includes a psychiatrist sent by the prosecutor (*People v Anderson* (1990) 52 C3d 453, 470, 276 CR 356; *People v Montgomery* (1965) 235 CA2d 582, 588, 45 CR 475), as well as one appointed by the court on the issue of insanity (*In re Spencer* (1965) 63 C2d 400, 410, 46 CR 753), or competency to stand trial (*Estelle v Smith* (1981) 451 US 454, 68 L Ed 2d 359, 101 S Ct 1866).

Conversely, a criminal suspect need not be advised of the *Miranda* rights before questioning by certain other classes of people not otherwise acting as agents of the police. For instance, medical personnel and social workers asking questions as a part of their duties need not advise a defendant of *Miranda* rights, even when they know that the defendant has been arrested. *People v Battaglia* (1984) 156 CA3d 1058, 1064, 203 CR 370 (social worker); *People v Salinas* (1982) 131 CA3d 925, 937, 182 CR 683 (medical personnel).

Probation officers. Under the truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)), federal rather than state laws govern the admissibility of a defendant's statements. Under the federal rule of *Minnesota v Murphy* (1984) 465 US 420, 429 n5, 79 L Ed 2d 409, 421 n5, 104 S Ct 1136, which controls in California (see *People v May* (1988) 44 C3d 309, 243 CR 369), probation officers need not Mirandize probationers who are not in police custody before questioning them about new offenses. In *U.S. v Saechao* (9th Cir 2005) 418 F3d 1073, 1081, the Ninth Circuit held that a probationer's inculpatory out-of-custody statements to his probation officer were compelled, and thus inadmissible at trial, when the probationer was subject to a condition of probation that required him to promptly and truthfully answer all reasonable inquiries by the probation officer. The court distinguished that case from a situation in which probation conditions required only that the probationer be "truthful" but did not impose an affirmative obligation to respond to the probation officer's inquiries. 418 F3d at 1078. Whether a probation officer must Mirandize a probationer who is in police custody before questioning him or her about a new offense is an open question. See *Minnesota v Murphy* (1984) 465 US 420, 429 n5, 79 L Ed 2d 409, 420 n5, 104 S Ct 1136.

California courts have held that statements made to a probation officer during a pre-sentence investigation interview may be used against the defendant, at least in the absence of any evidence that the probation officer threatened the defendant with an unfavorable recommendation if the defendant refuses to give a statement. *People v Coffman* (2004) 34 C4th 1, 117, 17 CR3d 710; *People v Goodner* (1992) 7 CA4th 1324, 1330, 9 CR2d 543.

Jailhouse informants. Questions continue to arise over the admissibility of defendants' statements made to jailhouse informants. Most of these cases focus on whether the informant actually questioned a charged defendant in violation of the defendant's Sixth Amendment right to counsel. These cases are analyzed in §§23.23, 23.44. It has been argued that a *Miranda* claim can also be made if the informant was acting as an agent of the police. Following *People v Walker* (1988) 47 C3d 605, 628, 253 CR 863, however, *Miranda* warnings are probably not required. The court in *Walker* ruled that no *Miranda* warnings are required when a defendant is questioned by an undercover agent, and is neither under arrest nor in custody at the time because the warnings were designed to dispel the coercive effect of police custodial questioning. Similarly, when a defendant talks to someone not known to him or her to be a police agent, there are no coercive effects. See also §17.14 on in-custody informants.

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§23.19 D. Requirement That Suspect Be in Police Custody

"Custody" is defined as a circumstance in which a suspect is "deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived." *People v Arnold* (1967) 66 C2d 438, 448, 58 CR 115, overruled on other grounds in *Walker v Superior Court* (1988) 47 C3d 112, 122, 253 CR 1. For purposes of *Miranda,* "custody" means that the subject has been formally arrested, or a restraint on freedom of movement of the degree associated with a formal arrest has been imposed. *Thompson v Keohane* (1995) 516 US 99, 112, 133 L Ed 2d 383, 394, 116 S Ct 457; *California v Beheler* (1983) 463 US 1121, 1125, 77 L Ed 2d 1275, 1279, 103 S Ct 3517.

"[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v California* (1994) 511 US 318, 323, 128 L Ed 2d 293, 298, 114 S Ct 1526. The test is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v McCarty* (1984) 468 US 420, 442, 82 L Ed 2d 317, 336, 104 S Ct 3138.

Because the *Miranda* custody test is an objective test, consideration of a suspect's age and inexperience with law enforcement, which is subjective, is inappropriate. *Yarborough v Alvarado* (2004) 541 US 652, 158 L Ed 2d 938, 124 S Ct 2140. In *Alvarado*, the Court noted that there is an important conceptual difference between the *Miranda* custody test and the line of cases considering age and experience in other contexts, such as determining the voluntariness of a statement. 541 US at 666, 158 L Ed 2d at 952. The Court did not believe that a police officer should be expected to consider the psychological effect of a particular suspect's past experience with law enforcement in deciding whether to administer *Miranda*. 541 US at 668, 158 L Ed 2d at 954. According to the Court, the reason for the objective test in the Miranda custody inquiry is "to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." 541 US at 668, 158 L Ed 2d at 954.

"[E]vidence of the officer's subjective suspicions or beliefs is relevant only… 'if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave,' or if such evidence is 'relevant in testing the credibility of [the officer's] account of what happened during the interrogation.'" *People v Stansbury* (1995) 9 C4th 824, 830, 38 CR2d 394; *Stansbury v California* (1994) 511 US 318, 325*,* 128 L Ed 2d 293, 300, 114 S Ct 1526.

Custody for purposes of *Miranda* can occur even in the absence of a formal arrest. *People v Benally* (1989) 208 CA3d 900, 911, 256 CR 483 (defendant was considered deprived of his freedom in significant way when police entered his room with passkey, with guns drawn, ordered him out of bed, and began questioning him without giving him *Miranda* warnings). When no formal arrest takes place, the relevant inquiry is whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *Thompson v Keohane* (1995) 516 US 99, 112, 133 L Ed 2d 383, 394, 116 S Ct 457. In *U.S. v Kim* (9th Cir 2002) 292 F3d 969, the Ninth Circuit found that, despite the defendant's voluntary entrance into her place of business during the execution of a search warrant, she was "in custody" for *Miranda* purposes under the totality of the circumstances, including the nature and length of questioning and the officers' conduct: The officers surrounded the defendant, locked her husband out of the store, restricted her communication with her son, and gave orders about what language she should speak and when and where she could sit. The court noted (292 F3d at 976),

> In the Fourth Amendment context, locking doors and restricting the occupants' movement are often reasonable police procedures to control access to a scene during the execution of a search warrant.… But whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is "in custody" for *Miranda* purposes are two different issues.

The totality of the circumstances is relevant, and no one factor is dispositive. The following are some of the factors to consider when determining whether a defendant believed he or she was free to leave (*People v Forster* (1994) 29 CA4th 1746, 1753, 35 CR2d 705; *People v Herdan* (1974) 42 CA3d 300, 306, 116 CR 641):

- The site or location of the interrogation;
- Whether the suspect has been formally arrested;
- Whether the objective indicia of arrest are present;
- Absent formal arrest, the length of the detention;
- The ratio of officers to suspect; and
- The demeanor of the officer, including the nature of the questioning.

The "in custody" determination is based on the "circumstances surrounding the *interrogation*." *Thompson v Keohane, supra* (emphasis added). In *U.S. v Crawford* (9th Cir 2004) 372 F3d 1048, 1059, the court held that, even though the defendant was initially detained during a parole search at his home, his detention ended when he agreed to go to the FBI office for questioning, and once there, because he was expressly told that he was not under arrest and was free to leave, the questioning did not amount to a custodial interrogation. In *U.S. v Craighead* (9th Cir 2008) 539 F3d 1073, 1089, the court found that a defendant in his own home was in custody for *Miranda* purposes, even though he was told he was free to leave when the circumstance effected "a police-dominated atmosphere;" *i.e*., after being escorted to a storage room, the defendant was sitting on a box with an armed guard by the door. See also *U.S. v Bassignani* (9th Cir 2009) 575 F3d 879, 887 (considering totality of circumstances, while question was "close" one, defendant not in custody when interrogated for over 2 hours in conference room at workplace).

The fact that questioning took place at the police station is not, by itself, determinative. In *People v Rich* (1988) 45 C3d 1036, 1077, 248 CR 510, the court ruled that the defendant was not in custody during and immediately after taking a polygraph examination at the police station because he had not been arrested, was never told he could not leave, was merely asked to stay and finish talking, and stood up and left after the questions were finished. See also *People v Holloway* (2004) 33 C4th 96, 120, 14 CR3d 212 (defendant who was handcuffed by parole officer while awaiting arrival of police was not in custody when police removed handcuffs as soon as they arrived, told defendant he was not under arrest, gave him a ride to station, and drove him home after questioning); *People v Ochoa* (1998) 19 C4th 353, 401, 79 CR2d 408 (defendant who sat unguarded in public waiting room was not in custody for purpose of agreeing to polygraph); *In re Kenneth S.* (2005) 133 CA4th 54, 66, 34 CR3d 430 (minor brought to police station by foster mother and questioned alone in room was not in custody; detective told minor that he was not under arrest and was free to leave); *People v Fradiue* (2000) 80 CA4th 15, 21, 95 CR2d 1 (defendant inmate under investigation for possession of heroin in state prison was not subjected to "custodial" interrogation when he was uncuffed and correctional officer remained outside his cell and informed him he was free to walk away from cell door and stop talking to officer at any time; under totality of circumstances, no restraints were placed on defendant over and above those normally associated with his inmate status, and thus *Miranda* warnings were not required); *People v Macklem* (2007) 149 CA4th 674, 696, 57 CR3d 237 (under totality of circumstances, defendant detained on murder charge was not in custody for *Miranda* purposes when questioned uncuffed in interview room about separate jailhouse assault); *People v Spears* (1991) 228 CA3d 1, 25, 278 CR 506; *People v Inman* (1986) 186 CA3d 1137, 1141, 231 CR 265 (defendant on bail called detective, set up appointment, came to police station to talk, and left after conversation held; no custody); *People v Anthony* (1986) 185 CA3d 1114, 230 CR 268 (incarcerated defendant found not in custody for *Miranda* purposes when *he* phoned police and volunteered statements); *Saleh v Fleming* (9th Cir 2008) 512 F3d 548, 551 (same). See also *California v Beheler* (1983) 463 US 1121, 1124, 77 L Ed 2d 1275, 1279, 103 S Ct 3517; *Oregon v Mathiason* (1977) 429 US 492, 50 L Ed 2d 714, 97 S Ct 711.

A detention short of arrest does not necessarily invoke *Miranda. Berkemer v McCarty* (1984) 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138; *California v Beheler, supra; In re Victor B.* (1994) 24 CA4th 521, 524, 29 CR2d 362; *People v Montoya* (1981) 125 CA3d 807, 178 CR 211; *People v Hubbard* (1970) 9 CA3d 827, 833, 88 CR 411; *People v Manis* (1969) 268 CA2d 653, 74 CR 423. Even when an officer develops a rational suspicion that a detained suspect may be armed, and "frisks" or "pats down" the suspect for weapons, there is no requirement that a *Miranda* admonishment be given. *In re Richard C.* (1979) 89 CA3d 477, 490, 152 CR 787. However, the closer the situation approaches that nebulous point where "probable cause" has been reached, the more likely *Miranda* warnings will be required. *People v Ceccone* (1968) 260 CA2d 886, 67 CR 499.

The fact that questioning takes place over the phone has been found inconsistent with a "custody" finding. *People v Murphy* (1972) 8 C3d 349, 361, 105 CR 138; *People v Strohl* (1976) 57 CA3d 347, 364, 129 CR 224. Similarly, no *Miranda* warning is necessary when police are negotiating by telephone with a defendant who has barricaded himself or

herself in a building with a hostage. See *People v Mayfield* (1997) 14 C4th 668, 732, 60 CR2d 1.

For discussion of issues involving a break in custody, see §23.23.

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§23.20 E. Sufficiency and Form of Advice of Rights

Whether the words used in giving suspects their *Miranda* rights sufficiently inform suspects of their constitutional rights must be considered. A person in custody "must be informed in clear and unequivocal terms" of the following:

- The right to remain silent;
- Anything said can and will be used against him or her in court;
- The right to consult with a lawyer and to have the lawyer present during any interrogation. *Miranda v Arizona* (1966) 384 US 436, 469, 16 L Ed 2d 694, 721, 86 S Ct 1602. See *People v Hinds* (1984) 154 CA3d 222, 235, 201 CR 104 (attempting in any way to dissuade suspect from seeking advice or assistance of counsel is *Miranda* violation); *People v Stewart* (1968) 267 CA2d 366, 378, 73 CR 484 (*Miranda* advisement insufficient because suspect not told he had right to have attorney present during questioning).
- An attorney will be appointed to represent the defendant if he or she is indigent. *People v Diaz* (1983) 140 CA3d 813, 819, 189 CR 784. There is no need to inform a defendant of the right to have an appointed lawyer present during questioning if the defendant is told of the right to be represented by a lawyer, to have an attorney present before and during questioning, and to have an attorney appointed free of charge if the defendant cannot afford to hire an attorney. *People v Thompson* (1990) 50 C3d 134, 164, 266 CR 309. In *Duckworth v Eagan* (1989) 492 US 195, 203, 106 L Ed 2d 166, 177, 109 S Ct 2875, the Supreme Court said it is sufficient to inform a defendant that he or she has the right to have an attorney appointed "if and when" he or she goes to court.

There is no requirement that a defendant be told of the actual charge pending against him or her (*People v Boyde* (1988) 46 C3d 212, 240, 250 CR 83) or of all possible crimes concerning which he or she may be questioned (*Colorado v Spring* (1987) 479 US 564, 93 L Ed 2d 954, 107 S Ct 851; *People v Henderson* (1990) 225 CA3d 1129, 1159, 275 CR 837, overruled on other grounds in *People v Davis* (1994) 7 C4th 797, 814, 30 CR2d 50).

No magic wording is required to make a *Miranda* warning legally sufficient. It is only necessary that the suspect be fully and unambiguously advised. See *People v Bradford* (2008) 169 CA4th 843, 854, 86 CR3d 866 (omission of one of four warnings made confession inadmissible). Warnings in a form equivalent to the language in the *Miranda* decision are sufficient. *California v Prysock* (1981) 453 US 355, 359, 69 L Ed 2d 696, 701, 101 S Ct 2806; *People v Kelly* (1990) 51 C3d 931, 947, 275 CR 160. In *U.S. v San Juan-Cruz* (9th Cir 2002) 314 F3d 384, the defendant, an illegal alien, was given two different and conflicting warnings, one after another: first, his administrative rights under 8 CFR §287.3, including the right to an attorney during questioning, but not at government expense, in connection with his deportation proceedings; second, his *Miranda* rights, including the right to a court-appointed attorney. The Ninth Circuit held that the warnings were confusing and inadequate because the defendant could not reasonably ascertain whether he could or could not retain the services of an attorney for free. 314 F3d at 387.

Although it is preferable for the police to read *Miranda* rights to everyone, no matter how many times they have been arrested, the courts will not throw out a confession when the defendant interrupts the police and recites the *Miranda* rights if it is clear from the record that the defendant knew what the *Miranda* rights were. *People v Nitschmann* (1995) 35 CA4th 677, 680, 41 CR2d 325.

Inadequate warnings that follow an adequate warning will not necessarily invalidate a confession obtained after the second (inadequate) admonishment if the defendant waived his or her rights after each admonishment, and the warnings were close in time. *People v Duren* (1973) 9 C3d 218, 242, 107 CR 157.

Most law enforcement agencies use a preprinted card from which they read the suspect his or her rights. Officers who attempt to advise a suspect of the *Miranda* rights from memory are vulnerable to what is sometimes very embarrassing cross-examination when, under the pressure of testifying, they do not recall the exact wording of the warning given or cannot recall whether all the rights were in fact recited to the suspect.

Common form of advisement. Defendants are commonly advised in the following form:

1. You have the right to remain silent.

2. If you give up the right to remain silent, anything you do say can and will be used in court against you.

3. You have the right to speak with an attorney of your choice before questioning, and to have the attorney present during questioning.

4. If you cannot afford an attorney, one will be appointed for you by the court before any questioning, if you so desire. The attorney will not cost you anything; the services are free.

Because the prosecution has the burden of proving that the defendant made a knowing and intelligent waiver of his or her rights (*People v Lilliock* (1965) 62 C2d 618, 621, 43 CR 699), police officers should ask two additional questions:

5. Do you understand each of these rights that I have explained to you?

6. Having in mind and understanding your rights as I have told you, are you willing to talk to me?

Foreign language advisement. Advisement of rights in a foreign language may result in an insufficient advisement if the proper words are not used. *People v Diaz* (1983) 140 CA3d 813, 822, 189 CR 784 (Spanish word for "to get" was used instead of "to afford" (an attorney); advisement held to be insufficient); *U.S. v Perez-Lopez* (9th Cir 2003) 348 F3d 839, 848 (as translated from Spanish to English, *Miranda* warning advising defendant that he had the right to "solicit" court for attorney if he had no funds implied that request might be rejected and, thus, did not properly convey government's obligation to appoint attorney for indigent accused). But see *People v Cortes* (1999) 71 CA4th 62, 70, 83 CR2d 519 (risk of "cultural misunderstanding" minimal when certified bilingual officer gave *Miranda* advisement to Spanish-speaking defendant, and defendant indicated no uncertainty or confusion).

Ø **Note:** When litigating the sufficiency of a foreign language advisement, counsel should consult with an expert interpreter, certified or registered under Govt C §§68560-68566, and take care to establish an accurate and detailed trial court record, *e.g.,* by recording the interpreted portion of the trial. On appeal, the trial court's findings on the sufficiency of a foreign language advisement will be upheld if supported by the record. *People v Marquez* (1992) 1 C4th 553, 571, 3 CR2d 710.

Advisement to minors. The police have no duty to advise a minor that he or she may call his or her parents. *In re Charles P.* (1982) 134 CA3d 768, 772, 184 CR 707. However, juvenile arrests trigger certain statutory advisement requirements (Welf & I C §§625-641; 18 USC §5033). See §23.28.

Advisement to aliens. International law requires that arrested aliens be advised of the right to contact their consulate (see also Pen C §834c). Failure to advise an arrestee of this right, however, does not require suppression of a postarrest, properly Mirandized statement. *People v Corona* (2001) 89 CA4th 1426, 1429, 108 CR2d 210.

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§23.21 F. Assertion of *Miranda* Rights

A request for an attorney automatically invokes the privilege to remain silent. *People v Soto* (1984) 157 CA3d 694, 705, 204 CR 204. The request for an attorney must be made in response to interrogation; thus, a request for counsel upon arrest does not invalidate a later waiver during interrogation. *People v Buskirk* (2009) 175 CA4th 1436, 1450, 96 CR3d 889. On the difference between requesting an attorney and invoking the right to remain silent, see §23.23. Any other words or conduct that are inconsistent with a present willingness to discuss the case freely and completely with the police may also be an invocation of that right, depending on the circumstances. *People v Soto, supra*; *People v Duran* (1983) 140 CA3d 485, 492, 189 CR 595.

A suspect must unambiguously request counsel with sufficient clarity that a reasonable police officer under the circumstances would understand the statement to be a request for an attorney. *Davis v U.S.* (1994) 512 US 452, 454, 129 L Ed 2d 362, 368, 114 S Ct 2350 (ambiguous mid-interview comment—"maybe I should talk to a lawyer"—following clear waiver not deemed unequivocal request for counsel; proper for officers to clarify that defendant was not asking for lawyer); *Clark v Murphy* (9th Cir 2003) 331 F3d 1062 (suspect's statement—"I think I would like to talk to a lawyer"—was not unambiguous invocation of right to counsel); *People v Gonzalez* (2005) 34 C4th 1111, 1125, 23 CR3d 295 (suspect's statement to interrogating officers that he wanted a lawyer if he were going to be charged was, at best, ambiguous and equivocal because reasonable police officer under circumstances would not have known if suspect would be charged, since charging decision not made by police); *People v Simons* (2007) 155 CA4th 948, 957, 66 CR3d 571 (defendant's questions regarding how long it would take for attorney to get there if he asked for one were not unequivocal invocation of right to counsel). The analysis of whether a defendant unambiguously waived his or her rights is an objective one. A police officer's subjective view concerning whether the defendant waived his or her rights is irrelevant to the analysis. *People v Roquemore* (2005) 131 CA4th 11, 27, 31 CR3d 214.

The importance of the context in which the suspect's statement is made, rather than the actual statement itself, is illustrated by *People v Jennings* (1988) 46 C3d 963, 978, 251 CR 278. There, during the course of an interrogation, a suspect said he did not want to talk to the police because they were scaring him. The court acknowledged that the claim that the suspect had invoked his rights appeared meritorious based on the transcript alone. However, there was a videotape of the interrogation. Viewing the tape established that the remarks were made in anger to one of the three officers doing the interrogation and that the suspect was merely indicating he was not going to respond to that officer anymore—not that he was invoking his right to remain silent.

The following are examples of conduct that has been considered to be assertion of the right to remain silent:

- Refusal to sign a written waiver form. *People v Fioritto* (1968) 68 C2d 714, 717, 68 CR 817, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582. But see *People v Maier* (1991) 226 CA3d 1670, 277 CR 667, discussed below.
- Refusal to continue participation in an interrogation already in progress. *People v Randall* (1970) 1 C3d 948, 955, 83 CR 658, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582.
- Making a telephone call to his or her attorney. *People v Randall, supra*.
- An adult's "repeated and insistent pleas" to call his or her parents. *People v Soto* (1984) 157 CA3d 694, 705, 204 CR 204.

The following are examples of conduct that has been held not to invoke the privilege to remain silent:

- A suspect's refusal to sign a waiver form or to allow his or her statements to be tape-recorded, unless refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others. *People v Johnson* (1993) 6 C4th 1, 25, 23 CR2d 593 (no invocation when defendant expressly consented to be interviewed after remarking, "No tape recorder. I don't want to incriminate myself"); *People v Samayoa* (1997) 15 C4th 795, 829, 64 CR2d 400 (follows *Johnson*); *People v Maier* (1991) 226 CA3d 1670, 1678, 277 CR 667 (refusal to sign written waiver or be recorded was not an invocation of right to silence). But see *People v Fioritto, supra*. A refusal to sign a written waiver form is looked at in context with other facts.

- An 18-year-old suspect's question "Can I call a lawyer or my mom to talk to you?" *People v Roquemore* (2005) 131 CA4th 11, 25, 31 CR3d 214.
- A suspect's request for clarification of *Miranda* rights (*People v Hart* (1999) 20 C4th 546, 642, 85 CR2d 132; *People v Crittenden, supra*; *People v Maynarich* (1978) 83 CA3d 476, 481, 147 CR 823), unless the clarification request follows a valid invocation of the *Miranda* rights (*Smith v Illinois* (1984) 469 US 91, 83 L Ed 2d 488, 105 S Ct 490).

Suspect's ambiguous response. The police may seek clarification of a suspect's ambiguous response to a *Miranda* admonition. *People v Farnam* (2002) 28 C4th 107, 181, 121 CR2d 106 (defendant's prearrest refusal to answer officer's investigatory questions, not made in response to *Miranda* advisement, warranted clarification); *People v Box* (2000) 23 C4th 1153, 1195, 99 CR2d 69 (defendant's statement to officer that either an attorney or his attorney had told him not to speak with anyone was sufficiently ambiguous to justify officer's clarification whether defendant was exercising right to remain silent or right to counsel). The Ninth Circuit has held that, absent any prior waiver, an officer has a duty to clarify a suspect's ambiguous assertion of *Miranda* rights before further questioning. *U.S. v Rodriguez* (9th Cir 2008) 518 F3d 1072, 1080 (defendant's response of "I'm good for tonight" after being read *Miranda* rights was ambiguous and required further clarification).

An effort to clarify an ambiguous response may not be made in an attempt to talk a suspect into changing his or her mind after an invocation of the rights. *People v Carey* (1986) 183 CA3d 99, 103, 227 CR 813. A police attempt to clarify a suspect's response (known as the "clarification rule") "requires ambiguity as a precedent." 183 CA3d at 103. See *Anderson v Terhune* (9th Cir 2008) 516 F3d 781, 787 (defendant's statement, "I plead the Fifth," was not ambiguous). An officer may not inquire into the reason a suspect wishes to invoke his or her rights. *People v Peracchi* (2001) 86 CA4th 353, 360, 102 CR2d 921. Remarks that courts have found to be ambiguous include the following:

- An interrogated suspect's refusal to answer only some of the questions asked. *People v Silva* (1988) 45 C3d 604, 629, 247 CR 573; *People v Turnage* (1975) 45 CA3d 201, 210, 119 CR 237.
- A defendant's statement that she was calling her lawyer made during her arrest. *People v Nguyen* (2005) 132 CA4th 350, 357, 33 CR3d 390.
- A request by a criminally sophisticated suspect to see a third person other than an attorney. *People v Robertson* (1982) 33 C3d 21, 39, 188 CR 77.
- A minor's request to have his or her probation officer present during questioning. *Fare v Michael C.* (1979) 442 US 707, 61 L Ed 2d 197, 99 S Ct 2560.
- Indicating a desire to leave the office where the interrogation is taking place. *People v Rich* (1988) 45 C3d 1036, 1078, 248 CR 510.
- A suspect's statement before submitting to a polygraph that, if he was going to be charged, he wanted to talk to an attorney. *People v Gonzalez* (2005) 34 C4th 1111, 1116, 23 CR3d 295.
- A suspect's statements that his lawyer had told him not to talk. *People v Thompson* (1990) 50 C3d 134, 165, 266 CR 309 (court interpreted comments as explanation of why defendant was willing to proceed without counsel).

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§23.22 G. Sufficiency of Waiver; Capacity to Waive

Sufficiency of waiver. An express waiver of one's *Miranda* rights is not necessarily required. Waiver may be implied from the circumstances when, after a full advisement and acknowledgment of rights, the defendant freely submits to questioning. *North Carolina v Butler* (1979) 441 US 369, 373, 60 L Ed 2d 286, 292, 99 S Ct 1755; *People v Whitson* (1998) 17 C4th 229, 247, 70 CR2d 321. A waiver will not be presumed, however, simply from an accused's silence after being advised, or because a confession was in fact later obtained, if the surrounding circumstances do not support that conclusion. *Miranda v Arizona* (1966) 384 US 436, 475, 16 L Ed 2d 694, 724, 86 S Ct 1602; *People v Johnson* (1969) 70 C2d 541, 557, 75 CR 401. The better practice is for police officers to ask a suspect if he or she understands the rights as explained and whether the suspect is willing to waive them. Requesting clarification is not an invocation of the *Miranda* rights. *People v Bestelmeyer* (1985) 166 CA3d 520, 526, 212 CR 605; *People v Maynarich* (1978) 83 CA3d 476, 481, 147 CR 823. A request for clarification, if correctly answered, would seem to provide even clearer evidence of the defendant's understanding of his or her rights and a knowing waiver.

A waiver that results from a "clever softening-up" of the suspect, such as by involving him or her in an "ingratiating conversation" before giving the *Miranda* advisement, will likely result in any statement being held to be involuntary. *People v Honeycutt* (1977) 20 C3d 150, 160, 141 CR 698. An involuntary waiver is invalid. See §23.31.

Capacity to waive. To be valid, a waiver of one's rights under *Miranda* must be knowingly and intelligently made. *In re Schlette* (1965) 232 CA2d 407, 412, 42 CR 708. The defendant may not have been capable of waiving his or her rights. Some of the possible reasons counsel might wish to raise follow:

- The defendant has low intelligence.
- The defendant was under the influence of alcohol or drugs.
- The defendant is not fluent in the language of the advisement. See §23.20.
- The defendant was insane or suffering from some other disabling mental condition. *U.S. v Bradshaw* (DC Cir 1991) 935 F2d 295, 298; *Derrick v Peterson* (9th Cir 1990) 924 F2d 813, 824.

The court will look to the defendant's actions and words at the time of the confession, and will consider the testimony of any experts on the issue, in deciding whether any of these factors affected the defendant's waiver. *People v Marshall* (1990) 50 C3d 907, 925, 269 CR 269 (defendant's hypertension and medication did not affect his waiver); *People v Jackson* (1989) 49 C3d 1170, 1189, 264 CR 852 (voluntary ingestion of PCP insufficient under the circumstances).

In determining whether a minor has the capacity to make a valid waiver, the court will consider such factors as the minor's age, intelligence, education, experience, and ability to comprehend the meaning and effect of making a statement. *People v Lara* (1967) 67 C2d 365, 385, 62 CR 586; *In re John S.* (1988) 199 CA3d 441, 245 CR 17.

In *Colorado v Connelly* (1986) 479 US 157, 159, 93 L Ed 2d 473, 479, 107 S Ct 515, the Supreme Court ruled that a defendant's mental condition by itself does not necessarily render a *Miranda* waiver involuntary. In this regard *Miranda* protects only against police coercion. However, a *Miranda* waiver must be knowing and intelligent as well as voluntary.

A defendant can waive his or her *Miranda* rights concerning an oral confession while asserting those rights concerning a written statement. *Connecticut v Barrett* (1987) 479 US 523, 527, 93 L Ed 2d 920, 927, 107 S Ct 828.

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Source: Criminal Law/California Criminal Law Procedure and Practice/23 CONFESSIONS AND ADMISSIONS/§23.23 H. Effect of Request for Counsel Versus Invocation of Right to Remain Silent; Difference Between Fifth and Sixth Amendment Right to Counsel

§23.23 H. Effect of Request for Counsel Versus Invocation of Right to Remain Silent; Difference Between Fifth and Sixth Amendment Right to Counsel

Effect of request for counsel versus invocation of right to remain silent. As soon as a suspect asserts the right to counsel, all questioning must cease until an attorney is present. *Minnick v Mississippi* (1990) 498 US 146, 112 L Ed 2d 489, 111 S Ct 486; *Edwards v Arizona* (1981) 451 US 477, 484, 68 L Ed 2d 378, 386, 101 S Ct 1880; *Miranda v Arizona* (1966) 384 US 436, 473, 16 L Ed 2d 694, 723, 86 S Ct 1602; *People v Ireland* (1969) 70 C2d 522, 537, 75 CR 188. This is the suspect's Fifth Amendment right to counsel. *Minnick v Mississippi, supra*. It bars further police questioning on both the crime charged (*People v Montano* (1991) 226 CA3d 914, 277 CR 327) and any unrelated offenses (*Arizona v Roberson* (1988) 486 US 675, 100 L Ed 2d 704, 108 S Ct 2093), as long as the defendant remains in custody (*Minnick v Mississippi, supra*). This is true even if the officer conducting the second questioning is unaware that the defendant was Mirandized earlier and requested counsel. *Arizona v Roberson,* 486 US at 687, 100 L Ed 2d at 717. Further attempts at interrogating the defendant are forbidden. 486 US at 687, 100 L Ed 2d at 717.

Readmonishing the suspect will not produce evidence that is admissible in the prosecution's case-in-chief (*People v Smith* (1983) 34 C3d 251, 265, 193 CR 692; *People v Fioritto* (1968) 68 C2d 714, 719, 68 CR 817, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582), but it will be admissible for impeachment purposes (*Michigan v Harvey* (1990) 494 US 344, 351, 108 L Ed 2d 293, 303, 110 S Ct 1176). The purpose of this rule is to protect against wearing the defendant down by repeated attempts to get him or her to answer questions. See also *People v Boyer* (1989) 48 C3d 247, 270, 256 CR 96, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394 (egregious example of continued questioning by overbearing police officers despite defendant's invocation of *Miranda* rights). Questioning may not be later resumed merely because defendant has been provided with the opportunity or did in fact consult with an attorney in response to his or her request. The attorney must be present during the questioning. *Minnick v Mississippi, supra*.

Once a suspect in custody invokes the right to counsel, subsequent statements to police are presumed involuntary and inadmissible if obtained in an encounter initiated by police in the absence of counsel. *Edwards v Arizona* (1981) 451 US 477, 481, 68 L Ed 2d 378, 384, 101 S Ct 1880. A 14-day break in custody vitiates the *Edwards* no-recontact rule. *Maryland v Shatzer* (2010) ___ US ___, 175 L Ed 2d 1045, 130 S Ct 1213. However, a defendant who has experienced a 14-day break in custody after invoking *Miranda* can still claim that any subsequent waiver of his or her *Miranda* rights was in fact involuntary. 175 L Ed 2d at 1057 n7.

In contrast to a request for counsel, a suspect's assertion only of the right to remain silent does not preclude later police questioning on a separate case, as long as the police "scrupulously honor" the defendant's wish not to discuss the original case by immediately terminating the questioning. *McNeil v Wisconsin* (1991) 501 US 171, 175, 115 L Ed 2d 158, 166, 111 S Ct 2204; *Michigan v Mosley* (1975) 423 US 96, 102, 46 L Ed 2d 313, 320, 96 S Ct 321; *People v DeLeon* (1994) 22 CA4th 1265, 1269, 27 CR2d 818.

Differences between Fifth Amendment and Sixth Amendment right to counsel. An important distinction has arisen between invocations of the Fifth Amendment and Sixth Amendment rights to counsel. The Fifth Amendment right to counsel arises when a suspect requests a lawyer in response to a *Miranda* warning. *Edwards v Arizona, supra*. The Fifth Amendment precludes subsequent police approaches and questioning on any subject when the defendant who remains in custody invokes the right to counsel. *Arizona v Roberson* (1988) 486 US 675, 687, 100 L Ed 2d 704, 717, 108 S Ct 2093.

The Sixth Amendment provides a right to counsel at each "critical stage" of the proceedings, even when there is no interrogation and no Fifth Amendment applicability. *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 963, 129 S Ct 2079. For discussion of critical stages, see §3.2. The Sixth Amendment right to counsel arises when a suspect is charged and seeks or is appointed counsel. When counsel is appointed for an indigent defendant who has not requested that appointment, the defendant has not "elected" to exercise the right to counsel and questioning is allowed, unless the defendant has specifically invoked the Fifth Amendment right to counsel. *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 965, 129 S Ct 2079.

Counsel should advise clients to request an attorney after receiving a *Miranda* warning. If a client did not request an attorney at the time of the warning, counsel should have the client invoke his or her right to counsel and right to remain silent under *Miranda v Arizona, supra,* and *Edwards v Arizona, supra,* in court, on the record, at the earliest opportunity. A sample form is in California Criminal Law Forms Manual §23.1 (2d ed Cal CEB 2005).

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§23.24 I. Multiple Interrogations and Admonitions

Contemporaneous questioning period. Once a suspect is properly admonished and has chosen to talk to the police, a new warning is not necessary before each subsequent interrogation as long as each questioning period is reasonably contemporaneous with the prior one. *People v Smith* (2007) 40 C4th 483, 504, 54 CR3d 245 (readvisement unnecessary when defendant reinterviewed less than 12 hours after first interview, defendant remained in custody between interrogations, interrogations conducted by same officers, and defendant was asked whether he remembered the *Miranda* warnings); *People v Mickle* (1991) 54 C3d 140, 170, 284 CR 511 (readvisement of *Miranda* rights unnecessary when defendant was reinterviewed in the hospital 36 hours after he had twice received and twice waived his rights and when reinterview was conducted by the same two officers who had previously interrogated defendant at the police station); *People v Johnson* (1969) 70 C2d 469, 477, 74 CR 889 (one warning may be sufficient); *People v Riva* (2003) 112 CA4th 981, 993, 5 CR3d 649 (suspect's statement "I don't want to say anything else right now" indicated that he might be willing to talk later; officer did not violate *Miranda* by initiating further questioning an hour later; readvisement not required given that both interrogations were conducted by same officer and suspect's presumed sophistication with law enforcement based on education (college student) and prior juvenile arrest experience). Renewed questioning without readmonishment the next day may be valid (*People v Sievers* (1967) 255 CA2d 34, 37, 62 CR 841), but 3 days later is probably invalid (*People v Quirk* (1982) 129 CA3d 618, 625, 181 CR 301). See also *U.S. v Rodriguez-Preciado* (9th Cir 2005) 399 F3d 1118, 1128, as amended by 416 F3d 939 (readvisement of *Miranda* rights unnecessary during second day of interrogation that began 16 hours after original waiver of rights). Although it is the better practice to readmonish the suspect before continuing the questioning, it is not necessary absent evidence that indicates that the defendant was acting in ignorance of his or her rights. *In re Frank C.* (1982) 138 CA3d 708, 714, 188 CR 68.

That a person is questioned in violation of *Miranda* before a proper admonishment is but one factor to look at in determining whether the *Miranda* waiver was voluntary. *Oregon v Elstad* (1985) 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285; *People v Gastile* (1988) 205 CA3d 1376, 1384, 253 CR 283, disapproved on other grounds in *People v Wrest* (1992) 3 C4th 1088, 1104, 13 CR2d 511. The defendant has the burden of proving that the second confession was obtained by exploitation of the earlier illegality. If the defendant makes this showing, the burden shifts to the prosecution to prove that the taint has been purged and that the evidence is admissible in spite of the primary illegality. *People v Beardslee* (1991) 53 C3d 68, 108, 279 CR 276.

Two-step interrogation process. If a defendant is first engaged in un-Mirandized but uncoerced conversation, then later gives a statement following a voluntary and informed waiver, the second statement is admissible. *Oregon v Elstad, supra*; *People v Bradford* (1997) 14 C4th 1005, 1040, 60 CR2d 225 (continued interrogation after defendant invokes right to counsel does not inherently constitute coercion). See also *Garvin v Farmon* (9th Cir 2001) 258 F3d 951 (second interrogation not tainted by earlier interrogation 3 days before that was tainted by numerous violations). In *Missouri v Seibert* (2004) 542 US 600, 159 L Ed 2d 643, 124 S Ct 2601, the Court held that the *Elstad* rule did not apply to a confession the police secured through a two-step interrogation process designed to circumvent *Miranda*. In *Seibert,* the police deliberately omitted the *Miranda* advisements during an initial interrogation in which the suspect confessed. This was followed by a second interrogation in which the suspect was Mirandized and questioned about statements made in the first interview. The incriminating statements made during the second interview were inadmissible.

See §23.46 for discussion of deliberate violations of *Miranda*. See §23.30 for discussion of the applicability of the "fruit of the poisonous tree" doctrine to *Miranda* violations.

Voluntary reinitiation of questioning. When a suspect voluntarily reinitiates the questioning, despite an earlier invocation of his or her rights, any later statements are proper. *People v Marshall* (1990) 50 C3d 907, 923, 269 CR 269 (defendant invoked right to counsel, then reopened dialogue with police and waived rights; proper); *People v Inman* (1986) 186 CA3d 1137, 1141, 231 CR 265 (defendant out of custody and returned to police station only to claim belongings; confession proper despite earlier request for counsel); *People v Dominick* (1986) 182 CA3d 1174, 1188, 227 CR 849 (court upheld confession because second interview initiated by defendant, despite falsehood); *Pollard v*

Galaza (9th Cir 2002) 290 F3d 1030, 1035 (when defendant initially invoked right to remain silent but then initiated further conversation, officer's deliberate *Miranda* violation—because officer knew statements could be used for impeachment at trial—did not constitute coercive conduct per se).

An accused initiates questioning when he or she "speaks words or engages in conduct that can be 'fairly said to represent a desire' on his or her part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'" *People v Mickey* (1991) 54 C3d 612, 648, 286 CR 801. See, *e.g., People v Waidla* (2000) 22 C4th 690, 730, 94 CR2d 396 (after suspect was detained and invoked right to counsel, suspect initiated further communication the next day by spontaneously asking detective questions to the effect of, "What can I do for you?," "What do you want from me?," and "What can I do to help you?").

Continued interrogation in violation of *Miranda*. In *People v Neal* (2003) 31 C4th 63, 1 CR3d 650, the officer in his initial custodial interrogation of the defendant intentionally continued questioning in deliberate violation of *Miranda* despite the defendant's repeated invocation of his right to remain silent and right to counsel (nine times). The officer also badgered the defendant, accusing him of lying, and telling him, "this is your one chance" and "if you don't try and cooperate… the system is going to stick it to you as hard as they can." The defendant made only exculpatory statements in the initial session and was kept in jail overnight without access to counsel or noncustodial personnel and without food or drink or toilet facilities. The next morning, the defendant asked to speak to the officer, who met with him and resumed questioning and ultimately obtained two confessions from the defendant. The court found that in light of all the surrounding circumstances—including the officer's deliberate violation of *Miranda*; the fact that the defendant remained in custody without being provided access to counsel before requesting to speak to the officer; the defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on the defendant during his confinement; and the promise and threat the officer made to the defendant during the initial interrogation after questioning should have ceased—the defendant's initiation of further contact with the officer, and the two subsequent confessions, were involuntary. The court held that the confessions were not only inadmissible in the prosecution's case-in-chief because they were obtained in violation of *Edwards v Arizona* (1981) 451 US 477, 484, 68 L Ed 2d 378, 386, 101 S Ct 1880, but they were inadmissible for any purpose because they were involuntary. *People v Neal* (2003) 31 C4th 63, 78, 1 CR3d 650.

Previous un-Mirandized questioning of a suspect, if done with the intention of softening up the suspect, may invalidate a subsequent confession. *People v Honeycutt* (1977) 20 C3d 150, 160, 141 CR 698. But absent a deliberate attempt to trick a suspect, the rule in *Honeycutt* does not apply. *People v Posten* (1980) 108 CA3d 633, 647, 166 CR 661.

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§23.25 J. Exceptions to *Miranda* Requirement: Rescue, Public Safety, and Officer Safety Doctrines

Even when an in-custody suspect is questioned by law enforcement officers, there are exceptions to the requirement that the suspect be advised of the *Miranda* rights. For instance, when a suspect voluntarily answers questions asked by officers who are primarily concerned with rescuing the victim and do not wish to impede their efforts by giving the *Miranda* warnings, the suspect's responses are admissible. *People v Davis* (2009) 46 C4th 539, 591, 94 CR3d 322; *People v Coffman* (2004) 34 C4th 1, 55, 17 CR3d 710. This exception is sometimes referred to as the "rescue doctrine." The rescue doctrine has been applied to situations in which a defendant was thought to be the one endangered. See, *e.g., People v Stevenson* (1996) 51 CA4th 1234, 59 CR2d 878, disapproved on other grounds in *People v Davis* (2009) 46 C4th 539, 594 n4, 94 CR3d 322 (defendant had swallowed large quantity of cocaine).

Under what is known as the "public safety" exception, no warnings may be required when a police officer asks a defendant questions devoted to locating an abandoned deadly weapon out of concern for the public safety. *New York v Quarles* (1984) 467 US 649, 81 L Ed 2d 550, 104 S Ct 2626; *People v Simpson* (1998) 65 CA4th 854, 861, 76 CR2d 851 (*Quarles* public safety exception applies when questions asked are primarily related to objectively reasonable need to protect police officers or public from danger during execution of search warrant); *People v Cole* (1985) 165 CA3d 41, 52, 211 CR 242; *Allen v Roe* (9th Cir 2002) 305 F3d 1046, 1050 (questioning about location of gun fell within public safety exception). An officer is also entitled to ask a defendant un-Mirandized questions about information that might affect the officer's own health. See *People v Cressy* (1996) 47 CA4th 981, 987, 55 CR2d 237 (officer saw defendant drop hypodermic syringe, and was entitled to ask whether defendant had any other needles).

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§23.26 K. Interrogating Police Officers and Other Public Employees

Public safety officers who refuse to answer questions that are part of an administrative investigation are subject to administrative discipline. Govt C §3303(e); *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 221 CR 529. If the officers can be charged with a criminal offense, they must immediately be informed not only of their constitutional rights but must also be told that their responses to the questions asked during the administrative investigation generally cannot be used against them in court. Govt C §3303(f), (h); *Lybarger v City of Los Angeles, supra*. See *Lefkowitz v Turley* (1973) 414 US 70, 77, 38 L Ed 2d 274, 281, 94 S Ct 316; *Garrity v New Jersey* (1967) 385 US 493, 500, 17 L Ed 2d 562, 567, 87 S Ct 616; *Williams v City of Los Angeles* (1988) 47 C3d 195, 200 n3, 252 CR 817.

The rights and duties extended to public safety officers under Govt C §3303, *Lybarger,* and *Williams* actually apply to all public employees and contractors (and arguably to all governmentally licensed professionals) under the authority of *Lefkowitz* and *Garrity.* Counsel representing such clients should recognize that the use immunity afforded them by these cases presents broad opportunities for successful trial strategies, because the state has the burden of establishing that a subsequent prosecution is based on independent evidence. See discussion of immunity in chap 49.

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§23.27 L. Interrogation in Another Country

When a defendant is apprehended in and interrogated by officials in a foreign country, the results of that interrogation may be used against him or her in a California prosecution as long as the methods used by the interrogators were not so violative of "fundamental due process as to undermine the truth of the evidence acquired." *People v Helfend* (1969) 1 CA3d 873, 890, 82 CR 295. If U.S. officials were involved in the questioning, however, or if the foreign officers acted on behalf of U.S. officials, the laws of the jurisdiction in which the case is tried in the United States apply. *People v Neustice* (1972) 24 CA3d 178, 186, 100 CR 783.

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§23.28 M. Application of *Miranda* to Juveniles

There is a statutory exception to the rules developed for adult arrestees that requires a *Miranda*-type admonishment for minors whenever they are taken into custody, even if they are not questioned. Welf & I C §625. Under California law, unlike under federal law, the failure to comply with the statutory requirements applicable to juvenile arrests does not affect admissibility of the arrestee's statements absent a due process violation. Compare *In re Michael E.* (1980) 112 CA3d 74, 78, 169 CR 62 (failure to bring juvenile before magistrate without unnecessary delay does not affect admissibility of statement), with *U.S. v Female Juvenile (Wendy G.)* (9th Cir 2001) 255 F3d 761, 765 (in which (1) arresting officers violated 18 USC §5033 by failing to inform parents of juvenile in custody that they might advise and counsel child before interrogation, (2) violation was a cause of confession, and (3) juvenile was prejudiced by confession; confession should be suppressed even though deficient notification does not rise to level of due process violation).

A minor may validly waive his or her *Miranda* rights. The same test applies to a minor as applies to an adult to determine whether the minor has waived the Fifth Amendment privilege. The court must inquire into the totality of the circumstances surrounding the interrogation. *People v Lessie* (2010) 47 C4th 1152, 104 CR3d 131. The test is whether, under all the circumstances, including age, experience, background, intelligence, and education, the minor had the capacity to understand the warnings given, the nature of his or her Fifth Amendment rights, and the consequences of waiving those rights. *People v Lessie, supra*.

> Ø **Note:** Age and inexperience with law enforcement are not factors in determining whether a suspect is "in custody" for *Miranda* purposes. See §23.19. However, the factors may be considered in determining whether a waiver was knowing and intelligent (see §23.22), or whether a statement was voluntary. See §23.32.

There is no requirement that the police obtain a parent's consent before interrogating a minor. *In re John S., supra*. Similarly, there is no requirement that the police advise a minor of his or her right to speak with a parent. *People v Lara, supra*; *In re Charles P.* (1982) 134 CA3d 768, 772, 184 CR 707.

Opinion is split over whether the police must advise a minor that a parent is present and wishes to speak to him or her. Compare *In re Patrick W.* (1980) 104 CA3d 615, 163 CR 848, with *In re John S., supra*.

A juvenile tried as an adult may be impeached with statements made to a probation officer while being interviewed for a Welf & I C §707(c) fitness hearing. *People v Macias* (1997) 16 C4th 739, 756, 66 CR2d 659.

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§23.29 N. Application of "Fruit of the Poisonous Tree" Doctrine: Subsequent Statement

The high court first addressed the applicability of the "fruit of the poisonous tree" doctrine of *Wong Sun v U.S.* (1963) 371 US 471, 485, 9 L Ed 2d 441, 453, 83 S Ct 407, to *Miranda* violations in *Michigan v Tucker* (1974) 417 US 433, 41 L Ed 2d 182, 94 S Ct 2357. In *Tucker,* the Court declined to extend the fruits doctrine to exclude the testimony of a witness who was identified by the defendant in a statement given without a *Miranda* warning, but found to be voluntary. 417 US at 445, 41 L Ed 2d at 193. Later, in *Oregon v Elstad* (1985) 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285, the Court considered whether a suspect's voluntary incriminating statement in custody, made after a waiver of *Miranda* rights, was nonetheless inadmissible because it followed an earlier incriminating statement obtained by custodial questioning without a *Miranda* warning. Finding that the subsequent statement need not be excluded, the *Elstad* majority held that (1) a *Miranda* violation does not require full application of the "fruit of the poisonous tree" doctrine developed for Fourth Amendment violations; (2) instead, if an unwarned custodial statement was otherwise voluntary, a later statement must be deemed untainted if also voluntary and in compliance with *Miranda*; and (3) in determining whether the second statement was voluntary, the suspect's awareness that he had already "let the cat out of the bag" is not dispositive. 470 US at 305, 84 L Ed 2d at 230.

Conversely, when an earlier statement was coerced or otherwise involuntary, any subsequent statement is presumed tainted. The burden is on the prosecution to show a break in the causative chain between the first and subsequent confessions in such a way that the second confession was not in fact obtained by exploitation of the illegality. *People v Sims* (1993) 5 C4th 405, 444, 20 CR2d 537; *People v Beardslee* (1991) 53 C3d 68, 109, 279 CR 276. In *Oregon v Elstad, supra,* the *Miranda* violation appeared unintentional. In *Missouri v Seibert* (2004) 542 US 600, 159 L Ed 2d 643, 124 S Ct 2601, the high court held that a police protocol calling for no *Miranda* warnings until after a first confession was obtained rendered the second statement of the defendant inadmissible. *Seibert* is discussed in §23.46.

In *People v Bradford* (1997) 14 C4th 1005, 1039, 60 CR2d 225, the less stringent *Elstad* "tainted product" analysis was held to apply when a prior confession was obtained despite the custodial suspect's *Miranda* request for counsel. The *Bradford* court reasoned that "just as a failure to give *Miranda* warnings does not in and of itself constitute coercion, neither does continued interrogation after a defendant has invoked his right to counsel, or an *Edwards* violation, inherently constitute coercion." 14 C4th at 1039. See *Edwards v Arizona* (1981) 451 US 477, 484, 68 L Ed 2d 378, 386, 101 S Ct 1880, discussed in §23.23.

Bradford involved the Fifth Amendment right to counsel. In *Fellers v U.S.* (2004) 540 US 519, 157 L Ed 2d 1016, 124 S Ct 1019, the police intentionally omitted any *Miranda* warning when they went to the defendant's home to arrest him. The U.S. Supreme Court held that the police violated the Sixth Amendment by deliberately eliciting incriminating information after the right to counsel had attached. The Court remanded the case to the court of appeals to determine whether the *Elstad* rationale applies to the defendant's subsequent jailhouse statement made after he was Mirandized and knowingly and voluntarily waived counsel. In *Missouri v Seibert* (2004) 542 US 600, 159 L Ed 2d 643, 124 S Ct 2601, the Court decided that an intentional *Miranda* violation that results in an incriminating statement taints a subsequent statement made after proper advisements and a knowing and intelligent waiver of Fifth Amendment rights. *Seibert* is discussed in §23.46. On the difference between the Fifth and Sixth Amendments' right to counsel, see §23.23.

See also *People v Carpenter* (1999) 21 C4th 1016, 1039, 90 CR2d 607 (inevitable discovery rule applies to evidence obtained as result of noncoerced interview of defendant in violation of *Miranda,* even if violation was deliberate); *People v Lujan* (2001) 92 CA4th 1389, 1403, 112 CR2d 769 (even though defendant's decision to testify at retrial was result of court's erroneous denial of defendant's motion to suppress his confession, reversal not required when there was no evidence that confession obtained in violation of *Miranda* was involuntary or that trial testimony was involuntary); *People v Brewer* (2000) 81 CA4th 442, 456, 96 CR2d 786 (noncoerced statements obtained in violation of *Miranda* may be used in search warrant affidavit and do not require suppression of their "fruits").

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§23.30 O. Application of "Fruit of the Poisonous Tree" Doctrine: Physical Evidence

In *U.S. v Patane* (2004) 542 US 630, 159 L Ed 2d 667, 673, 124 S Ct 2620, the Supreme Court settled the issue of whether the exclusionary rule requires suppression of physical evidence obtained as a result of unwarned but voluntary statements, holding that it does not. The court stated that the exclusionary rule does not apply, because the *Miranda* rule is a prophylactic designed to protect against violations of the Fifth Amendment Self-Incrimination Clause, which is not implicated by the introduction at trial of physical evidence resulting from voluntary statements. "The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn." 542 US at 636, 159 L Ed 2d at 674. Thus, the Court reasoned, police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failure to provide a suspect with the *Miranda* advisement. 542 US at 637, 159 L Ed 2d at 675. "Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." 542 US at 641, 159 L Ed 2d at 678. The Court stated that, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or Self-Incrimination Clause, there is nothing to deter with respect to mere failures to warn. 542 US at 642, 159 L Ed 2d at 678. See also *People v Whitfield* (1996) 46 CA4th 947, 956, 54 CR2d 370 (physical evidence seized as result of defendant's statement that she possessed narcotics, made in response to officer's questioning in violation of *Miranda*, was admissible, even though verbal statement was not).

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IX. VOLUNTARINESS

§23.31 A. Involuntary Statements Obtained by Police Are Inadmissible

Confessions coerced by the police are considered involuntary and are inadmissible. *Colorado v Connelly* (1986) 479 US 157, 93 L Ed 2d 473, 107 S Ct 515. An involuntary statement cannot be used against the accused in a criminal proceeding for any purpose. See *Schneckloth v Bustamonte* (1973) 412 US 218, 225, 36 L Ed 2d 854, 861, 93 S Ct 2041; *Brown v Mississippi* (1936) 297 US 278, 286, 80 L Ed 682, 687, 56 S Ct 461. Evidence that is the direct "fruit" of an involuntary confession is also inadmissible. Evidence that is not directly obtained by illegal conduct may be admitted if the prosecution can show that the connection between the primary illegality and the challenged evidence has "become so attenuated as to dissipate the taint." *Wong Sun v U.S.* (1963) 371 US 471, 491, 9 L Ed 2d 441, 457, 83 S Ct 407; *People v Beardslee* (1991) 53 C3d 68, 108, 279 CR 276.

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§23.32 B. When Statements Are Involuntary

Definition of involuntary. A statement is obtained involuntarily from a defendant when the accused's abilities to reason, comprehend, or resist were so disabled that he or she was incapable of free or rational choice. *In re Cameron* (1968) 68 C2d 487, 498, 67 CR 529. To determine this issue, the "totality of the circumstances" surrounding the interrogation must be considered. *In re Cameron, supra*; *People v Benson* (1990) 52 C3d 754, 276 CR 827. An involuntary statement violates due process (*In re Cameron, supra*), and is of doubtful reliability (*People v Garner* (1961) 57 C2d 135, 163, 18 CR 40). In *Colorado v Connelly* (1986) 479 US 157, 93 L Ed 2d 473, 107 S Ct 515, the Supreme Court added the additional requirement that coercive police activity is a necessary predicate to the finding that a confession is involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment. Under the truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)), federal rather than state law governs admissibility of defendant's statements. See *People v May* (1988) 44 C3d 309, 243 CR 369.

Both physical and psychological coercion are prohibited. *Rogers v Richmond* (1961) 365 US 534, 540, 5 L Ed 2d 760, 767, 81 S Ct 735. This is true despite a prior valid admonishment and waiver of *Miranda* rights. See *People v Hill* (1967) 66 C2d 536, 547, 58 CR 340.

When a defendant challenges the voluntariness of a statement, the prosecution bears the burden of proof. *People v Lucas* (1995) 12 C4th 415, 442, 48 CR2d 525.

Examples of situations that may require suppression of a statement as involuntary:

- Drugs or alcohol. *In re Cameron* (1968) 68 C2d 487, 500, 67 CR 529 (medication administered by police; confession involuntary). Cases before *Colorado v Connelly, supra,* that considered voluntary ingestion of alcohol or drugs in determining whether a statement was voluntary (see, *e.g.*, *People v Loftis* (1984) 157 CA3d 229, 235, 203 CR 590) are probably no longer good law.
- Low intelligence, brain damage, or mental illness, when taken advantage of by law enforcement. See *U.S. v Barbour* (11th Cir 1995) 70 F3d 580, 585; *U.S. v Montgomery* (9th Cir 1994) 14 F3d 1189, 1195. See also *Blackburn v Alabama* (1960) 361 US 199, 4 L Ed 2d 242, 80 S Ct 274; *Payne v Arkansas* (1958) 356 US 560, 2 L Ed 2d 975, 78 S Ct 844; *People v Watson* (1977) 75 CA3d 384, 396, 142 CR 134.

Ø **Note:** When defense counsel has such an issue, the better technique is to have experts testify to the defendant's lack of capacity to exercise a free will and rational intellect. See *People v MacPherson* (1970) 2 C3d 109, 84 CR 129.

- Religious beliefs. "Religious beliefs [of the interrogator *or* suspect] are not matters to be used by governmental authorities to manipulate a suspect." *People v Montano* (1991) 226 CA3d 914, 935, 277 CR 327.
- Sleep deprivation. Sleep deprivation to induce a defendant to confess may be such that the confession will not be considered the product of a free will. *Clewis v Texas* (1967) 386 US 707, 712, 18 L Ed 2d 423, 428, 87 S Ct 1338.
- Threats or promises of leniency. A confession is invalid if it results from a police threat (*People v Brommel* (1961) 56 C2d 629, 632, 15 CR 909, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582) or if motivated by an express or implied promise of leniency (*People v Jimenez* (1978) 21 C3d 595, 611, 147 CR 172, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582; *People v Cahill* (1994) 22 CA4th 296, 309, 28 CR2d 1). This is true even though the defendant was properly admonished and waived his or her *Miranda* rights. *People v Brommel, supra*. The offer or promise of a benefit need not be express, but may be implied in equivocal language not otherwise made clear. *People v Jackson* (1980) 28 C3d 264, 299, 168 CR 603, overruled on other grounds in *People v Cromer* (2001) 24 C4th 889, 901 n3, 103 CR2d 23. The fact that the promise of leniency is fulfilled does not make the statement voluntary. *People v Vasila* (1995) 38 CA4th 865, 45 CR2d 355.

Examples of threats and promises of leniency. Some examples of threats and promises of leniency:

- Police officer threatened to inform the judge that the defendant was a liar. *People v Brommel* (1961) 56 C2d 629, 633, 15 CR 909, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582 (involuntary).
- Police officer promised a reward. *People v Trout* (1960) 54 C2d 576, 583, 6 CR 759, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582 (involuntary).
- Police officer improperly threatened a minor with the death penalty, called her a liar, and promised leniency if she cooperated. *People v McClary* (1977) 20 C3d 218, 229, 142 CR 163 (involuntary), overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 509 n17, 20 CR2d 582.
- Police threatened death penalty. *People v Hinds* (1984) 154 CA3d 222, 238, 201 CR 104 (involuntary).
- Police officer threatened to jail minor if he lied, but promised citation if he told the truth. *In re J. Clyde K.* (1987) 192 CA3d 710, 716, 237 CR 550, disapproved on other grounds in *People v Badgett* (1995) 10 C4th 330, 349, 41 CR2d 635 (involuntary).
- Police officer and federal agent promised defendant an O.R. release and that he would not be prosecuted federally. *People v Vasila, supra* (involuntary).
- Police officer conveyed impression that interrogation would continue until the defendant confessed. *People v Azure* (1986) 178 CA3d 591, 602, 224 CR 158, overruled on other grounds in *People v Markham* (1989) 49 C3d 63, 71 n4, 260 CR 273 (involuntary).

Examples of activities found not to be threats or promises. The following are some examples of activities either found not to be threats or promises or found not to require suppression of a statement as involuntary:

- Officer expressing his opinion that a judge and jury would give greater weight to defendant's remorse than to fear of punishment was not a promise of leniency. *Clark v Murphy* (9th Cir 2003) 331 F3d 1062, 1073.
- Just commenting on the realities of the accused's position and the courses of conduct open to him or her, or pointing out the benefits that would flow naturally from a truthful and honest statement, do not make a subsequent confession involuntary. *People v Andersen* (1980) 101 CA3d 563, 583, 161 CR 707.
- Detective's statement, "We're talking about a death penalty case here," and suggestions that the defendant might benefit from giving a truthful, mitigated account of the crimes did not amount to an implied promise of lenient treatment in exchange for a confession. *People v Holloway* (2004) 33 C4th 96, 112, 14 CR3d 212.
- Statement that there's "no death penalty here" did not make a confession involuntary, given the totality of the circumstances. *People v Benson* (1990) 52 C3d 754, 779, 276 CR 827.
- Telling a properly Mirandized suspect during interrogation that he or she would be better off telling the officers what happened, and that it would be good to get it off his or her chest, is not likely to be held to constitute a threat sufficient to warrant suppression of a subsequent confession. *People v Robinson* (1969) 274 CA2d 514, 520, 79 CR 213.
- Single comment by a detective that he wanted the record to show defendant's "degree of cooperation" is too brief and insubstantial to qualify as an inducement; nor does comment suggest any benefit in exchange for cooperation. *People v Musselwhite* (1998) 17 C4th 1216, 1237, 74 CR2d 212.
- The use of a mock polygraph test and fake results after defendant requested a lie detector test. *People v Mays* (2009) 174 CA4th 156, 166, 95 CR3d 219.
- A detective's statement that the defendant's cooperation would benefit him in the judicial process, qualified by an admonition that the detective would present evidence of cooperation to the prosecutor, but the prosecutor would decide any consideration in return for cooperation, did not constitute a promise of leniency. *People v Ramos* (2004) 121 CA4th 1194, 1202, 18 CR3d 167.
- An officer's statement that "what happens here affects your whole family" is not coercive. *People v Chutan* (1999) 72 CA4th 1276, 1282, 85 CR2d 744.
- Promising something to a defendant does not necessarily render a statement involuntary; the promise has to be a sufficient inducement to be the motivating cause of the confession. *People v Massie* (1998) 19 C4th 550, 575, 79 CR2d 816 (officer did not make his promise to attempt to place defendant in protective custody contingent upon defendant making a statement); *People v Hernandez* (1988) 204 CA3d 639, 650, 251 CR 393 (promise of food and a soda not enough).
- Even loud, aggressive accusations of lying may not jeopardize the admissibility of a confession. *In re Joe R.*

(1980) 27 C3d 496, 515, 165 CR 837.

- A statement is not invalid if the defendant initiated the prospect of a benefit and the police made it clear they could make no promises, but merely said they would pass any information on to the district attorney. *People v Boyde* (1988) 46 C3d 212, 238, 250 CR 83.
- Mere advice or exhortation to tell the truth when unaccompanied by threats or promises is permissible. *People v Belmontes* (1988) 45 C3d 744, 773, 248 CR 126, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Higareda* (1994) 24 CA4th 1399, 1409, 29 CR2d 763. But see *People v Jones* (1998) 17 C4th 279, 298, 70 CR2d 793 (court expressed disapproval of detective's exhortation "the truth is going to set you free," but found that it did not render defendant's statement inadmissible). The distinction between permissible and impermissible conduct does not depend on the language of the inducement, but rather on the nature of the benefits to be derived by the suspect from telling the truth. When the benefits are those that flow naturally from an honest and truthful course of conduct, the statement is not involuntary. *People v Belmontes, supra*.

Deception. Deception that is reasonably likely to produce an untrue statement results in a finding that the statement is involuntary. In most situations, however, the courts find that the deception involved was not likely to result in an untrue statement. See, *e.g., People v Smith* (2007) 40 C4th 483, 505, 54 CR3d 245; *People v Maury* (2003) 30 C4th 342, 411, 133 CR2d 561; *People v Gurule* (2002) 28 C4th 557, 603, 123 CR2d 345; *People v Jones* (1998) 17 C4th 279, 299, 70 CR2d 793; *People v Jackson* (1996) 13 C4th 1164, 1206, 56 CR2d 49; *In re Walker* (1974) 10 C3d 764, 777, 112 CR 177; *People v Arguello* (1967) 65 C2d 768, 775, 56 CR 274. Although it is improper to use deception to cause a suspect to waive his or her *Miranda* rights, its use may not invalidate the statement of one who has already made a free and voluntary waiver. See, *e.g., People v Dominick* (1986) 182 CA3d 1174, 1189, 227 CR 849 (police falsely told defendant that surviving victim had identified him as perpetrator). The contrary is also true: deception that is *not* likely to produce an untrue statement is admissible. *People v Felix* (1977) 72 CA3d 879, 885, 139 CR 366. Such deception, however, is a factor the court will consider when determining, based on all the circumstances, whether a resulting confession was involuntary. *People v Hogan* (1982) 31 C3d 815, 840, 183 CR 817, overruled on other grounds in *People v Cooper* (1991) 53 C3d 771, 836, 281 CR 90.

Coercion. The following cases dealt with a combination of circumstances, some involving physical coercion, others psychological coercion:

- When a suspect signed a written advice of *Miranda* rights form and a consent to polygraph form and was told that he was free to go at any time, and there was no evidence that his age, education, or intelligence made him susceptible to coercion, his statements were voluntary, despite the following circumstances: The agent drove the suspect to the FBI office for a polygraph examination, the suspect was interrogated all day before taking the polygraph examination and accused of being untruthful during the examination, the agent gave the suspect a newspaper article that discussed the possible consequences of lying, and the agent influenced the words used by the suspect in a written confession that followed his oral confession. *U.S. v Haswood* (9th Cir 2003) 350 F3d 1024.
- A minor's confession was deemed voluntary, even though the defendant was interrogated for 2 hours while in custody for 7 hours, was rewarded with a burrito and a coke, was reminded that his father died in prison, was told that a successful polygraph test could result in his release, and was not told that his mother was at the jail to see him. *People v Maestas* (1987) 194 CA3d 1499, 1505, 240 CR 360.
- Sixteen-year-old's relative youth, time of questioning (past midnight), length of interrogation (3 hours), absence of an attorney or parent, fact that minor was given no food and possibly no water and was offered no rest break, denial of minor's requests to speak with his mother, and denial of access to a telephone to call his lawyer rendered confession involuntary. *Taylor v Maddox* (9th Cir 2004) 366 F3d 992, 1015.
- Admissions were found voluntary despite deception, promises, and threats used by police. *People v Thompson* (1990) 50 C3d 134, 166, 266 CR 309.
- Repeated refusal of defendant's request to cease interrogation and use of defendant's religious beliefs required suppression of first and subsequent confession, even though defendant requested second interview. *People v Montano* (1991) 226 CA3d 914, 277 CR 327.
- Defendant's incriminating statements found voluntary and not coerced when made during jail facility's group

psychiatric therapy session, even though defendant signed confidentiality agreement regarding his participation in such sessions. *Beaty v Schriro* (9th Cir 2007) 509 F3d 994.

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X. CHALLENGING CODEFENDANT'S STATEMENT

A. Fifth Amendment Challenges

§23.33 1. Defendant May Challenge Voluntariness of Codefendant's Statement

A defendant has the right to challenge a statement made by a codefendant or other third party on the ground that it was involuntary. *People v Johnson* (1989) 47 C3d 1194, 1226 n8, 255 CR 569. A coerced confession is usually considered unreliable and contrary to public policy. Therefore, any defendant has standing to challenge the admissibility of evidence obtained as a result of any other person's coerced or involuntary confession or admission. *People v Jones* (1980) 105 CA3d 572, 581, 164 CR 605. Third party evidence that is the direct product of unlawful police coercion is inherently unreliable and must be excluded under the Due Process Clause. *People v Jenkins* (2000) 22 C4th 900, 966, 95 CR2d 377; *People v Lee* (2002) 95 CA4th 772, 786, 115 CR2d 828.

A trial witness's testimony, however, is subject to suppression only when the trial testimony itself, as opposed to pretrial statements that were allegedly coerced, is the product of continuing coercion and its admission would deprive the defendant of a fair trial. *People v Badgett* (1995) 10 C4th 330, 344, 41 CR2d 635; *People v Douglas* (1990) 50 C3d 468, 500, 503, 268 CR 126. See also *U.S. v Merkt* (5th Cir 1985) 764 F2d 266. Even when a codefendant's pretrial confession is found involuntary, if the trial court finds attenuation, the codefendant can testify against the defendant. *People v Johnson* (1989) 47 C3d 1194, 1227, 255 CR 569 (attenuation found); *People v Superior Court (Sosa)* (1982) 31 C3d 883, 887, 185 CR 113 (no attenuation found).

Similarly, when a defendant claims that evidence at trial, such as a murder weapon, is the "fruit" of unlawful police coercion of a third party, the defendant must show some connection between the evidence and the coercion that makes the evidence unreliable. *People v Jenkins, supra*; *People v Lee* (2002) 95 CA4th 772, 788, 115 CR2d 828. See §23.30 for further discussion of the application of the exclusionary rule to physical evidence obtained as the result of a statement taken in violation of *Miranda*.

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§23.34 2. Defendant May Not Raise Violation of Another's *Miranda* Rights

A defendant has no standing to challenge a violation of a codefendant's *Miranda* rights. Thus, when evidence is developed against the defendant that is the product of improperly obtained statements from a codefendant, the defendant cannot successfully move to suppress that evidence even though it was the product of a violation of the codefendant's *Miranda* rights. *People v Douglas* (1990) 50 C3d 468, 501, 268 CR 126; *People v Varnum* (1967) 66 C2d 808, 812, 59 CR 108.

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B. Confrontation Clause Challenges

§23.35 1. *Crawford v Washington*

Introduction of an out-of-court statement made by a codefendant (or any other third party) may violate the defendant's right to confront witnesses if the defendant has not had an opportunity to cross-examine the declarant. See *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. When an out-of-court statement implicating the defendant is "testimonial" in nature, its admission violates the Confrontation Clause unless the declarant is unavailable *and* the defendant has had an opportunity to cross-examine the declarant. 158 L Ed 2d at 203. "Testimonial" statements are those that are made in circumstances that reasonably suggest their future use in a trial. 158 L Ed 2d at 192. Although the Court declined to delineate the outer contours of the term "testimonial," it concluded that statements made to police officers during interrogation are "testimonial under even a narrow standard." 158 L Ed 2d at 203. Consequently, *Crawford* makes the out-of-court statement of a nontestifying accomplice, made during police interrogation, inadmissible against the defendant if the defendant has had no opportunity to cross-examine the accomplice. 158 L Ed 2d at 203. For discussion of the impact of *Crawford v Washington* on the admissibility of other out-of-court statements, see Jefferson's California Evidence Benchbook §§2.19-2.25 (4th ed CJA-CEB 2009).

Ø **Note:** The *Crawford* holding substitutes a bright-line rule for the case-by-case search for indicia of trustworthiness for "testimonial" hearsay. Although subsequent California cases have suggested that the case-by-case approach of *Ohio v Roberts* (1980) 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, may still apply to nontestimonial hearsay (see, *e.g., People v Cervantes* (2004) 118 CA4th 162, 174, 12 CR3d 774 (accomplice's statement made to neighbor was nontestimonial, trustworthy, and admissible under exception for statements made against penal interest)), the Supreme Court has made clear that if a statement is not testimonial, it is not subject to the Sixth Amendment. *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 236, 126 S Ct 2266.

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§23.36 2. *Aranda-Bruton* Rule

Under Evid C §1220, in a joint trial of two or more defendants, an out-of-court admission or confession is generally admissible against the defendant who made the statement. When such a statement implicates a nondeclarant defendant, its introduction in a joint trial may violate the nondeclarant's right of confrontation when the declarant does not testify. *People v Aranda* (1965) 63 C2d 518, 47 CR 353; *Bruton v U.S.* (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620. Under *Aranda* and *Bruton,* a limiting instruction directing the jury to consider the statement only as it relates to the declarant is insufficient to cure a Confrontation Clause problem because accusations from a codefendant are so inherently prejudicial that a jury cannot be trusted to ignore them when considering the defendant's guilt or innocence, even when specifically instructed to do so. *People v Anderson* (1987) 43 C3d 1104, 1120, 240 CR 585.

The *Aranda-Bruton* rule applies whether the incriminating extrajudicial statement is offered by the prosecution or by a defendant. *People v Floyd* (1970) 1 C3d 694, 720, 83 CR 608, disapproved on other grounds in *People v Wheeler* (1978) 22 C3d 258, 287, 148 CR 890. The rule's applicability does not turn on whether the extrajudicial statement can be technically categorized as a "confession" (*i.e.,* a complete and express acknowledgment of intentional participation in the crime) or whether it is offered for its truth; all statements inculpating the nondeclarant defendant fall within the rationale of the rule. *People v Anderson* (1987) 43 C3d 1104, 1124, 240 CR 585. Nor can the police avoid *Aranda-Bruton* issues by interrogating codefendants together and then attempting to use one defendant's silence as an implied adoptive admission of another defendant's statement. *People v Jennings* (2003) 112 CA4th 459, 471, 5 CR3d 243. But see *People v Combs* (2004) 34 C4th 821, 841, 22 CR3d 61 (statement incriminating defendant made by accomplice during joint interrogation and followed by defendant's silence is admissible against defendant as implied adoptive admission; *Aranda-Bruton* rule does not apply to exclude statement when accomplice is not jointly charged or tried with defendant).

The *Aranda-Bruton* rule does not apply to bench trials (*People v Walkkein* (1993) 14 CA4th 1401, 1406, 18 CR2d 383) or to preliminary hearings (*People v Miranda* (2000) 23 C4th 340, 352, 96 CR2d 758). Nor does it apply when the defendant puts the nontestifying accomplice's confession at issue. *Tennessee v Street* (1985) 471 US 409, 414, 85 L Ed 2d 425, 431, 105 S Ct 2078.

Under *Aranda* and *Bruton,* a nontestifying defendant's extrajudicial, self-incriminating statement that inculpates a codefendant *presumptively* violates the latter's right of confrontation. See *People v Anderson* (1987) 43 C3d 1104, 1120, 240 CR 585. However, neither case considered whether there were circumstances under which such a statement could be introduced at trial without violating the nondeclarant's right of confrontation. See *Bruton v U.S.* (1968) 391 US 123, 128 n2, 20 L Ed 2d 476, 480 n2, 88 S Ct 1620. In the wake of *Crawford,* it appears that such statements would be admissible without the need for editing or severance if the statements are nontestimonial and otherwise admissible under a statutory hearsay exception.

In *People v Cervantes* (2004) 118 CA4th 162, 176, 12 CR3d 774, the statement of a codefendant identifying himself and his codefendants as participants in a shooting qualified as a declaration against interest hearsay exception and was thus admissible without redaction in a joint trial. See *People v Greenberger* (1997) 58 CA4th 298, 336, 68 CR2d 61 ("*Bruton* does not stand for the proposition that all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial"); *People v Smith* (2005) 135 CA4th 914, 921, 38 CR3d 1 ("spontaneous statement" of codefendant to girlfriend regarding defendant's participation in murder that had just occurred did not violate *Aranda, Bruton,* or *Crawford*). But see *People v Song* (2004) 124 CA4th 973, 982, 22 CR3d 118 (codefendant's inculpatory statement introduced against the defendant was *Aranda-Bruton* and *Crawford* error; "[a] limiting instruction is not always an adequate substitute for a defendant's constitutional right of cross-examination").

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§23.37 C. Fourth Amendment Challenge

An attack on a codefendant's confession as the product of an unlawful search and seizure is usually difficult because a defendant must have a "reasonable expectation of privacy" in the place searched or the items seized in order to contest the legality of a search or seizure. *Rakas v Illinois* (1978) 439 US 128, 130, 58 L Ed 2d 387, 392, 99 S Ct 421. For further discussion, see §§16.11-16.14.

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XI. SPECIAL PROBLEMS

§23.38 A. Providing Defendant's Statement to Prosecution

In the extremely rare case, an attorney may advise a client to discuss the case with the police or prosecutor in order to terminate an investigation and avoid the issuance of a formal complaint or indictment. This is a dangerous tactic that should be used most cautiously, and only after counsel has reviewed all available evidence and has determined that giving a statement will clearly result in exonerating the client. If counsel reaches this conclusion incorrectly, the client may be burdened with an incriminating statement and no means of preventing its introduction at trial. See, *e.g., People v Claudio* (Sup Ct 1982) 447 NYS2d 972, aff'd on appeal (1983) 466 NYS2d 271, 453 NE2d 500.

Statements recorded by a defendant and given to defense counsel, *e.g.,* a diary or a murder checklist, are protected by the Fifth Amendment only when four requirements are met: The evidence is (1) incriminating, (2) personal to the defendant, (3) obtained by compulsion, and (4) testimonial or communicative in nature. *People v Sanchez* (1994) 24 CA4th 1012, 1020, 30 CR2d 111. It may be an ethical violation for a defense attorney not to turn such evidence over to the prosecution (Cal Rules of Prof Cond 5-220) as well as a possible criminal violation (Pen C §135).

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§23.39 B. Polygraphs (Lie Detectors)

Polygraph test results are admissible at trial or at any pretrial or postconviction hearings, including juvenile hearings, only if their admission is stipulated to by both the prosecution and the defense. Evid C §351.1; *In re Aontae D.* (1994) 25 CA4th 167, 173, 30 CR2d 176; *People v Kegler* (1987) 197 CA3d 72, 84, 242 CR 897. Any reference to taking, offering to take, or failure to take a polygraph examination is similarly inadmissible under Evid C §351.1. This absolute bar on the admission of polygraph evidence in a criminal case absent a stipulation is constitutional. *People v Wilkinson* (2004) 33 C4th 821, 842, 16 CR3d 420 (relying on *U.S. v Scheffer* (1998) 523 US 303, 140 L Ed 2d 413, 118 S Ct 1261).

Police requests that a client submit to a polygraph examination should be treated no differently from requests to interrogate the defendant. A polygraph examination typically includes a pre- and postexamination "interview." All statements made by a client during any part of the examination can be admissible regardless of the admissibility of the test results. Evid C §§351-351.1.

Miranda warnings are required before a defendant in custody can be questioned. See *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602; *People v Rich* (1988) 45 C3d 1036, 1078, 248 CR 510 (new *Miranda* warnings not required when defendant questioned immediately after polygraph unless "the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights"). The use of waiver forms signed by the defendant specifying that he or she is taking the test totally without threat or promise, including promise of immunity, was upheld by the supreme court in *People v Ochoa* (1998) 19 C4th 353, 79 CR2d 408. In *People v Rankins* (1986) 178 CA3d 1163, 224 CR 282, the court upheld the introduction of the defendant's statements made when confronted with polygraph results despite an agreement that no questioning would go on outside the polygraph test. The *Rankins* court held that questioning about unfavorable test results is part of the very nature of a polygraph exam. Hence, the vague agreement involved here did nothing to protect the defendant. The court noted that the defense attorney could have instructed the client either to refuse to answer questions after the polygraph machine was turned off or to summon counsel to observe any subsequent questioning.

The better practice is for counsel to insist on being present during the entire examination, so that the examination can be monitored and terminated whenever it is in the client's interests to do so. Nevertheless, allowing a defendant to submit to a law enforcement polygraph is always a dangerous tactic, which should be considered only after the defendant has been examined confidentially by a competent defense polygraph expert and found to be truthful on the relevant factual issues. If the results are favorable, defense counsel may approach the prosecution and offer to allow the defendant to take a prosecution polygraph examination with the understanding that the prosecutor will consider a dismissal, depending on the results, or that both sides stipulate to admission of the results.

It may be incompetent for defense counsel to allow the defendant to take a prosecution polygraph without having first taken a defense-run polygraph. See *People v Reeder* (1976) 65 CA3d 235, 135 CR 421 (claim of defense counsel's incompetence based on stipulation to admissibility of polygraph results of defendant and victim denied because defendant also signed stipulation).

A defense offer to take a polygraph is itself inadmissible as evidence, even if the police refuse the offer. *People v Espinoza* (1992) 3 C4th 806, 818, 12 CR2d 682.

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§23.40 C. Effect of Statements Provided by Counsel During Plea Negotiations

Statements provided by counsel during plea negotiations have been held inadmissible (*People v Tanner* (1975) 45 CA3d 345, 119 CR 407) except in cross-examination as rebuttal to the defendant's testimony on direct concerning the same factual issues (*People v Crow* (1994) 28 CA4th 440, 451, 33 CR2d 624).

Ø **Note:** A defendant's unprompted, spontaneous statement in the courtroom declaring his guilt when no plea negotiations were underway was not an inadmissible offer to plead guilty. *People v Leonard* (2007) 40 C4th 1370, 58 CR3d 368.

Some commentators have questioned the continuing validity of *Tanner* under the truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)). Counsel may wish to guard against making a usable authorized admission by requiring the prosecutor to stipulate in advance that statements made during plea negotiations will not be used as evidence.

Prosecutors may wish to refuse such a stipulation absent the evidentiary need to engage in plea negotiations. For further discussion of plea bargaining, see chap 26.

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XII. CORPUS DELICTI REQUIREMENT

§23.41 A. Corpus Delicti Need Not Be Proved Before Statement Can Be Introduced

The elements of an offense are known as the corpus delicti. Under California law, an uncorroborated confession is insufficient evidence by itself to support a conviction. Traditionally, the corpus delicti rule also meant that statements of an accused were not admissible at the preliminary hearing or at trial against him or her until the prosecution had established prima facie proof of every element of the offense. *People v Jennings* (1991) 53 C3d 334, 279 CR 780 (trial); *Hall v Superior Court* (1953) 120 CA2d 844, 262 P2d 351 (preliminary hearing). The truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)) abrogated the corpus delicti rule to the extent that the rule prohibited the admission of a defendant's extrajudicial statements in the absence of independent proof of the corpus delicti. *People v Alvarez* (2002) 27 C4th 1161, 119 CR2d 903. Thus, there no longer exists a trial objection to the admission in evidence of the defendant's out-of-court statements on grounds that independent proof of the corpus delicti is lacking. However, the truth-in-evidence provision did not eliminate the aspect of the corpus delicti rule that bars conviction when the only evidence that the crime was committed is the defendant's own out-of-court statement. 27 C4th at 1169.

Only a slight or prima facie showing, permitting the reasonable inference that a crime was committed, is required. *People v Ray* (1996) 13 C4th 313, 342, 52 CR2d 296; *People v Alcala* (1984) 36 C3d 604, 624, 205 CR 775; *People v Riccio* (1996) 42 CA4th 995, 1000, 50 CR2d 52. The prosecutor need not show that the defendant was the perpetrator as part of the corpus delicti. See *People v Manson* (1977) 71 CA3d 1, 41, 139 CR 275. The corpus delicti may be shown by circumstantial as well as direct evidence. *People v Andrews* (1963) 222 CA2d 242, 244, 35 CR 118. Although neither the extrajudicial statements of the accused nor those of a codefendant may be used to establish the corpus (*Jones v Superior Court* (1979) 96 CA3d 390, 396, 157 CR 809), the defendant's statements may be used to prove the degree of the charged crime once the elements of the basic offense have been proved (*People v Sanders* (1983) 145 CA3d 218, 222, 193 CR 331). The defendant's statements may also be used to prove that the defendant was the perpetrator, once the corpus delicti of the offense has been shown. *People v Manson* (1977) 71 CA3d 1, 41, 139 CR 275 (identity of accused is not an element of offense). It is possible for statements by the defendant to be the only evidence establishing identity. 71 CA3d at 42. The corpus delicti rule is similarly not violated when a defendant's statements are the sole evidence establishing the facts necessary for a sentencing enhancement. *People v Miranda* (2008) 161 CA4th 98, 107, 73 CR3d 759.

The court has a sua sponte duty to instruct the jury that the corpus must be proved independent of the defendant's statements. *People v Lara* (1994) 30 CA4th 658, 674, 35 CR2d 886. See CALCRIM 359 (defendant may not be convicted of crime on the basis of his or her out-of-court statement(s) alone).

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§23.42 B. Corpus Delicti Requirements for Homicides, Similars, Conspiracies

Homicides. In homicide prosecutions involving the felony murder rule, once evidence is presented showing a death by criminal means, the defendant's admissions themselves may be used to prove the underlying offense. *People v Cantrell* (1973) 8 C3d 672, 680, 105 CR 792; *People v Martinez* (1994) 26 CA4th 1098, 1103, 31 CR2d 869.

Ø **Note:** The corpus delicti of any of the felony-based special circumstances listed in Pen C §190.2(a)(17) does not need to be proved independent of a defendant's extrajudicial statement. Pen C §190.41.

Similars. Proof that a defendant committed a similar offense to prove the defendant's intent in committing the offense for which the defendant is on trial may be shown by defendant's statements without having to first put on evidence of the corpus of the similar offense. *People v Denis* (1990) 224 CA3d 563, 273 CR 724.

Co-conspirator's statements. Under former law, the introduction of a co-conspirator's statement in a conspiracy case required independent proof that there was a conspiracy and that the defendant was a member. Evid C §1223; *People v Saling* (1972) 7 C3d 844, 103 CR 698. Presumably, the truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)) abrogated the independent-proof requirement as it relates to the introduction of the statement, but not as it relates to independent proof of the conspiracy.

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§23.43 XIII. EFFECT OF DELAY IN ARRAIGNMENT ON ADMISSIBILITY OF STATEMENT

In interpreting federal statutes, the U.S. Supreme Court has held that any unnecessary delay in the arraignment of an arrested suspect will result in suppression of statements obtained from the accused during the delay. *McNabb v U.S.* (1943) 318 US 332, 87 L Ed 819, 63 S Ct 608. Strictly construing the "without unnecessary delay" requirement of Fed R Crim P 5(a), the Court held that postponing taking an accused before a magistrate to have time to question him or her will result in suppression of any statements obtained. *Mallory v U.S.* (1957) 354 US 449, 1 L Ed 2d 1479, 77 S Ct 1356. This is commonly known as the *McNabb-Mallory* rule, and is not the law in California.

California has declined to adopt the stricter federal rule when interpreting similar state statutes dealing with time limitations for arraigning an arrested suspect. A delay in arraignment in California is but one factor to consider in ruling on the admissibility of a statement. *People v Morris* (1991) 53 C3d 152, 200, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394; *People v Thompson* (1980) 27 C3d 303, 329, 165 CR 289. See Pen C §825 (an accused "shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays"). If the arrest is on a Wednesday, however, no matter what time it was made, the defendant must be arraigned on Friday (unless it is a court holiday). Pen C §825(a)(2). An arraignment within the 48-hour maximum period, however, does not preclude a finding that there was an unnecessary delay. *People v King* (1969) 270 CA2d 817, 822, 76 CR 145.

If arraignment delay was solely for the purpose of allowing time to obtain incriminating statements, those statements will likely be suppressed. See *People v Powell* (1967) 67 C2d 32, 59, 59 CR 817; *People v Cook* (1982) 135 CA3d 785, 792, 185 CR 576. But if the delay was caused by the need to complete the arrest, book the accused, transport the accused to court, evaluate the evidence for the limited purpose of determining what charge, if any, to file, and complete the necessary clerical and administrative tasks necessary to prepare a formal pleading, then the delay will probably be held permissible. *People v Turner* (1994) 8 C4th 137, 172, 32 CR2d 762; *People v Williams* (1977) 68 CA3d 36, 43, 137 CR 70.

For discussion of probable cause hearings, see §6.23.

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§23.44 XIV. RELATIONSHIP OF RIGHT TO COUNSEL TO DEFENDANT'S STATEMENT

Sixth Amendment right to counsel. When an accused is represented by counsel (whether retained or appointed) and has been formally charged with a crime, police questioning on that case without giving defense counsel the opportunity to speak to the defendant and to be present during questioning, and without a waiver of counsel, will result in suppression of any statements obtained. *Minnick v Mississippi* (1990) 498 US 146, 112 L Ed 2d 489, 111 S Ct 486; *U.S. v Henry* (1980) 447 US 264, 273, 65 L Ed 2d 115, 124, 100 S Ct 2183; *Spano v New York* (1959) 360 US 315, 3 L Ed 2d 1265, 79 S Ct 1202; *People v Arguello* (1965) 63 C2d 566, 47 CR 485.

The right attaches "after the first formal charging proceeding." *Moran v Burbine* (1986) 475 US 412, 428, 89 L Ed 2d 410, 425, 106 S Ct 1135. The right to counsel does not attach during extradition proceedings, which are not criminal proceedings, but civil proceedings related to criminal proceedings in another jurisdiction. *People v Wheelock* (2004) 117 CA4th 561, 566, 11 CR3d 796. The filing of a complaint by a prosecutor in California triggers the Sixth Amendment right to counsel. *People v Viray* (2005) 134 CA4th 1186, 1205, 36 CR3d 693. A defendant's consent to police-initiated interrogation after the Sixth Amendment right has attached is not presumed involuntary or coerced simply because the defendant has been previously appointed counsel. *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 965, 129 S Ct 2079.

The prosecution may use a statement that was obtained in violation of a defendant's Sixth Amendment right to impeach the defendant. *Kansas v Ventris* (2009) ___ US ___, 173 L Ed 2d 801, 809, 129 S Ct 1841. The California Supreme Court has held that a defendant's statements made during a court-ordered mental competency examination are inadmissible at trial, including for the purpose of impeaching the defendant's testimony. *People v Pokovich* (2006) 39 C4th 1240, 1253, 48 CR3d 158. The court in *Pokovich* based its decision on constitutional and policy concerns specific to court-ordered competency evaluations. Undecided by the U.S. Supreme Court and the California Supreme Court is the issue of whether the *Oregon v Elstad* "tainted product" analysis (see §23.29) applies when a suspect makes incriminating statements after a knowing and voluntary waiver of the right to counsel, despite earlier police questioning in violation of the suspect's Sixth Amendment rights. See *Fellers v U.S.* (2004) 540 US 519, 157 L Ed 2d 1016, 124 S Ct 1019. *Fellers* was remanded to the Eighth Circuit with explicit instruction to address this question. On remand, the Eighth Circuit held that the *Elstad* analysis applied. *U.S. v Fellers* (8th Cir 2005) 397 F3d 1090, 1095.

In *McNeil v Wisconsin* (1991) 501 US 171, 175, 115 L Ed 2d 158, 166, 111 S Ct 2204, the U.S. Supreme Court declared that the Sixth Amendment right to counsel is "offense specific." In other words, unlike the invocation of a suspect's *Miranda* rights, which precludes police from discussing *any* investigation with an accused in custody unless he or she voluntarily approaches the police and initiates a discussion (see §23.23), the Sixth Amendment right to counsel attaches only to charged offenses, and does not limit questioning about unrelated, uncharged crimes. See also *People v Wader* (1993) 5 C4th 610, 636, 20 CR2d 788; *People v Avila* (1999) 75 CA4th 416, 420, 89 CR2d 320 (attorney representing defendant in one case cannot assert blanket invocation preventing police from questioning defendant about any other case); *People v Beltran* (1999) 75 CA4th 425, 430, 89 CR2d 267 (same).

Ten years after *McNeil*, in *Texas v Cobb* (2001) 532 US 162, 149 L Ed 2d 321, 121 S Ct 1335, the Supreme Court emphasized that it "meant what it said" in *McNeil* with respect to the offense-specific nature of the right to counsel, holding that there is no exception to the offense-specific rule when the uncharged crimes are "closely related to" or "inextricably intertwined" with charged offenses. 532 US at 172, 149 L Ed 2d at 331. Defining "offense" in the context of the right to counsel, the *Cobb* Court adopted the test set forth earlier in *Blockburger v U.S.* (1932) 284 US 299, 304, 76 L Ed 306, 309, 52 S Ct 180: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Texas v Cobb* (2001) 532 US 162, 172, 149 L Ed 2d 321, 331, 121 S Ct 1335. See also *People v Slayton* (2001) 26 C4th 1076, 1082, 112 CR2d 561.

The defendant can waive the right to have counsel present by initiating contact with the authorities. *Minnick v Mississippi, supra*; *People v Mattson* (1990) 50 C3d 826, 859, 268 CR 802. For the waiver to be valid, the defendant must be aware that he or she is under arrest or that charges have been filed against him or her. *People v Engert*

(1987) 193 CA3d 1518, 1525, 239 CR 169 (error, but not prejudicial).

Ø **Note:** There are differences between the Fifth Amendment and Sixth Amendment rights to counsel, and between invoking the right to counsel and the right to remain silent in response to *Miranda* warnings. See §23.23.

There is no *federal* requirement under *Miranda* that a suspect who is undergoing interrogation be informed that an attorney is present and wishes to speak to him or her. *Moran v Burbine* (1986) 475 US 412, 89 L Ed 2d 410, 106 S Ct 1135. If at the time of the interrogation the suspect has not been formally charged, there is likewise no *federal* requirement under the Sixth Amendment that the suspect be told of the attorney's presence, even if an attorney-client relationship has already been established. This is because the Sixth Amendment right attaches at the time of formal charging, not at the time an attorney-client relationship is formed. *Moran v Burbine, supra*.

There is a limited right under Cal Const art I, §15 for an attorney who has taken diligent steps to see the defendant in custody, to be given the opportunity to meet with the client before questioning begins or resumes, even though no charges have been filed. *People v Mattson, supra*.

***Massiah* error.** Interrogation in violation of the defendant's right to counsel that is improper when conducted by the prosecution is also improper when obtained surreptitiously, through the use of an undercover police agent. *U.S. v Henry, supra* (federal); *People v Arguello, supra* (state); *Massiah v U.S.* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (undercover or open interrogation). This is commonly called a *Massiah* violation. Similarly, *Massiah* error occurs when a co-principal, working at the request of the police, purposely "stimulates" a conversation with the defendant about the charged offenses. This is even true when the defendant knows that the co-principal is supplying information to the police. *In re Neely* (1993) 6 C4th 901, 909, 26 CR2d 203.

No *Massiah* violation occurs when spontaneous, voluntary statements are made by an accused to others who pass them on to the police, when the informant makes no attempt to solicit the statements. Such volunteered statements are admissible even when the informant is placed in a cell with the defendant for the purpose of monitoring the defendant's conversations, so long as the government provides no incentive to the informant. *People v Hovey* (1988) 44 C3d 543, 561, 244 CR 121; *People v Whitt* (1984) 36 C3d 724, 741, 205 CR 810.

There is no attorney-client privilege when a defendant discusses his or her case with another inmate who is helping the defendant with legal questions. *People v Velasquez* (1987) 192 CA3d 319, 328, 237 CR 366.

Although there is no *Massiah* violation if the informant had no prior relationship with the police and first approached the prosecution with the information after having obtained it, when the state has directed an informant to obtain incriminating information, or has created powerful inducements for him or her to do so, the defendant's Sixth Amendment rights may be violated if the informant actively engaged the defendant in conversation, acting as more than a passive listener, even though he or she did not initiate the conversation. *People v Howard* (1988) 44 C3d 375, 400, 243 CR 842; *Kuhlmann v Wilson* (1986) 477 US 436, 91 L Ed 2d 364, 106 S Ct 2616; *Maine v Moulton* (1985) 474 US 159, 88 L Ed 2d 481, 106 S Ct 477. See also *People v Pensinger* (1991) 52 C3d 1210, 1249, 278 CR 640 (informant not agent of police when he acted as no more than listening post, was told he was not agent of police, and was told he would receive no benefit from information he passed on to police); *People v Catelli* (1991) 227 CA3d 1434, 1442, 278 CR 452. For an informant to be considered a government agent, there need not be an express agreement by the state to compensate the informant for his or her services. Even if the informant is told not to expect a deal in exchange for testimony, when the state makes a conscious decision to obtain the informant's cooperation and the informant consciously decides to provide that cooperation, the informant then becomes an agent of the state. *Randolph v California* (9th Cir 2004) 380 F3d 1133, 1144.

In *In re Wilson* (1992) 3 C4th 945, 13 CR2d 269, while the defendant was incarcerated pending trial, he told another inmate that he wanted to eliminate a potential witness. The inmate contacted the district attorney, and a prosecution investigator posing as a "hit man" spoke with the defendant. A unanimous supreme court held that this violated *Massiah,* and that defense counsel's failure to object constituted reversible error because of incompetence of counsel. It is important to remember in such cases that the Sixth Amendment right to counsel is offense-specific; it attaches only to the charged crime, even when the facts relating to other offenses are inextricably intertwined or closely related to the charged offense. See *Texas v Cobb* (2001) 532 US 162, 149 L Ed 2d 321, 121 S Ct 1335. In *People v Martin* (2002) 98 CA4th 408, 421, 119 CR2d 679, the defendant's girlfriend, a witness in his pending murder case, contacted the police because she felt threatened by him. In investigating a possible charge of witness intimidation, the police secretly recorded her telephone conversations with the defendant. The court found that officers did not knowingly circumvent

the defendant's right to counsel, because the girlfriend was not acting as an agent of the police, there was no agreement between the officers and the girlfriend to obtain evidence against the defendant with regard to the charged crime, and the officers did not create a situation likely to induce incriminating statements about the charged crime.

Ø **Note:** As these cases illustrate, it is incumbent on defense counsel to thoroughly warn clients of the dangers of talking to anyone, including sympathetic cellmates, about their case. This is particularly true in light of Pen C §2600, which the California Supreme Court has interpreted to permit law enforcement officers to monitor and record unprivileged communications between inmates and their visitors as a means of gathering evidence of a crime. *People v Loyd* (2002) 27 C4th 997, 1007, 119 CR2d 360. See also *People v Thornton* (2007) 41 C4th 391, 429, 61 CR3d 461 (taped conversation between defendant in custody and visitor); *People v Jefferson* (2008) 158 CA4th 830, 840, 70 CR3d 451 (secret recording of cellmates was not custodial interrogation).

Generally, the remedy for a *Massiah* violation is suppression of the statements. See *U.S. v Morrison* (1981) 449 US 361, 66 L Ed 2d 564, 101 S Ct 665 (usual remedy for prosecution interference with defendant's right to counsel is reversal, not dismissal); *People v Benally* (1989) 208 CA3d 900, 908, 256 CR 483 (police taped conversation between defense counsel and his investigator; tape suppressed). Dismissal, however, may be an appropriate sanction in some cases. See *People v Hayes* (1988) 200 CA3d 400, 246 CR 750; *People v Lowery* (1988) 200 CA3d 1207, 1223, 246 CR 443. Such a situation might exist when the informant or agent has infiltrated the defense camp, learned defense strategies, and otherwise intruded on the attorney-client relationship. See *Barber v Municipal Court* (1979) 24 C3d 742, 157 CR 658; *U.S. v Levy* (3d Cir 1978) 577 F2d 200.

In *People v Benally, supra,* the court based its decision to suppress only the statement (and any evidence derived from it) in part on the fact that the district attorney had not listened to the tape.

Secretly tape recording the accused's conversation with an unwitting codefendant or other third party not acting as a police agent, at least when the subject has no legitimate expectation of privacy, does not violate the accused's right to counsel and is permissible. *People v Lucero* (1987) 190 CA3d 1065, 235 CR 751 (in a police car); accord, *People v Harmon* (1992) 7 CA4th 845, 849, 9 CR2d 265. However, if the defendant is "lulled … into believing" that a conversation with someone will be private, it is inadmissible. *People v Loyd* (2002) 27 C4th 997, 1003, 119 CR2d 360. See *North v Superior Court* (1972) 8 C3d 301, 311, 104 CR 833 (prisoner in jail and spouse allowed to talk privately; taping violated marital privilege and Fourth Amendment); *People v Hammons* (1991) 235 CA3d 1710, 5 CR2d 317 (police told jailed codefendants they could have private conversation, then secretly taped it; Fourth Amendment violated). But see *People v Edwards* (1991) 54 C3d 787, 814, 1 CR2d 696 (during voluntary conversation with jailer, defendant said "off the record, I'm guilty"; court held there was no interrogation and no duty to stop defendant when he said "off the record").

For discussion generally of the right to counsel, see chap 3. For discussion of defense counsel's role in agreeing to have an accused cooperate with the prosecution, see §§51.8-51.12.

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XV. USING EXCLUDED STATEMENTS

§23.45 A. Involuntary Statements

Involuntary statements are inadmissible for any purpose. See *Brown v Mississippi* (1936) 297 US 278, 80 L Ed 682, 56 S Ct 461; *People v Haydel* (1974) 12 C3d 190, 197, 115 CR 394. The use in a criminal prosecution of involuntary confessions constitutes a denial of due process of law under both the federal and state constitutions. *Lego v Twomey* (1972) 404 US 477, 483, 30 L Ed 2d 618, 623, 92 S Ct 619; *People v Sanchez* (1969) 70 C2d 562, 571, 75 CR 642.

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§23.46 B. Statement Obtained in Violation of *Miranda*

Inadmissible in prosecution's case-in-chief. A voluntary statement excluded because of *Miranda* error cannot be used during the prosecution's case-in-chief. *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602. In *Harris v New York* (1971) 401 US 222, 28 L Ed 2d 1, 91 S Ct 643, the Court held that, although the prosecution is prohibited from introducing the statement in its case-in-chief, *Miranda* was not intended to grant the suspect license to lie in his or her testimony at trial. Thus, if a statement obtained in violation of *Miranda* is voluntary, the statement may nonetheless be admitted to impeach a defendant who testifies differently at trial. See *People v May* (1988) 44 C3d 309, 243 CR 369; *People v Pilster* (2006) 138 CA4th 1395, 42 CR3d 301. It is also admissible in rebuttal to the defendant's case. *People v Herbst* (1986) 186 CA3d 793, 800, 233 CR 123. There is no sua sponte duty, however, for the court to give an instruction limiting the use of the defendant's prior inconsistent statements to purposes of impeachment. *People v Torrez* (1995) 31 CA4th 1084, 1088, 37 CR2d 712. However, the trial court must give the instruction if defense counsel requests it and if the evidence shows a *Miranda* violation occurred. *People v Pilster* (2006) 138 CA4th 1395, 1401, 42 CR3d 301; see Bench Notes to CALCRIM 356.

Voluntary statements obtained in violation of *Miranda* can be introduced at Pen C §1368 competency hearings (*People v Samuel* (1981) 29 C3d 489, 174 CR 684) and at parole revocation hearings (*In re Martinez* (1970) 1 C3d 641, 83 CR 382).

Statements made by a defendant during a court-ordered mental competency examination cannot be used to impeach the defendant at trial. *People v Pokovich* (2006) 39 C4th 1240, 1253, 48 CR3d 158.

> Ø **Note:** The good faith exception to the Fourth Amendment exclusionary rule (see *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405), does not apply to *Miranda* violations. *People v Smith* (1995) 31 CA4th 1185, 1192, 37 CR2d 524.

Effects of deliberate violations of *Miranda*. As reflected in numerous reported cases, there is a growing trend in some law enforcement agencies to question suspects "outside *Miranda*," *i.e.*, to deliberately omit Miranda warnings altogether or continue questioning after a suspect has invoked his or her rights with the aim of using the suspect's statements for impeachment purposes at a later trial. When a law enforcement officer deliberately violates *Miranda*, the officer's misconduct will not alone render *Harris v New York, supra,* inapplicable. Statements obtained from the defendant remain admissible for impeachment if not otherwise involuntary. *People v Peevy* (1998) 17 C4th 1184, 73 CR2d 865; *Pollard v Galaza* (9th Cir 2002) 290 F3d 1030, 1035 (when suspect initially invoked right to remain silent but then initiated further conversation, officer's deliberate violation of *Miranda* by continuing to talk to suspect did not constitute coercive conduct per se; interaction became more like conversation than interrogation, and officer did not misrepresent nature or purpose of interview, or make promises or threats). However, when a statement is purposely taken in violation of *Miranda* and other circumstances are present indicating involuntariness of a subsequent confession, the confession will be inadmissible for any purpose. *People v Neal* (2003) 31 C4th 63, 68, 1 CR3d 650 (confessions considered involuntary in light of surrounding circumstances, including officer's deliberate violation of *Miranda,* and suspect's youth, inexperience, minimal education and low intelligence, deprivation and isolation imposed during suspect's custodial confinement, and promise and threat made by officer); *People v Bey* (1993) 21 CA4th 1623, 1628, 27 CR2d 28 (statement considered "coerced and involuntary" and hence inadmissible for any purpose when intentionally taken in violation of *Miranda* and accompanied by assurances that it would not be used against suspect). In both *Peevy* and *Neal,* the California Supreme Court expressly declined to address the question of whether the People may use a voluntary statement to impeach a defendant if the statement was intentionally obtained by a law enforcement officer in deliberate violation of *Miranda,* when there is a widespread or systematic policy, training, or practice to obtain such statements for purposes of impeachment. *People v Neal* (2003) 31 C4th 63, 78 n4, 1 CR3d 650; *People v Peevy* (1998) 17 C4th 1184, 1205, 73 CR2d 865.

In *People v Coffman* (2004) 34 C4th 1, 17 CR3d 710, investigators continued to question the two defendants, Coffman and Marlow, after their repeated requests for counsel. One officer told Marlow, numerous times, that because

he had invoked his *Miranda* rights whatever he told officers during the interrogation could not be used in court. At trial, the court found that the defendants' statements were made voluntarily and thus could be used for impeachment, despite the officers' noncompliance with *Miranda*. On appeal, before reaching the issue of voluntariness, the supreme court found that the public safety/rescue doctrines of *New York v Quarles* (1984) 467 US 649, 81 L Ed 2d 550, 104 S Ct 2626, and *People v Modesto* (1965) 62 C2d 436, 42 CR 417, applied to the defendants' interrogation because the victim had been missing for a week at the time the defendants were questioned, and because Marlow's sister had told police that he had previously been known to leave individuals bound and stranded alive in rural areas. *Coffman,* 34 C4th at 57. The court held that, therefore, any statements made before police discovered the victim's body, if voluntarily made, were admissible, either as substantive evidence or as impeachment, despite the officers' noncompliance with *Miranda*. 34 C4th at 58. Finding the issue of voluntariness to be "close," the court expressed concern over the fact that the officers repeatedly ignored Marlow's requests for an attorney, but found it unlikely that Marlow, who was over 30 years old and a convicted felon, was coerced into speaking to the officers given his maturity and criminal experience. 34 C4th at 58. The court noted that the officers' assurances that any statements Marlow might make could not be used in court also raised the specter of coercion, but observed that Marlow continued to resist disclosing the victim's whereabouts or admitting that he committed the offenses, which suggested that he was still able to calculate his self-interest in choosing whether to disclose or withhold information. 34 C4th at 59. In the court's view, his eventual admissions were voluntary and were the result of his being presented with the evidence against him. 34 C4th at 58.

In *Missouri v Seibert* (2004) 542 US 600, 159 L Ed 2d 643, 124 S Ct 2601, the Supreme Court considered the voluntariness of a confession when the officer purposefully withheld *Miranda* warnings as part of a two-step interrogation technique promoted by a national police training agency. Referring to this technique as "question-first," the Court, in a plurality opinion, found that it is more likely that if interrogators question first and warn later, after eliciting a confession, that *Miranda* warnings would be "ineffective in preparing the suspect for a successive interrogation, close in time and similar in content." 542 US at 610, 159 L Ed 2d at 654. The Court observed that the "manifest purpose" of the question-first practice, *i.e.,* "to get a confession the suspect would not make if he understood his rights at the outset," conflicts with the aim of *Miranda,* which is to reduce the risk of a coerced confession. 542 US at 611, 159 L Ed 2d at 655. The Court went on to consider whether a postwarning confession obtained through a question-first technique would nonetheless be admissible under *Oregon v Elstad* (1985) 470 US 298, 84 L Ed 2d 222, 105 S Ct 1285. The Court held that it would not be admissible, distinguishing *Elstad*'s "good-faith *Miranda* mistake" from the interrogation in *Seibert,* which was designed to undermine *Miranda*. 159 L Ed 2d 657. For a comparison of *Elstad* with *Siebert* in the context of an impermissible two-step interrogation technique, see *U.S. v Williams* (9th Cir 2006) 435 F3d 1148, 1152. For further discussion of *Miranda* violations and the "fruit of the poisonous tree" doctrine, see §23.30.

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§23.47 C. Statement Excluded Because of Fourth Amendment Error

Evidence seized in violation of one's Fourth Amendment rights and suppressed as fruit of an illegal search, detention, or arrest is not admissible in the prosecution's case-in-chief. *New York v Harris* (1990) 495 US 14, 19, 109 L Ed 2d 13, 21, 110 S Ct 1640; *People v Williams* (1988) 45 C3d 1268, 1299, 248 CR 834; *People v Moore* (1988) 201 CA3d 877, 885, 247 CR 353. Voluntary statements that are the product of an unlawful search and seizure in violation of the Fourth Amendment may be used to impeach the defendant. *U.S. v Havens* (1980) 446 US 620, 627, 64 L Ed 2d 559, 566, 100 S Ct 1912; *People v Moore* (1988) 201 CA3d 877, 883, 247 CR 353 (note written by defendant that was suppressed on Fourth Amendment grounds properly admitted to impeach defendant). See §§23.9-23.10 for further discussion of the admissibility of a statement obtained after a Fourth Amendment violation.

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§23.48 D. Statement Excluded Because of Sixth Amendment Error

A defendant's voluntary statement, excluded from the prosecution's case-in-chief because it was taken in violation of the Sixth Amendment right to counsel, is admissible to impeach the defendant's inconsistent testimony at trial. *Kansas v Ventris* (2009) ___ US ___, 173 L Ed 2d 801, 808, 129 S Ct 1841; *People v Brown* (1996) 42 CA4th 461, 471, 49 CR2d 652. For further discussion of the Sixth Amendment right to counsel, see §23.44.

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§23.49 E. Prosecution Bound by Defendant's Statement (*Toledo* Doctrine)

The *Toledo* doctrine (*People v Toledo* (1948) 85 CA2d 577, 193 P2d 953) holds that the prosecution is bound by the defendant's extrajudicial statements that are irreconcilable with guilt when the prosecution introduced the statements and there is no other competent and substantial evidence that could establish guilt. *People v Acosta* (1955) 45 C2d 538, 542, 290 P2d 1.

The *Toledo* rule, however, was not intended to detract from the more modern rule allowing impeachment of a witness by any party, including the party calling the witness. Rather, it refers only to a principle of judicial review obviating a defendant's burden of proving a defense when the prosecution's proof itself tends to show the defense, and there is no other competent and substantial evidence to the contrary. *People v Ross* (1979) 92 CA3d 391, 400, 154 CR 783. When there is other "competent and substantial" evidence of guilt, the conflict in the evidence is, in the final analysis, one for the jury to resolve. See *People v Burney* (2009) 47 C4th 203, 248, 97 CR3d 348; *In re George B.* (1991) 228 CA3d 1088, 1093, 279 CR 388.

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§23.50 F. Counsel Opens Door to Admission of Otherwise Inadmissible Statement

Counsel must consider the ramifications of questions before asking them. If counsel's question elicits information about a topic that the court has ruled the opposition cannot introduce, the court will probably allow opposition rebuttal. For example, in *People v Rich* (1988) 45 C3d 1036, 248 CR 510, the court upheld the prosecutor's questioning of defense experts about a suppressed confession, because the experts had relied on that statement in reaching their opinion. In this situation, defense counsel is said to have "opened the door" to bringing in the otherwise inadmissible evidence.

Ø **Note:** When a suppressed confession is raised in this manner, a limiting instruction should be given. 45 C3d at 1095.

See also *People v Sakarias* (2000) 22 C4th 596, 644, 94 CR2d 17 (after court excluded prosecution's use of defendant's statements taken in violation of *Miranda,* defense opened door to introduction of statements by cross-examining detective on matters detective learned from defendant's statements).

In contrast to *People v Rich, supra,* the mention by a defendant that he had been Mirandized but that he declined to make a statement did not allow the prosecution to ask on cross-examination whether the defendant told the police that he had done nothing wrong. See *People v Evans* (1994) 25 CA4th 358, 31 CR2d 20. Note, however, that when the defendant testifies on direct examination about his or her own un-Mirandized statement, it is proper for the trial court to give an instruction that the jury may draw an inference of guilt from a willfully false or deliberately misleading statement made by a defendant after arrest. *People v Williams* (2000) 79 CA4th 1157, 1168, 94 CR2d 727 (discussing CALJIC 2.03; now see CALCRIM 362 (addressing consciousness of guilt and a defendant's false statements)).

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Source: Criminal Law/California Criminal Law Procedure and Practice/23 CONFESSIONS AND ADMISSIONS/§23.51 G. Defendant's Right Not to Take Stand and Not to Testify; Griffin Error

§23.51 G. Defendant's Right Not to Take Stand and Not to Testify; *Griffin* Error

Statements, whether exculpatory or inculpatory, obtained in violation of a person's right against self-incrimination are not admissible against that person in any criminal case. *U.S. v Blue* (1966) 384 US 251, 255, 16 L Ed 2d 510, 514, 86 S Ct 1416. The protections under the Fifth Amendment to the U.S. Constitution and its California constitutional equivalent, Cal Const art I, §15, are included in Evid C §§930 and 940.

Ø **Note:** The right against self-incrimination is not the same thing as the *Miranda* rule, which is discussed in §§23.16-23.30.

Evidence Code §930 provides simply that "a defendant in a criminal case has a privilege not to be called as a witness and not to testify." Thus, while a criminal defendant may waive this privilege and testify if he or she so chooses, the prosecution may not call the defendant to the stand to make him or her claim the privilege against self-incrimination in front of jurors. *People v Cabrellis* (1967) 251 CA2d 681, 685, 59 CR 795. Nor may the prosecution comment to the jury on the defendant's exercise of this privilege (called *Griffin* error). *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229; *Brecht v Abrahamson* (1993) 507 US 619, 123 L Ed 2d 353, 113 S Ct 1710. A trial court is not required to advise a self-represented defendant of the privilege against self-incrimination before he or she testifies, even if the prosecution calls the defendant as a witness. *People v Barnum* (2003) 29 C4th 1210, 1217, 131 CR2d 499. However, the trial court is not precluded from advising on the privilege in any given case, as long as the court's words "do not stray from neutrality toward favoring any one option over another." 29 C4th at 1226. The California Supreme Court has not considered whether a prosecutor commits misconduct by calling a self-represented defendant as a witness in its case-in-chief.

Although the prosecutor may not comment, either directly or indirectly, on the defendant's failure to take the stand, *Griffin v California, supra,* does not forbid comments on the state of the evidence or the defense's failure to introduce material evidence or its failure to call logical witnesses. *People v Hovey* (1988) 44 C3d 543, 572, 244 CR 121. *Hovey* is a good example of the fine line drawn between proper and improper comment.

The prosecutor also may not comment on or present evidence concerning the defendant's failure to give a postarrest, post-*Miranda* statement to the police explaining his or her conduct (*Doyle v Ohio* (1976) 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240), even if it is offered in an attempt to impeach an exculpatory explanation offered at trial (*People v Evans* (1994) 25 CA4th 358, 367, 31 CR2d 20). This is true regardless of the adoptive admissions rule because silence during a post-*Miranda* custodial interrogation is generally interpreted to be an assertion of the right to remain silent guaranteed by the Fifth Amendment. *People v Medina* (1990) 51 C3d 870, 891, 274 CR 849, aff'd on other grounds sub nom *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572; *People v Jennings* (2003) 112 CA4th 459, 471, 5 CR3d 243 (silence during joint custodial interrogation cannot be used to prove implied adoptive admission). In *Fletcher v Weir* (1982) 455 US 603, 71 L Ed 2d 490, 102 S Ct 1309 (per curiam), the Court declined to extend *Doyle* to postarrest, pre-*Miranda* situations, finding no due process violation in permitting cross-examination of a defendant about his or her postarrest silence when no *Miranda* warnings have been given. Thus, in California, a prosecutor may comment on the defendant's failure to deny if it occurred before *Miranda* warnings were given unless the defendant's silence is held by the court to have been an attempt to invoke his or her rights. *People v O'Sullivan* (1990) 217 CA3d 237, 244, 265 CR 784; *U.S. v Lopez* (9th Cir 2007) 500 F3d 840, 845 (harmless error for prosecution to comment on defendant's postarrest silence in light of entirety of defendant's testimony, when defendant's pre-*Miranda* silence was compelling rebuttal of defendant's claim of duress and inference of guilt from silence was not stressed to jury). When, however, a defendant presents evidence to the effect that he or she was prevented from talking to police, the prosecution may rebut the misimpression with evidence of the defendant's refusal to respond to police questioning. *People v Champion* (2005) 134 CA4th 1440, 37 CR3d 122 (prosecutor may cross-examine defendant concerning officer's postarrest offer to take defendant's statement to rebut defendant's direct testimony that he had not been given an opportunity to tell his side of the story); *People v Austin* (1994) 23 CA4th 1596, 1611, 28 CR2d 885.

The prosecutor may point out the inconsistencies between a defendant's statement to the police and his or her trial

testimony, but it is *Doyle* error to do so by showing that the defendant did not talk to police again after giving the statement and before trial. *People v Belmontes* (1988) 45 C3d 744, 786, 248 CR 126.

In a series of federal cases, the Ninth Circuit has extended the postarrest, post-*Miranda* silence protection of *Doyle* to the postarrest, pre-*Miranda* context on grounds that the privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence. This protection covers not only the silence itself (*U.S. v Whitehead* (9th Cir 2000) 200 F3d 634, 639) but also statements by a suspect invoking the right to silence (*U.S. v Bushyhead* (9th Cir 2001) 270 F3d 905, 912) and evidence of a suspect's demeanor while detained and informed of incriminating evidence. *U.S. v Velarde-Gomez* (9th Cir 2001) 269 F3d 1023, 1031 (en banc). However, the rationale of *Doyle* does not apply to mental competency hearings, in which evidence of a defendant's invocation of *Miranda* is used to show cognition, not guilt. *Nguyen v Garcia* (9th Cir 2007) 477 F3d 716, 727.

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§23.52 XVI. PROSECUTION ADVICE CONCERNING LAW ENFORCEMENT CONTACT WITH REPRESENTED DEFENDANTS

Prosecutors cannot encourage law enforcement contacts with charged criminal defendants on the subject matter of the representation unless defense counsel consents. Cal Rules of Prof Cond 2-100. This is true whether such attempts are part of an investigation of the prosecution's or the defendant's case. Such actions violate state and national ethical standards and may involve constitutional violations. See *People v Moore* (1976) 57 CA3d 437, 129 CR 279 (case dismissed; district attorney's investigator elicited accused's cooperation in other cases without defense counsel's knowledge or approval).

Communication with a represented party is governed by Cal Rules of Prof Cond 2-100:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Rule 2-100's prohibition against communicating with represented parties without the consent of their counsel tracks the language of ABA Model Rules of Prof Cond 4.2.

California courts have consistently held prosecutors to the rules prohibiting communications with represented parties. In *People v Sharp* (1983) 150 CA3d 13, 18, 197 CR 436, decided under Rule 2-100's predecessor, the court noted:

> Because the prosecutor's position is unique—he represents authority and the discretion to make decisions affecting the defendant's pending case—his contact carries an implication of leniency for cooperative defendants or harsher treatment for the uncooperative. Such contact intrudes upon the function of defense counsel and impedes his or her ability to negotiate a settlement and properly represent the client, whose interests the rule is designed to protect.

The court thus concluded that, by directing police agents to conduct a lineup without notifying the defendant's attorney, the prosecutor violated his professional ethical responsibilities. 150 CA3d at 19. See also *Triple A Mach. Shop, Inc. v State* (1989) 213 CA3d 131, 141, 261 CR 493 (assuming Rule 2-100 can apply to prosecutors); *People v Manson* (1976) 61 CA3d 102, 165, 132 CR 265 (holding prosecutor to ethical rules because he "is no less a member of the State Bar than any other admitted lawyer"); *People v Moore, supra*.

The Ninth Circuit Court of Appeals has also found that conduct violates Cal Rules of Prof Cond 2-100 and federal court rules even when prosecution contact was purportedly "preauthorized" by the U.S. Attorney General and the trial court. *U.S. v Lopez* (9th Cir 1993) 4 F3d 1455. *Lopez* involved postindictment contact with a represented defendant.

The prosecution does have the right to contact a represented defendant without permission before the defendant has been formally charged. *Boulas v Superior Court* (1986) 188 CA3d 422, 431, 233 CR 487; 75 Ops Cal Atty Gen 223 (1992).

> Ø **Note:** If the defendant has claimed the right under *Miranda* to refuse to talk to the prosecution, and to have counsel present, the prosecution may not talk to the defendant about any case. See discussion in §23.23.

For further discussion of contacts with represented parties, see §2.35.

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§23.53 XVII. ENSURING COMPLIANCE WITH EXCLUSION ORDERS

When an extrajudicial statement has been ruled inadmissible by the court, it is error to bring that information before the jury. *People v Woodberry* (1970) 10 CA3d 695, 708, 89 CR 330. Defense counsel can request a mistrial or ask that the inadmissible statement be stricken from the record and the jury admonished to disregard it.

Before giving testimony, witnesses should be admonished by the attorney calling them to refrain from mentioning anything excluded by the court. In addition, prosecution witnesses can be told that mentioning something previously ruled inadmissible may carry with it the further penalty of having to start the case all over before a fresh jury. Most witnesses will comply when told that a mistrial means that the witness will be resubpoenaed and will have to testify again on another day.

Police witnesses should be told that the fact that a defendant refused to waive his or her *Miranda* rights cannot be mentioned. Some prosecutors prefer, as a matter of tactics, to have the jury informed during testimony that the defendant was advised of these rights. If such testimony is allowed, police witnesses should be warned not to go beyond the simple fact that the defendant received a reading of his or her *Miranda* rights. Defense counsel, however, should object to such testimony on grounds of prejudice and relevance—advisement testimony without more implies that the defendant refused to speak with the police.

A witness who intentionally, or perhaps continually, violates the court's ruling by mentioning an inadmissible topic is subject to a contempt of court citation by the judge. See chap 58 on contempt. The threat of contempt is often enough to ensure compliance.

Attorneys who intentionally violate a court's rulings are subject themselves to the possibility of a contempt citation as well as possible disciplinary proceedings by the State Bar. See Cal Rules of Prof Cond 3-210.

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§23.54 XVIII. REQUESTING JURY INSTRUCTIONS CONCERNING STATEMENTS

Defendant's testimony and statements are covered in CALCRIM 355-362.

The CALCRIM instructions do not distinguish between admissions and confessions, but instruct more generally on "defendant's statements." See CALCRIM 358. Special trial issues surrounding a defendant's statements, including defendant's right to testify (CALCRIM 355), *Miranda*-defective statements (CALCRIM 356), adoptive admissions (CALCRIM 357), corpus delicti (CALCRIM 359), defendant's statements to experts (CALCRIM 360), failure to explain or deny adverse testimony (CALCRIM 361), and consciousness of guilt (CALCRIM 362) are treated separately. The CALJIC instructions defined confession and admission (CALJIC 2.70), defined adoptive admission (CALJIC 2.71.5), addressed the jury's consideration of a defendant's statement made before the offense was committed (CALJIC 2.71.7), and explained the fact that corpus delicti must be proved independent of the admission or confession (CALJIC 2.72). Other sources of instructions are given in chap 32.

CALCRIM 358 includes the admonition that evidence of an oral statement by the defendant should be viewed with caution. The admonition is meant to apply only to a defendant's inculpatory statements (see Bench Notes to CALCRIM 358), which were referred to as "confessions" or "admissions" in the applicable CALJIC instructions. See CALJIC 2.70-2.71. This admonition must usually be given sua sponte. See Bench Notes to CALCRIM 358; see also *People v Beagle* (1972) 6 C3d 441, 455, 99 CR 313. However, the admonition to the jury that it should view a defendant's oral statements with caution should not be given when the statements are written or recorded. Bench Notes to CALCRIM 358; see *People v Franco* (1994) 24 CA4th 1528, 1541, 30 CR2d 478. Nor should such an instruction be given when the statement constitutes the criminal act itself, as in a case charging the making of a criminal threat under Pen C §422. Bench Notes to CALCRIM 358; see *People v Zichko* (2004) 118 CA4th 1055, 13 CR3d 509. The admonition also need not be given sua sponte in the penalty phase of a criminal trial, but should be given if requested by the defense. Bench Notes to CALCRIM 358; see *People v Livaditis* (1992) 2 C4th 759, 784, 9 CR2d 72.

Because the trial judge determines as a matter of law whether a defendant received a proper *Miranda* admonishment, that issue is not subject to redetermination by the jury. *People v Schader* (1965) 62 C2d 716, 728, 44 CR 193. Nor is it the subject of any instructions to jurors. However, if the judge has determined that a defendant's statement was taken in violation of *Miranda,* CALCRIM 356 provides a limiting instruction on the use of that statement. There is no sua sponte duty to give this instruction. Bench Notes to CALCRIM 356.

The trial judge also makes the initial ruling on the admissibility of statements that are challenged as involuntary. Unlike the *Miranda* determination, however, if the judge finds that a statement is voluntary, jurors must still be allowed to decide the "integrity" of the statement, *i.e.,* whether it is reliable under the circumstances. *Crane v Kentucky* (1986) 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142; *People v Carroll* (1970) 4 CA3d 52, 59, 84 CR 60.

On the basis of the reasoning in *Carroll* and *Crane,* a defense attorney might consider a special instruction explaining the relationship between voluntariness and reliability and that, if the jury decides under the circumstances that the defendant's statements were influenced by, *e.g.,* duress, coercion, or promises of leniency, such factors may be considered when determining the weight to be given to those statements. The prosecution might consider requesting a special instruction that the jury must base its decision on the evidence. See *People v Carroll, supra*.

If the prosecution uses an un-Mirandized statement for impeachment, defense counsel should ask for CALCRIM 356, an instruction limiting the statement to the issue of the credibility of the defendant's trial testimony. Although there is no sua sponte duty to give CALCRIM 356 (see *Harris v New York* (1971) 401 US 222, 28 L Ed 2d 1, 91 S Ct 643; *People v Coffman* (2004) 34 C4th 1, 63, 17 CR3d 710), the court must give the instruction on request. Bench Notes to CALCRIM 356.

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24

PRIOR CONVICTIONS AND UNCHARGED MISCONDUCT

BRENT RIGGS
JAMES P. COOPER III

I. OVERVIEW §24.1

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§24.1 I. OVERVIEW

Effect of using priors. Prior convictions (usually just called "priors") can be used to enhance a sentence, establish a mandatory minimum sentence, restrict a defendant's license to drive, prohibit the possession of firearms, make otherwise innocent conduct criminal, elevate a misdemeanor to a felony prosecution, make a "wobbler" (defined in §8.40) into a straight felony, and eliminate probation as a sentencing choice. Priors can also be used as evidence to prove identity or an element of the crime, such as intent, or to impeach the defendant if he or she testifies.

Charging priors. Whether a prior must be charged depends on its purpose. Prior convictions used for some purposes must be proved at the preliminary hearing, others only at trial, and still others only at sentencing. See the chart in §24.18. Pleadings can be amended to add a prior. Pen C §§969a, 1009; *People v Carson* (1941) 45 CA2d 554, 558, 114 P2d 619.

Bifurcating prior for trial. The defendant may be able to keep the jury from learning of a prior by admitting it (Pen C §1025) or by bifurcating the prior from the present offense and having jurors hear evidence on the prior only after they have returned a verdict on the underlying charges. *People v Saunders* (1993) 5 C4th 580, 588 n4, 20 CR2d 638.

Admitting to prior. Before accepting a defendant's admission to a prior, the court must ensure that the defendant understands the rights being waived by the admission, and the consequences of the admission. *In re Yurko* (1974) 10 C3d 857, 863, 112 CR 513. The required advisements and waivers are discussed in §§26.10-26.17.

Challenges: Constitutionality and use. Constitutional challenges to a prior and challenges to the use to which a prior can be put during trial are usually made as pretrial motions. See *People v Jackson* (1991) 1 CA4th 697, 701, 2 CR2d 308. Constitutional legal challenges to a prior conviction are decided by the judge. *Burgett v Texas* (1967) 389 US 109, 19 L Ed 2d 319, 88 S Ct 258; *People v Curl* (2009) 46 C4th 339, 350, 93 CR3d 537; *Curl v Superior Court* (1990) 51 C3d 1292, 1302, 276 CR 49. Except for priors alleged in murder special circumstances allegations or as an element of an offense, a defendant who challenges the factual validity of a charged prior has only a limited statutory right to a trial by jury. Pen C §1025; see *People v Mosby* (2004) 33 C4th 353, 360, 15 CR3d 262. Special rules apply to priors involving Veh C §§14601, 14601.1-14601.2, 23103, and 23152-23153. They are set out in Veh C §41403 and discussed in §24.44.

Challenging priors. As a tactical matter, defense counsel must decide whether it is better to admit a prior or to request a court trial on a prior, and whether to preclude its introduction to the jury (if possible), or to contest the prior either before the jury or (if possible) in a bifurcated trial.

The defendant can also attack a prior by appeal from the conviction (Pen C §§1237, 1466(2)), habeas corpus (see *People v Sumstine* (1984) 36 C3d 909, 919, 206 CR 707), or coram nobis (see *People v Wadkins* (1965) 63 C2d 110, 45 CR 173).

The prosecution can seek appellate relief from an erroneous adverse order on a motion to strike a prior or from an erroneous grant of a petition for writ of habeas corpus or coram nobis. See *In re Walker* (1974) 10 C3d 764, 112 CR 177 (prosecution review of habeas corpus); *People v Burke* (1956) 47 C2d 45, 53, 301 P2d 241 (prosecution appeal of order on motion to strike in felony cases); *People v Kirk* (1992) 7 CA4th 855, 9 CR2d 270 (prosecution appeal of order on motion to strike in misdemeanor cases); *People v Goodspeed* (1963) 223 CA2d 146, 35 CR 743 (prosecution appeal of order granting writ of error coram nobis).

Tactics. Prosecutors should review a defendant's record of convictions when charging a case and add all appropriate prior convictions to the complaint. Pen C §969. See also Pen C §§667(f)(1), (g), 1170.12(d)(1), (e). Prosecutors trying cases should review each defendant's conviction record to see whether any convictions unavailable for enhancing the sentence or for making the defendant statutorily ineligible for probation can nonetheless be used to impeach the defendant, or as relevant evidence of another bad act that can be used to prove an element of the offense, such as intent or identity. Records of defense and prosecution witnesses should also be reviewed to see whether any prior convictions can be used to impeach.

Defense counsel should discover whether the client has any prior convictions and the details of those convictions. Because the charge, date, and manner of conviction are of great importance, practitioners should establish these facts

through official records. Prosecution and defense witnesses are also vulnerable to impeachment with felony priors, so defense counsel should pursue discovery concerning the records of prosecution witnesses and secure the record of convictions of defense witnesses when it appears necessary.

Priors used to impeach. Prior felony convictions can be used to impeach any witness, including the defendant, when the prior involves moral turpitude. The trial judge must balance the probative value of the prior against its prejudicial effect, under Evid C §352. Evid C §788; *People v Castro* (1985) 38 C3d 301, 211 CR 719. The facts underlying other conduct involving moral turpitude may also be used to impeach, even if the conduct was charged as a misdemeanor or resulted in a misdemeanor conviction. *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418.

Evidence of other crimes used for nonimpeachment purposes. The prosecution may use a prior or an uncharged crime in its case-in-chief to prove specified issues like identity and intent. Evid C §1101. See, *e.g.*, *People v Whisenhunt* (2008) 44 C4th 174, 204, 79 CR3d 125 (prior acts of child abuse admissible to show intent and absence of accident). Similarity of the crimes can result in an inference of guilt. *People v Malone* (1988) 47 C3d 1, 21, 252 CR 525. But a dissimilar crime may also be relevant when, for instance, the uncharged crime shows a motive. *People v Daniels* (1991) 52 C3d 815, 856, 277 CR 122. The general statutory prohibition on the use of character evidence to prove conduct on a particular occasion does not preclude such use. Evid C §1101(b). Evidence of similar acts may be used to establish a propensity to commit the charged crime in prosecutions for sex offenses, domestic violence, and abuse of a child or of an elder or dependent person. See Evid C §§1108-1109. See also *People v Falsetta* (1999) 21 C4th 903, 89 CR2d 847 (Evid C §1108 constitutional); *People v Price* (2004) 120 CA4th 224, 240, 15 CR3d 229 (Evid C §1109 constitutional).

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§24.2 II. CHART: DEADLINES

See also §24.18.

Action	Deadline	Authority
Charge prior conviction that is element of offense or that elevates misdemeanor to felony.	In accusatory pleading before trial in misdemeanor case, or in felony case proceeding by way of indictment; before preliminary hearing in felony case proceeding by way of information.	See Pen C §§739, 1158; *People v Casillas* (2001) 92 CA4th 171, 111 CR2d 651.
Charge prior conviction that makes defendant ineligible for probation or that enhances state prison sentence.	When jury trial available, prior must be pleaded and proved before the trier of fact, before jury is discharged.	*People v Tindall* (2000) 24 C4th 767, 102 CR2d 533.
Prove prior conviction to determine suitability for probation in cases other than statutory ineligibility.	No need to charge prior; evidence introduced at sentencing.	Pen C §969a; see *Levy v Superior Court* (1973) 31 CA3d 427, 107 CR 384. See also *People v Lo Cicero* (1969) 71 C2d 1186, 1195 n10, 80 CR 913.
Disclose evidence of uncharged sex offense under Evid C §1108.	At least 30 days before trial absent good cause for disclosure to be denied, restricted, or deferred.	Pen C §1054.7; Evid C §1108(b).
Disclose evidence of uncharged acts of domestic violence or abuse of child or elder or dependent person under Evid C §1109.	At least 30 days before trial absent good cause for disclosure to be denied, restricted, or deferred.	Pen C §1054.7; Evid C §1109(b).
Challenge constitutionality of prior conviction in court where current case pending that charges prior (motion to strike prior).	Usually brought before trial, but can also be raised as in limine motion at trial, or at sentencing, if that right was reserved in trial court when plea was entered to prior.	*In re Cortez* (1971) 6 C3d 78, 87, 98 CR 307; *Gonzalez v Municipal Court* (1973) 32 CA3d 706, 710, 108 CR 612.
Challenge constitutionality of prior conviction in rendering court (writ of coram nobis or motion to vacate judgment).	As soon as possible after alleged error is discovered.	*People v Hemphill* (1968) 265 CA2d 156, 71 CR 397.
Challenge prior conviction used to impeach, or similar act of misconduct.	At trial either by in limine motion or as objection if counsel is surprised by testimony during trial.	See *People v Castro* (1985) 38 C3d 301, 211 CR 719.

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III. USING PRIOR TO ELEVATE STATUS OF CRIME OR TO ENHANCE SENTENCE

A. What Qualifies as Prior in Charging and Sentencing

§24.3 1. When Prior Occurred; Effect of Appeal, Pronouncement of Judgment, Pen C §654, and Expungement

When a prior is used as an element of a charged crime to increase the seriousness of the crime or to increase the sentence, reference to the conviction as a prior requires that the "ascertainment of guilt, *i.e.,* the verdict" (*People v Johnson* (1989) 210 CA3d 316, 324, 258 CR 347) or a guilty plea (*People v Rhoads* (1990) 221 CA3d 56, 270 CR 266) precede the date of commission of the current offense (see *People v Flood* (2003) 108 CA4th 504, 507, 133 CR2d 516). It is not necessary, however, that judgment be pronounced before the date of commission of the current offense (*People v Kirk* (2006) 141 CA4th 715, 721, 46 CR3d 258 (under Pen C §1000); *People v Queen* (2006) 141 CA4th 838, 46 CR3d 332; *People v Milosavljevic* (1997) 56 CA4th 811, 817, 65 CR2d 562); that any appeal of the conviction be completed (*People v Hurley* (1957) 155 CA2d 350, 352, 317 P2d 1003); or, unless the statutory language justifies it, that the prior crime be committed before the current crime (*People v Baez* (2008) 167 CA4th 197, 83 CR3d 895).

That a prior occurred before enactment of the enhancing statute does not prevent its use in enhancing a sentence as long as the current crime occurred after the enactment of the enhancing statute. *People v Rivadeneira* (1991) 232 CA3d 1416, 1420, 284 CR 75.

A prior stricken in the interests of justice at sentencing may still be used as an enhancement in a future case (*People v Milosavljevic, supra*), and although a prior stayed under Pen C §654 ordinarily may not be so used (*People v Pearson* (1986) 42 C3d 351, 361, 228 CR 509), such a prior may be used if the statutory scheme so provides (*People v Benson* (1998) 18 C4th 24, 30, 74 CR2d 294 (Three Strikes law)).

Under the statute's plain language, convictions expunged under Pen C §1203.4 qualify as priors in later prosecutions. *People v Frawley* (2000) 82 CA4th 784, 791, 98 CR2d 555; *People v Diaz* (1996) 41 CA4th 1424, 1430, 49 CR2d 252. So do convictions expunged under Welf & I C §1772. *People v Pride* (1992) 3 C4th 195, 256, 10 CR2d 636; *People v Daniels* (1996) 51 CA4th 520, 522, 59 CR2d 395; *People v Jacob* (1985) 174 CA3d 1166, 1172, 220 CR 520.

A felony conviction reduced at sentencing to a misdemeanor under Pen C §17 cannot thereafter be used as a felony prior. Pen C §§667(d)(1), 1170.12(b)(1) (Three Strikes law); *People v Gilbreth* (2007) 156 CA4th 53, 67 CR3d 10 (charge of felon with firearm); *People v Camarillo* (2000) 84 CA4th 1386, 1389, 101 CR2d 618 (DUI). Granting summary probation causes such a reduction. *People v Glee* (2000) 82 CA4th 99, 105, 97 CR2d 847. However, when a conviction is reduced to a misdemeanor under Pen C §17 at a time later than the initial sentencing, the conviction counts as a prior serious felony for Three Strikes purposes. *People v Franklin* (1997) 57 CA4th 68, 70, 66 CR2d 742.

A conviction in a case later dismissed under Pen C §1385 cannot be used as a prior. *People v Barro* (2001) 93 CA4th 62, 66, 112 CR2d 797.

A defendant's avoidance of another conviction (see, *e.g.,* Veh C §23540) or of a conviction and prison incarceration (see, *e.g.,* Pen C §667.5(b)) for a period of time specified by statute (the "wash-out" period) can make a prior unusable for some sentence-enhancing purposes. See, *e.g., People v Fielder* (2004) 114 CA4th 1221, 8 CR3d 247 (under Pen C §667.5). However, if the Legislature extends the time in which a prior may be used to enhance punishment, due process and ex post facto principles do not prevent the use of a prior suffered during the extension. *People v Treadway* (2008) 163 CA4th 689, 698, 77 CR3d 786.

Old convictions for some offenses involving marijuana may no longer qualify as priors as a result of Health & S C §§11361.5-11361.7. See, *e.g., People v Price* (1991) 1 C4th 324, 470, 3 CR2d 106 (inadmissible in aggravation in death penalty case). But see Cal Const art I, §28(f).

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§24.4 2. Foreign Priors

Absent express limitations such as those discussed below, prior felony convictions include convictions that are felonies under the laws of the convicting jurisdiction, even if they are classified as misdemeanors in California. *People v Lang* (1989) 49 C3d 991, 1038, 264 CR 386. See the following statutes:

- Penal Code §190.2(a)(2) permits the use as a special circumstance of any foreign conviction for an offense that would be murder in California. See *People v Trevino* (2001) 26 C4th 237, 109 CR2d 567.
- Penal Code §667(a)(1) allows a foreign conviction to be used as a serious felony prior when the record of conviction for the foreign offense shows conduct that qualifies as a serious felony in California. *People v McGee* (2006) 38 C4th 682, 691, 42 CR3d 899.
- Penal Code §§667(d)(2) and 1170.12(b)(2) allow a foreign conviction to be used as a prior respectively under Pen C §667(e) and §1170.12(c) (Three Strikes law is discussed in §§37.33-37.33E), as long as the offense could have been punished by imprisonment in California if committed in California. The record of conviction for the foreign prior must reflect conduct qualifying as a felony listed in either Pen C §667.5(c) or §1192.7(c). See *People v McGee, supra; People v Fox* (2001) 93 CA4th 394, 399, 112 CR2d 907 (Oregon sex molestation qualified as serious felony prior under Pen C §1192.7(c)(6), regardless of intent).
- Penal Code §667.5 specifies that a prior used under that section (prison prior) from a foreign jurisdiction must have been for a crime punishable by imprisonment in state prison under California law if committed in California. Pen C §667.5(f). The foreign offense must include all the elements of the California felony. Pen C §667.5(f). In addition, the defendant must have served 1 or more years in prison for the foreign offense. Pen C §667.5(f).
- Penal Code §668 limits use of a foreign conviction to enhance punishment (*People v Lang* (1989) 49 C3d 991, 1038, 264 CR 386) to one for an offense that includes all the elements of a California crime (*In re McVickers* (1946) 29 C2d 264, 176 P2d 40) and which, if the crime were committed in California, could have been punished by imprisonment in state prison.

California courts may look to the entire record of the foreign conviction in determining whether the defendant's actual conduct in the foreign offense would constitute a crime under California law. *People v Carter* (2005) 36 C4th 1114, 1142, 32 CR3d 759 (giving retroactive effect to decision permitting use of entire record); *People v Riel* (2000) 22 C4th 1153, 1204, 96 CR2d 1. When the record fails to show the facts of the foreign crime, the court presumes the prior "was for the least offense punishable under the foreign law." *People v Jenkins* (2006) 140 CA4th 805, 810, 44 CR3d 788. But see *People v Miles* (2008) 43 C4th 1074, 1094 n14, 77 CR3d 270 ("least adjudicated elements" test). When it becomes necessary to establish the elements of a foreign crime, California courts look to the law of the foreign jurisdiction at the time of the foreign conviction (*People v Maldonado* (1986) 186 CA3d 863, 865 n1, 230 CR 925), and the way the foreign court would interpret that jurisdiction's law (*People v Leever* (1985) 173 CA3d 853, 873, 219 CR 581, disapproved on other grounds in *People v Ervin* (2000) 22 C4th 48, 91, 91 CR2d 623).

> Ø **Note:** Counsel must be careful to ascertain the elements of a foreign prior under the foreign law at the time of the defendant's prior crime. See, *e.g.*, *People v Rodriguez* (2004) 122 CA4th 121, 130, 18 CR3d 550.

Whether it is a misdemeanor or not, a theft conviction can serve as the prior in a prosecution under Pen C §666 (petty theft with theft-related prior), even when it occurred outside of a California court. *People v Perry* (1962) 204 CA2d 201, 204, 22 CR 54. Some foreign drunk driving and vehicular manslaughter convictions can be used as priors in drunk driving cases. Veh C §23626. See, *e.g., People v Palmer* (2006) 142 CA4th 724, 47 CR3d 864 (Nevada priors okay, despite no right to jury trial, rejecting *U.S. v Tighe* (9th Cir 2001) 266 F3d 1187). But see *People v Crane* (2006) 142 CA4th 425, 48 CR3d 334 (record failed to qualify Colorado "driving while ability impaired" prior). A foreign felony that serves as the basis of a charge of possession of a firearm by a convicted felon (Pen C §12021(a)) need not be a crime in California. *People v Shear* (1999) 71 CA4th 278, 282, 83 CR2d 707. However, a foreign felony conviction reduced to a misdemeanor cannot be used as a predicate felony. *People v Lewis* (2008) 164 CA4th 533, 536, 78 CR3d

881.

Neither state nor federal law requires a jury trial on an allegation of a foreign prior (*People v McGee* (2006) 38 C4th 682, 685, 42 CR3d 899) nor do they bar retrial of the foreign-prior allegation after an appellate court reverses for insufficiency of the evidence (*People v Jenkins* (2006) 140 CA4th 805, 813, 44 CR3d 788).

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§24.5 3. Offenses by Juveniles

Juvenile court findings usually are not considered "convictions." For some purposes, a finding of wardship in the juvenile court, even if it results in incarceration, is not considered a "conviction," and so cannot be used as a prior. See, *e.g., People v Lewis* (2001) 26 C4th 334, 378, 110 CR2d 272 (prior violent juvenile misconduct cannot be used as a prior under Pen C §190.3(c) but is admissible as an aggravating factor under Pen C §190.3(b)); *People v Westbrook* (2002) 100 CA4th 378, 383, 122 CR2d 514 (Pen C §1210.1(b)(1) does not include juvenile priors); *People v West* (1984) 154 CA3d 100, 201 CR 63 (juvenile prior cannot be used under former Pen C §667(a) (now Pen C §667(a)(1)); *In re Anthony R.* (1984) 154 CA3d 772, 201 CR 299 (juvenile prior cannot be used under Pen C §666).

However, the conviction of a youthful defendant in adult court may be used as a Pen C §667(a)(1) prior even if the defendant was treated as a minor at sentencing and committed to the Division of Juvenile Justice (DJJ) (formerly California Youth Authority (CYA) (see Stats 2005, ch 10)). *People v Shields* (1991) 228 CA3d 1239, 1240, 279 CR 403. See Pen C §667.5(j). See also *People v Level* (2002) 97 CA4th 1208, 119 CR2d 551 (by failing to assert right to juvenile adjudication at time of prior conviction, defendant waived any right in subsequent prosecution to have prior treated as juvenile adjudication).

Ø **Note:** An honorable discharge from a DJJ facility under Welf & I C §1772 does not keep a conviction from being used to enhance punishment for a subsequent offense. Welf & I C §1772(b)(4).

Use of juvenile findings under the Three Strikes law. A juvenile adjudication of guilt of a crime can be used as a prior for enhancing a sentence under Pen C §§667(e) and 1170.12(c) in the following circumstances:

- The defendant was at least age 16 at the time of the crime (Pen C §§667(d)(3)(A), 1170.12(b)(3)(A));
- Welfare and Institutions Code §707(b), Pen C §667(d)(1) or (2), or Pen C §1170.12(b)(1) or (2) list the crime (Pen C §§667(d)(3)(B), 1170.12(b)(3)(B); see *People v Garcia* (1999) 21 C4th 1, 87 CR2d 114);
- In the juvenile court, the defendant was "found to be a fit and proper subject to be dealt with under the juvenile court law" (Pen C §§667(d)(3)(C), 1170.12(b)(3)(C); see also *People v Davis* (1997) 15 C4th 1096, 1100, 64 CR2d 879 (minor need not *expressly* have been found fit));
- The defendant was adjudged a ward under Welf & I C §602 for a crime listed in Welf & I C §707(b) (Pen C §§667(d)(3)(D), 1170.12(b)(3)(D); see *People v Garcia, supra*); it is not sufficient that an offense merely included the elements of a listed crime (*In re Jensen* (2001) 92 CA4th 262, 111 CR2d 751).

Constitutionality. There is no constitutional ban on the use of a juvenile prior to enhance a sentence. *People v Bowden* (2002) 102 CA4th 387, 391, 125 CR2d 513. A juvenile prior may be used to enhance a sentence even though there is no right to a jury trial in juvenile proceedings. *People v Nguyen* (2009) 46 C4th 1007, 1014, 95 CR3d 615 (use of juvenile adjudication as prior conviction for strike purposes not precluded by *Apprendi*); *People v Quiles* (2009) 177 CA4th 612, 620, 99 CR3d 378.

Used to impeach. A juvenile adjudication, or evidence of prior conduct that involved a juvenile offense, is not admissible for purposes of impeachment if the juvenile adjudication was dismissed and the juvenile was honorably discharged from a DJJ facility under Welf & I C §1772. *People v Jackson* (1986) 177 CA3d 708, 712, 222 CR 470. If, however, no §1772 relief was obtained, the evidence is admissible for impeachment. *People v Lee* (1994) 28 CA4th 1724, 1738, 34 CR2d 723. See also discussion in §56.4.

Used as similar bad act. The prosecution may be able to use the defendant's *actions* in an earlier juvenile case to prove the current charge. See §§24.52-24.55.

Used in capital cases. In a capital murder case, the prosecutor may be able to use conduct underlying a juvenile prior under Pen C §190.3(b) as evidence of criminal activity involving the use, attempted use, or threat to use force or violence. *People v Lewis, supra; People v Champion* (1995) 9 C4th 879, 936, 39 CR2d 547; *People v Frierson* (1991) 53 C3d 730, 747, 280 CR 440; *People v Burton* (1989) 48 C3d 843, 862, 258 CR 184.

When adult committed to DJJ. When an *adult* is committed to the DJJ from the adult court following conviction of a

felony that was a wobbler (see Note in §24.10), and is discharged, the offense is deemed a misdemeanor. Pen C §17(c). Case law has engrafted onto §17(c) the requirement that the DJJ discharge have been honorable. *People v Goodner* (1990) 226 CA3d 609, 616, 276 CR 542; *People v Lassiter* (1988) 202 CA3d 352, 355, 248 CR 320.

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§24.6 4. No Jeopardy Attaches to Earlier Rulings on Priors; Pen C §654; Collateral Estoppel; Res Judicata

Double jeopardy. The trial of a prior does not place a defendant in jeopardy. *People v Hernandez* (1998) 19 C4th 835, 842-843, 80 CR2d 754. See also *People v Norris* (2002) 95 CA4th 475, 478, 115 CR2d 540 (court cannot "acquit" a defendant of prior). Thus, a prosecutor can allege a prior despite the fact that a jury in a previous case in which the prosecution alleged the same prior returned a finding that it was not true. *People v Rice* (1988) 200 CA3d 647, 653, 246 CR 177. A trial court can reconsider a decision that a charged prior does not apply. *People v Hernandez, supra; People v Norris, supra*. An appellate court may remand a case to the trial court for a new trial limited to proving up the prior conviction, even after reversing a true finding on the prior on the ground of insufficient evidence. *People v Barragan* (2004) 32 C4th 236, 9 CR3d 76; *People v Morton* (1953) 41 C2d 536, 541, 261 P2d 523; *People v Jenkins* (2006) 140 CA4th 805, 813, 44 CR3d 788 (foreign prior). On the remand, the prosecutor must adduce additional evidence to avoid the doctrine of law of the case, but the evidence need not be newly discovered. *People v Barragan, supra*.

Ø **Note:** The *constitutionality* of a drunk driving or driving on a suspended license prior as a rule may be litigated only once. Veh C §23624.

Penal Code §654. A conviction for which the sentence was stayed under §654 may not be used to enhance a future sentence unless the legislature explicitly provides for such use. *People v Pearson* (1986) 42 C3d 351, 361, 228 CR 509. However, the Three Strikes law explicitly provides that a conviction that meets other strike criteria can be charged as a strike despite a "stay of execution of sentence." Pen C §1170.12(b). Thus, a conviction stayed under §654 may be used as a strike. *People v Benson* (1998) 18 C4th 24, 74 CR2d 294. For further discussion of §654, see §§37.44-37.50.

Collateral estoppel; res judicata. A finding obtained by the defense in a previous prosecution of the unconstitutionality of a prior conviction may collaterally estop the prosecution from using the prior against the defendant in a current prosecution. *People v Howie* (1995) 41 CA4th 729, 734, 48 CR2d 505. If so, would a finding of the constitutionality of the prior in the previous prosecution collaterally estop the defendant's challenge to the prior in the current prosecution? See Veh C §23624, which provides for this estoppel concerning prior drunk driving convictions.

The court in *Gutierrez v Superior Court* (1994) 24 CA4th 153, 157, 29 CR2d 376, held that a defendant's right to a fair trial prevents the prosecution from asserting the collateral estoppel effect of a defendant's prior conviction for attempted murder on the issues of identity and intent in a subsequent trial for murder of the same victim. The *Gutierrez* court distinguished *People v Ford* (1966) 65 C2d 41, 50, 52 CR 228, which found no error in instructing a jury on felony murder principles, even though the defendant had not been arraigned on that theory, because the felony convictions obtained at the first trial, which were not overturned on appeal, had res judicata effect. *Gutierrez v Superior Court* (1994) 24 CA4th 153, 168, 29 CR2d 376. As a matter of policy, California courts do not apply res judicata to an appellate reversal of a prior for insufficient evidence. *People v Barragan* (2004) 32 C4th 236, 252, 9 CR3d 76 (resolving conflict between courts of appeal); *In re Jorge G.* (2004) 117 CA4th 931, 946, 12 CR3d 193.

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B. How Priors May Be Used to Elevate Crime or Enhance Sentence

1. Using Priors in New Misdemeanor Prosecutions

§24.7 a. Enhancing Sentence

Priors in a misdemeanor case may enhance the sentence by lengthening custodial time, increasing monetary punishment, or both. See Pen C §§311.2(a), 311.4(a) (obscenity and pornography), §§374.3, 374.4, 374.7 (illegal dumping and littering), §415.5 (fighting and other proscribed conduct on school grounds), §593e(b) (unauthorized unscrambling of cable TV signals), §§626.6(a), 626.8(b) (disturbance of school peace), §654.3 (nonpermitted highway carriers of persons); Harb & N C §§655, 668 (drunk boating); Health & S C §11357(e)(2) (minor with marijuana at school); and Veh C §§23540, 23546, 23550 (drunk driving with priors).

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§24.8 b. Mandatory Minimum Jail or Prison Sentences

A finding of the truth of some priors means that the defendant must serve at least a certain amount of time in jail, even if placed on probation. See, *e.g.,* Pen C §243(e)(3) (battery against persons with specified relationships to defendant), §273.5(g) (corporal injury inflicted on spouse or cohabitant), §415.5(b)-(c) (disturbing school peace), §647(b), (*l*) (prostitution); Veh C §§23542, 23548, 23552 (drunk driving with priors). Generally, the defendant can avoid the mandatory minimum only by persuading the court to strike the prior. These priors can be stricken either as invalid, or, when permitted, in the interests of justice. Pen C §1385, See also Pen C §§243(e)(3), 273.5(g) (court may elect not to impose mandatory minimum on stated crimes on finding of good cause).

Ø **Note:** On the use of priors that mandate a minimum sentence in driving under the influence cases, see §§55.31-55.35.

Prior convictions of Pen C §302 (disturbing religious meeting) and Pen C §403 (disturbing lawful meeting) require community service on subsequent convictions of Pen C §302. Pen C §302(c)-(d).

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§24.9 c. Drunk Driving Cases: License Restrictions; Notice to Convicting Court of New Case

In a drunk driving case, a prior conviction may result in restriction, suspension, or revocation of a defendant's driver's license, and mandatory enrollment in a drinking-driver education class. See Veh C §§23540-23552. In addition, on becoming aware through a Department of Motor Vehicles printout or other source that a defendant suffered a prior conviction of Veh C §23152 or §23153 within 10 years of the charged offense, the court of the defendant's current conviction must reveal the current conviction to the court that sentenced the defendant on the prior. Veh C §23622(c). As a result, if the defendant is still on probation on the prior, probation can be revoked or terminated as required by Veh C §23602.

Ø **Note:** These rules apply to persons with a California driver's license whether the prior occurred in California or out of state. *Moomjian v Zolin* (1993) 12 CA4th 1606, 1613, 16 CR2d 335.

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§24.10 d. Elevation of Infraction to Misdemeanor; Diversion

Priors can elevate a crime that is ordinarily an infraction to a misdemeanor. For examples, see Pen C §602.8(b) (third trespass offense in certain situations); Pen C §653.1(e) (third offense involving certain lighter-than-air balloons); and Veh C §40000.28 (fourth Vehicle Code infraction within 12 months), discussed in §36.14.

Ø **Note:** For discussion of offenses that can be either infractions or misdemeanors, see §§6.32, 36.13-36.14. Prior convictions may make a defendant ineligible for diversion. See chap 27.

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2. Using Priors in New Felony Prosecutions

§24.11 a. Priors That Make Innocent Acts Into Crimes

A prior can make what would otherwise be innocent activity a criminal act. See, *e.g.,* Pen C §§12021 (ex-convict with gun), 12403.7 (ex-convict with tear gas). Even if the prior is declared unconstitutional, it can support the crime. *People v Sanchez* (1989) 211 CA3d 477, 479, 259 CR 294 (focus is not on reliability of prior; case involved Pen C §12021.1).

See discussion of the effect of expungement and other forms of relief from disabilities on such crimes in chap 41.

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§24.12 b. Elevation of Misdemeanors to Felonies

Alleging a prior may allow a prosecutor to elevate an offense that would otherwise be a misdemeanor to a felony, with the concomitant possibility of a state prison sentence. Elevation to felony status can also lengthen the statute of limitations. See, *e.g., People v Crabtree* (2009) 169 CA4th 1293, 1309, 88 CR3d 41. For examples of offenses for which a prior may result in a subsequent felony prosecution, see Bus & P C §§2315, 6153 (cappers and runners), Pen C §§136.1(c)(3) (witness intimidation), 273(e) (illegal adoption payments), 273.6(d) (violation of order re domestic violence), 290.018(b) (failure to register as sex offender) (see *People v Gonzalez* (2007) 149 CA4th 304, 307, 56 CR3d 909 (straight felony)), 311.2(c), 311.3(d), 311.9, 311.11(b) (pornography), 314 (indecent exposure), 350(b) (counterfeit trademark), 476a(b) (small insufficient funds checks), 498(d) (theft of utility services), 647.6(c) (child molesting), 653f(d) (soliciting narcotics offense), 653h, 653s, 653u, 653w (theft of recorded media), 666 (petty theft) (but see *Bradwell v Superior Court* (2007) 156 CA4th 265, 67 CR3d 163 (prior Welf & I C §11483 welfare fraud conviction does not fit within Pen C §666)), 12025 (concealed firearm), 12031(a) (loaded gun in public place), 12072, 12101 (sale of firearm to prohibited class), 12304 (fixed ammunition), and Veh C §23550 (drunk driving with three priors).

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§24.13 c. Elevation of Wobblers to Straight Felonies

At times, a prior conviction may turn an offense that can be charged or punished as either a misdemeanor or a felony (see Pen C §17(b)) into a straight felony. Offenses that can be either felonies or misdemeanors are commonly referred to as "wobblers." See, *e.g., People v Wilkinson* (2004) 33 C4th 821, 830, 16 CR3d 420. Examples of wobblers are Pen C §§71, 76 (threatening school and public employees, officials, and judges), 311.9(b) (pornography), 314 (indecent exposure), and 337.7 (use of forged racing board credential).

The Three Strikes law does not have the effect of turning wobblers into straight felonies. *People v Superior Court (Alvarez)* (1997) 14 C4th 968, 979, 60 CR2d 93.

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§24.14 d. Enhancing Sentence

In a felony prosecution, a prior conviction may increase the amount of a fine, lengthen a prison sentence or minimum prison term (see, *e.g.*, *People v Jefferson* (1999) 21 C4th 86, 86 CR2d 893), or turn a murder into a capital crime (*People v Hendricks* (1987) 43 C3d 584, 238 CR 66).

Ø **Note:** A single prior may have multiple uses, although the prosecutor may have to elect a use in certain circumstances. See *People v White Eagle* (1996) 48 CA4th 1511, 56 CR2d 749. Also see §37.41.

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§24.15 e. Denying Probation

Priors can make a defendant ineligible for probation. Examples are Pen C §§667(c)(2), (4) (any felony combined with one or more of the priors specified in §§667(d)) and 1170.12(a)(2), (4) (same for §1170.12(b)); 1203(k) (serious or violent felony while on felony probation); 1203.055(c) (crimes while on public transit); 1203.06(a)(2) (defendant previously convicted of a crime listed in §1203.06(a)(1), or assault with intent to commit murder under former §217, then convicted of subsequent felony during commission of which defendant was personally armed with firearm or was unlawfully armed at time of arrest for subsequent felony); 1203.08(a) (two or more designated felonies (see §1203.08(c)) within 10 years, exclusive of prison time); 1210.1(b)(1) (serious or violent felony within 5 years of current offense makes defendant ineligible for Proposition 36 probation and drug treatment) (see *People v Superior Court (Martinez)* (2002) 104 CA4th 692, 699, 128 CR2d 372); and Health & S C §11370 (certain narcotics offenses when defendant has prior narcotics conviction).

Ø **Note:** Penal Code §1203.07 has limited the trial court's discretion to strike a narcotics prior alleged under Health & S C §11370. Compare *People v Neild* (2002) 99 CA4th 1223, 1226, 121 CA2d 803, with *People v Ruby* (1988) 204 CA3d 462, 465, 251 CR 339.

Other priors make a defendant ineligible for probation except in unusual circumstances when the interests of justice would best be served by granting probation. Examples are Pen C §§115(c)(1) (recording forged documents), 1203(e)(4) (twice-convicted felons), 1203(e)(6) (crimes involving weapons or great bodily injury), and 1203.073(b)(8) (drug offenses).

California Rules of Court 4.413 and 4.414 provide criteria for exercising the discretion to grant or deny probation in such cases. When the court grants probation in Pen C §1203(e) cases, the court may have to include in the record a statement of the circumstances justifying probation. Pen C §1203(f) (also requires entry on minute order). In all other cases when the defendant is otherwise eligible for probation, the sentencing court should consider the defendant's priors in exercising its discretion to grant or deny probation. Cal Rules of Ct 4.414(b)(1). See the charts that list these offenses in §§37.52 (priors that make defendant ineligible for probation) and 37.53 (priors that restrict probation eligibility).

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§24.16 f. Selecting Prison Term; Consecutive or Concurrent Sentence; Death Penalty

If probation is denied, a defendant's prior convictions are among the circumstances that help the sentencing court choose between low, middle, or high prison terms for the defendant. Cal Rules of Ct 4.421(b)(2) (circumstances in aggravation), 4.423(b)(1) (circumstances in mitigation). See also *People v Searle* (1989) 213 CA3d 1091, 1099, 261 CR 898 (three priors considered "numerous" within meaning of Rule 4.421(b)(2)). The court can also consider prior convictions in determining whether concurrent or consecutive sentences should be imposed for multiple crimes. Cal Rules of Ct 4.425(b).

The Three Strikes law (Pen C §§667(b)-(i), 1170.12, discussed in §§37.33-37.33E) requires the court to impose consecutive sentences on a defendant convicted of multiple felonies "not committed on the same occasion, and not arising from the same set of operative facts" (Pen C §§667(c)(6), 1170.12(a)(6)), if the defendant has a prior described in Pen C §§667(d), 1170.12(b).

Penal Code §190.3 requires the court to instruct the jury in the penalty phase of a capital murder case to consider, among other things, the presence or absence of (1) the defendant's criminal activity involving violence or the threat of violence (Pen C §190.3(b)) and (2) any prior felony convictions of the defendant (Pen C §190.3(c)), including those for nonviolent felonies (*People v Abilez* (2007) 41 C4th 472, 535, 61 CR3d 526). A single prior can be used for both purposes. *People v DePriest* (2007) 42 C4th 1, 59, 63 CR3d 896.

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§24.17 g. Miscellaneous Consequences

A serious or violent felony prior within 5 years of the current crime precludes otherwise mandatory probation and drug treatment under Proposition 36. Pen C §1210.1(b)(1); *People v Superior Court (Henkel)* (2002) 98 CA4th 78, 119 CR2d 465. The Three Strikes law (see discussion in §§24.16, 37.33-37.33E) forbids commitment to the California Rehabilitation Center. Pen C §§667(c)(4), 1170.12(a)(4). They also limit good behavior and work credits on prison sentences to "one-fifth of the total term of imprisonment imposed" (Pen C §§667(c)(5), 1170.12(a)(5)) if the defendant has a prior described in Pen C §667(d) or §1170.12(b).

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Source: Criminal Law/California Criminal Law Procedure and Practice/24 PRIOR CONVICTIONS AND UNCHARGED MISCONDUCT/ C. Charging and Plea Bargaining Prior/§24.18 1. Chart: When Priors Must Be Pleaded and Proved or Admitted in Felony Cases

C. Charging and Plea Bargaining Prior

§24.18 1. Chart: When Priors Must Be Pleaded and Proved or Admitted in Felony Cases

California statutes generally require that pleading and proof or the defendant's admission of a prior conviction be used for most sentencing purposes in a felony case. See Pen C §§1025, 1158; *People v Wiley* (1995) 9 C4th 580, 38 CR2d 347. The following chart indicates when pleading and proof are necessary, and at what stage in the proceedings.

Ø **Note:** The prosecution is not required to prove the priors when the defendant expressly waives the right to such pleading and proof on being advised of the consequences of the prior. See *People v Myers* (1984) 157 CA3d 1162, 1165, 204 CR 91.

Purpose for Which Prior Is Being Used	Must Prior Be Pleaded in Accusatory Pleading?	Must Prior Be Proved at Preliminary Hearing?	Must Prior Be Proved at Trial or at Sentencing if Denied?
As element of charge.	Yes. *Levy v Superior Court* (1973) 31 CA3d 427, 107 CR 384.	Yes. *Levy v Superior Court, supra*. See also Pen C §§1025, 1158.	Yes. *Levy v Superior Court, supra*. See Pen C §§1025, 1158.
Impeach defendant or witness.	No. See Evid C §788.	No. See Evid C §788.	Yes, at trial. See Evid C §788.
As evidence of an uncharged act of misconduct.	No. See Evid C §§140, 1101, 1108-1109.	No. See Evid C §§140, 1101, 1108-1109.	Yes. Because particular facts of case are what is relevant, testimony concerning them is required at trial. See also Evid C §140 (defines evidence).
Elevate misdemeanor to felony.	Yes. See *In re Mitchell* (1961) 56 C2d 667, 16 CR 281; *People v Tardy* (2003) 112 CA4th 783, 6 CR3d 24.	**Cases conflict:** Yes. See Pen C §739; *People v Casillas* (2001) 92 CA4th 171, 178, 111 CR2d 651 (Fifth District); *Levy v Superior Court, supra* (Second District). No. See *People v Robinson* (2004) 122 CA4th 275, 18 CR3d 744 (Fourth District).	At trial. Pen C §115.
Determine statutory ineligibility for probation under Pen C §1203.	Yes. *People v Lo Cicero* (1969) 71 C2d 1186, 1192, 80 CR 913; *People v Myers, supra;* but compare *People v Dorsch* (1992) 3 CA4th 1346, 5 CR2d 327.	No. Pen C §969a. See *Levy v Superior Court, supra*.	Yes. *People v Lo Cicero, supra* (at trial); see *People v Wiley* (1995) 9 C4th 580, 586, 38 CR2d 347.
Determine statutory ineligibility for	Yes. Pen C §§1203.055(d)(1),	No. Pen C §969a. See *Miranda v*	At trial. Pen C §§667(c), (f)-(g),

probation under Pen C §§667(c)(2), 1170.12(a)(2), 1203.055(c), 1203.06(a)(2), 1203.066(a)(5), 1203.07(a)(3), 1203.08, 1203.085, 1203.09; Health & S C §11370.	1203.06(b)(1), 1203.066(d), 1203.07(b), 1203.08(b)(1), 1203.085(c), 1203.09(c); Health & S C §11370(d).	*Superior Court* (1995) 38 CA4th 902, 45 CR2d 498 (Three Strikes priors); *Levy v Superior Court, supra*.	1203.055(d)(1), 1203.06(b)(1), 1203.066(d), 1203.07(b), 1203.08(b)(1), 1203.085(c), 1203.09(c); Health & S C §11370(d).
Determine statutory ineligibility for drug treatment under Pen C §1210.1.	No. *In re Varnell* (2003) 30 C4th 1132, 1139-1143, 135 CR2d 619.	No. *In re Varnell, supra*.	At sentencing. See *People v Lo Cicero, supra*.
Enhance prison sentence. Health & S C §11370.2; Pen C §§666.5, 667(f)(1), 667.5, 667.7, 667.71, 667.75, 667.9, 667.10, 1170.12(d)(1).	Yes. Health & S C §11370.2(d); Pen C §§666.5(b), 667.7(b), 667.75, 667.9(d), 1170.1(f). See also Pen C §§969a, 1158.	No. See *Levy v Superior Court, supra; Miranda v Superior Court, supra; Thompson v Superior Court* (2001) 91 CA4th 144, 110 CR2d 89 (Three Strikes).	At trial. Health & S C §11370.2(d); Pen C §§666.5(b), 667(c), (f)-(g), 667.5(d), 667.7(b), 667.75, 667.9(d), 1170.1(f), 1170.12(c). See also Pen C §§969a, 1158; *People v Bracamonte* (1981) 119 CA3d 644, 174 CR 191.
Determine suitability for probation in cases other than statutory ineligibility.	No. Pen C §969a. See *Levy v Superior Court, supra*.	No. Pen C §969a. See *Levy v Superior Court, supra*.	At sentencing; prima facie evidence through probation report is all that is required (*People v Lo Cicero*, *supra*). See also *People v Wiley, supra*.

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§24.19 2. Decision on Whether to Charge

Penal Code §969 directs the prosecution to allege all the defendant's known prior convictions if required to be charged "by some other law" (*In re Varnell* (2003) 30 C4th 1132, 1141 n6, 135 CR2d 619), whether or not they occurred in California. See Pen Code §§667(f)-(g) (prosecutor must charge all serious or violent felonies not stricken or dismissed under Pen C §1385), 1170.12(d)-(e) (same). Practically speaking, if proof of the prior *alters* the court's sentencing discretion, then, as a rule, the prosecutor must formally plead and prove the prior using the procedures found in Pen C §§969, 969a, 969.5, 1025, 1093, and 1158. *In re Varnell*, *supra; People v Lo Cicero* (1969) 71 C2d 1186, 1192, 80 CR 913; see *People v Bouzas* (1991) 53 C3d 467, 479, 279 CR 847. If the prior does not deprive the court of its sentencing discretion, then the prosecutor need not allege it. *People v Dorsch* (1992) 3 CA4th 1346, 1351, 5 CR2d 327 (because Pen C §1203(e)(4) removes none of trial judge's options, priors are only "sentencing facts" that need not be pleaded and proved). See the chart in §24.18.

Ø **Note:** In exercising judicial sentencing *discretion,* a court should consider prior convictions even if they are not formally charged. See, *e.g., People v Warner* (1978) 20 C3d 678, 685, 143 CR 885.

Double jeopardy does not prevent a prosecutor from alleging and proving a prior that a jury in another case has found not true. *People v Rice* (1988) 200 CA3d 647, 653, 246 CR 177.

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§24.20 3. How to Plead Prior

When a defendant has only one prior felony conviction, Pen C §969 permits the prosecution to charge it by stating the court in which the conviction occurred; the date of conviction does not need to be given. It is common, however, for the prosecutor to identify the crime of which the defendant was previously convicted, the court in which it occurred, and the date.

The defendant, before committing the offense charged in this _ _[*complaint/information/indictment*]_ _**, was convicted of a** _ _[*misdemeanor/felony*]_ _ _ _[*state crime, e.g., motor vehicle theft*]_ _**, a violation of** _ _[*specify statute under which convicted*]_ _**, in** _ _[*specify court in which conviction was had*]_ _**, on** _ _[*date*]_ _**.**

The prosecutor should also include in the charge any other facts that must be proved for effective use of the particular sentencing statute, *e.g.,* in a case involving multiple defendants and an allegation of a prior under Pen C §667(a), the allegation could read as follows:

That the defendant _ _[*name*]_ _**, before the commission of the offense charged herein, a serious felony within the meaning of Penal Code §667(a), namely,** _ _[*indicate category from list in Pen C §1192.7(c)* (*see People v Equarte (1986) 42 C3d 456, 466, 229 CR 116)*]_ _**, was, on or about** _ _[*date of prior judgment*]_ _**, in** _ _[*title of court in which defendant was convicted*]_ _**, convicted of a serious felony, namely,** _ _[*specify particular serious felony (see Pen C §1192.7(c))*]_ _**, under** _ _[*specify code section under which defendant was convicted, and, if appropriate, other criteria making prior a serious felony under §667(a) (see, e.g., People v Thomas (1986) 41 C3d 837, 843, 226 CR 107*; *People v Flynn (1995) 31 CA4th 1387, 37 CR2d 765)*]_ _**.**

If, at the time of the initial filing of the pleading, time or circumstances do not allow the prosecutor to determine exactly how or under what charging section a prior should be pleaded, pleading in the simple language of §969 will suffice until the defendant specially demurs, at which time the prosecutor can insert more particulars. See *People v Equarte, supra; People v Thomas, supra*. A more serious problem arises if the prosecutor alleges the prior under the wrong charging section, misleading the defendant into believing that the consequences would be less than what they would be under a different charging section. See, *e.g., People v Haskin* (1992) 4 CA4th 1434, 7 CR2d 1 (prior admitted under Pen C §667.5(b), so Pen C §667(a) term unavailable); *People v Rivadeneira* (1991) 232 CA3d 1416, 1421, 284 CR 75 (§667.5(b) is not lesser included enhancement within Pen C §667(a)).

When the prior conviction is an element of the offense, as in Pen C §12021 (ex-con with a gun), the prosecutor must prove the prior at the preliminary hearing to be able to charge it in the information as an element of that crime. *Levy v Superior Court* (1973) 31 CA3d 427, 429, 107 CR 384. In addition, the prosecutor can be forced to elect one among several available prior convictions in proving a prior as an element of an offense. See *People v Patino* (1984) 160 CA3d 986, 993, 206 CR 762. But see *U.S. v Lloyd* (9th Cir 1992) 981 F2d 1071 (prosecutor need not elect if defendant will not stipulate to prior).

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§24.21 4. Amending Pleading to Add Charge of Prior

Priors that must be charged in the accusatory pleading and proved at the preliminary hearing and at trial can be amended in the same way as the primary crime charged. See discussion in chap 7.

Amendments in felony cases can be made before both the magistrate and the superior court judge. See *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 255 CR 46 (certified plea from magistrate).

Before the defendant enters a plea, the prosecutor can amend without leave of the court; but after the plea is entered, the prosecutor must obtain leave of court to amend. Pen C §1009; *People v Superior Court (Alvarado), supra*.

In exercising its discretion on a proposed amendment, the court should not consider the effect of the prior on the sentence. *People v Superior Court (Alvarado), supra*.

On amendment, the defendant should be promptly arraigned on the new allegation. Pen C §§969a, 969.5, 1025. A jury waiver that is taken before the amendment is ineffective for the new allegation of a prior. *People v Luick* (1972) 24 CA3d 555, 558, 101 CR 252.

Amendments concerning priors to be used only at sentencing and not after the jury's discharge, when allowed, can be made at any time up to, but not after, the time of sentencing. Pen C §§969a, 969.5, 1025(b). See *People v Tindall* (2000) 24 C4th 767, 776, 102 CR2d 533; *People v Martin* (1978) 87 CA3d 573, 579, 151 CR 141.

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§24.22 5. Dismissing Priors

Generally, prosecutors may move to dismiss prior convictions subject to the restrictions of Pen C §1192.7 (discussed in §8.6). The Three Strikes law (see §§37.33-37.33E), however, allows a prosecutor to move to dismiss or strike a Pen C §667(d) or §1170.12(b) prior only in furtherance of justice, or when the prosecutor does not have enough evidence to prove the prior (Pen C §§667(f)(2), (g), 1170.12(d)(2), (e)).

The Three Strikes law expressly permits the court, if satisfied regarding the lack of proof, or in furtherance of justice (*People v Superior Court (Romero)* (1996) 13 C4th 497, 53 CR2d 789), to dismiss or strike the prior (Pen C §§667(f)(2), 1170.12(d)(2)). See *People v Wallace* (2004) 33 C4th 738, 747, 16 CR3d 96; *People v Carmony* (2004) 33 C4th 367, 378, 14 CR3d 880; *People v Williams* (1998) 17 C4th 148, 69 CR2d 917, on limits on "furtherance of justice" power. Compare *People v Allan* (1996) 49 CA4th 1507, 57 CR2d 269 (judge not allowed to unilaterally dismiss or strike prior on ground that prosecutor had no proof of prior at that time when district attorney expected proof later that day), and *People v Ramos* (1996) 47 CA4th 432, 55 CR2d 1, disapproved on other grounds in *People v Fuhrman* (1997) 16 C4th 930, 947 n11, 67 CR2d 1 (trial court abused its discretion by dismissing prior to secure defendant's guilty plea, without prosecutor's consent), with *People v Cepeda* (1996) 49 CA4th 1235, 57 CR2d 246 (trial court struck four priors as part of plea bargain; plea bargain upheld, but case remanded for trial court to clarify record under either Pen C §1385 or §667(f)). See also *People v Strong* (2001) 87 CA4th 328, 104 CR2d 490 (abuse of discretion for trial court to dismiss "strike" prior as outside the character of the Three Strikes law when defendant had 22-year criminal record, including several recent felonies).

In furtherance of justice in a multiple count case, dismissal of a prior need not apply to all counts. *People v Garcia* (1999) 20 C4th 490, 85 CR2d 280. Dismissal of a prior in furtherance of justice does not affect the prior's use in another case. *People v Ortega* (2000) 84 CA4th 659, 101 CR2d 253.

Ø **Note:** When the prosecutor can use priors in a plea bargain, an agreement not to charge priors does not imply that they may not be used to aggravate the sentence. *People v Haney* (1989) 207 CA3d 1034, 255 CR 276.

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§24.23 D. Confessing Prior

If a defendant denies a prior, or if the prior is an element of the crime, it must be proved. Otherwise, the court ordinarily cannot inform the jury of the prior. Pen C §1025. See *People v Bouzas* (1991) 53 C3d 467, 279 CR 847 (petty theft with prior (Pen C §666)); *People v Young* (1991) 234 CA3d 111, 285 CR 583 (vehicle theft with vehicle theft prior (Pen C §666.5)). An exception arises when the prior is allowed as evidence for some other purpose, such as impeachment of the defendant as a witness (Evid C §788) or to show other misconduct (Evid C §1101(b); Jefferson's California Evidence Benchbook §§35.19-35.20 (4th ed CJA-CEB 2009). But see *People v Vichroy* (1999) 76 CA4th 92, 90 CR2d 105 (jury instruction held unconstitutional for allowing jurors to infer guilt in charged offense from evidence of guilt in priors).

The defendant's admission of a prior is conclusive in all subsequent proceedings of the fact that the defendant suffered the conviction, and cannot be withdrawn without the court's consent. Pen C §1025. The defendant can, however, reserve a challenge against the use made of the admitted prior if the prosecutor agrees. *People v Calio* (1986) 42 C3d 639, 230 CR 137; *People v Crowson* (1983) 33 C3d 623, 628 n3, 190 CR 165. The defendant can also concede the fact of imprisonment while reserving the question of the legality of the prior for later determination by the trial court in the event of a conviction. *People v Trujillo* (1984) 154 CA3d 1077, 1091, 202 CR 832.

> Ø **Note:** Defense counsel must carefully check priors to be sure they are valid before advising a defendant to admit to them. See *People v Plager* (1987) 196 CA3d 1537, 1542, 242 CR 624 (defense counsel incompetent for advising defendant to admit to priors that prosecution would not have been able to prove were serious felonies).

When a prior results in a sentence enhancement, the trial court can impose or strike the enhancement unless the law limits discretion. *People v Harvey* (1991) 233 CA3d 1206, 1231, 285 CR 158. The court may not stay imposition of sentence on an enhancement and may not impose only a portion of the sentence on the enhancement. *People v Harvey, supra*. For further discussion of striking priors, see §§24.42-24.43.

For discussion of what constitutes a valid admission of a prior, see §§26.7-26.22.

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E. Trying Prior

§24.24 1. Speedy Trial Rules; Court or Jury Trial

The same speedy trial limits that apply to the underlying charges in a case also apply to trial of a prior conviction required to be proved to a jury. *People v Martin* (1978) 87 CA3d 573, 151 CR 141; *People v Huff* (1975) 46 CA3d 361, 120 CR 210.

There is no California or federal constitutional right to a jury trial on a prior (*People v Mosby* (2004) 33 C4th 353, 360, 15 CR3d 262), including a foreign prior (*People v McGee* (2006) 38 C4th 682, 685, 42 CR3d 899). Although the Sixth Amendment requires jury trials for certain sentence enhancements, this right does not extend to an enhancement based on a prior. *People v Jefferson* (2007) 154 CA4th 1381, 1386, 65 CR3d 607. See discussion in §§37.1A, 37.11. The sentencing statute establishes whether the defendant is entitled to a jury trial on a prior.

When a defendant has a right to a trial on a prior conviction, including a Pen C §667.5 prison prior (see *People v Thomas* (2001) 91 CA4th 212, 222, 110 CR2d 571), this right is generally limited to the factual validity (truth) of the prior. Pen C §1025(b)-(c); *People v Kelii* (1999) 21 C4th 452, 87 CR2d 674. The statute requires only a court trial on whether the defendant is the same person who suffered the conviction (Pen C §1025(c)), whether a prior conviction of a serious felony under Pen C §667(a)(1) was brought and tried separately (*People v Wiley* (1995) 9 C4th 580, 38 CR2d 347), and whether a particular statute authorizes using the prior (*People v Kelii*, *supra* (Three Strikes law)). Under Pen C §1025(c), the court tries the issue of the defendant's identity on the prior without the jury, leaving a minimal trial for the jury. See *People v Epps* (2001) 25 C4th 19, 104 CR2d 572. A jury's single finding of the fact of a conviction can support use of the same prior under multiple alleged enhancement provisions (*People v Williams* (2002) 99 CA4th 696, 700, 121 CR2d 464) and on multiple counts in a Three Strikes case (*People v Morales* (2003) 106 CA4th 445, 455, 130 CR2d 800). Challenges to aspects of the prior that do not require a jury trial may be made at any time before sentencing if the prior concerns only sentencing. See §24.18.

A waiver of the right to a jury trial on the prior also waives a jury on whether the current offense is a serious felony for purposes of sentencing under Pen C §667(a). *People v Arnett* (2006) 139 CA4th 1609, 44 CR3d 206.

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2. Unification Versus Bifurcation

§24.25 a. When Priors That Must Be Proved to Jury Can and Cannot Be Tried Separately From Current Offense; Conditional Bifurcation

When a prior is an element of the current offense, the defendant cannot prevent the jury from learning of its existence during the guilt phase of the trial even by stipulating to it. Cal Const art I, §28(f). See *People v Valentine* (1986) 42 C3d 170, 181, 228 CR 25. A felony prior that is an element of the offense must be presented to the jury. *People v Bouzas* (1991) 53 C3d 467, 478, 279 CR 847. However, when the defendant stipulates to the prior felony conviction, evidence of the *nature* of the prior must be withheld from jurors. *People v Sapp* (2003) 31 C4th 240, 260, 2 CR3d 554; *People v Valentine*, *supra*.

Ø **Note:** In a prosecution for being a convicted felon in possession of a firearm (see Pen C §12021), the prior is an element of the offense. *People v Valentine, supra*. In a prosecution for petty theft with a prior (see Pen C §666), the prior is *not* an element of the offense. *People v Bouzas, supra*. See also *People v Ramon* (2009) 175 CA4th 843, 96 CR3d 459 (Pen C §12031(a)(2)).

When a prior is not an element of the offense but instead a sentencing matter, the defendant may stipulate to the prior and preclude the jury from learning of the fact of the prior conviction. See *People v Calderon* (1994) 9 C4th 69, 36 CR2d 333; *People v Bouzas*, *supra*. If a defendant denies the allegation of such a prior, the question whether the defendant has suffered the prior conviction must be tried to a jury. Pen C §1025. The trial court has discretion to grant the defendant a bifurcated trial but is not required to do so. *Calderon,* 9 C4th at 71 (overruling *People v Bracamonte* (1981) 119 CA3d 644, 174 CR 191, on this issue). The trial court should generally order bifurcation unless the jury will likely learn of the prior sometime before returning a verdict. *People v Calderon, supra*. An initial ruling in favor of bifurcation can be reconsidered at appropriate stages of the trial. If the prosecution can use the prior to impeach the defendant's testimony (see §§24.45-24.51), the trial court may order conditional bifurcation on the basis of whether or not the defendant testifies in front of the jury. *People v Burch* (2007) 148 CA4th 862, 866, 55 CR3d 892. The defendant can waive jury for only the prior when the trial is bifurcated. During a bifurcated jury trial, jurors first hear evidence and reach a verdict on the current offense. If the defendant is found guilty, the jurors then hear evidence on the prior. *People v Bracamonte, supra*.

When the bifurcated procedure is followed, jeopardy does not prevent the prosecution from trying the defendant on the prior if the jury is prematurely discharged before it considers the prior, unless the defendant timely objects to the discharge of the jury. *People v Saunders* (1993) 5 C4th 580, 20 CR2d 638. A chart showing which priors may be bifurcated and which may not is in §24.26.

When a prior murder conviction is charged as a special circumstance in a capital case, Pen C §190.1(b) requires bifurcation of the trial of the special circumstance from the trial on guilt. See *Curl v Superior Court* (1990) 51 C3d 1292, 1301, 276 CR 49.

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§24.26 b. Chart: Bifurcation of Proof of Prior Convictions [Deleted]

The material formerly in this section is discussed in §24.25.

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§24.27 3. Evidence

The prosecution's burden of proof on the fact of conviction of a charged prior is beyond a reasonable doubt. *People v Jones* (1995) 37 CA4th 1312, 44 CR2d 552 (waiver forms insufficient). In meeting this burden, the prosecution can rely on the defendant's testimony in the trial of the current offense. *People v Elmore* (1990) 225 CA3d 953, 960, 275 CR 315. The prosecutor must prove each "element" of a prior. *People v Winslow* (1995) 40 CA4th 680, 46 CR2d 901.

Proof of a prior consists of official documents; witnesses cannot testify about the facts of the prior crimes. *People v Kelii* (1999) 21 C4th 452, 87 CR2d 674. In determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction (*People v Guerrero* (1988) 44 C3d 343, 243 CR 688) but no further (*People v Trujillo* (2006) 40 C4th 165, 180, 51 CR3d 718). The entire record includes all relevant documents in the court file of the prior conviction (*People v Castellanos* (1990) 219 CA3d 1163, 1172, 269 CR 93), including the trial transcript (*People v Bartow* (1996) 46 CA4th 1573, 54 CR2d 482), the appellate record, including the defendant's guilty plea (*People v Sohal* (1997) 53 CA4th 911, 62 CR2d 110), and the appellate court opinion (*People v Woodell* (1998) 17 C4th 448, 71 CR2d 241; *People v Harbolt* (1997) 61 CA4th 123, 71 CR2d 459). See also *People v Johnson* (1991) 233 CA3d 1541, 1545, 285 CR 394 (Nevada prior); *People v Reynolds* (1989) 211 CA3d 382, 388, 259 CR 352 (Oregon prior). The record also includes the preliminary hearing transcript, but the witness's testimony there must satisfy Evid C §1291. *People v Reed* (1996) 13 C4th 217, 52 CR2d 106; *People v Gonzales* (2005) 131 CA4th 767, 32 CR3d 172. The record does not include a defendant's statements, made after the defendant's plea of guilty has been accepted, that appear in a probation officer's report. *People v Trujillo* (2006) 40 C4th 165, 179, 51 CR3d 718.

The prosecutor can, by supplying sufficient notice and information (Evid C §453), require the court to take judicial notice of certain facts in its own or any other court's records. *People v Bowen* (1971) 22 CA3d 267, 286, 99 CR 498 (court's own records); Evid C §452(d) (another court's records). When the prior comes from a different jurisdiction, the prosecution can introduce certified copies of the court records. *People v Brucker* (1983) 148 CA3d 230, 241, 195 CR 808. See Evid C §§1530-1531. Legible (see *People v Ruiz* (1999) 69 CA4th 1085, 1090, 82 CR2d 139) certified copies of prison records (Pen C §969b), rap sheets (*People v Martinez* (2000) 22 C4th 106, 91 CR2d 687; *People v Morris* (2008) 166 CA4th 363, 367, 83 CR3d 253), preliminary hearing transcripts (*People v Gonzales* (2005) 131 CA4th 767, 775, 32 CR3d 172), and DMV printouts (Veh C §23622(b)) are admissible to prove priors.

> Ø **Note:** Materials in the record remain subject to the usual evidentiary objections, including hearsay. *People v Reed, supra; People v Thoma* (2007) 150 CA4th 1096, 58 CR3d 855; *In re Cruse* (2003) 110 CA4th 1495, 1500, 2 CR3d 548. Constitutional objections may also lie. *Shepard v U.S.* (2005) 544 US 13, 16, 161 L Ed 2d 205, 125 S Ct 1254, held that in evaluating the nature of a prior under 18 USC §924(e), the sentencing court is limited to the statutory definition of the offense, the charging document, a written plea agreement, a colloquy on the record in which the accused affirmed the factual basis for the plea, and an explicit factual finding by the judge to which the accused has assented. Four justices said that going beyond those materials would create "serious risks of unconstitutionality" (544 US at 25, 161 L Ed 2d at 217), and a fifth justice said it "would give rise to constitutional error" (544 US at 28, 161 L Ed 2d at 219 (Thomas, J., concurring in part and in the judgment)). In rejecting constitutional objections to the use of the transcript of a Nevada preliminary hearing as evidence of the nature of a foreign prior, the supreme court in *People v McGee* (2006) 38 C4th 682, 707, 42 CR3d 899, observed that *Shepard* was decided on federal statutory rather than constitutional grounds. See also *People v Morris, supra* (CLETS rap sheet not testimonial hearsay); *People v Gonzales* (2005) 131 CA4th 767, 772, 32 CR3d 172 (no Confrontation Clause violation for use of preliminary hearing transcript); *People v Taulton* (2005) 129 CA4th 1218, 1222, 29 CR3d 203 (same for Pen C §969b records).

Evidence of the commission of the crime cannot increase the degree of the prior. *People v Maestas* (2006) 143 CA4th 247, 48 CR3d 846 (plea to second-degree burglary trumped first-degree evidence).

For some sentence enhancements, the prosecutor must prove that a prior resulted in the defendant's incarceration. For instance, Pen C §667.5 requires proof that the defendant served a "prior separate prison term" (Pen C §667.5(a):

3-year term; Pen C §667.5(b): 1-year term), and Pen C §666 requires proof of incarceration, *i.e.,* actual jail confinement (*People v Cortez* (1994) 24 CA4th 510, 29 CR2d 445), in connection with the prior conviction in a prosecution for petty theft with a prior. In such cases, Pen C §969b permits the prosecutor to use certified copies of records of the penal institution to establish prima facie evidence of the fact of the conviction and service of the penal term. See *People v Haney* (1994) 26 CA4th 472, 31 CR2d 547.

Evidence that the defendant was committed to prison on the prior raises a presumption that the defendant completed the prison term (*People v Tenner* (1993) 6 C4th 559, 24 CR2d 840), but not that the defendant served a specific term (*People v Gamble* (1996) 48 CA4th 576, 55 CR2d 721).

For purposes of a prior conviction alleged under §667.5, both commitment to the State Department of Health as a mentally disordered sex offender for at least a year following a felony conviction and incarceration in a Division of Juvenile Justice facility qualify as prison terms. Pen C §667.5(i)-(j).

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F. Challenging Prior

§24.28 1. Differences Between Challenging Constitutionality and Other Challenges to Use of Prior Conviction

The trial court decides a constitutional challenge to a prior conviction. By contrast, a defendant who challenges the factual validity (truth) of a prior conviction has the right to a jury trial. Pen C §1025.

A defendant, however, does not have either a state or a federal constitutional right to a jury trial on a prior that has been alleged as a sentence enhancement. *People v Vera* (1997) 15 C4th 269, 277, 62 CR2d 754. Rather, the right to a jury trial to test the factual validity (truth) of a prior conviction is determined by statute. Pen C §§1025, 1158; *In re Taylor* (2001) 88 CA4th 1100, 1109, 106 CR2d 454. See *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348 (exempting "fact of a prior conviction" from constitutional right to jury trial). Section 1025 limits the jury's role to determining the authenticity of the documents used to show that the defendant suffered a prior alleged for sentencing purposes. *People v Kelii* (1999) 21 C4th 452, 458, 87 CR2d 674. When relevant for purposes of sentencing allegations, the court rather than the jury determines whether priors were "brought and tried separately" (*People v Wiley* (1995) 9 C4th 580, 589, 38 CR2d 347) and whether a prior is a "serious felony" (*People v Kelii* (1999) 21 C4th 452, 454, 87 CR2d 674).

Challenges to other aspects of the prior, *e.g.,* that the defendant did not serve a separate prison term on the prior or that the prior is not from a specified list, can be made any time before sentencing if the challenge concerns only sentencing. See §24.18.

For further discussion of constitutional challenges to priors, see §§24.30-24.39, 26.10, 26.13-26.17.

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§24.29 2. Challenging Truth or Use of Prior Conviction

The truth of a prior conviction used to enhance punishment for a current misdemeanor or felony offense is determined by the trier of fact. Whether a prior constitutes a serious felony for sentencing under the Three Strikes law is to be determined by the court, not the jury. *People v Kelii* (1999) 21 C4th 452, 87 CR2d 674. For a discussion of when priors may and must be proved to the jury, see §24.25. When priors listed in the probation report are properly raised only to influence sentencing discretion, the court need make no finding regarding their truth (*People v Dorsch* (1992) 3 CA4th 1346, 1351, 5 CR2d 327) unless the defendant challenges them.

Defendants can challenge the use of prior convictions on the ground that they do not meet the criteria of the statute under which they are charged. It is the judge, not the jury, who determines whether the statutory requirements have been met. *People v Wiley* (1995) 9 C4th 580, 583, 38 CR2d 347. See *People v McGee* (2006) 38 C4th 682, 695, 42 CR3d 899.

Ø **Example:** The definition of serious felony in Pen C §1192.7(c)(28) does not include a misdemeanor that was punished as a felony under the alternate penalty provision of Pen C §186.22(d). *People v Ulloa* (2009) 175 CA4th 405, 408, 95 CR3d 905.

Ø **Example:** A prior conviction charged under Pen C §667.5 must have involved a prior separate prison term, served during the last 5 (any felony) or 10 (violent felony) years. A defendant can challenge a prior felony conviction charged under §667.5 if he or she did not go to prison on the prior or did not serve a *separate* prison term on that prior.

Ø **Example:** In *People v Deay* (1987) 194 CA3d 280, 290, 239 CR 406, two enhancements were reduced to one because the two prior convictions alleged had not been separately brought and tried as required by Pen C §667.

Ø **Example:** Multiple enhancements under §667.5 for prior prison terms may be challenged if the defendant served only one continuous period of incarceration even if he or she was serving concurrent or consecutive terms in separate prosecutions. *People v Smith* (1985) 166 CA3d 1003, 1010, 212 CR 737; *People v James* (1980) 102 CA3d 728, 732, 162 CR 548; *People v Burke* (1980) 102 CA3d 932, 942, 163 CR 4.

Ø **Example:** A sentence cannot be enhanced with a prior conviction in which sentence was stayed under Pen C §654. *People v Pearson* (1986) 42 C3d 351, 361, 228 CR 509. But see *People v Haney* (1994) 26 CA4th 472, 477, 31 CR2d 547 (merger of priors for sentencing).

Similarly, convictions in other states may be challenged if they do not meet California requirements. See *People v Curtis* (1969) 70 C2d 347, 359, 74 CR 713; *In re McVickers* (1946) 29 C2d 264, 279, 176 P2d 40.

A defendant may also challenge a prior conviction on the ground that he or she was not convicted of that prior. See *People v Morton* (1953) 41 C2d 536, 544, 261 P2d 523; *People v Garcia* (1970) 4 CA3d 904, 911, 84 CR 624. This challenge puts the prosecution to its proof, and the prosecutor must present admissible evidence to prove the prior. *People v Jones* (1995) 37 CA4th 1312, 1316, 44 CR2d 552 (waivers on guilty plea forms were insufficient to prove prior convictions; no proof that guilty plea entered). But see *People v Martinez* (2000) 22 C4th 106, 91 CR2d 687 (uncertified rap sheets admissible to prove prior). For further discussion, see §24.27. The trier of fact must make an express oral finding on the truth of the prior. Pen C §1158. A silent record operates as a finding that the prior was not true. *People v Mesa* (1975) 14 C3d 466, 471, 121 CR 473; *People v Anthony* (1986) 185 CA3d 1114, 1125, 230 CR 268.

A prior conviction stayed in the original case because of Pen C §654 cannot be used (*People v Pearson* (1986) 42 C3d 351, 228 CR 509), but a prior conviction that was stayed in the original case as part of the judge's sentencing discretion, unrelated to §654, can be used (*People v Milosavljevic* (1997) 56 CA4th 811, 817, 65 CR2d 562). When the defendant has not waived a jury trial, and the jury is discharged before making a finding on the truth of the prior, double jeopardy bars retrial of the defendant on the prior only if the defendant has timely objected to the discharge. *People v*

Saunders (1993) 5 C4th 580, 590, 20 CR2d 638. See also *People v Blackburn* (1999) 72 CA4th 1520, 1529, 86 CR2d 134 (prior stricken in plea bargain can be used as enhancement even though never admitted or proved in prior proceeding).

For discussion of unification or bifurcation of trial concerning the allegation of a prior conviction, see §§24.25-24.26.

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3. Challenging Constitutionality of Prior Conviction

a. Grounds for Challenging Constitutionality of Prior

§24.30 (1) Summary of Grounds

A defendant may challenge any constitutional defect in a prior conviction. *People v Sumstine* (1984) 36 C3d 909, 918, 206 CR 707. A defendant may *collaterally* challenge *Gideon* error in a prior conviction through a motion to strike, usually made before trial. In a noncapital case, the defense has no right to *collaterally* challenge a prior on the ground of ineffective assistance of counsel. *Garcia v Superior Court* (1997) 14 C4th 953, 963, 59 CR2d 858 (opinion based on *Custis v U.S*. (1994) 511 US 485, 128 L Ed 2d 517, 114 S Ct 1732). *Garcia* did not address collateral attacks on grounds other than ineffective assistance of counsel.

The rule is different in capital cases. If the current prosecution is a capital case, collateral constitutional challenges are allowed to challenge any fundamental constitutional error, and may be made before trial. *People v Horton* (1995) 11 C4th 1068, 1134, 47 CR2d 516.

The most common grounds for challenging prior convictions under *Sumstine* are these:

- Inadequate showing that the defendant knowingly and intelligently waived his or her *Boykin-Tahl* rights when a plea of guilty or no contest was entered. See §§26.10-26.17.
- Denial of the right to counsel and inadequate assistance of counsel. See *People v Sumstine, supra*.

Counsel may also consider constitutional challenges based on double jeopardy, prosecutorial misconduct in withholding exculpatory evidence, and extrinsic evidence (such as medication, injury, or coercion) rendering a plea involuntary.

Ø **Note:** Defense counsel should carefully review the files of convictions that are alleged as priors. One federal court, in *Cook v Lynaugh* (5th Cir 1987) 821 F2d 1072, 1078, found prejudicial ineffective assistance of counsel because defense counsel failed to investigate whether the defendant was assisted by competent counsel on an enhancing prior. The court found that the facts of the case would have alerted a reasonably competent attorney to the need to investigate.

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(2) *Boykin-Tahl* Challenges to Prior Convictions Based on Guilty Pleas

§24.31 (a) *Boykin-Tahl* Advisements Required for Both Felony and Misdemeanor Pleas

Defendants in misdemeanor and felony cases (see *Mills v Municipal Court* (1973) 10 C3d 288, 291, 110 CR 329) must be informed of, understand, and explicitly waive their constitutional privilege against compulsory self-incrimination, right to counsel and to trial by jury, and right to confront accusers before entering a valid plea of guilty. *People v Sumstine* (1984) 36 C3d 909, 914, 206 CR 707; *Boykin v Alabama* (1969) 395 US 238, 242, 23 L Ed 2d 274, 279, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577.

Ø **Note:** Motions to strike a prior felony conviction based on a failure to advise on *Boykin-Tahl* rights are limited to guilty pleas that occurred after November 7, 1969. *People v Allen* (1999) 21 C4th 424, 443, 87 CR2d 682.

For further discussion of advice and waiver on entering a plea of guilty or no contest, see §§26.10-26.17.

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§24.32 (b) Alleging Denial of *Boykin-Tahl* Rights Sufficient to Challenge Allegation of Prior Conviction

To challenge denial of *Boykin-Tahl* rights, defense counsel must obtain a copy of the docket or minute order of a plea, and any written waiver of rights signed by the defendant that concerns the prior. *People v Sumstine* (1984) 36 C3d 909, 914, 206 CR 707. Defense counsel must also show that the prior conviction occurred after November 7, 1969. *People v Allen* (1999) 21 C4th 424, 443, 87 CR2d 682. This must be done in time for the motion to be prepared and heard before trial begins. The trial court is not required to grant a continuance to the defense during trial to obtain the transcripts of prior convictions. *People v Vallejo* (1991) 1 CA4th 760, 763, 2 CR2d 413.

If the record indicates that the proceedings were reported, counsel must also obtain a copy of the transcript. *People v Sumstine, supra*. The docket and minute order and written waiver can be obtained from the court in which the prior occurred. In some courts, transcripts of guilty pleas are in the court file, particularly if the conviction was appealed. If not, the court reporter must be personally contacted for a copy of the transcript. Some court reporters will agree to read the tape over the phone so that counsel can decide whether to send for it. Because it may take as long as a month or more to obtain the documents, defense counsel should request them as early as possible so that there is time to notice and hold a hearing before trial.

Actual denial of one or more *Boykin-Tahl* rights must be alleged to prevail on a motion to strike. The defendant cannot rely solely on a silent record to show a failure to give the *Boykin-Tahl* advisements. Even if the transcript of the plea to the prior shows no advisements, the defendant must affirmatively allege that he or she was not aware of and did not waive the *Boykin-Tahl* rights. *People v Sumstine, supra*.

Placing the burden of proving constitutional error in a prior conviction on the defendant does not violate due process. *Parke v Raley* (1992) 506 US 20, 121 L Ed 2d 391, 113 S Ct 517. The defendant can meet this burden by testifying or by producing an affidavit or declaration signed under penalty of perjury, regarding the defect.

Either side may introduce a reporter's transcript of the plea; transcripts are the preferred evidence. See *Youkhanna v Municipal Court* (1978) 86 CA3d 612, 615, 150 CR 380, disapproved on other grounds in *People v Sumstine* (1984) 36 C3d 909, 923 n9, 206 CR 707; *Ganyo v Municipal Court* (1978) 80 CA3d 522, 529, 145 CR 636. If no transcript exists, but a minute order might exist, it could be used to demonstrate lack of advisement or waiver. See, *e.g., Youkhanna v Municipal Court, supra* (docket sheet minute order entries that did not record defendant's express and explicit waivers were inadequate); *Stewart v Justice Court* (1977) 74 CA3d 607, 611, 141 CR 589 (same). Docket entries by the clerk recording the defendant's answers of yes and no to specific questions from the judge regarding advisement and waiver, however, are sufficient to uphold a prior misdemeanor conviction against a *Boykin-Tahl* challenge. *People v Anderson* (1991) 1 CA4th 318, 322, 1 CR2d 676; *Ganyo v Municipal Court, supra*.

A trial judge's testimony on his or her regular habit and custom of advising defendants of their constitutional rights can be used to establish proper advisement of rights. *Curl v Superior Court* (1990) 51 C3d 1292, 1297 n1, 276 CR 49. A judge's habit and custom, however, cannot be used to establish a defendant's *waiver* of rights. *Stewart v Justice Court* (1977) 74 CA3d 607, 612, 141 CR 589.

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§24.33 (3) Other Constitutional Challenges to Convictions Based on Guilty Pleas

A defendant must be advised of the nature of the charge against him or her before pleading guilty. *Henderson v Morgan* (1976) 426 US 637, 645, 49 L Ed 2d 108, 114, 96 S Ct 2253. See also *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577. When a defendant is represented by counsel, however, unless the record shows otherwise, it may be presumed that defense counsel explained the nature of the offense in sufficient detail to give the accused notice of the charges. *Henderson v Morgan* (1976) 426 US 637, 647, 49 L Ed 2d 108, 115, 96 S Ct 2253.

The defendant need not be advised of the possible defenses to understand the nature of the charge against him or her. *People v Kunkel* (1985) 176 CA3d 46, 53, 221 CR 359. Nonetheless, the defendant may be able to mount a constitutional challenge to a prior conviction based on a plea on the ground that he or she was not sufficiently advised of the nature of the offense to which he or she pleaded guilty. *Henderson v Morgan, supra*. But see *People v Weaver* (2001) 26 C4th 876, 922, 111 CR2d 2 (*Boykin-Tahl* rights inapplicable to extrajudicial confession); *Murtishaw v Woodford* (9th Cir 2001) 255 F3d 926 (*Boykin-Tahl* inquiry by trial court not required after NGI (not guilty by reason of insanity) plea).

For further discussion, see §§26.10-26.17.

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§24.34 (4) Challenges to Prior Convictions Based on Ineffective Assistance of Counsel

In capital cases, defendants can *collaterally* attack the ineffective assistance of counsel in a prior conviction through a pretrial motion to strike. *People v Horton* (1995) 11 C4th 1068, 1134, 47 CR2d 516. However, in noncapital cases, a defendant does not have either a federal or state constitutional right to *collaterally* attack a prior conviction based on ineffective assistance of counsel. *Garcia v Superior Court* (1997) 14 C4th 953, 963, 59 CR2d 858. See §24.30.

To prove ineffective assistance of counsel, the defendant must show that:

- Counsel failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate; and
- Defendant was prejudiced, *i.e.,* but for counsel's incompetence the result of the proceedings would have been different.

People v Ledesma (1987) 43 C3d 171, 217, 233 CR 404; *Strickland v Washington* (1984) 466 US 668, 689, 80 L Ed 2d 674, 694, 104 S Ct 2052.

A motion alleging ineffective assistance of counsel should be accompanied by declarations of the defendant, attorney, or whoever is necessary to clearly allege the incompetence and resulting prejudice. See chap 18 for further discussion of preparing pretrial motions. For further discussion of ineffective assistance of counsel, see 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§199-228 (3d ed 2000).

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b. Procedures for Challenging Constitutionality of Prior

§24.35 (1) Summary of Procedures

Although the parties have the right to a jury trial on the factual validity or truth of a prior, neither party is entitled to have the jury decide the constitutional validity of a prior. The constitutional validity of a prior is decided by the court as a matter of law. *Curl v Superior Court* (1990) 51 C3d 1292, 1301, 276 CR 49; *People v Curl* (2009) 46 C4th 339, 350, 93 CR3d 537 (neither *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348, nor *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428, superseded or implicitly overruled *Curl v Superior Court*).

A defendant can challenge the constitutional validity of a prior conviction by a motion to strike (if in the court in which a pending case alleges that prior conviction), or by a petition for coram nobis or habeas corpus (if in the court in which the prior conviction was originally rendered). See §24.38.

The effect of a ruling is quite different in each situation. If the court in which the prior conviction is currently alleged finds it unconstitutional, the prior must be stricken from the accusatory pleading and cannot be used to enhance or aggravate punishment. Such a ruling does not vacate the underlying judgment of conviction. Cal Const art XIIIA; *People v Sumstine* (1984) 36 C3d 909, 920, 206 CR 707; *Gonzales v State* (1977) 68 CA3d 621, 633, 137 CR 681. By contrast, if the rendering court deems the prior unconstitutional, the judgment is vacated and the defendant may be subject to retrial. 68 CA3d at 632. See §24.6 on collateral estoppel.

Ø **Note:** Drunk driving (Veh C §§23152-23153) and driving on a suspended license (Veh C §§14601-14601.2) priors are an exception; these priors can be challenged only once (with a limited exception for new legal grounds) and, if stricken, cannot be charged in a subsequent proceeding. Veh C §23624. See §24.44.

Before finding an admission defective, a reviewing court should consult the entire record. *People v Howard* (1992) 1 C4th 1132, 1175, 5 CR2d 268.

A sample motion to strike a prior conviction is in California Criminal Law Forms Manual §24.1 (2d ed Cal CEB 2005).

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(2) Procedure for Motion to Strike Prior in Court in Which Current Case Charging Prior Is Pending

§24.36 (a) Timing of Motion to Strike

A motion to strike is generally the proper vehicle for challenging the constitutionality of a prior conviction alleged in a pending case. *People v Sumstine* (1984) 36 C3d 909, 916, 206 CR 707; *People v Coffey* (1967) 67 C2d 204, 215, 60 CR 457. There is an exception: A defendant may not collaterally challenge a prior for ineffective assistance of counsel. *Garcia v Superior Court* (1997) 14 C4th 953, 963, 59 CR2d 858; see discussion in §24.30.

A defendant can move to strike any prior conviction that is charged as a basis for augmenting punishment. *In re Woods* (1966) 64 C2d 3, 5, 48 CR 689.

The constitutionality of a prior can be challenged even when it was litigated earlier in a court other than the rendering court. *People v Coffey* (1967) 67 C2d 204, 210 n5, 60 CR 457; see §24.35. The rule is different for driving under the influence priors; they can be challenged only once. Veh C §23624. See §24.44.

There is no statute specifying the time for a motion to strike; it can be made at any time from the date of the plea to the finding or verdict of guilty or the pronouncement of judgment. *In re Cortez* (1971) 6 C3d 78, 87, 98 CR 307; *People v Curtis* (1969) 70 C2d 347, 359, 74 CR 713. The better practice, however, is to move to strike as a pretrial motion, complete with a supporting memorandum and the necessary declarations. This practice, if successful, has the advantage of allowing the defense to proceed to trial or negotiate a plea bargain from a more favorable position. See, *e.g., Curl v Superior Court* (1990) 51 C3d 1292, 1302, 276 CR 49 (pretrial motion to strike is only way to prevent jury from considering unwarranted special circumstance). If the pretrial motion is unsuccessful, the defendant may want to admit the prior so that the jury will not hear of it (see Pen C §1025; *People v Bouzas* (1991) 53 C3d 467, 478, 279 CR 847) or request a bifurcated trial (see §§24.25-24.26).

Ø **Note:** The time for making the motion may be regulated by local court rules.

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§24.37 (b) Conduct of Hearing

At the hearing on a motion to strike a prior, the prosecution must make a prima facie showing of the existence of the prior conviction. *People v Sumstine* (1984) 36 C3d 909, 923, 206 CR 707; *People v Coffey* (1967) 67 C2d 204, 217, 60 CR 457. The prosecution typically meets its prima facie burden by introducing evidence of the fact of the conviction, such as the original or a certified copy of the docket or minute order entry from the court that rendered the prior judgment of conviction (*People v Vienne* (1973) 30 CA3d 266, 271, 105 CR 584, disapproved in *People v Sumstine* (1984) 36 C3d 909, 919 n6, 206 CR 707, to the extent it limits motions to strike to attacks alleging denial of right to counsel), or certified prison records (see Pen C §969b). The defendant must then show constitutional invalidity by a preponderance of the evidence (*People v Curl* (2009) 46 C4th 339, 350, 93 CR3d 537; *Curl v Superior Court* (1990) 51 C3d 1292, 1305, 276 CR 49), through testimony or by production of declarations under penalty of perjury (*People v Coffey, supra*). The specific facts that constitute an actual denial of rights depend on the specific constitutional violation alleged. See §§24.31-24.34 on the substantive grounds for the motion. The prosecution can present evidence in rebuttal. *Curl v Superior Court, supra*.

If the court finds the prior unconstitutional, it must strike it from the accusatory pleading. This ruling does not vacate the underlying judgment of conviction, however. *People v Sumstine* (1984) 36 C3d 909, 920, 206 CR 707.

Procedures for certain Vehicle Code violation priors (Veh C §§14601, 14601.1-14601.2, 23103, and 23152-23153) are different. They are discussed in §24.44.

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§24.38 (3) Procedure Concerning Writ of Coram Nobis or Habeas Corpus in Rendering Court

Coram nobis. In consideration of the rulings pronounced in *Garcia v Superior Court* (1997) 14 C4th 953, 59 CR2d 858, defendants in noncapital cases must use the writ of coram nobis and the writ of habeas corpus to collaterally challenge the ineffective assistance of counsel concerning a prior conviction. If a defendant's prior conviction resulted from a guilty plea induced by misstatements of the judge or prosecutor (duress or fraud), or significant new evidence comes to light after the judgment, the defendant may challenge the prior in the rendering court by a petition for writ of coram nobis. See *People v Goodrum* (1991) 228 CA3d 397, 279 CR 120. Coram nobis does not lie to vacate a judgment because of ineffective assistance of counsel. 228 CA3d at 400 n4. Most coram nobis cases deal with improperly obtained guilty pleas. See, *e.g., People v Esquibel* (1975) 44 CA3d 591, 118 CR 748; *People v Wiedersperg* (1975) 44 CA3d 550, 118 CR 755.

Coram nobis is available only in the rendering court if the prior was never appealed. Pen C §1265; *People v Wadkins* (1965) 63 C2d 110, 113, 45 CR 173; *People v Haynes* (1969) 270 CA2d 318, 320, 75 CR 800. If the judgment was affirmed on appeal, a writ of coram nobis will lie only in the appellate court. Pen C §1265; *People v Haynes, supra*.

A motion to vacate a judgment of conviction is treated as a proceeding for a writ of error coram nobis whether or not it is called by that name. *People v Mason* (1958) 163 CA2d 630, 329 P2d 614.

Habeas corpus. A prior can be challenged in the rendering court by a petition for writ of habeas corpus if the issue is one that could not have been raised in a timely appeal. *People v Sumstine* (1984) 36 C3d 909, 919, 206 CR 707; *In re Ronald E.* (1977) 19 C3d 315, 321, 137 CR 781. A habeas petition must show prejudice in addition to the constitutional violation underlying the prior. *In re Ronald E., supra*. For further discussion of habeas corpus, see chap 42 of this book, and Appeals and Writs in Criminal Cases, chaps 9-10 (3d ed Cal CEB 2007) (state courts).

When prior should be attacked in rendering court. When a defendant is still in custody, on probation, or on parole on a prior conviction, attacking a prior in the rendering court is preferable to a motion to strike in the court in which current charges are pending. A successful writ of coram nobis or habeas corpus in the rendering court (or an appeal if one is still available) can reverse the underlying judgment, while a successful motion to strike in the court in which current charges are pending can, at best, only preclude use of the prior to enhance or impeach in the current case. *People v Sumstine* (1984) 36 C3d 909, 920, 206 CR 707. See §24.35.

For further discussion, see Appeals & Writs, chap 11 (coram nobis) and chaps 9-10 (habeas corpus).

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§24.39 (4) Challenging Plea to Prior (*Yurko* Error)

A defendant must be advised of and waive his or her *Boykin-Tahl* rights (see §26.11) before entering a plea of guilty or no contest to a prior conviction. *In re Yurko* (1974) 10 C3d 857, 863, 112 CR 513. (A plea to a prior may occur when a defendant does not want the jury on the primary charges to hear about the prior. See *People v Calio* (1986) 42 C3d 639, 643, 230 CR 137.)

Error concerning a defendant's plea of guilty or no contest to a prior conviction (called *Yurko* error) is determined under the federal Constitution. Under that test, a plea to a prior is valid if the record affirmatively shows that the plea is voluntary and intelligent under the totality of the circumstances. *People v Howard* (1992) 1 C4th 1132, 1175, 5 CR2d 268. This means that the defense must affirmatively allege prejudice through the defendant's declaration or testimony that, had he or she been fully advised of the *Boykin-Tahl* rights, he or she would not have entered a plea of guilty. See *Curl v Superior Court* (1990) 51 C3d 1292, 1303, 276 CR 49.

If *Boykin-Tahl* error is raised by habeas petition, the defendant must show prejudice by alleging that his or her guilty plea was involuntary for want of the admonitions (*In re Ibarra* (1983) 34 C3d 277, 283 n1, 193 CR 538), *i.e.,* if the advice had been properly given and adequate waivers elicited, the defendant would not have pleaded guilty (*In re Moser* (1993) 6 C4th 342, 352, 24 CR2d 723).

The *Yurko* requirements do not apply to a stipulation that is "not the legal equivalent of a guilty plea or other admission which necessarily would have definite penal consequences." *People v Lang* (1989) 49 C3d 991, 1038, 264 CR 386 (stipulation to priors used as circumstance relevant to penalty in capital case); *People v Hovey* (1988) 44 C3d 543, 567, 244 CR 121 (stipulation to uncharged murder).

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G. Effect of Finding Prior Conviction Invalid or Unconstitutional

§24.40 1. Current Court Finds Prior Invalid

When a prior conviction is found invalid (*e.g.,* no prison time served on prior that requires prison time) or unconstitutional (*e.g.,* defendant did not waive right to jury trial) as a result of a motion to strike in the court in which it is charged as a prior conviction, all of the following are true:

- The prior must be stricken from the accusatory pleading (*People v Coffey* (1967) 67 C2d 204, 217, 60 CR 457);
- The prior cannot be used to enhance or aggravate in the pending case (*In re Dabney* (1969) 71 C2d 1, 11, 76 CR 636; *People v Coffey, supra;* see *Burgett v Texas* (1967) 389 US 109, 19 L Ed 2d 319, 88 S Ct 258);
- The prior cannot be used to impeach the defendant in the pending case under Evid C §788 (*People v Coffey, supra;* see *Loper v Beto* (1972) 405 US 473, 483, 31 L Ed 2d 374, 381, 92 S Ct 1014); and
- Neither the rendering court nor future courts are bound by the ruling, except in drunk driving cases (*People v Sumstine* (1984) 36 C3d 909, 920, 206 CR 707; *Quintor v Municipal Court* (1982) 133 CA3d 980, 985, 184 CR 313; see §24.44 for drunk driving exception).

A court determination of constitutional invalidity is res judicata for any related administrative proceedings that seek to impose additional sanctions based on the invalid prior. *In re Rogers* (1980) 28 C3d 429, 434, 169 CR 222. Note, however, that striking a prior conviction does not necessarily reduce a maximum sentence when an *indeterminate* sentence is imposed, although it may vitiate a mandatory minimum (*People v Tenorio* (1970) 3 C3d 89, 95 n1, 89 CR 249).

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§24.41 2. Rendering Court Finds Prior Invalid

If the rendering court finds the prior conviction unconstitutional, it cannot be used for any purpose in the court in which it is alleged as a prior. In the rendering court, however, the defendant may be prosecuted on the underlying charge that is now being alleged as a prior conviction. *Gonzales v State* (1977) 68 CA3d 621, 634, 137 CR 681; *Gonzalez v Municipal Court* (1973) 32 CA3d 706, 712, 108 CR 612.

Ø **Note:** Even though a conviction was found unconstitutional, prosecutors may be able to introduce evidence of the underlying conduct when relevant (as a "similar bad act") because the validity of the judgment is not a prerequisite to Evid C §1101(b) evidence. *People v Coffey* (1967) 67 C2d 204, 218, 60 CR 457. See discussion of similar acts of misconduct in §§24.52-24.55.

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§24.42 H. Court's Authority to Strike Prior Conviction Under Pen C §1385

Judges have discretion to strike prior felony conviction allegations in furtherance of justice (Pen C §1385(a)), unless there is a clear legislative directive to the contrary. *People v Superior Court (Romero)* (1996) 13 C4th 497, 518, 53 CR2d 789. This includes the discretion to strike a prior felony conviction that qualifies as a "strike" under the Three Strikes law. 13 C4th at 529. A trial court in a Three Strikes case has discretion under Pen C §1385(a) to dismiss a prior with respect to one count but not another. A sentence that imposes a Three Strikes sentence on one but not all current counts still "applies" the Three Strikes law. *People v Garcia* (1999) 20 C4th 490, 503, 85 CR2d 280.

Judges also have discretion to strike prior misdemeanor convictions in the furtherance of justice. Pen C §1385(a); *People v Tenorio* (1970) 3 C3d 89, 89 CR 249. This discretion is also subject to legislative directives to the contrary. For example, the court cannot strike a prior conviction of driving under the influence or alcohol-related reckless driving to avoid the minimum mandatory sentence or to avoid driver's license sanctions. Veh C §23622(a). A court may not strike a prior serious felony conviction under any provision of law. *People v Garcia* (2008) 167 CA4th 1550, 1560, 85 CR3d 155.

The court, on request by the defendant that it exercise its discretion under §1385 to strike a prior, must consider evidence presented; the defendant bears the burden of producing the evidence. *People v Lee* (2008) 161 CA4th 124, 129, 73 CR3d 811.

A judge's decision on dismissing or striking a sentencing allegation under §1385 is reviewed under the abuse of discretion standard. *People v Carmony* (2004) 33 C4th 367, 14 CR3d 880; *People v Superior Court (Romero)* (1996) 13 C4th 497, 531, 53 CR2d 789. That discretion is limited, however, and the trial court must consider the interests of society in deciding whether to dismiss. *People v Wallace* (2004) 33 C4th 738, 16 CR3d 96 (circumstance that magistrate previously declined to hold defendant to answer on charge after preliminary hearing did not provide proper basis for dismissing a prior-strike-conviction allegation); *People v Superior Court (Romero)* (1996) 13 C4th 497, 530, 53 CR2d 789. While Pen C §1385(a) requires the court to include its reasons for striking a prior in a minute order, the court need not state reasons for refusing to strike a prior. *In re Large* (2007) 41 C4th 538, 546, 61 CR3d 2.

For further discussion of the court's authority to strike felony priors, see §§37.41-37.42. See generally §§25.11-25.36 on motions to dismiss.

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§24.43 I. Review of Dismissal of Prior-Conviction Allegation

The People have no right to appeal in a criminal case except as expressly provided by statute. *People v Smith* (1983) 33 C3d 596, 600, 189 CR 862. When the defendant successfully moves to strike a prior-conviction allegation on the ground that the conviction is invalid or unconstitutional, the legislature has authorized the prosecution to appeal directly in both misdemeanor and felony cases. *People v Burke* (1956) 47 C2d 45, 53, 301 P2d 241 (felonies); *People v Kirk* (1992) 7 CA4th 855, 860, 9 CR2d 270 (misdemeanors); *People v Davis* (1979) 94 CA3d 215, 221, 156 CR 395 (misdemeanors). Such an appeal does not implicate the defendant's constitutional guaranty against double jeopardy. *People v Goodner* (1990) 226 CA3d 609, 613, 276 CR 542. See Pen C §1238(a)(1)-(2), (6), (8), and *People v Davis, supra,* for a summary of relevant statutes and case law.

If an action is dismissed under Pen C §1385, the prosecution can move to reinstate it under Pen C §871.5 when that is available, instead of appealing. See §§13.32-13.36 on §871.5.

Either the prosecution or the defense can seek preconviction review of a trial court's ruling on a motion to strike by way of petition for writ of mandate. *People v Allheim* (1975) 48 CA3d Supp 1, 6, 121 CR 448.

> Ø **Note:** A successful motion to strike, except in driving under the influence cases (see §24.44), will not remove a conviction from the defendant's record; the prior will have to be relitigated if there is a subsequent charge. See *People v Sumstine* (1984) 36 C3d 909, 920, 206 CR 707.

The defense can appeal the denial of a motion to strike after judgment of conviction. Pen C §§1466(2) (misdemeanor cases), 1237 (felony cases). The defendant must have made a proper objection in the trial court to preserve the issue for appeal. *People v Morris* (1991) 53 C3d 152, 190, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. A certificate of probable cause is not necessary when the appeal is from a plea of guilty if a sentencing issue is involved. *People v Sumstine* (1984) 36 C3d 909, 915 n3, 206 CR 707.

When a case is reversed for error concerning the trial of a prior conviction, it is proper on remand to have a trial only on the prior. *People v Moore* (1992) 8 CA4th 411, 421, 10 CR2d 286.

When a magistrate strikes a prior under Veh C §41403 in a drunk driving prosecution brought under Veh C §23550(a), it undermines the basis for the felony charge and results in a ruling by the magistrate that the crime is a misdemeanor and not a felony. The prosecution cannot seek review of this order; the superior court lacks jurisdiction to conduct a hearing under Pen C §871.5, and the prosecution cannot appeal from the order striking the prior. *People v Hanley* (1992) 4 CA4th 340, 342, 5 CR2d 643, disapproved on other grounds by *People v Williams* (2005) 35 C4th 817, 824, 28 CR3d 29.

For discussion of writs of mandate and habeas corpus, see chap 42; Appeals and Writs in Criminal Cases, chaps 7-8 (3d ed Cal CEB 2007).

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§24.44 IV. PROCEDURES CONCERNING PRIORS UNDER VEH C §§14601, 14601.1, 14601.2, 23103, 23152-23153

Procedures to follow for certain Vehicle Code prior convictions are detailed in Veh C §41403. The prior convictions controlled by Veh C §41403 are convictions of Veh C §§14601, 14601.1, 14601.2, 23103, and 23152-23153 as specified in Veh C §23103.5. Veh C §41403(a).

To challenge these priors on constitutional grounds, the defense must state in writing the relevant facts and constitutional rights involved. The defense must file a copy of the statement in the court where the motion will be heard, and serve the court that rendered the judgment and the prosecutor in the present proceedings at least 5 court days before the hearing on the motion. Veh C §41403(a). Absent good cause, if the defense fails to comply with these notice requirements, the court must defer the motion to the time of sentencing; otherwise, the court must continue the trial. Veh C §41403(c). Ordinarily, the hearing on the motion should be before trial, out of the jury's presence. The burden of proof in demonstrating the unconstitutionality of the prior is with the defense, by a preponderance of the evidence. Veh C §41403(b)(2). The prosecution must produce evidence of the separate conviction sufficient to justify a finding that the defendant was convicted of it. Veh C §41403(b)(1). See §24.37 for discussion of the evidence admissible at such hearings. The defendant then has the burden of proving that his or her constitutional rights were infringed. Veh C §41403(b)(2). If the prior was based on a plea of guilty or no contest, the defense must provide evidence of the plea, including the court docket, any written waiver, and a transcript of entry of the plea. Veh C §41403(b)(2).

Ø **Note:** The public defender and appointed counsel are entitled to these records without cost. Veh C §41403(b)(2).

The prosecution has the right to produce rebuttal evidence. Veh C §41403(b)(3). The court then rules on the constitutional validity of the prior, striking the prior if it is found invalid. Veh C §41403(b)(4).

If the court finds that the prior conviction is constitutionally valid, the defendant cannot make another challenge unless a change in the law provides the basis for a new argument. If the court finds that the prior conviction is constitutionally invalid, the prior conviction cannot be used in any proceeding, and the DMV must delete the prior conviction from its records. Veh C §23624.

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Source: Criminal Law/California Criminal Law Procedure and Practice/24 PRIOR CONVICTIONS AND UNCHARGED MISCONDUCT/ V. USE OF PRIOR CONVICTIONS TO IMPEACH WITNESS/§24.45 A. Rules on Admitting Prior Convictions to Impeach

V. USE OF PRIOR CONVICTIONS TO IMPEACH WITNESS

§24.45 A. Rules on Admitting Prior Convictions to Impeach

Prior felony or misdemeanor convictions may be used to impeach a testifying witness. Prior felony convictions may be admissible to impeach either the defendant or a witness after he or she testifies. Cal Const art I, §28(f)(4) ("Any prior conviction of any person in any criminal proceeding … shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding"); Evid C §788 (prior felony convictions may be used to impeach witness unless he or she has been pardoned or discharged).

Evidence Code §452.5(b) has been construed as a hearsay exception allowing the record of a prior conviction to be used to prove both the fact of conviction and the occurrence of the underlying act or acts. *People v Duran* (2002) 97 CA4th 1448, 1460, 119 CR2d 272. This hearsay exception permits using a misdemeanor conviction to impeach a witness. Conduct underlying a misdemeanor conviction involving moral turpitude may also be admissible. *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418.

Ø **Note:** Although Pen C §1054.1(d) does not expressly require the prosecution to disclose prior misdemeanor convictions, federal due process mandates the disclosure of misdemeanor convictions on defense request. *People v Santos* (1994) 30 CA4th 169, 178, 35 CR2d 719.

Impeachment of exculpatory statement of nontestifying defendant. A defendant's prior felony convictions are admissible under Evid C §§788 and 1202 to attack the defendant's credibility when out-of-court exculpatory statements made by the defendant are admitted into evidence at the defendant's request but the defendant does not testify at trial. *People v Jacobs* (2000) 78 CA4th 1444, 1446, 93 CR2d 783. However, the prosecution has no right to introduce an exculpatory statement by the defendant that is otherwise irrelevant for the purpose of impeaching it. *People v Fritz* (2007) 153 CA4th 949, 956, 62 CR3d 885.

To preserve a claim of error, defendant must testify. To preserve a claim of error concerning a defendant's impeachment with a prior conviction, the defendant must testify. *People v Collins* (1986) 42 C3d 378, 228 CR 899.

There are restrictions on use of prior convictions, and misdemeanor conduct, to impeach. California Constitution article I, §28(f)(4), part of Proposition 8, purported to eliminate all restrictions on impeachment with prior convictions. In *People v Castro* (1985) 38 C3d 301, 211 CR 719, however, the California Supreme Court held that §28(f) does *not* mandate that the trial court admit all prior felony convictions on request to impeach a defendant or witness. *Castro* and later cases have placed limits on the use of prior convictions to impeach.

The restrictions that have been placed on using priors for impeachment include the following:

- The prior conviction must involve moral turpitude (*People v Collins* (1986) 42 C3d 378, 389, 228 CR 899; see discussion in §24.46);
- The risk of undue prejudice from allowing impeachment with the prior must not substantially outweigh its probative value, on the basis of Evid C §352 (*People v Castro* (1985) 38 C3d 301, 211 CR 719; see further discussion in §24.47);
- The use of prior juvenile adjudications is limited (see discussion in §24.5); and
- The prior cannot be constitutionally invalid (*Loper v Beto* (1972) 405 US 473, 483, 31 L Ed 2d 374, 381, 92 S Ct 1014).

People v Field (1995) 31 CA4th 1778, 1785, 37 CR2d 803, held that Proposition 8 did not abrogate the Evid C §788 limitations on use of felony priors to impeach. The limitations found in §788 forbid use of a prior to impeach in these situations:

- A pardon based on innocence or a certificate of rehabilitation and pardon was granted; and
- With regard to witnesses other than the defendant, the charge was dismissed under Pen C §1203.4, or a similar

procedure in another jurisdiction; expunged priors can be used to impeach defendants (Evid C §788(c)-(d); see also *People v Field, supra*).

The following factors do *not* necessarily require exclusion of a prior conviction for impeachment, although they might cause the risk of undue prejudice to substantially outweigh the probative value:

- The court is not required to exclude prior convictions because there are too many of them (*People v Dillingham* (1986) 186 CA3d 688, 695, 231 CR 20; *People v Castro* (1986) 186 CA3d 1211, 231 CR 269); and
- The court is not required to exclude a prior because it is too similar to the current charge (*People v Heishman* (1988) 45 C3d 147, 170, 246 CR 673).

Ø **Note:** The facts underlying a prior conviction may be admissible as a similar act of misconduct. See discussion in §§24.52-24.55.

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§24.46 B. Which Priors Involve Moral Turpitude

Prior conviction must have involved moral turpitude. A prior conviction must have involved moral turpitude to be used to impeach a witness, including a defendant. *People v Collins* (1986) 42 C3d 378, 389, 228 CR 899. The prior does not have to involve dishonesty; moral turpitude means a readiness to do evil. *People v Castro* (1985) 38 C3d 301, 314, 211 CR 719. *Castro* found justification for requiring that a prior conviction have involved moral turpitude in US Const amend XIV (inferences must "be based on a rational connection between the fact proved and the fact to be inferred" to comport with the Due Process Clause (38 C3d at 313)) and in Justice Holmes's statement that impeachment with a prior felony conviction is relevant only if it gives reason for disbelieving a witness (38 C3d at 314).

Court must use least adjudicated elements test. To decide whether a prior is one of moral turpitude, the court must refer to the least adjudicated elements of the crime. The least adjudicated elements test means that the court must look to the elements of the statute of which the defendant was convicted, and not to the defendant's actual conduct or to information in the charging document on which the prior conviction was based (by analogy to *People v Crowson* (1983) 33 C3d 623, 632, 190 CR 165). *People v Castro* (1985) 38 C3d 301, 316, 211 CR 719. See *People v Campbell* (1994) 23 CA4th 1488, 1492, 28 CR2d 716.

Crimes involving moral turpitude. The *Castro* court cited child molestation, crimes of violence, and torture as crimes demonstrating moral turpitude. *People v Castro* (1985) 38 C3d 301, 315, 211 CR 719. Following *Castro,* appellate courts have found the following additional crimes to involve moral turpitude:

- Accessory after the fact (Pen C §32; *In re Young* (1989) 49 C3d 257, 264, 261 CR 59);
- Arson (*People v Miles* (1985) 172 CA3d 474, 482, 218 CR 378);
- Assault with a deadly weapon (*People v Cavazos* (1985) 172 CA3d 589, 593, 218 CR 269);
- Assault with deadly weapon or by force likely to produce great bodily injury (Pen C §245(a)(1); *People v Elwell* (1988) 206 CA3d 171, 253 CR 480; see also *People v Thomas* (1988) 206 CA3d 689, 254 CR 15, holding that §245(a)(1) involves moral turpitude);
- Assault with intent to commit murder (*People v Olmedo* (1985) 167 CA3d 1085, 1097, 213 CR 742);
- Assault with intent to commit rape (*People v Morris* (1991) 53 C3d 152, 217, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394; *People v Bonilla* (1985) 168 CA3d 201, 214 CR 191);
- Auto theft (*People v Green* (1995) 34 CA4th 165, 40 CR2d 239; *People v Zataray* (1985) 173 CA3d 390, 399, 219 CR 33);
- Battery by an inmate on a noninmate (*People v Williams* (1985) 169 CA3d 951, 957, 215 CR 612);
- Battery on a police officer (*People v Lindsay* (1989) 209 CA3d 849, 857, 257 CR 529; *People v Clarida* (1987) 197 CA3d 547, 552, 249 CR 363);
- Burglary (*People v Muldrow* (1988) 202 CA3d 636, 645, 248 CR 891; *People v Castro* (1986) 186 CA3d 1211, 231 CR 269; *People v Almarez* (1985) 168 CA3d 262, 214 CR 105; *People v Boyd* (1985) 167 CA3d 36, 212 CR 873);
- Contributing to delinquency of a minor (see *In re Duggan* (1976) 17 C3d 416, 130 CR 715);
- Conspiracy to possess an unregistered firearm (18 USC §371; *People v White* (1992) 4 CA4th 1299, 1305, 6 CR2d 259);
- Corporal injury of a child (*People v Brooks* (1992) 3 CA4th 669, 672, 4 CR2d 570);
- Discharge of firearm at inhabited dwelling (Pen C §246; *People v White, supra*);
- Driving under the influence (felony) (Veh C §23152; *People v Forster* (1994) 29 CA4th 1746, 1757, 35 CR2d 705);
- Escape with or without violence (Pen C §§4530(a), (c), 4532(b); *People v Lang* (1989) 49 C3d 991, 1009, 264 CR 386; *People v Waldecker* (1987) 195 CA3d 1152, 1156, 241 CR 650; *People v Lee* (1991) 229 CA3d 1504, 1507, 281 CR 9);
- Evading a peace officer (Veh C §2800.2; *People v Dewey* (1996) 42 CA4th 216, 223, 49 CR2d 537);

- Extortion (see *Libarian v State Bar* (1952) 38 C2d 328, 330, 239 P2d 865);
- Failing to appear (felony) (see *People v Maestas* (2005) 132 CA4th 1552, 1556, 34 CR3d 503);
- False imprisonment (felony) (*People v Cornelio* (1989) 207 CA3d 1580, 1583, 255 CR 775);
- Forgery (*People v Parrish* (1985) 170 CA3d 336, 349, 217 CR 700; *People v Almarez, supra*);
- Grand theft (*People v Boyd* (1985) 167 CA3d 36, 45, 212 CR 873);
- Grand theft auto (Veh C §10851; *People v Rodriguez* (1986) 177 CA3d 174, 178, 222 CR 809);
- Hit and run (felony) (Veh C §20001; *People v Bautista* (1990) 217 CA3d 1, 7, 265 CR 661);
- Indecent exposure (felony) (*People v Ballard* (1993) 13 CA4th 687, 691, 16 CR2d 624);
- Kidnapping (*People v Zataray* (1985) 173 CA3d 390, 400, 219 CR 33);
- Lewd or lascivious act on a child under Pen C §288(a) (*People v Massey* (1987) 192 CA3d 819, 823, 237 CR 734);
- Murder (*People v Johnson* (1991) 233 CA3d 425, 459, 284 CR 579);
- Perjury (Pen C §118; see *People v Rollo* (1977) 20 C3d 109, 118, 141 CR 177);
- Pimping and pandering (*People v Jaimez* (1986) 184 CA3d 146, 150, 228 CR 852);
- Possession of a firearm by a felon (*People v Littrel* (1986) 185 CA3d 699, 703, 230 CR 83);
- Possession for sale of controlled substances (*People v Castro* (1985) 38 C3d 301, 317, 211 CR 719);
- Possession for sale of marijuana (*People v Standard* (1986) 181 CA3d 431, 435, 226 CR 62);
- Rape (*People v Mazza* (1985) 175 CA3d 836, 844, 221 CR 640), and attempted rape (*People v Morris, supra*);
- Receiving/possessing stolen property (*People v Rodriguez* (1986) 177 CA3d 174, 179, 222 CR 809);
- Resisting an executive officer by force or violence (*People v Williams* (1999) 72 CA4th 1460, 86 CR2d 62);
- Robbery (*People v Stewart* (1985) 171 CA3d 59, 66, 215 CR 716);
- Sale of heroin (*People v Hunt* (1985) 169 CA3d 668, 674, 215 CR 429);
- Spousal abuse (Pen C §273.5; *People v Rodriguez* (1992) 5 CA4th 1398, 1402, 7 CR2d 495);
- Tax evasion (see *In re Hallinan* (1954) 43 C2d 243, 248, 272 P2d 768);
- Terrorist threats (Pen C §422; *People v Thornton* (1992) 3 CA4th 419, 424, 4 CR2d 519);
- Threat to commit crime that will result in death or great bodily injury (*People v Thornton* (1992) 3 CA4th 419, 4 CR2d 519);
- Transportation of controlled substance (*People v Navarez* (1985) 169 CA3d 936, 949, 215 CR 519);
- Vandalism (felony) (Pen C §594; *People v Campbell* (1994) 23 CA4th 1488, 1493, 28 CR2d 716); and
- Voluntary manslaughter (*People v Partner* (1986) 180 CA3d 178, 187, 225 CR 502).

Crimes not involving moral turpitude. Crimes not involving moral turpitude as a matter of law include the following:

- Battery resulting in serious bodily injury (Pen C §243(d); *People v Mansfield* (1988) 200 CA3d 82, 89, 245 CR 800);
- Child endangerment (Pen C §273a; *People v Sanders* (1992) 10 CA4th 1268, 1274, 13 CR2d 205);
- Involuntary manslaughter (*People v Solis* (1985) 172 CA3d 877, 883, 218 CR 469);
- Marijuana possession (*People v Valdez* (1986) 177 CA3d 680, 697, 223 CR 149);
- Maintaining a place for narcotics use (*People v Vera* (1999) 69 CA4th 1100, 82 CR2d 128);
- Simple assault (Pen C §240; *People v Cavazos, supra*);
- Simple possession of a controlled substance (*People v Castro* (1985) 38 C3d 301, 317, 211 CR 719); and
- Statutory rape conviction suffered before *People v Hernandez* (1964) 61 C2d 529, 39 CR 361 (which established defense of good faith belief in victim's age) does not necessarily involve moral turpitude and may not be used to impeach. *People v Flanagan* (1986) 185 CA3d 764, 230 CR 64. Compare *People v Fulcher* (1987) 194 CA3d 749, 236 CR 845 (conviction occurred after 1964 and *Hernandez*).

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Source: Criminal Law/California Criminal Law Procedure and Practice/24 PRIOR CONVICTIONS AND UNCHARGED MISCONDUCT/§24.47 C. Trial Court Must Exercise Discretion Under Evid C §352 in Determining Admissibility of Priors to Impeach

§24.47 C. Trial Court Must Exercise Discretion Under Evid C §352 in Determining Admissibility of Priors to Impeach

Evidence Code §352 applies. A prior should be excluded for impeachment purposes when the risk of undue prejudice substantially outweighs its probative value, based on §352. *People v Castro* (1985) 38 C3d 301, 211 CR 719. Proposition 8 had no effect on this rule. 38 C3d at 309. See also *People v Collins* (1986) 42 C3d 378, 392, 228 CR 899.

Although *Castro* held that trial courts err by refusing to exercise discretion under Evid C §352, most appellate courts have found no error or harmless error when the judge simply recites that a ruling was the result of the §352 weighing process, without engaging in an on-the-record analysis of the probative value of the prior versus its prejudicial effect. Compare *People v Nguyen* (1988) 204 CA3d 181, 187, 251 CR 40 (no error), *People v Clarida* (1987) 197 CA3d 547, 552, 249 CR 363 (harmless error), and *People v Castro* (1986) 186 CA3d 1211, 231 CR 269 (harmless error), with *People v Flanagan* (1986) 185 CA3d 764, 773, 230 CR 64 (reversing and remanding for exercise of trial court discretion under §352 and for determination of prejudice).

Ø **Note:** If a judge rules on a motion in limine that a prior conviction is inadmissible under Evid C §352, the prosecutor should consider renewing the motion to admit the prior after the defendant testifies, especially if the defendant misleads the trier of fact regarding his or her past.

Four *Beagle* factors should guide trial court's exercise of discretion under Evid C §352 when defendant involved. Trial courts, in deciding whether to allow a defendant to be impeached with a prior conviction, should be guided by the four factors set out in *People v Beagle* (1972) 6 C3d 441, 453, 99 CR 313. *People v Collins, supra*.

(1) Does the prior reflect adversely on the defendant's honesty or veracity (the prior must involve moral turpitude)? See the list in §24.46 of crimes found by courts to involve, or not to involve, moral turpitude.

(2) Is the prior near or remote in time? The court can, but is not required to, exclude a prior because it is too remote in time. *People v Collins, supra; People v Burns* (1987) 189 CA3d 734, 738, 234 CR 547. In considering remoteness, the court should consider the following four factors (*People v Beagle, supra*):

- The time that has elapsed since the conviction. See *People v Burns, supra* (20-year-old conviction not necessarily remote because of subsequent lawlessness); *People v DeCosse* (1986) 183 CA3d 404, 228 CR 114 (no abuse of discretion to admit 12-year-old burglary conviction).
- The time that defendant was free between offenses. Prison time tolls remoteness. *People v Burns, supra*. For example, if a defendant was convicted 26 years ago of a felony, but spent 25 years in prison, the 25 years is tolled.
- The defendant's age. If the defendant was very young at the time of the prior conviction and the conviction is old, the court may consider the prior less probative to the defendant's credibility. *People v Burns, supra*.
- The defendant's subsequent conduct (whether he or she led a generally law-abiding life). The court can consider lawlessness subsequent to the prior conviction, including felony convictions not involving moral turpitude, along with all misdemeanor convictions. *People v Campbell* (1994) 23 CA4th 1488, 1496, 28 CR2d 716.

(3) Is the prior for conduct substantially similar to that for which the defendant is standing trial? The court is not required to exclude a prior conviction because it is too similar to the current charge. *People v Tamborrino* (1989) 215 CA3d 575, 590, 263 CR 731. Depending on the facts, a prior similar to the facts of the current offense may be more probative of the defendant's credibility. *People v Johnson* (1991) 233 CA3d 425, 443, 284 CR 579. Conversely, the danger of prejudice is higher for the same or a similar crime because the jury may be more likely to conclude that the defendant is guilty of the crime charged if the defendant previously committed the same type of crime. *People v Beagle, supra*.

(4) Will impeachment influence the defendant's decision to testify? The court should consider whether admission of the prior conviction will be likely to cause the defendant not to testify.

Ø **Note:** To raise on appeal a trial court's ruling that a prior conviction is admissible to impeach, the defendant must testify. An offer of proof by the defendant is insufficient to preserve the matter for appeal. *People v Collins, supra,* relying on *Luce v U.S.* (1984) 469 US 38, 83 L Ed 2d 443, 105 S Ct 460.

The *Beagle-Collins* factors do not rigidly require admission or exclusion of a prior and are not the only factors the trial court can consider. Other relevant circumstances may also be relied on. *People v Collins, supra; People v Tamborrino* (1989) 215 CA3d 575, 588, 263 CR 731.

Number of prior convictions that may be used to impeach. The court is not required to exclude prior convictions because there are too many of them. Under Evid C §352, however, the court has discretion to limit the number of priors admitted. *People v Castro, supra; People v Dillingham* (1986) 186 CA3d 688, 695, 231 CR 20. See also *People v Muldrow* (1988) 202 CA3d 636, 646, 248 CR 891.

Sample motion. A sample motion to preclude impeachment with a prior conviction is in California Criminal Law Forms Manual §24.2 (2d ed Cal CEB 2005).

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D. Procedures for Impeaching Witness With Prior and for Challenging Admission of Priors to Impeach

§24.48 1. Impeaching Witness With Prior

Any party can impeach any witness, including the defendant, with a prior conviction (Evid C §788; *People v Harris* (1989) 47 C3d 1047, 1090 n22, 255 CR 352) or can offer such other evidence of a prior conviction as may be relevant to issues on trial. See Evid C §§210, 352.

In the usual case, the prosecution seeks to impeach the defendant; however, both the prosecution and the defense may impeach witnesses with priors. Evid C §785. The customary practice is for one party to raise the impeachment issue as an in limine motion in the trial court. In this way, the court rules on the admissibility of the impeaching prior outside the jury's presence. When the prejudicial effect cannot be evaluated without judicial knowledge of the contents of the defendant's testimony, the defense can make an offer of proof, or the defendant can testify at an in camera hearing. The trial court is not constitutionally required to make its ruling before the witness testifies and can defer its decision until after the witness has taken the stand. *People v Washington* (1989) 211 CA3d 207, 213, 259 CR 307. See §30.19 on in limine motions.

A witness can be impeached with the type of prior discussed in §24.45 by eliciting testimony of the witness being impeached on direct or cross-examination, or by introducing a certified record of judgment. Evid C §788; Pen C §969b.

Ø **Note:** To soften the impact of an impeaching prior for a jury, counsel for the party relying on the witness may wish to elicit an acknowledgment of the prior on direct examination.

If the prior is similar to the offense charged, the trial court can "sanitize" it by allowing impeachment only by a generic reference, *e.g.,* a "felony involving theft." See *People v Massey* (1987) 192 CA3d 819, 825, 237 CR 734. The *Massey* court rejected the defense argument that the jury might speculate that the priors were for heinous crimes.

Ø **Note:** It is important for counsel to warn the witness not to volunteer any information beyond what is necessary concerning the prior. For example, a volunteered statement that the witness did not do it, or that the witness otherwise has a clean record, may allow a damaging cross-examination, or rebuttal evidence, that otherwise would be inadmissible. See *People v Rowland* (1992) 4 C4th 238, 261, 14 CR2d 377 (stated general rule but found that defense had not preserved issue for appeal because it had obtained no ruling from trial court on issue).

Generally, examination on the details and surrounding circumstances of the crime is forbidden. See, *e.g., People v Heckathorne* (1988) 202 CA3d 458, 462, 248 CR 399 (murder conviction reversed because prosecutor cross-examined defendant on underlying facts of prior). The witness, however, may be questioned about the details of the prior if he or she "opens the door" (see Jefferson's California Evidence Benchbook §29.64 (4th ed CJA-CEB 2009)), or if the prior is being used as a similar act of misconduct (*People v Allen* (1986) 42 C3d 1222, 1271, 232 CR 849). See also *People v Freeman* (1994) 8 C4th 450, 493, 34 CR2d 558 (alibi witness's admission on cross-examination to two prior felonies allowed prosecutor to elicit testimony that defendant had been crime partner).

If the witness denies the prior, it must be proved before the jury. *People v Hayes* (1990) 52 C3d 577, 614, 276 CR 874 (although held to be nonprejudicial, defense counsel was incompetent for failing to offer evidence to establish that prosecution witness's priors were felonies after witness replied, when asked if they were felonies, "not that I know of"). The burden is on the party impeaching a witness to prove beyond a reasonable doubt that the witness suffered the prior conviction by a court or jury or by plea. Pen C §1158; *People v Lo Cicero* (1969) 71 C2d 1186, 1192, 80 CR 913.

Counsel who is cross-examining a witness cannot ask whether the witness has a prior felony conviction without some evidence to support a good faith belief that the witness did in fact suffer a prior conviction. *People v Williams* (1991) 228 CA3d 146, 152, 278 CR 801 (rap sheet is proper basis for establishing good faith belief in existence of prior). Moreover, in the event of a denial, the questioner should be prepared to show by documentary evidence that the

witness has a prior. *People v Perez* (1962) 58 C2d 229, 238, 23 CR 569 (prejudicial prosecutorial misconduct for district attorney to ask defense witness if he had been convicted of felony, receive negative answer, and not offer affirmative proof of prior). See also *People v Darcy* (1951) 101 CA2d 665, 671, 226 P2d 53 (proof of prior by prison records is improper).

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§24.49 2. Stating Objection to Use of Prior to Impeach Witness

Any error in the admission of priors to impeach is waived by a failure to make a timely objection. Evid C §353(a). The opponent of impeaching evidence must specify the ground for his or her objection. *People v Lewis* (1987) 191 CA3d 1288, 1296, 237 CR 64 (request for "findings" on whether priors involved moral turpitude is not the same as objection under Evid C §352). For example:

I object to this evidence because it is not a felony, it is too old to be relevant—it happened 12 years ago—and any probative value it might have had at one time is far outweighed by the prejudice to the witness of branding her with a conviction she has worked hard to overcome.

Ø **Note:** If this objection were made in front of a jury, the opponent might object that it is argumentative and argues facts not in evidence.

When the defendant is the one impeached, he or she must testify to preserve an objection for appeal. If the defendant fails to testify, the denial of a motion to exclude a prior for impeachment cannot be reviewed on appeal. *People v Collins* (1986) 42 C3d 378, 383, 228 CR 899; *People v Irvin* (1991) 230 CA3d 180, 187, 281 CR 195. Presumably the same rule would apply to witnesses other than the defendant.

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§24.50 3. Instructions on Impeaching Prior

Trial counsel should ask the trial court to instruct the jury that priors used to impeach are admissible for only that limited purpose and cannot be considered for any other purpose. See CALCRIM 303, 316; see also CALJIC 2.09. This instruction does not have to be read to the jury unless counsel requests it. *People v Lang* (1989) 49 C3d 991, 1020, 264 CR 386 (discussing CALJIC 2.09; now see CALCRIM 316). See Evid C §355. The trial court has no sua sponte duty to instruct on limited admissibility (see *People v Hawkins* (1995) 10 C4th 920, 942, 42 CR2d 636), but the instruction must be given on request. Bench Notes to CALCRIM 316.

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§24.51 4. Reviewing Impeachment With Prior on Appeal

The *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243, standard of review (see Cal Const art VI, §13) applies to trial court error in allowing impeachment of a witness with a prior. *People v Castro* (1985) 38 C3d 301, 319, 211 CR 719; *People v Brown* (1985) 169 CA3d 800, 808, 215 CR 494.

Ø **Note:** The federal courts are increasingly evaluating state evidentiary errors as violations of federal due process. Defense counsel might want to frame the issue, at least in the alternative, as one of federal due process. See *McKinney v Rees* (9th Cir 1993) 993 F2d 1378, 1385; *Kealohapauole v Shimoda* (9th Cir 1986) 800 F2d 1463, 1465.

If the hearing on the admissibility of prior convictions was not on the record, the appellate court can remand the case solely for a new hearing on the record on that issue. *People v Flanagan* (1986) 185 CA3d 764, 773, 230 CR 64.

It is not reversible error for judges simply to state that they have exercised their discretion under Evid C §352, and that the probative value of the prior outweighs its prejudicial effect. *People v Nguyen* (1988) 204 CA3d 181, 187, 251 CR 40. It is error for a trial court to refuse to exercise its discretion concerning the admissibility of priors for impeachment. See *People v Castro* (1986) 186 CA3d 1211, 1217, 231 CR 269.

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VI. USE OF EVIDENCE OF UNCHARGED MISCONDUCT ("OTHER BAD ACTS")

A. Admissibility of Other Bad Acts

§24.52 1. To Prove Disputed Fact Other Than Defendant's Propensity to Commit Such Acts

Evidence Code §1101(a) prohibits the admission of "evidence of a person's character," whether by opinion or reputation evidence, or evidence of specific instances of conduct to prove his or her conduct on a specified occasion. Evidence Code §1101(b) survived Proposition 8. *People v Perkins* (1984) 159 CA3d 646, 649, 205 CR 625.

Section 1101(b) permits the admission of evidence that "a person committed a crime, civil wrong, or other act when relevant to prove some fact… other than his or her disposition to commit such an act." Such acts are commonly called "similars" or "bad acts," or referred to as "other crimes evidence." Evidence of other crimes or bad acts is admissible to prove such facts as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident," or lack of a good faith belief that the victim consented to a sexual act. Evid C §1101(b). Typically, the prosecutor invokes the §1101(b) exception to permit introduction of the defendant's uncharged misconduct. However, by its terms, §1101(b) makes admissible evidence of acts of misconduct committed by other witnesses if the evidence is relevant to something other than propensity.

Ø **Warning:** Under Evid C §1108, evidence that the defendant has committed an uncharged sexual offense is admissible for all purposes in a trial in which the defendant is charged with a sexual offense. Evid C §1108(a). Similarly, Evid C §1109 makes evidence of similar misconduct admissible against the defendant in a prosecution for domestic violence or abuse of a child or an elder or dependent person. Evid C §1109(a). These provisions are discussed in §24.52A.

In contrast to impeachment by prior convictions, relevant similar bad acts may be admitted even if the defendant does not testify. See *People v Archerd* (1970) 3 C3d 615, 639, 91 CR 397; *People v Poulin* (1972) 27 CA3d 54, 65, 103 CR 623. Moreover, the similar act can have occurred before or after the offense charged. *People v Balcom* (1994) 7 C4th 414, 425, 27 CR2d 666. The similar act need not be a crime and need not have resulted in conviction. *People v Griffin* (1967) 66 C2d 459, 464, 58 CR 107; *People v St. Andrew* (1980) 101 CA3d 450, 462, 161 CR 634.

Evidence of other crimes is admissible under §1101(b) only to prove a material fact such as motive, intent, identity, or common design or plan if that fact is in dispute. *People v Thompson* (1980) 27 C3d 303, 313, 165 CR 289. But see *People v Williams* (1988) 44 C3d 883, 907 n7, 245 CR 336 (not guilty plea places every element of offense in dispute). The admission of other crimes evidence cannot be justified by the mere assertion of an admissible purpose—the particular evidence must be relevant to the ultimate fact in dispute. *People v Poon* (1981) 125 CA3d 55, 71, 178 CR 375, disapproved on other grounds in *People v Lopez* (1998) 19 C4th 282, 292, 79 CR2d 195.

When other crimes evidence is used to prove identity, the pattern and characteristics of the crimes must be so unusual and distinctive as to be "like a signature." *People v Ewoldt* (1994) 7 C4th 380, 403, 27 CR2d 646. "Common design or plan" evidence must show sufficient "common features" to support the inference that both charged and uncharged offenses are manifestations of the same design. 7 C4th at 402. See also *People v Hovarter* (2008) 44 C4th 983, 1002, 81 CR3d 299. The least degree of similarity is required to prove intent; the conduct must be sufficiently similar to support the inference that the defendant harbored the same intent in each instance. *Ewoldt,* 7 C4th at 402. See also *People v Balcom* (1994) 7 C4th 414, 27 CR2d 666.

Even though other crimes evidence is relevant under §1101(b), Evid C §352 may require its exclusion. See *People v Balcom, supra*. When reviewing the admission of evidence of the facts and circumstances of other offenses, a court must consider (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crimes evidence to prove or disprove the facts, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. A court should also determine whether the jury will consider the evidence for an improper purpose. See *People v Ewoldt, supra; People v Balcom, supra*.

Remoteness in time has been mentioned as a factor in determining the admissibility of other crimes evidence. *People v Kronemyer* (1987) 189 CA3d 314, 346, 234 CR 442. Because this evidence is inherently prejudicial, uncharged offenses are admissible only if they have substantial probative value. *People v Ewoldt, supra*.

When a defendant claims he or she did not commit an act charged as an uncharged bad act or disputes the manner in which the act was committed, the trial court must hold a hearing on that issue. Evid C §403. The burden for admitting the uncharged act is by a preponderance of the evidence. The jury must be instructed to weigh the same preliminary facts again before considering the similar act. *People v Simon* (1986) 184 CA3d 125, 228 CR 855.

In *People v Alvarez* (2002) 27 C4th 1161, 119 CR2d 903, the California Supreme Court held that the truth-in-evidence provision of Proposition 8 (former Cal Const art I, §28(d); now see Cal Const art I, §28(f)(2)), abrogated California's corpus delicti rule to the extent that the rule prohibited the introduction of a defendant's otherwise admissible statement without also introducing independent proof that a criminal act was committed. Thus, it appears that the prosecution may use a defendant's admission or confession to prove uncharged misconduct without providing independent proof of the corpus delicti. But see *People v Williams* (1988) 44 C3d 883, 910, 245 CR 336 (prosecution conceded it must prove corpus delicti of misconduct before introducing defendant's admission).

Ø **Note:** Similar bad acts should be used only when the points of similarity are numerous and the relevance of the evidence is clear because of the possibility of reversal on appeal.

Cases that upheld admission of evidence of other crimes or bad acts: *People v Lewis* (2006) 39 C4th 970, 1000, 47 CR3d 467 (uncharged threats and abuse to show motive, opportunity, identity, and "escalating campaign to retaliate" against defendant's ex-wife and family); *People v Martinez* (2000) 22 C4th 106, 91 CR2d 687 (computer printout "rap sheets"); *People v Balcom, supra* (subsequent out-of-state crimes to show common design or plan); *People v Johnson* (1988) 47 C3d 576, 253 CR 710 (cross-linked evidence for rape and murder); *People v Robbins* (1988) 45 C3d 867, 248 CR 172 (other murder to show intent to kill and intent for special circumstances); *People v Heishman* (1988) 45 C3d 147, 246 CR 673 (attempted rape to show motive for murder); *People v Rodriguez* (1986) 42 C3d 730, 230 CR 667 (crime spree as motive for murder); *People v Blackburn* (1999) 72 CA4th 1520, 1527, 86 CR2d 134 (prior stricken enhancement); *People v Feagin* (1995) 34 CA4th 1427, 1433, 40 CR2d 918 (attempt to kill witness in murder prosecution).

Cases that found error in admission of evidence of other crimes or bad acts: *People v Avitia* (2005) 127 CA4th 185, 193, 24 CR3d 887 (evidence of gang graffiti in defendant's bedroom irrelevant and prejudicial when there was no other evidence of gang activity); *People v Felix* (1993) 14 CA4th 997, 1008, 18 CR2d 113 (admission of prior robbery conviction was reversible error when case against one defendant was weak); *People v Bruce* (1989) 208 CA3d 1099, 256 CR 647 (defendant's stipulation to identity negates relevance of similar rape); *People v Valentine* (1988) 207 CA3d 697, 254 CR 822 (intravenous drug use not admissible in marijuana prosecution); *People v Harvey* (1984) 163 CA3d 90, 101, 208 CR 910 (admission of prior robbery conviction to show intent was reversible error).

Ø **Note:** Defense counsel may wish to object to similar bad acts (see §§24.52-24.55) on federal due process grounds. See *McKinney v Rees* (9th Cir 1993) 993 F2d 1378, 1385.

For further discussion of the admissibility of similar acts, see Jefferson's California Evidence Benchbook, chap 35 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Circumstantial Evidence* §§74-99 (4th ed 2000); and California Trial Objections §32.7 (Cal CEB Annual).

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§24.52A 2. To Prove Propensity

Unlike Evid C §1101(b), Evid C §§1108-1109 permit the prosecution to use evidence of uncharged crimes to prove that the defendant had the propensity to commit the charged offenses.

Under Evid C §1108(a), the prosecution may introduce evidence of uncharged sexual misconduct in a prosecution for a sexual offense. Note that for purposes of Evid C §1108, a defendant accused of first-degree felony murder with rape as the underlying felony is accused of a sexual offense. *People v Story* (2009) 45 C4th 1282, 91 CR3d 709.

Under Evid C §1109(a)(1), the prosecution may introduce evidence of uncharged acts of domestic violence in a domestic violence prosecution; under Evid C §1109(a)(2), the prosecution may introduce evidence of uncharged acts of elder or dependent person abuse in a prosecution for elder or dependent person abuse; and under Evid C §1109(a)(3), the prosecution may introduce evidence of uncharged acts of child abuse in a prosecution for an offense involving child abuse (see Pen C §273d (acts constituting child abuse)). Note that the admission of prior acts of domestic violence at trial for a murder that took place before the codification of Evid C §1109 has been found not to violate the proscription against the ex post facto application of laws. *People v Flores* (2009) 176 CA4th 1171, 1176, 98 CR3d 450.

The prosecution must give the defense advance notice of its intention to introduce other crimes evidence under Evid C §1108 or §1109. See Evid C §§1108(b), 1109(b). Both §§1108 and 1109 preserve the trial court's discretion to exclude evidence that is unduly prejudicial under Evid C §352.

> Ø **Warning:** When the prosecution plans to introduce other crimes evidence under Evid C §1108 or §1109, defense counsel must make a timely and specific Evid C §352 objection, especially when the evidence of the charged crime is weak or insubstantial. Under §352, the trial court can exclude evidence because its admission will cause undue consumption of time, confuse the issues, mislead the jury, or create a substantial danger of undue prejudice.

In *People v Falsetta* (1999) 21 C4th 903, 89 CR2d 847, the California Supreme Court upheld §1108 against a due process challenge, concluding that the trial court's discretion to exclude unduly prejudicial evidence under Evid C §352 adequately protects the defendant's right to a fair trial.

> Ø **Warning:** The defense must object to the admission of other crimes evidence to preserve any remaining due process claims arising from its introduction. See *U.S. v LeMay* (9th Cir 2001) 260 F3d 1018. The court in *LeMay* upheld Fed R Evid 414, the federal equivalent to Evid C §§1108-1109, against due process challenge but warned that the rule "is not a blank check entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant." 260 F3d at 1022. On objecting to other crimes evidence, see §24.54.

The burden of proof for the other crimes evidence is preponderance of the evidence. *People v Durham* (1969) 70 C2d 171, 187 n15, 74 CR 262. See also *People v Medina* (1995) 11 C4th 694, 763, 47 CR2d 165; *People v Lisenba* (1939) 14 C2d 403, 429, 94 P2d 569. In *People v Van Winkle* (1999) 75 CA4th 133, 145, 89 CR2d 28, the court of appeal held that there is no constitutional requirement that other crimes evidence be proved beyond a reasonable doubt even when the jury is allowed to use the evidence to infer guilt. Also, in *People v Reliford* (2003) 29 C4th 1007, 130 CR2d 254, the California Supreme Court held that the 1999 version of CALJIC 2.50.01, instructing that other crimes evidence may be proved by preponderance, did not confuse the jury about the ultimate burden of proof to find guilt. Although *Reliford* upheld the earlier version of the instruction, CALJIC 2.50.01 was modified to clarify the relationship between proof of the uncharged offense and conviction.

CALCRIM 1191, on evidence of uncharged sex offenses, provides:

> The People presented evidence that the defendant committed the crime[s] of <*insert description of offense[s]*> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a

different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] *<insert charged sex offense[s]>*, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of *<insert charged sex offense[s]>*. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of *<insert other permitted purpose, e.g., determining the defendant's credibility>*].]

In accord with *Reliford,* it has been held that CALCRIM 1191 does not violate due process despite semantic differences between it and the former CALJIC 2.50.01. *People v Cromp* (2007) 153 CA4th 476, 480, 62 CR3d 848. There are virtually identical pattern instructions on evidence of uncharged domestic violence offenses (CALCRIM 852; see also CALJIC 2.50.02) and on evidence of uncharged acts of elder or dependent adult abuse (CALCRIM 853; see also CALJIC 2.50.03). See *People v Reyes* (2008) 160 CA4th 246, 253, 72 CR3d 586 (CALCRIM 852 does not violate due process).

Ø **Warning:** Defense counsel who wants the trial court to modify the pattern instruction or to give any other proper instructions on other crimes evidence introduced under Evid C §1108 or §1109 must request them; otherwise, any potential instructional issue will be waived. For example, defense counsel may want to request a limiting instruction when the evidence admitted under §1108 or §1109 is not relevant to all counts charged. See *People v Dallas* (2008) 165 CA4th 940, 958, 81 CR3d 521.

Evidence of an uncharged sexual offense is admissible under §1108 even if that uncharged offense occurred *after* the charged offense. *People v Medina* (2003) 114 CA4th 897, 8 CR3d 158. In a subsequent prosecution, evidence of prior conduct is admissible under §1108 if that conduct constituted a sexual offense, regardless of whether that conduct resulted in a conviction for a crime that is not a sexual offense. *People v Lopez* (2007) 156 CA4th 1291, 1296, 68 CR3d 376.

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§24.53 B. Introducing Evidence of Other Crimes

Evidence of other crimes under Evid C §1101(b) is introduced the same way as any other evidence in the case, in compliance with the Evidence Code. Usually, the victim of the other crime testifies. However, other evidence, including official court records, may be admissible to prove the prior offense. Evid C §452.5(b); *People v Wesson* (2006) 138 CA4th 959, 967, 41 CR3d 883.

Ø **Note:** The prosecutor may need to economize to avoid an adverse finding under Evid C §352 that the undue consumption of time or danger of confusing the issues outweighs the probative value of the other crimes evidence.

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§24.54 C. Procedure for Challenging Evidence of Other Crimes

If the defense does not object at trial, the issue will be waived on appeal. *People v Allen* (1986) 42 C3d 1222, 1271, 232 CR 849. Although no particular form of objection is required, the objection must alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought. A general relevancy objection is inadequate to preserve the issue for appeal. *People v Williams* (1988) 44 C3d 883, 906, 245 CR 336. Once an objection is made, the prosecution bears the burden of demonstrating admissibility. 44 C3d at 906. The federal courts require the prosecution to "articulate precisely the essential hypothesis" for introducing evidence of the similar crime. See *U.S. v Alfonso* (9th Cir 1985) 759 F2d 728, 739; *U.S. v Mehrmanesh* (9th Cir 1982) 689 F2d 822, 830. Defense counsel in state courts may want to request a similar statement from the prosecutor.

Determining the legal admissibility of other crimes evidence is solely a question of law. *People v Simon* (1986) 184 CA3d 125, 129, 228 CR 855. When a defendant claims that he or she did not commit the uncharged bad act, however, a question of fact is presented that the jury must resolve before any legal inference may be drawn. When a defendant disputes the manner in which the act was committed, that is a preliminary fact that must be resolved before the trial court can evaluate its relevancy and admissibility. 184 CA3d at 130.

> Ø **Note:** To avoid prejudicing the defendant in front of the jury, the admissibility of other crimes evidence is usually determined out of the jury's presence at an in limine hearing. See §30.19 on how to be sure in limine objections have been preserved.

If the trial court admits evidence that the defendant committed an uncharged sex offense, it must also admit evidence that the defendant was acquitted of that offense. *People v Mullens* (2004) 119 CA4th 648, 663, 14 CR3d 534 (error reviewed using *Watson* standard).

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§24.55 D. Instructions

Defense counsel should request a limiting instruction concerning evidence of other bad acts, modeled on CALCRIM 1191, 375, 852, or 853. See also CALJIC 2.50.01, 2.50.1, and 2.50.02. Although the trial court need not instruct sua sponte on the limited admissibility of other crimes evidence (*People v Hawkins* (1995) 10 C4th 920, 942, 42 CR2d 636), to diminish the risk of instructional error, a trial court should instruct even in the absence of a request by either party.

Ø **Note:** Unlike evidence admitted under Evid C §1101(b), there are no limitations on the use the jury may make of evidence admitted under Evid C §§1108-1109.

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25

TERMINATION OF PROSECUTION WITHOUT JUDGMENT

SUSAN HORST
JAMES A. LASSART

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§25.1 I. INTRODUCTION

There are a number of means by which a criminal prosecution may be terminated, permanently or temporarily, without a conviction or a "not guilty" jury verdict. This chapter will discuss some of them and give an overview of others discussed in greater detail elsewhere; see the chapter outline above.

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§25.2 II. CHART: DEADLINES

Action	Deadline	Authority
Motion for probable cause determination for defendant in custody charged with misdemeanor; a second dismissal based on no probable cause is a bar to further prosecution.	In open court, at time of defendant's first appearance.	Pen C §991.
Demurrer.	In open court before plea is entered unless court allows it to be made at later time.	Pen C §§1003-1004.
Plea of former judgment or double jeopardy.	In open court at time of entry of plea, in conjunction with plea of not guilty.	Pen C §§654, 656, 1016, 1017, 1118.2.
Acknowledgment of satisfaction by victim, injured by act constituting misdemeanor, who has civil remedy ("civil compromise").	In open court, when civil compromise has been reached.	Pen C §§1377-1379.
Dismissal of charges after successful diversion.	At end of diversion period.	Pen C §§1000.3, 1001.7, 1001.31, 1001.54, 1001.74.
Dismissal of complaint for defendant in custody if preliminary examination begins:		
(1) Beyond 10 *court* days after date of arraignment, plea, or reinstatement without personal waiver or established good cause; or	(1) In open court on or after 10 *court* days.	(1) Pen C §859b.
(2) Beyond 60 calendar days after date of arraignment, plea, or reinstatement.	(2) In open court on or after 60 calendar days.	(2) Pen C §859b.
Dismissal of complaint if preliminary hearing is not completed at one session, unless good cause shown by affidavit postpones it.	In open court, at time preliminary hearing reconvenes.	Pen C §861.
Dismissal when not sufficient cause to believe public offense has been committed.	In open court at preliminary hearing.	Pen C §871.
Motion to reduce felony to misdemeanor.	In open court before preliminary hearing magistrate enters order holding defendant to answer.	Pen C §17(b)(5); see *Malone v Superior Court* (1975) 47 CA3d 313, 317, 120 CR 851.
Dismissal of action if information not filed within 15 days after holding to answer.	In court at time information filed.	Pen C §1382(a)(1).
Dismissal of action if trial begins beyond 30 calendar days for misdemeanors or 60 calendar days for felonies without personal, general waiver.	In open court on or after 30 or 60 calendar days, as relevant.	Pen C §1382(a)(2)-(3).

Motion to set aside indictment for lack of legal commitment or lack of probable cause.	In superior court, on or after arraignment, by Pen C §995 motion.	Pen C §995.
Court discharges jury for lack of jurisdiction of offense, or because facts charged do not constitute offense punishable by law.	No time given in statute.	Pen C §1113.
Request judge dismiss on own motion in furtherance of justice.	At any time before, during, or after trial.	Pen C §1385; *People v Superior Court (Howard)* (1968) 69 C2d 491, 501, 72 CR 330.
Request judge dismiss after completion of drug treatment.	After successful completion of probation.	Pen C §1210.1; *People v Hatch* (2000) 22 C4th 260, 268, 92 CR2d 80.
California state prisoner serving sentence sends written request to DA to be brought to trial or to be sentenced on California case.	At any time while serving sentence and another case is pending against prisoner.	Pen C §1381.
Federal prisoner serving sentence in California sends written request to DA to be brought to trial or be sentenced on California case.	At any time while serving sentence and another case is pending against prisoner.	Pen C §1381.5.

For chart of deadlines and discussion of Pen C §1382 dismissals, see chap 19.

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III. DISCHARGE

§25.3 A. Discharge for Failure to Initiate Prosecution

If there is no complaint on file at the date and time a defendant has been cited to appear in court, the defendant is entitled to a discharge from custody, bail, or own recognizance obligations for failure to initiate prosecution. Such discharges are not dismissals as defined by Pen C §1387. The statute of limitations continues to run until a complaint or an indictment is filed. See Pen C §§799-805, discussed in §19.14.

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§25.4 B. Discharge for Defendant to Testify for Prosecution or Defense

A defendant in a criminal action is a competent witness for himself or herself or for a codefendant. However, a defendant may not be called as a witness without his or her consent. Evid C §930; *People v Haldeen* (1968) 267 CA2d 478, 73 CR 102. Before charging, if the prosecution wishes to compel a potential defendant to testify in a codefendant's case, it may refrain from filing a criminal complaint against the defendant either by granting immunity (see chap 49) or by assisting with a civil resolution instead of filing a criminal complaint. CCP §33. When the defendant has been charged, the prosecution may request immunity under Pen C §1324 (felony) or Pen C §1324.1 (misdemeanor), or request discharge of a codefendant during trial before the defense has presented its case (Pen C §1099). The court may discharge a defendant during trial because of insufficient evidence so that the defendant may be a witness for his or her codefendant. Pen C §1100.

A court's action under Pen C §1099 or §1100 is "an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense." Pen C §1101. The "acquittal" achieved under these provisions is not, however, an adjudication that the defendant is not guilty of the crime charged. See *People v Hadden* (1947) 79 CA2d 635, 637, 180 P2d 371.

Once a defendant is discharged under §1099, the court may not reverse the order discharging him or her, because the court no longer has jurisdiction over the defendant. *Bates v Superior Court* (1951) 107 CA2d 656, 658, 237 P2d 544. For further discussion of immunity, see chap 49.

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IV. CIVIL COMPROMISE

§25.5 A. Misdemeanor Cases

When the victim of a misdemeanor offense has a civil remedy, the court has the discretion to order the prosecution stayed and the defendant discharged by following the procedures outlined in Pen C §§1377-1379. See *Hoines v Barney's Club, Inc.* (1980) 28 C3d 603, 613, 170 CR 42. A county may be considered the injured party under the civil compromise statutes. *People v Strub* (1975) 49 CA3d Supp 1, 122 CR 374.

Discharge based on civil compromise is a bar to another prosecution for the same offense. Pen C §1378. The rules on civil compromise are as follows:

- Civil compromise is unavailable for the following violations: offenses committed against a peace officer while executing the duties of his or her office (Pen C §1377(a)), riotously (Pen C §1377(b)), with an intent to commit a felony (Pen C §1377(c)); offenses committed in violation of a court order as described in Pen C §273.6 or §273.65 (Pen C §1377(d); certain exceptions as set out in Pen C §1377); offenses committed in a domestic violence matter by or on a family or household member or another person when the violation involves a person described in Fam C §6211 or Pen C §13700(b) (Pen C §1377(e)), on an elder in violation of Pen C §368 or Welf & I C §15656 (Pen C §1377(f)), or on a child as described in Pen C §647.6 or §11165.6 (Pen C §1377(f)). There is no requirement in Pen C §§1377-1379 that the prosecutor join in a civil compromise.

  Ø **Note:** There is a division of authority on whether hit-and-run cases (Veh C §§20001-20004) may be compromised under Pen C §§1377-1379. Compare *People v McWhinney* (1988) 206 CA3d Supp 8, 12, 254 CR 205 (no), with *People v Tischman* (1995) 35 CA4th 174, 40 CR2d 650 (yes).

- The court may not reduce a felony to a misdemeanor and then order it dismissed under the civil compromise statutes without the prosecution's consent unless the court has found that the defendant had no felonious intent. *People v Moulton* (1982) 131 CA3d Supp 10, 182 CR 761; *People v Strub* (1975) 49 CA3d Supp 1, 122 CR 374.
- The victim must appear in court and acknowledge that he or she has received satisfaction for the injury. Pen C §1378. Some judges do not require the victim's presence if there is some proof of the agreement, such as a declaration or affidavit or the prosecutor's representation that he or she has talked with the victim.
- Either the defense or the victim must pay the costs of the prosecution. Pen C §1378.
- The reasons for the compromise must be recorded in a minute order. Pen C §1378. It is insufficient to have the court's explanation only in the reporter's transcript. *People v McWhinney* (1988) 206 CA3d Supp 8, 11, 254 CR 205.

In *People v Moulton* (1982) 131 CA3d Supp 10, 21, 182 CR 761, the court recommended that the trial court consider the following issues in deciding whether to exercise its discretion to dismiss after a civil compromise:

- Whether the criminal violation is coextensive with the civil injury;
- Whether the injury to the public is fully vindicated by a private settlement; and
- Whether the victim's agreement to settle is voluntary.

  Ø **Note:** It is a crime to condition settlement of a civil claim on the nonprosecution of a criminal action. Pen C §153; *People v Pic'l* (1982) 31 C3d 731, 183 CR 685.

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§25.6 B. Felony Cases

The prosecution may assist in a civil resolution of any crimes against property that could be charged under Pen C §§450-593(g) instead of filing a complaint. Included in these crimes are arson, burglary, forgery, grand theft, embezzlement, extortion, insurance crimes, and several other felonies. CCP §33.

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§25.7 V. DEMURRER

A demurrer is a legal objection to the sufficiency of a pleading, attacking what appears on the face of the document. *People v Hale* (1965) 232 CA2d 112, 120, 42 CR 533. The demurrer must be made in open court before a plea is entered unless the court allows it to be made at a later time. Pen C §§1003-1004. If a demurrer is sustained, and the defect can be remedied by amending the pleading, the court must give the prosecution an opportunity, not to exceed 10 days, to amend the pleading. See Pen C §1007. Not all defects can be cured by amendment. See, *e.g., People v Wright* (1938) 26 CA2d 197, 209, 79 P2d 102 (pleading cannot be amended to charge offense for which evidence was not adduced at preliminary hearing).

If a demurrer is sustained without leave to amend, or if a demurrer is sustained with leave to amend but no amendment is made within the time fixed, the action must be dismissed. Pen C §1008. The prosecutor then has the option of filing a new complaint or information or submitting the case to the grand jury. Pen C §1007. The court must permit the prosecutor to amend the charging document if amendment is possible. *People v Witt* (1975) 53 CA3d 154, 163, 125 CR 653, disapproved on other grounds in *People v Posey* (2004) 32 C4th 193, 205, 8 CR3d 551.

For further discussion of demurrers, see §§7.19-7.26.

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VI. DISMISSAL IN THE INTERESTS OF JUSTICE (PEN C §1385)

A. Procedures

§25.8 1. Motion by Prosecutor or Court

Either a judge or a magistrate may dismiss a case under Pen C §1385. The motion may be made by the prosecutor or by the court. Pen C §1385(a). A Pen C §1385 motion is the only method available to the prosecutor to discontinue a prosecution after an information has been filed or accusation has been found by a grand jury. Pen C §1386 (nolle prosequi abolished); *Bradley v Lacy* (1997) 53 CA4th 883, 61 CR2d 919.

Ø **Note:** A prosecutor who moves to dismiss cannot appeal from the dismissal. *People v Caserta* (1971) 14 CA3d 484, 92 CR 382.

Defense counsel does not have the right to move for dismissal in the interests of justice but may invite the court to consider dismissing a case on its own motion. *People v Superior Court (Flores)* (1989) 214 CA3d 127, 137, 262 CR 576 (defendant made "motion"; court's dismissal was reversed because record did not reflect that court expressly exercised its authority under §1385); *People v Ritchie* (1971) 17 CA3d 1098, 1104, 95 CR 462. See also *People v Harris* (1991) 227 CA3d 1223, 1225, 278 CR 391 (calling suggestion a "*Williams* motion," after *People v Williams* (1981) 30 C3d 470, 489, 179 CR 443); *People v Lopez* (1988) 198 CA3d 135, 140, 243 CR 590, citing *People v George* (1984) 157 CA3d 1053, 1058, 204 CR 329.

Ø **Note:** Not only should defense counsel be careful to only suggest a dismissal so that the dismissal is on the court's own motion, but counsel should make sure that the court enters its reasons in the minutes, as required by Pen C §1385(a). For discussion, see §25.12.

There are limits to the court's discretion to dismiss under §1385. For discussion, see §§25.14-25.20; see also §§24.42-24.43. In addition, there are explicit statutory limitations on the court's power to dismiss certain findings under Pen C §1385. For a list of provisions limiting or eliminating the court's §1385 discretion, see §37.41.

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§25.9 2. Time for Motion

A case may be dismissed under Pen C §1385 at any time before, during, or after trial. *People v Hatch* (2000) 22 C4th 260, 92 CR2d 80 (after jury deadlocked and mistrial declared); *People v Superior Court (Howard)* (1968) 69 C2d 491, 503, 72 CR 330 (after jury returned verdict of guilty); *People v Polk* (1964) 61 C2d 217, 228, 37 CR 753 (after defense commenced its case); *People v Valenti* (1957) 49 C2d 199, 202, 316 P2d 633 (after prosecution commenced its case); *People v Bordeaux* (1990) 224 CA3d 573, 273 CR 717 (after jury reported deadlock); *In re Krieger* (1969) 272 CA2d 886, 77 CR 822 (after entry of guilty plea); *People v Silva* (1965) 236 CA2d 453, 455, 46 CR 87 (before trial).

When the dismissal is part of a negotiated plea, it is advisable that the court take the motion to dismiss under submission until the time of sentencing in order to have full information about the case from the probation report before deciding whether to exercise its discretion to dismiss a felony charge. See *People v Beasley* (1970) 5 CA3d 617, 636, 85 CR 501. This procedure avoids the problems that may result from a premature dismissal if the defendant later withdraws his or her plea of guilty. See *People v Municipal Court (Martinez)* (1971) 14 CA3d 362, 366, 92 CR 248.

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§25.10 3. Notice to Prosecutor

When the court, on its own motion, seeks to dismiss an action, it should first give the prosecutor notice and a reasonable opportunity to be present so that he or she may submit additional evidence on the question of whether the interests of justice will be served by the dismissal. *People v Gonzales* (1965) 235 CA2d Supp 887, 891, 46 CR 301; *People v Winters* (1959) 171 CA2d Supp 876, 882, 342 P2d 538.

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§25.11 4. Motion May Be Made in Jury's Presence

It is not required that motions to dismiss be made outside the jury's presence. See *People v Polk* (1964) 61 C2d 217, 229, 37 CR 753. When codefendants are being jointly tried, however, it is better practice for a prosecutor making a motion to dismiss concerning only one defendant to do so outside the jury's presence. *People v Alverson* (1964) 60 C2d 803, 807, 36 CR 479 (dictum). This prevents prejudice to the codefendants.

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§25.12 5. Entry of Reasons in Minutes and in Disposition Report

If the court orders an action dismissed, the reasons must be set out in an order that is entered in the minutes. Pen C §1385; *People v Winters* (1959) 171 CA2d Supp 876, 882, 342 P2d 538. This requirement is mandatory. *People v Bonnetta* (2009) 46 C4th 143, 150, 92 CR3d 370. The statement of reasons must specify the factual basis on which the court has ruled; conclusions are insufficient. *People v McAlonan* (1972) 22 CA3d 982, 986, 99 CR 733. See *People v Fretwell* (1970) 8 CA3d Supp 37, 41, 87 CR 356 (statement that court was relying on reported decision that was not itself authority for dismissal at that stage held insufficient).

Failure to state the reasons in the minutes renders a dismissal under Pen C §1385 invalid. *People v Orin* (1975) 13 C3d 937, 943, 120 CR 65; *People v Andrade* (1978) 86 CA3d 963, 974, 150 CR 662. An oral statement by the court, even if reduced to writing by a court reporter, does not satisfy the statutory requirement. *People v Andrade, supra*.

If the trial court's reasons are not set out in an order entered in the minutes, the dismissal is ineffective and the case must be remanded. On remand, the trial court may correct the defect by setting forth its reasons in a written order entered in the minutes. Alternatively, the trial court may revisit its earlier decision and determine that the dismissal was unwarranted or should be ordered for another reason. In such a case, the trial court has the power to take appropriate related action, such as reconvening the sentencing hearing or allowing a defendant to withdraw a plea. *People v Bonnetta* (2009) 46 C4th 143, 153, 92 CR3d 370.

The court must also state its reasons for dismissing a case under Pen C §1385 in the disposition report that it is required to file with the Department of Justice. Pen C §13151.1(a).

Ø **Note:** There is no requirement that the trial court's reasons for granting a common law motion to dismiss, not made under Pen C §1385, be entered in the minutes. *People v Sims* (1982) 32 C3d 468, 474 n3, 186 CR 77 (motion to dismiss based on collateral estoppel and failure to meet request for restitution requirement of Welf & I C §11483).

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§25.13 B. All or Part of Case May Be Dismissed

The court may dismiss all or part of a case under Pen C §1385. *People v Superior Court (Romero)* (1996) 13 C4th 497, 508, 53 CR2d 789; *People v Burke* (1956) 47 C2d 45, 51, 301 P2d 241.

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§25.14 C. Court's Discretion Under Pen C §1385

Dismissal in the furtherance of justice is a matter within the court's "exclusive discretion." *People v Johnson* (1966) 247 CA2d 331, 333, 55 CR 450; *People v Parks* (1964) 230 CA2d 805, 812, 41 CR 329. Thus, the court may order dismissal over the prosecutor's objection (*People v Superior Court (Howard)* (1968) 69 C2d 491, 501, 72 CR 330) or may refuse the prosecutor's request for dismissal (*People v Parks* (1964) 230 CA2d 805, 811, 41 CR 329; *People v Smith* (1925) 76 CA 105, 111, 243 P 882).

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§25.15 D. Limits on Court's Discretion

The court's discretion to dismiss all or part of a prosecution under Pen C §1385 is not absolute. The discretion exercised must be "a valid legal discretion, amounting to more than the substitution of the predilections of a judge for the alleged predilections of the peace officers." *People v Winters* (1959) 171 CA2d Supp 876, 882, 342 P2d 538. The reason for the dismissal must be that which would motivate a "reasonable judge." *People v Curtiss* (1970) 4 CA3d 123, 126, 84 CR 106 (abuse of discretion to dismiss on ground that prosecution would render court a "collection agency").

When dismissing a case in furtherance of justice, the court must consider both "the constitutional rights of the defendant and the interests of society." *People v Fretwell* (1970) 8 CA3d Supp 37, 40, 87 CR 356. This determination involves

> a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed on the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial.

People v Superior Court (Howard) (1968) 69 C2d 491, 505, 72 CR 330.

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E. Appropriate Grounds for Pen C §1385 Dismissal

§25.16 1. Insufficient Evidence

The prosecutor may move to dismiss a charge or case under Pen C §1385 when he or she determines that there is insufficient evidence to support a conviction. See, *e.g., People v Polk* (1964) 61 C2d 217, 229, 37 CR 753 (defendant was in jail when crime was committed). A judge may dismiss for legal insufficiency of the evidence. *People v Hatch* (2000) 22 C4th 260, 267, 92 CR2d 80; *People v Salgado* (2001) 88 CA4th 5, 105 CR2d 373.

Ø **Note:** There are other ways for a defendant to seek a dismissal based on insufficient evidence: at a probable cause hearing in misdemeanor cases (Pen C §991; see §6.23); at the preliminary hearing in felony cases (Pen C §871); by a Pen C §995 motion in felony cases (Pen C §1387(a)); at trial through a motion for judgment of acquittal (Pen C §§1118-1118.1)); and when seeking appellate review of the issue after it was raised in the trial court (see Pen C §1259; *People v Superior Court (Howard)* (1968) 69 C2d 491, 505, 72 CR 330).

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§25.17 2. Plea Agreement

A common use of Pen C §1385 is for the prosecutor to move to dismiss one or more counts in an accusatory pleading in exchange for the defendant's agreement to plead guilty to the remaining counts, or in exchange for the defendant's promise to testify in the same or another prosecution. See, *e.g., People v Superior Court (Mowry)* (1971) 20 CA3d 684, 97 CR 886.

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§25.18 3. Enhancement Allegations

The court may dismiss or strike enhancement and prior conviction allegations unless the legislature has clearly limited the court's authority to strike the enhancement. *People v Fritz* (1985) 40 C3d 227, 219 CR 460. In an appropriate case, the trial court has discretion to dismiss one or more strikes to reduce the length of a defendant's sentence. *People v Superior Court (Romero)* (1996) 13 C4th 497, 504, 53 CR2d 789.

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§25.19 4. Other Grounds for §1385 Dismissal

There is no statutory list of situations that permit dismissal under Pen C §1385. The following are examples of proper dismissals under §1385:

- Dismissal of a misdemeanor conviction that would make the defendant ineligible for Proposition 36 sentencing. *People v Orabuena* (2004) 116 CA4th 84, 96, 10 CR3d 99. See §§27.26, 38.3A for discussion of Proposition 36.
- Dismissal of charges to permit prosecutor to add additional defendants or new offenses. See *Casey v Superior Court* (1989) 207 CA3d 837, 844, 255 CR 81 (dicta).
- Dismissal of charges because prosecution cannot proceed without unavailable witness. See *Casey v Superior Court* (1989) 207 CA3d 837, 844, 255 CR 81 (dicta).
- Dismissal of charges because prosecution's interference with defendant's right to counsel led to complete breakdown of attorney-client relationship. *Boulas v Superior Court* (1986) 188 CA3d 422, 233 CR 487. See also §3.29.
- Dismissal of charges because judge believed retrial was brought to harass defendant. *People v Superior Court (Howard)* (1968) 69 C2d 491, 504, 72 CR 330 (judge dismissed case under §1385 after jury returned guilty verdict).

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§25.20 F. Improper Grounds for §1385 Dismissal

The trial court may not dismiss charges, proceedings, or enhancements under Pen C §1385 in the following situations:

- The court may not strike an enhancement or other sentencing allegation when the legislature has eliminated the trial court's discretion. See, *e.g.,* Pen C §1385(b) (trial court may not strike Pen C §667(a) "serious felony" enhancement); Pen C §1385.1 (court may not dismiss special circumstance finding that has been admitted or found true by jury).
- The court may not dismiss sanity proceedings under §1385 to preserve judicial resources. *People v Hernandez* (2000) 22 C4th 512, 523, 93 CR2d 509.
- The court may not enter into a plea agreement with the defendant over the prosecutor's objection. *People v Orin* (1975) 13 C3d 937, 943, 120 CR 65. For further discussion of plea bargaining, see §§26.7-26.22.
- The court may not dismiss an action because the prosecutor requests a continuance, even without good cause, if the requested extension would not violate the defendant's statutory or constitutional right to a speedy trial. *People v Ferguson* (1990) 218 CA3d 1173, 267 CR 528; *People v Rubaum* (1980) 110 CA3d 930, 168 CR 291; *People v Flores* (1978) 90 CA3d Supp 1, 152 CR 896.
- The trial court may not dismiss an action in the interest of justice to obtain an appellate ruling. *People v Ritchie* (1971) 17 CA3d 1098, 1105, 95 CR 462 (trial court dismissed case at Pen C §1538.5 hearing because evidence not physically present in court and judge wanted appellate court to decide whether its presence was required).
- The trial court may not dismiss the case merely because it would be in the defendant's or victim's best interest, if the court has no reasonable doubt about the defendant's guilt. *People v Superior Court (Long)* (1976) 56 CA3d 374, 126 CR 465. See also *People v McAlonan* (1972) 22 CA3d 982, 987, 99 CR 733 (dismissal provisions of Pen C §1385 cannot be used for rehabilitation purposes); *People v Municipal Court (Gelardi)* (1978) 84 CA3d 692, 149 CR 30 (court could not, over prosecution's objection, use Pen C §1385 to effect its own form of nonstatutory diversion).
- The trial court may not dismiss because of court congestion, or for judicial convenience, when there is no detriment to the defendant. *People v Kessel* (1976) 61 CA3d 322, 132 CR 126.
- The illegality of a defendant's arrest is not a proper basis for dismissal of the action. *People v Valenti* (1957) 49 C2d 199, 203, 316 P2d 633, 635, cited with approval in *People v Charles* (1967) 66 C2d 330, 332 n1, 57 CR 745. See also *U.S. v Alvarez-Machain* (1992) 504 US 655, 119 L Ed 2d 441, 112 S Ct 2188. It may be used, however, as a basis for suppressing evidence or a confession obtained as a result of an illegal arrest. See chaps 16 (suppressing evidence) and 23 (confessions).

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VII. DISMISSAL ON OTHER GROUNDS

§25.21 A. Diversion (Pen C §§1000-1001.75)

A defendant who is charged with certain specified crimes or who is developmentally disabled may be eligible for diversion under Pen C §§1000-1001.75. For offenses eligible for diversion, see Pen C §§1000-1000.8 (narcotics drug abuse cases), 1000.12, 1001-1001.9 and 1001.50-1001.55 (misdemeanor diversion cases), 1001.20-1001.34 (cases involving defendants with cognitive developmental disabilities), 1001.60-1001.67 (bad-check diversion cases), and 1001.70-1001.75 (parental diversion cases). Depending on the facts of the case, a defendant may be diverted before charges are filed (see Pen C §§1000.12(b), 1001.64), before a plea is entered (preplea diversion) (see Pen C §§1001-1001.9), or after pleading guilty (deferred entry of judgment) (see Pen C §§1000-1000.5, 1000.12, 1000.17). When a defendant successfully completes a diversion program, the trial court must dismiss the charges. Pen C §§1000.3, 1001.7, 1001.31, 1001.54, 1001.74. After successful completion of diversion, (1) the divertee may indicate in response to most questions about his or her prior criminal record that he or she was not arrested or diverted for that offense, and (2) with one exception, the arrest record may not be used to deny the divertee any employment benefit, license, or certificate. Pen C §§1000.4, 1000.5, 1001.9, 1001.33, 1001.55, 1001.75. No statement or information obtained from a defendant in connection with the diversion program is admissible in any action or proceeding. Pen C §§1000.1(c), 1001.5, 1001.24-1001.25, 1001.52(b), 1001.67, and 1001.72(b).

Ø **Note:** Information on the diversion of police officers and persons who apply to become police officers may be disclosed. Pen C §§1000.4, 1001.9, 1001.33, 1001.55, 1001.75. In addition, if the defendant entered a guilty or nolo contendere plea, the arrest record may be used in deportation proceedings. *Paredes-Urrestarazu v U.S. INS* (9th Cir 1994) 36 F3d 801.

For further discussion of diversion and deferred entry of judgment, see chap 27. On the immigration consequences of state criminal convictions, see chap 52.

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§25.22 B. Alternative Dispute Resolution

Alternative dispute resolution programs may result in charges never being filed. See Pen C §§14150-14156. Even after charges have been filed, the court, with the agreement of the prosecution and the defendant, may refer misdemeanor cases to an established alternative dispute resolution program. Pen C §14154.

For further discussion of alternative dispute resolution, see §27.14.

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§25.23 C. Successful Completion of Drug Treatment Probation (Pen C §1210.1)

Penal Code §1210.1 mandates probation and drug treatment for persons convicted of specified nonviolent drug possession offenses. After successful completion of drug treatment, a defendant may petition the sentencing court for dismissal of the charges. Pen C §1210.1(d)(1). If the court finds that the defendant substantially complied with probation conditions and successfully completed treatment, the court must set aside the conviction and dismiss the charges. On the meaning of the term "successfully completed," see *People v Hinkel* (2005) 125 CA4th 845, 22 CR3d 895. On dismissal, the conviction is deemed never to have occurred, and with certain exceptions (Pen C §1210.1(d)(2)-(3)), the defendant is released from all penalties and disabilities resulting from the conviction. Pen C §1210.1(d)(1). For example, the dismissal does not permit possession of a concealed weapon and does not prevent conviction under Pen C §12021. An order under §1210.1(d)(1) setting aside a conviction does not moot defendant's appeal of the conviction. *People v DeLong* (2002) 101 CA4th 482, 492, 124 CR2d 293. For further discussion, see §41.17.

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§25.24 D. Double Jeopardy and Related Issues

The double jeopardy clauses (US Const amends V, XIV; Cal Const art I, §15) and California statutes (Pen C §§654, 656, 793-794, 1016, 1017(3)-(4)) provide protection against subsequent prosecution for the same offense. Dismissals based on double jeopardy are a bar to further prosecution. For further discussion, see §§26.23-26.28.

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E. Denial of Speedy Trial Rights

§25.25 1. Delay in Prosecuting Case (Pen C §1382)

Absent a waiver, consent, or good cause, if an action is not brought to trial within the applicable constitutional and statutory time limits, the court must order the action dismissed. Pen C §§1381, 1381.5, 1382. The right to a speedy trial is discussed in chap 19.

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2. Defendant Sentenced and Imprisoned on Another Charge

§25.26 a. State Imprisonment (Pen C §§1203.2a and 1381)

When a defendant placed on probation with imposition of sentence suspended is sentenced and imprisoned on another charge, the defendant may request imposition of sentence in his or her absence and without representation of counsel. The court must impose sentence and issue its commitment order or make a final order terminating jurisdiction in the case within 30 days of the request or it loses jurisdiction to do so. Pen C §1203.2a; *People v Wagner* (2009) 45 C4th 1039, 1050, 1051, 90 CR3d 26.

When a sentenced prisoner who is serving more than 90 calendar days in a California state or local correctional facility delivers to the district attorney of a county in which another criminal proceeding is pending a written request to be brought to trial or be sentenced, the district attorney must bring the prisoner to trial or for sentencing within 90 calendar days after the request is received. The remedy for failure to comply with the statute is dismissal. Pen C §1381.

Ø **Note:** Penal Code §1381 applies to a defendant placed on probation with imposition of sentence suspended who is subsequently imprisoned on another charge. However, the consequence for failure to meet the 90-day limit is only dismissal of the probation revocation proceedings and not dismissal of the conviction underlying the grant of probation. *People v Wagner* (2009) 45 C4th 1039, 1057, 90 CR3d 26.

The court may dismiss the case on its own motion or on the motion of the prosecution, the defense, or a correctional facility. Pen C §1381. When simultaneous demands are made by more than one jurisdiction, the time limitations of §1381 are tolled for subsequent jurisdictions while the prisoner is unavailable because he or she is facing trial in another county. *People v Boggs* (1985) 166 CA3d 851, 212 CR 683.

Ø **Note:** When counsel undertakes to assist a prisoner in filing a request for trial or sentencing under §1381, counsel should be careful to provide for and obtain proof that the request was received by the district attorney's office.

A dismissal under §1381 counts as one dismissal in a felony case. Pen C §1387. On the "two-dismissal" rule of Pen C §1387, see §§13.31, 25.46. A dismissed probation revocation can be refiled. *People v Wagner* (2009) 45 C4th 1039, 1059, 90 CR3d 26.

For further discussion of Pen C §1381 motions, see §19.30.

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§25.27 b. Federal and Out-of-State Imprisonment (Pen C §§1381.5, 1389)

In federal prison in California (Pen C §1381.5). When a prisoner serving more than 90 calendar days in a federal correctional facility in California sends a written request to be brought to trial or be sentenced on a California state court case to the district attorney of the county in which the other criminal matter is pending, the district attorney must promptly inquire of the federal authority when the prisoner may be released for trial or sentencing. If the federal authority assents to release the prisoner to the state, the district attorney must bring the defendant to trial or sentencing within 90 calendar days after the date the assent is received. If the federal authority sets a release date to the state that is beyond the 90-day limit, the district attorney must bring the prisoner to trial or sentencing at the time specified by federal authorities. Pen C §1381.5.

If the defendant is not brought to trial or for sentencing as provided by §1381.5, the court must dismiss the action on its own motion or on the motion of the prosecution, defense, or correctional facility. Pen C §1381.5. See discussion in §19.31.

Ø **Note:** As with Pen C §1381 (see §25.26), the consequence for failure to meet the 90-day limit in the case of a defendant placed on probation with imposition of sentence suspended is dismissal only of the probation revocation proceedings. *People v Wagner* (2009) 45 C4th 1039, 1057, 90 CR3d 26.

In prison in another state. The Interstate Agreement on Detainers (Pen C §§1389-1389.8) provides procedures for federal and state prisoners in other states to resolve *untried* criminal cases in California. See discussion in §19.32.

Remedy. A dismissal under §1381.5 counts as one dismissal in a felony case. Pen C §1387. On the "two-dismissal" rule of Pen C §1387, see §§13.31, 25.46.

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§25.28 c. Nonfelony Vehicle Code Violations Pending When Sentenced to State Prison or Committed to Youth Authority

Vehicle Code §41500 provides for dismissal of most nonfelony offenses arising from the operation of a motor vehicle that are pending when a defendant is sentenced to state prison or committed to the Division of Juvenile Justice. Section 41500 does not apply to violations of Veh C §§23103, 23152, or 23153, violations that require immediate revocation or suspension of the offender's driver's license, or violations committed by a person temporarily released from custody or on parole. Veh C §41500(d)-(f). See *People v Minor* (1988) 204 CA3d Supp 5, 251 CR 636.

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Source: Criminal Law/California Criminal Law Procedure and Practice/25 TERMINATION OF PROSECUTION WITHOUT JUDGMENT/§25.29 F. Action Against Registered Vehicle Owner After Vehicle Sold (Veh C §§5602(a)-(b), 40210(b))

§25.29 F. Action Against Registered Vehicle Owner After Vehicle Sold (Veh C §§5602(a)-(b), 40210(b))

The court must dismiss a case charging violation of any statute or ordinance governing the parking of vehicles after the following conditions are met (Veh C §40210(b)):

- The person charged provides an affidavit of nonliability (Veh C §40208) with evidence that he or she has made a bona fide sale or transfer of the vehicle, and has delivered its possession to the purchaser before the date of the alleged violation; and
- The court obtains verification from the Department of Motor Vehicles that the person charged complied with Veh C §5602 before the date of the alleged violation.

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§25.30 G. Treatment of Disabled Defendant

A variety of statutes allow the court to dismiss an action pending against a developmentally disabled, chronically alcoholic, or drug-abusing defendant who has been referred to the appropriate authority for evaluation and treatment. Developmental disability includes mental retardation, cerebral palsy, epilepsy, autism, and closely related handicapping conditions. See Pen C §1370.1. Chronic alcoholics and drug abusers are covered by Welf & I C §§5225, 5226.1, and 5230. See discussion in chap 27 (diversion), §§37.64-37.66 (commitment of narcotics addicts), and 48.71-48.74 (Lanterman-Petris-Short Act).

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§25.31 H. Preliminary Hearing Not Completed in Single Session

A preliminary hearing must be completed in one session unless the magistrate postpones it for good cause shown by affidavit (or declaration (see CCP §2015.5)). Pen C §861. The magistrate may interrupt the preliminary hearing to conduct brief court matters without violating the "one session" rule as long as a substantial majority of the court's time is devoted to the preliminary hearing. Pen C §861(b).

The remedy for violation of Pen C §861 is dismissal. *People v Bucher* (1959) 175 CA2d 343, 346 P2d 202. For further discussion, see §8.18. A dismissal under Pen C §861 counts as one dismissal in a felony case. Pen C §1387. On the "two-dismissal" rule of Pen C §1387, see §§13.31, 25.46.

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I. No Probable Cause to Believe Public Offense Has Been Committed

§25.32 1. Dismissal of Felony Complaint at Preliminary Hearing (Pen C §871)

Lack of probable cause. If a magistrate who presides over a preliminary hearing determines that no public offense has been committed or that there is not sufficient cause to believe that the defendant is guilty of the offense, the magistrate must order the complaint dismissed and the defendant released from custody. Pen C §871.

Delay. A magistrate must dismiss a felony complaint of a defendant in custody if the defendant does not waive time, or good cause is not shown for a continuance, and the preliminary hearing is set or continued beyond the 10-court-day period mandated by Pen C §859b. Pen C §1387; *Landrum v Superior Court* (1981) 30 C3d 1, 6, 177 CR 325. For further discussion, see §8.16.

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§25.33 2. Dismissal of Misdemeanor Complaint (Pen C §991)

If a defendant is in custody when he or she appears for arraignment on a misdemeanor, defense counsel may make a motion for the magistrate to make an immediate determination on whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty of it. Pen C §991(a). In no event should the probable cause hearing occur later than 48 hours after arrest unless the government demonstrates the existence of a bona fide emergency or extraordinary circumstances. *County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 111 S Ct 1661.

The court must consider any warrant with supporting affidavit, and any documents or reports incorporated by reference in support of the warrant. Pen C §991(c). If the court finds no probable cause, it must dismiss the complaint and discharge the defendant. Pen C §991(d). The district attorney has 15 calendar days within which to refile the complaint. A second dismissal is a bar to reprosecution. Pen C §§991(e), 1387. On the "two-dismissal" rule of Pen C §1387, see §§13.31, 25.46.

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§25.34 3. Pen C §995 Dismissal

The defense may challenge all or part of an indictment or information in the superior court by a Pen C §995 motion if the defendant was not legally committed or was committed without reasonable or probable cause. Pen C §995.

The prosecutor may not recharge, in an information in superior court, charges that were dismissed by a magistrate on the basis of factual findings. *People v Luna* (1983) 140 CA3d 788, 189 CR 792. If the prosecutor does recharge such charges, the defendant's remedy is a Pen C §995 motion. *Jones v Superior Court* (1971) 4 C3d 660, 664, 94 CR 289. For discussion of what the prosecutor can do to recharge the offense, see §§13.31-13.38.

A dismissal under §995 counts as one dismissal; two dismissals may be a complete bar to further prosecution of a felony. Pen C §1387(a). There are, however, several exceptions to the "two-dismissal" rule. See Pen C §1387. On the "two-dismissal" rule of Pen C §1387, see §§13.31, 25.46.

For further discussion of §995 motions, see chap 13. For further discussion of grand jury proceedings, see chap 9.

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§25.35 J. Adult Who Committed Crime When Juvenile and Cannot Be Tried in Either Adult or Juvenile Court

The juvenile court (which is part of the superior court) has jurisdiction over persons who committed crimes as juveniles. Welf & I C §607. When an accused is not brought before the court until he or she is an adult, a juvenile adjudication may be "a hollow ceremony." *In re Pfeiffer* (1968) 264 CA2d 470, 477, 70 CR 831. In *Pfeiffer,* the defendant was found unfit, was sentenced to state prison, escaped, and was recaptured years later. The appellate court's opinion was written when the defendant was 27 years old, beyond the statutory age limit for a juvenile commitment. To return the case to the superior court would result in denying the defendant his statutory and constitutional rights. Accordingly, his indictment for robbery was dismissed. But see *In re Harris* (1993) 5 C4th 813, 850, 21 CR2d 373 (when adult under 25 successfully petitioned for writ of habeas corpus based on judicial finding of unfitness in excess of trial court's jurisdiction, state supreme court remanded matter to superior court for new disposition by juvenile court).

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§25.36 K. Offense No Longer Crime

When a criminal statute is repealed, the legislature retains the authority to preserve criminal sanctions for acts committed before its repeal through a "savings" clause. In the absence of a savings clause, pending criminal proceedings involving the repealed statute are arrested. The court should discharge the defendant and dismiss the proceedings as long as the repeal occurred before the defendant's appeal is final. *People v Rossi* (1976) 18 C3d 295, 302, 134 CR 64 (interpreting effect on mitigation of punishment because of change in law). See also Govt C §9608.

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L. Prosecution Failure to Disclose Material Information

§25.37 1. Refusal to Disclose Informant's Identity

The trial court must dismiss a case if the prosecutor fails to disclose the identity of a confidential informant who is a material witness on the issue of guilt. See *Roviaro v U.S.* (1957) 353 US 53, 60, 1 L Ed 2d 639, 644, 77 S Ct 623. Similarly, the court must dismiss a case if the government refuses to disclose an informant's whereabouts or fails to make a good faith effort to keep in contact with the informant before trial. *Eleazer v Superior Court* (1970) 1 C3d 847, 851, 83 CR 586 (disclosure of "all pertinent information" on informant's whereabouts required); *Twiggs v Superior Court* (1983) 34 C3d 360, 366, 194 CR 152 (prosecution must make reasonable efforts to maintain contact with material witness).

In cases involving multiple counts, the informant may be a material witness on one count but not material on another. In that event, dismissal of only the counts concerning which the informant is a material witness is appropriate. *People v Goliday* (1973) 8 C3d 771, 783, 106 CR 113. For example, when sale and possession of narcotics are charged, the informant is frequently a material witness only on the sale count.

On motions to disclose the identity of an informant, see chap 17.

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§25.38 2. Failure to Provide Discovery

The court has a wide range of sanctions with which to enforce the discovery obligations of Pen C §§1054-1054.7. The sanctions of last resort are prohibition of witness testimony (which may be applied to both the defense and the prosecution), and dismissal of a charge if nondisclosure violates the U.S. Constitution. Pen C §1054.5(b)-(c). For further discussion of constitutional disclosure requirements, see §§11.26-11.29.

There are two limits on the court's ability to sanction noncompliance with discovery. First, the court may prohibit the testimony of a witness only if all other sanctions have been exhausted. Pen C §1054.5(c). Second, the court may not dismiss a charge unless required to do so by the U.S. Constitution. Pen C §1054.5(c).

Ø **Note:** Evidence lost or destroyed by the prosecution may still be used against a defendant if the prosecution did not act in bad faith in failing to preserve the evidence, even though it might have been exculpatory. See *Arizona v Youngblood* (1988) 488 US 51, 102 L Ed 2d 281, 109 S Ct 333; *California v Trombetta* (1984) 467 US 479, 488, 81 L Ed 2d 413, 422, 104 S Ct 2528.

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§25.39 M. Material Witness Unavailable Because of State Action

A defendant is not entitled to a dismissal merely because he or she is unable to obtain a material witness. If state action has made a material witness unavailable, however, dismissal may be required by due process and the defendant's constitutional right to a fair trial.

The prosecution is responsible for keeping in touch with informants. *Eleazer v Superior Court* (1970) 1 C3d 847, 851, 83 CR 586. This is commonly called the *Eleazer,* or *Mejia* (*People v Mejia* (1976) 57 CA3d 574, 129 CR 192), rule. See discussion in §§17.18 (*Eleaze*r), 52.9 (*Mejia*).

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§25.40 N. Discriminatory Law Enforcement

The deliberate discriminatory enforcement of a criminal statute for an invidiously selected class of individuals is a ground for dismissal for violation of the right to equal protection. *U.S. v Armstrong* (1996) 517 US 456, 464, 134 L Ed 2d 687, 698, 116 S Ct 1480; *Murgia v Municipal Court* (1975) 15 C3d 286, 290, 124 CR 204. This issue is properly raised by a pretrial motion to dismiss (sometimes called a "*Murgia* motion"). Treatment that may result from simple laxity of enforcement or the selective enforcement of a statute based on justifiable police procedures is not a denial of equal protection. *People v Superior Court (Hartway)* (1977) 19 C3d 338, 349, 138 CR 66 (police could enforce prostitution statute only against profiteers (primarily women) and not against customers (primarily men)).

A dismissal based on discriminatory law enforcement is a final dismissal. *Yick Wo v Hopkins* (1886) 118 US 356, 30 L Ed 220, 6 S Ct 1064.

For further discussion, see §§18.16-18.25.

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§25.41 O. Lesser Included Offense

A defendant cannot be convicted of two offenses if one offense is necessarily included within the other. *People v Ortega* (1998) 19 C4th 686, 692, 80 CR2d 489; *People v Pearson* (1986) 42 C3d 351, 355, 228 CR 509. Consequently, a conviction for a necessarily included offense must be dismissed at sentencing. *People v Ortiz* (2002) 101 CA4th 410, 415, 124 CR2d 92.

Ø **Note:** A defendant may otherwise be convicted of two offenses arising out of the same act or course of conduct although sentencing for both offenses may be prohibited by Pen C §654. On Pen C §654, see §37.44.

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VIII. MOTION FOR MISTRIAL

§25.42 A. Grounds for Mistrial

A motion for mistrial is a request to the court to terminate the trial after the trial has begun but before verdict. A trial ordinarily is deemed to have begun when jeopardy attaches, *i.e.,* when the jury is sworn or, in a court trial, when the first witness is sworn. *Rhinehart v Municipal Court* (1984) 35 C3d 772, 779 n8, 200 CR 916. See also *Perryman v Superior Court* (2006) 141 CA4th 767, 775, 46 CR3d 306. The motion should be granted if there is prejudice that cannot be cured by instruction or jury admonition. *People v Jenkins* (2000) 22 C4th 900, 985, 95 CR2d 377; *People v Hines* (1997) 15 C4th 997, 1038, 64 CR2d 594.

Grounds for mistrial include prosecutorial misconduct (*People v Rodrigues* (1994) 8 C4th 1060, 1154, 36 CR2d 235); midtrial substitution of counsel (*People v Gibbs* (1986) 177 CA3d 763, 766, 223 CR 194); jury misconduct and jury deadlock (see Pen C §1140); jury's inability to reach a verdict because of an accident, illness, or other physical cause beyond the court's control (see Pen C §1141); erroneous admission of incurably prejudicial evidence (*People v Harris* (1994) 22 CA4th 1575, 1581, 28 CR2d 317); and a witness's improper volunteering of information that the court had excluded in a prior ruling (*People v Williams* (1997) 16 C4th 153, 211, 66 CR2d 123).

Appellate courts review a trial court's denial of a motion for mistrial under the deferential abuse-of-discretion standard. *People v Cox* (2003) 30 C4th 916, 953, 135 CR2d 272, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209. For further discussion of mistrials, see California Trial Objections, chap 56 (Cal CEB Annual).

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§25.43 B. Jeopardy

When a defendant consents to the discharge of the jury before a verdict has been rendered (*People v Gibbs* (1986) 177 CA3d 763, 765, 223 CR 194) or when a court's mistrial ruling is based on a finding of legal necessity (*People v Marshall* (1996) 13 C4th 799, 825, 55 CR2d 347; *People v McNally* (1980) 107 CA3d 387, 390, 165 CR 715), a plea of former jeopardy does not lie and the case may be retried. See Pen C §1140. As a rule, when the defense moves for a mistrial, the defendant affirmatively waives a future claim of once in jeopardy. *Gibbs,* 177 CA3d at 766. An exception exists when a mistrial is provoked by prosecutorial or judicial misconduct that "goaded" the defendant into making the motion. In that event, the defendant's "consent" may not be deemed a waiver of the double jeopardy protection. See *Oregon v Kennedy* (1982) 456 US 667, 673, 72 L Ed 2d 416, 423, 102 S Ct 2083. For further discussion of jeopardy, see §§26.23-26.28.

Ø **Note:** Both the federal and state prohibitions against double jeopardy (see US Const amend V; Cal Const art I, §15) bar retrial when the prosecution intentionally commits misconduct for the purpose of causing a mistrial. In addition, the state double jeopardy ban may bar retrial when the prosecutor, believing that a defendant is likely to be acquitted at trial, knowingly and intentionally commits misconduct in order to thwart the acquittal. *People v Batts* (2003) 30 C4th 660, 695, 134 CR2d 67. But "'normal' prejudicial prosecutorial misconduct," including the failure to disclose material, exculpatory evidence, does not bar retrial even though it may warrant reversal. *Sons v Superior Court* (2004) 125 CA4th 110, 117, 22 CR3d 647.

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§25.44 C. Defense Motion for Mistrial

Defense counsel may choose not to move for or consent to a mistrial for many reasons. He or she may be of the opinion that no error in fact occurred or, if it occurred, that it was not prejudicial. Counsel may choose another remedy, such as moving to strike or requesting an admonition, or may attempt to impeach the witness or offer contrary defense evidence. Indeed, even when a palpably prejudicial error has been committed, a defendant may have valid tactical reasons for preferring to proceed to verdict. A defendant may withdraw his or her motion for a mistrial before court action and actual jury discharge. *Cardenas v Superior Court* (1961) 56 C2d 273, 14 CR 657.

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§25.45 D. Prosecution Motion for Mistrial

A prosecution request for mistrial will not bar retrial of the cause if legal necessity exists for granting the motion. See *People v Fields* (1996) 13 C4th 289, 311, 52 CR2d 282. When, for example, a jury renders a verdict on a lesser included offense without first acquitting the defendant on the charged offense and then declines to acquit on the greater offense after the court directs reconsideration under Pen C §1161, the prosecution may obtain retrial of the entire matter by moving the court to declare a mistrial. Alternatively, the prosecutor may elect to accept the conviction for the lesser offense and request the court to dismiss the charged offense under Pen C §1385 in the interest of justice. 13 C4th at 311. For further discussion of legal necessity, see §26.27.

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IX. DISMISSAL AS BAR TO FURTHER PROSECUTION

§25.46 A. General Rules

When a case is dismissed before jeopardy attaches, whether a dismissal is a bar to further prosecution depends on the nature of the dismissal. On jeopardy, see §§26.23-26.28.

Constitutional grounds. Generally, when a case is dismissed on constitutional grounds, the dismissal is a bar to further prosecution for that offense. See, *e.g., Yick Wo v Hopkins* (1886) 118 US 356, 30 L Ed 220, 6 S Ct 1064 (discriminatory law enforcement); *Strunk v U.S.* (1973) 412 US 434, 37 L Ed 2d 56, 93 S Ct 2260 (speedy trial (US Const Amend VI)); *Barber v Municipal Court* (1979) 24 C3d 742, 760, 157 CR 658 (interference with right to counsel); *People v Pinedo* (2005) 128 CA4th 968, 27 CR3d 562 (unreasonable preaccusation delay (due process)).

Statutory dismissal in misdemeanor cases. A court's order dismissing an action under Pen C §1385 is a bar to any other prosecution for the same offense if it is a misdemeanor (*Marler v Municipal Court* (1980) 110 CA3d 155, 162, 167 CR 666), unless it is charged along with a felony. A misdemeanor that is charged together with a felony is treated like the felony for the purpose of determining whether subsequent prosecutions are barred. Pen C §1387. Dismissal of a misdemeanor complaint does not bar further prosecution for the same conduct if it is subsequently charged as a felony. *Burris v Superior Court* (2005) 34 C4th 1012, 22 CR3d 876.

Dismissal of a misdemeanor not charged with a felony is a bar even if the dismissal order was made inadvertently. *In re Krieger* (1969) 272 CA2d 886, 890, 77 CR 822.

Statutory dismissal in felony cases. Under Pen C §1387, if the court twice dismisses a felony, or a misdemeanor charged with a felony, on one of the statutory grounds specified in Pen C §1387(a), the order terminating the action for the second time is a bar to a third prosecution for the same offense unless certain exceptions outlined in §1387 apply. These are the specified statutory grounds for dismissal:

- The preliminary hearing was set or continued beyond 10 days after the date of arraignment. Pen C §859b.
- The preliminary hearing was not completed in a single session. Pen C §8619(a).
- The preliminary hearing was postponed without the defendant's consent for more than 60 days from the date on which a motion for postponement was granted. Pen C §861(b).
- The magistrate dismissed the complaint for lack of probable cause. Pen C §871.
- The accusatory pleading was set aside under Pen C §995.
- The prosecution failed to bring the defendant to trial on a pending charge within 90 days of delivery of the defendant's notice under Pen C §1381.
- The interests of justice required dismissal. Pen C §1385.

Ø **Note:** When Pen C §1387 permits the prosecution to refile the action against the defendant after dismissal, the court may rearraign the defendant on the existing accusatory pleading without entering a formal order terminating the previous action if both the prosecution and the defense consent. Pen C §1387.2. A stipulated termination under Pen Code §1387.2 counts as one dismissal under Pen C §1387. *People v Mason* (2006) 140 CA4th 1190, 1197, 45 CR3d 256.

If the dismissed felony is a "wobbler," it may be recharged as either a felony or a misdemeanor. *Vizcarra v Municipal Court* (1972) 27 CA3d 916, 104 CR 177.

The exceptions to Pen C §1387's two-dismissal rule for nonviolent felonies are as follows:

- Substantial new evidence is discovered that was not previously available.
- The action was terminated as a result of the direct intimidation of a material witness.
- The complaining witness in a Pen C §243(e), §262, §273.5, or §273.6 case failed to appear after having been personally subpoenaed. This exception applies only once in a case, and only within 6 months after dismissal of the action.
- The action is dismissed before the preliminary hearing begins so that an indictment based on the same subject

matter can be sought.

- An action involving a misdemeanor act of domestic violence (under Pen C §13700(a)-(b)) is terminated because the complaining witness failed to appear. This exception must be invoked within 6 months after termination of the action, and may be invoked only once.
- When the first dismissal was under Pen C §859b, §861, §871, or §995, the second dismissal is not a bar in the following circumstances:
- Good cause is shown why the preliminary examination was not held within 60 calendar days after the date of arraignment or plea.
- The §995 motion was granted for the reasons discussed in §13.31.
- A count of a complaint is first dismissed by a magistrate under Pen C §871, recharged under Pen C §739, then dismissed under Pen C §995. The dismissal under §871 is not counted for purposes of refiling. Pen C §1387(c)(3); *People v Superior Court (Martinez)* (1993) 19 CA4th 738, 23 CR2d 733. But when a charge is refiled after a §995 motion is granted, and the second magistrate refuses to hold the defendant to answer, that order is a second termination barring further prosecution under §739. See *Ramos v Superior Court* (1982) 32 C3d 26, 35, 184 CR 622; *Bodner v Superior Court* (1996) 42 CA4th 1801, 50 CR2d 236. For discussion, see §13.31.

Ø **Note:** Dismissal for lack of territorial jurisdiction (defined in §15.3) does not count as a dismissal under Pen C §1385 and is thus not a bar to any further prosecution (see Pen C §1387). *Casey v Superior Court* (1989) 207 CA3d 837, 255 CR 81.

Two dismissals under Pen C §1387 will not bar the filing of *different* charges arising from the same conduct as long as the new charges could have been committed without engaging in the conduct alleged in the twice-dismissed charges. *People v Meza* (1991) 231 CA3d 362, 282 CR 366 (drunk driving with injury (Veh C §21353) can be committed without engaging in car theft or robbery (Veh C §10851)). See also *People v Traylor* (2009) 46 C4th 1205, 96 CR3d 277 (prior dismissal of felony vehicular manslaughter with gross negligence did not bar subsequent prosecution for lesser included misdemeanor of vehicular manslaughter with ordinary negligence). A greater offense may not be filed, however, after two dismissals of a lesser included offense, nor may a charge be filed that is of the same "essence" as the twice-dismissed charges. *Dunn v Superior Court* (1984) 159 CA3d 1110, 206 CR 242 (kidnapping for robbery is greater offense that includes simple kidnapping, and auto theft is of same essence as robbery).

But when the facts of the incident remain unchanged, the prosecution may not invoke Pen C §1387.1 to charge a violent felony in a third filing when the charged offense in the two prior dismissals was not a violent felony. *People v Salcido* (2008) 166 CA4th 1303, 1313, 83 CR3d 561.

Additional reasons for allowing refiling of violent felonies. An additional exception to the two-dismissal rule exists for the offenses defined as violent felonies in Pen C §667.5(c). A violent felony may be refiled for a third time after two dismissals under §1387 if either of the prior dismissals was due solely to excusable neglect. Pen C §1387.1(a). Excusable neglect "includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses." Pen C §1387.1(b). See *Miller v Superior Court* (2002) 101 CA4th 728, 747, 124 CR2d 591 (discussing burden of proof to show "excusable neglect" in response to defendant's motion to dismiss); *People v Superior Court (Quinteros)* (1993) 13 CA4th 12, 16 CR2d 462 (failure to consider conspiracy theory of liability for murder); *People v Woods* (1993) 12 CA4th 1139, 15 CR2d 906 (excusable neglect by prosecutor in omitting charge from complaint). *People v Mason* (2006) 140 CA4th 1190, 45 CR3d 256 (victim's failure to appear was due to excusable neglect; defense had obtained numerous continuances and victim became confused about when to appear).

Ø **Note:** When a defendant is charged both with violent felonies as defined in Pen C §667.5(c) and with nonviolent felonies, the counts may be subject to different Pen C §1387 exceptions. For example, a third or subsequent prosecution of a nonviolent felony is barred by an earlier dismissal on any of the grounds specified in Pen C §1387 unless one of the statutory exceptions in §1387 applies. See *People v Mason* (2006) 140 CA4th 1190, 1197, 45 CR3d 256 (trial court's refusal to dismiss carjacking charge proper because it was subject to violent felony exception to two-dismissal rule; gun charge should have been dismissed because it was not violent felony).

Juveniles. The bar to refiling in §1387 does not apply in juvenile court. *In re Nan P.* (1991) 230 CA3d 751, 281 CR 468.

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§25.47 B. Recharge After Dismissal Under Pen C §17(b)(5)

Court consent is required to recharge as a felony an offense reduced to a misdemeanor under Pen C §17(b)(5) and later dismissed under Pen C §1385. *Malone v Superior Court* (1975) 47 CA3d 313, 318, 120 CR 851.

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X. APPELLATE REVIEW

§25.48 A. Dismissal Under Pen C §1385 and Other Dismissal Statutes

The prosecution may appeal from an order dismissing an action under Pen C §1385:

- Before the defendant is placed in jeopardy or when the defendant has waived jeopardy. Pen C §§1238(a)(8), 1466(1)(B); *Bellizzi v Superior Court* (1974) 12 C3d 33, 36, 115 CR 52 (Pen C §1238(a)(8)); *People v Winters* (1959) 171 CA2d Supp 876, 880, 342 P2d 538 (Pen C §1466). See §26.24 on when jeopardy attaches.
- After the trial court grants a motion for mistrial, if the record does not clearly reflect that the trial court dismissed on the ground of insufficient evidence and applied the substantial evidence test. *People v Hatch* (2000) 22 C4th 260, 273, 92 CR2d 80.
- After a guilty verdict. Pen C §1238(a)(8); *People v Craney* (2002) 96 CA4th 431, 439, 117 CR2d 147; *People v Salgado* (2001) 88 CA4th 5, 105 CR2d 373.

The prosecution may also appeal from an order made after judgment that affects the People's substantial rights (Pen C §§1238(a)(5), 1466(1)(F); *People v Minjarez* (1980) 102 CA3d 309, 162 CR 292), from an order denying a motion to reinstate a complaint under Pen C §871.5 (Pen C §1238(a)(9)), and from a dismissal that follows the granting of a nonstatutory in limine pretrial motion to suppress evidence (Pen C §1238(a)(8); *People v Chacon* (2007) 40 C4th 558, 564, 53 CR3d 876).

On appeal, the trial court's failure to specify its reasons for a dismissal under §1385 renders the dismissal invalid. *People v Orin* (1975) 13 C3d 937, 945, 120 CR 65.

The defendant may appeal the trial court's refusal to accept the defendant's invitation to dismiss all or part of the action in the interest of justice. See *People v Carmony* (2004) 33 C4th 367, 375, 14 CR3d 880. The trial court's ruling is reviewed for abuse of discretion. 33 C4th at 376.

A defendant may not appeal a dismissal. *People v Stokes* (1894) 102 C 501, 36 P 834.

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§25.49 B. Writ of Mandate or Prohibition

The prosecution may obtain appellate court review of some dismissals by petition for extraordinary writ, even when there is no statutory authority to do so. The cases are in conflict, however, over which circumstances allow the prosecution to seek a writ. For example, the prosecution was granted extraordinary relief in the following cases: *People v Municipal Court (White)* (1979) 88 CA3d 206, 151 CR 861 (appellate court upheld superior court writ directing municipal court to reinstate dismissed prior felony and thus vacate its order reducing underlying charge to misdemeanor), *People v Municipal Court (Gelardi)* (1978) 84 CA3d 692, 149 CR 30 (mandate available; trial court continued case so that it could later dismiss it if defendant's behavior was satisfactory), and *People v Superior Court (Brodie)* (1975) 48 CA3d 195, 200, 121 CR 732 (mandate available; trial court struck allegation of prior conviction based on erroneous interpretation of law rather than on its view of guilt or innocence). Contrast these cases with *People v Superior Court (Howard)* (1968) 69 C2d 491, 72 CR 330 (no right for prosecution to appeal or seek writ to review trial court's dismissal of case on its own motion under Pen C §1385 after jury found defendant guilty), and *People v Municipal Court (Kong)* (1981) 122 CA3d 176, 183, 175 CR 861 (mandate is appropriate vehicle for review only when trial court has acted without jurisdiction of person or of subject matter; reviewing court must balance error complained of against risk of harassment to defendant).

Ø **Note:** When a dismissal is or will be the result of a trial court continuance of a case beyond the limits of Pen C §1049.5, Pen C §1511 gives the prosecution the authority to file a petition for writ. See *People v Municipal Court (Gelardi), supra*.

On writ review, see chap 42; Appeals and Writs in Criminal Cases, chaps 7-11 (3d ed Cal CEB 2007).

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26

PLEAS AND CASE SETTLEMENT

LORNA PATTON BROWN

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§26.1 I. OVERVIEW

There are six kinds of pleas to an indictment, information, or complaint (Pen C §1016):
(1) Guilty,
(2) Not guilty,
(3) No contest (nolo contendere),
(4) Former conviction or acquittal,
(5) Once in jeopardy, and
(6) Not guilty by reason of insanity.

Defendants can enter any plea without the court's consent except a plea of no contest. Pen C §1016(3).

Defense counsel who wants to demur to the pleading should do so before a plea is entered. See Pen C §1004. See also §§7.20-7.26 on demurrers.

Failure to enter a plea of not guilty by reason of insanity results in the conclusive presumption that the defendant was sane at the time of the commission of the charged offense. Pen C §1016. Similarly, if a defendant enters only a plea of not guilty by reason of insanity, that is considered an admission to the charged offense (Pen C §1016), and he or she is tried only on the sanity issue—not on the guilt issue (Pen C §1026(a)). To also receive a trial on the issue of guilt, a defendant must enter a plea of not guilty in addition to a plea of not guilty by reason of insanity. Pen C §1016.

Ultimately, the choice of plea is the defendant's personal decision, except in capital cases or when a sentence of life without the possibility of parole (LWOP) is the maximum punishment. *People v Chadd* (1981) 28 C3d 739, 747, 170 CR 798. See Pen C §1018. In those situations, the defendant must have defense counsel's consent to a guilty plea. Pen C §1018; *People v Alfaro* (2007) 41 C4th 1277, 1297, 63 CR3d 433.

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§26.2 II. CHART: DEADLINES

Action	Deadline	Authority
Enter plea.	At arraignment or shortly thereafter.	See Pen C §§988, 990.
Withdraw plea of guilty.	Any time before judgment or within 6 months after order granting probation.	Pen C §1018; see *People v Miranda* (2004) 123 CA4th 1124, 20 CR3d 610.

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§26.3 III. PRESENCE OF DEFENDANT

Unless otherwise provided by law, every plea must be entered or withdrawn by the defendant personally in open court. Pen C §1018.

In felony cases, the defendant must be personally present to enter a plea. Pen C §977(b). See *Mills v Municipal Court* (1973) 10 C3d 288, 304, 110 CR 329. In most misdemeanor cases, the defendant may enter any plea through counsel. Pen C §977(a)(1). However, a defendant charged with domestic violence under Fam C §6211 or Pen C §273.6 must be present at arraignment. Pen C §§977(a)(2), 1429. In addition, the court may order a defendant charged with misdemeanor driving under the influence to be present at arraignment or at the taking of any plea. Pen C §977(a)(3). When a defendant enters a guilty plea through counsel, a basis must exist on which the court can conclude that the defendant has knowledge of, and waives, each of the *Boykin-Tahl* rights (discussed in §§26.10-26.12), and that the defense attorney is authorized to enter the plea. 10 C3d at 305.

A corporation may enter a plea to an indictment or information through counsel. Pen C §1018. For misdemeanors and infractions arising from the operation of motor vehicles, a corporation may appear either by counsel or by its president, vice president, secretary, or managing agent for the purpose of entering a plea of guilty. Pen C §§1396, 1427.

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§26.4 IV. REPRESENTATION BY COUNSEL

A defendant charged with a felony or misdemeanor has the right to counsel before entering any plea, and must be told of that right if he or she appears without counsel. Pen C §987. After being advised of the right to counsel, the defendant may waive that right and enter any plea except a plea of guilty to a felony for which the maximum penalty is death or life imprisonment without the possibility of parole (LWOP); in those cases, the defendant must be represented by counsel, and counsel must consent to the plea. Pen C §1018. For further discussion of representation by counsel, see chap 3.

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§26.5 V. FORM OF PLEA

As a rule, pleas other than guilty and no contest come in direct response to an inquiry by the court about how the defendant wishes to plead. If a defendant fails to answer the accusatory pleading by demurrer or plea, the court must enter a not guilty plea on the defendant's behalf. Pen C §1024. Similarly, a refusal to admit or deny having suffered an alleged prior conviction should be entered as a denial of the allegation. Pen C §1025. Pleas of guilty or no contest to misdemeanors and felonies may be oral or in writing. Pen C §1017. Special rules apply to these pleas, which are discussed in §§26.7-26.17.

The plea, whether oral or written, should be in substantially the following form (Pen C §1017):

- If the defendant pleads guilty (or no contest): "The defendant pleads that he or she is guilty of (or pleads no contest to) the offense charged." Pen C §1017(1). On the differences between pleas of guilty and no contest, see §26.7.
- If the defendant pleads not guilty: "The defendant pleads that he or she is not guilty of the offense charged." Pen C §1017(2).
- If the defendant pleads a former conviction or acquittal: "The defendant pleads that he or she has already been convicted (or acquitted) of the offense charged, by the judgment of the court of _____ (naming it), rendered at _____ (naming the place), on the ____ day of _____." Pen C §1017(3).
- If the defendant pleads once in jeopardy: "The defendant pleads that he or she has been once in jeopardy for the offense charged (specifying the time, place, and court)." Pen C §1017(4).
- If the defendant pleads not guilty by reason of insanity: "The defendant pleads that he or she is not guilty of the offense charged because he or she was insane at the time that he or she is alleged to have committed the unlawful act." Pen C §1017(5).

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§26.6 VI. NOT GUILTY PLEA

A plea of not guilty puts in issue every material allegation of the accusatory pleading (Pen C §1019), including the requisite mental elements of intent, deliberation, willfulness, premeditation, and malice aforethought (*People v Moon* (2005) 37 C4th 1, 28, 32 CR3d 894; *People v Steele* (2002) 27 C4th 1230, 1243, 120 CR2d 432). All matters of fact tending to establish a defense, other than former conviction or acquittal, once in jeopardy, or not guilty by reason of insanity, may be presented at trial in furtherance of a not guilty plea. Pen C §1020. See *People v Perez* (1965) 62 C2d 769, 775, 44 CR 326.

Ø **Note:** A defendant who wishes to demur to the accusatory pleading should do so before a plea is entered. Pen C §1004. See §§7.20-7.26 on demurrers.

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VII. GUILTY AND NO CONTEST PLEAS

§26.7 A. Differences Between Guilty and No Contest Pleas

Defendants plead no contest when they are not guilty or do not admit guilt, yet do not wish to go to trial. A plea of no contest has the same legal effect in a criminal court as a plea of guilty. It does differ in some ways from a guilty plea. Unlike pleas of guilty as charged, the court's approval is required before entry of a plea of no contest, even though the plea is to all charges. Pen C §1016(3); *People v Hughes* (1980) 112 CA3d 452, 460, 169 CR 364. As with a plea of guilty, there is no requirement that the prosecutor consent to a plea of no contest as long as the plea is to all charges. *People v Superior Court (Smith)* (1978) 82 CA3d 909, 915, 147 CR 554. Arguably, the prosecutor's consent *is* required to plead no contest to a lesser offense, because the prosecutor's consent is required for the defendant to plead to fewer than all charged offenses. Pen C §1192.5. Such an offense must be reasonably related to the offense charged in the accusatory pleading. *People v West* (1970) 3 C3d 595, 611, 91 CR 385.

A defendant who pleads no contest must be advised of and waive the same constitutional rights as a defendant who pleads guilty. *People v Chagolla* (1984) 151 CA3d 1045, 1048, 199 CR 181; *Lara v Superior Court* (1982) 133 CA3d 436, 440, 183 CR 796. There is an additional requirement: The court must also ascertain that the defendant understands that the plea of no contest is, for purposes of the criminal proceedings, considered the same as a guilty plea. Pen C §1016(3).

A defendant who pleads no contest waives any evidentiary challenge to the truth of the underlying offense in the same manner as a defendant who pleads guilty. *People v Padfield* (1982) 136 CA3d 218, 227, 185 CR 903. See discussion of appellate rights following a guilty plea in §§44.6-44.16.

A no contest plea to a misdemeanor offense cannot be used as an admission in a civil action. Pen C §1016(3). A no contest plea to a felony offense is admissible as an admission in a civil case growing out of the act on which the criminal prosecution is built. Pen C §1016(3). A guilty plea to either a felony or a misdemeanor may be used as an admission in a civil case. *Teitelbaum Furs, Inc. v Dominion Ins. Co.* (1962) 58 C2d 601, 25 CR 559. See also §26.22.

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§26.8 B. Competence to Enter Guilty or No Contest Plea

Although most cases on competence to enter a plea concern guilty pleas, they apply equally to no contest pleas, because no action may proceed if the defendant is not competent. Pen C §1367(a).

If the court has a good faith doubt about a defendant's competence to plead guilty, it must hold a preplea competency hearing. *Darrow v Gunn* (9th Cir 1979) 594 F2d 767. See Pen C §1368. At the hearing, the standard for determining the defendant's competence to enter a guilty plea is the same as competence to stand trial: Does the defendant have a rational understanding of the proceedings? *Godinez v Moran* (1993) 509 US 389, 125 L Ed 2d 321, 113 S Ct 2680. Evidence of antisocial behavior, mental illness, emotional outbursts, narcotics usage, and other factors indicating poor judgment and insight are probative of a defendant's competence to enter a guilty plea. *Chavez v U.S.* (9th Cir 1981) 656 F2d 512, 519. For further discussion of competency proceedings, see §§48.7-48.22.

The trial court need not make a specific finding that a defendant is competent to plead guilty unless there is evidence that would lead the court to doubt the defendant's competence. *People v Wharton* (1991) 53 C3d 522, 583, 280 CR 631.

> Ø **Note:** Many courts now routinely inquire of a defendant entering a plea of guilty or no contest to criminal charges whether he or she has recently ingested any drugs or alcohol that might affect his or her ability to exercise judgment in entering the plea. This recommended procedure minimizes the potential for a future claim that the defendant was under the influence of such a substance and that the plea was therefore improperly entered.

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§26.9 C. Manner of Entry of Plea

Defendants must be advised of the rights discussed in §§26.11-26.12 before being asked to waive them. Group *advisement* of rights for those charged with misdemeanors (but not felonies) is acceptable. *Mills v Municipal Court* (1973) 10 C3d 288, 307, 110 CR 329. Group advisement, however, must be followed by an individual, knowing, and intelligent waiver. Group *waiver* is specifically prohibited in all cases. 10 C3d at 307.

When a defendant pleads guilty, it must be in response to the court's inquiry as to how the defendant pleads, rather than a spontaneous statement of guilt. *People v Sturdy* (1965) 235 CA2d 306, 311, 45 CR 203. See Pen C §988. The normal procedure is for the court to ask the defendant how he or she pleads, and for the defendant to personally answer, *e.g.,* "guilty." However, the defendant can expressly authorize or adopt defense counsel's statement of the plea. *People v Hofferber* (1977) 70 CA3d 265, 268, 137 CR 115.

A guilty plea may be oral or in writing. Pen C §1017. In most courts, a defendant who pleads guilty or no contest completes a written waiver form; however, some courts just put an oral advisement and plea on the record. Written waiver forms were approved for misdemeanors in *Mills v Municipal Court* (1973) 10 C3d 288, 110 CR 329, and in felony cases not involving unusual circumstances (which might indicate that the plea is otherwise involuntary) in *In re Ibarra* (1983) 34 C3d 277, 285, 193 CR 538. The written forms commonly have a printed recital of rights, each followed by a box. Defendants initial each box and sign their names at the bottom of the form. In misdemeanor cases, it is common for the judge to then ask the defendant whether he or she has read and understands the rights that are being waived; if the judge is satisfied that the defendant understands those rights, the guilty plea is accepted. In felony cases, the prosecutor or judge usually goes over each right with the defendant on the record and has the defendant waive each right aloud. If a written waiver and plea form are used, the court should obtain an oral acknowledgment from the defendant that he or she has read and understood the form and wishes to plead guilty. See *In re Moss* (1985) 175 CA3d 913, 221 CR 645. For discussion of rights that must be waived, see §26.12. A felony guilty plea checklist is in California Criminal Law Forms Manual §26.1 (2d ed Cal CEB 2005).

In misdemeanor cases, a minute order and checklist of rights—including a notation on a docket for arraignment and instructions with a typed notation by the judge that the defendant has waived his or her rights and the reporter's transcript of those waivers—is a sufficient record of expressed and explicit waiver. *Stewart v Justice Court* (1977) 74 CA3d 607, 141 CR 589. The clerk's docket with a specific recording of the defendant's yes or no answers to the specific advisements and waivers is also a sufficient record of expressed and explicit waiver. *Ganyo v Municipal Court* (1978) 80 CA3d 522, 145 CR 636.

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D. Requirements on Plea of Guilty or No Contest

§26.10 1. Summary of Requirements; Standard on Review

Before accepting a guilty or no contest plea, the trial court record must show on its face that the defendant was made aware of and expressly waived his or her *Boykin-Tahl* rights, *i.e.,* the constitutional rights required by *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709, and *In re Tahl* (1969) 1 C3d 122, 81 CR 577. *People v Sumstine* (1984) 36 C3d 909, 921, 206 CR 707. For a list of these constitutional rights, see §26.11.

Ø **Note:** When the defendant submits the case on the preliminary hearing transcript, the police report, or on stipulated facts in circumstances that make the submission tantamount to a guilty plea, the record must reflect a knowing and express waiver of *Boykin-Tahl* rights. *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. See also §§26.19, 28.19-28.21. A stipulation to evidentiary facts that admits some, *but not all*, of the elements of a conviction or enhancement does not trigger a defendant's *Boykin-Tahl* rights. *People v Newman* (1999) 21 C4th 413, 87 CR2d 474; *People v Adams* (1993) 6 C4th 570, 577, 24 CR2d 831. See also §28.31.

In reviewing *Boykin-Tahl* error, the standard of review is governed by federal law, under which a plea is valid if the record affirmatively shows that it is voluntary and intelligent in the totality of the circumstances. *People v Mosby* (2004) 33 C4th 353, 356, 15 CR3d 262; *People v Howard* (1992) 1 C4th 1132, 1175, 5 CR2d 268. See, *e.g., People v Christian* (2005) 125 CA4th 688, 22 CR3d 861 (under totality of circumstances, record was inadequate to allow court of appeal to conclude that defendant entered his plea understandingly and voluntarily).

In felony cases, the court must satisfy itself that a factual basis exists for the plea. Pen C §1192.5. See discussion in §26.13. In all cases, the court must make a finding that the plea was voluntary and was made knowingly and intelligently. *In re Johnson* (1965) 62 C2d 325, 42 CR 228. See discussion in §26.14. In addition, defendants must be advised of the direct consequences of the plea. *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. See also *Iowa v Tovar* (2004) 541 US 77, 158 L Ed 2d 209, 215, 124 S Ct 1379. See discussion in §26.15. For a list of the most common direct consequences, see §26.16.

Either the court or the prosecutor may explain the defendant's rights to him or her on the record. *In re Ibarra* (1983) 34 C3d 277, 285, 193 CR 538; *People v Harty* (1985) 173 CA3d 493, 504, 219 CR 85.

Ø **Note:** Prosecutors may want to ask the court's permission to question a defendant about his or her waiver of rights if it appears that a waiver taken by the court is insufficient. *In re Moss* (1985) 175 CA3d 913, 931, 221 CR 645.

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§26.11 2. Constitutional Rights That Must Be Included in Advisement and Waiver

Defendants in misdemeanor and felony cases must be informed of and explicitly waive each of the following constitutional rights before entering a valid guilty plea (*People v Sumstine* (1984) 36 C3d 909, 921, 206 CR 707):

- Right to counsel, if unrepresented by counsel (see discussion in §26.12);
- Privilege against compulsory self-incrimination;
- Right to trial by jury; and
- Right to confront accusers (including right to produce witnesses through court's subpoena processes). It is sufficient advisement of the right to confront witnesses for the court to explain that the defendant has the "right to cross-examine." *People v Hayes* (1990) 52 C3d 577, 637, 276 CR 874.

Ø **Note:** The record must also reflect that the defendant is aware that the charge to which he or she is pleading guilty is a constitutionally valid charge. *In re Tahl* (1969) 1 C3d 122, 81 CR 577. See §26.12.

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§26.12 3. Discussion of Constitutional Rights

Right to counsel. Defendants may plead guilty or no contest without an attorney in all but capital cases and cases in which the defendant may be sentenced to life imprisonment without the possibility of parole (LWOP). Pen C §987. An accused unrepresented by counsel must be advised of and waive the right to counsel before entering a plea of guilty or no contest. Cal Const art I, §13. See *In re Haro* (1969) 71 C2d 1021, 80 CR 588; *In re Smiley* (1967) 66 C2d 606, 615, 58 CR 579. The court must be satisfied that the defendant understands that he or she has the right to an attorney, and a defendant who does not wish to be represented by counsel must so state in open court. *People v Chadd* (1981) 28 C3d 739, 747, 170 CR 798.

> Ø **Note:** The federal Constitution does not require the court to give the defendant detailed advisements on the dangers and disadvantages of self-representation. *Iowa v Tovar* (2004) 541 US 77, 158 L Ed 2d 209, 222, 124 S Ct 1379.

Some courts use one defense attorney to give a mass advisement and counseling session to defendants at arraignment. This attorney is not required to speak with individual defendants for the record to reflect that the defendants were represented by counsel in deciding whether to enter a guilty plea. This practice is most common in cases involving driving under the influence, and when it occurs, defendants must be advised of and waive their right to have appointed counsel at every stage of the proceedings, including trial, if indigent. *People v Howell* (1986) 178 CA3d 268, 223 CR 818 (case reversed because of lack of advice and waiver of counsel).

Other *Boykin-Tahl* rights. Convictions based on a plea of guilty must also be supported by a record of the plea that contains direct evidence that the accused was advised of the right to jury trial, to confront witnesses, and against self-incrimination, and that he or she "knowingly and intelligently" waived each of those three rights. The record must also show that the defendant knew both the nature of the charge and the consequences of entering a plea of guilty. *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577; *People v Sumstine* (1984) 36 C3d 909, 206 CR 707.

The *Boykin-Tahl* rights also apply to any allegations or enhancements admitted at the time of taking the guilty plea. *In re Yurko* (1974) 10 C3d 857, 864, 112 CR 513. They apply to misdemeanor pleas. *Mills v Municipal Court* (1973) 10 C3d 288, 308, 110 CR 329, 343 (applied prospectively only). They also apply to juveniles charged under the Juvenile Court Law. *In re Ronald E.* (1977) 19 C3d 315, 321, 137 CR 781.

For purposes of *Boykin-Tahl* safeguards, there is no functional difference between a plea of guilty and a plea of no contest. *Mills v Municipal Court, supra*.

The right to testify on one's own behalf is not a constitutional right about which the defendant must be informed at the time the guilty plea is entered. *People v Jackson* (1991) 1 CA4th 697, 703, 2 CR2d 308 (rejecting dicta in *People v Tran* (1984) 152 CA3d 680, 684 n5, 199 CR 539).

Requirements for a "slow plea" are discussed in §§26.19, 28.19-28.21.

Procedure when clerk's docket conflicts with court reporter's transcript. When there is a conflict between the clerk's docket and the court reporter's transcript, the transcript will be held determinative of the issue. See *In re Birch* (1973) 10 C3d 314, 320, 110 CR 212.

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§26.13 4. Factual Basis for Plea in Felony Cases

In felony cases, the court must satisfy itself that there is a factual basis for the plea. Pen C §1192.5. The court may discharge this obligation by asking the defendant to describe the conduct that gave rise to the charge, by questioning the defendant about the factual basis of the complaint (or plea agreement), or by asking counsel to stipulate to a document (*e.g.,* police report, complaint, preliminary hearing transcript) that provides a factual basis for the plea. *People v Holmes* (2004) 32 C4th 432, 442, 9 CR3d 678. A "bare stipulation" from counsel, without reference to any document in the record, does not provide a sufficient factual basis. *People v Willard* (2007) 154 CA4th 1329, 1334, 65 CR3d 488. In *Holmes,* the trial court complied with §1192.5 by asking the defendant whether he had done what was charged in the complaint. This inquiry was adequate because the complaint was sufficient to establish a factual basis for the plea. 32 C4th at 443. Although the trial court's determination that there is a factual basis for a plea is a mixed question of fact and law, it is reviewed for abuse of discretion. Furthermore, any error will be deemed harmless when the record discloses an adequate factual basis for the plea. 32 C4th at 442.

With the consent of the defendant, the trial court may make this finding at the time of sentencing. *People v Coulter* (2008) 163 CA4th 1117, 1122, 78 CR3d 210.

See §26.45 for discussion of the problems involved, and possible solutions, when a defendant wishes to plead guilty but does not admit guilt.

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§26.14 5. Plea Must Be Knowing, Intelligent, and Voluntary

The rendering court must make a finding that a guilty plea was made voluntarily, knowingly, and intelligently. *In re Johnson* (1965) 62 C2d 325, 42 CR 228; *People v Garcia* (1979) 98 CA3d Supp 14, 159 CR 487. The judge, however, need not announce his or her finding; it is sufficient if the docket states that the court found the waiver to have been "knowingly, intelligently and understandingly made." 98 CA3d Supp at 17.

A guilty plea cannot be considered voluntary unless the defendant is informed of the charges pending against him or her. *People v West* (1970) 3 C3d 595, 91 CR 385. There is no requirement, however, that the technical elements of a crime be explained to the defendant before entry of a plea. *In re Ronald E.* (1977) 19 C3d 315, 324, 137 CR 781. The law does not even require an express statement that the elements of the offense have been discussed with counsel. *People v Wharton* (1991) 53 C3d 522, 583, 280 CR 631. The record need only "demonstrate" that the defendant understood the nature of the charge in order to foreclose any relief based on a claim that he or she was not expressly advised of the charge. *In re Ronald E., supra*.

> Ø **Note:** When counsel has reason to question the defendant's competence to plead guilty, failure to investigate further may constitute ineffective assistance of counsel. See *U.S. v Howard* (9th Cir 2004) 381 F3d 873, 882.

In multiple-defendant cases, when a defendant pleads guilty as part of a "package deal" arrangement for all codefendants, the trial court has a duty to inquire further into the voluntariness of the plea. Although such a bargain is not per se coercive, it may be so in the totality of the circumstances. *In re Ibarra* (1983) 34 C3d 277, 286, 193 CR 538. If the court determines that a plea of guilty is being entered into as part of a package deal, the following inquiries should be made: whether the inducement for the plea is proper, the factual basis for the guilty plea, and the nature and degree of coerciveness. 34 C3d at 287. Some factors to consider are the defendant's age, who initiated the plea bargain, whether charges have already been pressed against a third party, and the defendant's relationship to any other charged persons.

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§26.15 6. Advisement of Direct Consequences of Plea of Guilty or No Contest

Before accepting a plea of guilty or no contest, the court must advise the defendant of the direct consequences of the plea. *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. See §26.16 (list of direct consequences about which court must advise defendant before guilty plea may be accepted).

The California Supreme Court has characterized this requirement as a judicially declared rule of criminal procedure, not a rule that is constitutionally compelled. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902. See *People v McMillion* (1992) 2 CA4th 1363, 1370, 3 CR2d 821 (because failure to advise of consequences not federal constitutional error, reversal not required unless defendant shows reasonable probability that he or she would not have pleaded guilty if advised of consequences). However, in *Iowa v Tovar* (2004) 541 US 77, 158 L Ed 2d 209, 215, 124 S Ct 1379, the Supreme Court observed that the U.S. Constitution requires the trial court to inform the accused of the "range of allowable punishments." Although the observation was not essential to the holding in the case, it adds support to the opposing view, *i.e.,* that due process does require advice on the direct consequences of a guilty plea. See *Brady v U.S.* (1970) 397 US 742, 755, 25 L Ed 2d 747, 760, 90 S Ct 1463 (defining knowing and voluntary guilty plea); *Torrey v Estelle* (9th Cir 1988) 842 F2d 234 (Fifth Amendment requires advice on direct consequences of guilty plea). See also *In re Birch* (1973) 10 C3d 314, 319, 110 CR 212 (unrepresented defendant unaware of direct consequences of guilty plea cannot reasonably be found to have "knowingly and voluntarily" entered plea).

Defendants need not be advised of collateral consequences, *i.e.,* consequences that do not *inexorably* flow from a conviction of the offense charged. *People v Moore* (1998) 69 CA4th 626, 81 CR2d 658 (court not required to advise defendant that plea to sex offense could result in confinement under Sexually Violent Predator Act); *People v Crosby* (1992) 3 CA4th 1352, 1356, 5 CR2d 159 (trial court not required to advise defendant that subsequent conviction could result in enhanced punishment); *People v Martinez* (1975) 46 CA3d 736, 745, 120 CR 362 (court not required to advise defendant that conviction will result in revocation of probation).

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Source: Criminal Law/California Criminal Law Procedure and Practice/26 PLEAS AND CASE SETTLEMENT/§26.16 7. Checklist: Most Common Direct Consequences of Which Defendant Must Be Advised

§26.16 7. Checklist: Most Common Direct Consequences of Which Defendant Must Be Advised

The defendant must be advised of the following direct consequences of a guilty or no contest plea (see §26.15):

- Mandatory revocation of driving privileges on a driving under the influence conviction. *Corley v DMV* (1990) 222 CA3d 72, 76, 271 CR 406.
- Fines, penalty assessments, and drug and laboratory fees if applicable. Whether the trial court may nonetheless impose certain minimum fines or fees at sentencing appears to turn on whether they are *mandatory* and a significant deviation from the plea agreement. *People v Walker* (1991) 54 C3d 1013, 1 CR2d 902; *People v Sorenson* (2005) 125 CA4th 612, 621, 22 CR3d 854.
- Possible immigration consequences of a conviction, including deportation, exclusion from admission to the United States, or denial of naturalization. Pen C §1016.5(a). The court must warn a noncitizen defendant of these potential consequences. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 96 CR2d 463. Penal Code §1016.5 also requires the court to grant additional time to a defendant on request to consider the effect of a plea. The court that takes a plea must have a record of its advisement under Pen C §1016.5; otherwise, a presumption arises that there was no such advisement. If there was no advisement, the conviction must be vacated. Pen C §1016.5(b). For further discussion, see §52.8. Convictions and sentences with adverse immigration consequences are discussed in §§52.25-52.49.
- The maximum parole period that the defendant might have to serve following the completion of any prison term imposed. *In re Moser* (1993) 6 C4th 342, 357, 24 CR2d 723; *People v Avila* (1994) 24 CA4th 1455, 30 CR2d 138; *In re Carabes* (1983) 144 CA3d 927, 193 CR 65.
- The potential maximum sentence in the case. *In re Birch* (1973) 10 C3d 314, 110 CR 212.
- Absolute or presumptive probation ineligibility. *People v Caban* (1983) 148 CA3d 706, 196 CR 177.

  Ø **Note:** The court is *not* required to advise the defendant that a conviction will revoke an existing probationary grant. *People v Martinez* (1975) 46 CA3d 736, 745, 120 CR 362; *People v Searcie* (1974) 37 CA3d 204, 211, 112 CR 267. However, when the original plea agreement guarantees a grant of probation, the permissible future range of the sentence should be explained when the plea is taken. See *People v Kunkel* (1985) 176 CA3d 46, 221 CR 359.

- Arson offender registration. Pen C §457.1.
- Narcotics offender registration. Health & S C §11590.
- Sex offender registration under Pen C §§290-290.023. *In re Birch* (1973) 10 C3d 314, 110 CR 212; *People v Zaidi* (2007) 147 CA4th 1470, 1481, 55 CR3d 566 (court must advise that registration requirement will be for duration of defendant's life).
- Restitution fine. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902; *People v Crandell* (2007) 40 C4th 1301, 1310, 57 CR3d 349.

Right to appeal. The trial court is required to advise a defendant of his or her right to appeal after imposing sentence on conviction *after trial or revocation of probation.* Cal Rules of Ct 4.470. No equivalent provision, however, requires advisement after a plea of guilty. *In re Ibarra* (1983) 34 C3d 277, 283 n1, 193 CR 538. There is as yet no authority requiring that a trial court advise the defendant of the loss of any appeal rights following a guilty plea. See *In re Ibarra, supra*.

The right to appeal is a statutory right only. An express waiver of the right to appeal made as part of a plea bargain is valid as long as the defendant's waiver is a knowing, intelligent, and voluntary one. *People v Castrillon* (1991) 227 CA3d 718, 721, 278 CR 121. In fact, one court has gone so far as to explicitly encourage the use of waivers of appeal as part of negotiated dispositions. *People v Olson* (1989) 216 CA3d 601, 604, 264 CR 817. The scope of the waiver, however, if not explicitly made part of the record, will be determined by the context in which it arises. *People v Nguyen* (1993) 13 CA4th 114, 120, 16 CR2d 490 (in context of slow plea). Whether the bargain included waiver of appeal may be determined by analogy with contract law. The parties' expressed intent will be followed. If not expressed, the court

should seek to carry out their reasonable expectations. *People v Nguyen, supra*. See also *In re Uriah R.* (1999) 70 CA4th 1152, 83 CR2d 314 (plea-bargained waiver of appeal does not preclude appeal of errors after plea was entered).

Ø **Note:** If the defendant enters into a plea bargain that includes the promise that the defendant can appeal the case, and doing so is not possible, the defendant must be allowed to withdraw his or her plea. *People v DeVaughn* (1977) 18 C3d 889, 135 CR 786.

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§26.17 8. Checklist: Miscellaneous Requirements Concerning Plea of Guilty or No Contest

- In plea bargain situations, the court must see that the plea bargain is reflected in the record (*People v West* (1970) 3 C3d 595, 610, 91 CR 385) and admonish the defendant that approval of the plea is not binding on the sentencing court. The court may, at the time set for hearing on the application for probation or pronouncement of judgment, withdraw its approval in light of further consideration of the matter. In such a situation, the defendant will be permitted to withdraw his or her plea if he or she desires to do so. Pen C §1192.5. Failure to give this required admonition may mean that, if there is a variance between the sentence indicated at the time of the plea and the sentence ultimately pronounced and there is no objection at sentencing, the defendant will not be deemed to have waived the right to appeal. *People v Walker* (1991) 54 C3d 1013, 1025, 1 CR2d 902; *People v Clark* (1992) 7 CA4th 1041, 1049, 9 CR2d 726.
- Any conditions imposed with a plea must meet constitutional standards. A defendant's acquiescence to an improper plea agreement does not render the plea valid. *Alhusainy v Superior Court* (2006) 143 CA4th 385, 391, 48 CR3d 914.
- Unless the prosecutor obtains a waiver as part of a plea agreement, dismissed counts or facts pertaining solely to them may not be considered by the trial court in deciding what sentence to impose. *People v Harvey* (1979) 25 C3d 754, 159 CR 696.
- If a no contest plea is entered, the defendant must be told that the court will find the defendant guilty. Pen C §1016(3).
- A misdemeanant denied probation must be informed of the relief available under Pen C §1203.4a at the time of sentencing. Pen C §1203.4a(a). See discussion of relief from disabilities under Pen C §1203.4a in §41.16.
- A defendant who enters a plea agreement in a court that has jurisdiction to sentence is entitled to have the same judge impose the sentence, unless the defendant waives that right at the time of the plea. *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778. See discussion in §35.11.

In addition to these advisements and findings, the court may want to satisfy itself of the following and to indicate those inquiries and findings on the record:

- The defendant has not ingested drugs or alcohol. On the defendant's competence to enter a guilty or no contest plea, see §26.8.
- When the defendant has pleaded guilty to a felony before the magistrate, the defendant is aware that he or she is waiving the right to a preliminary hearing. Pen C §859b.

Ø **Note:** Appellate defense attorneys seldom find errors in the written forms, but they may find errors in the transcript of the oral advisement and waiver of rights, and by talking with the client. See, *e.g., People v Howell* (1986) 178 CA3d 268, 270, 223 CR 818. Prosecutors who routinely advise defendants of their rights may wish to read those advisements from a written list to make sure nothing is inadvertently omitted.

Because the entire record of a conviction may now be reviewed in determining whether a prior conviction is a "serious felony" for enhancement purposes under Pen C §667 (*People v Guerrero* (1988) 44 C3d 343, 355, 243 CR 688), it is probably better practice in taking a plea for the court or prosecutor to inform the defendant of the technical elements of the offense to which the defendant pleads.

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§26.18 E. Effect of Guilty and No Contest Pleas on Right to Appeal

A guilty plea (1) admits each element of the admitted offense, (2) is itself a conviction, and (3) leaves nothing more than for judgment to be entered and punishment imposed. *People v Hill* (1974) 12 C3d 731, 767, 117 CR 393, disapproved on other grounds in *People v DeVaughn* (1977) 18 C3d 889, 896 n5, 135 CR 786. A guilty plea waives all issues except for denial of a motion to suppress evidence, sentencing, or constitutional and jurisdictional issues. Pen C §1237.5. For a list of issues that can be appealed after a plea of guilty, see §44.13. Thus, an accused who wishes to preserve questions of fact for appellate review should not plead guilty but should stand trial (by jury or court) and appeal from the judgment if ultimately convicted (*People v Plummer* (1963) 222 CA2d 280, 35 CR 53), or should enter a "slow plea" (see §§26.19, 28.19-28.21) and appeal as from a court trial.

In felony cases, even when an issue is appealable following a plea of guilty, for constitutional and jurisdictional issues, a certificate of probable cause must be obtained from the trial court and filed with the notice of appeal. Pen C §1237.5(b). See §§44.8-44.12. There is an exception for appeals of Pen C §1538.5 issues (see §16.37) and sentencing issues. No certificate of probable cause is required to appeal a misdemeanor. *People v Woods* (1978) 84 CA3d 149, 148 CR 312. See Pen C §1235.

A plea of no contest is the equivalent of a plea of guilty for purposes of appeal rights. *People v Padfield* (1982) 136 CA3d 218, 227, 185 CR 903.

On appeals from pleas of guilty (and no contest), including the correct court in which to bring both felony and misdemeanor appeals, see §§44.6-44.13.

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§26.19 F. Submitting Case on Transcript From Preliminary Hearing or on Police Report ("Slow Plea")

A defendant who submits his or her case for decision on the basis of agreed-on evidence, typically the transcript of the preliminary hearing or a police report, enters what is termed a "slow plea." See *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. There are several variations of slow plea; they each allow the defendant to preserve appellate rights that would be waived by a guilty plea (see Pen C §1237.5).

Ø **Note:** It is good practice to make a clear record of what factual or legal issues are being contested for purposes of appeal.

When a submission on agreed-on evidence is tantamount to a guilty plea, the court must inform the defendant of the right to jury trial, the right to confront and cross-examine witnesses, and the privilege against self-incrimination, and must obtain a knowing and intelligent waiver of each of these rights. *Bunnell,* 13 C3d at 605.

If a case is submitted in exchange for a particular sentence based on a negotiated disposition, counsel should make a record of the disposition and obtain court approval. *People v James* (1989) 208 CA3d 1155, 1167, 256 CR 661.

For further discussion of slow pleas, see §§28.19-28.21.

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§26.20 G. Pleading Guilty Before Holding Order

A defendant can plead guilty at the conclusion of the preliminary hearing before a holding order is made. Pen C §859a(a). This is typically done to avoid the limitations on plea bargaining in Pen C §§667(g) and 1192.7(c). These provisions severely restrict postinformation and postindictment plea bargaining when the defendant is charged with an offense listed in Pen C §1192.7(a) or a prior felony conviction is alleged. On plea bargaining in such cases, see §§26.38-26.39.

After the defendant's plea is taken, the magistrate sets a time for pronouncing sentence and refers the defendant to a probation officer if the defendant is eligible for probation under Pen C §1191. Pen C §859a(b). Sentencing will be before the magistrate who presided at the preliminary hearing.

If an information is filed, the case will be assigned to another superior court judge for sentencing. If the magistrate will not be the sentencing judge, the parties should obtain the trial court's approval before entering a plea. See §8.6. If the plea is entered into with the expectation that a particular judge will sentence, it may be advisable to make this a condition of the plea.

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Source: Criminal Law/California Criminal Law Procedure and Practice/26 PLEAS AND CASE SETTLEMENT/§26.21 H. Withdrawing Guilty or No Contest Plea

§26.21 H. Withdrawing Guilty or No Contest Plea

At any time before judgment or within 6 months after an order granting probation, and if entry of judgment was suspended, the court may permit the withdrawal of a guilty plea and the entry of a not guilty plea on a showing of good cause. Pen C §1018. See *People v Miranda* (2004) 123 CA4th 1124, 20 CR3d 610. In such circumstances, if the defendant was not represented by counsel at the time of entering the plea, the court must permit the plea to be withdrawn. Pen C §1018.

The defendant must personally make some expression in open court that authorizes or adopts a motion made on his or her behalf to withdraw a guilty plea; the defendant's silence during a motion to withdraw will not suffice. Pen C §1018; *Johnson v Superior Court* (1981) 121 CA3d 115, 175 CR 272.

The decision to move to withdraw a guilty plea belongs to the defendant. Counsel may not simply refuse the defendant's request to make the motion. If counsel is not willing to make such a motion, new counsel should be appointed for the defendant. *People v McLeod* (1989) 210 CA3d 585, 588, 258 CR 496; *People v Brown* (1986) 179 CA3d 207, 224 CR 476. If the defendant wants to withdraw the guilty plea based on ineffective assistance of trial counsel, the trial court should appoint new counsel to represent the defendant on the motion to withdraw the plea. *People v Smith* (1993) 6 C4th 684, 25 CR2d 122. Defense counsel's failure to move to withdraw a plea of guilty at the defendant's request when good grounds exist could be considered ineffective assistance of counsel. *People v Osorio* (1987) 194 CA3d 183, 239 CR 333, disapproved on other grounds in *People v Johnson* (2009) 47 C4th 668, 681, 101 CR3d 332. See *People v Brown* (2009) 175 CA4th 1469, 97 CR3d 327 (counsel may decline to bring meritless motion).

"Good cause" to set aside a guilty plea is shown when the defendant demonstrates that the plea was entered as the result of mistake, ignorance, inadvertence, or some other factor that demonstrates overreaching. *People v Caban* (1983) 148 CA3d 706, 196 CR 177 (defendant allowed to withdraw guilty plea because he was not told that prison was mandatory if he pleaded guilty to robbery with use of gun). See *People v Ramirez* (2006) 141 CA4th 1501, 47 CR3d 272 (defendant allowed to withdraw plea on evidence that prosecution's withholding of favorable evidence rendered plea involuntary).

Common reasons for withdrawing a plea of guilty or no contest include:

- Failure to advise the defendant of his or her constitutional rights (*People v Howard* (1992) 1 C4th 1132, 1175, 5 CR2d 268);
- Failure to specify the direct consequences of the plea (*People v Walker* (1991) 54 C3d 1013, 1023, 1 CR2d 902);
- Violation of plea bargain (*People v Mancheno* (1982) 32 C3d 855, 860, 187 CR 441);

  Ø **Note:** The remedy for violation of a plea bargain, depending on the facts, may be enforcement of the plea bargain. See discussion in §26.53.

- Improper inducement to enter plea (*People v Bonwit* (1985) 173 CA3d 828, 833, 219 CR 297); and
- Illegal sentence contemplated (*People v Baries* (1989) 209 CA3d 313, 319, 256 CR 920).

The application should be both timely and credible. *People v Fick* (1980) 107 CA3d 892, 896, 166 CR 106. It is the defendant's burden to produce evidence of good cause by "clear and convincing" evidence. *People v Cruz* (1974) 12 C3d 562, 566, 116 CR 242. When in doubt, however, the court should grant a prejudgment motion to withdraw a guilty plea. *People v Spears* (1984) 153 CA3d 79, 88, 199 CR 922.

A defendant who simply pleads guilty as charged without any promise by the judge or prosecutor cannot later set aside the plea because he or she believed the court would impose a lesser sentence than that ultimately imposed. *People v Superior Court (Smith)* (1978) 82 CA3d 909, 915, 147 CR 554. However, when a defendant's plea is entered under a bargain, the defendant will be allowed to withdraw it if either the prosecution or the court repudiates any term of the negotiated disposition to the defendant's prejudice. *People v Kaanehe* (1977) 19 C3d 1, 11, 136 CR 409. On remedies for breach of plea bargain, see §26.53.

When a defendant successfully withdraws his or her guilty plea, the case is restored to its status before entry of the plea, including revival of any charges dismissed under the bargain. *People v Superior Court (Garcia)* (1982) 131 CA3d 256, 182 CR 426.

The order denying a motion to withdraw a guilty plea is not itself appealable, but can be reviewed on appeal from the judgment, with a certificate of probable cause from the trial court. *People v Johnson* (2009) 47 C4th 668, 101 CR3d 332; *People v Ribero* (1971) 4 C3d 55, 62, 92 CR 692. On appeal, the trial court's ruling (assuming the right standard of proof was used) is reviewed using the abuse of discretion standard. *People v Nance* (1991) 1 CA4th 1453, 2 CR2d 670.

Although the court loses its statutory authority to permit a defendant to withdraw a guilty plea after judgment is entered or 6 months after an order is made granting probation, both motions to vacate and petitions in the nature of coram nobis or habeas corpus may be considered by the trial court. See *People v Stanworth* (1974) 11 C3d 588, 596, 114 CR 250; *People v Miranda* (2004) 123 CA4th 1124, 20 CR3d 610.

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§26.22 I. Admissibility of Guilty or No Contest Plea in Related Civil Case

The following pleas by a defendant are admissible as admissions against him or her in a civil case growing out of the act on which the criminal prosecution was built:

- Guilty plea to a misdemeanor or felony. *Teitelbaum Furs, Inc. v Dominion Ins. Co.* (1962) 58 C2d 601, 25 CR 559.
- No contest plea to a *felony* offense. Pen C §1016(3).

A plea of guilty or no contest to a criminal offense has no collateral estoppel effect in a later civil proceeding. *Pease v Pease* (1988) 201 CA3d 29, 246 CR 762. In contrast, a prior conviction resulting from a *trial* that thoroughly litigated the same issues will have collateral estoppel effect. *Teitelbaum Furs, Inc. v Dominion Ins. Co., supra*. For further discussion of collateral estoppel, see §§26.29-26.33.

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VIII. ONCE IN JEOPARDY PLEA (DOUBLE JEOPARDY)

§26.23 A. Basis of Plea; Trial of Plea

In California, defendants may rely on the double jeopardy protection of the Fifth Amendment to the U.S. Constitution, binding on state courts through the Fourteenth Amendment (*Arizona v Manypenny* (1981) 451 US 232, 68 L Ed 2d 58, 101 S Ct 1657; *Richard M. v Superior Court* (1971) 4 C3d 370, 377, 93 CR 752) and of Cal Const art I, §15. The Double Jeopardy Clause of the Fifth Amendment establishes several distinct protections (not all of which are raised by a plea of once in jeopardy):

- Protection against a second prosecution for the same offense after an acquittal (*Illinois v Vitale* (1980) 447 US 410, 415, 65 L Ed 2d 228, 235, 100 S Ct 2260);
- Protection against a second prosecution for the same offense after a conviction (*U.S. v Dixon* (1993) 509 US 688, 125 L Ed 2d 556, 113 S Ct 2849);
- Protection against multiple prosecutions for the same offense (*Illinois v Vitale, supra; U.S. v Brooklier* (9th Cir 1981) 637 F2d 620; *Gonzalez v Municipal Court* (1973) 32 CA3d 706, 714, 108 CR 612); and
- Protection against multiple prosecutions when collateral estoppel or res judicata applies to an issue previously litigated (see *Yeager v U.S.* (2009) ___ US ___, 174 L Ed 2d 78, 129 S Ct 2360; *Ashe v Swenson* (1970) 397 US 436, 442, 25 L Ed 2d 469, 90 S Ct 1189; *People v Taylor* (1974) 12 C3d 686, 117 CR 70).

Ø **Note:** A state is not precluded from providing greater double jeopardy protection than the U.S. Supreme Court has determined to be available under the Fifth Amendment. *Curry v Superior Court* (1970) 2 C3d 707, 717, 87 CR 361. In California, statutes provide additional safeguards against potentially duplicative prosecutions. See §26.34 on pleas of former conviction and former acquittal.

A plea of once in jeopardy is entered when a defendant was placed in jeopardy for the same offense but no final verdict resulted, or when the defendant has been prosecuted for the same criminal act or transaction under two criminal statutes. If a verdict resulted on the same exact charge, a plea of former conviction or acquittal is raised. Pen C §1016. See Pen C §1017(3)-(4); §26.34. See §26.24 on when jeopardy attaches. The plea of once in jeopardy is most often raised when a mistrial was declared without the consent of the defense (see, *e.g., Larios v Superior Court* (1979) 24 C3d 324, 155 CR 374), or when the case was previously dismissed (see Pen C §1387; see, *e.g., People v Davidson* (2008) 159 CA4th 205, 212, 70 CR3d 913). See chap 25 on discharge and dismissal.

A plea of once in jeopardy is a bar to a California state court criminal proceeding whether the prior proceeding occurred in California, in another state, a territory of the United States, or in federal court. See Pen C §§656, 793; *People v Comingore* (1977) 20 C3d 142, 141 CR 542. Double jeopardy protection extends to necessarily lesser included offenses (see *In re Dennis B.* (1976) 18 C3d 687, 135 CR 82). See also §26.25.

Ø **Note:** Although double jeopardy protection does not extend to a prosecution under the laws of a foreign country (see Pen C §656), a defendant convicted of a crime based on facts for which he or she has previously been acquitted or convicted in a foreign country is entitled to credit for actual time served in custody in a penal institution in that country for the crime. Pen C §656.5.

The defendant makes the plea of once in jeopardy in open court, either orally or in writing, along with any other relevant plea, such as not guilty. When responding in court to the court's question as to what plea the defendant will enter, he or she should answer "I plead once in jeopardy," and then specify the time, place, and court where jeopardy attached. See Pen C §1017(4).

If the court accepts the defendant's plea of once in jeopardy, that issue is determined by the trier of fact (judge or jury) unless the prior proceeding could not constitute double jeopardy as a matter of law. In that event, the trial court has the power to determine the issue. *People v Greer* (1947) 30 C2d 589, 595, 184 P2d 512, 516, disapproved on other grounds in *People v Fields* (1996) 13 C4th 289, 308, 52 CR2d 282. The burden of proof is on the defendant.

People v Ferguson (1982) 129 CA3d 1014, 181 CR 593. Evidence is presented at trial in the order determined by the court. See Pen C §1093.

If the defense presents no evidence to support its plea of once in jeopardy, the judge can strike the plea and not submit it to the jury for a decision. See *People v Blau* (1956) 140 CA2d 193, 215, 294 P2d 1047.

Failure to enter a plea of once in jeopardy to any particular count constitutes a waiver of the claim as to that count. *People v Belcher* (1974) 11 C3d 91, 96, 113 CR 1 (court found ineffective assistance of counsel based on counsel's failure to raise defendant's acquittal in federal court until first day of trial); *People v Moore* (1983) 140 CA3d 508, 189 CR 487.

Ø **Note:** Prohibition is a proper remedy to prevent retrial when a defendant has been once in jeopardy. *Bunnell v Superior Court* (1975) 13 C3d 592, 119 CR 302; *Curry v Superior Court* (1970) 2 C3d 707, 87 CR 361. For further discussion of writs of prohibition, see chap 42.

For discussion of Pen C §654, which provides additional protection against multiple punishment, see §§37.44-37.50. See §§26.29-26.33 on res judicata and collateral estoppel. See §49.13 on effect of dismissal under Pen C §§1099-1100.

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§26.24 B. When Jeopardy Attaches

A person is in jeopardy for an offense when placed on trial on a valid accusatory pleading before a competent court, either with a jury duly empaneled and sworn if trial is by jury, or when the trial is "entered upon" if a judge is the trier of fact. *People v Bryant* (1992) 10 CA4th 1584, 1596, 13 CR2d 601. A court trial is usually considered to have been entered on when the judge begins to take evidence. *People v Hernandez* (1998) 19 C4th 835, 80 CR2d 754. Note, however, that a hearing on the enhancement is not a court trial. *People v Hernandez* (1998) 19 C4th 835, 80 CR2d 754.

A guilty plea (or plea of no contest) is equivalent to a conviction; jeopardy attaches when the plea is entered. *Gonzalez v Municipal Court* (1973) 32 CA3d 706, 714, 108 CR 612. See also *People v Bivens* (1991) 231 CA3d 653, 658, 282 CR 438.

Although jeopardy attaches in a jury trial once the jury has been sworn, discharging the jury before it reaches a verdict does not bar retrial if the defendant consented to the discharge or if legal necessity required it. See 1 Witkin & Epstein, California Criminal Law, *Defenses* §120 (3d ed 2000).

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§26.25 C. Jeopardy Concerning Greater and Lesser Offenses

Charged in accusatory pleading or submitted to jury. A judgment of acquittal of a greater offense does not encompass an acquittal of a lesser included offense if the lesser offense is charged in the accusatory pleading (see *People v Webb* (1967) 66 C2d 107, 56 CR 902), or if the jury is instructed on it and asked to return a separate verdict on it (*Stone v Superior Court* (1982) 31 C3d 503, 183 CR 647). *People v Garcia* (1985) 166 CA3d 1056, 1068, 212 CR 822. Retrial is barred on greater offenses when the defendant is found guilty of a lesser degree or of a lesser included offense. *Gomez v Superior Court* (1958) 50 C2d 640, 644, 328 P2d 976; *People v Fields* (1996) 13 C4th 289, 52 CR2d 282. See Pen C §1023. If the jury deadlocks on the lesser offenses but acquits on the greater, a failure to record the verdicts of acquittal forecloses further prosecution on any of the offenses if there was neither consent nor legal necessity. *People v Chaney* (1988) 202 CA3d 1109, 1124, 249 CR 251.

Not charged, not submitted to jury. When the accusatory pleading charges only the greater offenses and the question of the lesser included offense is not submitted to the jury, an acquittal of the greater offense bars subsequent prosecution and constitutes an acquittal of the lesser included offense. *In re Dennis B.* (1976) 18 C3d 687, 691, 135 CR 82; *People v Garcia, supra*.

When a court grants a directed verdict of not guilty under Pen C §1118.1, and no lesser included offense is charged in the accusatory pleading, failure to mention any lesser included offense bars subsequent submission of lesser offense to the jury. *People v Garcia, supra*. The court, however, can limit its judgment to only the greater offense, leaving the guilt or innocence of a lesser offense to be determined by the jury, without violating the jeopardy clause. *People v Garcia, supra*.

Conviction on both greater and lesser offenses bars conviction on lesser. Conviction of a lesser included offense cannot stand when the defendant was also found guilty of the greater offense. *People v Ward* (1986) 188 CA3d 459, 472, 233 CR 477 (defendant found guilty under both Pen C §288(a) and (b) based on same conduct; §288(a) conviction reversed because it is necessarily included offense of §288(b)).

Successive prosecutions. Successive prosecutions for the same criminal act or transaction under two different criminal statutes are forbidden unless each statute "contains an element not contained in the other." *U.S. v Dixon* (1993) 509 US 688, 696, 125 L Ed 2d 556, 568, 113 S Ct 2849. This is known as the "same-elements" or *Blockburger* test (after *Blockburger v U.S.* (1932) 284 US 299, 304, 76 L Ed 306, 309, 52 S Ct 180).

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§26.26 D. What Does Not Constitute Violation of Double Jeopardy

Federal and state prosecution for same acts. Prosecution and conviction for the same act by both state and federal governments are not barred by the constitutional protection against double jeopardy. *Abbate v U.S.* (1959) 359 US 187, 194, 3 L Ed 2d 729, 734, 79 S Ct 666. In practice, this means that the federal government can choose to criminally prosecute persons in the federal court for the same crimes for which they were prosecuted in a state court. California does not allow prosecution of individuals for the same crime for which they were already prosecuted in the federal system. Pen C §§656, 793-794.

Prosecution following civil contempt order. A civil contempt order for failure to comply with a family law court custody order does not operate as a bar to prosecution for felony child stealing under Pen C §278.5. *People v Batey* (1986) 183 CA3d 1281, 1289, 228 CR 787; *People v Derner* (1986) 182 CA3d 588, 227 CR 344.

Trial following plea bargain. When a plea bargain is properly withdrawn, double jeopardy does not prevent the defendant from being tried on the original charges. *Ricketts v Adamson* (1987) 483 US 1, 12, 97 L Ed 2d 1, 13, 107 S Ct 2680.

Trial following reversal for "trial errors." Unlike the situation in which a conviction is reversed because of insufficient evidence (*Burks v U.S.* (1978) 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141), a reversal for trial errors or for incorrect receipt or rejection of evidence does not bar a retrial under double jeopardy principles. If a case is reversed because the trial court improperly discharged a juror, double jeopardy does not bar a retrial. *People v Hernandez* (2003) 30 C4th 1, 131 CR2d 514. See *U.S. v Lewis* (9th Cir 2004) 368 F3d 1102, 1106 (double jeopardy did not bar retrial after reversal because of *Brady* violation).

Trial of prior convictions following reversal. When a true finding on a prior conviction is reversed on appeal in a noncapital case, double jeopardy principles do not bar retrial, even when insufficient evidence is the basis for the reversal. *Monge v California* (1998) 524 US 721, 734, 141 L Ed 2d 615, 627, 118 S Ct 2246 (U.S. Constitution); *People v Barragan* (2004) 32 C4th 236, 9 CR3d 76 (California Constitution).

Dismissal of action under Pen C §1385. Dismissal based on the furtherance of justice does not necessarily bar retrial on double jeopardy grounds unless the trial court uses the substantial evidence standard. *People v Hatch* (2000) 22 C4th 260, 273, 92 CR2d 80; *People v Davidson* (2008) 159 CA4th 205, 212, 70 CR3d 913.

Reinstatement of guilty verdict by reversal of trial court's dismissal for insufficiency of evidence. If the jury finds the defendant guilty and the court dismisses the action based on a finding that the evidence was insufficient to support the jury's verdict, the prosecution may appeal the dismissal without violating the Double Jeopardy Clause. In such a case, there is no danger of retrial, because a reversal of the trial court's decision on appeal merely results in reinstatement of the jury's verdict, *i.e.,* entering judgment on the verdict. *People v Salgado* (2001) 88 CA4th 5, 12, 105 CR2d 373.

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§26.27 E. Discharge of Jury

The discharge of a jury after jeopardy has attached but before a verdict is entered is the equivalent of an acquittal, and retrial is barred unless there was legal necessity for the discharge or the defendant or defense counsel gave his or her consent. *Larios v Superior Court* (1979) 24 C3d 324, 155 CR 374. The defendant's personal consent is not required. *People v Moore* (1983) 140 CA3d 508, 189 CR 487.

A criminal defendant who successfully moves for a mistrial is usually considered to have consented to a retrial and cannot seek the protection of the double jeopardy proscription. If, however, the prosecutorial or judicial conduct that gave rise to the successful motion was intended to provoke the defendant into moving for a mistrial, the defendant is considered *not* to have consented to a retrial. *Oregon v Kennedy* (1982) 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083. Conversely, a defendant has no duty to object to the declaration of a mistrial not sought by him or her; thus his or her silence cannot be deemed consent or invited error that would waive the constitutional protection against double jeopardy. *People v Saunders* (1993) 5 C4th 580, 592, 20 CR2d 638; *People v Upshaw* (1974) 13 C3d 29, 117 CR 668.

Circumstances that allow a judge to discharge a jury, called "legal necessity," include:

- The jury is unable to agree (Pen C §1140; *Curry v Superior Court* (1970) 2 C3d 707, 87 CR 361).
- The judge, a juror, or the defendant absents himself or herself from the proceedings (*Curry v Superior Court, supra;* see Pen C §1148).

  Ø **Note:** The *prosecutor's* absence is not legal necessity for a mistrial without defense consent; a mistrial not concurred in by the defense will bar any future prosecution for that crime. *People v McJimson* (1982) 135 CA3d 873, 185 CR 605.

- Defense counsel declares a conflict of interest that the court finds may be prejudicial to the defendant (*People v McNally* (1980) 107 CA3d 387, 165 CR 715; see §§2.8-2.16 for further discussion of conflicts).
- The judge disqualifies himself or herself on the basis that he or she cannot give the defendant a fair and impartial trial (*T.P.B. v Superior Court* (1977) 66 CA3d 881, 136 CR 311; but see *Scott v Municipal Court* (1971) 17 CA3d 885, 95 CR 460 (in court trial, judge disqualified himself after case had been submitted because defense counsel interrupted judge's summary of evidence and informed judge another woman arrested at same time had been acquitted; court held there was no legal necessity and defendant could not be retried for that offense)).

Retrial after a jury deadlock is not a violation of double jeopardy, because it is not "another prosecution" within the meaning of Pen C §1023. *Stone v Superior Court* (1982) 31 C3d 503, 520, 183 CR 647. See *People v Anderson* (2009) 47 C4th 92, 112, 97 CR3d 77 (retrial on sentencing enhancement after jury deadlock). See also §33.45.

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§26.28 F. Jeopardy in Juvenile Proceedings

Juveniles in delinquency proceedings are entitled to the constitutional protection against being twice placed in jeopardy for the same offense. *Jesse W. v Superior Court* (1979) 26 C3d 41, 44, 160 CR 700. A juvenile is placed in jeopardy on the proper convening of a jurisdictional hearing in the juvenile court (*In re Shanea J.* (1984) 150 CA3d 831, 841, 198 CR 228), whether before a juvenile court judge or a referee (*Jesse W. v Superior Court, supra*).

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IX. RES JUDICATA AND COLLATERAL ESTOPPEL

§26.29 A. Definitions of Res Judicata and Collateral Estoppel

The doctrine of res judicata means that "a prior judgment is a bar in a new action on the same cause of action." Further, "[i]n a new action on a different cause of action, the former judgment may also have an effect." That effect is based on the doctrine of collateral estoppel (related to res judicata), in which *issues* actually litigated in the former action are conducive as to most issues in a new action. *People v Gephart* (1979) 93 CA3d 989, 997, 156 CR 489. "The rule is based on the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." *Bernhard v Bank of America* (1942) 19 C2d 807, 811, 122 P2d 892.

Collateral estoppel is alleged more often than res judicata in criminal cases because it applies to *issues* that have previously been decided. See *People v Gephart, supra*. See discussion of specific requirements in §26.31.

The doctrines of collateral estoppel and res judicata are embodied in the Fifth Amendment guaranty against double jeopardy and they apply to criminal proceedings. *Yeager v U.S.* (2009) ___ US ___, 174 L Ed 2d 78, 129 S Ct 2360; *Ashe v Swenson* (1970) 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189; *People v Taylor* (1974) 12 C3d 686, 692, 117 CR 70. Their applicability is independent of the concept of double jeopardy. *People v Beltran* (1949) 94 CA2d 197, 202, 210 P2d 238; *People v Gephart* (1979) 93 CA3d 989, 997, 156 CR 489.

Ø **Note:** A subsequent final judgment can have res judicata or collateral estoppel effect over an earlier judgment whose appeal is still pending. *People v Huston* (1989) 210 CA3d 192, 224, 258 CR 393.

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§26.30 B. Raising Defense of Res Judicata or Collateral Estoppel by Demurrer or Plea

If a prior prosecution resulted in a verdict, a plea of former judgment of conviction or acquittal is raised. Pen C §§1016(4), 1017(3)-(4). See discussion in §26.34. If defense counsel wishes to raise the defense of res judicata or collateral estoppel, and the former proceeding did not result in either an acquittal or a conviction, the defense is raised by any of the following:

- A demurrer under Pen C §1004(5) if the defense is apparent from the face of the charging document. Pen C §1012.
- A plea of once in jeopardy if the defense comes within the double jeopardy proscription of US Const amends V, XIV, and Cal Const art I, §15, and it is not apparent from the face of the pleading. See *People v Taylor* (1974) 12 C3d 686, 117 CR 70.
- A plea of not guilty if the defense is not covered by the Double Jeopardy Clause and is not apparent from the face of the pleading, followed by a motion to dismiss. See *Lockwood v Superior Court* (1984) 160 CA3d 667, 670, 206 CR 785 (collateral estoppel defense raised at preliminary hearing and again in nonstatutory motion to dismiss in superior court).

Ø **Note:** Because of the case law requirements concerning pleas of former judgment and double jeopardy (see §§26.5, 26.23), it is recommended that defense counsel specify the court, place, date, and offense charged in the former proceeding, whether the plea is once in jeopardy or not guilty. When in doubt about the correct plea, counsel should enter all pleas that may apply.

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§26.31 C. Requirements for Collateral Estoppel

The doctrine of collateral estoppel applies only if the following threshold requirements are met (*Lucido v Superior Court* (1990) 51 C3d 335, 341, 272 CR 767):

- The issue sought to be precluded from relitigation is identical to that decided in a former proceeding;
- The issue was actually litigated in the former proceeding;
- The issue was necessarily decided in the former proceeding;
- The decision of the former proceeding was final and on the merits; and
- The party against whom the preclusion is sought is the same as, or was in privity with, the party to the former proceeding.

Even if all threshold issues are met, however, the courts will still look to public policy considerations before deciding whether to bar the subsequent litigation of an issue. *Lucido v Superior Court, supra*. The major public policy consideration is to limit litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. *People v Gephart* (1979) 93 CA3d 989, 997, 156 CR 489.

Ordinarily, the acquittal of one accomplice or co-conspirator does not bar conviction of another. *Standefer v U.S.* (1980) 447 US 10, 64 L Ed 2d 689, 100 S Ct 1999; *People v Summersville* (1995) 34 CA4th 1062, 40 CR2d 683. See *People v Palmer* (2001) 24 C4th 856, 103 CR2d 13 (overruling common law rule that acquittal of all other co-conspirators bars conviction of remaining defendant); *People v Taylor* (1948) 88 CA2d 983, 987, 199 P2d 751. However, in very limited circumstances, collateral estoppel may bar a subsequent conviction. See, *e.g*., *People v Taylor* (1974) 12 C3d 686, 690, 117 CR 70.

> Ø **Note:** Defense attorneys trying to apply collateral estoppel to a subsequent prosecution involving fewer than all codefendants should try to show that the underlying facts and charges involving all codefendants are so closely intertwined that a later prosecution will necessarily entail a grossly absurd and unjust result.

The defendant's right to a fair trial will usually outweigh any policy reasons for applying collateral estoppel to preclude the defense from presenting evidence on behalf of the defendant. *Gutierrez v Superior Court* (1994) 24 CA4th 153, 29 CR2d 376 (defendant raised defense of mistaken identity in trial in which convicted of attempted murder; defendant should not be precluded from raising same defense in later homicide trial involving same victim).

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§26.32 D. Collateral Estoppel Between Criminal and Civil Trials; Effect of Finding at Probation Revocation Hearing

Criminal and civil trials. A jury verdict in a criminal case can have collateral estoppel effect in a civil trial when the traditional elements of collateral estoppel are met. *Teitelbaum Furs, Inc. v Dominion Ins. Co.* (1962) 58 C2d 601, 25 CR 559.

Similarly, issues determined against a defendant at a Pen C §1538.5 motion to suppress evidence can have collateral estoppel effect on later civil proceedings if traditional collateral estoppel criteria are met. *McGowan v City of San Diego* (1989) 208 CA3d 890, 256 CR 537.

Probation revocation hearings. Findings at probation violation hearings do not collaterally estop a criminal trial on the same charges. *Lucido v Superior Court* (1990) 51 C3d 335, 272 CR 767.

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§26.33 E. Collateral Estoppel Between Criminal Trials and Administrative Agency Proceedings

An administrative agency decision favoring a defendant will be given collateral estoppel effect in a criminal court when the agency decision was reached in a judicial-like adversary proceeding that gave both parties the opportunity to fully litigate the issue; the issue was identical, with a final agency decision on the merits; and the party to be estopped was in privity with the administrative party. *People v Sims* (1982) 32 C3d 468, 186 CR 77 (welfare hearing issue was whether overpayments were because of fraud by defendant; criminal charge was welfare fraud).

Ø **Note:** Certain decisions of the Department of Motor Vehicles (DMV) concerning driving with excessive blood-alcohol levels or refusing blood-alcohol tests do not have collateral estoppel effect in criminal courts. Veh C §§13558(g), 13559(b).

A court decision favoring a defendant in a criminal case will be given collateral estoppel effect in an administrative agency when the court proceeding must necessarily have decided the identical issue; a final judgment was reached on the merits; and the parties to be estopped were in privity with each other. For example, dismissal of a criminal case can have a collateral estoppel effect on DMV license revocation proceedings. See *Zapata v DMV* (1991) 2 CA4th 108, 113, 2 CR2d 855; *Buttimer v Alexis* (1983) 146 CA3d 754, 194 CR 603; *Shackelton v DMV* (1975) 46 CA3d 327, 119 CR 921.

Privity of parties, *i.e.,* sufficient closeness, was found in *People v Sims, supra,* because the county Department of Social Services and the county district attorney operated jointly in investigating and controlling welfare fraud. Although *Buttimer* found privity between the district attorney and the DMV, other cases have refused to find privity between those two parties: *Pawlowski v Pierce* (1988) 202 CA3d 692, 249 CR 49; *Lofthouse v DMV* (1981) 124 CA3d 730, 737, 177 CR 601; *Skinner v Sillas* (1976) 58 CA3d 591, 130 CR 91.

For court rulings that did not find a collateral estoppel effect, see *Betyar v Pierce* (1988) 205 CA3d 1250, 252 CR 907 (stipulation is not equivalent of issue being litigated, nor was issue necessary to conviction); *People v O'Daniel* (1987) 194 CA3d 715, 239 CR 790 (collateral estoppel effect was not accorded decision of administrative board at prison disciplinary hearing because "hearing" was not "judicial" in nature); *People v Meyer* (1986) 183 CA3d 1150, 228 CR 635 (welfare fraud; new evidence discovered by prosecutor after agency hearing); *People v Wilson* (1985) 169 CA3d 1149, 215 CR 694 (welfare fraud; agency hearing concerned only value of assets at time of hearing, not fraud, perjury, or assets during time of application and receipt of benefits); *People v Rodriguez* (1984) 160 CA3d 650, 206 CR 79 (welfare fraud; agency hearing concerned only residency of father at time of hearing, not residency during time of application for and receipt of benefits); *Reed v DMV* (1979) 102 CA3d 662, 164 CR 373 (informal evidentiary ruling that was not binding did not involve issue that was litigated, nor was issue necessary to conviction). See also *Skinner v Sillas, supra*.

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§26.34 X. PLEA OF FORMER CONVICTION OR FORMER ACQUITTAL

No one can be subjected to a second prosecution for a public offense for which he or she has once been prosecuted and convicted or acquitted. Pen C §687. When an act charged as a public offense is within the jurisdiction of California, another state, a territory of the United States, or federal court, a conviction or acquittal is a bar to the prosecution or indictment of that offense in this state. Pen C §§656, 793. If, however, the offense committed in this state involves an element not present in the prior prosecution, a conviction in California is not barred. *People v Belcher* (1974) 11 C3d 91, 99, 113 CR 1.

When an offense is within the jurisdiction of two or more California courts, a conviction or acquittal of the offense in one court is a bar to prosecution of that offense in another court. Pen C §794.

When the facts are uncontradicted and different inferences cannot be drawn, the issue of former jeopardy or acquittal is one of law for the trial court to decide. Otherwise, the defense is entitled to a jury trial on the issue. See *People v Vigghiany* (1960) 181 CA2d 621, 631, 5 CR 501.

The doctrine of former acquittal applies even when the defendant is "convicted" of a nonexistent offense *People v Broussard* (1977) 76 CA3d 193, 199, 142 CR 664 (attempted voluntary manslaughter)) or an offense erroneously considered a necessarily included offense (*People v Tatem* (1976) 62 CA3d 655, 658, 133 CR 265 (petty theft when burglary charged)). Thus, a defendant who obtains reversal of a voluntary manslaughter conviction cannot later be retried for murder, because the finding of guilt of voluntary manslaughter operates as an implied acquittal of the greater offense. *People v Pena* (1984) 151 CA3d 462, 478, 198 CR 819.

It is not an acquittal of the same offense if (Pen C §1021):

- The defendant was formerly acquitted on the ground of variance between the accusatory pleading and the proof, or
- The accusatory pleading was dismissed based on an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal.

Whenever the defendant is acquitted on the merits, however, he or she is acquitted of the offense charged, despite any defect in form or substance in the accusatory pleading on which the trial was held. Pen C §1022.

When there has previously been an acquittal or conviction, both multiple prosecution and multiple punishment under another criminal statute are prohibited for the same acts or omissions. Pen C §654. See *People v Bas* (1987) 194 CA3d 878, 883, 241 CR 299. For further discussion of §654, see §§37.44-37.50.

For the form of the plea, see §26.5. For discussion of pleading once in jeopardy, see §§26.23-26.28.

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§26.35 XI. NOT GUILTY BY REASON OF INSANITY

The not guilty by reason of insanity (NGI) plea must be entered by the defendant personally and not through counsel alone. This is the rule, even though the present insanity of a defendant may make the validity of such a choice somewhat suspect. *People v Lomboy* (1981) 116 CA3d 67, 71, 171 CR 812. See Pen C §§1016(6), 1017(5), 1018.

A defendant who fails to join an NGI plea with a not guilty plea admits the offense charged. Pen C §1016(6); *In re Fuller* (1981) 124 CA3d 251, 177 CR 233. Thus, the defendant, on making such a plea, must be informed by the court of his or her *Boykin-Tahl* rights (see §§26.10-26.12). *People v Rizer* (1971) 5 C3d 35, 36, 95 CR 23. However, if the defendant pleads both "not guilty by reason of insanity" and "not guilty," the court does not need to advise the defendant of his or her *Boykin-Tahl* rights. *People v Weaver* (2001) 26 C4th 876, 964, 111 CR2d 2.

The insanity defense is discussed in §§48.40-48.58.

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XII. CASE SETTLEMENT (PLEA BARGAINING)

§26.36 A. Terminology Surrounding Plea Bargaining

The terms "case settlement" and "plea bargaining" refer to the resolution of a case without a trial through negotiation between the prosecution and the defense. Plea negotiations can take several forms. In the most common form of plea bargaining, the defendant agrees to plead guilty or no contest to one or more of the charged offenses, and the prosecution agrees

- To drop some charges,
- To reduce one or more of the charges to a less serious offense, or
- To recommend a particular sentence or a sentence of no more than an agreed-upon maximum term.

Negotiations concerning the charges are sometimes referred to as charge bargaining, and negotiations concerning the sentence are sometimes referred to as sentence bargaining.

Charge bargaining looks to the accusation and the crimes alleged. In their efforts to reach agreement on the facts, defense counsel and the prosecutor discuss the offenses that are charged or that are reasonably related to a charged offense. These are the only offenses to which a defendant can plead guilty, unless the charging document is amended. See *People v West* (1970) 3 C3d 595, 611, 91 CR 385. If agreement is reached, the prosecutor modifies the accusation in accord with the agreement and the defendant pleads guilty, thus resolving the factual issues and the need for trial. For example, in exchange for a plea of guilty to one count in a complaint, the prosecutor might agree to dismiss the remaining count, file no additional specified charges, reduce a charged count to a less serious offense, or drop an enhancement provision. Charge bargaining is codified in Pen C §§1192.1-1192.4, 1192.6-1192.7.

Sentence bargaining involves negotiating the sentence that the defendant will receive. Often, negotiations concerning the sentence include discussions of reducing or dismissing one or more charges. In sentence bargaining, the defendant gives up his or her right to a trial and pleads guilty in exchange for a reduced sentence (*e.g.,* a predetermined amount of time in the county jail), no state prison, no physical custody of any kind, or credit for time served (sometimes called "judgment suspended"). An agreed sentence must be approved by the court. Sentence bargaining is codified in Pen C §1192.5.

Defendants can waive any irregularities in sentencing if the sentence is part of the plea bargain. See *People v Jones* (1989) 210 CA3d 124, 132, 258 CR 294; *People v Otterstein* (1987) 189 CA3d 1548, 1550, 235 CR 108. See also *People v Velasquez* (1999) 69 CA4th 503, 81 CR2d 647 (although defendant can waive irregularities, this does not allow court to sentence defendant to term not stipulated in plea agreement).

Most defendants do not exercise their constitutional right to a trial, pleading guilty at or before the trial date. The court's and prosecutor's primary reason for plea bargaining is to save money by eliminating court congestion. Pleading guilty at an early stage eliminates numerous court hearings, saving time for judges and attorneys. Also, in some circumstances the prosecutor may be concerned about potential problems of proof, or protecting victims from having to testify, and would prefer to settle the case rather than go to trial. The defendant usually plea-bargains for a more lenient sentence, a less serious charge, or both.

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§26.37 B. Time of Plea Bargaining

The time when plea bargaining occurs varies, depending on local practice. It may take place on a special day scheduled by the court for a pretrial hearing or conference, or outside court at a time arranged between defense counsel and the prosecutor. It may even take place at arraignment. The trial court has the power to adopt and enforce its own procedures for court-supervised settlement conferences, *e.g.,* whether they are held in open court or in chambers, or on or off the record. *Bryce v Superior Court* (1988) 205 CA3d 671, 252 CR 443.

Plea bargaining usually takes place before the date the case is set to go to trial. In some counties, however, particularly in misdemeanor cases, plea bargaining does occur on the date set for trial. In larger counties with huge caseloads, "better deals" are sometimes available to the defense at that time.

Ø **Warning:** Defense counsel must know local practice before relying on the availability of plea bargaining after the prosecutor has made an offer that the defense has refused. And, even in counties where the prosecutor will discuss plea negotiations again before trial, defense counsel should be prepared for such negotiations to be unsuccessful and for the trial to proceed as scheduled.

Once trial has begun, most avenues of case settlement have been exhausted. However, events occasionally occur that cause counsel to reevaluate the case, *e.g.,* a material witness fails to appear or a witness refuses to testify or recants his or her testimony. In such situations, either party may suggest further discussion of a case settlement.

If a mistrial is declared for any reason, both the defense and the prosecution may then be able to reevaluate their previous positions and open the way to case settlement. When a hung jury was weighted in favor of acquittal, the prosecutor is more likely to plea bargain the case to a lesser charge.

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C. Limitations on Plea Bargaining

§26.38 1. Felonies Specified in Pen C §1192.7(a)

With limited exceptions, Pen C §1192.7 prohibits both charge and sentence bargaining when any of the following crimes are charged *in an indictment or information:*

- Serious felonies specified in Pen C §1192.7(c) (Pen C §1192.7(a)(2));
- Felonies in which the defendant personally used a firearm (Pen C §1192.7(a)(2));
- Driving under the influence of alcohol or drugs (Pen C §1192.7(a)(2)); or
- Violent sex offenses listed in Pen C §667.61(c) that could be prosecuted under Pen C §269, §288.7, §667(b)-(i), §667.61, or §667.71 (Pen C §1192.7(a)(3)).

Ø **Note:** Vehicle Code §23622 prohibits the court from striking prior drunk driving convictions in order to avoid imposing minimum imprisonment time or minimum fines otherwise required.

Under Pen C §1192.7(b), plea bargaining is defined as

> any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

The explicit language of Pen C §1192.7 applies only when an information or indictment has been filed. See Pen C §1192(a)(2)-(3). As a result, attorneys in many counties engage in plea bargaining before a commitment order at the preliminary hearing. On pleading guilty to a felony before the magistrate makes a commitment order, see §§8.6, 26.20.

In addition, there are three specified exceptions to the §1192.7 prohibition against plea bargaining. Plea bargaining is permitted in the following circumstances (Pen C §1192.7(a)(2)-(3)):

- When there is insufficient evidence to prove the prosecution's case;
- When the testimony of a material witness cannot be obtained; or
- When a reduction or dismissal would not result in a substantial change in sentence.

If a plea agreement is reached with respect to a violent sex crime listed in Pen C §667.61(c), the prosecutor must state on the record why the defendant was not prosecuted under Pen C §269, §288.7, §667(b)-(i), §667.61, or §667.71.

The local prosecutor may have policy guidelines on how these exceptions are applied or may apply them in a particular manner. Therefore, it is important to know what a jurisdiction's practices are before entering into any case settlement discussion. For example, what kind of disposition meets the requirement that there will be no substantial change in punishment? Some jurisdictions base the test on what could be expected if the case were to go to trial. Others use the maximum punishment available as the test for substantial change. In *People v Arauz* (1992) 5 CA4th 663, 665, 7 CR2d 145, the reviewing court concluded that "so long as the sentence a judge imposes as a result of a plea bargain is substantially the same sentence the judge would have imposed had there been no plea bargain, the sentence is proper." The court rejected the prosecution's argument that the maximum available punishment should be used as the "yardstick" to determine whether the plea bargain resulted in a substantial change in punishment, and relied on the trial court's statement on the record that the sentence imposed as a result of the defendant's plea was the one the court would have imposed had the defendant not pleaded guilty. 5 CA4th at 671.

Ø **Note:** As a rule of thumb, a criminal defense attorney who first practices in a "new" jurisdiction should discuss the local practice with either a public defender or a local defense attorney. Most jurisdictions vary on these kinds of questions.

The Uniform Crime Charging Manual (updated annually), issued by the California District Attorneys Association, is

helpful in determining what may be considered insufficient evidence: "Available admissible evidence should be of such convincing force that it would establish the guilt of the defendant beyond a reasonable doubt by an objective fact finder after hearing all the available admissible evidence."

Ø **Note:** The prosecutor must state on the record the reasons for a negotiated plea involving any felony. Pen C §1192.6. However, the defendant does not have standing to raise issues of violations of Pen C §§1192.6-1192.7 on appeal. *People v Gonzales* (1986) 188 CA3d 586, 233 CR 204.

By its terms, Pen C §1192.7(b) does not appear to apply to "slow pleas," submissions of the question of guilt to the trial judge on the preliminary hearing transcript, because the defendant does not plead guilty or no contest. However, an argument can be made that the §1192.7 restrictions on plea bargaining should apply when the slow plea is equivalent to a guilty plea. On slow pleas generally, see *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302; *In re Mosley* (1970) 1 C3d 913, 83 CR 809; *People v Tran* (1984) 152 CA3d 680, 199 CR 539. For discussion of slow pleas, see §§26.19, 28.19-28.21.

In addition, Pen C §1192.7(b) may not prohibit the judge from accepting a plea in exchange for a specified or "indicated" sentence under certain situations. On what constitutes an "indicated sentence," see §26.49.

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§26.39 2. Prior Felony Convictions

Under Pen C §667(g), the limitations imposed on plea bargaining in Pen C §1192.7(b) apply to prior felony convictions. Note, however, that the trial court on its own motion may dismiss prior felony convictions, including strikes, in furtherance of justice under Pen C §1385, unless otherwise prohibited. Pen C §667(f); *People v Superior Court (Romero)* (1996) 13 C4th 497, 508, 53 CR2d 789.

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§26.40 3. Illegal Sentence

The parties may not enter a plea bargain that requires the court to impose an illegal sentence. "A plea bargain that purports to authorize the court to exercise a power it does not have is unlawful and may not be enforced." *In re Williams* (2000) 83 CA4th 936, 944, 100 CR2d 144. See *People v Harvey* (1980) 112 CA3d 132, 139, 169 CR 153.

When a material term of a plea bargain is unenforceable because it calls for an illegal sentence, the defendant must be given the opportunity to withdraw the plea, but is not ordinarily entitled to specific enforcement of the agreement. *In re Williams,* 83 CA4th at 946. But see *Buckley v Terhune* (9th Cir 2006) 441 F3d 688, 699 (federal court ordered specific enforcement of unlawful sentence because defendant had performed his part of agreement, prosecutor had received benefit of bargain, and consequently rescission would not have repaired the harm caused by the state's breach of the plea agreement).

When a plea bargain calls for an unauthorized sentence, the defendant may be estopped from challenging the sentence on appeal. Ordinarily, either party may appeal the imposition of an unauthorized sentence, even when no objection has been made in the trial court. See, *e.g., People v Davis* (1981) 29 C3d 814, 827 n5, 176 CR 521 (court may correct unauthorized sentence at any time). However, when a defendant has pleaded guilty in exchange for a specified sentence, the reviewing court "will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction." *People v Hester* (2000) 22 C4th 290, 295, 92 CR2d 641. See also Cal Rules of Ct 4.412(b) (defendant who agreed to specified sentence may not challenge Pen C §654 violation on appeal absent objection in trial court).

As the court of appeal explained in *People v Couch* (1996) 48 CA4th 1053, 1057, 56 CR2d 220:

> When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.

But see *Alhusainy v Superior Court* (2006) 143 CA4th 385, 391, 48 CR3d 914 (probation condition banishing defendant from state set aside on appeal at defendant's request despite defendant's agreement to condition); *In re Babak S.* (1993) 18 CA4th 1077, 1084, 22 CR2d 893 (probation condition requiring minor to live in Iran for 2 years invalidated on appeal by minor).

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§26.41 D. Evidence of Failed Plea Bargain May Be Admissible at Trial

Evidence that a defendant offered to plead guilty is inadmissible by the terms of Evid C §§1153-1153.5 and Pen C §1192.4. See *People v Crow* (1994) 28 CA4th 440, 33 CR2d 624 (inadmissible in prosecution's case-in-chief). However, the "truth-in-evidence" provision of the California Constitution (Cal Const art I, §28(f)(2)) has been interpreted to allow statements made to a probation officer in the preparation of a presentence report to be used for *impeachment* at trial after the guilty plea was withdrawn. *People v Pacchioli* (1992) 9 CA4th 1331, 12 CR2d 156. However, a defendant's statements to a probation officer in reliance on a plea bargain could not be used as *substantive evidence of guilt* after the plea was withdrawn. *People v Scheller* (2006) 136 CA4th 1143, 39 CR3d 447.

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E. Defense Considerations in Plea Bargaining

§26.42 1. Negotiating With Prosecutor

Mutual respect and trust are the key ingredients in any plea bargaining session. If the defense attorney has practiced in the area, his or her reputation will be "well known" in the district attorney's office. If the case is counsel's maiden voyage, friendliness, candor, and an even temper are crucial first ingredients.

The willingness of either party to try the case if a fair disposition is not reached by agreement is an important ingredient in a successful plea bargaining session. Defense counsel (and district attorneys) who are known for a lack of enthusiasm for trial will tend to receive less advantageous offers.

The first thing defense counsel should do when bargaining is to learn the prosecutor's position on the case. Defense counsel may find that the prosecutor does not consider the case to be as serious as counsel thought or that the prosecutor has some problem with the case of which counsel was unaware. As a practical matter, the prosecutor wants to obtain a conviction and is most likely to negotiate when he or she is least likely to obtain a conviction because of a weak case. Therefore, if defense counsel has a strong factual or legal defense, that fact should be stressed at the outset. If the case against the client is strong, however, counsel must rely on other factors, such as a "clean" defendant, or a "cheap" case. (A "clean" defendant has no prior arrests, or at least no prior convictions. A "cheap" case is one involving a minor crime, *e.g.,* theft of a 49-cent pen.)

Ø **Note:** Defense counsel should avoid disclosing details of the defense in the event a plea bargain is not reached. See §26.41.

If defense counsel is dealing with an inexperienced prosecutor who refuses to accept what defense counsel feels is a realistic settlement, counsel may wish to ask to speak with a senior prosecutor. This request is a delicate one, and should be worded carefully so as not to make an enemy in the district attorney's office. Before talking to a senior deputy, the original deputy should be told of defense counsel's plan to go up the ladder.

A plea bargain must include a plea to an offense charged or to one reasonably related to an offense charged. The trial court lacks jurisdiction over other offenses unless the prosecutor amends the accusatory pleading. See *People v West* (1970) 3 C3d 595, 611, 91 CR 385.

Once an offer has been made by a prosecutor and accepted by defense counsel in an informal plea-bargaining process, defense counsel should write down the offer in the case file and either write the prosecutor a letter acknowledging acceptance of the offer o ask the prosecutor to write down the offer and acceptance in his or her file so that there is some record. Without such a record, another deputy prosecutor might pick up the file at the time the defendant plans to enter a plea and have no information about the negotiations. Complicated or lengthy terms and conditions should definitely be recorded so that confusion does not arise later when memories are not as clear.

Ø **Note:** Although the prosecutor may agree not to charge certain enhancements as part of a plea bargain, absent agreement, this does not preclude him or her from arguing for aggravation based on those uncharged enhancements. *People v Haney* (1989) 207 CA3d 1034, 255 CR 276. Defense counsel should consider including in the plea bargain an agreement that the prosecutor may not argue for aggravation based on any uncharged enhancements.

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§26.43 2. Strategies to Improve Defendant's Plea Bargaining and Sentencing Options; Alternatives to Jail

If possible, defense counsel should help the client get out of jail pending disposition of the case. If the client is not arrested again and can retain or find employment, his or her chances of receiving probation or other lenient disposition are improved. School is a possible alternative to a job. If the client has a drug or alcohol problem and enters an appropriate program, the judge may consider community service as an alternative to jail time, or the defendant may be eligible for diversion under Pen C §§1000-1000.8 (see chap 27). If the defendant is mentally ill and commits himself or herself to a mental hospital, counsel may be able to secure a dismissal under Pen C §1385 (discussed in chap 25). If the defendant has a cognitive developmental disability, he or she may be eligible for diversion under Pen C §§1001.20-1001.34 (discussed in chap 27). Civil compromise can result in dismissal. See Pen C §§1377-1379 (discussed in §§25.5-25.6). Some counties have informal hearings called "citation hearings" that are held instead of filing a complaint or that can be arranged by counsel after a complaint has been filed. At a citation hearing, a prosecutor or law clerk listens to the complaining witness and to the defendant, warns one or both of them, and dismisses the case. These hearings are most common for cases involving neighborhood disputes.

Experts are available, usually former probation officers, who will work with the defendant to plan a sentencing strategy and who will write a sentencing report similar to the one prepared by the probation department.

Despite the advantages just listed, if a defendant will receive some jail or prison time, the difficulty of a plea after the defendant is out of custody should be considered. In particular, a defendant with little experience in the criminal justice system is often reluctant to plead to time in custody. Cases are legion in which an out-of-custody defendant turned down a great deal that included time in custody, went to trial, and received a greater sentence.

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§26.44 3. Presenting Plea Bargain to Defendant

Plea bargaining is a crucial stage of the criminal process in which the defendant is entitled to effective assistance of counsel. *In re Alvernaz* (1992) 2 C4th 924, 935, 8 CR2d 713. Defense counsel has several obligations:

- Counsel must promptly communicate to clients all plea negotiation offers, whether written or oral. Cal Rules of Prof Cond 3-510; ABA Standards for Criminal Justice, Prosecution and Defense Function 4-6.2, cited in *In re Alvernaz, supra*.
- Before presenting a plea bargain to the defendant, counsel should have interviewed the client, obtained discovery, and investigated the case sufficiently to be aware of all potential defenses of law and fact. See *People v Pope* (1979) 23 C3d 412, 424, 152 CR 732.
- Counsel should tell the client whether the client's factual version provides a legal or factual defense to the crime charged. Clients sometimes think they have a defense when they do not. If the defendant does not admit guilt, there are special considerations, which are discussed in §26.45.
- Counsel should inform the defendant of the prosecution and defense evidence and assess its value at trial. Counsel should also evaluate the plea bargain for its relative fairness in that court and in that county, and for the risks and probable outcome of trial. See 1 ABA Standards for Criminal Justice, The Defense Function 4-6.2 (defense counsel is obligated to ensure that accused's choice on question of guilty plea is an informed one, made with full awareness of alternatives, including any that arise from proposals made by prosecutor).
- Counsel should tell the client the possible effects of the plea bargain and of being found guilty as charged after a trial. See *People v Huynh* (1991) 229 CA3d 1067, 281 CR 785 (misadvice regarding effect of guilty plea); *In re Alvernaz* (1992) 2 C4th 924, 937 n6, 8 CR2d 713 (defense counsel must accurately advise defendant of sentence offered by prosecutor and of possible exposure if defendant goes to trial).
- Once a plea bargain offer is made and accepted by the defendant, defense counsel has the duty to follow through on it. See *People v Brown* (1986) 177 CA3d 537, 223 CR 66 (defense counsel failed to diligently pursue plea bargain and to correct preplea report).

On appeal, if a defendant can prove that a reasonable probability exists that, but for counsel's deficient performance, the defendant would have accepted a proffered plea bargain and that it would have been approved by the trial court, the defendant has a claim of ineffective assistance of counsel. This type of constitutional violation cannot be remedied by a fair trial; it requires reversal. *In re Alvernaz* (1992) 2 C4th 924, 8 CR2d 713. Following reversal, the district attorney is given the choice of submitting the previously offered plea bargain to the trial court for its approval, or of announcing that it will retry the defendant. 2 C4th at 944. But see *Alvernaz v Ratelle* (SD Cal 1993) 831 F Supp 790, which holds that the proper relief is to enforce the plea bargain. Note that this is a federal district court case involving the same defendant as in the California Supreme Court case cited above.

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§26.45 4. Options When Defendant Does Not Admit Guilt

A showing of a factual basis for a guilty plea must be made in felony cases. Pen C §1192.5. There is no such requirement in misdemeanor cases. *In re Gross* (1983) 33 C3d 561, 189 CR 848. Some attorneys and public defender offices take the position that, as an ethical matter, defense attorneys should not join in guilty pleas in either felony or misdemeanor cases if the defendant denies guilt. Some judges will not accept a defendant's plea of guilty unless the defendant admits in open court that he or she is in truth guilty. A judge is not required to accept an *Alford* plea (*North Carolina v Alford* (1970) 400 US 25, 27 L Ed 2d 162, 91 S Ct 160), *i.e.,* one in which the defendant pleads guilty while maintaining his or her innocence so as to gain an advantage in sentence. *People v Snyder* (1989) 208 CA3d 1141, 256 CR 601.

The purpose of an inquiry concerning guilt is to protect against the situation in which the defendant, although realizing what he or she has done, is not sufficiently skilled in the law to recognize that his or her acts do not constitute the offense that is charged. Such an inquiry also provides the court with a better assessment of the defendant's competency, willingness to plead guilty, and understanding of the charges. *People v Watts* (1977) 67 CA3d 173, 178, 136 CR 496. If evidence pointing to the defendant's innocence is discovered later, and the defendant seeks to overturn his or her guilty plea, a record will exist to show that the defendant also maintained his or her innocence in the trial court.

Several alternatives are available if the defendant does not admit guilt:

- The parties may stipulate that a police report or a transcript from the preliminary hearing may be considered to supply the requisite factual basis. *People v Enright* (1982) 132 CA3d 631, 183 CR 249 (factual basis was police report); *People v Watts* (1977) 67 CA3d 173, 136 CR 496 (factual basis was preliminary hearing transcript). This is called a "slow plea" (discussed in §§28.19-28.21).
- An oral stipulation of a factual basis by defense counsel and the prosecution may be sufficient. See *People v McGuire* (1991) 1 CA4th 281, 1 CR2d 846 (when judge asked counsel if they stipulated to factual basis for plea, both answered "so stipulated"). But see *People v Willard* (2007) 154 CA4th 1329, 1335, 65 CR3d 488 (bare stipulation by counsel with no reference to documents containing factual support insufficient). However, the court's conclusionary statement that "there's a factual basis" is insufficient. *People v Tigner* (1982) 133 CA3d 430, 435, 184 CR 61.
- The defendant may plead no contest (see §§26.7-26.8).
- The parties may agree to a full trial.

Some defense attorneys, as an ethical choice, move to withdraw from the case when the defendant does not admit guilt but wants to plead guilty to take advantage of the plea bargain, and no alternative to a guilty plea is available. If the court refuses to allow counsel to withdraw, the attorney usually does not participate in the taking of the plea.

Defense counsel is not required to refrain completely from joining in a plea bargain when the client maintains that he or she is innocent. If the defendant elects to plead guilty while maintaining factual innocence, defense counsel can participate in the plea. See *People v Watts, supra*. The better practice, however, is to try to obtain one of the above alternatives or to inform the court that the factual basis for the plea will come from the weight of the evidence, not from the defendant's in-court admission. See *People v Watts, supra*. When even that is unacceptable to the court, defense counsel may want to ask the defendant whether he or she still wishes to accept the plea bargain and, if so, indicate on the record that the defendant is prepared to say what the court asks.

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§26.46 F. Prosecution Considerations in Plea Bargaining

Most prosecutors' offices have a statement of general settlement policies to guide the exercise of prosecutorial discretion. Although local policies vary, the objective of any policy should be to achieve a fair, efficient, and effective enforcement of the criminal law.

Just as for defense counsel, a prosecutor's credibility is important in plea negotiations. Without credibility, a prosecutor may have difficulty engaging in pretrial conferences, which can provide valuable information. Frequently, defense attorneys reveal facts not mentioned in police reports or confessions. These "insights" into the defense, *e.g.,* alibis or personal traits of the defendant, allow the prosecution to reassess the case.

The following general guidelines should be followed by prosecutors (see California District Attorneys Association Uniform Crime Charging Manual (updated annually)):

- A memorandum of any plea discussion or negotiation should be placed in the file when an agreement has been made with defense counsel.
- The prosecutor should be certain of the facts and know what facts are legally admissible before discussing a plea disposition.
- The prosecutor should inquire about what the defense will be, and, if the defense presents sound evidence, should consider it fairly and carefully, as if he or she would have to try the case.
- The prosecutor should always investigate the facts of the case that would be relevant in a sentence hearing, *e.g.,* recidivism, past violence, provocation, chances of rehabilitation or threats to the victim.
- Defense counsel should not be misled. Intentionally deceiving opposing counsel is a ground for disciplinary action. *Monroe v State Bar* (1961) 55 C2d 145, 152, 10 CR 257.
- Whenever possible, the victim should be contacted to verify the impact of the crime. The victim has the right to attend and be heard at the sentencing hearing. *People v Zikorus* (1983) 150 CA3d 324, 197 CR 509.
- The prosecutor should guard against any injustice when a defendant is wrongfully accused of a crime more serious than the one actually committed, or accused by individuals whom the prosecutor knows through his or her own investigation lack credibility.
- Any plea disposition should attempt to hold the defendant responsible for the essence of the criminal conduct. For example, if the defendant holds up a store with a gun, the essence of the crime is robbery (Pen C §211) with the use of a firearm (Pen C §12022.5), not grand theft person, petty theft, or burglary.

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§26.47 G. Preplea Report (Pen C §1203.7(a))

Counsel can ask the court to order a preplea probation report any time after arrest. Pen C §1203.7(a). When the prosecution is reluctant to enter into negotiations because the case falls within the plea bargaining limitations of Pen C §1192.7(a) or §667(g) (see §§26.38-26.39) or is a highly publicized case, this early probation report may be helpful in reaching a disposition. However, many prosecutors oppose preplea reports. For further discussion of preplea reports, see chap 27.

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§26.48 H. Limits on Judge's Role in Plea Bargaining

Although no California rule forbids judicial involvement in plea negotiations, strong reservations have been expressed about judicial participation. See *People v Weaver* (2004) 118 CA4th 131, 148, 12 CR3d 742 (judge abused discretion in refusing to allow defendant to withdraw guilty plea and urging him to accept plea bargain); *People v Sandoval* (2006) 140 CA4th 111, 126, 43 CR3d 911 (trial judge's communication of belief that defendant should accept bargain supported conclusion that plea was coerced); *People v Williams* (1969) 269 CA2d 879, 884, 75 CR 348. The ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.3(c), states that a judge should not directly or indirectly communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered. Although a judge should not ordinarily participate in plea negotiation discussions, the parties may present the judge with a proposed plea agreement and the judge may indicate whether he or she would accept the proposed terms and, if relevant, what sentence would be imposed. ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.3(d).

"The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court." *People v Orin* (1975) 13 C3d 937, 942, 120 CR 65. The trial court's role should be limited to approving or disapproving the agreement negotiated between the parties. "[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection." 13 C3d at 943. See *People v Segura* (2008) 44 C4th 921, 930, 80 CR3d 715. For example, once the court accepts the terms of a negotiated plea, it cannot change the terms of that plea so that it becomes more favorable to the defendant unless the prosecution agrees. *People v Segura, supra*.

If the probation report contains information suggesting that a higher sentence is more appropriate, the judge may withdraw his or her approval of the bargain. See Pen C §1192.5; *People v Superior Court (Smith)* (1978) 82 CA3d 909, 914, 147 CR 554. The defendant then has the option of withdrawing his or her plea. Pen C §1192.5; *People v Johnson* (1974) 10 C3d 868, 872, 112 CR 556.

If the judge who accepts a guilty plea retains sentencing discretion under the agreement, that judge must sentence the defendant; otherwise, the defendant may withdraw his or her guilty plea. *People v Arbuckle* (1978) 22 C3d 749, 756, 150 CR 778. This right may be waived, commonly called an *Arbuckle* waiver. See *People v Ruhl* (1985) 168 CA3d 311, 214 CR 93; *People v Poole* (1985) 168 CA3d 516, 214 CR 502. For discussion of *Arbuckle* rights, see §35.11.

A judge is not required to accept a plea of guilty if the defendant maintains his or her innocence. *People v Snyder* (1989) 208 CA3d 1141, 256 CR 601. For discussion of this issue, see §26.45.

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§26.49 I. "Indicated Sentence" Does Not Require Prosecution's Consent

The trial court may not negotiate a specific sentence with the defendant over the prosecution's objection. *People v Orin* (1975) 13 C3d 937, 943, 120 CR 65. When, however, the defendant pleads guilty to all charges, the court may indicate the sentence it will impose "if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea." *People v Superior Court (Smith)* (1978) 82 CA3d 909, 916, 147 CR 554. The court may arrive at this "indicated sentence" by dismissing or reducing counts or enhancing allegations. *People v Superior Court (Smith), supra*. When the sentence itself is not unlawful or in excess of the court's jurisdiction, the court's "statement of intention is not something that can be reviewed or set aside." 82 CA3d at 916. See also *People v Superior Court (Ramos)* (1991) 235 CA3d 1261, 1 CR2d 333.

As discussed in §26.38, Pen C §1192.7 prohibits plea bargaining in most cases in which the defendant is charged with (1) a serious felony listed in §1192.7(c); (2) any felony for which it is alleged that the defendant personally used a firearm during the commission of the felony; (3) any offense involving driving under the influence; or (4) a violent sex crime listed in Pen C §667.61 that could be prosecuted under Pen C §269, §288.7, §667(b)-(i), §667.61, or §667.71. In addition, Pen C §667(g) prohibits plea bargaining over the dismissal of prior-conviction allegations. See §26.39. However, some judges consider an "indicated sentence" for defendants who plead guilty as charged to be distinct from a plea bargain. The definition of plea bargaining in Pen C §1192.7(b) includes arrangements in which "the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the… judge relating to… sentencing." Thus, if the indicated sentence would be imposed "irrespective of whether guilt is adjudicated at trial or admitted by plea" (*People v Superior Court (Smith)* (1978) 82 CA3d 909, 916, 147 CR 554), it appears not to be a plea bargain within the meaning of Pen C §1192.7(b). Even when a court does engage in plea bargaining with the defendant as that term is defined in Pen C §1192.7(b), it is permissible if the bargain does not "result in a substantial change in sentence." Pen C §1192.7(a)(2)-(3); *People v Arauz* (1992) 5 CA4th 663, 671, 7 CR2d 145 (trial court made finding on the record that bargain did not result in substantial change in sentence). The line distinguishing a prohibited "plea bargain" (a violation of §1192.7) from an "indicated sentence" is sometimes a fine one. See *People v Superior Court (Ludwig)* (1985) 174 CA3d 473, 220 CR 87.

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§26.50 J. Recording Plea Bargain

Every aspect of a negotiated settlement approved by the court should be put on the record. This procedure protects the court, the defendant, the defense attorney, and the prosecutor (*People v Cardoza* (1984) 161 CA3d 40, 207 CR 388) and is essential for meaningful appellate review.

Concerning the method of recording the bargain, the California Supreme Court stated in *People v West* (1970) 3 C3d 595, 610, 91 CR 385:

> Without limiting [the trial] court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains.

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§26.51 K. When Judge Fails to Approve Plea Bargain

If the court refuses to approve a plea bargain, the defendant may withdraw it and enter whatever other pleas are available. Although it is within the court's discretion to approve or reject a negotiated plea, it may not arbitrarily refuse to consider a plea negotiation. *People v Smith* (1971) 22 CA3d 25, 99 CR 171.

When a plea bargain is made, a trial judge may not impose a judgment contrary to the terms of the negotiated plea without giving the defendant an opportunity to withdraw his or her guilty plea. Pen C §1192.5. See *People v Delles* (1968) 69 C2d 906, 73 CR 389. See also *People v Johnson* (1974) 10 C3d 868, 112 CR 556 (court must advise defendant of right to withdraw guilty plea under these circumstances); *People v Jackson* (1980) 103 CA3d 635, 638, 163 CR 115 (defendant understood that imposition of lighter sentence was conditioned on his having no prior record, yet he used alias in attempt to conceal prior record; neither §1192.5 nor plea bargain gave defendant right to withdraw plea).

A court has broad discretion to withdraw its prior approval of a previously negotiated plea bargain that includes a specific sentence (*e.g.,* 3 years in state prison) and may do so at sentencing if the court on further consideration, including hearing objections to the bargain from the victim's family, concludes that the bargain is not in the best interests of society. *People v Stringham* (1988) 206 CA3d 184, 253 CR 484. The court may not refuse to sentence when the prosecutor and defendant have agreed to the charges that the defendant will plead to and have left sentencing completely up to the judge. *People v Mikhail* (1993) 13 CA4th 846, 16 CR2d 641. On specific enforcement of plea bargains, see §26.53.

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§26.52 L. Result When Defendant Fails to Appear for Sentencing on Plea Bargain

A defendant may withdraw his or her plea-bargained guilty plea and proceed to trial if the trial court disapproves the plea bargain based on the defendant's failure to appear at sentencing. Pen C §1192.5; *People v Cruz* (1988) 44 C3d 1247, 1250, 246 CR 1.

Ø **Note:** As part of a plea, a defendant may execute a *Cruz* waiver pursuant to which the defendant is released from custody in exchange for his or her promise to appear for sentencing and, for example, not commit other crimes. See *People v Vargas* (2007) 148 CA4th 644, 646, 55 CR3d 837.

In *People v Casillas* (1997) 60 CA4th 445, 451, 70 CR2d 290, the court outlined a three-pronged approach to the defendant's failure to appear for sentencing on a plea bargain. The court held that

> first, when a defendant fails to appear at sentencing after entering a bargained plea with no discussion about a specific sanction for nonappearance, he or she is entitled to withdraw the plea if the court refuses to honor the plea bargain. Second, the same rule applies when during the plea proceedings but after the parties have negotiated the basic plea bargain, the court imposes an additional condition providing a sanction for nonappearance. Third, when the parties themselves agree as part of the plea bargain to a specific sanction for nonappearance, the court need not permit the defendant to withdraw his or her plea but may invoke the bargained-for sanction.

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§26.53 M. Remedies for Breach of Plea Bargain

Breach by court or prosecutor. The purpose of a remedy for breach of a plea bargain is to redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge. *People v Mancheno* (1982) 32 C3d 855, 860, 187 CR 441. The usual remedies for violation of a plea bargain are to allow the defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain. *People v Mancheno, supra*.

When the breach consists of the prosecutor's refusal to comply with the agreement, specific enforcement would entail an order directing the prosecutor to fulfill the bargain. When the breach consists of the court's refusal to sentence in accord with the agreed-on recommendation, the usual rule is that the defendant is allowed to withdraw his or her plea of guilty or no contest. See Pen C §1192.5, discussed in §26.51. In unusual circumstances, however, specific enforcement of a sentence agreed to by a judge when the plea was taken might be ordered. See *People v Kaanehe* (1977) 19 C3d 1, 13, 136 CR 409. See also, *e.g., Buckley v Terhune* (9th Cir 2006) 441 F3d 688, 699 (specific performance granted; when petitioner had fulfilled his obligations under plea agreement by testifying against his accomplices and serving agreed-on sentence, rescission would not repair harm caused by state's breach of agreement).

The punishment imposed by the court may not significantly exceed that which the parties agreed on. *People v Walker* (1991) 54 C3d 1013, 1024, 1 CR2d 902. The test for whether a deviation is "significant" is stricter than the test for prejudice on not being advised of the consequences of a guilty plea, *i.e.,* simply deciding whether the defendant would probably not have pleaded guilty had the greater punishment been known. Punishment that is not "prejudicial" can still be considered "significant" if imposed after a negotiated plea. 54 C3d at 1027 n3.

In *People v Williams* (1988) 45 C3d 1268, 1307, 248 CR 834, the California Supreme Court declined to adopt the rule of *Cooper v U.S.* (4th Cir 1979) 594 F2d 12 that, when a prosecutor offers a plea bargain and the defendant timely accepts it, the prosecution may not withdraw the offer absent exceptional circumstances. In *Mabry v Johnson* (1984) 467 US 504, 81 L Ed 2d 437, 104 S Ct 2543, the U.S. Supreme Court held that the *Cooper* rule is not mandated by the U.S. Constitution.

Breach by defendant. Plea bargains can be breached by the defendant as well as other parties. In *Ricketts v Adamson* (1987) 483 US 1, 97 L Ed 2d 1, 107 S Ct 2680, the defendant breached the plea bargain by not testifying after sentence. The plea was vacated and the defendant was placed on trial for the original charges. In *People v Collins* (1996) 45 CA4th 849, 53 CR2d 367, the defendant breached a condition of the plea bargain by not telling the truth about a murder. The court of appeal upheld vacating the defendant's sentence on the motion of the prosecution.

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§26.54 N. Remedy for IAC That Resulted in Rejection of Offered Plea Bargain

The appropriate remedy for ineffective assistance of counsel (IAC) that results in a defendant's decision to reject an offered plea bargain and proceed to trial is for the district attorney to submit the previously offered plea bargain to the trial court for its approval, unless the district attorney within 30 calendar days elects to retry the defendant and resume the plea negotiation process. *In re Alvernaz* (1992) 2 C4th 924, 944, 8 CR2d 713. But see *Alvernaz v Ratelle* (SD Cal 1993) 831 F Supp 790, which holds that the proper relief is to endorse the plea bargain. Note the federal district court case involves the same defendant as the California Supreme Court case.

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27

DEFERRED ENTRY OF JUDGMENT, DIVERSION, AND PREPLEA PROBATION REPORT

HON. DAVID M. KRASHNA

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§27.1 I. OVERVIEW

Deferred entry of judgment in narcotics, drug abuse, and child abuse cases. For violations of certain specified drug and child abuse crimes, a defendant may be eligible to participate in a deferred entry of judgment program. See Pen C §§1000-1000.6, 1000.12. Deferred entry of judgment is the suspension of criminal proceedings for a prescribed time with certain conditions after a defendant has entered a guilty plea. If the defendant is denied participation in the program, criminal proceedings resume, and the defendant, having already pleaded guilty, is sentenced. If the defendant is successful in meeting the terms of the program, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested for or charged with the diverted offense.

Diversion. For violations of certain specified crimes, a defendant may be eligible to participate in a diversion program. See Pen C §§1001-1001.9. Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. If the defendant is unsuccessful, criminal proceedings resume. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested for or charged with the diverted offense. Pen C §1001.9. A fee to the court and a separate fee to the program are usually required. The benefits and protections of a successful diversion are to be given broad application. *B.W. v Board of Med. Quality Assur.* (1985) 169 CA3d 219, 215 CR 130.

Preplea probation reports. The court may order preplea probation reports before a defendant enters a plea. Pen C §1203.7. They are sometimes used as the sentencing probation report. See Pen C §1203d. However, as a result of tight county budgets, preplea probation reports are not always available.

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§27.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many counties have specific time requirements not otherwise required by the Penal Code.

Action	Deadline	Authority
Preplea probation report requested.	Can be requested at time of arrest or of plea or verdict of guilty.	See Pen C §1203.7.
Deferred entry of judgment requested.	As soon as possible after the initial filing of charges and before trial begins.	See Pen C §1000(b).
Diversion requested.	Anytime before trial begins.	*Morse v Municipal Court* (1974) 13 C3d 149, 160, 118 CR 14.

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III. DEFERRED ENTRY OF JUDGMENT

§27.3 A. Narcotics and Drug Abuse Cases

Unless there is an applicable pre-guilty-plea drug diversion program in the court of jurisdiction (Pen C §1000.5), a defendant found to be eligible for "deferred entry of judgment" must plead guilty to the crime charged and waive time for the entry of judgment (Pen C §1000.1(b)). Entry of judgment on the defendant's plea is then deferred pending successful completion of a drug program. If the defendant successfully completes the program, criminal proceedings are dismissed, and the defendant may legally answer that he or she has never been arrested for, nor charged with, the offense.

If a defendant in a deferred entry of judgment program relapses into drug use or violates other terms of deferred entry of judgment, then deferred entry of judgment can be terminated and the judgment entered. Pen C §1000.3. Because the defendant had already pleaded guilty before obtaining deferred entry of judgment, the prosecution need only show that the defendant failed to successfully complete the drug program. Thereafter, the defendant is sentenced as he or she would be after any conviction. See *People v Rodriguez* (1990) 51 C3d 437, 445, 272 CR 613; *People v Davis* (2000) 79 CA4th 251, 257, 93 CR2d 905.

Penal Code §1000.5 authorizes the establishment of a pre-guilty-plea drug court program. Under such a program, criminal proceedings are suspended, without a guilty plea, for designated defendants who receive treatment during that time. Defendants who successfully complete the treatment are entitled to dismissal of their cases. See discussion in §27.10. Defendants who are terminated from the program unsuccessfully will have their criminal charges reinstated. Pen C §1000.5(b).

The drug court program must be consented to in writing by the presiding judge or the judge's designee, the district attorney, and the public defender; otherwise, the program is operated as a deferred entry of judgment program. Pen C §1000.5(a). Counties vary on the establishment of a drug court program.

Ø **Example:** The Wiley W. Manuel Courthouse branch of the Alameda County Superior Court offers an innovative preplea diversion and deferred entry of judgment option under Pen C §§1000-1000.6, the Mentor Diversion Program. The program is designed for young adult defendants under age 25 charged with nonviolent drug sales offenses who otherwise have no significant criminal history. If eligible, the defendant is placed into an intensive 24-month diversion program supervised by specialized probation officers and monitored by the court. The defendant is required to seek and maintain employment, attend school, dress appropriately for court, agree to be tested for drugs, meet regularly with a probation officer, and satisfy other requirements as ordered by the court. If the defendant is expelled from the program, the felony charges are reinstated, or judgment entered. A defendant who successfully completes the program and stays out of trouble avoids a felony conviction and his or her arrest record is sealed (see Pen C §851.90). Defense counsel with a youthful client may want to explore whether an option like the Mentor Diversion Program is available.

Ø **Note:** The legislature has authorized the superior courts to create a "Back on Track" deferred entry of judgment reentry program for first-time nonviolent felony drug offenders. See Pen C §§1000.8-1000.10. Defense counsel with such a client may want to explore whether this option is available.

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Source: Criminal Law/California Criminal Law Procedure and Practice/27 DEFERRED ENTRY OF JUDGMENT, DIVERSION, AND PREPLEA PROBATION REPORT/ 1. Eligibility Requirements/§27.4 a. Deferrable Offense

1. Eligibility Requirements

§27.4 a. Deferrable Offense

A defendant who is otherwise eligible may be considered for deferred entry of judgment if charged with one or more of the following offenses (Pen C §1000(a)):

- Possession of controlled substances and/or restricted drugs. Health & S C §11350.
- Possession of marijuana. Health & S C §11357.
- Possession of drug paraphernalia. Health & S C §11364.
- Aiding, assisting, or abetting the unlawful use of controlled substances. Health & S C §11365.
- Possession of nonnarcotic prescription drugs without a prescription. Health & S C §11377.
- Possession of prescription drugs without a prescription. Bus & P C §4060.
- Using or being under the influence of a controlled substance (Health & S C §11550; Pen C §647(f)) or possession of a gluelike substance with the intent to inhale and become intoxicated (Pen C §381).
- Possession of marijuana while driving. Veh C §23222(b).
- Cultivation of marijuana, if the marijuana planted, cultivated, harvested, dried, or processed is for personal use. Health & S C §11358.
- Creation or use of a forged or altered narcotic prescription, if the narcotic drug was secured by a fictitious prescription and is for the defendant's personal use and was not sold or furnished to another. Health & S C §11368.
- Solicitation to commit a felony, if the solicitation was for acts directed to personal use only. Pen C §653f.

An attempt to commit any of these eligible offenses makes a person eligible for diversion on the same basis as someone who has actually committed the eligible offense. See *People v Barrajas* (1998) 62 CA4th 926, 73 CR2d 123.

Ø **Note:** Diversion is available under Pen C §1000 for offenses involving small quantities of marijuana. Health and Safety Code §11357(b) provides a separate scheme for deferred entry of judgment for offenses that involve small quantities of marijuana. In addition, Health & S C §11357(b) (possession of less than 28.5 grams of marijuana) provides a separate, mandatory diversion scheme for anyone who has been convicted of violating §11357(b) three or more times within a 2-year period. Diversion under this subdivision does not require an eligibility determination or the concurrence of the district attorney. Health & S C §11357(b). See *People v Squier* (1993) 15 CA4th 235, 238, 18 CR2d 536.

Ø **Note:** Defense counsel should check with the district attorney to learn whether the county has a diversion program and whether the defendant is eligible. Such a program may allow for an early and inexpensive resolution of the case. For example, the Wiley W. Manuel Courthouse branch of the Alameda County Superior Court has a diversion program that gives first-time marijuana offenders charged with violating Health & S C §11357(b) an opportunity to undergo a 4-hour drug and alcohol consulting session in lieu of entering a plea. If the defendant attends and completes the session, the charge is dismissed.

Vehicle Code §23222(b) (possession of no more than an ounce of marijuana while driving) also provides for mandatory diversion when an individual has had three or more convictions within a 2-year period.

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§27.5 b. Other Requirements

The prosecutor is charged with the duty of determining whether a defendant meets the eligibility requirements set forth in Pen C §1000(a), unless the defendant comes within the provisions of Health & S C §11357(b) (see §27.4). Pen C §1000(b). The district attorney is statutorily required to "file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney." Pen C §1000(b). Defense attorneys should ensure that the district attorney follows this mandate to preserve the record on appeal. See *People v Brackett* (1994) 25 CA4th 488, 496, 30 CR2d 557.

For counsel who is retained after an arrest, it is good practice to contact the filing deputy in the prosecutor's office to request screening of the defendant for possible deferred entry of judgment. If charges have been filed, counsel should request a deferred entry of judgment referral as soon as practicable. In some counties, the prosecutor will provide the defense attorney and the court with an initial deferred entry of judgment recommendation at the arraignment. See Pen C §1000(b). To be eligible for deferred entry of judgment, all of the following conditions must be applicable to the defendant:

No prior controlled substance conviction. The defendant cannot have a prior conviction for any offense involving controlled substances before the alleged commission of the charged offense. Pen C §1000(a)(1). See *People v Ochoa* (2009) 175 CA4th 859, 96 CR3d 376 (court could not consider marijuana possession conviction under Health & S C §11357(b) that occurred more than 2 years before offense, because records of that conviction should have been destroyed). The conviction is deemed complete at the time of the ascertainment of guilt, which occurs when the defendant pleads guilty or there is a jury verdict of guilty, regardless of whether sentencing has occurred. *People v Kirk* (2006) 141 CA4th 715, 46 CR3d 258.

Case did not involve crime of violence. The offense cannot have involved a crime of violence or threatened violence. Pen C §1000(a)(2); *People v Macafee* (1980) 109 CA3d 808, 167 CR 495. In *Macafee,* cocaine found during a booking search was held to be unrelated to the battery and disorderly conduct charge for which the defendant was arrested. The prosecutor charged all three offenses and claimed that the battery charge caused the defendant to be ineligible for diversion. On appeal, the court held that the drug charge was unrelated to the other charges and that the (then) diversion statutes should be liberally construed to promote their general objectives. See *People v Superior Court (On Tai Ho)* (1974) 11 C3d 59, 62, 113 CR 21, and *People v Fulk* (1974) 39 CA3d 851, 855, 114 CR 567, for a statement of those objectives.

Only deferrable drug offenses involved. There can be no evidence of narcotic or drug violations other than one of the violations listed in Pen C §1000(a). Pen C §1000(a)(3). For example, a defendant who is charged both with being under the influence of a controlled substance (Health & S C §11550) and driving under the combined influence of alcohol and a controlled substance (Veh C §23152(a), an offense not listed in Pen C §1000) should be denied deferred entry of judgment. *People v Duncan* (1990) 216 CA3d 1621, 265 CR 612.

When a defendant is charged with various counts in a single complaint but only some of the counts are subject to deferred entry of judgment, he or she can be granted deferred entry of judgment on the eligible offenses and proceed to trial on the ineligible offenses. *Harvey v Superior Court* (1974) 43 CA3d 66, 117 CR 383; *People v Fulk* (1974) 39 CA3d 851, 114 CR 567. Alternatively, the prosecutor can dismiss the ineligible offenses on successful completion of the deferred entry of judgment period. If the court is unwilling to permit a defendant to waive time on the ineligible offenses, the prosecutor may be willing to dismiss the ineligible offenses at the time deferred entry of judgment is granted if the defendant agrees to have the original charges reinstated if he or she fails to successfully complete deferred entry of judgment.

Prior probation or parole successfully completed. The defendant's prior probation or parole cannot have been revoked without thereafter being successfully completed. Pen C §1000(a)(4); *People v Martinsen* (1987) 193 CA3d 843, 238 CR 530. Probation includes both formal probation and conditional sentence (commonly referred to as court or informal probation). *People v Bishop* (1992) 11 CA4th 1125, 15 CR2d 539.

No deferred entry of judgment or felony conviction for 5 years. The defendant cannot have successfully

completed or been terminated from diversion or deferred entry of judgment under Pen C §§1000-1000.6 (Pen C §1000(a)(5)) or suffered a felony conviction within 5 years prior to the commission of the offense charged. Pen C §1000(a)(6); *People v Burns* (1997) 53 CA4th 1171, 62 CR2d 211. It is unclear whether a felony conviction reduced to a misdemeanor within the 5-year period bars a person from eligibility for deferred entry of judgment. If the prior felony is reduced to a misdemeanor after commission of the offense for which deferred entry of judgment is sought, the defendant is ineligible. See *People v Marsh* (1982) 132 CA3d 809, 183 CR 455.

An accused otherwise eligible for deferred entry of judgment is not rendered ineligible because a strike prior is alleged under the Three Strikes law if the alleged strike occurred more than 5 years before the current offense. *People v Davis* (2000) 79 CA4th 251, 93 CR2d 905. The deferred entry of judgment program excludes defendants who have suffered any felony conviction within the preceding 5 years, or are currently charged with a felony that involved violence or the threat of violence. Pen C §1000(a)(2), (a)(6). Accordingly, nothing in the language of the deferred entry of judgment statutes excludes strike defendants. 79 CA4th at 258.

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§27.6 2. When to Request Deferred Entry of Judgment; Bringing Motions Before Deferred Entry of Judgment Accepted

Deferred entry of judgment can occur at any time before trial begins. *Morse v Municipal Court* (1974) 13 C3d 149, 160, 118 CR 14. After trial, deferred entry of judgment is not an option. *People v Wright* (1975) 47 CA3d 490, 120 CR 899; *People v Reed* (1975) 46 CA3d 625, 120 CR 250. See §27.5 for further discussion of when to approach the prosecution about a deferred entry of judgment referral.

The applicant may challenge the evidence by filing a motion to suppress or other pretrial motions before accepting a deferred entry of judgment referral. *Morse v Municipal Court, supra*. See chap 16 on Pen C §1538.5 motions. If the motion is denied, the defendant cannot appeal after a guilty or no contest plea if he is then granted deferred judgment because there is not yet a "conviction" within the meaning of Pen C §1538.5(m). *People v Mazurette* (2001) 24 C4th 789, 102 CR2d 555. However, if the defendant does not successfully complete the requirements imposed and judgment is entered, he or she can appeal at that time. Before pleading guilty for deferred judgment, a defendant charged with a felony does have the option to move to suppress evidence at the preliminary hearing (Pen C §1538.5(f)(2)), to renew the motion in a special hearing if denied, and to seek pretrial review by means of an extraordinary writ of mandate or prohibition (Pen C §1538.5(i)). See *People v Mazurette, supra*.

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§27.7 3. Initial Determination by Prosecutor

The prosecutor has a duty to review files to decide on deferred entry of judgment eligibility. Pen C §1000(b). Permitting the prosecutor instead of the court to determine eligibility is not a violation of the separation-of-powers doctrine. See *Sledge v Superior Court* (1974) 11 C3d 70, 113 CR 28.

Prosecutors do not have untrammeled discretion to overcharge a case in order to keep a defendant from qualifying for deferred entry of judgment. See *Davis v Municipal Court* (1988) 46 C3d 64, 86, 249 CR 300. Proving that overcharging occurred, however, can be difficult. See *People v Cook* (1989) 209 CA3d 404, 257 CR 226 (trial court erred in imposing sanctions under CCP §128.5 against prosecutor who admitted that possession-for-sale count was weak but refused to dismiss it so that defendant could be diverted, because §128.5 applies only to civil proceedings).

The prosecutor must state whether the defendant is eligible for deferred entry of judgment either orally on the record or in a written declaration filed with the court and made available to the defendant. Pen C §1000(b). The statement must also state the grounds on which the finding is based (Pen C §1000(b)) and must include the evidentiary basis for the prosecutor's conclusion. *Sledge v Superior Court* (1974) 11 C3d 70, 76, 113 CR 28. See §27.9 on review of the prosecutor's decision to deny deferred entry of judgment.

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§27.8 4. Deferred Entry of Judgment Hearing

If the prosecutor finds the defendant eligible for deferred entry of judgment, a deferred entry of judgment hearing must be held. Before the hearing, the court may refer the case to the probation department to make a recommendation on deferred entry of judgment. Pen C §1000.1(b). The hearing is usually set about 6 weeks after the referral to the probation officer to allow the probation department sufficient time to adequately investigate the applicant.

At the hearing, the court will consider any relevant information, ascertain whether the defendant consents to deferred entry of judgment, and rule on whether to grant deferred entry of judgment. Pen C §1000.2.

Ø **Note:** Although illegal alien status is not per se a basis for denying deferred entry of judgment, it may be considered in determining whether a person is a good candidate. *People v Cisneros* (2000) 84 CA4th 352, 100 CR2d 784. Similarly, when the defendant faces a substantial likelihood of imminent deportation so that probation cannot effectively be conditioned on completing a drug treatment program, Proposition 36 does not preclude the trial court from exercising its discretion to deny probation. *People v Espinoza* (2003) 107 CA4th 1069, 132 CR2d 670. Representing a noncitizen defendant is discussed in chap 52.

If the court offers deferred entry of judgment, the defendant may accept it by pleading guilty and waiving his or her speedy trial rights. Pen C §1000.1(a)(3). A plea of no contest is also permissible. See *People v Mazurette* (2001) 24 C4th 789, 102 CR2d 555.

The court cannot condition a grant of deferred entry of judgment on the acceptance of any term or condition not set out in the statutes. *Terry v Superior Court* (1999) 73 CA4th 661, 86 CR2d 653 (consent to search cannot be imposed as condition of deferred entry of judgment); *People v Fleming* (1994) 22 CA4th 1566, 28 CR2d 78; *Frederick v Justice Court* (1975) 47 CA3d 687, 121 CR 118.

Ø **Note:** A no-alcohol-use condition while in drug court has been upheld as a reasonably related condition based on empirical evidence showing a nexus between drug use and alcohol use. *People v Beal* (1997) 60 CA4th 84, 87, 70 CR2d 80.

The court may refer participants only to treatment programs certified by the county drug program administrator. Pen C §1000(c). Defendants can be required to undergo urinalysis to test for drug usage, but the results may not be used for a new criminal charge. Pen C §1000(e). Defendants in deferred entry of judgment (or also pre-guilty-plea diversion) may also participate in a licensed methadone or levoalphacetylmethadol (LAAM) program. Pen C §1000.6. At the time deferred entry of judgment is granted, bail, if any, must be exonerated, and the defendant must be released on his or her own recognizance. Pen C §1000.2.

A deferred entry of judgment hearing may also be held to resolve factual issues, *e.g.,* whether marijuana was cultivated for personal use rather than for sale. *People v Paz* (1990) 217 CA3d 1209, 1217, 266 CR 468; *People v Venghiattis* (1986) 185 CA3d 326, 229 CR 636; *People v Williamson* (1982) 137 CA3d 419, 187 CR 107. Otherwise, the prosecutor's deferred entry of judgment determination is binding on the trial court. See Pen C §1000(b); *People v Paz* (1990) 217 CA3d 1209, 266 CR 468.

If the defendant does not consent to deferred entry of judgment, or the court finds the defendant unsuitable for it, the criminal proceedings continue as in any other case. Pen C §1000.2. If the court denies deferred entry of judgment, defense counsel should make a clear record of the applicant's willingness and motivation to comply with all the terms and conditions of deferred entry of judgment and the probability that the applicant will benefit from such a program. *Harvey v Superior Court* (1974) 43 CA3d 66, 117 CR 383. See discussion in §27.9 of review of the trial court's decision.

The deferred entry of judgment period lasts at least 18 months and no more than 3 years, with periodic progress reports as directed by the court. Pen C §1000.2.

Ø **Note:** Some counties do not require an appearance by either the defendant or defense counsel for progress reports unless the defendant is failing to comply with the deferred entry of judgment. Some judges, however, do

require court appearances to closely monitor performance, to stress the importance of consistent good performance, and to hold good performers up as examples to newcomers and poor performers in the courtroom. A judge may reward good performance by lengthening the period between progress reports.

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§27.9 5. Challenging Denial of Deferred Entry of Judgment

Pretrial review of prosecutor's determination. Generally, a defendant cannot obtain pretrial judicial review of a prosecutor's determination that the defendant is ineligible for deferred entry of judgment. *Sledge v Superior Court* (1974) 11 C3d 70, 113 CR 28; *People v Sturiale* (2000) 82 CA4th 1308, 1314, 98 CR2d 865. A defendant may, however, obtain a pretrial judicial hearing to contest the prosecutor's determination when there is a legitimate factual conflict (see *People v McAlister* (1990) 225 CA3d 941, 275 CR 229; see also *People v Paz* (1990) 217 CA3d 1209, 1218, 266 CR 468), or a question of statutory interpretation (*People v Brackett* (1994) 25 CA4th 488, 500, 30 CR2d 557).

The courts have defined what constitutes a "legitimate factual conflict" very narrowly for purposes of challenging the prosecutor's determination of eligibility. The rule developing from current case law appears to be that a trial court has authority to determine an "operative fact" only when the offense with which the defendant is charged does not correspond with the divertible offense. 25 CA4th at 499. For instance, Pen C §1000 authorizes deferred entry of judgment for violations of Health & S C §11358 (cultivating marijuana) only if the marijuana was cultivated for personal use. Accordingly, a pretrial judicial hearing is proper to make the factual determination of whether the marijuana was for personal use. See *People v McAlister* (1990) 225 CA3d 941, 944, 275 CR 229.

Pretrial review of trial court's order denying deferred entry of judgment. A trial court's denial of deferred entry of judgment is ordinarily not subject to pretrial judicial review. *Butler v Superior Court* (1998) 63 CA4th 64, 73 CR2d 504; *Parra v Municipal Court* (1978) 83 CA3d 690, 693, 148 CR 203. However, the court's decision can be challenged by pretrial writ if the denial of deferred entry of judgment involves an issue of widespread concern about the interpretation or constitutionality of a statute. *Morse v Municipal Court* (1974) 13 C3d 149, 118 CR 14 (writ of mandate permitted for prompt, definitive resolution of constitutional challenge to new diversion program); *Parra v Municipal Court, supra* (writ of mandate appropriate to review trial court denial of diversion on ground that defendant refused to admit guilt).

Appeal. Following a conviction, the defendant may appeal the prosecutor's deferred entry of judgment ineligibility determination (*Sledge v Superior Court, supra*) or the trial court's order denying deferred entry of judgment (*Parra v Municipal Court, supra*). The appeal may be brought whether the defendant is convicted by trial or by guilty plea. *People v McAlister, supra*. If the defendant successfully challenges the prosecutor's determination of ineligibility, the judgment must be set aside and the case remanded to allow the trial court to exercise its discretion to grant deferred entry of judgment. *Sledge v Superior Court, supra*.

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§27.10 6. Successful Termination

Once the defendant has successfully completed all the terms and conditions of deferred entry of judgment, the deferred charges are dismissed and the defendant is legally entitled to state that he or she was never arrested for the deferred offense. Pen C §1000.4(a). Before dismissing the charges, however, the court must consider the defendant's ability to pay, and whether the defendant has paid, any diversion restitution fees (see Pen C §1001.90) or probation administration fees, if ordered (Pen C §1000.3).

The arrest record involving the deferred offense cannot be used to deny any employment benefit, license, or certificate (Pen C §1000.4(a)) with one exception. The deferred entry of judgment record of a peace officer (formerly "police officer") or of a person applying to be a peace officer may be disclosed. Pen C §1000.4(b). The legislature intended the benefits and protections of a successful completion of deferred entry of judgment be given the broadest possible application. See *B.W. v Board of Med. Quality Assur.* (1985) 169 CA3d 219, 215 CR 130. This prohibition, however, applies only after a defendant has successfully completed deferred entry of judgment; an agency or other entity may properly use information in a defendant's arrest record either before or during the period of deferred entry of judgment. *Sandoval v State Personnel Bd*. (1990) 225 CA3d 1498, 1500, 275 CR 702.

Another potential major consequence of a defendant's participation in deferred entry of judgment exists in the case of an immigrant defendant. Even if an immigrant successfully completes deferred entry of judgment, the arrest record may still be used against her or him in deportation or exclusion proceedings. *Paredes-Urrestarazu v U.S. INS* (9th Cir 1994) 36 F3d 801.

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§27.11 7. Unsuccessful Termination

The court, the probation department, or the prosecutor may move for entry of judgment under the following circumstances (Pen C §1000.3):

- The defendant is performing unsatisfactorily in the assigned program;
- The defendant is not benefiting from education, treatment, or rehabilitation;
- The defendant is convicted of a misdemeanor that reflects the defendant's propensity for violence;
- The defendant is convicted of a felony; or
- The defendant has engaged in criminal conduct rendering him or her unsuitable for deferred entry of judgment.

After notice to the defendant, the court must hold a hearing to determine whether judgment should be entered. If the court finds the allegations of the motion to be true, the court must render a finding of guilt to the charge or charges pleaded, enter judgment, and schedule a sentencing hearing as otherwise provided in the Penal Code. Pen C §1000.3.

Ø **Note:** Although the deferred entry of judgment period lasts no more than 3 years (Pen C §1000.2), the mere passage of time will not result in dismissal of the charges if the defendant has not successfully completed a drug treatment program. See *People v Popular* (2006) 146 CA4th 479, 483, 52 CR3d 708.

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§27.12 B. Child Abuse and Neglect

The legislature's scheme for child abuse and neglect counseling is a "hybrid" of diversion and deferred entry of judgment. If the crime or crimes charged involve child molestation or sexual abuse, the defendant may not obtain deferred entry of judgment or diversion. Pen C §1000.12(c). If the crime does not involve molestation or sexual abuse, the district attorney may move the trial court to defer judgment while the defendant undergoes counseling or psychological treatment. Pen C §1000.12(a)-(c).

Instead of prosecuting a person suspected of committing a crime in which a minor is an alleged victim of physical abuse or neglect, the prosecutor may refer the suspect to the county department in charge of social services or to the probation department for counseling or psychological treatment and for such other services as are deemed necessary. See Pen C §§1000.12, 1000.17. The suspect is responsible for paying the administrative costs of the referral (not exceeding $100 in felony cases and $50 in misdemeanor cases) and the expense of any counseling. Pen C §1000.17. The county department must take into consideration the suspect's ability to pay, and no one may be denied counseling services because of inability to pay. Pen C §1000.17. Although it is unclear what consequences, if any, exist for a defendant who fails to complete counseling or psychological treatment, defense counsel should strongly advise a client to adhere to the treatment program.

Unlike most diversion schemes, this type of diversion is completely discretionary with the prosecutor. Pen C §1000.12(a); see *People v Glover* (1980) 111 CA3d 914, 169 CR 12 (based on former Pen C §273ab, an identical statutory scheme in effect before the enactment of §1000.12). The requirement of the prosecutor's consent does not violate the separation of powers doctrine. *People v Andreotti* (2001) 91 CA4th 1263, 1267, 111 CR2d 462.

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IV. DIVERSION PROGRAMS

§27.13 A. Generally Applicable Law

Penal Code §§1001-1001.9 apply generally to all diversion programs and set forth the general "scheme" for all diversion programs. Without the prosecutor's approval, the court cannot create such a program. Pen C §1001.2(b); *Davis v Municipal Court* (1988) 46 C3d 64, 249 CR 300; *People v Tapia* (1982) 129 CA3d Supp 1, 181 CR 382. The prosecutor's exclusive jurisdiction over the creation of diversion programs, however, does not authorize the prosecutor to determine whether a particular defendant may be diverted. Pen C §1001.2(b). For certain crimes, a defendant may be eligible to participate in a diversion program. Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. Pen C §1001.1. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. See, *e.g.,* Pen C §§1001.3, 1001.66. When diversion is granted, any bail posted is exonerated. Pen C §§1000.2, 1001.6, 1001.27, 1001.53, 1001.73.

Statements made by the defendant during the period of diversion, information obtained as a result of those statements, and reports on the defendant's diversion program are admissible at a hearing on termination of diversion; however, such statements, information, and reports are not admissible in any other action or proceeding. Pen C §§1001.5, 1001.24-1001.25, 1001.67. Attorneys should be aware, however, that given the current state of the law regarding impeachment, it is likely that such statements would be admissible to impeach a defendant's testimony. See §27.29.

If diversion is successfully completed, the criminal charges are dismissed (Pen C §§1001.7, 1001.31, 1001.54, 1001.74) and the defendant may legally answer that he or she has never been arrested for or charged with the diverted offense (Pen C §§1001.9, 1001.33, 1001.55, 1001.75), unless he or she is applying for a position as a peace officer.

If the defendant is unsuccessful, criminal proceedings resume; however, the divertee is entitled to a hearing before his or her pretrial diversion may be terminated for cause. Pen C §§1001.4, 1001.54, 1001.74. The waiver of speedy trial required by Pen C §1001.53 is a general time waiver, meaning that if it is withdrawn, the prosecutor then has 30 days to bring the defendant to trial. *People v Murphy* (1998) 61 CA4th Supp 5, 74 CR2d 116. Presumably, this conclusion applies to other diversion time waivers. See, *e.g.,* Pen C §1000.1(b).

Penal Code §1001.2 specifically prohibits diversion programs for violations of Veh C §§23152, 23153, and former Veh C §23102. Also, a defendant who is charged with a crime that is subject to deferred entry of judgment or diversion for a drug offense under Pen C §§1000-1000.6 may not be diverted. Pen C §1001.2(a).

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§27.14 B. Misdemeanor Diversion

The legislature has given the prosecutor the ability to approve a local misdemeanor diversion program under Pen C §§1001-1001.9, and 1001.50-1001.55. Pen C §§1001.2(b), 1001.50(b). Offenses covered under other diversion or deferred entry of judgment provisions, or violations of Veh C §23152 or §23153, are ineligible for misdemeanor diversion. Pen C §1001.51(b).

To be eligible for misdemeanor diversion, the following requirements must be satisfied (Pen C §1001.51(a)):

- The defendant's prior probation or parole cannot have been revoked without thereafter being successfully completed;
- The defendant cannot have been granted misdemeanor diversion within 5 years before the current charges were filed;
- The defendant has never been convicted of a felony; and
- The defendant has not been convicted of a misdemeanor within the past 5 years.

Certain misdemeanors are statutorily ineligible for diversion (Pen C §1001.51(c)):

- Misdemeanors for which incarceration is mandatory on conviction;
- Misdemeanors for which registration under Pen C §§290-290.023 is mandatory on conviction;
- "Wobbler" crimes that have been reduced from a felony to a misdemeanor under Pen C §17(b)(5); and
- Misdemeanors involving the use of force or violence against another, unless the charge is a violation of Pen C §241 or §243.

Most counties have taken advantage of these options and enacted a misdemeanor diversion program. It is advisable to consult with the prosecutor's office to learn whether such a program exists and, if so, what its eligibility requirements are.

On the referral of a defendant to a diversion program, the court may examine the defendant's financial condition and require him or her to pay all or part of the actual costs of diversion. Pen C §1001.53.

Additionally, district attorneys and city prosecutors are authorized to set up California Community Dispute Programs, which provide alternative dispute resolution (ADR) services, such as mediation, arbitration, or a combination of both mediation and arbitration in cases involving violations that could be charged as misdemeanors. Pen C §§14150-14156. The consent of both the victim and the perpetrator is required. There are guidelines for both referral and dismissal.

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§27.15 C. Diversion for Persons With Cognitive Developmental Disabilities

The court may divert an individual found by a regional center for the developmentally disabled to have a cognitive developmental disability at any stage in the criminal proceedings when the offense is charged as, or has been reduced to, a misdemeanor. Pen C §§1001.20-1001.34; see §48.70. Persons who have been diverted under these code sections within 2 years of the present criminal proceedings are ineligible for diversion under §§1001.20-1001.34. Pen C §1001.21(b). The court must obtain a report on the defendant from the appropriate regional center. Pen C §1001.22. The center is then asked to evaluate the defendant and decide whether he or she has a cognitive developmental disability. Pen C §1001.22(a). The prosecutor also submits a report to the court as specified in Pen C §1001.22(b).

The diversion period may not last longer than 2 years, and progress reports are required at least every 6 months. Pen C §1001.28.

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§27.16 D. Diversion for Traffic Violators

Counties can divert traffic violators to traffic school. Pen C §1001.40. In place of adjudicating a traffic offense, and with the consent of the defendant, the court may order the defendant to attend traffic school. Veh C §42005(b). Willfully failing to attend traffic school after being so ordered is a misdemeanor. Veh C §42005(i). The court cannot stay a case of driving while under the influence in order to grant diversion. Veh C §23640 (former Veh C §23202; see *People v Weatherill* (1989) 215 CA3d 1569, 264 CR 298).

On successful completion of traffic school, the court clerk or hearing officer is required to deliver an abstract of the record of the proceedings to the DMV. Veh C §1803.5. The record of the first such proceeding in any 18-month period is confidential and may be disclosed only to a court. Veh C §1808.7.

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E. Bad Check Diversion

§27.17 1. Generally

Bad check diversion differs from other diversion schemes in that it is a "precomplaint" diversion scheme; *i.e.,* the prosecutor may refer a person to a bad check diversion program before a complaint is filed. Pen C §1001.61.

The prosecutor can create a diversion program for "persons who write bad checks" if it is authorized by the county board of supervisors. See Pen C §§1001.60-1001.67. "Writing a bad check" is defined as "making, drawing, uttering, or delivering any check or draft upon any bank or depository for the payment of money where there is probable cause to believe there has been a violation of [Penal Code §]476a." Pen C §1001.60. The program may be conducted by either the district attorney or a private entity under contract with the district attorney.

Penal Code §1001.62 states that "the district attorney shall determine if the case is one which is appropriate to be referred to the bad check diversion program." This wording directly conflicts with that of Pen C §1001.2(b), which states that district attorneys do not have the authority to decide whether individual defendants are eligible for diversion. Given that the bad check diversion scheme was enacted after the general diversion statutes and the fact that §1001.62 is a "specific," rather than a "general," statute, §1001.62 most likely controls.

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§27.18 2. Eligibility

In determining whether a defendant is eligible for bad check diversion, the district attorney must consider, but is not limited to considering, the following factors (Pen C §1001.62):

- The amount of the bad check;
- Whether the defendant has a prior criminal record or has been previously diverted;
- The number of bad check grievances against the defendant previously received by the district attorney;
- Whether other bad check grievances are currently pending against the defendant; and
- The strength of the evidence, if any, of intent to defraud the victim.

Although this wording implies that a district attorney may properly refer a defendant to bad check diversion when there is no evidence of intent to defraud, such action would clearly violate a prosecutor's duty to dismiss cases not supported by probable cause. Cal Rules of Prof Cond 5-110.

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§27.19 3. Procedure

If the district attorney refers the defendant to the program, a notice must be mailed to the defendant containing the following information (Pen C §1001.63):

- The date and amount of the bad check;
- The name of the payee;
- The date before which the defendant must contact the district attorney, or the district attorney's designee, concerning the bad check; and
- A statement of the penalty for issuance of a bad check.

If bad check diversion is offered, the district attorney and the suspect enter into a written contract for a period of time not exceeding 6 months, subject to the following conditions (Pen C §1001.64):

- The defendant's completion of a class or classes conducted by the district attorney or the private entity under contract with the district attorney;
- The defendant's payment of full restitution made to the recipient of the bad check; and
- The defendant's full payment of the diversion fees, if any.

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§27.20 4. Diversion Fees

The district attorney is entitled to collect a fee if his or her office "collects and processes" a bad check. Pen C §1001.65(a). This fee may not exceed $50 per check, plus the actual amount of bank charges, including the returned check fee, if any, incurred by the recipient of the bad check. Pen C §1001.65(a).

If the defendant fails to successfully complete bad check diversion and is later convicted, the court may impose a bad check processing fee. This fee may not exceed $50 per check, plus the actual amount of bank charges, including the returned check fee, if any, incurred by the recipient; the aggregate fees may not exceed $1200. Pen C §1001.65(b). Also, the court may require the defendant to participate in a check-writing education class as a condition of probation, in which event the court may require the defendant to pay all or part of the expense of that class, based on his or her ability to pay. Pen C §1001.65(b).

Any fee collected by the district attorney for processing a bad check must be used to reimburse the recipient for any bank charges incurred. This reimbursement may not exceed $15 per check. Pen C §1001.65(c).

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§27.21 F. Parental Diversion

The legislature has given the prosecutor the ability to approve a local diversion program for parents accused of violating Pen C §272 (contributing to the delinquency of a minor) under Pen C §§1001-1001.9 and 1001.70-1001.75. The alleged victim must be a minor child of the defendant, and the defendant is not eligible if his or her probation or parole was ever revoked without thereafter being completed or if he or she was previously granted parental diversion. Pen C §1001.71.

A defendant who is eligible for parental diversion must waive his or her speedy trial rights to allow time for the probation department to assess whether the defendant is otherwise eligible and suitable for diversion and whether diversion would benefit the defendant. The probation recommendation is filed with the court. Pen C §1001.72(a). The court then holds a hearing to decide whether diversion is proper. If diversion is granted, the court may order the defendant to pay all or part of the costs of diversion, according to the defendant's ability to pay. Pen C §1001.73.

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§27.22 G. Civil Compromise Agreements and Alternatives for Merchant Victims

Civil compromise is discussed in §§25.5-25.6. It results in dismissal of the case. See Pen C §§1377-1378.

As an alternative to civil compromise or criminal prosecution, a merchant or library can sue a suspected petty thief in small claims court for the amount of the merchandise plus $50 to $500 plus costs. Pen C §490.5. A settlement agreement made under this section is sometimes more appealing to a merchant than the normal Pen C §1377 civil compromise agreement.

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§27.23 H. AIDS Prevention Programs in Drug Abuse and Prostitution Cases

For certain offenses, the court must require the defendant to participate in an AIDS education program as a condition of diversion or probation. Pen C §1001.10(a). AIDS testing must be offered to participants but cannot be required. If the defendant has been granted deferred entry of judgment for a drug offense under Pen C §1001.10, and the deferred entry of judgment program includes an AIDS prevention component, the defendant does not have to participate in an additional AIDS prevention program. Pen C §1001.11(c).

Offenses for which an AIDS education program is mandatory include the following (Pen C §1001.10(b)):

- Possession of controlled substances or restricted drugs (Health & S C §§11350(a), 11377(a));
- Using or being under the influence of a controlled substance (Health & S C §11550); and
- Distribution or sale of hypodermic needles (Bus & P C §§4142, 4149);

Ø **Note:** Although Pen C §1001.10(b) specifies Bus & P C §4143, that section was renumbered as Bus & P C §4142; section 1001.10(b) was not amended to reflect this change.

- Using or being under the influence of a controlled substance (Pen C §647(f)) if the offense involves the intravenous use of a controlled substance.
- Soliciting or engaging in lewd conduct or prostitution (Pen C §647(a)-(b)).

Although the statute is written in mandatory terms, it has been construed to apply in probation cases only when the person either (1) has been convicted of an offense involving intravenous use of drugs or (2) is at reasonable risk of beginning to use intravenous drugs. *People v Patillo* (1992) 4 CA4th 1576, 6 CR2d 456, overruled on other grounds in *People v Welch* (1993) 5 C4th 228, 237, 19 CR2d 520; *People v Henson* (1991) 231 CA3d 172, 282 CR 222.

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§27.24 I. Diversion Fees

As a condition of diversion or deferred entry of judgment, the court may require the defendant to pay an administrative fee to cover the cost of enrollment in a diversion program. Pen C §1001.15. This fee may not exceed $500 in felony cases (Pen C §1001.15(a)) and $300 in misdemeanor cases (Pen C §§1001.15(c), 1001.16) and may not exceed the actual cost of the program.

Additionally, the court must impose a diversion restitution fee on the defendant in all diverted and deferred entry of judgment cases except diversion of developmentally disabled defendants. Pen C §1001.90(a), (i). This fee is set at the court's discretion according to the seriousness of the offense, but it may not be less than $100 or more than $1000. Pen C §1001.90(b). Although imposition of the fee is mandatory regardless of the defendant's ability to pay, the court may waive the fee for "compelling and extraordinary" reasons. Pen C §1001.90(c). In setting the amount of the fee, the court must consider relevant factors such as the defendant's ability to pay, the seriousness and gravity of the offense, any economic gain derived by the defendant as a result of the crime, and the extent to which anyone suffered losses as a result of the defendant's crime. Pen C §1001.90(d).

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§27.25 J. Nonstatutory Court Diversion

Trial court diversion in which the court continues a case for a time and then dismisses it under Pen C §1385 over the prosecutor's objection is improper. *People v Tapia* (1982) 129 CA3d Supp 1, 181 CR 382; *People v Municipal Court (Gelardi)* (1978) 84 CA3d 692, 149 CR 30. See also *People v Orin* (1975) 13 C3d 937, 120 CR 65.

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§27.26 V. POSTCONVICTION DRUG TREATMENT UNDER PROPOSITION 36

Ø **Practice tip:** During the 2005-2006 regular session, the California Legislature adopted SB 1137, which made significant changes to the drug treatment laws enacted under Proposition 36. The legislation, Stats 2006, ch 63, was signed into law on July 12, 2006. Among other things, the amended provisions changed existing law by permitting incarceration of offenders placed on Proposition 36 probation who relapsed during treatment. See Stats 2006, ch 63, §7(e). However, this legislation has been declared invalid in its entirety, and the First District upheld the permanent injunction enjoining enactment of SB 1137. See *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 101 CR3d 229. Counsel and the court should be careful to use the preamendment version of Pen C §1210.1 because the amended version still appears "on the books." Citations in this chapter are to the preamendment version of §1210.1.

Proposition 36 mandates probation and drug treatment for a qualified defendant convicted of a "nonviolent drug possession offense." See Pen C §§1210-1210.5. This postconviction program contains elements of deferred entry of judgment (DEJ) and diversion court policies and procedures. For example, under Pen C §1210.1(a), the sentencing court may impose as conditions of probation a regimen of participation in vocational training, educational pursuits, psychological counseling, and family counseling, as well as drug counseling and testing.

Five types of defendants convicted of nonviolent drug possession offenses are ineligible for postconviction drug treatment under Proposition 36. A judge has no discretion to admit a defendant to drug treatment under Proposition 36 when the defendant is otherwise ineligible under Pen C §1210.1(b). *In re Varnell* (2003) 30 C4th 1132, 1139, 135 CR2d 619. An ineligible defendant is (Pen C §1210.1(b)):

- Any defendant previously convicted of one or more serious or violent felonies under Pen C §667.5(c) or §1192.7, unless the prior conviction was more than 5 years before the current offense *and* during that 5-year period the defendant has both remained free from prison custody and did not commit certain other specified offenses;
- Any defendant convicted, in the same proceeding as the nonviolent drug offense currently charged, of a separate misdemeanor unrelated to drugs or of any felony;
- Any defendant who refuses drug treatment as a condition of probation;

Ø **Note:** A defendant who refuses to comply with the terms of drug treatment under a grant of DEJ has been held to fall into this category. *People v Strong* (2006) 138 CA4th Supp 1, 4, 41 CR3d 867.

- Any defendant with two separate convictions for nonviolent drug offenses who has participated in two separate courses of drug treatment pursuant to the statute and is found by the court to be unamenable to any and all forms of drug treatment; or
- Any defendant who has committed certain specified drug offenses in combination with the use of a firearm.

Under Pen C §1210.5, the results of drug testing cannot be given greater weight than any other aspects of the probationer's individual treatment program. A defendant who refuses drug treatment, or refuses to comply with its terms, under a grant of DEJ (the equivalent of probation) is ineligible for drug treatment under Proposition 36. *People v Strong* (2006) 138 CA4th Supp 1, 41 CR3d 867.

Ø **Note:** When dealing with a defendant who has a lengthy history of drug addiction, the argument may be made that "dirty" tests during the early part of the defendant's treatment program should not be the basis of a probation violation.

In addition to providing drug treatment to nonviolent drug possessors, some for the first time in their lives, Proposition 36 provides for comprehensive dismissals of criminal convictions. Under Pen C §1210.1(d)(1), the defendant may petition the court to dismiss all charges and set aside the conviction. Early on, defense counsel should learn what the sentencing court's criteria are for dismissal, *e.g.,* employment, actively seeking work or attending school,

payment of or paying on fees and fines, and clean drug test results, so that the client can work on what has to be completed. A Proposition 36 dismissal permits a recovering addict to avoid disclosing both the arrest and the conviction, and achieves an early termination of probation. After a Proposition 36 dismissal, the defendant is still subject to the Pen C §12021 restriction on ownership or possession of a concealable firearm. Pen C §1210(d)(2). Also, the conviction must be disclosed in certain circumstances, such as applying for the position of peace officer. See Pen C §1210.1(d)(3).

Ø **Note:** In the area of criminal drug use and abuse, three drug court programs are available: DEJ, diversion, and Proposition 36 drug treatment. Depending on the defendant's drug use background, all three programs may be needed to achieve sobriety. Some individuals have abused drugs for decades, and it may take more that one program for the individual to find the road to recovery. Some courts may have concerns, if not policies, as to the multiple use of court resources by individuals who may, for example, fail diversion, and desire another program. Counsel who has similar global concerns must still keep his or her main interest centered on what is best for the client in avoiding criminal penalties and achieving a dismissal of criminal charges. However, counsel must bear in mind that a defendant who has refused to comply with drug treatment terms under a grant of DEJ may be denied the opportunity to participate in Proposition 36 drug treatment. See Pen C §1210.1(b)(4); *People v Strong* (2006) 138 CA4th Supp 1, 4, 41 CR3d 867.

For discussion of probation under Proposition 36, see §§38.4-38.9. For discussion of probation revocation under Proposition 36, see §§46.36-46.42.

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VI. PREPLEA PROBATION REPORTS

§27.27 A. Procedure

At the time of arrest or at the time of a guilty plea or verdict, the court may direct the county probation officer to investigate a defendant and file a report with the court. Pen C §1203.7. Usually the preplea report is ordered when the defense attorney, prosecutor, and court all agree that it would assist in settling the case. The extent to which courts use preplea reports under §1203.7 varies from county to county. Preplea reports are generally viewed as more beneficial to the defense, but there are cases in which the prosecution may gain as well. See the checklist in §27.28.

Unfortunately, preparing a preplea probation report can be an expensive undertaking. Accordingly, fewer and fewer courts are willing to grant requests for preplea probation reports.

For a discussion of when the defendant's statements to the probation officer are admissible, see §27.29.

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§27.28 B. Checklist: Reasons for Requesting Preplea Probation Report

A preplea probation report can benefit all concerned, the prosecution, the court, and the defense:

- The report provides the prosecutor and court with information to enhance settlement discussions.
- The report is useful to the prosecutor when he or she wants to avoid trying the case, *e.g.,* because of a child witness, complicated factual or legal issues, an unusual type of case, or out-of-state or very elderly witnesses.
- The report allows the probation officer to analyze the appropriateness of probation in sex offenses, child abuse offenses, narcotics offenses, elder and disabled person abuse offenses, and in cases in which the interests of justice would best be served. Pen C §§1203.055, 1203.065, 1203.073-1203.074, 1203.09, 1203.095.
- The court can use the report to decide whether diversion is appropriate in child abuse cases.
- The court can have a probation officer evaluate the defendant's lack of sophistication in a drug sale case and make a recommendation for or against deferred entry of judgment.
- The report can bring out facts to show that the case involves "unusual circumstances" that allow the court to grant probation to a defendant who is otherwise ineligible for probation. See *People v Superior Court (Du)* (1992) 5 CA4th 822, 7 CR2d 177 (shopkeeper convicted of using gun in commission of voluntary manslaughter was granted probation).

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§27.29 VII. USE OF STATEMENTS MADE BY DEFENDANT DURING DEFERRED ENTRY OF JUDGMENT, DIVERSION, OR PROBATION OFFICER'S INVESTIGATION

Many of the statutory deferred entry of judgment and diversion plans provide that a defendant's statement and any information procured during the investigation of the case, used by the probation officer as part of the information on which to make a recommendation on deferred entry of judgment or diversion, are inadmissible in any action or proceeding brought after the investigation, except at a hearing to terminate the deferral or diversion. Pen C §§1000.1(c), 1001.5, 1001.24-1001.25, 1001.52(b), 1001.67. Information divulged by the applicant is not barred, however, by any of these statutes from being used in prosecutorial investigations. Further, under Cal Const art I, §28(f), statements made by a defendant to a probation officer during a presentence or diversion investigation interview may be used against the defendant in other contexts, absent any evidence that the probation officer threatened the defendant with an unfavorable recommendation if he or she refused to give a statement. See *Minnesota v Murphy* (1984) 465 US 420, 425, 79 L Ed 2d 409, 418, 104 S Ct 1136; *People v Coffman* (2004) 34 C4th 1, 118, 17 CR3d 710; *People v Pacchioli* (1992) 9 CA4th 1331, 12 CR2d 156 (probation interview following guilty plea); *People v Goodner* (1992) 7 CA4th 1324, 1330, 9 CR2d 543.

Ø **Note:** Because there is uncertainty in this area of the law, defense counsel may wish to seek a stipulation from the prosecutor that statements made to the probation department cannot be used in any way at trial either for impeachment or as substantive evidence. It is recommended that defense counsel seek such a stipulation.

Probation department diversion questionnaires often ask the defendant to write down the facts of the alleged offense. Defendants are not required to admit guilt or take responsibility before a grant of diversion can be made; an accused can maintain his or her innocence and still take advantage of the diversion program. Pen C §1001.3 (general diversion). See also Pen C §1000.5 (preplea drug diversion) and Pen C §1001.66 (precomplaint diversion). Defense counsel should usually advise the defendant not to relate the facts of the case to the probation officer. One possible approach is for counsel to advise the defendant to state that although he or she is not guilty of the charges, he or she is nonetheless willing to accept diversion rather than suffer the emotional and financial burden of a trial. See *Parra v Municipal Court* (1978) 83 CA3d 690, 148 CR 203. See also *North Carolina v Alford* (1970) 400 US 25, 27 L Ed 2d 162, 91 S Ct 160. Alternatively, the client may be advised to make clear his or her willingness to accept on counsel's advice the terms and conditions of a diversion program and that he or she declines to make any statement about the facts of the offense.

Defense counsel may also wish to write directly to the probation officer or provide information about the defendant through other witnesses and evidence.

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28

TRIAL BY COURT OR JURY

R. KONRAD MOORE

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§28.1 I. OVERVIEW

Right to jury trial. Both the defendant and the prosecution have the right to a trial by jury in felony and misdemeanor cases. Cal Const art I, §16; Pen C §689; US Const amends VI, XIV; *People v King* (1970) 1 C3d 791, 795, 83 CR 401. The right to trial by jury is discussed in §§28.3-28.5.

Waiver of jury trial. The defendant must personally enter the jury trial waiver (Cal Const art I, §16), and the defendant's counsel and the prosecution must join in the waiver. *People v King* (1969) 71 C2d 885, 80 CR 26; *People v Peace* (1980) 107 CA3d 996, 1007, 166 CR 202. Waiver is discussed in §§28.5-28.28. A jury waiver can be withdrawn only with the court's approval. *People v Chambers* (1972) 7 C3d 666, 670, 102 CR 776. On motion to withdraw a waiver, see §28.29.

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§28.2 II. COURT TRIAL

The parties may agree to waive a jury and allow the court alone to decide the case. Cal Const art I, §16.

Court trials can be identical to jury trials except that no jury is selected, opening statements may be abbreviated or forgone, fewer instructions are chosen and they are not read aloud, and the judge usually takes less time to deliberate than a jury. However, court trials can also be planned to include only specified evidence, *e.g.,* a preliminary hearing transcript and the defendant's testimony.

When the prosecution and the defense have agreed on a plea bargain that includes a jury waiver and submission of the case on specified evidence, a court trial is the equivalent of a "slow plea" of guilty, and the court is required to advise the defendant of certain rights and of the probability that the submission will result in conviction, and to obtain a waiver. *Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302. For discussion, see §§28.19-28.21.

The procedure followed during a court trial is discussed in §§28.31-28.38.

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III. RIGHT TO TRIAL BY JURY

§28.3 A. Checklist: Matters on Which Right to Jury Trial Exists in Criminal Cases

The right to a jury trial in criminal cases is controlled by the Sixth and Fourteenth Amendments to the United States Constitution, Cal Const art I, §16 and §24, and various California statutory provisions. See, *e.g.,* Pen C §689.

Defendants and prosecutors in criminal cases in California state courts have the right to a jury trial in the following proceedings:

- Criminal contempt violations. Pen C §166; *Mitchell v Superior Court* (1989) 49 C3d 1230, 265 CR 144. See §§58.10-58.13.
- Conduct enhancements (also called "specific enhancements"). *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348 (jury verdict required for every fact, other than prior convictions, that increases penalty beyond statutory maximum for offense); *People v Arnett* (2006) 139 CA4th 1609, 1613, 44 CR3d 206; *People v Bautista* (2005) 125 CA4th 646, 655, 22 CR3d 845. See §§37.11, 37.13.
- Prior convictions alleged as enhancements. Pen C §1025; *People v McGee* (2006) 38 C4th 682, 708, 42 CR3d 899; *People v Epps* (2001) 25 C4th 19, 28, 104 CR2d 572. See §37.31.
- Proceedings to recover hazardous clean-up expenses following conviction of or guilty plea to qualifying controlled substance offense. Health & S C §11470.2(d). See *People v Wilen* (2008) 165 CA4th 270, 286, 80 CR3d 895.
- Felony and misdemeanor cases. Cal Const art I, §16; Pen C §689.
- Insanity proceedings. *People v Jarmon* (1992) 2 CA4th 1345, 4 CR2d 9; see Pen C §1026(a). See §§48.45-48.51.
- Proceedings on mental competence to stand trial. Pen C §1369; *People v Superior Court (McPeters)* (1985) 169 CA3d 796, 215 CR 482. See §§48.7-48.11.
- Misdemeanor possession of marijuana under Health & S C §11357(b), even though it does not carry the possibility of incarceration. *Tracy v Municipal Court* (1978) 22 C3d 760, 150 CR 785.
- Penalty phase of capital case. *People v King* (1970) 1 C3d 791, 795, 83 CR 401; *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428. See §§54.34-54.52.
- Mentally Disordered Offender (MDO) commitment hearings. See Pen C §2972(a). See §48.71.
- Sexually Violent Predator commitment proceedings. See Welf & I C §6603. See §§48.62-48.69.

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Source: Criminal Law/California Criminal Law Procedure and Practice/28 TRIAL BY COURT OR JURY/§28.4 B. Checklist: Matters on Which No Right to Jury Trial Exists in Criminal Cases

§28.4 B. Checklist: Matters on Which No Right to Jury Trial Exists in Criminal Cases

There is no right to a jury trial on the following matters:

- Civil contempt (CCP §1209; *Mitchell v Superior Court* (1989) 49 C3d 1230, 265 CR 144), provided the aggregate sentence does not exceed 180 days. See *In re Kreitman* (1995) 40 CA4th 750, 754, 47 CR2d 595.
- Infractions. Pen C §19.6. If the infraction is charged with a misdemeanor or a felony, the court may order both offenses tried by a jury or may order a separate court trial for the infraction. Pen C §1042.5.
- Violation of Food & A C §5784, which carries a maximum $1000 fine. *People v Anderson* (1987) 191 CA3d 207, 236 CR 329.
- The issue of whether the defendant is the person who has suffered an alleged prior conviction, unless the prior conviction is alleged under Pen C §190.2 (special circumstances) or as an element of the charged offense (Pen C §1025(c)-(d)).
- The nature of prior offenses as "serious" or "violent." *People v McGee* (2006) 38 C4th 682, 708, 42 CR3d 899; *People v Epps* (2001) 25 C4th 19, 28, 104 CR2d 572; *People v Kelii* (1999) 21 C4th 452, 458, 87 CR2d 674.
- Competency trials under Pen C §1368. *People v Masterson* (1994) 8 C4th 965, 972, 35 CR2d 679.
- Trials for extended involuntary commitment under Pen C §2970, based on defendant's status as a Mentally Disordered Offender (MDO).
- The issue of territorial jurisdiction in a criminal proceeding. *People v Betts* (2005) 34 C4th 1039, 1047, 23 CR3d 138.
- The issue of venue in a criminal proceeding. *People v Posey* (2004) 32 C4th 193, 8 CR3d 551.

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§28.5 C. Right to Jury Trial

Both the defendant and the prosecution have the right to a trial by jury in felony and misdemeanor cases. Cal Const art I, §16; Pen C §689; US Const amends VI, XIV; *People v King* (1970) 1 C3d 791, 795, 83 CR 401. A defendant is entitled to be tried by an impartial jury selected from a representative cross-section of residents of the county in which the charged crime was committed. *Hernandez v Municipal Court* (1989) 49 C3d 713, 263 CR 513, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. For further discussion of jury composition, see chap 29. Preparing and presenting a case to a jury is discussed in chap 30.

The jury verdict in a criminal case must be unanimous. *People v Thomas* (1977) 19 C3d 630, 642, 139 CR 594. The right to a jury trial extends to elements of the offense and allegations in the complaint, information, or indictment that may affect sentencing or enhance the penalty. See Pen C §689; *People v Guzman* (1988) 45 C3d 915, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. See also *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 412, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348 (Sixth Amendment guarantees right to have jury determine every fact and enhancement, other than prior convictions, that could increase maximum punishment). Jurors must render a verdict on every element of each offense charged, including prior convictions that are part of the offense, *e.g.,* Pen C §12021 (possession of firearm prohibited because of prior conviction or juvenile adjudication). See Pen C §1025. Jurors must also render a verdict on any enhancements and priors in the complaint, information, or indictment that affect sentencing. See *People v Garcia* (1970) 4 CA3d 904, 907 n2, 84 CR 624 (failure to make finding on charged prior offense is deemed a finding that the allegation is not true).

Penalty. Although the jury is required to find the facts that determine whether offense-related enhancements should be added to the penalty, in noncapital criminal cases the jury does not actually fix the penalty—the court does. Pen C §§12-13. The death penalty can be imposed only by a jury, unless the defendant waives the right to a jury determination. US Const amends VI, XIV; *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428; Pen C §190.3.

Priors. Under California law, a defendant has a statutory right to have a jury determine the truth of a prior-conviction allegation. Pen C §§1025(b), 1158. This statutory right is limited in nature: A defendant has "the right to have the jury determine only whether he or she 'suffered' the alleged prior conviction." *People v Wiley* (1995) 9 C4th 580, 589, 38 CR2d 347. See *People v Epps* (2001) 25 C4th 19, 23, 104 CR2d 572. The court, not the jury, must decide ancillary facts necessary to establish that a prior conviction comes within a particular recidivist statute. *People v McGee* (2006) 38 C4th 682, 708, 42 CR3d 899; *People v Kelii* (1999) 21 C4th 452, 458, 87 CR2d 674; *People v Wiley* (1995) 9 C4th 580, 592, 38 CR2d 347. The right to jury trial is further limited by Pen C §1025(c), which mandates that the court (not the jury) determine whether the defendant is the person who has suffered the prior conviction. There are exceptions for prior convictions alleged under Pen C §190.2 (special circumstances), or as an element of the charged offense, to which the right to a jury trial on the defendant's identity still extends. Pen C §1025(d). See the chart in §24.18 on priors that must be pleaded and proved.

> Ø **Note:** In *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, the Supreme Court held that California's Determinate Sentencing Law (DSL), which allows the sentencing judge to use facts not found by the jury to impose an enhanced sentence, violated the Sixth Amendment right to trial by jury insofar as it permitted upper-term sentences based on facts found by the sentencing judge by a preponderance of the evidence, rather than on facts found by the jury beyond a reasonable doubt. *Cunningham* invalidated the inconsistent portions of Pen C §1170(b) and Cal Rules of Ct 4.420(b). The high court left to the state how to remedy the DSL's constitutional defects, and amendments to Pen C §1170(b) and the Rules of Court ensued. For further discussion of the impact of, and response to, *Cunningham,* see §37.1A.

Number of jurors. The parties are entitled to a jury of 12 persons. Cal Const art I, §16. Because the parties may waive an entire jury, they may also waive the right to have 12 jurors. See *People v Trejo* (1990) 217 CA3d 1026, 1031,

266 CR 266. However, because of concerns about the reliability and appropriate representation of juries of fewer than six persons, it may constitute ineffective assistance for an attorney to counsel a criminal defendant to agree to such a jury. See 217 CA3d at 1033 n5; *Ballew v Georgia* (1978) 435 US 223, 239, 55 L Ed 2d 234, 246, 98 S Ct 1029.

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IV. WAIVER OF JURY TRIAL

§28.6 A. Right to Waive Jury Trial

A defendant may waive the right to a jury trial with the consent of defense counsel and the prosecutor. Cal Const art I, §16; *People v Upshaw* (1974) 13 C3d 29, 33, 117 CR 668; *People v Peace* (1980) 107 CA3d 996, 1007, 166 CR 202 (defense counsel must independently consent to waiver). A defendant has no right to demand a court trial over the objections of defense counsel or the prosecutor. See Cal Const art I, §16. A defendant must expressly and knowingly waive jury in open court. Cal Const art I, §16. The defendant's silence will not be interpreted as consent to a waiver. See *People v Ames* (1975) 52 CA3d 389, 124 CR 894.

When there is no agreement about the sentence, the trial judge need not concur in the waiver of jury trial nor may he or she overrule the parties' waiver. *People v Scott* (1997) 15 C4th 1188, 1209, 65 CR2d 240. If there is an agreement about the sentence, however, as is common in "slow pleas" (discussed in §§28.19-28.21), the judge's approval is required and should be on the record. *People v James* (1989) 208 CA3d 1155, 1169, 256 CR 661.

When the defendant has entered pleas of not guilty and not guilty by reason of insanity and has waived jury trial, both the guilt and sanity phases are tried by the court. *People v Villarreal* (1985) 167 CA3d 450, 458, 213 CR 179.

Counsel may waive the right to a jury trial in a proceeding to determine the client's competency to stand trial (Pen C §1368) in a criminal matter even over the client's objection. *People v Masterson* (1994) 8 C4th 965, 972, 35 CR2d 679. Counsel may also waive the client's right to a jury trial over the client's objection in proceedings to extend an involuntary commitment of a Mentally Disordered Offender (MDO) (Pen C §2970; *People v Montoya* (2001) 86 CA4th 825, 103 CR2d 579) and in a "not guilty by reason of insanity" commitment extension trial (Pen C §1026.5; *People v Powell* (2004) 114 CA4th 1153, 8 CR3d 441).

All parties must waive their right to 12 jurors in open court. *People v Ames, supra* (one juror fell asleep during defense counsel's closing argument; case reversed because defendant did not expressly waive right to be tried by 12 jurors); *People v Loving* (1977) 67 CA3d Supp 12, 136 CR 851 (neither district attorney nor defendant waived right to 12 jurors after one juror failed to appear; case reversed).

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§28.7 B. Defendant's Capacity to Waive Jury Trial

An emotionally disturbed person may have the capacity to waive the right to a jury trial, but the waiver "must be carefully scrutinized to determine that the person making it had the physical and emotional capacity to do so under all the circumstances of the case." *People v Miller* (1972) 7 C3d 562, 568, 102 CR 841, quoting *In re Walker* (1969) 71 C2d 54, 57, 77 CR 16. There is no conclusive presumption that a defendant who has pleaded not guilty by reason of insanity is incapable of waiving a trial by jury. *People v Miller, supra*. Defendants classified as mentally defective to "dull normal" in intelligence may also be capable of waiving a jury trial. *People v Lookadoo* (1967) 66 C2d 307, 57 CR 608. In accepting a valid jury trial waiver, the court must assure that the waiver is personal, voluntary, and intelligent. *People v Miller, supra*.

Non-English-speaking defendants aided by interpreters may also waive a jury trial. *People v Castaneda* (1975) 52 CA3d 334, 125 CR 9.

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§28.8 C. Advice and Waiver Required

In a standard court trial, in which the defendant contests guilt and the prosecution and defense make a complete presentation of evidence, the defendant must be told of the existence and nature of the right to a trial by jury, and in order to waive that right, must do so affirmatively. See *People v Lookadoo* (1967) 66 C2d 307, 311, 57 CR 608. The record must clearly and affirmatively show that the defendant personally and by use of language waived the right to a jury trial; a waiver will not be implied from silence or conduct. *People v Holmes* (1960) 54 C2d 442, 5 CR 871. Although no specific language is required, the waiver must be expressed in language that leaves no uncertainty about whether the defendant intends to submit the case to the court without a jury. See *People v Kranhouse* (1968) 265 CA2d 440, 71 CR 223; *People v Redwine* (1958) 166 CA2d 371, 333 P2d 188. Any ambiguities in the record must be construed in favor of preserving the defendant's right to a jury trial. *People v Redwine, supra*. Courts indulge every reasonable presumption against a waiver of fundamental constitutional rights when the record is silent. *Blair v Pitchess* (1971) 5 C3d 258, 274, 96 CR 42; *Johnson v Zerbst* (1938) 304 US 458, 464, 82 L Ed 1461, 1466, 58 S Ct 1019. The court need not, however, explore the reasons for the waiver (*People v Diaz* (1992) 3 C4th 495, 571, 11 CR2d 353) nor need it explain all the "ins and outs" of a jury trial (*People v Wrest* (1992) 3 C4th 1088, 1105, 13 CR2d 511). The court cannot encourage a defendant to waive a jury trial by promising a benefit for the waiver, such as stating that it would consider the waiver as a mitigating factor at sentencing. See *People v Dixon* (2007) 153 CA4th 985, 993, 63 CR3d 637.

A defendant who pleads guilty in a misdemeanor case can generally do so through counsel by signing the court's waiver of rights statement, which includes waiving the right to a jury trial. Counsel then submits the waiver to the court. See Pen C §977(a); *Mills v Municipal Court* (1973) 10 C3d 288, 110 CR 329. However, a defendant must personally appear at sentencing in misdemeanor prosecutions involving domestic violence as defined in Fam C §6211 or violation of a restraining order as described in Pen C §273.6. Pen C §977(a)(1)-(2). When a defendant is charged with specified misdemeanor offenses involving driving under the influence, the court may order the defendant to be present at the time of plea and at sentencing. Pen C §977(a)(3). In felony cases, the defendant always must appear in court at the time of plea. Pen C §977(b)(1).

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§28.9 D. Waiver Must Be in Open Court

In a felony prosecution, the defendant's waiver must be made in open court. Cal Const art I, §16. "Open court" typically is understood to refer to nothing more or less than a hearing or trial held in a courtroom from which the public is not excluded. *People v Allegheny Cas. Co.* (2007) 41 C4th 704, 709, 61 CR3d 689. See also *People v Valenzuela* (1968) 259 CA2d 826, 832, 66 CR 825 (waiver made in chambers when court was in session and door to chambers was open may satisfy open court requirement).

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§28.10 E. Waiver by Pro Per Defendant

An unrepresented defendant acting in pro per may waive jury trial and "no stereotyped" language expressing a waiver need be used. *People v Kranhouse* (1968) 265 CA2d 440, 449, 71 CR 223. The waiver must be in open court when a felony is charged. Cal Const art I, §16.

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§28.11 F. Time for Waiver

Waiver of 12 jurors. The right to a jury trial, or to a jury of 12 persons, may be waived at any time before submission of the case. *People v King* (1969) 71 C2d 885, 887, 80 CR 26; *People v Medina* (1935) 9 CA2d 259, 49 P2d 332. Usually, this type of waiver occurs when a juror becomes ill, there is no alternate, and the defense wishes to proceed with the 11 remaining jurors. See, *e.g., People v Evans* (1970) 8 CA3d 152, 87 CR 315.

Extension of original waiver to second trial. A jury trial waiver will remain in effect when a retrial is ordered without appellate intervention, *e.g.,* when the trial judge declares a mistrial. After waiving a jury in a first trial, the defendant must make a timely motion to withdraw that prior jury waiver to be entitled to a jury in the second trial. *People v Smith* (2005) 132 CA4th 924, 936, 33 CR3d 918. However, a jury trial waiver made before a defendant's first trial is no longer effective when the defendant is retried following a reversal of his or her conviction on appeal. *People v Solis* (1998) 66 CA4th 62, 67, 77 CR2d 570.

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§28.12 G. Renewal of Waiver After Pleadings Amended

A prior jury trial waiver becomes ineffective when the prosecutor amends the charging document to charge a new offense or to add a prior conviction or penalty enhancement. New pleadings require a new waiver. *People v Sanders* (1987) 191 CA3d 79, 236 CR 197 (prosecutor added lesser included offense of count stricken by prosecutor to obtain defendant's jury waiver; no retrial possible on that count); *People v Hopkins* (1974) 39 CA3d 107, 113 CR 880 (penalty enhancement added); *People v Luick* (1972) 24 CA3d 555, 101 CR 252 (prior conviction added); *People v Walker* (1959) 170 CA2d 159, 338 P2d 536 (new and separate charge added). See also Pen C §§969.5 (amending complaint to charge prior convictions), 1009 (amending accusatory pleadings).

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§28.13 H. Consent of Prosecutor and Defense Counsel

A defendant does not have the unilateral right to waive a jury trial and demand a trial before a judge; both the prosecutor and defense counsel must concur. Cal Const art I, §16; *People v Upshaw* (1974) 13 C3d 29, 33, 117 CR 668 (jury trial waiver requires concurrence of defense counsel); *People v Terry* (1970) 2 C3d 362, 85 CR 409, disapproved on other grounds in *People v Carpenter* (1997) 15 C4th 312, 382, 63 CR2d 1 (jury trial waiver requires concurrence of prosecutor). See also *People v King* (1970) 1 C3d 791, 795, 83 CR 401; *People v Peace* (1980) 107 CA3d 996, 1007, 166 CR 202.

In *Singer v U.S.* (1965) 380 US 24, 36, 13 L Ed 2d 630, 638, 85 S Ct 783, the Supreme Court declined to assume that the prosecution would "demand a jury trial for an ignoble purpose." The Court continued, "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." 380 US at 37, 13 L Ed 2d at 639. Thus, cases may arise in which the defense brings enough pressure to bear that the prosecution capitulates to a court trial.

Defense counsel's statement that a jury trial waiver is against his or her advice is equivalent to failure to waive a jury trial. *People v Peace* (1980) 107 CA3d 996, 1008, 166 CR 202. Silence by the prosecutor and defense counsel, however, when the defendant waives jury, will be interpreted as a waiver of jury trial. *People v Evanson* (1968) 265 CA2d 698, 701, 71 CR 503.

If a trial court mistakenly begins a court trial despite defense counsel's refusal to waive jury and then, after jeopardy has attached, discovers the error and declares a mistrial, the defendant has been placed in jeopardy and cannot be retried. *People v Upshaw* (1974) 13 C3d 29, 117 CR 668.

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§28.14 I. Judge's Concurrence Not Required for Jury Trial Waiver

Because the California Constitution does not require the judge's consent to a nonjury trial, the trial judge may not overrule the parties' jury trial waiver. *People v Scott* (1997) 15 C4th 1188, 1209, 65 CR2d 240.

Ø **Warning:** There can be no valid agreement on the *sentence,* however, without the trial judge's approval. Any agreement on sentencing should be on the record; otherwise, it may not have to be honored. *People v James* (1989) 208 CA3d 1155, 1169, 256 CR 661. Plea bargaining and case settlement is discussed in chap 26.

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§28.15 J. Failure to Obtain Waiver

Failure to obtain an express jury trial waiver ordinarily violates the California Constitution and requires automatic reversal of the conviction. *People v Holmes* (1960) 54 C2d 442, 5 CR 871. It has, however, been held that failure to obtain an express waiver of jury on a special circumstances allegation is subject to harmless error review under the *Chapman* standard (*Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824). *People v Moreno* (1991) 228 CA3d 564, 279 CR 140, disapproved on other grounds in *People v Wrest* (1992) 3 C4th 1088, 1104, 13 CR2d 511.

Moreno's holding was based on the then-valid assumption that the federal Constitution includes no right to jury trial on a special circumstance allegation. 228 CA3d at 573. This assumption is no longer valid after *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531, *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428, and *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348. The redefinition of the Sixth Amendment jury trial right to include special circumstances allegations does not necessarily make the failure to obtain an express waiver from the defendant reversible per se, however. One reason is that the U.S. Supreme Court has never adopted the California requirement that the trial court must obtain an express waiver of each of the constitutional rights the defendant gives up when entering a guilty plea. See *North Carolina v Alford* (1970) 400 US 25, 31, 27 L Ed 2d 162, 167, 91 S Ct 160. Furthermore, the U.S. Supreme Court has not explicitly included deprivation of the right to jury trial in the list of errors deemed structural and hence automatically reversible. See *Neder v U.S.* (1999) 527 US 1, 8, 144 L Ed 2d 35, 46, 119 S Ct 1827, for list of errors deemed structural. Deprivation of the right to jury trial has, however, long been presumed to be structural error, and several of the justices have made no secret of their views that the Sixth Amendment forbids conviction by "the wrong entity." See, *e.g., Sullivan v Louisiana* (1993) 508 US 275, 281, 124 L Ed 2d 182, 190, 113 S Ct 2078 (holding harmless error analysis inapplicable to erroneous reasonable doubt instruction).

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§28.16 K. Waiver of Jury Trial on Special Circumstances Allegation in Capital Cases

Both California law and the Sixth Amendment guarantee the right to have a jury decide the truth of alleged special circumstances in a capital case. *People v Wrest* (1992) 3 C4th 1088, 1103, 13 CR2d 511; *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348. A waiver of the right to jury trial on a special circumstance allegation does not have to be separate from the waiver of the right to jury trial on the underlying charges if the record is clear that the defendant is waiving both. *People v Wrest, supra*.

Ø **Note:** After *Blakely* and *Apprendi*, the better practice is to take a separate jury trial waiver on the special circumstance allegation.

In a *non-death penalty* murder case charging special circumstances, a separate *Bunnell* (*Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302) jury waiver for consideration of the special circumstances allegation is not required, or is harmless error, if it is clear from the record that the defendant was informed of that right and the waiver was taken as part of the overall submission of the case. *People v Wrest, supra*; *People v Simpson* (1991) 2 CA4th 228, 2 CR2d 589.

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§28.17 L. Waiver of Jury Trial on Enhancements and Prior Convictions

Unlike the rule pertaining to special circumstances allegations, jury waiver on the underlying charge is deemed a jury waiver on prior convictions as well; no separate waiver is required. *People v Berutko* (1969) 71 C2d 84, 94, 77 CR 217. It is common practice for defendants to seek bifurcated trials on prior convictions charged as enhancements. A bifurcated trial means that a jury will decide guilt on the underlying charges, but it will not hear of the existence of the prior convictions until after the guilt phase of the trial is concluded, unless they are admissible as character evidence under Evid C §§1101 or 1108-1109, or to impeach the defendant if he or she testifies. If the defendant is found guilty, the same jury then decides the prior conviction issue. Pen C §1158. Without a defense objection, however, the discharge of the guilt jury and the later impaneling of a second jury to try the prior conviction issue is permissible and is not a double jeopardy violation. *People v Saunders* (1993) 5 C4th 580, 20 CR2d 638. When bifurcation is not permitted, defendants sometimes admit the priors before trial begins. This procedure also may keep the jury from hearing about the prior. Bifurcation is not possible when a prior conviction is an element of the offense and consequently must be determined by the jury during deliberations on guilt. For further discussion, see §§24.18, 24.25-24.26.

Issues such as whether a prior conviction is a serious felony for sentence enhancing purposes, or whether priors were brought and tried separately are considered issues of law rather than issues of fact. There is no right to trial by jury of an issue of law. See Pen C §1126; *People v McGee* (2006) 38 C4th 682, 708, 42 CR3d 899; *People v Kelii* (1999) 21 C4th 452, 455, 87 CR2d 674; *People v Wiley* (1995) 9 C4th 580, 589, 38 CR2d 347.

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§28.18 M. Waiver of Jury at Sanity Phase of Trial

When a defendant has pleaded both not guilty and not guilty by reason of insanity (NGI) and has waived a jury trial, that waiver extends to both the guilt and sanity phases. *People v Jarmon* (1992) 2 CA4th 1345, 1355, 4 CR2d 9. For further discussion of NGI issues, see §§48.40-48.58.

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N. Court Trials Involving Submission on Less Than All Evidence; Slow Plea of Guilty

§28.19 1. Description of Shortened Court Trial and of Slow Plea of Guilty

In a shortened court trial, the defendant contests guilt, but counsel agree to submit some of the factual issues on evidence other than live testimony. For example, one attorney may want to submit a witness's testimony through a transcript of former testimony because the witness is unavailable or may make an unfavorable impression on the jury. Opposing counsel may agree to that on the condition that a similar arrangement be made for another witness.

In some situations, counsel may agree to submit the entire case on evidence other than live testimony. Examples of evidence commonly used in stipulated submissions follow:

- All or parts of the preliminary hearing transcript;
- All or parts of various police reports;
- Affidavit or declaration of witness;
- Physical evidence;
- Stipulation of facts or testimony agreed to be submitted to the judge;
- Transcript from a former hearing or trial; and
- Testimony from only specified witnesses.

Usually, a submission on stipulated evidence is presented to the court with the understanding that the defendant is not contesting guilt. Such a submission is called a slow plea of guilty, because it is tantamount to a guilty plea. Often, the parties stipulate to the sentence the defendant will receive if found guilty, and obtain the court's approval of this agreement. See §28.14. A slow plea also occurs when it is agreed that the court will find the defendant guilty but is given a choice of several charges. *People v Huynh* (1991) 229 CA3d 1067, 281 CR 785 (second degree murder or manslaughter).

Sometimes, a submission on stipulated facts is not a slow plea. When, for example, undisputed facts present a substantial legal issue, such as whether the defendant's undisputed conduct is proscribed by the statute, the submission is not tantamount to a guilty plea and is not considered a slow plea. See *People v Wright* (1987) 43 C3d 487, 496, 233 CR 69.

Generally, the prosecution offers or agrees to this procedure when its case is weak, but for public policy considerations the prosecutor cannot dismiss the case. By reducing the charge in exchange for a court trial and agreement not to contest guilt, the prosecutor saves taxpayers the expense of a jury trial, eliminating the possibility that the defendant will be acquitted or will have to be retried because of a deadlocked jury. Defense reasons for agreeing to a slow plea of guilty are discussed in §28.23.

The special waiver required for a case submitted on stipulated facts is discussed in §28.20.

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§28.20 2. Waiver Required for Slow Plea of Guilty

When a submission on agreed-on evidence is tantamount to a guilty plea, the defendant must be informed of the following rights and must waive them (*Bunnell v Superior Court* (1975) 13 C3d 592, 605, 119 CR 302):

- The right to jury trial;
- The right to confront and cross-examine witnesses; and
- The right against self-incrimination.

If the submission is a slow plea, the *Bunnell* advisements and waiver are required even if the defendant is contesting guilt or reserving the right to present additional evidence or legal argument in his or her defense. On the different standards used to review this issue on appeal, see §28.21.

> Ø **Note:** If the defendant advances a substantial defense, the submission will not be considered tantamount to a plea of guilty. *People v Wright* (1987) 43 C3d 487, 496, 233 CR 69. See §§28.19, 28.21. However, a submission on less than a full presentation of the evidence furnishes a link in the chain of evidence needed for a conviction and thus involves the privilege against self-incrimination. 43 C3d at 492. See also *People v Huynh* (1991) 229 CA3d 1067, 1079, 281 CR 785. The better practice is therefore to advise and obtain a waiver from the defendant of the self-incrimination privilege on any such submission.

If the defendant does not reserve the right to present additional evidence and does not tell the court that he or she will contest guilt, the court must also advise the defendant of the probability that the court will find the defendant guilty. *People v Lucky* (1988) 45 C3d 259, 286, 247 CR 1. In addition, if the defendant does not reserve the right to present evidence, the court must advise the defendant of that right and obtain a waiver. 45 C3d at 285. The court should also advise the defendant of the direct consequences of a guilty finding. On the trial court's duties before accepting a guilty plea, see §§26.10-26.17.

It appears that the plea bargaining involved in a slow plea is not included in Pen C §1192.7 ("'plea bargaining' means any bargaining, negotiation, or discussion … whereby the defendant agrees to plead guilty or nolo contendere"). However, Pen C §1192.6, which requires the judge to provide a statement for the record if he or she dismisses a felony charge, does apply. For discussion of the effect of §1192.7 on plea bargaining in felony cases, see §§8.6, 26.20.

> Ø **Note:** It is crucial that the terms of a slow plea be made part of the record to avoid enforcement problems later. *People v James* (1989) 208 CA3d 1155, 1167, 256 CR 661.

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§28.21 3. Appellate Standards When Considering Advice and Waiver on Slow Plea

Under Cal Const art I, §16, a defendant must make an affirmative statement waiving his or her right to a jury trial and submitting the case to a judge in a court trial. A conviction obtained after a court trial without a proper jury trial waiver is reversible per se. *People v Holmes* (1960) 54 C2d 442, 5 CR 871. See discussion in §28.15.

Failure to properly advise a defendant and obtain proper waivers of the remaining *Bunnell* rights is not reversible per se either in a *Bunnell* plea or in a contested submission in which the defendant reserves the right to present evidence and contest guilt in argument; *People v Wright* (1987) 43 C3d 487, 492, 233 CR 69; *People v Stone* (1994) 27 CA4th 276, 281, 32 CR2d 494.

If the record affirmatively demonstrates that the waiver of rights and the submission of the agreed-on evidence were voluntary and intelligent under the totality of the circumstances, a conviction following a court trial will be affirmed. Reversal is compelled only if failure to advise and obtain express waivers is prejudicial to the defendant, *i.e.,* it is reasonably probable that a result more favorable to the defendant would have been reached if properly advised. *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243; *People v Stone, supra*.

Ø **Note:** A defendant who has asserted and received the right to a jury trial need not provide an additional waiver of constitutional rights when stipulating to an element of an offense. *People v Newman* (1999) 21 C4th 413, 422, 87 CR2d 474. Stipulating to an element of the offense charged is a tactical decision not requiring recordation of the defendant's personal consent. *People v Fisk* (1975) 50 CA3d 364, 371, 123 CR 414. When a defendant is charged with possession of a firearm by an ex-felon, for example, it is often advisable to stipulate to the prior felony conviction to minimize associated prejudice. With a stipulation to the prior conviction, the court "sanitizes" the prior. Although the jury is informed the defendant has a prior felony conviction, the nature of the felony is not specified. *People v Sapp* (2003) 31 C4th 240, 261, 2 CR3d 554; *People v Valentine* (1986) 42 C3d 170, 173, 228 CR 25.

Ø **Warning:** Courts and counsel should be mindful of the *Bunnell* requirements whenever issues are submitted on the basis of transcripts during a court trial. To avoid extensive appellate litigation, courts should insist on *Bunnell* advisement and waivers in *all* cases submitted on transcripts or other documentary evidence. See *People v Howard* (1992) 1 C4th 1132, 1178, 5 CR2d 268; *People v Dakin* (1988) 200 CA3d 1026, 248 CR 206.

When a stipulation admits every element of an offense, it is tantamount to a guilty plea and requires *Bunnell* (*Boykin-Tahl*) advisements and waiver. *People v Little* (2004) 115 CA4th 766, 778, 9 CR3d 446. For further discussion of the differences between a submission and a stipulation of fact, see *People v Gaul-Alexander* (1995) 32 CA4th 735, 749, 38 CR2d 176. Jury waiver for normal court trials is discussed in §§28.6-28.14.

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O. Defense Considerations

§28.22 1. Differences Between Judge and Jury

The right to jury trial developed as protection against government oppression. In our present adversary system, the jury trial remains the best arena for challenging criminal charges brought by the government against an individual. In addition, juries better reflect the diversity of attitudes and views within the community in which the crime was allegedly committed. Even in periods of extreme anticrime sentiment, defense counsel and the defendant may choose to trust the wisdom and integrity of jurors, as community representatives, to act justly. Depending on the case, a jury may be more likely than a judge to compromise or nullify the harshness of the law. See *People v Dillon* (1983) 34 C3d 441, 490, 194 CR 390 (concurring opinion of Kaus, J.).

Numbers play an important role in a jury trial. Even if jurors are homogeneous in race, education, and cultural background, they must unanimously agree on a verdict. To reach a verdict, they must sort out and resolve conflicts in the evidence as well as their personality differences. Defense counsel can expect 12 persons to challenge one another and the evidence before reaching a verdict. This practice often works to the defendant's advantage.

Finally, a jury may hear a sanitized version of the evidence. Evidence may be suppressed, priors may be stricken or their trial bifurcated, and collateral conduct, including similar offenses, may be excluded as too prejudicial. A judge sitting alone as the trier of fact after hearing such evidence might be hard-pressed to ignore it; when excluded, jurors never hear it.

If defense counsel or the defendant wants to waive jury trial, defense counsel should discuss with the defendant the tactical considerations involved. In the event of unresolved disagreement regarding whether to waive a jury, no waiver occurs. *People v Peace* (1980) 107 CA3d 996, 1007, 166 CR 202 (defendant does not have constitutional right to waive jury trial over his or her counsel's objection).

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§28.23 2. Checklist: Defense Reasons for Waiving Jury

Jury waiver can result in one of three different types of court trial: a full court trial in which guilt is contested and all relevant evidence is presented (see §§28.31-28.38); a shortened court trial submitted on stipulated evidence, with guilt contested (see §§28.19-28.21); or a slow plea of guilty in which the case is submitted on specified evidence with the understanding that the defendant will be found guilty of a particular charge (see §§28.19-28.21). Among the reasons for defense counsel to recommend one of these types of court trial are the following:

- The defendant wants to plead guilty but also wants to preserve a particular issue for appeal. See §28.24.
- The defendant does not admit guilt but wants to accept the prosecutor's offer.

  Ø **Note:** If new evidence of the defendant's innocence is found later, the fact that the defendant continued to maintain his or her innocence, as evidenced by a slow plea rather than a plea of guilty, can help support the defendant's position on a habeas petition.
- A court trial is used as a mitigation hearing.
- A judge is considered less likely to be affected emotionally by prosecution evidence.
- A quick resolution of a case is necessary to avoid delays in sentencing and sentence credits.
- A waiver of jury trial will expedite the case.
- A judge may admit evidence favorable to the defense that would probably have been excluded in a jury trial.

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§28.24 a. Preserving Appellate Issues

Some cases present no factual disputes but do raise constitutional or other legal issues. A defendant who pleads guilty or no contest waives all legal or factual issues going to guilt or innocence. See *People v Kaanehe* (1977) 19 C3d 1, 8, 136 CR 409; Appeals and Writs in Criminal Cases §1.11 (3d ed Cal CEB 2007). Most of the issues that are cognizable on appeal after a guilty plea—issues going to the jurisdiction of the court or the legality of the proceedings—require filing a certificate of probable cause for an appeal. Pen C §1237.5. See also Appeals & Writs §§1.12-1.13. A notable exception is that a defendant may, without a certificate of probable cause, appeal denial of a motion to suppress brought pursuant to Pen C §1538.5 following the entry of a guilty or no contest plea. Pen C §1538.5(m). A trial on a plea of not guilty, even an abbreviated trial on stipulated evidence, does not require a certificate of probable cause and preserves all issues for appeal that were otherwise properly preserved in the trial court. *People v Tran* (1984) 152 CA3d 680, 685 n7, 199 CR 539. See *Bunnell v Superior Court* (1975) 13 C3d 592, 602, 119 CR 302.

If a substantial federal issue is involved, a plea of guilty also renders the issue moot in federal habeas corpus proceedings. A state certificate of probable cause will not preserve the issue. To preserve an issue for federal review, counsel must protect the client and the legal issue by trying the case before either a jury or a judge. See *Mitchell v Superior Court* (9th Cir 1980) 632 F2d 767.

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§28.25 b. Court Trial Used as Mitigation Hearing

Sometimes, evidence of a defendant's guilt is so overwhelming that a jury trial does not serve the defendant's interest, yet the defense wants the sentencing judge to hear the witnesses. Mitigating and extenuating circumstances may exist, or the victim of the crime may be so unsavory that they may blunt the impact of the defendant's guilt. A court trial in such a case allows the defendant to present testimony and to cross-examine prosecution witnesses in a way that would not be permitted at a sentencing hearing. See *People v Zikorus* (1983) 150 CA3d 324, 333, 197 CR 509 (confrontation of witnesses and rules of evidence need not apply at sentencing hearing as long as procedure is fundamentally fair).

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§28.26 c. Speedy Disposition

A quick resolution of a case may benefit a defendant, especially if he or she faces charges in other jurisdictions or if witnesses crucial to the prosecution are missing. Because judges are often available to try short cases between jury trials, a jury waiver may accelerate trial of the defendant's case.

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§28.27 d. Evidentiary Considerations

In some cases, admission of all the evidence, including hearsay, "self-serving" statements, and collateral matters affecting a witness's or victim's interests, bias, or conduct in the case, benefits the defendant. A judge may be more likely to admit and consider such evidence if a jury trial has been waived. Careful analysis of the facts and Evidence Code determine the weight to be given such factors before defense counsel waives jury trial. Conversely, if highly prejudicial evidence will probably be excluded, a jury trial might be better because the jurors would never hear the excluded evidence, whereas the judge in a court trial would.

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§28.28 P. Prosecution Considerations

Many prosecutors prefer court trials to jury trials. The main reason is that jury attitudes are less known than those of a familiar judge, many of whom are former prosecutors; the risk of an aberrant decision increases with 12 decision-makers. Also, juror errors such as independent investigation make it more likely that a mistrial, new trial, or reversible error will occur. Jury trials also take more time and money—especially when counts or defendants have been severed, causing multiple trials. Finally, courts often find time for a court trial when a jury trial would be delayed.

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§28.29 V. MOTION TO WITHDRAW WAIVER

A party who properly waives the right to a jury trial may withdraw it only with the court's approval. *People v Chambers* (1972) 7 C3d 666, 670, 102 CR 776. Factors the court considers include the motion's timeliness, the likelihood of an undue delay of trial, and any inconvenience to witnesses. *People v Chambers, supra*.

When the motion is made sufficiently in advance of trial that it does not interfere with the orderly administration of court business or prejudice other parties to the action, the court should grant it and reinstate the party's right to a jury trial. *People v Osmon* (1961) 195 CA2d 151, 154, 15 CR 263. A motion made just before trial begins or during trial, however, may properly be denied. *People v Chambers, supra* (motion made on day of trial); *People v Colton* (1949) 92 CA2d 704, 207 P2d 890 (same); *People v Cowan* (1940) 38 CA2d 144, 100 P2d 1079 (motion made after district attorney presented case-in-chief). The judge's decision will be reversed on appeal only for abuse of discretion. *People v Chambers, supra*.

When a defendant appearing in pro per subsequently retains counsel, who asks in a timely fashion to withdraw the defendant's jury trial waiver and to reinstate his or her right to a jury trial, the court should permit it. This motion may be made by counsel only, if the defendant does not object. See *People v Kipnis* (1970) 5 CA3d 980, 986, 85 CR 547.

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§28.30 VI. CHOICE OF JUDGE IN COURT TRIAL; USING REFEREE OR COMMISSIONER

It is crucial to know the identity of the judge who will try the case before waiving a jury trial. Some judges excel in homicide cases because they understand and are not repelled by violence. Other judges, who are truly legal scholars and technicians, have the capacity to separate emotion from legal principles. Good practice dictates that defense counsel and the prosecutor agree on a judge acceptable to both sides.

This agreement should be explicit. See *People v Marshall* (1960) 184 CA2d 535, 7 CR 589 (jury trial waiver before particular judge does not mean that that judge will hear case). Both parties should therefore make the choice of judge a condition of jury waiver.

Ø **Warning:** It is unclear that such a condition would be deemed effective if the defendant attempted to withdraw the jury trial waiver on the ground that the case was assigned for trial to a different judge and the motion was denied. In *People v Terry* (1950) 99 CA2d 579, 584, 222 P2d 95, the court of appeal expressed skepticism about the enforceability of such a condition. The California Supreme Court has not ruled on the issue. See *People v Langdon* (1959) 52 C2d 425, 432, 341 P2d 303. See also *People v Jones* (1960) 177 CA2d 420, 426, 2 CR 305.

Both the defense and the prosecution can stipulate to having a referee or court commissioner hear a case. No personal waiver is required from the defendant. If the parties proceed through trial without an objection to the referee or commissioner, a de facto stipulation will be found. *In re Horton* (1991) 54 C3d 82, 91, 284 CR 305 (on appeal, waiver inferred from defense counsel's conduct). See Cal Const art VI, §21; CCP §259(d). See also *Foosadas v Superior Court* (2005) 130 CA4th 649, 30 CR3d 358 (local rule that deemed lack of objection as equivalent to implied stipulation held invalid); *Horton v Mayle* (9th Cir 2005) 408 F3d 570, 577.

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VII. PROCEDURE DURING COURT TRIAL

§28.31 A. Types of Evidence That May Be Presented

A trial without a jury can be just as formal as a jury trial; a defendant does not waive the right to a trial, only to a jury trial. The evidentiary portion of a court trial can be identical to the evidentiary portion of a jury trial. For discussion of jury trials, see chap 30.

Ø **Note:** Of course, there are differences, even when counsel elects a full, formal presentation of evidence: No jury is selected, fewer instructions are chosen and they are not read aloud, and the judge usually takes less time to deliberate than a jury.

Alternatively, counsel may stipulate to any combination of transcripts, reports, testimony, recordings, material objects, or other evidence. Stipulating to an element of the offense charged is a tactical decision not requiring recordation of the defendant's personal consent. *People v Fisk* (1975) 50 CA3d 364, 371, 123 CR 414. See *People v Newman* (1999) 21 C4th 413, 421, 87 CR2d 474 (*Boykin-Tahl* waiver not required for defendant's stipulation to previous felony conviction, because not a waiver of constitutional rights); *People v Adams* (1993) 6 C4th 570, 578, 24 CR2d 831 (recognizing evidentiary stipulation as tactical trial decision); *People v Gaul-Alexander* (1995) 32 CA4th 735, 38 CR2d 176. For tactical reasons, a trial may be abbreviated to a slow plea. For discussion, see §§28.19-28.21.

A court trial begins with opening statements, first by the prosecution, then by the defense. Both counsel may, and in misdemeanor court trials commonly do, waive opening statement in diplomatic reliance on the judge's ability to assimilate the evidence. The prosecution then offers evidence to support the charge. After the prosecution rests, defense counsel may move for a judgment of acquittal. The court may also consider entering a judgment of acquittal on its own motion. Pen C §1118. If the motion is denied or is not made, the defense may offer evidence. Each party may then offer rebuttal testimony. The court, for good cause and in the interest of justice, may permit either party to offer evidence on its original case after rebuttal, but this is highly unusual. The prosecution may be allowed to reopen and present additional evidence only when the court is convinced that failure to present evidence on an issue, *e.g.,* proof of enhancements or priors, was a result of the prosecutor's inadvertence or mistake and did not result from an attempt to gain a tactical advantage over the defendant. See *People v Goss* (1992) 7 CA4th 702, 706, 9 CR2d 412. On the other hand, if defense counsel inadvertently fails to present evidence before resting, it appears that a judge in a court trial could allow the defense to reopen and present additional evidence before a verdict has been rendered. See *People v Funes* (1994) 23 CA4th 1506, 28 CR2d 758. After introduction of all the evidence, the parties rest. Both parties are then permitted to argue their respective cases. Pen C §1093.

There is a significant difference between the trial court's role in ruling on a motion under Pen C §1118.1 (motion for judgment of acquittal in jury case) and its role in ruling on a Pen C §1118 motion. The trial court will grant a §1118.1 motion only if the evidence then before the court is insufficient to sustain a conviction on appeal. Because the judge is the trier of law and fact in a court trial, the court may grant the motion even if the evidence is sufficient if it has a reasonable doubt about the defendant's guilt after weighing the evidence then before it. If the court does not grant a judgment of acquittal, the defendant may then offer evidence. Pen C §1118.

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§28.32 B. Jeopardy

In a court trial in which witnesses testify, jeopardy attaches when the first witness is sworn. If the court accepts a stipulation to submit the case on documents instead of on the examination and cross-examination of witnesses, jeopardy attaches on acceptance of the stipulation. *Bunnell v Superior Court* (1975) 13 C3d 592, 602, 119 CR 302.

A judgment of acquittal of the substantive offense for insufficient evidence under Pen C §1118 is not appealable, and the double jeopardy prohibition bars retrial. Pen C §1118.2. When, however, the court enters a judgment of acquittal of an allegation of a prior conviction, the prosecution may produce additional evidence, and the court may subsequently set aside the judgment of acquittal. *People v Norris* (2002) 95 CA4th 475, 479, 115 CR2d 540. See *Monge v California* (1998) 524 US 721, 734, 141 L Ed 2d 615, 627, 118 S Ct 2246 (double jeopardy provision of U.S. Constitution does not bar retrial in noncapital prosecution of prior-conviction allegation reversed on appeal for insufficient evidence); *People v Barragan* (2004) 32 C4th 236, 9 CR3d 76 (same; California Constitution).

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§28.33 C. Admissibility of Evidence

Except as otherwise provided in the Penal Code or mandated by other procedural or evidentiary rules, the Evidence Code applies to all criminal actions, including court trials. Pen C §1102; Evid C §300; *People v Charles* (1967) 66 C2d 330, 338 n12, 57 CR 745; *People v Holmes* (1993) 12 CA4th 1094, 1097, 16 CR2d 52.

In a jury trial, a hearing on the admission of evidence dependent on a finding of a preliminary fact is held out of the presence or hearing of the jury. Evid C §402. In court trials, however, because judges are considered better able to limit their consideration of evidence to the purpose for which it is admissible, motions to exclude evidence are usually heard by the same judge who will hear the trial. In extreme cases, the trial judge may request another judge to hear pretrial evidentiary matters. *People v Charles, supra*.

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§28.34 D. Order of Proof

In conducting a court trial, courts normally follow Pen C §1093, which sets the order of proceedings in jury trials, but this is not required. For good reasons, including the consent of the parties, and in the sound discretion of the court, changes can be made in the order of proof. Pen C §1094; Evid C 320; *People v Gates* (1987) 43 C3d 1168, 1184, 240 CR 666; *People v Lanphear* (1980) 28 C3d 463, 171 CR 505; *People v Carter* (1957) 48 C2d 737, 754, 312 P2d 665.

The order of proof can be crucial to trial counsel. To prevent an alleged victim who is entitled to be present and seated at trial from hearing and potentially conforming his or her testimony to another witness's or unduly influencing other witnesses' testimony by his or her presence, defense counsel may seek to exclude the alleged victim, provided all the criteria in Pen C §1102.6(b) are met. Alternatively, counsel may object to the order of an alleged victim's testimony and may ask the court to require the alleged victim to testify first.

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§28.35 E. Role of Trial Judge

In a court trial, the judge not only rules on issues of law (Pen C §1124) but is the trier of fact—the final arbiter of whether the prosecution has sustained its burden of proving the defendant's guilt beyond a reasonable doubt (Pen C §1167). With a view to the "expeditious and effective ascertainment of the truth regarding the matters involved," the judge controls the introduction of evidence and limits counsels' arguments to relevant matters. Pen C §1044; Evid C §765; *People v Garcia* (1986) 183 CA3d 335, 345, 228 CR 87; *People v Ferguson* (1981) 126 CA3d Supp 22, 32 n6-7, 179 CR 437. The judge has a right and a duty to expedite the trial and, if necessary in the interests of fairness and efficiency, to participate by engaging in reasonable supplementary examination of witnesses during the course of trial to elicit or clarify testimony on material points. 126 CA3d Supp at 32 n8. In fact, the judge has a duty to speak up when it seems apparent that a witness's testimony should be clarified. 126 CA3d Supp at 31 n4; *People v Bonville* (1968) 268 CA2d 107, 116, 73 CR 741; *People v Lancellotti* (1957) 147 CA2d 723, 730, 305 P2d 926.

However, the judge, under the guise of examining witnesses, must not become an advocate of either party. *People v Clark* (1992) 3 C4th 41, 143, 10 CR2d 554; *People v Rocco* (1971) 21 CA3d 96, 108, 98 CR 365; *People v Bonville, supra*. Judges have a duty to be impartial and to make sure that the defendant in a criminal case is given a fair trial on the facts and not a trial "on the temper or whimsies of the judge who sits in his case." *People v Mahoney* (1927) 201 C 618, 626, 258 P 607; *People v Blackburn* (1982) 139 CA3d 761, 765, 189 CR 50. Similarly, the judge is obligated to see that the trial is fair to the prosecution. *People v Ferguson* (1981) 126 CA3d Supp 22, 32 n7, 179 CR 437.

When it appears to counsel that a judge is taking over the examination of witnesses or otherwise interfering with the presentation of the case, counsel has a duty to speak up at a proper time and in a proper manner to object to the judge's questioning of witnesses or to forestall rulings that counsel considers erroneous and detrimental to the interests of the client. Evid C §775; *People v Clark, supra; People v Travis* (1954) 129 CA2d 29, 36, 276 P2d 193; *People v Rocco* (1971) 21 CA3d 96, 108, 98 CR 365. See also *Offutt v U.S.* (1954) 348 US 11, 16, 99 L Ed 11, 17, 75 S Ct 11. Some examples of judicial conduct that may interfere with counsel's presentation of the case are:

- Asking leading questions. It is usually best to leave these issues to cross-examination by counsel. Evid C §§767, 773(b); see *People v Rocco, supra*. When counsel is confronted with a judge who insists on cross-examining counsel's witnesses by asking leading questions, counsel should not hesitate to object, especially if the questions intimidate the witnesses or suggest that the judge is no longer impartial.
- Asking questions that call for a narrative response. Narrative answers are more likely to be nonresponsive and may inadvertently include inadmissible evidence. Evid C §766.

For examples of judicial misconduct, see *People v Jackson* (1955) 44 C2d 511, 282 P2d 898; *People v Fatone* (1985) 165 CA3d 1164, 1172, 211 CR 288; *People v Campbell* (1958) 162 CA2d 776, 329 P2d 82; *People v Burns* (1952) 109 CA2d 524, 542, 241 P2d 308.

Objecting to the judge's conduct of the trial (as opposed to objecting to the judge's rulings on legal issues) is a delicate matter for counsel, especially if the objections are to the judge's questions. But counsel must object for two reasons: First, counsel must protect the client's chances of securing a favorable verdict. A well-made objection may make the judge aware that he or she has already decided the case, even though the evidence is not all in. Second, counsel must protect the client's right to appeal. Evid C §353. See, *e.g., People v Fudge* (1994) 7 C4th 1075, 1108, 31 CR2d 321 (failure to make timely objection to judge's examination of witness waives any error on appeal). Common sense, courtesy, and knowledge of the Evidence Code will enable counsel to argue objections effectively without offending the judge: "when pertinent argument is presented in a proper manner it is the duty of the court to listen." *People v Travis* (1954) 129 CA2d 29, 36, 276 P2d 193.

If the judge refuses to listen and arbitrarily overrules counsel's objections, aggrieved counsel, in a professional and courteous manner, should try to make an offer of proof. If the judge will not allow an offer of proof, counsel must be sure that his or her attempts to object are on the record. If they are not, counsel may wish to ask to put them on the record at a break, or may want to submit them in writing to the court (they should be filed).

Whenever prejudice is so severe that a defendant is denied a fair trial, counsel, even in a court trial, may consider assigning judicial misconduct and coupling the assignment of misconduct with a motion for mistrial. See California Trial Objections §§29.21-29.33 (Cal CEB Annual). When a particular judge manifests pervasive prejudicial conduct, counsel may seek an additional judicial remedy by reporting the conduct to the Commission on Judicial Performance (CJP), authorized to oversee California Judicial Officers and designed to uphold public confidence in the integrity of the judiciary. Counsel is well advised to exercise due care and thoroughly document any alleged misconduct before lodging a complaint with the CJP, because a complaint may engender ill will.

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§28.36 F. Instructions

Criminal prosecutions encompass broad and varied subject matter, from common law crimes to highly technical, environmental crimes. In complex cases, written instructions of law are particularly useful to instruct the trial judge on elements of the crime and available defenses. Tailored or pinpoint instructions relating particular facts to legal issues clarify for the judge the issues he or she must resolve. Pen C §1124; *People v Sears* (1970) 2 C3d 180, 190, 84 CR 711. Also, written instructions assist counsel in structuring a logical and concise final argument, which judges prefer in court trials. Proposed instructions must be delivered to the court before commencement of argument. Pen C §1093.5. On instructions, see chap 32.

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§28.37 G. Argument

Once the evidence has been introduced and the parties have rested, both the prosecution and the defense are entitled to argue the case. Pen C §1093(e). The defendant has a constitutional right to argument in a criminal trial, whether by jury or court trial. *People v Rodrigues* (1994) 8 C4th 1060, 1184, 36 CR2d 235. There appears to be no reason, however, that in a court trial the court could not require the parties to submit their arguments in writing, as long as they are given a full opportunity to argue the issues. See *In re William F.* (1974) 11 C3d 249, 255 n5, 113 CR 170, overruled on other grounds in *People v Bonin* (1988) 46 C3d 659, 695 n4, 250 CR 687.

For further discussion of argument, see §§30.30-30.33.

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§28.38 H. Findings

After considering any instructions offered by the parties, the trial judge as trier of fact deliberates before returning a finding (also called a decision). The finding is in substantially the same form as a verdict. Pen C §1167; *People v Flores* (1974) 12 C3d 85, 94, 115 CR 225. Specific findings are required on the degree of the crime. *People v Flores, supra;* Pen C §§1097, 1157. The court trial concludes with the trial judge announcing his or her findings on the issues of fact, and entry of the findings in the minutes. Pen C §1167. When enhancements are charged and a court trial held, the trial court must make a finding on the truth of those allegations. That finding must be announced at the conclusion of the trial. *People v Jackson* (1987) 193 CA3d 393, 404, 238 CR 327 (enhancement stricken because judge neglected to make finding).

The degree of the crime may be established either by a numerical designation or by a sufficiently clear description of the offense. *People v Preciado* (1991) 233 CA3d 1244, 1250, 285 CR 22; *In re Andrew I.* (1991) 230 CA3d 572, 581, 281 CR 570; *People v Deay* (1987) 194 CA3d 280, 285, 239 CR 406. If the verdict refers to a specific count that unequivocally sets out the substantive elements of the greater crime, the crime is properly fixed at the greater degree. *People v Deay, supra*. If the court fails to set the degree of the crime, it is deemed to be of the lesser degree. Pen C §§1097, 1157. The court is not required to give the facts on which it based its findings. *People v Golston* (1962) 58 C2d 535, 540, 25 CR 83.

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29

JURY SELECTION

MICHAEL BEGOVICH

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§29.1 I. OVERVIEW

The constitutional right to jury trial includes the right to be tried by an impartial jury selected from a representative cross-section of residents of a county with a reasonable relationship or nexus to the commission of the offense. See *Price v Superior Court* (2001) 25 C4th 1046, 1050, 1075, 108 CR2d 409. See also §28.5. This chapter discusses the selection of that impartial, representative jury.

Jury selection begins with a panel of prospective jurors. See CCP §194(q). Selection of the panel is discussed in §§29.3-29.6. The composition of the panel may be challenged on representative cross-section or equal protection grounds. It often takes a great deal of effort for counsel to obtain the data necessary to prove that a particular class is underrepresented on a jury panel, and experts are usually needed to testify. See, *e.g., Williams v Superior Court* (1989) 49 C3d 736, 741, 263 CR 503; *People v Burgener* (2003) 29 C4th 833, 856, 129 CR2d 747. Because these challenges are complex, expensive, and seldom successful, attorneys usually do not challenge the entire panel. Challenges to the jury panel are discussed in §§29.7-29.11

Selection of the individual jurors, as well as alternate jurors, from the jury panel is accomplished during the process of voir dire, which is intended to expose juror bias, whether express or implied. See CCP §223. The voir dire process is discussed in §§29.12-29.20. During voir dire, both the prosecution and defense are entitled to make two types of challenges to individual jurors: challenges for cause based on the bias of the individual juror (see §§29.21-29.26 for discussion of challenges for cause), and "peremptory" challenges for which counsel need not state a reason (see §§29.27-29.37 for discussion of peremptory challenges).

This chapter also includes a practical analysis of jury selection techniques for the criminal defense attorney. Rhetorical theory germane to jury selection is analyzed, and sample voir dire questions are provided. See §§29.38-29.56. The following books on jury selection provide a more expansive discussion: Levine, Jury Selection Deskbook (2004); Gobert & Jordan, Jury Selection: The Law, Art and Science of Selecting a Jury (2d ed 1980); Wenke, The Art of Selecting a Jury (2d ed 1989); Bennett, Hirschhorn & Dimitrius, Bennett's Guide to Jury Selection and Trial Dynamics: California Criminal Litigation (1994); Donner & Gabriel, Jury Selection, Strategy & Science (3d ed 2000); National Jury Project, Jurywork: Systematic Techniques (2005).

On jury selection issues unique to death penalty cases, see §§54.25-54.29.

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§29.2 II. CHART: DEADLINES

Action	Deadline	Authority
Challenging jury panel.	Before any jurors sworn.	CCP §225(a)(1).
Challenging individual jurors for general disqualification (*e.g.,* not a citizen).	Before challenges for bias or peremptory challenges.	CCP §§226, 227.
Challenging individual jurors for cause when implied bias.	Before challenge for actual bias or peremptory challenges.	CCP §§226, 227.
Challenging individual jurors for cause when actual bias.	Before peremptory challenges.	CCP §226.
Peremptory challenge.	Taken only after all other challenges exhausted.	CCP §226.

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III. CHALLENGES TO PANEL

A. Selection of Trial Jury Panel

§29.3 1. Trial Jury Panel Defined

A trial jury panel is a group of prospective jurors assigned to a courtroom for the purpose of voir dire. See CCP §194(q); *People v De Rosans* (1994) 27 CA4th 611, 616, 32 CR2d 680.

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§29.4 2. Random Selection of Panel Members

Jurors must be selected at random from a fair cross-section of the population of the area served by the court. See CCP §§191, 197. A list of names of potential jurors is prepared from voter registration, driver's license, and Department of Motor Vehicles' identification card records. CCP §197(b). These are called "source lists." Source lists may also include customer mailing lists, telephone directories, and utility company lists. CCP §197(a). Persons are randomly selected from the source lists by the jury commissioner to create a "master list." Individuals on the master list are then examined by the jury commissioner for their qualifications to serve as trial jurors, usually through a questionnaire mailed to them. CCP §§198, 205. Grounds for exemption from jury service are discussed in §29.5; grounds for general disqualification are discussed in §29.22. A "qualified jury list" made up of persons competent to serve is then prepared. CCP §§198, 203. When jurors are needed for service, names are randomly drawn from the qualified jury list, and those jurors are notified when and where to report for service.

Ø **Note:** If sessions of the superior court are held in a location other than the county seat, the names for master jury lists and qualified jury lists to serve in a session may be selected from the area in which the session is held if a local superior court rule has been enacted that divides the county in a manner that provides all qualified persons in the county an equal opportunity to be considered for jury service. See CCP §198.5.

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§29.5 3. Exemption or Excuse From Jury Service

No eligible person (see CCP §203; see also §29.22 (grounds for general disqualification)) can be made exempt from jury service for any reason. CCP §204(a). An eligible person may be excused from jury service only for undue hardship, on himself or herself, or on the public. CCP §204(b). Undue hardship excuses are heard and decided by the jury commissioner. CCP §218.

Ø **Note:** Even though the jury commissioner will "prescreen" the panel sent to the trial department, trial judges commonly excuse jurors for hardship. Typical hardships found in trial courts include prepaid vacations, child care difficulties with infants, an employer that will not pay more than 1 or 2 weeks' salary for the trial, and missing 2 weeks or more of class time, which will affect the grade of a college student eligible for jury duty.

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§29.6 4. Vicinage Right Does Not Limit Jurors to Residents of County Where Crime Occurred

The Sixth Amendment gives a defendant the right to be tried by a jury drawn from the judicial district (vicinage) in which the crime was committed. Traditionally, defense attorneys assumed that "vicinage" was synonymous with "venue" and that venue was only appropriate in the county in which the crime occurred. However, while venue usually is limited to the county in which the crime occurred (see Pen C §§691(b), 777), for some crimes venue is proper in more than one county. See, *e.g.,* Pen C §790 (in murder prosecution, venue may be in county where fatal wound inflicted, where body found, or where victim died). For discussion of venue, see chap 15. The California Supreme Court has rejected the argument that the vicinage right gives the defendant a right to be tried by a jury selected from residents of the county in which the crime occurred. The court stated that the Sixth Amendment vicinage right is not an attribute of Fourteenth Amendment due process (*Price v Superior Court* (2001) 25 C4th 1046, 1056, 108 CR2d 409) and pointed out that the only limit Cal Const art I, §16, places on "[t]he Legislature's power to designate the place for trial of a criminal offense" is the "requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense." *Price v Superior Court* (2001) 25 C4th 1046, 1075, 108 CR2d 409; see *People v Posey* (2004) 32 C4th 193, 222, 8 CR3d 551.

The conclusion that the Sixth Amendment vicinage right is not an attribute of Fourteenth Amendment due process affects the appellate test for determining whether a vicinage error is prejudicial. As a state law error, it is reviewable under the standard set forth in *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243, rather than under the standard for federal constitutional errors set forth in *Chapman v California* (1967) 386 US 18, 24, 17 L Ed 2d 705, 710, 87 S Ct 824 (error requires reversal unless prosecution shows it was harmless beyond reasonable doubt).

Ø **Note:** "Vicinage" has a different meaning from "community," which is used to determine whether a criminal defendant's Sixth Amendment right to be tried by an impartial jury "selected from a fair cross-section of the community" has been violated. *People v Coddington* (2000) 23 C4th 529, 573, 97 CR2d 528, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. For discussion of fair cross-section challenges, see §§29.9-29.10.

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B. Procedure for Challenging Panel

§29.7 1. Timing; Preparing Motion

A challenge to the jury panel is an objection made to all the jurors on the panel. The challenge must be made before any juror is sworn (CCP §225(a)(1)), *i.e.,* before the jurors are sworn to hear the case after voir dire, not before voir dire. *People v Myers* (1987) 43 C3d 250, 262, 233 CR 264. Challenges to the jury panel are usually heard as in limine motions.

The challenge must be in writing and must state the facts that support it. CCP §225(a)(1). The facts are usually set out in an affidavit or declaration.

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§29.8 2. Legal Bases for Challenging Panel

The most common jury panel challenges are the following:

- The jury panel does not include a representative cross-section of the community (US Const amend VI; Cal Const art I, §16). See *People v Horton* (1995) 11 C4th 1068, 1087, 47 CR2d 516; *Williams v Superior Court* (1989) 49 C3d 736, 741, 263 CR 503; *People v De Rosans* (1994) 27 CA4th 611, 618, 32 CR2d 680; and
- The selection process denied the defendant equal protection of the laws (US Const amends V, XIV; Cal Const art I, §7);

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3. Representative Cross-Section Challenge

§29.9 a. Right to Jury Panel That Represents Cross-Section of Community

Although a defendant does not have the right to a jury that mirrors the demographic composition of the population, or that necessarily includes members of his or her own group, or that is composed of any particular group of individuals (*People v Crittenden* (1994) 9 C4th 83, 119, 36 CR2d 474), a defendant is constitutionally entitled to a jury panel that is as near an approximation of the ideal cross-section of the community as the process of random drawing permits. *People v Wheeler* (1978) 22 C3d 258, 276, 148 CR 890. Despite this requirement, certain groups *can* be excluded from that cross-section, including resident aliens, nonresident aliens, persons in prison or on parole for a felony (*People v Karis* (1988) 46 C3d 612, 631, 250 CR 659; *Rubio v Superior Court* (1979) 24 C3d 93, 99, 154 CR 734), and peace officers (CCP §219). In addition, a person with an incapacity that satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party can be excluded from service as well. CCP §228(b). But see CCP §203(a)(6). General disqualification of a person from jury service is discussed in §29.22.

Cases have held that the "community" for cross-section analysis is the "judicial district" in which the case is tried. *S*ee *People v Jenkins* (2000) 22 C4th 900, 982, 95 CR2d 377. Since trial court unification, a judicial district is a county. See CCP §38. It is presently unclear when a "judicial district" for cross-section analysis will be a smaller unit than the entire county.

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§29.10 b. Prima Facie Case

To establish a prima facie violation of the fair cross-section requirement, the defendant must satisfy three elements (*Duren v Missouri* (1979) 439 US 357, 364, 58 L Ed 2d 579, 587, 99 S Ct 664; *People v Ramos* (1997) 15 C4th 1133, 1154, 64 CR2d 892; *People v Horton* (1995) 11 C4th 1068, 1087, 47 CR2d 516:

- The group alleged to have been excluded is a "distinctive" group in the community;
- The representation of this group in jury panels is not fair and reasonable in relation to the number of such persons in the community; and
- The underrepresentation is due to systematic exclusion of the group from the jury selection process.

Ø **Note:** With respect to the various measures of underrepresentation, counsel can consult National Jury Project, Jurywork: Systematic Techniques, chap 5 (2005).

With respect to the second element, the proportion of the distinctive group in the jury pool is to be compared with the proportion of the group in the whole community, not with the proportion of the group in the jury-eligible population. *U.S. v Rodriguez-Lara* (9th Cir 2005) 421 F3d 932, 941.

The third element, "systematic exclusion," cannot be established if the only evidence presented is statistical evidence of disparity. See *People v Horton* (1995) 11 C4th 1068, 1088, 47 CR2d 516 (upholding Los Angeles County selection system). There must be proof of *deliberate* systematic exclusion (see *People v Ramos* (1997) 15 C4th 1133, 1156, 64 CR2d 892 (upholding Orange County selection system)), which requires a showing that the disparity is the result of an improper feature of the jury selection process. See *People v Burgener* (2003) 29 C4th 833, 859, 129 CR2d 747 (upholding Riverside County selection system); *People v Ochoa* (2001) 26 C4th 398, 425, 110 CR2d 324 (upholding intracounty transfer); *People v Anderson* (2001) 25 C4th 543, 566, 106 CR2d 575.

If constitutionally permissible jury selection criteria are applied in a neutral manner, there can be no "systematic exclusion," even when a defendant establishes that the percentage of the distinctive group in the community represented on jury panels is consistently less than the percentage of that group in the community. *People v Bell* (1989) 49 C3d 502, 524, 262 CR 1. See also *People v Breaux* (1991) 1 C4th 281, 298, 3 CR2d 81; *People v Currie* (2001) 87 CA4th 225, 235, 104 CR2d 430 (upholding Contra Costa County jury venire despite clear underrepresentation of African-Americans). If a county's jury selection criteria are neutral with respect to the distinctive group, the defendant must identify some aspect of the manner in which those criteria are applied that is not only the probable cause of the disparity but also constitutionally impermissible. *People v Burgener* (2003) 29 C4th 833, 858, 129 CR2d 747. A defendant who makes a particularized showing supporting a reasonable belief that underrepresentation exists as the result of practices of systematic exclusion (a very high hurdle) is entitled to some discovery because the court must make a reasonable effort to accommodate relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent. *People v Jackson* (1996) 13 C4th 1164, 1194, 56 CR2d 49. See *Roddy v Superior Court* (2007) 151 CA4th 1115, 1137, 60 CR3d 307.

Ø **Practice tip:** If a challenge is planned to a county's jury selection criteria, counsel should advise the defendant that a time waiver will be needed to accommodate the discovery required to determine whether any systemic problems exist in the county's jury selection protocol.

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§29.11 4. Hearing on Motion Challenging Panel

In challenging the jury panel, counsel has the right to present testimony and conduct cross-examination. Expert witnesses are usually required to testify to the demographic evidence and to the selection methodology. It is common for defense counsel to submit census data on the percentage of a particular group in the community, evidence of the percentage of that group who appeared from the summoned jury panel, and evidence of the percentage of that group in the panel assigned to the case. See *People v Sanders* (1990) 51 C3d 471, 489 n4, 273 CR 537.

If a defendant establishes a prima facie case of underrepresentation (see §29.10), the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists, or a compelling justification for the procedure that has resulted in the disparity in the jury venire. *People v Anderson* (2001) 25 C4th 543, 566, 106 CR2d 575. See also *Duren v Missouri* (1979) 439 US 357, 368, 58 L Ed 2d 579, 589, 99 S Ct 664; *People v Turner* (1994) 8 C4th 137, 164, 32 CR2d 762; *People v Bell* (1989) 49 C3d 502, 530, 262 CR 1.

If the court finds the challenge valid, it must discharge the jury panel. *People v Smith* (1993) 21 CA4th 342, 344, 25 CR2d 850. If it finds the challenge invalid, it must direct the jury to be impaneled. Pen C §1065.

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IV. THE VOIR DIRE PROCESS

§29.12 A. Purpose of Voir Dire

Individual jurors are questioned before a jury is selected and sworn to try a case. The purpose of this process, known as voir dire, is to aid the attorneys in deciding whether to challenge a juror for cause and examination of prospective jurors is limited to matters that will assist counsel in making that determination. See CCP §223. A challenge for cause may be based on the juror's general disqualification, implied bias, or actual bias. CCP §225(b)(1); see §§29.21-29.26 (challenging juror for cause).

The court must conduct the initial examination of the prospective jurors orally or by written questionnaire, or by both methods. Judicial Council Form MC-002, Juror Questionnaire for Criminal Cases, may be used for this purpose. Cal Rules of Ct 4.201. After an initial examination of the prospective jurors by the court, counsel for each party has the right to conduct his or her own voir dire. Judges exercise wide discretion in controlling the jury selection process. CCP §223; Cal Rules of Ct 4.201.

Ø **Practice tip:** During voir dire, counsel should not tell jurors that the purpose of voir dire is to "get answers from the prospective jurors to select a fair and impartial jury." That statement is not true; jurors know that a jury trial is an adversarial process and that jury selection is part of this process. To preserve trust, the author suggests this approach:

I will be asking some questions so that I can fully represent my client. Some of these questions will relate to some private and sensitive matters. I am not here to embarrass you. I have worked it out with Judge X that we can go into chambers and you can answer a sensitive question outside the presence of everyone except for the judge, attorneys, and court staff. So tell me if you wish to go private. And if I see, from your body language, that you may be apprehensive or anxious because of any question that is asked, then I'll ask you: "Do you want to go private?

Ø **Practice tip:** The author also recommends that counsel have the defendant, during in limine motions, make a waiver on the record of his or her right to be present during in-chambers voir dire, because experience has taught that jurors feel more comfortable and hence are more predisposed to disclose outside the presence of the defendant.

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§29.13 B. Selection of Prospective Jurors From Master List

When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court must seat prospective jurors for voir dire in the order provided by the panel list. CCP §222(b). Otherwise, the clerk randomly selects the names of the potential jurors for voir dire until the jury is selected or the panel is exhausted. CCP §222(a).

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§29.14 C. Number of Jurors

The defense and prosecution are each entitled to a jury composed of 12 persons. See Cal Const art I, §16; CCP §220. If both waive that right, a jury may be composed of as few as six jurors, even in a felony case. See *Ballew v Georgia* (1978) 435 US 223, 245, 55 L Ed 2d 234, 250, 98 S Ct 1029; *People v Trejo* (1990) 217 CA3d 1026, 266 CR 266.

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§29.15 D. Order of Questioning and Challenges

Order of questioning. There are three methods of initially selecting jurors for questioning: the "jury box" method, the "six-pack" method, and the "struck juror" method. Some California judges use the jury box method of selecting jurors. Under this system, 12 prospective jurors are seated in the jury box, and challenges are made to those 12 in the order described below. As prospective jurors are excused, replacements are called. See *People v Wright* (1990) 52 C3d 367, 395, 276 CR 731.

The most common method of voir dire in California is the "six-pack" method of jury selection. Under this system, 18 prospective jurors are called. Twelve sit in the jury box, and the remaining six are seated in temporary chairs in front of the jury box. The court and counsel then examine all 18 prospective jurors. When jurors seated in the jury box are excused, they are immediately replaced by the prospective jurors in the six temporary seats, in the sequence they are seated. No additional questioning is permitted. Challenges continue until all six of the temporary seats are vacated. At that point, the clerk calls six additional names from the panel to fill the six seats. These six additional prospective jurors are then examined by court and counsel. If alternates are required, the desired number of prospective jurors remaining in the temporary seats will serve as the alternates, subject to the exercise of peremptory challenges. The six-pack method has the advantage of faster jury selection. Also, when one of the 12 jurors in the jury box is excused, the attorneys know in advance which prospective juror will move from one of the six temporary seats into the jury box. The disadvantage is that it often results in less thorough and individualized voir dire. The six-pack method is frequently modified, according to the size of the trial courtroom, so that the court and counsel voir dire a panel consisting of up to 22 jurors. As someone from positions 1-12 is excused, the next seat in order fills that position until the total number of seats is used. Trial judges find that a "modified six-pack" method saves time in jury selection.

A third, infrequently used manner of jury selection is known as the "struck juror" method, which is permitted with the consent of the parties. See *People v Visciotti* (1992) 2 C4th 1, 38, 5 CR2d 495. The supreme court has criticized deviation from the statutorily prescribed procedure, but refused to reverse a case in which the struck-juror method was used over defense objection, owing to lack of prejudice shown in that case. *People v Wright* (1990) 52 C3d 367, 398, 276 CR 731. Despite criticism, the struck-juror system has been held to be constitutional, as long as its actual use meets constitutional standards. *JEB v Alabama ex rel TB* (1994) 511 US 127, 144, 128 L Ed 2d 89, 114 S Ct 1419.

In the struck system, prospective jurors fill out questionnaires and are individually questioned and challenged for cause. Next, they are randomly assigned numbers establishing the order in which they will be further questioned and called to sit as jurors. They are then questioned in groups and subjected to challenges for cause. Finally, the remaining prospective jurors are seated in the jury box in the previously assigned order, and the parties exercise their peremptory challenges.

> Ø **Note:** In the struck-juror system, a waiver of a peremptory strike (like the exercise of a peremptory strike in the jury box or six-pack method) may form the basis of a *Batson* challenge. See *U.S. v Esparza-Gonzalez* (9th Cir 2005) 422 F3d 897.

Order of challenges. The first challenge for cause to a prospective juror is made by the defense. CCP §226(d). Challenges for cause must be taken in the following order: (1) to the panel, (2) to an individual juror for a general disqualification, (3) to an individual juror for an implied bias, and (4) to an individual juror for an actual bias. CCP §227.

Each party is entitled to have a full panel before exercising any peremptory challenge. Therefore, no peremptory challenges are exercised until after the challenges for cause are heard or passed. Then, the prosecution has the first peremptory challenge and the peremptory challenges are taken by each side alternately. Once a peremptory challenge is exercised, a new prospective juror is seated and is subject to challenge for cause. The seat will continue to be filled by new prospective jurors until no challenge for cause is successful, at which point the peremptory challenges begin anew. A side may pass on exercise of a peremptory challenge without diminishing the number of peremptory challenges remaining with it. When each side passes consecutively, the jury will be sworn unless the court, for good cause, orders otherwise. CCP §231(d)-(e).

Ø **Note:** Counsel should also be aware of the "70-percent rule." Because most judges use the six-pack method, which may involve up to 22 seats, it is prudent to stop using peremptory challenges after using 70 percent of the available peremptories, particularly when the opposition has used only a few of its peremptory challenges. This is because counsel knows which prospective jurors are next in a six-pack method of voir dire, and the opposition can fill the panel with jurors it perceives as harmful to you.

In multiple-defendant cases, codefendants should exercise joint challenges first, followed by individual challenges. See CCP §231(a).

Ø **Note:** It is necessary to keep track of information about jurors, and to keep a history of which jurors are excused and for what reason, *e.g.,* in case counsel wishes to make a *Batson-Wheeler* challenge. A sample jury selection chart for this purpose is in California Criminal Law Forms Manual §29.1 (2d ed Cal CEB 2005).

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§29.16 E. Areas of Examination Concerning Challenges

The following areas are often fertile ground for gleaning information from prospective jurors that may lead to a challenge for cause (see CCP §223):

- Familial or social relationships to law enforcement or criminal justice personnel;
- Attitudes about law enforcement, the police, the courts, or the criminal justice system;
- Attitudes and fears about crime, or about having been a crime victim or a friend or relation of a crime victim;
- Knowledge or opinions about the case, or familiarity with the victim, the victim's family, the defendant, or the defendant's family;
- Whether the juror has formed an opinion about the guilt or innocence of the defendant;
- Whether the juror will be able to follow the judge's instructions, even if the juror may personally disagree with the specific instructions;
- Opinions about alternative lifestyles or organizations;
- Publicity concerning the case;
- Attitudes about the exercise of the right not to testify;
- Knowledge of the defendant's criminal record or other extraneous matters; and
- Any potential health problems or pressing business that might impair the juror's ability to concentrate and deliberate.

Ø **Practice tip:** When conducting voir dire in a search for grounds to challenge a juror for cause, counsel should "push the envelope" with his or her questions. If opposing counsel objects, or the judge has concerns, counsel should argue that the questioning is relevant to a challenge for cause and not a fishing expedition for peremptory challenges. Although the trial judge has broad discretion in the conduct of voir dire (see CCP §222.5), when counsel specifically articulates the reason why the questions are relevant to an intelligent challenge for cause, making a detailed record, then the likelihood of a favorable result on appeal is enhanced. See *People v Rigney* (1961) 55 C2d 236, 244, 10 CR 625; *People v Hinshaw* (1919) 40 CA 672, 674, 182 P 59.

Even when personal problems such as health issues or pressing business are insufficient to justify a challenge for cause, the court has the authority to excuse a person from jury service for undue hardship. CCP §204(b)).

In Three Strikes cases, voir dire about jurors' views regarding the strikes law is not allowed. *People v Cardenas* (1997) 53 CA4th 240, 246, 61 CR2d 583. Nor is voir dire allowed on any other topic pertaining to possible sentences. *Shannon v U.S.* (1994) 512 US 573, 579, 129 L Ed 2d 459, 467, 114 S Ct 2419. In death penalty cases, however, jurors will be asked "death qualified" questions. See §§54.25-54.29 on jury selection in death penalty cases.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.17 F. Attorney's Right to Examine Jurors; Jury Questionnaires

§29.17 F. Attorney's Right to Examine Jurors; Jury Questionnaires

Right to examine jurors. After an initial examination of the prospective jurors by the court conducted orally, by written questionnaire, or by both methods, counsel for each party has the right to conduct voir dire. CCP §223; Cal Rules of Ct 4.201.

The court, in its discretion, may limit the time for questioning of individual jurors, or the court may specify an aggregate amount of time for each party. In all criminal cases, voir dire of prospective jurors must, when practicable, occur in the presence of other jurors. Examination of prospective jurors must be conducted only in aid of the exercise of challenges for cause. CCP §223.

The trial court has great discretion to control the manner in which voir dire, and the court's exercise of that discretion, is not cause for reversal unless it results in a miscarriage of justice. CCP §223.

Jury questionnaires. The court and counsel may agree to have jurors respond to a questionnaire before voir dire. Judicial Council Form MC-002, Juror Questionnaire for Criminal Cases, may be used for this purpose. Cal Rules of Ct 4.201. Questionnaires can streamline voir dire by eliminating the need to spend time obtaining basic demographic information and by disclosing attitudes that may point to a bias. Questionnaires also provide a written record so that counsel does not have to write down or remember the information in the questionnaire.

Questionnaires are particularly helpful when counsel wishes to learn information about jurors that might be embarrassing if brought out in open court. However, even when a questionnaire is used, the judge must advise the jurors that they may request a hearing in chambers rather than answer a sensitive question in writing. See Advisory Committee Comment to Cal Rules of Ct 4.201.

See the sample jury questionnaires in California Criminal Law Forms Manual §29.2 (2d ed Cal CEB 2005); National Jury Project, Jurywork: Systematic Techniques, chap 3 (2005). The trial court has ultimate authority over the contents of any questionnaires. See *People v Navarette* (2003) 30 C4th 458, 486, 133 CR2d 89 (trial court did not err in striking portions of 31-page questionnaire; note that oral voir dire was also permitted).

> Ø **Practice tip:** If defense counsel and the prosecutor cooperate in devising the questionnaire, during in limine motions any areas of disagreement can be highlighted for the trial judge. Ultimately, the trial judge will determine what the final content of the questionnaire will be, and the judge will be happy if this task is not so time-consuming because the attorneys worked together.

A questionnaire may not substitute for voir dire. See, *e.g., People v Stewart* (2004) 33 C4th 425, 441, 15 CR3d 656 (trial court erred in excusing five prospective jurors for cause (over defense objection) solely on the basis of their checked responses and written answers in a jury questionnaire). It is not necessarily an abuse of discretion, however, to excuse prospective jurors solely on the basis of questionnaire responses when the defense and prosecution mutually agree to do so. See *People v Benavides* (2005) 35 C4th 69, 88, 24 CR3d 507.

> Ø **Practice tip:** As a tactical matter, when counsel believes a juror should be disqualified for cause and it is reasonably foreseeable that opposing counsel will also want that juror excused, the mutual agreement of counsel to excuse the juror can prevent wasting a peremptory challenge.

IAC and prosecutorial misconduct during voir dire. Defense attorney errors during voir dire, such as forgetting the number of peremptory challenges left or failing to challenge a juror for cause, should be avoided by trial attorneys, but are generally not considered cause for reversal based on ineffective assistance of counsel (IAC). See, *e.g., People v Freeman* (1994) 8 C4th 450, 485, 34 CR2d 558 (exercising only 15 of possible 26 peremptory challenges not IAC); *People v McPeters* (1992) 2 C4th 1148, 1177, 9 CR2d 834, disapproved on other grounds in *Verdin v Superior Court* (2008) 43 C4th 1096, 1106, 77 CR3d 287 (losing count of peremptory challenges not IAC); *People v Lloyd* (1992) 4 CA4th 724, 734, 6 CR2d 105 (failure to challenge juror who had been victim of auto theft not prima facie IAC). Prosecutorial misconduct can also occur during voir dire, but the trial court has broad discretion in allowing prosecution voir dire. See *People v Ochoa* (2001) 26 C4th 398, 428, 110 CR2d 324; *People v Muhammad* (2003) 108 CA4th 313,

316, 133 CR2d 308 (monetary sanctions against district attorney are not appropriate).

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§29.18 G. In Camera Voir Dire

Voir dire must be conducted in the courtroom, in the presence of other jurors, when "practicable." CCP §223. See *Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 510, 78 L Ed 2d 629, 639, 104 S Ct 819 (disapproving routine exclusion of press and public during voir dire). The court does have discretion to permit individual voir dire or voir dire closed to the press and public ("sequestered" voir dire) in appropriate circumstances. See *People v Visciotti* (1992) 2 C4th 1, 50, 5 CR2d 495; Advisory Committee Comment to Cal Rules of Ct 4.201. A request for individual or sequestered voir dire should be made by motion. See *People v Visciotti, supra*. Refusal to grant a motion for sequestered voir dire is subject to reversal only for an abuse of discretion that results in a miscarriage of justice. CCP §223.

On individual and sequestered voir dire in capital cases, see §54.25. On closing voir dire to the press and the public generally, see §§14.14, 14.29.

> Ø **Practice tip:** Having made the tactical decision not to use "hot-button voir dire" (see §29.47), counsel may move in limine to have the court allow "private" voir dire of prospective jurors who do not wish to answer certain sensitive questions in front of the other jurors. The defendant's waiver of the right to be present during "private" voir dire in chambers results in more disclosure by the prospective juror. Therefore, once the defendant has waived that right, the venire should be told during introductory remarks that counsel will ask some "private" questions to properly represent the defendant, but a juror who doesn't want to answer any question may raise his or her hand. Counsel should then explain that the voir dire then will occur in the judge's chambers outside the presence of the other jurors. Counsel should also advise the venire that if he or she sees any body language consistent with apprehension with any of the questions, he or she will ask, "Do you want to go private?" Over the years, the author has heard much disclosure in chambers relating to jurors' experiences of rape, robbery, torture, child molestation, vicious domestic violence, and other horrific things they—or someone close to them—experienced. Since all of us see the world through the prism of our experience, it is of paramount importance to get prospective jurors to disclose key experiences that could bias them against the defendant.

Using private voir dire permits the juror to disclose with less embarrassment, protects the defendant by achieving the disclosure in terms of counsel's calculus in selecting and de-selecting the jury, and can result in counsel's immediate follow-up questions of the juror in chambers, leading to the granting of a cause challenge. Following disclosure in "private" voir dire, the author frequently feels a consensus has been reached between himself, the trial judge, and prosecutor that a juror should be excused for cause.

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§29.19 H. Discovery of Juror Information by Defense and Prosecution

Pretrial. Trial judges have discretion to permit the defense access to jury records and reports of juror investigations prepared by the prosecution. *People v Murtishaw* (1981) 29 C3d 733, 767, 175 CR 738 ("[w]hen courts then deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel"). See also *People v Pride* (1992) 3 C4th 195, 227, 10 CR2d 636 (no relief because inadequate record of what prosecution had).

Ø **Note:** Counsel may be able to obtain information from the registrar of voters on the political parties of prospective jurors.

Both the defense and the prosecution may obtain indications about the attitudes of prospective jurors about a case by conducting community case analysis interviews, attitudinal surveys, and trial simulations. See National Jury Project, Jurywork: Systematic Techniques, chap 9 (2005). Well-constructed jury questionnaires can also shed light on jurors' attitudes toward a case. See Jurywork, chap 11.

Postconviction. The court must seal juror identifying information following a criminal proceeding, subject to a motion that shows good cause for disclosure. CCP §237. See also §§12.21, 34.5. Providing such information to a defendant is a misdemeanor. Pen C §95.2.

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§29.20 I. Selecting Alternates

The number of alternate jurors and the procedure for selecting them will be addressed by the court in the mandatory pre-voir dire conference. Cal Rules of Ct 4.200(a)(7). A trial judge may order selection of one or more alternate jurors if the judge believes the trial will be protracted. Pen C §1089. Selection of alternate jurors takes place immediately after the panel is sworn and is conducted in the same manner as selection of regular jurors. Pen C §1089; see *People v Thomas* (1994) 26 CA4th 1328, 1333, 32 CR2d 177. On challenges for cause, see §§29.21-29.26; on peremptory challenges, see §§29.27-29.37.

Ø **Practice tip:** In a lengthy trial, *e.g.,* over 3 weeks, counsel should consider asking the trial judge during pretrial motions for three to five alternate jurors.

Each side is given one peremptory challenge for every alternate to be chosen. When two or more defendants are tried jointly, each defendant is given one peremptory challenge for every alternate to be chosen, to be exercised according to his or her individual discretion. The prosecution is entitled to the total number of peremptory challenges allowed all defendants. These challenges may be accumulated in the same manner as when selecting the first 12 jurors. Pen C §1089. See §29.15.

A trial court does not have the authority to reopen jury selection after a jury has been sworn. *People v Cottle* (2006) 39 C4th 246, 255, 46 CR3d 86. See CCP §226(a). The trial court is not "without recourse" if a juror becomes "unable" to serve: CCP §§233 and 234 and Pen C §1089 permit removal of a juror for good cause. *People v Cottle, supra*.

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V. CHALLENGING INDIVIDUAL JURORS FOR CAUSE

§29.21 A. No Limit on Number of Challenges for Cause

Although the number of peremptory challenges counsel may exercise is limited by statute (see CCP §231, discussed in §29.28), there is no limit to the number of challenges for cause that counsel can make. Counsel should challenge a juror for cause as soon as counsel believes a basis for challenge has been established.

Challenges to an individual juror for cause are taken first by the defendant, and then by the prosecution. CCP §226(d); see §29.15.

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B. Grounds for Challenge for Cause

§29.22 1. General Disqualification

A general challenge for cause may be made by either party on the ground that a juror is disqualified from serving in a particular case. CCP §228(a). A prospective juror is subject to a general challenge for cause if he or she (CCP §203):

- Is not a citizen of the United States;
- Is less than 18 years of age;
- Does not live in California (see Elec C §§2020-2035);
- Is not a resident of the jurisdiction in which the case is being tried;
- Does not speak English well enough to understand the proceedings;
- Has a disability (*e.g.,* loss of hearing or sight, or impaired mobility or ability to communicate), if the disability is the sole cause of the disqualification;
- Is simultaneously serving as a grand or trial juror in any court of this state;
- Is the subject of a conservatorship; or
- Has been convicted of a felony or of malfeasance in office, and has not his or her civil rights restored.

The jury commissioner screens prospective jurors for grounds for general disqualification before compiling the qualified-juror list. See CCP §205. Therefore, attorneys usually do not question individual jurors about these requirements.

Although a juror is not subject to general disqualification solely because of a disability (CCP §203(a)(6)), an "incapacity" that makes an individual incapable of performing the duties of a juror without prejudicing the substantial rights of the challenging party provides a ground for a challenge for cause. CCP §228(b).

The court must provide auxiliary services, *i.e.,* a sign language interpreter, oral interpreter, or deaf-blind interpreter, for disabled persons who are not challenged. CCP §224. It might be argued that the Americans with Disabilities Act requires the court to deny a challenge for cause made under CCP §228(b) if the court determines that the disabled prospective juror could adequately perform juror duties if a reasonable accommodation were made for the prospective juror's disability.

Ø **Note:** Hearing-impaired persons, and probably those with other disabilities, are not a "distinctive" group within the community for purposes of a fair cross-section challenge. *People v Fauber* (1992) 2 C4th 792, 816, 9 CR2d 24. See discussion in §§29.9-29.10.

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§29.23 2. Implied Bias

Either party may challenge a particular juror for cause on the ground of implied bias. CCP §§225(b)(1)(B), 229. Implied bias exists if a prospective juror falls into any of the categories specified in CCP §229. Under §229, bias will be implied if a prospective juror:

- Is related within the fourth degree to a party, an officer of a corporation that is a party, a witness, or the alleged victim;
- Is a guardian or ward, conservator or conservatee, master or servant, employer or clerk, landlord or tenant, principal or agent, or debtor or creditor of a party, or an officer of a corporation that is a party;
- Is the parent, spouse, or child of a guardian or ward, conservator or conservatee, master or servant, employer or clerk, landlord or tenant, principal or agent, or debtor or creditor of a party, or an officer of a corporation that is a party;
- Is a member of the family of a party;
- Holds bonds or shares of capital stock of a corporation that is a party;
- Within 1 year before the filing of the complaint, has had an attorney-client relationship with a party or with the attorney for a party (see *People v Terry* (1994) 30 CA4th 97, 100, 35 CR2d 729);
- Has been a trial or grand juror or witness in a previous or pending trial involving the parties to the current action, or the same specific offense or cause of action;
- Has, within 1 year, been a trial or grand juror in any action in which either party to the current action was a party or in which either party to the current action was a criminal defendant;
- Has any interest in the action other than his or her interest as a citizen or taxpayer;
- Has an unqualified opinion or belief on the merits of the action based on knowledge of the facts;
- Is biased for or against either party;
- Is a party to an action pending in the court for which he or she is drawn, that is set for trial before the panel of which the juror is a member; or
- In a death penalty case, has conscientious opinions that would preclude the juror finding the defendant guilty. See *People v Crittenden* (1994) 9 C4th 83, 120, 36 CR2d 474; *People v Rodrigues* (1994) 8 C4th 1060, 1146, 36 CR2d 235.

When implied bias is shown, no further proof of prejudice is required; it is inferred as a matter of law. *People v Wheeler* (1978) 22 C3d 258, 274, 148 CR 890 (decided under former CCP §1074; now see CCP §229).

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§29.24 3. Actual Bias

Either party may challenge a particular juror for cause on the ground of actual bias. Actual bias is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." CCP §225(b)(1)(C).

A juror may be disqualified for actual bias in the following situations:

- The juror states that it would be difficult to keep an open mind because of the nature of the case. *People v Compton* (1971) 6 C3d 55, 59, 98 CR 217.
- The juror admits bias for or against a group involved in the case. *People v Buyle* (1937) 22 CA2d 143, 145, 70 P2d 955.
- The juror admits having settled opinions about issues in the case. *People v Williams* (1988) 199 CA3d 469, 476, 245 CR 61; *People v Sullivan* (1922) 59 CA 633, 634, 211 P 467.
- The juror cannot assure the court that he or she would decide the case by reference exclusively to the law and the evidence, or admits that there is a significant likelihood that extraneous matters will enter into the decision-making process. *People v Hecker* (1990) 219 CA3d 1238, 1242, 268 CR 884; see, *e.g., Merced v McGrath* (2005) 426 F3d 1076 (jury nullification).

Ø **Note:** The mere fact that a juror does not wish to sit on a particular kind of case because it would be too emotional does not justify excusing the juror for cause on the ground of actual bias. *People v Sanchez* (1989) 208 CA3d 721, 732, 256 CR 446.

- The juror has an opinion on the defendant's guilt or innocence. *People v Wheeler* (1978) 22 C3d 258, 265, 148 CR 890.

Ø **Note:** If a sufficient number of jurors have read or seen prejudicial publicity about a case, counsel may be able to obtain a change of venue. See chap 15.

Ø **Practice tip:** When making a record of why a particular juror should be excused for cause, it is very important to articulate the body language communicated by that juror, because words alone do not adequately convey the potential juror's bias. For example, a record may be made as follows: "Your Honor, when I asked juror number 3 if she thinks she can give my client a fair trial even though he looks like the man that held her up at gunpoint when she worked at a convenience store in college, you saw her pause about 5 seconds in her response to my question, and you also saw that she was starting to cry and was very uncomfortable. My client is charged with strong armed robbery in facts similar to the experience juror number 3 suffered 21 years ago. Her words mask her actual prejudice, Your Honor, and from the totality of circumstances, she has actual bias and thus must be excused for cause—so my client may receive a fair trial."

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§29.25 C. Trial of Challenge to Individual Juror for Cause

Challenges for cause are tried by the court. The juror and anyone else may be examined as a witness. CCP §230. The Evidence Code applies. See Evid C §300. The decision to seat jurors challenged for cause is within the court's discretion and is seldom disturbed on appeal. *People v Kelly* (1992) 1 C4th 495, 519, 3 CR2d 677; *People v Kaurish* (1990) 52 C3d 648, 675, 276 CR 788; *People v Bittaker* (1989) 48 C3d 1046, 1087, 259 CR 630. See §29.26 on how to proceed if a challenge for cause is denied.

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§29.26 D. Preserving Right to Review of Trial Court's Ruling on Challenge for Cause

Review of denial of challenge. If the court disallows counsel's challenge for cause, counsel should exercise a peremptory challenge as to that juror. To preserve the issue of an erroneous denial of a challenge for cause for appeal, counsel must exhaust all his or her peremptory challenges and must express dissatisfaction with the jury as constituted. *People v Boyette* (2002) 29 C4th 381, 419, 127 CR2d 544; *People v Hillhouse* (2002) 27 C4th 469, 487, 117 CR2d 45. The same rule applies to alternate jurors—counsel must make a timely motion to excuse an alternate for cause and exhaust all peremptory challenges in order to preserve a claim of error in denying a challenge for cause as to that alternate. *People v Ramos* (1997) 15 C4th 1133, 1159, 64 CR2d 892.

Ø **Note:** Although instances may occur when counsel is not required to exhaust peremptory challenges (*e.g.,* when the court precludes counsel from asking questions that are important in determining whether jurors are biased), improper restrictions on voir dire are not per se prejudicial. *People v Bittaker* (1989) 48 C3d 1046, 1086, 259 CR 630. Therefore, counsel should exhaust peremptories in all instances when appellate review of jury selection issues is needed.

However, appeal on this issue is an uphill battle. The reviewing court will probably find no prejudice if the prospective juror who was the subject of the disallowed challenge for cause was peremptorily challenged. See, *e.g., People v Boyette* (2002) 29 C4th 381, 127 CR2d 544 (failure to excuse juror biased in favor of death penalty was harmless; removal of juror through peremptory challenge meant jury's impartiality not compromised; dissent by Kennard, J); *People v Johnson* (1992) 3 C4th 1183, 1210, 14 CR2d 702.

Even when counsel has no peremptory challenges left, the error will likely be held nonprejudicial unless trial counsel requests additional peremptory challenges or otherwise expresses dissatisfaction with the jury as presently constituted. *People v Stankewitz* (1990) 51 C3d 72, 103, 270 CR 817. The court may refuse to grant additional peremptory challenges unless counsel can show that, without such additional challenges, the defendant is reasonably likely to receive an unfair trial before a partial jury. *People v Pride* (1992) 3 C4th 195, 230, 10 CR2d 636.

Review of sustained challenge for cause. Whether a ruling erroneously sustaining a prosecution challenge for cause requires reversal depends on the circumstances. The defendant will be required to show prejudice, because the defendant is not entitled to a particular juror, but only to an impartial jury. *People v Parman* (1939) 14 C2d 17, 20, 92 P2d 387.

Ø **Note:** The challenge in *Parman* was to an all-male jury in a death penalty case, and the court found such a jury permissible. *Parman* is no longer valid on this point. See *People v Howard* (1992) 1 C4th 1132, 1158, 5 CR2d 268; *Ballard v U.S.* (1946) 329 US 187, 193, 91 L Ed 181, 185, 67 S Ct 261 (federal conviction reversed due to deliberate exclusion of women from jury service). See also CCP §231.5; *People v Wheeler* (1978) 22 C3d 258, 280, 148 CR 890.

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VI. PEREMPTORY CHALLENGES

§29.27 A. Definition

A peremptory challenge may be made by either party and is an objection to a juror for which no reason need be given. The court is required to excuse jurors challenged peremptorily. See CCP §231. The prosecution makes its peremptory challenge first; then the sides alternate in making challenges. If both the prosecution and defense counsel pass consecutively, the jury is sworn by the clerk. See CCP §231(d)-(e); see §29.15. The trial judge cannot reopen jury selection for further challenges after the jury has been sworn, even if alternates have not been sworn. *People v Cottle* (2006) 39 C4th 246, 46 CR3d 86. If a juror is unable to serve, recourse may be taken under CCP §§233-234 or Pen C §1089.

Ø **Note:** The right to a public trial requires that peremptory challenges be made in open court; any error in this regard is per se reversible. *People v Harris* (1992) 10 CA4th 672, 682, 12 CR2d 758.

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§29.28 B. Number

Offense punishable by maximum of 90 days. If the charged offense is punishable with a maximum term of imprisonment of 90 days or less, each side is entitled to six peremptory challenges. CCP §231(b).

Offense punishable with death or life imprisonment. If the charged offense is punishable with death or with imprisonment in the state prison for life, each side is entitled to 20 peremptory challenges. CCP §231(a). In a prosecution for first degree murder without special circumstances, imprisonment "for a term of 25 years to life" (Pen C §190) constitutes "imprisonment… for life" within the meaning of §231(a), and thus each side is entitled to 20 peremptory challenges. *People v Yates* (1983) 34 C3d 644, 646, 194 CR 765.

All other cases. In all other cases, each side is entitled to 10 peremptory challenges. CCP §231(a). See *People v Brown* (1996) 42 CA4th 461, 474, 49 CR2d 652 (no violation of equal protection to impose peremptory limit of 10 challenges when defendant is charged with 20 counts of forcible lewd conduct).

Ø **Note:** In a commitment proceeding under the Sexually Violent Predator Act, each side is entitled to six peremptory challenges. *People v Calhoun* (2004) 118 CA4th 519, 523, 13 CR3d 166; see CCP §231(c).

Multiple defendants. If more than one defendant is tried in a case punishable by 90 days or less, the codefendants are entitled to six joint challenges. In addition, each defendant is entitled to four separate peremptory challenges. The prosecution is entitled to as many peremptory challenges as are allowed all defendants. CCP §231(b).

If multiple defendants are charged with the same offense, other than one punishable by 90 days or less, they receive "joint challenges," which must be exercised by mutual agreement in the amount specified by CCP §231(a) (20 challenges for life-in-prison and death cases and 10 challenges in all others). In addition, each defendant is given 5 additional peremptories to be exercised according to his or her individual discretion. The prosecution is entitled to the total number of peremptory challenges allowed all defendants. CCP §231(a).

Alternate jurors. On the number of peremptory challenges available for alternate jurors, see §29.20.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.29 C. Questioning in Aid of Peremptory Challenges

§29.29 C. Questioning in Aid of Peremptory Challenges

Questioning of jurors can only be conducted for the purpose of assessing challenges for cause. CCP §223. Because peremptory challenges are a creature of statute, and are not required by the U.S. Constitution, it is the state's responsibility to define their purpose, and the manner of their exercise. *Ross v Oklahoma* (1988) 487 US 81, 89, 101 L Ed 2d 80, 90, 108 S Ct 2273.

Ø **Practice tip:** Although jurors are not subject to questioning for the purpose of exercising a peremptory challenge, questions aimed at uncovering the basis for a challenge for cause will obviously assist counsel in deciding how to exercise their peremptory challenges. For example, if a prospective juror says she has had several bad experiences with the police, the prosecutor can certainly ask questions about those experiences to determine whether a challenge for cause is appropriate. The juror's responses to those questions may well be relevant to determining whether to make a peremptory challenge even if she says she can put those experiences aside and be impartial.

Recommended questions of prospective jurors in criminal cases are set out in Standards of Judicial Administration Title 4, Standard 4.30, and in Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002).

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D. Limitations on Use of Peremptory Challenges Under *People v Wheeler* and *Batson v Kentucky*

§29.30 1. Systematic Exclusion of Jurors Because of Membership in "Cognizable Group" Prohibited

Peremptory challenges may not be used to systematically exclude jurors because of membership in a cognizable group distinguished by racial, religious, ethnic, or similar characteristics. *People v Wheeler* (1978) 22 C3d 258, 276, 148 CR 890 (decision based on California Constitution representative cross-section rule); *Batson v Kentucky* (1986) 476 US 79, 84, 90 L Ed 2d 69, 79, 106 S Ct 1712 (decision based on Equal Protection Clause of Fourteenth Amendment). See also *Purkett v Elem* (1995) 514 US 765, 131 L Ed 2d 834, 115 S Ct 1769; *Georgia v McCollum* (1992) 505 US 42, 120 L Ed 2d 33, 112 S Ct 2348; *Trevino v Texas* (1992) 503 US 562, 118 L Ed 2d 193, 112 S Ct 1547. This principle has been codified in CCP §231.5, which states:

> A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.

The following are examples of cognizable groups: gays and lesbians (*People v Garcia* (2000) 77 CA4th 1269, 92 CR2d 339); African-American men (*People v Gray* (2001) 87 CA4th 781, 788, 104 CR2d 848); Hispanics (*People v Harris* (1984) 36 C3d 36, 51, 201 CR 782; *People v Gonzales* (2008) 165 CA4th 620, 631, 81 CR3d 205); and men (*People v Williams* (2000) 78 CA4th 1118, 1125, 93 CR2d 356). In contrast, "people of color" (*People v Davis* (2009) 46 C4th 539, 583, 94 CR3d 322; *People v Neuman* (2009) 176 CA4th 571, 578, 97 CR3d 715); Caucasians with Spanish surnames (*People v Cruz* (2008) 44 C4th 636, 656, 80 CR3d 126); persons with "low incomes" (*People v Burgener* (2003) 29 C4th 833, 856, 129 CR2d 747; *People v Johnson* (1989) 47 C3d 1194, 1214, 255 CR 569); people over 70 (*People v McCoy* (1995) 40 CA4th 778, 783, 47 CR2d 599); and "young people" (*People v Marbley* (1986) 181 CA3d 45, 47, 225 CR 918) are not members of a cognizable group.

> Ø **Note:** In the struck-juror system, a waiver of a peremptory strike (like the exercise of a peremptory strike in an alternate-juror system) may also not be used to systematically exclude jurors for their membership in one of the aforementioned cognizable groups. *U.S. v Esparza-Gonzalez* (9th Cir 2005) 422 F3d 897, 902.

The *Batson-Wheeler* rule applies to both the defense and the prosecution. *Georgia v McCollum* (1992) 505 US 42, 59, 120 L Ed 2d 33, 51, 112 S Ct 2348; *People v Willis* (2002) 27 C4th 811, 118 CR2d 301. A party may challenge systematic exclusion of a juror who is a member of a cognizable group even though the party is not a member of that group. *People v Farnam* (2002) 28 C4th 107, 135, 121 CR2d 106; *People v Wheeler, supra; Powers v Ohio* (1991) 499 US 400, 402, 113 L Ed 2d 411, 419, 111 S Ct 1364. The judge may initiate *Batson-Wheeler* proceedings on his or her own motion. *People v Lopez* (1991) 3 CA4th Supp 11, 15, 5 CR2d 775.

> Ø **Warning:** The systematic exclusion of members of a cognizable group is error under both state and federal constitutions, and consequently, the prosecutor's unconstitutional use of peremptory challenges presents a claim cognizable on federal habeas corpus. Because of the federal habeas rules on exhaustion of state remedies (see §45.23) and procedural default (see §45.24), when making a motion challenging the prosecutor's improper removal of prospective jurors, defense counsel should state explicitly that it is made under both *Batson* and *Wheeler*. See *Baldwin v Reese* (2004) 541 US 27, 158 L Ed 2d 64, 124 S Ct 1347.

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§29.31 2. Procedural Aspects of *Batson-Wheeler* Motion

The court will address the procedure for making *Batson-Wheeler* objections as part of the mandatory pre-voir dire conference. Cal Rules of Ct 4.200(a)(8). To be timely, a *Batson-Wheeler* motion must be made during jury selection. *People v Wheeler* (1978) 22 C3d 258, 280, 148 CR 890. See *People v Perez* (1996) 48 CA4th 1310, 1314, 56 CR2d 299 (motion untimely if made after jury sworn).

There are three recognized steps to the motion. First, the side asserting the improper use of peremptory challenges must state a prima facie case of systematic exclusion. *Batson v Kentucky* (1986) 476 US 79, 93, 90 L Ed 2d 69, 85, 106 S Ct 1712; *People v Wheeler, supra*. See §29.32. If a prima facie case is made, the burden shifts to the other party to show that there were reasons for exercising the challenges other than the systematic exclusion of members of a cognizable group. *Wheeler,* 22 C3d at 281; *Batson,* 476 US at 97, 90 L Ed 2d at 88. See §29.34. In the third step, the trial court decides whether purposeful discrimination has been shown. *Snyder v Louisiana* (2008) 552 US 472, 170 L Ed 2d 175, 180, 128 S Ct 1203. See §29.35. The ultimate burden of persuasion remains on the party alleging systematic exclusion. *Batson,* 476 US at 93, 90 L Ed 2d at 85. See also *Purkett v Elem* (1995) 514 US 765, 768, 131 L Ed 2d 834, 839, 115 S Ct 1769. The burden on that party is to establish purposeful discrimination by a preponderance of the evidence. *People v Hutchins* (2007) 147 CA4th 992, 998, 55 CR3d 105.

To ensure against undue prejudice to the party unsuccessfully making a peremptory challenge or challenge for cause, the trial court may use a sidebar conference followed by appropriate disclosure in open court as to *successful* challenges. *People v Willis* (2002) 27 C4th 811, 821, 118 CR2d 301; see *People v Williams* (1994) 26 CA4th Supp 1, 7, 31 CR2d 769. Because requiring all challenges to be made at a sidebar may be unduly burdensome, the trial court has the discretion to develop appropriate procedures such as limiting sidebars to situations in which a *Wheeler* objection has been made to a particular challenge. *People v Willis* (2002) 27 C4th 811, 821, 118 CR2d 301.

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§29.32 a. Making a Prima Facie Case

It is presumed that peremptory challenges are exercised in a constitutional manner. *People v Alvarez* (1996) 14 C4th 155, 193, 58 CR2d 385. Therefore, the party claiming that the opponent is improperly using peremptory challenges bears the burden at the outset to make a prima facie case of systematic exclusion. To meet this burden, the objecting party must:

- Establish that the persons excluded are members of a cognizable group under the Equal Protection Clause or the representative cross-section rule (on cognizable groups, see §29.30); and
- Point to circumstances supporting a reasonable inference that such persons are being challenged because of their membership in the group, rather than because of any specific bias.

People v Box (2000) 23 C4th 1153, 1188, 99 CR2d 69; *People v Turner* (1994) 8 C4th 137, 167, 32 CR2d 762; *Wade v Terhune* (9th Cir 2000) 202 F3d 1190, 1195.

Counsel should make as complete a record of the circumstances as is feasible. Simply pointing out that the opposing party has struck several prospective jurors who are members of a cognizable group is seldom sufficient. See *People v Walker* (1998) 64 CA4th 1062, 1069, 75 CR2d 871, for a list of cases finding no prima facie showing.

Ø **Examples:** To strengthen the inference of systematic exclusion, it might be possible to show that the party has excused members of a cognizable group who have traits often viewed favorable to that party (*e.g.,* that the prosecutor has struck black jurors who have favorable attitudes toward the police) or that membership in a cognizable group was the only discernible difference between jurors the party excused and jurors the party passed.

Under *Batson v Kentucky* (1986) 476 US 79, 93, 90 L Ed 2d 69, 85, 106 S Ct 1712, a prima facie showing is one that supports a "reasonable inference" of systematic exclusion of a cognizable group. The U.S. Supreme Court has specifically rejected a requirement that the objecting party show either a "strong likelihood" or that it is "more likely than not" that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. *Johnson v California* (2005) 545 US 162, 162 L Ed 2d 129, 125 S Ct 2410.

Lay groundwork for comparative analysis. Counsel who suspects that the opponent is systematically excluding prospective jurors who are members of a cognizable group should pay close attention to the similarities and differences between jurors who have been struck and jurors who have been retained. Suppose, for example, the prosecutor uses a peremptory challenge to excuse an African-American woman who said she would get too upset listening to the evidence, but does not excuse a Caucasian woman who asks to be excused for the same reason. Such comparisons may be used to strengthen the inference that the juror who was the member of the cognizable group was excused in violation of *Batson-Wheeler*. See *Miller-El v Cockrell* (2003) 537 US 322**,** 332**,** 154 L Ed 2d 931, 947, 123 S Ct 1029. Evidence of comparative juror analysis must be considered by the trial court in making its determination at the third step of the motion. *People v Lenix* (2008) 44 C4th 602, 622, 80 CR3d 98.

Ø **Practice tip:** To preserve both state and federal issues for appellate purposes, defense counsel should make the record as specific as possible concerning impermissible group bias in the exercise of peremptory challenges by the prosecution. Prosecutorial practices designed to exclude groups of people on the basis of race under the pretense of other legally valid reasons are disdained. See *Johnson v California* (2005) 545 US 162, 162 L Ed 2d 129, 125 S Ct 2410; *Miller-El v Dretke* (2005) 545 US 231, 162 L Ed 2d 196, 125 S Ct 2317. Defense counsel's duty is to make a detailed record, outside the presence of the jury, that shows that the reasons given by the prosecution are not valid. When making the record, defense counsel should ask questions of the trial judge if counsel believes that the court may have "glossed over" some issues about why or why not the reasons for the prosecutor's decision to exercise a peremptory challenge are valid. For example, counsel might ask, "Your honor, why does the court conclude X about juror Jones when jurors Smith and Williams had the same response, and the prosecutor didn't excuse them?"

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§29.33 b. Trial Court's Response

When a defense attorney has made a prima facie case that one particular juror was challenged because of impermissible group bias, the trial court is not required to ask a prosecutor to justify all other challenges to other potential jurors in the same group. *People v Avila* (2006) 38 C4th 491, 549, 43 CR3d 1. If the trial court concludes that the objecting party has made out a prima facie case of systematic exclusion of members of a cognizable class, the opponent is given the opportunity to rebut the inference. If the trial court concludes that the circumstances do not support the inference, there is no need for the opposing party to respond, but in practice, trial courts often request a response before ruling on the prima facie case. This practice has been endorsed by the appellate courts. *People v Howard* (2008) 42 C4th 1000, 1020, 71 CR3d 264; *People v Bonilla* (2007) 41 C4th 313, 343 n13, 60 CR3d 209. For example, in *People v Gray* (2001) 87 CA4th 781, 788, 104 CR2d 848*,* the court explained:

> Even when it appears to the trial court that the defense has failed to present a prima facie case of prosecutor bias in selection of the jury, the court should hear the prosecutor's explanation for excusing the jurors in question. By permitting the prosecutor to make a record, the trial court enables the Court of Appeal to determine whether the prosecutor possessed any legitimate, nonsuspect reasons for excusing the jurors in question.

When the trial court solicits an explanation of the questioned peremptory challenges without first indicating its views on the prima facie issue, the appellate court may infer that the trial court made an implied prima facie finding. *People v Arias* (1996) 13 C4th 92, 135, 51 CR2d 770. When, however, the court finds that the movant has not made out a prima facie case but nevertheless asks counsel to justify peremptory challenges, the appellate court is not required to review the adequacy of counsel's justifications. *People v Turner* (1994) 8 C4th 137, 167, 32 CR2d 762.

A trial court's finding of a prima facie showing for one *Batson-Wheeler* motion does not mean that all subsequent challenges to members of that juror group are to be presumed improper. *People v Irvin* (1996) 46 CA4th 1340, 1351, 54 CR2d 450.

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§29.34 c. Responding Party

Once a prima facie case has been shown, the burden shifts to the other party to rebut the claim by neutral reasons for the peremptory challenge or challenges. *Purkett v Elem* (1995) 514 US 765, 768, 131 L Ed 2d 834, 839, 115 S Ct 1769; *People v Turner* (1994) 8 C4th 137, 164, 32 CR2d 762; *People v Clair* (1992) 2 C4th 629, 652, 7 CR2d 564; *People v Johnson* (1989) 47 C3d 1194, 1216, 255 CR 569.

These reasons may be subjective. Hunches (see *People v Hall* (1983) 35 C3d 161, 170, 197 CR 71), the prospective juror's "body language," mode of answering questions, or lack of life experience, as long as they are not pretexts for systematic exclusion for members of a cognizable group, may be acceptable reasons for excusing jurors and can be used to rebut the inference of systematic exclusion. *People v Turner* (1994) 8 C4th 137, 164, 32 CR2d 762; *People v Gray* (2001) 87 CA4th 781, 788, 104 CR2d 848; *People v Perez* (1994) 29 CA4th 1313, 1328, 35 CR2d 103.

Ø **Note:** Counsel must consider that any pretextual reason offered for striking a juror may raise an inference that other proffered rationales are also "make-weight." See, *e.g., Ali v Hickman* (9th Cir 2009) 584 F3d 1174, 1184.

For example, California appellate courts have found the exercise of a peremptory challenge to be valid when based on the prospective juror's:

- Views about the death penalty in a capital case (*People v McDermott* (2002) 28 C4th 946, 969, 123 CR2d 654);
- Views that illicit drugs should be legalized combined with ambivalent or noncommittal responses to questions on whether those views might affect the juror's view of the case (*People v Adanandus* (2007) 157 CA4th 496, 510, 69 CR3d 25);
- Relative with a criminal conviction (*People v Cummings* (1993) 4 C4th 1233, 1282, 18 CR2d 796; *People v Adanandus* (2007) 157 CA4th 496, 509, 69 CR3d 25);
- Bad feelings against the police (*People v Johnson* (1989) 47 C3d 1194, 1215, 255 CR 569);
- Skepticism about the fairness of the criminal justice system (*People v Calvin* (2008) 159 CA4th 1377, 1386, 72 CR3d 300);
- Apparent agreement with defense counsel's questions, leading prosecutor to conclude he might be skeptical of the People's evidence (*People v Johnson, supra*);
- Indication that the prospective juror would place undue reliance on expert witness opinion (*People v Gutierrez* (2002) 28 C4th 1083, 1124, 124 CR2d 373);
- Apparent inability to focus on the evidence (*People v Gutierrez, supra*);
- Being overwhelmed by outside stress (*People v Gutierrez, supra* (prospective juror cried twice during voir dire and referred to her "nerves"));
- Bias against a victim or witness (28 C4th at 1125 (prospective juror stated he felt transsexuals were "sick human beings"));
- Hostile looks (*People v Wheeler* (1978) 22 C3d 258, 275, 148 CR 890);
- Intransigence in refusing to be influenced by anyone else's opinion (*People v Davenport* (1995) 11 C4th 1171, 1203, 47 CR2d 800);
- Previous service that resulted in a hung jury (*People v Farnam* (2002) 28 C4th 107, 138, 121 CR2d 106);
- Having visited a relative in prison within the past year (*People v Farnam, supra*);
- Manner of dress (*People v Barber* (1988) 200 CA3d 378, 396, 245 CR 895); or
- Poor grasp of the English language or legal principles (*People v Turner* (1994) 8 C4th 137, 169, 32 CR2d 762; *People v Barber* (1988) 200 CA3d 378, 397, 245 CR 895).

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§29.35 d. Trial Court's Determination of Motion

Once a neutral basis for the exercise of a peremptory challenge is offered, the trial court must then determine if purposeful discrimination has been established. *Hernandez v New York* (1991) 500 US 352, 363, 114 L Ed 2d 395, 111 S Ct 1859.

Before ruling, the trial court will give the moving party an opportunity to respond to the offered justifications.

Ø **Practice tip:** This is counsel's last and best opportunity to persuade the trial court that opposing counsel is using peremptory challenges to improperly strip the jury of members of a cognizable group. Counsel should carefully evaluate neutral-sounding justifications for indications that they are actually pretextual. Counsel should also keep in mind that the proffered justifications present another opportunity for comparative analysis and should point out to the trial court any instances of jurors who are not members of the cognizable class being retained on the jury even though they shared the allegedly neutral trait used to justify a peremptory challenge.

Distinguishing bona fide reasons for using peremptory challenges from sham excuses is, in essence, a credibility determination; thus, the trial court's decision is given great deference on appeal (*People v Reynoso* (2003) 31 C4th 903, 928, 3 CR3d 769; *People v Ervin* (2000) 22 C4th 48, 74, 91 CR2d 623), and must be sustained unless it is clearly erroneous. *Snyder v Louisiana* (2008) 552 US 472, 170 L Ed 2d 175, 181, 128 S Ct 1203. Nonetheless, its proper focus is the subjective genuineness of the responding party's neutral explanation, not the objective reasonableness of that explanation. *People v Reynoso* (2003) 31 C4th 903, 924, 3 CR3d 769. See also *Purkett v Elem* (1995) 514 US 765, 768, 131 L Ed 2d 834, 839, 115 S Ct 1769. The trial court must engage on the record in a "sincere and reasoned inquiry" into counsel's proffered explanations and make findings as to the genuineness of those explanations. *People v McDermott* (2002) 28 C4th 946, 971, 123 CR2d 654. The court's focus must be on the *real* reason the juror was stricken, not on nondiscriminatory reasons the party exercising the peremptory challenge *might* have had. See *Paulino v Castro* (9th Cir 2004) 371 F3d 1083, 1089 (trial court erred in speculating sua sponte as to why prosecutor may have struck potential jurors in question rather than requiring actual explanation from prosecutor). The trial court must consider evidence of comparative juror analysis. *People v Lenix* (2008) 44 C4th 602, 622, 80 CR3d 98.

The record should contain sufficient detail so that the issue can be intelligently considered on appeal. *People v McDermott* (2002) 28 C4th 946, 981, 123 CR2d 654. See *Green v LaMarque* (9th Cir 2008) 532 F3d 1028, 1030 (habeas relief granted when record failed to demonstrate that trial court's inquiry included required comparative juror analysis).

Ø **Practice tip:** Trial counsel opposing a *Batson-Wheeler* motion should point out any jurors who are members of the group allegedly discriminated against. This is an indication of good faith in exercising peremptories, and an objective factor for the trial judge to consider in ruling on the motion. See *People v Gutierrez* (2002) 28 C4th 1083, 1122, 124 CR2d 373. Counsel need only identify facially valid neutral reasons why prospective jurors were excused; the explanation need not justify a challenge for cause. *People v Silva* (2001) 25 C4th 345, 384 106 CR2d 93. If a juror is excused on the basis of demeanor, the record should contain the court's observation of that juror's demeanor. See *Snyder v Louisiana* (2008) 552 US 472, 170 L Ed 2d 175, 182, 128 S Ct 1203.

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§29.36 3. Successful Motion Requires New Panel Absent Waiver or Consent

If the objecting party makes a prima facie case of illegal discrimination and if the responding party is unsuccessful in establishing to the court's satisfaction that the prospective juror or jurors were excused for nondiscriminatory reasons, the court must dismiss the jurors selected, excuse any remaining members of the jury panel, and start over with a new panel. *People v Wheeler* (1978) 22 C3d 258, 283, 148 CR 890; *People v Smith* (1993) 21 CA4th 342, 345, 25 CR2d 850. Dismissal of the panel is not, however, required when it would reward the party who exercises biased peremptory exclusions, but waiver or consent of the objecting party is required. *People v Willis* (2002) 27 C4th 811, 818, 118 CR2d 301 (defense counsel persisted in improperly "kicking" Caucasian males); *People v Morris* (2003) 107 CA4th 402, 131 CR2d 872. The consent required by *Willis* need not be personally given by the defendant and may be granted by counsel. *People v Overby* (2004) 124 CA4th 1237, 1243, 22 CR3d 233.

Ø **Practice tip:** Under *People v Willis, supra,* if the aggrieved party consents to maintaining the existing panel, the trial court has broad discretion to fashion remedies short of the "traditional" remedy of excusing the entire venire. Among the orders a trial court may issue to remedy a *Batson-Wheeler* violation (as long as the aggrieved party consents) include assessing sanctions against counsel whose challenges exhibit group bias; reseating any improperly discharged jurors if they are available to serve; and, possibly, allowing the aggrieved party additional peremptory challenges. Some cases tactically require counsel to request a new panel, which is the traditional remedy. However, if keeping the existing panel will benefit the client, counsel should ask for sanctions and for any improperly discharged jurors to be reseated if they are available to serve. The court is likely to prefer this approach in that it promotes judicial economy because another venire does not have to be ordered from the jury commissioner. If the improperly challenged jurors have been excused, counsel should ask for additional peremptory challenges. More "kicks" are better for the client than having opposing counsel pay monetary sanctions. Finally, counsel should consider asking the trial judge to admonish the jury that opposing counsel engaged in illegal selection methods, that he or she was told to stop, that he or she persisted, and that this unprofessional behavior caused the jury selection process to be more time-consuming.

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§29.37 4. Review

On appeal, *Wheeler* error is prejudicial per se; the conviction must be reversed. *People v Snow* (1987) 44 C3d 216, 226, 242 CR 477; *People v Wheeler* (1978) 22 C3d 258, 283, 148 CR 890. When the error was in failing to recognize that a prima facie case was made and in not requiring an explanation of challenges, however, the U.S. Supreme Court in *Batson v Kentucky* (1986) 476 US 79, 100, 90 L Ed 2d 69, 106 S Ct 1712, ordered the case to be remanded to allow the prosecutor to explain his reasons for excluding the prospective jurors in question. The California Supreme Court has not absolutely rejected or endorsed that remedy for an error in failing to require a statement of reasons, but it has declined to adopt it in two cases in which the lapse of time made it unrealistic to expect the prosecution to recall the details of the case, or for the court to assess the manner in which the challenges had been exercised. *People v Snow, supra* (6-year lapse); *People v Hall* (1983) 35 C3d 161, 170, 197 CR 71 (3-year lapse). Other courts have applied the *Batson* remand procedure. *People v Williams* (2000) 78 CA4th 1118, 1125, 93 CR2d 356; *People v Rodriguez* (1999) 76 CA4th 1093, 1101, 91 CR2d 308.

When a trial court denies a *Batson-Wheeler* motion on the ground that no prima facie case of group bias has been established, the reviewing court must consider the entire voir dire record. If the record suggests grounds on which the prosecutor might reasonably have challenged the jurors in question, the court will affirm. *People v Box* (2000) 23 C4th 1153, 1188, 99 CR2d 69; *People v Davenport* (1995) 11 C4th 1171, 1200, 47 CR2d 800. Federal courts in habeas corpus proceedings may review de novo a trial court's holding that a purported reason for excusing the juror is neutral and may conclude, despite the trial court's holding, that the proffered reason was merely a pretext for illegal discrimination, inferring motive from the totality of the relevant facts. *McClain v Prunty* (9th Cir 2000) 217 F3d 1209, 1220.

Counsel appealing an adverse trial court ruling on the issue of bias in the exercise of peremptory challenges has a high hurdle to overcome. The trial court's ruling will be upheld even when the record does not contain detailed findings on the reasons for the exercise of each challenge as long as (1) the trial court was fully apprised of the nature of the defense challenge, (2) the proffered reasons for excusing the juror are neither contradicted by the record nor inherently implausible, and (3) nothing in the record conflicts with either the presumption that all peremptory challenges have been exercised in a constitutional manner or the presumption that the trial court properly made a sincere and reasoned evaluation of the prosecutor's proffered reasons. See, *e.g., People v Reynoso* (2003) 31 C4th 903, 925, 3 CR3d 769 (prosecutor did not demonstrate purposeful racial discrimination by challenging two Hispanic women, thereby leaving jury of 12 Caucasians). But see *U.S. v Alanis* (9th Cir 2003) 335 F3d 965, 969 (when prosecutor used all six peremptory challenges to strike men from jury in abusive sexual conduct trial, and did not strike four women who possessed objective characteristics that prosecutor claimed she found objectionable in the men, judge had sua sponte duty to decide whether the prosecutor in fact had gender-neutral explanations). See also *Miller-El v Dretke* (2005) 545 US 231, 162 L Ed 2d 196, 125 S Ct 2317 (more striking than prosecutors' use of peremptory strikes to exclude 91 percent of eligible African-American venire members was side-by-side comparison of some black venire panelists who were struck and white panelists allowed to serve).

Ø **Note:** Counsel challenging an adverse state trial court ruling on the issue of bias in the exercise of peremptory challenge with a federal habeas petition has a very high hurdle to overcome. After the prosecution has presented a race-neutral explanation for exercising the challenge, the trial court's determination of credibility will stand as long as it is not unreasonable. See, *e.g., Rice v Collins* (2006) 546 US 333, 163 L Ed 2d 824, 126 S Ct 969.

Comparative analysis on review. It is important for the party making a *Batson-Wheeler* motion to bring such comparisons to the trial court's attention. If the trial court denies the defendant's motion at the "first stage," *i.e.,* after concluding the defense has not made a prima facie case, *Miller-El v Dretke* (2005) 545 US 231, 162 L Ed 2d 196, 125 S Ct 2317, does not mandate that the reviewing court conduct comparative juror analysis for the first time on appeal. *People v Bell* (2007) 40 C4th 582, 601, 54 CR3d 453; *People v Bonilla* (2007) 41 C4th 313, 350, 60 CR3d 209. See *People v Lenix* (2008) 44 C4th 602, 622 n15, 80 CR3d 98. On the other hand, an appellate court is obligated to conduct a comparative juror analysis for the first time in a "third stage" *Batson-Wheeler* case, *i.e.,* one in which a trial

court concluded a prima facie case had been made, solicited an explanation of the peremptory challenges from the prosecutor, and then determined that the defense did not carry its burden of demonstrating group bias. *People v Lenix* (2008) 44 C4th 602, 622, 80 CR3d 98. In that case, the record must be adequate to permit the argued comparisons. *People v Lenix, supra*. Therefore, prudent trial counsel will make the comparative analysis record, if applicable, for each and every challenge under *Batson-Wheeler* to avoid a potential waiver of the issue in subsequent appellate litigation.

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VII. TECHNIQUES IN JURY SELECTION

§29.38 A. Aids to Jury Selection

Most juries are selected by the attorneys alone. However, aids to jury selection are occasionally used. The trend in complex criminal cases is to use jury consultants to assist with voir dire or focus group preparation, or with both. Counsel may hire an expert in selecting juries, usually a psychologist or sociologist. This person will help counsel decide what qualities are needed in jurors for the particular case, and may prepare questions to ask panel members that are designed to elicit information that may aid counsel in determining whether particular jurors have the desired qualities. During voir dire, the expert may give counsel information gained from observing jurors' body language and, from listening to their answers, may help the attorney decide whom to challenge.

In capital cases, the court may appoint a jury selection expert at public expense under Pen C §987.9 to assist defense counsel in jury selection. However, a court's refusal to appoint a jury selection expert will be upheld on appeal, absent an abuse of discretion. *People v Box* (2000) 23 C4th 1153, 1182, 99 CR2d 69.

Counsel may hire specialists to interview persons living in the area from which a jury will be called, and to provide information on what types of people are apt to be more supportive of the prosecution or defense, and why, in order to assist counsel in determining whom to challenge. See National Jury Project, Jurywork: Systematic Techniques, chap 9 (2005). Access to personal information about jurors is governed by CCP §237. See discussion of posttrial interrogation of jurors in §§33.46, 34.5.

Counsel may have a mock jury trial, also called jury simulation, before the actual trial begins. This process serves both to provide experience in trying the case and to discuss with the mock jurors their opinions and reactions to the attorneys and to the evidence.

Counsel may also use a "shadow jury." This means that counsel has several people attend the actual trial and listen to all evidence as if they were jurors. Counsel can then consult with them during trial to find out how they are reacting to the lawyers, the witnesses, and the evidence.

Other books on jury selection are listed at the end of §29.1. General books on body language can be helpful in selecting jurors. See, *e.g.,* Dimitrius & Mazzerella, Reading People: How to Understand People and Predict Their Behavior—Anytime, Anyplace (1998); Dimitrius & Mazzerella, Put Your Best Foot Forward (2002). Books on jury communication may also help counsel in selecting jurors. See, *e.g.,* Simon, The Jury System in America, chaps 2, 4 (1975); Hans & Vidmar, Judging the Jury, chaps 4-6 (2001); Kassin & Wrightsman, The American Jury on Trial: Psychological Perspectives, chaps 1-4 (1989); Hamlin, What Makes Juries Listen, chap 2 (1985).

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B. Courtroom Techniques

§29.39 1. Persuasive Communication During Voir Dire

Jury selection is a persuasive process. The first time an attorney speaks to the jury in any meaningful way is during jury selection and there is no second chance to make a first impression. During voir dire, jurors are assessing you. If you effectively use persuasion techniques during jury selection, you will gain credibility and prospective jurors will disclose more about themselves. Establishing credibility during voir dire will lead to increased receptivity to your presentation of evidence during the actual trial. Knowing your audience will help you maximize persuasion by targeting your communication to the needs of the audience. Audience analysis is discussed in §29.40.

Elements of persuasive communication. As Aristotle theorized, there are three elements to persuasion: source credibility (*ethos*), effective communication (*pathos*), and logical argument (*logos*).

An attorney perceived to be credible by the jury during voir dire will obtain more information from jurors and will make them more sympathetic to the client, because juries subconsciously identify counsel and the client as one entity. Jurors pay attention to subsequent information from a source they perceive as credible, and they minimize or ignore information from noncredible sources.

Because body language is often more telling than spoken words alone, active listening is an important medium of communication during voir dire. For example, if a juror reveals that she was violently attacked, counsel should maintain eye contact, nod, soften his or her voice, and slow the rate of his or her speech. Showing concern makes effective use of voir dire and will also increase credibility. The author has observed that other jurors take note of this concern when a particular juror has disclosed something of a sensitive nature. When counsel demonstrates sensitivity and concern about a juror's disclosure of sensitive information, this appears to substantially increase the chance that other members of the venire will disclose something that may be sensitive.

Aristotle observed that discourse that is designed to interest the audience and stimulate them to learn is often persuasive discourse. Jurors want to learn things during voir dire and during a trial. During voir dire, potential jurors will watch you, try to figure you out, assess what type of person your client is, and figure out what the evidence consists of. Therefore, asking intelligent questions can add to counsel's credibility.

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§29.40 2. Audience Analysis During Voir Dire

Research shows that jurors find voir dire to be stressful, like a job interview. Jurors are often fearful of the criminal defendant, especially of a gang member. The persuasive communicator pays attention to the important needs of the audience. Experienced trial attorneys know that:

- Jurors value privacy;
- Jurors value anonymity;
- Jurors are anxious because of the courtroom setting; and
- Jurors understand the importance of the jury selection process.

Research also shows that jurors are not predisposed to disclose information in their response to voir dire questions, especially when counsel is asking the questions. This propensity for nondisclosure is exacerbated if the inquiry involves "private" or "sensitive" topics. The goal of voir dire is to persuade potential jurors to open up. If they are persuaded that the attorney is asking intelligent questions to properly benefit the client, jurors are more likely to disclose because they will think: "If I was accused of this crime, I would want my lawyer asking those questions, too."

Potential jurors should be observed both in and out of the courtroom. A jury consultant, paralegal, investigator, co-counsel, or law student can be used to observe potential jurors outside of the courtroom during breaks. The clothing worn by prospective jurors can reveal attitudes and beliefs. The attitude a potential juror manifests in answering voir dire questions from the court and attorneys can be telling. Nonverbal communication by a potential juror, such as giving one side favorable or unfavorable looks or nods, must be incorporated into the decision of whether to exercise a peremptory challenge.

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§29.41 3. Juror Profiling

Jurors see the world through the prism of their life experiences. How an individual juror generally processes information is how that juror will process the information and evidence presented in the courtroom. The most important goal of jury selection is to challenge (or deselect) jurors who dislike your client or case. "Deselection" applies when the facts of the case relate to something negative experienced by a juror, or someone close a juror. For example, if the male defendant is accused of raping an adult woman, a prospective juror who was the victim of date rape when she was a junior in college is a candidate for deselection. The following sections discuss broad ways of categorizing prospective jurors that the author has found helpful in the jury selection process.

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§29.42 a. Four Juror Types

On the basis of social science research and trial experience, the author has identified four types of jurors for purposes of profiling: the linear thinker, the salesperson, the helper, and the artist. In the author's experience, linear thinkers are most numerous, followed by salespersons and helpers. Artists are relatively rare.

A "linear thinker" processes information sequentially: A-B-C-D-E. Logic and order are important components in the problem solving process. Examples of occupations held by linear thinkers are engineer, scientist, mathematician, auto mechanic, patent attorney.

A "salesperson" has a target-oriented thinking process: "I'm at A, and I need to get to C." Examples of occupations held by the salesperson personality are sales professional, sales manager, and trial attorney.

A "helper" processes information with more of an emotional emphasis than a linear thinker or a salesperson, *i.e.,* thinks more with his or her heart than head. Examples of occupations held by the helper personality are nurse, teacher, counselor, priest, social worker, and psychologist.

An "artist" is a free-spirited individual who processes information existentially without a particular pattern. An artist is imaginative, very creative, and possesses a higher emotional or moral sense than other juror types. An artist tends to be well educated, having a bachelor's degree or higher. An artist will tend to identify with a criminal defendant. Artists tend to be anticorporate and antigovernment, and they have strongly held beliefs on social issues. They believe in working to effect social change. For example, instead of going to the beach with family on a sunny Saturday afternoon, an artist will take them to march in a demonstration sponsored by a "social change" group.

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§29.43 b. Juror Dynamics During Deliberations

Linear thinkers typically disagree with the artists, and juror discussions can get testy. Linear thinkers and salespersons tend to bond and form an informal alliance. Likewise, artists and helpers often tend to agree and will form a coalition. As a general observation, linear thinkers and salespersons make decisions faster than artists and helpers, who can often be more analytical of trial evidence.

In observing actual juries and mock juries in the process of deliberation, the author has found that, many times, two or three of the 12 are "leader" jurors with strong personalities who dominate the deliberation process. Leader jurors tend to have management positions with hiring and firing power. A leader juror will frequently become the presiding juror and may put substantial pressure on hold-outs to yield to the majority opinion. Leader jurors often offend the "silent" jurors. Trial counsel should aim in voir dire to select a leader juror, who has a strong chance of ending up as the presiding juror, favorably disposed to his or her client. Conversely, all things being equal, trial counsel should excuse any leader who is not favorable to his or her case.

Typically, six or seven of the 12 are "follower" jurors who engage in the deliberation process, are respectful and listen to other jurors, and are not adamant in their opinions. Follower jurors will change their opinions because they are open to discussion of the evidence and will frequently adopt the opinions of the "leader" jurors.

Finally, two or three of the 12 are "silent" jurors who say little or nothing unless the presiding juror asks for their input. They tend to agree with the majority with virtually no hesitation, shun conflict and debate, are polite and pleasant, and do not want to hurt anyone's feelings. "Silent" jurors will easily engage in compromise verdicts to end the process quickly.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.44 c. Typical Prosecution Juror

§29.44 c. Typical Prosecution Juror

For the prosecution, linear thinkers are best, salespersons are second best, helpers are acceptable, and artists are to be avoided. An artist is often the "one holdout" in an 11-1 hung jury when the majority voted for conviction. In addition to linear thinkers, an "ideal" prosecution panel would incorporate people who:

- Are older;
- Are conservative;
- Are prone to make quick judgments and decisions;
- Have prior favorable experiences with law enforcement or government;
- Have prior military or law enforcement experience or a spouse or significant other with that experience;
- Have served more than twice on a jury;
- Are not very emotive;
- Tend to relate to the world in "black or white" terms;
- Donate money to law enforcement or crime victim causes; and
- Are guarded in their responses to questions.

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§29.45 d. Typical Defense Juror

For the defense, artists are best, helpers tend to be excellent choices, salespersons are acceptable, and linear thinkers are the worst. The artist looks at a criminal case through the eyes of the defendant, feels sympathy for the defendant, and may attempt to send a message to the government with a not guilty verdict. In addition to having at least one artist and two helpers, an "ideal" defense panel would incorporate people who:

- Are younger;
- Are liberal;
- Are prone to asking questions and not making snap decisions;
- Are employed in "helping" professions;
- Belong to "helping" organizations;
- Have prior negative experiences or perceptions of police, prosecutors, or government;
- Are on a jury for the first time;
- Are willing to disclose personal information such as prior drug use or bias against certain crimes;
- Do not view the world or decision-making as a "black or white" process; and
- Have favorable, cooperative body language during questioning.

Specific jury selection techniques for the defense in a criminal trial are discussed in §29.46.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.46 4. Criminal Defense Jury Selection Techniques

§29.46 4. Criminal Defense Jury Selection Techniques

The goals during jury selection for a criminal defense attorney are to:

- Excuse the jurors most harmful to your case;
- Select a jury that is oriented to your side of the case; and
- Get the jury to like you by building rapport and establishing your credibility.

Several techniques are available to assist counsel to obtain the information needed to make intelligent challenges during voir dire and to make a good impression on the jurors who will eventually decide the case.

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§29.47 a. Request "Hot Button" Voir Dire

If you represent a criminal defendant in a high-profile or emotionally charged case, your most important goal is to excuse all jurors who have life experiences involving "hot button" issues. Doing so can be accomplished with a motion in limine for hot-button voir dire. In hot-button voir dire, the trial judge asks for a show of hands in response to hot-button questions during the opening voir dire. After the opening voir dire, all potential jurors who did not raise their hands in response to the hot-button questions are told to go on a break. Potential jurors who raised their hands are then taken inside the courtroom, one at a time, to give disclosure germane to the hot-button questions. Both counsel then have the opportunity to voir dire. After the completion of individual voir dire, the panel is returned to the courtroom and jury selection continues. For a list of hot-button questions from a rape case, see §29.58.

The advantages of hot-button voir dire are that it minimizes the opportunity for deception because counsel gets to immediately observe body language, and that a number of jurors can be excused for cause, thus saving peremptory challenges.

> Ø **Practice tip:** In utilizing "hot button" voir dire in aggravated sex crime and homicide cases, the author has seen instances when over half of the jurors who responded to the "hot button" process were excused by the trial judge for cause. This relieved the author of having to "waste" peremptory challenges on jurors with salient life experiences that could translate into bias against the defendant.

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§29.48 b. Get Prospective Jurors to Talk During Voir Dire

The most effective voir dire is one in which the prospective jurors do most of the talking. Counsel should try with questions, active listening techniques, and overall presentation to foster an atmosphere in which juror and lawyer are like friends talking over coffee because calm, relaxed jurors disclose more than anxious, nervous ones. To foster this friendly atmosphere, greet the panel and welcome them to the courtroom. Introduce yourself and client. It may be a good idea to tell the panel that you may not ask each person a question owing to court-imposed time constraints.

Ø **Note:** Do not touch the defendant. Jurors read that behavior as a staged attempt to curry favor with them. However, interaction with the defendant during the jury selection process is an important way to make the defendant, particularly in a homicide case, appear nonviolent. If you and other members of the defense team talk easily with the defendant and do not appear to fear the defendant, it sends the message to the jury that they need not fear the defendant either.

In your introduction, explain that you are not there to embarrass them or make them nervous as if it were a job interview. You are asking only questions necessary to properly represent your client.

Ø **Note:** Do not say "I'm here to pick a fair and impartial jury." The panel knows this is false; they are acutely aware that a criminal trial is an adversarial process and a juror who is bad for the defense is most likely good for the prosecution.

Devise a procedure to go private for sensitive questions. This is usually accomplished in one of two ways. First, the jurors are excused and then individuals "that need to go private" are individually brought into the courtroom and questioned with no other jurors listening. The second approach is for a criminal defendant to waive the right to be present for all portions of the trial and consent to counsel's going into chambers with the juror for a private voir dire. Sequestered, individual voir dire of prospective jurors is within the trial court's sound discretion. See CCP §223; *People v Box* (2000) 23 C4th 1153, 1179, 99 CR2d 69; *People v Waidla* (2000) 22 C4th 690, 713, 94 CR2d 396. Either way, explain to the panel in your introduction how sensitive or private voir dire will be handled. Tell prospective jurors to raise their hands if they feel uncomfortable about responding to any question. Let them know you will respect their privacy by stopping the inquiry until the discussion can be done in private, consistent with the court's pretrial ruling.

After your introduction, begin with "icebreaker" questions that show the panel that you paid attention to their responses to the court's questions.

Ø **Example:** Mr. Jones, you told Judge Brown that you were a paralegal for 6 years. What type of cases did you work on? Explain your duties.

Ø **Note:** It is important to pronounce the juror's names correctly. To help with this, write the names down phonetically when the clerk calls the roll.

Next, go to group questions. Group questions are usually not as stressful as individual questions for each juror. Follow up with jurors who raised their hands. Start with less sensitive questions to encourage participation and progress to more sensitive questions.

Ø **Practice tip:** Vary the phrasing of questions so that the minority response does not always require a raised hand. This technique keeps the jurors' attention.

Be sure to alternate individual and group questions. Capitalize on jurors' answers by using them as a springboard to compare other jurors' responses and experiences, or to lead into an important area of your voir dire.

Finally, never ask questions by going down the row in order: the other jurors will figure out the response you want to hear and you will not get useful disclosure.

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§29.49 c. Encourage Disclosure With Your Words

For example, "Please raise your hand if you remember something during this jury selection process that you forgot to tell me initially. Thank you very much." Then, encourage disclosure by paying attention.

Ø **Example:** Mr. Johnson, I saw that you just raised your hand. Sir, what would you like to say?" The other jurors sincerely appreciate that you are aware of what is going on in the courtroom and that you care to allow others who have now remembered something important to have a chance to convey that information.

Reward candor and self-examination by thanking a prospective juror who has revealed an attitude or experience that may be embarrassing.

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§29.50 d. Keep Record-Keeping to a Minimum

The goal is to write less and observe more during voir dire. Your focus should be on active listening and observing nonverbal communication. It is much more important to make eye contact than it is to write down every word that is said. Using the chart provided by the clerk, you can place small Post-Its by each name to jot down a rating of "+," "−," or "?" If co-counsel, a jury consultant, or questionnaire is used, then the rating system can be modified to a "1-2-3-4-5" format.

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§29.51 e. Use Voir Dire as Opportunity to Educate and Desensitize Prospective Jurors

Defense counsel should use voir dire as an opportunity to explain the basics of the case and the defense in a neutral way. For example, "Judge Thomas will instruct you at the end of this trial that it is legal to use force to protect yourself from an attack. Do you agree with that law? If the evidence shows that my client acted in self-defense, could you vote for an acquittal even though Mr. Green was hurt more than my client was?"

Voir dire also presents an opportunity to desensitize jurors to prejudicial evidence that will be admitted at trial. For example, "The evidence will show that Ms. Crane had a pistol in her purse when she was arrested. How do you feel about handguns generally? Does the gun in her purse cause you to have difficulty in objectively listening to other evidence in this case?" By front-ending prejudicial evidence you will steal the prosecutor's thunder and score credibility points. Such items as photographs of wounds and injuries, testimony about sexual acts, etc., should be introduced to the jury as soon as possible. The goal is to reduce juror shock and aversion to harmful evidence before deliberation commences.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.52 f. Make Favorable Impression on Jury

§29.52 f. Make Favorable Impression on Jury

Manifest professionalism by never talking down to the jurors. Use short, open-ended voir dire questions in a conversational style. Avoid excessive use of legal terms. Maintain eye contact and a warm and friendly attitude. Combine active listening with positive verbal and nonverbal feedback: Nod as jurors speak to you and show empathy and caring, especially if "sensitive" issues are being discussed. For example, you may ask "Would you feel more comfortable if we talked about this in chambers?"

Ø **Note:** Never interrupt a juror while he or she answers a question. This suggests that you are not listening and discourages other jurors from disclosing information.

Humor and self-revelation can increase bonding with panel. For example, counsel may reveal, "I have two kids, too, I coach little league, have pets," etc. Revelation often may elicit reciprocity: Jurors tend to disclose to attorneys who have disclosed personal information to them.

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§29.53 g. Maximize Jurors' Favorable Perception of Your Client

The key here is "Don't ignore the elephant in the room." Remember that jurors walk into the courtroom thinking that the criminal defense attorney is hiding bad information about the client or the case or both. Accordingly, confront potentially prejudicial issues. For example, confront appearance issues by asking questions about your client's shaved head, tattoos, dreadlocks, etc. With respect to race, don't ask "Are you prejudiced against African-Americans?" Rather consider asking questions such as "What does the term "racial prejudice" mean to you? Do you think that African-Americans (or other groups) commit more crimes than whites? Why? What do you think about affirmative action programs? Do you think whites get discriminated against in job hiring or promotions because of affirmative action? Why?"

From the beginning, discuss your client's prior record or bad acts if that evidence will be admitted during trial. Most jurors think your client has a prior criminal record anyway, so showing them that you are "not hiding the ball" will make you and your client's case more credible. "Front-ending" bad facts also minimizes the damage when the prosecutor brings up the information at trial. Finally, it may lead to excusing a juror for cause. To illustrate, "Ms. Jones, if a person has a prior felony conviction, does that fact make it more likely to you that they committed another felony? Why or why not?"

The goal is to have the defendant look and act innocent. The defendant should present as friendly, sincere, nonthreatening, and respectful. Good eye contact with jurors and laughing when appropriate is useful. The defendant should demonstrate appropriate body language by avoiding slouching, sighing, and nervous gestures. Have your client get friendly with the bailiff so jurors can see that both of them talk freely. If the bailiff thinks that the client is "human," *i.e.,* not dangerous, then the jury will think so, too.

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§29.54 h. Follow Up on Disclosures That Reveal Experiences That Could Affect Decision-Making

It is widely recognized that a traumatic event, such as rape or other violent crime, can have a profound effect on a person's life, causing the victim to alter his or her behavior to avoid reexperiencing the event. An individual suffering from posttraumatic stress disorder may be an undesirable juror in a criminal trial, especially if the facts of the case are likely to cause the individual to reexperience the trauma. Defense counsel should be aware that more subtle life experiences may also have a profound effect on an individual's life. Sometimes a little probing of a juror's responses to standard voir dire questions will reveal such an experience. Suppose, for example, a prospective juror reveals that her car was burglarized. Follow-up questions that reveal that after the burglary she obtained not just a car alarm but a burglar alarm for her home as well may lead counsel to infer that the car burglary was a traumatic experience for her and question whether she would be an appropriate juror.

When a juror's responses to standard questions suggest the possibility of such an experience, counsel should try to get more information about the experience. The author refers to this as the "Salient Life Experiences Rule." In assessing the experience and its possible impact on the juror's decision-making, it is important for counsel to know:

- What was the salient experience?
- How related and relevant is it to a key issue in the case?
- How did the juror react to the salient experience?
- Did the juror change her behavior as a result of the salient experience?
- How much time has passed since the salient experience?

Counsel should carefully observe the prospective juror's body language during voir dire on the incident. It will often say more than the words the juror uses.

Defense counsel should be wary when a juror's verbal responses and body language suggest that he is presently experiencing aggravated stressors (divorce, job, serious illness, death, and children) in life to a significant degree. Individuals who are depressed or experiencing significant difficulties in their lives can find it easy to be blaming and may not be appropriate jurors from the defense standpoint. The author calls this the "Down on Life Rule."

This information is typically received in response to open-ended questions during voir dire. Watch for demeanor changes as the prospective juror discloses painful perceptions.

> Ø **Example:** In a possession of controlled substances case, counsel asked: "Have you, or has anyone close to you, had a bad experience with illegal drugs?" An otherwise excellent criminal defense juror revealed that his son, a senior in high school, was in his second live-in drug treatment program for methamphetamine addiction, and that he lost a football scholarship owing to the drug abuse. This juror was excused by defense counsel.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.55 i. Stop When You Are Satisfied

§29.55 i. Stop When You Are Satisfied

Stop asking questions of a particular juror once you are satisfied that you will either keep the juror or excuse her. Why waste valuable time during voir dire? If the juror is favorable and she keeps talking, you risk tipping off the other side, and having your opponent excuse that juror.

Ø **Practice tip:** To avoid appearing rude or abrupt, counsel may wish to inform the prospective jurors during his opening remarks that court-imposed time limits preclude individual questioning of each prospective juror.

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§29.55A 5. Tips for Jury Selection by Prosecution

Prosecutors can benefit from some of the tips and tactics described above for defense counsel to employ during the voir dire process, such as active listening techniques, not interrupting jurors, asking open-ended questions, and not repeating questions that are already covered by the court or defense counsel. Like defense counsel, prosecutors should watch the venire and listen carefully to all questions propounded by the court and the opposition.

Prosecutors should choose questions carefully, bearing in mind that the jurors may be tired and bored by the time the prosecutor gets to speak. For example, questions such as "Have you ever received a traffic ticket that you didn't agree with?" and "Do you have trouble making decisions?" tend to waste time because the responses do not elicit valuable information for the prosecutor. In one of the author's trials, the trial judge and the author, as defense counsel, conducted a thorough voir dire. When the prosecutor stood up, he asked only one question: "Will all of you find the defendant not guilty if I do not prove my case beyond a reasonable doubt? Please raise your hand if you'll find him not guilty." Every prospective juror quickly raised his or her hand. The deputy district attorney responded, "Thank you very much," and sat down. The defendant was convicted of all charges after one of the fastest guilty verdicts rendered for any of the author's clients.

Like defense counsel, prosecutors can make the tactical decision to request during in limine motions that the trial judge ask certain questions during the court's portion of voir dire. The venire will feel more comfortable speaking on relatively private matters when the judge—rather than counsel—asks the questions. Effective questions a prosecutor may wish the trial judge to ask include:

Do you have any negative views about anyone from a prosecutor's office?

Have you, a close family member, or close friend had any unpleasant experiences with law enforcement?

Have you or has someone close to you been affected by drug abuse by a relative?

Have any of you witnessed family or domestic violence?

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§29.56 6. Reading Prospective Juror's Body Language

A prospective juror may disclose as much through body language as through verbal response. The following charts, adapted from Frederick, Mastering Voir Dire & Jury Selection: Gaining an Edge in Questioning & Selecting a Jury (ABA 1995), can help you read body language.

Summary of Auditory Cues to Anxiety and Deception With Associated Sample Behaviors

Source	Anxiety Signs
Speech disturbances	Nonfluencies, "ums, ers," and word repetition
Vocal hesitancy	Pauses before and during answers
Pitch of voice	Rising pitch and volume of speech
Type of speech	Unusually short answer to question; evasive answer or irrelevant response
Tone of voice	Cold and condescending
Laughter	Inappropriate laughter or excessive, tense laughter
Word choice	Greater psychological distancing, *e.g.,* "them" instead of "African-Americans"

Summary of Visual Cues of Deception With Associated Sample Behaviors

Source	Anxiety Signs
Body movement	Shifting postures, repetitive movements, wringing of hands, turning neck from side to side, and looking upward
Body posture	Greater rigidity; less head and body movement
Body orientation	Folded arms, crossed legs, or leaning away from the speaker; shrugs involving neck and shoulders
Eye contact	Less eye contact with more blinking and rolling of eyes in response to certain questions; however, juror will make eye contact when feelings of hostility-anxiety are manifest
Facial expression	Frowning, skeptical expression, fixed smile

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§29.57 C. Exercising Peremptory Challenges

Counsel will obviously want to kick the least acceptable jurors from the panel first. In addition to removing them, doing so educates the remaining prospective jurors that their suspicions were correct, *i.e.*, that the first few jurors excused by the defense were in fact the worst. Challenges to jurors rated with a "?" should be saved until the end because the prosecution may exercise a peremptory for you. Confer with the client if you are really unsure about exercising a peremptory and advise the client to inform you if any juror has been glaring or unduly staring at him or her. Counsel should apply the "70-percent rule," being aware that the prosecution can stack the venire in a "six-pack" or similar voir dire format when she or he has used only 3 or 4 peremptories and you have used about 70 percent of yours.

Ø **Practice tip:** Don't assume that a person in recovery will be an appropriate juror for the defense in a drug or DUI case. People in recovery sometimes think: "I got through it, why can't she?" Moreover, a juror in recovery can become an "expert" during deliberations, which misconduct can prove detrimental to the defense. Likewise, if the case involves forensic or scientific experts, a juror with expertise in that field may not be appropriate for the defense, because that juror could also become an expert during deliberations and persuade others against your client.

Challenges for cause. Challenges for cause should never be exercised in the presence of any juror. Counsel must always make a solid record of the reasons for the cause challenge and no prospective juror should ever hear the basis for that challenge. The record should be made at sidebar or in chambers, or in the courtroom outside the presence of the jury. Counsel should endeavor to get the prosecution to stipulate to challenges for cause because it will increase the chances that the trial judge will grant your cause challenge. If the prosecution will not stipulate, and if tactically prudent, immediately make your challenge for cause. If granted, you save a peremptory.

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Source: Criminal Law/California Criminal Law Procedure and Practice/29 JURY SELECTION/§29.58 D. Sample Voir Dire Questions

§29.58 D. Sample Voir Dire Questions

Some questions are best asked by the trial judge after the initial voir dire because the panel perceives the judge to be a neutral guardian of fairness and justice, while attorneys are perceived as advocates for a position. Having the judge ask sensitive questions communicates to the panel that the information requested is truly important and necessary for a fair trial. Jurors are then more likely to disclose the truth. Counsel should present the judge with the questions you want the court to ask during pretrial motions. If your request is denied, you can make a record for appeal. The following sample questions are adapted from the author's jury trials:

Standard bias questions

Have you ever given a financial contribution to a police, prosecution, crime victims' group, or similar organization? ____ If so, please explain.

_____

Do you or does anyone in your family volunteer at any victim's rights organization, sexual assault victims' organization, battered woman's shelter, etc? ____

Are police officers more believable than civilian witnesses? ____

Why?_____
_____
_____

Standard deselection questions

Do you think that if the police and prosecution have put significant effort in bringing [the defendant] to trial that [he or she] is probably guilty? ____

Why or why not? Please explain._____
_____
_____

Do you think that if the police believe a [specify crime, *e.g.,* rape] victim that you—as a juror—should believe [him *or* her] too? ____

Why or why not? Please explain._____
_____
_____

Have you written a letter to the editor or your legislative representative, or a similar letter? ____

If so, why did you do it?_____

Did you get a response? ____

Do you have the power to hire and fire at your job? ____

If so, have you ever fired anyone? ____

Why did you do it?_____

Describe the experience(s) please._____

Standard legal questions

[The defendant] is presumed innocent under the law. [Juror name], how do you feel about the presumption of innocence?

Would you change that law?_____
_____

Do you think that if the police and prosecution have put significant effort in bringing [the defendant] to trial that [he or she] is probably guilty? ____

Why? Please explain._____
_____
_____

Why is it so easy to believe that someone is guilty once they've been accused of a crime?

_____
_____

[Juror name], do you think that police sometimes arrest the wrong suspect? ____

How often does this happen?_____

Why does this happen?_____
_____

Is there pressure on police to make arrests? ____

Why or why not?_____
_____

Are there occasions when police officers may lie under oath in order to get a conviction?
_____

[Juror name], how often does this happen? ____

Why does it happen? ____

At the end of the trial, Judge [Name] will instruct you that the District Attorney must prove each element of the crime charged beyond a reasonable doubt in order for you to reach a guilty verdict. [Juror name], assume that the crime has four elements and the DA has proved three of the four elements beyond a reasonable doubt, and one element by clear and convincing evidence.

What is your verdict?_____

Why?_____
_____
_____

Ø **Warning:** Some attorneys, including the author, intentionally omit the "traditional" voir dire on reasonable doubt because of time constraints and because a significant number of jurors believe that the standard is "beyond a shadow of a doubt" and that talking about reasonable doubt during voir dire signals that the defense case is weak.

[The defendant] has the constitutional right not to testify, and that decision cannot be held against [him or her] in any way. [He or She] may choose to testify or not to testify. [He or She] makes that decision.

Would it bother you if [the defendant] didn't take the stand to testify? ____

Why?_____
_____
_____

What are some reasons why a person accused of a crime might not testify in a jury trial?

Speech problem? ____ Nervous-stage fright? ____

Not an effective communicator? ____ Hiding a criminal record? ____

Hiding gang membership? ____ Prior bad experience as a public speaker? ____

Prior bad experience testifying? ____

There are many reasons a person accused of a crime might not testify. Judge [Name] will instruct you that you cannot speculate as to why [the defendant] elects not to testify. Can you follow that instruction as a juror?___
_____
_____

Would you be able to follow the Court's instruction that you cannot hold the defendant's decision not to testify in this trial against [him or her]?

Assume you are the defense attorney in this serious case. Pretend there is a prospective juror—exactly like you—that has truthfully answered all questions asked. What additional information about yourself would you think the defense attorney in this case would like to know that hasn't yet been asked?_____
_____
_____

Aggravated rape, kidnapping, or stalking trial: court voir dire questions

Ø **Note:** From the defense perspective, these questions should be asked by the trial judge during "hot button"

voir dire (see §29.47) because the "person in the black robe" is likely to get more disclosure on such sensitive matters than the "hired gun" attorney.

Have you, or has someone close to you, witnessed or experienced:

Physical child abuse; ____ Sexual child abuse; ____ Domestic violence; ____ or

Stalking? ____

Have you, or has someone close to you, been the victim of:

Date rape; ____ Stranger rape; ____ Marital rape; ____

Any other form of rape; ____ or Any other form of sexual assault? ____

Have you, or has someone close to you, received counseling for:

Physical child abuse; ____ Sexual child abuse; ____

Sexual assault received at age 16 or older; ____

Stalking; ____ or Domestic violence? ____

Have you, or has someone close to you, ever been accused of any crime relating to:

Stalking; ____ Rape; ____ Any other sex crime; ____ Kidnapping; ____ or

Domestic violence? ____

Have you, or has someone close to you, had a negative experience with a:

Psychologist or psychiatrist; ____ OB-GYN; ____ or Perinatologist? ____

Aggravated rape, kidnapping, or stalking trial: attorney voir dire questions on profiling

What factors do you think predispose a man to be a rapist?

Prior record for rape? ____ Raped before but there was no prosecution? ____

Molested as a child? ____ Has fantasies regarding rape? ____

Engages in sadomasochism? ____

A drug addict? ____ An alcoholic? ____

Do women sometimes falsely claim they have been raped? ____

What are the main reasons why a woman would falsely claim she was raped?

_____

_____

Do you think some women consent to sex, then have "buyer's remorse," and ultimately press charges for rape?

What are the reasons for "buyer's remorse?"_____

Domestic violence case: attorney voir dire questions

Have you, or has someone close to you, been the victim of:

Domestic violence, be it physical or mental abuse? ____ A messy divorce? ____

A difficult child custody or adoption proceeding? ____ Stalking? ____

A jealous spouse, girlfriend/boyfriend, or significant other? ____

Have you, or has someone close to you, ever attended any counseling or therapy for domestic violence? ____

Have you, or has anyone close to you, witnessed domestic violence (physical abuse, emotional abuse, or neglect) at any time? ____

Do you have any special education, training, or experience with:

Domestic violence? ____ Psychology? ____ Sociology? ____

Have you, or has someone close to you, ever worked in a battered women's shelter or other women's rights organization?

Questions about possible biases tailored to the facts of the case

Have you, or has anyone close to you, had a negative experience with:

A [Latino/African-American]? ____

Someone who abuses [alcohol /other drugs]? ____

A gang member or former gang member, or prison gang member? ____

A [psychiatrist/psychologist/social worker/counselor/other mental health professional]? ____

A pistol, rifle, shotgun, pellet gun, knife, or other weapon? ____

Have you, or has anyone close to you, been the victim of:

Any crime with a weapon? ____

Any violent crime? ____

Does anyone think handgun laws should be changed to restrict gun ownership?

[Juror name], do you own a handgun? ____

What are your feelings on current gun laws?_____

Have you received training in handgun safety? ____

Are you a member of the NRA? ____

Client with previous conviction or gang affiliation: attorney voir dire questions

[If the defendant will testify in the case-in-chief or the People's in limine motion to admit prior bad act is granted, or both:]

Can you follow a jury instruction that says a defendant's prior felony convictions are to be considered as one factor in the overall assessment of [his or her] credibility because when [the defendant] testifies, [he or she] will admit having pleaded guilty to [crime, *e.g.,* voluntary manslaughter]? ____

Can you give [the defendant] the presumption of innocence knowing that [he or she] has unlawfully [committed prior bad act, *e.g.,* killed another human being]? ____

[The defendant] is dressed in green jail clothing because [he or she] was documented as being affiliated with a prison gang when [he or she] served time in prison. Do any of you think [the defendant] is more likely to be guilty in this case, based on these facts? ____

Is anyone afraid to be on this jury knowing that [the defendant] was once affiliated with a prison gang? ____

[The defendant] is currently in jail and on parole. Does that make it likely [he or she] is guilty of the crimes charged? ____

Trial with media presence

How do you feel about cameras in the courtroom generally?_____

Do you watch Court TV and similar programs? ____

Why or why not?_____
_____
_____

Do the cameras in this courtroom bother you? ____

Why or why not?_____
_____
_____

Would you prefer that the media is not covering this case? ____

Why or why not?_____
_____
_____

How will you avoid watching TV and not reading the newspaper while you are a juror in this case?

Do you think the defendant is more likely to be guilty because the media is covering this case? ____

Why or why not?_____
_____

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§29.59 VIII. POSTVERDICT INTERVIEW TIPS

Following the recording of the verdict, the trial judge will advise the jurors that now they are free to discuss the case with anyone, including trial counsel. Since personal juror information is sealed, the only opportunity counsel may have to speak with the jury is immediately after the verdict is recorded—right outside of the courtroom. Postverdict interviews are imperative if defense counsel is contemplating a motion for new trial based on juror misconduct. If there has been a mistrial on one or more counts, getting feedback can be invaluable. Counsel should be open, friendly, calm, and an active listener when communicating with jurors after the verdict or mistrial. The following are suggested open-ended questions that counsel may wish to ask:

What were the two or three key portions of the evidence (witness, exhibit, etc.) that led you to the verdict? *or* Why did you find [the Defendant] guilty?

Who was the most important witness? Why?

What did you find believable from the defense case? Why?

What was not believable from the defense case? Why?

What evidence could the defense have produced that would have led you to vote not guilty?

What could I have done better as a lawyer in this case?

What was the best thing that the prosecution did in terms of being able to convince you to vote guilty?

Counsel and his or her investigator must be professional at all times because the trial judge will instruct the jurors, right after the verdict is given, that they do not have to speak with you. If, during a postverdict interview, counsel elicits a response consistent with juror misconduct or another ground that would support a motion for new trial, it is important to give jurors a business card so that they can contact you at a later date. Having an investigator present is also important if a juror wishes to immediately speak about any misconduct before leaving the courthouse. In that case, the investigator should conduct the interview outside the presence of the other jurors by, for example, taking the juror down the hallway. The investigator's job is to develop information that will support preparation of a declaration under penalty of perjury for the juror to sign, which declaration will be attached as an exhibit to the motion for a new trial.

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PREPARATION AND PRESENTATION OF CASE AND ARGUMENT

HON. MORRIS D. JACOBSON

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§30.1 I. OVERVIEW

The presentation of evidence and argument begins with thorough preparation before the attorney even enters the courtroom. Thorough preparation puts the trial attorney in the best position to adapt to the ever-changing trial dynamic and gives the attorney the best chance of success. A checklist to help prepare for trial is in California Criminal Law Forms Manual §30.1 (2d ed Cal CEB 2005).

Although the ultimate goals of a prosecutor and a defense attorney differ, the initial aims of preparation should be similar: a thorough knowledge of the case, all the evidence likely to be presented, the strengths and weaknesses of each side, the problems likely to be encountered, and the possible defenses presented by the evidence. It is useful initially both to consider the evidence from a dispassionate, nonpartisan point of view and to attempt an evaluation of the case from the opponent's viewpoint.

This chapter discusses basic concepts that can be applied to cases that have been or will be set for trial. The discussion is separated into (1) preparation for trial (see §§30.2-30.16) and (2) presentation of the case in trial (see §§30.17-30.33).

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II. PREPARATION FOR TRIAL

§30.2 A. Importance of Early Preparation

Preparation is the key to success and competent representation at trial. (For discussion of the requirement that counsel provide competent representation, see §§2.20-2.21.) Without preparation, the attorney has no idea what witnesses to call, what questions to ask, or what exhibits to use. Without preparation, counsel cannot anticipate what evidence the opposition may introduce. Both physical and testimonial evidence may need to be preserved; they may not otherwise be available at the time of trial. Counsel may need to send for evidence, such as records of prior convictions or medical records, that takes time to obtain. Counsel may need to take steps to minimize the effect of negative evidence such as similar acts of misconduct or prior convictions (see chap 24). An investigator needs time to conduct interviews and follow leads.

Early preparation is crucial for both sides. For example, although the prosecution has the burden of proving every element of the crime charged against the defendant, the defense must present evidence to support affirmative defenses such as self-defense. *Martin v Ohio* (1987) 480 US 228, 94 L Ed 2d 267, 107 S Ct 1098. Without preparation, defense counsel will not know whether an affirmative defense is available, and if so, what witnesses are needed to support that defense. See the list of defenses in §32.12. Even if no affirmative defense is contemplated, information on the reliability and credibility of prosecution witnesses will likely be central to the defense. Similarly, the prosecution needs to know what information is available to avoid being surprised at court.

Sometimes the circumstances of the crime or the client's demeanor will suggest the possibility that the defendant was suffering from some type of mental or cognitive impairment at the time of the offense. If defense counsel is contemplating any type of mental defense, a mental health professional must be promptly retained, and counsel should gather mental health history and background to supply to the professional in a timely fashion so that the expert does not rely exclusively on the self-reporting of the client, which may be inadequate and ultimately deprive the defendant of a viable defense. See, *e.g., Bloom v Calderon* (9th Cir 1997) 132 F3d 1267.

> Ø **Note:** Defense attorneys planning to use a mental defense should be aware that doing so may permit the mental examination of the defendant by a prosecution expert if such an examination is authorized by statute. *Verdin v Superior Court* (2008) 43 C4th 1096, 1108, 77 CR3d 287. See, *e.g.*, *Centeno v Superior Court* (2004) 117 CA4th 30, 11 CR3d 533 (prosecution expert permitted to test defendant for mental retardation in capital case). See chap 48 on mental competence and mental defenses.

Prosecutors cannot wait until trial begins to prepare, because they bear the burden of proving the case and they need to know what information is available to avoid being surprised at court. Moreover, because the current statutory scheme contemplates a substantial level of reciprocity in criminal discovery, the schedule for trial preparation must be made with Pen C §§1054-1054.7 in mind. These sections set forth what information each side must disclose to the other, the time within which demands for discovery and disclosure must be made, the mechanism for compelling compliance, and the remedies for failure to comply. For further discussion of discovery, see chap 11.

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§30.3 B. Reading Reports and Files of Present and Related Cases

The quickest way to obtain the necessary overview of a case is to read all reports, transcripts, and documentation relating to the case. The prosecutor should do this before discussing the case with witnesses. Defense counsel may not have this opportunity before interviewing the defendant but should at least try to read the police report before the first interview with the defendant.

Ø **Note:** In serious felony cases, defense counsel may want to concentrate on establishing a rapport with the defendant at the first interview and wait until later to discuss the facts of the case.

Interviews with witnesses are more informative if counsel is familiar with the case and with statements the witnesses have already made, than if counsel's first information about the case comes from the witnesses themselves. Furthermore, people have greater confidence in a lawyer who appears to be familiar with the facts of the case than in one who does not know who the significant players are, what occurred, or when it occurred. Familiarity with the case also allows the attorney to better guide the discussion during interviews.

In addition to reading all available information about the pending case, counsel should become familiar with any other cases involving the defendant and any witnesses, both in past and pending cases. Some defendants are creatures of habit; prior criminal activities may provide prosecutors with useful similar acts of misconduct. See Evid C §§1101, 1108-1109. See also §§24.52-24.55. Knowledge of the criminal activities of witnesses may provide character evidence that may help or hurt counsel's case, or establish a motive for the witness to testify favorably for one side or the other. This information is available to prosecutors through law enforcement computer records. The prosecutor must inform defense counsel, in a timely fashion, of the existence of a felony conviction of any material witness whose credibility is likely to be crucial to the outcome of the trial. See Pen C §1054.1(d). Defense counsel should not overlook the possibility of bringing a *Pitchess* motion concerning police witnesses. *Pitchess* motions are discussed in chap 11.

It is well worth the effort for both defense counsel and the prosecutor to meet with the officers involved in the arrest or investigation and go over their personal notes, if any, as well the investigator's case file or packet. Sometimes the police have reports, pictures, diagrams, and taped statements that were never sent to the prosecutor. Such finds are not necessarily the product of the officers trying to hide something. More often, this information was not obtained until after the case was charged. When prosecutors learn about this information, they must evaluate it and decide what must be given to defense counsel. The police and district attorney investigators will rarely agree to talk with defense counsel, and usually contend that any personal notes were destroyed once written reports were prepared, but it is worth the effort for defense counsel to attempt an interview. In addition, if officers refuse to talk to defense counsel, that fact may be useful to establish their bias at trial.

Although police officers and other investigators may be reluctant to discuss a case with the defense, the same is not true of most expert witnesses. Pathologists, firearms examiners, serologists, handwriting experts, and many others are often willing to talk to the defense. In addition to providing information about the instant case, these experts can be a valuable source of information on their respective fields. If nothing else, counsel can learn enough to ask intelligent questions in the trial court.

It may be helpful to review documents in the court file and to view any exhibits admitted at an earlier hearing, preliminary examination, or grand jury proceeding. It is particularly important for defense counsel to carefully read all reports to become intimately familiar with the case and to be prepared to deal with any inconsistencies between the reports of different witnesses to the same facts, or between the reports of one witness given at different times. Defense counsel should have a defense investigator interview every prosecution witness and all additional witnesses suggested by this initial interview. Early interviews are strongly recommended in the event follow-up interviews are required.

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§30.4 C. Visiting Crime Scene and Viewing Physical Evidence

Actually viewing the crime scene can make a significant difference at trial and should be undertaken in every case, even if things have changed. The authors never cease to be amazed by the difference between their mental images of the crime scene gleaned from reports, pictures, and diagrams, and the real thing.

Counsel should visit the crime scene promptly. Crime scenes change; thus the longer counsel waits to view the scene, the more likely it is that it will have changed. If counsel waits until right before trial, and the key issue in the case is whether a witness could in fact see what he or she claims to have seen, counsel will be hard pressed to argue that pictures taken many months or even several years after the alleged crime corroborate or destroy the witness's testimony. By going to the crime scene as soon as possible, counsel also acquires knowledge that will aid in discussing the location with witnesses. Counsel can then have an investigator or a paralegal take additional pictures and make diagrams that will aid the jury in understanding the case.

After visiting the crime scene, counsel can decide whether and how to preserve and reproduce it for the jury. Pictures and diagrams of the crime scene are generally required, and in some cases, a mock-up of the scene. The miniaturization of videotape cameras and their higher sensitivity to low light levels make videotaping of crime scenes economical and effective. Videotapes provide a full color, comprehensive, and often more dramatic view than still pictures. It is advisable, however, to have some still pictures in addition to the video because they can be used to highlight points during argument. Also, it is easier for a juror to pick up a still picture in the jury room than to have a television brought in so that the video can be viewed. Counsel may decide that it would be advisable to have the jury view the crime scene during the course of the trial. See §33.17 on jury views.

Counsel should go to the crime scene with an investigator so that he or she can testify to any evidence found there. For example, a bullet that was overlooked by police may prove that the defendant was not the killer, the investigator may be able to testify that an eyewitness would have been unable to see what he or she claims to have seen from a particular position, or a witness may be encountered who has important information about the case.

A corollary to viewing the scene is viewing the physical evidence the police and the opposition have collected, *e.g.,* clothing, weapons, wallets, crime scene pictures, and videos. See chap 11 on discovery. Just as with viewing the crime scene, viewing the physical evidence before it is brought into court can make a big difference. It can help support a theory of the case, might lead to additional evidence that was overlooked, or might have a significance to the case that is not understood by the opposition. See §§30.10-30.13 for further discussion of real and demonstrative evidence.

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D. Witnesses

§30.5 1. Selecting Witnesses for Trial

Selecting witnesses is often a very different process for prosecutors than it is for defense attorneys. A prosecutor is concerned with establishing all elements of the charged crimes in a direct and comprehensive fashion. If the defendant has an affirmative defense (*e.g.,* alibi, mental state), his or her concerns will be very similar to those of the prosecution. Often, however, the defense will be trying to poke holes in the prosecution's case and draw attention to facts that tend to show the prosecution theory is not solidly based in fact, by, for example, highlighting inconsistencies or showing bias on the part of witnesses.

After investigating the case, counsel may have several potential witnesses and must decide which ones to actually use to prove the prosecution's case-in-chief or an affirmative defense. Counsel's theory of the case plays an important role in witness selection. Counsel needs to decide what function each individual witness will serve if called to testify, *e.g.,* to identify a piece of evidence, to testify to the chain of custody, to serve as a percipient witness, to testify as a victim, to introduce an admission by the defendant, or to substantiate the defendant's alibi. It is frequently helpful to write out why counsel wants each witness to testify and what purpose each witness's testimony serves to check for any duplication. When two or more witnesses are available to testify to the same thing, counsel must decide how many and which witnesses to use.

More does not always mean better. If counsel calls more than one witness to testify to the same events, inconsistencies may be introduced that will weaken the case. Moreover, if counsel calls several witnesses and they all testify exactly alike, the opposition can point out that such an occurrence is contrary to human experience and that they must be testifying from the same script or must have met and reconciled the differences in their stories. The best practice is to call the best available witnesses to establish the point. Two or three witnesses should be sufficient. This practice minimizes inconsistencies, presents the facts in a concise fashion, and does not allow the case to get lost in collateral issues. It also permits counsel to argue that if witnesses who were not called had anything different to say the opposition would have subpoenaed them.

Ø **Note:** A district attorney making this argument must be careful to avoid *Griffin* error, discussed in §§23.33, 30.33.

The opposition may then wish to present some of the witnesses who were not called to maximize inconsistencies, prevent facts from being presented concisely, and to confuse the case with collateral issues.

If a witness has given a statement to a police officer or other investigator, and there is even a slight chance that his or her trial testimony will be inconsistent with that statement, then the police or other investigator should be subpoenaed if impeachment testimony is required.

The type of testimony will help establish how many witnesses to call. If several eyewitnesses identify the defendant as the perpetrator, the prosecutor should probably call them all. But if several police officers went to the crime scene and stood by the front door to make sure no one entered until the investigators arrived, only one officer is needed to testify.

The witness who will best communicate the required information to jurors is the one to select when counsel has a choice. That is why interviewing witnesses in person is a significant part of witness selection.

Once the core witnesses have been selected, counsel should consider whether any additional witnesses will enhance the presentation. For example, the prosecutor may want to help the jury experience the terror the victim felt. An effective way of doing this is to call the first person the victim had contact with immediately after the crime to testify to the victim's demeanor and emotional and physical condition at that time ("I woke up to someone pounding on my door.… I was frightened when I looked through the peephole and saw a naked girl, crying hysterically for help, with blood dripping down the side of her head"). Defense counsel with strong evidence that the only alleged eyewitness could not have seen the assailant may want to begin with the defense investigator's testimony and demonstrative evidence.

The selection of witnesses to be called at trial must take into account discovery rights under Pen C §§1054-1054.7. Each side must make pretrial disclosure of the identity of trial witnesses, including experts, together with relevant written or recorded statements or reports of each witness's statement. Pen C §1054.3. Disclosure must be made 30 calendar days before trial. Pen C §1054.7. If material comes into counsel's possession later, it must be disclosed "immediately." Pen C §1054.7. A request for pretrial disclosure is required in order to seek court enforcement of failure to provide this information. Pen C §1054.5(b). Failure to disclose is punishable by various sanctions, with witness preclusion as a last resort. Pen C §1054.5(b). See chap 11 for further discussion of discovery.

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§30.6 2. Anticipating Witness Problems

Once it is decided which witnesses to call, counsel must ascertain whether any problems are presented by any of the witnesses. Will the witness have difficulty qualifying as a competent witness because of an inability to understand questions or communicate or because of an inability to understand the duty to tell the truth? See Evid C §701; see, *e.g.*, *People v Augustin* (2003) 112 CA4th 444, 5 CR3d 171 (witness with cerebral palsy). Are there any legal problems that must be overcome, *e.g.,* hearsay, foundation, privilege, or expertise? Is the witness hostile to counsel's case? Does the witness have communication or language problems that may require an interpreter? Will the witness be available when the case goes to trial? Does the witness need transportation to court? Does the witness have any physical limitations (*e.g.,* is in a wheelchair or is blind) that may make coming to court more difficult and may require special instructions (*e.g.,* where parking or wheelchair access is available).

One way of anticipating witness problems is to avoid creating them. Attorney or investigator discourtesy and poor communication with witnesses can alienate witnesses. It is particularly important to keep witnesses informed of changes in court dates. It is absurd for a witness to lose a day's pay or incur an employer's wrath only to find that the court date has been continued or to find out that his or her testimony is no longer needed. Keeping the witness informed is not only the decent thing to do, it can pay dividends, because a disgruntled witness generally is not a good witness.

The attorney has to engage in a delicate balance of having enough witnesses to fill up the court day, yet not have witnesses needlessly sitting around for days waiting to testify. If possible, counsel should designate an investigator, paralegal, or law clerk as the witness coordinator and assign that person the responsibility of keeping the witnesses informed of when they need to be in court. Effective use of a witness coordinator serves the dual needs of maintaining the requisite flow of witnesses while allowing the attorney to focus on the trial itself. The witness coordinator has enough time to explain the process to witnesses and to decide when witnesses should be told to come to court and when they can be placed on telephone standby. A little courtesy can go a long way in minimizing witness inconvenience and maintaining witness goodwill.

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§30.7 3. Using Interpreters

If a witness requires an interpreter, counsel should work with the witness and the interpreter before trial to make sure that the interpreter can in fact translate the witness's testimony and to work out any difficulties before the witness testifies. See, *e.g., Vasquez v Kirkland* (9th Cir 2009) 572 F3d 1029 (deaf and mute witness who communicated through nonstandard sign language testified through American Sign Language interpreter and certified intermediary interpreter). This should be done even if the interpreter is court-certified because the witness may speak a different dialect from the interpreter's, or some cultural interaction might take place between the witness and interpreter that inhibits communication. For example, in some cultures rape victims are shunned, a value judgment that might affect the courtroom interaction between the interpreter and the witness.

Ø **Note:** In some counties, counsel must notify the court well in advance when an interpreter will be needed for a witness or client.

Counsel should make sure that jurors are not biased against persons who do not speak English fluently, and should ask the court to instruct the jury to look at the witness and not the translator, because the translator will not have the voice inflection and affect of the witness. The witness's body language is evidence that jurors should consider in determining credibility. Jurors who speak the language being interpreted should be instructed to rely only on the interpreter and not on their own language ability. See CALCRIM 120, 121. See also Evid C §§750-755.5.

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§30.8 4. Preparing Witnesses to Testify

It is essential that counsel personally talk to all available witnesses before they testify. (See §2.27 on ethical considerations and cautions that apply to interviewing witnesses.) Personal interviews provide the best method an attorney has to anticipate how well a witness will testify. A prosecutor's case-in-chief or an affirmative defense may seem persuasive on paper, but it can be weakened by a key witness's manner of testifying. Counsel who knows about a witness problem well before trial may be able to minimize the problem. If counsel waits until the day the witness is to testify, it is probably too late to work on improving his or her manner of testifying, to plea bargain, to find a replacement witness, or to take the witness's personality and background into account when selecting jurors.

Interviewing a witness will ensure that counsel and the witness are communicating with one another and will allow counsel to evaluate the witness to ascertain how much the witness remembers and the method counsel should use to elicit all information (*e.g.,* simply asking the question, using past recollection recorded, or impeaching the witness). Witnesses also need to be prepared for the courtroom in order to know what to expect and what is expected of them. This includes police officers, for while many people assume they are professional witnesses, frequently nothing can be further from reality, despite training at the police academy on how to testify.

The length of time spent preparing a witness will vary depending on the complexity of the witness's testimony. Some witnesses may require two or three sessions; others may require only enough time to make sure that they can testify to the information counsel plans to introduce.

Counsel must be familiar with a witness's previous statements in order to know what the witness can testify to and whether those statements contain any discrepancies. Statements may be found through conversations with other witnesses or in police reports, signed and taped statements, or previously recorded testimony. Tape-recorded statements and prior testimony are usually reliable; police reports and signed statements, however, are not always accurate or inclusive. Witnesses may sign statements without reading them, may not challenge what the officer wrote down, or, because of the stress under which the statements were made, may not have fully read or understood what was in the documents they signed.

In interviewing witnesses, it is good practice for the attorney to have an investigator present. There are three primary purposes for this:

(1) The investigator hears directly what the witness has to say, so that counsel does not have to repeat it later to the investigator;

(2) The witness knows who the investigator is, so that in subsequent contacts the witness feels at ease; and

(3) If counsel needs to impeach the witness with what the witness said during conversations with counsel, the investigator can be called to testify.

The last reason avoids the awkward and ethical problems of the attorney being a witness in the case. See §2.18 on the attorney as witness.

Counsel should begin preparing the witness by generally describing the experience and purpose of testifying, correct demeanor on the witness stand, clothing to be worn, and, most important, the requirement that the witness tell the truth. Counsel should explain that, if the witness is unsure of an answer, the proper response is to say so rather than to guess.

Counsel should then go over the areas to be covered in the witness's testimony. Preparation need not consist of taking the witness through a question-and-answer script, but counsel should familiarize the witness with the areas to be covered and how the questions may be phrased to make sure the witness understands counsel's approach. Counsel should describe what happens when there is an objection, and what to do if the judge says "sustained" or "overruled."

The witness should be shown any exhibits (or copies of exhibits) that will be used during the course of testimony to ensure that he or she can identify or discuss them accurately. Counsel should explain any questions that must be asked to lay a foundation for the exhibit's admission into evidence, *e.g.,* does this picture fairly reflect the condition of the apartment at the time of the incident? A witness who will be expected to explain or use a diagram or chart during testimony should be familiar with it. If the witness will mark the exhibit in any fashion, counsel should go over the

procedure. Spontaneity may be exciting, but it is very difficult to undo the confusion generated by a witness who marks an exhibit in the wrong location because of lack of familiarity with the exhibit or misunderstanding of the procedure to be followed.

Discrepancies between the witness's current memory and prior testimony or statements should be probed in detail. Apparent inconsistencies can often be reconciled. Questions that might be asked include these:

- Did the police officer misquote the witness in his or her report?
- Did the police officer leave anything out or fail to ask a follow-up question?
- What was the context in which the statement was made?
- Did the witness read the statement?
- What was the witness's state of mind (*e.g.,* was he or she under unusual stress)?
- Does the statement clearly contradict an earlier statement, or is it something that was not mentioned before?

Ø **Note:** Counsel must be careful to avoid any hint that he or she may have influenced the witness's testimony. It is, at best, embarrassing to have a witness explain that his or her current testimony differs from an earlier statement because the district attorney or defense attorney told him or her what to say.

If the witness has any special qualification that adds credence to his or her testimony, counsel should explain how it will be developed through the witness's testimony. For example, the witness's background as a portrait artist with training in observing facial features may help corroborate an identification of the defendant.

After preparing the witness for direct examination, counsel should prepare the witness for cross-examination. Examples of negative issues that may be raised include prior felony convictions, motive to fabricate, and inability to observe what the witness claims to have seen.

Witness preparation includes not only evidence to be elicited during testimony but also matters that are not to be mentioned. This area includes matters that the court has ordered not be raised (*e.g.,* polygraph examinations), statements of codefendants, and topics that counsel wants to avoid so that the door is not opened for the opposition to cross-examine on them (*e.g.,* character evidence of one of counsel's witnesses).

The witness should be assured that it is not improper to meet with counsel to prepare for direct and cross-examination. This may seem obvious, but many witnesses, when confronted on cross-examination with a question about advance preparation, become flustered and fear that because the question is asked there might have been something improper in meeting with counsel and will deny that the meeting occurred.

Counsel should issue or order subpoenas early enough to allow the witnesses to be found and served. If the witness is in court when a trial date is set, counsel can ask the court to order the witness to appear on the date set for trial. Counsel can also have the witness accept service when he or she comes to the office to be interviewed. For further discussion of subpoenas, see §§4.39-4.47.

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§30.9 5. Interviewing Opposition Witnesses

Counsel should try to interview all witnesses, particularly those who will testify for the opposition. An investigator should be present during the interview so that he or she can impeach the witness at trial, if necessary, with the witness's statement.

Counsel should not discuss the case with a represented codefendant without the consent of the codefendant's attorney, even if the codefendant plans to testify. Cal Rules of Prof Cond 2-100; see §2.35. Witnesses in a criminal case who testify for the prosecution are not considered to be represented by the prosecutor; defense counsel may approach them directly unless they are represented by another attorney concerning their testimony in that case. See chap 51 on representing witnesses.

Each side is obligated not to interfere with communication by attorneys or investigators from the other side with witnesses who would otherwise be willing to discuss the case. See *Walker v Superior Court* (1957) 155 CA2d 134, 139, 317 P2d 130; ABA Model Rules of Prof Cond 3.4. See §30.3 for discussion of interviewing police officers and district attorney investigators. On ethical problems in communicating with the opposing party's experts and consultants, see §2.35.

Counsel should try to obtain disclosure of opposition witness statements and reports before interviewing those witnesses. See Pen C §§1054.1, 1054.3, and discussion in chap 11 on discovery of witness statements and reports.

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§30.10 E. Evidence in Place of Witnesses

Evidence can take many forms. Attorneys should not overlook stipulations, judicial notice, business records, official records, or prior sworn testimony. The use of these alternatives to live witnesses can greatly reduce the length of the trial and the number of witnesses to be called. Counsel should not, however, use them merely to save time. What must be determined is whether a witness's presence in court enhances the presentation of the evidence. For example, when introducing a business record, counsel might consider asking opposing counsel to stipulate to the foundation to avoid having the custodian of records testify. Of course, the custodian of records might be necessary to explain the significance of the records.

For discussion of these issues, see Effective Introduction of Evidence in California, chaps 13 (business records), 28 (former testimony), 31 (judicial notice), 36 (official records), 51 (stipulations) (2d ed Cal CEB 2000).

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§30.11 F. Examining and Testing Physical Evidence; Further Investigation

Physical evidence should be viewed as soon as possible after it is obtained to allow time for any forensic examinations that might be required, *e.g.,* blood or DNA analysis, stain analysis, or bullet analysis.

Ideas for further investigation usually develop from reading all reports, statements, transcripts, and documentation on the case and any ancillary cases; inspecting the crime scene; interviewing significant witnesses; and examining physical evidence such as clothing, pictures, or weapons. Counsel may want to have additional witnesses contacted for statements, pictures taken, videotapes or diagrams prepared, and criminalistics performed, and take steps to see that police radio or telephone tapes are preserved.

The mandated disclosure of defense and prosecution expert witnesses, their reports, and tests performed under Pen C §§1054-1054.7 may suggest additional areas of investigation. See chap 11 for further discussion.

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G. Demonstrative Evidence

§30.12 1. Reasons for Using Demonstrative Evidence

People remember what they see longer than what they hear. When the two senses are combined, learning and retention improve even more. Thus, if a trial consists only of the testimony of witnesses, jurors will not recall as much as they would if the testimony were combined with demonstrative evidence. Visual evidence can also help clarify a witness's testimony.

Demonstrative evidence is helpful in re-creating the crime. Words alone are inadequate to take the jury's attention from the sterile environment of the courtroom and focus it on the scene of the crime so they can see, hear, and feel as the witnesses did at the time of the occurrence. This result can be achieved only through demonstrative evidence.

Demonstrative evidence also plays an important role in maintaining the jury's interest in counsel's case. Few people have the ability to verbally describe a scene so that all listeners create the same image in their minds. When a picture is used, however, everyone knows what the witness is talking about.

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§30.13 2. Selecting and Creating Demonstrative Evidence

Counsel needs to think creatively about which audio and visual aids will help the jury to be more interested and to better understand and remember counsel's case. Photographs, videotapes, diagrams, maps, models, clothing, documents, and charts are common forms of demonstrative evidence. The use of computer-generated graphics and animations is becoming more common. See *People v Hood* (1997) 53 CA4th 965, 968, 62 CR2d 137 (ordinary rules applicable to demonstrative evidence determine admissibility of computer animation).

To know what items of demonstrative evidence to use at trial, counsel must have a thorough understanding of the case. To have evidence ready when trial begins, counsel must begin preparation at least 1 month before trial. A good place to start in compiling a list of evidence for trial is with evidence seized by the police. It is important for the attorney to view and examine every item of evidence that has been collected, not only to decide what items to use during trial, but to more thoroughly understand the case. For example, whether clothing is damaged and where the damage is located may make or break counsel's case; or if the defendant claims not to have known the victim but has the victim's address in his or her pocket, the attorney certainly needs to know about it.

After deciding what demonstrative evidence to present, counsel must decide on the type of mounting or manner in which the evidence will be displayed to the jury. Demonstrative evidence should be large enough to enable the jury to clearly see all details as the witness or counsel describes their significance. Many types of demonstrative evidence can be created easily and inexpensively on computers with the required graphic capability.

For further discussion of the foundation necessary for admitting demonstrative evidence, see Effective Introduction of Evidence in California, chap 39 (2d ed Cal CEB 2000); California Trial Practice: Civil Procedure During Trial, chap 13 (3d ed Cal CEB 1995).

Computer-generated presentations (*e.g.,* PowerPoint) incorporated into opening statements, direct and cross-examination, and arguments can be very effective in communicating the case to the jury. Such presentations can capture the jury's attention and allow counsel to engage the minds of jury members on multiple levels. During examination of witnesses, the exhibit can be simultaneously presented to the witness and the jury, facilitating the jurors' understanding of the witness's testimony. In argument, counsel can not only outline the major points of the case and do away with the podium and notes, but also can creatively weave various important pieces of the evidence (pictures, charts, video- and audiotapes) into a powerful and compelling presentation that is persuasive and holds the jurors' attention.

Presentations take time and thought to prepare. In addition to creating the presentation, counsel must anticipate legal or procedural objections that may be raised by opposing counsel or the court or both (*e.g.,* publishing exhibits to the jury before a foundation has been fully laid). Anticipation allows counsel to craft the presentation of their case or work through any objections in hearings in advance, outside the jury's presence. Also, there are logistical problems that have to be worked out in advance:

(1) Familiarity with the program to operate it effectively;

(2) Making sure the courtroom has the power outlets necessary for your computer and projector;

(3) Deciding where to set up the equipment and screen in the courtroom;

(4) Assessing whether a technician is needed to set up the equipment;

(5) Making sure the equipment gets to the courtroom; and

(6) Creating a fallback plan if there is an equipment/operator glitch or failure.

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§30.14 H. Preparing Motions and Trial Briefs; Trial Notebook

Once counsel is familiar with the case, potential legal issues should be obvious. Some pretrial motions may be necessary to obtain desired evidence or to eliminate undesirable evidence. See the checklist of pretrial motions in §18.4.

As the time for trial nears, counsel should research and write trial memorandums on any important evidentiary issues, *e.g.,* hearsay objections or exceptions, admissibility of photographs, and character evidence.

If the case involves a key legal issue, a trial brief should be prepared on it. Trial briefs impress the court and make counsel more confident through familiarity with the relevant law. If the case turns on the defendant's similar acts of misconduct, admissibility of a hearsay statement, competency of a witness, statement of a defendant, or character evidence, then a trial brief outlining the law and citing cases that are on point may be essential.

Counsel may wish to create a notebook or file for each major witness. At trial, there is nothing worse than fumbling through volumes of transcripts, police reports, notes, and exhibits trying to find the one piece of paper that will allow counsel to destroy the witness. The jury stares; the witness regains his or her composure; the judge's fingers drum on the bench; and counsel grows more frustrated and self-conscious and less able to find the missing document.

Organization is crucial to every case, and the more complex and important the case the more significant the role that organization will play. Jurors are impressed with well-organized lawyers and are put off by those who are not. These impressions will be carried through to the end of the trial when counsel stands before them and argues the case. In the jurors' minds, organization and professionalism go hand in hand. If jurors see that counsel is not well organized, they may not take his or her closing argument as seriously as that of a more organized opponent.

The two most common forms of organization are the notebook system and the file system. Whichever format is used, it should be simple and allow counsel to easily and quickly find reports, statements, testimony, and legal authority for issues that may arise.

In the notebook system, counsel uses one or more three-ring binders with index dividers that are labeled (*e.g.,* jury voir dire questions, police reports) and outlines or checklists for direct testimony and cross-examination, criminalist reports, exhibits, trial memos, argument, experts, and instructions. While we like to think we can remember everything, in the heat of a courtroom battle it is easy to miss an important point. Checklists are thus essential.

The notebook can be further divided into a section for each witness that includes prior statements and transcripts, reports involving the witness, and an outline for examination of the witness. Reports can be photocopied and placed in several sections for ease of retrieval. Counsel should decide in advance whether exhibits will be used to enhance the witness's testimony and should note on the witness sheet the exhibits counsel plans to use with the witness, cross-referenced to counsel's exhibit list. If counsel anticipates any legal problems with a witness's testimony, *e.g.,* competency or hearsay, then notes on the legal requirements needed to lay the appropriate foundation or legal arguments that counter any objection to the testimony's admissibility should be included.

In a file system, counsel uses a box or a file cabinet on rollers with separate files for each topic.

It is now common for attorneys to use computer programs to organize files and make them easily accessible in the courtroom. This practice is particularly advantageous in a large case involving voluminous materials. It is obviously easier to carry a laptop than boxes of files or numerous notebooks. However, there are drawbacks: programs require a certain amount of expertise to operate effectively and counsel may not have time to acquire this expertise; it is more difficult to show a document to a witness for impeachment or other purposes when it is only available as an image on a screen, and use of a computer subjects counsel to the vicissitudes of power outages and computer crashes. Computer use is probably best left to large and complex cases when counsel will have time to master the technology. Whatever system is used, counsel should be thoroughly familiar with it and be able to access documents quickly and accurately.

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§30.15 I. Developing Theory of Case

After obtaining a working knowledge of the case, counsel needs to ponder its strengths and weaknesses and develop a theory of the case to present to the jury. A theory of the case provides a sense of continuity and comprehension for jurors. It explains what the case is all about (*e.g.,* self-defense, consent, misidentification, misunderstanding, jealousy, profit, retaliation). It focuses the case and provides a framework that helps jurors understand the case and form an opinion about the defendant's guilt or innocence.

Ø **Note:** Counsel should be alert to the potential for having to revise the theory of the case in light of developments during trial. Some cases lend themselves to alternative theories.

Even when the defense will not present witnesses or other evidence of its own, defense counsel can make jurors aware of defense themes through the opening statement, cross-examination, instructions, and closing argument.

A review of the chapters *Elements of Crime* and *Defenses* in 1 Witkin & Epstein, California Criminal Law (3d ed 2000), of Judicial Council of California Criminal Jury Instructions (CALCRIM), and of Lundy's FORECITE California will often help to identify and refine theories. It can also assist in identifying discovery issues, tactics, evidence issues, and ideas for original jury instructions not found in CALCRIM.

Prosecutors should outline every element of the case, and list next to each one what witnesses or evidence will be used to prove it. Defense attorneys should do the same for defense witnesses. Both sides should list points to be made through cross-examination of opposing witnesses. See the checklist of defenses in §32.12.

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§30.16 J. Using Jury Instructions to Prepare Case

Once counsel has developed the central theory of the case, the next task is to determine what testimony and evidence must be presented to prove that theory. A common approach is to go through Judicial Council of California Criminal Jury Instructions (CALCRIM) and see which instructions on the elements of the crime or defenses will apply, then outline what must be proved to obtain the jury instructions desired. In addition, other instructions such as those on willful destruction of evidence, the defendant's good character, or flight as evidence of guilt may give counsel ideas about issues that can be raised.

Ø **Note:** Although the use of CALCRIM instructions is "strongly encouraged" (see Cal Rules of Ct 2.1050(e)), other sources of instructions can be helpful in giving counsel ideas for the case. See particularly Rucker & Overland, California Criminal Practice, Motions, Jury Instructions and Sentencing (3d ed 2004), and Lundy, FORECITE California. See also chap 32.

After deciding what evidence must be introduced or elicited from witnesses, counsel needs to decide how to produce the evidence during trial in the most persuasive fashion. This is the "orchestration" of the case.

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III. PRESENTATION OF CASE

§30.17 A. Deciding What Type of Jurors Are Needed

Counsel begins to prepare for jury selection by analyzing the case, examining its strengths and weaknesses, and researching the applicable law. While doing so, counsel should make notes of the types of jurors who will be responsive or adverse to specific aspects of the case. While interviewing witnesses, counsel should constantly ask: What type of juror might be biased against this witness or might empathize with this witness? In examining the law that will be applied to the case, the same questions should run through counsel's mind.

The next step is to compose jury voir dire questions that will reveal prospective jurors' attitudes about the case. Open-ended questions are preferable because they give jurors an opportunity to reveal their true feelings about relevant issues.

Ø **Note:** The trial judge may require the attorneys to give the judge their requested jury voir dire questions *in writing* before the pre-voir dire conference begins. This applies both to questions to be asked orally and to questions to be asked by written questionnaire. Judicial Council Form MC-002, Juror Questionnaire for Criminal Cases, may be used. Cal Rules of Ct 4.200(b).

Part of trial preparation should include learning how the various judges who may be assigned to the case approach jury voir dire so that counsel can be properly prepared for the pre-voir dire conference when the case is assigned to a trial court. Counsel needs to know the judge's attitude and approach in jury voir dire to know what to expect and what hurdles counsel will have to leap to get a fair jury. For example, if the court uses a questionnaire, counsel should have already reviewed it and should come to court with any desired modifications.

Although the law again permits attorneys the right to personally voir dire prospective jurors, voir dire is still limited to questions directed at exercising challenges for cause. CCP §223. The court can, and probably will, impose time limits on counsel. Further, there are judges with definite views about what kinds of questions are relevant to challenges for cause. An attorney who is appearing before a judge known to impose strict limits on attorney voir dire should walk into court with an extensive brief focusing on the areas that need to be covered, why these areas go to challenges for cause, and why counsel should be permitted to ask these questions personally. See *People v Chapman* (1993) 15 CA4th 136, 141, 18 CR2d 738. For further discussion of jury selection, see chap 29.

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§30.18 B. Pre-Voir Dire Conference

Pre-voir dire conferences are required in all criminal cases. Cal Rules of Ct 4.200. The rule requires the court and counsel to discuss the nature of the case, the legal issues involved, the witnesses to be called, and the court's jury selection practice. These areas include the court's procedure for dealing with excusing jurors for hardship, areas of inquiry to be covered in voir dire by the judge and permitted to be covered by the attorneys, guidelines and time limits on attorney voir dire, and manner of exercising challenges. See discussion of sequestered voir dire in §§14.14, 14.29, 29.20, 54.25.

Rule 4.200 also requires the court to find out the following from counsel:

- The charges and nature of the case;
- The names of witnesses who will testify;
- The prosecution's theory of the case;
- The defense's theory of the case, unless defense counsel asks to be excused from disclosing it (the court must grant this request);
- The schedule for the trial and its predicted length;
- The number of, and procedure for selecting, alternate jurors; and
- The procedure for making *Batson-Wheeler* objections.

Counsel may want to ask the court for a general ruling excluding witnesses from the courtroom throughout the trial, except when they are testifying. Evid C §777. This section does not apply to defendants.

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§30.19 C. Motions in Limine

An in limine motion is a request by a party to admit or exclude evidence made before the evidence is presented to the trier of fact. It is made outside the jury's presence. *People v Morris* (1991) 53 C3d 152, 188, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. See also Evid C §402(b).

Most cases involve evidentiary issues that have to be discussed outside the jury's presence. Motions in limine are the ideal tool to handle such issues as photographs that may be too gruesome, impeachment of the defendant or witnesses with prior felony convictions or moral turpitude misconduct, admissibility of uncharged acts of the defendant under Evid C §§1101, 1108, and 1109, and the victim's prior sexual conduct. For a variety of reasons, such matters should be decided before the jury is selected, if the judge consents. An early decision allows counsel to know whether the matter will come before the jury. If it will, counsel may want to cover that subject in jury voir dire because it may affect the type of jurors counsel wants. An early decision also allows counsel to address the issue in opening statement. Another benefit of an early decision is to allow an uninterrupted presentation of the case. If counsel builds the testimony of a witness to a climax, shows the witness photographs, and then the opposition objects, causing the jury to be excused from the courtroom so that the judge can decide whether the photos should be excluded under Evid C §352, then the dramatic moment is broken, the flow of the case is interrupted, and jurors and witness are inconvenienced.

Because in limine rulings are not binding on the trial court (*People v Karis* (1988) 46 C3d 612, 634 n16, 250 CR 659), if evidence introduced at trial changes the basis for the court's in limine ruling, counsel should feel free to ask the court to reconsider its ruling. *Morris,* 53 C3d at 189.

Ø **Note:** Once the court rules on a motion in limine, trial counsel must remember to inform any affected witness that the court, as a result of an in limine motion, has ordered that a specific issue not be mentioned.

Normally, an evidentiary objection made as an in limine motion that is not renewed when the affected evidence is introduced during trial is not preserved for appeal unless counsel obtains a stipulation from opposing counsel and the court that the objection is to be deemed to have been made. This is commonly called the reiteration requirement. An exception arises if a specific objection is directed to an identifiable body of evidence and is advanced when the court can see that evidence in context, *i.e.,* no further evidence is introduced that changes the relevant facts concerning the issue ruled on. *People v Morris, supra*.

Ø **Note:** To make sure that appellate rights are preserved, if counsel has made an in limine objection to particular evidence and does not want to object to it again in front of the jury, counsel should obtain a stipulation that the in limine objection is also deemed to have been made when the evidence is introduced at trial.

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D. Opening Statements

§30.20 1. Purpose and Style

Counsel for all parties may make an opening statement. Pen C §1093(b). No time limit is set by statute, but local court rules and local practice should be consulted. Occasionally, the trial judge sets time limits on opening statements.

The opening statement gives the trier of fact an overview of the case. It is not an argument, but it can be persuasive without being argumentative. A frequently used analogy is that the opening statement provides a "road map" of the evidence expected to be presented during the trial.

A frequent error of inexperienced attorneys is to list the witnesses to be called and summarize each witness's testimony. It is more effective and informative to act as a storyteller, giving jurors the highlights and introducing the important characters.

Another approach is to make the opening statement like a preview of coming attractions at the movies or a promotional teaser on television. This method gives the jury an understanding of the overall case to aid them in placing each witness's testimony or piece of evidence into the larger picture. It grabs their attention yet it does not take away from the impact of the evidence when it is finally presented to them.

It is not necessary to detail every piece of evidence or every important item. It is often wise to leave a significant piece of evidence out of the opening statement (*e.g.,* evidence that the defendant tried to have the key witness killed to prevent that witness from testifying, or that the key opposition witness has two perjury convictions) so that it will have a greater impact when it emerges during the presentation of evidence.

The attorney may want to use visual aids during the opening statement. Visual aids are especially effective in a complex case in which many incidents or counts are involved. For example, a map or an outline of the charges, broken down into individual incidents, may be helpful. It is proper to use any demonstrative evidence in an opening statement that will be introduced into evidence. *People v Green* (1956) 47 C2d 209, 215, 302 P2d 307 (prosecution's opening statement); *People v Kirk* (1974) 43 CA3d 921, 929, 117 CR 345 (same). Counsel should show these aids to the judge and opposing counsel before attempting to use them. It is within the trial court's discretion to allow or not allow demonstrative evidence during opening statement. *People v Green, supra*.

Ø **Note:** Opening statements can lead jurors to take sides before any evidence is presented. The persuasiveness of a prosecutor's opening statement was illustrated by a "muffled shout" of "he's guilty" from a juror after the prosecutor's opening statement in *U.S. v Armstrong* (9th Cir 1990) 909 F2d 1238, 1244 (alleged juror misconduct did not affect defendant's right to fair trial). A prosecutor who uses "deceptive or reprehensible methods" to persuade the jury commits misconduct, but an opening statement outlining what the evidence shows and will show at trial does not give rise to a misconduct claim. *People v Cook* (2006) 39 C4th 566, 606, 47 CR3d 22.

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§30.21 2. Timing

The prosecution has the first opportunity to make an opening statement. Pen C §1093(b). It is the authors' view that, in jury trials, the prosecution should always make an opening statement. It gives the jury the prosecution's overview of the case, focuses the jury's attention on the issues most important to the prosecution, and, if done effectively, creates a favorable impression that makes the jury more receptive to prosecution evidence.

The defense can make an opening statement immediately after the prosecution's opening statement or can wait until before the presentation of the defense case ("reserve it"). Pen C §1093(b). Talented and experienced defense attorneys frequently disagree on which is the better choice.

The main argument in favor of an early opening statement is that first impressions are powerful and lasting. Jurors may decide at the beginning of trial whether the defendant is guilty and, if they hear nothing from the defense, may conclude that the defendant must be guilty. If counsel is confident in its case, and if putting the prosecutor on notice of it does not create a tactical disadvantage, defense counsel can make effective use of an opening statement at the beginning of trial to shoot holes in the prosecution's case and focus the jury's attention at the outset on issues significant to the defense. Yet, by making an early opening statement, the defense may alert the prosecution to the nature of the defense, or to more details than were given to the prosecution during discovery. See discussion of prosecutorial discovery in §§11.9-11.11.

Reserving the opening statement until after the prosecution has presented its case may allow the defense to take full advantage of the prosecution's lack of preparation for the defense case. If defense counsel decides to reserve its opening statement, counsel may wish to ask the court to explain to the jury the options the defense has, remind the jury that the burden of proof is on the prosecution, and point out that counsel is merely following the rules on the presentation of evidence and is not trying to hide something. See Pen C §1093(b).

Waiving an opening statement entirely is also a possibility for the defense, which may be considered when counsel has little or no evidence to offer on the defendant's behalf. See, *e.g., People v Carter* (2005) 36 C4th 1114, 1189, 1193, 32 CR3d 759 (defense counsel "was placed in the extremely challenging position of representing a defendant clearly linked to the deaths of five women, four of whom died by strangulation within days of each other, as well as to the near fatality by strangulation of a sixth woman"). In general, however, this is the worst alternative because it allows the prosecutor to make an opening statement without rebuttal, and to present the case-in-chief and closing argument before the jury hears anything from defense counsel. Even if the defense can offer only a general denial, this can usually be worked into an opening statement.

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E. Direct Examination

§30.22 1. Preparation for Direct Examination

Counsel should use an outline of the evidence to be elicited from each witness whether on direct or cross-examination. The courtroom is a stressful environment; even the most skilled and experienced trial attorney would be foolhardy to rely on memory alone during direct examination. Although the outline should be used as little as possible during the actual examination, counsel can request a moment from the court to review the outline once the questioning is completed to make sure that nothing has been omitted. The outline should include both the testimony to be elicited and the exhibits to be used with each witness, to ensure that exhibits will not be overlooked.

Ø **Note:** Counsel should avoid interrupting the flow of the examination by having physical evidence marked at a break before examination of the witness begins.

Some attorneys go beyond a simple outline and write out each question to be asked. While this approach may ensure that questions will not be objectionable, it can result in a monotonous and stilted presentation, which presumes that the witness will respond in a predetermined way. This is not only ineffective and unrealistic (assuming that the witness has not been given a script), but it can deprive the attorney of the flexibility of taking advantage of responses that are helpful to the case. There are exceptions, of course; some attorneys are able to use written questions, yet remain flexible and appear spontaneous.

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§30.23 2. Order of Presentation of Witnesses

Once counsel knows who will testify and what that testimony will be, counsel can concentrate on the order of witnesses to ensure the greatest impact on the jury. Counsel is much like the director of a play, who needs to grab the audience's attention and keep it. There is no single method of presenting evidence. Although most attorneys present cases chronologically, it is sometimes better to start at the end (*e.g.,* finding the body) and then jump to the beginning, and occasionally it may be most effective to start in the middle. If counsel has provided jurors with a memorable road map of the case in the opening statement, the order in which evidence is presented can be varied as needed to have the greatest impact on the jury.

Pacing and timing are important. The case should peak to dramatic moments, but should also have a few valleys to make the peaks noticeable. Key witnesses should be presented when the jury is fresh and alert, while less important witnesses, *e.g.,* chain of custody or exhibit identification witnesses, can be put on late in the day when jurors are more likely to be tired.

Counsel should expect his or her grand design to be interrupted. The pathologist or treating physician may suddenly become unavailable (thus, it is good practice to put physicians on as the first witness in the morning); the investigating officer may be busy investigating a homicide; or the prison system may fail to deliver the star witness. Some of these problems can be anticipated and possibly avoided; others cannot. Counsel should remain flexible and be ready to proceed with a different witness when necessary because many judges will not allow a continuance during trial if other witnesses have been subpoenaed.

Jurors' attention span is limited. It is bad practice to call several technical experts consecutively, *e.g.,* a criminalist, fingerprint expert, doctor, psychiatrist, or crime-scene technician, and expect jurors to concentrate at all times.

Counsel should also keep in mind the attention span of witnesses, especially children. Children need frequent breaks. Like adults, they are most alert at the beginning of the day. If a child cannot testify on the morning planned, it is best to send him or her home and schedule that testimony for the next morning.

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§30.24 3. Style of Direct Examination

In examining a witness, communication between the witness, the examining attorney, and the jury is of the utmost importance. The lawyer should speak like someone engaged in everyday conversation, not talking down to the witness, and avoiding jargon by using simple words whenever possible (*e.g.,* "before" instead of "prior to," and "after" instead of "subsequent to").

On direct examination, the witness should generally be the focal point of the jury's attention. The attorney serves merely as a conduit to direct the flow of testimony and highlight significant points. The attorney should minimize his or her own presence and not distract the jury's attention from the witness. An exception to the rule occurs when the witness is hostile or the attorney wants to highlight a particular point. To achieve this goal, the attorney may take center stage from the witness.

On direct as on cross-examination, the attorney should rarely ask a question without knowing the answer. The courtroom is not the place to go fishing with new questions involving areas not fully covered with the witness, for this frequently ends in disaster.

On direct examination, see Effective Direct & Cross-Examination (Cal CEB 1986); California Expert Witness Guide, chap 13 (2d ed Cal CEB 1991); Effective Introduction of Evidence in California (2d ed Cal CEB 2000).

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§30.25 F. Cross-Examination

As a rule, the cross-examiner should aim for one or more of the following goals during cross-examination:

- Impeach the witness with prior inconsistent statements;
- Discredit the witness's direct testimony on substantial issues;
- Corroborate matters that are significant to the cross-examiner's case; and
- Establish bias, interest, or motive for the witness's testimony.

For a more thorough list of the goals of cross-examination, see CALCRIM 105; see also CALJIC 2.20.

Seldom is a witness totally destroyed no matter how clever the cross-examiner appears to be. In fact, a too forceful cross-examination can be harmful if the jury perceives the witness as an underdog who is relentlessly attacked by counsel. Courtesy is a requisite for attorneys during cross-examination as it is throughout the trial. Not every witness to be cross-examined is a liar. As with all rules, however, there are exceptions. Sometimes counsel must be aggressive, and if this is done with an appropriate witness, the jury will understand.

Attorneys should remember that cross-examination is not required. Often, the best cross-examination is counsel's statement "No questions, thank you."

Cross-examination is often perceived as more crucial to the defense than to the prosecution because the defense frequently relies solely on the cross-examination of the prosecution's witnesses to develop its case. However, many a close case has been won or lost on the quality (or its lack) of the prosecutor's cross-examination. Whether the defense or prosecution is doing the cross-examination, the same principles apply. Counsel should anticipate what he or she wants to elicit from each witness and prepare an outline for the cross-examination accordingly. If it will be necessary to impeach the witness, it is particularly important for counsel to have a thorough knowledge of the witness's prior statements and to be able to quickly locate any inconsistencies.

> Ø **Note:** Although not usually done, the court can limit cross-examination to a "reasonable" time period. *People v Ducu* (1991) 226 CA3d 1412, 1415, 277 CR 464. In addition, the court can impose other reasonable limits on cross-examination because of concerns such as marginal relevance, repetition, harassment, prejudice, confusion of the issues, or the witness's safety. See *Fowler v Sacramento County Sheriff's Dep't* (9th Cir 2005) 421 F3d 1027, 1035.

On cross-examination, see Effective Direct & Cross-Examination (Cal CEB 1986); California Expert Witness Guide, chaps 14-15 (2d ed Cal CEB 1991).

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G. Objections

§30.26 1. Trial Strategy

Generally, skilled trial lawyers make few objections during trial—not because the form of the question is usually proper, but because there is often more to lose than to gain from an objection. An objection calls the jury's attention to the question and may make it appear that the attorney is trying to hide information from jurors. Moreover, objections are often ineffective, particularly when made to the form of the question because a skilled lawyer can rephrase the question in a nonobjectionable fashion. Objections should be saved for when they are significant, *e.g.,* when necessary to perfect the record on appeal, or when they are likely to result in the exclusion of evidence.

When counsel does object, the objection should "fairly [apprise] the trial court of the issue it is being called upon to decide." *People v Scott* (1978) 21 C3d 284, 290, 145 CR 876; see *People v Mattson* (1990) 50 C3d 826, 854, 268 CR 802. The court must rule on all objections. See *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 698, 39 CR 64. See also California Trial Objections §4.20 (Cal CEB Annual).

Ø **Note:** Some attorneys review the Evidence Code before each trial to refresh their memory of the bases for objections and the grounds for the admissibility of evidence.

Lawyers can avoid most important objections during trial by planning ahead whenever possible. With the broad discovery now available to both prosecution and defense, attorneys should be able to anticipate the issues that are likely to arise. Evidence of questionable admissibility can be dealt with before the witness testifies by motions in limine (discussed in §§30.19, 31.8). Similarly, a competent attorney will obtain court approval of any questionable legal issue out of the jury's presence and before the issue arises during trial to avoid interruptions in the flow of the case and a possible mistrial.

Information on the form and substance of trial objections is in Trial Objections.

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§30.27 2. Objections to Attorney Misconduct

Counsel should be specific in objecting to misconduct at any stage of the trial, especially during closing argument. Conduct may be found improper by the court on appeal, but the error may be held to have been waived by the failure to object or by an ambiguous objection, on the ground that the effect of the misconduct could have been cured by a timely admonition. See, *e.g., People v Bloom* (1989) 48 C3d 1194, 1213, 259 CR 669; *People v Bittaker* (1989) 48 C3d 1046, 1104, 259 CR 630.

A showing of "bad faith" is not required to establish attorney misconduct. The standard is an objective one. "We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656. In *People v Bolton* (1979) 23 C3d 208, 212, 152 CR 141, the California Supreme Court eliminated bad faith as a prerequisite for establishing prosecutorial misconduct, explaining: "The emphasis on intentionality is misplaced. 'Injury to the appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" (Citation omitted.)

Cases in the last decade generally mention two requirements for objecting to attorney misconduct: an objection and a request for an admonition. See, *e.g., People v Bloom, supra*; *People v Heldenburg* (1990) 219 CA3d 468, 268 CR 255; *People v Martinez* (1987) 191 CA3d 1372, 1384, 237 CR 219. Earlier cases required the objection to be asserted as an assignment of misconduct. See, *e.g., People v Hampton* (1956) 47 C2d 239, 302 P2d 300. The better practice now seems to be to follow these steps: (1) make a timely objection; (2) describe the misconduct to which objection is made; (3) specify the grounds for the objection; and (4) request specific relief.

The requested relief should be tailored to the harm. The most common types of relief are an admonition to disregard the misconduct and a mistrial. Less common is asking the court to hold opposing counsel in contempt. If the court's corrective action is insufficient, counsel should make a further record establishing with specificity why the relief is insufficient and why the requested relief should be granted. See *People v Heldenburg, supra*. For a suggested admonition, see *People v Bolton* (1979) 23 C3d 208, 216 n5, 152 CR 141.

Attorney misconduct applies to both prosecutors and defense attorneys. Although the prosecution may not appeal a trial acquittal, it is important for the court to hold defense counsel accountable because it may affect the outcome of the case. The prosecutor may request an admonishment or an instruction that defense counsel's statement, argument, or line of questioning is improper and should be disregarded.

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§30.28 H. Deciding Whether Defendant Should Testify

One of the most difficult decisions for defense counsel in preparing a case is whether to have the defendant testify. Some attorneys believe that the defendant should testify whenever possible because jurors find it difficult to acquit otherwise. In the authors' opinion, however, defense counsel should keep the defendant off the stand unless he or she has an exceptionally good story to tell and can perform well under cross-examination. If the defendant tells an unbelievable story or comes across as less than believable on cross-examination, a jury may well decide that the defendant is lying because he or she is guilty. In other words, reasonable doubt goes out the window and the trial becomes a credibility contest between prosecution witnesses and the defendant. Although the absence of a defendant's testimony may raise questions, the judge will inform the jury that they can draw no inferences from the fact that the defendant did not testify (CALCRIM 355). After hearing that instruction, the jury will be more amenable to concentrating on any weaknesses in the prosecution's case.

In some cases, the defendant should be encouraged to testify—especially when his or her testimony is necessary to provide the factual basis for the defense (*e.g.,* when the defense is consent in a sexual assault case or self-defense in a homicide case). If the defendant is to testify, every effort must be made to enhance the defendant's credibility. Many defendants are not naturally effective witnesses and preparation is essential. Preparation may include practice cross-examination by an attorney not associated with the case. Videotaping may be helpful, particularly when the defendant appears evasive or has an off-putting mannerism of which he or she is not aware. Preparation may also convince a defendant who intended to offer a palpably absurd story not to testify.

The defendant has a constitutional right to testify (*People v Robles* (1970) 2 C3d 205, 215, 85 CR 166) and to refrain from testifying (US Const amends V, XIV; Cal Const art I, §15; see CALCRIM 355). Whatever decision the defendant makes, the court should advise the defendant on the record and out of the jury's presence of the right to testify or not testify. This procedure avoids any future claim that the defendant was either forced to testify or denied the right to testify. The prosecution wants this on the record to avoid an appealable issue, and defense counsel wants the matter on the record to avoid a later claim of inadequate representation of counsel. This advisement can be an important part of the record on appeal or on habeas. See, *e.g., U.S. v Layton* (ND Cal 1987) 666 F Supp 1369, 1372, aff'd (9th Cir 1988) 855 F2d 1388, 1416. *Layton* suggests a variety of ways counsel can contemporaneously memorialize investigation, preparation, and trial decisions to ensure adequate recollection in a later challenge.

Under the reciprocal discovery rules, the defense need not disclose to the prosecution whether the defendant will testify as a witness. Pen C §1054.3(a). The defendant's decision on whether to testify, however, may have an impact on what additional witnesses the defense intends to call; disclosure of those witnesses to the prosecution is required by Pen C §1054.3. The defendant may want to wait until the close of the prosecution's case before deciding.

Defense counsel should document the file to support a late decision by the defendant to testify in the event the prosecutor makes a motion for sanctions for failure to make timely disclosures (see chap 11). Although counsel will sometimes not know whether the defendant will testify, counsel usually knows what additional witnesses to call if the defendant does testify. Thus, the prosecutor can argue that the defense should have reasonably anticipated calling those witnesses and should have revealed the discovery material on those witnesses required by Pen C §1054.3. The defense can argue that discovery concerning defense witnesses is not required until the time the defense reasonably decides to call them.

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§30.29 I. Rebuttal and Surrebuttal

Rebuttal evidence is evidence put on by the prosecution after the defense has completed its case (rested). Rebuttal does not include evidence that should have been included in the prosecution's case-in-chief. Rebuttal evidence "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." *People v Carter* (1957) 48 C2d 737, 753, 312 P2d 665. See also *People v Daniels* (1991) 52 C3d 815, 859, 277 CR 122 (error to introduce defendant's admission on rebuttal, but harmless); *People v Gay* (1972) 28 CA3d 661, 672, 104 CR 812, quoting from *People v Harrison* (1963) 59 C2d 622, 629, 30 CR 841 (no specific objection to rebuttal evidence, and no abuse of discretion). Just because a defendant takes the witness stand and denies guilt does not open the door for the prosecution to introduce evidence that should have been offered in its case-in-chief. *People v Carter, supra*.

It is proper to introduce evidence in rebuttal if counsel was unaware of the need for such testimony until after the case-in-chief was presented. *People v Gates* (1987) 43 C3d 1168, 1184, 240 CR 666. Admission of rebuttal evidence is primarily in the court's discretion. *People v Gates, supra*. The *Gates* court also pointed out that the trial courts are allowed discretion in setting the order of proof.

Examples of proper rebuttal evidence include the defendant's statements about the crime that are contrary to his or her testimony, evidence to rebut an alibi, and evidence of similar acts of misconduct to prove intent when the defendant has testified that he or she lacked the requisite intent. See *People v Haskett* (1990) 52 C3d 210, 242, 276 CR 80 (use of psychiatrist during penalty phase of homicide case); *People v Gallego* (1990) 52 C3d 115, 149, 276 CR 679 (similar acts of misconduct); *People v Kelly* (1990) 51 C3d 931, 964, 275 CR 160 (evidence of sale of victim's ring to rebut testimony that defendant was honest and hard-working).

> Ø **Note:** If the trial court decides to permit damaging rebuttal evidence, counsel should consider requesting a continuance to obtain evidence for surrebuttal. See *People v Gallego, supra*.

After the prosecution has completed its rebuttal, the defense can present surrebuttal. The same restrictions that apply to rebuttal apply to surrebuttal. See *People v Remington* (1925) 74 CA 371, 376, 240 P 526.

Further rebuttal and surrebuttal are allowed as needed. See Pen C §1093(d).

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J. Argument

§30.30 1. Description and Time Limits

After all evidence has been presented, both sides may argue the case to the court and jury. The prosecution starts with its summation, followed by the defense argument, then the prosecution has a closing argument. Pen C §1093(e). If the defense makes no closing argument, the prosecution cannot make a second (closing) argument, because it is supposed to be a rebuttal of the defense argument. See Pen C §1093(e).

Although there are no statutory time restrictions on argument, it is in the trial court's discretion to control proceedings by limiting evidence and argument (Pen C §1044). In some counties, trial judges set limits, *e.g.,* 1 hour for each side, but in other counties, limits are rarely set. In general, the more serious the case the longer the time limit, or the more likely it is that the judge will not set a time limit. Too short a limit on argument, particularly in a serious case, can infringe on the defendant's rights to counsel and to due process. *People v Green* (1893) 99 C 564, 567, 34 P 231. See also *In re William F.* (1974) 11 C3d 249, 113 CR 170, overruled on other grounds in *People v Bonin* (1988) 46 C3d 659, 695 n4, 250 CR 687 (trial court's refusal to permit defense counsel to argue denied defendant effective assistance of counsel).

The trial court has discretion to reopen final argument if the jury reports it is deadlocked and the court determines further action may assist the jury in reaching a verdict. Cal Rules of Ct 2.1036(b)(3). See *People v Young* (2007) 156 CA4th 1165, 67 CR3d 899.

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§30.31 2. Preparing Final Argument

Ideally, final argument should be prepared long before the first witness is called to testify. Although developments do occur during the course of a trial, a properly prepared attorney generally knows what evidence is likely to be presented. Having developed a theory of the case, knowing what must be proved and what the opposition is likely to raise, and knowing what instructions the jury will receive, the attorney is in a good position before trial begins to formulate a closing argument.

As a practical matter, a good closing argument outline should be formulated well before the presentation of evidence because it can aid counsel in knowing what evidence to present during trial and because counsel will not have much time to prepare an argument after the evidence has been presented.

Jury instructions afford a good starting point for the preparation of argument; most arguments revolve around instructions important to the case. Counsel should decode them so they are comprehensible to jurors, and show how the evidence fits into them, thereby establishing the defendant's guilt or innocence. If the attorney has any special instructions that he or she will submit to the court, they will likely play a crucial role in the final argument.

It is good practice for counsel to make notes of things that develop during the trial that can be incorporated into the argument, *e.g.,* a witness's particular phrase ("it was the worst possible nightmare come true"), body language (downcast eyes, curling into a seated fetal position), or any inspirational flashes counsel has. Whatever method of organization counsel uses, there should be a section for "argument ideas" to preserve these thoughts.

What holds true for the jury's ability to remember witnesses' testimony also applies to their ability to recall counsel's argument: The more senses appealed to, the greater the likelihood that jurors will understand and remember counsel's interpretation of the evidence. Thus, demonstrative evidence should be incorporated into the argument. Such evidence includes physical items introduced into evidence, photographic enlargements of key jury instructions, and computer program presentations (*e.g.,* PowerPoint) or charts that demonstrate how certain key pieces of evidence link (or fail to link) together to establish the defendant's guilt or innocence. These visual aids should be prepared as early as possible, particularly if professional preparation is required.

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§30.32 3. Argument Techniques

The fundamental purpose of argument is to persuade the jury to the attorney's point of view. Counsel has the right to discuss the merits of the case, the law and facts, and counsel's view of what the evidence shows and what conclusions may fairly be drawn from application of the law to the facts. *People v Beivelman* (1968) 70 C2d 60, 76, 73 CR 521.

This is the time to review and consolidate the evidence in a logical fashion—bringing it together to form the big picture. The attorney's theory of the case (see §30.15) is again useful, for it allows a point of organization for the evidence produced and an explanation of the significance of that evidence. The testimony and evidence can be tied to the key instructions of law to support counsel's theory of the case. At the same time, the attorney can show the discrepancies and weaknesses of the opposition.

One of the most difficult things attorneys learn about argument is that they must be themselves, without imitating another lawyer's style. Sincerity is important. If an attorney does not appear to believe in what he or she is saying, the jury may not believe it either.

Communication flows through eye contact. Anything that interrupts direct communication with the jury, such as reading to jurors, subtracts from the impact of what is said. Any reading should be limited to one or two very brief, concise items. Counsel should never read an entire argument to the jury; eye contact will be lost, and communication will be impersonal and unconvincing.

Lawyers spend years and a lot of money acquiring a vocabulary that is intelligible only to other lawyers. Even among lawyers, reasonable minds may differ on what particular legal terms mean. Attorneys cannot "talk like a lawyer" to jurors. They must communicate in plain, understandable English. This does not mean talking down to jurors, for a patronizing demeanor will alienate them. The old adage taught in basic public speaking applies: "Know your audience and speak to them accordingly."

One of the fundamental goals of closing argument is to translate the legalese of jury instructions into comprehensible language and concepts. In explaining important jury instructions, it is helpful to reduce each one to common experiences, thereby bridging the gap between the legal definition and its application to everyday affairs. For example, jurors can be told that conspirators or aiders and abettors are "partners in crime."

Communication requires a clear, logical presentation. Reason and logic, however, do not exclude emotion. To help maintain the jury's interest, counsel's tone of voice should vary during the presentation. Using diagrams and charts to illustrate the law or the evidence, or to tie the two together, can be extremely effective. Counsel may also use illustrations from common experience, history, or literature (*People v Love* (1961) 56 C2d 720, 730, 16 CR 777, overruled on other grounds in *People v Morse* (1964) 60 C2d 631, 637, 36 CR 201; *People v Travis* (1954) 129 CA2d 29, 37, 276 P2d 193), and discuss matters of common knowledge (*People v Johnson* (1950) 99 CA2d 717, 730, 222 P2d 335) to make the presentation more interesting and forceful.

Spontaneity of presentation frequently projects sincerity. Argument should not appear rehearsed or memorized. Further, counsel needs flexibility in the presentation to react to the moment and the audience. This does not mean that counsel should merely improvise. Counsel should always have an outline of the points that must be covered and verify that each point has in fact been addressed.

The presentation should be only as long as necessary to effectively present counsel's argument. Most people have short attention spans for speeches. While charts, models, diagrams, photographs, and voice fluctuations can extend that span, counsel should not bog down in a clutter of detail. Counsel should make the major points, then sit down.

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§30.33 4. Improper Argument

Counsel's argument may be vigorous as long as it amounts to fair comment on the evidence. Counsel have wide latitude to draw reasonable inferences or deductions from the evidence presented at trial, to refer to matters of common knowledge (*People v Mendoza* (2000) 24 C4th 130, 172, 99 CR2d 485), and to use illustrations drawn from common experience, history, or literature (*People v Vargas* (2001) 91 CA4th 506, 569, 110 CR2d 210). Counsel may not otherwise argue facts that are not in evidence. *People v Kirkes* (1952) 39 C2d 719, 249 P2d 1; *People v Villa* (1980) 109 CA3d 360, 167 CR 265. Counsel also have broad discretion in discussing the legal and factual merits of a case; however, it is improper to misstate the law. *People v Mendoza* (2007) 42 C4th 686, 702, 68 CR3d 274. See, *e.g., People v Katzenberger* (2009) 178 CA4th 1260, 101 CR3d 122.

It is improper for the prosecution to comment on a defendant's failure to testify. *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229; *People v Modesto* (1967) 66 C2d 695, 709, 59 CR 124. It is also generally improper for a prosecutor to comment on a defendant's postarrest silence after he or she was advised of the constitutional right to remain silent. *Doyle v Ohio* (1976) 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240. See *Greer v Miller* (1987) 483 US 756, 97 L Ed 2d 618, 107 S Ct 3102, which reviews several Supreme Court decisions following *Doyle*. However, when defense evidence gives the false impression that a defendant was not given the opportunity to comment or provide his or her "side of the story," a prosecutor's reference to the defendant's refusal to speak to police is permissible as a "fair response" to this claim. *People v Champion* (2005) 134 CA4th 1440, 1448, 37 CR3d 122. See *Anderson v Charles* (1980) 447 US 404, 408, 65 L Ed 2d 222, 100 S Ct 2180 ("*Griffin* and *Doyle*'s protection of the right to remain silent is a 'shield,' not a 'sword' that can be used to cut off the prosecution's 'fair response' to the evidence or argument of the defendant").

A prosecutor's comment on *prearrest* silence is permissible unless the facts indicate and the court finds that the silence was the accused's invocation of the right to remain silent. *People v Free* (1982) 131 CA3d 155, 165, 182 CR 259.

It is not misconduct under *Griffin* to comment on the state of the evidence, the failure of the defense to call logical witnesses, the failure of the defense to present material evidence, or the defendant's tailoring of his or her testimony to conform with that of the witnesses who preceded the defendant to the witness stand. *Portuondo v Agard* (2000) 529 US 61, 146 L Ed 2d 47, 120 S Ct 1119 (in weighing credibility of victim against that of defendant, permissible for prosecutor to call jury's attention to fact that defendant had opportunity to hear all other witnesses testify and to tailor his own testimony accordingly); *People v Miller* (1990) 50 C3d 954, 995, 269 CR 492 (DA's comments were response to defense argument that there was no pattern to murders); *People v Ratliff* (1986) 41 C3d 675, 691, 224 CR 705 (proper for DA to comment, "Now, is there any evidence on the other side? None has been presented to you"); *People v Szeto* (1981) 29 C3d 20, 34, 171 CR 652 (DA properly commented that defense had produced no alibi witnesses); *People v Lewis* (2004) 117 CA4th 246, 256, 12 CR3d 1 (DA's comment on defense failure to request live lineup was proper). The courts have drawn a very fine line; counsel should be cautious.

> Ø **Note:** These rules apply not only to prosecutors but to attorneys for codefendants being jointly tried. *People v Hardy* (1992) 2 C4th 86, 157, 5 CR2d 796.

It is improper for counsel to state a personal belief about the credibility of witnesses (*People v Perez* (1962) 58 C2d 229, 245, 23 CR 569) or about the defendant's guilt or innocence (*U.S. v Young* (1985) 470 US 1, 8, 84 L Ed 2d 1, 8, 105 S Ct 1038; *People v Modesto* (1967) 66 C2d 695, 714, 59 CR 124) unless it is stated as being based on the evidence (*People v Green* (1980) 27 C3d 1, 35, 164 CR 1, overruled on other grounds in *People v Martinez* (1999) 20 C4th 225, 241, 83 CR2d 533). See *People v Alvarado* (2006) 141 CA4th 1577, 1581, 47 CR3d 289 (prosecutor impermissibly invited jury to convict on the basis of her own opinion and "prestige" of her office by referring to her "duty" and "oath" not to prosecute a case if she had any doubt that a crime occurred).

It is improper for the prosecutor to intentionally and in bad faith argue inconsistent and irreconcilable factual theories in two severed trials that attribute to each defendant acts that could have been committed by only one person. *In re*

Sakarias (2005) 35 C4th 140, 156, 25 CR3d 265. It is also improper for a prosecutor to misstate the law in closing argument; however, the issue is waived when the defense fails to object. *People v Anzalone* (2006) 141 CA4th 380, 392, 45 CR3d 876.

See §30.27 on objecting to misconduct, §§33.20-33.21 on jury misconduct, chap 2 on attorney misconduct, and §2.45 on prosecutorial misconduct.

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SELECTED TRIAL MOTIONS

E. THOMAS DUNN, JR.
ALAN J. CRIVARO

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§31.1 I. OVERVIEW

Motions that may be filed in a trial court are limited only by the circumstances of a particular case and counsel's imagination and creativity. See the checklist in §31.3. This chapter discusses general considerations in making trial motions, including timing, format, reporting, and remedies. See §§31.4-31.7. This chapter also examines a variety of evidentiary motions, including motions in limine, and reviews methods of introducing and opposing the introduction of documentary and other demonstrative evidence, bases for motions to exclude or limit evidence, and motions to admit or attack specific types of evidence such as prior testimony and proof of prior convictions. See §§31.8-31.32. Technical evidentiary objections are not discussed in this book. See generally Jefferson's California Evidence Benchbook (4th ed CJA-CEB 2009); California Trial Objections (Cal CEB Annual).

Other portions of this chapter explore the requirement that the prosecution select the particular act on which it intends to rely in proving the charged count (see §31.33); sanctions for discovery violations (see §31.34); jury issues (see §§31.35-31.40); control in the courtroom and courthouse (see §§31.41-31.43); an in-custody defendant's appearance and needs (see §31.44); and motions for judgments of acquittal (§§31.45-31.46). Motions for mistrial are discussed in chap 25. Finally, appellate review of trial motions is briefly addressed. See §31.47.

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§31.2 II. DEADLINES IMPOSED BY LOCAL RULES AND PRACTICE

No general statute or California rule of court governs the timing of trial motions. Because of the time standards for disposing of criminal cases (see Cal Rules of Ct, Standards of J Admin 2.2(j)-(m)), however, many courts have promulgated unique procedures, some written and some unwritten, to expedite motions and trials. Failure to learn and follow these procedures can cause, at the least, embarrassment and inconvenience and, in some cases, consequences as significant as forfeiture of the right to bring certain motions. The safest course for new and seasoned practitioners alike is to become familiar with the local rules and discuss procedural questions with colleagues who practice before the court and with clerks of the court to which each case is assigned to ensure compliance with applicable local rules and practice. See §1.16. Many California counties, including all the counties with large populations, have posted their local rules on the Judicial Council's website, http://www.courtinfo.ca.gov/rules/localrules.htm.

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§31.3 III. CHECKLIST: TRIAL MOTIONS

Defense Motions

Motions to Exclude Evidence

- Prosecution failed to disclose evidence favorable to the defendant on the question of guilt or innocence or failed to disclose evidence in response to a discovery order. See chap 11.
- New prosecution discovery. See chap 11.
- Immunity for defendant or defense witness. See chap 49.
- Confession or admission illegally obtained. See chap 23.
- Prior conviction used to make a misdemeanor a felony, as an element of the crime, or to enhance sentence. See chap 24.
- Evidence of offense or act similar to crime charged. See §§24.52-24.55. See also Jefferson's California Evidence Benchbook §§35.18-35.40 (4th ed CJA-CEB 2009).
- Witness's prior felony conviction or prior misdemeanor conduct. See chap 24.
- Unnecessarily gruesome and inflammatory photographs. See §31.30. See also California Trial Objections, chap 30 (Cal CEB Annual).
- Identification of defendant tainted. See §22.21.
- Witness's identification of defendant, or other testimony, hypnotically induced. See §22.18.
- Prosecution's improper use of preliminary hearing transcript instead of testimony of witness. See §8.47.
- Witness will incriminate himself or herself if required to testify. See Trial Objections, chap 46.

Other Defense Motions

- Request for hearing on need for a support person's presence during molestation victim's testimony. *People v Lord* (1994) 30 CA4th 1718, 1722, 36 CR2d 453.
- For judgment of acquittal. Pen C §§1118-1118.1. See §§31.45-31.46.
- Regarding courtroom security, defendant's custody status and appearance. See §§31.41-31.44.
- Allow defendant to show certain of his or her physical characteristics without testifying. *U.S. v Bay* (9th Cir 1984) 762 F2d 1314, 1315. See *People v Perez* (1989) 216 CA3d 1346, 1352, 265 CR 400 (display of defendant's tattoo to jury denied for lack of proper foundation).
- Force prosecutor to elect specific incident that supports charge. See §31.33.
- Close trial to press and public during all or part of the trial. See chap 14.
- For an interpreter to interpret for the defendant exclusively. See *People v Menchaca* (1983) 146 CA3d 1019, 1023, 194 CR 691. See also §52.7.
- Dismiss because immigration authorities deported a witness who would have provided material testimony favorable to the defense. *People v Valencia* (1990) 218 CA3d 808, 825, 267 CR 257; *U.S. v Valenzuela-Bernal* (1982) 458 US 858, 873, 73 L Ed 2d 1193, 1206, 102 S Ct 3440. See §52.34.
- Dismiss because of prosecutor's unlawful suppression of exculpatory evidence, *e.g.,* a confession by someone other than defendant. *Brady v Maryland* (1963) 373 US 83, 87, 10 L Ed 2d 215, 218, 83 S Ct 1194; *People v Robinson* (1995) 31 CA4th 494, 498, 37 CR2d 183. See §11.26.

Prosecution Motions

- Provide immunity for a witness. See chap 49.
- Continuance because of defense testimony of which prosecutor was unaware. Pen C §1051. See §20.23.

- Exclude defendant from face-to-face view of witness. *Maryland v Craig* (1990) 497 US 836, 853, 111 L Ed 2d 666, 683, 110 S Ct 3157 (no confrontation right violation by defense attorney's using statutory procedure for closed-circuit television examination of child abuse victim, when witness is unable to see defendant).
- Exclude evidence of victim's sexual conduct in certain sex crime cases. Evid C §1103(c).
- Exclude sex crime victim's address and telephone number. Evid C §352.1.
- Require defendant to display certain physical characteristics to the jury or to provide fingerprints, voice exemplars, or handwriting samples. *U.S. v Dionisio* (1973) 410 US 1, 14, 35 L Ed 2d 67, 79, 93 S Ct 764.
- Have defendant utter certain words. *U.S. v Wade* (1967) 388 US 218, 222, 18 L Ed 2d 1149, 1154, 87 S Ct 1926.
- Have defendant wear certain clothing. *Holt v U.S.* (1910) 218 US 245, 252, 54 L Ed 1021, 1030, 31 S Ct 2.
- Have defendant wear head or facial hair in a particular way. *U.S. v Valenzuela* (9th Cir 1983) 722 F2d 1431, 1433 (defendant required to shave full beard and mustache).
- Require defendant to be present. See Pen C §§977(b), 1043.

Motions That May Be Brought by Defense or Prosecution

- Witness incompetent to testify because of inability to understand the duty to tell the truth, *e.g.,* because of age, mental illness, or influence of drugs or alcohol. Evid C §701(a)(2). See Trial Objections, chap 18.
- Striking witness's testimony because counsel was deprived of the right to cross-examine witness. See Evidence Benchbook §8.2.
- Admit new or novel scientific evidence. *People v Leahy* (1994) 8 C4th 587, 598, 34 CR2d 663; *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144. See §§31.12-31.15.
- Contempt. See chap 58.
- Continuance motion. See chap 20.
- Discovery motion (when reasons arise during trial). See chap 11.
- Motion for sanctions under Pen C §1054.5(b) for noncompliance with discovery procedures. See chap 11.
- Dismiss. See chap 25.
- Examination of defendant's mental competence (when reasons arise during trial). See chap 48.
- Exclude witnesses from courtroom. Evid C §777.
- Renewed motion to change venue. See chap 15.
- Recuse counsel (when reasons arise during trial). See chap 18.
- Severance motion (when reasons arise during trial). See chap 7.
- Standard evidentiary objections, such as privilege or calls for narrative response.
- Test veracity of testimony concerning witness observations. *People v Fudge* (1994) 7 C4th 1075, 1104, 31 CR2d 321.
- For jury to view scene. Pen C §1119. See *People v Williams* (1997) 16 C4th 153, 212, 66 CR2d 123 (standard for reviewing court's decision is abuse of discretion); *People v Lang* (1989) 49 C3d 991, 1025, 264 CR 386 (defendant's presence at scene of crime may be waived).
- Admit demonstrative evidence. See §§30.12-30.13.
- Admit reenactment of crime. See §30.13.
- Exclude members of the media from the courtroom. See §§14.8-14.15.
- Allow counsel's in-court use of personal tape recorder for trial notes. Cal Rules of Ct 1.150(d).
- For special security measures, such as metal detector screening and full body pat searches. See *Gibson v Superior Court* (1982) 135 CA3d 774, 783, 185 CR 741. See also *Holbrook v Flynn* (1986) 475 US 560, 567, 89 L Ed 2d 525, 533, 106 S Ct 1340 (allowing uniformed state troopers as extra security in front row of spectators' section not error); *People v Ainsworth* (1988) 45 C3d 984, 1003, 248 CR 568 (guards in courtroom).

- For mistrial. See chap 25.

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IV. GENERAL CONSIDERATIONS FOR TRIAL MOTION PRACTICE

§31.4 A. Make Motion as Soon as Practicable

The parties should complete discovery as far in advance of the trial as possible. For discussion of discovery, see chap 11. Once discovery is completed, counsel may prepare and make those motions that must, or may, be brought before trial. As a rule, motions should be made as soon as practicable after counsel becomes aware of the need for a ruling. The sooner discovery is completed, the more time will be available to prepare well-developed pretrial motions, motions in limine, and other trial briefs, and to ready the case for trial. Any motion that may be resolved before trial will contribute to an orderly trial with minimum surprises.

Ø **Practice tip:** Counsel should refer to relevant jury instructions to check the elements of the crimes and defenses before deciding what motions to prepare. It is often helpful for counsel to prepare a checklist including the elements of each crime and defense, and listing the items of evidence that counsel anticipates will be presented by *both* parties to prove each required element. This approach not only ensures that evidence is organized logically for presentation at trial, it also helps counsel identify evidence that needs to be addressed in pretrial motions.

Pretrial motions are beyond the scope of this chapter. For a list of motions that must be brought before trial, see §18.4.

Ø **Note:** Even motions that are ordinarily pretrial motions may be made at trial if the grounds for the motion only arise or become known at that time.

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§31.5 B. Deciding Whether Motion Should Be Written or Oral

Whenever possible, motion should be written. Whenever possible, a motion should be made in writing, supported by a memorandum and, when factual matters are at issue, a declaration or affidavit under penalty of perjury. On form and format requirements for a memorandum in support of a motion, see Cal Rules of Ct 3.1113. See also §§18.5-18.7. The motion should be concise, indicating the issues, cases, statutes, and rules that bear on the matter. The memorandum should inform the court of the nature of the relief sought, explain the legal basis for the request, and describe the prejudice that will result if relief is denied. Copies of the motion should be given to opposing counsel and co-counsel in advance of the hearing.

Ø **Practice tip:** If there is a federal constitutional basis for the motion, the memorandum should cite the specific constitutional provision and any U.S. Supreme Court decisions that support the claim.

Local court rules or practice may make it necessary for counsel to prepare written trial motions and file them before the case is assigned to a trial judge. In that event, counsel may list the "trial court" as the department in which the motion is to be heard and note the date the motion is to be heard as being before voir dire begins.

Articulate grounds for oral motion and have motion recorded. Whenever an oral motion is made, counsel should clearly articulate for the record each objection or ground on which the motion is made to preserve the matter for appellate review. Counsel should be sure that oral motions, including evidentiary objections, are recorded. See §31.6. Issues relating to the admission or exclusion of evidence will not be considered on appeal absent a timely objection or motion in the trial court. *People v Crittenden* (1994) 9 C4th 83, 126, 36 CR2d 474. See also *People v Williams* (1997) 16 C4th 635, 661, 66 CR2d 573.

Absent a controlling statute, local rule, or pretrial order, counsel is free to consider strategic factors in determining the appropriate time and method for presenting trial motions and objections. For example, counsel may prefer the informal spontaneity of an oral motion because it affords the opponent less opportunity to analyze issues and organize an effective response. However, most judges are inclined to give a party a reasonable opportunity to prepare a response to points raised orally by an opponent, especially if it appears to the court that the answering party was not given adequate notice or that the answering party could not reasonably have anticipated the motion. When appropriate, counsel can argue, based on the facts, that the opponent should have been aware of the issue long before trial and should have been prepared.

Making an objection before the jury. If counsel first becomes aware of the need for a trial motion when jurors are present, counsel may make a brief, formal objection in front of the jury but should ask to be heard at the bench or in chambers to argue the matter to avoid prejudicing the jury with information that may be excluded after the motion is heard.

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§31.6 C. Hearings on Trial Motions Should Be Reported

Record must be created to preserve issues for appeal. To ensure that any issues related to the trial court's ruling are preserved for appeal, whether a motion is made orally or in writing, care should be taken to ensure that all discussions about the motion are on the record and that the arguments in support of the motion are clearly stated. See, *e.g.,* Evid C §353. See also *People v Ramos* (1997) 15 C4th 1133, 1171, 64 CR2d 892. By the same token, reasons for resisting an opponent's motion must be stated clearly to preserve objections on appeal. See Evid C §354. Although insisting on on-the-record proceedings may not be the most popular position to take, if counsel wishes to preserve an issue for appeal, there must be a record for the appellate courts to review. See, *e.g., People v Mendoza Tello* (1997) 15 C4th 264, 266, 62 CR2d 437; *Steve J. v Superior Court* (1995) 35 CA4th 798, 813, 41 CR2d 731 (not appellate court's function "to play guessing games about evidence not in the record").

Record may be created after informal discussion. It is not uncommon for the court and counsel to meet informally in chambers or at sidebar about certain motions or objections. This process can be efficient, but it contains the seeds of disaster for appellate review. Counsel should never accede to a suggestion that a ruling on an objection or motion be "taken care of later," after an informal conference. The motion or objection and the court's ruling must be articulated on the record. Counsel need not request a reporter's presence in the judge's chambers during an initial discussion; however, if a reporter is not present for the chambers conference, counsel should request that the exchange between the court and the parties be memorialized on the record at some point before proceedings resume in front of the jury. In courts to which no court reporter is assigned, counsel should keep in mind that settled statements prepared by counsel not only provide incomplete records of the proceedings, they are far less helpful than a verbatim transcript prepared by a court reporter. Thus, if the court will not make a court reporter available, and the issue before the court is particularly important, counsel should consider hiring a court reporter to record the proceedings independently.

Proceedings are sometimes electronically recorded. See Cal Rules of Ct 2.952. One of the most difficult problems created by electronic recording is that those reviewing the tape often cannot hear the comments made by counsel or the court. If a court reporter is not available and the proceedings must be electronically recorded, counsel should take responsibility for ensuring that the microphones used are placed in locations that will pick up the voices of counsel, the witnesses, and the court. If the recording cannot be made satisfactorily, where the rules permit, counsel should insist that a court reporter be present.

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§31.7 D. Remedies

Counsel should not hesitate to be innovative in tailoring a remedy to correct whatever wrong has been done. Some examples follow:

- Requesting sanctions under Pen C §1054.5(b) for failure of opposing party to comply with discovery procedures. See *People v Edwards* (1993) 17 CA4th 1248, 1262, 22 CR2d 3, for discussion of available sanctions.
- Requesting a continuance, *e.g.,* when counsel was not provided discovery of some information that the court has determined is admissible, or when a witness has unexpectedly become necessary. See Pen C §1050.
- Requesting the exclusion of evidence or testimony, *e.g.,* concerning test results based on destroyed evidence. *California v Trombetta* (1984) 467 US 479, 489, 81 L Ed 2d 413, 422, 104 S Ct 2528.
- Requesting a limiting instruction when evidence is offered for a limited purpose. Evid C §355; see CALCRIM 303; *People v Hood* (1997) 53 CA4th 965, 972, 62 CR2d 137; *People v Eagles* (1982) 133 CA3d 330, 340, 183 CR 784. See also Jefferson's California Evidence Benchbook §20.14 (4th ed CJA-CEB 2009).
- Moving to dismiss the case, *e.g.,* when defense counsel learns during trial that the prosecutor failed to disclose the existence and identity of a material witness of whom the defense was previously unaware. *People v Kiihoa* (1960) 53 C2d 748, 752, 3 CR 1.

Counsel opposing the remedy can argue that no error occurred or that the error was not prejudicial to the defendant (*e.g.,* because it came as no surprise), or counsel can argue for a different remedy. For example, in *U.S. v Tamura* (9th Cir 1982) 694 F2d 591, 599, the trial court offered to remedy the prejudicial effect of surprise testimony either through a limiting instruction or by granting a motion to strike, but it refused to grant a continuance. The appellate court found no abuse of discretion.

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V. EVIDENTIARY MOTIONS

A. In Limine Motions

§31.8 1. Advantages of Settling Important Evidentiary Issues Before Trial Begins

Unless a statute, *e.g.,* Pen C §1538.5, or case law provides for a pretrial ruling on an evidentiary issue, whether a particular item of evidence is to be admitted or excluded is usually a question for the judge who presides at trial. See Evid C §§402-405; Jefferson's California Evidence Benchbook, chaps 24-26 (4th ed CJA-CEB 2009). Although it is not possible to anticipate every possible objection to the admission of evidence in advance, by the time the case is assigned to a judge for trial, counsel should know what evidence is likely to be offered and what potential evidence may be subject to exclusion. It is a good idea to handle these issues on excluding or limiting the effect of the anticipated evidence with a motion requesting an advance ruling on the disputed evidentiary issue. These motions are called "motions in limine." A sample motion in limine to exclude evidence is in California Criminal Law Forms Manual §31.1 (2d ed Cal CEB 2005). For further discussion of in limine motions, see Effective Intro of Evidence, chap 3; California Trial Objections, chap 2 (Cal CEB Annual).

The in limine motion, which can be made any time after the case is assigned to a trial judge, raises technical objections to potentially prejudicial evidence, highlighting foundational inadequacies, lack of relevance or reliability, and any failure to provide discovery or preserve exculpatory evidence. Counsel should usually submit motions in limine before jury selection begins. See *Kelly v New W. Fed. Sav.* (1996) 49 CA4th 659, 671, 56 CR2d 803. An early in limine determination of admissibility permits the attorneys to deal consistently and confidently with particular items of evidence during voir dire, opening statements, and examination. In limine orders typically direct counsel, the parties, and witnesses not to refer in the presence of the jury to any evidence that the court has rejected. Counsel bringing a motion in limine should ensure that the judge rules on the record on each ground raised. See Evid C §§402-405.

A motion in limine may be brought during trial when unanticipated evidentiary issues emerge. *People v Morris* (1991) 53 C3d 152, 188, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. When opposing counsel surprises counsel by trying to introduce objectionable evidence during trial, counsel may wish to ask to approach the bench, then either argue the issue quietly at the bench, or ask for a hearing outside the jury's presence. Counsel then has the opportunity to argue the point without the jury hearing the evidence during argument about its admissibility.

Trial attorneys seldom seek advance rulings on the admissibility of their own evidence, but attempt to introduce it in the normal course of trial, inquiring about information or showing items to witnesses on the stand. This approach can pose a significant risk. For instance, if the prosecutor produces sensitive evidence in the jury's presence that is deemed unduly prejudicial, a mistrial may be declared or reversal on appeal may result, even though a defense objection was sustained and any answer was stricken. See, *e.g., People v Bentley* (1955) 131 CA2d 687, 690, 281 P2d 1, disapproved on other grounds in *People v White* (1958) 50 C2d 428, 431, 325 P2d 985 (conviction reversed in part because prosecutor failed to warn police officer not to volunteer information about similar sex offense).

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§31.9 2. Reiteration Requirement

A motion in limine to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it complies with these requirements (see Evid C §353):

- A specific legal ground for exclusion is advanced and subsequently raised on appeal;
- The motion is directed to a particular, identifiable body of evidence; and
- The motion is made at a time before or during trial when the trial judge can rule on the evidentiary question in its appropriate context.

If a motion in limine does not satisfy each of these three requirements, a proper objection must be made during trial when opposing counsel attempts to introduce the evidence in question to preserve the evidentiary issue for appeal. This is sometimes referred to as the "reiteration requirement." If the three requirements are not satisfied and the trial judge denies a motion in limine designed to exclude evidence, the party seeking exclusion must ordinarily renew the objection at the time the evidence is actually offered at trial to preserve the issue for appeal. *People v Waidla* (2000) 22 C4th 690, 717, 94 CR2d 396; *People v Benson* (1990) 52 C3d 754, 788, 276 CR 827.

A carefully crafted motion in limine objecting to the admission of evidence may meet the requirements of Evid C §353 and preserve objections for appeal. Reiteration may be excused if (1) the proponent of the motion secures an express ruling from the court on the record and (2) the court deems that party's objection to be a continuing one. See *People v Ramos* (1997) 15 C4th 1133, 1171, 64 CR2d 892; *People v Holt* (1997) 15 C4th 619, 666, 63 CR2d 782. Repetition of the objection may also be excused if the objecting party obtains a stipulation from opposing counsel that the objection need not be repeated, when repetition of the objection would be futile as a matter of law, or when the objection concerns the use of an involuntary statement or other evidence that might impinge on the defendant's constitutional or statutory rights. See *People v Underwood* (1964) 61 C2d 113, 126, 37 CR 313; *People v Cahill* (1994) 22 CA4th 296, 309 n3, 28 CR2d 1. See also §31.24.

Ø **Practice tip:** Repeat the objection on each occasion the evidence is proffered, so that the record on appeal is clear; or, if counsel prefers not to make fruitless objections in front of the jury, request that the objection be deemed a continuing one.

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3. Examples of Evidentiary Issues Commonly Handled in Limine

§31.10 a. Foundational Issues

When the resolution of an objection depends on the establishment of preliminary facts, an evidentiary hearing is required to resolve the preliminary facts. See Evid C §§402-405. Foundational hearings that require extensive testimony are best held as in limine motions before a jury is selected. If the court and parties take the time to sort out the intricacies of foundational issues before selecting a jury, the trial will usually proceed more efficiently, avoiding prolonged recesses that inconvenience witnesses and distress members of the jury. Depending on the court's rulings, pretrial resolution of foundational issues can also serve to narrow or limit the issues presented at trial.

Ø **Practice tip**: In the interests of efficiency and courtesy, counsel should request pretrial hearings on foundational issues by submitting written, noticed motions with realistic time estimates, to ensure that witnesses can be subpoenaed and sufficient court time can be set aside to dispose of the issues raised. See §§18.5-18.7 for form, service, and filing requirements for pretrial motions.

When counsel moves to exclude evidence because of foundational inadequacies, the court may grant the motion without prejudice in order to allow the proponent of the evidence an opportunity to introduce sufficient foundational facts during trial to obtain a favorable ruling on admissibility. See *People v Morris* (1991) 53 C3d 152, 187, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394.

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§31.11 b. Improper Chain of Custody

A writing (see Evid C §250) "is not presumed to be what it purports to be, and it must be authenticated… before it is introduced into evidence." *Fakhoury v Magner* (1972) 25 CA3d 58, 65, 101 CR 473. Other physical evidence must also be authenticated. "The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." *U.S. v Howard-Arias* (4th Cir 1982) 679 F2d 363, 366. "The purpose of this threshold requirement is to establish that the item to be introduced… is what it purports to be." Mueller & Kirkpatrick, Evidence Under the Rules, p 957 (2d ed 1993). Consequently, "[c]hain-of-custody issues are present whenever physical evidence capable of submission to the jury is introduced at trial." *People v Baldine* (2001) 94 CA4th 773, 779, 114 CR2d 570.

The chain of custody is established when the party offering a particular item in evidence shows that it is reasonably certain the evidence has not been altered. See *People v Catlin* (2001) 26 C4th 81, 134, 109 CR2d 31; *People v Lucas* (1995) 12 C4th 415, 444, 48 CR2d 525. The "reasonable certainty" standard is, essentially, the equivalent of proof by a preponderance of the evidence. *People v Herrera* (2000) 83 CA4th 46, 61, 98 CR2d 911. This is a foundational issue: an improper chain of custody precludes testimony or evidence on the issue involved. For example, when the testimony of prosecution witnesses fails to resolve key foundational issues about the chain of custody of a DNA reference sample taken from the defendant, the trial court's overruling of objections to the admission of the reference sample and to the criminalist's comparison of the reference sample with DNA taken from crime scene evidence was an abuse of discretion. Because the erroneous admission of the evidence was not harmless beyond a reasonable doubt, the case was reversed and remanded for a new trial. *People v Jimenez* (2008) 165 CA4th 75, 81, 80 CR3d 579.

If the possibility that someone has tampered with the evidence is supported by only bare speculation, then "it is proper to admit the evidence and let what doubt remains go to its weight." *People v Williams* (1989) 48 C3d 1112, 1134, 259 CR 473 (unexplained anomalies in prosecution handling of latent fingerprint card went to weight of evidence after prosecution had made prima facie showing that card had not been tampered with); *In re Ruth H.* (1972) 26 CA3d 77, 83, 102 CR 534 (inference that pills placed in envelope by high school security agent were same as those picked up within short time by deputy sheriff was sufficient to deny chain-of-custody objection).

The trial court's exercise of discretion in admitting the evidence over an improper chain-of-custody objection is reviewed on appeal for abuse of discretion. *People v Catlin, supra; People v Jimenez, supra*.

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c. New or Novel Scientific Techniques (*Kelly* Test)

§31.12 (1) Three-Prong *Kelly* Test

A party that wants to introduce evidence that is based on a new or novel scientific technique bears the burden of establishing the reliability of that evidence before it is admitted under the rule of *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144, and *Frye v U.S.* (DC Cir 1923) 293 F 1013, 1014.

Ø **Note:** In *Daubert v Merrell Dow Pharms., Inc.* (1993) 509 US 579, 587, 125 L Ed 2d 469, 479, 113 S Ct 2786, the Supreme Court found that the standard in *Frye* no longer applies in federal trials after adoption of the more flexible approach in Fed R Evid 702. California continues to adhere to the *Kelly* rule; in *People v Leahy* (1994) 8 C4th 587, 598, 34 CR2d 663, the California Supreme Court declined to adopt the *Daubert* approach in California. Since *Daubert*, however, the test for determining the admissibility of evidence based on a new scientific technique is usually referred to as the *Kelly* test.

The *Kelly* rule is based on the notion that juries may give undue weight to experimental techniques presented by credentialed experts whose testimony may convey an unjustified aura of scientific certainty. It is an exception for the usual rule, that the weight of the evidence is a question of fact for the jury.

The rule only tests the fundamental validity of the new scientific technique. The degree of professionalism with which the methodology is applied is relegated to the weight of the evidence. See *People v Cooper* (1991) 53 C3d 771, 814, 281 CR 90; *People v Farmer* (1989) 47 C3d 888, 913, 254 CR 508, overruled on other grounds in *People v Waidla* (2000) 22 C4th 690, 724 n6, 94 CR2d 396.

The *Kelly* standard has three prongs (*People v Fierro* (1991) 1 C4th 173, 214, 3 CR2d 426; *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144):

- The test must be generally accepted in the relevant scientific community; general acceptance means "a consensus drawn from a typical cross-section of the relevant, qualified scientific community" (see *People v Leahy* (1994) 8 C4th 587, 612, 34 CR2d 663);
- Testimony must be given by properly qualified experts (see *People v Jackson* (1996) 13 C4th 1164, 1212, 56 CR2d 49); and
- Correct scientific procedures must have been applied in the case before the court (see *People v Venegas* (1998) 18 C4th 47, 81, 74 CR2d 262).

Because *Kelly* hearings can be complex, costly, and time-consuming, when discovery reveals the existence of a *Kelly* issue, the party opposing introduction of the evidence should promptly file a written motion stating the grounds of the objection and requesting a hearing.

Because of considerations such as time consumption, subject matter complexity, and the cost and availability of expert witnesses, courts often allow relevant prior expert testimony elicited in unrelated cases to be received in evidence at pretrial foundational hearings. See *People v Fierro* (1991) 1 C4th 173, 214 n11, 3 CR2d 426 (stipulated testimony from unrelated cases was relied on); *People v Smith* (1989) 215 CA3d 19, 25, 263 CR 678 (court took judicial notice of findings made after extensive *Kelly* hearing in another case in same county).

Failure to specifically challenge the admission of evidence on *Kelly* grounds waives the issue on appeal. *People v Diaz* (1992) 3 C4th 495, 528, 11 CR2d 353; *People v Kaurish* (1990) 52 C3d 648, 688, 276 CR 788. For further discussion of *Kelly,* see Scientific Evidence in California Criminal Cases, chap 2 (Cal CEB 2008).

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§31.13 (2) *Kelly* Applies Only to New or Novel Procedure

The *Kelly* test does not apply at all when no new scientific test is involved. See, *e.g., People v Nelson* (2008) 43 C4th 1242, 1263, 78 CR3d 69; *People v Jackson* (2008) 163 CA4th 313, 323, 77 CR3d 474; *People v Bui* (2001) 86 CA4th 1187, 1196, 103 CR2d 908. Before beginning a foundational hearing under *Kelly,* counsel should give careful consideration to the potential issues of what constitutes general acceptance, what comprises the relevant scientific community, and who is qualified to render opinions in that specific community. Note that the court will not require a *Kelly* showing if the judge does not first find the procedure new or novel. See *People v Pride* (1992) 3 C4th 195, 238, 10 CR2d 636 (hair comparison evidence was not new); *People v Nolan* (2002) 95 CA4th 1210, 1214, 116 CR2d 331 (enzyme immunoassay technique for detection of drugs in urine not new); *People v Bury* (1996) 41 CA4th 1194, 1201, 49 CR2d 107 (Preliminary Alcohol Screening (PAS) device was not novel technique).

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§31.14 (3) *Kelly* Test Results

The *Kelly* test has been applied to a variety of forensic techniques. The following have been found to pass the *Kelly* test:

- Agglutination-inhibition blood testing. *People v Yorba* (1989) 209 CA3d 1017, 1024, 257 CR 641.
- Ballistics examinations. *People v Trujillo* (1948) 32 C2d 105, 111, 194 P2d 681.
- Blood (*In re Newbern* (1959) 175 CA2d 862, 865, 1 CR 80), breath (*People v Adams* (1976) 59 CA3d 559, 561, 131 CR 190), and urine tests (*Quesada v Orr* (1971) 14 CA3d 866, 869, 92 CR 640) for intoxication.
- DNA polymerase chain reaction analysis (PCR) for DQ alpha gene. *People v Morganti* (1996) 43 CA4th 643, 657, 50 CR2d 837.
- DNA PCR analysis and short tandems repeat (STR) test. *People v Allen* (1999) 72 CA4th 1093, 1099, 85 CR2d 655.
- DNA profiling or typing for identification using restriction fragment length polymorphism (RFLP) method. *People v Soto* (1999) 21 C4th 512, 514, 88 CR2d 34; *People v Venegas* (1998) 18 C4th 47, 84, 74 CR2d 262.
- DNA profiling using Profiler Plus kit and 310 Genetic Analyzer (found to be sophisticated extension of PCR/STR testing methods). *People v Hill* (2001) 89 CA4th 48, 58, 107 CR2d 110.
- DNA profiling involving multiple mixtures using Profiler Plus and COfiler kits ABI 310 genetic analyzer. *People v Smith* (2003) 107 CA4th 646, 666, 132 CR2d 230.
- Using unmodified product rule to calculate statistical probabilities in DNA forensic analysis. *People v Soto*, *supra*.
- Electrophoretic testing of dried blood stains. *People v Fierro* (1991) 1 C4th 173, 214, 3 CR2d 426; *People v Reilly* (1987) 196 CA3d 1127, 1148, 242 CR 496.
- Fingerprint analysis. *People v Riser* (1956) 47 C2d 566, 589, 305 P2d 1, overruled on other grounds in *People v Morse* (1964) 60 C2d 631, 637 n2, 36 CR2d 201.
- Handwriting comparison. *People v Storke* (1900) 128 C 486, 488, 60 P 1090.
- Horizontal gaze nystagmus (HGN) test. *People v Joehnk* (1995) 35 CA4th 1488, 1505, 42 CR2d 6.
- Odontology. *People v Peneda* (1995) 32 CA4th 1022, 38 CR2d 312; *People v Marx* (1975) 54 CA3d 100, 126 CR 350.

New or novel techniques that did not pass the *Kelly* test include the following:

- Defendant's scent purportedly identified by dog from expended shell casings at crime using scent transfer device and scent identification lineup procedure. *People v Mitchell* (2003) 110 CA4th 772, 793, 2 CR3d 49. See also *People v Willis* (2004) 115 CA4th 379, 385, 9 CR3d 235.
- Penile plethysmograph test. *In re Mark C.* (1992) 7 CA4th 433, 444, 8 CR2d 856.
- Polygraph. See *People v Price* (1991) 1 C4th 324, 419, 3 CR2d 106. See also *People v Wilkinson* (2004) 33 C4th 821, 845, 16 CR3d 420 (because Evid C §351.1 makes polygraph evidence inadmissible absent stipulation, party is not entitled to *Kelly* hearing on reliability of technique).
- Detection of child abuse by reports of abuse and observations of child with anatomically correct dolls. *In re Amber B.* (1987) 191 CA3d 682, 691, 236 CR 623; *In re Christine C.* (1987) 191 CA3d 676, 679, 236 CR 630.
- Posthypnotic testimony, except in limited circumstances as set out in Evid C §795; see *People v Shirley* (1982) 31 C3d 18, 66, 181 CR 243.
- Retrieval of repressed memories of sexual molestation by using sodium amytal. *Ramona v Superior Court* (1997) 57 CA4th 107, 116, 66 CR2d 766.
- Truth serum. See *People v Cullen* (1951) 37 C2d 614, 626, 234 P2d 1.
- Voiceprint identification through spectrographic analysis. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144.

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§31.15 d. Improper Use of Statistics

Statistical analysis may be applied to the results of a forensic method. For example, courts will admit statistical blood-group evidence based on serological tests that have long been recognized as reliable to show that an accused is included within the class of possible donors. *People v Poggi* (1988) 45 C3d 306, 324, 246 CR 886. This use of statistical evidence is distinguishable from the prohibited use of statistics to express a likelihood of guilt. See *People v Collins* (1968) 68 C2d 319, 320, 66 CR 497.

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e. Expert Testimony

§31.16 (1) Grounds for Challenging Expert Testimony

An expert is someone who is allowed to state an opinion on a subject beyond the knowledge and experience of ordinary witnesses because the expert has the special skill necessary to give an opinion on that particular subject. Evid C §§720, 801. See *People v Gardeley* (1996) 14 C4th 605, 617, 59 CR2d 356. An expert's opinion must be based on matters "of a type that reasonably may be relied upon by an expert in forming an opinion" on the subject. An expert may base his or her testimony on reliable information about the case, reliable texts, tests, and on reliable information in the form of a hypothetical question. Evid C §801; *People v Bui* (2001) 86 CA4th 1187, 1196, 103 CR2d 908.

An expert may be challenged on grounds including (see Evid C §§720, 801):

- The expert is not qualified to give an opinion on the particular topic involved (*People v Champion* (1995) 9 C4th 879, 924, 39 CR2d 547);
- The subject is not beyond the experience of ordinary witnesses (see *People v Fudge* (1994) 7 C4th 1075, 1120, 31 CR2d 321);
- The basis for the expert's opinion is improper (see Evid C §§721, 801; *People v Sims* (1993) 5 C4th 405, 437, 20 CR2d 537);
- Although an expert witness may rely on hearsay in forming an opinion, reliance on prejudicial unreliable hearsay may be objectionable (*People v Pollock* (2004) 32 C4th 1153, 1171, 13 CR3d 34; *People v Montiel* (1993) 5 C4th 877, 918, 21 CR2d 705);
- The evidence is too time-consuming, is too prejudicial, will confuse the issues, or will mislead the jury (Evid C §352);
- Improper hypothetical question; or
- Evidence denies the defendant due process (see *Estelle v McGuire* (1991) 502 US 62, 70, 116 L Ed 2d 385, 397, 112 S Ct 475 (due process challenge made to battered child syndrome; challenge unsuccessful)).

Experts may be challenged by an in limine motion. They may also be challenged twice after they take the stand. When the expert first takes the stand, his or her qualifications must be demonstrated, if challenged, before the expert is allowed to testify. Evid C §720(a). Counsel may request an Evid C §402 hearing on this issue or simply request the court to allow the witness to be taken on voir dire at the outset of the examination. Second challenges to the expert's testimony are usually made at the time objectionable questions are asked, or answers given.

For further discussion of expert testimony, see California Expert Witness Guide (2d ed Cal CEB 1991).

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§31.17 (2) *Kelly* Rule Does Not Usually Apply to Expert Testimony

Absent a unique feature that "effectively blindsides" the jury, expert testimony is not subject to *Kelly* foundational requirements. See, *e.g., People v Rowland* (1992) 4 C4th 238, 266, 14 CR2d 377; *People v Stoll* (1989) 49 C3d 1136, 1157, 265 CR 111; *Wilson v Phillips* (1999) 73 CA4th 250, 254, 86 CR2d 204; *People v Ward* (1999) 71 CA4th 368, 372, 83 CR2d 828. Computer animations that are tantamount to drawings by experts, and which are used only to illustrate testimony, are not required to meet the *Kelly* requirements. *People v Hood* (1997) 53 CA4th 965, 969, 62 CR2d 137.

If an expert conducts an experiment crucial to his or her opinion on a material fact, the proponent of the expert's opinion must be ready to demonstrate that the experiment was conducted under conditions substantially similar to those existing at the time of the event at issue. Failure to lay an adequate foundation will render the experiment and the expert's opinion inadmissible, on proper objection. *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 390, 164 CR 343 (expert's deductions from experiment conducted 2 years after accident, under different weather conditions, held inadmissible); *People v Zismer* (1969) 275 CA2d 660, 665, 80 CR 184 (photo of imprint of shoes from scene of crime was prejudicial because no testimony that shoe prints were those of defendant).

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f. Admissions and Confessions

§31.18 (1) Trial Motions to Exclude Admissions and Confessions

A defendant may move to exclude an admission or confession during trial. Pretrial rulings on admissions and confessions are not binding on the trial court. *People v Keenan* (1988) 46 C3d 478, 513, 250 CR 550; *People v Beasley* (1967) 250 CA2d 71, 77, 58 CR 485. If exclusion is unsuccessfully sought by an in limine motion, the party seeking exclusion must usually reiterate his or her objection at the time the admission or confession is actually offered at trial to preserve the issue for appeal. *People v Jennings* (1988) 46 C3d 963, 975 n3, 251 CR 278. There are several exceptions. Counsel may stipulate or the court may order that counsel's in limine objection is considered to have been made during trial. See §31.9. Reiteration of the objection is also excused if a specific objection has been directed to an identifiable body of evidence and advanced when the court has had an opportunity to consider that evidence in context, *i.e.,* no further evidence is introduced to change the relevant facts that the court has already heard and ruled on. *People v Crittenden* (1994) 9 C4th 83, 127, 36 CR2d 474.

Ø **Practice tip**: Repeat the objection each time the evidence is proffered, or request that the initial objection be deemed a continuing one.

When an admission or confession is the product of an unlawful search or seizure, exclusion must be sought by a pretrial motion under Pen C §1538.5. *People v Boyer* (1989) 48 C3d 247, 270 n13, 256 CR 96, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. A trial court can hear the issue during trial when it should have been raised before trial only if, before the trial, opportunity for the motion did not exist or the defendant was not aware of the grounds for the motion. Pen C §1538.5(h). See *People v Jackson* (1996) 13 C4th 1164, 1203, 56 CR2d 49. On motions to suppress evidence based on unlawful searches and seizures, see chap 16; on motions to exclude admissions and confessions, see chap 23.

Issues related to the *Miranda* rule or to the voluntariness of a confession should be addressed at trial by a motion under Evid C §402, discussed in §23.9. *People v Mattson* (1990) 50 C3d 826, 851, 268 CR 802; *People v Whitfield* (1996) 46 CA4th 947, 952, 54 CR2d 370. See also *Oregon v Elstad* (1985) 470 US 298, 308, 84 L Ed 2d 222, 232, 105 S Ct 1285; *U.S. v Gonzalez-Sandoval* (9th Cir 1990) 894 F2d 1043, 1048.

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§31.19 (2) Corpus Delicti Rule as Basis for Exclusion of Evidence Eliminated

Historically, the corpus delicti rule made a defendant's extrajudicial statements admitting involvement in the offense inadmissible until the prosecution proved that (1) a crime actually occurred and (2) it was caused by a criminal agency. This evidentiary aspect of the corpus delicti rule was eliminated by the truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)). *People v Alvarez* (2002) 27 C4th 1161, 1173, 119 CR2d 903. However, the portion of the corpus delicti rule that precludes conviction unless there is independent evidence of (1) the crime and (2) the defendant's involvement in it is not affected by the truth-in-evidence provision. *People v Alvarez, supra*.

For crimes committed on or after June 6, 1990 (see *People v Ray* (1996) 13 C4th 313, 341, 52 CR2d 296), Pen C §190.41 eliminates the need for independent proof of the commission of a felony underlying a felony murder special circumstance allegation. Thus, when a felony murder special circumstance is alleged under Pen C §190.2(a)(17), a defendant's uncorroborated extrajudicial statements may be used to prove the commission of the felony on which the allegation is based, even if the felony cannot be shown by other evidence. *People v Weaver* (2001) 26 C4th 876, 929, 111 CR2d 2.

Ø **Note:** Counsel should make a Pen C §1118 or §1118.1 motion for judgment of acquittal if the prosecution fails to produce sufficient independent evidence to corroborate a defendant's confession or admission of involvement in a crime. On Pen C §§1118 and 1118.1 motions, see §§25.43-25.44.

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Source: Criminal Law/California Criminal Law Procedure and Practice/31 SELECTED TRIAL MOTIONS/ g. Prior Testimony/§31.20 (1) When Prior Testimony May Be Admitted

g. Prior Testimony

§31.20 (1) When Prior Testimony May Be Admitted

Prior testimony may be admitted when witness is unavailable. When a witness who is unavailable to testify at trial has testified under oath at a prior proceeding, counsel may move to have the prior testimony admitted into evidence. Evid C §§240 (definition of unavailable witness), 1290-1294 (former testimony exception to hearsay rule).

Ø **Note:** If the prosecution seeks to have relevant prior testimony admitted against the defendant, it must be shown that the defendant has had an opportunity to cross-examine the witness. *Crawford v Washington* (2004) 541 US 36, 54, 158 L Ed 2d 177, 203, 124 S Ct 1354. Under *Crawford,* a witness's prior testimony at the defendant's preliminary hearing is potentially admissible at trial, but prior testimony at the separate trial of another defendant would not be admissible.

Counsel must have made a good faith effort and exercised reasonable diligence in attempting to secure the witness's attendance. *People v Hovey* (1988) 44 C3d 543, 562, 244 CR 121. See also *People v Saucedo* (1995) 33 CA4th 1230, 40 CR2d 153, disapproved on other grounds in *People v Cromer* (2001) 24 C4th 889, 901, 103 CR2d 23, for a summary of cases finding reasonable diligence when a search for a witness begins shortly before, or during, trial. The trial court's determination of due diligence is subject to independent review on appeal. *People v Cromer* (2001) 24 C4th 889, 901, 103 CR2d 23.

Ø **Warning:** Decisions predating *Cromer* may provide useful illustrations of steps counsel can take to demonstrate due diligence in attempting to find a witness, but it is important to keep in mind that, in pre-*Cromer* cases, the reviewing court may have been reviewing the trial court's ruling on the issue under the more deferential abuse-of-discretion standard. See 24 C4th at 899.

An evidentiary hearing is held in the trial court to decide whether the witness's prior testimony should be admitted. *People v Alcala* (1992) 4 C4th 742, 774, 15 CR2d 432. Credible, competent evidence must support a finding that the witness is unavailable. *People v Stritzinger* (1983) 34 C3d 505, 515, 194 CR 431. For example, it is proper to use an expert's testimony to establish that a victim suffering from rape-induced posttraumatic stress disorder is "unavailable" as a witness. *People v Turner* (1990) 219 CA3d 1207, 1216, 268 CR 686, disapproved on other grounds in *People v Cromer* (2001) 24 C4th 889, 901, 103 CR2d 23 (victim's preliminary examination testimony held admissible).

The prosecution has a more difficult burden to meet before a court will find a witness legally unavailable and allow his or her prior testimony to be introduced at trial, because defendants have federal and state constitutional rights to confront and cross-examine witnesses. US Const amend VI; Cal Const art I, §15; Pen C §686(3); *Barber v Page* (1968) 390 US 719, 722, 20 L Ed 2d 255, 259, 88 S Ct 1318; *Pointer v Texas* (1965) 380 US 400, 403, 13 L Ed 2d 923, 926, 85 S Ct 1065 (federal right to confrontation applies to states through Fourteenth Amendment). For an example of an evidentiary showing held to meet this burden, see *People v Macioce* (1987) 197 CA3d 262, 283, 242 CR 771 (witness's preliminary hearing testimony held admissible after doctor testified at trial that there was a 70-percent chance that further testimony would be detrimental to witness).

When a witness is outside the state, counsel must usually satisfy the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (Pen C §§1334-1334.6). *People v Masters* (1982) 134 CA3d 509, 520, 185 CR 134 (prosecutor could not use robbery victim's preliminary hearing testimony at trial because prosecutor did not make use of Uniform Act). Compliance may be excused based on the facts of the case. See, *e.g., Dres v Campoy* (9th Cir 1986) 784 F2d 996, 1001 (lack of compliance with Uniform Act excused because witness's mother promised that witness would attend). A federal subpoena may be required when a U.S. resident is in a foreign country. See *People v St. Germain* (1982) 138 CA3d 507, 517, 187 CR 915. If a valid California subpoena was served on the witness before he or she left the country, however, it may be possible to show due diligence without serving the witness with a federal subpoena. See *People v Watson* (1989) 213 CA3d 446, 453, 261 CR 635. A mere showing that a foreign witness has returned to his or her native country may be insufficient to satisfy due diligence. *People v Sandoval* (2001)

87 CA4th 1425, 1443, 105 CR2d 504. For cases showing due diligence when a foreign witness has left the country, see *People v Smith* (2003) 30 C4th 581, 609, 134 CR2d 1 (Japanese native returned to Japan); *People v Martinez* (2007) 154 CA4th 314, 64 CR3d 580 (refugee from India seeking asylum in Canada).

Compliance with a subpoena through the mail or messenger provisions of Pen C §1328d is sufficient diligence to support the introduction of former testimony when the witness fails to appear. *People v Perez* (1989) 207 CA3d 431, 435, 254 CR 869 (witness acknowledged receipt of subpoena and agreed to be "on call" on specified dates but went on vacation instead).

Ø **Note:** Under traditional Confrontation Clause analysis, certain prior out-of-court statements, *e.g.,* spontaneous statements, have been held admissible even though the defendant did not have the opportunity to cross-examine the witness. See *White v Illinois* (1992) 502 US 346, 356, 116 L Ed 2d 848, 859, 112 S Ct 736 (child sex assault victim's out-of-court statements properly admitted even though child did not testify at trial). After *Crawford v Washington, supra,* the admissibility of such out-of-court statements will turn on whether they are testimonial in nature. For further discussion of *Crawford,* see Jefferson's California Evidence Benchbook, chap 2 (4th ed CJA-CEB 2009).

Qualifying testimony. The party against whom former testimony is offered must not only have been a party to the proceeding in which the former testimony was given and have had the right and opportunity to cross-examine the declarant, but the party must also have had an interest in and motive for cross-examining the declarant that is similar to that existing in the present trial. Evid C §1291(a)(1)-(2); *People v Samayoa* (1997) 15 C4th 795, 849, 64 CR2d 400. See also Evidence Benchbook §8.2. Testimony from an earlier trial of the same case, *i.e.,* after a mistrial was declared or the case was reversed on appeal, meets these criteria. *People v Ashford* (1968) 265 CA2d 673, 677, 71 CR 619 (witness out of state during second trial); *People v Williams* (1968) 265 CA2d 888, 896, 71 CR 773 (witness invoked Fifth Amendment at second trial). When such testimony is used, it can be impeached even though the witness who testified at the earlier trial is unavailable for rehabilitation at the subsequent trial. See *People v Ashford* (1968) 265 CA2d 673, 682, 71 CR 619.

Testimony from the preliminary hearing in the case usually qualifies. See *People v Reed* (1996) 13 C4th 217, 224, 52 CR2d 106; *People v King* (1969) 269 CA2d 40, 46, 74 CR 679. But see *People v Johnson* (1975) 46 CA3d 701, 705, 120 CR 372 (prosecutor's request to introduce preliminary-hearing testimony of victim who was unavailable at trial denied because testimony of Spanish-speaking investigator present at preliminary hearing showed victim's testimony was inaccurately translated, thus denying defense counsel opportunity to effectively cross-examine victim).

Penal Code §872(b) now permits the finding of probable cause to be based on hearsay, *i.e.,* the sworn testimony of a qualified law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. A prosecutor concerned about the future availability of a key witness may decide to forgo a hearsay preliminary hearing and instead call the witness to testify at the preliminary hearing to preserve the testimony for potential introduction at trial. See *Correa v Superior Court* (2002) 27 C4th 444, 452, 117 CR2d 27.

Ø **Practice tip:** The hearsay preliminary hearing may provide a basis for challenging the testimony of witnesses who testify. Penal Code §866(b) essentially limits defense counsel's cross-examination at the preliminary examination to the existence of probable cause. This limitation may be grounds for opposing the subsequent introduction of the testimony at trial on the basis that the opportunity and motive to cross-examine the witness was not the same as at trial. See *Crawford v Washington, supra; People v Robinson, supra*. Although the defendant must have had the opportunity to cross-examine the witness at the preliminary hearing, the defendant need not have fully used that right. *People v Smith* (2003) 30 C4th 581, 611, 134 CR2d 1; *People v Zapien* (1993) 4 C4th 929, 975, 17 CR2d 122.

Testimony that is not admissible. A probationer's testimony at a hearing to revoke probation is inadmissible against the probationer during subsequent proceedings on related criminal charges, except for impeachment or rebuttal. *People v Weaver* (1985) 39 C3d 654, 660, 217 CR 245 (immunity created by *Coleman* survived Proposition 8); *People v Coleman* (1975) 13 C3d 867, 889, 120 CR 384. Also, a defendant's testimony at a Pen C §1538.5 hearing may not be used at trial except to impeach the defendant. *Simmons v U.S.* (1968) 390 US 377, 394, 19 L Ed 2d 1247, 1259, 88 S Ct 967.

Conditional examination of witness. Under Pen C §§1335-1345, in any criminal matter, the defendant may have a witness conditionally examined if there is reason to believe the witness will be unavailable at trial. See Pen C §1336. In any noncapital case, the prosecution may also use the conditional examination procedure for witnesses who will be unavailable at trial. Pen C §1335(a). In a case charging a serious felony (*i.e.,* a felony listed in Pen C §1192.7(c) or a drug offense specified in Health & S C §§11351, 11352, 11378, or 11379) or in a case of domestic violence, the prosecution or the defense may use the conditional examination procedures to memorialize testimony if there is evidence that the witness's life is in jeopardy. Pen C §1335(b). Additionally, in a case of domestic violence, a witness may be conditionally examined if there is evidence that the victim or material witness has been or is being dissuaded, by the defendant or any person acting on behalf of the defendant, by intimidation or a physical threat, from cooperating with the prosecutor or testifying at trial. Pen C §1335(d). This testimony is admissible at trial if the witness is unavailable within the meaning of Evid C §240. Pen C §1345. For further discussion, see §11.25A.

Similar rules permit the parties to memorialize the testimony of an out-of-state witness and to introduce the record of that testimony at trial when the witness is unavailable. See Pen C §§1349-1362.

Other uses of prior testimony. Prior testimony can also be introduced to impeach a witness (Evid C §§770, 1235), to support or rehabilitate a witness's credibility after it is attacked by an express or implied charge of recent bias or motive to fabricate (Evid C §§791, 1236), and as substantive testimony if the witness has no present recollection of the matter (Evid C §§1237-1238). See *People v Brock* (1985) 38 C3d 180, 198, 211 CR 122.

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§31.21 (2) Procedure for Introducing Prior Testimony

Counsel seeking to introduce prior (former) testimony (Evid C §§1290-1294) must first provide the court and opposing counsel with a transcript or recording of the testimony. Counsel can either ask opposing counsel to stipulate that the transcript is a correct transcription of testimony taken in a prior proceeding or produce a witness to testify to that fact. Possible witnesses include the court reporter who took down the testimony and the attorney who represented one of the parties. See Evid C §§1400-1402, 1410-1421 for authentication requirements. See also Effective Introduction of Evidence in California, chap 28 (2d ed Cal CEB 2000); Jefferson's California Evidence Benchbook, chap 8 (4th ed CJA-CEB 2009).

As an alternative, when the prior testimony is in a properly certified reporter's transcript, and that transcript is part of an accessible court file, counsel can simply request the court to take judicial notice of the transcript. See Evid C §§452(d), 1280. A sample request for judicial notice at trial is in California Criminal Law Forms Manual §31.3 (2d ed Cal CEB 2005).

Ø **Note:** If counsel is using former testimony to impeach a witness, the impeaching documents do not need to be shown to the witness. Evid C §768(a).

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§31.22 h. Prior Convictions

When a defendant's prior felony conviction is an element of a charged crime, the prosecution is entitled to prove the conviction in open court; that proof can include both the fact that the defendant was previously convicted of a felony offense as well as the nature of the felony involved, or the defendant can stipulate to having a felony conviction and thereby keep from the jury the nature (but not the fact) of the particular felony. *People v Sapp* (2003) 31 C4th 240, 261, 2 CR3d 554. But if, as in *People v Bouzas* (1991) 53 C3d 467, 480, 279 CR 847 (in which defendant was charged with petty theft with prior under Pen C §§484 and 666), the prior conviction is *not* an element of the charged offense but merely a sentencing enhancement, the defense is entitled to admit the existence of the prior and prevent the jury from learning about it. See Pen C §1025(e).

When a defendant pleads not guilty but admits the truth of an allegation of a prior conviction, and the prior is one that may be kept from the jury, the prior must not be read to the jury or alluded to during trial (Pen C §1025) unless the prior conviction is adjudged admissible for some other legitimate purpose. *People v Calderon* (1994) 9 C4th 69, 73, 36 CR2d 333.

When a defendant pleads not guilty and denies having an alleged prior conviction, the defendant may move to bifurcate the trial of the prior conviction allegation. The defendant is entitled to have a jury decide the truth of prior conviction allegations except when identity issues are raised. Those issues must generally be tried by the court. Pen C §1025(c). Prior convictions are typically proved by the submission of documentary evidence. See Pen C §969b; *People v Reed* (1996) 13 C4th 217, 224, 52 CR2d 106 (record of conviction may be used to ascertain nature of felony). For additional discussion, see §24.26.

A trial court need not advise the defendant of his or her rights (*Boykin-Tahl* advisement) before permitting him or her to stipulate to a prior conviction. *People v Newman* (1999) 21 C4th 413, 422, 87 CR2d 474. See §§24.31-24.32.

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§31.23 B. Stipulations to Admission of Evidence

Counsel for the parties may decide to agree or "stipulate" to the admission of certain evidence at trial. A decision to enter into such a stipulation has long been recognized as being within the range of tactical determinations that counsel is invested with discretion to make without the client's express authority. *People v Adams* (1993) 6 C4th 570, 578, 24 CR2d 831. Stipulations can be useful to avoid the impact of unduly prejudicial evidence. For example, when the prosecution seeks to introduce a similar act of misconduct to prove identity or modus operandi, the defense can offer a stipulation sanitizing the similar act or precluding its use altogether, as appropriate. *People v Perry* (1985) 166 CA3d 924, 931, 212 CR 793 (case reversed because of court's refusal to accept defense stipulation to elements of similar act; undue prejudice resulted).

A stipulation can also be useful to simplify proof of undisputed facts or as a strategy to deemphasize certain aspects of an opponent's case. For instance, in a murder prosecution, a stipulation that a decedent was a human being living on a certain date and found dead on another, can obviate the need to admit a picture in evidence showing the victim alive before the homicide occurred. *People v Hendricks* (1987) 43 C3d 584, 594, 238 CR 66.

Counsel should be aware that the prosecution can be *compelled* to accept a defendant's offer to stipulate to certain facts only if the evidence that the prosecutor intends to proffer is unduly prejudicial. Examples of when evidence would be too prejudicial are an unnecessarily gruesome photograph that the court concludes would only inflame the jury, or evidence offered on an uncontested issue without some other legitimate purpose, *e.g.,* the evidence only goes to establish the existence of an element of the crime to which the defendant has already admitted. See, *e.g.,* Pen C §1025(e); *People v Bouzas* (1991) 53 C3d 467, 471, 279 CR 847. If, however, the evidence is relevant and not unduly prejudicial, and the prosecutor can explain why the evidence is relevant, not unduly prejudicial, and serves another legitimate purpose, the prosecution cannot be forced to accept a defendant's proposed stipulation. See, *e.g.*, *People v Scheid* (1997) 16 C4th 1, 19, 65 CR2d 348; *People v Medina* (1995) 11 C4th 694, 754, 47 CR2d 165. The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. *People v Scheid* (1997) 16 C4th 1, 17, 65 CR2d 348; *People v Arias* (1996) 13 C4th 92, 131, 51 CR2d 770.

The following situations allow the introduction of evidence despite a stipulation to certain facts:

- The evidence stipulated to retains some probative value;
- The evidence remains relevant to an issue not covered by the stipulation or admission;
- The stipulation would force the prosecution to choose between theories of guilt or would hamper a coherent presentation of the evidence on the remaining issues;
- The stipulation or admission is ambiguous in form or limited in scope; and
- During trial, a party seeks to deprive his or her opponent of the legitimate force and effect of material evidence to which a stipulation was entered.

Ø **Note:** Conceivably, a trial court could treat a party's offer to stipulate as a judicial admission, with the effect that the disputed facts would no longer be in issue, thereby limiting or excluding under Evid C §352 the evidence the opposing party seeks to introduce to prove those facts.

Typically, stipulations are read to the jury during the trial in place of testimony and are reiterated by the court in connection with the reading of CALCRIM 104. In framing a stipulation, counsel should make sure that a meeting of the minds has occurred concerning the stipulation's meaning and scope. See *People v Dyer* (1988) 45 C3d 26, 57, 246 CR 209 (court relieved prosecution of burdensome effects of stipulation because it found, despite both counsels' good faith, no meeting of minds had occurred on what stipulation meant). The best way to ensure that a stipulation sets forth precisely what the parties intend is to put it in writing, preferably in advance of trial, and have both attorneys sign it.

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§31.24 C. Objecting to Evidence When It Is Introduced; Objections Must Be Specific and Timely

For an objection to the admission of evidence to be reviewable on appeal, the objection must be both timely and specific. Evid C §353(a); *People v Waidla* (2000) 22 C4th 690, 717, 94 CR2d 396. A defendant cannot argue on appeal that evidence should have been excluded for reasons not set forth at trial; however, he or she may argue that "the asserted error in overruling the trial objection had the legal consequence of violating due process." *People v Partida* (2005) 37 C4th 428, 431, 35 CR3d 644.

In addition to the basic ground for objection (*e.g.,* hearsay, relevance), it is often advisable to ask the court to weigh the probative value of the evidence against its potential for undue prejudice under Evid C §352. Counsel should apprise the court why admission or exclusion is unduly prejudicial and explain why no remedy can repair the damage that will occur if the jury is exposed to the objectionable evidence or if the proposed evidence is rejected.

It is vital to object to a question asked by opposing counsel before the witness answers the question. If counsel does not object until after the witness has responded, or if only the response was objectionable, counsel must move to strike in addition to objecting, and request that the jury be admonished to disregard the evidence. *People v Abbott* (1956) 47 C2d 362, 372, 303 P2d 730 (motion to strike is not available unless counsel first makes preliminary objection to elicited inadmissible evidence); *People v Brogna* (1988) 202 CA3d 700, 710, 248 CR 761 (counsel may draft appropriate limiting instruction to be given by court).

> Ø **Note:** When existing CALCRIM instructions are insufficient to meet the demands of a given problem, counsel should first try to modify the most nearly applicable instruction, if its content is close to what is required. Historically, courts tended to approve instructions patterned after the approved instructions more readily than instructions independently created by counsel. Given that CALCRIM does not cover everything, counsel should not be dissuaded from preparing pinpoint instructions to deal with objectionable testimony or evidence as the need arises. Jury instructions are discussed in chap 32.

For discussion of motions to strike and requests for admonition, see California Trial Objections, chaps 52-53 (Cal CEB Annual).

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D. Introducing and Opposing Introduction of Exhibits and Demonstrative Evidence

§31.25 1. Marking Exhibits for Identification

Exhibits must be marked for identification. See 3 Witkin, California Evidence, *Presentation at Trial* §149 (4th ed 2000). Although different courts use different procedures, most courts prefer to have exhibits marked by the court clerk during a recess so that trial proceedings are not unnecessarily delayed. If more than four or five exhibits will be proffered, counsel may prepare an exhibit list and give a copy to the court clerk in advance or after all exhibits are marked. Attorneys sometimes prefer to have exhibits marked at the time they are to be identified to avoid giving opposing counsel advance notice. However, opposing counsel should have already learned of most evidence through pretrial discovery (see chap 11), and many trial judges like to have the exhibits premarked. Before or after an exhibit has been marked for identification, counsel should show the exhibit to opposing counsel in order to give counsel an opportunity to object. See 3 Witkin, Evidence, *Presentation* §147.

When counsel wishes to take a witness by surprise and enhance the impeachment value of an exhibit, counsel may ask the judge to order opposing counsel not to tell the witness about the exhibit before he or she testifies.

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§31.26 2. Exhibit May Be Used Solely for Illustration or Admitted Into Evidence

Models, photographs, and other types of exhibits must accurately reflect something that is relevant to the facts in dispute to be admissible as evidence. See Evid C §350.

If counsel uses an exhibit solely for purposes of illustration, there is no need to move the exhibit into evidence, although it still must be marked for identification. The requirements for using exhibits merely as illustrations are less stringent than those for introducing exhibits into evidence. See, *e.g., People v Ham* (1970) 7 CA3d 768, 780, 86 CR 906, disapproved on other grounds in *People v Compton* (1971) 6 C3d 55, 60 n3, 98 CR 217 (gun similar to that used in robbery shown for illustrative purposes). The exhibits, however, must be relevant and cannot be misleading. See, *e.g., People v Vaiza* (1966) 244 CA2d 121, 125, 52 CR 733 (error to introduce real gun for illustration when issue was whether deadly weapon or toy gun was used).

If counsel wants jurors to consider the exhibit and have it before them during deliberations, counsel must move the court to receive the exhibit in evidence. See Evid C §140; 3 Witkin, California Evidence, *Presentation at Trial* §149 (4th ed 2000). This step is commonly taken at the conclusion of the evidentiary phase of the trial.

To move an exhibit into evidence, counsel should state:

Your Honor, I _ _[*move/ask*]_ _ **that** _ _[*defendant's/People's*]_ _ **Exhibit No.** _ _[*number*]_ _ **be** _ _[*admitted into/received in*]_ _ **evidence.**

Counsel can also add a description of the exhibit, *e.g.*:

Your Honor, I ask that People's Exhibit No. 22, a 22-caliber handgun, be received in evidence.

The following are some of the primary objections to documentary and demonstrative evidence:

- Not properly authenticated. Evid C §1401.
- Too time-consuming, too prejudicial, will confuse the issues, or will mislead the jury. Evid C §352.
- Unduly gruesome or inflammatory. *People v Crittenden* (1994) 9 C4th 83, 133, 36 CR2d 474.
- Not substantially similar. See *People v Bonin* (1989) 47 C3d 808, 847, 254 CR 298.
- Misleading. See California Trial Objections, chap 31 (Cal CEB Annual).

For discussion of the requirements for using various models, exhibits, and demonstrations, see Effective Introduction of Evidence in California, chaps 11 (authentication), 23 (experiments and scientific tests), 39 (physical evidence) (2d ed Cal CEB 2000).

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§31.27 3. Juror Access to Exhibits

Ordinarily, jurors are not permitted to view or handle exhibits until after they have been admitted in evidence and jury deliberations have begun. On occasion, counsel may wish the jury to have access to exhibits during the trial so that jurors may refer to the exhibits while the authenticating witness testifies. Such access is available in the court's discretion, even for some materials that may not be moved into evidence, *e.g.,* transcripts of tape recordings. In some counties, it is common practice for counsel to ask permission of the court to "publish" an exhibit. "Publishing" an exhibit means allowing jurors to examine it while it is being discussed by the witness describing it, but before the court has decided whether the exhibit may be admitted into evidence. See Mauet, Trial Techniques (5th ed 2000).

To publish or show an exhibit to the jury, counsel should state:

Your Honor, I ask that _ _[*defendant's/People's*]_ _ Exhibit No. _ _[*number*]_ _ be published to the jury at this time.

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§31.28 4. Common Exhibits

Common exhibits, including both real evidence and illustrative evidence, include the following:

- Film or videotape, *e.g.,* showing the crime scene;
- Audio or video recording, *e.g.,* of the defendant's statement to police;
- Demonstrations of the crime;
- Scientific evidence, *e.g.,* slides or photographs of fingerprints;
- X-ray films showing injuries;
- Photographs or slides, *e.g.,* of injuries;
- Maps or diagrams of the crime scene;
- Weapon with which crime was committed;
- Model, *e.g.,* of injured part of body; and
- Fruits of the crime, *e.g.,* burglarized items.

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5. Demonstrative Evidence

§31.29 a. Preserving Objection

Counsel opposing the introduction of an exhibit may object as soon as he or she is aware of the evidence. The objection should be made even if the item is to be used solely for demonstrative purposes and not admitted into evidence. If opposing counsel has the exhibit marked during a recess, counsel should ask that his or her objection be taken down by the court reporter. If opposing counsel has the exhibit marked during trial and it is prejudicial to counsel's case, counsel may ask to approach the bench and request a hearing outside the jury's presence. To preserve the issue for appeal if the objection is not sustained, counsel must request that the demonstrative exhibit or a facsimile be lodged with the court as part of the trial record.

For further discussion, see §31.3 (checklist of trial motions), §§31.8-31.22 (in limine motions), §§31.25-31.32 (procedure for admission of exhibits in evidence). See generally California Trial Objections (Cal CEB Annual).

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§31.30 b. Photographs

Counsel may try to introduce photographs into evidence or use them for illustration purposes. See *People v Thomas* (1992) 2 C4th 489, 524, 7 CR2d 199; *People v O'Brien* (1976) 61 CA3d 766, 780, 132 CR 616. Opposing counsel can object to autopsy photographs or other photographs of injuries or violent death on grounds that the photos are unduly prejudicial because of their gruesome nature, that they might confuse the issues or mislead the jury, or that explaining them or laying a proper foundation for them would take an undue amount of time. See Evid C §352; *People v Crittenden* (1994) 9 C4th 83, 133, 36 CR2d 474.

Counsel opposing the admission of photographic evidence should examine the photographs carefully to make sure that they accurately depict what they are supposed to show. For example, a photograph of the crime scene taken in daylight might give a false impression of how much detail eyewitnesses were able to observe and might be subject to exclusion. However, changes in what is photographed since the time of the crime do not necessarily make photographs inadmissible, as long as the photograph is accurate. See *People v O'Brien, supra* (posed photos allowed into evidence when witness testified that they accurately depicted scene and conditions prevailing at time of burglary); *People v Smith* (1963) 223 CA2d 394, 407, 36 CR 119 (photo of scene of robbery taken at later date admissible to show witness's view).

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§31.31 c. Demonstrations and Experiments

Demonstrations, reenactments, simulations, experiments and the like have long been permitted in trial courts. They are admitted in the trial court's discretion. The proponent of such evidence bears the burden of laying an adequate foundation, showing that (*People v Turner* (1994) 8 C4th 137, 198, 32 CR2d 762; *People v Bonin* (1989) 47 C3d 808, 847, 254 CR 298):

- The experiment is relevant;
- The experiment was or will be conducted under conditions substantially similar to those existing at the time of the actual event in question;
- The experiment will not consume undue time, confuse the issues, or mislead the jury; and
- Any expert who conducts and testifies about an experiment possesses the proper qualifications.

Examples of the wide variety of experimental evidence that have been held admissible include an anthropomorphic dummy used to measure the force generated by a collision (*People v Roehler* (1985) 167 CA3d 353, 385, 213 CR 353), an audiotape reenactment used to identify sounds as gunshots (*People v Turner* (1994) 8 C4th 137, 198, 32 CR2d 762), and a videotape reenactment depicting scenes witness saw on the evening of a murder (*People v Rodrigues* (1994) 8 C4th 1060, 1113, 36 CR2d 235).

In ruling on the admissibility of a reenactment, the court must determine whether it (1) is a reasonable representation of what it purports to portray, and (2) will assist jurors in determining the facts of the case or will instead mislead them. *People v Rodrigues* (1994) 8 C4th 1060, 1114, 36 CR2d 235. For example, in *People v Boyd* (1990) 222 CA3d 541, 566, 271 CR 738, the defense retained a cinematographer to create a film that attempted to reproduce the lighting conditions at the crime scene to discredit an eyewitness's identification of the defendant. After viewing the film during a hearing outside the jury' presence, the court concluded that an inadequate foundation had been laid because no witness had established that the film was an accurate representation of the lighting conditions at the time of the incident. The court also noted that the human eye is capable of observing more than the film depicted. Likewise, in *People v Gilbert* (1992) 5 CA4th 1372, 1388, 7 CR2d 660, an in-court demonstration using live models was not permitted because of significant physical and emotional disparities existing between the models and the individuals they were supposed to represent. The appellate court found that the trial court was well within its discretion in finding that the defense failed to show that the conditions of the proposed demonstration would be the same as those existing at the time of the alleged crime.

For discussion of using experiments and scientific tests, see Effective Introduction of Evidence in California, chap 23 (2d ed Cal CEB 2000). For discussion of physical evidence, see Effective Intro of Evidence, chaps 11, 39.

Ø **Note:** With technologies such as computer-generated simulations and optical laser systems being introduced to the courtroom, counsel must be aware of the *Kelly* (see §§31.12-31.14) and Evid C §352 issues presented and must object during trial to preserve the issue of admissibility on appeal. *People v Hart* (1999) 20 C4th 546, 615, 85 CR2d 132.

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§31.32 d. Similar but Not Identical Evidence

Counsel may attempt to introduce as evidence, or use only for purposes of illustration, objects similar to those connected with the commission of a crime. *People v Barnett* (1998) 17 C4th 1044, 1135, 74 CR2d 121. If the object is not exactly the same as that which it purports to represent, opposing counsel may object to its admission or use on the grounds that the evidence is irrelevant, lacking in proper foundation, misleading to the jury, and unduly prejudicial. See Evid C §§350, 352, 402-405. Compare *People v Vaiza* (1966) 244 CA2d 121, 125, 52 CR 733 (error to introduce real gun to illustrate gun that victim claimed he saw, because substitute differed in several meaningful respects; issue was whether deadly weapon was used, and victim might have seen toy gun), with *People v Ham* (1970) 7 CA3d 768, 780, 86 CR 906, disapproved on other grounds in *People v Compton* (1971) 6 C3d 55, 60 n3, 98 CR 217 (gun used for illustration only in robbery case to allow defendant's wife to testify that gun was similar to one owned by defendant).

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VI. OTHER TRIAL MOTIONS

§31.33 A. Requiring Election by Prosecution

The defense can invoke the doctrine of election when the evidence that the prosecution intends to present at trial tends to show a number of distinct and separate criminal acts, any one of which may constitute the crime charged. At the beginning of trial, the defense may request that the court require the prosecution to select the particular act on which it intends to rely in proving the charged count. *People v Burnett* (1999) 71 CA4th 151, 165, 83 CR2d 629; *People v Salvato* (1991) 234 CA3d 872, 879, 285 CR 837.

If there is no request for an election, the court must instruct the jury so as to ensure unanimity. *People v Melhado* (1998) 60 CA4th 1529, 1534, 70 CR2d 878; *People v Salvato, supra*. As a rule, when more than one act supports the crime charged, the court must instruct jurors that, to find the defendant guilty, they must unanimously agree that the defendant committed the same act or acts. See *People v Russo* (2001) 25 C4th 1124, 1132, 108 CR2d 436; *People v Castaneda* (1997) 55 CA4th 1067, 1070, 64 CR2d 395. See also CALCRIM 3500-3502. Jurors must also unanimously agree that the defendant committed the same specific act constituting the crime within the period alleged. *People v Crow* (1994) 28 CA4th 440, 445, 33 CR2d 624. See CALCRIM 3410 (statute of limitations).

Election cannot be compelled when the acts alleged are wholly generic in nature or constitute a continuous course of criminal conduct. *People v Jones* (1990) 51 C3d 294, 321, 270 CR 611; *People v Sanchez* (2001) 94 CA4th 622, 631, 114 CR2d 437 (continuing offense does not require unanimity). Moreover, jurors need not agree on a specific overt act in a conspiracy case as long as they all agree that a conspirator committed an overt act in furtherance of the conspiracy. *People v Russo* (2001) 25 C4th 1124, 1133, 108 CR2d 436.

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§31.34 B. Sanctions for Failing to Comply With Discovery

An evidentiary showing is required to support a motion for sanctions for failure to comply with the statutory discovery provisions. With the possible exception of constitutional discovery violations, counsel must provide evidence that a request for discovery was made before trial, and that the prosecution did not respond as required. See Pen C §§1054(b), 1054.5(b). Subsequent motions to compel disclosure of information are optional. Pen C §1054.5(b); *People v Jackson* (1993) 15 CA4th 1197, 1202, 19 CR2d 80; *People v Superior Court (Sturm)* (1992) 9 CA4th 172, 181, 11 CR2d 652.

As possible sanctions for failure to comply with discovery, the court may:

- Issue an order compelling disclosure of information. See *In re Littlefield* (1993) 5 C4th 122, 137, 19 CR2d 248 (court authorized to order defense to telephone likely witness and obtain address for disclosure to prosecution).
- Hold the noncomplying party, or the party's attorney, in contempt for any violation of a valid discovery order. *In re Littlefield, supra*.
- Give a jury instruction based on Pen C §1054.5(b) advising the jury that it may consider a party's concealment of evidence or failure to timely disclose evidence. See CALCRIM 306.
- Delay or prohibit a witness from testifying or prohibit evidence from being presented at trial. This sanction is available only when other sanctions have been unsuccessful in motivating a party to disgorge discoverable information. Pen C §1054.5(c); *People v Edwards* (1993) 17 CA4th 1248, 1264, 22 CR2d 3.
- Dismiss a charge, when required to do so by the U.S. Constitution. Pen C §1054.5(c).
- Issue any other lawful order the court deems appropriate. Pen C §1054.5(b).

For further discussion of discovery, see chap 11.

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C. Jury Issues

§31.35 1. Juror's Question for Witness

Although jurors are not selected for the purpose of asking questions of witnesses, the trial court may occasionally permit jurors to venture into this area of counsel's domain. *People v Anderson* (1990) 52 C3d 453, 481, 276 CR 356; *People v McAlister* (1985) 167 CA3d 633, 644, 213 CR 271. If the trial court decides to allow a juror to pose a question, counsel should request that the court require the question to be submitted in writing so that both attorneys may examine it, make necessary objections, and obtain a ruling, all out of the jury's presence. *People v Majors* (1998) 18 C4th 385, 407, 75 CR2d 684. Direct questioning by jurors has been disapproved and should not be permitted. *People v Cummings* (1993) 4 C4th 1233, 1305, 18 CR2d 796.

Judges may ask questions but cannot align themselves with one side. *People v Cummings, supra; People v Swanson* (1981) 123 CA3d 1024, 1030, 176 CR 915. Even when the judge asks the question, counsel must make a specific objection in order to preserve the issue for appellate review. See, *e.g., People v Ham* (1970) 7 CA3d 768, 781, 86 CR 906, disapproved on other grounds in *People v Compton* (1971) 6 C3d 55, 60 n3, 98 CR 217.

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§31.36 2. Communication Between Judge and Jurors

When jurors have questions about the law or evidence that they want answered during deliberations, those questions should be answered in open court, in the presence of the accused and counsel for the parties, unless the defendant's presence is waived. Pen C §1138. On receiving a jury's question, the trial judge should advise all counsel of the question and give each an opportunity to object to any action by the court or jury that might be deemed irregular. *People v Hawthorne* (1992) 4 C4th 43, 69, 14 CR2d 133. Failure to object in a timely manner operates as a waiver of the issue on appeal. *People v Jennings* (1991) 53 C3d 334, 384, 279 CR 780. Failure to follow this procedure can be harmless error. See, *e.g., People v Hawthorne* (1992) 4 C4th 43, 70, 14 CR2d 133; *People v Jennings, supra*.

Private communications between the court and the jury are generally improper. *People v Delgado* (1993) 5 C4th 312, 330, 19 CR2d 529. Ex parte communications between the court and the jury impinge on a defendant's constitutional rights to the assistance of counsel and to be personally present at all trial proceedings. *People v Hawthorne* (1992) 4 C4th 43, 69, 14 CR2d 133. If the court communicates with the jury during deliberations outside open court and without the defendant's prior consent, defense counsel must object on the record in a timely manner or the issue will be waived on appeal. *People v Jennings, supra*.

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3. Discharge of Juror

§31.37 a. Grounds for Discharging Juror and Seating Alternate

The court may discharge a juror and replace him or her with an alternate juror when (Pen C §1089; CCP §§233-234):

- The juror dies;
- The juror becomes ill;
- Good cause is shown to the court that the juror is unable to perform his or her duty, such as when a juror refuses to deliberate (*People v Thomas* (1994) 26 CA4th 1328, 1333, 32 CR2d 177; see *People v Cleveland* (2001) 25 C4th 466, 485, 106 CR2d 313 (what constitutes refusal to deliberate)); or
- The juror requests to be discharged and good cause appears for the discharge.

The appellate courts have also found the following to be good cause for discharging a juror:

- The juror's brother dies (*In re Mendes* (1979) 23 C3d 847, 852, 153 CR 831);
- The juror has an emotional reaction to the evidence (*People v Van Houten* (1980) 113 CA3d 280, 286, 170 CR 189);
- The juror is inattentive or sleeps during trial (*People v Johnson* (1993) 6 C4th 1, 22, 23 CR2d 593);
- The juror conceals a prior criminal charge (*People v Price* (1991) 1 C4th 324, 399, 3 CR2d 106);
- The juror has family obligations (*People v Hall* (1979) 95 CA3d 299, 157 CR 107);
- The juror becomes a victim of crime during court recess (*People v Manriquez* (1976) 59 CA3d 426, 431, 130 CR 585);
- The juror is arrested during trial (*People v Farris* (1977) 66 CA3d 376, 386, 136 CR 45);
- The juror is inadvertently exposed to outside information about the case, which gives rise to a presumption of prejudice (*People v Nesler* (1997) 16 C4th 561, 579, 66 CR2d 454; see *Caliendo v Warden of Cal. Men's Colony* (9th Cir 2004) 365 F3d 691, 696);
- The juror requests to be discharged during deliberations because he or she is too emotionally involved to follow court's instructions (*People v Collins* (1976) 17 C3d 687, 690, 131 CR 782); and
- Juror misconduct (*Larios v Superior Court* (1979) 24 C3d 324, 331, 155 CR 374; *People v Guzman* (1977) 66 CA3d 549, 559, 136 CR 163).

Ø **Warning:** The following actions concerning jurors are crimes that may be punished either as misdemeanors or felonies: improper attempts to influence a juror (Pen C §95); threats to a juror after a verdict (Pen C §95.1); and a promise by a juror to give a verdict, or the receipt by a juror of improper communications (Pen C §96).

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§31.38 b. Hearing on Whether to Discharge Juror

A hearing to determine whether good cause exists to discharge a juror does not have to be a full-scale adversary proceeding in which sworn testimony is taken. It should be summary in nature and scope. *People v Manriquez* (1976) 59 CA3d 426, 432, 130 CR 585; see §§33.20-33.24 (procedure to learn whether juror misconduct occurred). Although the trial judge's determination of "good cause" calls for the exercise of discretion (*People v Farris* (1977) 66 CA3d 376, 386, 136 CR 45), the record should be complete enough to show the ground for discharging the juror as a "demonstrable reality" (*People v Compton* (1971) 6 C3d 55, 60, 98 CR 217; see *U.S. v Murillo* (9th Cir 2002) 288 F3d 1126, 1137 (incomplete record)). The trial court's decision will be upheld on appeal "unless a manifest and unmistakable abuse of discretion clearly appears." *People v Duran* (1996) 50 CA4th 103, 113, 57 CR2d 635. An error in discharging a juror is treated no differently from any other trial error leading to reversal on appeal, *i.e.,* retrial is not precluded. *People v Hernandez* (2003) 30 C4th 1, 10, 131 CR2d 514.

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§31.39 c. Selecting Alternate

If there is more than one alternate juror, the one selected to substitute for a regular juror is to be selected by "drawing" the name according to Pen C §1089. However, the practice of using the first alternate chosen during voir dire as the first alternate used to replace a regular juror was also approved in *People v Armendariz* (1984) 37 C3d 573, 581 n7, 209 CR 664. The court and counsel may decide during jury selection how alternates will be used.

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§31.40 d. Declaring Mistrial When There Are No Alternates

If there are no alternates, and the trial court discharges a juror for good cause, the judge must declare a mistrial and start the trial anew, or send the case back to the master calendar judge to set a date for retrial, unless the parties stipulate to a smaller number of jurors. See *People v Ames* (1975) 52 CA3d 389, 392, 124 CR 894.

There must be "legal necessity" to declare a mistrial without the defendant's consent. The death, illness, or absence of a judge or juror constitutes legal necessity. However, evidence that would justify discharging a juror on the statutory grounds of "good cause" does not establish legal necessity to declare a mistrial when no alternate is available to replace the juror. *Larios v Superior Court* (1979) 24 C3d 324, 331, 155 CR 374.

If there is good cause to excuse a juror (*e.g.,* bias or family hardship) that does not amount to "legal necessity" (*e.g.,* death or grave illness), the trial must continue with the objectionable juror unless (1) the defendant requests that the juror be discharged and a motion for a mistrial be granted because there is no alternate to replace the juror, or (2) the defendant requests that the juror be discharged and waives his or her right to a jury of 12. See *People v Ames, supra*. See also §28.5. If a court declares a mistrial after excusing a juror without legal necessity and there are no alternates and the defendant does not consent to the mistrial, further proceedings will be barred because the defendant will have been placed once in jeopardy. *Larios v Superior Court* (1979) 24 C3d 324, 332, 155 CR 374.

For discussion of motions for mistrial, see chap 25.

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D. Control in Courtroom and Courthouse

§31.41 1. Judge Has Duty to Preserve Order

It is the judge's duty to preserve order in the courtroom and to see that the accused receives a fair and impartial trial as guaranteed by US Const amends VI and XIV, and Cal Const art I, §15, cl 2. This duty includes the responsibility to guard against outbursts by the defendant or others, or any conduct calculated to obstruct justice, including demonstrations in and around the courthouse. *People v Slocum* (1975) 52 CA3d 867, 883, 125 CR 442. The trial court has broad discretion in the exercise of its duty to maintain an orderly and secure courtroom. *People v Hayes* (1999) 21 C4th 1211, 1269, 91 CR2d 211. The court is also required to control publicity and press access to the courtroom. See chap 14.

For general discussion of the court's responsibility to provide an atmosphere conducive to a fair trial, see 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§7-21 (3d ed 2000).

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§31.42 2. Restraining Defendant or Defense Witnesses; Removing Defendant From Courtroom

A defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of manifest need for such restraints. *People v Hill* (1998) 17 C4th 800, 841, 72 CR2d 656; *People v Duran* (1976) 16 C3d 282, 290, 127 CR 618; *People v Miller* (2009) 175 CA4th 1109, 1113, 96 CR3d 716. See *Deck v Missouri* (2005) 544 US 622, 161 L Ed 2d 953, 125 S Ct 2007. Physical restraints cannot be imposed in the absence of a record showing violence, the threat of violence, or other nonconforming conduct by the defendant. *People v Mar* (2002) 28 C4th 1201, 1217, 124 CR2d 161; *People v Jackson* (1996) 13 C4th 1164, 1215, 56 CR2d 49. Otherwise, the jury may infer that the defendant is violent, dispelling the presumption of innocence. *People v Jenkins* (2000) 22 C4th 900, 995, 95 CR2d 377. The same rule applies to defense witnesses (*People v Ceniceros* (1994) 26 CA4th 266, 277, 31 CR2d 303) and in Mentally Disordered Offender (MDO) proceedings (*People v Fisher* (2006) 136 CA4th 76, 80, 38 CR3d 540).

Examples of cases approving restraint of a defendant are *People v Wallace* (2008) 44 C4th 1032, 81 CR3d 651 (shackling in way that could not be seen by jurors approved for defendant who had been cited for many jailhouse rule violations, including five fights and possession of illegal razors); *People v Combs* (2004) 34 C4th 821, 837, 22 CR3d 61 (leg restraints not visible to jury approved for defendant who told psychologist he was going to "nut up" and set himself up to be shot by deputy); *People v Pride* (1992) 3 C4th 195, 231, 10 CR2d 636 (shackling approved for disruptive defendant); *People v Livaditis* (1992) 2 C4th 759, 774, 9 CR2d 72 (handcuffs on defendant, invisible to jury, approved to alleviate fear of victim-witness who refused to testify otherwise); *People v Sheldon* (1989) 48 C3d 935, 945, 258 CR 242 (shackling justified by substantial risk that defendant would make escape attempt in courtroom); *People v George* (1994) 30 CA4th 262, 268, 35 CR2d 750 (maximum security measures justified for defendant with history of escapes who killed motorist during most recent escape).

The determination of whether a defendant should be restrained must be made by the court, not by its security personnel. The court cannot simply adopt a policy of restraining defendants accused of violent crimes (*People v Jackson* (1993) 14 CA4th 1818, 1824, 18 CR2d 586) and must determine on the record whether manifest need for restraint exists, considering the facts of each particular case. *People v Miller* (2009) 175 CA4th 1109, 1114, 96 CR3d 716. A showing of manifest need is required even when the device used to restrain the defendant is one that does not directly restrain physical movement and cannot easily be seen by jurors, such as a stun belt. The trial court must also consider the special risks posed by the use of a device such as a stun belt before authorizing its use. No formal evidentiary hearing need be held; however, the court cannot base its decision to use restraints on mere rumor or innuendo. It must make a record that can be reviewed by the appellate courts that demonstrates that the use of any restraint is legally justified. *People v Mar* (2002) 28 C4th 1201, 1218, 124 CR2d 161 (improper use of stun belt held prejudicial because of likely effect on demeanor of defendant required to wear belt while testifying).

If restraints are found to be essential, the defendant cannot be subjected to any more restraint than is necessary. See Pen C §688. The restraint selected should be as unobtrusive as possible. *People v Duran* (1976) 16 C3d 282, 291, 127 CR 618. When visible restraints are required to ensure adequate security, the trial court must instruct the jury sua sponte that restraints should have no bearing on the determination of the defendant's guilt. *People v Livaditis, supra; People v Duran, supra*. The mere fact that a juror sees a defendant shackled or in jail garb, however, does not, by itself, create a due process problem. Prejudice must be demonstrated. *People v Majors* (1998) 18 C4th 385, 406, 75 CR2d 684; *People v Rodrigues* (1994) 8 C4th 1060, 1179, 36 CR2d 235.

> Ø **Practice tip:** Defense counsel should be aware of the picture that the defendant presents to the jury and quickly bring to the court's attention anything that would tend to prejudice the defendant in the jury's eyes. *People v Taylor* (1982) 31 C3d 488, 495, 183 CR 64. If the court decides to restrain the defendant, to remove the defendant from the courtroom, or to proceed to trial while the defendant wears prison garb, an objection is required to preserve the right to complain on appeal. *Estelle v Williams* (1976) 425 US 501, 508, 48 L Ed 2d 126, 133, 96 S Ct 1691; *People v Ward* (2005) 36 C4th 186, 206, 30 CR3d 464.

Ø **Practice tip:** Difficult clients should be advised that outbursts, violence, and other disruptive behavior in front of the jury will not provide grounds for a mistrial or reversal on appeal because an accused cannot benefit on appeal from his or her own misconduct before the jury. *People v Arias* (1996) 13 C4th 92, 148, 51 CR2d 770. A defendant who acts in a disruptive manner, causing jurors to see previously concealed shackles or to become aware of other security measures, is estopped from complaining on appeal. *People v Arias, supra; People v Pride* (1992) 3 C4th 195, 253, 10 CR2d 636.

When a defendant acts disruptively, the court should admonish the jury to disregard the defendant's outburst and to decide the case solely on the trial evidence. *People v Arias, supra*. If restraints are ineffective to prevent the defendant's disruptive behavior, the defendant may be removed from the courtroom. *People v Pena* (1992) 7 CA4th 1294, 1308, 9 CR2d 550; *People v Hayes* (1991) 229 CA3d 1226, 1233, 280 CR 578 (disruptive defendant properly removed from courtroom).

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§31.43 3. Security Measures Other Than Restraint of Defendant

Security measures that are not inherently prejudicial to the defendant do not require a showing of manifest need and "reside within the sound discretion of the trial court." *People v Jenkins* (2000) 22 C4th 900, 995, 95 CR2d 377. For example, the use of metal detectors in courthouses need not be justified by compelling evidence of imminent threats to the security of the court. *People v Jenkins* (2000) 22 C4th 900, 997, 95 CR2d 377. Similarly, the presence of armed guards in the courtroom requires no on-the-record justification "unless they are present in unreasonable numbers" (*People v Ainsworth* (1988) 45 C3d 984, 1003, 248 CR 568 (four to six uniformed guards placed strategically throughout courtroom)); likewise, no showing of manifest need is required to station a uniformed, armed deputy beside the defendant during his or her testimony (*People v Stevens* (2009) 47 C4th 625, 101 CR3d 14; *People v Sanchez* (2009) 180 CA4th 763, 103 CR3d 334).

When extraordinary security measures are contemplated, *e.g.,* photographing members of the public who attend trial or limiting the number of spectators, the defendant is entitled to advance notice and an opportunity to object, as a matter of procedural due process. A hearing is required on request, and testimony on the need for security measures should be taken. An in camera hearing is permissible to protect confidential information. *Gibson v Superior Court* (1982) 135 CA3d 774, 783, 185 CR 741. Failure to provide notice to the defense is a variety of "trial error" subject to harmless error analysis, requiring a defendant to demonstrate prejudice. *People v Woodward* (1992) 4 C4th 376, 387, 14 CR2d 434.

The court also has broad discretion in deciding whether to permit procedures that require security measures when alternatives are available. For example, the court had discretion to deny a defendant's motion for jury view of the scene when in-court review of diagrams was sufficient and would obviate the need for security measures. *People v Jenkins, supra*. See also *People v Fudge* (1994) 7 C4th 1075, 1104, 31 CR2d 321.

When a defendant who is a prison inmate is to be brought to the crime scene to be present at a jury view, the trial court may follow California Department of Corrections and Rehabilitation (CDCR) rules requiring the defendant to be shackled. See *People v Roberts* (1992) 2 C4th 271, 306, 6 CR2d 276. The reasons for shackling a defendant *outside* the courtroom need not meet the test of manifest need (see §31.42); the court can order the defendant shackled if it states reasons on the record indicating that restraint is being imposed on the basis of previous conduct of the defendant or circumstances that make restraint reasonable. *People v Roberts, supra*.

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§31.44 E. Orders Concerning In-Custody Defendant's Appearance and Needs

When a defendant is in custody and law enforcement officers are unwilling to accommodate the reasonable requests of the defense concerning the defendant's need for a haircut, daily showers, telephone calls, medical treatment, civilian clothing for trial, and the like, counsel may bring a motion requesting an order from the court. This type of request may be made orally and off the record. A written order, however, must be prepared to be given to law enforcement officials. A sample motion and order is in California Criminal Law Forms Manual §31.4 (2d ed Cal CEB 2005).

Although courts are generally careful not to interfere with the administration of the jails or jail officials' decisions on issues of security or housing, most motions that concern the personal needs of a particular defendant are granted as long as they appear reasonable. See *People v Meredith* (2009) 174 CA4th 1257, 1262, 95 CR3d 297 (requiring defendant to go to trial wearing jail clothing violated rights to fair trial, due process, and equal protection); *People v Kozel* (1982) 133 CA3d 507, 538, 184 CR 208 (prisoner's request to hold papers and notes about approaching trial in his cell denied; however, prisoner allowed to have notes in cell and court during trial); *People v Sanchez* (1969) 275 CA2d 226, 232, 79 CR 781 (when defendant did not avail himself of opportunity to get haircut, subsequent request denied).

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F. Judgment of Acquittal

§31.45 1. Nature of Motion

Because the prosecution bears the burden of proving the defendant's guilt, the defendant is not required to put on evidence if the evidence presented in the prosecution's case-in-chief is insufficient to warrant conviction. See Pen C §§1118 (court trial), 1118.1 (jury trial). The court may enter a judgment of acquittal on its own motion or on the motion of the defendant. Pen C §§1118, 1118.1.

In a court trial, there is only one opportunity for a motion for judgment of acquittal: at the close of the prosecution's case-in-chief. See Pen C §1118. In a jury trial, there are two opportunities for the motion: at the close of the prosecution's case-in-chief and at the close of all the evidence before the case is submitted to the jury. See Pen C §1118.1.

Ø **Practice tip:** Moving for judgment of acquittal at the close of the prosecution's case-in-chief preserves the defendant's right on appeal to have a reviewing court consider the sufficiency of the evidence as it stood at that time, *i.e.,* before the defendant put on evidence. See *People v Trevino* (1985) 39 C3d 667, 695, 217 CR 652, overruled on other grounds in *People v Johnson* (1989) 47 C3d 1194, 1219, 255 CR 569.

A motion for judgment of acquittal is typically made orally at the close of the prosecution's case-in-chief. The motion can challenge the sufficiency of the evidence on any factual matter the prosecution is required to prove beyond a reasonable doubt, *e.g.,* any count, enhancement allegation, or special circumstance. No particular form is required for the motion and the defendant is not required to state the grounds or direct the court's attention to particular counts. See *People v Cole* (2004) 33 C4th 1158, 1213, 17 CR3d 532; *People v Belton* (1979) 23 C3d 516, 521, 153 CR 195 (defense counsel's statement that he didn't think there was sufficient evidence to convict defendant held to be sufficient articulation of motion for judgment of acquittal). Thus, a nonspecific motion for acquittal requires the trial court to consider all possible claims of insufficiency of the evidence.

The appellate courts are not, however, in agreement about whether a motion for judgment of acquittal directed to specified grounds or counts encompasses unspecified grounds or counts. Compare *People v Ceja* (1988) 205 CA3d 1296, 253 CR 132 (motion for acquittal directing court's attention to particular counts does not encompass unspecified counts), with *People v Martinez* (1982) 132 CA3d 119, 183 CR 256 (trial court was obligated to consider all possible grounds for acquittal, even though defense counsel limited argument to single ground). See also 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §§562-564 (3d ed 2000) on judgment of acquittal.

In either a court trial or a jury trial, the court must consider whether the evidence presented is sufficient to sustain a conviction on appeal. See Pen C §§1118, 1118.1; *People v Ainsworth* (1988) 45 C3d 984, 1022, 248 CR 568 (test to be applied in deciding Pen C §1118.1 motion is "whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged"). In a court trial, because the judge is the trier of fact, the judge must also weigh the evidence, evaluate the credibility of witnesses, and determine that the case against the defendant is "proved beyond a reasonable doubt before [the defendant] is required to put on a defense." *People v Partner* (1986) 180 CA3d 178, 183, 225 CR 502.

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§31.46 2. Effect of Judge's Order

An acquittal under Pen C §1118 or §1118.1 operates like any other acquittal. It cannot be appealed and it acts as a bar to any other prosecution for the same offense. Pen C §1118.2. See also *Burks v U.S.* (1978) 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141 (double jeopardy precludes retrial after reversal for insufficiency of evidence).

In an appropriate case, however, the court may limit the impact of a Pen C §1118.1 acquittal. If the evidence will not sustain a conviction for the charged offense, but is sufficient to sustain a conviction for a necessarily included lesser offense, the trial court may limit its ruling to the greater offense, thereby permitting the prosecution to seek conviction for the lesser offense. See *People v Garcia* (1985) 166 CA3d 1056, 1066, 212 CR 822; *People v Wong* (1973) 35 CA3d 812, 828, 111 CR 314. In addition, it may be appropriate to permit amendment of the charging document to charge a closely related offense that is not a lesser included offense, when the defendant has received adequate notice of the new charge. See *People v Suk* (1990) 220 CA3d 952, 960, 269 CR 676.

However, when a motion for acquittal is granted without any qualification, the prosecution may not subsequently amend the information to charge a lesser included offense. *People v McElroy* (1989) 208 CA3d 1415, 1424, 256 CR 853, disapproved on other grounds in *People v Cromer* (2001) 24 C4th 889, 901 n3, 103 CR2d 23 (relying on *People v Garcia, supra*). Nor may the trial court change its mind and reinstate a count after having dismissed it under Pen C §1118.1. *People v Moran* (1973) 33 CA3d 724, 728, 109 CR 287. See *Smith v Massachusetts* (2005) 543 US 462, 160 L Ed 2d 914, 125 S Ct 1129.

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§31.47 VII. APPELLATE REVIEW OF TRIAL MOTIONS

As a rule, neither a writ of prohibition nor mandate will lie to resolve an issue concerning the admissibility of evidence. *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 660, 117 CR 20; *Laurie S. v Superior Court* (1994) 26 CA4th 195, 203, 31 CR2d 506; *People v Yarbrough* (1991) 227 CA3d 1650, 1654, 278 CR 703. It is rare for appellate courts to grant extraordinary review during trial. For an example of an exception, see *Tapia v Superior Court* (1991) 53 C3d 282, 286, 279 CR 592 (alternative writ of mandate issued to determine applicability of Proposition 115's changes in voir dire procedures to defendant's trial). Most trial issues are raised on appeal from the judgment. See generally Appeals and Writs in Criminal Cases §§4.5-4.20 (3d ed Cal CEB 2007).

When a judge denies a Pen C §1118.1 motion for judgment of acquittal, the standard of review is the same as the standard of review on a claim that the evidence is insufficient to support the verdict. The court must determine whether there is any substantial evidence of the existence of each element of the offense charged. *People v Trevino* (1985) 39 C3d 667, 695, 217 CR 652, overruled on other grounds in *People v Johnson* (1989) 47 C3d 1194, 1221, 255 CR 569. On what constitutes substantial evidence, see *People v Johnson* (1980) 26 C3d 557, 578, 162 CR 431 (court must review entire record to determine whether it discloses substantial evidence from which a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt). The substantial evidence rule is an aspect of due process. *Jackson v Virginia* (1979) 443 US 307, 61 L Ed 2d 560, 99 S Ct 2781.

Appellate courts reviewing Pen C §1118 and §1118.1 rulings may consider only evidence presented up to the time the motion was made. *People v Trevino, supra* (§1118.1 motion); *People v Belton* (1979) 23 C3d 516, 526, 153 CR 195 (§1118 motion). Failure to make a Pen C §1118 or §1118.1 motion does not preclude the defendant from challenging the sufficiency of the evidence on appeal, but if the defendant did not make a §1118.1 motion at the close of the prosecution's case, the claim will be reviewed on the basis of the entire trial record. *People v Smith* (1998) 64 CA4th 1458, 76 CR2d 75.

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JURY INSTRUCTIONS

MICHAEL C. McMAHON

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§32.1 I. OVERVIEW

The trial court has a duty to instruct the jury on every principle of law necessary to decide the case, including defenses. *People v St. Martin* (1970) 1 C3d 524, 531, 83 CR 166; *People v Russell* (2006) 144 CA4th 1415, 1424, 51 CR3d 263.

Counsel's duties in a criminal case include planning and requesting favorable instructions as well as requesting any necessary amplification or explanation of the instructions given. See *People v Maury* (2003) 30 C4th 342, 425, 133 CR2d 561; *People v Anderson* (1966) 64 C2d 633, 639, 51 CR 238. Making sure all instructions necessary to the jury's consideration of the case are requested is the prosecutor's job. Defense counsel has the duty to make sure that the court gives any instruction that could support an argument that the prosecution has not proved the case beyond a reasonable doubt. Despite the central role instructions play in defining the issues to be decided, many criminal trial lawyers devote insufficient time to preparing the charge to the jury. Advocates on both sides of a criminal trial would do well to heed the observation that "nothing results in more cases of reversible error than mistakes in jury instructions." *People v Thompkins* (1987) 195 CA3d 244, 252, 240 CR 516.

This chapter discusses sua sponte instructions (see §§32.3-32.13); instructions that must be requested (see §§32.14-32.20); CALCRIM instructions (see §§32.21-32.23); stipulating to lesser related offense instructions (see §32.8); preparing and submitting instructions (see §§32.24-32.28); objecting to instructions (see §§32.29-32.34); and instructing the jury (see §§32.35-32.38).

In determining what instructions to request or oppose, most attorneys begin with the Judicial Council of California Criminal Jury Instructions (CALCRIM) (2008). The Mandatory Criminal Jury Instructions Handbook (CJER-CEB Annual) lists required instructions by offense.

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§32.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should consult local rules before relying on this chart. Many counties have specific time requirements not otherwise required by the Penal Code. However, such local rules may not be inconsistent with law. *Boyle v CertainTeed Corp.* (2006) 137 CA4th 645, 649, 40 CR3d 501.

Action	Deadline	Authority
Time to submit instructions to court.	Proposed instructions must be submitted to judge before argument begins.	Pen C §1093.5.
Trial court to inform counsel of exact instructions to be given, on request of counsel.	Before oral argument.	Pen C §1093.5.

An exception exists when issues are raised during argument that have not been covered by instructions given or refused previously. In that event, the court may, on counsel's request, give additional instructions on those issues. Pen C §1093.5.

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III. TYPES OF INSTRUCTIONS

A. Sua Sponte Instructions

§32.3 1. Trial Court Must Instruct on General Principles of Law Relevant to Case

Instructions given on the court's own motion are called sua sponte instructions. The trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence that are necessary for the jury's understanding of the case, even in the absence of a request. *People v Breverman* (1998) 19 C4th 142, 154, 77 CR2d 870; *People v St. Martin* (1970) 1 C3d 524, 531, 83 CR 166; *People v Elize* (1999) 71 CA4th 605, 615, 84 CR2d 35.

It is the prosecutor's responsibility to request any instructions that the court is required to give sua sponte and to ensure that all instructions the jury needs to decide the case are given.

Ø **Warning:** Most experienced trial attorneys agree that counsel should request every instruction he or she considers important to the case whether or not the trial court is required to give the instruction sua sponte. The only way to ensure that the court gives instructions counsel considers important is to request them, and then, if the trial court agrees to give a particular instruction, to pay attention to the instructions given to make sure that the trial court actually gives them.

When the prosecutor fails to make certain that the trial court gives all instructions the jury needs to decide the case, the result may be reversal and a new trial for the defendant. See *People v Thompkins* (1987) 195 CA3d 244, 252, 240 CR 516. This does not mean, however, that defense counsel should try to build in instructional error with a view to obtaining a reversal on appeal: even significant instructional errors are generally subject to harmless error analysis on review. *People v Flood* (1998) 18 C4th 470, 499, 76 CR2d 180; *People v Molina* (2000) 82 CA4th 1329, 1334, 98 CR2d 869.

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§32.3A 2. Trial Court Must Instruct on Presumption of Innocence and Reasonable Doubt

The trial court has a sua sponte duty under the California Constitution to instruct the jury in every criminal case on the presumption of innocence and the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt. *People v Vann* (1974) 12 C3d 220, 225, 115 CR 352; *People v Elguera* (1992) 8 CA4th 1214, 1219, 10 CR2d 910. See CALCRIM 103, 220. See also Pen C §1096 (defining presumption of innocence and reasonable doubt).

Ø **Note:** In Judicial Council of California Criminal Jury Instructions (CALCRIM) (2008), there is an error in CALCRIM 220. As originally published, both CALCRIM 103 and 220 stated in pertinent part that the presumption of innocence "requires that the People prove each element of a crime… beyond a reasonable doubt." See Judicial Council of California Criminal Jury Instructions (2006). That language is retained in CALCRIM 103, but the current version of CALCRIM 220 omits the "each element" language, stating only that the presumption of innocence "requires that the People prove a defendant guilty beyond a reasonable doubt." But see *People v Zepeda* (2008) 167 CA4th 25, 30, 83 CR3d 793 (court approves CALCRIM 220).

Under *Cage v Louisiana* (1990) 498 US 39, 41, 112 L Ed 2d 339, 342, 111 S Ct 328, an erroneous reasonable doubt instruction violates the federal Constitution if there is a reasonable likelihood that the jury understood the instruction to "allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." The federal Constitution does not require the trial court to *define* reasonable doubt. *Victor v Nebraska* (1994) 511 US 1, 5, 127 L Ed 2d 583, 590, 114 S Ct 1239. However, "'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.'" 511 US at 5, 127 L Ed 2d at 590, quoting from *Holland v U.S.* (1954) 348 US 121, 140, 99 L Ed 150, 167, 75 S Ct 127.

Although the failure to instruct on reasonable doubt is error under California law, whether the error violates the federal Constitution depends on whether the charge as a whole correctly conveyed the concept of reasonable doubt. Thus, in *People v Mayo* (2006) 140 CA4th 535, 545, 44 CR3d 497, the reviewing court held that the failure to instruct on reasonable doubt was not error under the federal Constitution and was harmless under the California Constitution because the instructions "fully and repeatedly informed the jurors Mayo was entitled to an acquittal unless each element of the crime charged was proved beyond a reasonable doubt." In contrast, in *People v Flores* (2007) 147 CA4th 199, 219, 54 CR3d 98, federal constitutional error occurred and reversal was required because the instructions, "whether considered individually or together," did not inform the jury that the defendant could not be found guilty unless each element of the charged offenses was proved beyond a reasonable doubt.

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§32.4 3. Limits on Trial Court's Duty to Instruct Sua Sponte

The trial court's duty to instruct on its own motion is quite limited. The court is not required to instruct on its own motion on every specific point developed at the trial. *People v Hood* (1969) 1 C3d 444, 449, 82 CR 618. "[T]he trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly." *People v Wade* (1959) 53 C2d 322, 334, 1 CR 683, disapproved on other grounds in *People v Carpenter* (1997) 15 C4th 312, 381, 63 CR2d 1; *People v Huynh* (2002) 99 CA4th 662, 677, 121 CR2d 340. As a result, both prosecutors and defense counsel must propose instructions that support their theories of the case. See *People v Kane* (1946) 27 C2d 693, 700, 166 P2d 285; *People v Cook* (1906) 148 C 334, 347, 83 P 43.

Many instructions that are useful to the defense do not fall within the ambit of the trial court's duty to instruct on it own motion. See, *e.g., People v Collie* (1981) 30 C3d 43, 63, 177 CR 458 (no sua sponte duty to give limiting instruction when other crimes evidence admitted for limited purpose under Evid C §1101(b)); *People v Gardner* (1969) 71 C2d 843, 852, 79 CR 743 (court has no sua sponte duty to instruct jury not to draw inference of guilt from defendant's failure to testify).

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§32.5 4. Examples of Other Instructions Required in Every Case

Because the trial court's duty to instruct the jury on its own motion is an open-ended one that varies from case to case, there is no definitive list of instructions the court must give on its own motion. It is, however, well established that in every criminal case the trial court must give certain instructions sua sponte. See Mandatory Criminal Jury Instructions Handbook (CJER-CEB Annual). These include instructions on:

- The elements of all charged offenses. *People v Cummings* (1993) 4 C4th 1233, 1311, 18 CR2d 796. This includes instructions on states of mind. *People v Ford* (1964) 60 C2d 772, 792, 36 CR 620, overruled on other grounds in *People v Satchell* (1971) 6 C3d 28.36, 98 CR 33 (trial court required to instruct sua sponte on specific intent). See, *e.g.,* CALCRIM 250, 252 (general criminal intent), 251-252 (specific intent), 520 (malice aforethought).
- The believability of witnesses. *People v Rincon-Pineda* (1975) 14 C3d 864, 883, 123 CR 119. See CALCRIM 105, 226.
- The sufficiency of the testimony of a single witness. *People v Rincon-Pineda* (1975) 14 C3d 864, 884, 123 CR 119. See CALCRIM 301.
- The conduct of the trial and the jury's duties. See CALCRIM 100-124 (pretrial instructions), 200-207 (posttrial instructions).

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Source: Criminal Law/California Criminal Law Procedure and Practice/32 JURY INSTRUCTIONS/§32.6 5. Examples of Instructions Required When Appropriate

§32.6 5. Examples of Instructions Required When Appropriate

Certain instructions must be given by the trial court on its own motion when circumstances warrant it. The Bench Notes to individual CALCRIM instructions often state whether the instruction must be given sua sponte. For a checklist of instructions that must be given sua sponte in criminal cases, see Mandatory Criminal Jury Instructions Handbook, chap 2 (CJER-CEB Annual).

Among the most important of the instructions that must be given sua sponte when the circumstances warrant are instructions on lesser included offenses (*People v Kelly* (1992) 1 C4th 495, 529, 3 CR2d 677; see §§32.7-32.10) and instructions on defenses that are not inconsistent with the defendant's theory of the case (*People v Rubalcava* (2000) 23 C4th 322, 334, 96 CR2d 735; see §§32.11-32.13). Other instructions that must be given sua sponte when appropriate include:

- An instruction on the sufficiency of circumstantial evidence must be given when the prosecution relied substantially on circumstantial evidence for proof of the defendant's guilt. *People v Marquez* (1992) 1 C4th 553, 577, 3 CR2d 710; *People v Yrigoyen* (1955) 45 C2d 46, 49, 286 P2d 1. See CALCRIM 224.
- An instruction on weighing conflicting testimony must be given in any case in which conflicting testimony has been given. *People v Rincon-Pineda* (1975) 14 C3d 864, 884, 123 CR 119. See, *e.g., People v Reyes* (2007) 151 CA4th 1491, 60 CR3d 777. See also CALCRIM 302.
- An instruction that flight after a crime is not sufficient by itself to establish guilt must be given when the prosecution relies on evidence of flight as tending to show guilt. Pen C §1127c. See *People v Paysinger* (2009) 174 CA4th 26, 93 CR3d 901. See also CALCRIM 372.
- An instruction that the corpus delicti of a crime must be established independently of the defendant's admission or confession must be given when the prosecution relies on the defendant's admission or confession. *People v Beagle* (1972) 6 C3d 441, 455, 99 CR 313; *People v Reyes* (2007) 151 CA4th 1491, 1498, 60 CR3d 777. See CALCRIM 359. On the corpus delicti rule generally, see §8.27.
- An instruction on assessing expert testimony must be given when an expert's opinion has been received in evidence. *People v Bowens* (1964) 229 CA2d 590, 600, 40 CR 435, disapproved on other grounds in *People v Mayberry* (1975) 15 C3d 143, 158, 125 CR 745. See CALCRIM 332.
- Instructions on aiding and abetting must be given when the defendant's liability for the charged offense is based on aiding and abetting. *People v Montoya* (1994) 7 C4th 1027, 1047, 31 CR2d 128. See CALCRIM 400-401.
- Instructions defining the "target offense" must be given when the prosecutor relies on the natural and probable consequences theory of aiding and abetting liability. *People v Prettyman* (1996) 14 C4th 248, 267, 58 CR2d 827. See CALCRIM 402-403.
- Instructions on the need for corroboration of accomplice testimony must be given when there is substantial evidence that a witness is an accomplice. See Pen C §1111. See also CALCRIM 334-335; *People v Felton* (2004) 122 CA4th 260, 267, 18 CR3d 626 (co-perpetrator is accomplice). The court need only give such an instruction when there is substantial evidence that the witness was an accomplice and not merely an accessory. *People v Boyer* (2006) 38 C4th 412, 466, 42 CR3d 677 (contrasting definition of "accomplice" and "accessory"); *People v Lewis* (2001) 26 C4th 334, 369, 110 CR2d 272.
- Instructions defining or clarifying the statutory definition of the crime charged must be given when the terms used in the statute have a technical meaning peculiar to the law. *People v Failla* (1966) 64 C2d 560, 565, 51 CR 103.
- Cautionary instructions must be given when the prosecution relies on the defendant's oral confession or admission. *People v Beagle* (1972) 6 C3d 441, 455, 99 CR 313. See CALCRIM 356-358.
- Cautionary instructions must be given when an accomplice's testimony incriminates the defendant. *People v Guiuan* (1998) 18 C4th 558, 569, 76 CR2d 239. See CALCRIM 334-335.
- A unanimity instruction is required when the evidence discloses more than one act on which a conviction could be based if the acts in question could have been charged as separate offenses. *People v Diedrich* (1982) 31

C3d 263, 280, 182 CR 354. See CALCRIM 3500. But see *People v Flores* (2007) 157 CA4th 216, 222, 68 CR3d 472 (unanimity instruction not required when evidence shows multiple acts in continuous course of conduct).

Ø **Note:** The failure to give a unanimity instruction has been held to be federal constitutional error even though the federal Constitution does not require a unanimous verdict. See *People v Smith* (2005) 132 CA4th 1537, 1545, 34 CR3d 472. As the court in *Smith* explained, the requirement that all jurors who vote for guilt agree on the same criminal act is not undermined by the fact that federal due process does not require all members of a jury to agree on the verdict. 132 CA4th at 1545. But see *People v Vargas* (2001) 91 CA4th 506, 561, 110 CR2d 210.

- If the court conditionally admits evidence dependent upon evidence of a preliminary fact's being admitted later in the trial, a sua sponte instruction to disregard the evidence may be required if the court later determines that a jury could not reasonably find the existence of the preliminary fact. Evid C §403(c)(2). See *People v Lucas* (1995) 12 C4th 415, 467, 48 CR2d 525.

Ø **Note:** The trial court does not have a duty to instruct sua sponte that the jury may consider a confession obtained in violation of *Miranda* solely for purposes of impeachment, and not for the truth of any statements in it. *People v Coffman* (2004) 34 C4th 1, 63, 17 CR3d 710. See Bench Notes to CALCRIM 356.

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6. Sua Sponte Instructions on Lesser Included Offenses

§32.7 a. Court's Sua Sponte Duty to Instruct on Lessers

The court must instruct sua sponte on lesser included offenses when there is evidence "substantial enough to warrant consideration" that the defendant is guilty of the lesser offense. *People v Flannel* (1979) 25 C3d 668, 684 n12, 160 CR 84. Instructions on lesser included offenses are required when the evidence raises a question as to whether all the elements of the charged offense are present (*People v Kelly* (1992) 1 C4th 495, 529, 3 CR2d 677) and the jury could conclude that the defendant is guilty of the lesser offense (*People v Wickersham* (1982) 32 C3d 307, 324, 185 CR 436, overruled on other grounds in *People v Barton* (1995) 12 C4th 186, 200, 47 CR2d 569). In determining whether the evidence warrants instructions on a lesser included offense, the trial court is not permitted to make credibility determinations. *People v Wickersham, supra; People v Strozier* (1993) 20 CA4th 55, 63, 24 CR2d 362.

There is no sua sponte duty to instruct on lesser included offenses when there is no evidence that the offense was less than that charged (*People v Neely* (1993) 6 C4th 877, 897, 26 CR2d 189 (court properly rejected defense request for instructions on second degree murder and voluntary manslaughter)), when the evidence supporting the instructions is speculative or presents no more than a mere possibility the lesser offense was committed, or when the evidence rises only to the level of speculation (*People v Sakarias* (2000) 22 C4th 596, 620, 94 CR2d 17). In a noncapital case, the failure to instruct on lesser included offenses when the evidence warrants it is subject to harmless error analysis under the standard of *People v Watson* (1956) 46 C2d 818, 836, 299 P2d 243. *People v Breverman* (1998) 19 C4th 142, 178, 77 CR2d 870; *People v Lacefield* (2007) 157 CA4th 249, 261, 68 CR3d 508.

Ø **Note:** The defendant does not have a unilateral right to instructions on a lesser *related* offense. However, it is not error to give such instructions if both the defendant and the prosecutor agree that they should be given. *People v Birks* (1998) 19 C4th 108, 116, 77 CR2d 848. See §32.8.

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§32.8 b. Determining Whether Offense Is Lesser Included Offense

As a rule, an offense is necessarily included in the charged offense (often called the greater offense) if (*People v Lopez* (1998) 19 C4th 282, 288, 79 CR2d 195; *People v Lohbauer* (1981) 29 C3d 364, 369, 173 CR 453):

- The greater offense cannot be committed without committing the lesser offense; or
- The specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense.

In the context of the rule proscribing conviction of both a greater and a lesser included offense, the courts have explained the relationship between the greater offense and a necessarily included lesser offense in terms of the statutory elements of the offenses. Thus, a less serious offense is necessarily included in a greater offense only if all its elements are also elements of the greater offense. *People v Sanchez* (2001) 24 C4th 983, 987, 103 CR2d 698. Under this definition, even an offense that is very closely related to the charged crime may not qualify as a necessarily included offense. Thus, *e.g.,* assault with a deadly weapon is not an offense necessarily included in the crime of murder (*People v Benjamin* (1975) 52 CA3d 63, 71, 124 CR 799), nor is gross vehicular manslaughter necessarily included in the crime of murder (*People v Sanchez* (2001) 24 C4th 983, 988, 103 CR2d 698).

It is important to distinguish between lesser included offenses and lesser related offenses because neither party is entitled to instructions on a lesser related offense even if they are requested. *People v Birks* (1998) 19 C4th 108, 119, 77 CR2d 848. See, *e.g., People v Valentine* (2006) 143 CA4th 1383, 1386, 49 CR3d 948 (uncharged crime of receiving stolen property not lesser included offense of robbery; defendant not entitled to instruction).

Ø **Note:** It is permissible for both parties to agree that instructions on lesser related offenses should be given in appropriate cases. Note that a defendant who agrees to or acquiesces in such instructions will not be able to challenge them on appeal. *People v Birks* (1998) 19 C4th 108, 136 n19, 77 CR2d 848. See also California Jury Instructions Criminal (CALJIC), App D ("The Birth, Life, and Death of Lesser Related Offenses").

The determination of what is a necessarily lesser included offense is a question of law. In making this determination, the trial court should consider the elements of the offenses in the abstract, without reference to the actual evidence introduced at trial. *People v Birks* (1998) 19 C4th 108, 117, 77 CR2d 848; *People v Cheaves* (2003) 113 CA4th 445, 454, 6 CR3d 382.

Ø **Note:** In *People v Sanchez* (2001) 24 C4th 983, 103 CR2d 698, the supreme court took care to point out it was using this strict definition in the context of the rule against multiple convictions. Different considerations may apply in the context of instructions. Whether an offense is necessarily included within a specific charged crime can be a complex question, and authorities are sometimes contradictory. A good starting point for research is California Jury Instructions Criminal (CALJIC), App C (Lesser Offenses to the Offense Charged).

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§32.9 c. Waiving Statute of Limitations as Defense to Lesser

The defendant can affirmatively waive the statute of limitations as a defense to an otherwise time-barred lesser included offense. *Cowan v Superior Court* (1996) 14 C4th 367, 372, 58 CR2d 458. Such a tactical choice might be appropriately made either to avail the defendant of jury instructions on the lesser offense or to enter a guilty plea to the lesser offense. A defendant who requests or acquiesces in instructions on a time-barred lesser offense forfeits the right to rely on the statute of limitations on appeal (*People v Stanfill* (1999) 76 CA4th 1137, 1150, 90 CR2d 885), but a finding of a request or acquiescence requires more than a silent record (*People v Beasley* (2003) 105 CA4th 1078, 1089, 130 CR2d 717). Further, the filing of an information charging the greater offense may toll the statute of limitations for a lesser offense based on the same conduct. See Pen C §803(b); *People v Whitfield* (1993) 19 CA4th 1652, 1659, 24 CR2d 210.

For jury instructions on the order in which juries may deliberate on lesser offenses, see §33.32 on partial verdicts.

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§32.10 d. Instruction on Lesser Must Be Given Over Defense Objection

If the evidence warrants instructions on a lesser included offense, they must be given even over a defense objection. *People v Breverman* (1998) 19 C4th 142, 154, 77 CR2d 870; *People v Barton* (1995) 12 C4th 186, 194, 47 CR2d 569. Thus, the trial court errs when it fails to give instructions on lesser included offenses when warranted by the evidence, even if it omitted the instructions at defendant's behest. However, the doctrine of invited error will preclude the defendant from complaining of this error on appeal if it clearly appears on the record that the defendant expressly objected, not out of inadvertence or mistake, but for deliberate tactical reasons. 12 C4th at 198. See also *People v Green* (1995) 34 CA4th 165, 175, 40 CR2d 239 (error for judge not to instruct on lesser included offense when defendant acquiesced; defendant was pro per, and it was unclear from record that it was deliberate tactical decision).

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7. Sua Sponte Instructions on Defenses

§32.11 a. Court's Sua Sponte Duty to Instruct on Defenses

The trial court's obligation to instruct sua sponte on the general principles of law necessary to decide the case includes the obligation to instruct on defenses. *People v Sedeno* (1974) 10 C3d 703, 716, 112 CR 1, overruled on other grounds in *People v Breverman* (1998) 19 C4th 142, 178 n26, 77 CR2d 870. This obligation is more limited than the obligation to instruct on lesser included offenses. The rule is that the trial court must instruct on a defense that is supported by substantial evidence if the defendant is relying on it *or* if it is not inconsistent with the defense theory of the case. See *People v Flannel* (1979) 25 C3d 668, 684, 160 CR 84; *People v Sedeno, supra*; *People v Whitehurst* (1992) 9 CA4th 1045, 1049, 12 CR2d 33. In determining whether substantial evidence supports the instruction, the trial court should not weigh credibility. *People v Flannel, supra*.

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§32.12 b. Defenses

As a rule, a defense either (1) disputes the sufficiency of the evidence to establish one or more elements of the offense or (2) affirmatively asserts a state of facts that, if true, defeats the prosecution's allegations. Defenses that fall into the second category are often referred to as affirmative defenses, because they ordinarily require the defendant to produce some evidence of the facts that support their assertion.

When an affirmative defense directly relates to the defendant's guilt or innocence, the defendant has the burden of introducing some evidence of the underlying facts, but the defendant can satisfy that burden by raising a reasonable doubt. *People v Figueroa* (1986) 41 C3d 714, 721, 224 CR 719; Comment to Evid C §501. The ultimate burden of proof of all facts necessary to establish guilt remains on the prosecution. See *Mullaney v Wilbur* (1975) 421 US 684, 690, 44 L Ed 2d 508, 514, 95 S Ct 1881 (state may not constitutionally shift burden to defendant to prove any fact essential to offense charged). See, *e.g., People v Mower* (2002) 28 C4th 457, 479, 122 CR2d 326 (medical marijuana defense negates element of unlawful possession; therefore, defendant required to raise only reasonable doubt about guilt). See also §32.33.

Examples of such defenses include:

- Alibi. *People v Costello* (1943) 21 C2d 760, 765, 135 P2d 164. See CALCRIM 3400.
- Unconsciousness. *People v Babbitt* (1988) 45 C3d 660, 689, 248 CR 69. See CALCRIM 3425. For discussion, see §§48.37-48.39
- Duress. *People v Graham* (1976) 57 CA3d 238, 240, 129 CR 31. See CALCRIM 3402.
- Any defense justifying, excusing, or mitigating a homicide. *People v Bushton* (1889) 80 C 160, 164, 22 P 127. See CALCRIM 505-512.
- Defense of another. *People v Roe* (1922) 189 C 548, 560, 209 P 560. See CALCRIM 505 (homicide), 3470 (assault).
- Self-defense. *People v Adrian* (1982) 135 CA3d 335, 337, 185 CR 506. See CALCRIM 505 (homicide), 3470 (assault), 3471-3474 (general principles of self-defense).
- Mistake of fact. *People v Mayberry* (1975) 15 C3d 143, 157, 125 CR 745 (reasonable and good faith belief in consent against charges of kidnapping and rape); *People v Russell* (2006) 144 CA4th 1415, 1430, 51 CR3d 263. See CALCRIM 3406.
- Claim of right. *People v Williams* (2009) 176 CA4th 1521, 98 CR3d 770; *People v Russell* (2006) 144 CA4th 1415, 1430, 51 CR3d 263.
- Lawful arrest (against charge of false imprisonment). *People v Agnew* (1940) 16 C2d 655, 664, 107 P2d 601.

When an affirmative defense relates to a matter that is collateral to the truth of the charges, there is no constitutional impediment to requiring a defendant to prove the facts establishing the defense by a preponderance of the evidence. *People v Bolden* (1990) 217 CA3d 1591, 1601, 266 CR 724. See also *Martin v Ohio* (1987) 480 US 228, 233, 94 L Ed 2d 267, 274, 107 S Ct 1098.

Examples of defenses that fall into this category include:

- Insanity. Pen C §25(b); *People v Hernandez* (2000) 22 C4th 512, 522, 93 CR2d 509. See CALCRIM 3450-3451. For discussion, see §§48.40-48.58.
- Necessity. *People v Kearns* (1997) 55 CA4th 1128, 1135, 64 CR2d 654. See CALCRIM 3403.
- Entrapment. *People v Moran* (1970) 1 C3d 755, 760, 83 CR 411. See CALCRIM 3408.
- Accident. *People v Gonzales* (1999) 74 CA4th 382, 389, 88 CR2d 111. See CALCRIM 3404.

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§32.13 c. Distinguishing Between Lessers and Defenses

Because the trial court's obligation to instruct on defenses is more limited than is its obligation to instruct on lesser included offenses, it is important to distinguish between these categories. See *People v Barton* (1995) 12 C4th 186, 200, 47 CR2d 569. However, drawing that distinction is not always easy. For example, unreasonable or "imperfect" self-defense is closely related to true or "perfect" self-defense. The only difference between the two theories is the reasonableness of the individual's belief in the need to defend against imminent peril. Perfect self-defense is a true defense: a defendant charged with murder who is found to have acted in the reasonable belief in the need for self-defense is not guilty of an unlawful homicide. But imperfect self-defense merely negates malice aforethought, an element of murder—it does not make the homicide lawful. A defendant found to have acted in an unreasonable belief in the need for self-defense is guilty of the lesser included offense of voluntary manslaughter. Thus, unreasonable self-defense is more accurately viewed as a description of one form of voluntary manslaughter, and in a murder prosecution, instructions on unreasonable self-defense are really instructions on the lesser included offense of voluntary manslaughter. 12 C4th at 200.

The trial court is consequently obligated to instruct on *unreasonable* self-defense whenever substantial evidence exists to support a conviction of voluntary manslaughter on that theory—even if imperfect self-defense is inconsistent with the theory of defense—but it is not obligated to instruct on true self-defense if such a defense is inconsistent with the defendant's theory of the case. 12 C4th at 201.

Ø **Example:** If the defendant is relying on an alibi, the trial court is probably not required to instruct sua sponte on self-defense, even if the theory is supported by substantial evidence, but it is required to instruct sua sponte on imperfect self-defense if that theory is supported by substantial evidence.

It is important for defense counsel to be aware that many instructions on defense theories are not considered to be instructions on defenses that the trial court must give sua sponte but rather "pinpoint" instructions that the trial court must give only on request. See §32.16. For example, evidence of voluntary intoxication may negate the intent element of a crime that requires a specific intent or other statutorily specified mental state. See Pen C §§22, 28. It might therefore appear to be a defense on which the trial court is required to instruct sua sponte. However, in *People v Saille* (1991) 54 C3d 1103, 2 CR2d 364, the California Supreme Court held that the abolition of the diminished capacity defense (see Pen C §28(b)) ended the requirement that the trial court instruct sua sponte on voluntary intoxication; a defendant desiring trial court instructions on voluntary intoxication must specifically request them.

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B. Instructions That Must Be Requested

§32.14 1. General Requirements for Requested Instructions

As a rule, both prosecutors and defense attorneys are entitled to have the court instruct on legal principles that are relevant to the case. See Pen C §1093(f). A requested instruction should (see Pen C §1127):

- Contain a correct statement of the law.
- Be abstract and not too closely tied to the facts of the case.
- Be supported by substantial evidence; speculation is not enough. See *People v Marshall* (1997) 15 C4th 1, 39, 61 CR2d 84; *People v Ceja* (1993) 4 C4th 1134, 1142, 17 CR2d 375.
- Not be argumentative. *People v Mincey* (1992) 2 C4th 408, 437, 6 CR2d 822.
- Not merely duplicate other instructions. *People v Catlin* (2001) 26 C4th 81, 152, 109 CR2d 31.

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§32.15 2. Instruction on Bias or Sympathy

On the request of either party, the court must instruct the jury substantially as follows (Pen C §1127h):

> Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.

The statute was enacted out of concern about so-called "panic strategies," which try to explain a defendant's actions or emotional reactions on the basis of the belated discovery of the victim's gender identity or sexual orientation. The emotional reactions of the defendant are, of course, often relevant and material under California's homicide law and in other contexts.

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3. Instructions Commonly Requested by Defense

§32.16 a. Pinpoint Instructions

The defense, on proper request, has the right to an instruction "relating particular facts to any legal issue." *People v Rincon-Pineda* (1975) 14 C3d 864, 885, 123 CR 119, quoting from *People v Sears* (1970) 2 C3d 180, 190, 84 CR 711; *People v Saille* (1991) 54 C3d 1103, 1119, 2 CR2d 364. Such instructions may direct the jury's attention to evidence that could raise a reasonable doubt about the defendant's guilt or they may "pinpoint" the crux of the defendant's case. *People v Saille, supra*. See *People v Granados* (1957) 49 C2d 490, 496, 319 P2d 346 (conviction reversed; trial court refused to give instruction that pinpointed defense); *People v Mathews* (1994) 25 CA4th 89, 100, 30 CR2d 330 (same); *People v Guzman* (1975) 47 CA3d 380, 388, 121 CR 69 (error to refuse defense request for instruction relating reasonable doubt to identification).

A *pinpoint* instruction describes precisely the crux of a defendant's case, usually by relating a legal issue in the case to particular evidence from which a reasonable doubt about the defendant's guilt could arise. *People v Sears* (1970) 2 C3d 180, 190, 84 CR 711. A number of instructions now routinely given in criminal cases originated as defense-requested pinpoint instructions. See *People v Wright* (1988) 45 C3d 1126, 1137, 248 CR 600.

Examples of pinpoint instructions include:

- An instruction that legally adequate provocation to reduce murder to voluntary manslaughter can occur over a considerable period of time. See *People v Wharton* (1991) 53 C3d 522, 569, 280 CR 631.
- An instruction that an individual who forms the intent to steal after the application of force is not guilty of robbery. *People v Webster* (1991) 54 C3d 411, 443, 285 CR 31.
- An instruction that intoxication can negate specific intent or another required mental state. *People v Saille* (1991) 54 C3d 1103, 1119, 2 CR2d 364.
- An instruction that evidence of provocation may be considered in determining whether a homicide is first or second degree murder. *People v Mayfield* (1997) 14 C4th 668, 778, 60 CR2d 1. See CALCRIM 522.
- An instruction on the effect of the victim's antecedent threats or assaults against the defendant on the reasonableness of defendant's conduct. *People v Moore* (1954) 43 C2d 517, 531, 275 P2d 485; *People v Garvin* (2003) 110 CA4th 484, 488, 1 CR3d 774.

Pinpoint instructions are fact-specific and this list is merely illustrative. In determining whether pinpoint instructions are needed in a given case, there is no substitute for a thorough acquaintance with the statutory formulation of the charged crime and with any pertinent case law interpreting it.

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§32.17 b. Clarifying or Amplifying Instructions

Ordinarily, the instructions defining the elements of the crime adequately set forth what the prosecutor needs to prove to establish guilt. Sometimes, however, the facts of the case are such that instruction on legal principles not contained in the definition of the crime will assist the jury in its consideration of the case. In those situations, clarifying or amplifying instructions may be necessary or appropriate. If the clarification or amplification is not a general principle of law governing the case, the trial court is not required to give such instructions sua sponte and the instruction must be requested. *People v Estrada* (1995) 11 C4th 568, 574, 46 CR2d 586; *People v Poggi* (1988) 45 C3d 306, 327, 246 CR 886.

Moreover, if the language defining a crime and the instructions as a whole adequately inform the jury about the legal principles governing the case, any error in refusing *requested* amplifying or clarifying instructions is likely to be harmless. *People v Cordero* (1989) 216 CA3d 275, 279, 264 CR 774.

Ø **Note:** Counsel should consider requesting clarifying or amplifying instructions when it appears that a legal principle that is not entirely obvious from the elements of the crime may be an important factor in deciding the case. For example, it is well settled in California that an individual who has been threatened by another is entitled to act more quickly and take harsher measures in repelling an assault than one who has not. See *People v Humphrey* (1996) 13 C4th 1073, 1095, 56 CR2d 142 (concurring opinion of Brown, J.). In a homicide or assault prosecution, the defendant is entitled on request to support a self-defense claim with an instruction to that effect when there is evidence of antecedent threats by the alleged victim. *People v Moore* (1954) 43 C2d 517, 528, 275 P2d 485; *People v Bush* (1978) 84 CA3d 294, 302, 148 CR 430 (contains text of proposed instruction).

Some clarifying and amplifying instructions may also be pinpoint instructions. See §32.16. Examples of clarifying or amplifying instructions that may be required in appropriate cases include:

- An instruction that the victim's fear of immediate bodily injury must be reasonable. *People v Maury* (2003) 30 C4th 342, 425, 133 CR2d 561 (rape prosecution); *People v Anderson* (1966) 64 C2d 633, 639, 51 CR 238 (robbery prosecution).
- An instruction defining the phrase "reckless indifference to human life," as used in Pen C §190.2(d). *People v Estrada* (1995) 11 C4th 568, 574, 46 CR2d 586.
- An instruction that the crime of conviction and attendant special circumstances can be counted only once as an aggravating factor during the penalty phase of a capital trial. *People v Melton* (1988) 44 C3d 713, 768, 244 CR 867.
- An instruction defining "actual but unreasonable belief" in the need for self-defense. *People v Cordero* (1989) 216 CA3d 275, 279, 264 CR 774. See CALCRIM 571.

Even when there is no apparent need for clarifying or amplifying instructions in the initial charge to the jury, the situation may change during deliberations if the jury requests clarification of an instruction or otherwise indicates confusion. Thus, in *Cordero,* for example, the court of appeal found error in the trial court's failure to give defendant's requested clarification of the meaning of the term "deliberation" after a question from the jury indicated that it was confused about its meaning. *People v Cordero* (1989) 216 CA3d 275, 282, 264 CR 774. See also *People v Thompkins* (1987) 195 CA3d 244, 257, 240 CR 516.

Ø **Note:** A party generally may not argue on appeal that a court's legally correct instruction was too general or incomplete unless the complaining party requested the appropriate clarifying or amplifying language. *People v Andrews* (1989) 49 C3d 200, 218, 260 CR 583. However, this rule does not apply when the trial court gives an instruction that is an incorrect statement of the law. *People v Hudson* (2006) 38 C4th 1002, 1011, 44 CR3d 632; *People v Smithey* (1999) 20 C4th 936, 976 n7, 86 CR2d 243.

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§32.18 c. Cautionary Instructions

Cautionary instructions may be appropriate in a variety of situations. Cautionary instructions that may be required if requested in an appropriate case include:

- An instruction that the jury may not draw any inferences from the defendant's failure to testify (CALCRIM 355). See *Griffin v California* (1965) 380 US 609, 614, 14 L Ed 2d 106, 110, 85 S Ct 1229; *People v Mendoza* (1987) 192 CA3d 667, 677, 238 CR 1.
- Instructions on eyewitness identification (see CALCRIM 315). *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431.

  Ø **Note:** CALCRIM 315 must be given on request when identification is a crucial issue and there is no substantial corroborative evidence. *People v Wright* (1988) 45 C3d 1126, 1143, 248 CR 600. See Bench Notes to CALCRIM 315.

- An instruction on the effect of coercion on the reliability of a witness's testimony. See *People v Ervin* (2000) 22 C4th 48, 83, 91 CR2d 623; *People v Underwood* (1964) 61 C2d 113, 122, 37 CR 313 (cautionary instruction on jury's use of witness's prior inconsistent statements required sua sponte when evidence of coercion was uncontradicted).

Often, the need for a cautionary instruction arises unexpectedly during trial, when, for example, a witness inadvertently testifies about something that the trial court had ruled inadmissible. In this situation, the party objecting to the evidence must request a cautionary instruction admonishing the jury to disregard the testimony.

Ø **Note:** If the testimony is very prejudicial, its admission may be grounds for a mistrial motion. See chap 25.

When the need for a cautionary instruction is caused by prosecutorial misconduct, the failure to object to the conduct and to request the trial court to caution the jury to disregard the prosecutor's remarks precludes the defendant from raising the issue on appeal unless the prejudicial impact of the prosecutor's conduct was such that it could not be cured by admonition. *People v Bell* (1989) 49 C3d 502, 535, 262 CR 1; *People v Green* (1980) 27 C3d 1, 27, 164 CR 1, overruled on other grounds in *People v Martinez* (1999) 20 C4th 225, 241, 83 CR2d 533.

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§32.19 d. Limiting Instructions

Limiting instructions must be requested. Limiting instructions must be given on request when the trial court admits testimony or other evidence for a limited purpose. Evid C §355. Ordinarily, the court has no sua sponte duty to give limiting instructions. See *People v Hernandez* (2004) 33 C4th 1040, 1051, 16 CR3d 880; *People v Brown* (1994) 8 C4th 746, 758, 35 CR2d 407. Although the court must give appropriate limiting instructions if they are properly requested, the timing of the instructions is within the trial court's discretion: the trial court does not have to give limiting instructions when the limited evidence is presented or when the request is made and subsequent instructions can suffice in a proper case. *People v Dennis* (1998) 17 C4th 468, 533, 71 CR2d 680; *People v Johnson* (1967) 253 CA2d 396, 399, 61 CR 225.

Situations calling for limiting instructions that arise in criminal cases include the introduction of evidence that is admissible against one codefendant but not another (see CALCRIM 304-305), the introduction of evidence of uncharged misconduct under Evid C §1101(b) (see CALCRIM 375), and the introduction for a nonhearsay purpose of an out-of-court statement that is not admissible for the truth of the matter asserted (see CALCRIM 303).

Limiting instruction on evidence of uncharged misconduct. When evidence of the defendant's uncharged misconduct is admitted under Evid C §1101(b), the defendant is entitled on request to an instruction that the jury should not use the misconduct as evidence that the defendant has a predisposition to commit the charged act. See CALCRIM 375. The trial court has no sua sponte duty to instruct on the limited admissibility of uncharged misconduct. *People v Collie* (1981) 30 C3d 43, 63, 177 CR 458.

> Ø **Note:** Evidence Code §§1108-1109 make evidence of specified prior offenses admissible in prosecutions for sexual offenses, domestic violence, and abuse of a child or of an elder or dependent person. In such cases, the jury *is* permitted to infer that the defendant has a disposition to commit the charged offenses. Thus, limiting instructions are not required. See CALCRIM 852 (domestic violence), 853 (abuse of elder or dependent person), 1191 (sex offenses). See *People v Falsetta* (1999) 21 C4th 903, 915, 89 CR2d 847 (Evid C §1108 is constitutional; court retains discretion to exclude evidence as unduly prejudicial under Evid C §352).

Limiting instruction on evidence admitted for nonhearsay purpose. When an out-of-court statement that would be hearsay if admitted for its truth is admitted for a nonhearsay purpose, the party that would be harmed by the hearsay aspects of the statement is entitled on request to a limiting instruction. Common examples in criminal cases include:

- A statement admissible as circumstantial evidence of state of mind but not admissible under the state of mind exception to the hearsay rule. On the distinction between the state of mind exception to the hearsay rule and circumstantial evidence of state of mind, see *People v Ortiz* (1995) 38 CA4th 377, 389, 44 CR2d 914. See also Jefferson's California Evidence Benchbook §1.34 (4th ed CJA-CEB 2009).
- A statement admissible as a "fresh complaint" by a sexual assault victim. See *People v Brown* (1994) 8 C4th 746, 756, 35 CR2d 407.
- The defendant's prior inconsistent statement taken in violation of *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, admissible for impeachment but not as substantive evidence of guilt. See CALCRIM 356. See also Bench Notes to CALCRIM 356.
- The defendant's statements to a defense expert (such as statements to a medical expert in the course of an examination), introduced not to be evaluated for their truth, but to show the basis of the expert's opinion. See CALCRIM 360; Bench Notes to CALCRIM 360; *People v Boyer* (2006) 38 C4th 412, 465, 42 CR3d 677.

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§32.20 4. Instructions Commonly Requested by Prosecution

The prosecution has the right to have the judge instruct the jury on the legal principles that relate to facts that it feels are important to its case when its proffered instructions are "correct statements of abstract propositions of law" with evidentiary support. *People v Moore* (1954) 43 C2d 517, 524, 275 P2d 485. Like the defense, the prosecution may request pinpoint instructions, clarifying or amplifying instructions, cautionary instructions, and limiting instructions.

Examples of instructions that may be requested by the prosecution:

- An amplifying instruction on the limits of self-defense. *People v Moore* (1954) 43 C2d 517, 526, 275 P2d 485. See CALCRIM 3471-3472.
- An instruction on the use of prior statements as evidence. See CALCRIM 318-319.
- An instruction on distrust of a witness who is willfully false. *People v Reyes* (1987) 195 CA3d 957, 966, 240 CR 752. See CALCRIM 226.
- An instruction on the defendant's flight after the crime. *People v Hernandez Rios* (2007) 151 CA4th 1154, 1157, 60 CR3d 591. See CALCRIM 372.

  Ø **Note:** When there is evidence of flight, the prosecution should request CALCRIM 372 even though the court should give the instruction sua sponte. See Pen C §1127c. See also Bench Notes to CALCRIM 372. An instruction on flight may be appropriate even when the defendant concedes culpability of some crime but contests the degree of the charged offense. *People v Moon* (2005) 37 C4th 1, 27, 32 CR3d 894.

- An instruction on transferred intent in either a murder or voluntary manslaughter prosecution when specific intent is involved. See CALCRIM 562.
- A limiting instruction that the defendant's statements to a medical expert may be considered only as information on which the expert relied and not for their truth. *People v Dennis* (1998) 17 C4th 468, 532, 71 CR2d 680. See CALCRIM 360.
- An instruction that insanity cannot be shown by antisocial acts alone. *People v Weaver* (2001) 26 C4th 876, 968, 111 CR2d 2.
- An instruction that the jury need not unanimously agree on the theory (*i.e.,* felony murder or premeditated and deliberate murder) underlying a unanimous verdict of first degree murder. See *People v Pride* (1992) 3 C4th 195, 249, 10 CR2d 636.
- An instruction that juror unanimity is not required for specific acts constituting the crime when it involves a continuous course of conduct of a series of acts over a period of time, such as child abuse. See *People v Napoles* (2002) 104 CA4th 108, 117, 127 CR2d 777.

For discussion of objecting to instructions, see §§32.29-32.34.

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C. CALCRIM Instructions

§32.21 1. Description and Recommendation for Use

In determining what instructions to request (or oppose), most criminal practitioners begin with Judicial Council of California Criminal Jury Instructions (CALCRIM) (2008). These are the official instructions for use in the state, and their use is strongly encouraged. See Cal Rules of Ct 2.1050(e).

The instructions are organized into 24 series, which reflect broad categories of crime (*e.g.,* homicide) and components of the trial (*e.g.,* evidence). The series and the instructions within each series are presented in the order in which they are likely to be given in an actual trial. Therefore, greater offenses, such as DUI with injury come before lesser offenses, such as simple DUI. Defenses are grouped together at the end of the instructions, rather than dispersed throughout.

The misdemeanors are placed within the category of instructions to which they belong, so simple battery is found with the other battery instructions rather than in a stand-alone misdemeanor section.

CALCRIM is an excellent place to begin when preparing proposed instructions, but they should not be counsel's sole resource. No CALCRIM instruction should be requested without first giving careful attention to the notes that follow it. Bench Notes following the instructions alert counsel to the court's instructional duty and to related instructions, as well as to situations in which the instruction or elements of it must not be given (see, *e.g.,* CALCRIM 720). In addition to authority, commentary, and related issues, the notes may also specify lesser included offenses (see, *e.g.,* Bench Notes to CALCRIM 840). Counsel can easily avoid potential embarrassment at the instruction conference by thoroughly reading the notes that accompany a proposed instruction.

It is important to remember that although CALCRIM instructions are considered authoritative, they do not have the force of law, and may be held incorrect. See, *e.g., People v Montoya* (1994) 7 C4th 1027, 1047, 31 CR2d 128 (former CALJIC 14.54 incorrect); *People v Frye* (1994) 28 CA4th 1080, 1090, 34 CR2d 180 (former CALJIC 16.305 incorrect).

The latest CALCRIM revisions are available on the Administrative Office of the Courts' website at http://www.courtinfo.ca.gov. Trial counsel should check that website for recent CALCRIM developments.

Ø **Warning:** Counsel may want to proceed with caution in requesting CALCRIM 306 (which informs the jury that it may consider in its deliberations a party's failure to timely produce evidence). See Bench Notes to CALCRIM 306. CALJIC 2.28 on the same subject was "recognized as a problematic jury instruction." *People v Saucedo* (2004) 121 CA4th 937, 942, 17 CR3d 692. See also *People v Cabral* (2004) 121 CA4th 748, 17 CR3d 456 (CALJIC 2.28 failed to give jury any guidance regarding legitimate inferences that could be drawn; judgment reversed); *People v Bell* (2004) 118 CA4th 249, 255, 12 CR3d 808 (same).

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§32.22 2. Modification May Be Required for CALCRIM Instruction to Fit Facts of Case

Instructions must fit facts of case. Despite Cal Rules of Ct 2.1050 (see §32.21), and the high regard in which CALCRIM instructions are held, trial judges must give the instructions required by the facts of the case on trial. See *People v Runnion* (1994) 30 CA4th 852, 858, 36 CR2d 203. CALCRIM instructions may need modification given the facts of a particular case. See Cal Rules of Ct 2.1050(e). See also *People v Pulido* (1997) 15 C4th 713, 729, 63 CR2d 625 (CALJIC 8.27 needed modification in some aider and abettor felony murder cases). Many CALCRIM instructions are designed to be modified to fit the facts of the particular case. For example, CALCRIM 226's laundry list of factors the jury can consider in assessing the believability of witnesses should be tailored to the facts shown by the evidence. Likewise, CALCRIM 315, on eyewitness identification, contains a list similar to the list in CALCRIM 226 and blanks for inserting factors relevant to the particular case.

When there is no CALCRIM instruction on a particular crime, "'[t]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction.'" *People v Estrada* (1995) 11 C4th 568, 574, 46 CR2d 586, quoting from *People v Poggi* (1988) 45 C3d 306, 246 CR 886.

Prepare tailored instructions when no CALCRIM instruction is on point. Because CALCRIM instructions are often rather general, their relevance to specific evidence in a given case may be difficult to discern. When there are no CALCRIM instructions that make the points counsel wishes to emphasize or that state the legal principle on which he or she wishes to rely in closing argument, counsel should prepare tailored instructions that may be more intelligible to jurors and that better fit the case and counsel's argument than those that the court might select from CALCRIM. Jury instructions tailored to the evidence can often be used to add force to a closing argument.

Ø **Note:** Suggestions for tailored instructions can be found in the references cited in §32.1. Case law is another obvious source for ideas for tailored instructions. On considerations to keep in mind when drafting tailored instructions, see §32.24.

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Source: Criminal Law/California Criminal Law Procedure and Practice/32 JURY INSTRUCTIONS/§32.23 3. Checklist: Commonly Requested CALCRIM Instructions

§32.23 3. Checklist: Commonly Requested CALCRIM Instructions

This checklist separates instructions most commonly requested by the prosecution from those most commonly requested by the defense. Some instructions are common to both and, depending on the facts of the case, either side may wish to request a particular instruction.

Subject	CALCRIM
PROSECUTION:	
• Defendant lied to arresting officers about offense	362, 371
• Defendant threatened witness	371
• Possible suppression of evidence by defense	371
• Prior inconsistent statement	105, 226, 302, 318-319
• Defendant's prior inconsistent statement obtained in violation of *Miranda*	356
• Witness testified under influence of intoxicant	105, 226
• defendant committed similar offense	375. See also 852-853, 1191
• Defendant's flight	372
• Preoffense statement by defendant	358
• Expert testimony	332
• Mental defect caused by long use of drugs	3450
• Unanimity as to specific act	3500-3502
• Conspiracy	415-419
• Testimony of co-conspirators	418
• All elements of the crime	520-2996
• Lesser included or related offense	3517-3518. See also CALJIC App C
• Defendant has prior felony conviction	3100, 3103
DEFENSE:	
• Circumstantial evidence	223-225
	303, 305, 316, 360, 375

• Limiting instructions	303-305, 316, 360, 375
• Neither side required to call all witnesses	300
• Prior inconsistent statement	105, 226, 302, 318-319
• Witness testified under influence of intoxicant	105, 226
• Witness has prior felony conviction	105, 226, 316
• Witness lied	226
• Testimony of single witness	301
• Conflicting testimony	302
• Witness exercised privilege to refuse to testify	320
• Only one prosecution witness	301
• Good character evidence introduced concerning defendant	350
• Prosecutor's questions are not evidence	351
• Defendant did not testify	355
• Confession or admission	356-359
• Eyewitness identification	315

Ø **Note:** See §32.5 for examples of instructions, such as CALCRIM 103 (presumption of innocence, reasonable doubt, burden of proof), which must be given in every criminal case.

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IV. PREPARING AND SUBMITTING INSTRUCTIONS

§32.24 A. Drafting Technique in General

Trial courts have broad leeway in determining whether to give any particular requested instruction. Jury instruction preparation requires a thorough knowledge of the legal principles on which the requested instruction is based, taking care not to be too specific about the facts that the instruction is supposed to highlight, and a flexible attitude about the wording. It may be useful to prepare more than one version of a proposed instruction. Then, if the first version is rejected, another version will be available to counter any specific objection. Alternatively, counsel may revise the original instructions in response to a successful objection.

Draft even-handed instructions. Counsel should aim to draft even-handed instructions that will not engender a strenuous objection from the other side and then to persuade the court that the instruction will be helpful to the jury. Counsel should recognize that he or she has the primary responsibility for preparing instructions and should not expect the court to rewrite or edit them substantially.

Ø **Note:** Published appellate decisions are a good source for special instructions. However, "language in an appellate court decision which may be a good statement of law or of the reasoning of the appellate court does not necessarily make a good jury instruction." *People v Adams* (1987) 196 CA3d 201, 204, 241 CR 684. See also *People v Colantuono* (1994) 7 C4th 206, 221 n13, 26 CR2d 908.

Drafting principles. When preparing instructions, counsel should keep in mind the following principles:

- The trial court may refuse an instruction if it is deemed to be incorrect. See Pen C §1127.
- The trial court may refuse an instruction if it is deemed not pertinent, *i.e.*, if there is no evidence to which the requested instruction relates. See Pen C §1127.
- The trial court need not give the exact instructions requested by the party, even if they are pertinent, and may modify requested instructions to make them more appropriate or may replace them with his or her own instructions. *People v Dieguez* (2001) 89 CA4th 266, 277, 107 CR2d 160; *People v Galvan* (1962) 208 CA2d 443, 452, 25 CR 128. See *People v Musselwhite* (1998) 17 C4th 1216, 1247, 74 CR2d 212.
- The trial court will refuse an instruction deemed to be argumentative, *i.e.*, one that analyzes specific evidence on a disputed question of fact to the benefit of one party or another. *People v Carter* (2003) 30 C4th 1166, 1225 n22, 135 CR2d 553.
- The trial court will refuse an instruction that informs jurors that particular evidence is in fact true. *People v Moore* (1954) 43 C2d 517, 527, 275 P2d 485.
- The court will refuse a formula instruction, *i.e.*, one that requires the jury to return a verdict in favor of one party (usually the prosecution) if they find certain facts to be true; such an instruction can unconstitutionally lighten the prosecution's burden of proof by requiring the jury to presume material facts from the proof of other facts that do not necessarily support those facts. See, *e.g., People v Roder* (1983) 33 C3d 491, 498, 189 CR 501. See also §32.32.
- The trial court is not required to give a requested instruction if its subject matter is adequately covered by other instructions. *People v Benson* (1990) 52 C3d 754, 805 n12, 276 CR 827.

Ø **Note:** While the trial court is not required to give a duplicative instruction, when the requested instruction is an important one, is supported by the evidence, and makes a point that is obscure or ambiguous in other instructions, counsel should distinguish the requested instruction from the other instructions and argue that it would be error for the trial court to refuse the instruction. See, *e.g., People v Cook* (1906) 148 C 334, 83 P 43 (instruction actually given was "brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis"). See also *People v Kane* (1946) 27 C2d 693, 700, 166 P2d 285 (quoting *Cook*); *People v Mayo* (1961) 194 CA2d 527, 537, 15 CR 366 (same).

Draft instructions that support your argument. Closing argument is the denouement of every trial; it should dictate every tactical decision of counsel that precedes it. Every question asked on cross-examination and each bit of testimonial or documentary evidence offered by the parties should be designed to support an element of defense counsel's plea to the jury that the client is innocent, or the state's argument that guilt has been proved beyond a reasonable doubt. The preparation of jury instructions should also be governed by the direction of counsel's closing argument. After outlining the closing argument, an attorney should design jury instructions that reflect the evidence and counsel's theory of the case as much as possible.

Defense counsel should establish the theory on which the case will be presented to the jury, considering the following questions:

- What is the prosecution's theory of liability (*e.g.,* felony murder, aiding and abetting)?
- What factual elements will defense counsel claim that the state must prove?
- On what shortcomings in the People's evidence will the defense argument focus? See, *e.g.,* CALCRIM 226.
- Which witnesses for the opposing side will counsel most vigorously attack, and on what grounds?
- What legal defense will be argued, and what evidence will be offered in its support?

The prosecutor can and should attempt a similar assessment of the probable defense case based on the preliminary hearing, cross-examination of prosecution witnesses, and other information in the case. It may be possible to eliminate or restrict certain lines of defense in the prosecution's case-in-chief if they are anticipated early. Familiarity with the instructions that define the elements of the offense will help counsel structure the final argument and ensure that all elements of the crime are proven.

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§32.25 B. Drafting Instructions on Elements of the Crime

The prosecutor may have to draft instructions on the elements of the crime if there is no CALCRIM instruction on point. This can happen with obscure or new crimes. As a general rule, the language of a statute defining a crime is usually an appropriate basis for an instruction and will usually be sufficient absent a request for an amplifying instruction. *People v Rodriguez* (2002) 28 C4th 543, 546, 122 CR2d 348. In drafting such an instruction, the prosecutor should keep in mind that the legislature may not have expressed itself clearly. The prosecutor may need to break the statute down into the component elements, including ascertaining what mental state is required if none is specified.

Ø **Note:** A new CALCRIM instruction should be examined closely to make sure it does not contain errors and would not benefit from improvement. See, *e.g., People v Reliford* (2003) 29 C4th 1007, 1016, 130 CR2d 254 (although 1999 version of CALJIC 2.50.01 was not unconstitutional, court recognized that it could be improved, as it was in the 2002 version). Trial attorneys and judges may submit suggestions for improving or modifying CALCRIM instructions, or for new instructions. Suggestions, accompanied with an explanation of any proposed change, should be sent to the Administrative Office of the Courts, Office of the General Counsel, 455 Golden Gate Avenue, San Francisco, CA 94102-3688. Cal Rules of Ct 2.1050(d).

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§32.26 C. Time to Prepare and Submit Instructions

Unlike civil cases in which counsel generally submit instructions before trial begins, counsel in criminal cases may be allowed to delay submitting instructions until the close of their case. See Pen C §1093.5 (instructions in criminal cases must be submitted before argument). If ordered to submit instructions earlier, counsel may try arguing that to do so would violate Pen C §1054(e) by constituting a form of discovery not provided for in Pen C §§1054-1054.10. Counsel should also be aware that the need for some instructions may not arise until argument. See, *e.g., People v Ponce* (1996) 44 CA4th 1380, 1386, 52 CR2d 422 (additional limiting instructions required in response to inappropriate argument by both defense and prosecution).

Because instructions are usually submitted and discussed after presentation of the evidence, many attorneys wait until a trial has almost ended before turning their attention to jury instructions, a fact that helps explain why instructions are so often poorly done. The time to begin thinking about proposed instructions and doing research in support of them is the same time that trial counsel begins preparing his or her closing argument: the day the attorney begins working on the case.

The prosecutor should carefully review CALCRIM instructions on the offense charged to make sure the case is properly charged, and decide what instructions will help support his or her case. Once a defense is selected, defense counsel should work on instructions in support of that defense. If defense counsel decides at some point before trial that he or she will offer character testimony, or if a prosecutor obtains evidence of admissions by a defendant, both should immediately make a note to prepare and request appropriate instructions on these types of testimony.

> Ø **Practice tip:** When the trial court has questions about the relevance of proffered evidence, submitting a proposed instruction in conjunction with a request for a ruling on its admissibility may help convince the court that the evidence is relevant.

Unlike many tasks, such as the preparation of cross-examination or closing argument, which simply cannot be delegated to anyone other than trial counsel, the task of preparing instructions is "research intensive," and thus one with which a trial assistant or law student can be helpful. In death penalty cases, in which a second defense counsel usually is available (*Keenan v Superior Court* (1982) 31 C3d 424, 428, 180 CR 489; see §54.9), one attorney should be able to devote considerable attention to jury instructions while the other attorney works on other aspects of the defense. Full and complete reinstruction of the jury will be required for any penalty phase of the trial. *People v Moon* (2005) 37 C4th 1, 36, 32 CR3d 894.

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§32.27 D. Form of Proposed Instructions

The general rules (use of recycled paper, size of paper, etc.) that apply to any papers filed with court apply to proposed instructions. Cal Rules of Ct 2.1055(b)(1). See Cal Rules of Ct 2.100-2.119 (form and format of papers). Each set of proposed instructions must have a cover page with the case caption and the name of the party proposing the instructions, and should include an index listing all the proposed instructions. Cal Rules of Ct 2.1055(b)(2). Each set must be bound loosely. Cal Rules of Ct 2.1055(b)(4). The index must identify CALCRIM instructions by number and must list special instructions numbered consecutively. Cal Rules of Ct 2.1055(b)(3). "Special instructions" are those specially prepared by a party or approved instructions that have been substantially modified by a party. Cal Rules of Ct 2.1055(a)(1)(B). The index must also contain a checklist that the court may use to indicate whether the instruction was given as proposed, given as modified, refused, or withdrawn. Cal Rules of Ct 2.1055(b)(3).

Each proposed instruction must be on a separate page or pages, contain the instruction number and title of the instruction at the top of the first page of the instruction, and be prepared without any blank lines or unused bracketed portions so that it can be read directly to the jury. Cal Rules of Ct 2.1055(c). Each special instruction must include a citation of authorities that support the instruction at the bottom of the page. No citation is required for CALCRIM instructions. Cal Rules of Ct 2.1055(d).

No local court form or rule may require that the instructions be submitted in any other manner. Cal Rules of Ct 2.1055(e).

See the sample request forms in California Criminal Law Forms Manual §32.1 (2d ed Cal CEB 2005).

Attorneys submitting instructions should serve copies on co-counsel and opposing counsel, unless service is waived.

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§32.28 E. Hearing on Instructions

Trial judges generally ask that proposed instructions be submitted as the taking of evidence draws to a close. Discussion of proposed instructions should be held before argument begins. See Pen C §1093.5; *People v Terry* (1969) 70 C2d 410, 420 n4, 77 CR 460.

Counsel can expect that some judges will not accept a full set of tailored instructions. Every requested instruction raises a possible appellate issue if denied, and the court may be hesitant or unwilling to make numerous instructional decisions outside the framework of CALCRIM. Other judges are delighted to have the lawyers determine the instructions to be given.

Ø **Note:** It is strongly recommended that a CALCRIM instruction be used when applicable. See Cal Rules of Ct 2.1050(e), discussed in §32.21.

Counsel should expect to hear that his or her tailored instructions are argumentative, invade the province of the jury by deciding issues of fact, are adequately covered by pattern instructions, and improperly emphasize certain principles of law or pieces of evidence by unduly focusing on them. Most of these criticisms can be met by good drafting. See §32.24 for discussion of problems to avoid in drafting original instructions.

The arguments presented in support of or in opposition to jury instructions are useful on appeal. See §32.34. Therefore, counsel should insist that any conference at which jury instructions are discussed be on the record. Arguments for or against instructions should be as detailed as possible and should refer to the specific pieces of evidence that support or undercut a given instruction.

A defendant is not entitled to be present at a jury instruction conference, because it is not a critical stage of the trial. *People v Morris* (1991) 53 C3d 152, 210, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. On what constitutes a "critical stage" of the case, see §3.2.

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V. OBJECTIONS TO INSTRUCTIONS

A. Grounds for Objecting

§32.29 1. General Grounds

Counsel should carefully examine the list of instructions proposed by opposing counsel as well as those the court intends to give on its own motion. Many of these will be unobjectionable. Others will be contrary to the client's interest, and counsel should attempt to devise an objection to each such instruction. Objections to instructions proposed by opposing counsel should be made in writing when time permits. A sample form of objection to instructions is in California Criminal Law Forms Manual §32.2 (2d ed Cal CEB 2005).

Major grounds for objecting to a proposed instruction include the following:

- Is not supported by the evidence. *People v McNeill* (1980) 112 CA3d 330, 339, 169 CR 313. See §32.30.
- Does not accurately state the law. *People v Beeman* (1984) 35 C3d 547, 555, 199 CR 60. See §32.31.
- Lightens the prosecution's burden of proof, or improperly shifts the burden of proof to the defendant. *Sandstrom v Montana* (1979) 442 US 510, 513, 61 L Ed 2d 39, 44, 99 S Ct 2450. See §32.32.
- Removes an element of the offense from the jury. See *U.S. v Gaudin* (1995) 515 US 506, 519, 132 L Ed 2d 444, 455, 115 S Ct 2310 (in perjury prosecution, failure to submit question of "materiality" to jury violated Sixth and Fourteenth Amendments); *Sullivan v Louisiana* (1993) 508 US 275, 277, 124 L Ed 2d 182, 188, 113 S Ct 2078.
- Is argumentative. *People v Wright* (1988) 45 C3d 1126, 1135, 248 CR 600; *People v Ward* (1999) 71 CA4th 368, 376, 83 CR2d 828.
- Repeats other instructions. *People v Catlin* (2001) 26 C4th 81, 152, 109 CR2d 31; *People v Turner* (1994) 8 C4th 137, 203, 32 CR2d 762.
- Conflicts with another instruction. *People v Rhoden* (1972) 6 C3d 519, 526, 99 CR 751.
- Singles out, even if only by implication, the testimony of a particular witness. *People v Harris* (1989) 47 C3d 1047, 1099, 255 CR 352 (upholding trial court's refusal to give tailored instruction on effect of witness's intoxication on his ability to perceive and recall).

Many instructional errors are arguably erroneous under both California law and the U.S. Constitution. To present and preserve a federal constitutional claim, the defense should explain how the federal right applies under the particular facts and circumstances of the trial. The consequence of failing to raise a federal claim for adjudication at the proper time is generally forfeiture of the claim. See, *e.g., Sanchez-Llamas v Oregon* (2006) 548 US 331, 165 L Ed 2d 557, 582, 126 S Ct 2669. The defendant should indicate the federal-law basis for his claim by citing "the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v Reese* (2004) 541 US 27, 32, 158 L Ed 2d 64, 71, 124 S Ct 1347. On federalizing generally, see §44.29; Appeals and Writs in Criminal Cases §4.34 (3d ed Cal CEB 2007).

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§32.30 2. Instruction Is Unsupported by Evidence

The trial court must refrain from instructing on principles of law concerning issues unrelated to the evidence at trial, because it may confuse the jury or relieve it from making findings on relevant issues. *People v Satchell* (1971) 6 C3d 28, 33 n10, 98 CR 33, overruled on other grounds in *People v Flood* (1998) 18 C4th 470, 490 n12, 76 CR2d 180; *People v Andersen* (1994) 26 CA4th 1241, 1250, 32 CR2d 442. Instructions on irrelevant issues tend to mislead the jury by injecting matters into the case that the undisputed evidence shows are not involved (*People v Jackson* (1954) 42 C2d 540, 546, 268 P2d 6; *People v Schultz* (1987) 192 CA3d 535, 539, 237 CR 513), or by causing the jury to believe that it has missed something during the trial or that the court and counsel had special knowledge of matters that could not be presented because of the technical rules of criminal procedure.

Consequently, before the court agrees to give an instruction, it must find legally sufficient evidence in the record to support the finding or inference that the instruction permits. The trial court must initially decide the question of the legal sufficiency of the evidence to support an instruction; its failure to make such a preliminary finding is error. *People v Hannon* (1977) 19 C3d 588, 597, 138 CR 885. As with all instructions, those concerning lesser included offenses require some evidence that the offense committed was less than that charged. *People v Noah* (1971) 5 C3d 469, 478, 96 CR 441. For further discussion of lesser included offenses, see §§32.7-32.10.

If a jury is instructed on alternative theories of guilt, one of which is factually inadequate, the judgment will be affirmed unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the inadequate theory. However, if the jury is instructed on alternative theories, one of which is legally inadequate, the judgment must be reversed if the reviewing court cannot determine on which theory the defendant was convicted. *People v Marks* (2003) 31 C4th 197, 233, 2 CR3d 252; *People v Guiton* (1993) 4 C4th 1116, 1126, 17 CR2d 365.

Ø **Note:** Defense counsel should object to an instruction that reflects any prosecutorial theory of the case (*e.g.,* conspiracy, aiding and abetting, felony murder) that is unsupported by the evidence at trial. See, *e.g., People v Anderson* (1965) 63 C2d 351, 360, 46 CR 763 (two of prosecution's four possible theories that supported first degree murder were not supported by substantial evidence). Likewise, the prosecutor should object to an instruction requested by defense counsel if there is no legal basis, or if the evidence does not support the defense theory. See, *e.g., People v Sinclair* (1998) 64 CA4th 1012, 1015, 75 CR2d 626 (instructions on voluntary manslaughter properly refused in absence of any evidence of heat of passion or imperfect self-defense).

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§32.31 3. Instruction Incorrectly States Law

That an instruction incorrectly states the law is a commonly made attack on attorney-drafted instructions. A CALCRIM instruction may also be vulnerable to attack on that basis because it is only by challenging accepted statements of law as defective that new doctrine is made. For example, the Supreme Court's criticism in *Victor v Nebraska* (1994) 511 US 1, 13, 127 L Ed 2d 583, 595, 114 S Ct 1239, of the outmoded phrase "moral certainty" led to a revision of CALJIC 2.90. See also *People v Gainer* (1977) 19 C3d 835, 843, 139 CR 861 (disapproving long-accepted *Allen* charge urging deadlocked juries to reach verdict); *People v Bell* (2009) 179 CA4th 428, 102 CR3d 300 (CALCRIM 1215 found misleading).

Ø **Note:** An instruction that is correct in the abstract may be incorrectly applied to a particular case. For example, an instruction defining implied malice, while correct in the abstract, was erroneously given in a case involving assault with intent to commit murder, because that crime requires an express intent to kill. *People v Murtishaw* (1981) 29 C3d 733, 764, 175 CR 738. An instruction unsupported by the evidence should not be given. See §32.30.

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Source: Criminal Law/California Criminal Law Procedure and Practice/32 JURY INSTRUCTIONS/§32.32 4. Instruction Lightens Prosecution's Burden of Proof

§32.32 4. Instruction Lightens Prosecution's Burden of Proof

Under the Fifth Amendment to the United States Constitution, the prosecution must prove every element of a criminal offense beyond a reasonable doubt. See *Patterson v New York* (1977) 432 US 197, 210, 53 L Ed 2d 281, 292, 97 S Ct 2319; *In re Winship* (1970) 397 US 358, 364, 25 L Ed 2d 368, 375, 90 S Ct 1068. Under the Sixth Amendment, that determination must be made by the jury, not the judge. See *Apprendi v New Jersey* (2000) 530 US 466, 476, 147 L Ed 2d 435, 446, 120 S Ct 2348; *Sullivan v Louisiana* (1993) 508 US 275, 277, 124 L Ed 2d 182, 188, 113 S Ct 2078. Consequently, instructions that lighten the prosecution's burden of proof violate the defendant's Sixth Amendment right to jury trial.

Examples of instructions that lighten the prosecution's burden of proof:

- Instructions that fail to define every element of the offense. See, *e.g., People v Cummings* (1993) 4 C4th 1233, 1312, 18 CR2d 796 (instructions failed to define four out of five elements of robbery).
- Instructions that tell the jury that an element of the offense has been proven. See, *e.g., U.S. v Gaudin* (1995) 515 US 506, 519, 132 L Ed 2d 444, 455, 115 S Ct 2310 (in perjury prosecution, instruction that defendant's misstatements were material removed element of offense); *People v Flood* (1998) 18 C4th 470, 482, 76 CR2d 180 (in prosecution for evading peace officer, instruction that individuals trying to stop defendant were peace officers removed element of offense); *People v Reyes Martinez* (1993) 14 CA4th 1412, 1417, 18 CR2d 300 (instruction that forcibly moving victim 500 feet or more was "substantial distance" within meaning of kidnapping statute removed element of offense); *People v Lawson* (1987) 189 CA3d 741, 747, 234 CR 557 (in prosecution for sale of unqualified securities, instruction that certain accounts were securities removed element of offense).
- Instructions that require the jury to presume an element of the offense from the proof of another fact (*Sandstrom* error). In criminal cases, a mandatory presumption offends constitutional principles of due process of law because it relieves the prosecutor from having to prove each element of the offense beyond a reasonable doubt. See, e.g., *Sandstrom v Montana* (1979) 442 US 510, 513, 61 L Ed 2d 39, 43, 99 S Ct 2450 (in murder prosecution, instruction told jurors that individual is presumed to intend ordinary consequences of voluntary acts); *People v Roder* (1983) 33 C3d 491, 499, 189 CR 501 (instructions allowed jury to presume that secondhand dealer who receives property in suspicious circumstances has knowledge that it is stolen); *People v Vanegas* (2004) 115 CA4th 592, 598, 9 CR3d 398 (instructing jury that any violation of basic speed law is inherently dangerous to human life created impermissible mandatory presumption); *People v Forrester* (1994) 30 CA4th 1697, 1701, 37 CR2d 19 (instruction required jury to presume that person who willfully fails to appear within 14 days after date designated for appearance intended to evade court's process). On the difference between mandatory and permissive presumptions, see *People v Roder, supra*; *People v McCall* (2004) 32 C4th 175, 182, 8 CR3d 337.

Ø **Note:** Although the Evidence Code uses the terms "conclusive presumption" and "rebuttable presumption" (see, *e.g.,* Evid C §§601, 620), only rebuttable presumptions present due process issues because a "conclusive presumption" is not really a rule of evidence but a rule of substantive law. *McCall,* 32 C4th at 185.

The fact that a statute defines an element of the offense as including specific conduct does not lessen the prosecution's burden of proof. A rule of substantive law may properly define conduct that establishes an element of an offense as a matter of law. In this situation, there is no presumption and there is nothing to rebut. See, *e.g., People v Laughlin* (2006) 137 CA4th 1020, 1026, 40 CR3d 737 (commission of three or more Vehicle Code violations assigned a traffic point count constitutes willful or wanton disregard for safety of persons or property as a matter of law, without resort to any presumption).

Most errors involving presumptions are subject to harmless error analysis under the *Chapman* test (*Chapman v California* (1967) 386 US 18, 24, 17 L Ed 2d 705, 711, 87 S Ct 824 (reversal required for constitutional error unless error is harmless beyond a reasonable doubt)). See *Neder v U.S.* (1999) 527 US 1, 4, 144 L Ed 2d 35, 44, 119 S Ct 1827 (failure to instruct on element of offense subject to harmless error analysis); *Rose v Clark* (1986) 478 US 570,

580, 92 L Ed 2d 460, 472, 106 S Ct 3101 (*Sandstrom* error subject to harmless error analysis); *People v Flood* (1998) 18 C4th 470, 502, 76 CR2d 180 (instruction that removes element of offense from jury subject to harmless error analysis under *Chapman*). However, an erroneous reasonable doubt instruction is per se reversible error. *Sullivan v Louisiana* (1993) 508 US 275, 277, 124 L Ed 2d 182, 188, 113 S Ct 2078; see *Rose v Clark, supra* (dictum suggests that instruction directing verdict for prosecution is reversible per se).

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§32.33 5. Instruction Mischaracterizes Defense Burden

It is permissible to give the defendant the burden of *producing* evidence that, if believed, would negate proof of an element of the offense; but it is not permissible to require the defendant to do any more than raise a reasonable doubt about its existence. See *Mullaney v Wilbur* (1975) 421 US 684, 703, 44 L Ed 2d 508, 522, 95 S Ct 1881; *People v Mower* (2002) 28 C4th 457, 476, 122 CR2d 326. See also *People v Fuentes* (1990) 224 CA3d 1041, 1044, 274 CR 17 (upholding CALJIC 16.005, which places burden on defendant to raise reasonable doubt about lawful possession of syringe; lists similar cases involving drugs and guns).

The state may constitutionally require the defendant to bear both the burden of production and the burden of persuasion on an affirmative defense, *i.e.,* one that does not negate any element of the offense on which the prosecution bears the burden of proof. *Patterson* v *New York* (1977) 432 US 197, 210, 53 L Ed 2d 281, 292, 97 S Ct 2319. An instruction on an affirmative defense must state the burden of proof borne by the defendant; otherwise, jurors might assume that the burden was proof beyond a reasonable doubt. *People v Spry* (1997) 58 CA4th 1345, 1367, 68 CR2d 691, disapproved in part on other grounds by *People v Martin* (2001) 25 C4th 1180, 1192, 108 CR2d 599 (reversible error not to instruct that defendant can establish lawful possession of drugs by preponderance of evidence).

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§32.34 B. Preserving Instructional Issues for Appeal

Although the general rule is that trial court errors must be brought to the court's attention during trial to be cognizable on appeal (see *People v Campos* (2007) 156 CA4th 1228, 1236, 67 CR3d 904), defendants are permitted to raise on appeal instructional issues that affect substantial rights even if no objection was made in the trial court (Pen C §1259; see *People v Coffman* (2004) 34 C4th 1, 103 n34, 17 CR3d 710). The constitutional right to have all elements of a criminal offense proved beyond a reasonable doubt is such a "substantial right." *People v Johnson* (2004) 119 CA4th 976, 985, 14 CR3d 780; *People v Van Winkle* (1999) 75 CA4th 133, 139, 89 CR2d 28. Also, an objection is not necessary to preserve the right to appellate review of an instruction if any objection would have been futile. See *People v Hill* (1998) 17 C4th 800, 822, 72 CR2d 656; *People v Johnson* (2004) 119 CA4th 976, 984, 14 CR3d 780. Even if a defendant has forfeited the right to raise an issue on appeal by failing to raise the issue below, an appellate court may exercise its discretion to consider the issue. See *People v Williams* (1998) 17 C4th 148, 161 n6, 69 CR2d 917; *People v Johnson* (2004) 119 CA4th 976, 984, 14 CR3d 780; *People v Marchand* (2002) 98 CA4th 1056, 1061, 120 CR2d 687.

Under Cal Rules of Ct 8.320(b), the clerk's transcript on appeal must contain copies of all jury instructions submitted in writing, identifying the requesting party and any written instructions the court gave. Under Cal Rules of Ct 8.320(c), the reporter's transcript on appeal must contain copies of all oral jury instructions. A request for augmentation of the record with written jury instructions may, if appropriate, simply designate "all written instructions given, refused, or withdrawn" (Cal Rules of Ct 8.122(a)(1)).

Ø **Note:** It is advisable for counsel to ensure that a clear record exists of objections to instructions, and of proposed but rejected instructions, and the bases for them. If instructions are discussed off the record, counsel should summarize for the record the positions taken by counsel and see that the court's rulings are stated. Counsel should not waive reporting of the oral instructions. However, in the event of a discrepancy between written instructions provided for deliberations and the oral instructions read to the jury by the judge, the jury may be presumed to have used the written instructions. *People v Osband* (1996) 13 C4th 622, 717, 55 CR2d 26. This may be true even if the jury has not been instructed to read the written instructions.

The doctrine of invited error may bar consideration of a claim of instructional error on appeal if defense counsel makes a tactical decision specifically to not object to an instruction (*People v Lewis* (2001) 25 C4th 610, 676, 106 CR2d 629), to withdraw an objection to an instruction (*People v Brown* (2003) 31 C4th 518, 560, 3 CR3d 145), or to request an instruction (*People v Lucero* (2000) 23 C4th 692, 723, 97 CR2d 871; *People v Hernandez* (1988) 47 C3d 315, 353, 253 CR 199). But see *People v Boyette* (2002) 29 C4th 381, 438, 127 CR2d 544 (ordinarily defense counsel joining with prosecutor in requesting instruction would be invited error, but here there was no obvious tactical reason defense counsel requested very damaging instruction).

Ø **Note:** Faulty instructions requested by defense counsel are subject to attack on appeal as ineffective assistance of counsel. *People v Oden* (1987) 193 CA3d 1675, 1681, 239 CR 232.

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VI. INSTRUCTING THE JURY

§32.35 A. When Instructions Are Given

Cautionary and limiting instructions are traditionally requested and given at the time the evidence is introduced. The effectiveness of such instructions often depends on their close temporal proximity to the evidence to which they relate.

Instructions on the general standards by which the credibility of witnesses is to be judged should arguably be read to the jury as a matter of course before testimony begins, because jurors begin to form opinions on credibility long before hearing the formal charges given at the close of trial.

The timing of giving instructions to the jury is within the trial court's discretion. *People v Webb* (1967) 66 C2d 107, 128, 56 CR 902; *People v Chung* (1997) 57 CA4th 755, 759, 67 CR2d 337; *People v Lamb* (1988) 206 CA3d 397, 400, 253 CR 465; see Pen C §1093(f). However, the trial court must determine the exact instructions that it will give and inform counsel of these before oral argument begins. Pen C §1093.5. Judicial alteration of instructions during or after oral argument can constitute reversible error. See *People v Sanchez* (1978) 83 CA3d Supp 1, 7, 147 CR 850 (material modification and departure from agreed on instructions may deprive defendant of fair trial).

Some trial judges prefer to instruct before argument, and some prefer to instruct after argument. Others instruct on the law applicable to the case before argument and give concluding instructions after argument. One court has called this the "preferable" practice. See *People v Murillo* (1996) 47 CA4th 1104, 1109, 55 CR2d 21. Counsel may wish to ask the court to give case-specific instructions before argument to better weave the governing law into his or her argument.

Counsel may want to check with the court clerk to be sure that proposed instructions that are refused by the court are made part of the clerk's transcript for appellate purposes. See Cal Rules of Ct 2.1055. Finally, counsel should pay close attention to the instructions as the court reads them. It is not unusual for the court to inadvertently omit an agreed on instruction or, conversely, to read a proposed instruction that the parties have agreed should not be given. See, *e.g.*, *Middleton v McNeil* (2004) 541 US 433, 158 L Ed 2d 701, 707, 124 S Ct 1830 (in instruction on "unreasonable self-defense," trial judge misspoke, substituting word "reasonable" for "unreasonable" in one instruction).

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§32.36 B. Maximizing Impact of Instructions

Counsel who has succeeded in obtaining requested instructions can maximize their impact in several ways. Counsel should incorporate the more important favorable instructions into the closing argument, and use the closing argument to defuse unfavorable instructions. Defense attorneys can make the reasonable-doubt instruction the cornerstone of an argument in a particular case, or an instruction on eyewitness identification the center of another. Prosecutors may want to make use of instructions on the defendant's flight after the crime, efforts by the defendant to fabricate evidence, or the effect of a prior felony conviction on a witness's credibility.

The court may allow counsel to use photographic or written enlargements of key instructions to display to the jury during closing argument. Many effective trial lawyers use computer software to aid them in presenting instructions visually to the jury during their arguments.

Also, if the court does not give the jury a written copy of the instructions on its own motion, counsel may want to ask the court to provide the jury with a complete copy of the instructions so that it can refer to the instructions during deliberations. See Pen C §1093(f).

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§32.37 C. Jury's Request for Supplemental Instructions

The court is required to clear up a jury's confusion over instructions and to consider giving additional explanations. *People v Beardslee* (1991) 53 C3d 68, 97, 279 CR 276; *People v Gonzalez* (1990) 51 C3d 1179, 1212, 275 CR 729. This mandatory duty to clear up any confusion expressed by the jury over instructions does not necessarily require the judge to give additional instructions. *People v Gonzalez* (1990) 51 C3d 1179, 1212, 275 CR 729. The court must notify all parties and give them an opportunity to be heard before giving additional instructions. See Pen C §1138. A criminal defendant has a constitutional right to appear with counsel and present argument at any conference during deliberations concerning additional instructions requested by the jury. *People v Hawthorne* (1992) 4 C4th 43, 68, 14 CR2d 133; *People v Lozano* (1987) 192 CA3d 618, 623, 237 CR 612; *People v Dagnino* (1978) 80 CA3d 981, 985, 146 CR 129. See also §33.24. Counsel should be prepared to demand an examination of the court's supplemental instruction before it is given or, if already given, to record an objection to a damaging instruction. Generally, harmless error analysis applies when an appellate court is considering a claim that the trial court failed to clarify instructions. See *Beardslee v Woodford* (9th Cir 2004) 358 F3d 560, 575.

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§32.38 D. Instruction When Alternate Juror Substituted

If a juror is excused during deliberations and an alternate is substituted, the jurors must be informed that they must begin their deliberations anew. *People v Collins* (1976) 17 C3d 687, 691, 131 CR 782. See Pen C §1089; CALCRIM 3575. The trial court's instructions must make it clear that jurors cannot just bring the alternate "up to speed." *People v Odle* (1988) 45 C3d 386, 405, 247 CR 137.

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JURY DELIBERATIONS AND VERDICT

JAMES P. LAMBE

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§33.1 I. OVERVIEW

After reading the instructions to the jurors, the judge instructs them on how to deliberate and asks the bailiff to take them to the jury room. The judge may sequester jurors, but this is rarely done.

Once jurors retire to the jury room, they select a foreperson. Jurors may ask for testimony to be reread, ask the judge to clarify instructions (Pen C §1138; *People v Stewart* (1983) 145 CA3d 967, 193 CR 799), and ask to view the scene or an object outside the courtroom (Pen C §1119).

Jurors must confine their deliberations to the evidence. They must not read newspaper accounts of the case, communicate with nonjurors about the case, consult with experts about the case, or conduct an unauthorized view of the scene. See *People v Honeycutt* (1977) 20 C3d 150, 156, 141 CR 698.

In unusual circumstances, the judge will allow counsel to reopen the case to present new evidence (*People v Frohner* (1976) 65 CA3d 94, 110, 135 CR 153), but this rarely occurs.

Occasionally, jurors ask to be excused from the case during deliberations for reasons such as illness or serious family problems, or counsel seeks to dismiss a juror for misconduct. If this occurs, the better practice is for the judge to conduct a hearing unless the attorneys stipulate that the juror may be dismissed for good cause. However, a hearing is not always required. *In re Mendes* (1979) 23 C3d 847, 852, 153 CR 831. If the attorneys do not stipulate to the juror's dismissal, the judge must find "good cause" before excusing the juror. Pen C §1089. If alternate jurors were chosen during jury selection, one of them may replace the excused juror, and the jury must begin deliberations anew. *People v Collins* (1976) 17 C3d 687, 694, 131 CR 782. If no alternates were selected, the judge must declare a mistrial. CCP §233.

If a judge excuses a juror without the attorneys' stipulation and without good cause, the defendant has been placed in jeopardy and is entitled to a dismissal. *Larios v Superior Court* (1979) 24 C3d 324, 333, 155 CR 374.

When jurors have either reached a verdict or believe that they are unable to reach a verdict, they tell the bailiff, who informs the judge. The judge notifies the attorneys and, when they are present in court, has the bailiff bring in the jury.

If jurors state that they are unable to reach a verdict, and there is more than one charge, the judge should ask whether jurors have reached a verdict on any of the counts. If they have, the judge should take that verdict and either declare a mistrial or have jurors continue deliberating on the remaining counts. See Pen C §§1140, 1160. When the judge is satisfied that there is no reasonable possibility that jurors will agree on a verdict, or when the parties consent, he or she must discharge the jury and declare a mistrial. Pen C §1140. The judge must not try to force minority jurors to change their position. *People v Gainer* (1977) 19 C3d 835, 842, 139 CR 861.

Practice varies concerning preparation of verdict forms. In some counties it is common for the clerk to prepare them. In other counties, the party who seeks a verdict on a particular charge prepares a verdict form for that charge. Verdict forms are given to jurors by the bailiff. Jurors are given the choice of two verdicts for each crime charged (guilty/not guilty), and enhancement (*e.g.,* used a firearm/did not use a firearm). Verdict forms must also be given for lesser included offenses of the crimes charged. See §32.8. When special defenses have been pleaded (*e.g.,* once in jeopardy), jurors are given additional verdict forms to cover those.

The common practice is for the foreperson to give the verdict forms filled out by the jury to the bailiff, who gives them to the judge. The judge looks at them, and then gives them to the court clerk, who reads them aloud.

Verdicts are sometimes inconsistent, *e.g.,* guilty of one count and not another that arose from the same fact situation, or guilty for one codefendant and not another. They are not void, however, if substantial evidence supports them. *People v Taylor* (1948) 88 CA2d 983, 199 P2d 751.

Irregularity in verdict forms may also occur. For example, jurors may sign both guilty and not guilty forms for the same charge, or they may add a note to the verdict form requesting leniency for the defendant. The court has a great deal of flexibility in handling these problems. If the jury has not been discharged, the court may ask them to correct their error. See Pen C §1161.

If an error is not discovered before the jury is discharged, defense counsel may raise it on appeal. Counsel must show prejudice to secure a reversal. See *People v Bonilla*s (1989) 48 C3d 757, 770, 257 CR 895 (error discovered

before jury discharged; judgment affirmed). If the jury found the defendant guilty but neglected to state the degree of the offense, it is deemed to be the lesser degree. Pen C §1157.

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§33.2 II. CHART: DEADLINES

Action	Deadline	Authority
Judge declares mistrial because jurors are unable to reach a verdict.	When all attorneys consent, or when judge thinks there is no reasonable probability that jurors will agree on verdict.	Pen C §1140.
Judge discharges one or more jurors for cause and seats alternate(s).	By stipulation or waiver, usually after hearing, when alternate(s) available.	Pen C §1089; see *In re Mendes* (1979) 23 C3d 847, 852, 153 CR 831.

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§33.3 III. JUDGE'S DIRECTIONS TO JURORS ON HOW TO CONDUCT THEIR DELIBERATIONS

At the close of instructions on the law, the judge reads the jurors general instructions on how to conduct their deliberations. Jurors are instructed that they are impartial judges of the facts. See CALCRIM 3550. Jurors are instructed that each of them must decide the case for himself or herself, but only after they have discussed the evidence together as part of their duty to deliberate. See CALCRIM 3550. Jurors are told to approach deliberations with an open mind, and to refrain from expressing a final opinion too soon. See CALCRIM 3550. Jurors may not conduct any independent investigation concerning the case or discuss the case with others during deliberations. See CALCRIM 3550. Jurors are told to select a foreperson and that in order to reach a verdict, all 12 jurors must agree. See CALCRIM 3550. The judge should admonish jurors, both at the close of instructions on the law and at any adjournment of the court before deliberations begin, not to talk to anyone about the case until they have rendered a verdict. Pen C §1122. See CALCRIM 124, 3550. See §33.5 on admonition to jurors not to discuss the case.

The court must be careful not to place specific time pressures on jurors or to predict how long it should take them to decide an issue or to reach a verdict. *People v Anderson* (1990) 52 C3d 453, 469, 276 CR 356.

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§33.4 IV. JUDGE'S DIRECTIONS TO BAILIFF

After the jury has been instructed and is about to retire, the bailiff is sworn. The bailiff is to keep jurors together in a private place and not permit anyone to talk to them or communicate with them. Pen C §1128.

It is improper for anyone to communicate or attempt to communicate with jurors (other than the bailiff, in accordance with his or her oath). Pen C §§95, 1121. An improper communication can include the transmission of books or papers, threats, intimidation, persuasion, promises, or assurances. Further, the bailiff is not to communicate with jurors unless ordered to, or to ask them if they have agreed on a verdict. Pen C §1128.

The bailiff is to take charge of any alternate jurors and to keep them available but separate from nonjurors and from regular jurors during deliberations. *People v Collins* (1976) 17 C3d 687, 694, 131 CR 782. Alternates return to court each time regular jurors do, *e.g.,* to hear rereading of testimony, and go with jurors when they eat meals or are sequestered. *People v Collins, supra*. However, the judge may instead admonish alternates and allow them to go about their business subject to recall if the parties stipulate to this. Alternate jurors are not discharged until the case is over. Pen C §1089.

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§33.5 V. TIME AND PLACE OF DELIBERATIONS; ADMONISHING JURORS NOT TO DISCUSS CASE

The judge designates the time and place for deliberation. The bailiff takes jurors to a room where they can conduct their deliberations without being overheard. See CALCRIM 3550. The judge can permit jurors to return to their homes each day at the close of deliberations, or can sequester them, ordering a bailiff to keep charge of them at all times during deliberations. Whether to sequester or not is left to the sound discretion of the judge. See *People v Manson* (1977) 71 CA3d 1, 27, 139 CR 275. Sequestering jurors is not mandatory even in capital cases and is, in fact, rare. *People v Morales* (1989) 48 C3d 527, 563, 257 CR 64.

At each adjournment, the jurors must be admonished by the court not to converse among themselves or with anyone else on any subject related to the trial. Pen C §1122. The failure to re-admonish a jury is not reversible error, however, unless both an objection was made in the trial court and prejudice is shown on appeal. 48 C3d at 565.

"Adjournment" means the time when the court continues proceedings to another day. Any continuance of a lesser period is a "recess" and does not require the same admonition mentioned in §1122. *People v Moore* (1971) 15 CA3d 851, 93 CR 447. Often, after the complete admonition is given a few times, counsel will stipulate that the complete admonition need not be given as long as the judge asks jurors to heed the original admonition. *People v Zurica* (1964) 225 CA2d 25, 34, 37 CR 118.

> Ø **Note:** CALCRIM 101, which is to be given to the jury after jury selection, includes the admonition that jurors must not "read, listen to, or watch any news report or commentary about the case." See §14.30 on jury instructions for cases with extensive pretrial publicity.

The court usually directs the bailiff to take the jurors to meals during the course of deliberations. If the alternates have not been placed on call, they are to remain with the regular jurors. There should be no deliberations or discussion of the case during this time. Although the trial judge has the discretion to permit jurors to separate at mealtime, some courts provide lunch to jurors. If the bailiff takes jurors to lunch, the bailiff must keep them from separating during mealtime. See Pen C §1181(3) (separation of jury without court's permission after retiring to deliberate is grounds for new trial). Permitting three jurors to go 25 feet away to a bar for drinks during lunch required a new trial in *People v Thornton* (1888) 74 C 482, 484, 16 P 244.

If the jurors are sequestered and must be lodged overnight, the court must provide separate rooms for male and female jurors. Pen C §1128.

The court may adjourn deliberations (Pen C §1121), but a lengthy adjournment for the judge's personal reasons can be an abuse of discretion (*People v Santamaria* (1991) 229 CA3d 269, 280 CR 43).

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§33.6 VI. ALTERNATES EXCLUDED; DELIBERATIONS BEGIN ANEW IF ALTERNATE SEATED

Alternates are not permitted in the jury room during deliberations. *People v Adame* (1973) 36 CA3d 402, 409, 111 CR 462 (reversible error even though alternate did not participate in deliberations). But see *U.S. v Olano* (1993) 507 US 725, 123 L Ed 2d 508, 113 S Ct 1770 (reversal on appeal required only if harm resulted). As with many other rules, counsel can waive the objection. *People v Valles* (1979) 24 C3d 121, 123, 154 CR 543 (defense attorney's stipulation allowing alternate in jury room waived any subsequent objection).

If a juror is excused during deliberations and an alternate is seated, the judge must instruct jurors to begin their deliberations all over again. See CALCRIM 3575. An alternate juror may be seated after a verdict or partial verdict is in as long as the jury is instructed to disregard all deliberations on the remaining counts and begin anew. *People v Aikens* (1988) 207 CA3d 209, 254 CR 30. See also *People v Thomas* (1990) 218 CA3d 1477, 1486, 267 CR 865. However, it is not reversible error to instruct the jury to discard the partial verdicts it reached before an alternate juror is seated, particularly if all counsel agree to so proceed. *People v Sanborn* (2005) 133 CA4th 1462, 1468, 35 CR3d 592.

In a capital case, when an alternate is seated after the guilt phase but before submission of the penalty phase, the alternate juror must accept all the verdicts and findings returned by the jury in the guilt phase. CALCRIM 3576. While it is unclear if CALCRIM 3576 must be given sua sponte, the preferred approach is to give it when relevant. See Bench Notes to CALCRIM 3576.

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§33.7 VII. CHOOSING FOREPERSON

Jurors are instructed to choose a foreperson. See CALCRIM 3550. This is usually the first thing they do after retiring. The judge is not to appoint, order, or designate the person to head the jury. Jurors may change their minds after initially selecting a foreperson and select a new one. *People v Perez* (1989) 212 CA3d 395, 402, 260 CR 474.

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VIII. MATERIALS ALLOWED IN JURY ROOM

§33.8 A. In General

The trial judge has discretion to permit jurors to take materials into the jury room that are not prejudicial. *People v Potter* (1966) 240 CA2d 621, 633, 49 CR 892; *People v Walker* (1957) 150 CA2d 594, 603, 310 P2d 110. It is better practice for the judge to discuss with counsel what will be sent into the jury room before sending it in. The judge has discretion to refuse to send jurors material they are entitled to have if the request for the material is made only by counsel. *People v Horowitz* (1945) 70 CA2d 675, 704, 161 P2d 833.

There are limits on what may be brought into the jury room. For example, jurors should not be permitted to bring their cell phones into the jury room because of the danger of violating Pen C §1128. *People v Fauber* (1992) 2 C4th 792, 837, 9 CR2d 24. See §33.13 on the procedure for answering jurors' requests.

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§33.9 B. Papers, Notes, Exhibits, and Pleadings

Jurors are entitled to take with them most papers that were received in evidence and their own notes. Pen C §1137. See CALCRIM 202. The court has a sua sponte duty to instruct jurors that they may take notes. See Bench Notes to CALCRIM 202. On request, the court must give additional adequate instruction on note-taking. *People v Guzman* (1988) 45 C3d 915, 948, 248 CR 467, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n13, 108 CR2d 409. Jurors must not take depositions into the jury room (Pen C §1137) and probably may not take transcripts of the trial or preliminary hearing (see §33.11).

The material that may be brought into the jury room has been interpreted to include exhibits, although neither side has a right to have exhibits sent into the deliberation room unless the jury requests them. *People v Horowitz* (1945) 70 CA2d 675, 704, 161 P2d 833. If the jury requests exhibits after deliberations begin, the court should advise counsel of the request and conduct a hearing in open court, permitting objections by counsel. *People v Hogan* (1982) 31 C3d 815, 849, 183 CR 817, overruled on other grounds in *People v Cooper* (1991) 53 C3d 771, 836, 281 CR 90 (jury request for exhibits is critical stage of prosecution; right to counsel applies).

Exhibits marked only for identification must not be sent into the deliberation room. However, prejudice must be shown on appeal; it will not be presumed. See *People v Horowitz, supra; People v Herrera* (1917) 32 CA 610, 614, 163 P 879.

Diagrams may be sent in to jurors, but the court has discretion to refuse a request from counsel that they be given to jurors. On request, however, diagrams must be given to them. *People v Cochran* (1882) 61 C 548. The pleadings may also be sent into the deliberation room (*People v Rosoto* (1962) 58 C2d 304, 356, 23 CR 779; *People v Walther* (1938) 27 CA2d 583, 593, 81 P2d 452).

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§33.10 C. Clothing, Photographs, Tape Recordings, Records, and Books

It is proper to send in items received in evidence (Pen C §1137), such as clothing (*People v Hower* (1907) 151 C 638, 645, 91 P 507) and photographs (*People v Williams* (1960) 187 CA2d 355, 366, 9 CR 722). However, discretion must be exercised in determining which photographs may be taken into the jury room. For example, gruesome photographs of a victim's body that might tend to inflame the jury, and that are cumulative of other evidence, should not be allowed in the jury room. *People v Smith* (1973) 33 CA3d 51, 69, 108 CR 698.

Jurors may listen to tape recordings placed in evidence, such as the defendant's confession (see *People v Walker* (1957) 150 CA2d 594, 603, 310 P2d 110), recordings of events surrounding police activities (see *People v Douglas* (1977) 66 CA3d 998, 1006, 136 CR 358), and phonograph records (*People v Manson* (1976) 61 CA3d 102, 214, 132 CR 265). When only part of a recording is admissible, however, care should be taken that jurors hear only the admissible portion. *People v Clair* (1992) 2 C4th 629, 7 CR2d 564 (inadmissible portion heard by jury; no prejudice shown). Transcripts of tape-recorded evidence may also be brought into the jury room. *People v Fujita* (1974) 43 CA3d 454, 473, 117 CR 757.

Dictionaries are not allowed in the jury room. *People v Karis* (1988) 46 C3d 612, 642 n22, 250 CR 659. Bringing Bible passages into the jury room and passing them around to other jurors is misconduct. *People v Danks* (2004) 32 C4th 269, 308, 8 CR3d 767.

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§33.11 D. Transcripts of Court Proceedings and Instructions

Trial or preliminary hearing transcripts probably cannot be sent into the jury room. See *People v Stevenson* (1978) 79 CA3d 976, 990, 145 CR 301 (error for jurors to be given edited transcript of preliminary hearing testimony of two prosecution witnesses while it was being read to jurors); *People v Manson* (1976) 61 CA3d 102, 214, 132 CR 265 (court noted that Pen C §1137 excepts depositions from items that may be sent into jury room and likened trial transcript to deposition).

Instructions given to jurors must be in writing and legible, but it is acceptable to send in deletions and additions, as well as indicating whether the instruction was asked to be given by the prosecution or the defense. The better practice, however, is to give jurors a clean copy with no changes and no indication of who offered them. *People v Welborn* (1966) 242 CA2d 668, 677, 51 CR 644; *People v Fisher* (1911) 16 CA 271, 274, 116 P 688.

The court *must* supply a copy of the written instructions if the jury requests them (Pen C §§1093(f), 1137; *People v Blakley* (1992) 6 CA4th 1019, 8 CR2d 219), but not if the request comes only from counsel (*People v Sheldon* (1989) 48 C3d 935, 943, 258 CR 242). If instructions are sent in to jurors, all instructions, not just selected ones, must be provided. *People v Wingo* (1973) 34 CA3d 974, 984, 110 CR 448.

As a practical matter, the court routinely sends at least one copy of the written instructions to the jury room, and it is increasingly common to provide multiple copies of the instructions to the jury. When jurors request one or more instructions to be reread after their deliberations have begun, the judge must consult with counsel before responding to the request; otherwise, it is constitutional (right to counsel) and statutory (Pen C §1138) error. *People v Dagnino* (1978) 80 CA3d 981, 990, 146 CR 129 (case reversed because judge gave jurors written instructions without consulting counsel; *Chapman* standard applied (*Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824)). For further discussion, see §33.13.

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§33.12 E. Experiments

Jurors have been permitted to do experiments in the jury room as long as new evidence does not result and it amounts to no more than a careful examination of the evidence. *People v Cooper* (1979) 95 CA3d 844, 853, 157 CR 348. For example, jurors may use a magnifying glass to examine photographs (*People v Turner* (1971) 22 CA3d 174, 182, 99 CR 186) and may insert keys into a lock and safe to see if the keys fit (*People v Bogle* (1995) 41 CA4th 770, 777, 48 CR2d 739).

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IX. QUESTIONS AND REQUESTS DURING DELIBERATIONS

§33.13 A. Procedure for Answering Jurors' Questions and Requests

The court must stay open for every purpose connected with a case until jurors reach a verdict. Pen C §1142. The bailiff is to communicate all questions and requests by jurors to the trial judge without responding to them. Pen C §1138. It is error for the trial court to fail to answer jury questions that are proper legal inquiries. *People v Thoi* (1989) 213 CA3d 689, 697, 261 CR 789 (error was waived or invited by counsel).

The trial court should not answer questions from the jury, regardless of how insignificant, without first communicating with counsel. The defendant is entitled to counsel's assistance at this stage of the proceedings. Pen C §1138; US Const amend VI; *People v Lozano* (1987) 192 CA3d 618, 237 CR 612. See *Musladin v Lamarque* (9th Cir 2009) 555 F3d 830, 842.

Also, it is improper for the judge to have a private communication with a jury. *People v Vinson* (1981) 121 CA3d 80, 83, 175 CR 123. Any error, however, is judged by the harmless error standard on appeal. *People v Mickle* (1991) 54 C3d 140, 174, 284 CR 511 (court received note from jury and judge wrote on note that jurors could request reread; harmless error).

It is improper for a judge to enter the jury room without counsel and communicate with jurors. *People v Bradford* (2007) 154 CA4th 1390, 65 CR3d 548 (judgment reversed; judge entered jury room during deliberations, unaccompanied by counsel and with no court reporter, on four occasions); *People v Thompson* (1990) 50 C3d 134, 173, 266 CR 309 (error harmless because judge merely gave jurors verdict form for lesser included offense he had forgotten to give them earlier). When the court receives a communication from the jury, the court should notify counsel, communicate the jury's questions to them, and allow counsel to be heard on the record out of the jury's presence. *People v Hogan* (1982) 31 C3d 815, 848, 183 CR 817, overruled on other grounds in *People v Cooper* (1991) 53 C3d 771, 836, 281 CR 90. But see *People v McCoy* (2005) 133 CA4th 974, 35 CR3d 366 (readback of testimony outside presence of defendant and defense counsel was permissible). The judge should then settle on an answer, call in the jury, clarify and restate the problem or question, and answer it. Unless counsel objects, the court can permit deliberations to continue while the answer is drafted. *People v McCleod* (1997) 55 CA4th 1205, 1220, 64 CR2d 545. The defendant must be in court when the jurors' questions are answered (see Pen C §1138) but need not be there while the judge and counsel are discussing the jury's questions (*People v Lang* (1989) 49 C3d 991, 1026, 264 CR 386). If the jury still has questions, the safest approach is to excuse the jury, settle on an answer on the record with counsel, then call back the jury and answer the question.

The defendant's right to be present for jury questions may be waived, even in a capital case. *People v Odle* (1988) 45 C3d 386, 247 CR 137; *People v Ainsworth* (1988) 45 C3d 984, 248 CR 568. A written waiver of the defendant's right to be present should be obtained, but on appeal the failure to do so is harmless error if no prejudice is shown. *People v Medina* (1990) 51 C3d 870, 902, 274 CR 849, aff'd on other grounds sub nom *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572. Similarly, counsel may waive his or her own right to be present. 51 C3d at 904. In contrast, *People v McCoy* (2005) 133 CA4th 974, 35 CR3d 366, held that despite the objection of defense counsel, the readback of testimony to the jury in the absence of the defendant and defense counsel did not violate defendant's right to counsel or due process, concluding that unlike jury questions, readback is not a critical stage of the proceedings for which the presence of counsel is constitutionally compelled. On what is and is not a critical stage of criminal proceedings, see §3.2.

Ø **Note:** If the court's communication with the jury exceeds the scope of counsel's waiver or stipulation, the error is of constitutional dimension. *People v Rubalcava* (1988) 200 CA3d 295, 246 CR 75 (counsel and defendant waived right to be present for jury questions that were neither complex nor required any research; court's explanation of reasonable-doubt instruction in counsel's absence held error).

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§33.14 B. Objecting to Improper Communication Between Judge or Bailiff and Jury

Counsel may object to improper communication between the judge or bailiff and jury by assigning the act as misconduct and requesting a mistrial or an admonition. See California Trial Objections, chap 29 (Cal CEB Annual). Counsel may object and request an admonition or move for a mistrial whether or not the court attempts to correct the problem. See *People v Woods* (1950) 35 C2d 504, 511, 218 P2d 981 (judge; affirmed, no prejudice); *People v Weatherford* (1945) 27 C2d 401, 418, 164 P2d 753 (bailiff; reversed).

If counsel feels that an acquittal or a favorable verdict is likely, counsel may make a tactical decision not to make the motion. In that event, counsel should at least object and request an admonition to preserve the issue for appellate review. *People v House* (1970) 12 CA3d 756, 765, 90 CR 831, disapproved on other grounds in *People v Beagle* (1972) 6 C3d 441, 451, 99 CR 313. If an activity of the trial court was so prejudicial that it could not have been cured by an objection or admonition, the appellate court may consider the claim of error despite failure to object or move for a mistrial. See *People v Chagolla* (1983) 144 CA3d 422, 432, 193 CR 711 (inadequate objection; rule stated, but error did not require reversal).

Prosecutors seldom move for mistrial, both because of the cost of a retrial and because prosecutors usually achieve guilty verdicts. Therefore, when a judge has communicated privately with jurors, the prosecutor will usually oppose a motion for mistrial and take precautions so that the judge is not reversed on appeal. To reduce the possibility of reversal on appeal, the prosecutor may suggest a strong cautionary instruction or admonition to the court and recommend that the judge make findings to protect the record by explaining the court's activity and reasons for denying the motion for mistrial.

Ø **Note:** Under Cal Rules of Ct 8.320(b)(5), the record on a defense appeal must include *all* written communications to and from the jury.

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§33.15 C. Jury's Request for Reread

The trial court must not refuse a reasonable jury request for testimony to be read back if there is a disagreement over the testimony. Pen C §1138; *People v Cooks* (1983) 141 CA3d 224, 260, 190 CR 211 (affirmed); *People v Butler* (1975) 47 CA3d 273, 120 CR 647 (reversed). If the jury requests a rereading of particular testimony, it is error not to read all that is requested. *People v Ainsworth* (1988) 45 C3d 984, 1020, 248 CR 568 (error held harmless).

The trial judge need not be present during rereading unless good cause is shown. Pen C §1138.5. Nor is the defendant required to be present during the rereading. *People v Pride* (1992) 3 C4th 195, 251, 10 CR2d 636; *People v Douglas* (1990) 50 C3d 468, 517, 268 CR 126; *People v Lang* (1989) 49 C3d 991, 1028, 264 CR 386. A written waiver of the defendant's right to be present should be obtained, but on appeal any error in procedure is harmless if no prejudice is shown. *People v Medina* (1990) 51 C3d 870, 902, 274 CR 849, aff'd on other grounds sub nom *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572. Defense counsel has the right to be present but can waive that right. 51 C3d at 904. (There is no discussion of this issue in *Medina v California, supra*.) But see *People v McCoy* (2005) 133 CA4th 974, 35 CR3d 366 (Fifth District held that readback of victim testimony to jury when defendant and defense counsel were not present did not violate defendant's right to counsel or due process, despite defense counsel's objection to readback in their absence, citing dicta in *People v Cox* (2003) 30 C4th 916, 963, 135 CR2d 272, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209, that "the rereading of testimony is not a critical stage of the proceedings").

Ø **Note:** Defense counsel and the prosecutor should consider being present during the rereading in the event the reporter mistakenly rereads unrequested testimony, or testimony that was ruled inadmissible.

The procedure to be followed for considering the request is the same as that discussed in §33.13.

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§33.16 D. Jury's Request for Clarification of Law

If the jury asks to be informed on a point of law, the court usually rereads instructions relevant to that issue, gives jurors written copies of the instructions already given, or gives additional instructions. Comments that diverge from the instructions in the case are usually risky. See *People v Beardslee* (1991) 53 C3d 68, 97, 279 CR 276.

Because this is a critical stage of the proceedings, a judge's failure to discuss the jury's request with counsel, and have them present when the judge discusses the law with jurors, requires reversal on appeal if the defendant was prejudiced by the error. *People v Rubalcava* (1988) 200 CA3d 295, 300, 246 CR 75; *People v Stewart* (1983) 145 CA3d 967, 972, 193 CR 799. For further discussion of procedure to be followed, see §33.13.

If jurors request a point of law clarification and the trial court does not answer, or answers improperly, the error will be considered harmless on appeal unless prejudice is shown. *People v Beardslee* (1991) 53 C3d 68, 97, 279 CR 276. But see *People v Gonzales* (1999) 74 CA4th 382, 390, 88 CR2d 111 (prejudice shown).

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§33.17 E. Jury's Request to View Scene or Object Outside Courtroom

The court can order the jury transported to view the crime scene or an object that cannot conveniently be brought into court. Pen C §1119. Doing so is a discretionary decision. See *People v Keltie* (1983) 148 CA3d 773, 782, 196 CR 243 (no error to deny defense motion to view scene, because other means existed to introduce desired evidence); *People v Peggese* (1980) 102 CA3d 415, 421, 162 CR 510 (denial of jury's request to view scene not abuse of discretion). When a trial court authorizes a jury to view the crime scene during a criminal trial, the defendant and defense counsel have a right to be present during the jury view. *People v Bush* (1886) 68 C 623, 631. The defendant and defense counsel also have the right to be present if the jury makes a return visit to the crime scene after deliberations have begun. *People v Garcia* (2005) 36 C4th 777, 782, 31 CR3d 541. The right to be present may be waived by the defendant. See, *e.g., People v Moon* (2005) 37 C4th 1, 19, 32 CR3d 894.

Although jurors must not make unauthorized visits to the crime scene, error is usually not found when that occurs. See, *e.g., People v Tedesco* (1934) 1 C2d 211, 221, 34 P2d 467.

In a jury view of the scene, there must be a *contemporaneous* objection to preserve for appeal any issue, *e.g.,* unauthorized jury questions, demonstrations, and receipt of evidence. *People v Wisely* (1990) 224 CA3d 939, 274 CR 291.

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§33.18 F. Jury's Consideration of Greater and Lesser Offenses

A jury has the power to return verdicts on some counts and to continue deliberating on others. See Pen C §§1140, 1160; *People v Allen* (1974) 41 CA3d 821, 116 CR 493. This rule was expanded in *Stone v Superior Court* (1982) 31 C3d 503, 183 CR 647, to apply to cases in which a jury also considers lesser offenses. *Stone* held that in this situation the trial court should provide the jury with forms for a verdict of guilty and not guilty for each lesser and charged offense. The greater and lesser verdicts may be placed on a single verdict form. *People v Gammage* (1992) 2 C4th 693, 7 CR2d 541.

Although the jury may consider and discuss lesser offenses at any time during deliberations, a not guilty verdict on the greater offense must be returned before a verdict on a lesser offense. *People v Zapata* (1992) 9 CA4th 527, 533, 12 CR2d 118, disapproved on other grounds in *People v Fields* (1996) 13 C4th 289, 305, 52 CR2d 282. See *People v Kurtzman* (1988) 46 C3d 322, 250 CR 244; *Stone v Superior Court* (1982) 31 C3d 503, 519, 183 CR 647. See CALCRIM 3517.

When deliberations appear to be at an impasse, the trial court may ask the jury if it is unable to reach a verdict. If the jury is deadlocked, the court may ask whether jurors were able to eliminate any offense. If the jury states that it is unanimous for acquittal on the greater offense, but hopelessly deadlocked on a lesser offense, the court must accept a partial verdict of not guilty on the greater offense if the court is satisfied that the jury is not merely expressing a tentative vote but has completed its deliberations. *Stone v Superior Court* (1982) 31 C3d 503, 519, 183 CR 647. If jurors are still deliberating, the court should allow them to continue. *People v Dixon* (1979) 24 C3d 43, 154 CR 236.

If the jury is discharged without making a finding on the greater charge, but with a finding on the lesser charge, the defendant is deemed acquitted on the greater charge. Pen C §1157; *People v Bordeaux* (1990) 224 CA3d 573, 273 CR 717. If the jury is discharged after hanging on the greater charge, but with a finding on the lesser charge, the defendant is not deemed acquitted on the greater charge, based on US Const amend V. Retrial is barred nevertheless under Pen C §1023 (conviction of lesser included offense bars subsequent prosecution for greater offense). *People v Fields* (1996) 13 C4th 289, 305, 52 CR2d 282. See also §33.36 on when jury is discharged; §§8.41, 26.25 on lesser included offenses.

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§33.19 X. REQUEST BY COUNSEL TO REOPEN EVIDENCE OR ARGUMENT

During jury deliberations, either counsel may request that the jury be returned to court and the case reopened. This extraordinary measure requires a showing by the proponent that newly discovered evidence will be presented, and that due diligence would not have produced it earlier. *People v Frohner* (1976) 65 CA3d 94, 110, 135 CR 153. Granting or denying the motion rests within the sound discretion of the court. *People v Gaines* (1966) 247 CA2d 141, 148, 55 CR 283 (court did not reopen case when jurors asked for additional evidence; no error because defense counsel made no objection or motion); *People v Richardson* (1961) 192 CA2d 166, 169, 13 CR 321 (People permitted to reopen). It is common for the court to allow each attorney a brief argument on the new testimony.

If additional instructions suggesting a new theory of liability are given during deliberations, defense counsel may waive any due process objection by not seeking leave to reopen argument. *People v Bishop* (1996) 44 CA4th 220, 235, 51 CR2d 629.

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XI. PROCEDURE FOR DETERMINING WHETHER TO EXCUSE JUROR DURING DELIBERATIONS

A. Juror Misconduct

§33.20 1. Checklist: Common Types of Juror Misconduct

- Asserting special expertise in evaluating scientific evidence, based on juror's background. *In re Malone* (1996) 12 C4th 935, 963, 50 CR2d 281 (harmless error).
- Bias or prejudgment of the case. *People v Nesler* (1997) 16 C4th 561, 580, 66 CR2d 454 (juror received prejudicial information from defendant's babysitter and repeatedly conveyed such information to other jurors during deliberations).
- Communicating with a third party about the case. *People v Lewis* (2009) 46 C4th 1255, 1305, 96 CR3d 512; *People v Ault* (2004) 33 C4th 1250, 1258, 17 CR3d 302 (juror discussed case with her manicurist and then related manicurist's viewpoint during deliberations); *People v Danks* (2004) 32 C4th 269, 304, 8 CR3d 767 (juror asked her pastor about Bible's stand on death penalty).
- Communicating with witness. *People v Pierce* (1979) 24 C3d 199, 155 CR 657.
- Conducting unauthorized view of scene. *People v Sutter* (1982) 134 CA3d 806, 819, 184 CR 829.
- Conducting experiments that produce new evidence on matter on trial. *People v Castro* (1986) 184 CA3d 849, 229 CR 280 (juror used binoculars outside courtroom to see whether witness was capable of identifying defendant).
- Consulting extraneous materials. *People v Danks* (2004) 32 C4th 269, 308, 8 CR3d 767 (passage from Bible); *People v Ramos* (2004) 34 C4th 494, 519, 21 CR3d 575 (newspaper article dealing with case); *People v Karis* (1988) 46 C3d 612, 250 CR 659 (dictionary definitions of words used in instructions); *People v Harper* (1986) 186 CA3d 1420, 231 CR 414 (dictionary definition of murder).
- Contradicting court interpreter's translation of witness's statement. *People v Cabrera* (1991) 230 CA3d 300, 281 CR 238 (one juror told others that particular word should have been interpreted as "push" rather than "touch" in molestation case, but error was harmless).
- Inattentiveness during deliberations. *People v Bowers* (2001) 87 CA4th 722, 728, 104 CR2d 726 (juror erroneously removed after other jurors mischaracterized his disagreement as inattentiveness).
- Language limitations. *People v Elam* (2001) 91 CA4th 298, 313, 110 CR2d 185 (juror erroneously removed after other jurors mischaracterized his legitimate disagreement over meaning of instructions as inadequate comprehension of English language).
- Refusing to deliberate. *People v Leonard* (2007) 40 C4th 1370, 1410, 58 CR3d 368; *People v Engelman* (2002) 28 C4th 436, 443, 121 CR2d 862.
- Refusing to follow the law. *People v Williams* (2001) 25 C4th 441, 447, 106 CR2d 295 (juror admitted that he would not follow court's instructions regarding the offense).
- Seeking legal advice from an attorney, even one not connected with the case. *People v Honeycutt* (1977) 20 C3d 150, 157, 141 CR 698.
- Sleeping. *People v Bradford* (1997) 15 C4th 1229, 1347, 65 CR2d 145; *People v Bonilla* (2007) 41 C4th 313, 350, 60 CR3d 209.
- Stating law erroneously to other jurors on the basis of juror's background. *People v Marshall* (1990) 50 C3d 907, 949, 269 CR 269 (juror was in law enforcement; misconduct, but harmless error).
- Untruthfulness during voir dire. *People v Green* (1995) 31 CA4th 1001, 38 CR2d 401 (no error in dismissing juror who falsely denied knowing defendant's family); *People v Thomas* (1990) 218 CA3d 1477, 1485, 267 CR 865 (trial court did not err in dismissing juror who was biased against police officers); *People v Blackwell* (1987) 191 CA3d 925, 236 CR 803 (reversed because juror's action deliberate).

- Introducing extrinsic material into the juryroom. *People v Davis* (2009) 46 C4th 539, 624, 94 CR3d 322; *People v Mincey* (1992) 2 C4th 408, 483, 6 CR2d 822.

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§33.21 2. Remedies for Juror Misconduct

Juror misconduct is commonly raised as an issue either during trial, during deliberations, or in a motion for new trial. Possible remedies during trial are to:

- Attempt to cure the misconduct by admonishing jurors (*People v Harper* (1986) 186 CA3d 1420, 231 CR 414).
- Remove the juror for misconduct (*People v Daniels* (1991) 52 C3d 815, 863, 277 CR 122); the entire jury does not have to be discharged (*People v Medina* (1990) 51 C3d 870, 888, 274 CR 849; no discussion of this issue in *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572).
- Declare a mistrial (*People v Daniels, supra*).
- Order a hearing to determine whether misconduct was prejudicial (*People v Bonilla* (2007) 41 C4th 313, 350, 60 CR3d 209).
- Order a new trial. On new trial motions, see §§34.3-34.16.

On appeal, the standard for deciding whether juror misconduct requires reversal is whether the jury's impartiality was adversely affected, the burden of proof lightened, or a defense removed. *People v Harper* (1986) 186 CA3d 1420, 231 CR 414; *People v Martinez* (1978) 82 CA3d 1, 22, 147 CR 208.

Hearings on the issue of juror misconduct are discussed in §33.23. A checklist of common types of juror misconduct is in §33.20.

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§33.22 B. Other Reasons for Excusing Jurors

Jurors may become unavailable or wish to be excused for many reasons other than juror misconduct, including illness, financial hardship, serious family problems, unexplainable absence, or disqualification because of personal information or knowledge (see CCP §233; Pen C §1089). See, *e.g., People v Leonard* (2007) 40 C4th 1370, 1408, 58 CR3d 368 (death of juror's father-in-law); *People v Roberts* (1992) 2 C4th 271, 6 CR2d 276 (sick juror); *People v Hecker* (1990) 219 CA3d 1238, 1244, 268 CR 884 (juror excluded because defendant had recently joined juror's church). Compare *People v Delamora* (1996) 48 CA4th 1850, 1855, 56 CR2d 382 (jurors erroneously excused after trial exceeded estimate and they asked court to contact their employers about extending paid time off), with *People v Earp* (1999) 20 C4th 826, 893, 85 CR2d 857 (juror properly excused because she did not wish to use up any more of her vacation leave).

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§33.23 C. When Hearing Is Required to Determine Whether to Excuse Juror

The trial court has a duty to look into reports of juror misconduct. *People v Burgener* (1986) 41 C3d 505, 224 CR 112, overruled on other grounds in *People v Reyes* (1998) 19 C4th 743, 753, 80 CR2d 734 (court failed to conduct hearing on report of intoxicated juror; error, but not prejudicial). Although courts should promptly investigate allegations of juror misconduct, a court has broad discretion in the conduct of the investigation. *People v Prieto* (2003) 30 C4th 226, 274, 133 CR2d 18 (decision to postpone inquiry until after verdict was within trial court's discretion). When evidence is presented that indicates "a strong possibility that prejudicial misconduct has occurred," a hearing is required if the trial court determines one is necessary to resolve material, disputed issues of fact. *People v Davis* (2009) 46 C4th 539, 625, 94 CR3d 322. The hearing must be sufficiently thorough to determine whether good cause exists to discharge the juror. *People v Keenan* (1988) 46 C3d 478, 537, 250 CR 550.

If it comes to the court's attention during deliberations that a juror has any personal knowledge that could be a factor in the trial, the juror must return to court, be sworn as a witness, and be examined in the presence of counsel and the defendant so that the court can decide whether good cause exists to excuse the juror. Pen C §1120.

In some circumstances, the trial court was not required to conduct a hearing to decide whether good cause exists to excuse a juror. See *People v Davis* (2009) 46 C4th 539, 625, 94 CR3d 322 (foreman read jury a note sent to him by nonjuror); *People v Kaurish* (1990) 52 C3d 648, 694, 276 CR 788 (no inquiry required when juror called defense attorney a "son of a bitch"; comment indicated only exasperation at length of proceedings); *In re Mendes* (1979) 23 C3d 847, 852, 153 CR 831 (death in juror's family; permissible for court to excuse juror for good cause without consulting attorneys). However, the better practice is for the court to conduct a hearing. *People v Dell* (1991) 232 CA3d 248, 283 CR 361 (juror ill; better practice is to hold hearing before excusing juror).

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§33.24 D. Conduct of Hearing to Determine Whether to Excuse Juror; Court's Ruling

Conduct of hearing. When the trial court conducts a hearing on whether to excuse a juror, it should be complete enough to determine whether good cause exists to excuse the juror. *People v Manriquez* (1976) 59 CA3d 426, 432, 130 CR 585. Informal hearings are common when a juror wishes to be discharged for something like illness or a family emergency. Even in these less formal hearings, however, the court and prosecutor should make sure the record is sufficient to show that the juror cannot function. *People v Compton* (1971) 6 C3d 55, 60, 98 CR 217. In conducting the hearing, the court should hear and consider evidence supporting each side's position and should avoid delegating the questioning solely to counsel, creating "an adversarial proceeding," putting a "juror on trial," or inquiring into deliberative thoughts. *People v Barber* (2002) 102 CA4th 145, 150, 124 CR2d 917.

Counsel and the defendant should be present at the hearing. In some circumstances, counsel may be excluded from the hearing, as long as he or she is given a transcript of it. *People v Siripongs* (1988) 45 C3d 548, 247 CR 729 (defense attorney excluded at defendant's request; no constitutional violation).

The court may take testimony but is not required to unless a juror has personal knowledge about the case (Pen C §1120). *People v Keenan* (1988) 46 C3d 478, 540, 250 CR 550. See also *People v Hedgecock* (1990) 51 C3d 395, 414, 272 CR 803 (in hearing on bailiff and jury misconduct, court has discretion to conduct evidentiary session at which jurors may testify). Counsel normally proceed by declaration.

> Ø **Note:** Declarations based on hearsay are not admissible to impeach a verdict. *People v Williams* (1988) 45 C3d 1268, 1318, 248 CR 834.

Evidence presented at a hearing on the issue of juror misconduct is limited to statements, conduct, conditions, or events involving a juror. *In re Hamilton* (1999) 20 C4th 273, 294, 84 CR2d 403; *People v Hutchinson* (1969) 71 C2d 342, 349, 78 CR 196. See Evid C §1150. No evidence is admissible to show the *effect* of any statement, conduct, condition, or event on a juror, or to show the mental process used in reaching the verdict. *In re Hamilton, supra*; *U.S. v Dutkel* (9th Cir 1999) 192 F3d 893, 899 ("court may not inquire into any juror's mental processes, but rather must focus on conduct"). See also §33.46.

It is often difficult for counsel to develop a complete record at this type of hearing. The discovery of juror misconduct is normally unanticipated, and when the misconduct is discovered during trial there is great pressure to settle the matter quickly. The importance of making a complete record, however, is demonstrated in *People v Dyer* (1988) 45 C3d 26, 246 CR 209. During voir dire, a juror answered that no member of her family had been a crime victim. Counsel subsequently learned that her brother had been shot and killed. The court held a hearing at which the juror testified that she considered the shooting to be an accident. A motion for mistrial was denied. On appeal, the defendant asked the court to take judicial notice of records that established that the juror's brother had been beaten and then shot in the back of the head. His death had been the subject of a criminal prosecution and a civil suit by the juror. The supreme court would not consider this information, because it had not been presented to the trial court. For further discussion of investigating juror misconduct, see §34.5.

Court's ruling. Proof of jury misconduct raises a presumption of prejudice that can be rebutted by proof that no prejudice actually resulted. *People v Dorsey* (1995) 34 CA4th 694, 40 CR2d 384 (juror left deliberations to smoke cigarette; alternate substituted for her; presumption rebutted). In removing a juror, the trial court must exercise its discretion with great care. To be upheld on review, a juror's disqualification must appear on the record as a "demonstrable reality." *People v Barnwell* (2007) 41 C4th 1038, 1052, 63 CR3d 82.

For discussion of when discharge of a jury may prevent a retrial, see §26.27.

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XII. TERMINATION OF DELIBERATIONS

§33.25 A. Reasons for Terminating Deliberations

Trial may be terminated for many reasons. The most common is when the jury renders a verdict in open court. See Pen C §1140.

When the jurors cannot agree on a verdict, the judge has discretion to declare a mistrial or to order further deliberations. Pen C §§1140-1141. The decision on whether to discharge the jury because there is no reasonable probability that it can render a verdict is left to the judge's discretion. *People v Rojas* (1975) 15 C3d 540, 545, 125 CR 357. For further discussion, see §33.36. Limited noncoercive questioning of jurors about the usefulness of further deliberations in reaching a verdict is proper. *People v Johnson* (1992) 3 C4th 1183, 1252, 14 CR2d 702.

A mistrial may also be declared when the defendant consents to a mistrial by stipulation (see *People v Terry* (1970) 2 C3d 362, 386, 85 CR 409), or when a juror has been excused for good cause and no alternate is available (CCP §233). For further discussion of mistrials, see §§33.26, 33.45.

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§33.26 B. Determining Whether Jurors Are Unable to Reach Verdict; Declaring Mistrial

If a judge suspects that the jury cannot reach a verdict, or if jurors so announce, the judge should direct the bailiff to bring the jury back into court. The judge should then attempt to learn whether there is any reasonable probability that the jury can reach a verdict. Pen C §1140; *People v Miller* (1990) 50 C3d 954, 993, 269 CR 492. The judge should first ask the foreperson if he or she believes the jury can reach a verdict (see *People v Borousk* (1972) 24 CA3d 147, 100 CR 867) and then question jurors individually on whether they feel a verdict can be reached.

It is permissible for the judge to ask what the numerical division is, without seeking to discover how many are for acquittal or conviction (*e.g.,* ten to two, or five to seven). *People v Rodriguez* (1986) 42 C3d 730, 776, 230 CR 667.

> Ø **Note:** Federal courts do not allow judges to ask the numerical division. *Brasfield v U.S.* (1926) 272 US 448, 71 L Ed 345, 47 S Ct 135. This rule is not based on the U.S. Constitution and therefore does not need to be followed in California. *People v Proctor* (1992) 4 C4th 499, 538, 15 CR2d 340.

If the judge inadvertently discovers how many are in favor of conviction or acquittal, he or she must be very careful not to put added pressure on the minority jurors. The judge can only take measures to encourage agreement by advising jurors of their proper role in a manner that may assist them in their deliberations, but cannot admonish minority jurors to consider the preponderance of opinion, numerical division, or the cost or inconvenience of a retrial. *People v Gainer* (1977) 19 C3d 835, 852, 139 CR 861; *People v Hinton* (2004) 121 CA4th 655, 17 CR3d 437 (clear and prejudicial error for trial judge to give deadlocked jury a "dynamite" instruction); *People v Yarbrow* (1978) 86 CA3d 445, 150 CR 324.

The judge must also avoid coercing a verdict by attempting to influence the jury to consider compromise, thus depriving the defendant of the benefit of the jury's full and independent consideration. *People v Peters* (1982) 128 CA3d 75, 89, 180 CR 76. The court also must not express its belief in the defendant's guilt. *People v Cook* (1983) 33 C3d 400, 189 CR 159, overruled on other grounds by *People v Rodriguez* (1986) 42 C3d 730, 766, 230 CR 667. The court may, however, summarize and analyze the law. *People v Rodriguez* (1986) 42 C3d 730, 766, 230 CR 667.

After a jury reports that it has reached an impasse, the court may, in the presence of counsel, advise the jury of its duty to decide the case on the basis of the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns that, if resolved, might assist the jury in reaching a verdict. If the court determines that further action might assist the jury in reaching a verdict, it may give additional instructions, clarify previous instructions, or reopen argument, or any combination thereof. See Cal Rules of Ct 2.1036; *People v Young* (2007) 156 CA4th 1165, 1171, 67 CR3d 899 (reopening closing argument); *People v Moore* (2002) 96 CA4th 1105, 1118, 117 CR2d 715 (instruction to deadlocked jury that urges jurors to follow their individual judgments and does not urge them to listen to majority is not coercive).

When a jury is having difficulty reaching a verdict, it is proper to allow the jury to select a new foreperson, even if the person replaced is in the minority. *People v Perez* (1989) 212 CA3d 395, 402, 260 CR 474.

If jurors are deadlocked, the judge must declare a mistrial. Pen C §§1140-1141. The court, however, is not bound by the jury's determination that it is at an impasse. *People v Pride* (1992) 3 C4th 195, 265, 10 CR2d 636 (inquiry following foreman's note concerning inability to reach verdict not coercive); *People v Johnson* (1992) 3 C4th 1183, 1252, 14 CR2d 702 (no error in directing jury to continue deliberating after jury sent note saying it was deadlocked; when court questioned individual jurors, several thought verdict might be possible); *People v Rodriguez* (1986) 42 C3d 730, 775, 230 CR 667 (no mistrial after deliberations and five notes from jurors saying they were deadlocked).

For discussion of partial and incomplete verdicts, see §§33.27-33.28, 33.32.

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XIII. GENERAL AND SPECIAL VERDICTS

§33.27 A. Definition of Verdict

A verdict is reached in a criminal case when all 12 jurors impaneled to try the case have agreed on the issues submitted to them. Cal Const art I, §16; *People v Superior Court (Thomas)* (1967) 67 C2d 929, 64 CR 327. The only other requirement is that on reaching this agreement they must be brought into the courtroom to declare their verdict. See Pen C §§1147, 1149. Thus, the jurors' assent in court is the "true return of the verdict." *People v Lankford* (1976) 55 CA3d 203, 211, 127 CR 408; see *People v Hernandez* (1985) 163 CA3d 645, 209 CR 809; *People v Mestas* (1967) 253 CA2d 780, 786, 61 CR 731.

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§33.28 B. Written Verdict Forms

Although the oral statement of consensus in open court is the true verdict (*People v Lankford* (1976) 55 CA3d 203, 211, 127 CR 408), the use of written verdict forms is universal and has been the cause of considerable appellate discussion. No specific format is required.

Counsel's failure to object to whatever forms are eventually submitted may preclude a successful attack on them on appeal. See *People v Rogers* (1931) 112 CA 615, 297 P 924. In view of this, it is advisable for counsel to make any objections to a specific form on the record before the forms are submitted to the jury.

Specific forms of verdict are called for when allegations in the charging document call for enhanced punishment if certain facts are found true, *e.g.,* armed with or use of a deadly weapon or firearm (Pen C §§12022(a), 12022.3, 12022.5, 12022.53).

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§33.29 C. General Verdict

There are two types of verdict: general and special. The most common form of verdict is the general verdict, which must be given in a misdemeanor case. See Pen C §1150. The statutorily prescribed form for the general verdict is "guilty" or "not guilty." On a plea of "once in jeopardy," the general verdict is "for the People" or "for the defendant."

Aside from these statutory requirements, no particular form of general verdict is required. A verdict will be found sufficient if it clearly shows the jury's intention. See *Bigelow v Superior Court* (1989) 208 CA3d 1127, 256 CR 528. No great detail is required. A guide to determining the sufficiency of a verdict is whether it can be understood to relate to the allegations of the accusatory pleading. See *People v Beltran* (1949) 93 CA2d 704, 209 P2d 635. For example, "guilty as charged in Count One of the information" is sufficient. See *People v Fisher* (1948) 86 CA2d 24, 30, 194 P2d 116.

If the crime is divided into degrees and jurors fail to specify the degree, a finding of guilt will be deemed to be of the lesser degree. Pen C §1157; *People v Beamon* (1973) 8 C3d 625, 629, 105 CR 681. However, if jurors are instructed only on a felony-murder theory that is first degree murder as a matter of law, their guilty verdict will be deemed a finding of first degree murder. *People v Mendoza* (2000) 23 C4th 896, 908, 98 CR2d 431. See also §33.40.

For discussion of necessarily lesser included offenses, see §§8.41, 26.25, 32.8.

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§33.30 D. Special Verdict

The special verdict is not often used, but it is dealt with by statute (see, *e.g.,* Pen C §§1152-1156) and by case law (see *People v Bratis* (1977) 73 CA3d 751, 762, 141 CR 45, and cases cited there). When a special verdict is used, the jury finds the facts only and the judge draws conclusions of law from those facts. A special verdict can be returned in any felony case other than a criminal libel case, but only when a jury is in doubt about the legal effect of the facts proved. Pen C §1150.

The power to render a special verdict is discretionary with the jury, but the court has no duty to tell the jury of this power sua sponte. The court must instruct a jury on special verdicts on request. *People v Perry* (1972) 7 C3d 756, 103 CR 161; *People v Mardian* (1975) 47 CA3d 16, 121 CR 269, disapproved on other grounds in *People v Anderson* (1987) 43 C3d 1104, 1123, 240 CR 585. Special verdict instructions are not required in every case in which they are requested by counsel. For example, in *People v Rehman* (1967) 253 CA2d 119, 61 CR 65, the court held that, when the jury is properly instructed on the elements of a conspiracy charge, the legal effect of the facts proved cannot be in doubt. Consequently, under §1150, a general verdict is mandatory. *People v Rehman, supra*.

The trial court should have the clerk enter the verdict in the minutes in the jury's presence after the jury's agreement with it in open court, unless the jury itself has reduced its special verdict to writing or counsel waives such a recording. See Pen C §1153.

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§33.31 E. Jury's Verdict on Special Allegations and Prior Convictions

Penal Code §1158a sets out suggested language for the jury's findings that the defendant was armed with a weapon at the time the charged offense was committed, at the time of the arrest, or both. Pen C §1158a(a).

Specific findings that can be made by a jury when charged in the information, *e.g.,* criminal street gang activity (Pen C §186.22), armed with or use of a deadly weapon or firearm (Pen C §§12022, 12022.3, 12022.5, 12022.53), taking property of great value (Pen C §12022.6), and possession of 14.25 grams or more of heroin for sale (Pen C §1203.07(a)(1)), are usually patterned after the suggested language in Pen C §1158a.

Unless the trial is bifurcated, the findings on these issues must be made at the time the jury declares the verdict in court. The jury's failure to make a finding on these matters, followed by the jury's discharge, operates as an acquittal. See *People v Saunders* (1993) 5 C4th 580, 20 CR2d 638; *People v Huffman* (1967) 248 CA2d 260, 56 CR 255 (court trial; judge's failure to rule on prior conviction operated as acquittal).

Usually, the trial of the issues of guilt and proof of prior convictions are bifurcated. If the defendant is found guilty, the same jury then proceeds to determine most prior conviction issues. Pen C §§1025, 1158. Examples of such issues regarding priors include whether the defendant was committed to prison, whether he or she has remained free of prison custody, whether a deadly weapon was personally used, and whether great bodily injury was personally inflicted. For further discussion, see §§24.25-24.26.

Absent a defense objection, discharge of the guilt jury and later impaneling of a second jury to try the prior conviction issue is permissible and is not a double jeopardy violation. *People v Saunders, supra*. This issue does not arise with prior convictions that must be determined by the jury during deliberations on guilt. See §24.25.

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§33.32 F. Partial Verdicts

It is permissible to receive partial verdicts as to different defendants in a multidefendant case (see, *e.g., People v Gaines* (1962) 58 C2d 630, 25 CR 448, overruled on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201) or as to some counts in a multicount case (see *People v Rigney* (1961) 55 C2d 236, 10 CR 625).

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XIV. DELIVERY OF VERDICT

§33.33 A. Parties to Be Present in Court

When the jury reaches a verdict, the foreperson notifies the bailiff, who informs the judge. The judge has the clerk notify the attorneys, and when the court and parties are in court, the bailiff brings the jurors into the courtroom. When all jurors and parties are present, the judge notes for the record that all jurors are present.

Although there is no specific statutory requirement of counsel's presence at the time of receiving a verdict, it is standard practice for counsel to be present.

A defendant who is charged with a felony must be present when the verdict is received. Pen C §§977(b)(1), 1148. If the court cannot procure the defendant's presence after exercising reasonable diligence, the verdict can be received in the defendant's absence "in the interest of justice." Pen C §1148. Section 1148 does not distinguish between voluntary and involuntary absences. Therefore, it must be assumed that the reason for the defendant's absence is not determinative. The only requirement is that the court exercise reasonable diligence in securing the defendant's presence. See *People v Lewis* (2006) 39 C4th 970, 1039, 47 CR3d 467 (Pen C §1148 "interest-of-justice" exception permitted reading of verdict in absence of the defendant because he was comatose with uncertain prognosis after jailhouse stabbing).

Misdemeanor cases have no such requirements for the defendant's presence, because counsel generally may appear for the defendant at all stages, including return of the verdict. Pen C §977(a).

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B. Method of Taking Verdict

§33.34 1. Oral Declaration

The jury foreperson gives the bailiff or clerk the verdict forms. The clerk reads the verdict, and the court asks if that is the jury's verdict. Alternatively, the court may ask the foreperson to read the verdict. The oral declaration constitutes the verdict. See Pen C §1149; *People v Hernandez* (1985) 163 CA3d 645, 209 CR 809; *People v Lankford* (1976) 55 CA3d 203, 127 CR 408.

The court then asks counsel if they would like the jury polled. At either counsel's request, the clerk asks each juror if the verdict given is his or her verdict. See *People v Lessard* (1962) 58 C2d 447, 25 CR 78. If any do not answer in the affirmative, they must be sent out for further deliberation. See Pen C §1163.

A court usually has wide latitude in determining the meaning to be placed on a juror's response during a poll of individual jurors under §1163. Absent evidence of coercion by the court, procedures such as asking questions to clarify a juror's response have been found reasonable. See *People v Burnett* (1962) 204 CA2d 453, 22 CR 320. An objection must be made if jury polling is not complete; otherwise, it will be considered waived. See *People v Wright* (1990) 52 C3d 367, 276 CR 731. See also *People v Masajo* (1996) 41 CA4th 1335, 1339, 49 CR2d 234 (asking for show of hands was error, but harmless).

At what point attempts at clarification reveal that the jury has not reached a verdict and should return for further deliberations is a matter of judicial discretion. See *People v Mestas* (1967) 253 CA2d 780, 61 CR 731.

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§33.35 2. Delivery of Verdict

A general verdict on a plea of not guilty is either "guilty" or "not guilty." Pen C §1151. However, no specific words are necessary. The verdict is sufficient if it finds the defendant guilty or not guilty by reference to a specific count. *People v Fisher* (1948) 86 CA2d 24, 31, 194 P2d 116.

When delivered, a special verdict need not be in a specific form. Pen C §1154. Unlike a general verdict, however, it must be put in writing by the jury, or it must be entered in the minutes of the court in the jurors' presence and agreed to by them before they are discharged. Pen C §1153. Failure to comply before discharge could be viewed as a discharge before verdict without legal necessity, thus raising a double jeopardy issue if retrial is sought.

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§33.36 C. Trial Ends When Verdict Is Complete or Jury Is Discharged

A verdict is complete once it has been read in court, acknowledged by the jury without dissent during any polling, and recorded by the clerk. *People v Bento* (1998) 65 CA4th 179, 188, 76 CR2d 412; *People v Green* (1995) 31 CA4th 1001, 1009, 38 CR2d 401. However, if a complete verdict has not been rendered or if the verdict is otherwise irregular, the court retains jurisdiction to reconvene the jury if the jury has not yet been discharged and the trial court still retains control over the jury. *People v Gray* (2005) 37 C4th 168, 199, 33 CR3d 451; *People v Hendricks* (1987) 43 C3d 584, 597, 238 CR 66.

If the verdict is complete and the jury has been discharged, the jury cannot be reconvened, even if the jurors have not yet left the jury box. *People v Peavey* (1981) 126 CA3d 44, 49, 178 CR 520.

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§33.37 D. Recording Verdict in Minutes

The verdict must be recorded in the minutes and, if requested by any party, read as recorded. See Pen C §1164. Its reading is routinely waived by stipulation. Reversal on this ground is unlikely. See *People v Sing Chan* (1944) 64 CA2d 167, 174, 148 P2d 81, disapproved on other grounds in *People v Mathis* (1965) 63 C2d 416, 430, 46 CR 785.

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XV. DEFECTIVE VERDICTS

§33.38 A. Inconsistent Verdicts

In a multicount case, a jury may find the defendant guilty of some counts and not guilty of others. See Pen C §954 (acquittal on one count cannot be deemed acquittal on another). When the offenses arise from one fact situation, *e.g.,* repeated sexual intercourse on one occasion, a claim of inconsistency of verdicts may be raised. Although the verdicts may appear inconsistent, guilty verdicts are not void for this reason if substantial evidence supports them. *People v York* (1992) 11 CA4th 1506, 1510, 15 CR2d 66; *People v Matos* (1979) 92 CA3d 862, 868, 155 CR 293; *People v Edwards* (1947) 81 CA2d 655, 185 P2d 74. The same is true when some defendants are found guilty and some are found not guilty (see *People v Taylor* (1948) 88 CA2d 983, 199 P2d 751), or when codefendants charged with the same crimes and tried jointly are convicted of different degrees of an offense (see *People v Abilez* (2007) 41 C4th 472, 512, 61 CR3d 526 (jury convicted one defendant of only second degree murder, while it convicted the other defendant of first degree murder with three special circumstances)). This situation should be distinguished from that involving irregularities in the verdict forms themselves. See §33.39 on irregularity in written forms.

The concept of inconsistent verdicts has become intertwined with verdict finality questions. For example, in *Bigelow v Superior Court* (1989) 208 CA3d 1127, 256 CR 528, the jury returned written verdict forms acquitting the defendant of murder but finding the special circumstance allegation true. To resolve this apparent inconsistency, the trial court refused to enter judgment on the murder acquittal and directed the jury to deliberate further. The jury then came back hung on the murder count. Error was found because the jury had already reached a verdict. See Pen C §1162. Because jurors clearly showed the intent to acquit, the fact that the verdicts were inconsistent could not bar the acquittal from being received and recorded. See also *People v Guerra* (2009) 176 CA4th 933, 98 CR3d 175; *People v Blair* (1987) 191 CA3d 832, 236 CR 675.

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§33.38A B. Right to Unanimous Jury

The jury must unanimously agree on the commission of the same specific act or acts that establish the charged crime within the period of time alleged in the charging document. *People v Thompson* (1995) 36 CA4th 843, 42 CR2d 798 (diversion of construction funds); *People v Crow* (1994) 28 CA4th 440, 33 CR2d 624 (child molest case); see Cal Const art I, §16; CALCRIM 3500-3502. See also §31.33.

The jury is not, however, required to agree on the same theory of guilt. *People v Santamaria* (1994) 8 C4th 903, 35 CR2d 624 (jury need not decide whether murder conviction based on defendant's being aider and abettor or direct perpetrator); *People v Carey* (2007) 41 C4th 109, 132, 59 CR3d 172 (jury need not unanimously agree on theory of first degree murder as either felony murder or murder with premeditation).

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§33.39 C. Irregularity in Written Forms

Verdict forms do not have to be signed. The custom of having the foreperson sign the verdict is only a method of authentication. See *People v Wiley* (1931) 111 CA 622, 295 P 1075. The true verdict is the oral declaration of the verdict in court and its confirmation by the jurors. See *People v Lankford* (1976) 55 CA3d 203, 127 CR 408.

An irregularity in written forms supplied by the jury to the court is not itself enough to void the verdicts; prejudice must be shown. Some examples of irregularity in the forms are incorrectly numbering the counts (*People v Harders* (1962) 201 CA2d 795, 20 CR 595); adding a note to the court on the verdict form requesting leniency for the defendant (*People v Gidney* (1937) 10 C2d 138, 73 P2d 1186; *People v Bajo* (1963) 220 CA2d 741, 33 CR 918); and returning signed guilty and not guilty forms for the same charge (*People v Keating* (1981) 118 CA3d 172, 173 CR 286). The court has a great deal of flexibility in dealing with these problems. Pen C §1161. For example, in *People v Keating, supra,* the appellate court held that the trial court properly ordered further deliberations, instructing the jury to make one finding on each count and allegation.

In *People v Harders, supra,* the trial court was held to have acted properly by changing the record to correct the verdicts to show the proper count. In *People v Trotter* (1992) 7 CA4th 363, 8 CR2d 648, the jury was mistakenly supplied with verdict forms dealing with the question of whether the defendant was armed with a firearm, rather than being given a form on the use of a firearm. Because the jury was instructed only on the issue of use of a firearm, its affirmative finding that the defendant was armed with a firearm was ruled only a clerical error, correctable by the court.

A factor in showing prejudice on appeal is counsel's reaction to the flawed verdict. Defense counsel's failure to object will weigh against a finding of prejudice. See *People v Schroeder* (1979) 96 CA3d 730, 158 CR 220; *People v Harders* (1962) 201 CA2d 795, 798, 20 CR 595.

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§33.40 D. Finding on Degree of Offense; Failure to Find Degree; Reconsideration of Verdict

When a crime is divided into degrees and the trier of fact has reasonable doubt about the degree, the defendant can be convicted only of the lesser degree. Pen C §1097. Following from this principle is the rule that, when a trier of fact finds a defendant guilty but neglects to state the degree of the offense, the conviction will be deemed of the lesser degree on appeal. Pen C §1157; *People v Superior Court (Marks)* (1991) 1 C4th 56, 2 CR2d 389.

There is an exception to this rule, however. When it is possible to conclude, despite the omission, that the greater degree was intended, the conviction will be deemed to be of the greater degree. See, *e.g., People v Preciado* (1991) 233 CA3d 1244, 285 CR 22 (verdict specified conviction was for "residential burglary" as specified in information, and information unmistakably charged first degree burglary); *People v Goodwin* (1988) 202 CA3d 940, 249 CR 430 (same).

Furthermore, in *People v Mendoza* (2000) 23 C4th 896, 908, 98 CR2d 431, a divided California Supreme Court recognized an exception to the rule for first degree felony murder, holding that a killing during the commission of one of the crimes specified in Pen C §189 is not a crime divided into degrees but rather is first degree murder as a matter of law. Consequently, when the prosecution's only theory is that the killing took place during the commission of a robbery or a burglary, the conviction could be fixed at first degree murder, despite the verdict's failure to specify the degree.

If the jury expresses agreement on the crime (*e.g.,* murder) but not on the degree (*e.g.,* first or second) before they have been discharged, jurors can properly be asked to retire and fix the degree of the crime. *People v Dixon* (1979) 24 C3d 43, 52, 154 CR 236. See also §33.29.

If the jury returns conflicting verdicts, the court may send them back for further deliberations. *People v Mestas* (1967) 253 CA2d 780, 61 CR 731; *People v Crawford* (1953) 115 CA2d 838, 252 P2d 963. For example, when the jury foreperson signs both guilty and not guilty verdicts, the court may order the jury to deliberate further, with an instruction to return only a "guilty" or a "not guilty" verdict. *People v Keating* (1981) 118 CA3d 172, 173 CR 286. Similarly, when a jury returns a verdict finding the defendant guilty of a degree that is inapplicable, the court can order further deliberations. *People v Scott* (1960) 53 C2d 558, 2 CR 274.

When a verdict clearly indicates the jurors' intention to acquit, however, the judge cannot ask them to reconsider the verdict even though it is defective. *People v Romero* (1982) 31 C3d 685, 689, 183 CR 663; *People v Blair* (1987) 191 CA3d 832, 236 CR 675.

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§33.41 E. Failure to Make Finding on Enhancement

The failure of the trier of fact to make a finding on an enhancement operates as an acquittal on that allegation. *People v Cole* (1979) 94 CA3d 854, 155 CR 892, disapproved on other grounds in *People v Kelly* (1983) 33 C3d 267, 277, 188 CR 447 (great bodily injury enhancement per Pen C §12022.7). This situation is different from that in which the jury cannot actually agree on a finding. In that event, a mistrial should be declared and the prosecution should be allowed to retry the case on the enhancement based on the analogous situation in *People v Ysabel* (1938) 28 CA2d 259, 82 P2d 476.

See also §33.31 on the effect of discharge of the jury on the verdict in bifurcated cases.

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XVI. ACTION ON VERDICT

§33.42 A. Recording Verdict

After a verdict has been received in open court, the clerk, or the court if there is no clerk, records the verdict in the minutes and reads it to the jury as recorded. Pen C §1164. Counsel usually waive the reading of the verdict as recorded.

If a juror states that the verdict is not his or hers, the jury must be sent out to deliberate further. Pen C §1163. If there is no dissent, the verdict is complete and the jury is discharged.

Ø **Note:** The trial judge should neither praise nor criticize the verdict or the jury's failure to reach a verdict. Cal Rules of Ct, Standards of J Admin 2.30.

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§33.43 B. Finding for Defendant

When a verdict is returned in the defendant's favor, the court must immediately enter the acquittal in the minutes. Pen C §1164. The jury's finding in the defendant's favor is absolute and cannot be overturned even if it is palpably wrong. *People v Gottman* (1976) 64 CA3d 775, 134 CR 834.

Once acquitted, the defendant must be discharged, if in custody, unless he or she is being detained on another case. Pen C §1165.

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§33.44 C. Finding Against Defendant

When a verdict of guilty is returned against an in-custody defendant, he or she must be remanded to the sheriff pending sentencing, unless the court concludes that the evidence supports its decision to allow the defendant out on bail. Pen C §1166. See Pen C §§1272 (noncapital defendant seeking probation or to appeal conviction may be admitted to bail), 1270 (judge may release on O.R. any noncapital defendant for whom bail could be set).

If the defendant is out of custody, the court may commit him or her to the sheriff's custody pending sentencing, or allow the defendant to remain on bail or O.R. release. If a defendant on bail is remanded, bail is to be exonerated. Pen C §1166. For discussion of bail on appeal, see §§43.9, 44.18.

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§33.45 XVII. EFFECT OF MISTRIAL DECLARED DURING DELIBERATIONS

When a trial judge declares a mistrial during jury deliberations because not enough jurors remain to return a verdict, the case may be retried if the juror was excused for good cause that amounts to a legal necessity, or with the consent of counsel. *Larios v Superior Court* (1979) 24 C3d 324, 332, 155 CR 374; *People v Guillen* (1994) 25 CA4th 756, 31 CR2d 653. If neither good cause nor consent are present, the defendant is entitled to a dismissal. *Larios v Superior Court, supra*.

When the attorneys stipulate, and the defendant personally consents, that the judge may discharge the jury because jurors are unable to agree on a verdict, or when the judge finds no reasonable probability that jurors will agree on a verdict, the judge may discharge the jury, declare a mistrial, and the case may be tried again. Pen C §§1140-1141.

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§33.46 XVIII. POSTTRIAL INTERROGATION OF JURORS

Before discharging the jury, the court must tell jurors they have the absolute right to discuss or not to discuss the case with anyone, including the attorneys in the case. CCP §206(a). See *People v Santos* (2007) 147 CA4th 965, 972, 55 CR3d 1 (allowing jury to exit secretly through private corridor did not violate substantive due process). The attorneys, and their representatives, may only discuss the case with a juror with the juror's consent and at a reasonable time and place. CCP §206(b). Before any such discussion occurring more than 24 hours after the verdict, the attorneys, and their representatives, must inform the juror of the identity of the case, the identity of the party the attorneys represent, the subject of the interview, the right not to discuss the deliberations or verdict, and the right to review and receive a copy of any declaration that is filed with the court. CCP §206(c). Violation of CCP §206 is a violation of a lawful court order, subjecting the violator to monetary sanctions under CCP §177.5. CCP §206(d).

It is improper for attorneys, after a trial, to ask a juror questions or to make comments "that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service." Cal Rules of Prof Cond 5-320(D). See also Cal Rules of Prof Cond 5-320(E)-(G), and discussion in §2.36. Therefore, to avoid influencing a juror's actions in future jury service, it is advisable for counsel to refrain from initiating disclosure to jurors of excluded evidence.

On the recording of the jury's verdict, personal juror identifying information must be sealed until further court order. CCP §237. The information to be sealed is limited to names, addresses, and telephone numbers, and does not include the other contents of juror questionnaires. *Zamudio v Superior Court* (1998) 64 CA4th 24, 30, 74 CR2d 765. Trial counsel are entitled to retain redacted copies of juror questionnaires. *Bellas v Superior Court* (2000) 85 CA4th 636, 651, 102 CR2d 380 (citing *Zamudio*).

Requests to unseal personal juror-identifying information require notice to the affected juror and a hearing. CCP §237(c); *People v Duran* (1996) 50 CA4th 103, 115, 57 CR2d 635. A showing of good cause does not automatically entitle the requesting party to juror contact information; the request may be denied if the trial court finds a compelling interest for nondisclosure. *Townsel v Superior Court* (1999) 20 C4th 1084, 1095, 86 CR2d 602; *People v Tuggles* (2009) 178 CA4th 1106, 1149, 100 CR3d 820. Denial of such a request is reviewed under the abuse of discretion standard. *Townsel,* 20 C4th at 1097; *People v Santos* (2007) 147 CA4th 965, 978, 55 CR3d 1. See also CCP §206(g) and discussion in §§12.21, 29.19.

On contacting jurors after trial to attempt to impeach the verdict, see §34.5.

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34

PREJUDGMENT MOTIONS

HON. EDWARD DANIEL WEBSTER

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§34.1 I. OVERVIEW

Prejudgment motions are brought in the trial court before sentence is pronounced. Pen C §§1182 (new trial), 1181(6) (modify verdict), 1185 (arrest of judgment). Unless the court has transferred the case, these motions are heard by the trial judge or by the judge who took the defendant's plea. See *People v Tokich* (1954) 128 CA2d 515, 517, 275 P2d 816.

Prejudgment motions are often made orally, as are the prosecutor's responses. The trial court may not refuse to hear and decide a motion for new trial made orally. See, *e.g., People v Simon* (1989) 208 CA3d 841, 847, 256 CR 373.

Ø **Note:** Under Pen C §1202 on pronouncing judgment, "[i]f the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial." When the trial court refuses or neglects to hear a defendant's motion for new trial, a separate motion citing §1202 is not required. However, a defendant may forfeit his or her claim to the remedy provided by §1202 by acquiescing in the trial court's failure to hear the new trial motion. If the court's failure to hear the new trial motion is inadvertent or the result of neglect, the defendant must "press for a ruling." A reviewing court may order a new trial under §1202 only if the trial court's failure to hear the defendant's new trial motion resulted in a miscarriage of justice; the reviewing court may prevent a miscarriage of justice by remanding the matter to the trial court for a belated hearing and ruling on the defendant's new trial motion. *People v Braxton* (2004) 34 C4th 798, 805, 22 CR3d 46.

When possible, however, it is preferable to make motions and submit responses in writing to be sure the facts and legal support are clearly presented to the court and to ensure a good record in case of appeal.

These are the most common prejudgment motions:

- Motion for new trial (Pen C §1181; discussed in §§34.3-34.16);
- Motion to modify verdict to a lesser offense or degree (Pen C §1181(6); discussed in §34.17);
- Motion to strike enhancement or special findings (Pen C §1385; discussed in §§24.39, 37.41);
- Motion in arrest of judgment (Pen C §1185; discussed in §34.19); and
- Motion to withdraw plea (Pen C §1018; discussed in §26.21).

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§34.2 II. CHART: DEADLINES

Action	Deadline	Authority
New trial.	After verdict rendered. Must be made before pronouncement of judgment, order granting probation, or commitment for narcotics addiction or insanity.	Pen C §1182.
Modify verdict to lesser offense or degree.	Same as new trial.	Pen C §§1181(6), 1182.
Strike enhancement or special findings.	Prosecutor may move to strike certain enhancements and special findings, or court may dismiss them on its own motion in pronouncing judgment.	Pen C §§1385-1385.1.
Arrest of judgment.	Must be made before judgment is pronounced. May be made by defendant or court.	Pen C §§1185-1186.

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III. MOTION FOR NEW TRIAL

§34.3 A. Purpose; When Available

A motion for new trial allows a criminal defendant to secure a new trial after a verdict has been given. Pen C §1179. The motion may be made after either a jury trial or a court trial. *In re Rothrock* (1939) 14 C2d 34, 40, 92 P2d 634. The statutory grounds for the motion are set forth in Pen C §1181. A motion for new trial may be granted only on a ground raised in the motion; the court cannot grant the motion on a ground not raised by the moving party. *People v Masotti* (2008) 163 CA4th 504, 508, 77 CR3d 483.

Ø **Note:** In *People v Masotti, supra,* the defense motion for new trial was based solely on the ground that there was insufficient evidence to sustain the verdict. See Pen C §1181(6). Nevertheless, the trial court granted the motion based on inadequate jury instructions. Pen C §1181(5). The court of appeal reversed, finding that the defendant waived his right to a new trial on all grounds not raised in his motion. *Masotti* creates two practical problems: First, since the instructional error may be one that cannot be waived on appeal (see Pen C §1259), an appeal may ultimately result in a reversal only after the defendant has served a substantial sentence; second, had the trial judge merely advised defense counsel of the instructional error and granted a continuance to allow amendment of the motion for new trial, presumably there would have been no waiver and the motion would have been properly granted. In short, form is elevated over substance.

If the motion is granted, the parties are placed in the same position as if there had been no trial. Pen C §1180. The court has jurisdiction to grant a new trial motion for some but not all counts. *People v Drake* (1992) 6 CA4th 92, 99, 7 CR2d 790. The court may also reconsider and reverse an earlier ruling granting a motion for new trial to correct an error of law. *People v Rose* (1996) 46 CA4th 257, 53 CR2d 559.

A motion for new trial can sometimes be a good vehicle for presenting and preserving facts that did not become part of the record during the trial. For example, in *People v Thurmond* (1985) 175 CA3d 865, 874, 221 CR 292, the appellate court on appeal rejected the defense claim that the trial judge slept through most of the trial. If the defense had made this issue the basis for a Pen C §1181 motion, counsel could have presented evidence in the trial court that would have been subject to review on appeal.

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B. Grounds

§34.4 1. Absence of Defendant at Trial

The court may grant a new trial when the trial proceeded in the absence of the defendant except when conducting the trial in the defendant's absence was lawful. Pen C §1181(1). A criminal defendant's right to be present at trial is protected under both the federal and state constitutions. US Const Amends VI, XIV; Cal Const art I, §15. The state constitutional protections are implemented by Pen C §§977 and 1043. Penal Code §977(b)(1) states that the accused in a felony case shall be present at the arraignment, at the time of plea, during the preliminary hearing, during the portions of the trial when evidence is taken, and at the time of sentencing. Penal Code §1043(a) states that, except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.

The defendant's right to be present is not absolute, however, and may be lost by consent or misconduct. Section 977(b)(1) allows a defendant to waive in writing the right to be personally present at certain nonfundamental proceedings, and Pen C §1043 allows a trial to continue despite the defendant's absence in any of the following circumstances:

- The court, after warning the defendant, has ordered the defendant removed from the courtroom because of his or her continuing disruptive behavior;
- The defendant in a non-death penalty case is voluntarily absent; and
- The defendant has waived his or her right to be present in favor of appearing through counsel under Pen C §977.

Although §977 specifies certain proceedings in which the defendant's attendance is mandatory, Pen C §1043(b)(2), which allows the trial to continue in the defendant's absence, does not. Despite the mandatory language in §977, it has been interpreted as being subject to §1043. For example, a felony trial may be conducted in the defendant's absence if the defendant is disruptive (*People v Welch* (1999) 20 C4th 701, 774, 85 CR2d 203) or voluntarily absent (*People v Gutierrez* (2003) 29 C4th 1196, 1204, 130 CR2d 917).

The §1043 exceptions to the presence requirement are triggered by the defendant's absence "after trial has commenced." Pen C §1043(b)(2). Therefore, a felony trial cannot be held without the defendant ever appearing. A defendant is present when a trial "commences" if he or she is physically present in the courtroom where the trial is to be held, understands that the proceedings against him or her are underway, confronts the judge, and voluntarily declines to participate further in the proceedings. See *People v Ruiz* (2001) 92 CA4th 162, 111 CR2d 640 (defendant expressed desire not to be present during trial in open court session addressing trial management issues); *People v Granderson* (1998) 67 CA4th 703, 79 CR2d 268 (noncustodial defendant who was present when jury selection began did not return for second day of voir dire proceedings); *People v Lewis* (1983) 144 CA3d 267, 277, 192 CR 257 (defendant announced his intention not to participate before voir dire had begun). But see *People v Molina* (1976) 55 CA3d 173, 176, 127 CR 434 (defendant's absence began after 11 jurors were selected), for a contrary view.

The defendant's presence is not required at misdemeanor trials, proceedings that are preliminary, or those in which the defendant's substantial rights are not affected. *People v White* (1971) 18 CA3d 44, 51, 95 CR 576 (examples of when defendant's presence not required); *People v Cox* (1978) 81 CA3d Supp 1, 146 CR 724.

For purposes of a motion for new trial, the defendant's absence may result from either a physical or a mental disability. *People v Williams* (1961) 194 CA2d 523, 15 CR 191 (new trial granted because defendant insane at trial). See also *People v Berling* (1953) 115 CA2d 255, 251 P2d 1017 (new trial granted because defendant "mentally absent" after trial began). This rule does not apply if the disability was voluntarily induced. *People v Cox* (1978) 81 CA3d Supp 1, 146 CR 724 (no new trial when defendant voluntarily took hallucinogenic drugs); *People v Rogers* (1957) 150 CA2d 403, 415, 309 P2d 949 (self-induced insulin shock did not support motion for new trial). That a defendant is in physical pain does not amount to "absence" if the defendant is coherent, lucid, and able to communicate with his or her attorney. *People v Avila* (2004) 117 CA4th 771, 778, 11 CR3d 894.

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§34.5 2. Jury Misconduct

Standard for obtaining relief. The court may grant a new trial because of jury misconduct. Pen C §1181(2), (4). Perhaps the most common form of jury misconduct is the receipt of extraneous information. See Pen C §1181(2). In this situation, the verdict must be set aside if there is a substantial likelihood of prejudice. The likelihood is established when the material itself is "inherently and substantially likely" to have influenced jurors who were aware of the information or when the nature of the misconduct and the surrounding circumstances demonstrate a substantial likelihood that at least one juror was actually biased against the defendant. *In re Carpenter* (1995) 9 C4th 634, 653, 38 CR2d 665.

When a defendant appeals the *denial* of his or her motion for a new trial on the ground of juror misconduct, the appellate court must independently review, as a mixed question of law and fact, the trial court's conclusion that no prejudice arose from the misconduct. *People v Nesler* (1997) 16 C4th 561, 582 n5, 66 CR2d 454. But when the prosecution appeals the trial court's *grant* of a defendant's motion for a new trial on the ground of juror misconduct, the trial court's finding that the misconduct was prejudicial is reviewed for abuse of discretion. *People v Ault* (2004) 33 C4th 1250, 17 CR3d 302.

Investigating misconduct. It is common for trial lawyers to discuss a case with any interested jurors immediately after a verdict is received. Jurors often voluntarily remain after the verdict is rendered to discuss matters of common interest. This is the usual time when counsel is told of possible juror misconduct.

Such posttrial contact with interested jurors may well be defense counsel's only opportunity to learn whether misconduct occurred during deliberations because of statutes protecting juror privacy and safety. Before discharging the jury, the judge must inform the jurors that they have an absolute right to discuss or not discuss the deliberations or verdict with anyone. CCP §206(a). Information such as names, addresses, and telephone numbers that could be used to identify individual jurors must be sealed automatically after the verdict is recorded. CCP §237(a)(2). Anyone seeking such information must petition the court and show good cause for disclosure. CCP §237(b). See, *e.g., People v Tuggles* (2009) 178 CA4th 1106, 100 CR3d 820. A criminal defendant or defense counsel may obtain the information if he or she petitions the court and demonstrates that the information is necessary for a new trial motion or any other lawful purpose. CCP §206(g).

Trial courts have always possessed the inherent power to protect jurors' physical safety and privacy. *Townsel v Superior Court* (1999) 20 C4th 1084, 1087, 86 CR2d 602, 604. In exercising its discretion, the trial court must balance competing public interests in jury privacy and safety and in ascertaining the truth in judicial proceedings. *People v Rhodes* (1989) 212 CA3d 541, 261 CR 1; *People v Santos* (2007) 147 CA4th 965, 55 CR3d 1.

Ø **Note:** Unreasonable contact without a juror's consent is improper. CCP §206(c).

Although brevity of deliberations does not by itself demonstrate juror misconduct, it may raise a concern requiring investigation to see if something unusual occurred. *People v Atkins* (1988) 203 CA3d 15, 249 CR 863, disapproved on other grounds in *People v Jones* (1990) 51 C3d 294, 322, 270 CR 611.

Evidence of jury misconduct. A motion for new trial because of jury misconduct is usually accompanied by affidavits or declarations (usually from jurors) describing the alleged misconduct. The court may grant an evidentiary hearing when there are material, disputed issues of fact. *People v Hedgecock* (1990) 51 C3d 395, 414, 272 CR 803. Admissible evidence includes statements made, or conduct, conditions, or events occurring either inside or outside the jury room that are likely to have improperly influenced the verdict. Evid C §1150(a). Evidence of the jury discussing a particular topic, such as a defendant's failure to testify, is admissible. *People v Perez* (1992) 4 CA4th 893, 6 CR2d 141. But evidence that purports to show the *effect* of statements, conduct, and the like on a juror or evidence of a juror's mental processes is inadmissible. Evid C §1150; *People v Hill* (1992) 3 CA4th 16, 27, 4 CR2d 258, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 582 n5, 66 CR2d 454. The proscription against using statements, conduct, conditions, and events that purport to show that they affected a juror was not invalidated by former Cal Const art I, §28(d) (now see Cal Const art I, §28(f)(2)), passed as part of Proposition 8. *People v Hill, supra*.

For further discussion of jury misconduct, see chap 33.

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§34.6 3. Error of Law by Court

A defendant may be granted a new trial if the court has either misdirected the jury on a matter of law or made an erroneous legal ruling. Pen C §1181(5). Virtually any legal ruling made during the course of a trial may support the grant of a new trial. The only limitation is that the ruling must have affected a substantial right of the defendant. *People v Honeycutt* (1946) 29 C2d 52, 61, 172 P2d 698 (instructional error, but no reversal, because instructions taken together would not have led to misconception of law); *People v Forrester* (1994) 30 CA4th 1697, 37 CR2d 19 (instructional error, but no reversal, because harmless beyond reasonable doubt).

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§34.7 4. Prosecutorial Misconduct; Errors by Other Prosecution Agencies

"Prosecutorial misconduct refers to the use of deceptive or reprehensible methods to influence the jury." *People v Strickland* (1974) 11 C3d 946, 955, 114 CR 632. Appeals to passion or prejudice, arguments unsupported by the evidence, improper questioning by the prosecutor, expressions of personal opinion on the guilt of the accused by the prosecutor, erroneous comments concerning the law, and name-calling are representative examples of prosecutorial misconduct. Failure to disclose evidence may also support the grant of a new trial. *Merrill v Superior Court* (1994) 27 CA4th 1586, 33 CR2d 515.

Although prosecutorial misconduct is a ground for a motion for new trial (Pen C §1181(5)), the misconduct must have been prejudicial (*People v Prysock* (1982) 127 CA3d 972, 998, 180 CR 15). The test for prejudice is whether it is "reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant." *People v Prysock, supra*. There is usually no prejudice if timely objection and prompt admonishment did or would have cured the harm. *People v Prysock, supra*.

The failure of authorities to timely return a defendant to court for resentencing does not require a new trial. *People v Flores* (1988) 198 CA3d 1156, 244 CR 322.

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§34.8 5. Insufficiency of Evidence

A motion for new trial made on the ground that the verdict or finding is contrary to the law or evidence (Pen C §1181(6)) requires the trial judge to independently review the evidence. *People v Davis* (1995) 10 C4th 463, 523, 41 CR2d 826. Although the trial judge should not ignore the verdict (*People v Lopez* (1969) 1 CA3d 78, 85, 81 CR 386), and is to be "guided" by a presumption in favor of the correctness of the jury's verdict, this means only that the judge may not *arbitrarily* reject a verdict that is supported by substantial evidence. *People v Dickens* (2005) 130 CA4th 1245, 1251, 30 CR3d 845. The trial judge is not bound by the jury's resolution of conflicts in the evidence or determinations regarding witness credibility. *People v Robarge* (1953) 41 C2d 628, 633, 262 P2d 14; *Dickens,* 130 CA4th at 1251.

The trial judge has broad discretion in determining whether the evidence has sufficient probative value to sustain the verdict. *Robarge,* 41 C2d at 633. An order granting a new trial based on insufficiency of evidence will not be reversed on appeal absent a manifest and unmistakable abuse of that discretion. *People v Lewis* (2001) 26 C4th 334, 364, 110 CR2d 272.

If the court grants the defendant's new trial motion because the evidence was insufficient as a matter of law, the prosecution is barred from retrying the defendant. *Hudson v Louisiana* (1981) 450 US 40, 67 L Ed 2d 30, 101 S Ct 970; *People v Trevino* (1985) 39 C3d 667, 699, 217 CR 652, overruled on other grounds in *People v Johnson* (1989) 47 C3d 1194, 1219, 255 CR 569.

Ø **Note:** Counsel should seek a new trial in a close case when the issue is the sufficiency of the evidence, rather than first raise the issue on appeal, because at the appellate level the court will uphold a verdict if there is any substantial evidence to support it. *People v Serrato* (1973) 9 C3d 753, 109 CR 65, overruled on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855; *People v Veitch* (1982) 128 CA3d 460, 180 CR 412.

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§34.9 6. Newly Discovered Evidence

A defendant may secure a new trial based on newly discovered evidence. Pen C §1181(8). The motion must be supported by declarations or affidavits. It is not necessary to produce witnesses at the hearing. Pen C §1181(8); *People v Trujillo* (1977) 67 CA3d 547, 557, 136 CR 672.

Ø **Note:** The court bases its decision only on evidence before the court, not on evidence that *might* be developed. *People v Beeler* (1995) 9 C4th 953, 1004, 39 CR2d 607.

To entitle the defendant to a new trial on the ground of newly discovered evidence, the defendant must show (*People v Turner* (1994) 8 C4th 137, 212, 32 CR2d 762):

- The evidence itself, not just its materiality, is newly discovered;
- The evidence is not cumulative to that already presented;
- If the evidence were presented at a retrial, a different result would be probable;
- The defendant could not have discovered the evidence earlier using reasonable diligence; and
- These facts are shown by the best evidence that can be obtained under the circumstances.

Ø **Note:** When counsel's lack of diligence in securing the attendance of a necessary witness at trial is the only requirement not met, and the prosecution's case was very weak, courts may make an exception and grant a new trial. *People v Martinez* (1984) 36 C3d 816, 205 CR 852 (judgment reversed; trial court erred in denying new trial motion).

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§34.10 7. Loss of Trial Transcript

If the trial record has been lost or destroyed in whole or in substantial part, a new trial may be granted. See Pen C §1181(9). Not every loss of any part of the reporter's notes requires vacating the judgment. *People v Morales* (1979) 88 CA3d 259, 266, 151 CR 610. "The test is whether in light of all the circumstances it appears that the lost portion is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal." *People v Holloway* (1990) 50 C3d 1098, 1116, 269 CR 530; *People v Pinholster* (1992) 1 C4th 865, 920, 4 CR2d 765.

Except in capital cases, reporting notes may be destroyed on court order after 10 years in criminal proceedings and after 5 years in all other proceedings. No reporting notes in a capital case (including preliminary hearing notes) may be destroyed without express authorization from the supreme court. Govt C §69955. If the defendant flees, and the stenographic notes were properly destroyed under Govt C §69955, the defendant may have lost the right to a verbatim record. *People v Everett* (1990) 224 CA3d 932, 274 CR 429.

Ø **Note:** If other methods of reconstructing the trial record are available, the defendant must proceed with those alternatives to obtain review. *People v Jones* (1981) 125 CA3d 298, 178 CR 44. A settled statement may provide an adequate substitute for a missing transcript. *People v Holloway, supra*.

For further discussion of the record on appeal, see §§43.12 (use in misdemeanor appeals), and 44.25 (use in felony appeals).

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§34.11 8. Nonstatutory Grounds

The trial court's power to grant a new trial is not limited to the specific grounds listed in Pen C §1181. *People v Fosselman* (1983) 33 C3d 572, 582, 189 CR 855 (issue was ineffective assistance of counsel). *Fosselman* cited with approval *People v Davis* (1973) 31 CA3d 106, 110, 106 CR 897, which held that the trial court has broad discretion to grant a new trial whenever an accused is denied a fair and impartial trial. The power to grant a new trial on nonstatutory grounds is derived from the trial court's constitutional duty to ensure an accused a fair trial. *People v Davis*, *supra*.

There are two requirements for raising nonstatutory grounds to support a motion for new trial (*People v Mayorga* (1985) 171 CA3d 929, 940, 218 CR 830): (1) the error denied the defendant a fair trial, and (2) the defendant had no earlier opportunity to raise the issue.

The trial court's finding of prejudice in granting a new trial motion based on ineffective assistance of counsel is subject to the abuse of discretion standard of review, as is the trial court's finding of whether counsel's representation was deficient. *People v Callahan* (2004) 124 CA4th 198, 209, 21 CR3d 226.

Nonstatutory grounds for granting a motion for new trial include:

- Ineffective assistance of counsel (see *People v Cornwell* (2005) 37 C4th 50, 98, 33 CR3d 1, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Smith* (1993) 6 C4th 684, 25 CR2d 122; *People v Callahan, supra*);
- Trial court's failure to grant a continuance (see *People v Sherrod* (1997) 59 CA4th 1168, 69 CR2d 361);
- Prosecution's failure to disclose exculpatory evidence (see *Merrill v Superior Court* (1994) 27 CA4th 1586, 33 CR2d 515);
- Erroneous admission of evidence (see, *e.g., People v Albarran* (2007) 149 CA4th 214, 57 CR3d 92 (admission of extremely inflammatory gang evidence violated defendant's federal constitutional rights to due process and rendered trial fundamentally unfair); and
- Spectator misconduct (see *People v Cornwell* (2005) 37 C4th 50, 87, 33 CR3d 1, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209), which *may* include the wearing of buttons or display of placards showing sympathy for an alleged victim (see *People v Houston* (2005) 130 CA4th 279, 29 CR3d 818).
- Material change in the law (see *People v DeLouize* (2004) 32 C4th 1223, 1233, 13 CR3d 302).

Ø **Note:** If no request for mistrial was made at the time the spectator misconduct occurred, counsel would be well advised to raise the issue in a motion for new trial. The court in *Cornwell,* 37 C4th at 87, observed that normally the judge will be present when the misconduct occurs and will be in the best position to evaluate the impact of the conduct on the fairness of the trial. If counsel never objects to the misconduct, it is likely that the misconduct will be found insignificant.

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C. Procedure

§34.12 1. Application by Defendant; Appointment of Counsel; Time for Application

The court cannot on its own motion grant a new trial; defense counsel must move for a new trial. Pen C §1181. On request, trial courts should appoint counsel for defendants who represented themselves at trial unless the defendant is seeking representation for a bad faith purpose such as delay. *People v Ngaue* (1991) 229 CA3d 1115, 280 CR 757 (harmless error for trial court to fail to rule on appellant's posttrial request for counsel). The court may appoint separate counsel to investigate possible grounds for a motion for new trial; if the separate counsel reports that he or she finds no grounds for a new trial, there is no requirement that an *Anders-Wende* brief be filed. *People v Thurman* (2007) 157 CA4th 36, 45, 68 CR3d 425.

The application and hearing on a motion for new trial must be made and determined before any of the following (Pen C §1182):

- Pronouncement of judgment;
- An order granting probation; or
- A commitment adjudging the defendant a narcotics addict or insane.

Once judgment has been entered by the clerk or a commitment has been made, the court has no jurisdiction to hear a motion for new trial (*People v Sainz* (1967) 253 CA2d 496, 61 CR 196), and the defendant is deemed to have waived the right to so move (*People v Pineda* (1967) 253 CA2d 443, 449, 62 CR 144). If the judgment is vacated or set aside *before* its entry, however, the court can entertain a motion for new trial. See *People v Hales* (1966) 244 CA2d 507, 508, 53 CR 161 (rule stated, but judgment had already been entered before judge vacated it).

When an appellate court affirms a conviction and orders a limited reversal and remand, the trial court does not regain jurisdiction to entertain a motion for new trial. *People v Smyers* (1969) 2 CA3d 666, 668, 83 CR 3.

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§34.13 2. Form and Content of Application; Right to Transcript to Support Motion

Defense counsel may make "application" for a new trial. Pen C §1181. The word "application" has been interpreted to mean either an oral or a written motion. *People v Braxton* (2004) 34 C4th 798, 814, 22 CR3d 46 (written motion not required); *People v Simon* (1989) 208 CA3d 841, 847, 256 CR 373. Counsel should follow any local rules for form, notice, time, and filing requirements.

The grounds relied on must be specified; failure to properly state the motion may be deemed a waiver of the motion. *People v Grake* (1964) 227 CA2d 289, 292, 38 CR 666. Certainly, appellate review of the denial of a motion for new trial will not be successful unless the issues were properly raised in the trial court. *People v Donovan* (1971) 16 CA3d 921, 923, 94 CR 310. A general motion "on all statutory grounds," submitted without argument, does not suffice to raise any issues cognizable on appeal. *People v Donovan, supra*.

The motion for new trial must be supported by evidence that is admissible under the Evidence Code. See Evid C §300. Whenever possible, the trial transcript should be used. Indigent defendants are entitled to a free transcript if they can show that the transcript is necessary for effective representation on the motion for new trial. *People v Bizieff* (1991) 226 CA3d 1689, 1702, 277 CR 678.

Ø **Note:** If copies of the entire transcript are unavailable when counsel is preparing the motion, that portion of the testimony that is crucial to the motion should be transcribed first.

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D. Court's Ruling

§34.14 1. Proper Judge to Hear Motion; Discretionary Ruling

The judge who presided at the trial should hear and rule on the motion for new trial. See *People v Tokich* (1954) 128 CA2d 515, 517, 275 P2d 816. This is, however, a matter of custom. The defendant has no due process right to have the judge who presided at trial rule on the motion for new trial. *People v Moreda* (2004) 118 CA4th 507, 13 CR3d 154. The court considering a motion for new trial may (1) set aside the verdict and grant a new trial, (2) deny the motion and enter judgment on the verdict, or (3) modify the verdict either to a lesser degree of the crime of which the defendant was convicted or to a lesser included offense of that crime as specified in Pen C §1181(6). *People v Lagunas* (1994) 8 C4th 1030, 36 CR2d 67.

An order granting or denying a motion for new trial "rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." *People v Turner* (1994) 8 C4th 137, 212, 32 CR2d 762. The court should determine whether there is sufficient credible evidence to sustain the verdict, and if not, the court should grant the motion. *People v Robarge* (1953) 41 C2d 628, 634, 262 P2d 14.

When the court grants a motion for new trial, it retains jurisdiction to reconsider that order. *People v DeLouize* (2004) 32 C4th 1223, 13 CR3d 302. The trial court may even reconsider its order granting a new trial after the time for a prosecution appeal has expired when a material change in the law that undercuts the grounds for granting the motion occurs after that date. 32 C4th at 1232. A trial court that has denied a motion for a new trial cannot grant a second or renewed motion. *People v Martin* (1926) 199 C 240, 248 P 908; *People v Fice* (1893) 97 C 459, 32 P 531; see *People v DeLouize* (2004) 32 C4th 1223, 1228, 13 CR3d 302.

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§34.15 2. Time to Rule

The court must decide a motion for new trial within the same time limits that govern making the motion. That is, it must be done before (1) pronouncement of judgment, (2) a grant of probation, or (3) commitment as a narcotics addict or insane person. Pen C §1182.

If the trial judge fails to pronounce judgment within 20 judicial days after the verdict in felony cases (Pen C §1191; see the statute for exceptions), or if the court fails to decide a motion for new trial before pronouncement of judgment in either a misdemeanor or felony case, the defendant is entitled to a new trial. Pen C §1202. On appeal, however, a trial court's refusal to grant a new trial under §1202 will be reversed only if the defendant can show prejudice. *People v Teddie* (1981) 120 CA3d 756, 764, 175 CR 49.

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§34.16 E. Appellate Review

When a motion for new trial is granted, the prosecution has a right to appeal. See Pen C §§1238(a)(3), 1466(1)(D). On denial of the motion, defense counsel can obtain review of the order on appeal from the final judgment. See Pen C §§1237(a), 1466(2)(A). When a motion for new trial is granted, the defendant may move for bail under Pen C §1275. See *In re Weiner* (1995) 32 CA4th 441, 38 CR2d 172.

When the trial court grants a new-trial order, the standard of review is abuse of discretion. *People v Ault* (2004) 33 C4th 1250, 1261, 17 CR3d 302; *People v Albarran* (2007) 149 CA4th 214, 224 n7, 57 CR3d 92. However, review of a trial court's order denying a motion for a new trial is *de novo* when the case implicates a defendant's federal constitutional rights to due process and concerns the fundamental fairness of the trial. 149 CA4th at 224. See *Ault,* 33 C4th at 1262.

Ø **Note:** Counsel should keep in mind the fundamental rule that matters not presented to the trial court will ordinarily not be considered on appeal. *People v Webb* (1986) 186 CA3d 401, 410, 230 CR 755.

On remand following a successful appeal or writ, the defense is entitled to challenge the trial judge under CCP §170.6(a)(2). *Overton v Superior Court* (1994) 22 CA4th 112, 27 CR2d 274.

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§34.17 IV. MOTION TO MODIFY VERDICT TO LESSER OFFENSE OR LESSER DEGREE

Rather than granting a defense attorney's application for a new trial, the court may modify the verdict to a necessarily lesser included crime or to a lesser degree of the same crime if the evidence shows that the defendant is not guilty of the degree of the crime of which he or she was convicted, and supports the lesser offense. Pen C §1181(6); see *People v Lagunas* (1994) 8 C4th 1030, 36 CR2d 67. Counsel may wish to request this relief as part of the motion for new trial.

The prosecution can appeal from an order in a felony case that modifies the verdict or finding by reducing the degree of the offense or modifying the offense to a lesser offense. Pen C §1238(a)(6).

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§34.18 V. MOTION TO STRIKE ENHANCEMENTS OR SPECIAL FINDINGS

With the advent of determinate sentencing, enhancements and special findings affecting punishment are matters of crucial concern. A motion to strike is usually made orally at the time of sentencing. For discussion of which enhancements and prior convictions may be stricken, see chap 37.

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§34.19 VI. MOTION IN ARREST OF JUDGMENT

A motion in arrest of judgment is an application by a defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict on a plea of former conviction, former acquittal, or once in jeopardy. Pen C §1185.

The motion may be founded on any of the defects appearing on the face of the accusatory pleading stated in Pen C §1004 (grounds for demurrer), unless the objection has been waived by failure to demur. Pen C §1185. The following grounds are not waived by failure to demur and may instead be challenged by a motion in arrest of judgment (Pen C §1012): (1) objection to the court's jurisdiction and (2) objection that the facts stated do not constitute a public offense.

The motion may be made by the defendant (Pen C §1185), or the court on its own motion may arrest judgment (Pen C §1186). The motion must be made and determined before judgment is pronounced. Pen C §§1185-1186.

In a misdemeanor or infraction case, the effect of an order arresting judgment is to place the defendant in the same situation he or she was in before trial. Pen C §1187. In a felony case, the effect is to put the defendant in the same situation he or she was in immediately before the information was filed or indictment found. Pen C §1187.

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§34.20 VII. JUDGMENT NOTWITHSTANDING THE VERDICT (JUDGMENT N.O.V.)

Motions for judgment n.o.v. are unavailable in criminal cases. *People v Morales* (1989) 48 C3d 527, 560, 257 CR 64; *People v Morgan* (1977) 75 CA3d 32, 141 CR 863. The defendant may move for a new trial on the ground that the verdict is contrary to the law or evidence. Pen C §1181(6). See §34.8.

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35

PRONOUNCING JUDGMENT

HON. GREGG L. PRICKETT

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§35.1 I. OVERVIEW

Judgment is synonymous with the pronouncement of sentence. *People v Perez* (1979) 23 C3d 545, 549 n2, 153 CR 40; *People v Flores* (1974) 12 C3d 85, 93 n6, 115 CR 225; *People v Chlad* (1992) 6 CA4th 1719, 1725, 8 CR2d 610. A judge may sentence a defendant in either misdemeanor or felony cases. Cal Const art VI, §10.

The law establishes time limitations within which sentence must be pronounced after a defendant is convicted of a crime. Pen C §§1191, 1449. A defendant may waive these time limitations. *People v Ford* (1966) 65 C2d 41, 47, 52 CR 228 (felony). See also *In re Elsholz* (1964) 228 CA2d 192, 197, 39 CR 356 (misdemeanor; rule stated but court found no waiver). The failure to pronounce judgment within the time limitations of §§1191 and 1449 is not jurisdictional. Such error is procedural and does not require a new trial or reversal unless the delay results in a miscarriage of justice. *People v Ford* (1966) 65 C2d 41, 52 CR 228; *People v Cheffen* (1969) 2 CA3d 638, 82 CR 658; Pen C §1202.

The defendant in a criminal case has a right to be present for pronouncement of judgment. Pen C §1193; see Pen C §§686, 977(b); *People v Neal* (1950) 97 CA2d 668, 218 P2d 556. In felony cases, when the defendant is in custody, the court may require the defendant to be personally present. Pen C §1194. In most misdemeanor cases, the defendant may appear through counsel only. Pen C §§977(a)(1), 1193(b); *Olney v Municipal Court* (1982) 133 CA3d 455, 184 CR 78. However, if the defendant has been charged with domestic violence under Fam C §6211 or with violating a protective order under Pen C §273.6, the defendant must be present for sentencing. Pen C §977(a)(2). In addition, the court may order a defendant charged with misdemeanor driving under the influence to be present at sentencing. Pen C §977(a)(3).

If the defendant is not present for sentencing, the court must determine whether the defendant's absence is a waiver of the right to be present. See Pen C §§977(a), 1193. Waiver may be found if the defendant, in a felony case, has, with leave of court, executed in open court a written *waiver* of his or her right to be personally present or, after the exercise of reasonable diligence to procure the presence of the defendant, the court finds that it is in the interest of justice that judgment be pronounced in his or her absence. In a misdemeanor case, a waiver of defendant's presence may be found if he or she is represented by counsel or made a knowing and intelligent waiver of the right to be present at sentencing. *People v Kriss* (1979) 96 CA3d 913, 158 CR 420.

Whether a defendant will be released on bail between conviction of a felony not punishable with death and pronouncement of judgment is subject to the court's consideration of the factors listed in Pen C §§1166, 1272. If the court sets bail after a guilty verdict, it should state on the record the factors it considered; but such a statement is not required when the conviction is based on a plea of guilty or no contest. *People v Seneca Ins. Co.* (2003) 29 C4th 954, 129 CR2d 842. Compare §1272, which appears to be in conflict with §1166 when a defendant convicted of a felony has applied for probation. In a misdemeanor case, bail is a matter of right if an application for probation is pending (Pen C §1272), although the trial court may set reasonable bail conditions related to public safety (*In re McSherry* (2003) 112 CA4th 856, 863, 5 CR3d 497).

The defendant has a constitutional right to counsel at the time judgment is pronounced. Cal Const art I, §15; *Mempa v Rhay* (1967) 389 US 128, 19 L Ed 2d 336, 88 S Ct 254; *In re Roberts* (1953) 40 C2d 745, 748, 255 P2d 782. See also *In re Cortez* (1971) 6 C3d 78, 88, 98 CR 307. If counsel is not present, the court must decide whether there has been an effective waiver of the right to be represented. See *In re Johnson* (1965) 62 C2d 325, 334, 42 CR 228.

Before pronouncement of judgment in a felony case, the parties are entitled to a hearing to present evidence on factors in aggravation or mitigation affecting the sentence. Pen C §§1170(b), 1204; Cal Rules of Ct 4.421, 4.423. The parties are also entitled to a meaningful opportunity to respond to the court's proposed sentencing choices. *People v Gonzalez* (2003) 31 C4th 745, 3 CR3d 676; *People v Scott* (1994) 9 C4th 331, 36 CR2d 627. In a misdemeanor case, the defendant has the right to confront witnesses and to present evidence on his or her own behalf. See *People v Surplice* (1962) 203 CA2d 784, 792, 21 CR 826. The sentence hearing is not governed by the same rules of evidence and procedure that apply at the trial. *Williams v New York* (1949) 337 US 241, 93 L Ed 1337, 69 S Ct 1079; see *People v Peterson* (1973) 9 C3d 717, 726, 108 CR 835. Unless waived, the defendant must be arraigned for judgment, which includes being advised of the nature of the charges, the pleas entered, and the verdicts returned on the pleas.

The defendant or counsel must also be asked whether there is any legal cause to show why judgment should not be pronounced. Pen C §1200. This procedure is called the allocution. *People v Cross* (1963) 213 CA2d 678, 28 CR 918.

If the defendant is sentenced to incarceration, the court must advise the defendant that the law permits the award of conduct and worktime credits. Pen C §1191.3. Credits are discussed in §39.8. In addition to any incarceration term that may be imposed, the court must also set forth probationary conditions if the defendant is placed on probation. If the offense for which the defendant was convicted requires registration with local law enforcement agencies, the court must so advise.

In all felony cases in which the defendant was convicted after trial, or after a hearing on revocation of probation (Cal Rules of Ct 4.305, 4.470), the court must advise the defendant of the term of parole following a commitment to state prison (Pen C §3000), and of the rights concerning appeal of the judgment (*People v Serrano* (1973) 33 CA3d 331, 109 CR 30).

When a misdemeanor defendant is not represented by counsel, the court must advise the defendant of his or her appeal rights. Cal Rules of Ct 4.306.

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Source: Criminal Law/California Criminal Law Procedure and Practice/35 PRONOUNCING JUDGMENT/§35.2 II. CHART: DEADLINES

§35.2 II. CHART: DEADLINES

Action	Deadline	Authority
Pronouncement of judgment in felony case.	Within 20 judicial days after verdict, finding, or plea of guilty. May extend another 10 calendar days for new trial motion or motion in arrest of judgment. When sanity is in issue, may extend until that issue is heard and determined. When defendant is placed in diagnostic facility under Pen C §1203.03, may extend for period of time equal to time elapsed between §1203.03 order and notice of whether defendant will be accepted in §1203.03 facility, or, when defendant will be accepted, time between notice of acceptance and defendant's return to court.	Pen C §1191.
Pronouncement of judgment in misdemeanor or infraction case.	Not less than 6 hours nor more than 5 calendar days after verdict, finding, or plea. Time may be extended additional days for the following: 10 calendar days for new trial motion or motion in arrest of judgment; 20 calendar days when probation is considered; and 90 calendar days at request of defendant or probation officer when probation considered.	Pen C §1449.
Imposition of sentence when defendant convicted of driving under the influence.	Within reasonable time, including time for receipt of any pre-sentence investigation report per Veh C §23655, or of defendant's driving record from DMV.	Veh C §§23600, 23655.
Recall of commitment to state prison under Pen C §1170(d).	Within 120 calendar days after commitment or at any time on recommendation of Secretary of California Department of Corrections and Rehabilitation (CDCR) or Board of Parole Hearings.	Pen C §1170(d).
Recall of commitment under Pen C §1170(e).	Within 10 days after receipt of a positive recommendation by the Secretary of CDCR or the Board of Parole Hearings, or both, based on prisoner's health.	Pen C §1170(e).
Sentencing of defendant serving sentence on another offense, who has requested to be sentenced on pending matter (covers felonies and misdemeanors).	Within 90 calendar days after district attorney's receipt of defendant's request to be sentenced.	Pen C §§1381, 1381.5.
Sentencing of probationer who is committed to state prison for another offense.	Within 60 calendar days after court is notified of confinement if sentence on probation case has been imposed, or within 30 calendar days if sentence on probation case has not been imposed.	Pen C §1203.2a.
Notification to defendant of duty to register as sex, narcotics, or arson offender.	Before defendant is released on probation or discharged on parole.	Pen C §§290-290.023, 457.1; Health & S C §§11590, 11593.

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III. TIME TO PRONOUNCE JUDGMENT

§35.3 A. General Rule

In a felony case, after a plea, finding, or verdict of guilty, the court must schedule a time for pronouncing judgment on the defendant. Pen C §1191. See also Pen C §859a(b). See §§8.6, 26.20. The time must be within 20 judicial days after the verdict, finding, or plea of guilty. The court may extend that time for up to 10 days to consider a motion for new trial, or in arrest of judgment, and may further extend the time until the probation officer's report is received, and any proceedings for granting or denying probation have been concluded. Pen C §1191.

In a misdemeanor or infraction case, after a plea, finding, or verdict of guilty, the court must pronounce judgment not less than 6 hours nor more than 5 calendar days after a verdict or plea of guilty, unless the defendant waives the time. Pen C §1449; *People v Kriss* (1979) 96 CA3d 913, 158 CR 420 (§1449 applies to infractions as well as misdemeanors). The court may extend the time for pronouncing judgment up to 10 calendar days in order to hear or decide any motion for a new trial, or in arrest of judgment. Pen C §1449. The court may also extend the time up to 20 calendar days whenever probation is being considered, except that, on request of the defendant or the probation officer, it may further extend the time up to an additional 90 calendar days. Pen C §1449.

On remedies for violating the Pen C §§1191 and 1449 deadlines, see §35.9.

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B. Exceptions

§35.4 1. Time Waiver

Defendants may waive time by either requesting or consenting to pronouncement of judgment outside the time limits of Pen C §1191 or §1449. *People v Ford* (1966) 65 C2d 41, 47, 52 CR 228 (felony); *People v Atkins* (1988) 203 CA3d 15, 249 CR 863 (felony), disapproved on other grounds in *People v Jones* (1990) 51 C3d 294, 322, 270 CR 611; *In re Elsholz* (1964) 228 CA2d 192, 197, 39 CR 356 (misdemeanor). It is common practice for the court to ask counsel whether the client wishes to waive time for pronouncing judgment.

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§35.5 2. Mentally Incompetent Defendant; Combat Veteran

Time for pronouncing judgment may be extended for a mentally incompetent defendant, *i.e.,* one who "is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Pen C §1367.

The procedural route toward a finding of incompetency varies depending on whether the defendant is charged with a felony or a misdemeanor. Penal Code §§1367.1 and 1370.01 apply to misdemeanors only.

For further discussion of incompetency procedures, see §§48.3-48.21.

If a defendant who would otherwise receive a county jail or prison term alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from his or her combat service in the U.S. armed forces, the trial court must hold a hearing to determine the truth of the allegation. Pen C §1170.9(b).

If the court concludes that the defendant's allegation is true and the defendant is otherwise eligible for probation, the court may place the defendant on probation and order the defendant into an appropriate treatment program if an appropriate program is available and the defendant agrees to participate. Pen C §1170.9.

This provision is intended to make the opportunity for alternative sentencing available to "all combat veterans" but is not intended to "expand probation eligibility for veterans who commit crimes." Stats 2006, ch 788, §1.

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§35.6 3. Insane Defendant

If, in the court's opinion, whether in a felony or misdemeanor case, reasonable ground exists to believe the defendant is insane (see Pen C §1201(a)), the court may extend the time for pronouncing judgment until the question of the defendant's sanity has been heard and determined (Pen C §§1191 (felony), 1449 (misdemeanor)).

The term "insanity" used in Pen C §1201(a) appears to refer to mental incompetency as that term is defined in Pen C §1367(a). Penal Code §1201(a) provides that the question of "insanity" shall be tried as provided in Pen C §§1367-1375.5, which deal with mental incompetence.

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§35.7 4. Defendant Convicted of Driving Under Influence

Under Veh C §23600, the court must pronounce sentence within a reasonable time, including the time for receipt of any presentence investigation report ordered under Veh C §23655. However, Veh C §13209 provides in part that "[n]otwithstanding the provisions of §1449 of the Penal Code, the time for pronouncement of judgment shall not commence to run until … the court receives the record of prior convictions from the department." Further, §23655 requires the court to obtain from the DMV a copy of the person's driving record to see whether the person is eligible to participate in an approved program as a condition of probation. Despite these seemingly conflicting time constraints, it appears that the "reasonable time" standard of §23600 controls.

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§35.8 5. Defendant Placed in Diagnostic Facility (Felony Cases)

Whenever a defendant is convicted of a felony, the court, if it concludes that a just disposition of the case requires the diagnostic and treatment services that can be provided at a diagnostic facility of the California Department of Corrections and Rehabilitation (CDCR), may order a defendant placed temporarily in that facility for up to 90 days. Pen C §1203.03. See also Pen C §1191. See §§38.17, 38.19, 38.21. On credit for time served while undergoing the diagnostic study, see §37.55.

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§35.9 C. Effect of Time Limit Violation

Absent a waiver, the pronouncement of judgment in a felony case after expiration of the period prescribed by Pen C §1191 is error. Pen C §1202. Unless the defendant is imprisoned on another conviction (see Pen C §§1381, 1381.5, 1389, discussed in §§19.30-19.32), the defendant's remedy is to move for a new trial. Pen C §1202. However, the failure to pronounce judgment within the time limitations of Pen C §§1191 and 1449 does not require a new trial or reversal unless the delay results in a miscarriage of justice. *People v Ford* (1966) 65 C2d 41, 52 CR 228; *People v Harrison* (1970) 5 CA3d 602, 85 CR 302; *People v Cheffen* (1969) 2 CA3d 638, 82 CR 658.

Penal Code §1191 does not apply to a remand for resentencing after the appellate court has affirmed the conviction. *People v Flores* (1988) 198 CA3d 1156, 244 CR 322.

The pronouncement of judgment in a misdemeanor case before the period prescribed by §1449 is error that affects the judgment but not the plea or verdict. *In re Elsholz* (1964) 228 CA2d 192, 198, 39 CR 356. The remedy is to vacate the judgment and rearraign the defendant for sentence. *In re Elsholz, supra*. The pronouncement of judgment after the period prescribed by §1449 is challenged by a motion for a new trial. Pen C §1202; *In re Hemstreet* (1912) 18 CA 639, 123 P 984.

If the trial court refuses to hear or neglects to decide a defendant's motion for new trial based on §1202 grounds, the defendant is entitled to a new trial. Pen C §1202. Prejudice must be shown on appeal. *People v Teddie* (1981) 120 CA3d 756, 175 CR 49. See, generally, *People v Braxton* (2004) 34 C4th 798, 22 CR3d 46.

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Source: Criminal Law/California Criminal Law Procedure and Practice/35 PRONOUNCING JUDGMENT/§35.10 D. Recall of Sentence; Correction of Judgment

§35.10 D. Recall of Sentence; Correction of Judgment

On court's motion or recommendation of others. When a defendant has been sentenced to state prison under Pen C §1168(b) or §1170 and committed to the custody of the Secretary of the California Department of Corrections and Rehabilitation (CDCR), the court may recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced. Pen C §1170(d). The court must hold a hearing to determine whether to recall the sentence of a terminally ill defendant when such recall is recommended by the Secretary of the CDCR or the Board of Parole Hearings, or both. Pen C §1170(e). Defense counsel commonly ask the court to recall its sentence; however, the court's denial of a defense request is not appealable. *People v Chlad* (1992) 6 CA4th 1719, 8 CR2d 610. A crime victim has no standing to request recall of a defendant's sentence. *Dix v Superior Court* (1991) 53 C3d 442, 279 CR 834.

Time for recall. The court's recall of a prisoner for resentencing on the recommendation of the Secretary of the CDCR or the Board of Parole Hearings may occur at any time; the 120-day limit does not apply. Pen C §1170(d). If the trial court recalls the sentence on its own motion, it must do so within 120 calendar days after the commitment date. Pen C §1170(d). If the court receives a recommendation to recall the sentence of a terminally ill defendant, the court must hold a hearing within 10 days after receipt of the recommendation to decide whether to recall the sentence. Pen C §1170(e).

120-day limitation. Failure to comply with the 120-day requirement deprives the trial court of jurisdiction to recall the defendant's sentence if the sentence has been entered in the court minutes or the defendant has begun serving the sentence. *People v Kirkpatrick* (1991) 1 CA4th 538, 542, 3 CR2d 213. The court may not recall or modify a sentence beyond the 120 days provided in §1170(d), even if the defendant has served no time in prison pending appeal and has not physically been delivered to the CDCR. *People v Superior Court (Cornelius)* (1995) 31 CA4th 343, 37 CR2d 156. Pronouncement of a *new* sentence, however, need not come within the 120-day period but must come within the "20 judicial days" of the recall. See Pen C §1191; *Dix v Superior Court* (1991) 53 C3d 442, 465, 279 CR 834 (concurring opinion of Mosk); *People v Chlad* (1992) 6 CA4th 1719, 1724 n5, 8 CR2d 610.

Ø **Note:** Both *Chlad* and *Dix* refer to 28 days; however, Pen C §1191 was later amended to 20 judicial days.

Effect of power to recall. The trial court has the power to recall a defendant's sentence while the defendant has an appeal pending. *People v Nelms* (2008) 165 CA4th 1465, 1472, 82 CR3d 32; *People v Lockridge* (1993) 12 CA4th 1752, 16 CR2d 340. Penal Code §1170(d) represents a limited statutory exception to the rule that a trial court loses jurisdiction to reconsider a denial of probation or to vacate or modify a sentence after a defendant has been committed and execution of sentence has begun. *People v Pritchett* (1993) 20 CA4th 190, 24 CR2d 391. The defendant's notice of appeal after conviction and sentencing does not toll the 120-day period to recall the sentence under §1170(d). See *People v Lockridge, supra; Portillo v Superior Court* (1992) 10 CA4th 1829, 13 CR2d 709.

Who decides recall. The original sentencing judge should be assigned a motion for recall and sentencing when that judge is available. See Pen C §1170(e)(8). If that judge is not available for any reason prescribed in Pen C §1053, then another judge may substitute. *People v Jasso* (1994) 25 CA4th 591, 30 CR2d 572.

Scope of power to recall. Recall of a sentence under Pen C §1170(d) is not limited to correcting errors. The trial court may recall a sentence for any reason rationally related to lawful sentencing and impose any otherwise lawful sentence suggested by the facts available at the time of resentencing. *Dix v Superior Court, supra*. Section 1170, however, "does not provide the trial court with any broader discretion to impose sentence than the court originally possessed at the initial sentencing." *People v Blount* (2009) 175 CA4th 992, 998, 96 CR3d 684. Any new sentence imposed cannot be greater than the initial sentence. Pen C §1170(d). The court does not have the power to modify the judgment of conviction, *e.g.,* dismiss a count. *People v Nelms, supra*. Nor can the court alter the terms of a plea agreement agreed to by the parties and the trial court. *Blount*, *supra*. Recall of a sentence under §1170(e) may result in release of the terminally ill defendant under the postrelease plan provided by the director or board. See Pen C §1170(e)(2)-(7). If the court grants the recall and resentencing application, the prisoner must be released within 48

hours of receipt of the court's order, unless the inmate consents to a longer time. Pen C §1170(e)(9). At resentencing, the trial court must state its reasons in compliance with Cal Rules of Ct 4.406 and 4.420. *People v Arnold* (1988) 206 CA3d 88, 90, 253 CR 468.

One purpose of power to recall. Resentencing under §1170(d) is also intended "to eliminate disparity of sentences and to promote uniformity of sentencing." Pen C §1170(d).

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§35.11 IV. AUTHORITY OF SUCCESSOR JUDGE; *ARBUCKLE*

When a defendant is found guilty at trial, it is better practice to have the same judge who presided over the trial impose sentence, although a different judge may do so. *People v Downer* (1962) 57 C2d 800, 22 CR 347; *People v Jacobs* (2007) 156 CA4th 728, 738, 67 CR3d 615. When sentence is imposed by a different judge, it must reflect an independent judgment, based on evidence properly before the court. If the new judge fails to exercise discretion, the sentence imposed is void. *People v Downer, supra*.

A defendant who pleads guilty has the right to be sentenced by the judge before whom the guilty plea was entered *if that judge retained sentencing discretion under the agreement*. If sentence is to be imposed by a different judge, the defendant has the right to withdraw the guilty plea. *In re Mark L.* (1983) 34 C3d 171, 193 CR 165; *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778.

The right to be sentenced by the same judge can be waived (commonly called an *Arbuckle* waiver). There is a split of authority on whether a defendant waives *Arbuckle* rights by silence when a different judge imposes sentence. In *People v Adams* (1990) 224 CA3d 1540, 1544, 274 CR 629, and *People v Serrato* (1988) 201 CA3d 761, 764, 247 CR 322, the courts held that a defendant waives *Arbuckle* rights by failing to object to a second judge at the sentencing hearing. In *People v Horn* (1989) 213 CA3d 701, 705, 261 CR 814, the court held that silence does not constitute a waiver, but failure to object is relevant in determining whether an *Arbuckle* right was a term of the plea agreement.

The *Arbuckle* rule does not apply when a judge's unavailability arises from circumstances clearly beyond the court's power, such as the judge's retirement, resignation, illness, or death. *People v Jackson* (1987) 193 CA3d 393, 403, 238 CR 327 (illness); *People v Dunn* (1986) 176 CA3d 572, 575, 222 CR 273 (retirement); *People v Watson* (1982) 129 CA3d 5, 7, 180 CR 759 (death). But see *People v McIntosh* (2009) 177 CA4th 534, 545, 98 CR3d 901 (right to withdraw plea because of unavailability beyond court's control depends on extent to which judge retained sentencing discretion under plea agreement and whether exercise of that discretion was express or implied part of bargain).

Ø **Note:** Defense counsel should make certain the record is clear at the time of plea that the same judge who accepted the plea will impose sentence, and object at sentencing if a different judge is present or assigned to sentence the defendant.

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V. DEFENDANT'S PRESENCE

§35.12 A. Right to Be Present

Felony cases. In a felony case, the defendant has a statutory (Pen C §§977(b), 1193) and a constitutional (Cal Const art I, §15) right to be present for pronouncement of judgment. That right is of substantial importance because the defendant may be able to show cause why the judgment should not be pronounced or that there are grounds for a new trial or for a motion in arrest of judgment. See Pen C §1201; *In re Levi* (1952) 39 C2d 41, 45, 244 P2d 403. The defendant's presence also provides an opportunity to refute evidence in aggravation of the sentence (Pen C §§1170(b), 1204; Cal Rules of Ct 4.433(c)(1)), to object to the consideration of improper evidence (see *In re Miller* (1959) 176 CA2d 75, 78, 1 CR 62), to present mitigating evidence (Pen C §§1170(b), 1204; Cal Rules of Ct 4.433(c)(1)), and to ensure that the defendant has knowledge of the judgment in sufficient time to file an appeal (*In re Cortez* (1971) 6 C3d 78, 98 CR 307; *In re Klein* (1961) 197 CA2d 58, 65, 17 CR 71).

If the defendant is not present in a felony case, the court is not authorized to pronounce judgment unless the defendant waives the right to be present (see §35.13) or a diligent effort has been made to procure the defendant's presence and the court finds that it will be in the interest of justice that judgment be pronounced in the defendant's absence. Pen C §1193; *People v White* (1971) 18 CA3d 44, 95 CR 576. See, generally, *People v Pigage* (2003) 112 CA4th 1359, 1368, 6 CR3d 88 (same rule applies for appearances at trial). Otherwise, a judgment pronounced in the defendant's absence will be set aside with direction that the defendant be properly arraigned for judgment. *People v Brown, supra*. One exception to this rule is that judgment may be pronounced in the defendant's absence when the defendant has been sentenced to death and the death penalty has been affirmed on appeal. Pen C §1193(a).

A defendant may lose the right to be present by voluntarily and deliberately failing to appear (*People v White* (1971) 18 CA3d 44, 95 CR 576) or through misconduct (see, *e.g., People v Booker* (1977) 69 CA3d 654, 667, 138 CR 347).

Misdemeanor and infraction cases. The defendant has a constitutional right to be present at trial (Cal Const art I, §15; Pen C §686; see also *In re Levi, supra*) but may waive that right and appear through counsel in most cases. Pen C §977(a)(1). A misdemeanor defendant's appearance may be required in certain situations specified in §977(a)(2)-(3). For discussion, see §35.13.

When the defendant's presence is not statutorily required, the court may sentence a defendant convicted of a misdemeanor or infraction in the defendant's absence. Pen C §1193(b). A waiver requirement has been read into the statute by case law. See, *e.g., People v Kriss* (1979) 96 CA3d 913, 918, 158 CR 420.

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§35.13 B. When Judgment Can Be Rendered in Defendant's Absence

In felony cases. The court may sentence the defendant in absentia under the following conditions:

- The defendant, in open court and on the record, or in a notarized writing, has requested that judgment be pronounced in his or her absence and that he or she be represented by an attorney when judgment is pronounced, and the court has approved the defendant's absence (Pen C §1193(a));
- The pro se defendant has requested that judgment in a noncapital case be pronounced in his or her absence and the court has appointed counsel to represent the defendant at the in absentia sentencing hearing (Pen C §1193(a));
- After the exercise of reasonable diligence to procure the defendant's presence, the court finds that it would be in the interest of justice to pronounce judgment in his or her absence (Pen C §1193(a); see also *In re Jimenez* (1969) 269 CA2d 621, 75 CR 152);
- The defendant, who is being held in another county (Pen C §1035) or currently on probation (Pen C §1203.2a), executes a written waiver allowing sentencing in absentia. See also §38.44.

In misdemeanor cases. In most instances, a defendant in a misdemeanor case may waive the right to be present at sentencing by having defense counsel appear on the defendant's behalf (see Pen C §977(a)(1)), by knowingly and intelligently waiving the right to be present (*People v Kriss* (1979) 96 CA3d 913, 919, 158 CR 420), or by voluntarily and deliberately failing to appear (see *In re Baird* (1957) 150 CA2d 561, 310 P2d 454 (waiver of presence at trial found); *In re Klein* (1961) 197 CA2d 58, 66, 17 CR 71 (no waiver found)). See Pen C §1193(b), which allows the court to sentence a defendant in his or her absence. Case law has added a waiver requirement. See *People v Shelby* (1980) 108 CA3d Supp 7, 166 CR 707. A defendant charged with domestic violence under Fam C §6211 or with violating a protective order under Pen C §273.6 must be present for sentencing. Pen C §977(a)(2). The court may order the defendant to appear at any other time during the proceeding in order to inform him or her of the conditions of a protective order issued under Pen C §136.2. Pen C §977(a)(2). In addition, the court may order a defendant charged with misdemeanor driving under the influence to be present at sentencing. Pen C §977(a)(3).

Trial court procedure. When a defendant is absent at the time set for sentencing, the trial court should ascertain whether the defendant's absence is a knowing and voluntary waiver of the right to be present. See *People v Connolly* (1973) 36 CA3d 379, 111 CR 409. See also *People v Shelby* (1980) 108 CA3d Supp 7, 166 CR 707 (court may not sentence defendant who fails to appear at sentencing unless court has before it sufficient facts to show that absence is voluntary). The trial court may issue a bench warrant to retain jurisdiction and toll any time limits. See *People v Shelby, supra*.

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§35.14 C. Requiring Defendant's Presence

Felonies. In a felony case, the court may require the defendant to be personally present for sentencing. Pen C §977(b)(1). If the defendant is in custody, the court may direct the officer having custody to bring the defendant before the court for judgment. Pen C §1194. If the defendant is at liberty and fails to appear as required, bail or own recognizance release may be revoked and a bench warrant issued for the defendant's arrest. See Pen C §§1195, 1305, 1320.

Misdemeanors. In misdemeanor cases, because defendants ordinarily have the right to appear through counsel (Pen C §977(a)(1)), trial courts may not have "blanket policies" requiring the personal appearance of all defendants at sentencing. *Olney v Municipal Court* (1982) 133 CA3d 455, 184 CR 78 (decision whether to require defendant's presence must be made on case-by-case basis). For situations in which the defendant's presence at sentencing is statutorily required, see §35.13.

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VI. DEFENDANT'S RIGHTS

§35.15 A. Bail

Whether to release on bail or allow a defendant to remain at liberty after conviction of a felony and before sentencing is discretionary. There is no absolute right to bail during the period between conviction and imposition of judgment in a felony case. See Pen C §§1166, 1272. The court should state on the record the factors it considered in setting bail under §1166 if the conviction is after trial on a not guilty plea. This statement is not required when the defendant pleads guilty or no contest. *People v Seneca Ins. Co.* (2003) 29 C4th 954, 129 CR2d 842. When admission to bail is sought after the sentencing hearing, notice of the hearing on the bail motion must be given to the prosecuting attorney at least 5 court days before the hearing. Pen C §1272(3).

In misdemeanor cases, a defendant who has not applied for probation or appealed has no absolute right to bail after conviction and before sentencing; it is discretionary with the court. See Pen C §§1166, 1449, 1458; *People v Turner* (1974) 39 CA3d 682, 114 CR 372. However, a defendant who has applied for probation or who has appealed is entitled to be released on bail as a matter of right before judgment is pronounced. Pen C §1272. See *In re O'Driscoll* (1987) 191 CA3d 1356, 236 CR 882. The trial court may set reasonable bail conditions related to public safety. *In re McSherry* (2003) 112 CA4th 856, 863, 5 CR3d 497.

For further discussion of release from custody, see chap 5.

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§35.16 B. Right to Counsel at Sentencing

At the time judgment is pronounced in felony and misdemeanor cases, a defendant has a constitutional right to retained or appointed counsel. Cal Const art I, §15; *Mempa v Rhay* (1967) 389 US 128, 19 L Ed 2d 336, 88 S Ct 254; *In re Cortez* (1971) 6 C3d 78, 88, 98 CR 307.

The court is not required to inform a defendant of the right to counsel when the defendant has been advised of and waived that right at an earlier stage of the criminal proceedings. *In re Fresquez* (1967) 67 C2d 626, 634, 63 CR 271. The previous waiver remains in effect and the burden is on the defendant to take some affirmative action to reinstate the right. *People v Norman* (1967) 252 CA2d 381, 407, 60 CR 609, disapproved on other grounds in *McDermott v Superior Court* (1972) 6 C3d 693, 697, 100 CR 297. However, when a significant period of time has elapsed between the initial advisement and sentencing, the court must again inform the defendant of the right to counsel. *In re Turrieta* (1960) 54 C2d 816, 820, 8 CR 737 (2-year interval); *In re Pickett* (1972) 25 CA3d 1158, 1166, 102 CR 487 (14-month interval).

When a defendant who was represented by counsel before sentencing appears without explanation in pro per, the court must advise the defendant of the right to counsel, even if the defendant was informed earlier of that right. *People v Maldonado* (1965) 237 CA2d Supp 902, 904, 47 CR 470. If the defendant desires to proceed without counsel, the court must obtain a knowing, intelligent, and voluntary waiver of his or her right to counsel. *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525; *In re Johnson* (1965) 62 C2d 325, 334, 42 CR 228. See also *In re Perez* (1966) 65 C2d 224, 231, 53 CR 414 (waiver of right to be present not waiver of counsel); *In re Levi* (1952) 39 C2d 41, 244 P2d 403 (no waiver by failure to request counsel).

The defendant's discharge of retained or appointed counsel does not, in itself, constitute a knowing and intelligent waiver of counsel. The court must either find that a waiver is intended and is knowledgeably made or require the attorney of record to continue with the case. *In re Luna* (1968) 257 CA2d 754, 757, 65 CR 121. See *People v Gutkowsky* (1963) 219 CA2d 223, 228, 33 CR 79 (court's consent necessary to discharge attorney at time of sentencing). See also *People v Munoz* (2006) 138 CA4th 860, 41 CR3d 842 (defendant may discharge retained counsel at sentencing without showing of conflict or good cause).

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VII. HEARING ON PRONOUNCEMENT OF JUDGMENT

§35.17 A. Meaningful Opportunity to Object

A party may not challenge the court's discretionary sentencing choices on appeal if that party did not object at the time of sentencing. However, counsel must have a "meaningful opportunity to object." This "can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose, and the reasons that support any discretionary sentencing choices." *People v Scott* (1994) 9 C4th 331, 36 CR2d 627.

The court is *not* required to issue a tentative decision before the sentencing date and need not describe its proposed sentence as "tentative" as long as it "demonstrates a willingness to consider" objections to the sentence the court indicates it intends to impose and the reasons for the sentence. *People v Gonzalez* (2003) 31 C4th 745, 3 CR3d 676.

Ø **Note:** Counsel should consider requesting a brief continuance of the sentencing if the proposed sentence is unexpected, unusual, or particularly complex in order to further research and argue the issues. In complex cases, counsel should consider filing a sentencing brief before the sentencing date to assist the judge in understanding counsels' respective positions.

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§35.18 B. Nature of Sentencing Hearing; Matters That Court May Consider at Hearing

The nature of the sentencing hearing is quite different in misdemeanor and in felony cases. See the description of these hearings in §36.4 (misdemeanor cases) and §37.51 (felony cases). See also §38.21 (generally).

Under Pen C §1204, which applies to both felony and misdemeanor cases, the court may hear the testimony of witnesses and consider the deposition of a witness who is too ill or infirm to come to court. Any oral statement by the defendant in mitigation of punishment must be made under oath and subject to cross-examination as authorized by Pen C §1204. *People v Evans* (2008) 44 C4th 590, 598, 80 CR3d 174. In addition, under Pen C §1204, the defense may introduce a written report presenting information on the defendant's background and personality and suggesting a rehabilitation program. A person who presents to a sentencing court "any … testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed … , except as provided" in the Penal Code, is guilty of a misdemeanor contempt of court. Pen C §166(a)(8). See Pen C §1204.

Despite the proscription of §1204, case law also permits the sentencing court to consider the following:

- Information included in the probation report, as long as there is "some substantial basis for believing the information is accurate and reliable." *People v Peterson* (1973) 9 C3d 717, 727, 108 CR 835; *People v Calloway* (1974) 37 CA3d 905, 908, 112 CR 745. The defendant does not, however, have the right to cross-examine the probation officer who prepared the report. *People v Arbuckle* (1978) 22 C3d 749, 754, 150 CR 778 (Sixth Amendment right of confrontation inapplicable at sentencing stage of criminal proceedings).
- If a misdemeanor case was not referred to the probation department, information that could have been included in the report after telling the defendant of such information and permitting him or her to controvert it. Pen C §1203(d). For discussion of the probation report, see chap 38. See §§27.27-27.28 on preplea probation reports.
- Defense witnesses presented to counteract or correct any portion of the probation officer's report. *People v Valdivia* (1960) 182 CA2d 145, 148, 5 CR 832. See also Pen C §1204. However, a defendant has no right to court-appointed experts for sentencing. *People v Stuckey* (2009) 175 CA4th 898, 96 CR3d 477.
- Any reply by the prosecutor or probation officer to a report submitted by the defense suggesting a rehabilitation program. Pen C §1204.
- Information in a report from the Director of the California Department of Corrections and Rehabilitation (CDCR) under Pen C §1203.03. These reports are discussed in §§35.4, 38.17, 38.19, 38.21.
- Any facts supplied by the record of trial, including the existence of prior convictions admitted or proved. *People v Vatelli* (1971) 15 CA3d 54, 64, 92 CR 763; *People v Gillette* (1959) 171 CA2d 497, 504, 341 P2d 398; *People v Giles* (1945) 70 CA2d Supp 872, 884, 161 P2d 623.
- Facts relating to counts or cases dismissed if the facts in the dismissed counts are "transactionally related" to the crimes for which the defendant is being sentenced. *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696; *People v Lamb* (1999) 76 CA4th 664, 672, 90 CR2d 565. Dismissed counts not transactionally related may be considered if the defendant consents. *People v Harvey, supra*.
- Conduct underlying a charge of which the defendant was acquitted. *People v Towne* (2008) 44 C4th 63, 85, 78 CR3d 530.
- The defendant's perjury at trial in determining his or her prospects for rehabilitation. *People v Redmond* (1981) 29 C3d 904, 913, 176 CR 780. See also *U.S. v Dunnigan* (1993) 507 US 87, 122 L Ed 2d 445, 113 S Ct 1111 (federal judges may enhance sentence of criminal defendants found to have committed perjury on witness stand).
- The views of the victim of a crime, or his or her parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died. These views may be expressed in person or by counsel, and may relate to the facts of the crime, the person responsible, and the need for restitution. Pen C §1191.1. The court must consider these statements in imposing sentence and state on the record its conclusion concerning whether the defendant would pose a threat to public safety if granted probation. Pen C §1191.1. Instead of or in addition to a personal appearance, the victim, the parent or guardian of a minor victim, or the next of kin of a deceased victim may file

with the court a written, audio- or videotaped statement, or a statement stored on a CD-ROM, DVD, or any other recording medium acceptable to the court. Pen C §1191.15.

- Other out-of-court or unsworn statements concerning the circumstances of the crime and the characteristics of the defendant relevant to sentencing as long as the defendant has notice that the statements will be accepted and has an opportunity to respond. *People v Mockel* (1990) 226 CA3d 581, 586, 276 CR 559 (consideration of letters from friends and family of victim did not violate defendant's due process right to fair hearing). The defendant does not have the right to cross-examine the victim or other source of these statements. *People v Huber* (1986) 181 CA3d 601, 635, 227 CR 113; *People v Zikorus* (1983) 150 CA3d 324, 333, 197 CR 509. See *People v Sewell* (1989) 210 CA3d 1447, 259 CR 34 (use of victim's impact statement—permitted by §1191.1—at sentencing does not impermissibly divert sentencer's attention from relevant issues of defendant's blameworthiness and facts of crime in violation of US Const amend VIII).
- The driving record of the defendant in driving-under-the-influence cases. The court must obtain and consider such a report from the DMV. Veh C §13209.

Ø **Note:** Vehicle Code §41500 may be invoked on a client's commitment to state prison or to the Division of Juvenile Justice. Section 41500 prohibits prosecution for most nonfelony offenses arising from operation of a motor vehicle that are pending at the time of commitment. The statute does not apply to persons who are temporarily released from custody, on parole, or charged with violating Veh C §23103, §23152, or §23153. Veh C §41500(e)-(f).

The following information should *not* be included in the probation report or considered by the court:

- Evidence suppressed as a result of an unlawful search and seizure after a Pen C §1538.5 hearing. *People v Belleci* (1979) 24 C3d 879, 157 CR 503 (sentencing court erred by not striking suppressed evidence from probation report). The validity of the *Belleci* decision is in doubt, however, with the passage of Proposition 8, which added former art I, §28(d), to the California Constitution (right to truth-in-evidence) (now see Cal Const art I, §28(f)(2)). See *People v Moore* (1988) 201 CA3d 877, 885, 247 CR 353 (evidence suppressed under §1538.5 is inadmissible only if exclusion is required by Fourth Amendment exclusionary rule). See also *People v Brewster* (1986) 184 CA3d 921, 928, 229 CR 352 (illegally seized evidence suppressed in unrelated matter is admissible).
- Arrests for charges resulting in successful completion of a diversion or deferred entry of judgment (DEJ) program. On successful completion of a DEJ program, the arrest on which the DEJ was based is deemed never to have occurred. Pen C §§1000.4, 1001.9.
- Arrests not resulting in convictions. Records of arrests that did not result in conviction should not be included in a probation report or considered by the sentencing judge unless supporting factual information is included and the information is not presented in a misleading manner. *People v Ratcliffe* (1981) 124 CA3d 808, 823, 177 CR 627; *People v Calloway* (1974) 37 CA3d 905, 909, 112 CR 745.
- Juvenile records sealed under Welf & I C §389.
- Arrest or convictions for marijuana offenses specified in Health & S C §11361.5 that are subject to destruction 2 years after the date of conviction or after the date of arrest if the defendant was not convicted. Health & S C §11361.7(a); *People v Boyd* (1979) 24 C3d 285, 292, 155 CR 367; *People v Fick* (1980) 107 CA3d 892, 897, 166 CR 106.

On probation reports, see §§38.4-38.11; on conditions of probation, see §§38.26-38.30; on probation under Proposition 36 (Stats 2001, ch 721), see §38.3A.

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§35.19 C. Defendant's Right to Confrontation

At the sentencing hearing, the defendant does *not* have a right to cross-examine the probation officer who prepared the report. *People v Arbuckle* (1978) 22 C3d 749, 753, 150 CR 778. The defendant does have the right to cross-examine sources of information relied on by the court that were not supplied by the probation officer's report or by the record of the trial. See *In re Calhoun* (1976) 17 C3d 75, 130 CR 139. "Such facts… should have been obtained from the lips of witnesses called in open court, in the presence of the defendant." *People v Giles* (1945) 70 CA2d Supp 872, 884, 161 P2d 623.

If the judge relies, even in part, on statements made out of court that the defendant has no opportunity to meet, it is a basis for reversal with directions to rearraign the accused for proper probation and sentence proceedings. Such a defective judgment is subject to being set aside by motion at any time. *People v Webster* (1983) 143 CA3d 679, 192 CR 86; *People v Surplice* (1962) 203 CA2d 784, 792, 21 CR 826. See also *People v Giles, supra*.

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§35.19A D. Sentencing Entrapment/Sentencing Manipulation

When the police induce a defendant who was predisposed to commit a lesser offense into committing an offense subject to greater punishment, it is called "sentencing entrapment." Some federal courts, including the Ninth Circuit, have held that when sentence entrapment occurs, the defendant's sentence should be reduced. *U.S. v Staufer* (9th Cir 1994) 38 F3d 1103. In addition, some federal courts authorize a reduction in a defendant's sentence for "sentencing manipulation," *i.e.,* when law enforcement officials, in order to increase a defendant's sentence, engage in conduct so outrageous as to violate the defendant's right to due process. *U.S. v Lacey* (10th Cir 1996) 86 F3d 956.

The California Supreme Court rejected the practice of reducing sentences in cases of sentencing entrapment in *People v Smith* (2003) 31 C4th 1207, 7 CR3d 559. In the same case, however, the court left open the possibility of sentence reduction because of sentencing manipulation, explaining that in a drug case "defendants establish sentence manipulation for purposes of the quantity enhancement when they show the police selected the amount of drugs for no legitimate law enforcement purpose but solely to maximize the defendants' sentence." 31 C4th at 1212.

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§35.20 E. Continuance of Hearing

In misdemeanor cases, if the court intends to base its sentence on information that could have been contained in a probation report, but will not refer the defendant to the probation officer for a report before sentencing, the court must advise the defendant of the information to be considered. On request, the court must grant the defendant a continuance to enable him or her to meet or controvert this information. Pen C §1203(d). See also Veh C §40806 (continuance for defendant to answer or rebut police reports considered by court in imposing sentence on guilty plea).

The prosecution or the probation officer may obtain a continuance to enable it to respond if a defense report is submitted. See Pen C §1204.

Sometimes trial courts sentence a defendant, then grant a stay of execution to allow the defendant more time out of custody before beginning to serve the sentence. The court may not condition the stay by advising the defendant that failure to appear to begin serving the sentence will be punished by an additional term of imprisonment. *People v Gooch* (1995) 33 CA4th 1004, 39 CR2d 518. The court is authorized only to vacate the previously imposed sentence and permit the defendant to withdraw the plea, or to reduce the initial sentence. The court cannot increase the sentence. *People v Gooch, supra*. However, a defendant may enter a waiver by agreeing to a sanction for nonappearance and disallowing the withdrawal of a plea. *People v Cruz* (1988) 44 C3d 1247, 1250, 246 CR 1. See, *e.g., People v Vargas* (1990) 223 CA3d 1107, 273 CR 48 (agreed-on increased sentence if defendant failed to appear at sentencing proper when supported by waivers under *Cruz;* sometimes referred to as "*Vargas*" waivers). Other times, a defendant is sentenced to a greater term that will be reduced at the agreed-on appearance date. *People v Carr* (2006) 143 CA4th 786, 49 CR3d 548.

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§35.21 F. Arraignment for Judgment

A defendant appearing for judgment must be informed by the court, or by the clerk under its direction, of the nature of the charge, the pleas entered, the verdict if any, and must be asked whether there is any legal cause to show why judgment should not be pronounced. Pen C §1200; *Stenback v Municipal Court* (1969) 272 CA2d 27, 31, 76 CR 917 (court may render judgment only if defendant fails to show legal cause why judgment should not be pronounced).

If the court grants probation without pronouncing sentence, no technical arraignment for judgment is necessary (see *People v McShane* (1954) 126 CA2d Supp 845, 272 P2d 571), but, if sentence is to be imposed, arraignment is mandatory, unless waived (see Pen C §§1200-1201; *People v Hawthorne* (1944) 63 CA2d 262, 264, 146 P2d 517; *People v Swift* (1934) 140 CA 7, 34 P2d 1041). However, failure to comply with §1200 is a ground for reversal only when it causes prejudice resulting in a miscarriage of justice. *People v Hawthorne, supra; People v Swift, supra*.

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VIII. ALLOCUTION

§35.22 A. Allocution Defined

Allocution is the formal inquiry by the judge at the arraignment for sentencing about whether the defendant has any legal cause to show why sentence should not be pronounced. Pen C §1200; *People v Evans* (2008) 44 C4th 590, 592, 80 CR3d 174. "Only if the defendant fails to show legal cause why judgment should not be pronounced at this time may the court render judgment." *Stenback v Municipal Court* (1969) 272 CA2d 27, 31, 76 CR 917 (misdemeanor case).

Penal Code §1200 does not entitle the defendant, in response to the trial court's allocution, to offer an unsworn personal statement in mitigation of punishment. Any oral statement by the defendant in mitigation of punishment must be made under oath and subject to cross-examination. *People v Evans, supra*.

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§35.23 B. Causes Against Judgment

In allocution, the defendant may show the following as cause against judgment:

- **Present insanity.** If the trial court thinks that a reasonable ground exists to believe the defendant insane, the question of insanity must be tried in accordance with Pen C §§1367-1375.5. Pen C §1201(a).
- **Cause in arrest of judgment.** If the defendant has good cause to offer in arrest of judgment, the court may, in its discretion, order the judgment to be deferred and proceed to decide the motion in arrest of judgment. Pen C §1201(b). See Pen C §§1004, 1185-1186. For discussion of motions in arrest of judgment, see §34.19.
- **Cause for new trial.** If the defendant has good cause to offer for a new trial, the court may, in its discretion, order the judgment to be deferred and proceed to decide the new trial motion. Pen C §1201(b). See Pen C §§1179-1182. For discussion of motions for new trial, see §§34.3-34.16.
- **Invalidity of priors.** If the court intends to consider a prior conviction in determining sentence, and that prior is challenged by the defense as factually or constitutionally invalid, the court must decide the validity of the prior. *People v Sumstine* (1984) 36 C3d 909, 206 CR 707. There are two exceptions: A criminal defendant may not collaterally challenge a prior conviction on the ground of ineffective assistance of counsel in a noncapital case (*Garcia v Superior Court* (1997) 14 C4th 953, 59 CR2d 858), and a challenge based on a violation of *Boykin-Tahl* rights can be made only if the prior conviction is post-*Tahl, i.e.,* after November 7, 1969 (*People v Allen* (1999) 21 C4th 424, 87 CR2d 682). However, *Garcia v Superior Court, supra,* does not apply to federal habeas jurisdiction over challenges to state prior convictions. *Pogue v Ratelle* (2001) 532 US 1063, 149 L Ed 2d 1041, 121 S Ct 2209. On challenging the validity of a prior conviction, see §§24.28-24.43.

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§35.24 IX. RENDITION AND ENTRY OF JUDGMENT

The rendition of judgment is the oral pronouncement of sentence. *People v Moran* (1973) 33 CA3d 724, 728, 109 CR 287. The judgment must be pronounced orally and must reflect the court's ruling on the matter. *People v Hartsell* (1973) 34 CA3d 8, 13, 109 CR 627 (failure to state findings on priors); *People v Blackman* (1963) 223 CA2d 303, 35 CR 761; *In re Bateman* (1928) 94 CA 639, 271 P 757. Pen C §§1202, 1445. The court should read any fines, fees, penalties, or surcharges into the record separately at sentencing. See *People v High* (2004) 119 CA4th 1192, 1200, 15 CR3d 148.

If no sufficient cause against judgment is alleged or appears to the court at the time fixed for pronouncing judgment, judgment should be pronounced, as provided in Pen C §1191. See §35.10 on the effect of failure to render judgment within the time fixed by law or within the time to which the hearing was properly continued.

Once judgment has been rendered, the court clerk must enter in the minutes the judgment as orally pronounced, and a copy of the judgment must be filed with the papers in the case. Pen C §1207. The entry must include a brief statement of the offense and the fact of any prior conviction. Pen C §1207; see *In re Candelario* (1970) 3 C3d 702, 706, 91 CR 497 (felony judgment silent about priors); *People v Hartsell, supra* (same). If there later proves to be a discrepancy between the judgment as pronounced and the judgment as entered in the minutes, the judgment as pronounced governs. *People v Mesa* (1975) 14 C3d 466, 121 CR 473. See also *People v Smith* (1983) 33 C3d 596, 189 CR 862, on conflicts in the record. But see *People v Thompson* (2009) 180 CA4th 974, ___ CR3d ___ (when oral pronouncement of sentence was erroneous, correct minute order and abstract of judgment prevailed).

> Ø **Note:** The minute order may be relied on by a federal district court at sentencing in applying the modified categorical approach to determine career offender status. *U.S. v Snellenberger* (9th Cir 2008) 548 F3d 699, 701 (en banc). In *Snellenberger,* the court rejected the defense argument that the minute order should not be relied on because it is not something seen or approved by the parties, noting that it is not "secret" and can be checked to ensure it accurately reflected the proceedings.

When the court's oral judgment on prior convictions is ambiguous, the defendant is entitled to a limited new trial on that issue. *People v Meals* (1975) 48 CA3d 215, 121 CR 742 (court had found prior "true as admitted" despite defendant's recorded denial).

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X. NOTICES TO DEFENDANT

§35.25 A. Duty to Register

If the defendant is convicted of a drug-related offense listed in Health & S C §11590, or of an attempt to commit one of the listed offenses, the court must inform the defendant of the duty to register if the court releases him or her on probation or only imposes a fine. Health & S C §11593.

If the defendant is convicted of an offense listed in Pen C §290(c) or of an attempt or conspiracy to commit one of the listed offenses, the court must inform the defendant of the duty to register if the court conditionally releases the defendant without supervised probation or only imposes a fine. Pen C §290.017(d). Note that equal protection considerations now require the trial court to consider not imposing registration if other similar conduct does not require registration. See *People v Hofsheier* (2006) 37 C4th 1185, 1198, 39 CR3d 821; *People v Cavallaro* (2009) 178 CA4th 103, 110, 100 CR3d 139; *People v Thompson* (2009) 177 CA4th 1424, 1430, 100 CR3d 57; *People v Luansing* (2009) 176 CA4th 676, 680, 97 CR3d 836; *People v Ranscht* (2009) 173 CA4th 1369, 1375, 93 CR3d 800; *In re J.P.* (2009) 170 CA4th 1292, 1299, 89 CR3d 17. See also *People v Kennedy* (2009) 180 CA4th 403, 409, ___ CR3d ___ (declining to extend *Hofsheier* to felony violations of Pen C §288.2(b)).

Ø **Note:** When a defendant who is convicted of an offense for which registration is required is incarcerated, the director of the place of confinement is responsible for informing him or her of the registration requirement. Pen C §290.017(a); Health & S C §11592.

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§35.26 B. Duty to Submit to AIDS Testing

The court must inform every person convicted of specified sex offenses of the duty to submit to a blood or saliva test for evidence of antibodies to the probable causative agent of Acquired Immune Deficiency Syndrome (AIDS). Pen C §1202.1(d)-(e). Each person tested must be informed of the results of the blood or saliva test. Pen C §1202.1(a).

The duty to inform convicted persons under Pen C §1202.1 applies whether a sentence or fine is imposed or probation is granted. Pen C §1202.1(a).

The results of the test must also be made available to the prosecuting attorney on request for the sole purpose of preparing counts for a subsequent offense under Pen C §647f (prostitution following prior conviction and positive AIDS test) or to enhance a sentence under Pen C §12022.85 (commission of sexual offense with knowledge that defendant carries AIDS virus). Pen C §1202.1(c).

For a *first offense* of Pen C §647(b) (soliciting or engaging in prostitution), the court must, *before sentencing or as a condition of probation,* order the defendant to submit to an AIDS test. Pen C §1202.6(a). On a *second* or *subsequent conviction* of §647(b), the court must, *before sentencing,* order the defendant to submit to an AIDS test.

Ø **Note:** Penal Code §§1202.1 and 1202.6 should be clearly distinguished from Pen C §1524.1 and Health & S C §§121050-121070. The latter code sections permit AIDS testing of charged defendants *before conviction* in specified circumstances. They are discussed in §18.38.

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§35.27 C. Right to Appeal

Felonies. Every defendant convicted of a felony has a right to appeal the judgment. Pen C §§1235-1237.5. The trial court is required to advise a defendant of the right to appeal after imposing sentence on conviction after trial or revocation of probation. Cal Rules of Ct 4.305, 4.470. See also Cal Rules of Ct 5.590 (advisement of right to review in juvenile proceedings), amended effective July 10, 2010. There is no equivalent provision, however, requiring advisement after a plea of guilty. *In re Ibarra* (1983) 34 C3d 277, 283 n1, 193 CR 538; *People v Serrano* (1973) 33 CA3d 331, 109 CR 30. There is as yet no authority requiring a trial court to advise the defendant of the loss of any appeal rights following a guilty plea. See *In re Ibarra, supra*.

In advising a defendant of the right to appeal from the judgment, the court must advise the defendant of the necessary steps and time for taking an appeal, and the right to have counsel appointed by the reviewing court if the defendant is indigent. Specifically, the defendant must be advised of the need to file a written notice of appeal with the clerk of the sentencing court within 60 days after the date of pronouncement of judgment. The defendant must be advised that, if an appeal is taken, and he or she is unable to hire a lawyer, the appellate court will appoint a lawyer to represent the defendant on appeal at no cost. The defendant must be advised of the right to a free transcript and a record of the necessary proceedings in the trial court. Last, the defendant must be advised that the written notice of appeal must be timely filed. Cal Rules of Ct 4.305, 4.470.

Ø **Note:** There is no right to a transcript of a codefendant's trial. *People v Hayden* (1994) 22 CA4th 48, 27 CR2d 127.

Failure to advise a defendant of the right to appeal may result in a presumption of prejudice to the defendant. *Abels v Kaiser* (10th Cir 1990) 913 F2d 821; *Estes v U.S.* (8th Cir 1989) 883 F2d 645.

On appeals in criminal cases, see Pen C §§1239-1265 and Cal Rules of Ct 8.300-8.482. See also chaps 43-44. See generally Appeals and Writs in Criminal Cases, chaps 1-6 (3d ed Cal CEB 2007). On trial counsel's duty to assist defendant in perfecting appeal, see §§41.4-41.7 and Appeals & Writs §§2.3-2.11.

Misdemeanors. After imposing sentence or making an order deemed to be a final judgment in a misdemeanor case, on conviction after trial or following a revocation of probation, the court must orally or in writing advise a defendant *not represented by counsel* of the following (Cal Rules of Ct 4.306):

- The right to appeal to the superior court appellate division (Pen C §1466);
- The deadline for filing a notice of appeal (30 days; Cal Rules of Ct 8.853); and
- The right of an indigent defendant to have counsel appointed on appeal (see *In re Henderson* (1964) 61 C2d 541, 39 CR 373 (counsel must be appointed on appeal of misdemeanor, particularly when conviction may result in serious consequences)).

Other situations. Defendants convicted only of an infraction and probationers who have had probation revoked after admitting a probation violation do not have to be advised of the right to appeal. Cal Rules of Ct 4.306.

Waiving right to appeal. The right to appeal is a statutory right only. An express waiver of the right to appeal made under a plea bargain is valid as long as the defendant's waiver is a knowing, intelligent, and voluntary one. *People v Castrillon* (1991) 227 CA3d 718, 721, 278 CR 121.

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§35.28 D. Period of Parole

Every sentence under Pen C §1168 or §1170 includes a period of parole unless the Board of Parole Hearings, for good cause, waives parole and discharges the inmate from department custody. Pen C §3000(a)-(b). See also *In re Carabes* (1983) 144 CA3d 927, 193 CR 65. Therefore, every defendant convicted of a felony and sentenced to prison must be told at the time of sentencing that, in addition to the sentence imposed, he or she is also subject to a period of parole under Pen C §§3000 and 3000.1. On parole generally, see chap 47.

A guilty plea is not voluntarily and intelligently made when a trial judge fails to inform a defendant of a mandatory parole term concomitant to the sentence imposed. When a criminal statute imposes a mandatory parole term to be served following completion of the confinement period, the parole term is necessarily a direct consequence of the guilty plea. A plea of guilty can be voluntary only if it is entered by one fully aware of the direct consequences. *Carter v McCarthy* (9th Cir 1986) 806 F2d 1373. For a list of the most common direct consequences of a guilty plea, see §26.16.

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XI. ALTERNATIVES IN CONTROLLED SUBSTANCE CASES

§35.29 A. Commitment to California Rehabilitation Center (CRC)

At the time sentence is imposed in a felony case, if it appears that the defendant is in imminent danger of becoming addicted to or is already addicted to narcotics, the court must sentence the defendant as it would without the addiction consideration, and then suspend execution of the sentence. The court must then order the district attorney to file a petition for determination of whether the defendant is addicted or in imminent danger of becoming addicted to narcotics. Welf & I C §3051; *People v Granado* (1994) 22 CA4th 194, 27 CR2d 286.

On the filing of the petition, a doctor is appointed to give an opinion on the issue of addiction. Welf & I C §3051. A hearing is held and the court makes its determination. If dissatisfied with the court's decision, the defendant has the right to a jury trial on the issue of whether he or she is addicted to or in imminent danger of becoming addicted to narcotics. Welf & I C §§3051, 3108; *People v Thomas* (1977) 19 C3d 630, 139 CR 594. If the defendant is found to be addicted or in imminent danger of becoming addicted, the defendant is committed to the California Rehabilitation Center (CRC) at Norco, California, until discharged by that facility. Ordinarily, the defendant may not be incarcerated at CRC beyond the maximum commitment received for the underlying offense(s). Welf & I C §3201(c).

The defendant may be found to be ineligible for CRC in three circumstances: (1) if the defendant has been convicted of certain offenses and/or certain enhancements have been found true (see Welf & I C §3052(a)(1)-(2)); (2) if the sentence imposed on the defendant exceeds 6 years (Welf & I C §3052(a)(2)); or (3) if the defendant's criminal history demonstrates a pattern of excessive criminality (Welf & I C §3053(a); *People v Granado, supra*; *People v Ellers* (1980) 108 CA3d 943, 956, 166 CR 888). The court must state its reasons on the record for denying CRC. *People v Jeffery* (2006) 142 CA4th 192, 47 CR3d 691; *People v McLemore* (1994) 27 CA4th 601, 32 CR2d 687; *People v Granado, supra*. For further discussion of §3051 procedures, see §§37.64-37.66.

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§35.29A B. Proposition 36 Treatment

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, was passed by California voters in November 2000 and became effective July 1, 2001. The specific provisions of the Act relating to probation and probation revocation are codified at Pen C §§1210-1210.1. Under Proposition 36, defendants convicted of nonviolent drug possession offenses must be sentenced to probation and drug treatment instead of incarceration. The court may impose additional terms of probation for drug-related probation violations. Pen C §1210.1(a). Note that the judgment enjoining the enforcement of SB 1137, which was signed into law in 2006 and amended the provisions of Proposition 36 to permit, among other things, the incarceration of offenders placed on Proposition 36 probation who relapse during treatment, has been affirmed. See *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 101 CR3d 229.

On successful completion of the drug treatment program, the defendant may petition the court to dismiss the charge(s) for which treatment was accorded.

For discussion of Proposition 36, see §§38.3A, 46.36-46.41.

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§35.29B C. Deferred Entry of Judgment

Penal Code §1000 allows for individuals charged with certain offenses involving simple possession of a controlled substance or being under the influence of a controlled substance to be diverted out of the criminal process into a drug program. Successful completion of the program can result in the dismissal of criminal charges. On deferred entry of judgment and diversion generally, see chap 27.

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XII. CORRECTING ERRORS IN PRONOUNCING JUDGMENT

§35.30 A. Clerical and Judicial Error Distinguished

The trial court may, without recalling the sentence under Pen C §1170(d) (see §35.5), modify or correct only clerical errors in a judgment. If an error was made in "recording the judgment rendered," it is clerical in nature. *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497; *People v Schultz* (1965) 238 CA2d 804, 807, 48 CR 328. The trial court may not modify or correct judicial errors. *In re Candelario, supra*. To be characterized as clerical, an error must have been inadvertent and not reasonably attributable to an exercise of discretion. *Bowden v Green* (1982) 128 CA3d 65, 71, 180 CR 90. For example, the oral pronouncement of judgment is a judicial act, but the entry of the judgment in the minutes is clerical. *People v Wilshire Ins. Co.* (1977) 67 CA3d 521, 532, 136 CR 693. A void sentence may be corrected at any time. See §35.34.

Some of the decisions distinguishing judicial from clerical error are contradictory and difficult to reconcile. The trial court has a great deal of discretion in this area.

If the record is silent, counsel opposing correction may argue that it leads to the inference that the omission was a willful act and operates as a finding, and may not be presumed to be clerical error. See, *e.g., In re Candelario, supra* (trial court failed to include prior conviction in judgment); *People v Thomas* (1978) 84 CA3d 281, 283, 148 CR 532 (trier of fact failed to specify degree of offense when returning verdict).

Counsel (usually the prosecutor) who wishes the record corrected may argue that an omission was an oversight (*People v Castellano* (1978) 79 CA3d 844, 861, 145 CR 264 (court's omission of first degree robbery finding from oral pronouncement held oversight when jury had found robbery to be first degree); *People v Prater* (1977) 71 CA3d 695, 703, 139 CR 566 (failure to orally pronounce sentence on enhancement under Pen C §12022.5 deemed oversight; matter remanded for resentencing)), or that some statute, case, or judicial policy requires that the court correct the error (*Hoffman v Superior Court* (1981) 122 CA3d 715, 177 CR 868 (matter remanded for trial judge to pronounce judgment on one count); *People v Williams* (1980) 103 CA3d 507, 519, 163 CR 169 (silence will not bar subsequent correction by trial court adding sentence for prior felony enhancement under Pen C §667.5 because Determinate Sentencing Law requires statement of reasons for striking prior)).

When a discrepancy appears between the oral pronouncement or minute order and the abstract of judgment, courts generally resolve it in favor of the oral rendition. *People v McGahuey* (1981) 121 CA3d 524, 530, 175 CR 479 (sentence pronounced orally could not be later "modified" without defendant's presence when it resulted in substantial change to defendant's detriment); *People v Zackery* (2007) 147 CA4th 380, 386, 54 CR3d 198 (clerk could not include fines in abstract of judgment that were never orally imposed by judge); *People v Bowie* (1977) 72 CA3d 143, 157, 140 CR 49 (court's comments showed it was aware of priors and did not intend to sentence defendant as prior offender); *People v Hartsell* (1973) 34 CA3d 8, 13, 109 CR 627 (reference in abstract of judgment to prior convictions stricken because priors not included in oral pronouncement of judgment or entered in minutes). A court of appeal that has properly assumed jurisdiction of a case may order correction of an abstract of judgment that does not accurately reflect the oral judgment of the sentencing court. *People v Mitchell* (2001) 26 C4th 181, 185, 109 CR2d 303. See *People v Samaniego* (2009) 172 CA4th 1148, 1183, 91 CR3d 874 (remand to trial court to correct abstracts of judgments to reflect victim restitution award as joint and several).

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§35.31 B. Clerical Error

If an error is clerical in nature, the court has the inherent power to correct it so that the record reflects the actual facts. The correction can be made even while the case is on appeal. *In re Roberts* (1962) 200 CA2d 95, 97, 19 CR 147.

The trial court may correct clerical errors on its own motion or on the motion of any party at any time without notice. *People v Flores* (1960) 177 CA2d 610, 613, 2 CR 363; *In re Roberts, supra*.

The following are matters that can be corrected as clerical error:

- A minute entry corrected to reflect the actual number of grand jurors concurring in a true bill (*Bogart v Superior Court* (1964) 230 CA2d 874, 41 CR 480);
- The number of a subsection of the Penal Code statute under which the defendant was convicted to conform to the jury's actual finding (*People v Shirley* (1970) 10 CA3d 268, 88 CR 853; *People v Schultz* (1965) 238 CA2d 804, 48 CR 328);
- The record to reflect a commitment under Pen C §1368 and not §1026 (*People v Anderson* (1976) 59 CA3d 831, 131 CR 104 (clerical correction made 2 years after commitment order)); and
- An abstract of judgment to reflect the correct sentence of the middle and not the upper term (*People v Jackson* (1981) 117 CA3d 654, 172 CR 856 (correction made by court of appeal)).

If a correction would substantially modify the original judgment or materially alter the rights of the parties, it may not be considered a clerical error unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion. *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497; *Morgan v State Bd. of Equalization* (1949) 89 CA2d 674, 682, 201 P2d 859. See *People v Kelly* (1999) 72 CA4th 842, 85 CR2d 430, which upheld a resentencing to the same number of years based on a previous plea bargain even though the court and counsel erroneously believed that the upper term of 6 years was the middle term.

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§35.32 C. Judicial Error

Judicial error is error that resulted from the exercise of judicial discretion. *In re Wimbs* (1966) 65 C2d 490, 498, 55 CR 222. The general rule is that judicial error cannot be corrected by amendment. *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497 (trial court lacked power to amend judgment to add finding of prior felony conviction); *People v Drake* (1981) 123 CA3d 59, 63, 176 CR 186 (imposing sentence of 6 years is judicial act and cannot be amended even if 10 years intended). Compare *People v Kelly* (1999) 72 CA4th 842, 85 CR2d 430, discussed in §35.31, with *People v Ferrara* (1988) 202 CA3d 201, 208, 248 CR 311 (trial court may not revise factual finding under guise of correcting clerical error).

A dismissal entered through "misapprehension" by the court is a judicial act and may not later be corrected. *Smith v Superior Court* (1981) 115 CA3d 285, 292, 171 CR 387.

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§35.33 D. Correcting Oral Pronouncement of Sentence

The court may modify or correct an oral pronouncement of sentence before the defendant begins serving the sentence and before it is recorded in the minutes. *People v Thomas* (1959) 52 C2d 521, 530, 342 P2d 889 (prison instead of jail term imposed before end of day); *People v Guerrero* (1975) 47 CA3d 441, 120 CR 732 (state prison sentence corrected when defendant could be sentenced to county jail only). See also §35.34 on correcting void sentences.

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§35.34 E. Vacating or Correcting Void Sentence

When a sentence is unauthorized by law, the court may correct it even if it has been entered in the minutes, execution has commenced, and the defendant has appealed. *People v Chagolla* (1983) 144 CA3d 422, 434, 193 CR 711 (court attached enhancement to wrong count; attached to correct count after defendant filed notice of appeal). See also *People v Ross* (1994) 28 CA4th 1151, 33 CR2d 894 (court of appeal directed trial court to prepare amended abstract of judgment and forward it to appropriate authorities).

The appellate court has the power to change a sentence that is void for lack of jurisdiction. See, *e.g., People v Vasilyan* (2009) 174 CA4th 443, 94 CR3d 260 (motion to vacate judgment and withdraw plea granted for lack of subject matter jurisdiction after California Supreme Court subsequently characterized statutory provision under which defendant was convicted and deported as penalty provision rather than substantive offense); *In re May* (1976) 62 CA3d 165, 168, 133 CR 33 (legislature subsequently declared offense misdemeanor; habeas corpus granted and probationer's conviction reduced in light of trial court's exceeding jurisdiction by imposing greater punishment for greater crime than law allowed).

Ø **Note:** When an illegal sentence is vacated, the court can substitute the correct sentence even when it is more severe than the original. *People v Brown* (1987) 193 CA3d 957, 961, 238 CR 697; *People v Grimble* (1981) 116 CA3d 678, 685, 172 CR 362.

Either a prosecutor or a defendant seeking correction should bring a motion in the trial court to vacate the void portion of the judgment and to impose an authorized sentence. See *In re Sandel* (1966) 64 C2d 412, 418, 50 CR 462 (prosecution). If the court refuses to correct the illegal sentence, the prosecution may petition the appellate court for a writ of mandate. See *People v Superior Court (Oliver)* (1933) 135 CA 562, 27 P2d 670. The defendant may file a petition for writ of habeas corpus. *In re May, supra*. A sentence that is not authorized by law or that is based on an unlawful order can be appealed by the prosecution. Pen C §§1238(a)(10), 1466(1)(G). See also *People v Superior Court (Duran)* (1978) 84 CA3d 480, 148 CR 698; *People v Ventura* (1978) 84 CA3d Supp 8, 148 CR 581.

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36

MISDEMEANOR SENTENCING

HON. TERESA SANCHEZ-GORDON

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§36.1 I. OVERVIEW

Primary misdemeanor sentencing options. This chapter covers the two primary sentencing options for misdemeanor offenses: fines and incarceration in the county jail. There are sentencing alternatives. Those that are not covered here are found in other chapters: chaps 27 (diversion), 36 (work alternative to fine; serving jail time on weekends), 37 (commitment or transfer to Division of Juvenile Justice), 38 (probation, including under Proposition 36; *Harvey* waivers for counts or cases dismissed), and 39 (county parole and work furlough). Defense counsel representing a misdemeanor client can do the client a great service by tailoring a sentence to fit the client and the crime. Judges have the authority to try a number of innovative sentences; it is counsel's obligation to present these options to the court, together with persuasive evidence of their usefulness and application to the defendant. Because of jail overcrowding and changes in felony prosecutions, judges are particularly amenable to alternatives to jail.

Prosecutors should give all information relevant to sentencing to the probation officer to ensure that it is discussed in the probation report. Most important are prior convictions, threats against the victim or witnesses, and performance on probation and parole in other cases.

Sentencing issues covered in other chapters. Other issues related to sentencing are covered in other chapters. Counsel should check the index or the case and statute tables in the back of this book to find discussion of particular topics. Some of the more important ones are:

- Prejudgment motions, *i.e.,* motions brought before sentence is pronounced, such as motions for new trial. See chap 34.
- Pen C §654 and the prohibition on multiple punishment. See §§37.44-37.50.
- Pen C §954 and the prohibition on multiple convictions. See §37.50.
- Prohibition on multiple prosecutions. See §§7.35, 26.23-26.34.
- Pronouncement of judgment and sentencing hearings. See chap 35.
- Attorney preparation for sentencing. See §§38.23-38.26.
- Stay of execution and release of defendant on bail or own recognizance pending appeal. See §§41.6-41.7.
- Professional licenses. See chap 53.
- Noncitizen criminal defendants. See chap 52.
- Driving under the influence cases. See chap 55.

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§36.2 II. CHART: DEADLINES

Action	Deadline	Authority
Pronouncement of judgment in misdemeanor cases.	Not less than 6 hours nor more than 5 days after verdict, finding, or plea, unless waived by defendant; extended up to 10 calendar days if motion for new trial or in arrest of judgment made, or, if probation is considered, up to 90 additional days at defendant's or probation officer's request.	Pen C §1449.
Correct judgment to indicate whether sentences are to run consecutively or concurrently.	Within 60 days of notice to the court of prior judgment or failure to specify.	Pen C §669.

Ø **Note:** If the court fails to indicate otherwise, multiple terms run concurrently.

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§36.3 III. TIME OF SENTENCING; RIGHT TO COUNSEL

Judgment must be pronounced in misdemeanor cases not less than 6 hours nor more than 5 days after the verdict, finding, or plea, unless time is waived by the defendant or extended by the court. Pen C §1449. The court may extend the time for pronouncing sentence up to 10 days for motions for a new trial or in arrest of judgment. On referral to the probation department, the court may extend the time for sentencing up to 90 days at the request of the defendant or probation officer. Pen C §1449.

The defendant has the right to be represented by counsel when judgment is rendered. Cal Const art I, §15; *In re Levi* (1952) 39 C2d 41, 244 P2d 403 (decided on basis of Cal Const art I, §13, predecessor to §15).

Defendants in misdemeanor cases may be sentenced in absentia. Pen C §1193(b).

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§36.3A IV. REFERRAL TO PROBATION DEPARTMENT

Ordinarily, when a defendant is convicted of a misdemeanor, the trial court is not required to obtain a probation report before sentencing. Pen C §1203(d).

Sex offenders. When the defendant is convicted of a sex offense for which registration is required under Pen C §§290-290.023, or if the probation officer recommends that the court at sentencing order the offender to register as a sex offender under Pen C §290.006, the court must refer the defendant to the probation department for an assessment of the risk the defendant poses to the community. Pen C §1203(d). This assessment is to be performed using the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO), which is being phased in by Pen C §§290.03-290.08. Pen C §1203(d). The trial court must consider this report in sentencing. Pen C §1203(d). As of July 1, 2008, each county probation department is required to assess each eligible person for whom it prepares a report under Pen C §1203. Pen C §290.06(a)(5).

DNA samples. Misdemeanor defendants required to register under Pen C §290 or Pen C §457.1 must provide DNA samples for identification purposes. Pen C §296(a)(3). Misdemeanants who have been registering pursuant to Pen C §290 for a sex offense, and who have not already done so, must provide DNA samples when they renew their registration regardless of whether their conviction that triggered registration predates Proposition 69 and the amendments to Pen C §296. *Good v Superior Court* (2008) 158 CA4th 1494, 1510, 71 CR3d 125.

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§36.4 V. WHO CAN SENTENCE IN MISDEMEANOR CASES; COURT'S DISCRETION IN SENTENCING

As in felony cases, a superior court judge ordinarily imposes sentence in misdemeanor cases. However, the parties may stipulate to a temporary judge, commissioner, or referee sitting as a judge. Cal Const art VI, §21 (temporary judge).

The defendant may have the right to be sentenced by the same trier of fact who took his or her plea. See discussion of *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778, in §35.11.

Sentencing hearings in misdemeanor cases are generally brief. It is common for the prosecutor and defense counsel to address the court and then for the court to pronounce judgment. The choice of sentence is within the discretion of the judge, acting within prescribed statutory limits. See Pen C §§12-13. When a defendant rejects a plea bargain and proceeds to trial, the court may not impose a more severe sentence than that offered before trial unless based on factors revealed during trial or in the sentencing report following trial. *In re Lewallen* (1979) 23 C3d 274, 152 CR 528.

The penalty for a given misdemeanor can be ascertained from (1) the statute or ordinance designating the offense or the provisions immediately following the statute; (2) a general punishment provision applicable to a specific group or class of misdemeanors (*e.g.,* Bus & P C §25617; Fish & G C §§12000-12026; Health & S C §11374; Veh C §§42000.1-42002.5); or (3) the general provisions of Pen C §§19 and 672, when no penalty is otherwise provided in the statute or ordinance violated.

Judges may sentence a defendant to serve his or her sentence at intermittent periods. Incarceration on weekends is the common intermittent sentence. See Pen C §1209. A sentence of restitution or community service is also common. See Pen C §1202.4.

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VI. PUNISHMENT FOR MISDEMEANORS

§36.5 A. Suspending Execution of Sentence; Suspending Imposition of Sentence

In sentencing a defendant, the trial court may (Pen C §1203.1):

- Impose sentence by selecting and ordering a sentence, *e.g.,* probation with no jail time, probation with 6 months in the county jail, or "judgment suspended" (no probation, no jail time).
- Impose sentence and place the defendant on probation, but suspend *execution* of sentence. In other words, the judge states a particular sentence, such as 2 months in the county jail, but suspends execution of that portion of the sentence so that the defendant does not have to serve it until ordered. If the defendant completes probation successfully, the jail sentence is never served. If probation is revoked, and the trial court decides not to reinstate probation, it appears that the court must order the defendant to serve the entire suspended sentence. See *People v Colado* (1995) 32 CA4th 260, 38 CR2d 57 (when court revoked felony probation and imposed prison term, it had no discretion to modify previously imposed but unexecuted sentence). See discussion in §46.30.
- Suspend the *imposition* of sentence by placing the defendant on probation without stating a sentence. When this procedure is used, the court leaves open the possibility of sentencing the defendant up to the maximum sentence on a revocation of probation. See discussion in §46.29.

Ø **Note:** Which choice the court makes can be crucial to a noncitizen defendant. A sentence that is *imposed* counts as a sentence for immigration purposes, even if its *execution* is stayed. See discussion in §52.10.

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§36.6 B. Judgment of Imprisonment, Fine, or Both

Except when a different punishment is prescribed by statute, a misdemeanor is punishable by imprisonment in the county jail not exceeding 6 months, by a fine not exceeding $1000, or both. Pen C §19. If the misdemeanor is punishable by a jail term but no fine is prescribed, the court may impose a fine of up to $1000 in addition to the authorized imprisonment. Pen C §672. See Veh C §42003 on imprisonment and fines in Vehicle Code cases.

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C. Imprisonment

§36.7 1. Maximum Term; Good Time and Work Time

Maximum term. A judgment of imprisonment cannot exceed the term allowable for the offense charged. In addition, with two exceptions, misdemeanor punishment may not exceed 1 year. Pen C §19.2. The exceptions to this rule that allow more than 1 year to be imposed are these: the judge imposes consecutive misdemeanor sentences, and the defendant waives the §19.2 1-year top. *People v Harris* (1987) 195 CA3d 717, 240 CR 891, disapproved on other grounds in *People v Arnold* (2004) 33 C4th 294, 307, 14 CR3d 840. A sentence to consecutive full terms on multiple counts, in the absence of an objection, does not violate equal protection. *People v Erdelen* (1996) 46 CA4th 86, 53 CR2d 553.

The maximum penalty for violation of a city ordinance is 6 months in jail, a $1000 fine, or both. Govt C §36901.

A defendant cannot be sentenced to more than 1 year in the county jail for a concurrent sentence unless the defendant specifically waives the right to a maximum 1-year sentence, *e.g.,* to avoid a state prison sentence. Pen C §19.2 (former Pen C §19a).

Good-time and work-time (conduct) credits. Misdemeanor defendants serving time in custody may reduce that time through work and good behavior. For each 4-day period the prisoner is in custody, 1 day can be deducted from the period of confinement for work time, and 1 day can be deducted for good behavior. Pen C §4019. If the defendant is required to register as a sex offender or has a prior conviction for a serious or violent felony, then for every 6-day period of confinement, 1 day can be deducted for work time and 1 day can be deducted for good behavior.

On calculating conduct credits, see §37.61.

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§36.8 2. Serving Jail Term on Weekends

The court may permit a jail sentence to be served on weekends or at any other "intermittent periods" the judge finds appropriate. Pen C §1203.1. See also Pen C §1209 (court to decide whether defendant can afford to pay part or all of cost of administering weekend sentence program; procedure for determining ability to pay described).

The court can recommend or refuse to permit the sentence to be served through an electronic monitor/home arrest program. This type of program may be a condition of probation when the program is supervised through the private sector. The court, however, cannot order a defendant into such a program without the concurrence of the probation department or the sheriff's department, depending on which agency administers the program. Pen C §1203.016; *People v Superior Court (Hubbard)* (1991) 230 CA3d 287, 281 CR 309. For further discussion, see §39.32.

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§36.9 D. Judgment of Fine

Maximum amount and payment. Unless the applicable statute specifically provides otherwise, the maximum fine for a misdemeanor is $1000. Pen C §§19, 672; Govt C §36901.

Ø **Note:** A judgment that the defendant pay a fine may also direct that payment be made within a limited time or in installments on specified dates. Unless this direction is given, the fine is payable immediately. Pen C §1205(a).

Addition of penalty assessments. A penalty assessment of up to $24 must be levied for every $10, or fraction of $10, of every "fine, penalty or forfeiture" imposed, including Vehicle Code violations other than parking. Pen C §1464(a) ($10 penalty assessment for every $10 or part of $10), §1465.7(a) (20-percent surcharge on base fine); Govt C §§76000(a) ($7 additional penalty for every $10 or part of $10), 70372(a), 70375 (up to $5 net state court construction penalty). See also Govt C §69926.5; Pen C §1465.8.

Ø **Note:** The Pen C §1465.7 surcharge and the Govt C §70372 construction penalty may be imposed only when the crime was committed after their effective dates, September 30, 2002, and January 1, 2003, respectively. See *People v High* (2004) 119 CA4th 1192, 15 CR3d 148. In contrast, the Pen C §1465.8(a)(1) $30 court security fee is not punitive and may be imposed even when the crime was committed before its effective date. *People v Alford* (2007) 42 C4th 749, 759, 68 CR3d 310; *People v Wallace* (2004) 120 CA4th 867, 16 CR3d 152.

When multiple offenses are involved, the assessment is based on the total fine or bail for all offenses. When a fine is suspended in whole or in part, the assessment must be reduced in proportion to the suspension. Pen C §1464. Locally imposed penalty assessments can, and do, push the total amount of the penalty that the defendant must pay even higher. But see *People v McHenry* (2000) 77 CA4th 730, 91 CR2d 877 (error for trial court to impose §1464 penalty assessment on restitution fines that are governed by other statutes).

The penalty assessment of Pen C §1464(a) is mandatory, except for the waiver allowed by Pen C §1464(d). *People v Heisler* (1987) 192 CA3d 504, 237 CR 452. Section 1464(d) allows the court to waive all or any part of the applicable penalty assessment payment that would work a hardship on the defendant or his or her immediate family when the defendant has been imprisoned to satisfy the fine. The trial court's failure to impose penalty assessments under Pen C §1464(a) and Govt C §76000(a) is a jurisdictional error that may be raised for the first time on appeal. *People v Stewart* (2004) 117 CA4th 907, 12 CR3d 171.

Restitution. Restitution is discussed in §§38.19-38.21. Restitution orders are fully enforceable as civil judgments. Pen C §§1202.4(i), 1203(j), 1214(b).

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E. Judgment of Imprisonment to Satisfy Fine

§36.10 1. General Rule

If an offense is punishable by imprisonment as well as by fine, a judgment that the defendant pay a fine (with or without other punishment) may also direct that he or she be imprisoned until the fine is satisfied or, in the case of a judgment for payment in installments, that on default he or she be imprisoned either until the defaulted installment is satisfied or until the fine is satisfied in full. Pen C §1205. However, the court cannot imprison the defendant for defaulting unless the court provided at the time of sentencing that, on default of payment, the defendant could be imprisoned. 63 Ops Cal Atty Gen 418 (1980). The judgment may direct that any imprisonment for failure to pay begin at, and continue after, expiration of any imprisonment imposed as part of the punishment, or expiration of any other imprisonment to which the defendant may previously have been sentenced. Pen C §1205(a).

The defendant is entitled to credit toward any fine for any days spent in custody, at the rate of $30 per day or more, in the court's discretion. Pen C §2900.5(a). The term of imprisonment for the fine cannot exceed the term for which the defendant might be sentenced to jail for the offense. Pen C §1205. But if the applicable statute authorizes 6 months, $1000, or both, the defendant can be required to serve more than 6 months in jail. See *People v Lein* (1928) 204 C 84, 266 P 536; *In re Erdmann* (1891) 88 C 579, 26 P 372; *People v Pera* (1918) 36 CA 292, 295, 171 P 1091. The maximum confinement time cannot exceed 1 year. Pen C §19.2.

The sentencing court must set the date of a defendant's admission to and release from custody before sentencing, and the total number of days to be credited to the defendant's sentence, according to statute. The number of days credited must be specified in the abstract of judgment. Pen C §2900.5(d).

If the applicable statute provides for punishment by fine only, the court cannot order the defendant imprisoned on default of payment. See Pen C §1205(a). See also Pen C §19.6 (infractions not punishable by imprisonment) and §36.13 of this book.

Willful failure to pay a fine as a condition of probation may be punished as a violation of probation. Pen C §1214.2.

See Veh C §42003 on imprisonment and fines in Vehicle Code cases.

See §§37.70-37.71 on presentence and other credits for Division of Juvenile Justice confinements; see §36.11 on indigent defendants. Restitution is discussed in §§38.19-38.21.

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§36.11 2. Application to Indigent

The court violates equal protection by imprisoning an indigent defendant for failure to pay a fine and penalty assessment when that failure results solely from indigency. *In re Antazo* (1970) 3 C3d 100, 115, 89 CR 255. See also *In re Siegel* (1975) 45 CA3d 843, 120 CR 8, overruled on other grounds in *People v Romero* (1994) 8 C4th 728, 35 CR2d 270 (court order imprisoning indigent attorneys for failure to pay contempt fine reversed because no hearing held on attorneys' claims of indigency). But see *People v Lawson* (1999) 69 CA4th 29, 37, 81 CR2d 283. In *Lawson,* a welfare fraud case, the court distinguished *Antazo* and rejected the defendant's claim of equal protection violation. The defendant, a nonindigent, was sentenced to prison for willful failure to pay $21,226 in restitution as a condition of probation when she had the means to pay.

However, if an indigent is given an option comparable to that offered to an offender who is not indigent (*e.g.,* the opportunity to pay the fine in installments or to do specified work to satisfy the fine), and he or she refuses or fails to meet the conditions of the alternative, his or her indigency "ceases to be dispositive and he may, consistently with the mandate of the equal protection clause, be relegated to 'working out' his fine by imprisonment." *In re Antazo* (1970) 3 C3d 100, 116, 89 CR 255. See also *Tate v Short* (1971) 401 US 395, 28 L Ed 2d 130, 91 S Ct 668; *Williams v Illinois* (1970) 399 US 235, 244 n21, 26 L Ed 2d 586, 595 n21, 90 S Ct 2018; *In re Fry* (1971) 19 CA3d 177, 181, 96 CR 418 (error, on revocation of probation, to imprison indigent for failure to pay fine without first giving him alternative to imprisonment).

Whether the defendant is indigent is a fact to be determined by the trial judge at a hearing. *People v Lewis* (1971) 19 CA3d 1019, 97 CR 419. See Veh C §42003 on imprisonment and fines in Vehicle Code cases. A flexible standard should be applied. Examples of items the court may consider are amount of income; bank accounts; ownership of a home, car, or other property; the number of dependents; basic living expenses for the defendant and his or her dependents; and the amount of the fine. 19 CA3d at 1023.

In determining indigence, the court need not allow the defendant to prefer his or her creditors to the obligation to the state for payments of the fine, nor must it allow the defendant the same standard of living to which he or she has become accustomed. If the court finds that the defendant's indigence is partial or temporary, it may order him or her to pay a fine in installments or within a specified period of time. 19 CA3d at 1024.

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§36.12 3. Application to Person Under 21

Under Welf & I C §1735, if a person under age 21 fails to pay a fine, the court may either refrain from imposing the fine in whole or in part or (unless he or she is indigent) commit the defendant to jail for the length of time authorized in the statutes relating to imprisonment to satisfy a fine (*e.g.,* Pen C §1205; Veh C §42003(b)). If the court orders the defendant imprisoned, the place of confinement must be approved by the Division of Juvenile Justice. On Vehicle Code infractions, see §36.14.

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§36.12A F. Civil Assessments

The court may impose a civil assessment of up to $300 against a defendant who fails to appear after notice and without good cause, or who fails to pay all or any portion of a fine ordered by the court or to pay an installment of bail as agreed under Veh C §40510.5. Pen C §1214.1(a). Section 1214.1(e) sets out the procedures to be followed in imposing the assessment.

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§36.13 VII. INFRACTIONS

Infractions are not punishable by imprisonment. Pen C §19.6. A defendant may not be imprisoned to satisfy an infraction fine. See Pen C §1205(a) (limits such imprisonment to "the term for which the defendant might be sentenced to imprisonment for the offense"); 63 Ops Cal Atty Gen 418 (1980) (courts can enforce a judgment of fine for an infraction only by same means available for enforcing civil judgments). A defendant charged with an infraction is not entitled to a jury trial (Pen C §19.6) and is not entitled to appointed counsel if he or she is "released on his or her written promise to appear,… own recognizance, or a deposit of bail." Pen C §19.6.

Generally, the maximum fine for any infraction is $250 (Pen C §19.8), with certain exceptions. A conviction of an infraction is not grounds for suspension of "any license, or for the revocation of probation or parole."

Most infraction fines are subject to the penalty assessment provisions of Pen C §1464. See §36.9.

The court can grant probation or suspend sentence in infraction cases. Pen C §1203b.

If the defendant consents, the trial court may reduce the misdemeanors named in §19.8 (see list in §6.32) to infractions. Pen C §17(d). Petty theft, a misdemeanor not listed in §19.8, can also be charged as an infraction (Pen C §490.1) if the property taken is valued at $50 or less. The court can reduce a misdemeanor to an infraction only if the reduction is authorized by the legislature. *People v Dibacco* (2004) 117 CA4th Supp 1, 4, 12 CR3d 258 (trial court acted in excess of jurisdiction when it reduced reckless driving to infraction). If the prosecutor has charged the offense as a misdemeanor, the trial court cannot convert it to an infraction at sentencing over the prosecutor's objection. *People v Campbell* (2002) 104 CA4th Supp 1, 129 CR2d 601.

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VIII. VEHICLE CODE VIOLATIONS

§36.14 A. Infraction Violations of Vehicle Code

Unless a different penalty is specifically provided (see, *e.g.,* Veh C §§21712, 42001(a)-(d), 42001.19, 42001.25), an infraction violation of the Vehicle Code (or of any local ordinance adopted under the Code) is punishable by a maximum fine of $100 for the first offense, $200 for the second offense within 1 year, and $250 for a third offense. Veh C §42001(a). A Vehicle Code violation that would otherwise be an infraction becomes a misdemeanor if the defendant has been convicted of three or more violations within the year preceding the current offense, and the defendant admits the priors or they are alleged in the accusatory pleading and proved at trial. Veh C §40000.28.

Unless otherwise ordered, a fine is payable immediately. However, the judgment may provide for the fine to be paid within a specified time or in specified installments. A judgment that grants a defendant time to pay must order him or her to appear in court on the due date for further proceedings if he or she fails to pay the fine. Veh C §42003(a). If the defendant fails to pay the fine or any installment or an installment of bail as agreed under Veh C §40510.5, the court may impound or limit his or her driver's license for up to 30 days. Veh C §40508(d).

A willful violation of the order to appear is punishable as contempt (Veh C §42003(a)), and a willful failure to pay the fine is a misdemeanor (Veh C §40508(b)-(c)). Both are punishable by imprisonment in the county jail.

The court has the authority to place a defendant convicted of a Vehicle Code infraction on probation. See Pen C §1203b. In appropriate cases, the court can also require the defendant to attend traffic school (see §36.17) and can suspend his or her driver's license (see Veh C §§13200-13202.8).

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§36.15 B. Misdemeanor Violations of Vehicle Code

Unless a different penalty is expressly provided, each person convicted of a misdemeanor under the Vehicle Code is punishable by a maximum $1000 fine, a maximum 6 months' jail term, or both. Veh C §42002. A judgment imposing a fine may provide that it be paid within a limited time or in specified installments, but unless that direction is given, the fine is payable immediately. Pen C §1205. If a defendant requests a 24-hour suspension of the execution of a jail sentence, it must be granted unless the judge determines that the defendant would fail to appear to serve the sentence. Veh C §42004.5.

Some Vehicle Code misdemeanors can be reduced to infractions at sentencing, under Pen C §17. Reducible misdemeanors include engaging in a speed exhibition (Veh C §23109(c)); driving without a license (Veh C §12500); driving with suspended or revoked license (Veh C §14601.1); selling nonregulation exhaust systems (Veh C §27150.1); failure to appear (Veh C §40508); and failure to attend traffic school (Veh C §42005). See Pen C §19.8. Offenses that can be charged or sentenced as misdemeanors or infractions are also discussed in §§6.32, 24.10, 36.13-36.14.

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§36.16 C. Imprisonment to Satisfy Vehicle Code Fine

If a misdemeanor Vehicle Code violation is punishable by imprisonment as well as by fine, a judgment ordering a convicted defendant to pay a fine may also order that he or she be imprisoned until the fine is satisfied. Veh C §42003(b). The judgment must specify the length of the imprisonment, which cannot exceed 1 day for every $30 of the fine or extend in any case beyond the term for which the defendant might be sentenced for the offense. Veh C §42003(b). On application of this provision to an indigent, see §36.11.

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§36.17 D. Traffic School

The court may order or permit a person convicted of any traffic violation, whether an infraction or a misdemeanor, to attend a school for traffic violators. Veh C §42005(a). A defendant who willfully fails to comply with this order is guilty of a misdemeanor. Veh C §§40000.25, 42005. See also *Fischler v Municipal Court* (1965) 233 CA2d 780, 43 CR 882 (state's power to require traffic school attendance does not abridge freedom of speech and assembly).

Persons ordered to attend traffic school can choose the school they wish to attend. Veh C §42005.

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IX. CONCURRENT AND CONSECUTIVE SENTENCES

§36.18 A. Judgment Should Specify Whether Terms Are Concurrent or Consecutive

If sentences are concurrent, they run together during the time that the periods overlap. *In re Roberts* (1953) 40 C2d 745, 255 P2d 782.

When sentences are served consecutively, the later sentence begins on termination of the earlier. Pen C §669; *People v Carr* (1936) 6 C2d 227, 57 P2d 489.

A separate sentence must be pronounced on each count that results in a conviction. See Pen C §12; *People v Morrow* (1969) 275 CA2d 507, 514, 80 CR 75. Whenever a defendant is convicted of two or more crimes in the same or different proceedings, the terms of imprisonment on the second or subsequent judgments run concurrently to the first unless the court expressly imposes consecutive sentences. Pen C §669; *In re Patton* (1964) 225 CA2d 83, 36 CR 864. The court must, in effect, issue a separate order for a consecutive sentence. *People v Caudillo* (1980) 101 CA3d 122, 161 CR 293. Separate sentences of a fine or a fine with imprisonment to satisfy payment, however, are not concurrent if the judgment fails to specify that they are to be concurrent. 34 Ops Cal Atty Gen 290 (1959).

In sentencing for multiple misdemeanor convictions, the judge can impose consecutive sentences for separate offenses even though the resulting jail term exceeds 1 year. See Pen C §19.2; *People v Haendiges* (1983) 142 CA3d Supp 9, 191 CR 785 (court affirmed consecutive misdemeanor sentences that totaled 4 years and 3 months, on basis of former Pen C §19a, predecessor to Pen C §19.2). When alternate felony/misdemeanor offenses are charged as misdemeanors, however, consecutive sentences may not exceed the statutory maximum term of confinement for those crimes if charged as felonies. *People v Powell* (1985) 166 CA3d Supp 12, 212 CR 454.

A ruling that sentences should run consecutively is part of the judgment (see Pen C §669) and must be certified by the clerk or the judge to the officer executing the judgment (Pen C §§1213-1213.5). A rubber-stamped impression on the certificate of judgment designating the sentence as consecutive has no effect if the record does not show that it represents an order or judgment of the court. *In re Taube* (1947) 78 CA2d 142, 177 P2d 329.

When a defendant is convicted of two (or more) offenses in separate court proceedings, the second court has the authority to decide whether to sentence concurrently or consecutively. Pen C §669. This is not true if execution of sentence was suspended on the first case. The legislature intended to "exclude from consecutive sentence those cases in which defendant is on probation, at the California Rehabilitation Center, or otherwise is not subject to imprisonment if the pronounced judgment is affirmed on appeal or otherwise becomes final." *People v Gray* (1986) 176 CA3d 520, 523, 222 CR 29; see *People v Todd* (1994) 22 CA4th 82, 85, 27 CR2d 276.

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B. Determining Sentences to Be Consecutive

§36.19 1. Factors to Consider

In determining whether sentences should run consecutively, the judge may properly consider "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial." *People v Morales* (1967) 252 CA2d 537, 547, 60 CR 671. The judge may also take into consideration his or her belief, based on the record, that the defendant committed perjury. *People v Redmond* (1981) 29 C3d 904, 913, 176 CR 780 (used to support upper term). In addition, the court may impose consecutive sentences following a defendant's refusal of probation. *People v Giminez* (1975) 14 C3d 68, 120 CR 577 (trial court did not abuse its discretion in imposing consecutive sentences on felony defendant who had been offered, but refused, probation conditioned on warrantless search and seizure). It is improper, however, to impose consecutive sentences as a penalty for pleading not guilty and demanding a jury trial, even though the judge concludes that the defense was frivolous or presented in bad faith. *People v Morales* (1967) 252 CA2d 537, 545, 60 CR 671.

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§36.20 2. Receipt of Evidence

If the trial judge decides to receive evidence in determining whether to impose a consecutive or concurrent sentence, Pen C §1204, which requires the testimony of witnesses in open court on the issue of mitigation or aggravation of sentence, applies. See §35.18 for discussion of §1204. See *In re Calhoun* (1976) 17 C3d 75, 130 CR 139 (prosecutor's letter improper); *People v Neal* (1950) 97 CA2d 668, 676, 218 P2d 556 (error for court to violate §1204 by considering prosecutor's unsubstantiated remarks relating to defendant's alleged criminal background without receiving evidence on question).

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§36.21 C. Time Limit on Correction

If the court, either through ignorance of a prior judgment or otherwise, fails at the time of sentence to determine how successive judgments shall run in relation to each other, it may determine in the defendant's absence that they shall run consecutively, as long as (Pen C §669):

- The prior judgment or the court's failure to determine is brought to the court's attention within 60 calendar days after the defendant's imprisonment or second or other subsequent judgment; and
- The court makes the determination within 60 calendar days after receiving notice.

Such a determination then becomes part of the judgment and must be certified as provided in Pen C §§1213-1213.5 (see §36.18). *In re Taube* (1947) 78 CA2d 142, 177 P2d 329. However, §669 does not authorize the sentencing court to deliberately defer its decision on whether to impose consecutive or concurrent sentences. *In re Calhoun* (1976) 17 C3d 75, 130 CR 139 (trial court mistakenly reserved jurisdiction at sentencing hearing under §669 to determine whether defendant should be sentenced consecutively or concurrently; defendant's sentences deemed concurrent).

After the applicable 60-day period lapses, the court is without authority to direct that the sentences run consecutively, and the terms must run concurrently. *People v Cowan* (1941) 44 CA2d 155, 163, 112 P2d 62.

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37

FELONY SENTENCING

MATTHEW C. BRANER

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I. OVERVIEW

§37.1 A. Chapter Highlights

This chapter discusses sentencing in felony cases, including those in which sentence is imposed but *execution* of sentence is suspended and probation is granted. On probation generally, including probation under Proposition 36 for persons convicted of nonviolent drug possession offenses, see chap 38.

Most felonies are punished under the Determinate Sentencing Law (DSL). See Pen C §1170. In *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, the U.S. Supreme Court held California's DSL unconstitutional under the Sixth and Fourteenth Amendments insofar as it permitted upper-term sentences to be based on facts found by the sentencing judge by a preponderance of the evidence rather than on facts found by the jury beyond a reasonable doubt. Following *Cunningham,* the legislature amended Pen C §1170(b), and the Judicial Council amended the California Rules of Court. The amendments remove most references to "upper," "middle," and "lower" terms. Rather than considering "facts" to elevate the middle term, the sentencing court is now directed to use its "sound discretion" to select one of the "three authorized terms." Cal Rules of Ct 4.420; Pen C §1170(b). The court must set forth its reasons for imposing any "term selected." Pen C §1170(b). For more discussion of *Cunningham* and the subsequent amendments, see §37.1A.

> Ø **Note:** After *Cunningham* and the amendments to Pen C §1170, defense counsel is strongly advised to object on Sixth Amendment grounds if the court appears to be using "facts" not found true by a jury or admitted by the defendant to increase a sentence above the statutory maximum.

There are two kinds of enhancements: those related to the crime (conduct enhancements, which are attached to specific counts) (see, *e.g.,* Pen C §§12022.5, 12022.7) and those related to recidivism (enhancements for priors, which are attached to the accusatory pleading as a whole) (see, *e.g.,* Pen C §§667(b), 667.5(b)). The court must impose all enhancements that have been pleaded and proved unless it has the authority to strike an enhancement in furtherance of justice under Pen C §1385. The court's authority to strike enhancements is discussed in §37.41. Some enhancements carry only a single term. Others permit the trial court to select one of three terms.

Prior convictions for serious or violent felonies may be alleged as enhancements under the DSL (Pen C §667(a)) and as "strikes" under the Three Strikes law. Pen C §§667(b)-(i), 1170.12. The Three Strikes law is an alternative sentencing scheme applicable when one or more prior serious felonies are alleged as "strikes." For discussion of enhancements for prior convictions, see §§37.31-37.32. Three strikes sentencing is discussed in §§37.33-37.33E.

If the trial court is imposing sentence for more than one offense, the court must select one term as the principal term (see §37.14) and, when concurrent sentencing is an option, must decide whether to sentence concurrently or consecutively. The rules for deciding between concurrent and consecutive sentences are discussed in §§37.16-37.30.

Imprisonment for "life" or for a term of years to life is an indeterminate sentence. Indeterminate sentencing is discussed in §37.4. Rules for combining determinate and indeterminate sentences are discussed in §37.38.

Sentencing hearings are discussed in §37.51. Other topics discussed in this chapter include the ban on using the same fact to support more than one sentencing choice (see §37.43), the limitation on multiple punishment imposed by Pen C §654 (see §§37.44-37.50); custody credits (see §§37.54-37.61); civil commitment for narcotics offenders (see §§37.63-37.66); commitments and transfers to the Division of Juvenile Justice (DJJ; formerly the California Youth Authority) (see §37.67-37.74); and alternative sentencing for pregnant women and mothers (see §37.75). Brief discussions of former sentencing rules are included when appropriate to assist counsel facing sentencing issues in cases involving offenses committed before the current rules were enacted. See, *e.g.,* §§37.3, 37.30. A glossary of common sentencing terms is in §37.5.

Other publications to consult on felony sentencing include the invaluable syllabus from the Sentencing for Felony Prosecutors Seminar, by the California District Attorneys Association. A computer sentencing program, *Crime Time,* is available from The Placer Group in Auburn, California, at (530) 885-0100. For developments in the Three Strikes law, the Attorney General distributes a regular case digest for its staff. See also Menaster & Ricciardulli, 3 Strikes Manual

(2003); Couzens & Bigelow, California Three Strikes Sentencing (2008).

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.1A B. Sentencing After Cunningham v California

§37.1A B. Sentencing After *Cunningham v California*

Under California's Determinate Sentencing Law (DSL) as it existed before March 30, 2007, a sentencing court imposing a determinate prison term was limited to imposition of the middle term prescribed for the offense "unless there [were] circumstances in aggravation or mitigation of the crime." Former Pen C §1170(b). Circumstances in aggravation justifying imposition of the upper term could be found by the sentencing judge by a preponderance of the evidence.

On January 22, 2007, in *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, the U.S. Supreme Court held that California's DSL violated a defendant's constitutional right to a jury trial under the Sixth and Fourteenth Amendments because the DSL's "sentence-elevating factfinding" could be based on facts found by the sentencing judge by a preponderance of the evidence, rather than on facts found by the jury beyond a reasonable doubt. 549 US at 274, 166 L Ed 2d at 864.

Cunningham overruled the California Supreme Court's decision to the contrary in *People v Black* (2005) 35 C4th 1238, 29 CR3d 740 (*Black I*), and invalidated the inconsistent portions of Pen C §1170(b) and Cal Rules of Ct 4.420(b). *Cunningham* left to the state how to remedy the DSL's constitutional defects. 549 US at 293, 166 L Ed 2d at 876.

Ø **Note:** The right to a jury trial under *Cunningham* does not apply to a fact admitted by the defendant or to the aggravating fact of a prior conviction. *People v Sandoval* (2007) 41 C4th 825, 836, 62 CR3d 588. See also *Cunningham,* 549 US at 274, 166 L Ed 2d at 864; *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348.

Following *Cunningham,* the legislature amended Pen C §1170(b), and the Judicial Council amended the California Rules of Court. The amendments eliminate the requirement that the court impose the middle term in the absence of facts in aggravation or mitigation. The statute now directs that when three possible terms of imprisonment are authorized, "the choice of the appropriate term shall rest within the sound discretion of the court." Pen C §1170(b). The court must select the term among the three that, "in the court's discretion, best serves the interests of justice." Pen C §1170(b). The court must set forth its *reasons* for imposing any "term selected" but is not required to make any findings of fact. Pen C §1170(b).

The California Supreme Court responded to *Cunningham* and subsequent legislative action in *People v Black* (2007) 41 C4th 799, 812, 62 CR3d 569 (*Black II*), and *People v Sandoval, supra*. In *Black II,* the supreme court held that the existence of a single factor in aggravation that did not violate the jury trial right (such as a prior conviction) was sufficient to uphold a pre-*Cunningham* upper-term sentence, even if the sentencing judge relied on other factors that it found true in actually imposing the upper term. *Black II, supra*. The court reasoned that one valid factor made the defendant eligible for the upper term; once eligibility was established, the sentencing court could consider any factors traditionally used by courts in exercising sentencing discretion to select the appropriate term from the triad.

In *People v Sandoval, supra,* the supreme court faced a case in which an upper-term sentence had been imposed without any aggravating factor having been found true in compliance with *Cunningham*. The court concluded that the case had to be remanded to the trial court for resentencing. Exercising its power to reform the sentencing statutes to avoid unconstitutionality, the court directed that sentencing proceedings held in cases remanded for *Cunningham* error were to be conducted consistent with the post-*Cunningham* legislative amendments to the DSL. 41 C4th at 846. In other words, the court held, the sentencing court "will be required to specify reasons for its sentencing decision, but will not be required to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances." 41 C4th at 846. The sentencing decision is subject to review for abuse of discretion. 41 C4th at 847.

For further discussion of *Black II* and *Sandoval,* see §37.9.

Ø **Practice tip:** Defense lawyers may challenge in federal court the application of *Sandoval* to a case that predates that decision as violating federal due process, since it would in effect be an ex post facto application of law. Note, however, in two recent cases the Ninth Circuit has found that the retroactive application of *Sandoval* violates neither ex post facto nor due process principles. *Butler v Curry* (9th Cir 2008) 528 F3d 624, 652 n20; *Chioino v Kernan* (9th Cir 2009) 581 F3d 1182, 1185.

Ø **Note:** Because of the large volume of post-*Cunningham* cases and the rapid rate of developments in this area, attorneys for both sides are strongly advised to keep abreast of cases that may have been decided since this volume went to press.

Felony sentencing after *Cunningham* remains a fertile ground for litigation. See §37.9. Probably the area of practice that will be least affected by *Cunningham* is plea bargaining. Since the decision in *Blakely v Washington* (2004) 542 US 296, 305, 159 L Ed 2d 403, 415, 124 S Ct 2531, on which *Cunningham* relies, most courts and prosecutors have been routinely requiring defendants to enter "*Blakely* waivers" as a part of plea negotiations. Like any other constitutional right, the right to a jury trial on the truth of facts in aggravation can be waived by a defendant to obtain a favorable plea bargain. Cases that are not settled by plea bargain have a number of possible outcomes. In some situations, the defendant admits or the jury necessarily makes findings that can be considered and used as circumstances in aggravation to impose the upper term. See, *e.g., People v Calhoun* (2007) 40 C4th 398, 53 CR3d 539, in which the California Supreme Court held that it was proper for the trial court to sentence the defendant in a vehicular manslaughter case to two upper terms on the ground that there were multiple victims even though there was only one victim for each count. The supreme court held that by finding the defendant guilty on multiple counts, the jury necessarily found that there were multiple victims. In addition, prior convictions and certain other enhancements that must be pleaded and proved at trial may be used as circumstances in aggravation if the additional punishment for the enhancement is not imposed. Cal Rules of Ct 4.420(c). See §37.43.

Some courts or prosecutors have experimented with alleging possible circumstances in aggravation in the accusatory pleading and requiring the jury to render special verdicts on those allegations.

Ø **Practice tip:** When proving the circumstances in aggravation requires the jury to hear evidence that ordinarily would be inadmissible at the guilt phase of the trial, this procedure may impinge on the defendant's right to a fair trial. Defense counsel should request bifurcation of the "trial" on the alleged circumstances in aggravation from the trial on the actual crimes with which the defendant is charged. See *People v Bracamonte* (1981) 119 CA3d 644, 650, 174 CR 191, disapproved on other grounds in *People v Calderon* (1994) 9 C4th 69, 80, 36 CR2d 333.

Finally, when alleged factors in aggravation have not been admitted by the defendant nor found true beyond a reasonable doubt by the jury, the sentencing court is limited to imposing a sentence no greater than the middle term.

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§37.2 II. IMPORTANT FELONY SENTENCING ISSUES

Changes in sentencing law. Sentencing is controlled by the statutes effective on the date of the commission of the crime. US Const art I, §10; Cal Const art I, §9; *People v Simpson* (1986) 186 CA3d 1125, 1127, 231 CR 200. Consequently, it is often necessary for attorneys to be aware of the effective dates of new sentencing legislation so that they can ascertain what sentencing rules were in effect at the time of the crime.

The DSL, as amended effective March 30, 2007 (see §37.1A), remains the basic sentencing law for most felonies. The Three Strikes law (Pen C §§667(b)-(i) (Stats 1994, ch 12, effective Mar. 12, 1994) and Pen C §1170.12 (Proposition 184, effective Nov. 9, 1994)) established a separate and much harsher sentencing scheme when a defendant convicted of a felony has one or more prior convictions for a serious or violent felony. Other significant changes in sentencing law since the adoption of the DSL include the following:

- Addition of a 5-year sentence enhancement for prior serious felony. Pen C §667(a).
- Limitation on plea bargaining when defendant is charged with serious felony, felony involving personal use of firearm, driving under the influence, or violent sex crime listed in Pen C §667.61(c). Pen C §1192.7(a).
- Limitation on custody credits for individual convicted of violent felony listed in Pen C §667.5(c) to 15 percent of "work time" credit. Pen C §2933.1 (Stats 1994, ch 713, effective Sept. 21, 1994).
- Elimination of the rule limiting the time imposed for enhancements in many cases to double the base term (Stats 1997, ch 750, effective Jan. 1, 1998).
- Abolition of the rule imposing a 5-year limit on subordinate terms for nonviolent offenses (Stats 1998, ch 926, effective Jan. 1, 1999).

This chapter attempts to provide some guidance for practitioners who need to address sentencing questions under superseded sentencing provisions. See, *e.g.,* §37.30. However, determining the answers to specific sentencing questions will still require the attorney to consult original sources of authority.

Case settlement. The prosecutor must be able to calculate minimum and maximum exposures to know how to charge a case or to structure possible settlements. If the defendant rejects a settlement offer, it may be necessary to have the court fully advise the defendant of the possible consequences of proceeding to trial. Failure to advise a defendant can lead to a reduction of sentence or even reversal of a subsequent conviction. See *In re Alvernaz* (1992) 2 C4th 924, 8 CR2d 713; *Alvernaz v Ratelle* (SD Cal 1993) 831 F Supp 790. It is equally crucial for defense counsel to determine a client's possible sentencing exposure in order to give the client competent legal advice in plea negotiations. See *In re Alvernaz, supra*. The most important consideration is usually the number of years involved, but other consequences may be important, *e.g.,* narcotic or sex offender registration requirements (see Pen C §290; Health & S C §11590; chap 35); restrictions on firearm possession (Pen C §12021); driver's license consequences (see Veh C §§23530-23598; chap 55); and the effect of the plea on a professional license (see chap 53) or on a noncitizen's immigration status (see chap 52).

Preparing for sentencing. The prosecutor must ensure that the judge complies with all requirements at the sentencing hearing (see §37.51, chaps 35, 38); sentencing errors are subject to reversal. In a complex case, such as one involving the Three Strikes law or the One Strike sex crime law, a sentencing memorandum can greatly assist the court in imposing a sentence that will survive appeal. Prosecutors should also consider adding a waiver of appeal as a condition of any negotiated settlement. Such waivers should be as detailed as possible. See, *e.g., People v Vargas* (1993) 13 CA4th 1653, 1660, 17 CR2d 445.

To preserve the defendant's right to appeal a sentencing error, defense counsel must object to any errors in the trial court's statement of reasons. See *People v Scott* (1994) 9 C4th 331, 348, 36 CR2d 627. A sentencing memorandum or statement in mitigation is of great value to the court. In cases in which a life term is mandatory, a sentencing memorandum or statement in mitigation is still important because it will become part of the packet of documents that accompanies the defendant to prison, and it may be the only document available to a future parole board documenting favorable aspects of the defendant.

Ø **Note:** For sentencing proceedings that took place before *Blakely v Washington* (2004) 542 US 296, 305, 159 L Ed 2d 403, 415, 124 S Ct 2531, a claim of sentencing error on *Cunningham-Blakely* grounds is not forfeited by counsel's failure to object at trial. *People v Black* (2007) 41 C4th 799, 811, 62 CR3d 569 (*Black II*). See chap 44.

Although this chapter is devoted to state prison sentencing issues, there are many crimes that permit lesser sentences. Defense counsel's role in pursuing alternatives is crucial. See discussion of alternatives to incarceration in chaps 38-39. When an alternative to state prison is sought, it is important that defense counsel prepare a thorough defense sentencing report.

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§37.3 III. CHART: DEADLINES

Action	Deadline	Authority
Probation report and recommendations to be made available to prosecutor and defense counsel.	At least 5 calendar days before sentencing hearing; on request, 9 calendar days before hearing.	Pen C §1203(b)(2)(E).
Statements in aggravation or mitigation may be filed.	At least 4 calendar days before sentencing hearing.	Pen C §1170(b).
Pronouncement of judgment in felony cases.	Within 20 judicial days after conviction (unless defendant waives time).	Pen C §1191.

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§37.4 IV. DETERMINATE SENTENCING VERSUS INDETERMINATE SENTENCING

All felons who are committed to state prison are given determinate terms under Pen C §1170, indeterminate terms under Pen C §1168(b), or a combination of determinate and indeterminate terms (see Pen C §669).

Determinate terms are fixed by the sentencing court according to the Determinate Sentencing Law (DSL). The DSL covers (1) felonies for which three specific terms of imprisonment are provided, (2) crimes declared to be felonies without a specified penalty, and (3) crimes simply made punishable by imprisonment in the state prison. The second and third categories of DSL felonies are punishable by 16 months (lower term), 2 years (middle term), or 3 years (upper term) in state prison. Pen C §18. Indeterminate terms, *i.e.,* life sentences with the possibility of parole, are not fixed by the court. Pen C §1168(b). The Board of Parole Hearings (BPH) is the parole authority that sets the parole dates for prisoners serving life sentences. See Pen C §§5075-5081, 3046. The administrative regulations governing parole are found in 15 Cal Code Regs, Div 2, Ch 3. Parole is discussed in chap 47. It is important to note that effective November 5, 2008, subsequent parole hearings for life inmates will normally be set *15 years* from the date of the previous hearing. Pen C §3041.5(b)(3). The list of crimes for which an indeterminate life term may be imposed is constantly growing. It includes murder (Pen C §§187, 190, 190.05); attempted willful, deliberate, and premeditated murder (Pen C §§187, 664(a)); certain gang offenses (Pen C §186.22(b)(4)); aggravated mayhem (Pen C §205); torture (Pen C §206); kidnapping for ransom or extortion (Pen C §209(a)); kidnapping for robbery or sex crime (Pen C §209(b)); kidnapping in the commission of a carjacking (Pen C §209.5); attempted murder of a government official (Pen C §217.1(b)); train wrecking (Pen C §219); assault to commit specified sex offense during commission of first-degree burglary (Pen C §220(b)); aggravated sexual assault of a child (see Pen C §269(b)); child molestation under Pen C §288 or §288.5 with specified priors (Pen C §667.51(c)); specified sexual conduct with child under age 10 (Pen C §288.7); certain aggravated sex offenses (Pen C §667.61) (One Strike law); assault by a life prisoner not resulting in death (Pen C §4500); use of a weapon of mass destruction (Pen C §11418(b)(1)); use of a weapon of mass destruction causing death (Pen C §11418(b)(2)); and exploding a destructive device causing mayhem or great bodily injury (Pen C §12310(b)). In addition, count-specific (conduct) enhancements may also result in indeterminate life sentences (see, *e.g.,* Pen C §12022.53(d) (25-year-to-life term for intentional discharge of firearm with great bodily injury)), as may enhancements for prior convictions or prison terms. See Pen C §§667(b)-(i), 1170.12 (indeterminate life term with 25-year minimum for conviction of felony with two or more serious or violent felony priors (Three Strikes)); Pen C §667.7(a), (a)(1) (life imprisonment with 20-year minimum parole ineligibility for conviction of specified offenses with two prior prison terms for specified offenses); Pen C §667.71 (25-year-to-life term for second conviction of specified sex offense); Pen C §667.75 (life imprisonment with 17-year minimum parole ineligibility for conviction of specified drug offenses involving minors with two or more prior prison terms for specified offenses). For discussion of the Three Strikes law, see §§37.33-37.33E.

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§37.5 V. TERMINOLOGY

Factors in aggravation. Facts that the court may consider in its "broad discretion in imposing one of three authorized prison terms." Cal Rules of Ct 4.405(4), 4.421.

Aggregate term. The total term of imprisonment, consisting of the sum of the principal term, the subordinate term(s), any term(s) imposed for prior conviction enhancements, and any term(s) for the on bail/O.R. (Pen C §12022.1) enhancement. Pen C §1170.1(a); *People v Tassell* (1984) 36 C3d 77, 90, 201 CR 567, overruled on other grounds in *People v Ewoldt* (1994) 7 C4th 380, 401, 27 CR2d 646.

Armed allegation. A conduct enhancement alleging defendant or an accomplice was armed, *e.g.,* Pen C §12022(a).

Base term. "[T]he determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed" for each felony on which the court imposes sentence. Cal Rules of Ct 4.405(2).

Conduct enhancement. A statutorily designated fact relating to the defendant's conduct during commission of the offense that, if found true, requires or permits a specific additional punishment added to the base term. Examples are armed allegations (Pen C §12022) and great bodily injury enhancements (Pen C §12022.7). Conduct enhancements are count-specific. See Pen C §§1170.1, 1170.11. For discussion, see §§37.11-37.13.

Dual use of facts. Using the same fact to justify more than one sentencing choice. In many situations, dual use of a fact is prohibited. For example, a court may not use an imposed enhancement to justify imposition of an upper base term. However, in other situations, dual (or even triple) use of a fact is permitted. See Pen C §1170(b); Cal Rules of Ct 4.420(c)-(d). See §37.43.

Enhancement. An additional prison term that is added to the base term. Cal Rules of Ct 4.405(3). Enhancements are generally of two types: conduct enhancements, which go to the nature of the offense (*e.g.,* Pen C §12022 series), and prior conviction or prison term enhancements (priors), which go to the nature of the offender's criminal record (*e.g.,* Pen C §667(a)).

Five-year limit on subordinate terms. Now-repealed rule (eliminated for offenses committed on or after January 1, 1999 (Stats 1998, ch 926)) that limited the total subordinate term for nonviolent felonies to a maximum of 5 years.

Full-term consecutive sentence; "full boat"; full-term stacking. A reference to a fully consecutive sentence for a subordinate term, rather than the usual one-third of the middle term. An example is multiple counts of forcible sex crimes, imposed under Pen C §667.6(c) or (d). See §§37.25-37.26.

GBI enhancement. A conduct enhancement alleging that the defendant inflicted great bodily injury, *e.g.,* Pen C §§12022.7-12022.8.

"Factors in mitigation." Factors that the court is permitted to consider in its "broad discretion in imposing one of the three authorized prison terms referred to in section 1170(b)," or factors that may justify the court in striking additional punishment for an enhancement when the court has discretion not to impose it. Cal Rules of Ct 4.405(5), 4.423. See §37.10.

One-third the middle-term rule. The general rule of consecutive felony sentencing that limits each consecutively imposed subordinate term to one-third of the middle term prescribed for the offense and any offense-related enhancements. Pen C §1170.1(a). Exceptions to this rule include full consecutive sentences for sex crimes under Pen C §667.6(c)-(d) and life-term counts subject to the Three Strikes law. See §37.18.

Penal Code §654 stay. A stay under Pen C §654, in which a single act may be punished only once, even if the act violates multiple statutes. See §§37.44-37.50.

Penal Code §1385 dismissal. A dismissal generally authorized under Pen C §1385(a) allowing the trial court, on its own motion, to order an action dismissed in furtherance of justice. The word "action" includes allegations relevant to sentencing. *People v Superior Court (Romero)* (1996) 13 C4th 497, 504, 53 CR2d 789. See §37.41. On the court's power to dismiss strikes under §1385, see §37.33D.

Principal term. The longest term (calculated by adding together the base term and any conduct enhancements) imposed for any count when consecutive terms are being imposed. Other counts become subordinate to this term when

stacked. Pen C §1170.1(a). On calculating the principal term, see §§37.8-37.14.

Prior (status enhancement). An allegation that the defendant suffered a qualifying prior conviction or prison term before committing the crime charged. Under the DSL, these enhancements attach to the defendant, not to individual counts, and are added only once per judgment. Pen C §1170.1; *People v Tassell, supra*. See §§37.33-37.34A. This limitation does not apply to multiple indeterminate third- or second-strike sentences imposed under the Three Strikes law. *People v Williams* (2004) 34 C4th 397, 402, 19 CR3d 619; *People v Misa* (2006) 140 CA4th 837, 845, 44 CR3d 805 (Pen C §667(a) prior serious felony enhancements must be imposed on every count); *People v Garcia* (2008) 167 CA4th 1550, 1561, 85 CR3d 155 (Pen C §667.5(b) prior prison term enhancements must be imposed or stricken on every count).

Sentence choice. The selection of any disposition of the case other than a dismissal, acquittal, or grant of a new trial. See Cal Rules of Ct 4.405(6).

Serious felony. A felony listed in Pen C §1192.7(c) or §1192.8. A person convicted of a serious felony receives a 5-year enhancement for each prior conviction of a serious felony that was brought and tried separately. Pen C §667(a). A person convicted of a felony with one or more prior serious felony convictions is subject to the Three Strikes law, discussed in §§37.33-37.33E.

Stack. To make consecutive, as in stacked or consecutive prison terms. See Cal Rules of Ct 4.425.

Statement of reasons. The statement made by the court to comply with the requirement that it "state the reasons for its sentence choice on the record at the time of sentencing." Pen C §1170(c). See Cal Rules of Ct 4.406. One reason for this requirement is to avoid prohibited dual use of facts in choosing punishment. *People v Jackson* (1987) 196 CA3d 380, 388, 242 CR 1. See also "Dual use of facts," above. Another reason is to ensure that the court has recognized each sentencing option available to it in imposing sentence. See §37.51.

Stay. A temporary suspension in a case until the occurrence of a defined contingency. If sentence on a count must be stayed, any enhancement for that count must also be stayed. *People v Santana* (1986) 182 CA3d 185, 190, 227 CR 51. Sentences subject to Pen C §654 are stayed. On service of the unstayed term, the stay becomes permanent. See P*eople v Beamon* (1973) 8 C3d 625, 640, 105 CR 681.

"Strike." A prior conviction of a serious felony listed in Pen C §§1192.7(c) and 1192.8 or a violent felony listed in Pen C §667.5(c) that is alleged under Pen C §§667(b)-(i) and 1170.12 (the Three Strikes law). A single strike doubles the base term for the new offense and is referred to as a "second strike" case; two or more strikes result in an indeterminate sentence of at least 25 years to life. Such a case is known as a "third strike" case. See §§37.33-37.33E.

Subordinate term. A count plus its related enhancements that is "stacked" or made consecutive to the principal term.

Suspended sentence. A suspension of either imposition or execution of sentence in which the court chooses to grant probation rather than send the convicted defendant to prison. Generally, the court suspends imposition of sentence and grants probation. This option means no prison term is selected or imposed, and leaves all sentencing options open should the defendant violate probation. A court may impose a prison sentence, suspend the execution of the sentence, and place a defendant on probation. Pen C §1203.1. This usually occurs in cases in which the decision to grant probation was a very close call. An "execution suspended" grant of probation is generally chosen to let the defendant know that he or she is already sentenced to prison, and a probation violation will probably result in the execution of the already imposed sentence. When imposition of sentence is suspended and sentence is therefore not pronounced after a conviction by trial, the trial judge still must identify and state on the record circumstances that would justify imposing one of the three authorized terms if probation is later revoked. Cal Rules of Ct 4.433(b).

Use enhancement. A conduct enhancement alleging that the defendant used a specified weapon. See Pen C §§12022(b), 12022.3, 12022.5, 12022.53.

Violent felony. A felony listed in Pen C §667.5(c). A prior conviction for a violent felony is a "strike" and makes the defendant subject to punishment under the Three Strikes law. Before January 1, 2001, a subordinate term for a felony conviction could be enhanced by one-third of any conduct enhancement only if the subordinate term was for a violent felony. Former Pen C §1170.1(a). Credits are limited to 15 percent for a defendant convicted of a violent felony. Pen C §2933.1.

Ø **Note:** In nearly all cases, a violent felony is also a "serious felony" under Pen C §§1192.7(c) and 1192.8. See §§37.33-37.33E.

Washout. A provision in, *e.g.,* Pen C §667.5(a)-(b), §667.7(b), or §1210.1(b)(1) that nullifies or "washes out" the punishment effect of a prior when the defendant has been "clean" (free of prison custody and commission of a new felony) for a specified period, *e.g.,* "5-year washout," "10-year washout."

Wobbler. A crime that may be punished as either a misdemeanor or a felony, also known as an "alternative felony/misdemeanor." See Pen C §17(b). On reduction of a felony to a misdemeanor, see §8.40.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/ VI. DETERMINATE SENTENCING/§37.6 A. Structure of Typical DSL Sentence: Two Formulas

VI. DETERMINATE SENTENCING

§37.6 A. Structure of Typical DSL Sentence: Two Formulas

A typical DSL prison sentence calculation involves up to four steps. First, a *base term* is chosen. The *base term* is one of three terms specified by the statute for the crime charged. These three terms are commonly called the lower, middle, and upper terms. For further discussion of base term, see §§37.5, 37.8-37.10. Second, any *count-specific (conduct) enhancements* that were pleaded and found true are added to the base term. An enhancement does not define a crime but provides additional punishment if the crime is committed in specified circumstances. See Cal Rules of Ct 4.405(3). The total of the base term plus any conduct enhancements is the *principal term*. Third, if the defendant is being sentenced on additional counts, and if the sentencing judge chooses (or is required) to impose one or more additional terms consecutively, all "subordinate" terms, plus any count-specific enhancements that attach to them, are added together. Finally, the terms for enhancements that attach to the judgment as a whole, *i.e.,* enhancements for prior convictions or prison terms (Pen C §§667(b), 667.5(b)), or the "on bail" enhancement (Pen C §12022.1), are added to the principal and subordinate terms to arrive at the *aggregate term* or final sentence.

If the defendant is convicted of more than one crime, one of them must be chosen for the *principal term*; the other counts are either made concurrent or figured as *subordinate terms,* discussed below. If there are multiple counts, the principal term is the count that results in the longest term after the court chooses the appropriate term (mitigated, middle, or aggravated) *and adds applicable specific (conduct) enhancements.* Pen C §1170.1(a). The court may need to determine the base term and enhancements for each count to see which results in the longest term. That count then becomes the principal term.

If there is more than one count, and all counts are to run consecutively, the "one-third rule" of §1170.1(a) is applied to the counts that are made consecutive to the principal term to produce the subordinate terms. Each subordinate term may be enhanced with applicable specific (conduct) enhancements, also subject to the one-third rule.

Sentencing formulas

Formula One (figured for count chosen for principal term):

Base term (lower, middle, or upper term)
+ Conduct enhancements

_____

= Principal term

Formula Two (when there is more than one count):

Principal term
+ Any subordinate terms + enhancements (figured as described below)
+ Any priors
+ Any Pen C §12022.1 enhancement

_____

= Aggregate term

To figure the subordinate term for *each* subordinate count in cases not involving sex crimes or strikes (see §37.16A):

Mid term × 1/3
+ Conduct enhancements × 1/3

_____

= Subordinate term

Ø **Note:** Sentencing for sex crimes is discussed in §§37.25-37.27, and 37.34-37.34A. The Three Strikes

sentencing scheme is discussed in §§37.33-37.33E.

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§37.7 1. Checklist: Sentencing Limitations [Deleted]

The material in this section has been moved to §37.30.

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B. Formula One: Base Term Plus Conduct Enhancements Equals Principal Term

1. Base Term

§37.8 a. Selecting One of Three Authorized Terms

When prison is imposed for a DSL crime, the judge must select one of three statutorily authorized terms or "time periods" for each count. Pen C §1170(b); Cal Rules of Ct 4.420. Courts and practitioners often refer to these terms or time periods as "lower," "middle," and "upper" terms. The selection of the appropriate term rests within the "sound discretion of the trial court," and the court shall select the term that, in the court's discretion, "best serves the interests of justice." The selected term is called the base term. The parties may agree to use a particular term as the base term, subject to court approval. Pen C §1192.5.

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§37.9 b. Upper Term

***Cunningham v California*.** As discussed above (see §37.1A), in *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, the U.S. Supreme Court held that California's Determinate Sentencing Law (DSL) violated a defendant's Sixth Amendment right to trial by jury insofar as it permitted the imposition of sentences above the statutorily prescribed maximum (midterm) based on facts found by the sentencing judge by a preponderance of the evidence rather than on facts found by the jury beyond a reasonable doubt. See also *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348.

Penal Code §1170(b) now provides that when a statute specifies three possible terms, the selection of the appropriate term rests within the "sound discretion of the trial court," and the court shall select the term that, in its discretion, "best serves the interests of justice." See also *People v Pham* (2009) 180 CA4th 919, 103 CR3d 366. The trial court must state on the record the reasons for imposing the term selected. Pen C §1170(b); Cal Rules of Ct 4.420(e). Amended rules still provide that the sentencing judge may consider circumstances in aggravation or mitigation and "any other factor reasonably related to the sentencing decision" when determining which term to impose under Pen C §1170(b) (Cal Rules of Ct 4.420(b)); the rules also provide a list of criteria that the court may consider in aggravation (Cal Rules of Ct 4.421). The judge may rely on any number of aggravating circumstances in imposing the upper term so long as the defendant is eligible for the upper term by virtue of facts that have been established according to Sixth Amendment requirements (*i.e.,* either admitted by the defendant or found true by a jury beyond a reasonable doubt). *People v Sandoval* (2007) 41 C4th 825, 838, 62 CR3d 588. See *People v Hamlin* (2009) 170 CA4th 1412, 1469, 89 CR3d 402 (prejudicial error to impose upper term, since appellate court could not conclude jury would have found circumstances true beyond a reasonable doubt). For additional discussion, see §37.1A.

Facts admitted by defendant. After *Cunningham,* a judge may use a fact admitted by the defendant to elevate a sentence above the statutory maximum authorized by a jury's verdict. *Sandoval,* 41 C4th at 835. Aggravating factors admitted by the defendant need not be tried by a jury. *People v Landaverde* (2007) 157 CA4th 28, 34, 68 CR3d 261. A plea of no contest and stipulation to a factual basis for the plea with the understanding that the defendant will receive a sentence within an agreed-upon maximum (*i.e.,* pleading "open") does not, per se, constitute an admission to aggravating factors. *People v French* (2008) 43 C4th 36, 48, 73 CR3d 605 (defendant retains opportunity to litigate court's choice of sentence at sentencing hearing). See *In re Jonathan T.* (2008) 166 CA4th 474, 483, 82 CR3d 753 (minor's stipulation to police report as basis for plea is not admission to specific facts contained within).

Prior convictions. The right to a jury trial and proof beyond a reasonable doubt does not apply to the "aggravating fact of a prior conviction." *Sandoval,* 41 C4th at 836. See also *Cunningham v California* (2007) 549 US 270, 274, 166 L Ed 2d 856, 864, 127 S Ct 856; *People v Wilson* (2008) 164 CA4th 988, 992, 79 CR3d 631. The exception for prior convictions is known as the *Almendarez-Torres* exception. See *People v Towne* (2008) 44 C4th 63, 75, 78 CR3d 530. There is a split of authority as to whether the upper term can be imposed on the basis of misdemeanor convictions that were not raised by the court as a ground for imposing the upper term. Compare *People v Stuart* (2008) 159 CA4th 312, 314, 70 CR3d 920 (defendant's six unmentioned misdemeanor convictions qualified as an aggravating circumstance which justified imposition of upper term), with *People v Cardenas* (2007) 155 CA4th 1468, 1480, 66 CR3d 821 (reliance on court-found facts of "planning and sophistication" and defendant's unmentioned prior misdemeanor convictions was *Cunningham* error requiring remand for resentencing). Prior juvenile adjudications, like adult convictions, can be used to increase the term of a sentence without the need for a jury to find the adjudication beyond a reasonable doubt. *People v Quiles* (2009) 177 CA4th 612, 620, 99 CR3d 378. See also *People v Nguyen* (2009) 46 C4th 1007, 95 CR3d 615 (no constitutional ban to using juvenile adjudication as strike prior).

Probation, parole, and prior prison term. Prior prison terms, status as a probationer or parolee at the time of the commission of the offense, and poor performance on probation or parole are "recidivism-related" aggravating factors. Cal Rules of Ct 4.421(b). The California Supreme Court has ruled that the federal constitutional right to a jury trial and proof beyond a reasonable doubt on aggravating circumstances do not extend to the circumstance that a defendant was on probation or parole at the time of the offense or has served a prior prison term. *People v Towne* (2008) 44

C4th 63, 79, 78 CR3d 530. Judicial determination of these factors does not require factfinding on the charged offense. 44 C4th at 81. See also *People v Medrano* (2008) 161 CA4th 1514, 1520, 74 CR3d 907. The Ninth Circuit, however, holds otherwise. See *Butler v Curry* (9th Cir 2008) 528 F3d 624, 647 (prior conviction exception does not extend to defendant's probationary status at time of instant offense).

When poor performance on probation or parole can be established only by facts other than that the defendant was convicted of offenses while on probation or parole, the right to a jury trial on those facts applies. *Towne,* 44 C4th at 83.

One constitutionally valid aggravating fact sufficient to impose upper term. In *People v Black* (2007) 41 C4th 799, 812, 62 CR3d 569 (*Black II*), the California Supreme Court held that, after *Cunningham,* the upper term may be imposed as long as one aggravating circumstance rendering a defendant eligible for the upper term has been established in accordance with *Blakely*'s constitutional jury trial requirements. If this requirement is met, "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." See also *Rita v U.S.* (2007) 551 US 338, 168 L Ed 2d 203, 127 S Ct 2456 ("This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence"); *People v Towne* (2008) 44 C4th 63, 86, 78 CR3d 530 (because other aggravating factors rendered defendant eligible for upper term, judge's consideration of conduct underlying offenses for which defendant was acquitted did not implicate constitutional right to jury trial). The *Black II* court found that two validly imposed aggravating circumstances justified the defendant's upper term: the jury's finding of the defendant's use of force during the charged crime of sexual abuse, and the defendant's criminal history. The court of appeal opined in a later case that as long as the trial court "relied on at least one proper factor, its reliance upon other factors was not error." *People v Landaverde* (2007) 157 CA4th 28, 34, 68 CR3d 261 (court's reliance on defendant's admission of continuous sexual abuse of a child was not *Cunningham* error). See §37.1A.

Statements in aggravation. A statement in aggravation must be filed at least 4 days before the sentencing hearing. Pen C §1170(b). A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a "greater term" of imprisonment. Cal Rules of Ct 4.420(d). The court is also prohibited from using a fact charged and proved as a conduct enhancement to impose an upper term. Pen C §1170(b); Cal Rules of Ct 4.420(c). However, if the court has discretion to strike the punishment for such an enhancement and does so, it may still use that fact or conduct to impose the upper term. Such use is an adequate reason for striking the additional term of imprisonment. Cal Rules of Ct 4.420(c).

Error requires remand for new sentence. In *People v Sandoval* (2007) 41 C4th 825, 836, 62 CR3d 588, the California Supreme Court ruled that the remedy for Sixth Amendment error under *Cunningham* is remand to the trial court for resentencing under one of the three available terms provided under the post-*Cunningham* amended sentencing statutes. See *People v Lincoln* (2007) 157 CA4th 196, 202, 68 CR3d 596; *People v Cardenas* (2007) 155 CA4th 1468, 1480, 66 CR3d 821. See also *Chioino v Kernan* (9th Cir 2009) 581 F3d 1182 (district court erred in reducing habeas petitioner's sentence instead of remanding to state court for resentencing). *Cunningham* applies retroactively to any case in which the judgment was not final at the time the decision in *Blakely* was issued. *In re Gomez* (2009) 45 C4th 650, 88 CR3d 177.

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§37.10 c. Lower Term

Selection of the lower term is justified if the sentencing judge deems it appropriate in his or her discretion after considering circumstances in aggravation and mitigation. Cal Rules of Ct 4.420(b). See also Pen C §1170(b). California Rules of Court 4.423 provides a list of criteria the sentencing judge may consider in determining which term should be imposed. The judge may apply additional criteria not enumerated in Rule 4.423 if they are reasonably related to the judge's decision. Cal Rules of Ct 4.408(a); *People v Covino* (1980) 100 CA3d 660, 670, 161 CR 155. The court must state on the record its reasons for imposing the selected term. Cal Rules of Ct 4.420(e).

The "dual use" prohibition discussed in §37.43 does not apply to circumstances in mitigation; thus, the circumstances in mitigation found in Rule 4.423 can be used to impose the mitigated term as the base term and to strike the additional punishment prescribed for an enhancement.

Circumstances in mitigation can be found in the case record, the probation officer's report, other reports and statements properly received, statements in mitigation, and any other evidence introduced at the sentencing hearing. Pen C §1170(b); see Cal Rules of Ct 4.420(b). Defense counsel should seriously consider filing a statement in mitigation to marshal for the court's consideration all facts that could convince the court to impose the lower term. A sentencing court generally knows very little about a defendant and how he or she came to stand before the court convicted of a felony. It is defense counsel's job to tell the court the sympathetic circumstances of the defendant's life to counteract any circumstances in aggravation and possibly convince the court that mitigating circumstances outweigh other circumstances. A statement in mitigation must be filed at least 4 days before the sentencing hearing. Pen C §1170(b).

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2. Conduct (Specific) Enhancements

§37.11 a. Description

Penal Code §1170.1(a) provides, in part, "The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements." The phrase "specific enhancement," as used in Pen C §1170.1, refers to enhancements that relate to the circumstances of the offense. See Pen C §1170.11.

Ø **Note:** The phrase "specific enhancement" was apparently used in the DSL to distinguish these types of enhancements, which relate to the circumstances of the charged offense and attach to specific counts of the accusatory pleading, from "general" enhancements, such as enhancements for prior convictions, which relate to the offender and attach to the accusatory pleading as a whole. See *People v Lawson* (1980) 107 CA3d 748, 753 n6, 165 CR 764. The phrase "conduct enhancement" is also sometimes used to describe these enhancements. When not quoting the statutory language, this chapter will use "conduct enhancements" or "count-specific enhancements" to refer to these enhancements.

All enhancements must be specifically alleged, and proved or admitted. Pen C §1170.1(e). For any conduct enhancement that potentially increases the defendant's punishment beyond the statutory maximum for the crime, due process requires the prosecution to prove the facts on which the enhancement relies beyond a reasonable doubt and entitles the defendant to a jury verdict. *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348. When three possible terms are specified for an enhancement, the court must, in its discretion, impose the term that best serves the interests of justice, unless the court uses the discretion conferred by Pen C §1385 to strike the enhancement. The court must state reasons for its choice of term for the enhancement. Pen C §1170.1(d). The court's choice of sentence for enhancements is independent from its choice for the base term. *People v Keeton* (1992) 10 CA4th 1125, 1133, 13 CR2d 155 (court properly selected lower term as base term and middle term as enhancement).

Ø **Note:** Selection of the upper term for an enhancement with a three-point range raises the same issues of Sixth Amendment jury trial right under *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, as does selection of the upper term for the substantive offense. *People v Lincoln* (2007) 157 CA4th 196, 205, 68 CR3d 596. Although the legislature amended Pen C §1170 after *Cunningham,* the legislature did not enact similar amendments to §1170.1(d) or any other section providing for an enhancement with three possible terms. See Advisory Committee Comment to Cal Rules of Ct 4.405. For discussion, see §37.1A.

Penal Code §654 may apply to enhancements. See discussion in §37.49. Under Pen C §1385, the court has the power to strike any enhancement unless specifically prohibited by statute. For discussion, see §37.41.

A chart containing a list of conduct enhancements, with their terms, is in §37.13. See also Pen C §1170.11.

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§37.12 b. Statutory Limitations on Terms of Conduct Enhancements

Current law. Penal Code §1170.1(a), as amended by Stats 1997, ch 750, (applicable to crimes committed on or after January 1, 1998), provides in part, "The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific [conduct] enhancements." There is no limitation on the number of conduct enhancements that can be alleged. However, when two or more enhancements for using or being armed with a firearm or deadly weapon in the commission of a single offense are found true, only the greatest can be imposed. Pen C §1170.1(f); *People v Rodriguez* (2009) 47 C4th 501, 508, 98 CR3d 108 (error to impose both Pen C §§12022.5(a) and 186.22(b)(1) enhancements). When two or more enhancements may be imposed for great bodily injury *on the same victim,* only the greatest can be imposed. Pen C §1170.1(g); *People v Gonzalez* (2009) 178 CA4th 1325, 101 CR3d 135 (imposition of both Pen C §§12022.7(a) and 186.22(b)(1)(C) enhancements violates §1170.1(g)).

The number of enhancements that may be imposed for certain specified forcible sex crimes may not be limited, must be full and separately served, and may not be merged with any term or with any other enhancement. Pen C §1170.1(h). Those sex crimes include forcible rape and spousal rape, rape in concert, forcible child molestation, forcible penetration with foreign object, forcible sodomy, and forcible oral copulation. All of these sex crimes are also subject to fully consecutive sentencing under Pen C §667.6(c)-(d). See §§37.25-37.26.

Pre-1998 law. For a discussion of pre-1998 limitations on conduct enhancements attached to the principal term as well as other sentencing limitations that still apply in older cases, see §37.30.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.13 c. Chart: Conduct Enhancements

§37.13 c. Chart: Conduct Enhancements

This chart is intended to be comprehensive, but it should not be considered a substitute for the attorney's own research of current primary sources. Citations are to the Penal Code unless otherwise indicated. See also Pen C §1170.11 (defining "specific enhancement").

Section	Description	Term
§186.10(c)(1)	Money laundering	1 to 4 years, depending on amount involved
§186.11(a)(1)	White collar crime:	
§186.11(a)(2)	Taking or loss of over $500,000	2, 3, or 5 years in addition to any §12022.6 enhancement
§186.11(a)(3)	Taking or loss of $100,000 to $500,000	1 or 2 years, depending on amount, as specified in §12022.6
§186.22(b)	Commission of felony in furtherance of criminal street gang activity:	

Notes: Expert testimony about possible reasons for committing a crime is insufficient, alone, to establish that a crime was committed with the specific intent to promote, further, or assist the gang. *People v Ramon* (2009) 175 CA4th 843, 850, 96 CR3d 459. See also *People v Ochoa* (2009) 179 CA4th 650, 102 CR3d 108.

There is no requirement that the criminal conduct "to assist the gang" be distinct from the charged offense, or that the evidence establish specific crimes with which the defendant intended to assist the gang. *People v Vazquez* (2009) 178 CA4th 347, 354, 100 CR3d 351 (disagreeing with *Briceno v Scribner* (9th Cir 2009) 555 F3d 1069).

§186.22(b)(1)(A)	Any felony	2, 3, or 4 years
§186.22(b)(1)(B)	Serious felony under §1192.7(c)	5 years
§186.22(b)(1)(C)	Violent felony under §667.5(c)	10 years

The enhancements imposed by §186.22(b)(1) are not applicable to crimes punishable by life terms. Instead, such offenses are subject to the 15-year restriction on parole specified in §186.22(b)(5). *People v Lopez* (2005) 34 C4th 1002, 22 CR3d 869.

§186.22(b)(4)(B)	Home invasion robbery, carjacking, violation of §246 or §12022.55 (Not an enhancement, this section creates a new sentencing scheme, similar to Three Strikes law; see §37.34A)	Life sentence, minimum term set as the *greater* of 15 years or the term under §1170, including conduct enhancements

Note: A defendant subject to life under Pen C §186.22(b)(4) for a violation of Pen C §246 has committed a "felony punishable by imprisonment for life," triggering application of the 20-year enhancement under Pen C §12022.53(c). *People v Jones* (2009) 47 C4th 566, 98 CR3d 546.

§186.22(b)(4)(C)	Felony extortion or threats to victims or witnesses (Not an enhancement, this section creates a new sentencing scheme, similar to Three Strikes law; see §37.34A)	Life sentence, minimum term set as the *greater* of 7 years or the term under §1170, including conduct enhancements
§186.22(b)(5)	Felony punishable by life	No parole for 15

		calendar years

Notes: Pen C §186.22(b)(5) applies only when the felony by its own terms provides for a life sentence. *People v Montes* (2003) 31 C4th 350, 352, 2 CR3d 621 (crime subject to additional punishment under Pen C §12022.53(d) is not "felony punishable by imprisonment for life" within meaning of §186.22(b)(5)).

Penal Code §1192.7(c)(28), which adds felony violations of §186.22 to the list of serious felonies that can be used as strikes, includes any felony that was enhanced by a criminal street gang enhancement under §186.22(b)(1). *People v Briceno* (2004) 34 C4th 451, 460, 20 CR3d 418. Although §186.22(b)(1) can elevate any gang-related felony to a "serious" felony (see Pen C §1192.7(c)(28)), it is impermissible bootstrapping to impose a separate 5-year enhancement for the same conduct under §186.22(b)(1)(B). 34 C4th at 465. See also *Lopez v Superior Court* (2008) 160 CA4th 824, 831, 72 CR3d 929 (applying *Briceno,* it is impermissible to use same gang-related conduct to both violate court injunction and enhance misdemeanor to wobbler under §186.22(d)). A misdemeanor conviction punished as a felony under §186.22(d) is not a serious felony for the purposes of Pen C §1192.7(c)(28). *People v Ulloa* (2009) 175 CA4th 405, 413, 95 CR3d 905.

§186.26(d)	Solicitation of a minor to participate in criminal street gang for commission of specified felonies	3 years
§186.33(b)	Commission of specified felony after failure to register as member of criminal street gang	16 months, 2 or 3 years
§192.5(e)	Fleeing scene of vehicular manslaughter involving vessel	5 years
§213(a)(1)(A)	Robbery in concert within an inhabited dwelling house or vessel. See *In re Jonathan T.* (2008) 166 CA4th 474, 482, 82 CR3d 753	3, 6, or 9 years
§273.4(a)	Felony child abuse consisting of female genital mutilation	1 year
§289.5(d)	Commission of specified sex offense after having fled to this state to avoid prosecution for registrable offense	2 years
§290.4(c)(1)	Use of information about registered sex offender, disclosed under §290.4, to commit any felony	5 years
§290.45(e)	Use of information about registered sex offender, disclosed under §290.45, to commit any felony	5 years
§290.46(j)(2)	Use of information about registered sex offender, disclosed under §290.46, to commit any felony	5 years
§347(a)(2)	Use of poison in committing specified crimes causing GBI	3 years
§368(b)	Elder or dependent adult abuse:	
§368(b)(2)(A)	Causing GBI, victim under 70	3 years
§368(b)(2)(B)	Causing GBI, victim 70 or over	5 years
§368(b)(3)(A)	Causing death, victim under 70	5 years
§368(b)(3)(B)	Causing death, victim 70 or over	7 years
§422.75(a)	Felony hate crime, not punished	1, 2, or 3 years

	under §422.7	
§422.75(b)	Hate crime in concert, not punished under §422.7 or §422.75(a)	2, 3, or 4 years

Note: Penal Code §422.75 also authorizes imposition of an enhancement for prior hate crime convictions. See Pen C §422.75(d).

§451.1(a)	Arson with any of the following:	3, 4, or 5 years
	Injury to police or firefighter (§451.1(a)(2))	
	Causing GBI to more than one victim (§451.1(a)(3))	
	Causing multiple structures to burn (§451.1(a)(4))	
	Use of accelerant or delayed ignition (§451.1(a)(5))	
§452.1(a)	Felony conviction of §452 with any of the following:	1, 2, or 3 years
	Injury to police or firefighter (§452.1(a)(2))	
	GBI to more than one victim (§452.1(a)(3))	
	Causing multiple structures to burn (§452.1(a)(3))	
§550(g)	Staged accident with serious bodily injury to nonaccomplice	2 years per victim
§550(i)	Staged accident in designated auto insurance fraud crisis area	Fines doubled
§593a(b)	Tree spiking with injury to nonaccomplice	3 years
§600(c)	Intentional death or serious injury to police horse or dog	1 year
§600(d)	Intentional GBI to human in course of injury to police horse or dog	2 years
§667.8(a)	Kidnapping for purpose of committing designated sex crime (when defendant convicted of sex crime)	9 years
§667.8(b)	Kidnapping victim under 14 for purpose of committing designated sex crime (when defendant convicted of sex crime)	15 years
§667.85	Kidnapping child under 14 to permanently deprive parent or legal guardian of custody	5 years
§667.9(a)	Specified crimes against elderly, disabled, or victim under age of 14	1 year
§667.15	Exhibiting to minor material showing minor engaged in sexual conduct:	
§667.15(a)	In commission or attempted commission of §288	1 year
§667.15(b)	In commission or attempted commission of §288.5	2 years

§667.16(a)	Felony forged check, grand theft, or false pretenses to defraud victim of natural disaster	1 year
§667.17	Impersonating police officer in commission of any felony	1 year
§670(a)	Conviction of violating Bus & P C §§7158-7159, 7161(b)-(e); or Pen C §470, §484, §487, or §532 after natural disaster	Fines doubled
§674(a)	Conviction of primary care provider in day care facility of violating §261, §285, §286, §288, §288a, or §289	2 years
§674(b)	Conviction of primary care provider in day care facility of violating §§261, 285, 286, 288, 288a, 289 in concert	3 years
§675	Conviction of violating §261.5(c) or (d); §286(b)(2) or (c)(1); §288(a) or (c)(1); or §288a(b)(1) or (b)(2) or (c)(1) with minor for money or other consideration	1 year
§12021.5(a)	Individual armed with firearm during street gang crime	1, 2, or 3 years
§12021.5(b)	Individual armed with firearm and specified magazine during street gang crime	2, 3, or 4 years
§12022(a)(1)	Defendant is principal in felony in which any principal is armed with any firearm	1 year
§12022(a)(2)	Defendant is principal in felony in which any principal is armed with assault weapon or machine gun	3 years

Note: Defendant who has firearms and drugs present at the same location is subject to enhancement under §12022(a)(2), even if defendant is not present when those items are discovered. *People v Bland* (1995) 10 C4th 991, 43 CR2d 77.

§12022(b)(1)	Defendant is principal in felony or attempted felony in which deadly or dangerous weapon is used	1 year
§12022(b)(2)	Defendant is principal in carjacking or attempted carjacking in which deadly or dangerous weapon is used	1, 2, or 3 years
§12022(c)	Defendant is personally armed with firearm in commission of specified Health & S C offenses	3, 4, or 5 years
§12022(d)	Defendant is principal in §12022(c) offense and knows that another principal is armed with firearm	1, 2, or 3 years
§12022.2(a)	Possession of metal-piercing or armor-piercing ammunition while armed with firearm during commission or attempted commission of felony	3, 4, or 10 years
§12022.2(b)	Wearing body vest in commission or attempted commission of violent	1, 2, or 5 years

	offense	
§12022.3(a)	Defendant uses firearm or deadly weapon in commission or attempted commission of specified sex crimes	3, 4, or 10 years

Notes: The term "in the commission of" is broadly construed. A Pen C §12022.3(a) enhancement was properly imposed when defendant displayed a knife to the victim after the completion of the sex offense. *People v Jones* (2001) 25 C4th 98, 107, 104 CR2d 753.

For purposes of a §12022.3 enhancement, "firearm" includes any firearm, whether loaded or unloaded. See *People v Steele* (1991) 235 CA3d 788, 286 CR 887.

§12022.3(b)	Defendant is armed with firearm or deadly weapon in commission or attempted commission of specified sex crime	1, 2, or 5 years
§12022.4	Furnishing firearm to commit felony	1, 2, or 3 years
§12022.5(a)	Personal use of firearm in commission or attempted commission of felony	3, 4, or 10 years
§12022.5(b)	Personal use of assault weapon or machine gun in commission or attempted commission of felony	5, 6, or 10 years

Notes: Effective January 1, 2003, the court may not strike a §12022.5 allegation or finding. Pen C §12022.5(c). The §12022.5 enhancement must be imposed for any violation of §245 involving a firearm and for specified drive-by shootings when a death is involved, even if the use of a firearm is an element of the offense. Pen C §12022.5(d).

A Pen C §12022.53 enhancement in addition to a greater term of punishment under §186.22(b)(4) is improper unless the defendant personally discharged the firearm in the commission of the offense. *People v Brookfield* (2009) 47 C4th 583, 590, 98 CR3d 535.

§12022.53(b)	Personal use of firearm in commission or attempted commission of specified violent offenses, whether or not firearm is loaded or operable	10 years
§12022.53(c)	Intentional, personal discharge of firearm in commission or attempted commission of specified violent offenses	20 years
§12022.53(d)	Intentional, personal discharge of firearm in commission or attempted commission of specified violent offenses that proximately causes GBI to or death of nonaccomplice	25 years to life

Notes: After a trial court imposes punishment for the §12022.53 firearm enhancement with the longest term of imprisonment (see §37.12), the remaining §12022.53 firearm enhancements and any §12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed. *People v Gonzalez* (2008) 43 C4th 1118, 1130, 77 CR3d 569; *People v Warner* (2008) 166 CA4th 653, 659, 82 CR3d 911; *People v Ybarra* (2008) 166 CA4th 1069, 1089, 83 CR3d 340.

Section 12022.53(d) adds two more offenses to the list in §12022.53(a). The §12022.53(d) enhancement is not cruel and unusual punishment. *People v Martinez* (1999) 76 CA4th 489, 90 CR2d 517. The §12022.53(d) enhancement may be imposed even when the defendant has been sentenced to life without the possibility of parole on the underlying felony. *People v Shabazz* (2006) 38 C4th 55, 66, 40 CR3d 750. A §12022.53(d) enhancement may be imposed even though the injury is not a bullet wound. *People v Zarazua* (2008) 162 CA4th 1348, 1361, 77 CR3d 29 (death of child due to car accident with fleeing vehicle); *People v Palmer* (2005) 133 CA4th 1141, 35 CR3d 373 (injury was broken ankle sustained as result of victim's evasive action). A §12022.53(d) enhancement should not be used both to establish the minimum of a life

term under §186.22(b)(4)(A) and as a separate enhancement of that term. *People v Sok* (2010) 181 CA4th 88, 97, ___ CR3d ___.

With multiple victims, enhancement may be added to counts in which a victim was uninjured. *People v Oates* (2004) 32 C4th 1048, 12 CR3d 325. However, when there is a single victim and a single crime, only one §12022.53(d) enhancement can be imposed for each defendant even though there are multiple perpetrators. *People v Cobb* (2004) 124 CA4th 1051, 1056, 21 CR3d 869. When a murder occurs in the course of multiple robberies, *all* counts are subject to §12022.53(d) enhancements. *People v Mason* (2002) 96 CA4th 1, 115 CR2d 359.

Section 12022.53 applies to *all* principals when a §186.22(b) (street gang enhancement) is pleaded and proved and *any* principal meets specified conditions (Pen C §12022.53(e)(1)) but bars imposition of the parole limitation under §186.22(b)(5) on anyone but the principal who personally used or discharged the firearm (Pen C §12022.53(e)(2)). *People v Gonzalez* (2010) 180 CA4th 1420, 1425, 103 CR3d 878. When a §186.22(b) enhancement is proved, the actual shooter need not be convicted for this enhancement to be applied to an aider and abettor. *People v Garcia* (2002) 28 C4th 1166, 1174, 124 CR2d 464.

Whenever an enhancement specified in §12022.53 has been admitted or found true, punishment according to its provisions must be imposed rather than punishment authorized under any other provision of law, unless another enhancement provides for greater punishment. Pen C §12022.53(j); *People v Sinclair* (2008) 166 CA4th 848, 853, 83 CR3d 128.

Section 12022.53(j) does not permit the court to impose greater punishment by combining enhancement provisions (*e.g.*, Pen C §186.22(b)(1)(C) with §12022(a)(1)). *Sinclair,* 166 CA4th at 853.

§12022.55	Intentionally causing GBI or death by discharging firearm from motor vehicle during commission or attempted commission of felony	5, 6, or 10 years
§12022.6(a)	Taking, damage to, or destruction of property during commission or attempted commission of felony	1 to 4 years, depending on $ amount of loss
§12022.7(a)	Personal infliction of GBI on nonaccomplice in commission or attempted commission of felony	3 years

Notes: Imposition of the §12022.7 enhancement does not require proof that the defendant intended to cause GBI. See Stats 1995, ch 341, §1 (effective January 1, 1995). The enhancement applies to virtually every felony not specifically listed as an exception. *People v Sainz* (1999) 74 CA4th 565, 88 CR2d 203 (permitting GBI enhancement for conviction of violating Veh C §23153 (DUI with injury)).

§12022.7(b)	GBI causing coma or permanent paralysis	5 years

Note: This enhancement applies whether the coma is permanent or not; "permanent" modifies only paralysis. *People v Galvan* (2008) 168 CA4th 846, 854, 85 CR3d 776.

§12022.7(c)	GBI, victim 70 or older	5 years
§12022.7(d)	GBI, victim under 5 years old	4, 5, or 6 years
§12022.7(e)	GBI in case involving domestic violence	3, 4, or 5 years
§12022.75(a)	Administration of controlled substance against victim's will to commit felony	3 years
§12022.75(b)	Administration of controlled substance to commit sex offense specified in §12022.75(b)(2)	5 years
§12022.8	GBI in commission of specified sex offenses *or attempts*	5 years

§12022.85(a)	Specified sex offenses while knowingly HIV infected	3 years
§12022.9	Intentional infliction of injury terminating pregnancy in commission or attempted commission of felony	5 years
§12022.95	Child abuse resulting in death	4 years
§12072(g)(4)	Providing firearm to minor or other prohibited person, when used in commission of felony	1, 2, or 3 years
§12280(a)(2)	Furnishing assault weapon to minor	1 year
§12280(d)	Committing crime while violating §12280 (possession, etc. of assault weapon)	1 year
Health & S C §1522.01(c)	Use of sex offender registration information disclosed under Health & S C §1522.01 in commission of any felony	5 years
Health & S C §11353.1(a)	Employment of minor in commission of drug offenses specified in Health & S C §11353:	
Health & S C §11353.1(a)(1)	On or in church or synagogue, playground, youth center, day care facility, or pool	1 year
Health & S C §11353.1(a)(2)	On or within 1000 feet of school	2 years
Health & S C §11353.1(a)(3)	When minor is at least 4 years younger than defendant	1, 2, or 3 years
Health & S C §11353.4(b)	Health & S C §11353 conviction involving minor 14 or younger with prior conviction for Health & S C §11353	1, 2, or 3 years
Health & S C §11353.6	Sale, possession for sale, or manufacturing of cocaine base, heroin, or methamphetamine by individual 18 years or older:	
Health & S C §11353.6(b)	On or within 1000 feet of school	3, 4, or 5 years
Health & S C §11353.6(c)	Involving minor at least 4 years younger than defendant	3, 4, or 5 years
Health & S C §11356.5(a)	Health & S C §11351, §11352, §11379.5 or §11379.6 (PCP) conviction when defendant induced another to violate one of these sections	1 to 3 years, depending on $ value of transaction
Health & S C §11370.4(a)	Possession for sale or sale of heroin, cocaine base, or cocaine	3 to 25 years, depending on quantity involved
Health & S C §11370.4(b)	Possession for sale or sale of methamphetamine, amphetamine, or PCP	3 to 15 years, depending on quantity involved
Health & S C §11379.7	Manufacturing methamphetamine or PCP or possession with intent to manufacture of specified chemical precursors of methamphetamine or PCP:	
Health & S C §11379.7(a)	With child under 16 present	2 years
Health & S C	With GBI to child under 16	5 years

§11379.7(b)		
Health & S C §11379.8(a)	Quantity enhancement for manufacture of or conspiracy to manufacture PCP, PCP precursors, PCP analogs, amphetamine, or methamphetamine	3 to 15 years, depending on quantity involved
Health & S C §11379.9(a)	Possession of precursors with intent to manufacture, or manufacture of methamphetamine or PCP that causes death or GBI to nonaccomplice	1 year
Health & S C §11380.1(a)	Health & S C §11380 conviction involving PCP, methamphetamine, amphetamine, or LSD:	
Health & S C §11380.1(a)(1)	On or within church or synagogue, playground, youth center, day care facility, or pool	1 year
Health & S C §11380.1(a)(2)	On or within 1000 feet of a school	2 years
Health & S C §11380.1(a)(3)	Involving minor at least 4 years younger than defendant	1, 2, or 3 years
Health & S C §25189.5(e)	Disposal of hazardous waste with GBI or substantial probability of death	1, 2, or 3 years
Health & S C §25189.7(c)	Burning of hazardous waste with GBI or substantial probability of death	1, 2, or 3 years
Veh C §20001(c)	Flight from scene of specified vehicular manslaughter	5 years

Note: In *People v Calhoun* (2007) 40 C4th 398, 53 CR3d 539, the supreme court held that a defendant convicted of gross vehicular manslaughter as an accomplice is subject to a Vehicle Code §20001(c) enhancement.

Veh C §23558	Felony DUI with GBI or vehicular manslaughter with injuries to multiple victims	1 year per victim; maximum 3 years
Veh C §23566(c)	Felony DUI with GBI and 4 priors within 10 years	3 years, in addition to Health & S C §23566(b) sentence
Welf & I C §10980(h)	Food stamp fraud by electronic transfer of benefits	1 to 4 years, depending on $ amount involved
Welf & I C §14107(d)	Medical fraud in circumstances likely to or that do cause GBI or serious bodily injury to two or more persons; one enhancement for each person injured	4 years per injured victim

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.14 3. Principal Term

§37.14 3. Principal Term

The *principal term* is the greatest term imposed and consists of the sum of the *base term* (see §§37.8-37.10) plus any term for *specific (conduct) enhancements* (see §§37.11-37.13).

Ø **Example:**

Base term: Pen C §211	5 years (upper term)
+ Conduct enhancement: Pen C §12022(b)(1)	1 year
= Principal term:	6 years

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C. Formula Two: Principal Term Plus Subordinate Term(s) Plus Prior(s) Plus Pen C §12022.1 Equals Aggregate Term

1. Rules Applicable to Consecutive Sentences

§37.15 a. Description of Subordinate Term [Deleted]

Material formerly in this section has been moved to §37.16A.

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§37.16 b. Imposing Consecutive Terms

When the defendant is convicted of more than one count, the sentencing court must first determine whether the proscription in Pen C §654 against multiple punishment for the same act requires a stay of imposition of sentence on any count. Cal Rules of Ct 4.424. See §§37.44-37.50.

For counts not subject to §654, the sentencing judge has discretion to order that the terms be served either concurrently or consecutively unless the legislature has mandated consecutive terms. Pen C §669. But see, *e.g.,* Pen C §667.6(d), mandating consecutive terms for specified sex crimes committed on separate occasions or involving separate victims. The defendant is not entitled to a jury trial on the imposition of consecutive sentences. See *Oregon v Ice* (2009) ___ US ___, 172 L Ed 2d 517, 526, 129 S Ct 711 (decision whether to impose consecutive sentences not historically within province of jury; instead, specifying scheme for administering multiple sentences is within prerogative of state legislatures); *People v Black* (2007) 41 C4th 799, 820, 62 CR3d 569 (*Black II*) (whether to sentence consecutively is decision made by judge after jury has made the factual findings necessary to subject defendant to statutory maximum on each offense and does not implicate Sixth Amendment right to trial on elements of offense.

The criteria the court may consider in deciding whether to impose consecutive or concurrent sentences are listed in Cal Rules of Ct 4.425. These criteria are not exclusive. See Cal Rules of Ct 4.408(a). See, *e.g.*, *People v Caesar* (2008) 167 CA4th 1050, 1061, 84 CR3d 663, disapproved on other grounds by *People v Superior Court (Sparks)* (2010) 48 C4th 1, 18, ___ CR3d ___ (naming separate victims in separate counts is circumstance on which court may impose consecutive sentences). The imposition of consecutive sentences, unless it is mandatory, requires a statement of reasons. Pen C §1170(c); Cal Rules of Ct 4.406(b)(5); *People v Tillotson* (2007) 157 CA4th 517, 545, 69 CR3d 42. The court does not fulfill its obligation to state reasons by simply incorporating by reference aggravating factors listed in the probation report. *People v Turner* (1978) 87 CA3d 244, 247, 150 CR 807. The court may, however, use the same reason to justify more than one consecutive term. *People v Fernandez* (1990) 226 CA3d 669, 682 n9, 276 CR 631. California Rules of Court 4.425(b) states that consecutive sentences may not be imposed by the use of:

- A fact used to impose the upper term;
- A fact used to otherwise enhance the defendant's prison sentence; or
- A fact that is an element of the crime.

When a court imposes sentence on a second or subsequent offense without specifying whether the term is to run concurrently with or consecutively to the first judgment, it will run concurrently by operation of law. Pen C §669. On DSL sentencing in multiple cases, whether in the same proceeding or court or in different proceedings or courts, see §37.37.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.16A c. Calculating Aggregate Term When Consecutive Sentences Imposed

§37.16A c. Calculating Aggregate Term When Consecutive Sentences Imposed

When consecutive sentences for different counts are imposed under Pen C §1170.1(a), the count (including its conduct enhancements) for which the court imposes the greatest punishment is designated the *principal term*; counts made consecutive to it are *subordinate terms*. Pen C §1170.1(a). In concurrent sentencing cases, all counts run together. See discussion in §37.16.

When sentencing consecutively, the court is not required to select the count with the greatest available sentencing triad for determining the principal term. Under Pen C §1170.1, the court must designate as the principal term the longest of the terms (base term plus conduct enhancements) that the court actually imposes, not necessarily the longest term available under the applicable sentencing triads. *People v Miller* (2006) 145 CA4th 206, 215, 51 CR3d 421. For example, if two counts are to be sentenced consecutively, one with a triad of 16 months, 2 years, or 3 years, and the other with a triad of 2 years, 3 years, or 4 years, either count may be selected for determining the principal term depending on the length of the base term of punishment (lower, middle, or upper) actually imposed by the court.

Miller seems to suggest that so long as the base term of a count selected by the court is longer than one-third the middle term of another count, the sentencing is lawful. For example, if the court selected the low term of 16 months from the lower triad as the principal term and imposed 1/3 the middle of 3 years from the higher triad as the subordinate term, this would be lawful because 16 months is longer than 1 year.

In most cases, the one-third of the middle-term rule of Pen C §1170.1(a), discussed in §37.18, requires that subordinate terms for consecutive counts be punished at one-third of the middle term of each count. Conduct enhancements attached to subordinate counts are added at one-third of the term specified for the enhancement. If the enhancement has more than one term (*e.g.,* Pen C §12022.5; 3-4-10 years for use of firearm), the court must choose, in its discretion, the term that best serves the interest of justice. It then imposes one-third of the selected term. Pen C §1170.1(d). See also *People v Sandoval* (1994) 30 CA4th 1288, 36 CR2d 646.

Ø **Note:** Special rules in this area, *e.g.,* for multiple kidnappings and forcible sex offenses, are described in detail in §§37.21-37.28.

Pre-2001 law. Sentences for nonviolent felonies committed before January 1, 2001, are still governed by former Pen C §1170.1(a), which provided that additional terms for conduct enhancements were not to be included in the subordinate term for an offense not listed as a violent felony in Pen C §667.5(c) on that date. See §37.30.

Subordinate term example, maximum sentence. Defendant convicted of three separate crimes: robbery with a firearm, residential burglary with over $50,000 taken, and unlawful driving of a vehicle:

(1) Calculation of principal term:

Base term (Count One): Pen C §211	5 years (upper term)
+ Conduct enhancement: Pen C §12022.5	10 years (upper term); the upper term for this enhancement may not be imposed without a jury trial on the aggravating factors or an admission. *People v Lincoln* (2007) 157 CA4th 196, 205, 68 CR3d 596.
= Principal term:	15 years

(2) Calculation of subordinate terms:

Count Two: Pen C §459 (1/3 × mid term of 4 years) =	1 year, 4 months
Conduct enhancement: Pen C §12022.6 (1/3 × 1 year) =	4 months
Count Three: Veh C §10851	

(1/3 × mid term of 2 years) =	8 months
Aggregate term (principal term + subordinate terms):	17 years, 4 months

Ø **Note:** Although the crime of robbery (Pen C §211, 2-3-5 years) carries a smaller term than does residential burglary (Pen C §459, 2-4-6 years), robbery is chosen as the principal term because robbery plus firearm enhancement results in a greater principal term than does burglary plus excessive taking enhancement. Because count one was designated as the principal term, counts two and three are the subordinate terms. See Pen C §1170.1(a); Cal Rules of Ct 4.425.

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§37.17 d. Calculating Consecutive Terms

The law provides three basic consecutive sentence formulas (and their variations). In ascending order of punitive effect, they are the basic one-third subordinate term formula (discussed in §37.18), full middle term stacking (see §§37.21-37.23), and full-term stacking (see §§37.24-37.28).

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§37.18 (1) One-Third of Middle Term for Crime Plus One-Third of Specific (Conduct) Enhancements

In most situations, the trial court has discretion under Pen C §§669 and 1170.1(a) and Cal Rules of Court 4.425 to sentence multiple counts concurrently or consecutively. If the court chooses consecutive sentences, the sentence for each consecutive term is one-third the middle term plus one-third the term specified for any specific (conduct) enhancements (see Pen C §1170.11) applicable to that count. Exceptions to this rule are discussed in §§37.21 (multiple kidnapping), 37.22 (witness threats), 37.23 (witness intimidation), 37.24 (voluntary manslaughter), 37.25-37.27 (forcible sex offenses), and 37.33-37.33E (strikes). For an enhancement with a triad of terms (*e.g.,* 3-4-10 years), the court is not limited to the middle term. It may impose one-third of *any* of the terms for an enhancement to a subordinate term. Pen C §1170.1(d). See also *People v Sandoval* (1994) 30 CA4th 1288, 36 CR2d 646. If the court chooses the upper or lower term for the enhancement, it must state on the record the reasons for its sentence choice. Pen C §1170.1(d). In determining what term to impose for an enhancement, the court is not limited to factors related to that enhancement in selecting the lower, middle, or upper term. *People v Hall* (1994) 8 C4th 950, 35 CR2d 432. On the impact of *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, on judicial fact-finding in sentence choice, see §37.1A.

Ø **Note:** If an enhancement is for an indeterminate term (*e.g.,* 25 years to life for Pen C §12022.53(d)), it is *not* subject to the one-third the middle-term rule of Pen C §1170.1; the enhancement is imposed in full. *People v Mason* (2002) 96 CA4th 1, 14, 115 CR2d 359.

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§37.19 (2) Old Law: No Enhancements to Nonviolent Subordinate Terms [Deleted]

The material formerly discussed in this section has been moved to §37.30.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.20 (3) Old Law: Multiple Residential Burglaries, Residential Robberies, Residential Arsons, and Robberies With Use of Deadly Weapon (Former Pen C §1170.95) [Deleted]

§37.20 (3) Old Law: Multiple Residential Burglaries, Residential Robberies, Residential Arsons, and Robberies With Use of Deadly Weapon (Former Pen C §1170.95) [Deleted]

The material formerly discussed in this section has been moved to §37.30.

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(4) Full-Term Consecutive Sentences

§37.21 (a) Multiple Kidnappings (Pen C §1170.1(b))

Current law. The subordinate term for multiple kidnapping is the full middle term; the enhancements for any subordinate kidnapping terms are the full term chosen for any of the specific (conduct) enhancements listed in Pen C §1170.11. Pen C §1170.1(b). The "one-third the middle term" rule does not apply.

For offenses committed before 1998, see former Pen C §§1170.1(b) and (g); *People v Eddahbi* (1988) 199 CA3d 1135, 1142, 245 CR 330.

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§37.22 (b) Witness Threats (Pen C §1170.13)

Current law. Under Pen C §1170.13, the subordinate term for a violation of Pen C §139(b) (threat to victim or witness) must be a full middle term. All the other restrictions in the older law have been eliminated. Presumably, any count-specific enhancements would still be subject to the one-third rule because the statute does not explicitly restrict them. Pen C §1170.1(a).

For offenses committed before 1998, see former Pen C §1170.13.

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§37.23 (c) Witness Intimidation (Pen C §1170.15)

If a person is convicted of a felony and of violating Pen C §136.1 (preventing or dissuading a person from attending or testifying at a trial), §137 (bribery or threatening a witness), or §653f (solicitation to commit a felony to dissuade a witness) with respect to a witness to the felony, the court must impose a consecutive *full middle term.* Any enhancements for being armed with or using a dangerous or deadly weapon or firearm, or for inflicting great bodily injury, are also imposed at full term. Pen C §1170.15.

For offenses committed before 1998, see former Pen C §1170.15.

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§37.24 (d) Voluntary Manslaughter (Pen C §1170.16)

If a person is convicted of multiple counts of voluntary manslaughter (Pen C §192(a)), the court has discretion to impose a full, separate, consecutive term for each count rather than sentencing the subordinate counts at one-third the middle term under Pen C §1170.1(a). Full-term sentencing for each count is permitted even if the killings were committed in a single transaction. Stacking is *not* restricted to the middle term, and thus it appears that any of the three terms for the crime may be imposed. The statute is silent about enhancements, so they are probably subject to the one-third rule of Pen C §1170.1(a). Pen C §1170.16.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/ (e) Full-Term Consecutive Sentences for Forcible Sex Offenses/§37.25 (i) Optional Full-Term Consecutive Sentences (Same Victim, Same Occasion) (Pen C §667.6(c))

(e) Full-Term Consecutive Sentences for Forcible Sex Offenses

§37.25 (i) Optional Full-Term Consecutive Sentences (Same Victim, Same Occasion) (Pen C §667.6(c))

An entirely separate sentencing scheme applies if any of the following sex offenses, listed in Pen C §667.6(e), is perpetrated on a single victim on a single occasion (Pen C §667.6(c), (e)):

- Rape as described in Pen C §261(a)(2)-(3) or (a)(6)-(7);
- Spousal rape as described in Pen C §262(a)(1), (a)(4), or (a)(5);
- Rape, spousal rape, or sexual penetration, in concert, in violation of Pen C §264.1;
- Sodomy as described in Pen C §286(c)(2)-(3), (d), or (k);
- Lewd or lascivious act in violation of Pen C §288(b);
- Continuous sexual abuse of child, in violation of Pen C §288.5;
- Oral copulation as described in Pen C §288a(c)(2)-(3), (d), or (k);
- Sexual penetration as described in Pen C §289(a) or (g); or
- Assault with intent to commit a specified sexual offense in violation of Pen C §220.

Attempts are not included. *People v Thomas* (1990) 218 CA3d 1477, 1490, 267 CR 865.

Ø **Note:** Although attempted forcible sex crimes are not subject to this special sentencing scheme (*People v Thomas* (1990) 218 CA3d 1477, 1490, 267 CR 865; *People v Le* (1984) 154 CA3d 1, 10, 200 CR 839, disapproved on other grounds in *People v Piper* (1986) 42 C3d 471, 477 n5, 229 CR 125), they *are* subject to the special enhancements for weapons and GBI in Pen C §§12022.3 and 12022.8.

Penal Code §667.6(c) allows full-term consecutive sentences, rather than following the usual rule of Pen C §1170.1(a), which limits consecutive terms to one-third of the middle term. Penal Code §667.6(c) applies only if the crimes involve the same victim on the same occasion. *People v Goodliffe* (2009) 177 CA4th 723, 732, 99 CR3d 385. When Pen C §667.6(c) applies, the trial court has two decisions:

- Whether the terms should be concurrent or consecutive; and
- Whether any consecutive terms for the listed sex crimes should be imposed under §1170.1(a) (one-third of middle term) or §667.6(c) (full consecutive terms).

Ø **Example:** A defendant is convicted of robbery and two counts of rape. The court has three options: (1) the court may sentence the three terms concurrently; (2) the court may sentence any of the three terms consecutively under Pen C §1170.1(a) (if so, any subordinate term will be limited to one-third of its middle term); or (3) the court may sentence the rapes under Pen C §667.6(c) (if so, the court can impose a full base term for the robbery, and each consecutive rape term will be a full consecutive term of 3, 6, or 8 years at the court's discretion). A reason must be stated if the upper or lower base term is imposed.

With more than one listed sex offense, the court may treat some, but not all, under Pen C §667.6(c). The rest will then be concurrent or consecutive under the normal §1170.1(a) rules. Under §667.6(c), the court may impose full-term consecutive sentences for offenses listed in §667.6(e) that are separate acts committed against the same victim during an indivisible or single transaction. *People v Hicks* (1993) 6 C4th 784, 791, 25 CR2d 469 (Pen C §654 no bar to imposition of separate consecutive sentence for burglary committed incidental to §667.6(c) forcible sex offenses). A full, consecutive term may be imposed when the defendant is convicted of a single forcible sex crime and another felony. *People v Jones* (1988) 46 C3d 585, 600, 250 CR 635.

When a full consecutive term is imposed under Pen C §667.6, specific (conduct) enhancements for that term are also imposed in full under Pen C §1170.1(h) and are not subject to the usual one-third rule for subordinate enhancements. *People v Garza* (2003) 107 CA4th 1081, 132 CR2d 831.

The technique of sentencing some offenses under Pen C §667.6(c) or (d) (see below) and other offenses under §1170.1(a) is commonly called the "box theory." *People v Belmontes* (1983) 34 C3d 335, 345, 193 CR 882. In the box theory, one box holds the terms for offenses sentenced under §1170.1(a), with the usual structure of a principal term and subordinate term(s) restricted to one-third of the middle term. A second box holds the terms for the offenses sentenced under §667.6. The total sentence is the sum of the total terms in the two boxes. *People v Jones, supra* (box theory applies even if a box contains only one offense; single qualifying sex offense may be made fully consecutive to other nonsex offenses).

The trial court must, as usual, state the reasons for imposing consecutive terms, but it must also state a reason for choosing §667.6(c) instead of the normal §1170.1(a) scheme. The same reason may be used for both choices, as long as the record reflects the court's awareness that it is making two separate choices. *People v Belmontes* (1983) 34 C3d 335, 348, 193 CR 882; *People v Quintanilla* (2009) 170 CA4th 406, 410, 87 CR3d 889; Cal Rules of Ct 4.426.

Sentences imposed under the special provisions of Pen C §667.6(c) and (d) are sometimes called "full-boat" consecutive sentences.

This sentencing scheme may be invoked in situations involving the One Strike sex crime (Pen C §667.61) and habitual sex offender (Pen C §667.71) laws. See §§37.34-37.34A. When fully consecutive sentencing is not mandated under those laws, *discretionary* full consecutive sentencing may be available to the court under §667.6(c).

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.26 (ii) Mandatory Full-Term Consecutive Sentences (Separate Victims or Separate Occasions) (Pen C §667.6(d))

§37.26 (ii) Mandatory Full-Term Consecutive Sentences (Separate Victims or Separate Occasions) (Pen C §667.6(d))

Under Pen C §667.6(d), mandatory full-term stacking is required for the sex offenses listed in Pen C §667.6(e) if the crimes involve *separate victims* or involve the same victim on *separate occasions*. For a list of these crimes, see §37.25.

Aggravated sexual assault against a child, as defined in Pen C §269(a), is also subject to the terms of Pen C §667.6(d). Pen C §269(c). Note that offenses listed in both Pen C §§269 and former §667.6(d) were subject to the terms of §667.6(d) even before the enactment of §269(c). See *People v Figueroa* (2008) 162 CA4th 95, 100, 75 CR3d 435 (no ex post facto violation for application of §667.6(d) to conviction for offenses committed before 2006 amendment which merely added express language); *People v Jimenez* (2000) 80 CA4th 286, 94 CR2d 884.

If the defendant is convicted of a listed sex offense committed against different victims, or against the same victim on different occasions, §667.6(d) *requires* full consecutive sentences. This means the Pen C §1170.1(a) one-third of the middle-term formula does not apply. The court has the usual discretion to choose between the lower, middle, or upper base term and must state reasons for its choice. *People v Reeder* (1984) 152 CA3d 900, 200 CR 479. No statement of reasons is necessary for *mandatory* consecutive terms, for which leniency may be expressed only by imposing consecutive full lower terms.

The second paragraph of §667.6(d) was enacted as a legislative response to *People v Craft* (1986) 41 C3d 554, 224 CR 626 (narrow construction of "separate occasion"). It provides:

> In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.

This language establishes an objective separate-occasion test for determining whether "between the commission of one sex crime and another the defendant had a reasonable opportunity to reflect on his or her actions." *People v Pena* (1992) 7 CA4th 1294, 1314, 9 CR2d 550. A break in time may be sufficient to indicate separate occasions. *People v Magana* (1991) 230 CA3d 1117, 1121, 281 CR 338.

The court, not the jury, is charged with determining whether the sex crimes occurred on separate occasions. Cal Rules of Ct 4.426(a). The standard of proof is by a preponderance of the evidence. *People v Groves* (2003) 107 CA4th 1227, 1230, 132 CR2d 744. In *Groves,* the court held that *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, does not mandate a jury trial or proof beyond a reasonable doubt. *People v Groves, supra*. The rationale of the *Groves* decision is that the maximum statutory punishment is not increased by finding the offenses occurred on separate occasions, because full consecutive sentences are authorized under §667.6(c) "even if both offenses were committed during a single transaction." 107 CA4th at 1231. The separate-occasions finding merely makes full-term consecutive sentences mandatory rather than permissive. 107 CA4th at 1231.

Completion of a sex offense has been narrowly defined to permit imposition of multiple punishment on a defendant who commits multiple sex offenses against a single victim. Each criminal sexual act, even when one follows another in rapid, uninterrupted succession, may be considered a discrete and segregated crime. *People v Harrison* (1989) 48 C3d 321, 324, 256 CR 401. Offenses sentenced under Pen C §667.6 are exempt from the proscription of §654. *People v Hicks* (1993) 6 C4th 784, 25 CR2d 469. Section 667.6(d) applies to *principals*; the defendant need not have personally committed the sex act to be subject to mandatory consecutive sentencing. *People v Farr* (1997) 54 CA4th 835, 62 CR2d 892.

When a full consecutive term is imposed under §667.6, conduct enhancements for that term are also imposed fully under Pen C §1170.1(h) and are not subject to the usual one-third rule for subordinate enhancements. *People v Garza* (2003) 107 CA4th 1081, 132 CR2d 831.

Ø **Note:** A defendant qualifying for the enhanced sentencing requirements of Pen C §667.6(d) because of crimes committed against more than one victim may also be subject to the One Strike law of Pen C §667.61, for which he or she may be sentenced to a separate, consecutive life term for each victim. See §37.34.

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§37.27 (f) Special Rules for Conduct Enhancements in Pen C §667.6 Cases

Penal Code §1170.1(h) provides that the number of conduct enhancements that may be imposed for the crimes listed in Pen C §667.6 may not be limited, whether they are imposed under Pen C §1170.1 or another provision. The crimes listed in §667.6 are forcible rape (Pen C §261(a)(2)-(3), (a)(6)); forcible spousal rape (Pen C §262(a)(1), (a)(4)); rape in concert (Pen C §264.1); sodomy with force or threat (Pen C §286); oral copulation with force or threat (Pen C §288a); child molestation with force (Pen C §288(b)); and rape or sodomy with foreign object with force (Pen C §289(a)). Essentially identical language in former Pen C §1170.1(h) has been held to justify imposition of enhancements for both possession of a knife and use of a firearm during a forcible oral copulation. *People v Stiltner* (1982) 132 CA3d 216, 182 CR 790.

Each enhancement must be fully consecutive to its base term and any other enhancement. Pen C §1170.1(h). Note that there are two conduct enhancements specific to sex cases: Pen C §§12022.3 (weapons) and 12022.8 (GBI). These enhancements also apply to *attempted* forcible sex crimes, although other special sex crime sentencing provisions (*e.g.,* §§667.6 and 1170.1(h)) apply only to *completed* sex crimes. *People v Le* (1984) 154 CA3d 1, 10, 200 CR 839, disapproved on other grounds in *People v Piper* (1986) 42 C3d 471, 477 n5, 229 CR 125.

Even if a court chooses not to impose full-term consecutive sentences on a defendant who meets the requirements of Pen C §667.6(c) and instead chooses to sentence under the one-third middle-term scheme of Pen C §1170.1(a), any *enhancements* to those subordinate terms must be imposed at full term and not at the usual one-third term. Pen C §1170.1(h).

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§37.28 (g) Special Rules for Crimes by State Prisoners and Escapees

Felonies committed by state prisoners or state prison escapees, if made consecutive with each other, are calculated according to the standard formula of Pen C §1170.1(a). With multiple counts, one is chosen as the principal term and the others are subordinate, calculated according to the one-third formula. There are, however, several differences:

- The total sentence imposed on the new offenses is not subordinate to the prison term already being served; service of the sentence on the new offenses does not begin until the time the prisoner would have otherwise been released. Pen C §1170.1(c); *People v McCart* (1982) 32 C3d 338, 340, 185 CR 284. The sentence for a defendant who commits multiple in-prison crimes, even if committed years apart, is computed under §1170.1(a), and that sentence is then run fully consecutive to his original underlying prison term. *People v Venegas* (1994) 25 CA4th 1731, 31 CR2d 114.
- Priors can be added to the new offenses even though the same priors resulted in the enhancement of the original sentence. *People v White* (1988) 202 CA3d 862, 870, 249 CR 165.
- The 5-year limit on the subordinate term (for crimes predating January 1, 1999) is not applicable. Former Pen C §1170.1(c); see §37.30.
- The double-the-base-term limit on the sentence (for crimes predating January 1, 1998) is not applicable. Pen C §1170.1(g) (before it was amended in 1997); see §37.30.

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§37.29 (5) Old Law: Subordinate Term Limits [Deleted]

The material formerly discussed in this section has been moved to §37.30.

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§37.30 (h) Limitations on Consecutive Terms for Cases Before 2001

Before January 1, 1998, there were a number of limitations on consecutive sentences for subordinate terms and enhancements. These limitations were phased out between 1998 and 2001. They included the double-the-base-term rule; the 5-year limit on subordinate terms for nonviolent felonies; and limitations on the amount of time that could be added to both the principal term and subordinate terms for specific (conduct) enhancements.

Because sentencing for a crime is controlled by the law in effect when the crime was committed (see *People v Mota* (1981) 115 CA3d 227, 235, 171 CR 212 (ex post facto violation to apply Pen C §1170.1 amendment to crime committed before amendment took effect)), these rules still apply in cases in which the statute of limitations has been tolled or has not yet expired. On the time for commencing criminal actions generally, see Pen C §§799-805. On tolling, see Pen C §803.

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2. Prior Convictions

§37.30A a. Uses of Prior Convictions

Depending on its nature, a prior felony conviction may be used to enhance a sentence imposed under the DSL, as a strike under the Three Strikes law, or as both an enhancement and a strike. This section discusses only the felony sentence enhancing consequences of prior convictions. For discussions of other ramifications of prior convictions, such as making innocent acts crimes, elevating misdemeanors to felonies, making a defendant ineligible for probation, and impeaching the testimony of a witness, see chap 24 and §38.16.

Enhancements for recidivism. Enhancements for recidivism do not attach to a particular count but instead go to the nature of the defendant. *People v Tassell* (1984) 36 C3d 77, 90, 201 CR 567, overruled on other grounds in *People v Ewoldt* (1994) 7 C4th 380, 401, 27 CR2d 646. As such, enhancements for priors "are added only once as a step in arriving at the aggregate sentence." *Tassell,* 36 C3d at 90. Once the prior conviction or prison term is proved, the court must either impose the additional punishment or strike the prior; the court may not simply ignore it. Pen C §12; *People v Bradley* (1998) 64 CA4th 386, 390, 75 CR2d 244. Note that the court has no discretion to strike a 5-year Pen C §667(a) prior under Pen C §1385. Pen C §1385(b). On striking prior convictions and other sentence "elements," see §37.41.

The basic kinds of priors for sentence enhancement. There are three primary kinds of prior convictions used for sentence enhancement: prior prison terms, serious felony priors, and strike priors.

Prior prison terms. Penal Code §667.5(b) provides for a 1-year sentence enhancement for "each prior separate prison term served for any felony."

The "separate" requirement means that a sentence to prison for multiple cases when the terms are continuous, whether concurrent or consecutive, results in only one prison term enhancement. Pen C §667.5(g).

Certain commitments are not deemed "prison terms." Reimprisonment for violation of parole does not count as a prison prior. Pen C §667.5(g). Commitment to the California Rehabilitation Center (CRC) under Welf & I C §3051 (see §35.29) does not count as a prison term. *People v Shoals* (1992) 8 CA4th 475, 501, 10 CR2d 296; *People v Lara* (1979) 95 CA3d 247, 249, 158 CR 847. However, a defendant committed to prison who is housed at CRC does incur a prior prison term. *People v Valdez* (1994) 24 CA4th 238, 30 CR2d 102.

The prior prison term must be for a "felony." Pen C §667.5(b). This is usually of concern only when the alleged prior prison term was served in a foreign jurisdiction. In that situation, the prior must meet all the elements of the particular felony as defined under California law, and the defendant must have served 1 year or more in prison in the other jurisdiction. Pen C §667.5(f).

There is a "washout" period after which the prior may not be used. Section 667.5(b) priors have a 5-year washout period, which means that the defendant must have been free from both prison custody and the *commission* of an offense resulting in a felony conviction for that period. Note that the *commission* of the offense, not the conviction, is the event that ends a washout period. Pen C §667.5(b).

The court may not impose both a §667.5(b) prior prison term and a 5-year serious felony enhancement under Pen C §667(a) for the same offense. *People v Jones* (1993) 5 C4th 1142, 22 CR2d 753. However, a 5-year prior can be imposed for one count of a multiple-count prior, and a 1-year prior prison term for another count. *People v Wiley* (1994) 25 CA4th 159, 30 CR2d 701.

A prior prison term enhancement under Pen C §667.5(b) is subject to the court's discretion to strike its imposition under Pen C §1385(c).

Other prior prison term enhancements. In addition to the 1-year enhancement under Pen C §667.5(b), there are other, less often encountered enhancements for prior prison terms. Penal Code §667.5(a) provides for a 3-year enhancement when both the current offense and the prior are "violent felonies" as defined in Pen C §667.5(c). Its washout period is 10 years.

Serious felony priors. When the current offense is also a serious felony under Pen C §1192.7(c), Pen C §667(a)(1)

provides for a 5-year sentence enhancement for each prior conviction of a serious felony that was separately brought and tried.

There are substantial differences between serious felony priors and prior prison terms. There is no washout period for any serious felony prior. There is no requirement that the defendant have served time in prison on the prior. Pen C §667(a)(2). A sentencing court does not have discretion to "strike" or stay the punishment for a serious felony prior. Pen C §1385(b).

Serious felony priors must be "brought and tried separately." Pen C §667(a)(1). This means that multiple counts in a single case or separate cases joined for trial result in only one 5-year prior regardless of the number of counts. *In re Harris* (1989) 49 C3d 131, 136, 260 CR 288 ("underlying proceedings must have been formally distinct, from filing to adjudication of guilt"). See also *People v Frausto* (2009) 180 CA4th 890, 103 CR3d 231, modified at 2010 Cal App Lexis 31 (error to impose more than one enhancement when three prior convictions were from one case). Thus, in *Harris,* when two counts were charged in a single complaint and a single preliminary examination was held, but two separate informations were filed, only one §667(a) prior resulted. However, guilty pleas entered at the same time in two completely separate cases that are then sentenced at the same time can result in two 5-year priors. *People v Wagner* (1994) 21 CA4th 729, 26 CR2d 383. Whether convictions were brought and tried separately is a legal question to be decided by the trial court, not the jury. *People v Wiley* (1995) 9 C4th 580, 589, 38 CR2d 347.

Both the prior and the current offense must qualify as serious felonies as defined in Pen C §1192.7(c). Pen C §667(a)(1). The California Supreme Court has held that whether the prior qualifies as a serious felony is a legal question for the court, not an issue for jury determination. *People v Kelii* (1999) 21 C4th 452, 87 CR2d 674. In *People v McGee* (2006) 38 C4th 682, 695, 42 CR3d 899, the California Supreme Court reaffirmed its adherence to the view that a judge, not a jury, is charged with making this determination even in light of *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, and *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531, because of the "clear legislative intent" that a jury play a "very limited role" in determining allegations of prior offenses.

The *Apprendi-Blakely-Cunningham* jury trial requirement almost certainly applies to determining whether the *current* offense is serious or violent, if the determination requires additional proof beyond the elements of the offense. See *People v Taylor* (2004) 118 CA4th 11, 27, 12 CR3d 693. Note, however, that California courts have held that a jury trial waiver on the prior also acts as a jury waiver on whether the current offense is serious or violent. *People v Equarte* (1986) 42 C3d 456, 467, 229 CR 116; *People v Yarbrough* (1997) 57 CA4th 469, 67 CR2d 227; *People v Arnett* (2006) 139 CA4th 1609, 1614, 44 CR3d 206. But see *People v Taylor* (2004) 118 CA4th 11, 27 n6, 12 CR3d 693 (jury waiver on priors after jury had started deliberating on current offense not a jury waiver regarding serious felony nature of current offense). Although the court in *Taylor* distinguished *Equarte* on its facts (see 118 CA4th at 27 n6), the waiver issue appears to have been something of an afterthought in *Equarte*; it did not receive in-depth treatment, and it may be ripe for reconsideration in light of *Apprendi*. See §37.31D.

Ø **Note:** When a case presents a question about whether the present offense is a serious or violent felony, counsel for the defendant can avoid waiver issues by explicitly stating that any waiver of jury trial on the priors is not intended to waive a jury finding on the nature of the present offense.

Ø **Note:** All prior serious felony convictions are also strikes. A prior serious felony conviction can be used as an enhancement and a strike in the same proceeding as long as the new offense is a serious or violent felony. Pen C §667(a); *People v Williams* (2004) 34 C4th 397, 19 CR3d 619.

On the trial and proof of prior convictions for sentence enhancement purposes, see §37.31.

Battery with serious bodily injury, in violation of Pen C §243(d), may be a serious felony. See *People v Taylor* (2004) 118 CA4th 11, 19, 12 CR3d 693; *People v Moore* (1992) 10 CA4th 1868, 1871, 13 CR2d 713. Any felony vehicular manslaughter is a serious felony. See Pen C §1192.8. Grand theft of a firearm is a serious felony. Pen C §1192.7(c)(26). Proposition 21 added several crimes to the list of serious felonies in Pen C §1192.7(c), including assault with a deadly weapon or firearm in violation of Pen C §245(a)(1). However, assault by means of force likely to produce GBI, also included in Pen C §245(a)(1), is *not* a serious felony. See *People v Haykel* (2002) 96 CA4th 146, 148, 116 CR2d 667; *People v Winters* (2001) 93 CA4th 273, 276, 113 CR2d 158; *Williams v Superior Court* (2001) 92 CA4th 612, 111 CR2d 918.

Conduct not charged as an enhancement may be used to establish that a conviction qualifies as a serious felony. *People v Brown* (1988) 201 CA3d 1296, 1302, 247 CR 683. A conduct enhancement stricken in a plea agreement may still be used to prove a serious felony prior. *People v Blackburn* (1999) 72 CA4th 1520, 1527, 86 CR2d 134.

Three Strikes. When an individual is charged with any felony, a prior conviction of a serious felony listed in Pen C §§1192.7(c) and 1192.8 or a prior conviction of a violent felony listed in Pen C §667.5(c) can be alleged as a "strike," bringing the defendant within the ambit of the Three Strikes law. Pen C §§667(b)-(i), 1170.12. For discussion, see §§37.33-37.33E.

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b. Pleading and Proving Prior Convictions and Prison Terms

§37.31 (1) Charging Priors

Sentence enhancing priors must be charged in the accusatory pleading. Pen C §§667(f)(1), 969, 1170.1(e), 1170.12(d)(1). Penal Code §969a permits amendment of a pending accusatory pleading to charge priors "[w]henever it shall be discovered" that not all prior felonies have been charged. However, Pen C §1025(b) requires the same jury to decide both the issue of guilt and the truth of any prior conviction allegations. Thus, it is an abuse of discretion to permit the adding of priors after the jury is discharged. *People v Tindall* (2000) 24 C4th 767, 102 CR2d 533.

If the defendant pleads guilty to a "complaint" that does not allege all priors, the complaint can be amended. Pen C §969.5(a). Note that the statute does not say "accusatory pleading" or mention indictment or information. The defendant is entitled to have a jury impaneled to decide the truth of the prior; however, the issue of identity remains one for the court to determine. Pen C §969.5(b). Felony complaints are subject to amendment to add priors after a guilty plea because priors generally do not have to be alleged or proved at the preliminary examination, only in an indictment or information. *People v Shaw* (1986) 182 CA3d 682, 227 CR 378.

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§37.31A (2) Trial of Priors

Right to jury trial. Under Pen C §§1025(b) and 1158, the defendant has a right to a jury trial on allegations of prior convictions. This right is statutory, not constitutional. *In re Taylor* (2001) 88 CA4th 1100, 106 CR2d 454; see *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348 (exempting "fact of a prior conviction" from constitutional right to jury trial).

The right to a jury trial on the truth of alleged priors is severely limited. The trial court determines whether prior serious felonies or strikes were brought and tried separately (*People v Wiley* (1995) 9 C4th 580, 38 CR2d 347), whether a prior conviction is for a serious felony (*People v Kelii* (1999) 21 C4th 452, 87 CR2d 674), and whether the defendant is the person who suffered the prior conviction (Pen C §1025(c)). Thus, when the prior is alleged as either a prior serious felony or a strike, the jury decides only whether a prior conviction was suffered. The court's determination of identification can be implicit and may be inferred from the fact that the court instructed the jury that the defendant was the person referred to in the Pen C §969b prison packet. *People v Belmares* (2003) 106 CA4th 19, 130 CR2d 400. In *People v Epps* (2001) 25 C4th 19, 28, 104 CR2d 572, the supreme court strongly suggested that the legislature revise Pen C §1025 "and adopt a rule that makes more sense." Thus far, the legislature has declined to act on the supreme court's suggestion.

Bifurcation of trial on new offense and truth of priors. The trial of prior convictions usually takes place after the trial of the substantive offense. It has long been accepted that the defense may move to bifurcate the trial of the substantive offense and the priors to ensure a fair trial. See *People v Bracamonte* (1981) 119 CA3d 644, 650, 174 CR 191, disapproved on other grounds in *People v Calderon* (1994) 9 C4th 69, 80, 36 CR2d 333. In *People v Cline* (1998) 60 CA4th 1327, 71 CR2d 41, it was held that the court had the discretion to grant a prosecution motion to bifurcate the trial of prior-strike allegations to avoid the possibility of jury nullification.

In a bifurcated trial, when the jury is discharged after the guilty verdict without objection, the court can impanel a new jury for the trial of the priors. *People v Saunders* (1993) 5 C4th 580, 20 CR2d 638. The trial court's failure to obtain the defendant's express waiver of a jury before conducting a court trial on bifurcated priors is harmless error. *People v Vera* (1997) 15 C4th 269, 62 CR2d 754. However, additional priors may not be alleged after the jury is discharged. *People v Tindall* (2000) 24 C4th 767, 102 CR2d 533.

Double jeopardy not applicable to trial of priors. *People v Hernandez* (1998) 19 C4th 835, 80 CR2d 754, held that a trial court that initially ruled that a present offense was not a serious offense for purposes of Pen C §667(a) could later reconsider and reverse that decision. State and federal prohibitions against double jeopardy do not apply to noncapital sentencing determinations. A prior strike reversed on appeal for insufficient evidence is not subject to double jeopardy and can be retried. *Monge v California* (1998) 524 US 721, 734, 141 L Ed 2d 615, 627, 118 S Ct 2246; *People v Monge* (1997) 16 C4th 826, 66 CR2d 853. Additional evidence may be introduced at the second trial. *People v Barragan* (2004) 32 C4th 236, 9 CR3d 76.

***Boykin-Tahl* rights.** Absent a specific challenge by the defendant, there is no requirement that the prosecution prove the validity of the waiver of *Boykin-Tahl* rights (*Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 81 CR 577) in a prior conviction. *People v Walker* (2001) 89 CA4th 380, 107 CR2d 264. See *People v Allen* (1999) 21 C4th 424, 87 CR2d 682. For discussion of the law and procedures for such a challenge, see chap 24.

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§37.31B (3) Proof of Priors

"Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt." *People v Tenner* (1993) 6 C4th 559, 566, 24 CR2d 840. Note, however, that allegations of sentence enhancing priors need not be proven at the preliminary examination. *People v Superior Court (Mendella)* (1983) 33 C3d 754, 191 CR 1; *People v Shaw* (1986) 182 CA3d 682, 685-686, 227 CR 378.

Proof of prior convictions is generally simple and straightforward. Certified copies of the records of any penal institution, commonly known as the "prison packet," are admissible in evidence to prove the prior conviction or jail or prison term. Pen C §969b. Also, certified copies of court records are admissible to prove a conviction. Evid C §§452(d), 1280, 1530, 1532, 1550. Even a copy of a certified copy of an official record is admissible, unless there is a genuine dispute concerning its terms and justice requires its exclusion. Evid C §1521(a); *People v Skiles* (2010) 180 CA4th 1363, 1366, 103 CR3d 873, modified at 2010 Cal App Lexis 74. Identity is generally proved by similarity of name (see *People v Luckett* (1969) 1 CA3d 248, 252, 81 CR 539) and date of birth, and a comparison of fingerprints or booking photos from the prior case with known originals taken from the defendant in connection with the present proceedings. So, while the prosecution has the burden of proof beyond a reasonable doubt, proof of the actual conviction or prison term is generally not burdensome if the prosecution puts any thought or effort into doing so.

> Ø **Note:** Often the only dispute regarding a prior is whether it qualifies as a serious felony. Because that decision is made by the court, not the jury, it is perfectly reasonable for a defendant to admit having suffered the prior conviction and merely litigate whether the conviction qualifies as a serious felony. The trial on the issue of whether the prior qualifies is often held in conjunction with the sentencing hearing. For discussion, see §37.31C.

No collateral estoppel effect of previous findings. Previous findings with respect to the truth of a prior conviction allegation have no collateral estoppel effect. *People v Rice* (1988) 200 CA3d 647, 654, 246 CR 177; see Pen C §667.6(d) (prior must be charged and admitted or found true in prosecution for new offense before additional penalty may be imposed). Similarly, the fact that a defendant may have admitted the prior conviction as part of an earlier plea bargain has no collateral estoppel effect. *Pease v Pease* (1988) 201 CA3d 29, 33, 246 CR 762; *People v Fuentes* (1986) 183 CA3d 444, 451, 237 CR 465. Therefore, the prosecution must specifically prove a prior conviction in the present action despite a previous jury's "true" finding, and, by the same token, a previous jury's "not true" finding does not prevent the prosecution from alleging and proving a prior conviction in the current case. 200 CA3d at 654.

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§37.31C (4) Proof That Prior Constitutes Serious or Violent Felony

While proof of the *fact* of a prior conviction or prison sentence is generally quite easy, sometimes proof of the defendant's conduct during the commission of the offense is necessary to establish that the offense qualifies as a serious or violent felony prior within the meaning of Pen C §667(a) or the Three Strikes law. When the prior is from a foreign jurisdiction, it is often necessary to show that the crime of which the defendant was convicted contains all the elements of a California felony.

Proof of the simple fact of a prior conviction is deemed to be proof only that the defendant committed the "least adjudicated elements" of the offense. "[W]hen the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable." *People v Guerrero* (1988) 44 C3d 343, 355, 243 CR 688. In most cases, proof that a prior conviction was for a "serious" felony also establishes that the conviction qualifies as a 5-year prior or strike prior, because the majority of the serious felonies listed in Pen C §1192.7(c) are "per se" serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking. *People v Kelii* (1999) 21 C4th 452, 456, 87 CR2d 674. Other offenses require proof of additional conduct, such as personal use of a weapon or personal infliction of great bodily injury, to qualify as serious felonies. Still other offenses, such as assault under Pen C §245(a)(1), can be committed in alternative ways, not all of which constitute serious felonies.

In determining whether a prior conviction qualifies as a prior serious felony conviction, the trier of fact may look to the entire record of the conviction *but no further*. *People v Woodell* (1998) 17 C4th 448, 450, 71 CR2d 241; *People v Myers* (1993) 5 C4th 1193, 1195, 22 CR2d 911; *Guerrero,* 44 C3d at 355. This means the prosecution may not relitigate the circumstances of the prior—evidence is limited to the record of the prior. *Woodell,* 17 C4th at 450; *Myers,* 5 C4th at 1198; *Guerrero,* 44 C3d at 355.

"Record of conviction" was defined by the supreme court in *People v Trujillo* (2006) 40 C4th 165, 177, 51 CR3d 718, as being limited to documents in the record "reliably reflecting the facts of the offense for which the defendant was convicted." That record appears to be limited to proceedings at and before the adjudication of guilt, whether by plea or verdict. 40 C4th at 179. *Trujillo* specifically held that defendant's statements in a postplea probation report could not be used to supply the element of personal use of a dangerous or deadly weapon necessary to qualify an offense as a serious felony under Pen C §1192.7(c)(23). 40 C4th at 178.

> Ø **Note:** The definition adopted in *Trujillo* is narrower than that used by some courts of appeal. See, *e.g., People v Monreal* (1997) 52 CA4th 670, 676, 60 CR2d 737, which was overruled by *Trujillo*. 40 C4th at 178.

A document that is included in the "record of conviction" must still be admissible under the *rules of evidence*. *Myers,* 5 C4th at 1201.

Not even all transcripts of testimony from the record of the prior are admissible. A preliminary hearing transcript is admissible when the defendant pleaded guilty after the preliminary hearing and the transcript was relied on for the factual basis of the plea. See *People v Reed* (1996) 13 C4th 217, 230, 52 CR2d 106. But when the prior was tried to a jury, the preliminary hearing transcript is *not* admissible, because it "is not reliable as to what evidence was presented to, or relied on by, the jury in reaching its verdict." *People v Houck* (1998) 66 CA4th 350, 356, 77 CR2d 837.

A prior that resulted from a guilty plea generally has a record limited to the accusatory pleading, the written change of plea form, the transcript of the change of plea colloquy, and any documents considered for the factual basis of the plea.

For further discussion of what constitutes the "record of conviction" that can be used to determine the nature of a prior conviction, see §37.33B.

> Ø **Note:** Recently, the U.S. Supreme Court questioned the constitutionality of judicial fact-finding to determine the nature of a prior conviction. See *Shepard v U.S.* (2005) 544 US 13, 161 L Ed 2d 205, 125 S Ct 1254. For discussion, see §24.27.

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§37.31D (a) California Offenses That May Require Additional Proof to Qualify as Serious Felony Priors or Strike Priors

California offenses that may require additional proof to qualify as serious-felony or strike priors include the following:

- Penal Code §245(a)(1). Use of a weapon or personal infliction of great bodily injury (GBI) is necessary; aider and abettor liability is sufficient with respect to use of a deadly weapon. See *People v Delgado* (2008) 43 C4th 1059, 1067, 77 CR3d 259. See also *People v Modiri* (2006) 39 C4th 481, 497, 46 CR3d 762 (group-beating theory sufficient to satisfy personal-infliction requirement).
- Penal Code §243(d). *Personal* infliction of the injury must be shown. *People v Moore* (1992) 10 CA4th 1868, 13 CR2d 713.
- Vehicle Code §23153 (drunk driving with injury). The injury must be *great* and personally inflicted. Pen C §1192.8.
- Any other felony that is alleged to be serious because of the personal infliction of GBI or because of personal use of a deadly weapon. In such cases, the nature of the injury and the fact that defendant *personally* used a weapon or inflicted GBI is required.

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§37.32 (b) Proving Out-of-State Priors

Determining whether an out-of-state prior constitutes a serious or violent felony under California law can be difficult, but it is imperative when a case involves a prior from another jurisdiction. Internet legal research makes it much easier to obtain the foreign jurisdiction's statutes and case law. The least adjudicated elements of the foreign offense must then be compared to the equivalent California offense. Robbery and burglary priors from foreign jurisdictions are always suspect and must be carefully scrutinized. Here are some of the considerations pertinent to out-of-state priors:

- Robbery must include the element of an intent to *permanently deprive* the owner of his or her property. In addition, the taking must be from the victim's *person or immediate presence*. See Pen C §211. Many other states' robbery statutes do not contain these elements.
- Burglary must meet the elements of a California first-degree burglary. See Pen C §§459-460(a), 1192.7(c)(18). The structure must be a *dwelling house* or statutory equivalent, and it must be *inhabited*. An uninhabited vacation cabin or fishing shack does not count. Many other states' burglary statutes apply to any building or structure without specifying whether the building is a dwelling or whether it is inhabited. The intent to commit theft or another felony must have been formed at or before entry. Many other states' burglary statutes cover entering *or remaining* with the requisite intent. The intent must be to commit theft or a felony. Other states often define burglary as entering or remaining with the intent to commit *any crime,* including misdemeanors. If the intent alleged in the prior is larceny, it is important to check the other state's larceny statute to see if intent to *permanently* deprive is an element.

Ø **Caution:** Because most California priors are so easily proven, defense counsel sometimes fails to scrutinize those priors requiring additional proof beyond the least adjudicated elements. Any prior that is not a California conviction for a per se serious felony listed in Pen C §1192.7(c), or a per se violent felony listed in Pen C §667(c), requires a careful and thoughtful review to see if it really qualifies as a serious felony.

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c. Three Strikes Law

§37.33 (1) Introduction

The Three Strikes law was initially enacted by the legislature (Stats 1994, ch 12, effective Mar. 12, 1994) and established an *alternative* sentencing scheme with dramatically increased punishment for recidivists with any prior violent or serious felony convictions. This original Three Strikes law is found in Pen C §667(b)-(i). In the general election of November 8, 1994, the voters enacted Proposition 184, which reenacted essentially similar language. It is codified at Pen C §1170.12. The relationship between these two sections is not specified in any statute. The California Supreme Court has not resolved the relationship between the two statutes, but Justices Mosk and Kennard have expressed the opinion that the passage of §1170.12 did not repeal or supersede §667(b)-(i). *People v Hazelton* (1996) 14 C4th 101, 58 CR2d 443.

Although known as the Three Strikes law, two separate sentencing schemes are created in this law. The first, accurately called Three Strikes, creates a life term for a defendant who has suffered *two or more* prior strikes. The second scheme deals with a defendant who has suffered a *single* prior strike, and *doubles* his or her sentence. This second scheme is often referred to as a "second strike" sentence. Other limitations, such as mandatory prison sentences and limitations on credits, apply to both schemes.

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§37.33A (2) Determining Whether Prior Is a Strike

All prior serious or violent felony convictions can be charged as strikes. When an individual who has at least one prior conviction of a crime defined as a "violent felony" in Pen C §667.5(c) or as a "serious felony" in Pen C §1192.7(c) is charged with any new felony offense, the prior conviction or convictions can be alleged as a strike under the Three Strikes law. If the prior is a serious felony under §1192.7, it can be used as both a strike prior *and* as a 5-year prior under §667(a). The new felony does *not* have to be a serious or violent felony for the prior to be used as a strike; however, the new felony must be serious or violent for the prior to be used as a 5-year prior under §667(a).

A conviction of a serious or violent felony is a strike even if it did not result in a prison sentence. See *People v Medina* (1988) 206 CA3d 986, 254 CR 89. There is no "washout" period. *People v Smith* (1988) 206 CA3d 599, 253 CR 673.

Convictions predating enactment of the Three Strikes law are strikes if the Three Strikes law defines them as strikes and the currently charged offense took place after the effective date of the Three Strikes law. *People v Sipe* (1995) 36 CA4th 468, 42 CR2d 266; *People v Reed* (1995) 33 CA4th 1608, 40 CR2d 47; *People v Hatcher* (1995) 33 CA4th 1526, 39 CR2d 801.

As originally enacted, the Three Strikes law defined a strike as a felony listed in Pen C §667.5(c) (violent felony) or Pen C §1192.7(c) (serious felony) on June 30, 1993. See Pen C §667(h); Prop 184, §2; *People v Nava* (1996) 47 CA4th 1732, 1735, 55 CR2d 543. Proposition 21 added a number of additional crimes to the serious and violent felony lists, and explicitly provided that prior convictions for these offenses can be alleged as strikes in prosecutions for offenses committed on or after March 8, 2000. See former Pen C §667.1; Prop 21, §14; *People v James* (2001) 91 CA4th 1147, 111 CR2d 292. Therefore, in a prosecution for an offense committed between the effective date of the Three Strikes law and March 8, 2000, a prior conviction can be used as a strike only if it was on the serious or violent felony list on June 30, 1993. For a list of such offenses, see *Nava,* 47 CA4th at 1735 n4. The violent-felony list in Pen C §667.5(c) was amended, effective September 20, 2006, to include certain sex offenses committed against children or in concert. See Stats 2006, ch 337, §§30, 62. Under Pen C §667.1, these amended provisions can be used as the basis of strike allegations in prosecutions for offenses committed on or after September 20, 2006. Stats 2006, ch 337, §29.

The conviction in the prior case must have occurred before the commission of the offense in which the prior conviction is alleged. *People v Flood* (2003) 108 CA4th 504, 133 CR2d 516. In the Three Strikes context, the date of conviction is the date on which the verdict is reached or the defendant's plea is entered; not the date of entry of judgment. *People v Castello* (1998) 65 CA4th 1242, 1254, 77 CR2d 314; *People v Williams* (1996) 49 CA4th 1632, 1637, 57 CR2d 448.

A conviction of a qualifying felony remains a strike even if it is later dismissed or reduced to a misdemeanor, unless a misdemeanor sentence was imposed at the initial sentencing. Pen C §§667(d)(1), 1170.12(b)(1). In other words, if an offense is made a misdemeanor at the initial sentencing, this determination is retroactive to the date guilt was decided, rendering the conviction a nonstrike. *People v Queen* (2006) 141 CA4th 838, 842, 46 CR3d 332 (wobblers ultimately sentenced as felonies were strikes, though sentencing had not yet occurred when new offense was committed); *People v Barkley* (2008) 166 CA4th 1590, 1595, 83 CR3d 694 (court intended felony conviction; jail sentence imposed as condition of probation is not misdemeanor sentence). See, *e.g.*, *People v Laino* (2004) 32 C4th 878, 11 CR3d 723 (Arizona aggravated assault was strike even though charge was dismissed after successful diversion program); *People v Franklin* (1997) 57 CA4th 68, 66 CR2d 742 (reduction of felony to misdemeanor after successful CYA commitment did not affect its status as strike); *People v Daniels* (1996) 51 CA4th 520, 59 CR2d 395 (dismissal under Welf & I C §1772 after successful discharge from CYA does not remove strike prior); *People v Diaz* (1996) 41 CA4th 1424, 49 CR2d 252 (dismissal under Pen C §1203.4 on successful completion of probation did not remove strike prior).

Strike priors need not have been separately brought and tried. They may arise from multiple counts in a single case. *People v Fuhrman* (1997) 16 C4th 930, 67 CR2d 1.

A qualifying prior conviction stayed under Pen C §654 may be treated as a strike. *People v Benson* (1998) 18 C4th

24, 74 CR2d 294. In *Benson,* the supreme court held that the trial court did not abuse its discretion when it counted as a strike a prior conviction that had been stayed under Pen C §654 on the ground that it arose out of a continuous course of conduct with another conviction that was also alleged as a strike. The court left open the possibility that the trial court would abuse its discretion if it failed to dismiss a strike prior that was stayed under §654 when it and another conviction also alleged as a strike arose from a single act. 18 C4th at 36 n8. In *People v Burgos* (2004) 117 CA4th 1209, 12 CR3d 566, the court of appeal held that the trial court had abused its discretion when it refused to strike one of two prior strike convictions (carjacking and robbery) that had arisen from a single act. But in *People v Scott* (2009) 179 CA4th 920, 929, 101 CR3d 875, the court criticized *Burgos* and found that a §654 stay is but one factor the trial court must consider in conducting a *Romero* analysis and does not compel striking a strike. Similarly, in *People v Ortega* (2000) 84 CA4th 659, 101 CR2d 253, the defendant was convicted of two "strike" offenses (attempted voluntary manslaughter and assault with a firearm, both with personal use of a firearm). The court concluded that the offenses were subject to §654 and stayed punishment on the assault. It was held *not* to be an abuse of discretion for the trial court to refuse to strike the assault offense, even though the offense might in the future constitute an additional strike prior.

The lists of violent and serious felonies in Pen C §§667.5 and 1192.7 include both specific, named offenses, such as murder and arson, and "generic criminal conduct." *Nava,* 47 CA4th at 1735. See, *e.g.,* Pen C §§667.5(c)(8) ("any felony in which the defendant inflicts great bodily injury on any person other than an accomplice"), 1192.7(c)(8) (same). As a result, some crimes are strikes only under certain circumstances. For example, a violation of Pen C §245(a)(1) is a strike if the defendant or an accomplice used a deadly weapon in the commission or the offense, or if the defendant personally inflicted great bodily injury. A Pen C §245(a)(1) conviction is not a strike, however, if it is based on the use of force likely to produce great bodily injury. See, *e.g., People v Banuelos* (2005) 130 CA4th 601, 604, 30 CR3d 315. A perhaps more subtle example is a violation of negligent discharge of a firearm under Pen C §246.3. This would be a strike only if the record of conviction shows that the defendant personally used the gun. *People v Golde* (2008) 163 CA4th 101, 113, 77 CR3d 120.

Qualifying out-of-state convictions can be strikes. A foreign conviction that fits the definition of a strike in California qualifies as a strike. Pen C §§667(d)(2), 1170.12(b)(2). See, *e.g., People v Avery* (2002) 27 C4th 49, 115 CR2d 403 (specific intent element of theft under Texas law (*i.e.,* intent to take property for long enough to deprive owner of majority of its value) is functional equivalent of California's intent to permanently deprive; therefore, Texas burglary, in which theft was underlying felony, could be California strike); *People v Harbolt* (1997) 61 CA4th 123, 126, 71 CR2d 459 (federal bank robbery a strike). Ambiguous language in the initiative version (Pen C §1170.12) has been interpreted to mean that foreign priors qualify as strikes for both the "single prior strike" and "multiple prior strike" sentencing schemes. *People v Hazelton* (1996) 14 C4th 101, 109, 58 CR2d 443. On proof of priors, see §37.31B.

Qualifying juvenile delinquency adjudications can be strikes. Prior juvenile adjudications may be treated as strikes in the following circumstances:

- The juvenile was age 16 or older at the time of the offense (Pen C §§667(d)(3)(A), 1170.12(b)(3)(A));
- The prior offense is listed in Welf & I C §707(b), Pen C §667.5(c) (violent felony), *or* Pen C §1192.7(c) (serious felony) (Pen C §§667(d)(3)(B), 1170.12(b)(3)(B));
- The juvenile was found to be a fit and proper subject to be dealt with under the juvenile law (Pen C §§667(d)(3)(C), 1170.12(b)(3)(C)); and
- The juvenile was made a ward of the court under Welf & I C §602 because he or she committed an offense listed in Welf & I C §707(b) (Pen C §§667(d)(3)(D), 1170.12(b)(3)(D)).

See also Pen C §1170.12(b)(3).

The use of the disjunctive "or" in Pen C §667(d)(3)(B) appears to permit the court to use a Welf & I C §707(b) offense as a strike even if it is not a serious or violent felony. However, in *People v Leng* (1999) 71 CA4th 1, 83 CR2d 433, the court of appeal ruled that a nonserious, nonviolent juvenile adjudication cannot be a strike. 71 CA4th at 10. The court ruled that to permit the use of a juvenile adjudication as a strike, when an adult conviction for the same offense is not a strike, would violate equal protection. 71 CA4th at 11.

This definition contains another potential ambiguity, which was resolved by the supreme court in *People v Garcia* (1999) 21 C4th 1, 87 CR2d 114. If both Pen C §§667(d)(3)(B) and 667(d)(3)(D) are read as referring to the offense alleged as a strike, there is an internal conflict in the definition when the alleged strike is a serious felony under Welf &

I C §1192.7 or a violent felony under Pen C §667.5(c) but is not included in the list of offenses in Welf & I C §707(b).

In *Garcia,* the supreme court reconciled this apparent conflict by construing the fourth paragraph to refer not to the offense alleged as a strike, but to any other offense the minor was found to have committed in the same juvenile proceeding at which he or she was found to have committed the offense alleged to be a strike. 21 C4th at 7. Under *Garcia,* therefore, a juvenile adjudication for an offense such as residential burglary, a serious felony under Pen C §667.5(c) but not a Welf & I C §707(b) offense, can be alleged as a strike only if, during the same juvenile proceeding, the minor was found to have committed a §707(b) offense.

Ø **Practice tip:** Determining whether a juvenile adjudication can be used as a strike can be complex. For example, "kidnapping" is both a violent felony under Pen C §667.5(c)(14) and a serious felony under Pen C §1192.7(c)(20). However, only three specified forms of kidnapping—kidnapping for ransom, kidnapping for robbery, and kidnapping with bodily harm—are listed in Welf & I C §707(b). In this situation, determining whether the juvenile adjudication constitutes a strike may require examining the entire juvenile court record to ascertain whether the facts proven at the juvenile proceeding bring the offense within the provisions of Welf & I C §707(b) or whether another offense found at the same juvenile proceeding is included in §707(b). See *In re Jensen* (2001) 92 CA4th 262, 267, 111 CR2d 751. On what materials may be used to prove the fact and nature of a prior, see §24.27.

California appellate courts historically have held that a juvenile adjudication may be a strike despite the lack of a jury trial. *People v Del Rio* (2008) 165 CA4th 439, 441, 80 CR3d 615; *People v Lee* (2003) 111 CA4th 1310, 4 CR3d 642; *People v Smith* (2003) 110 CA4th 1072, 1 CR3d 901; *People v Bowden* (2002) 102 CA4th 387, 125 CR2d 513; *People v Fowler* (1999) 72 CA4th 581, 84 CR2d 874. The California Supreme Court has confirmed that the absence of a jury trial does not, under *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, preclude the use of a juvenile adjudication as a strike prior. *People v Nguyen* (2009) 46 C4th 1007, 1028, 95 CR3d 615. But see *U.S. v Tighe* (9th Cir 2001) 266 F3d 1187 (under *Apprendi,* lack of jury trial right prevented juvenile adjudication from being prior under federal Armed Career Criminal Act). An express finding of fitness is unnecessary. An implied finding of fitness (*i.e.,* the juvenile was adjudicated in the juvenile court) is sufficient. *People v Davis* (1997) 15 C4th 1096, 64 CR2d 879.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.33B (3) Proof of Prior Strikes

§37.33B (3) Proof of Prior Strikes

Issues have arisen about how priors may be proved. In some cases, the facts making a prior a strike may be an element of the offense itself. Grand theft of a firearm is a strike. Pen C §1192.7(c)(26); *People v Rodola* (1998) 66 CA4th 1505, 78 CR2d 735. Hit-and-run driving with great bodily injury is not a strike, unless the GBI was caused by the flight. *People v Wood* (2000) 83 CA4th 862, 100 CR2d 115.

In some instances, the prior conviction offense itself is insufficient to decide whether it was a serious felony (*e.g.*, Pen C §245(a)(1)—was a deadly weapon used or just "force likely"?). In such cases, the court may look to the entire "record of conviction." *People v Woodell* (1998) 17 C4th 448, 454, 71 CR2d 241. This also applies to foreign convictions. *People v Riel* (2000) 22 C4th 1153, 96 CR2d 1. The "record of conviction" may still, however, contain inadmissible hearsay that cannot be considered. *People v Stewart* (2000) 77 CA4th 785, 91 CR2d 888.

"Record of conviction" was defined by the supreme court in *People v Trujillo* (2006) 40 C4th 165, 177, 51 CR3d 718, as being limited to documents in the record that reliably reflect the facts of the offense for which the defendant was convicted. That record appears to be limited to proceedings at and before the adjudication of guilt, whether by plea or verdict. 40 C4th at 179. Overruling *People v Monreal* (1997) 52 CA4th 670, 676, 60 CR2d 737, *Trujillo* specifically held that the defendant's statements in a postplea probation report could not be used to supply the element of personal use of a dangerous or deadly weapon necessary to qualify an offense as a serious felony under Pen C §1192.7(c)(23). *Trujillo,* 40 C4th at 178. Nor may other statements in the probation report, including statements by witnesses or the probation officer's summary, be used to establish that the offense was a serious felony. *People v Reed* (1996) 13 C4th 217, 223, 52 CR2d 106.

Trujillo did not overrule the holding in *People v Woodell* (1998) 17 C4th 448, 454, 71 CR2d 241, that the record included an appellate opinion, but the court did reiterate its caution that "[w]hether and to what extent an opinion is probative in a specific case must be decided on the facts of that case." *Trujillo,* 40 C4th at 180.

The following items are included in the record of conviction:

- Charging documents. *People v Moenius* (1998) 60 CA4th 820, 824, 70 CR2d 579.
- Abstract of judgment. *People v Gomez* (1990) 219 CA3d 157, 159, 268 CR 50; *People v Colbert* (1988) 198 CA3d 924, 930, 244 CR 98.
- Clerk's minutes. *People v Moenius, supra*; *People v Harrell* (1989) 207 CA3d 1439, 1444, 255 CR 750.
- Change of plea form. *People v Smith* (1988) 206 CA3d 340, 345, 253 CR 522; *People v Carr* (1988) 204 CA3d 774, 778, 251 CR 458.
- Transcript of entry of plea. *People v Sohal* (1997) 53 CA4th 911, 915, 62 CR2d 110 (including factual basis for plea offered by prosecutor without objection by defense); *People v Abarca* (1991) 233 CA3d 1347, 1351, 285 CR 213.
- Preliminary hearing transcript, if conviction resulted from plea. *People v Reed* (1996) 13 C4th 217, 223, 52 CR2d 106.

  Ø **Note:** If the conviction resulted from a *trial,* the preliminary hearing transcript is *not* admissible. *People v Houck* (1998) 66 CA4th 350, 77 CR2d 837.

- Trial transcript. *People v Bartow* (1996) 46 CA4th 1573, 1580, 54 CR2d 482.
- Penal Code §1203.01 statement by court or prosecutor. *People v Johnson* (1989) 208 CA3d 19, 26, 256 CR 16.
- Appellate opinion. *People v Woodell* (1998) 17 C4th 448, 457, 71 CR2d 241 (North Carolina appellate decision used to determine prior conviction was residential burglary); *People v Harbolt* (1997) 61 CA4th 123, 126, 71 CR2d 459 (U.S. Court of Appeals decision used to establish serious felony nature of federal bank robbery conviction). But see *People v Trujillo* (2006) 40 C4th 165, 181, 51 CR3d 718 (probative value of statement in appellate decision must be determined case by case).
- Uncertified "rap" sheets. *People v Martinez* (2000) 22 C4th 106, 91 CR2d 687 (uncertified computer printouts of criminal history information (CLETS) admitted under "official records" exception to hearsay rule to prove *fact* of

prior conviction but not its substance).

For further discussion of what constitutes the "record of conviction" that may be used to determine the nature of a prior conviction, see §37.31C.

In some cases, the record of conviction may be inadequate to show the defendant's actual conduct. In such a case, the court is bound by the "least adjudicated elements" test in its determination. *People v Cortez* (1999) 73 CA4th 276, 279, 86 CR2d 234 (California prior); *People v Jones* (1999) 75 CA4th 616, 89 CR2d 485. However, some foreign prior convictions whose elements do not precisely match California's requirements have been found to be strikes. See *People v Avery* (2002) 27 C4th 49, 115 CR2d 403 (Texas "burglary of a habitation"); *People v Mumm* (2002) 98 CA4th 812, 120 CR2d 18 (Arizona robbery).

It has been held that neither party can call live witnesses to testify to the facts of a prior conviction. See *People v Kelii* (1999) 21 C4th 452, 457, 87 CR2d 674 (trier of fact may look to entire record but no further). However, in *Gill v Ayers* (9th Cir 2003) 342 F3d 911, the Ninth Circuit Court of Appeals held that it was a denial of due process to prohibit the defendant from testifying about his prior conviction. In *Kelii*, the finding that the prior was a strike depended on trial testimony that the defendant personally used a weapon. It is uncertain whether this rule would apply when the strike was proved by the charge itself, *e.g.,* robbery.

Prior strikes do not have to be proved at the preliminary hearing. This remains true even after *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348. *Thompson v Superior Court* (2001) 91 CA4th 144, 110 CR2d 89. The statutes require the district attorney to plead and prove the prior strikes but do not specify at what stage this must occur. *Miranda v Superior Court* (1995) 38 CA4th 902, 45 CR2d 498. Strike allegations can be added after the defendant has been convicted or after a guilty plea. *People v Valladoli* (1996) 13 C4th 590, 54 CR2d 695. Strikes cannot be alleged after the jury has been discharged (*People v Tindall* (2000) 24 C4th 767, 102 CR2d 533), even if jury trial on the prior strikes was previously waived (*People v Gutierrez* (2001) 93 CA4th 15, 112 CR2d 568).

For further discussion of proof of priors, see §§37.31-37.32.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.33C (4) Consequences of One or More Strikes

§37.33C (4) Consequences of One or More Strikes

Both versions of the Three Strikes statute list several mandatory consequences for a defendant with one or more strikes found true. They include the following:

- Commitment to state prison is mandatory. Probation and diversion are prohibited. Pen C §§667(c)(2), (c)(4), 1170.12(a)(2), (a)(4). See *People v Superior Court (Roam)* (1999) 69 CA4th 1220, 82 CR2d 119 (trial court reversed for deferring sentence and releasing defendant on "supervised own recognizance" to attend rehabilitation).
- The total credits under Pen C §§2930-2934 may not exceed 20 percent and do not accrue until the defendant is physically placed in the state prison. Pen C §§667(c)(5), 1170.12(a)(5). The defendant is entitled to Pen C §4019 presentence credits but does not receive additional day-for-day credits under the amendments to the statute, effective January 25, 2010. See §37.59. The defendant's credits are also subject to the 15-percent limitation of Pen C §2933.1 if the current offense is a violent crime. The language in §2933.1 regarding a life term does *not* make the 15-percent limitation applicable to all multiple strike cases. *People v Thomas* (1999) 21 C4th 1122, 90 CR2d 642. The limitation of credits does not violate equal protection. *People v Applin* (1995) 40 CA4th 404, 46 CR2d 862. A defendant does not need to be advised of the credits limitation that results from a plea to a "strikes" case. *People v Barella* (1999) 20 C4th 261, 84 CR2d 248. However, a defendant who is misinformed about the credit limitations may have cause to withdraw his or her plea. See *People v Goodwillie* (2007) 147 CA4th 695, 735, 54 CR3d 601.
- Prior strike convictions may not be used in plea bargaining. Pen C §§667(g), 1170.12(e), 1192.7(b).
- "Dual use" may be made of a strike prior. The same prior can be used to elevate the present offense to a felony and to double the base term. *People v Hurtado* (1996) 47 CA4th 805, 54 CR2d 853 (same prior burglary used as prior for ex-felon in possession of firearm and as strike). The same prior conviction can be used to (1) elevate present petty theft to felony; (2) double the term as a prior strike; and (3) enhance the sentence as a prior prison term (Pen C §667.5(b)) enhancement. *People v White Eagle* (1996) 48 CA4th 1511, 56 CR2d 749. The same prior may be used to add 1 year for a prior prison term (Pen C §667.5(b)) and to double the base term. *People v Cressy* (1996) 47 CA4th 981, 55 CR2d 237 (prior burglary used as prior prison term and as strike). The same prior can be used to double the present term and to add 5 years for the prior under Pen C §667(a). *People v Nelson* (1996) 42 CA4th 131, 49 CR2d 361 (new residential burglary with prior residential burglary). The same prior can be used as an element of the offense of failure to register under Pen C §290 and to double the present term. *People v Tillman* (1999) 73 CA4th 771, 774, 86 CR2d 715. The same prior can be used to elevate a sex crime to a 25-year-to-life term under both Pen C §§667.61 and 667.71 (One Strike sex law and habitual sex offender law), double (or triple) it as a prior strike, and add a Pen C §667(a) serious felony enhancement. *People v Acosta* (2002) 29 C4th 105, 124 CR2d 435; *People v Murphy* (2001) 25 C4th 136, 105 CR2d 387. See discussion in §§37.34-37.34A.
- Penal Code §1170.1, which permits the court to use "status enhancements" only once in determining the "aggregate term" for a determinate sentence, does not apply to the Three Strikes law. Therefore, recidivist enhancements, like conduct enhancements, are to be applied to each count of conviction under the Three Strikes law. *People v Williams* (2004) 34 C4th 397, 19 CR3d 619 (Pen C §667(a) prior serious felony enhancements); *People v Garcia* (2008) 167 CA4th 1550, 1562, 85 CR3d 155 (Pen C §667.5(b) prior prison term enhancements).
- The court *must* impose consecutive sentences for subordinate terms *unless* the offenses were committed on the same occasion or arose from the same set of operative facts. *People v Casper* (2004) 33 C4th 38, 14 CR3d 43; *People v Brione*s (2008) 167 CA4th 524, 526, 84 CR3d 232 (conspiracy to possess drugs for sale and possession of drugs for sale arose from same set of operative facts); *People v Hendrix* (1997) 16 C4th 508, 66 CR2d 431 (robbery of multiple victims at one location; trial court had discretion to impose consecutive or concurrent sentences). The determination of "same occasion or same set of operative facts" is *not* the same

analysis as that for Pen C §654. *People v Deloza* (1998) 18 C4th 585, 76 CR2d 255. Nor, when sex crimes are involved, is it the same standard as that for Pen C §667.6(c)-(d). *People v Jeffries* (2000) 83 CA4th 15, 98 CR2d 903. "Same occasion" is construed narrowly. A theft, followed by flight and then by an assault committed within a few minutes, makes consecutive sentencing mandatory. *People v Lawrence* (2000) 24 C4th 219, 99 CR2d 570. Consecutive sentences were found to be mandatory when a defendant walking down a street tried and failed to enter two separate residences and then successfully entered a third. *People v Durant* (1999) 68 CA4th 1393, 81 CR2d 207. When a jury verdict can be based on a number of unlawful acts, and the court cannot determine beyond a reasonable doubt the particular acts selected by the jury, it must assume that the jury based its finding on those acts that give the court the most discretion to impose concurrent terms. *People v Coelho* (2001) 89 CA4th 861, 107 CR2d 729.

- The sentence for a "second strike" offense (when one prior strike has been found true) must be consecutive to any other sentence. However, it does not run fully consecutively; the "one-third the middle term" rule of Pen C §1170.1 applies. *People v Riggs* (2001) 86 CA4th 1126, 103 CR2d 890. Any subordinate count to which a prior strike applies is actually served at two-thirds the middle term. The general rule of one-third the middle term applies (Pen C §1170.1(a)), which is then doubled by the strike. *People v Nguyen* (1999) 21 C4th 197, 87 CR2d 198.

Penal Code §654 applies to sentencing for multiple counts under the Three Strikes law in cases in which consecutive sentencing is not mandated by that law. *People v Danowski* (1999) 74 CA4th 815, 88 CR2d 471. See *People v Carrasco* (2008) 163 CA4th 978, 994, 77 CR3d 912 (Three Strikes law does not preclude court from determining whether two convictions were part of same occasion).

One prior strike. If the defendant has *one* prior strike, the determinate term for the present crime (or minimum term for an indeterminate term) is doubled. In a multiple count case, this applies to both the *base* term and any *subordinate* terms. All other sentencing computations remain the same. Applicable enhancements, either specific (conduct) enhancements or other prior enhancements, are still available but are *not* doubled. Enhancements for prior prison terms (*e.g.,* Pen C §667.5(b)) or for serious felony priors (Pen C §667(a)) are still imposed but are *not* doubled.

Ø **Example:** The defendant is convicted of one count of robbery with a knife, with a single prior strike. The base term for robbery (2-3-4 years) is *doubled,* to a term of 4-6-8 years. The Pen C §12022(b)(1) enhancement for the knife is *not* doubled—it remains at 1 year. The defendant is *additionally* punished with a 5-year enhancement if (as in this example) the current offense is a serious felony as defined in Pen C §§667(a) and 1192.7. *People v Ramirez* (1995) 33 CA4th 559, 39 CR2d 374. In this example, the total maximum punishment would be 14 years, and the defendant's total credits both presentence and postsentence would be limited to a total of 15 percent (Pen C §2933.2, because robbery is a violent crime under Pen C §667.5(c)). If the defendant is convicted of multiple counts, the normal Pen C §1170.1 scheme will apply. This means consecutive terms are calculated as one-third of the middle term, which then is doubled under Pen C §§667(e) and 1170.12(c)(1). *People v Nguyen, supra*.

A defendant convicted of attempted willful, deliberated, premeditated murder is subject to a sentence of life with the possibility of parole. He is eligible for parole in 7 years. If he has a prior strike, his minimum term is doubled to 14 years. *People v Jefferson* (1999) 21 C4th 86, 86 CR2d 893. Additionally, a 15-year minimum term before parole established by Pen C §186.22(b)(1) is also subject to doubling. *People v Jefferson, supra*.

There is a split about whether a sentence of life without possibility of parole, with a prior strike, is doubled to *two consecutive* terms of life without possibility of parole. *People v Smithson* (2000) 79 CA4th 480, 94 CR2d 170 (no); *People v Hardy* (1999) 73 CA4th 1429, 87 CR2d 279 (yes). See also *People v Coyle* (2009) 178 CA4th 209, 219, 100 CR3d 245 (LWOP cannot be tripled pursuant to Pen C §667(e)(2)).

Two or more prior strikes. If the defendant has *two or more* qualifying priors, there are additional consequences:

- A defendant with two or more strikes receives *no* credits against his or her indeterminate life term for good conduct/work conduct in prison. *In re Cervera* (2001) 24 C4th 1073, 103 CR2d 762. The defendant does receive Pen C §4019 presentence credits (*People v Thomas* (1999) 21 C4th 1122, 90 CR2d 642) but is not entitled to the one-for-one credits under the amendments to the statute effective January 25, 2010. It also appears from the concurring opinion in *In re Cervera* (2001) 24 C4th 1073, 1088, 103 CR2d 762, that a Three Strikes defendant does receive credits against any *determinate* portion of his sentence. It remains unresolved whether

this will include credits against a determinate enhancement (*e.g.,* personal use of firearm) to an indeterminate life term.

- The *base term* for each current conviction is an indeterminate term of life imprisonment with the minimum term calculated as the *greatest* of:
- (1) Three times the punishment for each current felony conviction;
- (2) 25 years; or
- (3) The term for the underlying conviction, or any period prescribed by Pen C §190 (murder) or Pen C §3046 (punishment for life term).
- In a multiple count case, the court may have to calculate each of the three options for *each count*, and then impose the greatest for each, even if it means using a different formula for each count. *People v Thomas* (1997) 56 CA4th 396, 65 CR2d 425. The resulting computations can become very complicated.
- Specific (conduct) enhancements on subordinate counts are served *full term*; they are not reduced by the one-third scheme of Pen C §1170.1. *People v Lyons* (1999) 72 CA4th 1224, 85 CR2d 581.
- Prior enhancements (*e.g.,* Pen C §§667(a), 667.5(b)) are then added to arrive at the aggregate sentence. *People v Dotson* (1997) 16 C4th 547, 66 CR2d 423.

In computing the possible sentence under option (1), the court is not required to use the aggravated term for the crime. It first chooses the term it would impose and then triples it, to see if this option results in the largest term. *People v Keelen* (1998) 62 CA4th 813, 73 CR2d 250.

Option (3) was discussed in *People v Dotson, supra*. The entire "nonstrike" sentence, which includes any enhancements, goes into option (3) to set the punishment for the crime itself. Then any enhancements, even though they were included in the computation of the minimum term, are added to the punishment. In *Dotson,* the defendant was convicted of residential burglary (2-4-6 years) with four separate prior convictions (5-year priors under Pen C §667(a)) for the same offense. Under option (3), his "term for the underlying conviction" would be 6 years (aggravated term) plus 20 years for priors, or a total of 26 years. His term for the crime is therefore 26 years to life. To that are *added* any enhancements, which include four 5-year §667(a) priors. His total sentence was therefore 46 years to life.

Specific (conduct) enhancements are subject to the same treatment under option (3) and can result in a highly complex sentencing scheme, as seen in *People v Byrd* (2001) 89 CA4th 1373, 108 CR2d 243. Byrd was convicted of 12 counts of robbery, each with the use of a firearm, and had three §667(a) prior serious felony convictions. For those counts, the option (3) sentencing went as follows: aggravated term of 5 years, plus 10 years for personal use of firearm (Pen C §12022.53), plus 15 years (three prior serious felonies), for a total indeterminate term for the robbery of 30 years to life. Ten years were then added for the firearm use, for a total of 10 plus 30 years to life *for each count.* The 12 counts resulted in a total of 120 plus 360 years to life, to which were then added another 15 years for the three prior serious felony convictions. With a few other counts, Byrd's total sentence was 115 years plus 444 years to life.

Where does a sentence of life with the possibility of parole ("straight life") with two or more prior strikes fit into this scheme? The court in *People v Dozier* (2000) 78 CA4th 1195, 93 CR2d 600, disapproved on other grounds in *People v Acosta* (2002) 29 C4th 105, 118 n4, 124 CR2d 435, held that the correct sentence is 25 years to life.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.33D (5) Discretion to Strike: Romero and Williams

§37.33D (5) Discretion to Strike: *Romero* and *Williams*

The sentencing court must exercise its discretion carefully when sentencing under the Three Strikes law. In some situations the court may have discretion to strike one or more priors and significantly reduce the defendant's sentence. In other situations it may be an abuse of discretion to strike priors.

The court retains the discretion to reduce a "wobbler" offense to a misdemeanor under Pen C §17(b), despite the allegation of one or multiple prior strikes. *People v Superior Court (Alvarez)* (1997) 14 C4th 968, 60 CR2d 93. A strike offender is still eligible for deferred entry of judgment under Pen C §§1000-1000.8. *People v Davis* (2000) 79 CA4th 251, 93 CR2d 905.

The prosecuting attorney may move to dismiss or strike a prior felony allegation in the furtherance of justice under Pen C §1385, or the court may dismiss a prior conviction allegation for insufficient evidence. Pen C §§667(f)(2), 1170.12(d)(2).

The trial court has discretion under Pen C §1385 to strike a "strike" in the interest of justice. *People v Superior Court (Romero)* (1996) 13 C4th 497, 53 CR2d 789. This decision is fully retroactive. It cannot do so arbitrarily, to reduce calendar congestion, or because the judge just does not like the strikes law. *People v Smith* (1996) 50 CA4th 1194, 58 CR2d 9; *People v Carter* (1996) 49 CA4th 567, 56 CR2d 689; *People v Ramos* (1996) 47 CA4th 432, 55 CR2d 1, disapproved on other grounds in *People v Fuhrman* (1997) 16 C4th 930, 947 n11, 67 CR2d 1. The court must specifically articulate its reasons for doing so in the court's minutes. *People v Superior Court (Romero), supra*; Pen C §1385(a). If the record is clear that the court did not recognize its power under §1385, remand for reconsideration is appropriate.

The court may exercise its discretion under *Romero* to strike priors on some counts but to leave the priors intact on other counts. *People v Garcia* (1999) 20 C4th 490, 85 CR2d 280. In an unusual case, the information alleged multiple felony counts but alleged a prior strike on only one count. The trial court doubled the sentence for that one count but not the others, in the belief that a strike finding had to be made for each count. The appellate court reversed, saying that the strike had to be applied to all counts unless the trial court complied with *People v Superior Court (Romero), supra*. *People v Morales* (2003) 106 CA4th 445, 130 CR2d 800.

Even when a court exercises its discretion to strike a strike, the prior conviction remains in effect as a 5-year prior under Pen C §667(a). *People v Turner* (1998) 67 CA4th 1258, 79 CR2d 740. The court does not have discretion to strike a 5-year prior. Pen C §1385(b).

As to the court's exercise of discretion, the supreme court has ruled in *People v Williams* (1998) 17 C4th 148, 161, 69 CR2d 917:

> [T]he court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more felonies and/or had not previously been convicted of one or more serious and/or violent felonies.

In its review of the exercise of discretion by the lower court, the supreme court held that the standard of review is whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts.

A number of cases have found an abuse of discretion when priors were stricken. See *People v Gaston* (1999) 74 CA4th 310, 87 CR2d 829 (auto theft; robbery and kidnapping 15 years earlier; four separate prison terms within the prior decade); *People v Thornton* (1999) 73 CA4th 42, 86 CR2d 84 (ATM robbery of disabled victim; prior separate prison terms for burglary and robbery with multiple parole violations on each; still on parole when committed present crime); *People v McGlothin* (1998) 67 CA4th 468, 79 CR2d 83 (robbery of two elderly victims; criminal history since 1972, including juvenile robbery and seven adult felonies, including two robberies, battery on a peace officer, and drugs). The defendant may challenge the trial court's failure to strike a strike under the same abuse of discretion standard. *People v Carmony* (2004) 33 C4th 367, 374, 14 CR3d 880.

A sentence of 25 years to life for possession of methamphetamine and violation of Pen C §69 (resisting officer) is not

cruel and unusual punishment, given an extensive criminal record. *People v Martinez* (1999) 71 CA4th 1502, 84 CR2d 638.

However, it was held in *People v Cluff* (2001) 87 CA4th 991, 105 CR2d 80, that the trial court abused its discretion by refusing to strike one or more priors under *Romero*. *Cluff* involved a conviction the court viewed as a "technical" violation of Pen C §290 (failure to register as a convicted sex offender). The defendant had failed to update his registration as required on his birthday, although he had not moved from his previously registered address.

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§37.33E (6) Eighth Amendment Considerations—"Cruel and Unusual"

The U.S. Supreme Court addressed the constitutionality of the application of the Three Strikes law in *Ewing v California* (2003) 538 US 11, 155 L Ed 2d 108, 123 S Ct 1179. In *Ewing,* a 5-4 decision, the defendant was charged with the theft of three golf clubs, worth $400 each. His prior record included strikes for three burglaries and a robbery, for which he was still on parole. While acknowledging that in an "exceedingly rare" case, a prison sentence might be so disproportionate to the crime or to the offender that it would violate the federal constitutional prohibition against cruel and unusual punishment, the Supreme Court concluded that Ewing's sentence of 25 years to life was not cruel and unusual. 538 US at 20, 155 L Ed 2d at 112.

In *Lockyer v Andrade* (2003) 538 US 63, 155 L Ed 2d 144, 123 S Ct 1166, another 5-4 decision, the U.S. Supreme Court reversed a Ninth Circuit decision granting the defendant's habeas corpus petition. Andrade, who had multiple nonviolent prior strikes, was convicted of two counts of petty theft with a prior, for stealing videotapes with a total value of approximately $150, and was sentenced to 50 years to life. The U.S. Supreme Court found that the California court's decision upholding the sentence was not contrary to clearly established federal law. 538 US at 77, 155 L Ed 2d at 159.

In *Gonzalez v Duncan* (9th Cir 2008) 551 F3d 875, 884, the Ninth Circuit applied the analytical model used by the Supreme Court in *Lockyer v Andrade*, *supra,* but still struck as cruel and unusual the defendant's 28-year-to-life sentence for failing to update his annual sex offender registration within 5 days of his birthday. Even though the defendant had many prior convictions for serious and violent offenses, the court found the instant offense failed to show any recidivist tendencies and was overall very minimal particularly since the defendant lived at his last registered address, and police knew where he was all the time.

In contrast, the Ninth Circuit held in *Taylor v Lewis* (9th Cir 2006) 460 F3d 1093, 1110, that a 25-year-to-life sentence was not cruel and unusual punishment for a defendant convicted of possession of 36 milligrams of cocaine. The defendant's history of crimes against the person—his priors included a voluntary manslaughter conviction and a conviction of robbery in which a firearm was used—was an important factor in the court's conclusion.

In *People v Carmony* (2005) 127 CA4th 1066, 26 CR3d 365, the Third District Court of Appeal held that a 25-year-to-life sentence for failure to update sex offender registration within 5 days of defendant's birthday (the defendant had registered a month previously and the information had not changed) was cruel and unusual punishment. See also *Ramirez v Castro* (9th Cir 2004) 365 F3d 755 (25-year-to-life sentence for shoplifting, when defendant's strikes were essentially nonviolent shoplifts, was cruel and unusual).

For discussion of attack on the constitutional validity of an alleged prior conviction, see §§24.30-24.39.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.34 d. One Strike Sex Crime Law

§37.34 d. One Strike Sex Crime Law

Separate sentencing scheme. Penal Code §667.61 provides a separate sentencing scheme for sex offenders who meet its criteria. Under this provision, a first time offender who commits one of the offenses specified in subdivision (c) and who meets the statutory criteria set out in subdivisions (d) or (e) is subject to a mandatory sentence of 15 or 25 years to life.

Ø **Note:** The Sex Offender Punishment, Control, and Containment Act of 2006, effective September 20, 2006, added Pen C §667.61(c)(8)-(9), which make violations of Pen C §§288(a) and 288.5 subject to One Strike sentencing. See Stats 2006, ch 337, §§33, 62. Before this amendment, Pen C §667.61 did not apply to such convictions. See *People v Palmer* (2001) 86 CA4th 440, 103 CR2d 301. Proposition 83, effective November 8, 2006, eliminated an exception in Pen C §667.61(c)(8), as it was enacted by the legislature, for defendants eligible for probation under Pen C §1203.066.

Facts that bring the defendant within the provisions of Pen C §667.61. The defendant is subject to a sentence of 25 years to life if one or more of the circumstances ("major factors") specified in Pen C §667.61(d) exist, or if two or more circumstances specified in Pen C §667.61(e) ("minor factors") exist. If a single §667.61(e) ("minor factor") circumstance exists, the defendant is subject to a sentence of 15 years to life under Pen C §667.61(b).

Offenses committed before November 30, 1994, are ineligible for sentencing under this scheme. *People v Hiscox* (2006) 136 CA4th 253, 257, 38 CR3d 781. The effective date of Pen C §667.61(c)(5) and (d)(8), which added new circumstances to the list of circumstances that require sentencing under §667.61, was September 20, 2006. Stats 2006, ch 337, §62.

Pleading and proof requirements. Any fact necessary to invoke this alternative sentencing scheme must be alleged in the accusatory pleading and must be found true by the trier of fact or admitted by the defendant in open court. Pen C §667.61(j); *People v Mancebo* (2002) 27 C4th 735, 117 CR2d 550. This statutory requirement is mandated by the U.S. Constitution. *People v Benitez* (2005) 127 CA4th 1274, 1277, 26 CR3d 262. See *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856; *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 415, 124 S Ct 2531. The trial court must instruct the jury on the factual findings necessary to bring the defendant within this law. *People v Estrada* (1997) 57 CA4th 1270, 67 CR2d 596.

Ø **Note:** A finding under Pen C §667.61 that a defendant convicted of violating Pen C §288(a) is not eligible for probation is not an element of the sentencing scheme that must be found by the jury under *Blakely v Washington, supra*. *People v Benitez* (2005) 127 CA4th 1274, 1278, 26 CR3d 262.

Use of Pen C §667.61(c) and (d) facts. A fact that is necessary to support the imposition of a Pen C §667.61 sentence must be used for that purpose unless another provision of law provides for a greater penalty, and may not be used again to impose an additional enhancement. Pen C §667.61(f); *Mancebo,* 27 C4th at 742 (gun use allegation was necessary to imposition of §667.61 term; therefore, it could not be used to impose gun use enhancement). If more than the minimum number of facts necessary to impose a §667.61 sentence have been pleaded and proved, the extra facts must be used to impose additional punishment authorized by other provisions of law. Pen C §667.61(f).

Definition of "single occasion." The 15-year-to-life or 25-year-to-life sentence mandated by this section must be imposed once for each offense committed against a single victim on a single occasion. Pen C §667.61(g). A defendant is not entitled to a jury trial on the issue of whether each offense occurred on a single or separate occasion. *People v Martinez* (2008) 166 CA4th 1598, 1605, 83 CR3d 738 (judicial determination regarding imposition of indeterminate sentences under §667.61(g) is not functional equivalent of factual determination regarding an element of the crime). In *People v Jones* (2001) 25 C4th 98, 107, 104 CR2d 753, the California Supreme Court held that, given the harsh punishment under Pen C §667.61(g) and the absence of clear legislative intent to the contrary, for purposes of the statute, sex offenses committed "in close temporal and spatial proximity" occurred on a "single occasion." See also *People v Fuller* (2006) 135 CA4th 1336, 1342, 38 CR3d 428 (three rapes against the same victim over the course of an

hour constituted "a single occasion" punishable by one strike). A 2006 amendment to Pen C §667.61 (see Stats 2006, ch 337, §62) adopted the definition of "separate occasions" found in Pen C §667.6(d). Pen C §667.61(i). Sentencing under Pen C §667.6 is discussed in §§37.25-37.27. If there are multiple victims on a single occasion, a separate consecutive sentence must be imposed for each victim. Pen C §667.61(i). Multiple indeterminate terms must be imposed under Pen C §667.61(e)(5) for offenses against multiple victims on multiple occasions. *People v DeSimone* (1998) 62 CA4th 693, 696, 73 CR2d 73.

One Strike allegation may not be stricken. The court may not strike a circumstance that brings the defendant within this section. Pen C §667.61(g). *People v Estrada* (1997) 57 CA4th 1270, 1277, 67 CR2d 596; *People v Espino* (1997) 53 CA4th 92, 61 CR2d 350.

Constitutionality. Section 667.61 does not impose unconstitutionally cruel and unusual punishment or deprive the defendant of equal protection. *People v Crooks* (1997) 55 CA4th 797, 64 CR2d 236.

Relationship to Three Strikes law. A defendant can be subject to both this statute and the Three Strikes law. *People v Acosta* (2002) 29 C4th 105, 124 CR2d 435. In *Acosta,* the supreme court also concluded that a strike prior can be used to impose a Three Strikes sentence, to bring the defendant within the provisions of the One Strike law, and to enhance the defendant's sentence, despite language in Pen C §667.61(f) that appears to limit the use of §667.61(c) and (d) factors to imposition of one of the terms prescribed in §557.61(a) and (b) when only the minimum number of facts have been pleaded and proved. 29 C4th at 119. See also *People v Lopez* (2004) 119 CA4th 355, 14 CR3d 202.

> Ø **Note:** The relationship of Pen C §§667.61 and 667.71 to the Three Strikes law is exceedingly complicated. See, *e.g., People v Lopez, supra*. Because each law deals with each prior and each present offense in a slightly different fashion, the permutations are endless. The laws may apply in various combinations to a particular case.

Relationship to Pen C §667.71. Penal Code §667.61 and the habitual sex offender statute (Pen C §667.71) are mutually exclusive sentencing schemes. *People v Snow* (2003) 105 CA4th 271, 129 CR2d 314. When a defendant qualifies for sentencing under both alternatives, there is a split of authority as to whether the correct procedure is to impose but stay or to strike the unused alternative. Compare *Snow,* 105 CA4th at 283 (strike), with *People v McQueen* (2008) 160 CA4th 27, 37, 72 CR3d 499 (stay), and *People v Lopez* (2004) 119 CA4th 355, 364, 14 CR3d 202 (stay).

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.34A e. Other Alternative Sentencing Schemes

§37.34A e. Other Alternative Sentencing Schemes

A number of other statutes provide alternative sentencing schemes.

Penal Code §667.51(c). This statute mandates a 15-year-to-life term for an individual convicted of violating Pen C §288 (lewd and lascivious conduct with minor) or §288.5 (continuous sexual abuse of child under 14) who has at least two prior convictions of sex offenses specified in Pen C §667.51(b). See Pen C §667.51.

Ø **Note:** Few, if any, defendants are currently charged under §667.51(c), because it overlaps with §§667.61 and 667.71.

Penal Code §667.7 (habitual violent offender). Most defendants eligible for sentencing under this provision are also eligible for sentencing under the Three Strikes law. However, §667.7 does include some qualifying priors (*e.g.,* escape or attempt to escape by an inmate with force or violence in violation of Pen C §4530 or §4532) that are *not* strikes under Pen C §§667(b)-(i) and 1170.12. See Pen C §667.7(a). A defendant convicted of a felony in which the defendant inflicted great bodily injury (GBI), or personally used force that was likely to produce GBI, and who has served two or more prior separate prison terms for listed violent offenses, including murder, forcible sex crimes, kidnapping, carjacking with a deadly weapon, or any felony in which the defendant inflicted GBI as provided in Pen C §12022.7, must be punished under either Pen C §667.7(a)(1) or (a)(2). Section 667.7(a)(1) provides that when a defendant served two prior separate prison terms for listed violent offenses, the new term must be life in prison. In addition, the defendant's minimum parole date will be calculated by the greater of a minimum of 20 years or the term that would have been imposed in the absence of the enhancing statute. This means that, without the statute, if the defendant had received a 15-year term, his or her term under the statute would be 20 years to life. If the term without the statute had been 25 years, the term under the statute would be 25 years to life. *People v Skeirik* (1991) 229 CA3d 444, 466, 280 CR 175; *People v Victor* (1991) 227 CA3d 518, 524, 278 CR 7. For a discussion of the applicability of this statute to a defendant convicted of murder, see *People v Jenkins* (1995) 10 C4th 234, 40 CR2d 903.

Under Pen C §667.7(a)(2), when a defendant has served three or more prior separate prison terms for the listed violent offenses, the punishment is life without possibility of parole. This exceeds the punishment available under the Three Strikes law.

Penal Code §667.71 (habitual sex offender). A person who has previously served at least one prison term for specified sex offenses, and who is again convicted of one of these offenses, is a habitual sex offender. The specified offenses are listed in Pen C §667.71(c)(1)-(13).

The statute applies only if the facts required to prove that the defendant falls within it are alleged in the accusatory pleading and admitted or proved. Pen C §667.71(e).

A defendant convicted under §667.71 is also subject to the Three Strikes law if he or she has one or more qualifying prior convictions. *People v Murphy* (2001) 25 C4th 136, 105 CR2d 387. In *Murphy,* the defendant was charged with two counts of lewd and lascivious conduct with a child. He had two prior convictions of similar offenses. His two prior convictions were used three times: to elevate the terms for each of his present crimes to 25 to life under §667.71; to triple each term to 75 to life under the Three Strikes law (these terms were run consecutively to total 150 to life); and as a prior serious felony conviction under Pen C §667(a) to add another 5 years, for a total of 155 years to life.

Ø **Note:** In *Murphy,* the *same* prior was used repeatedly. This same scenario will apply to most cases in which §667.71 is applicable, because it appears that most qualifying priors under this section are also serious felonies and strikes under Pen C §1192.7.

If a qualifying defendant has multiple offenses against a single victim, §667.71 is likely to result in a larger sentence than would §667.61.

This statute and the One Strike sex crime law (Pen C §667.61) are mutually exclusive sentencing schemes. *People v Snow* (2003) 105 CA4th 271, 129 CR2d 314. When a defendant qualifies for sentencing under both alternatives, there is a split of authority as to whether the correct procedure is to strike or to impose but stay the unused alternative.

Compare *Snow,* 105 CA4th at 283 (strike), with *People v McQueen* (2008) 160 CA4th 27, 37, 72 CR3d 499 (stay), and *People v Lopez* (2004) 119 CA4th 355, 364, 14 CR3d 202 (stay).

Penal Code §667.75 (drug offenses involving minors). A defendant convicted of certain drug offenses involving minors who has previously served two or more prior separate prison terms as defined in Pen C §667.5 for violation of those crimes may be punished by imprisonment for life and will not be eligible for release on parole for 17 years, or for the term determined by the court normally under Pen C §1170.

Penal Code §186.22(b)(4) (life term for criminal street gang crimes). Under Pen C §186.22(b)(4), enacted by Proposition 21, crimes listed in §186.22(b)(4)(B)-(C) committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in" criminal activity by gang members, are punishable by an indeterminate life term. The listed crimes include home invasion robbery, carjacking, violation of §246 or §12022.55 (Pen C §186.22(b)(4)(B)), felony extortion, and threatening victims or witnesses (Pen C §186.22(b)(4)(C)). The effective date of Proposition 21 was March 8, 2000.

The minimum term for the indeterminate life sentence is either (1) the term under Pen C §1170 for the underlying conviction, including enhancements, or (2) the term specified for the crime in the following list, whichever is *greater*. A minimum of 15 years is prescribed for the following crimes: home invasion robbery (Pen C §213(a)(1)(A)); carjacking (Pen C §215); felony violation of Pen C §246; and violation of Pen C §12022.55. The minimum term for extortion (Pen C §519) and threats to victims and witnesses (Pen C §136.1) is 7 years. A person convicted of a crime that carries a life term may not be paroled until he or she has served 15 years. Pen C §186.22(b)(5). The minimum term applies *only* to the substantive offense; it does not apply to a life term (*e.g.,* Pen C §12022.53(d)) enhancement. *People v Montes* (2003) 31 C4th 350, 2 CR3d 621.

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§37.35 3. Penal Code §12022.1: Felony Committed While on Bail or Own Recognizance

A defendant released on bail or on his or her own recognizance (O.R.) who commits a second offense any time before his or her conviction on the primary offense becomes final may be punished under Pen C §12022.1. Effective January 1, 1999, this definition of "primary offense" was expanded to include a felony offense for which the defendant is out of custody between the pronouncement of judgment and the time the person actually surrenders or is otherwise returned to custody. The terms for the primary offense, the secondary offense, and the 2-year term for the enhancement must be imposed consecutively. Pen C §12022.1; *People v Burnes* (1990) 224 CA3d 1222, 274 CR 466, overruled on other grounds in *People v McClanahan* (1992) 3 C4th 860, 872 n6, 12 CR2d 719.

The enhancement is linked to the number of separate prior cases for which the defendant is on bail or O.R. If the defendant commits a crime while released on multiple previous cases, his or her sentence is subject to one enhancement for *each* such prior. Thus, a defendant on bail in two separate cases who commits a new felony is subject to *two* enhancements. *People v Mackabee* (1989) 214 CA3d 1250, 1262, 263 CR 183; *People v Warinner* (1988) 200 CA3d 1352, 1355, 247 CR 197. However, while the defendant must serve a consecutive term to the first offense for one of the new offenses, the trial court has discretion to sentence concurrently on the remaining new offenses. *People v Tillotson* (2007) 157 CA4th 517, 544, 69 CR3d 42. The enhancement is *not* multiplied if the defendant commits multiple felonies while on bail for a *single* prior offense. *People v Nguyen* (1988) 204 CA3d 181, 196, 251 CR 40.

For crimes committed before January 1, 1998, §12022.1 enhancements are subject to the double-the-base-term limit. *People v McClanahan* (1992) 3 C4th 860, 12 CR2d 719. See §37.30.

A §12022.1 enhancement may be stricken by the court under Pen C §1385. *People v Meloney* (2003) 30 C4th 1145, 135 CR2d 602.

A defendant who has been placed in a diversion program, even though he or she was released on O.R. to enter the program, is not subject to the §12022.1 enhancement. *People v Ormiston* (2003) 105 CA4th 676, 129 CR2d 567.

The §12022.1 enhancement can be applied to a conviction for Pen C §1320.5 (failure to appear in court when released on bail). *People v Walker* (2002) 29 C4th 577, 128 CR2d 75. The enhancement can be imposed when the defendant is on bail for an out-of-state offense. *People v Griffin* (2005) 128 CA4th 1112, 27 CR3d 734.

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§37.36 4. Aggregate Term

The aggregate term is the sum of the following (Pen C §1170.1(a); *People v Tassell* (1984) 36 C3d 77, 90, 201 CR 567, overruled on other grounds in *People v Ewoldt* (1994) 7 C4th 380, 401, 27 CR2d 646):

Principal term (base term + specific (conduct) enhancements)

+ Subordinate terms (including specific (conduct) enhancement)

+ Enhancement terms for Pen C §12022.1

+ Enhancement terms for priors

Aggregate term =

Ø **Example:**

The defendant is convicted of attempted murder and robbery with GBI, all of which he did while out on bail for Veh C §10851, for which he was subsequently convicted. He has two prior prison terms (Pen C §667.5(b)).

Principal term (Pen C §§664, 187) =	9 years
+ Subordinate term (for Pen C §211 & GBI) (1/3 mid term) =	2 years
+ Subordinate term (for Veh C §10851) (1/3 mid term) =	8 months
+ (Pen C §12022.1) =	2 years
+ Priors (Pen C §667.5(b)) =	2 years
Aggregate term =	15 years, 8 months

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D. Multiple DSL and Combined DSL/ISL Terms

§37.37 1. Multiple Cases That Result in Multiple DSL Terms (Including Misdemeanors)

Under Pen C §1170.1(a), when a defendant is convicted in separate judgments, the judge in the last case must pronounce a single aggregate term. This can occur

- when new charges are brought in the same county after the defendant has been convicted there and is serving a sentence;
- when a defendant is convicted in one county and then on conviction is transported to another county to face pending charges; or
- when a defendant has been committed to state prison and is brought back after making a Pen C §1381 demand.

As long as the defendant has been in continuous custody, the lapse of time does not change the applicability of this rule. All the sentences must be combined as if they were all counts in one judgment. If the last judge intends to impose any terms consecutive to any of the previous terms, the judge must then make a new determination of which count represents the principal term. Discretionary decisions, including imposition of other than the middle term for a count, making counts consecutive or concurrent to each other, or striking punishment for enhancements, made by the judges in the previous cases may not be changed by the current judge. Cal Rules of Ct 4.452. See Pen C §§669, 1170.1(a). The decision to impose a consecutive sentence is generally a sentencing choice that requires a statement of reasons. *People v Callahan* (1983) 149 CA3d 1183, 1188, 198 CR 12, disapproved on another ground in *People v Scott* (1994) 9 C4th 331, 353, 36 CR2d 627.

If the court in the last case does not specify that some or all terms are consecutive to the earlier ones at sentencing or within 60 calendar days thereafter, the sentences become concurrent by operation of law. Pen C §669.

Misdemeanor terms to be served in a county jail may be sentenced consecutively to a DSL prison term. See *In re Eric J.* (1979) 25 C3d 522, 538, 159 CR 317. A consecutive misdemeanor term does *not* require a statement of reasons. *People v Fugate* (1990) 219 CA3d 1408, 269 CR 37. It is, however, subject to the double-the-base-term limit of Pen C §1170.1(g) if the crime was committed before January 1, 1998. *People v Murray* (1994) 23 CA4th 1783, 29 CR2d 42.

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§37.38 2. Combined Determinate (DSL) and Indeterminate (ISL) Terms

An indeterminate sentence under Pen C §1168 may run concurrently or consecutively to a determinate sentence under Pen C §1170. Pen C §669; Cal Rules of Ct 4.425.

The ISL count cannot be a "principal term" to subordinate DSL counts. *People v McGahuey* (1981) 121 CA3d 524, 531, 175 CR 479. Both the ISL sentence and the DSL sentence must be considered and calculated independently. One DSL count must be designated the principal term to which any other consecutive DSL counts are subordinate. When a person is committed to prison on an indeterminate sentence that is ordered consecutive to a determinate sentence, the determinate sentence is served first. Pen C §669. The entire DSL aggregate term must be served before the consecutive ISL sentence. *People v Reyes* (1989) 212 CA3d 852, 858, 260 CR 846. No part of the DSL term may be credited toward parole eligibility on the life term. Pen C §669. Effective January 1, 1998, enhancements to indeterminate terms are served in full and are not subject to any reduction. *People v Felix* (2000) 22 C4th 651, 94 CR2d 54.

Ø **Example:** The defendant is convicted of second-degree murder (Pen C §187) with the use of a firearm (Pen C §12022.53(d)) and two separate, unrelated counts of robbery (Pen C §211), each with the use of a knife (Pen C §12022(b)(1)). His maximum sentence is calculated as follows:

Principal term (Pen C §211) (aggravated term) =	5 years
+ enhancement (Pen C §12022(b)(1)) =	1 year
+ subordinate term (Pen C §211) (1/3 mid term) =	1 year
+ enhancement (Pen C §12022(b)(1)) (1/3 mid term) =	4 months
+ indeterminate term (Pen C §187) =	15 years to life
+ enhancement (Pen C §12022.53(d)) =	25 years to life
Aggregate term =	7 years, 4 months + 40 years to life

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§37.39 3. Multiple ISL Terms and Enhancements

The trial court has discretion to decide whether to impose multiple ISL terms consecutively or concurrently. Pen C §669; *People v Morris* (1971) 20 CA3d 659, 667, 97 CR 817, overruled on other grounds in *People v Duran* (1976) 16 C3d 282, 292, 127 CR 618. For determinate sentences, Cal Rules of Ct 4.403 and 4.406(b)(6) require the court to set forth its reasons for imposing consecutive sentences, but these rules do not apply to multiple indeterminate sentences. *People v Arviso* (1988) 201 CA3d 1055, 1058, 247 CR 559. The decision to run indeterminate terms consecutively is, however, subject to review under the abuse of discretion standard (201 CA3d at 1058), and thus should be carefully considered and supported by reasons. *People v Murray* (1990) 225 CA3d 734, 750, 275 CR 498.

If consecutive indeterminate terms are imposed, they are *not* subject to any of the "one-third" rules, because those rules (and Pen C §1170.1) apply only to determinate sentences. Thus, consecutive indeterminate terms are imposed at full term. Enhancements to consecutive indeterminate terms are also imposed at full term. They are *not* subject to the one-third rule, even though the enhancement itself carries a determinate term. *People v Felix* (2000) 22 C4th 651, 94 CR2d 54.

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§37.40 4. Out-of-State and California DSL Terms

California courts can sentence concurrently or consecutively to a prior uncompleted term in a foreign jurisdiction (Cal Rules of Ct 4.451(b)), with one exception. When the legislature has expressly provided that the sentence must commence from the time the offender would otherwise have been released from prison, the trial court must sentence consecutively. *People v Gulbrandsen* (1989) 209 CA3d 1547, 1558, 258 CR 75. When a determinate sentence is imposed to run consecutively to a federal sentence or the sentence of another state, the California sentence must be determined without reference to the foreign judgment, and service of it does not begin until completion of the other sentence. Cal Rules of Ct 4.451(b). This means that the principal/subordinate rules do not include the foreign sentence. The California term is computed as if the foreign sentence did not exist, with the principal term and subordinate terms, if any, computed entirely from the California convictions. Cal Rules of Ct 4.451(b); *People v Veasey* (1979) 98 CA3d 779, 786, 159 CR 755. A defendant sentenced on a state case ordered to run concurrently with a federal case is not eligible for this benefit unless he or she is in federal custody. See Cal Rules of Ct 4.451(b). Such a defendant may file a writ of habeas corpus to petition the state court for transfer to a federal facility. *In re Stoliker* (1957) 49 C2d 75, 77, 315 P2d 12.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.41 E. Striking Charges and Enhancements Under Pen C §1385

§37.41 E. Striking Charges and Enhancements Under Pen C §1385

Trial court's discretion to strike or dismiss enhancement or other sentencing element. The trial court may dismiss an action in furtherance of justice either on its own motion or on application of the prosecutor. Pen C §1385. The defendant has no right to make a motion to dismiss under Pen C §1385, but may *invite* the trial court to dismiss in the interests of justice. *People v Carmony* (2004) 33 C4th 367, 375, 14 CR3d 880. Such an invitation may be made by an oral or written application. See *People v Carmony, supra*; *Rockwell v Superior Court* (1976) 18 C3d 420, 441, 134 CR 650. The §1385 request can be made at a preliminary hearing. *People v Konow* (2004) 32 C4th 995, 12 CR3d 301. The court's erroneous failure to consider such a request can deny the defendant a substantial right. 32 C4th at 1022. An appellate claim or error premised on the trial court's failure to dismiss under Pen C §1385 is reviewed for abuse of discretion. *Carmony*, 33 C4th at 376.

Ø **Note:** By failing to invite the trial court to dismiss a charge or enhancement in furtherance of justice, the defendant forfeits the opportunity for appellate review or any error under *People v Scott* (1994) 9 C4th 331, 352, 36 CR2d 627; *Carmony,* 33 C4th at 375.

The authority conferred by §1385 permits dismissal in the interest of justice in any situation in which the legislature has not clearly shown a contrary intent. *People v Fritz* (1985) 40 C3d 227, 219 CR 460. This authority includes the power to strike (or dismiss) enhancements. See, *e.g., People v Jones* (2007) 157 CA4th 1373, 1379, 69 CR3d 262 (court may strike deadly-weapon-use enhancement under Pen C §12022(b)(1)); *People v Meloney* (2003) 30 C4th 1145, 1155, 135 CR2d 602 (trial court may strike or dismiss Pen C §12022.1 (on bail) allegation); *People v Superior Court (Romero)* (1996) 13 C4th 497, 504, 53 CR2d 789 (trial court has discretion under §1385 to dismiss strike). See also *People v Harvey* (1991) 233 CA3d 1206, 1231, 285 CR 158; *People v Cattaneo* (1990) 217 CA3d 1577, 1589, 266 CR 710. In general, the court may, under §1385, strike an enhancement unless the enhancement statute itself or a court decision discussing that statute prohibits it. See, *e.g.,* Pen C §12022.53(h) (court may not strike under §1385).

In exercising its discretion to strike an enhancement, the court may consider various factors, including the defendant's youth, the number of adult priors, the lack of prior prison terms, the current nonviolent crime, the length of the prison sentence that the trial court is imposing, and the "nature and circumstances" of the defendant's past and present convictions which suggest that the prior offenses were mitigated by either being committed in a less serious or violent manner than normal or by the low level of the defendant's participation as, for example, a subordinate. See *People v Wallace* (2004) 33 C4th 738, 753, 16 CR3d 96. The court has no sua sponte duty to gather and consider evidence potentially in support of a defendant's request to strike an enhancement under Pen C §1385. The burden is on the defendant to provide the facts to the court but when such evidence is presented, the court does have a duty to consider it. *People v Lee* (2008) 161 CA4th 124, 129, 73 CR3d 811.

Limitations on discretion. By its own terms, §1385 may not be used to strike a prior serious felony alleged under Pen C §667(a). See Pen C §1385(b). Other examples of sentencing provisions for which the legislature has clearly shown an intent to restrict or eliminate the trial court's §1385 discretion include the following:

- Penal Code §1203.06 (barring probation for individual who personally used firearm in commission of specified offenses, and prohibiting court from striking personal-use findings under §1385). See *People v Tanner* (1979) 24 C3d 514, 519, 156 CR 450.
- Penal Code §1203.066 (prohibiting court from striking findings barring probation for individual convicted of specified sex offenses). See *People v Lathrop* (1986) 181 CA3d 1217, 1222, 227 CR 34.
- Penal Code §1203.07 (barring probation for individual convicted of specified serious drug-related offenses). See *People v McGuire* (1993) 14 CA4th 687, 695, 18 CR2d 12.
- Penal Code §12022.5 (enhancement for personal use of firearm in commission of felony or controlled substance offense). See Pen C §12022.5(c) (as amended, Stats 2002, ch 126); *People v Herrera* (1998) 67 CA4th 987, 79 CR2d 539.
- Penal Code §12022.53 (enhancement for personal use of firearm in commission of specified felonies). See Pen

C §12022.53(h).

- The predicate circumstances for a "one strike" sex offense under Pen C §667.61.

In general, the court may not exercise §1385 discretion to eliminate a historical *fact* as opposed to an allegation that must be pleaded and proved. *In re Varnell* (2003) 30 C4th 1132, 1137, 135 CR2d 619 (court could not "strike" fact defendant was convicted of a serious felony in order to make him eligible for Proposition 36). For a chart listing prior-conviction allegations that must be pleaded and proved, see §24.18.

Procedure. The procedure under Pen C §1385 for striking an enhancement is strict. The court must provide a written minute order stating its justification. Pen C §1385(a); *People v Bonnetta* (2009) 46 C4th 143, 151, 92 CR3d 370 (dismissal order ineffective absent written statement of reasons on minute order); *People v Rivadeneira* (1985) 176 CA3d 132, 137, 222 CR 548. The sentence element affected must be stricken (*i.e.,* eliminated for all time) as opposed to being stayed. See *People v Harvey, supra*.

The trial court has discretion either to strike (or dismiss) an enhancement or to strike the punishment. Pen C §1385(c); *People v Meloney, supra*. Under Cal Rules of Ct 4.428(a), the trial court should not strike the enhancement *allegation*. To the extent that this directive can be read as a preference for striking the punishment only rather than the enhancement itself, it appears to conflict with Pen C §1385(a). See *People v Hall* (1994) 8 C4th 950, 35 CR2d 432 (rule of court that conflicts with governing statutes is invalid).

Ø **Note:** Prosecutors generally encourage the trial court to strike just the punishment under a given section, not the finding. This practice allows later courts to use the finding and its surrounding circumstances. Defense attorneys prefer that the court strike the finding.

On dismissal of prior strike allegations under §1385, see §37.33D. For discussion of §1385 generally, see chap 25.

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§37.42 F. Striking Punishment for Certain Enhancements Under Former Pen C §1170.1(h) [Deleted]

Material formerly discussed in this section has been deleted.

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G. Mandatory Sentencing Limitations

§37.43 1. Dual Use of Facts

Sentencing courts generally may not use one fact as two aggravating factors, but the rules are not completely clear about when using the same fact more than once is prohibited.

Facts relating to the crime or to the defendant are used in several ways under the Determinate Sentencing Law (DSL): as elements of crimes or enhancements, and as sentencing factors. Sentencing factors are used primarily in decisions to grant or deny probation, to aggravate or mitigate a base term, or to choose consecutive sentences. There are two express rules against dual use of a fact:

(1) The court must not impose an upper term by using the fact of an enhancement on which sentence is imposed, nor can it impose an upper term by using a fact used to justify consecutive sentences. Pen Code §1170(b). See *People v Coleman* (1989) 48 C3d 112, 164, 255 CR 813; *People v Jones* (2009) 178 CA4th 853, 860, 100 CR3d 780; *People v Fernandez* (1990) 226 CA3d 669, 680, 276 CR 631.

(2) The court may not impose consecutive rather than concurrent sentences on the basis of a fact used to impose the upper term, a fact used to otherwise enhance the defendant's prison sentence (*e.g.,* a specific (conduct) enhancement), or a fact that is an element of the crime. Cal Rules of Ct 4.425(b). See *Coleman,* 48 C3d at 163; *People v Barker* (1986) 182 CA3d 921, 940, 227 CR 578.

Ø **Note:** The legislature created an exception to this rule by allowing convictions for assault with a firearm under Pen C §245(a)(2) to be enhanced with firearm use under Pen C §12022.5(d).

Theoretically, apart from these express restrictions, repeated use of the same fact should be permitted. See *People v Vega* (1990) 224 CA3d 506, 513, 273 CR 684, disapproved on other grounds in *People v McClanahan* (1992) 3 C4th 860, 872 n6, 12 CR2d 719. In practice, the courts of appeal have created the following dual use rules:

- An element of a crime may not be used to impose a greater term of punishment for that crime. Cal Rules of Ct 4.420(d). *People v Marshall* (1987) 196 CA3d 1253, 1259, 242 CR 319.
- An element of a crime may not be used as a factor in denying probation. *People v Parrott* (1986) 179 CA3d 1119, 1125, 225 CR 293.

Ø **Note:** In *Lopez v Superior Court* (2008) 160 CA4th 824, 831, 72 CR3d 929, the court held that the same gang-related conduct should not be used both to violate an injunction against gang-related activity and to enhance the misdemeanor to a wobbler under Pen C §186.22(d).

Ø **Note:** In *People v Calhoun* (2007) 40 C4th 398, 53 CR3d 539, the supreme court held that it was proper for the trial court to sentence the defendant in a vehicular manslaughter case to two upper terms on the ground that there were multiple victims even though there was only one victim per count. The court held that by finding the defendant guilty on multiple counts, the jury necessarily found that there were multiple victims.

The same fact may justify making numerous terms consecutive to each other. *People v Coulter* (1989) 209 CA3d 506, 516, 257 CR 391. That same fact may also justify making terms consecutive and choosing full consecutive sentences under Pen C §667.6(c). The sentencing court is required to give separate statements of reasons for the two sentencing choices. *People v Huber* (1986) 181 CA3d 601, 628, 227 CR 113.

Beyond these rules, the issue becomes whether the same fact is really being used twice. Numerous disputes arise in connection with the serious-felony and prison-prior enhancements under Pen C §§667(a) and 667.5(b):

Enhancing under both former Pen C §§667(a) and 667.5(b) for the identical prior conviction was prohibited in *People v Jones* (1993) 5 C4th 1142, 22 CR2d 753. Both enhancements may be imposed, however, if the prior judgment contains more than one felony conviction leading to a prison sentence. *People v Perez* (1992) 4 CA4th 893, 6 CR2d 141; *People v Medina* (1988) 206 CA3d 986, 254 CR 89.

A prior was used to support a Pen C §667.5(a) enhancement, and the defendant's parole status stemming from that

term was used as an aggravating factor, in *People v Coleman* (1991) 53 C3d 949, 281 CR 146.

Courts disagree on whether the prior convictions that support a Pen C §667 enhancement can be used to support a factor in aggravation based on a prior bad record. Cal Rules of Ct 4.421(b). Compare *People v Hurley* (1983) 144 CA3d 706, 709, 192 CR 805 (yes), and *People v Raby* (1986) 179 CA3d 577, 582, 224 CR 576 (yes; status as parolee is factor distinct from prior conviction), with *People v Fernandez* (1990) 226 CA3d 669, 681, 276 CR 631 (no), and *People v Barker* (1986) 182 CA3d 921, 940, 227 CR 578 (no).

May a fact used as an element be used to aggravate when that fact is more extreme than usual? Is great violence a factor beyond the elements of assault with a deadly weapon? Compare *People v Oberreuter* (1988) 204 CA3d 884, 887, 251 CR 522 (yes), with *People v Fernandez* (1990) 226 CA3d 669, 680, 276 CR 631 (no; when age range is an element, vulnerability is not proper aggravating factor). A defendant who was convicted of gross vehicular manslaughter while intoxicated and whose conduct exceeded gross negligence and approached implied malice properly receives the aggravated term. *People v Castorena* (1996) 51 CA4th 558, 59 CR2d 782. See generally *People v Quinones* (1988) 202 CA3d 1154, 1159, 249 CR 435, and *People v Miranda* (1987) 196 CA3d 1000, 1003, 242 CR 267, discussing how certain attributes of a particular element may be used in other ways.

The choice of term for a three-term enhancement need not be limited to the facts applicable to that particular enhancement; subject to the dual use rules discussed above, the defendant's background and probation/parole status may also be considered. *People v Hall* (1994) 8 C4th 950, 35 CR2d 432. See Cal Rules of Ct 4.428.

Dual use error can be forfeited. In *People v Scott* (1994) 9 C4th 331, 353, 36 CR2d 627, the court held that the failure of trial counsel to object to dual use issues will forfeit the issue on appeal. On the impact of *Scott* generally, see §37.51. Moreover, even a properly preserved dual use error may be found harmless because any one factor is frequently sufficient to sustain the trial court's decision. Thus, whenever the court relies on more than one aggravating factor, dual use error may be harmless if it is not reasonably probable a more favorable sentence would have been imposed absent the error. See *People v Coleman* (1989) 48 C3d 112, 166, 255 CR 813.

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§37.44 2. Penal Code §654: Limit on Acts or Omissions Made Punishable by Different Provisions

Penal Code §654 states, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Case law has expanded the meaning of the section to apply not only when there was only one act, but also when there was a course of conduct that violates more than one statute but nevertheless constitutes an indivisible transaction. Whether a course of conduct is indivisible depends on the actor's intent and objective. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. *People v Latimer* (1993) 5 C4th 1203, 1211, 23 CR2d 144. See, *e.g., People v Tarris* (2009) 180 CA4th 612, 628, 103 CR3d 278 (fines imposed on two counts constituting single course of action were penal in nature, regardless of whether payment was condition of probation, and therefore should have been stayed on one count); *People v Sanchez* (2009) 179 CA4th 1297, 101 CR3d 639 (imposition of separate and unstayed sentences violated §654 when defendant had to have same intent and objective in committing the offense of gang participation and the underlying robberies used to satisfy the element of gang participation); *People v Kenefick* (2009) 170 CA4th 114, 124, 87 CR3d 773 (sentence on forgeries stayed as "part and parcel" of theft and securities fraud); *People v Lopez* (2004) 119 CA4th 132, 137, 13 CR3d 921 (when defendant convicted on possession of firearm and possession of ammunition (which was loaded in firearm), sentence for possession of ammunition stayed under §654); *People v Bradley* (2003) 111 CA4th 765, 770, 4 CR3d 166 (defendant convicted of robbery, under straight aiding and abetting theory, and of attempted murder, under natural and probable consequences doctrine could not be punished for both offenses in absence of evidence that she intended to aid and abet murder attempt).

Note that multiple *punishment* is barred, but multiple *convictions* may be allowed under Pen C §954, unless one of the offenses is a necessarily included lesser offense of the other. See *People v Ortega* (1998) 19 C4th 686, 692, 80 CR2d 489. An analysis entirely separate from application of §654 determines whether certain conduct may give rise to several counts or just one. See, *e.g.*, *People v Hertzig* (2007) 156 CA4th 398, 403, 67 CR3d 312 (regardless of how many images there were on defendant's computer, he committed just one offense of possession of child pornography). By contrast, under §654, a defendant may be convicted of any number of crimes on the basis of the same act or course of conduct, but all but one of the sentences must be stayed. When Pen C §954 allows multiple convictions, but Pen C §654 prohibits multiple punishment, the court must stay execution of sentence on the convictions for which multiple punishment is prohibited. *People v Sloan* (2007) 42 C4th 110, 116, 64 CR3d 137. This may be of great significance if the crimes of conviction are serious felonies, because a qualifying conviction is a strike, even if punishment was stayed under Pen C §654. *People v Benson* (1998) 18 C4th 24, 74 CR2d 294. But see *People v Burgos* (2004) 117 CA4th 1209, 12 CR3d 566 (trial court abused its discretion when it failed to strike one of two strike priors that arose from same act). For further discussion of prior strikes, see §37.33A; on the Three Strikes law generally, see §§37.33-37.33E.

In many cases, such as the (a) and (b) counts of a DUI (see Veh C §§23152(a)-(b), 23153(a)-(b)), application of the §654 bar is straightforward. *People v Subramani* (1985) 173 CA3d 1106, 1111, 219 CR 644. But some applications are less obvious. The following cases are illustrative:

- A defendant may be convicted of both driving a stolen vehicle under Veh C §10851 and receiving the vehicle as stolen, but may not be punished for both. *People v Garza* (2005) 35 C4th 866, 28 CR3d 335; *People v Jaramillo* (1976) 16 C3d 752, 760 n9, 129 CR 306.
- A defendant may be convicted of both burglary (Pen C §459) and concealing the property stolen in the burglary, but may not be punished for both crimes. *People v Allen* (1999) 21 C4th 846, 89 CR2d 279.
- A defendant cannot be punished for both aggravated sexual assault on a child and forcible lewd conduct based on the same act. *People v Alvarez* (2009) 178 CA4th 999, 1007, 101 CR3d 169.
- A defendant may be convicted of both robbery and burglary arising from one course of conduct with a single purpose, but punishment for both crimes violates §654. *People v Le* (2006) 136 CA4th 925, 930, 39 CR3d 146.
- A defendant convicted of two counts of kidnapping, one with intent to commit carjacking and one with intent to

commit robbery, was not subject to punishment for both offenses. *People v Perez* (2000) 84 CA4th 856, 101 CR2d 376.

- When the purpose of a robbery was to obtain cocaine for sale, the court could sentence on only one of the crimes. *People v Austin* (1994) 23 CA4th 1596, 28 CR2d 885, disapproved on another ground in *People v Palmer* (2001) 24 C4th 856, 861, 103 CR2d 13.
- A defendant could not be punished separately for substantive crime and conspiracy when object of conspiracy was commission of substantive crime. *People v Ramirez* (1987) 189 CA3d 603, 616, 236 CR 404.

Exceptions to application of Pen C §654. There are two basic kinds of exceptions to the §654 bar. The first are categorical exclusions set out by case law, usually for policy reasons. The second are factual distinctions that show that two closely related crimes were done for separate reasons.

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a. General Legal Exceptions

§37.45 (1) Acts of Violence With Separate Victims

Multiple acts of violence committed against separate victims may be punished separately, even when they are done with the same intent and during the same transaction. *People v Perez* (1979) 23 C3d 545, 553, 153 CR 40; *People v Robinson* (1988) 198 CA3d 674, 681, 244 CR 17. Thus, a bank robber who robs multiple tellers may be sentenced for each robbery. See *People v James* (1977) 19 C3d 99, 119, 137 CR 447. If a gun was used, each count may be enhanced. See §37.49. For purposes of the §654 ban on multiple punishment, Pen C §422 (criminal threats) is a violent crime, and criminal threats against multiple victims are exempt from §654. *People v Solis* (2001) 90 CA4th 1002, 109 CR2d 464. Similarly, felony resisting arrest under Pen C §69 is a crime of violence to which the §654 bar does not apply. *People v Martin* (2005) 133 CA4th 776, 35 CR3d 105.

However, brandishing a firearm in the presence of multiple police officers (Pen C §417(c)) is subject to the limitation of §654. *People v Hall* (2000) 83 CA4th 1084, 100 CR2d 279.

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§37.46 (2) Multiple Sex Acts

Multiple penetrations. Multiple forcible sexual penetrations are exempt from Pen C §654. Each successive penetration justifies a separate sentence. *People v Harrison* (1989) 48 C3d 321, 329, 256 CR 401.

Multiple sex acts under Pen C §288(a). Multiple sex acts under Pen C §288(a) are exempt from §654. *People v Kirk* (1990) 217 CA3d 1488, 1496, 267 CR 126. Some older opinions attempted to distinguish between "defined" sex acts, such as rape, and "undefined" acts, such as various forms of touching under §288. This distinction appears to have ended with *People v Scott* (1994) 9 C4th 331, 36 CR2d 627.

Penal Code §667.6. The court's discretion under Pen C §667.6(c) to impose full-term consecutive sentences for sex crimes is categorically exempt from §654. *People v Hicks* (1993) 6 C4th 784, 25 CR2d 469. In *Hicks,* the California Supreme Court held that a defendant may be consecutively punished for a burglary (done with sexual intent) and for the subsequent sex crime. In contrast, indecent exposure in front of multiple victims is subject to the §654 bar. *People v Davey* (2005) 133 CA4th 384, 390, 34 CR3d 811.

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§37.47 (3) Certain Vehicle Code Violations

Vehicular manslaughter and DUI with injury. Vehicular manslaughter (Pen C §192) and driving under the influence with injury (Veh C §23153) are separate acts of violence, when separate victims are killed and injured, and so may be punished separately. *People v McFarland* (1989) 47 C3d 798, 803, 254 CR 331. When gross vehicular manslaughter while intoxicated is alleged, both gross vehicular manslaughter and DUI with injury are included offenses and may not be separate convictions. *People v Miranda* (1994) 21 CA4th 1464, 26 CR2d 610.

Drunk driving with injury. On the basis of legislative intent, not Pen C §654, only one Veh C §23153 violation may be charged per incident of drunk driving with injury. *Wilkoff v Superior Court* (1985) 38 C3d 345, 211 CR 742. However, a 1-year enhancement under Veh C §23558 may be added for each additional victim, not to exceed a total of three enhancements. Veh C §23558. Alternatively, if the facts warrant it, a Pen C §12022.7 enhancement may be imposed for each victim who suffered great bodily injury in the accident. See *People v Guzman* (2000) 77 CA4th 761, 91 CR2d 885 (multiple enhancements for multiple victims); *People v Arndt* (1999) 76 CA4th 387, 90 CR2d 415 (§12022.7 enhancement is instead of, not in addition to, enhancement under former Veh C §23182 (now Veh C §23558)); *People v Sainz* (1999) 74 CA4th 565, 88 CR2d 203. On Veh C §23153 convictions as strike offenses, see §37.31D.

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§37.48 b. Factual Distinctions

Even when a course of criminal conduct is continuous, Pen C §654 does not preclude multiple punishment for offenses that have independent intents or objectives. *People v Latimer* (1993) 5 C4th 1203, 23 CR2d 144. The following cases are illustrative:

- *People v Coleman* (1989) 48 C3d 112, 162, 255 CR 813 (separate punishment for assault and robbery proper when victim stabbed after robbery to prevent sounding of alarm);
- *People v Hairston* (2009) 174 CA4th 231, 238, 94 CR3d 159 (concurrent sentences permissible for multiple counts of Pen C §148 when defendant had separate objective for each violation);
- *In re Noelle M.* (2008) 169 CA4th 193, 197, 86 CR3d 663 (separate sales of methadone pills by minor during one high school football game constituted independent criminal objectives and could be punished separately);
- *People v Garcia* (2008) 167 CA4th 1550, 1566, 85 CR3d 155 (concurrent sentence for felon-in-possession could be imposed when defendant's intent in possessing weapon was different at time of arrest from that harbored at time of robbery in which gun was used);
- *People v Moseley* (2008) 164 CA4th 1598, 1604, 80 CR3d 551 (court not required to stay sentence for either offense when maintaining a place for selling drugs is independent of objective of possessing methamphetamine for sale);
- *People v Jones* (2002) 103 CA4th 1139, 127 CR2d 319 (shooting at dwelling by ex-felon who arrived at crime scene in possession of gun permitted punishment for both crimes); see also *People v Ratcliff* (1990) 223 CA3d 1401, 1410, 273 CR 253;
- *People v Green* (1996) 50 CA4th 1076, 58 CR2d 259 (independent objectives in course of conduct that included robbing, kidnapping, and raping victim and then taking her car by force justified punishment for each charged crime);
- *People v Dobson* (1988) 205 CA3d 496, 500, 252 CR 423, disapproved on other grounds in *People v Jones* (2001) 25 C4th 98, 110, 104 CR2d 753 (separate punishment for attempted murder and rape proper when attempt to kill rape victim motivated by intent to avoid identification);
- *People v Nguyen* (1988) 204 CA3d 181, 190, 251 CR 40 (separate punishment for robbery and attempted murder proper when victim was shot for no apparent reason);
- *People v Booth* (1988) 201 CA3d 1499, 1502, 248 CR 64 (punishment for both rape and burglary proper when burglary was committed with intent to rob and intent to rape arose after entry);
- *People v Goodall* (1982) 131 CA3d 129, 147, 182 CR 243 (separate punishment proper for defendant convicted of possession of PCP precursors, manufacture of PCP, and possession of PCP for sale).
- *People v Ratcliffe* (1981) 124 CA3d 808, 177 CR 627 (separate punishment for kidnapping and rape proper when defendant, who knew victim, kidnapped her to harass her, and later raped her for independent reasons).

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.49 c. Applicability to Enhancements

§37.49 c. Applicability to Enhancements

There is no dispute that when the base term of an offense is stayed under Pen C §654, the attendant enhancements must also be stayed. *People v Guilford* (1984) 151 CA3d 406, 411, 198 CR 700. There is, however, a split on whether §654 applies when more than one enhancement may be imposed for conduct arising out of the same set of facts. Some courts have found that enhancements "do not define a crime" and thus lie outside the ambit of Pen C §654. See, *e.g., People v Warinner* (1988) 200 CA3d 1352, 1355, 247 CR 197. Other courts reason that the enhancement is an "act" for which Pen C §654 proscribes multiple punishment. See, *e.g., People v Vaughn* (1989) 209 CA3d 398, 400, 257 CR 229; *People v Moringlane* (1982) 127 CA3d 811, 179 CR 726.

The California Supreme Court has shed imperfect light on this subject. In *People v Coronado* (1995) 12 C4th 145, 156, 48 CR2d 77, the court recognized but did not resolve this split. In *People v Palacios* (2007) 41 C4th 720, 726, 62 CR3d 145, the court held that §654 did not preclude imposition of all three gun enhancements under Pen C §12022.53(d) for one shot fired at a single victim, but did not reach the question whether Pen C §654 applied to enhancements in general. In *People v Gonzalez* (2008) 43 C4th 1118, 1123 n5, 77 CR3d 569, the court noted that the trial court correctly imposed and stayed Pen C §§12022.53 and 12022.5 enhancements but had incorrectly done so under Pen C §654 which "applies only to offenses punishable in different ways, not to prohibited enhancements." In *People v Arndt* (1999) 76 CA4th 387, 394, 90 CR2d 415, the court of appeal pointed out that the supreme court's analysis of the question in *Coronado* "suggests the applicability of section 654 depends on the nature of the enhancement at issue." 76 CA4th at 395. The court in *Arndt* construed the supreme court's analysis as indicating that enhancements going to the offense, such as weapons use or great bodily injury, are subject to Pen C §654, but enhancements going to the offender, such as recidivism statutes, are not. 76 CA4th at 395. See also *People v Jones* (2009) 178 CA4th 853, 864, 100 CR3d 780 (following *Coronado,* court did not violate Pen C §654 by adding two different 5-year enhancements based on defendant's status as repeat offender). In *People v Rodriguez* (2009) 47 C4th 501, 507, 98 CR3d 108, the supreme court confirmed that in *Coronado* it had identified two types of sentence enhancements and had concluded that Pen C §654 does not apply to those going to the nature of the *offender*. While the court agreed with the court of appeal that additional punishment for defendant's firearm use could not be imposed under both Pen C §§12022.5 and 186.22(b)(1)(C), it did not adopt the court of appeal's rationale that Pen C §654 precluded the application of multiple enhancements based on the nature of the *offense*. The court explicitly did not address the issue, finding instead that Pen C §1170.1(f) precluded the application of both enhancements.

Examples of enhancements going to the offense are Pen C §§186.11(a)(3) and 12022.6(a), both of which impose an additional prison sentence for excessive taking. When a defendant is subject to both these enhancements, the court must stay execution of the term imposed under §12022.6. *People v Lai* (2006) 138 CA4th 1227, 1237, 42 CR3d 444. Penal Code §654 bars sentencing on a GBI enhancement attached to a burglary when the defendant was sentenced on the same enhancement against the same victim for an assault based on the same conduct. *People v Reeves* (2001) 91 CA4th 14, 56, 109 CR2d 728.

Enhancements exempt from Pen C §654 on factual grounds. Penal Code §654 does not bar sentencing on more than one enhancement in the following situations:

- When a prior judgment consists of more than one felony conviction, both Pen C §667(a) (former Pen C §667) (5-year prior serious felony enhancement) and Pen C §667.5(b) (1-year prior prison term enhancement) may be imposed. *People v Perez* (1992) 4 CA4th 893, 909, 6 CR2d 141; *People v Medina* (1988) 206 CA3d 986, 254 CR 89. When the serious felony and prison prior involve the same conviction, only the greater enhancement may be imposed. *People v Jones* (1993) 5 C4th 1142, 1149, 22 CR2d 753.
- When both §667(a) (former §667) (5-year serious felony enhancement) and Pen C §12022.1 (enhancement for commission of felony while on bail or own recognizance) are charged, both may be imposed because the latter is based on additional facts beyond mere commission of a felony. *People v Juarez* (1993) 21 CA4th 318, 26 CR2d 697; *People v Melchor* (1989) 211 CA3d 1485, 1489, 260 CR 174 (appellant also had several prior felonies).

- When a prior conviction is used to elevate petty theft to a felony, it may also be used for enhancement under §667.5(b). *People v Darwin* (1993) 12 CA4th 1101, 15 CR2d 894; *People v Rodriguez* (1988) 206 CA3d 517, 253 CR 633; *People v Levell* (1988) 201 CA3d 749, 247 CR 489.
- When a prior felony conviction is used to establish the ex-felon element of possession of a firearm, it may also be used to enhance a defendant's sentence under §667.5(b). *People v Baird* (1995) 12 C4th 126, 48 CR2d 65.
- When a felony DUI prior is used to elevate the present DUI to a felony, it may also be used to enhance the sentence as a prior prison term under §667.5(b). *People v Coronado* (1995) 12 C4th 145, 48 CR2d 77.
- When a prior Veh C §10851 conviction is used to increase the base term for the present offense (Veh C §10851(e)/Pen C §666.5), it may also be used to enhance the sentence under §667.5(b). *People v Demara* (1995) 41 CA4th 448, 48 CR2d 682.

Ø **Note:** The California Supreme Court has suggested that the Pen C §666 enhancement does not lie if it is based on Veh C §10851 when the §10851 prior is based on driving, not taking, the vehicle. *People v Garza* (2005) 35 C4th 866, 882, 28 CR3d 335.

- When a prior sex offense is alleged as a strike prior, it may be used both to require registration under Pen C §290 and to enhance the sentence. *People v Garcia* (2001) 25 C4th 744, 107 CR2d 355.
- When there are multiple victims, multiple gun use enhancements may be imposed for a single episode. *People v King* (1993) 5 C4th 59, 19 CR2d 233.
- When a shot is fired at an intended victim but the shot misses and inadvertently injures another victim, thereby committing another assault, both assaults are subject to a separate firearm use enhancement. *In re Tameka C.* (2000) 22 C4th 190, 91 CR2d 730.

Enhancements exempt from Pen C §654 because of statutory language. The legislature has specifically exempted the following enhancements from Pen C §654's prohibition on multiple punishment:

- Health and Safety Code §11370.2 (3-year enhancement for prior drug conviction) applies in addition to any enhancement under Pen C §667.5. *People v Powell* (1991) 230 CA3d 438, 281 CR 568.
- On imposition of sentence for in-prison offenses, prior prison term enhancements under §667.5, which had been added to the term being served, may be added again to the new sentence. *People v White* (1988) 202 CA3d 862, 249 CR 165. See §37.28.
- An enhancement for Pen C §12022.5 (use of a firearm) may be added to any violation of Pen C §245 (assault with a deadly weapon) if a firearm is used, or to murder, if the killing is by means of shooting a firearm from a motor vehicle, intentionally at a person outside the motor vehicle, with the intent to inflict GBI or death. Pen C §12022.5(d).

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.50 d. Sentencing Procedures When Pen C §654 Applies

§37.50 d. Sentencing Procedures When Pen C §654 Applies

General rules. The sentencing court must consider the Pen C §654 issue before determining whether to impose concurrent or consecutive sentences. Cal Rules of Ct 4.424. The issue is a question of fact, but for the court, not the jury. *People v Porter* (1987) 194 CA3d 34, 38, 239 CR 269. When the trial court is uncertain of the facts, as after a guilty plea, it may hold a §654 hearing. *People v Ross* (1988) 201 CA3d 1232, 1238, 247 CR 827. Agreement by the defendant to the term abandons all §654 claims. Cal Rules of Ct 4.412(b). See *People v Jones* (1981) 124 CA3d 749, 754, 177 CR 605. A defendant may waive §654 in a plea agreement, and the waiver need not be express. *People v Hester* (2000) 22 C4th 290, 92 CR2d 641.

The sentence for all counts must be imposed, then §654-barred counts must be stayed. *People v Alford* (2010) 180 CA4th 1463, 1466, 103 CR3d 898. On service of the unstayed term, the stay becomes permanent. See *People v Beamon* (1973) 8 C3d 625, 640, 105 CR 681. A concurrent term is not proper. *People v Pearson* (1986) 42 C3d 351, 358, 228 CR 509. The barred terms should not be stricken (*People v Barker* (1986) 182 CA3d 921, 942, 227 CR 578), nor should imposition of the term be suspended (*People v Eberhardt* (1986) 186 CA3d 1112, 1124, 231 CR 387). The stayed terms are imposed as *full terms*; they are not subordinate terms, so the one-third rule does not apply. The imposed and stayed term thus is available if the other terms fail on appeal. All specific (conduct) enhancements relating to a stayed term must be stayed. *People v Smith* (1985) 163 CA3d 908, 911, 210 CR 43. Specific (conduct) enhancements follow their substantive crime.

Generally, a term stayed under §654 may not be used as the basis for a later enhancement. *People v Pearson, supra*. However, this rule does *not* apply to subsequent use of stayed counts as priors under the Three Strikes law; stayed counts may be used as prior strikes. *People v Benson* (1998) 18 C4th 24, 74 CR2d 294. But see *People v Burgos* (2004) 117 CA4th 1209, 12 CR3d 566 (trial court abused its discretion when it failed to strike one of two strike priors that arose from same act). For discussion, see §37.33A. In addition, transactionally related facts of counts stayed under §654 may be used as factors in aggravation. *People v Young* (1983) 146 CA3d 729, 194 CR 338.

Court must impose the longest term. Effective January 1, 1998, §654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment." In simple terms, this means the sentencing court may no longer impose sentence on the lesser of two or more related crimes under §654.

> Ø **Example:** In *People v Bradley* (2003) 111 CA4th 765, 770, 4 CR3d 166, the defendant was convicted as an aider and abettor of both robbery and attempted murder. Although she had intended to aid and abet the robbery, and had not intended the attempted murder to occur, §654 required that the punishment for attempted murder, the crime she did not intend, be imposed, while the punishment for robbery, the crime she did intend, was stayed.

Enhancements are included to determine longest term. To determine which term is longest, the court must take into account applicable count-specific enhancements. *People v Kramer* (2002) 29 C4th 720, 128 CR2d 407. In *Kramer,* the defendant was convicted of Pen C §§246 (7-year maximum) and 245(a) (4-year maximum, *but* with 4-year gun enhancement). The defendant argued that the §246 conviction was longer and that the §245(a) count with the gun enhancement should be stayed. The court ruled that the enhancement(s) must be included in the calculation and ordered that the §245(a) sentence, enhanced for the gun use, be imposed. But since subordinate terms run at 1/3 strength, the court may select any term as the principal one so long as it actually exceeds the subordinate terms in length. See §37.16. See also *People v Miller* (2006) 145 CA4th 206, 51 CR3d 421.

Multiple convictions not prohibited by Pen C §654. Normally, multiple convictions are legal. Exceptions to this rule include the following:

- *Theft and receiving stolen property*. A defendant cannot be convicted of separate crimes for the theft of property and receiving the property. *People v Jaramillo* (1976) 16 C3d 752, 757, 129 CR 306. See also *People v Magallanes* (2009) 173 CA4th 529, 535, 92 CR3d 751 (carjacking of van and receipt of same van); *People v Strong* (1994) 30 CA4th 366, 35 CR2d 494 (defendant may be convicted of receiving even though defendant

was thief, as long as he or she is not also convicted of the theft itself). However, a defendant may be convicted of *burglary* and receiving the property stolen in that burglary. *People v Allen* (1999) 21 C4th 846, 89 CR2d 279.

Ø **Note:** When a defendant is convicted of both theft and receiving, appellate courts are split about whether the court should dismiss the theft or the receiving. Compare *People v Recio* (2007) 156 CA4th 719, 67 CR3d 600 (dismiss receiving), with *People v Ceja* (review granted Jan. 16, 2008, S157932; superseded opinion at 155 CA4th 1246, 66 CR3d 697) (dismiss theft).

- *Penal Code §32*. Conviction as a principal and as an accessory after the fact is improper when both convictions are based on the same predicate facts. *People v Prado* (1977) 67 CA3d 267, 136 CR 521. See also *People v Mouton* (1993) 15 CA4th 1313, 19 CR2d 423. But see *People v Riley* (1993) 20 CA4th 1808, 1813, 25 CR2d 676.
- *Lesser included offenses*. Conviction of both an offense and a lesser included offense is improper. Pen C §954; *People v Ortega* (1998) 19 C4th 686, 692, 80 CR2d 489. The test of a lesser included offense is "simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." *People v Pearson* (1986) 42 C3d 351, 355, 228 CR 509. See, *e.g., People v Ramirez* (2009) 45 C4th 980, 89 CR3d 586 (grossly negligent discharge of firearm is necessarily included offense of discharge at inhabited building). To determine whether an offense is lesser included, the court should look to the language of the statute, not to the language of the charging document. *People v Miranda* (1994) 21 CA4th 1464, 26 CR2d 610. But see *People v Rush* (1993) 16 CA4th 20, 20 CR2d 15, disapproved on other grounds in *People v Montoya* (2004) 33 C4th 1031, 1036 n4, 16 CR3d 902 (ruling based on pleading).

Appellate review of Pen C §654 issue. Failure to object does not forfeit the issue on appeal, because Pen C §654 error results in an unauthorized sentence. *People v Scott* (1994) 9 C4th 331, 354 n17, 36 CR2d 627; *People v Perez* (1979) 23 C3d 545, 549 n3, 153 CR 40. On a silent record, however, a reviewing court will presume that the trial court considered and rejected use of §654. Thus, lack of a §654 stay will be upheld if any substantial evidence supports a finding of separate intents or separate transactions. *People v Coleman* (1989) 48 C3d 112, 162, 255 CR 813; *People v Green* (1988) 200 CA3d 538, 544, 246 CR 164.

California Rules of Court 4.412(b), upheld in *People v Hester* (2000) 22 C4th 290, 92 CR2d 641, provides that a defendant, who with counsel personally agrees to a specific prison term, abandons any claim that the sentence violates §654 unless the defendant objects at the time of sentencing. A defendant who negotiates a plea agreement with a sentencing "lid" may not raise a §654 challenge on appeal unless he or she reserves that right as part of the plea bargain or first obtains a certificate of probable cause under Pen C §1237.5. *People v Cuevas* (2008) 44 C4th 374, 384, 79 CR3d 303; *People v Shelton* (2006) 37 C4th 759, 771, 37 CR3d 354.

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§37.51 H. Sentencing Hearing, Sentencing Choices, and Statement of Reasons

Sentencing hearing procedure. At the sentencing hearing, the defense and the prosecution have the right to present evidence on their own behalf and to rebut statements in the probation officer's report. Pen C §1204; *People v Valdivia* (1960) 182 CA2d 145, 5 CR 832. The rules of evidence do not strictly apply to sentencing hearings; the judge has wide discretion in the sources and types of evidence he or she uses to determine the kind and extent of punishment to be imposed within limits fixed by law. *Williams v New York* (1949) 337 US 241, 246, 93 L Ed 1337, 69 S Ct 1079. The defendant has no right to court-appointed experts for sentencing. *People v Stuckey* (2009) 175 CA4th 898, 96 CR3d 477. The parties are entitled to a hearing that affords due process, however, and to a sentencing decision based on accurate information. *People v Peterson* (1973) 9 C3d 717, 726, 108 CR 835. See *People v Eckley* (2004) 123 CA4th 1072, 20 CR3d 555 (court's reliance on inaccurate information provided by probation department and correctional authorities denied defendant due process and required remand for new probation and sentencing hearing).

Ø **Practice tip:** Prison authorities rely heavily on the probation report to determine where inmates should be housed and whether special conditions and restrictions should apply. See Pen C §1203(c); Cal Rules of Ct 4.411(d). The trial court may order the report to be corrected. Cal Rules of Ct 4.437(e). But if the court refuses to correct the probation report, it is important for trial counsel to object to inaccuracies in the probation report. The issue was preserved for appeal in *People v Eckley, supra,* because counsel filed a statement in mitigation, which included objections to the errors.

A defendant who is to be sentenced on a felony may waive his or her appearance for pronouncement of judgment with the court's permission. That waiver can be made orally in court or by filing a notarized statement to that effect with the court. Pen C §1193(a). See also §§35.18, 38.28 on sentencing hearing procedure.

Probation. A court may place a defendant convicted of a felony on probation for a period not exceeding the maximum possible term for his or her sentence, or for 5 years, whichever is greater. Pen C §1203.1. In granting probation, the court can order the defendant to serve time in jail or prison as a condition of probation, suspend the imposition of sentence by refraining from stating a sentence, or impose a sentence but suspend its execution. Pen C §1203.1. For discussion of suspending execution or imposition of sentence, see §§36.5, 46.29-46.30. On the difference between suspended imposition and suspended execution of sentence for immigration purposes, see §52.10. When imposition of sentence is suspended and sentence is therefore not pronounced after conviction by trial, the trial judge still must identify and state on the record circumstances that would justify imposing one of the three authorized terms if probation is later revoked. Cal Rules of Ct 4.433(b). A nonexclusive list of reasons for granting or denying probation is in Cal Rules of Ct 4.414. On mandatory and discretionary probation bars, see §§37.52-37.53.

When the initial sentencing court imposes a state prison sentence but stays execution of the sentence pending completion of probation, on a subsequent violation of probation the court does not have discretion to *change* the sentence previously imposed (*People v Howard* (1997) 16 C4th 1081, 1088, 68 CR2d 870) unless the sentence was unauthorized. *In re Renfrow* (2008) 164 CA4th 1251, 1256, 79 CR3d 898. The court may, however, recall this sentence within 120 days of the date of commitment and resentence the defendant under the provisions of Pen C §1170(d). *Howard,* 16 C4th at 1095. The court also retains discretion to *reinstate* probation. *People v Medina* (2001) 89 CA4th 318, 106 CR2d 895.

Statement of reasons. When announcing the sentence, the judge must state on the record the facts and reasons for imposing the upper or lower term, and for any other sentencing choices, including granting probation; imposing a prison sentence; declining to commit an eligible defendant to the Division of Juvenile Justice (DJJ) or CRC (California Rehabilitation Center); selecting a base term other than the middle term; imposing consecutive sentences; imposing full consecutive terms under Pen C §667.6(c); striking or staying the punishment for an enhancement; or imposing multiple enhancements under Pen C §1170.1(e) (applicable only to crimes committed before January 1, 1998; see §37.30). Pen C §1170(b)-(c); Cal Rules of Ct 4.406(b).

Sentencing defects are waived unless challenged at sentencing hearing. The requirement of an oral statement

of sentencing decisions encourages careful exercise of discretion and decreases risk of error. It also supplies reviewing courts with information needed to assess the merits of sentencing claims, and the prejudicial effect of any error. Defects in the sentencing court's statement of reasons are waived unless challenged at the time of sentencing. *People v Scott* (1994) 9 C4th 331, 36 CR2d 627. The *Scott* court took pains to point out that a defense attorney who does not properly understand and argue at sentencing is subject to a finding of ineffectiveness. 9 C4th at 351. Under *Scott,* the court must afford counsel a meaningful opportunity to object to the sentence, which means that, at some time during the sentencing hearing, the trial court must describe the sentence it intends to impose, give its reasons, and consider the parties' objections before pronouncing judgment. Due process does not require the court to give the parties advance notice of its intended sentence, nor is the court required to describe the proposed sentence as "tentative," as long as it demonstrates a willingness to consider objections. *People v Gonzalez* (2003) 31 C4th 745, 752, 3 CR3d 676.

Ø **Note:** In *Gonzalez,* 31 C4th at 754, the supreme court suggested that when the sentence is unexpected or unusually complex, defense counsel should request a continuance to assess whether to make objections, or request permission to submit written objections.

Generally, a fact used as an element of the crime, as an enhancement, or in aggravation may not be used for any other purpose. See Pen C §1170(b); Cal Rules of Ct 4.420(c)-(d). However, the same fact may be used (1) to impose consecutive sentences and (2) to invoke the discretionary full consecutive sentencing scheme of §667.6(c) for forcible sex crimes. See discussion in §37.25.

When the trial court fails to produce a technically correct statement of reasons linking specific reasons to specific sentence choices, the prosecutor may be well advised to bring the requirements to the court's attention.

Ø **Note:** If the parties have stipulated to a particular sentence, the judge need not state reasons for that sentence, and the defendant is deemed to have waived Pen C §654 limitations. However, the parties cannot stipulate to a sentence not otherwise authorized by law. See Cal Rules of Ct 4.412(a). The court is not required to state reasons for an indeterminate sentence. Cal Rules of Ct 4.403.

When a defendant has been convicted of a felony and is eligible for probation, the sentencing court should normally order the probation officer to investigate the circumstances of the crime and the defendant's history and prepare a probation report. Pen C §1203(b)(1). See also Cal Rules of Ct 4.411(a) (court should permit waiver of probation report only in unusual circumstances), and Cal Rules of Ct 4.411(b) (court should refer matter to probation officer for report even when defendant is ineligible for probation). For further discussion of the probation report, see chap 38.

When probation has been granted and is then revoked, the trial court must generally state a reason for declining to reimpose probation and sentencing the defendant to prison. *People v Hawthorne* (1991) 226 CA3d 789, 793, 277 CR 85. This rule may not apply when the sentence had previously been imposed, but the execution was suspended. *People v Jones* (1990) 224 CA3d 1309, 1315, 274 CR 527.

When lifting the suspension of a previously imposed prison sentence, the court has no discretion to alter the term. *People v Howard* (1997) 16 C4th 1081, 1087, 68 CR2d 870. But when the court that revokes probation also imposes a prison term, the length of the prison sentence is based on circumstances existing at the time probation was granted; events that occurred while the defendant was on probation may not be considered. Cal Rules of Ct 4.435; *In re Rodriguez* (1975) 14 C3d 639, 652, 122 CR 552.

***Johnson* waivers.** When a defendant serves a jail term as a condition of probation, and then probation is revoked, if the court wishes to reimpose probation with additional jail time the court may seek a waiver from the defendant of credit for the previous jail time. *People v Johnson* (1978) 82 CA3d 183, 147 CR 55. See discussion at §37.56.

Resentencing after appeal. Ordinarily, a defendant's sentence cannot be increased on remand after a successful or partially successful appeal. *People* v *Collins* (1978) 21 C3d 208, 216, 145 CR 686. This rule applies when a judgment is reversed because of trial error or when a case is remanded because of an erroneous sentence, *i.e.,* the sentence is authorized by statute but the court erred in the manner of sentencing. See *People v Brown* (1987) 193 CA3d 957, 961, 238 CR 697. The trial court may impose a more severe sentence after appeal if the original sentence was unauthorized by law, *i.e.*, illegal. *People v Serrato* (1973) 9 C3d 753, 109 CR 65, overruled on other grounds in *People v Fosselman* (1983) 33 C3d 572, 189 CR 855; *People v Craig* (1998) 66 CA4th 1444, 78 CR2d 659; *People v Brown, supra*.

Ø **Note:** Nothing precludes the court from changing its initial sentencing choices so that the term imposed after

resentencing equals the sentence previously imposed. *People v Burbine* (2003) 106 CA4th 1250, 131 CR2d 628.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.52 I. Chart: Persons Ineligible for Probation

§37.52 I. Chart: Persons Ineligible for Probation

Most statutes that bar probation have express pleading requirements. These statutes should be read carefully. As a rule, when a prior conviction results in mandatory denial of probation, the prior conviction must be pleaded and proved. *People v Lo Cicero* (1969) 71 C2d 1186, 1191, 80 CR 913.

When a no-probation statute is pleaded and proved, counts or allegations that trigger the probation ban may be stricken under Pen C §1385 unless the legislature has specifically eliminated the trial court's §1385 authority. See *People v Superior Court (Romero)* (1996) 13 C4th 497, 518, 53 CR2d 789; *People v Fritz* (1985) 40 C3d 227, 229, 219 CR 460. The following phrase in former Pen C §1203.06, "[n]otwithstanding the provisions of section 1203, probation shall not be granted," has been construed as eliminating the trial court's §1385 discretion. *People v Tanner* (1979) 24 C3d 514, 156 CR 450. See also *People v Hesslink* (1985) 167 CA3d 781, 793, 213 CR 465 (phrase "notwithstanding any other provision of law" in Pen C §1203.065 eliminates trial court's §1385 discretion).

Citations are to the Penal Code unless otherwise indicated.

Authority	Description of Offense
§667(c)(4)	The original legislative version of the Three Strikes law; applies to anyone with a prior strike conviction.
§667.61(h)	Anyone convicted under this One Strike sex crime law.
§1170.12(a)(4)	Anyone with a prior strike conviction under the Three Strikes law.
§1203(k)	Anyone convicted of a violent felony (§667.5(c)) or serious felony (§1192.7) who was on felony probation at time of offense.
§1203.044(b)	Anyone convicted of theft of over $50,000 in a single transaction or occurrence with a prior felony conviction in which a §12022.6 (excessive taking) enhancement was found true.
§1203.055(c)	Anyone convicted of committing or attempting to commit a specified crime against passenger, driver, or occupant of public transit vehicle, with prior conviction for same offense.
§1203.06(a)(1)	Anyone found to have personally used a firearm to attempt or commit specified violent crime.
§1203.06(a)(2)	Anyone with a prior conviction of a §1203.06(a)(1) offense or assault to commit murder under former Pen C §217 who is convicted of a felony and is found to have personally used a firearm in its attempted commission or was unlawfully armed with a firearm when arrested.
§1203.06(a)(3)	Anyone convicted of aggravated arson (§451.5).
§1203.065(a)	Anyone convicted of specified sex offenses.
Note: The prohibition on probation under §1203.065(a) for spousal rape with a foreign object but not for spousal rape does not violate equal protection. *People v Valdez* (2009) 174 CA4th 1528, 1530, 95 CR3d 367.	
§1203.066(a)	Anyone convicted of child molestation (§288) or continuous child molestation (§288.5) under specified circumstances.
§1203.07(a)	Anyone convicted of specified drug offenses. Court has no discretion to strike this allegation under Pen C §1385. *People v McGuire* (1993) 14 CA4th 687, 18 CR2d 12.
§1203.075	Anyone who inflicts great bodily injury during the commission of enumerated offenses.
§1203.08	Anyone convicted of a designated felony who has two designated felony prior convictions, if all convictions occurred within a 10-year period. Time spent in prison is exempt from the 10-year period.

§1203.085	(a) Anyone who commits a straight felony (nonwobbler) while on parole for a violent (§667.5(c)) or serious (§1192.7) felony. (b) Anyone who commits a violent or serious felony while on parole.
§1203.09	Anyone who inflicts great bodily injury on an aged or disabled person in the committing of a specified violent felony. See *People v Brown* (1980) 110 CA3d 24, 167 CR 557.
§12311	Anyone convicted of offenses listed in §§12301-12316 involving explosives or destructive devices.
Health & S C §11370(a)	Anyone convicted of specified drug offenses, with prior conviction involving specified narcotics or controlled substances. Court has discretion to strike this allegation under Pen C §1385. *People v Ruby* (1988) 204 CA3d 462, 251 CR 339.
Health & S C §11370(b)	Anyone over age 18 who gives or sells specified controlled substances or narcotics to a minor or who induces a minor to use a specified drug.

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§37.53 J. Restricted Probation Eligibility

Restricted probation eligibility means that probation may not be granted except in "unusual cases where the interests of justice would best be served." See, *e.g.,* Pen C §§462, 462.5, 1203(e).

It is recommended that facts giving rise to presumptive probation bars be pleaded and proved, even absent an express statutory requirement. Pleading a presumptive ineligibility section may not be mandatory, however. See *People v Dorsch* (1992) 3 CA4th 1346, 5 CR2d 327. Probation is restricted for specified offenses delineated by Pen C §§115(c), 290(g)(4), 454(c), 462(a), 462.5(a), 1203(e), 1203.045(a), 1203.046(a), 1203.048(a), 1203.049(a), 1203.065(b), 1203.073(b)(1)-(8), 1203.074(a), 1203.09(f), 4532(c)(1).

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VII. CREDIT FOR TIME SERVED

§37.54 A. In General

California permits defendants to receive credit against their county jail or state prison sentences for time spent in presentence custody (Pen C §4019), and for performance in work or educational programs during confinement in state prison (Pen C §2933). Certain crimes, including violent crimes and murder, are subject to special restrictions that apply to both presentence and postsentence credits. See §37.61. A defendant convicted under the Three Strikes law is subject to restrictions on postsentence credits. See §37.33C. A defendant who, as a term of probation, is sentenced to local jail time but serves that time in a work release program, is *not* entitled to work and conduct credits under §4019. *People v Wills* (1994) 22 CA4th 1810, 27 CR2d 925.

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B. Credit for Time Spent in Presentence Custody

1. Actual Time

§37.55 a. When Available

A defendant convicted of a felony is entitled to credit against a state prison term, or against any fine imposed, for actual time spent in custody before commencement of the prison sentence. "In custody" includes, "but [is] not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution" (Pen C §2900.5(a)), including the California Rehabilitation Center (CRC), or a California Department of Corrections and Rehabilitation (CDCR) facility while undergoing a diagnostic study. Pen C §1203.03(g). Presentence credit is not authorized for time spent in home detention with electronic monitoring. *People v Anaya* (2007) 158 CA4th 608, 612, 70 CR3d 47. Included in the statutory credit allowance are days spent in custody as a condition of probation. Pen C §2900.5(a). Defendants are entitled to time spent in an inpatient rehabilitation even when this is a condition of a Proposition 36 drug diversion. *People v Davenport* (2007) 148 CA4th 240, 55 CR3d 473. Outpatient drug rehabilitation programs are not residential programs and therefore do not qualify for custody credits. *People v Schnaible* (1985) 165 CA3d 275, 277, 211 CR 530. Time spent in unlocked outpatient facilities does not count as actual custody time for mentally disordered sex offenders, defendants found not guilty by reason of insanity, and mentally disordered offenders. Pen C §§1600.5, 2972.

Ø **Note:** For the purposes of calculating presentence credits, "custody" time is defined by the language of the statute, not by the traditional definition of "custody" under *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602. A defendant is not "in custody" within the meaning of Pen C §2900.5 until he or she is processed into a jail or similar custodial situation as described in Pen C §2900.5(a); time spent arrested or detained by police before booking is not included. *People v Ravaux* (2006) 142 CA4th 914, 920, 49 CR3d 211. See *Anaya,* 158 CA4th at 613 n4 (lynchpin of custody credits is "custody").

Defendants are entitled to custody credits for time spent in mandatory work release programs established under Pen C §4024.3. Pen C §4024.3(a). They are not, however, entitled to custody credits for time spent in voluntary work release programs established under Pen C §4024.2. *People v Richter* (2005) 128 CA4th 575, 27 CR3d 198.

A defendant gets a full day's credit for each partial day served, including the day of arrest, the day of commitment to state prison (*People v Smith* (1989) 211 CA3d 523, 526, 259 CR 515), and any partial days served as work furlough days on probation-condition jail sentences. *People v Browning* (1991) 233 CA3d 1410, 1412, 285 CR 216.

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§37.56 b. *Johnson* Waivers

When a defendant serves a jail term as a condition of probation, and probation is then revoked, if the court wishes to restore probation with additional jail time, the court may ask the defendant to waive credit for the previous jail time. *People v Johnson* (1978) 82 CA3d 183, 147 CR 55. The court may ask the defendant to waive custody credits for one of the following reasons:

(1) To give sentencing courts the flexibility to reinstate probation while having the defendant serve up to 1 year in jail. Pen C §19.2 (1-year limit on jail time that can be served as condition of probation). If the total of the jail time already served by defendant and the jail time the court seeks to impose on reimposition of probation exceeds 1 year, a waiver of this limit is required.

(2) To allow the court to keep prison as a viable option, because the presentence credits are waived not only for the jail sentence but also as credits against a future prison sentence should probation ultimately be terminated. *People v Arnold* (2004) 33 C4th 294, 14 CR3d 840.

Similarly, a waiver of future custody credits to be earned in a residential drug or alcohol treatment facility applies if the defendant is ultimately sent to prison. *People v Jeffrey* (2004) 33 C4th 312, 14 CR3d 852. The better practice is for the sentencing court to inform the defendant that he or she will be waiving not only present but also future presentence credits; however, an express waiver of future credits is not required. *Arnold*, 33 C4th at 309. The concurring opinion in *Arnold* suggests defendants are entitled to limit the scope of the waiver. 33 C4th at 311.

> Ø **Practice tip:** As *Arnold* makes clear, a defendant can make numerous *Johnson* waivers in a single case and thus exceed the maximum prison sentence. This knowledge should be factored into any discussion about whether to tender such a waiver.

A *Johnson* waiver must be on the record and knowingly, intelligently, and voluntarily made. See *People v Correll* (1991) 229 CA3d 656, 660, 280 CR 266. The defendant must be personally advised and must personally waive credit; the defendant's attorney may not waive it on the defendant's behalf. *People v Harris* (1991) 227 CA3d 1223, 1227, 278 CR 391.

A defendant may validly waive credits for time he or she has not yet served in local custody as a condition of a grant of probation, even if the net result is to increase the defendant's potential custody time beyond the statutory maximum punishment. *People v Johnson* (2002) 28 C4th 1050, 123 CR2d 700.

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Source: Criminal Law/California Criminal Law Procedure and Practice/37 FELONY SENTENCING/§37.57 c. Multiple Reasons for Presentence Custody

§37.57 c. Multiple Reasons for Presentence Custody

Complex issues arise when a defendant is in presentence custody for more than one reason. For example, if a defendant is in presentence custody in Florida on a California arrest hold, while simultaneously in custody on a Florida hold, he or she does not receive presentence credit against an eventual California prison term. *In re Joyner* (1989) 48 C3d 487, 256 CR 785. The test is whether the defendant can carry the burden of showing that he or she would have been free from custody but for the California hold. Otherwise, the presentence time was not "attributable to the proceedings related to the same conduct for which the defendant has been convicted." Pen C §2900.5(b).

When a defendant is in presentence custody on one California case, is arrested for a second California case, and eventually receives concurrent terms on both cases, he or she does not receive credit for the presentence incarceration against both concurrent terms. When the defendant cannot show that he or she would have been free but for the second case, credit will apply only to the concurrent term for the first case, meaning that the second concurrent term must be served in full. *People v Davis* (1986) 187 CA3d 1250, 1256, 232 CR 428. See *People v Huff* (1990) 223 CA3d 1100, 1106, 273 CR 44. Presentence credit is not intended to equalize term differentials caused by the timing of the prosecutions. *People v Adrian* (1987) 191 CA3d 868, 884, 236 CR 685. But in cases of unreasonable delay in bringing a prosecution, defendants may argue that the delay resulted in the loss of concurrent time and seek an equitable distribution of credits. *Crockett v Superior Court* (1975) 14 C3d 433, 441, 121 CR 457. On factors that may be used to show prejudice in speedy trial and due process motions, see §19.10.

When a defendant is serving a term for either a misdemeanor or a felony and is arrested for a second offense, presentence custody is not attributable to the second case and the defendant receives no credit against any term imposed for the second case. *Adrian,* 191 CA3d at 878; *People v Esparza* (1986) 185 CA3d 458, 468, 229 CR 739.

Questions about credits may arise when the defendant is on probation, serves a jail sentence, and then is arrested for a new offense. In *People v Cooksey* (2002) 95 CA4th 1407, 116 CR2d 1, the court addressed this situation. Sentence was imposed on the new offense, in which the defendant received presentence credits from the time of his arrest. The first offense was sentenced consecutively as the subordinate term. The defendant was awarded presentence credits for the first case, up until the date his probation was violated, but those credits applied only against the subordinate portion of his sentence. A defendant who is on probation is not entitled to credit against the probation revocation sentence for time spent in jail between the time of arrest on new charges and the summary revocation of the grant of probation, even when the new charges formed the basis for the violation of probation and are ultimately dismissed. *People v Pruitt* (2008) 161 CA4th 637, 649, 74 CR3d 368.

> Ø **Practice tip:** Counsel for defendants who will lose presentence credits on one or more of their cases should seek time-served dispositions on these cases.

It may be that anyone in custody on a parole hold loses all presentence credits for crimes not exclusively and entirely the subject of the parole hold. In *People v Shabazz* (2003) 107 CA4th 1255, 132 CR2d 708, a defendant with parole warrants was arrested on a new offense. He was awarded no presentence credits on the new case because he could not satisfy the "but for" test of *In re Joyner, supra*. Presentence credits were also denied a defendant who was held in custody pending trial on a parole hold based on the new drug arrest but also on additional, unrelated grounds. *People v Bruner* (1995) 9 C4th 1178, 1194, 40 CR2d 534.

The *Joyner* strict causation test also applies to those who have been found not guilty by reason of insanity (NGI). In *People v Callahan* (2006) 144 CA4th 678, 50 CR3d 677, the defendant assaulted a hospital guard. The court awarded no credits for the period defendant was in jail awaiting trial on the assault, because he otherwise remained confined on his NGI commitment.

A successful appeal can trigger a recalculation of presentence credits. In *In re Marquez* (2003) 30 C4th 14, 131 CR2d 911, the defendant was convicted twice, first in Santa Cruz and then in Monterey, and was sentenced in both counties. 30 C4th at 18. His Santa Cruz conviction was reversed on appeal and later dismissed, and he sought presentence credit against the Monterey conviction for time in custody between the original Santa Cruz conviction and

the Monterey sentencing. The court ruled that he was entitled to those credits. Because the Santa Cruz conviction was invalid, the Monterey charges became the sole cause for his custody. *In re Marquez, supra*.

Notwithstanding *Joyner*'s strict "but for" test, a defendant whose actual time in custody exceeds his sentence in one case may apply the excess "dead time" credits to his sentence on an unrelated case. *People v Gonzalez* (2006) 138 CA4th 246, 251, 41 CR3d 267.

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2. Credit for Good Conduct

§37.58 a. Availability of Conduct Credits

In addition to the credit for each day actually spent in presentence custody available under Pen C §2900.5(a), credits are available, with exceptions, for good conduct during presentence confinement. Pen C §4019; *People v Sage* (1980) 26 C3d 498, 165 CR 280. Beginning January 25, 2010, qualified defendants in presentence custody can earn, for good conduct and assigned work, approximately 1 day of conduct credit for each day of custody. Defendants who have serious or violent felony priors or who must register under Pen C §290 will generally receive 1 day of conduct credit for every 2 days of custody. For a discussion of the new custody-credit legislation, see §37.59.

Defendants are not entitled to *conduct* credits, under Pen C §4019, for time spent in rehabilitation facilities, hospitals, or similar residential facilities. See, *e.g., People v Silva* (2003) 114 CA4th 122, 7 CR3d 473 (home detention on county electronic monitoring program); *People v Pottorff* (1996) 47 CA4th 1709, 55 CR2d 536 (defendant on O.R. ordered to stay at home or at work); *People v Moore* (1991) 226 CA3d 783, 277 CR 82 (time served in alcohol recovery center as a condition of probation); *People v Palazuelos* (1986) 180 CA3d 962, 964, 226 CR 31 (time served in residential drug treatment program as condition of probation); *People v Smith* (1981) 120 CA3d 817, 822, 175 CR 54 (no custody credits for persons committed to hospital after NGI finding).

Ø **Note:** Penal Code §2900.5 does provide for *custody* credits for such time. On custody credits, see §§37.55-37.57.

Conduct credits may not be earned by persons confined in state hospitals while recovering competency to stand trial under Pen C §1370. *People v Waterman* (1986) 42 C3d 565, 229 CR 796. But see *People v Bryant* (2009) 174 CA4th 175, 182, 94 CR3d 151 (defendant entitled to credits for period of delay between declaration of competency and return from state hospital). A defendant committed on a finding of NGI receives no presentence or postsentence conduct credit. *People v Mord* (1988) 197 CA3d 1090, 1104, 243 CR 403. A California Rehabilitation Center (CRC) inmate does not receive this credit either. *People v Williams* (1991) 232 CA3d 1643, 1648, 284 CR 241.

Section 4019 conduct credits are not earned for time served between a defendant's original sentencing and resentencing resulting from the trial court's recall of sentence (see Pen C §1170(d)), even if the defendant is confined in county jail to attend a resentencing hearing. *People v Johnson* (2004) 32 C4th 260, 8 CR3d 761.

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§37.58A b. Limitation on Credits for Violent Felonies

Conduct credits are limited for a defendant who is convicted under certain statutes. Penal Code §2933.1(c) provides that a defendant convicted after September 21, 1994, of any violent felony and sentenced to prison may not receive presentence credits in excess of 15 percent. The underlying conviction must be for a *violent* felony listed as such in Pen C §667.5(c). Other felonies, including felonies listed as serious felonies in Pen C §1192.7(c), are not subject to the 15-percent limitation on presentence credits. *People v Thomas* (1999) 21 C4th 1122, 1130, 90 CR2d 642.

Ø **Note:** Determining whether the current conviction is a violent felony for the purpose of calculating presentence conduct credits is part of the trial court's sentencing function; a jury finding is not required. *People v Garcia* (2004) 121 CA4th 271, 274, 16 CR3d 833.

This limitation applies only on a prison sentence, so a person convicted of a violent offense who receives probation is still entitled to Pen C §4019 credits. However, if that person subsequently violates probation and is sentenced to prison, the court must recompute the presentence credits and apply the 15-percent limitation. *People v Daniels* (2003) 106 CA4th 736, 130 CR2d 887. A defendant sentenced under the Three Strikes law (Pen C §§667(b)-(i), 1170.12) is entitled to full presentence credits under §4019, unless the defendant's current conviction is for a violent felony within the meaning of Pen C §667.5(c). *People v Thomas, supra*. See discussion in §37.33C. However, a defendant sentenced to concurrent time for multiple offenses is subject to the 15-percent limitation for each offense if *any* offense comes within Pen C §667.5(c). *People v Nunez* (2008) 167 CA4th 761, 765, 84 CR3d 397. A defendant convicted of any specified violent crime who has two or more prior separate prison terms for specified violent crimes earns *no conduct credits at all.* Pen C §2933.5. A defendant convicted of murder after June 3, 1998, earns *no* §4019 credits, on either the indeterminate term for murder or any determinate enhancements. Pen C §2933.2; *People v McNamee* (2002) 96 CA4th 66, 116 CR2d 625.

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§37.59 c. Calculating Days of Conduct Credit

Calculating credits under Pen C §4019. On January 25, 2010, a new method for calculating credits under §4019 went into effect. See Stats 2009, 3d Extra Sess, ch 28, §50. Instead of receiving 1 day of credit for every 2 days of custody, qualifying jail inmates will now receive 1 day of credit for each day of actual custody served. Inmates who are not in jail but who otherwise qualify for conduct credits, such as those assigned to work release, are also entitled to the new one-for-one credits under §4019. See §37.58 for discussion of nonjail sentences that qualify for conduct credits.

Jail inmates not qualifying for the additional credits are those whose instant offense is a serious or violent felony, or who have previously been convicted of a serious or violent felony, or who must register under Pen C §290.

Retroactivity. Whether additional credits should be awarded retroactively to inmates sentenced before January 25, 2010, remains an open question at this writing. It could be argued that previously sentenced inmates, both those who remain in jail and those sent to prison, *are* entitled to the additional credits. *People v Nasalga* (1996) 12 C4th 784, 790, 50 CR2d 88 (when amendatory statute mitigates punishment and there is no saving clause, amendment will operate retroactively so that lighter punishment is imposed); *People v Doganiere* (1978) 86 CA3d 237, 239, 150 CR 61; *In re Estrada* (1965) 63 C2d 740, 48 CR 172. A conflict has appeared in the courts on the question of whether the legislature intended the amendments to Pen C §4019 to apply retroactively to defendants who were sentenced before January 25, 2010, but whose convictions were not yet final. Compare *People v Brown* (Mar. 16, 2010, C056510) 2010 Cal App Lexis 344 (section 59 of Senate Bill 18 and overall purpose of legislation suggest legislature intended amendment to be applied retroactively) with *People v Rodriguez* (Mar. 1, 2010, F057533) 2010 Cal App Lexis 250 (a conduct-credit statute, because of incentive effect, is legally distinguishable from statutes that reduce punishment in other ways).

> Ø **Practice Tip:** A retroactive award of credits can make a big difference to some inmates. For example, a defendant previously sentenced to 365 days is entitled to almost 60 days of additional conduct credit under newly amended Pen C §4019. In some jurisdictions such as San Diego, the sheriff and the District Attorney's Office are assisting in the recalculation and the implementation of additional credits for these previously sentenced inmates. In other jurisdictions, however, defense attorneys likely will be responsible for getting their clients these additional credits.

Nonqualifying jail inmates. Jail and prison inmates previously convicted of a serious or violent felony and jail inmates required to register as sex offenders will generally receive credits under the old §4019 method, in which 1 day of custody credit is awarded for each 2 days of actual custody served. There are two different and conflicting methods of calculating these "one-for-two" conduct credits. Compare *People v Smith* (1989) 211 CA3d 523, 526, 259 CR 515, and *People v Browning* (1991) 233 CA3d 1410, 1412, 285 CR 216, with *People v Twine* (1982) 135 CA3d 59, 61 n1, 185 CR 85, and *People v Collins* (1981) 123 CA3d 535, 540, 176 CR 696. The *Smith* method for calculating one-for-two conduct credits under Pen C §4019 is to grant 2 days of credit for each completed 4-day block of service. This means that the total number of actual custody days should be divided by four, any fractional remainder should be discarded, and the total should then be multiplied by two to determine the conduct credit. See *People v Gutierrez* (1991) 232 CA3d 1571, 1573, 284 CR 211; *People v Magana* (1991) 230 CA3d 1117, 1121, 281 CR 338. The *Twine* method is simply to multiply the actual credits by one-half. This approach was sharply criticized in *People v Bravo* (1990) 219 CA3d 729, 268 CR 486. To compute credits, the court should first add *all* days of actual custody before applying the appropriate calculations. *People v Culp* (2002) 100 CA4th 1278, 122 CR2d 924.

Calculating credits limited by Pen C §2933.1. Jail inmates whose current offense is a violent felony will receive both pre- and postsentence credits in accordance with Pen C §2933.1 (the 15-percent limitation for violent felonies); the credits *may not exceed* 15 percent. The number of days' credit, if a fraction is included, must be rounded *down* to the nearest whole number. *People v Ramos* (1996) 50 CA4th 810, 58 CR2d 24.

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§37.60 3. Applying Credits to Confinement Time and Fine

Credits earned for presentence confinement, conduct during presentence custody, and days spent in jail as a condition of probation must be applied first to the state prison term and then to any fine or restitution fine imposed as part of the sentence. Pen C §2900.5(a). Time in custody is credited to a fine at the rate of $30 per day or more, in the discretion of the sentencing judge. Pen C §2900.5(a).

It is the duty of the court imposing sentence to compute the presentence custody credits to which the defendant is entitled. Pen C §2900.5(d). These credits must be reflected in the abstract of judgment. Pen C §2900.5(d). See also Cal Rules of Ct 4.472. The agency to which the person is committed computes credits for the period of time between sentencing and the date the person is delivered to the agency of commitment. Pen C §2900.5(e). The California Department of Corrections and Rehabilitation (CDCR) must determine postcommitment credit issues; exhaustion of administrative remedies is required before a court will intercede. *People v Chew* (1985) 172 CA3d 45, 52, 217 CR 805, overruled on other grounds in *People v Buckhalter* (2001) 26 C4th 20, 40, 108 CR2d 625.

When a defendant who has been serving time in state prison is remanded for resentencing after an appeal, the trial court must recompute the defendant's entire credits for *actual* time served, from initial custody until resentencing. The presentence conduct credits are computed as of the defendant's *initial* sentencing to state prison, and presumably remain the same as previously computed. The CDCR will compute the defendant's good-time/work-time credits earned in prison, starting with the defendant's initial commitment. *People v Buckhalter* (2001) 26 C4th 20, 108 CR2d 625.

When a defendant's conviction is reversed but he or she is subsequently reconvicted, the "pre-reversal" prison time is not calculated as presentence custody. *In re Martinez* (2003) 30 C4th 29, 131 CR2d 921. Similarly, when a court recalls a state prison sentence under Pen C §1170(d), time spent in prison before recall and resentencing is treated as prison time, not presentence time, for purposes of calculating credits. *People v Johnson* (2004) 32 C4th 260, 8 CR3d 761.

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§37.61 C. Credit for Conduct in State Prison

One-for-one postsentence credits. Prisoners may earn up to 6 months of credit for every 6 months of continuous incarceration. Credit will be awarded according to regulations adopted by the Secretary of the Department of Corrections and Rehabilitation. Pen C §2933, effective January 25, 2010. Inmates may earn up to 6 weeks additional credit per year on the basis of their completion of certain performance objectives for approved rehabilitative programming that will be described in regulations that must be promulgated by late April 2010. Pen C §2933.05, enacted January 25, 2010. Under §2933.05, these performance objectives include academic and vocational programs, anger management, and substance abuse and life skills classes. Unlike the presentence credits in newly amended Pen C §4019 described above in §37.59, the additional credits under §2933.05 will very likely not be applied retroactively, because the programs entitling inmates to these credits have yet to be designated and, in some instances, even created.

Ø **Practice tip:** In advising prison-bound clients on the actual time they will serve, lawyers routinely subtract the actual time served from the prison sentence and divide the remainder by two—assuming work-time credits will start immediately. A more accurate calculation, particularly for longer sentences, is to subtract the actual time from the sentence, divide the remaining time by three and then multiply that by two. This formula accounts for the time it takes the California Department of Corrections and Rehabilitation (CDCR) to process inmates and deliver them to a credit-earning site.

Sentence reduction for heroic act. Any inmate may be granted a sentence reduction of up to 12 months for performing a heroic act in a life-threatening situation, or by providing "exceptional assistance in maintaining the safety and security of a prison." Pen C §2935. This sentence reduction is not a Three Strikes "credit" and is not subject to the Three Strikes 20-percent limitation on postsentence credits. *In re Young* (2004) 32 C4th 900, 12 CR3d 48.

Violent offenses with specified priors—no credits. Penal Code §2933.5 prohibits good-time or work-time credit for defendants convicted of the following offenses committed on or after January 1, 1991: murder, voluntary manslaughter, mayhem, aggravated mayhem, kidnapping for child molestation with GBI, assault with caustic chemical, rape by force, sodomy by force, sodomy in concert, lewd or lascivious acts on a child under the age of 14 years, oral copulation by force, resident child molester, rape by foreign object, exploding a destructive device, or any felony with GBI. This prohibition applies to defendants who have previously been convicted two or more times of any of these offenses, on charges separately brought and tried, and who have previously served two or more separate prior prison terms for any of these offenses. Pen C §2933.5(a). The statute does not address *presentence* credits under Pen C §4019.

Violent felony—15-percent limit. A defendant convicted of a violent felony under Pen C §667.5(c), committed after September 21, 1994, may use work-time credits to reduce the term for the conviction by no more than 15 percent. Pen C §2933.1(a). The underlying conviction must be for a violent felony. A nonviolent felon, sentenced to a life term because of strike priors, is *not* subject to this limitation. *People v Thomas* (1999) 21 C4th 1122, 90 CR2d 642. Nor is this limitation triggered by a conviction of *conspiracy* to commit a violent felony. *In re Mitchell* (2000) 81 CA4th 653, 97 CR2d 41. The limitation applies to preconviction as well as postconviction credits. *People v Sylvester* (1997) 58 CA4th 1493, 68 CR2d 716.

When a defendant is convicted of both violent and nonviolent felonies and is sentenced to concurrent terms for the convictions, time attributable only to the nonviolent felony or felonies is not subject to this limitation. *In re Reeves* (2005) 35 C4th 765, 779, 28 CR3d 4. In *Reeves,* the defendant was convicted of a violent offense for which he received a 5-year prison term, and a nonviolent offense for which he received a 10-year term. He was entitled to earn work-time credits at a rate of 15 percent during his first 5 years in prison and at a rate of 50 percent during the second 5-year period. 35 C4th at 780. Similarly, when the court has imposed sentence on a nonviolent felony and stayed the sentence on a violent felony under Pen C §654, none of the defendant's term is attributable to the violent felony and the Pen C §2933.1(a) limitation on credits does not apply. *In re Phelon* (2005) 132 CA4th 1214, 34 CR3d 276. See also *In re*

Gomez (2009) 179 CA4th 1272, 102 CR3d 221. A number of courts disagree with the rationale and holding of *Phelon*. The California Supreme Court may resolve this issue with its opinions in *People v Duff* (review granted Aug. 29, 2007, S153917; superseded opinion at 151 CA4th 913, 60 CR3d 185) and *In re Pope* (review granted Apr. 9 2008, S160930; superseded opinion at 158 CA4th 860, 70 CR3d 314).

When, however, a defendant is given a consecutive sentence that includes both violent and nonviolent felonies, the Pen C §2933.1(a) limitation applies to the entire term, because under Pen C §1170.1(a), all the consecutive terms merge into a single aggregate term. *In re Reeves,* 35 C4th at 772.

The Pen C §2933.1(a) limitation does not apply to a consecutive term imposed for a nonviolent felony committed in prison. *In re Tate* (2006) 135 CA4th 756, 37 CR3d 710. Under Pen C §1170.1(c), the sentence on the in-prison felony begins to run only after the inmate has served the full sentence on the violent felony, and does not merge with the term for previous offenses. Therefore, an inmate serving time on a violent felony who commits a nonviolent felony while in prison will receive his or her 50-percent good-time credits on the in-prison offense. *In re Tate, supra*.

Counsel need not specifically advise the defendant of this credit limitation; a plea to an included offense is all that is required. *People v Fitzgerald* (1997) 59 CA4th 932, 69 CR2d 453.

The limitation on credits of Pen C §2933.1 applies only to defendants sentenced to state prison. A defendant granted probation is *not* subject to the 15-percent limitation. *In re Carr* (1998) 65 CA4th 1525, 77 CR2d 500.

Murder—no credits for crime after June 3, 1998. Former Pen C §2933(e) provided that terms for first- and second-degree murder are reduced only by the "one-for-two" scheme of Pen C §2931(a)-(c). *In re Monigold* (1988) 205 CA3d 1224, 1227, 253 CR 120. Presumably, any murder occurring between September 21, 1994, the effective date of Pen C §2933.1, and June 3, 1998, is subject to the 15-percent credit limitation of §2933.1. A defendant convicted of murder occurring on or after June 3, 1998, accrues *no* credits on any part of his or her sentence, and is specifically barred from accruing presentence credits under §4019. Pen C §2933.2. When convicted of crimes in addition to murder, the defendant accrues no credits on these additional convictions. *People v McNamee* (2002) 96 CA4th 66, 69, 116 CR2d 625.

One Strike sex crime and habitual sex offender laws—15-percent limit. The Sex Offender Punishment, Control, and Containment Act of 2006 (Stats 2006, ch 337) eliminated Pen C §§667.61(j) and 667.71(b), which limited custody credits for defendants convicted of enumerated sex offenses to no more than 15 percent of the sentence. Although the "Digest" to the legislation states that the bill eliminates all credits, the author has been unable to find such a provision in the legislation (see Stats 2006, ch 337) or any other statute that eliminates credits for those convicted under §667.61 or §667.71.

Three Strikes law. For a defendant with a single prior "strike," work-time credits are limited to a maximum of 20 percent of the total term of imprisonment and do not accrue until the defendant is physically placed in state prison. Pen C §§667(c)(5), 1170.12(a)(5). But if the one-strike defendant is convicted of a violent offense, his or her presentence credits are subject to the 15-percent credit limitation of Pen C §2933.1. *People v Thomas* (1999) 21 C4th 1122, 90 CR2d 642. A defendant sentenced with two or more prior strikes receives no good-time or work-time credits at all. *In re Cervera* (2001) 24 C4th 1073, 103 CR2d 762.

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§37.62 VIII. JUVENILES PROSECUTED AS ADULTS [DELETED]

The information formerly discussed in this section is now in chap 56.

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IX. CIVIL COMMITMENT OF NARCOTICS ADDICTS

§37.63 A. Mandatory Petition for Commitment for Drug Abuse Treatment

After an eligible defendant has been convicted and sentenced for a felony or after revocation of a defendant's felony probation, if the judge believes that the defendant may be addicted or is in imminent danger of becoming addicted to narcotics, the judge must, with exceptions, suspend execution of the sentence and order the district attorney to file a petition to have the defendant committed to the California Rehabilitation Center (CRC) for narcotics treatment. Welf & I C §3051. The CRC is a statutorily mandated treatment facility and department within the California Department of Corrections and Rehabilitation (CDCR). Welf & I C §3001. Although courts and parties speak of committing a defendant to CRC, in fact the commitment is to the CDCR with an order that the defendant be confined in the treatment facility. See Welf & I C §§3001, 3050.

A narcotics addict, for purposes of the CRC commitment scheme, is "any person, adult or minor, who is addicted to the unlawful use of any narcotic … except marijuana." Welf & I C §3009. A defendant addicted solely to alcohol is not eligible for CRC. *People v Chavez* (2004) 116 CA4th 1, 10 CR3d 556.

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§37.63A 1. Disqualifying Factors

Excessive criminality. The court must order a commitment petition filed on a person otherwise eligible for treatment unless the defendant's record and probation report indicate such a "pattern of criminality" that he or she "does not constitute a fit subject for commitment." Welf & I C §3051. See *People v Flores* (1971) 6 C3d 305, 98 CR 822, overruled on another ground in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301 (refusal to initiate commitment procedures not error when record available to court at sentencing showed criminal history and no indication of addiction); *People v McGinnis* (2001) 87 CA4th 592, 105 CR2d 1 (court must state adequate reasons relating criminality to unfitness for CRC; record showed addiction motivating factor for criminal activity); *People v Jeffery* (2006) 142 CA4th 192, 195, 47 CR3d 691 (trial court's statement that it declined to initiate CRC commitment proceedings for "a variety of reasons" inadequate because it left reviewing court guessing); *People v Cruz* (1990) 217 CA3d 413, 421, 266 CR 29 (court must determine whether defendant's main problem is drug abuse or a criminal orientation as reflected in a pattern of criminality); *People v Urdiain* (1986) 179 CA3d 330, 332, 225 CR 1 (evidence of heroin trafficking sufficient to show pattern of criminality despite lack of criminal record). As in competency proceedings, CRC defendants are involuntarily committed. Because treatment is ordered and is not a privilege, the defendant's lack of motivation to recover from drug addiction is not a proper basis for the court to discontinue commitment proceedings. *People v Madden* (1979) 98 CA3d 249, 262, 159 CR 381; *People v Leonard* (1972) 25 CA3d 1131, 102 CR 435.

Ineligibility under Welf & I C §3052. A person who is convicted of specified offenses, including arson, certain violent crimes, and sex offenses, is *not* eligible for commitment for narcotics treatment if:

- He or she received a sentence in excess of 6 years;
- The sentence is subject to weapons, property damage, or great bodily injury enhancements, or
- He or she is statutorily ineligible for probation under Pen C §1203.06.

Welf & I C §3052.

"Strikes" conviction. A person convicted under the Three Strikes law with one or more prior "strikes" may not be committed to CRC. Pen C §§667(c)(4), 1170.12(a)(4).

Lack of Beds. Welfare and Institutions Code §3055 allows the California Department of Corrections and Rehabilitation (CDCR) to limit the number of CRC inmates and to refer otherwise eligible defendants back to court when that number is exceeded. In November 2002, the department reduced the number of CRC beds from 1777 to 954, where it has remained ever since.

Holds. Although not mandated in any statute, CRC memos indicate that it automatically excludes individuals with out-of-state, federal criminal, or INS holds.

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§37.63B 2. Reviewing the Trial Court's Decision to Disqualify

The trial court's decision that the defendant is ineligible for a CRC commitment is appealable. Pen C §1237. When the trial court makes no mention of imminent addiction, the court of appeal will presume that the lower court considered and rejected such evidence, and the implied rejection will be upheld unless (1) the evidence establishes as a matter of law that the defendant was in imminent danger of addiction, or (2) the defendant proves on appeal that the lower court did not consider the issue. *People v Sanford* (1988) 204 CA3d 1181, 1183, 251 CR 707; *People v Perez* (1987) 196 CA3d 686, 690, 242 CR 135.

If the trial court makes an express addiction finding, it must act under Welf & I C §3051 or expressly explain its refusal to do so. The only proper reason for such refusal would be the defendant's excessive criminality as shown by his or her record and the probation report. *People v Young* (1991) 228 CA3d 171, 185, 278 CR 784; *People v Sanford, supra*. Failure to commit an eligible addict is a sentencing choice that requires a statement of reasons. Cal Rules of Ct 4.406(b)(10); *People v Granado* (1994) 22 CA4th 194, 201, 27 CR2d 286. If the trial court fails to sentence a defendant before it commits him or her to CRC, the court is considered to have de facto acted under Welf & I C §§3100-3111 and created a direct civil commitment to CRC. *People v Froehle* (1990) 223 CA3d 1210, 1216, 272 CR 835 (because defendant not sentenced before committed to CRC, he could not be excluded from CRC on basis of what would have been sentence exceeding 6 years).

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§37.64 B. Procedure for Committing to California Rehabilitation Center (CRC)

When the district attorney files a court-ordered petition for commitment to the CRC, the court must order the defendant to be examined by one physician, or by two physicians if requested by the defense. The defendant may waive that examination, under limited conditions. If the medical report indicates that the defendant is neither an addict nor in danger of becoming an addict, the court may order execution of the sentence, or may modify or suspend the sentence. Welf & I C §3051.

If the doctor finds that the defendant is addicted or in danger of becoming addicted, the defendant must be arraigned and advised of his or her rights to a hearing, counsel, presentation of evidence, and confrontation. Welf & I C §§3051, 3104. The defendant may waive the right to a hearing. Welf & I C §3107. At the hearing, the court must determine whether the person is addicted or in danger of becoming addicted to narcotics. Welf & I C §3106. Absent a stipulation to the admissibility of the medical reports, the doctor who examined the defendant must attend the hearing and testify. Welf & I C §3106.

If the defendant, or any friend on his or her behalf, is dissatisfied with the commitment order after a court hearing, the defendant may demand a jury trial on the sole question of whether he or she is addicted to the use of narcotics or is in imminent danger of addiction because of the repeated use of narcotics. The demand must be in writing and made within 10 calendar days after the making of the order. Welf & I C §3108. The court's prior commitment order may not be read or referred to in the jury trial. Welf & I C §3108.

Although §3108 describes the jury proceeding as a civil trial requiring a verdict by three-fourths of the jury, this provision was invalidated by the California Supreme Court, which found that due process requires proof beyond a reasonable doubt and a unanimous jury on the issue of addiction or danger of addiction. *People v Thomas* (1977) 19 C3d 630, 139 CR 594. Note that the legislature has not modified §3108 to reflect the *Thomas* ruling.

A defendant's failure to seek a jury trial does not prevent him or her from raising the issue of addiction in a direct appeal from the court's original commitment order. *People v Murphy* (1969) 70 C2d 109, 74 CR 65.

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§37.64A C. Treatment and Outpatient Release

On commitment, a person is transferred to the CRC facility at Norco, California, for an initial period of observation and treatment. When during treatment a person is considered sufficiently recovered to be released on outpatient status (parole), he or she is certified to the Board of Parole Hearings (BPH) for evaluation for release under the board's supervision. Welf & I C §§3050-3051. A person who is not referred to the BPH for consideration for parole outpatient within 12 months after commitment is to be automatically referred for that purpose. Welf & I C §3201(b).

A person who violates parole conditions imposed by the BPH is subject to being retaken and returned to the CRC under CRC rules or through a new commitment proceeding. Welf & I C §§3151-3152.

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§37.65 D. Unfit for Treatment and Return to Court; Credit for Time in CRC

If at any time during the period of commitment the Director of Corrections concludes that the defendant, because of excessive criminality or other relevant reason, is not a fit subject for treatment, the Director must return the person to the court for further criminal proceedings. Welf & I C §3053(a). A defendant may waive the right under Welf & I C §3053(a) to return to court. *People v Sanders* (2009) 170 CA4th 1236, 1238, 88 CR3d 837. A defendant is not entitled to a hearing before being excluded from the CRC. *People v Quintana* (1977) 69 CA3d 178, 138 CR 1.

Anyone committed to the CRC who is subsequently committed to prison for another offense under Pen C §1168 or §1170 is deemed, by virtue of the subsequent commitment, an unfit subject for treatment. Welf & I C §3053(b). When the California Department of Corrections and Rehabilitation (CDCR) notifies the court of this subsequent commitment, the court must automatically terminate the CRC commitment and reinstate criminal proceedings. Welf & I C §3053(b).

If a defendant is excluded from the CRC and returned to court, the sentencing court is not bound by the sentence it imposed before the CRC commitment. The court retains jurisdiction to decrease, but not increase, the sentence. *People v Nubla* (1999) 74 CA4th 719, 88 CR2d 265.

When computing credits for the time spent in custody at the CRC, the court excludes time in outpatient status. Welf & I C §3201(c). The defendant does not receive work-time credits under Pen C §2933. *People v Miller* (1991) 233 CA3d 1551, 285 CR 410. Nor does the defendant receive good-time or participation credits under Pen C §2931. *People v Jones* (1995) 11 C4th 118, 44 CR2d 164.

> Ø **Note:** It is not uncommon for a person to be at the CRC for nearly a year (the period before mandatory referral for consideration of outpatient status) before the CRC makes a decision to return him or her to court for excessive criminality. Because that person will not receive good-time credits for confinement time before exclusion, a defendant at risk for such exclusion might not be interested in a CRC commitment. Defense counsel can contact the CRC before suggesting a commitment to the court to get an informal opinion on the likelihood the client would be later excluded. Counsel can ask to speak to the classification and parole representative or exclusion coordinator at (951) 737-2683.

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§37.66 E. Completion of Term of Commitment; Maximum Period of Commitment

When the Board of Parole Hearings (BPH) and the Director of Corrections and Rehabilitation are satisfied that a person has abstained from narcotics use and complied with his or her terms of parole, the parole authority files with the court a certificate recommending the person be discharged from the CRC and serves a copy on the district attorney. The person is returned to court, which discharges him or her from the CRC. The court may then, unless otherwise prohibited, modify the sentence, dismiss the charges, or suspend further proceedings. A dismissal qualifies as a dismissal under Pen C §1203.4. Welf & I C §3200(b). See §41.19.

If not discharged from the CRC within 12 months, a person under a civil commitment must be returned to court. Welf & I C §3201(b). A person committed after suspension of a felony sentence must be released on parole under BPH supervision if he or she has not been discharged after confinement for a period equal to what he or she would have spent in prison on that sentence (maximum period of commitment). The period of parole is that provided in Pen C §3000. A person who violates parole can be returned to the CRC. When parole is completed, the person is returned to court. In this situation, the court may not dismiss the charges but may suspend or terminate further proceedings in the interest of justice, modify the sentence, or deem the sentence to have been served in full. Welf & I C §3201(c).

For a person with a felony conviction, the maximum period of commitment to the CRC is the term of the sentence that was suspended. Outpatient time is included in calculating whether the maximum commitment has been reached. Welf & I C §3201(c).

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X. COMMITMENT AND TRANSFERS TO DIVISION OF JUVENILE JUSTICE (DJJ)

§37.67 A. Defendants Eligible for DJJ Commitment

If a person was under age 18 (a minor) when he or she committed an offense, under age 21 when apprehended for the crime, and convicted in adult court, he or she may be committed to the Division of Juvenile Justice (DJJ) rather than to state prison. Welf & I C §1731(a). Juvenile courts are also empowered to commit wards to DJJ. Welf & I C §1736. See §56.45.

There are significant limitations on DJJ commitments. An otherwise eligible individual may not be committed to the DJJ if he or she has been:

- Sentenced to death, life imprisonment, or the payment of a fine. Welf & I C §1731.5(a).
- Convicted of any Pen C §667.5(c) (violent felony) or §1192.7 (serious felony) and sentenced to life, to an indeterminate term to life, or a determinate term for which the maximum period of confinement, added to the minor's age, would exceed 25 years. Welf & I C §1732.6(a).
- Convicted of any Welf & I C §602(b) offense (mandatory direct filing in adult court). Welf & I C §1732.6(b)(1).
- Convicted of any Welf & I C §707(d)(1), (d)(2) or (d)(3) offense (prosecutor's discretion to file directly in adult court), if the facts specified in those paragraphs are found true. Welf & I C §1732.6(b)(2).
- Convicted of any Welf & I C §707(b) offense committed when the minor was age 16 or older. Welf & I C §1732.6(b)(3).

An otherwise eligible defendant convicted of an offense with a maximum penalty of not more than 90 days may not be committed to the DJJ unless he or she has been previously convicted of a public offense or has been a ward of the juvenile court by reason of a public offense, *and* the court is satisfied that society will best be protected by commitment to the DJJ. Welf & I C §1732.7.

Ø **Note:** In 1994, Welf & I C §1731 was amended to limit a DJJ commitment to a person who was a minor when a crime was committed; before that amendment, adults under age 21 could be committed to the DJJ. Stats 1994, ch 452, §2. This amendment moots the implications of Welf & I C §§1732 and 1732.5, which continue to retain language implying that a DJJ commitment is available for adults under age 21.

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§37.68 B. When Defendant May or Must Be Referred to DJJ Diagnostic and Treatment Center Before Sentencing

Before making an order committing the defendant to the Division of Juvenile Justice (DJJ), the court may continue the proceedings and place a person coming within the terms of Welf & I C §§1731-1731.5 in a DJJ diagnostic and treatment center for up to 90 calendar days if the court concludes that proper disposition of the case requires such observation and diagnosis. Welf & I C §1731.6(a); *People v Wells* (1983) 149 CA3d 721, 197 CR 163. Persons between the ages of 16 and 18 when they committed a criminal offense and found to be unfit for the juvenile court process *may* be referred to the DJJ for evaluation. If the court decides not to remand for evaluation, it must make a finding that the evaluation is unnecessary. Welf & I C §707.2(a). For a person under age 16 when he or she committed the offense, the court *must* refer the person for an evaluation before that person can be sentenced to state prison, unless commitment to the DJJ would be prohibited by Welf & I C §1732.6 (violent or serious felonies; life term, or term that would extend past the person's 25th birthday). Welf & I C §707.2(b). To calculate whether the commitment would extend past the 25th birthday, the sentencing court is not required to use the maximum term that could be imposed. The court can consider the term it actually intends to impose. *People v Rangel* (1999) 70 CA4th 350, 82 CR2d 589. The DJJ recommendation under Welf & I C §707.2, pertaining to a minor defendant who has been found not fit for treatment as a juvenile, is to focus on amenability to DJJ training and treatment. The court's sentencing decision, however, is to be based on "the need to protect society, the nature and seriousness of the offense, the interests of justice, and the needs of the minor." Welf & I C §707.2(a).

The DJJ must accept an eligible defendant committed to it "if it believes that the person can be materially benefitted by its reformatory and educational discipline, and if it has adequate facilities to provide that care." Welf & I C §1731.5(b). The defendant has no right to a hearing if he or she is rejected by the DJJ. *People v Rocha* (1982) 135 CA3d 590, 186 CR 132.

A commitment to the DJJ must generally correspond to the normal Determinate Sentencing Law (DSL) rules, with some exceptions. The principal term must be the upper base term. *In re Eric J.* (1979) 25 C3d 522, 536, 159 CR 317.

The decision to impose terms consecutively or concurrently is in the trial court's discretion, but, unlike DSL terms, the court need not state a reason for a consecutive term. *In re Ismael A*. (1989) 207 CA3d 911, 920, 255 CR 126. The rule of Pen C §1170.1(a)—one-third the middle term limit on subordinate consecutive terms—applies. *In re Claude J*. (1990) 217 CA3d 760, 765, 266 CR 99.

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§37.69 C. Stage of Proceedings When Actual Commitment to DJJ Occurs

The court may order the defendant's commitment to the Division of Juvenile Justice (DJJ) either before or after pronouncing sentence. *In re Ralph* (1946) 27 C2d 866, 871, 168 P2d 1 (sentence pronounced, but execution suspended while defendant sent to DJJ for determination of eligibility); *People v Stevenson* (1969) 275 CA2d 645, 651, 80 CR 392 (commitment before sentence pronounced); *People v Woolbert* (1965) 232 CA2d 544, 42 CR 919 (same).

Ø **Note:** When the defendant has been placed on probation and it has been revoked and terminated, the court may order an otherwise eligible defendant committed to the DJJ regardless of whether the imposition of sentence or merely its execution was suspended at the time probation was granted. See Pen C §1203.2(d).

When the court commits a person to the DJJ, the court may order temporary placement in some place of detention approved or established by the DJJ, or it may direct that the defendant be left at liberty until otherwise ordered by the DJJ, under conditions that will ensure the defendant's submission to the DJJ. Welf & I C §1738. See also Welf & I C §1739 (bail pending appeal).

The court must immediately forward to the DJJ a certified copy of the commitment order. Welf & I C §1740. The judge, prosecutor, and probation officer must furnish the DJJ with a written report on the defendant's background including their knowledge of his or her education, character, and disposition. Welf & I C §1741.

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§37.70 D. Proceedings if Defendant Rejected

The Division of Juvenile Justice (DJJ) has the discretion to accept or reject a defendant referred to it for commitment. See Welf & I C §1737.1. If the DJJ rejects the defendant, either at the time of presentation or during the period of commitment, it returns the defendant to the committing court, which may then sentence him or her to confinement as provided by law for punishment of the offense of which the defendant was convicted. Welf & I C §1737.1. See also *People v Stevenson* (1969) 275 CA2d 645, 651, 80 CR 392. Once committed to and accepted by the DJJ, however, a ward may be returned to superior court for sentencing to state prison only if the DJJ finds the ward to be "incorrigible" or an "improper person" or "incapable of reformation." Welf & I C §1737.1; 15 Cal Code Regs §4178. In a superior court review on mandamus of such a decision, the trial court must apply an "independent judgment" standard of review. *Mardesich v California Youthful Offender Parole Bd.* (1999) 69 CA4th 1361, 82 CR2d 294.

If the judge designates an alternative misdemeanor/felony to be a misdemeanor on commitment to the DJJ, the offense is deemed a misdemeanor for all purposes. Pen C §17(b)(2). If the defendant is thereafter returned by the DJJ to the sentencing court, the defendant can only be sentenced as a misdemeanant. See *People v Hannon* (1971) 5 C3d 330, 96 CR 35 (although *Hannon* was decided when §17(b)(2) made an alternative misdemeanor/felony a misdemeanor automatically when a defendant was sentenced to DJJ, the principle is the same under the amended statute when the judge actually specifies that the offense is a misdemeanor).

If the defendant is returned for sentencing, he or she has the right to counsel, to a hearing on sentence, and to be arraigned for judgment, as discussed in chap 35. However, if sentence has previously been pronounced and only its execution has been suspended, the court may order the defendant to be directly committed to the appropriate facility in execution of the original sentence. See *In re Ralph* (1946) 27 C2d 866, 168 P2d 1. The defendant is entitled to actual credits only for time spent in the DJJ against any term subsequently imposed. Welf & I C §1737. He or she is, however, entitled to conduct credits for time spent in custody *other than* the time he or she was actually committed to the DJJ. *People v Acosta* (1985) 170 CA3d 1033, 1036, 216 CR 841; *In re Edward S.* (1982) 133 CA3d 154, 158, 183 CR 733. A youthful offender ultimately sent to prison does receive conduct credits for time spent in the DJJ undergoing diagnostic study. See *People v Saldivar* (1984) 154 CA3d 111, 116, 201 CR 60. But a youthful offender initially *committed* to the DJJ, but later rejected and returned to court because of misconduct, is *not* entitled to receive conduct credits. *People v Reynolds* (1981) 116 CA3d 141, 171 CR 461.

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§37.71 E. Duration if Defendant Accepted

After initial commitment to the Division of Juvenile Justice (DJJ), under certain circumstances the court may recall and resentence the defendant, with credit for the time served in the DJJ. To do so within 120 days after initial commitment, it must be recommended by the diagnostic report and the DJJ director. After 120 days, it may be done at the director's recommendation. Welf & I C §1737.

The DJJ is generally required to retain the defendant under its supervision and control "so long as in its judgment such control is necessary for the protection of the public," and it must discharge the defendant "as soon as in its own opinion there is reasonable probability that he or she can be given full liberty without danger to the public." Welf & I C §1765. See also Welf & I C §1766(f). Despite the open-ended language of the quoted section, however, a DJJ commitment is subject to statutory age limits and case law restrictions.

A person committed to the DJJ after conviction of a felony must be discharged on his or her 25th birthday unless an order extending DJJ commitment (under Welf & I C §1800) or sentencing the person to state prison is made. Welf & I C §1771. In no event may a DJJ commitment after conviction of a felony exceed the maximum term established for the offense in the Penal Code. *People v Herron* (1976) 62 CA3d 643, 133 CR 287.

A defendant committed to the DJJ by an adult court is entitled to credit for time spent in presentence custody. *People v Sandoval* (1977) 70 CA3d 73, 138 CR 609.

If a judge commits a defendant to the DJJ on a wobbler offense, the offense is deemed a misdemeanor for all purposes once the defendant is discharged from the DJJ. Pen C §17(c). But an offense constituting a strike under the Three Strikes law remains a strike and is unaffected by that reduction. See §37.33A.

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§37.72 F. Housing Youthful State Prison Inmate at DJJ Facility; DJJ's Power to Transfer Such Inmates to Other Institutions

Having ordered a state prison sentence, a sentencing court may promptly transfer anyone under age 18 to the Division of Juvenile Justice (DJJ). The Secretary of the California Department of Corrections and Rehabilitation (CDCR) has the same power. Welf & I C §1731.5(a), (c). The transfer is for housing, participation in DJJ programs, and DJJ parole supervision. However, the person remains subject to the jurisdiction of the CDCR. A transfer ends when the DJJ Chief Deputy Secretary returns the person to the CDCR, when the person is paroled, when the sentence is served, or when the person reaches age 18, whichever occurs first; however, the person may remain at the DJJ, in the Chief Deputy Secretary's discretion, if his or her sentence will be complete before age 21. Welf & I C §1731.5(c).

The DJJ may transfer juveniles to any one of several prisons under the jurisdiction of the CDCR, including the California Rehabilitation Center (CRC). Welf & I C §1755.5. In addition, the DJJ may transfer a mentally disordered or developmentally disabled person to a state hospital if rehabilitation would be expedited by state hospital treatment. Welf & I C §1756.

Anyone committed to the DJJ may be returned to the committing court for further disposition before the date of discharge if the person appears to the Board of Parole Hearings "to be an improper person to be retained by the Youth Authority, or to be so incorrigible or so incapable of reformation … as to render his or her detention detrimental to the interests of the Youth Authority and the other persons committed thereto." Welf & I C §1737.1. The court may commit a person returned from the DJJ to prison or jail for a period equal to the maximum term for the offense involved less the period during which the person was under DJJ control. Welf & I C §1737.1.

A youthful offender has no right to a hearing to test the validity of his or her rejection from the DJJ under §1737.1. *People v Ferrel* (1972) 25 CA3d 970, 102 CR 372 (no due process violation).

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§37.73 G. Extension of DJJ Commitment

The Youthful Offender Parole Board may request the prosecuting attorney to seek an order extending a DJJ commitment if it determines the person is physically dangerous to the public because of a "mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior." Welf & I C §1800; *In re Howard N.* (2005) 35 C4th 117, 24 CR3d 866; see *Kansas v Crane* (2002) 534 US 407, 412, 151 L Ed 2d 856, 862, 122 S Ct 867.

Such a request to the prosecutor must be filed with the committing court at least 90 days before the discharge date and must be accompanied by a written statement of facts. If the prosecution declines to proceed, it must promptly notify the board. Welf & I C §1800. If the court agrees that probable cause supports the petition, it must order a hearing. The person involved has the right to a hearing, to the assistance of counsel, and to appear and compel the attendance of witnesses and the production of evidence. A probable cause hearing must be held within 10 calendar days after the court's order. Welf & I C §1801(a).

If the court finds no probable cause, it must dismiss the petition and the person must be discharged at the conclusion of his or her commitment. If the court does find probable cause, it must order that a trial be conducted to decide whether the person is physically dangerous to the public because a mental or physical deficiency, disorder, or abnormality causes the person serious difficulty in controlling dangerous behavior. Welf & I C §1801(b). If the cause of the offender's "dangerousness" is not a mental or physical condition, however, or if the offender is not amenable to DJJ treatment, the DJJ's control may not be extended.

At any trial under Welf & I C §1801, the person is entitled to a jury, unless he or she is advised and waives it. *In re Gary W.* (1971) 5 C3d 296, 96 CR 1. If not waived, the jury must be summoned within 4 to 30 days after the date of the order for a hearing, unless time is waived. Any verdict must be unanimous, and the standard of proof is beyond a reasonable doubt. Welf & I C §1801.5.

A continued DJJ detention terminates 2 years after the continued commitment order was made, unless the Youthful Offender Parole Board files a new application for continued detention. Welf & I C §1802. "Such applications may be repeated at intervals as often as in the opinion of the board may be necessary for the protection of the public." Welf & I C §1802. The Board may order a person over age 21 to be transferred to the Director of the California Department of Corrections and Rehabilitation for appropriate placement in order to protect other persons in DJJ custody. Welf & I C §1802.

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§37.74 H. State Prison Commitment Instead of Discharge

A person who is otherwise subject to discharge under Welf & I C §1771 (having reached the age of 25) may be committed to state prison instead of being discharged if (Welf & I C §1780):

- The date of discharge precedes the date on which the maximum prison term for the same offense expires; and
- The Youthful Offender Parole Board believes that unrestrained freedom for the person would be dangerous to the public.

Ø **Note:** A person committed to the Division of Juvenile Justice (DJJ) by the juvenile court is not subject to commitment pursuant to Welf & I C §1780, because that statute expressly requires a "conviction." See *In re John R.* (1981) 116 CA3d 940, 946, 172 CR 387.

A DJJ commitment may not be extended for a period exceeding what could properly be imposed on a ward originally committed by juvenile court. *People v Smith* (1971) 5 C3d 313, 319, 96 CR 13. See *People v Herron* (1976) 62 CA3d 643, 133 CR 287.

When the Board files a petition for state prison commitment, the committing court must notify the defendant, and the parents if the defendant is still a minor. Welf & I C §1781. The defendant has the right to a hearing on the petition, to appointed counsel, and to be afforded the opportunity to appear and compel the attendance of witnesses and the production of evidence. Welf & I C §1781.

If the committing court finds that the defendant would be dangerous to the public if released, the court may order him or her to state prison for the maximum term less the time the person spent under DJJ control. Welf & I C §1782. Such an order is appealable in the same manner as a criminal conviction. Welf & I C §1783.

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§37.75 XI. PREGNANT AND PARENTING WOMEN'S ALTERNATIVE SENTENCING

The Pregnant and Parenting Women's Alternative Sentencing Program Act is codified at Pen C §§1174-1174.9. Although enacted in 1994, the first prison program under the law was activated in 1999, administered as the Family Foundations Program of the California Department of Corrections and Rehabilitation (CDCR). The program is intended for women sentenced to state prison who have an "established history of drug abuse," and are pregnant and/or mothers of children under the age of 6. The program includes a community substance abuse treatment program while allowing mothers to care for their children. Goals include drug relapse prevention and reduced recidivism.

Program requirements. Inmates must voluntarily agree to participate in the program. The program is 12 months long, and is not affected by presentence or postsentence credits, including good-time/work-time credits. An inmate who successfully completes the program is then released to parole for a 12-month period. An inmate removed from the program will serve the remainder of her original sentence, with full credit for her time in the program under Pen C §2933. Pen C §1174.4(i).

Eligibility criteria. An inmate must meet *all* of the following criteria (Pen C §1174.4):

- Must have an established history of drug abuse;
- Must be pregnant and/or be the mother of one or more children under the age of 6. If a mother, at least one child under age 6 must reside with mother in the facility;
- Must never have served a prison term for, nor be convicted in the present offense for, any of the list of violent and serious felonies specified in Pen C §1174.4(a)(2); and
- Must not be sentenced to a term in excess of 3 years.

Additional CDCR criteria. As part of the Family Foundations Program, the CDCR has (under regulatory authority in Pen C §1174.8) adopted additional restrictions on eligibility. There is a two-child limit, and if applicable there must be no objection from the Department of Social Services to the child's placement with the mother. The mother must not have a potential or active felony hold or INS hold. Misdemeanor holds will not result in exclusion.

Procedure. The court, defense attorney, probation officer, or other officer of the court must determine the defendant's interest in the program and ensure that she meets the above criteria. The Women and Children's Services Unit of the CDCR should be contacted at (916) 323-0125 to determine an applicant's eligibility and the bed availability in the program. The probation department must prepare a written evaluation, which must include (1) whether the defendant is eligible, (2) whether participation by the defendant and her children is in the best interests of the children, (3) whether the defendant is amenable to treatment for substance abuse and would benefit from the program, and (4) a favorable recommendation by the appropriate child welfare services agency if the child is a dependent of the juvenile court under Welf & I C §300. Although the district attorney must make a recommendation whether the defendant would benefit from this program, the court has the power to recommend the defendant's participation without the district attorney's concurrence but must specify its reasons in writing and enter them in the record. Pen C §1174.4(c)-(d).

At sentencing, the court pronounces sentence to state prison, with the recommendation that the defendant participate in the program. The court must notify the CDCR of the recommendation within 48 hours after imposition of sentence. Pen C §1174.4(d). If the defendant is accepted for the program, she must be delivered *directly* to the program facility selected by the Department, not first to state prison. Pen C §§1174.4(i), 1202a.

> Ø **Note:** Because it is the intention of this sentencing scheme that the woman be delivered directly to the program, it is important that during the preparation of the probation report the CDCR be contacted to determine her eligibility. Defense counsel should work closely with the probation officer to ensure that all the prerequisites are met and that necessary information is provided to the court to ensure that the client can be sent directly to the program facility.

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PROBATION

ROBIN H. DERMAN

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§38.1 I. OVERVIEW

Probation defined. Probation is the suspension of the imposition or execution of a sentence and the conditional release of a defendant into the community under the direction of a probation officer (commonly called "formal" or "supervised" probation) or the court (commonly called a "conditional sentence," "informal probation," or "court probation"). Pen C §1203(a). "Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation." *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681. Probation can be conditioned on serving a period of incarceration in county jail (Pen C §1203.1) and on conditions reasonably related to the offense (*People v Lent* (1975) 15 C3d 481, 124 CR 905), *e.g.*, that the defendant in a driving under the influence case is to refrain from drinking alcoholic beverages or that the defendant in a theft case is to make restitution to the victim. The trial courts have broad discretion to impose conditions that foster the defendant's rehabilitation and protect the public safety. *People v Carbajal, supra*.

In felony cases, the court has discretion to grant probation for up to 5 years, or no longer than the prison term that can be imposed when the prison term exceeds 5 years. Pen C §1203.1.

In misdemeanor cases, the court may generally grant probation for up to 3 years, or no longer than the consecutive sentence that could be imposed if more than 3 years. Pen C §1203a; *People v Powell* (1985) 166 CA3d Supp 12, 26, 212 CR 454. Probation can extend for 5 years in misdemeanor cases of driving under the influence (Veh C §23600(b)(1)), being under the influence of a controlled substance (Health & S C §11550(a)), and for contributing to the delinquency of a minor (Pen C §272).

In limited circumstances, probation may be extended beyond the maximum term. See §§38.43, 46.11.

Probation report. A probation report is prepared by a probation officer at the court's direction after a plea or trial to assist the judge in making a sentencing decision. Preplea probation reports are authorized by statute (see Pen C §1203.7) but are rarely available because of budget constraints. See also §§27.27-27.28. Courts often follow the probation officer's recommendation. It is therefore important that counsel give any information to the probation officer that counsel thinks is important, *e.g.,* names of persons to be contacted, psychiatric or medical reports, or a transcript of portions of trial testimony. The probation officer otherwise may not locate these persons or this information.

Defense counsel's role. Competent representation demands that defense counsel be aware of sentencing alternatives and the availability of rehabilitation centers and similar programs in the community, help the client find a suitable program, and advocate that sentencing alternative. *People v Scott* (1994) 9 C4th 331, 351, 36 CR2d 627. Counsel should begin planning for sentencing when he or she first receives the case. If the client's release from jail can be obtained, counsel should refer the client for needed services, *e.g.,* psychiatry, a substance abuse program, or medical help, and see that he or she obtains a job, if possible, or becomes a full-time student. The court is much more likely to grant probation to a client who is employed or in school than to one who is neither and has no plans for the future.

If a defendant is granted probation, counsel should review with the defendant any conditions of probation, the consequences of a probation revocation, and the possibility of relief from penalties at the end of the probationary period. Some attorneys calendar the date that each client's probation period ends and send the client a letter as a reminder of the relief from penalties procedure.

Most attorneys withdraw from a case when the defendant is sentenced. Court-appointed attorneys must usually withdraw before they can obtain payment for their services. Public defenders withdraw so that financial eligibility can be redetermined if there is a probation revocation. Private attorneys withdraw so that new fee arrangements can be agreed to for any further representation.

Prosecutor's role. The prosecutor should convey to the probation officer all information he or she thinks is important in each case. The prosecutor should particularly inform the probation officer of information of which he or she would not otherwise be aware, *e.g.,* that the defendant has threatened the victim.

Scope of chapter. This chapter does not cover probation in juvenile cases. See chap 56 (juvenile delinquency proceedings).

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§38.2 II. CHART: DEADLINES

Action	Deadline	Authority
Request preplea probation investigation and report.	Any time before plea or trial.	See Pen C §1203.7 (not direct authority, but relied on because it allows probation report before plea has been entered).
Pronouncement of judgment when misdemeanant referred for probation report.	Within 20 judicial days after conviction. Time may be extended up to 90 calendar days on request of defendant *or* probation officer. If court has reasonable ground for believing defendant to be insane, time can be extended until sanity issue is decided.	Pen C §1449.
Pronouncement of judgment when felon referred for probation report.	Within 20 judicial days after conviction; this time may be extended until the probation officer's report is received. If an issue, time may be extended until defendant's sanity is decided. Time is extended if defendant is sent to diagnostic facility under Pen C §1203.03.	Pen C §1191.
Probation report to be made available to court and parties in misdemeanor cases.	At least 2 days before sentencing date or, at defendant's request, 5 days before sentencing date.	Pen C §1203d.
Probation report to be made available to court and parties in felony cases.	At least 5 days before the sentencing date or, at request of defense attorney or prosecutor, 9 days before sentencing date.	Pen C §1203(b)(2)(E).
Counsel to file statement in mitigation or aggravation.	At least 4 days before sentencing date.	Pen C §1170(b); Cal Rules of Ct 4.437(a).

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III. ELIGIBILITY FOR PROBATION

§38.3 A. General Rules

Persons convicted of misdemeanors or infractions, and most felonies, are eligible for probation, the sentencing court having discretion to decide their suitability for probation under Pen C §§1203(b)(3) (felons) and 1203a (misdemeanants). See Cal Rules of Ct 4.414 (criteria affecting probation).

In infraction and misdemeanor cases, all courts have the power to suspend the imposition or execution of a sentence and grant a conditional sentence, without referral to the probation officer. The defendant then reports only to the court unless the court orders otherwise. Pen C §1203b. This is commonly called "court probation," "bench probation," or "informal probation."

Certain convicted felons, because of the nature of the offense (*e.g.,* a forcible sex crime), circumstances of the offense (*e.g.,* firearm use), or the nature and number of the defendant's prior convictions, are not eligible for probation. See chart in §37.52 (persons ineligible for probation). Other felons are presumptively ineligible for probation but may be granted probation in an unusual case. See §37.53 (restricted eligibility).

If the defendant's case falls within one of the "presumptively ineligible" statutes, the defendant carries the burden of demonstrating at the sentencing hearing that his or her case is sufficiently distinguishable from others covered by the statute to be identified as "unusual." The criteria affecting when probation should be granted in these cases are set out in Cal Rules of Ct 4.413. See *People v Stuart* (2007) 156 CA4th 165, 178, 67 CR3d 129; *People v Superior Court (Dorsey)* (1996) 50 CA4th 1216, 1225, 58 CR2d 165. See also Cal Rules of Ct 4.408 (court may also rely on additional criteria that are reasonably related). The defense attorney, victim, and prosecutor may include any relevant criteria affecting probation in the unusual case in their statements in mitigation or aggravation filed with the court under Pen C §1170(b).

For discussion of when the court may consider evidence of other crimes in determining probation eligibility, see §§38.16-38.18.

When a defendant is convicted of committing a lewd and lascivious act upon a child under the age of 14, Pen C §288.1 requires a report from a reputable mental health professional before a judge can grant probation. See *People v Lamb* (1999) 76 CA4th 664, 673, 90 CR2d 565. See also Pen C §1203.066 (eligibility in child molestation cases); *People v Wills* (2008) 160 CA4th 728, 737, 73 CR3d 104 (court may grant probation when defendant meets all criteria of Pen C §1203.066, including that probation is in best interest of child victim; when victim is no longer a child at sentencing, court has no authority to grant probation).

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B. Rules Applicable to Nonviolent Drug Possession Offenses (Proposition 36)

§38.4 1. Basic Provisions

The provisions of Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, relating to probation and probation revocation, are codified at Pen C §§1210-1210.1. Other provisions of the Act are codified at Pen C §3063.1 (parole), and Health & S C §§11999.4-11999.13 (funding). On Proposition 36 parole provisions, see §47.30.

Ø **Note:** The judgment enjoining the enforcement of SB 1137 has been affirmed. See *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 1377, 101 CR3d 229. Senate Bill 1137 was signed into law in 2006 and amended the provisions of Proposition 36 to permit, among other things, the incarceration of offenders placed on Proposition 36 probation who relapse during treatment. Counsel and the court should be careful to refer to the pre-amendment version of Pen C §1210.1 because the amended version still appears "on the books."

Proposition 36 mandates probation and drug treatment for defendants convicted of a "nonviolent drug possession offense," prohibits incarceration as a condition of probation, and establishes procedures for violations of probation or parole that involve nonviolent drug offenses.

"Nonviolent drug possession offenses" are defined as unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance identified in Health & S C §§11054 (including heroin, LSD, cocaine base, and marijuana), 11055 (including opium, cocaine, methamphetamine, PCP, methadone, and Khat), 11056, 11057, and 11058. Pen C §1210.

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§38.5 2. Statutory Exclusions

Penal Code §1210.1(b)(1)-(5) excludes five categories of defendants:

(1) Any defendant previously convicted of any serious or violent felony listed in Pen C §667.5(c) or §1192.7(c), "unless the nonviolent drug possession offense occurred after a period of 5 years in which the defendant remained free of both *prison custody* and the *commission* of an offense that results in (A) a felony conviction other than a nonviolent drug possession offense or (B) a misdemeanor conviction involving physical injury or the threat of physical injury to another person."

Ø **Note:** The 5-year prison-free, offense-free period is the 5 years immediately before the new crime. *People v Superior Court (Martinez)* (2002) 104 CA4th 692, 128 CR2d 372; *People v Superior Court (Turner)* (2002) 97 CA4th 1222, 119 CR2d 170. The washout period starts on the date of *commission* of a disqualifying offense, not the date of conviction. Pen C §1210.1(b)(1). This means that a conviction of a disqualifying offense within 5 years of the commission of a nonviolent drug possession offense does not necessarily disqualify the defendant from Proposition 36 probation, if the defendant committed the disqualifying offense more than 5 years before the commission of the nonviolent drug possession offense. *Moore v Superior Court* (2004) 117 CA4th 401, 12 CR3d 383.

(2) Any defendant convicted, in the same case, of any misdemeanor not related to drugs or any other felony that is not a nonviolent drug possession offense.

Ø **Note:** the following offenses have been held to exclude the defendant from Proposition 36 eligibility: misdemeanor driving under the influence (*People v Canty* (2004) 32 C4th 1266, 14 CR3d 1 (drugs); *People v Eribarne* (2004) 124 CA4th 1463, 22 CR3d 417 (alcohol)); forging or passing a forged prescription to obtain drugs (*People v Wheeler* (2005) 127 CA4th 873, 26 CR3d 138; *People v Foreman* (2005) 126 CA4th 338, 23 CR3d 714); possession of a controlled substance while in possession of a loaded operable firearm in violation of Health & S C §11370.1 (*In re Ogea* (2004) 121 CA4th 974, 17 CR3d 698); opening or maintaining a place for the use or sale of methamphetamine in violation of Health & S C §11366 (*People v Ferrando* (2004) 115 CA4th 917, 9 CR3d 670); concealment of evidence when evidence concealed was drugs (*People v Moniz* (2006) 140 CA4th 86, 43 CR3d 904); and cultivation of marijuana (*People v Sharp* (2003) 112 CA4th 1336, 5 CR3d 771).

(3) Any defendant who, while using a firearm, possessed or was under the influence of specified drugs (including cocaine, cocaine base, heroin, and methamphetamine).

(4) Any defendant who refuses drug treatment as a term of probation.

Ø **Note:** In *People v Espinoza* (2003) 107 CA4th 1069, 132 CR2d 670, the court rejected the argument that a past refusal to accept drug treatment as a condition of probation was a ground for denying the defendant probation under Proposition 36. However, in *People v Guzman* (2003) 109 CA4th 341, 349, 134 CR2d 727, when the defendant left the country instead of reporting for treatment and failed to report to his probation officer, to the treatment program, or to the trial court when he returned, the court construed this conduct as a refusal of drug treatment within the meaning of Pen C §1210.1(b)(4). See also *People v Johnson* (2003) 114 CA4th 284, 293, 7 CR3d 492. But see *People v Dagostino* (2004) 117 CA4th 974, 992, 12 CR3d 223 (defendant's failure to report to drug treatment "gatekeeper" not grounds for excluding defendant from program under facts of case).

Ø **Note:** One court has taken note that there is nothing in Proposition 36 that requires a defendant to abstain from all controlled substances, including those for which an established medical need exists and that a physician has prescribed. Therefore, the authorized medical use of marijuana cannot, as a matter of law, render a defendant unamenable to treatment under Proposition 36. *People v Beaty* (2010) 181 CA4th 644, 649, ___ CR3d ___.

(5) Any repeat drug offender who has participated in two or more separate courses of drug treatment and who is found by the court, by clear and convincing evidence, not to be amenable to drug treatment. If a defendant is excluded for this reason, the court is required to sentence him or her to at least 30 days in jail.

Ø **Note:** Concurrent treatment for two separate offenses does not constitute two separate courses of drug treatment as contemplated by Pen C §1210.1. *People v Castagne* (2008) 166 CA4th 727, 732, 83 CR3d 37.

Unlike Pen C §3063.1, which makes drug treatment available to a parolee who commits a nonviolent drug possession offense while on parole for a nonserious, nonviolent offense that is not drug related, Pen C §1210.1 does not make drug treatment available to individuals on probation for non-drug-related offenses who violate that probation as a result of a nonviolent drug possession offense. See *People v Superior Court (Edwards)* (2007) 146 CA4th 518, 521, 52 CR3d 889; *People v Esparza* (2003) 107 CA4th 691, 132 CR2d 377. A defendant who is on probation for a drug-related offense but who is not incarcerated at the time of sentencing on a non-drug-related offense is eligible for Proposition 36 treatment. This can happen when the prosecution has not sought to have probation revoked for the prior drug-related offense. *People v Superior Court (Edwards), supra*.

The discrepancy between Pen C §3063.1 and Pen C §1210.1 does not deprive probationers of equal protection under the Fourteenth Amendment. *People v Guzman* (2005) 35 C4th 577, 25 CR3d 761.

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§38.6 3. Other Exclusions

The First District has recognized a nonstatutory exception to Proposition 36 eligibility when there is a "substantial likelihood" that the defendant will be deported before completing drug treatment. *People v Espinoza* (2003) 107 CA4th 1069, 132 CR2d 670. But see *People v Muldrow* (2006) 144 CA4th 1038, 50 CR3d 848 ("substantial likelihood" test in *Espinoza* applicable to illegal aliens, not applicable to parolees). The First District has also held that a defendant who pleaded guilty to a nonviolent drug possession offense as part of a plea bargain nonetheless was not entitled to Proposition 36 probation, because he received the benefit of his bargain, which included the dismissal of a charge that otherwise would have disqualified him from Proposition 36 probation. *People v Chatmon* (2005) 129 CA4th 771, 28 CR3d 859.

The Third District has held that a defendant who received a 2-year prison sentence for a felony theft committed while he was awaiting trial for a nonviolent drug possession offense was not entitled to Proposition 36 probation for the drug conviction, even though he did not fit into any exception listed in Pen C §1210.1(b). *People v Wandick* (2004) 115 CA4th 131, 135, 9 CR3d 167. The defendant was "unamenable" to treatment within the meaning of the statute because his prison commitment made him unavailable to participate in the program. See also *People v Esparza* (2003) 107 CA4th 691, 699, 132 CR2d 377. *Esparza* also held that Proposition 36 does not apply to drug-related probation violations for nondrug offenses. 107 CA4th at 697.

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§38.7 4. Sentencing Under Proposition 36

Under Pen C §1210.1(a), when a defendant qualifies for sentencing under Proposition 36, the court must grant probation and must order the defendant to participate in and complete a drug treatment program. The court *may* impose additional terms of probation but *may not* impose a period of incarceration as a condition of probation. As a rule, this mandate does not permit judicially created nonstatutory exceptions. *People v Superior Court (Edwards)* (2007) 146 CA4th 518, 521, 52 CR3d 889.

The court may, however, as a condition of Proposition 36 probation, require the defendant to waive custody credits for time to be spent in residential drug treatment. *People v Thurman* (2005) 125 CA4th 1453, 23 CR3d 659.

A jury's acquittal on possession for sale does not compel a finding that the drugs were possessed for personal use. *People v Dove* (2004) 124 CA4th 1, 10, 21 CR3d 52. In *Dove,* the trial court denied the defendant Proposition 36 probation though he had been found not guilty of possession of cocaine base for sale and convicted only of simple possession and transportation. The court of appeal affirmed the sentence, noting that Proposition 36 *reduces* a sentence that would otherwise apply. Because the decision to deny Proposition 36 probation was not one that *raised* the sentence beyond the statutory maximum within the meaning of *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348, and *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 415, 124 S Ct 2531, the trial court could make a finding based on a preponderance of the evidence that the cocaine base was not possessed for personal use. *Dove,* 124 CA4th at 11.

A trial court's finding that the possession or transportation was not for personal use need not be stated on the record but may be implied from the imposition of a prison sentence and will be upheld when supported by substantial evidence. *Dove,* 124 CA4th at 10. In *People v Harris* (2009) 171 CA4th 1488, 1496, 91 CR3d 205, however, the appellate court found the trial court had imposed an unauthorized sentence when it sent the defendant to prison for 19 years instead of granting Proposition 36 probation. Given the prosecution's failure at sentencing to challenge the jury's express special finding of personal use, and the sufficiency of the evidence supporting that finding, the court refused to allow the prosecution another opportunity "to make their transportation for sales case by implying the trial court made a finding that it was not asked to make." 171 CA4th at 1498.

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§38.8 5. Violations of Proposition 36 Probation

Proposition 36 entitles a probationer to three distinct periods of treatment, and three distinct revocation motions, before his or her probation can be revoked. Note, however, *People v Sizemore* (2009) 175 CA4th 864, 96 CR3d 638, in which the defendant "opted out" of Proposition 36 probation after his second violation and agreed to be placed on standard felony probation. The defendant's acknowledgment that he could not comply with Proposition 36 probation, coupled with the trial court's observations that it was not practical for him to continue with the requirements of the program, rendered proper the court's decision to terminate him from the drug treatment program after his second violation.

If multiple drug-related probation revocation petitions are before the court, and if the petitions are filed so closely together that the probationer did not receive notice of one violation before committing the conduct underlying the next, the petitions will not be treated as separately noticed revocation motions. *People v Enriquez* (2008) 160 CA4th 230, 239, 72 CR3d 718. For further discussion of Proposition 36 probation revocations, see §§46.36-46.41.

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§38.9 6. Successful Completion of Treatment

A defendant who successfully completes the drug treatment program may petition the sentencing court to dismiss all charges. Pen C §1210.1(d)(1). See *People v Hartley* (2007) 156 CA4th 859, 863, 67 CR3d 667. On the meaning of the term "successful completion of treatment," see *People v Hinkel* (2005) 125 CA4th 845, 22 CR3d 895. If the court finds that the defendant successfully completed the program and substantially complied with the conditions of probation, the court *must* set aside and dismiss the indictment or information. The arrest will be deemed never to have occurred. Pen C §1210.1(d)(1). Despite the dismissal, the defendant remains subject to Pen C §12021 (restriction on possession of concealable firearm) and must disclose the arrest and conviction in response to any law enforcement inquiry. The defendant must also disclose the arrest and conviction in any application for public office, peace officer employment, licensing by any state or local agency, contracting with the state lottery, or purposes of serving on a jury. Pen C §1210.1(d)(3). See also §41.17. Note that while under certain circumstances a court may declare an offense a misdemeanor with a grant of probation (see Pen C §17(b)(3)), Health & S C §11350 describes a straight felony, not a wobbler, so the court has no power to reduce the conviction, even after the successful completion of Proposition 36 treatment. *People v Myers* (2009) 170 CA4th 512, 516, 87 CR3d 916.

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IV. PROBATION INVESTIGATION AND REPORT

§38.10 A. Preplea Probation Reports

When available, a preplea probation investigation and report may help ensure a just disposition of the case in certain instances, *e.g.,* when the case involves complex emotional or psychological factors. Although defense counsel may request it at any time before the plea, it is usually requested at the court appearance when plea negotiations occur. For further discussion of preplea reports, see §§27.27-27.28.

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B. Court's Discretion to Refer Cases to Probation After Plea or Trial

§38.11 1. Misdemeanor Cases

Persons convicted of misdemeanors may be referred to the probation officer for a probation investigation and report, or the court in its discretion may grant informal or court probation summarily without a probation report. See Pen C §§1203(d), 1203b. The common practice in some counties is for courts to refer all defendants for a probation report unless the plea bargain is for court probation and no jail time, or counsel stipulate that a probation report is waived. In other counties, because of the lack of probation services, referrals are made on misdemeanants only in rare cases when the court is considering formal probation.

Ø **Note:** If a person is referred to the probation officer for a report, the court may extend the time for sentencing by 20 judicial days. At the request of the probation officer or the defendant, that time may be extended an additional 90 days. Pen C §1449.

The probation report must be made available to the court and the parties at least 2 days before the sentencing date or, at the defendant's request, 5 days before the sentencing date. Pen C §1203d. If the defendant is not represented by counsel, the court must order the probation officer to discuss the contents of the report with the defendant before sentencing. Pen C §1203d.

The prosecution has no right to appeal a trial court's failure to order a probation report before sentencing. *People v Eberhardt* (1986) 186 CA3d 1112, 231 CR 387.

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§38.12 2. Felony Cases

Felons who are eligible for probation (see §38.3) must be referred for a presentence probation report. See Pen C §§1191, 1203(b). This includes felons who are presumptively ineligible for probation, because they are still technically eligible. *People v Bohannon* (2000) 82 CA4th 798, 808, 98 CR2d 488, disapproved on other grounds in *People v Zambrano* (2007) 41 C4th 1082, 1135 n13, 63 CR3d 297. For felons ineligible for probation, a presentence probation report must be prepared to determine the appropriate amount of restitution. The judge may ask the probation officer to investigate facts relevant to the sentencing of the felon. Pen C §1203(g). This is discretionary with the judge, but it is better practice to obtain a presentence report even when the defendant is not eligible for probation. *People v Bullock* (1994) 26 CA4th 985, 31 CR2d 850; *People v Tatlis* (1991) 230 CA3d 1266, 282 CR 55; Cal Rules of Ct 4.411(b). In addition, whenever a defendant is committed to state prison, a report on the circumstances of the offense and the defendant's prior record must be prepared and accompany the commitment papers. A presentence report meets this requirement. See Pen C §1203c.

In felony cases, the probation report must be made available to the court and the parties at least 5 days (or 9 days on request) before the sentencing date. Pen C §1203(b)(2)(E); *People v Bohannon*, *supra*. The parties, however, may waive time by written stipulation or by oral stipulation in open court. See Pen C §1203(b)(2)(D). This 5-day/9-day requirement applies only to felonies and was enacted to give the parties time to prepare and file statements in mitigation or aggravation. See *People v Conners* (2008) 168 CA4th 443, 456, 85 CR3d 627 (when parties and court not provided with meaningful probation report and defense counsel requested continuance, court's failure to grant continuance and imposition of sentence without informative report violated purpose of statute). On misdemeanors, see §38.11.

Statements in mitigation or aggravation must be filed with the court at least 4 days before sentencing. Pen C §1170(b). Counsel who needs more time to file this statement should move to continue under Pen C §1050(b) at least 2 days before the hearing.

Ordinarily, judgment must be pronounced within 20 judicial days after conviction. Pen C §1191. However, when a convicted felon is referred for a probation investigation and report, the time may be extended "until the probation officer's report is received." Pen C §1191. See also chap 35 on pronouncing judgment.

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§38.13 C. When Supplemental Probation Report Is Required

When the defendant is eligible for probation, the court must order a supplemental probation report for sentencing proceedings that occur "a significant period of time" after the original report was prepared. Cal Rules of Ct 4.411(c). See, *e.g., People v Dobbins* (2005) 127 CA4th 176, 24 CR3d 882 (8-month interval between first probation report and resentencing was significant period of time); *People v Johnson* (1999) 70 CA4th 1429, 1432, 83 CR2d 423. See also *People v Rojas* (1962) 57 C2d 676, 21 CR 564 (supplemental report required on remand for resentencing after appeal).

When the defendant is not eligible for probation, Cal Rules of Ct 4.411(b) recommends but does not require that the trial court refer the case to the probation department. Thus, even when the sentencing proceeding occurs a significant time after the preparation of the original probation report, as is almost invariably true when an appellate court remands a case for resentencing, the trial court is not required to obtain a current probation report if the defendant is ineligible for probation. *People v Bullock* (1994) 26 CA4th 985, 31 CR2d 850; *People v Tatlis* (1991) 230 CA3d 1266, 1273, 282 CR 55.

Ø **Warning:** When a supplemental probation report is required, failure to request a report or to object to proceeding without one can waive the requirement. *People v Myers* (1999) 69 CA4th 305, 311, 81 CR2d 564. See also *People v Welch* (1993) 5 C4th 228, 234, 19 CR2d 520 (failure to object to errors in probation report waives claim of error on appeal).

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§38.14 D. Purpose of Probation Report; Court's Discretion to Reject Report's Recommendation

The purpose of a probation report is to assist the sentencing court in determining an appropriate disposition. The court must state on the record that it has considered the report before sentencing. Pen C §1203(b)(3). However, the court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary. *People v Myers* (1999) 69 CA4th 305, 310, 81 CR2d 564.

Although the court must *consider* the probation report (Pen C §1203(b)(3)), it need not follow it. The court has the discretion to reject part or all of the report. *People v Llamas* (1998) 67 CA4th 35, 40, 78 CR2d 759. The court must exercise its discretion in sentencing matters; failure to do so is error. *People v Tang* (1997) 54 CA4th 669, 677, 62 CR2d 876.

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E. Contents of Probation Report

§38.15 1. In General; Hearsay; Suppressed Evidence

Hearsay is admissible in the probation report as long as it is sufficiently reliable to provide fundamental fairness. *People v Otto* (2001) 26 C4th 200, 212, 109 CR2d 327; *People v Arbuckle* (1978) 22 C3d 749, 755, 150 CR 778.

The minimum requirements for the contents of probation reports are given in Cal Rules of Ct 4.411.5. Several hearsay statements are listed:

- Victim's statement or a summary of it, including information relevant to restitution (Cal Rules of Ct 4.411.5(a)(5); Pen C §1203(h); see also *People v Mockel* (1990) 226 CA3d 581, 588, 276 CR 559);
- Defendant's statement or a summary of it (Cal Rules of Ct 4.411.5(a)(4));
- Letters submitted on the defendant's behalf (Cal Rules of Ct 4.411.5(a)(7));

  Ø **Note:** The court in *People v Slater* (1989) 215 CA3d 872, 263 CR 867, said it is acceptable for the probation officer to summarize statements submitted on the defendant's behalf even though Rule 4.411.5(a)(7) does not list that option. Defense counsel should therefore submit these statements directly to the court in addition to giving copies to the probation officer.

- Written statements from defense and prosecuting attorneys, police, and probation and parole officers who had previous experience with defendant, and from correctional officers who observed the defendant during presentence incarceration (Cal Rules of Ct 4.411.5(a)(7)); and
- Relevant facts about the defendant's social history, including education, employment, and social history (Cal Rules of Ct 4.411.5(a)(6)).

The report must also contain an evaluation and recommendation by the probation officer on the defendant's suitability for probation, the relevant aggravating and mitigating factors considered if the officer recommends a prison sentence, sentencing and enhancements, if any, and the defendant's ability to pay restitution. Cal Rules of Ct 4.411.5(a)(8)-(9). Penal Code §1203(b)(2)(D) specifically requires the probation officer to include a recommendation on the amount the defendant should pay as restitution and whether the court should require restitution to the victim or to the State Restitution Fund. See also Cal Rules of Ct 4.411.5(a)(11). On restitution, see chap 40.

Illegally seized evidence may be considered in determining the appropriate sentence. *People v Brewster* (1986) 184 CA3d 921, 925, 229 CR 352 (Proposition 8 abrogated rule that evidence suppressed under Pen C §1538.5 is inadmissible in sentencing hearings; even before passage of Proposition 8, evidence suppressed in an *unrelated* matter was admissible).

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§38.16 2. Prior Criminality

The probation report must include a variety of information about the defendant's criminal history (see Cal Rules of Ct 4.411.5), such as the following:

Prior convictions. With certain limitations discussed below, all the defendant's prior convictions as an adult must be contained in the probation officer's presentence report (Cal Rules of Ct 4.411.5(a)(3)) and may be considered by the court in making its sentencing determinations, including a defendant's suitability for probation and the choice of prison terms within the sentencing range.

Ø **Note:** Uncharged priors mentioned in the probation report may not be used to determine whether a defendant is *statutorily eligible* for probation. When a statute, such as Health & S C §11370 (barring probation for offenders who have been convicted of certain offenses), precludes the court from even considering probation as an alternative to imprisonment, the prior must be pleaded and proved. *People v Lo Cicero* (1969) 71 C2d 1186, 1192, 80 CR 913. When, however, a statute, such as Pen C §1203(e)(4), makes a defendant *presumptively ineligible*, uncharged priors may be used in determining whether to grant probation, because the statute does not restrict the range of dispositions available to the court. *People v Dorsch* (1992) 3 CA4th 1346, 1350, 5 CR2d 327. See also Cal Rules of Ct 4.413. For discussion of prior convictions, see chap 24.

Delinquency adjudications. Juvenile court adjudications of crimes committed by the defendant must be included in the report unless the records have been sealed. Pen C §1203(b)(2)(B); Cal Rules of Ct 4.411.5(a)(3); *People v Hubbell* (1980) 108 CA3d 253, 166 CR 466.

Limitations. The following may not be included in the probation report:

- Sealed records of delinquency adjudications. If the juvenile court record has been sealed under Welf & I C §389, it is deemed "never to have occurred and the person may properly reply accordingly to any inquiry about the events, records of which are ordered sealed." See below for discussion of prior arrests not resulting in conviction for another possible limitation on the use of juvenile records.
- Marijuana convictions. Convictions for marijuana offenses specified in Health & S C §§11361.5 and 11361.7 are subject to destruction 2 years after the conviction, or 2 years after the arrest if the defendant was not convicted, and should not be included in the probation report (see Health & S C §11361.7) or considered for any purpose by the sentencing court. *People v Price* (1991) 1 C4th 324, 471, 3 CR2d 106.
- Diversion; deferred entry of judgment. Charges that were disposed of under Pen C §§1000-1001.90 ("diversion" or "deferred entry of judgment") should not be included in the probation report or be considered by the sentencing court if the diversion program was successfully completed. See also chap 27.
- Arrests that did not result in convictions. Arrests and police contacts that did not result in convictions may not be included in the probation report or be considered by the court unless supporting factual information is included so that the court will have a basis for making an intelligent judgment on the reliability of the information. Cal Rules of Ct 4.411.5(a)(3); *People v Gragg* (1989) 216 CA3d 32, 43, 264 CR 765.

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§38.17 3. Risk Assessment for Sex Offenders

When a defendant is convicted of a sex offense for which registration is required under the Sex Offender Registration Act (Pen C §§290-290.023), or if the probation officer recommends that at sentencing the court order the defendant to register as a sex offender under Pen C §290.006, the trial court must refer the defendant to the probation officer for a report on the defendant's performance on the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) (see Pen C §§290.04-290.07). Pen C §1203(d). Note that though the trial court is not ordinarily required to obtain a probation report on a defendant convicted of a misdemeanor, it must obtain and consider the SARATSO results for a defendant convicted of a misdemeanor sex offense. For additional discussion of risk assessment for sex offenders, see §38.35.

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§38.18 4. Facts Pertaining to Charges in Current Case

Counts or cases dismissed. A probation report may include, and sentencing courts may consider, facts relating to counts or cases that were dismissed as part of a plea bargain as long as the facts in the dismissed counts are "transactionally related" to the crimes for which the defendant is being sentenced. *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696. See *People v Lamb* (1999) 76 CA4th 664, 672, 90 CR2d 565.

Dismissed counts that are not transactionally related to the crimes for which the defendant is being sentenced can be considered if the defendant consents (called a "*Harvey* waiver"). The dismissed counts can then be used to decide the defendant's suitability for probation and which term to select. *People v Harvey, supra*. But even when the *Harvey* requirements are met and the dismissed matters may properly be considered, the court may consider such facts in making its sentencing decisions only if the facts are reliable. *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778.

> Ø **Note:** The supreme court has granted review in *People v Martin* (review granted Oct. 22, 2009, S175356; superseded opinion at 175 CA4th 1252, 96 CR3d 616) and may determine whether counts dismissed as part of a plea bargain can be considered in determining probation conditions without a *Harvey* waiver.

There is an exception to the rule that, without a *Harvey* waiver, dismissed counts must be transactionally related to the counts on which the defendant is being sentenced. Penal Code §288.1 requires a psychological evaluation of the mental condition of defendants convicted of certain sex crimes involving victims under age 14 who are being considered for probation. That report can properly include information on dismissed counts. *People v Lamb, supra*.

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V. RESTITUTION

§38.19 A. Available to Victim

A person injured by a criminal act in California has three main avenues for seeking restorative relief (Pen C §1191.2): civil remedies (discussed in chap 40); the State Restitution Fund (discussed in §38.21); and a restitution order from the criminal court (discussed in chap 40).

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Source: Criminal Law/California Criminal Law Procedure and Practice/38 PROBATION/§38.20 B. Fine Paid by Defendant to State Restitution Fund

§38.20 B. Fine Paid by Defendant to State Restitution Fund

With few exceptions, a defendant convicted of either a misdemeanor or a felony in California must pay a restitution fine. The fine does not apply to Vehicle Code violations involving bicyclists, pedestrians, parking, or registration. 70 Ops Cal Atty Gen 172 (1987). For other misdemeanor offenses, a convicted defendant must pay a restitution fine of $100-$1000. A defendant convicted of a felony must pay a restitution fine of $200-$10,000. Pen C §1202.4(b); *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134. This fine is to be paid into the State Restitution Fund. Pen C §1202.4(e).

Ø **Note:** In domestic violence cases, the defendant must pay at least $400, which is disbursed to domestic violence funds. Pen C §1203.097(a)(5).

Courts must impose these fines unless they find compelling and extraordinary reasons not to, and must state those reasons on the record. Inability to pay is not a compelling and extraordinary reason. Pen C §1202.4(c). Defendants awaiting sentencing are prohibited from disposing of property to avoid forfeiture or to lessen their ability to make restitution. Pen C §155.5.

The restitution required by former Govt C §13967 (precursor to Pen C §1202.4) was found constitutional in *People v Glenn* (1985) 164 CA3d 736, 211 CR 547, and *People v Long* (1985) 164 CA3d 820, 210 CR 745. Penalty assessments are not imposed on restitution fines. Pen C §1202.4(e); *People v Allen* (2001) 88 CA4th 986, 106 CR2d 253; *People v McHenry* (2000) 77 CA4th 730, 91 CR2d 877.

Restitution qualifies as punishment and therefore should be considered in plea negotiations. *People v Walker* (1991) 54 C3d 1013, 1024, 1 CR2d 902. The trial court must inform a defendant pleading guilty about the mandatory restitution fine under Pen C §1202.4(b), because the fine is a direct consequence of that plea. 54 C3d at 1022. However, when the record indicates that the defendant had actual notice that the fine would be imposed, any error will be deemed waived if counsel does not object. 54 C3d at 1023.

In setting a felony restitution fine above the $200 minimum, the court can multiply $200 by the number of years the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b). The upper limit is $10,000, no matter how many victims or counts there are. *People v Ivans* (1992) 2 CA4th 1654, 4 CR2d 66.

Ø **Note:** The supreme court has granted review in *People v Soria* (review granted Aug. 27, 2008, S164796; superseded opinion at 163 CA4th 247, 77 CR3d 421) and may determine whether a court can impose a restitution fine up to $10,000 in each case resolved by a package plea agreement, or whether the total fine for all unconsolidated cases resolved by such an agreement is limited to $10,000.

Whenever the defendant receives a conditional sentence or a sentence including a period of probation, Pen C §1202.44 requires the court to assess an additional probation revocation restitution fine in the same amount as the restitution fine imposed under Pen C §1202.4(b). The probation revocation restitution fine is suspended unless probation is revoked. *People v Taylor* (2007) 157 CA4th 433, 438, 68 CR3d 682. See also Pen C §1202.45 (requiring parole revocation fine in same amount as Pen C §1202.4(b) restitution fine whenever sentence includes period of parole; fine suspended unless parole revoked).

The amount paid to the victim is not offset against the restitution fine. *People v Vazquez* (2009) 178 CA4th 347, 355, 100 CR3d 351; *People v Blackburn* (1999) 72 CA4th 1520, 1535, 86 CR2d 134. A penalty assessment is not applied to the restitution paid to the victim. *People v Dorsey* (1999) 75 CA4th 729, 735, 89 CR2d 498.

In setting the amount of the fine beyond the minimums ($100 and $200), the court must consider the defendant's ability to pay the fine, the gravity of the offense, the economic gain to the defendant, the number of victims, and the losses caused by the crime. Pen C §1202.4(d). A formal hearing is not required, however, and the court need not make express findings. Pen C §1202.4(d).

Under §1202.4(d), the defendant has the burden of demonstrating his or her inability to pay. The defendant waives

the issue of the amount and ability to pay if he or she fails to object in the trial court. *People v Welch* (1993) 5 C4th 228, 234, 19 CR2d 520.

Ø **Note:** Defense counsel should review the probation report regarding the recommendation for probation and raise an objection at the sentencing hearing if the defendant does not have the ability to pay fines exceeding the minimums.

The trial court must state its findings on the record only if it imposes no restitution fine. *People v Menius* (1994) 25 CA4th 1290, 31 CR2d 15. If the court finds and states on the record compelling and extraordinary reasons not to require restitution or a restitution fine, it must order community service as a condition of probation, unless it also finds reasons for not imposing community service. Pen C §1202.4(n).

When the court has ordered a restitution fine, denied probation, and sent the defendant to prison, the California Department of Corrections and Rehabilitation (CDCR) may collect the fine by deducting a minimum of 20 percent or the total amount of the fine, whichever is less, up to 50 percent of the prisoner's wages. Pen C §2085.5(a)-(b); *People v Rowland* (1988) 206 CA3d 119, 124, 253 CR 190. See generally *People v Hong* (1998) 64 CA4th 1071, 76 CR2d 23. The trial court has no jurisdiction to modify a restitution fine once the defendant has begun serving the sentence. *People v Turrin* (2009) 176 CA4th 1200, 1204, 98 CR3d 471.

An appellate court can reverse a restitution fine on appeal if the fine is unauthorized. *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134. The appellate court, in deciding whether a restitution fine should be reversed, considers three elements: whether the necessary advisements were given; whether the required waivers were made; and whether the parties adhered to the plea bargain. *People v Walker* (1991) 54 C3d 1013, 1021, 1 CR2d 902. If a restitution fine under Pen C §1202.4 is reversed, the appellate court has the power to reduce it to the minimum fine and otherwise affirm the judgment to avoid the cost of returning the case to the trial court for a further hearing on the issue. *People v Walker, supra*. The fine cannot be increased after an appeal, because it is punishment, and an increase would violate double jeopardy principles. *People v Hanson* (2000) 23 C4th 355, 97 CR2d 58; *People v Wardell* (2008) 162 CA4th 1484, 1496, 77 CR3d 77. Restitution to the victim, however, is not punishment, but is analogous to a civil remedy. Therefore, restitution to the victim can be increased after appeal, if it is warranted. *People v Harvest* (2000) 84 CA4th 641, 101 CR2d 135. If the trial court fails to impose a restitution fine and the People fail to object, the People have waived the claim and may not raise it on appeal, because the trial court need not impose the restitution fine if there are compelling and extraordinary reasons not to do so. *People v Tillman* (2000) 22 C4th 300, 303, 92 CR2d 741. However, when the court omits or imposes an erroneous parole revocation fine, this may be corrected on appeal, even if the People did not object at the sentencing hearing, because a parole revocation fine is mandatory in all cases in which the sentence "includes a period of parole." Pen C §1202.45; *People v Smith* (2001) 24 C4th 849, 102 CR2d 731. If there is no parole eligibility, a parole revocation fine cannot be imposed. *People v Samaniego* (2009) 172 CA4th 1148, 1183, 91 CR3d 874 (parole revocation fine improperly assessed against defendants sentenced to life without possibility of parole).

Under Pen C §1202.4(*l*), a county board of supervisors may impose a fee (not to exceed 10 percent of the amount ordered for restitution) to be deposited in the county's general fund to cover the administrative costs of collecting a restitution *fine* ordered under Pen C §1202.4(b). *People v Robertson* (2009) 174 CA4th 206, 209, 94 CR3d 179. However, when restitution is ordered as a condition of probation to be paid under Pen C §1203.1(b) either to the victim or to the State Restitution Fund, the court may impose a 15-percent administrative fee only for the collection of restitution payments made to the victim, but not for those made to the State Restitution Fund. Pen C §1203.1(*l*); *People v Eddards* (2008) 162 CA4th 712, 715, 75 CR3d 924.

If probation is revoked or if the defendant violates probation, the court may not impose a second restitution fine because the original fine survives the revocation. *People v Guiffre* (2008) 167 CA4th 430, 434, 84 CR3d 165; *People v Arata* (2004) 118 CA4th 195, 12 CR3d 757. If probation is revoked, the court has no discretion as to whether to impose the previously stayed probation revocation restitution fine; imposition is mandatory. Pen C §1202.44; *People v Guiffre, supra*.

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§38.21 C. Recovering From State Restitution Fund Through Victim Compensation Program

In addition to notice of the sentencing proceedings given them by the probation officer under Pen C §1191.1, all victims receive information prepared by the Judicial Council on their rights to civil recovery against the defendant and to compensation from the State Restitution Fund. Pen C §1191.2.

Victims must apply to the California Victim Compensation and Government Claims Board (see Govt C §§13950-13966) to obtain reimbursement from the Restitution Fund. If a victim qualifies for the program, this is probably the most reliable method of redress. Claims to the State Restitution Fund must be filed within 1 year after the date of the crime.

To qualify for the program, the victim must have been injured in a qualifying violent crime. The program offers no assistance to victims of nonviolent crimes. Further, even if the victim seeking assistance from the state under this program has been victimized by a qualifying crime, he or she must meet other qualifying requirements. If the victim does qualify, he or she can obtain an award from the program to reimburse or pay for particular losses incurred as a result of the crime.

Victims may be referred to the Victims of Crime Resource Center at McGeorge School of Law. Their toll-free number is 1-800-VICTIMS and their website is http://www.1800victims.org. This resource center is operated in cooperation with the Governor's Office of Criminal Justice Planning. Victims may also find more information about California's Victim Compensation Fund (VCF) at http://www.boc.ca.gov/Victims. For further discussion of restitution, see chap 40.

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§38.22 VI. REIMBURSEMENT FOR PROBATION COSTS

A defendant may be required to reimburse the county for the following probation-related costs:

- Presentence investigation and report (Pen C §1203.1b);
- Probation (Pen C §1203.1b);
- Purchasing and installing an ignition lock device (Pen C §1203.1bb; see Veh C §13386);
- Deferred entry of judgment costs (Pen C §§1001.15-1001.16, 1001.90);
- Drug testing (Pen C §1203.1ab);
- Medical or psychological treatment of the victim (Pen C §§1203.1g-1203.1h);
- Costs of polygraph testing (*Brown v Superior Court (People)* (2002) 101 CA4th 313, 124 CR2d 43);
- Emergency response (Pen C §1203.1*l*);
- County parole supervision (Pen C §1203.1e; see chap 39 on county parole);
- Costs of incarceration in local detention facility (Pen C §1203.1c); and
- Cost of court-appointed attorney (Pen C §987.8).

Ø **Note:** Payment of probation costs, either as cash or as hours of community service, cannot be made a condition of probation. *People v Hall* (2002) 103 CA4th 889, 126 CR2d 916; *People v Hart* (1998) 65 CA4th 902, 907, 76 CR2d 837. An order requiring the defendant to pay probation costs can be enforced only through a civil action. *Brown v Superior Court (People)* (2002) 101 CA4th 313, 124 CR2d 43.

Ø **Warning:** Although a waiver of the right to a hearing on the ability to pay must be "knowing and intelligent" (Pen C §1203.1b(a)), the right may be waived if the defendant fails to object at sentencing. *People v Valtakis* (2003) 105 CA4th 1066, 1070, 130 CR2d 133.

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VII. ATTORNEY PREPARATION FOR SENTENCING

§38.23 A. Waiving Presentence Investigation and Report

The court may waive the presentence investigation and report in misdemeanor cases. See Pen C §§1203(d), 1203b. When court probation and no jail time are agreed on as part of a bargain in a misdemeanor case, it is customary to waive the probation report. Defense counsel may wish to avoid another court appearance and the possibility that negative information about the defendant will be revealed, while prosecutors may consider a probation report to be unnecessary.

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B. Defense Attorney Preparation

§38.24 1. In General; Pen C §1203.03 Evaluation; Statement in Mitigation

Formulate sentencing plan. It is imperative that defense counsel have a sentencing plan. Counsel should know what sentencing options are available and argue for the least restrictive option. When possible, counsel should help the defendant find an acceptable alternative to jail or prison, and present that plan to the probation officer before the officer writes the probation report. Counsel may also wish to try to obtain the prosecutor's agreement to a specific disposition. See Cal Rules of Ct 4.412(a).

Ø **Note:** Defense counsel should be aware of sentencing options that may be available, such as residential treatment facilities, public service work projects or community service (volunteer work) programs, private work furlough centers, electronic surveillance programs, and home detention. See chap 39.

Obtain diagnostic evaluation in appropriate case. In felony cases, defense counsel may wish to recommend that the defendant be placed in a diagnostic facility of the California Department of Corrections and Rehabilitation (CDCR) under Pen C §1203.03 for a written diagnosis and recommendation on whether the defendant should be sent to prison. The commitment is for a period not to exceed 90 calendar days. Pen C §1203.03(a). For further discussion, see §§35.4, 37.55, 46.29. Defense counsel is not entitled to cross-examine persons who prepare reports under §1203.03. *People v Campo* (1987) 193 CA3d 1423, 239 CR 44.

Defense counsel may also wish to send the defendant to a psychiatrist or medical doctor, or a professional that the defendant is already seeing, to get a written report for the court on the psychiatric or medical factors that affected the defendant either at the time the crime was committed (see Cal Rules of Ct 4.423(b)(2), 4.425(b)) or at the time of sentencing (see Cal Rules of Ct 4.408).

Prepare defendant for interview with probation officer. Defense counsel should always prepare the defendant for the interview with the probation officer (see §38.25), give the officer all the information counsel thinks will benefit the defendant, and communicate anything unusual about the case personally with the officer. If the defendant is in custody, counsel should check with the probation officer on the defendant's credit for time served. This area of the law is complex, and it is easy to err in calculating these credits, particularly when the defendant is in custody on more than one case. For discussion of credit for time served, see §§37.54-37.61, 46.33.

File written report or statement in mitigation. In misdemeanor cases, defense counsel may file a written report with the court, furnishing information about the defendant's background and personality and suggesting a rehabilitation program. The prosecution and the probation officer must be permitted to reply or to evaluate the program recommended. Pen C §1204.

In felony cases, counsel may file a written statement under §1204 or a statement in mitigation under Pen C §1170(b). See also Cal Rules of Ct 4.437. The statement in mitigation must be served on the prosecution and filed with the court at least 4 days before the date set for sentencing. Cal Rules of Ct 4.437(a). It must include a summary of the facts on which the defense relies to justify probation. Cal Rules of Ct 4.437(c). Assertions of fact in the statement in mitigation must be supported by competent evidence. Cal Rules of Ct 4.437(d). Counsel may rely on information in the probation report or other reports filed in the case or may produce independent evidence. For examples of mitigating circumstances, see Cal Rules of Ct 4.423. If the defendant intends to dispute facts in the probation officer's report or to offer evidence in mitigation at the sentencing hearing, the statement in mitigation must give notice of that intent and must include a summary of any evidence to be introduced, including witnesses' names and the substance of the expected testimony. Cal Rules of Ct 4.437(c)(2). If counsel fails to notice his or her intent to present evidence as required by Cal Rules of Ct 4.437(c)(2), the court can refuse to hear that evidence.

Ø **Warning:** Defense counsel should not rely on oral argument to establish mitigating circumstances or to dispute the accuracy of information in the probation report. Assertions of counsel are not competent evidence. Additionally, Pen C §1204 requires that mitigating circumstances be presented by witness testimony and a

defendant wishing to make a statement in mitigation on his or her own behalf must do so through sworn testimony subject to cross-examination. *People v Evans* (2008) 44 C4th 590, 598, 80 CR3d 174. While a trial court may choose to proceed informally if the parties consent, and may permit the defendant to make an unsworn statement, counsel should not presume the court will proceed in this manner. *Evans* also holds that if defense counsel intends to present testimony in mitigation, or if a defendant wishes to testify on his or her own behalf, the request to do so must be timely; if the request is too late, such as after the court begins to pronounce sentence, the opportunity will be deemed forfeited. 44 C4th at 600.

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Source: Criminal Law/California Criminal Law Procedure and Practice/38 PROBATION/§38.25 2. Checklist: Preparing Defendant for Probation Interview

§38.25 2. Checklist: Preparing Defendant for Probation Interview

It is important for several reasons to prepare the defendant for the probation interview: trial courts frequently follow the probation officer's recommendation; and any statements by the defendant to the probation officer will probably be included in the probation report.

The following are some of the issues that counsel should cover with the defendant:

- Inform the defendant where and when to report to the probation officer (assuming that defendant is not in custody).
- Tell the defendant to be candid and truthful in answering the officer's questions (a defendant's credibility is often his or her most important asset in a probation interview).
- The defendant will be asked to complete a probation questionnaire and to provide a written statement about the offense and why he or she thinks the court should grant probation. Defense counsel may want to review the defendant's statement before it is given to the probation officer.

Ø **Note:** Counsel should inform the defendant that any statements he or she makes to the probation officer about the offense will be admissible as impeachment if for some reason there is a trial or retrial of the charges. See, *e.g., People v Pacchioli* (1992) 9 CA4th 1331, 12 CR2d 156. Such statements may also be admissible in the prosecution's case in chief. See *People v Coffman* (2004) 34 C4th 1, 16, 17 CR3d 710. But see *People v Harrington* (1970) 2 C3d 991, 88 CR 161; *Ramona R. v Superior Court* (1985) 37 C3d 802, 808, 210 CR 204.

- The officer will ask the defendant questions about the items listed in Cal Rules of Ct 4.411.5:
- The offense itself and the defendant's part in it.

Ø **Note:** If the police reports and preliminary hearing transcript do not accurately or adequately describe the facts, the attorney should contact the probation officer before the interview to acquaint him or her with those facts.

- Defendant's prior criminal and juvenile record.
- Defendant's personal and social history, including information about his or her education, employment, marriage, family, and any personal problems that may have contributed to involvement in the offense.
- The subjects of restitution to the victim and to the State Restitution Fund (as required by Pen C §1202.4). The probation officer will consider the defendant's willingness and ability to pay the restitution fine. If defense counsel has questions about the appropriateness or amount of restitution, he or she might wish to discuss those issues with the officer before the report is prepared.
- The court may require the defendant to pay the costs of the investigation and report and, if probation is granted, the costs of probation supervision. See Pen C §1203.1b; Cal Rules of Ct 4.411.5(a)(11) (discussed in §38.22).

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§38.26 C. Prosecution Preparation; Statement in Aggravation

The prosecutor should inform the victim of the sentencing date and inform the court of any special considerations regarding the victim, *e.g.,* the defendant's threats of retaliation or the need for restitution. The prosecutor should make sure that the probation officer has any information the prosecutor considers important that is not included in the police reports or in the preliminary hearing transcript. Although the prosecutor should not try to persuade the probation officer to make a specific recommendation, he or she should make sure that the officer has complete information about the offense and the defendant, particularly information about the defendant that came out for the first time at trial.

In felony cases, the prosecutor can file a statement in aggravation that disputes information in the probation officer's report or in defense counsel's statement in mitigation and can offer evidence in favor of denying probation or imposing an aggravated term. Pen C §1170(b); Cal Rules of Ct 4.437. The prosecutor must include in the statement a summary of the facts on which the argument for aggravation is based and give notice of the intent to dispute facts or offer evidence. The statement should describe the evidence to be offered and give the names of any witnesses and their expected testimony. Cal Rules of Ct 4.437(c). See Cal Rules of Ct 4.411.5, 4.421 for items and information relevant to aggravation. See also Cal Rules of Ct 4.408, 4.437(d).

Ø **Note:** The statement must be filed at least 4 days before the date set for sentencing. Cal Rules of Ct 4.437(a). The judge may refuse to hear any evidence in aggravation if counsel does not comply with this requirement unless the judge makes an exception "in the interests of justice." Cal Rules of Ct 4.437(c)(2); Pen C §1170(b).

The prosecutor may wish to recommend a Pen C §1203.03 diagnostic study in felony cases when he or she is not sure that time in prison is needed. See §38.24.

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VIII. COURT PROCEDURES IN DECIDING WHETHER TO GRANT PROBATION

§38.27 A. Considerations in Granting Probation

The primary considerations in granting probation are the following (Pen C §1202.7): public safety, the nature of the offense, the interests of justice, the victim's loss, and the defendant's needs. See also *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681.

When the crime is a felony, the court must also consider to the extent they are applicable, the criteria listed in Cal Rules of Ct 4.410 (general objectives in sentencing), 4.414 (criteria affecting probation), and 4.413 (criteria affecting probation in unusual case). See also Cal Rules of Ct 4.408 (significance of factors; additional factors), 4.421 (circumstances in aggravation), 4.423 (circumstances in mitigation).

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§38.28 B. Sentencing Hearing

A sentencing hearing is less formal than a trial; the rules of evidence generally do not apply. The defendant is entitled to a hearing that complies with due process, however, and some basis must exist for believing that the information relied on by the court is accurate. *People v Arbuckle* (1978) 22 C3d 749, 754, 150 CR 778; *People v Tang* (1997) 54 CA4th 669, 678, 62 CR2d 876.

The court may consider "the testimony of witnesses examined in open court" (Pen C §1204) and any facts supplied by the trial record, including prior convictions, whether admitted or proved (*People v Vatelli* (1971) 15 CA3d 54, 92 CR 763). If a probation report has been prepared, the court must consider it and state on the record that it has done so. Pen C §1203(b). But see *People v Gorley* (1988) 203 CA3d 498, 250 CR 15 (judge's failure to state that he had read report was harmless error because it was clear from record that court had read and considered it). Counsel must object to any errors or omissions in the probation report at the sentencing hearing; otherwise, all claims will be waived. *People v Welch* (1993) 5 C4th 228, 19 CR2d 520.

The defendant has the right to present testimony or other evidence on the defendant's behalf to assist the court in deciding whether to grant probation, to counteract or correct any portion of the probation report, or, if there is no report, to answer or controvert any information on which the court might rely in fixing the sentence. *People v Tang, supra*. Defendants do not have the right, however, to cross-examine the probation officer who prepared the report. *People v Smith* (1985) 38 C3d 945, 960, 216 CR 98; *In re Romeo C.* (1995) 33 CA4th 1838, 1849, 40 CR2d 85. Nor is the defendant entitled to cross-examine persons who have prepared diagnostic reports under Pen C §1203.03. *People v Arbuckle, supra; People v Tang*, *supra*. See *People v Cain* (2000) 82 CA4th 81, 86, 97 CR2d 836. Additionally, note *People v Stuckey* (2009) 175 CA4th 898, 908, 96 CR3d 477, holding that while Evid C §703 permits a court to appoint experts at public expense for indigent defendants for purposes of trial, no such statutory authority exists for the appointment of experts for purposes of sentencing.

The defendant also has the right to submit an alternative sentencing report suggesting a rehabilitation program (see Pen C §1204) or, in felony cases, a statement in mitigation (see Pen C §1170(b)). The prosecution can submit a statement in aggravation in felony cases. Pen C §1170(b). The statements in mitigation and aggravation must be filed at least 4 days before the hearing date. Cal Rules of Ct 4.437. A statement in aggravation or mitigation must be supported by competent evidence. Cal Rules of Ct 4.437(d).

> Ø **Practice tip:** It is crucial for defense counsel to assemble and present evidence supporting any request for leniency. Counsel should not rely on argument to persuade the court. Although the evidentiary rules at sentencing are more relaxed than the rules that apply in the guilt phase of the trial, statements of counsel are not competent evidence.

The victim, the victim's attorney, the victim's parents (if the victim is a minor) or the victim's next of kin (if the victim has died) have the right to be notified of the sentencing hearing and to appear and be heard concerning the crime, the defendant, and the need for restitution. Pen C §1191.1. The court must consider statements by the same people when imposing sentence. The statements may be made in person, in writing, or on any recording medium acceptable to the court (*e.g.,* audio- or videotape, CD-ROM, DVD). Pen C §1191.15. See *People v Sanders* (1990) 221 CA3d 350, 361, 271 CR 534 (court can properly consider victims' statements related in probation reports). Victims who give statements at sentencing need not take an oath, are not subject to cross-examination, and are free to relate hearsay information. *People v Birmingham* (1990) 217 CA3d 180, 184, 265 CR 780.

When the victim or other interested parties submit letters instead of testimony, due process demands that the defendant be permitted to read them in advance and respond to them at the sentencing hearing. *People v Mockel* (1990) 226 CA3d 581, 587, 276 CR 559. See generally Pen C §§1191.1-1191.3 (victim's rights at sentencing). See also Pen C §1204 (testimony in aggravation or mitigation must usually be in person).

For further discussion of the sentencing hearing, see §§35.18, 36.4 (misdemeanor sentencing), 37.51 (felony sentencing).

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§38.29 C. Form of Probationary Order; Papers Given Defendant

The court may place the defendant on formal probation, ordering the defendant to report to a probation officer (see Pen C §§1203(a), 1203.1), or on court probation, which means that the defendant is on probation to the court and is not required to report to a probation officer (see Pen C §1203b). In misdemeanor cases, probation is usually to the court. Pen C §1203b.

If the defendant is placed on probation, the probation officer or court must furnish the defendant with a written statement of the conditions of probation (Pen C §1203.12) and papers that inform the defendant of the right, on successful completion of probation, to have the conviction set aside and the complaint dismissed, and the possible right to apply for a certificate of rehabilitation and pardon. Pen C §1203.4(a). The procedure for applying for a certificate of rehabilitation is described in Pen C §§4852.01-4852.21. For further discussion of obtaining relief from disabilities, see chap 41.

Even when imposition of sentence is suspended and no abstract of judgment is issued, the court must set forth the statutory basis for all fines, fees, and penalties assessed against the defendant in a commitment document (probation minute order) "bearing the form and content" of an abstract as prescribed by the Judicial Council. *People v Eddards* (2008) 162 CA4th 712, 718, 75 CR3d 924.

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§38.30 IX. RIGHT TO REJECT PROBATION

The defendant has the right to refuse probation and undergo sentence, *e.g.,* if the defendant feels that the probation terms are harsher than the sentence imposed by law. *People v Bravo* (1987) 43 C3d 600, 608, 238 CR 282; *People v Beal* (1997) 60 CA4th 84, 87, 70 CR2d 80. The rejection must be timely (*People v Atwood* (1963) 221 CA2d 216, 34 CR 361), but the court cannot make the defendant's right to refuse the offered probation conditional on immediate rejection; the defendant may await an appellate decision on the challenged condition (*In re Mackey* (1983) 142 CA3d 38, 43, 190 CR 716).

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X. MODIFICATION OR EARLY TERMINATION OF PROBATION

§38.31 A. Grounds for Modification

The court may modify a probation order by extending the probation period, increasing the confinement period, changing the place of detention, or revising the probation conditions when required by the interests of justice, and when grounds for modification exist. Pen C §§1203.1-1203.3. The court does not need to wait for a violation of probation before it can modify the conditions. *People v Cookson* (1991) 54 C3d 1091, 1098, 2 CR2d 176. Examples follow:

- The probationer violates any term or condition of the probation order (Pen C §1203.1 (see also Pen C §1203.2(a)-(b));
- The probationer cannot pay full restitution within the probationary period (*People v Cookson* (1991) 54 C3d 1091, 1097, 2 CR2d 176);
- The probationer deceives the court at the time probation is granted (*In re Bine* (1957) 47 C2d 814, 817, 306 P2d 445; *People v Haskins* (1985) 171 CA3d 344, 214 CR 685); or
- New facts appear (*People v Allen* (1975) 46 CA3d 583, 587, 120 CR 127, disapproved on other grounds in *People v Segura* (2008) 44 C4th 921, 934, 80 CR3d 715).

Ø **Note:** The court's decision to modify probation must be based on new facts or changed circumstances. *People v Cookson* (1991) 54 C3d 1091, 1095, 2 CR2d 176; *In re Clark* (1959) 51 C2d 838, 840, 337 P2d 67; *In re Bine* (1957) 47 C2d 814, 816, 306 P2d 445.

The court has the inherent power to change standard probation conditions to favor the probationer at any time. *People v Allen* (1975) 46 CA3d 583, 120 CR 127, disapproved on other grounds in *People v Segura* (2008) 44 C4th 921, 934, 80 CR3d 715. However, a court cannot reduce a specified probationary jail term agreed to as part of a plea bargain without the prosecutor's consent (*People v Segura, supra*), or modify, on the basis of the defendant's good conduct and reform, the amount of restitution owed to the victim without compelling and extraordinary reasons (Pen C §1203.3(b)(4)). Neither can the court, while the defendant is still on probation, reduce the amount of county jail time imposed as a condition of probation, once the term has been served. *People v Mendoza* (2009) 171 CA4th 1142, 1146, 90 CR3d 315 (defendant could not avoid deportation by reduction in time originally imposed).

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§38.32 B. Modification Procedures

Formal probation. The court may modify formal probation on its own motion, or the probation officer, the probationer, or the prosecutor may petition for modification. Pen C §1203.2(b). Any modification must take place within the probationary period (Pen C §1203.2(a)), unless that period is extended. For discussion of extending probation, see §§38.43, 46.11.

Notice of the motion or petition must be given to the probationer's attorney, the probationer, the probation officer, and the prosecutor. See Pen C §1203.2(b). In addition, the court must notify the probation officer in writing of its intention to modify or change the probation order. Pen C §1203.3. The probation officer prepares a report for the judge, who must read and consider it. Pen C §1203.2(b).

The probationer may be notified on his or her first court appearance in the modification proceeding. Pen C §1203.2(b). The probationer may waive the right to be present for modification proceedings if he or she agrees with the new conditions. Pen C §1203.2(b). Before any action occurs on the motion or petition, the probationer must be informed that he or she has the right to counsel. Any waiver of the right to counsel must be in writing. Pen C §1203.2(b).

Informal probation. There are no specific statutory procedures for modification of court probation, in which the probationer reports only to the court and is not under a probation officer's supervision. See Pen C §1203b. However, by analogy to Pen C §§1203.2(b) and 1203.3, relating to formal probation, it appears that the court may revoke, modify, or change its order of probation in the same manner.

For discussion of probation revocation, see chap 46.

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§38.33 C. Early Termination of Probation

The court can terminate probation and discharge the probationer "when the ends of justice will be subserved thereby," and the probationer's good conduct and reform warrant it. Pen C §1203.3. Ordinarily, a defendant who has either satisfactorily completed the probationary period *or* has been discharged before its termination is entitled to have his or her guilty plea expunged and the accusations dismissed. Pen C §1203.4; *People v Hawley* (1991) 228 CA3d 247, 250, 278 CR 389. To qualify, the defendant must pay both the entire restitution to the victim and the restitution fine. *People v Covington* (2000) 82 CA4th 1263, 98 CR2d 852. A court's discretion to set aside a defendant's conviction under Pen C §1203.4 in the interest of justice is not limited to conduct during the probation period, but may be based on any relevant information, including postprobation conduct. See *People v McLernon* (2009) 174 CA4th 569, 571, 94 CR3d 570 (matter remanded for trial court to consider whether defendant's conduct following a 1995 probation violation warranted Pen C §1203.4 relief).

See §41.15 on dismissal after successful completion of probation.

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XI. CONDITIONS OF PROBATION

§38.34 A. General Rule for Determining Validity of Probation Conditions

In most counties, standard conditions of probation prohibit the probationer from engaging in criminal activity and require the probationer to report to the probation officer as directed and to inform the probation officer of any change of address or employment.

Courts have broad general discretion to fashion and impose additional probation conditions that are particularized to the defendant. *People v Smith* (2007) 152 CA4th 1245, 1249, 62 CR3d 316. See, *e.g., People v Tarris* (2009) 180 CA4th 612, 621, 103 CR3d 278 (payment for Riverside County Department of Environmental Health's investigation and cleanup costs within court's discretion). Under Pen C §1203.1, courts may impose any "reasonable conditions" necessary to secure justice, make amends to society and individuals injured by the defendant's unlawful conduct, and assist the "reformation and rehabilitation of the probationer."

A valid condition must be reasonably related to the offense and aimed at deterring such misconduct in the future. See *People v Carbajal* (1995) 10 C4th 1114, 1121, 43 CR2d 681; *People v Lent* (1975) 15 C3d 481, 486, 124 CR 905; *People v Balestra* (1999) 76 CA4th 57, 65, 90 CR2d 77. These cases have articulated a three-part test for determining the validity of probation conditions. A condition is invalid if it:

(1) Has no relationship to the crime for which the defendant was convicted;

(2) Relates to conduct that is not itself criminal; *and*

(3) Requires or forbids conduct not reasonably related to future criminality.

For examples of probation conditions held invalid, see §38.38.

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§38.35 B. Sex Offender Registration Requirements

If a sex offender who is required to register under Pen C §290 is granted probation, the probation officer must give the defendant formal notice of the registration requirements. See Pen C §290.017(c).

DNA samples. Misdemeanor sex offenders required to register under Pen C §290 must provide DNA samples when they renew their registration, if they have not already done so, regardless of whether the conviction that triggered registration predates Proposition 69 and the amendments to Pen C §296. *Good v Superior Court* (2008) 158 CA4th 1494, 1510, 71 CR3d 125.

Electronic monitoring for sex offenders. Under Pen C §§290.04-290.06, the state is required to set up and implement a program for assessing the risk of reoffense posed by individuals convicted of sex offenses, using a State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO). In Pen C §290.04(b)(1), the legislature designated the "STATIC-99," an actuarial instrument for assessing the risk of reoffense of adult male sex offenders, as the authorized risk assessment tool for adult males. For additional information on this instrument, see Harris, Phenix, Hanson & Thornton, STATIC-99 Coding Rules-2003, available on the National Institute of Corrections' website, http://www.nicic.org/Library/018977.

Penal Code §290.04 also establishes a SARATSO Review Committee, which is charged with recommending risk assessment tools for other groups of sex offenders and periodically reviewing existing SARATSOs. See Pen C §290.04. By no later than July 1, 2008, whenever a probation department prepares a presentence report on a person required to register as a sex offender, it must assess that person using the SARATSO applicable to that offender. Beginning on January 1, 2009, every person required to register as a sex offender under the Sex Offender Registration Act (Pen C §§290-290.023) who has been assessed with the SARATSO and who has a high risk of reoffending will be subject to continuous electronic monitoring while he or she is on probation unless the court determines that monitoring is unnecessary in a given case. Pen C §1202.8(b).

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§38.36 C. Mandatory Probation Conditions

Mandatory probation conditions are sometimes codified in the sections following Pen C §1203 and sometimes codified in the provisions relating to the substantive offenses to which the mandatory condition attaches. Counsel should carefully check the substantive charging sections and the sections following Pen C §1203 to determine whether the charged offense has any mandatory conditions. For example, mandatory conditions exist for the following offenses:

- Driving under the influence. See Veh C §§23538(a)(1), 23542(a)-(b), 23548(a)(1), 23552(a)(1), 23562(a)-(b), 23568(a)-(b). See also chap 55.
- Driving on a revoked or suspended license. See Veh C §§14601-14601.9.
- Controlled substances. See Pen C §§1001.10, 1203.076, 1203.1ab; Health & S C §11550; Welf & I C §§729.8-729.10 (minors).
- Assault/weapons offenses. See Pen C §§1203.095, 1203.1(g)(2) (minors), 12021.1, 12025, 12031.
- Sex offenses. See Pen C §§290.016, 296.1, 647.6(d)(1), 1202.1, 1202.6, 1203.1g, 1203.067.
- Domestic violence. See Pen C §1203.097.

  Ø **Note:** The application of Pen C §1203.097 is not limited to defendants charged with specified offenses; it encompasses defendants convicted of any crime of "abuse," provided the victim is a person identified in Fam C §6211. *People v Cates* (2009) 170 CA4th 545, 549, 87 CA3d 919 (52-week batterer's course mandatory for defendant convicted of assault under Pen C §245(a)(1) against former girlfriend).

- Economic crimes. See Pen C §1203.044.
- Child abuse. See Pen C §§273a, 273d, 1203.1g.
- Computer crimes. See Pen C §1203.047.
- Offenses on public transit. See Pen C §1203.055.

On misdemeanor sentences enhanced by priors, see §§24.7-24.10, 24.12.

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Source: Criminal Law/California Criminal Law Procedure and Practice/38 PROBATION/§38.37 D. Discretionary Probation Conditions

§38.37 D. Discretionary Probation Conditions

The following are some of the more common discretionary conditions of probation imposed by the courts:

AIDS education program participation. *People v Henson* (1991) 231 CA3d 172, 282 CR 222. Participation is mandatory for certain crimes; see §35.26.

Alcohol restrictions. The court may order a defendant to abstain from alcohol in a case involving alcohol or in a drug case in which the defendant admits to having an alcohol problem. *People v Lindsay* (1992) 10 CA4th 1642, 13 CR2d 676. More recent cases recognize a nexus between drug and alcohol use, and permit no-alcohol conditions even when the defendant is convicted of drug offenses and does not admit any alcohol problem. *People v Balestra* (1999) 76 CA4th 57, 68, 90 CR2d 77; *People v Beal* (1997) 60 CA4th 84, 70 CR2d 80.

Answer questions from probation officer truthfully. See *Minnesota v Murphy* (1984) 465 US 420, 79 L Ed 2d 409, 104 S Ct 1136.

Community service. The court may require the defendant to perform a specified amount of community service. See Pen C §1202.4(n).

Counseling. See *In re Jason J.* (1991) 233 CA3d 710, 284 CR 673, overruled on other grounds in *People v Welch* (1993) 5 C4th 228, 237, 19 CR2d 520.

Drug testing without warrant. Subject to the three-part test in *People v Lent* (1975) 15 C3d 481, 124 CR 905, discussed in §38.34, warrantless drug tests are commonly found valid. See, *e.g., People v Balestra* (1999) 76 CA4th 57, 69, 90 CR2d 77; *People v Wardlow* (1991) 227 CA3d 360, 366, 278 CR 1. See also Pen C §1203.1ab; Welf & I C §§729.8-729.10 (drug testing required in certain cases); Health & S C §11551 (when court has reason to believe that probationer is or has been user of controlled substances other than marijuana (see Health & S C §11553), it may, as condition of probation, require him or her to submit to periodic tests to determine addiction to controlled substance).

> Ø **Note:** Because revocation of probation is a criminal sanction, Health & S C §11362.5 (compassionate use of marijuana) may be asserted as a defense. See *People v Tilehkooh* (2003) 113 CA4th 1433, 7 CR3d 226. The provisions of Health & S C §11362.77, which prescribe specific quantities of marijuana that a qualified patient or caregiver can possess or cultivate, have been found unconstitutional in that they burden a defense otherwise available under Health & S C §11362.5. *People v Kelly* (2010) 47 C4th 1008, 103 CR3d 733. Note, however, that in *People v Moret* (2009) 180 CA4th 839, 104 CR3d 1, the appellate court found the trial court did not abuse its discretion when it gave the defendant a choice to accept a probation condition requiring the surrender of his medical marijuana card or to face jail or prison.

Education or work furlough. The counties can enact ordinances providing for the operation of educational programs, work furlough programs, or both. Pen C §1208; see chap 39.

Electronic monitoring. Electronic monitoring is available in some counties as a condition of probation. Pen C §1203.016. (It is available as a condition of parole under Pen C §3004.)

Effective January 1, 2009, electronic monitoring will be a mandatory condition of probation for all individuals convicted of an offense for which registration under the Sex Offender Registration Act (Pen C §§290-290.023) is required, if assessment with the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) indicates a high risk of reoffense, unless the court concludes that monitoring is unnecessary for a particular individual. Pen C §1202.8. See Pen C §§290.04-290.06.

Employment and application of earnings. The trial court may mandate as a condition of probation that a defendant seek and maintain gainful employment, but the court must first consider the individual factors set forth in Pen C §1203.1. *People v Hodgkin* (1987) 194 CA3d 795, 239 CR 831. The court can also require a probationer to pay any fine or restitution condition, pay support to his or her dependents, and apply his or her earnings as the court directs. Pen C §1203.1. The defendant can be ordered to keep an account of his or her earnings and report them to the probation officer. Pen C §1203.1.

Fourth Amendment waivers. A defendant may waive Fourth Amendment protection. *People v Reyes* (1998) 19

C4th 743, 752, 80 CR2d 734; *People v Bravo* (1987) 43 C3d 600, 610, 238 CR 282; *People v Medina* (2007) 158 CA4th 1571, 1577, 70 CR3d 413.

Home detention. Under Pen C §1203.016, the counties may authorize home detention for minimum-security inmates and low-risk offenders. See §39.32 for further discussion of home detention.

Restricted Internet access. When use of the Internet is related to the crime, the court can restrict access to it. *People v Harrisson* (2005) 134 CA4th 637, 36 CR3d 264.

Jail term, fine, or both. Jail, a fine, or both may be imposed as a condition of probation in misdemeanor and felony cases. In some cases, imprisonment is mandatory. Under Pen C §2900.5, the defendant must be given credit for any custody or fine imposed for all days of presentence custody served that are attributable to the offense. Precustody credit can be expressly waived as a condition of probation. *People v Johnson* (2002) 28 C4th 1050, 123 CR2d 700.

No association with other criminals, drug users, or gang members. Probationers can be ordered to stay away from persons whom they know to be criminals, gang members, or drug users. *In re Spencer S.* (2009) 176 CA4th 1315, 1329, 98 CR3d 477; *People v Lopez* (1998) 66 CA4th 615, 78 CR2d 66; *In re Laylah K.* (1991) 229 CA3d 1496, 281 CR 6, disapproved on other grounds in *In re Sade C.* (1996) 13 C4th 952, 962, 55 CR2d 771; *People v Wardlow* (1991) 227 CA3d 360, 278 CR 1. A condition requiring the defendant to stay away from other drug users does not violate the defendant's freedom of religion even when the use of marijuana is a "sacrament" in the defendant's church. *People v Peck* (1996) 52 CA4th 351, 362, 61 CR2d 1.

Pet conditions. The court may order a probationer to keep the probation officer informed of all pets and to give 24 hours' notice before any changes. *People v Olguin* (2008) 45 C4th 375, 380, 87 CR3d 199 (condition was related to future criminality because it informs and protects the probation officer responsible for monitoring probationer's compliance with terms of probation).

Polygraph. Polygraph testing may be a valid condition of probation, but the court should impose restrictions on the questions. *Brown v Superior Court (People)* (2002) 101 CA4th 313, 124 CR2d 43. See also *People v Miller* (1989) 208 CA3d 1311, 256 CR 587; Pen C §1203.1b. See §38.22 on costs.

Possession of dangerous or deadly weapon. In a juvenile case, the prohibition on possessing any "dangerous or deadly weapon" has been found not to be unconstitutionally vague. See *In re R.P.* (2009) 176 CA4th 562, 97 CR3d 822.

Restraint on employment. The court may forbid a defendant from engaging in a specified type of employment as a condition of probation, as long as the condition is reasonably related to the crime of which the defendant was convicted. *People v Burden* (1988) 205 CA3d 1277, 253 CR 130 (condition not approved); *People v Burden* (1980) 105 CA3d 917, 166 CR 542 (condition approved).

Road camps or public work. The courts can place probationers in road camps, farms, or other public work, if available (Pen C §1203.1), and may require adult misdemeanor probationers to work pursuant to Govt C §25359.

Stay-away orders. A probation condition that the defendant stay away from places where minor children congregate may be appropriate. *People v Delvalle* (1994) 26 CA4th 869, 31 CR2d 725 (condition was directly related to defendant's crime of trying to buy children and was reasonably related to deterrence of future criminality). A probation condition that the defendant in a domestic violence case not initiate contact with his wife was reasonable. *People v Jungers* (2005) 127 CA4th 698, 25 CR3d 873. A requirement that the probationer report the areas he frequents was held to be too vague. *People v Sanchez* (2003) 105 CA4th 1240, 130 CR2d 219.

> Ø **Note:** While violation of a criminal protective order imposed under Pen C §136.2 or §1203.097 may be punishable as a separate offense, violation of a stay-away order—by conduct that is not otherwise criminal—imposed as a condition of probation is not. Instead, probation may be revoked. See *People v Selga* (2008) 162 CA4th 113, 120, 75 CR3d 453. Protective orders made under Pen C §136.2 are operative only during the pendency of a case; the court has no inherent authority to extend the duration. *People v Ponce* (2009) 173 CA4th 378, 383, 92 CR3d 667.

Suspension of driver's license. *People v Gimenez* (1995) 36 CA4th 1233, 42 CR2d 681; *In re Gaspar D.* (1994) 22 CA4th 166, 27 CR2d 152.

Travel restrictions. Conditions of probation that impinge on constitutional rights, such as the right to travel, must be narrowly drawn, be particularized to the individual, and have a reasonable nexus to criminality. *People v Smith* (2007) 152 CA4th 1245, 1249, 62 CR3d 316; *In re Babak S.* (1993) 18 CA4th 1077, 1084, 22 CR2d 893.

Waiver of custody credits. The court may require the defendant to waive any custody credits he or she would otherwise receive if probation is revoked and the probationer is sent to prison. *People v Johnson* (2002) 28 C4th 1050, 123 CR2d 700. Such a waiver is often called a "*Johnson*" waiver.

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Source: Criminal Law/California Criminal Law Procedure and Practice/38 PROBATION/§38.38 E. Invalid Probation Conditions

§38.38 E. Invalid Probation Conditions

The following probation conditions were found invalid by the courts:

- Condition prohibiting the possession of stolen property or weapons and ammunition (*People v Freitas* (2009) 179 CA4th 747, 750, 102 CR3d 51 (modified to prohibit the "knowing possession" of each));
- Condition prohibiting defendant from associating with persons under the age of 18 unless accompanied by an unrelated responsible adult (*People v Turner* (2007) 155 CA4th 1432, 1435, 66 CR3d 803 (condition modified to require that defendant must either know or reasonably should know that persons are under 18));
- Condition prohibiting probationer from frequenting any areas of gang-related activity (*In re H.C.* (2009) 175 CA4th 1067, 96 CR3d 793 (condition reversed and remanded for trial court to further define "frequent" and forbidden "areas"));
- Condition prohibiting a probationer from being within 500 feet of any court in which he was neither a defendant nor under subpoena (*People v Perez* (2009) 176 CA4th 380, 97 CR3d 632 (although gang-related, condition overbroad restriction on defendant's right to access courts when there was no assertion that he had loitered near court or intimidated witnesses; remanded for court to consider narrower restriction prohibiting attendance at gang trials and contact with witnesses));
- Condition prohibiting possession of sexually stimulating or oriented material deemed inappropriate by the probation officer (*People v Turner* (2007) 155 CA4th 1432, 1435, 66 CR3d 803 (condition modified to require that defendant be informed by probation officer that such material is inappropriate));
- Blanket condition prohibiting registered sex offenders from leaving the county (*People v Smith* (2007) 152 CA4th 1245, 1252, 62 CR3d 316);
- Suspending a defendant's driver's license for a period beyond that authorized by the Vehicle Code (Veh C §13203; *People v Williams* (1956) 144 CA2d 144, 300 P2d 734);
- Forfeiture of a defendant's property, when intended to punish rather than to rehabilitate the defendant (*People v Fritchey* (1992) 2 CA4th 829, 3 CR2d 585);
- Directing a probationer not to move to another residence without the probation officer's approval (*People v Bauer* (1989) 211 CA3d 937, 260 CR 62);
- Banishment (*Alhusainy v Superior Court* (2006) 143 CA4th 385, 48 CR3d 914; *In re Babak S.* (1993) 18 CA4th 1077, 22 CR2d 893);
- Imposing an absolute ban on travel to a particular place (*In re James C.* (2008) 165 CA4th 1198, 1203, 81 CR3d 846; *In re Antonio R.* (2000) 78 CA4th 937, 93 CR2d 212; *In re White* (1979) 97 CA3d 141, 158 CR 562);
- Prohibiting a probationer's association with others without an express knowledge requirement (*In re Sheena K.* (2007) 40 C4th 875, 878, 55 CR3d 716 (prohibiting association with anyone "disapproved of by probation," but rendered valid by inserting qualification that probationer *know* who was disapproved of); *In re H.C.* (2009) 175 CA4th 1067, 1069, 96 CR3d 793 (prohibiting association with "any known probationer, parolee, or gang member"; modified to prohibit association with "anyone known to probationer" to be on probation, parole, or member of criminal street gang); *In re Vincent G.* (2008) 162 CA4th 238, 241, 246, 75 CR3d 526 (prohibiting association with "known gang members"; modified to prohibit association with anyone known by the probationer to be a gang member); *People v O'Neil* (2008) 165 CA4th 1351, 1354, 81 CR3d 878 (prohibiting association with "any person as designated by probation officer"));
- Prohibiting a particular type of employment when no relationship exists between the crime and employment (*People v Burden* (1988) 205 CA3d 1277, 253 CR 130);
- Requiring the defendant to wear a T-shirt proclaiming that he is on felony probation for theft (*People v Hackler* (1993) 13 CA4th 1049, 1060, 16 CR2d 681);
- Requiring a probationer to report the areas he frequents (*People v Sanchez* (2003) 105 CA4th 1240, 130 CR2d 219);
- Requiring a probationer to waive his or her Fifth Amendment rights (*Minnesota v Murphy* (1984) 465 US 420,

435, 79 L Ed 2d 409, 104 S Ct 1136);

- Requiring a probationer to pay costs of, *e.g.,* attorney fees, presentence investigation, probation supervision, or polygraph testing (*People v Flores* (2008) 169 CA4th 568, 578, 86 CR3d 804 (courts statutorily authorized to order payment of such costs, but not as probation condition); *Brown v Superior Court (People)* (2002) 101 CA4th 313, 124 CR2d 43).

Ø **Note:** A defendant can waive a constitutional right and agree to an otherwise unconstitutional condition of probation as part of a plea bargain. *People v Bravo* (1987) 43 C3d 600, 608, 238 CR 282; *People v Peck* (1996) 52 CA4th 351, 362, 61 CR2d 1.

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§38.39 XII. APPELLATE CHALLENGE TO CONDITIONS OF PROBATION

Defense challenge to conditions of probation. If the defendant wishes to challenge a condition that seems unduly harsh or otherwise invalid, he or she may do so by either (1) refusing probation, undergoing the sentence, and challenging the proposed condition on an appeal from the judgment or on habeas corpus, or (2) accepting probation, after objecting to the condition on the record, and challenging the allegedly invalid condition on appeal from the order granting probation or on habeas corpus. *People v Welch* (1993) 5 C4th 228, 19 CR2d 520.

Ø **Warning:** As a general rule, if the defendant does not object to the assertedly invalid condition at sentencing, the issue may not be raised on appeal. 5 C4th at 232. However, the failure to object to a condition of probation in the trial court does not forfeit the defendant's right to challenge the condition on appeal as unconstitutionally vague or overbroad when the claim presents "pure questions of law." *In re Sheena K.* (2007) 40 C4th 875, 888, 55 CR3d 716; *People v Turner* (2007) 155 CA4th 1432, 1435, 66 CR3d 803.

Prosecution challenge to conditions of probation. The prosecution, too, must object at trial to preserve the right to appeal discretionary probation conditions. *People v Tillman* (2000) 22 C4th 300, 92 CR2d 741. However, if a condition is mandatory, an appellate court can correct the condition even if there was no objection at the sentencing hearing, because a sentence or order granting probation without a mandatory condition is unauthorized, and the court always retains the power to correct an unauthorized sentence on appeal. *People v Smith* (2001) 24 C4th 849, 102 CR2d 731. Note, however, that a condition that must be imposed except in unusual circumstances is discretionary and may not be appealed absent objection in the trial court. *People v Tillman, supra* (because trial court retains discretion not to impose restitution fine in extraordinary circumstances, sentence that failed to include it was not unauthorized and prosecutor's failure to object at trial waived error).

Prosecution challenge to order granting probation. The prosecution cannot appeal an order granting probation, but may seek appellate review of a grant of probation by means of a petition for writ of mandate or prohibition. The petition must be filed within 60 calendar days after the order granting probation. Pen C §1238(d); *People v Bailey* (1996) 45 CA4th 926, 929, 53 CR2d 198. See also *People v Douglas* (1999) 20 C4th 85, 92, 82 CR2d 816 (prosecution may appeal from order declaring wobbler offense to be misdemeanor instead of felony, because it was a challenge to a separate judgment entered after the judgment granting probation, and not a challenge to the validity of the probation order).

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XIII. TRANSFERS

§38.40 A. Transfer of Supervision to Another County

If the probationer lives in another county in California, or moves to another county during the term of probation, the court may transfer the case to that county as long as the receiving county is first given the opportunity to confirm that the probationer does reside there. Pen C §1203.9(a). The determination of residency must be given precedence over all other actions or proceedings, except those given special precedence by law. Pen C §1203.9(a). After transfer, the receiving county has entire jurisdiction over the case.

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§38.41 B. Transfer of Case to Another State

Interstate probation supervision is governed by the Interstate Compact for Adult Offender Supervision. See Pen C §§11180-11181. For current rules, see http://www.interstatecompact.org. In practice, only persons convicted of felonies and granted formal probation are routinely referred for compact supervision.

The probationer must sign a waiver of extradition and an agreement to accept whatever differences in supervision may exist between the two states. See *People v Reed* (1994) 23 CA4th 135, 28 CR2d 509 (Nevada probationer who moved to California was subject to same standards of probation supervision as if probation had been granted in California). Jurisdiction over the case remains with the court that granted probation; if a defendant granted probation in California violates probation while residing in the other state, he or she must be returned to the California court to face revocation proceedings.

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XIV. DURATION OF PROBATION

§38.42 A. Standard Term

Felony probation may last for up to 5 years if the conviction offense or offenses carry a maximum prison term of 5 years or less. If the maximum term is more than 5 years, the court may make the probationary period longer than 5 years but may not exceed the maximum prison term for the offense. Pen C §1203.1(a).

With two exceptions, misdemeanor probation may last for up to 3 years if the conviction offense or offenses carry a maximum term of incarceration of 3 years or less. If the maximum term is more than 3 years, the probationary period may be longer than 3 years but may not exceed the maximum term for the offense. Pen C §1203a. The exceptions involve misdemeanants convicted of being under the influence of a controlled substance, or of driving under the influence. Probation can extend for 5 years for these probationers. Health & S C §11550(a) (controlled substance); Veh C §23600(b)(1) (driving under the influence).

If the court fails to specify the probation period, it is deemed to be the maximum period of imprisonment for the offense. *People v Blakeman* (1959) 170 CA2d 596, 339 P2d 202. If the court orders a probationary term that exceeds the statutory limit, the order will be given effect only for the maximum permissible term. See *People v Medeiros* (1994) 25 CA4th 1260, 31 CR2d 83.

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§38.43 B. Revoking, Modifying, and Extending Probation

A court may revoke or modify probation at any time before the term expires. Pen C §§1203.1-1203.3. This power includes the ability to extend probation up to either the maximum term or 5 years. *People v Cookson* (1991) 54 C3d 1091, 2 CR2d 176. New information or a change of circumstances is required before the court can modify the terms of probation; a violation of probation is not required. *People v Cookson, supra*. A court cannot, without the prosecutor's consent, reduce a specified probationary jail term agreed to as part of a plea agreement. *People v Segura* (2008) 44 C4th 921, 935, 80 CR3d 715. Nor can a court, while the defendant is still on probation, reduce the amount of county jail time imposed as a condition of probation, once the term has been served. *People v Mendoza* (2009) 171 CA4th 1142, 1149, 90 CR3d 315 (defendant could not avoid deportation by reducing time originally imposed). For discussion of probation revocation, see chap 46.

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§38.44 XV. TERMINATING PROBATION AND IMPOSING PRISON SENTENCE

When a defendant released on probation is committed to prison on another offense and requests through counsel or in writing to the court, signed in the presence of an authorized prison official, that he or she be sentenced in the case in which he or she is on probation, the court must either sentence the prisoner or make a final judgment terminating the case. Pen C §1203.2a. If, after receiving notice, the probation officer fails to timely notify the court, that court loses jurisdiction. *In re Hoddinott* (1996) 12 C4th 992, 50 CR2d 706.

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§38.45 XVI. PROFESSIONAL RESPONSIBILITY OF COURT, COUNSEL, AND PROBATION OFFICER

When a sentencing judge receives information from an improper source, that information must be revealed to all parties. If the judge intends to disregard the communication, that fact must be stated on the record. If the judge intends to consider the communication, he or she must give the defense and the prosecution an opportunity to respond. *People v Shaw* (1989) 210 CA3d 859, 867, 258 CR 693.

Counsel should not pressure a probation officer out of court to make a certain recommendation. See, *e.g., People v Villarreal* (1977) 65 CA3d 938, 135 CR 636 (district attorney's inducement of probation officer to change recommendation from jail to prison "grossly improper" and probation officer's conduct "totally inconsistent" with function of probation department). Probation officers "should evaluate each case on its own merits, unfettered by fixed and inflexible policies adopted to conform with the ideas of prosecuting authorities." 65 CA3d at 945.

Actions taken by a probation officer under his or her statutory duty to provide a presentence report are covered by the judicial immunity doctrine. *Demoran v Witt* (9th Cir 1985) 781 F2d 155. Similarly, prosecutors enjoy absolute immunity from civil suits seeking monetary damages if the prosecution conduct is "intimately associated with the judicial phase of the criminal process." *Imbler v Pachtman* (1976) 424 US 409, 47 L Ed 2d 128, 96 S Ct 984. However, if the prosecutor's conduct relates to his or her investigative or administrative role (*e.g.,* giving legal advice to a police officer) rather than to his or her role as an advocate, the prosecutor is entitled only to qualified immunity: "[I]t is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Burns v Reed* (1991) 500 US 478, 495, 114 L Ed 2d 547, 564, 111 S Ct 1934.

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39

WORK FURLOUGH AND OTHER ALTERNATIVE SENTENCES

HON. RICHARD KELLER

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§39.1 I. OVERVIEW

When it is not possible to obtain a "no-time" disposition, counsel for a criminal defendant may nevertheless serve his or her client well by exploring alternatives to county jail incarceration. Work furlough, alternative work programs, home detention, and county parole ameliorate the impact of a criminal sentence on the families and jobs of those clients sentenced to county jail. The overcrowded condition of jails also makes such alternatives more attractive to some prosecutors and judges. In addition to reasons of rehabilitation and overcrowding, the California Legislature has found that county parole is "in the interest of public safety." Pen C §3074.

The procedures, administration, and even availability of these programs vary widely throughout California. It cannot be emphasized too strongly that defense counsel considering such programs must investigate carefully the regulations that apply in the county where a defendant is to be sentenced. Defense counsel should also be aware that many counties accept out-of-county referrals to some or all of their alternative sentencing programs. For a defendant facing conviction on charges in more than one county, the availability and standards for alternative sentencing programs may determine where to seek disposition.

Alternative sentencing programs include work programs such as the sheriff's work alternative program (SWAP), work furlough (WF), split-time programs involving in-custody time with intervening noncustody periods (weekender programs), electronic monitoring programs or home surveillance programs (EMPs), or county parole (CP). These options vary greatly from county to county. Information regarding those options should be obtained from individual counties. A chart with contact information and descriptions of alternative sentencing programs available in California counties appears in §39.33.

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II. WORK FURLOUGH, JOB TRAINING, AND SCHOOL FURLOUGH

§39.2 A. Description and Eligibility

Work furlough, job training, and school furlough are authorized by Pen C §1208. They are referred to collectively in this chapter as work furlough. These programs allow inmates to continue to work and support themselves and their families while completing the jail time ordered served by the court. These programs also allow defendants to continue their education or receive job training while completing their obligations. Employment "includes care of children, including the daytime care of children of the prisoner." Pen C §1208(j)(3). Juveniles may attend school through a work furlough facility. Welf & I C §927.

All persons sentenced to county jail are eligible to apply for furlough programs unless the court stated in its sentencing order that the defendant was not eligible for furlough programs. Pen C §1208(b). Persons convicted of certain types of crimes, however, may find it more difficult to be accepted on work furlough. Areas that are generally carefully screened are sex offenses, heavy narcotics and drug use, psychiatric problems, a history of violent behavior, and a history of escape.

Persons applying for work furlough must be found to be fit subjects by the work furlough administrator. Pen C §1208(b). Although the court cannot order work furlough to accept a particular defendant (see *People v Superior Court (Peterson)* (1992) 12 CA4th 16, 25, 14 CR2d 685), great weight must be given to a court recommendation that an individual be placed in the program (Pen C §1208(i)). See also *People v Superior Court (Hubbard)* (1991) 230 CA3d 287, 281 CR 309 (court cannot order defendant to be placed in home monitoring program under analogous Pen C §1203.016).

Wages earned by a prisoner while on work furlough must be "at least as high as the prevailing wage for similar work in the area where the work is performed and in accordance with the prevailing working conditions in that area." Pen C §1208(c). This is usually interpreted to mean the federal minimum wage. (It is usually applied only to defendants who are not already employed, but are allowed to secure employment or job training.)

Some counties have restrictions on the minimum number of days one has to serve to be eligible to apply. Penal Code §1208(c) prohibits a defendant from participating in any employment, job training, or educational program involving any earnings by the defendant if there is a labor dispute in the establishment. Pen C §1208(c).

If arrangements are made early enough, it may help the defendant secure a more favorable plea bargain. Early application may also prevent loss of time on the job or from school. It is not necessary, however, that the defendant have regular employment, regular job training, or an education program to be eligible for entry into a program. The administrator of a program may authorize the defendant to secure employment, job training, or education and may provide assistance to the defendant in securing employment, job training, or education. Pen C §1208(c).

> Ø **Note:** Clients who are not likely to comply with the strictly enforced rules in these programs may, in the long run, find themselves in greater difficulties and should be discouraged from applying.

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§39.3 B. Availability

Availability of work furlough varies throughout the state. Some counties do not offer it while others have a program capacity exceeding two or three hundred. Although most work furlough programs are administered by sheriffs' departments, some are run by county probation departments and some are run by the county's department of corrections. For example, Napa County's Work Furlough Program is administered by its California Department of Corrections and Rehabilitation (CDCR), while county probation departments administer similar programs in Glenn and Imperial counties.

Many counties now provide equivalent work furlough facilities for women. Counsel for female defendants eligible for work furlough should take note of Pen C §1208.5, which provides that two or more counties may agree to house inmates regularly residing or employed in one county but sentenced in another.

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§39.4 C. Monitoring

Many counties use electronic monitoring and allow inmates on furlough programs to remain at home where they are monitored by video and radio transmitters supplemented by home- and worksite visits by staff. Pen C §1203.016. In addition to being preferred by prisoners, this program has helped considerably with the overcrowding that affects virtually every county jail in the state. Monitoring may be by radio frequency (which requires a basic service telephone line) or by GPS, or both.

The California Electronic Monitoring Association (CEMA) is a statewide association of public law enforcement agencies. Its goals are to provide mutual support, share information, meet vendors, and influence public policy through education and networking. The organization meets quarterly, usually in January, April, July, and October, throughout the state and maintains a "Contact Roster" for each county's electronic monitoring program, and a county-by-county list of the requirements and fees for each program. More information on the organization is available through its website at http://thecema.com.

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§39.5 D. Transfers to Other Counties

If approved by the board of supervisors of each county, work furlough participants can transfer between counties. Pen C §1208.5. Because of overcrowding, many counties will not accept transfers. Agencies that do allow or take prisoner transfers often require a formal agreement with the transferring county that covers such things as the following:

- The cost of transporting a prisoner to the receiving county;
- The cost of returning the inmate to the sentencing county if the inmate loses his or her job or is removed from the program for cause;
- The cost of medical and dental care incurred by the prisoner; and
- The cost of clothing and food.

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§39.6 E. Fees

Participants in work furlough can be ordered to pay for board, personal expenses, and administrative costs. Pen C §1208(e). Some programs charge a sign-up fee to process the application and a daily participation fee that can range from $4 to $24 or more. Some counties use a sliding scale related to the participant's hourly wage; other counties charge all participants the same fee. Before program fees can be charged, the trial court must find that the defendant has the ability to pay all or part of the cost "without resulting in unnecessary economic hardship to the defendant and his or her dependents." Pen C §1209. Under Pen C §1209, the defendant has a number of procedural rights at the hearing on his or her ability to pay the program fees.

An employer can pay a work furlough participant's wages directly to the work furlough administrator. Pen C §1208(e). That administrator can then pay the inmate's expenses for board and personal expenses both in and out of custody. Pen C §1208(e). In practice, however, most programs do not handle inmate money other than to collect a fee based on the cost of operating the program.

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§39.7 F. Passes

The sheriff may release inmates on work furlough for up to 72 hours for medical, dental, or psychiatric care, family emergencies, and other reasons that the administrator believes may promote a successful return to the community. Pen C §§1208(d), 4018.6. If an inmate is injured during a period of employment, training, or education, the work furlough administrator may release the inmate from the facility for continued medical treatment by a private physician or medical treatment facility at the expense of the employer, workers' compensation, or the inmate. Pen C §1208(d).

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§39.8 G. Credits

An individual on a work furlough program who is housed in the county jail, a work furlough facility, or a halfway house is eligible for good-time and work-time credits under Pen C §4019. See Pen C §4019(a)(4). A person not housed in a jail or other institution is eligible for custody credits if participating in a mandatory work furlough program. See Pen C §4024.3(a). A person not actually in custody who is participating in a voluntary work furlough program established under Pen C §4024.2 is not eligible for conduct or custody credits. *People v Richter* (2005) 128 CA4th 575, 27 CR3d 198. See also *People v Wills* (1994) 22 CA4th 1810, 27 CR2d 925 (prisoner in work release program who was living at girlfriend's house while working at senior citizens' center not entitled to good time and work time, because not "in actual custody").

Note that the defendant may be asked to waive §4019 credits as a condition of participating in a work furlough program. See *People v Fares* (1993) 16 CA4th 954, 20 CR2d 314.

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§39.9 H. Escapes

Inmates may be charged with escape (Pen C §4532) for willful failure to return to the place of confinement at the authorized time (Pen C §1208(h)). See *Yost v Superior Court* (1975) 52 CA3d 289, 125 CR 74. As an example, in the Jail Overflow Program operated by Tuolumne County, the inmate reports to the jail each morning and is assigned to work from there. The inmate reports back to the jail at the end of each work day before being released to go home for the night. An inmate's failure to report back to the jail, either in the morning or after the work day, qualifies as an escape, rather than a violation of the terms and conditions of probation.

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III. COUNTY PAROLE

§39.10 A. Composition of Parole Board

Penal Code §§3074-3089 provide for county parole programs. The board is composed of three members (Pen C §3075):

- The sheriff or his or her designee, or, in counties with a department of corrections, the director of corrections;
- The probation officer or his or her designee; and
- A member of the public appointed by the presiding judge. The public member is appointed for a 1-year term and cannot serve more than three consecutive terms.

Members of the board may designate deputies to serve in their place when they cannot serve. Pen C §3085.

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§39.11 B. Meetings

The board must have regularly scheduled meetings with at least two members present. Pen C §3076(b). Some counties meet weekly, while others with smaller programs meet monthly, or only when they receive an application.

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§39.12 C. Rules and Regulations

Each county parole board must establish rules and regulations in writing for inmates serving county time to apply for parole. Pen C §3076(b). A copy of those rules and regulations must be supplied to each judge of the county courts. Pen C §3076(c). Copies must also be furnished to the persons in charge of the counties' correctional facilities, and a copy conspicuously posted in each facility or a copy given to each prisoner. Pen C §3076(c).

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§39.13 D. Eligibility

Most counties require a minimum portion of the sentence, typically one-half of the total sentence, be served before application is made for parole. Practice varies among counties. Some counties count good time and work time under Pen C §4019 when determining eligibility, and others do not. Some counties waive the minimum time requirement in the event of a family emergency; other counties have no such provision. An increasing number of counties are being forced to consider this option because of jail overcrowding.

The sentencing judge can deny county parole eligibility at the time of sentencing if the time to be served is a condition of felony probation. Pen C §3076(b).

Although all those serving time "for any criminal offense" are eligible for county parole (Pen C §3076(b)), parole boards are generally reluctant to consider persons convicted of drug sales, sex crimes, and crimes of violence. Some counties exclude from consideration altogether persons convicted of these types of crimes.

Ø **Note:** A defendant cannot be denied parole because he or she will not admit guilt. Pen C §3086.

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§39.14 E. Emergency or Limited Paroles

Most counties have regulations allowing paroles of up to 3 days for family emergencies, or other special circumstance, on approval of one parole board commissioner on short notice. See Pen C §3079(a). In addition, the sheriff of each county has the power to authorize the temporary release of an inmate for up to 3 days for family emergencies or for purposes related to his or her return to the community. Pen C §4018.6.

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§39.15 F. Authority to Grant Parole

Only the parole board of the county that sentenced a prisoner has jurisdiction to grant parole. An inmate who has transferred to another county on work furlough must apply for parole to the county where the sentencing took place. Pen C §3077.

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§39.16 G. Right to Counsel

There is no established right to counsel for prisoners requesting county parole. Some counties allow attorneys to appear, and others do not.

A few counties provide for a parolee to be represented by counsel at county parole revocation hearings. Of these, some counties provide counsel at all revocation hearings, while others apply the standards of *Gagnon v Scarpelli* (1973) 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756, on the need for counsel. For standards of assistance of counsel in state parole revocation proceedings, see 15 Cal Code Regs §§2690-2701. In addition to counties with no formal revocation hearing procedure, a number of counties either expressly forbid counsel at revocation hearings or allow counsel only to assist the parolee to prepare for the hearing.

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§39.17 H. Notification of Application

The board must notify the sentencing judge of the parole application to provide an opportunity for the judge to make a recommendation. Although the judge's recommendation is not binding, the board is required to give it careful consideration. Pen C §3078. Some parole boards have a rule that the district attorney, arresting agency, or the victim, or all of them, must also be notified of a county parole request.

Applications should be submitted well in advance of the expected date of appearance, which allows the board sufficient time for the required notifications and ensures the applicant that the application will be considered as early as possible. A delay could mean waiting as much as a month for the board's next meeting. Most boards require applications to be submitted at least 2 weeks before the hearing.

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§39.18 I. Appearance

An applicant must be allowed to appear and speak on his or her own behalf at the meeting at which the application is considered by the board. Pen C §3079(b). Some counties require a written request from the applicant before they allow an appearance. Other counties allow an attorney or another person to appear only with prior authorization, and then only when the matter being considered is too complicated for the prisoner to adequately explain. Some county parole boards allow no one other than the applicant to appear.

An application for parole cannot be granted or denied except by a vote of the parole board at a meeting at which a quorum of its members are present, unless the applicant is ineligible for parole by order of the superior court or the granting of the parole is in an emergency. Pen C §3079(a).

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§39.19 J. Admission of Guilt

An admission of guilt cannot be required when setting terms or discharge dates for parole. Pen C §3086.

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§39.20 K. Length of Parole

County parole may be granted for up to 2 years with such rules and regulations as the board deems proper for the defendant's rehabilitation. Pen C §3081(b). Many counties in which parole is available are granting parole once the defendant has served one-half of the time to which he or she was sentenced.

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§39.21 L. Conditions

The county parole board can impose parole conditions (Pen C §3081(b)), which may include such provisions as seem appropriate for the parolee's rehabilitation. Typical conditions of county parole when the defendant's offense was related to substance abuse are to attend alcohol or drug counseling and to submit to breath or urine tests.

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§39.22 M. Parole Denied

Most county parole boards give a prisoner who has applied for parole written notice when parole is denied. The reason for the denial is not usually given. Some boards allow a rehearing when a parole request is denied. There is usually a waiting period of 30 to 60 days before the rehearing.

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§39.23 N. Violation

It is unclear whether the prohibitions set forth in Proposition 36 relating to nonviolent drug possession offenses or for violating a drug-related condition of parole (see Pen C §3063.1, discussed in §47.30) apply to individuals on county parole. With these possible exceptions, when it is believed a person has violated parole, the board's written order is sufficient warrant to authorize the officers named in it to return the paroled prisoner to custody. Pen C §3081(c). A parolee who leaves the county without permission may be arrested as an escaped prisoner. Pen C §3080.

Many counties do not offer a hearing for a parole violation. Others provide a hearing, but only after receiving a written request. Two parole board members must be present at revocation hearings. Pen C §3079(a).

A parolee who violates parole or any rules or regulations governing his or her parole must be returned to custody to complete the unserved portion of the sentence. Pen C §3081(b). No credit is granted for the time the inmate was on county parole. Pen C §3081(d). In addition, some agencies take the inmate before a disciplinary board and request loss of good-time credits because of the violation.

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§39.24 O. Noncitizen Prisoners

The county parole board can release noncitizen prisoners who voluntarily consent to return to their native land. Pen C §3082. The expenses for transportation and supervision may be paid by the county with authorization of the board of supervisors. Pen C §3082. This section is seldom used.

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§39.25 P. Supervision

Prisoners placed on county parole must be supervised by a parole officer of the county board of parole commissioners. Pen C §§3087-3088. The Penal Code does not describe the manner of supervision, or how closely the parolee must be supervised. Once again, the practice varies among counties. In some counties there is close supervision, including frequent personal contact in the home, while in other counties only written or phone reports are required from the parolee.

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§39.26 Q. Fees for County Parole

A defendant may be ordered to reimburse the county for all or part of the reasonable cost of parole supervision. Pen C §1203.1e(a). However, before the court can order reimbursement, it must determine that the defendant has the ability to pay. Pen C §1203.1e(a). Parole cannot be denied or revoked because the defendant cannot or does not pay the costs of parole supervision. Pen C §1203.1e(f).

Some counties require payment of fines assessed as part of the sentence as a prerequisite for parole eligibility. That requirement appears to conflict with at least the spirit of Pen C §1203.1e(g), which prohibits county board of parole commissioners from having access to offender financial data before making any parole decision.

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IV. ALTERNATIVE WORK PROGRAMS

A. Work Release Programs

§39.27 1. Description

Work release programs allow a sentenced person the option to substitute for the jail sentence 8 to 10 hours a day at manual labor or in public projects, *e.g.,* manual labor in support of nonprofit organizations, graffiti cleanup, house repairs for senior citizens. Pen C §4024.2(b)(1), (4). The sheriff may also permit prisoners to participate in education, vocational training, or substance abuse programs instead of doing manual labor. Pen C §4024.2(b)(2). One day of participation is given in lieu of 1 day of confinement. Pen C §4024.2(a). Hours spent participating in education, vocational training, and substance abuse programs cannot be counted for more than half of the hours the prisoner has been sentenced to serve on the work release program. The other half of the hours must be spent on manual labor or public projects. Pen C §4024.2(b)(2). The inmate is allowed out of custody with few restrictions when at work, school, or attending a prescribed program. Work release programs are being used more often as counties throughout the state experience continued difficulties with jail overcrowding.

Any county may authorize a voluntary work release program under Pen C §4024.2. In any county in which the average daily inmate population is 90 percent of the county's correctional system's mandated capacity, the board of supervisors may institute a mandatory work release program in which anyone committed to a county facility must participate in the work release program under §4024.2. Pen C §4024.3.

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§39.28 2. Time Limits

Most counties restrict availability of work release programs to persons serving short sentences, typically 30 or 45 days. However, because of increasing demands on jail beds and financial constraints on county budgets, many counties have increased the number of days that may be served through work release or have eliminated restrictions altogether. Some counties, such as Stanislaus County, have established a policy of granting defendants good-time/work-time credits for work alternative programs.

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§39.29 3. Fees

The county can collect a fee from participants in work release programs to pay for costs of its administration, based on the participant's ability to pay. Pen C §4024.2(e). Most programs charge a sign-up or application fee and a daily fee. The amounts charged vary among counties.

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§39.30 4. Failures

Defendants participating in work release programs must sign a promise to appear at the assigned time and place for their work assignments. Pen C §4024.2(c). The court may issue a warrant to retake a person into custody who fails to appear for work release. If a peace officer has reasonable cause to believe that the defendant has failed to appear at the time and place specified for the work release, and the officer has a written order to retake the defendant into custody, the officer may do so without a warrant. Pen C §4024.2(c). The person in charge of the program may also issue a written order to retake the person into custody. Pen C §4024.2(c).

Defendants who fail to appear as promised may be charged with a misdemeanor. Pen C §4024.2(c). Defendants can also be taken before a disciplinary board and lose good-time credits. See Pen C §4019. About 10 percent of those who sign up for work release fail to complete it successfully and are returned to custody.

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§39.31 B. Accelerated Release

The persons responsible for administering the county jail may apply to the presiding judge for general authorization for 30 days to release inmates because of overcrowding. Pen C §4024.1.

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§39.32 C. Home Detention

It has become common to use the terms "home detention" and "electronic monitoring" interchangeably. While the law does not require that a defendant placed on home detention must also be subject to electronic monitoring, it has become the standard practice in most if not all counties.

Home detention under Pen C §1203.016 is an expanding alternative to jail. Any county's board of supervisors may authorize this program. Home detention means that the participant must remain inside his or her home during the hours designated by the correctional administrator. The participant may be permitted to seek employment, counseling, education, medical or dental assistance, or training classes. Pen C §1203.016(b), (f). Electronic monitor or supervising devices may be required. Pen C §1203.016(b)(3).

Home detention is open only to minimum security inmates and low-risk offenders committed to a county jail or other county correctional facility, and to inmates participating in a work furlough program. An inmate's participation is voluntary. Pen C §1203.016(a).

The court may restrict or deny a defendant's participation in the program, and may recommend placement in the program but has no authority to direct or order such placement. Pen C §1203.016(e); *People v Superior Court (Hubbard)* (1991) 230 CA3d 287, 298, 281 CR 309.

Days spent in home detention are considered days spent in custody for purposes of giving credit for time served and for good time and work time under Pen C §§2900.5 and 4019. Pen C §2900.5(a).

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Source: Criminal Law/California Criminal Law Procedure and Practice/39 WORK FURLOUGH AND OTHER ALTERNATIVE SENTENCES/§39.33 V. CHART: ALTERNATIVE SENTENCING BY COUNTY

§39.33 V. CHART: ALTERNATIVE SENTENCING BY COUNTY

The following chart provides a county-by-county listing of alternative sentencing programs available in California. These are among the most common alternative sentencing programs:

- **Sheriff's work alternative program (SWAP), work release program (WR), or alternative work program (AWP).** In a SWAP, WR, or AWP, the offender serves his or her sentence by participating in a public service work project, such as cleaning graffiti or removing litter from the highways, during the day. Typically, the offender goes home at night, but some programs require the offender to spend nights in jail.
- **Work furlough program (WF).** In a WF, the offender is released during the day to work but spends nights in jail. Furlough programs may also be available for school (SF) or job training.
- **Electronic monitoring program (EMP).** With EMP, the offender is allowed to serve his or her sentence at home and is monitored through either GPS technology or electronic monitoring. For electronic monitoring, the offender must have a basic service telephone line for radio frequency. Activities are severely restricted.
- **Weekender program (WKR).** In a weekender program, the offender is allowed to serve his or her sentence in increments. The name derives from the typical schedule in which the offender spends weekends in jail, but many programs permit the offender to serve either weekends or weekdays in jail, depending on the offender's schedule. Some weekender programs do not require overnight confinement.
- **County parole (CP).** See §§39.10-39.26.
- **Community Service Work (CSW).** Allows offenders to earn credits for specified work in the community, often benefiting charities and nonprofit foundations.

The programs listed above are the most commonly available alternative sentencing schemes, but a wide variety of programs is available. A few counties have unique programs. Eligibility and fee requirements vary widely from county to county. Obtain information from individual counties.

Ø **Note:** Some counties accept defendants sentenced in other counties into their alternative sentencing programs. Acceptance of out-of-county transfers varies greatly from county to county and is often restricted to counties with reciprocal agreements. Obtain information from individual counties.

Ø **Caution:** County programs are subject to change due to funding availability, jail population, and other factors. Attorneys are advised to verify the continuing availability of any program listed here.

County	Contact Information	Programs Available
Alameda	(510) 268-7898 (510) 268-2628 (CP)	**SWAP** when court ordered for minimal criminal and traffic offenders. Sentences served in 30-day increments, with maximum of 6 days and minimum of 2 days per week. No outstanding warrants. No transfers.
	(510) 667-4486 (EMP)	**CP** on case-by-case basis; must have served ½ sentence with no more than 50 days left to serve; generally no violent offenders, drug sales, or multiple DUIs.
		CSW when court ordered.
		EMP available for juveniles only.
Alpine	(530) 694-2192	**SWAP** run by Probation Department. Work in county departments, such as county museum and library.
		EMP run by Douglas County (Nevada).
Amador	(209) 223-6387	**EMP** for 10 days to 180 days. No GT/WT credit. May accept disabled offenders. Transfers accepted.
		WR available. Minimum days per week/per term: 2 days for 45 days; 3 days for 90 or more days; 4 days for 135 or more days; 5 days for 180 or more days or if not employed. May accept sex offenders and some transfers.

Butte	(530) 538-7471 (530) 538-7545 (EMP)	**SWAP** for nonviolent offenders; maximum of 120 days. **EMP** for 10 days minimum; no maximum; must contact 1 week before. GT/WT credit. Transfers accepted.
Calaveras	(209) 754-6499 (Jail-SWAP) (209) 754-6471 or (209) 754-6466 (Probation-EMP)	**SWAP** with no minimum sentence; no violent or sex offenders or weapons charges. Transfers accepted. **EMP** for adults and juveniles on case-by-case basis particularly for primary-care or financial provider. From 45 days to 1 year. GT/WT credit. No transfers.
Colusa	(530) 458-5871 (WR/SWAP/EMP) (530) 458-0205 (WF only)	**WR**/**SWAP** for nonviolent offenders with sentences of less than 120 days; no GT/WT credit; minimum 2 days per week. On violation, offender goes directly back to jail without a hearing. **WF** on case-by-case basis. Maximum 7 days; minimum 4 days. Must be employed in county. No violent felons. **EMP**/**CSW** with work at least 3 days per month; available Mon.-Sun. EMP for juveniles only.
Contra Costa	(925) 313-4261	**SWAP** available for sentences of less than 30 days. **EMP** for 30 days to 1 year. **CP** for county residents only. Also **sobriety monitoring**.
Del Norte	(707) 464-8718 (707) 464-7215 (Probation-EMP)	**WKR** available 7 days a week, in no less than 48-hour increments, for offenders serving 20 days or less. **WF/CP** available if ½ of sentence completed; GT/WT credit; sentence of at least 45 days; maximum travel one-way is 1 hour. For both WF & WKR, no violent, sex, domestic violence, narcotics, or weapons offenders. **EMP** generally for adults with medical problems; no domestic violence or crimes with bodily injury by weapon, or minor as victim; no drug sales; generally no DUIs; no sex crimes or assaults against officers. Sentences over 90 days preferred. Schooling allowed, generally court-approved.
El Dorado	(530) 621-6070 (SWAP) (530) 621-6011 (WKR) (530) 621-5625 (Probation-EMP)	**SWAP** for court-approved misdemeanors and felonies with 60 days or less. No stalking, §290, or long history of violence, drugs, or alcohol. **WKR** not limited to weekends. Court order required; sentence of 20 days or less. **EMP** for county residents with sentences from 30 to 180 days. No serious or violent felonies, injuries to spouse or domestic partner, or felony DUIs. GT/WT credit. See http://www.co.el-dorado.ca.us/sheriff/alt_sentencing.asp.
Fresno	(559) 455-5127	**Adult Offender Work Program** for sentences of 90 days or less; minimum 2 8-hour days per week. Must have own transportation. Transfers possible. Generally no serious felons. **WF/EMP** with court order for sentences of more than 30 days. GT/WT credit. See "probation department" at http://www.co.fresno.ca.us.
Glenn	(530) 934-6428 (530) 934-6116 (EMP)	**SWAP** for sentences of 60 days or less. Through Caltrans, weekends only; through other county agencies, weekdays available. **WF**/**EMP** with no GT/WT credit.
Humboldt	(707) 441-5134 (SWAP) (707) 444-	**SWAP** for sentences of 180 days or less; may work every day except Thursday. No GT/WT credit. No sex or violent offenders; may accept transfers. **EMP** available for juveniles. Generally, maximum of 90 days, no violent felons, prior program

	0600 (CSW)	failures, or previous tampering with equipment. No transfers and no credits.
	(707) 268-3320 or (707) 445-7401 (Juvenile EMP)	
Imperial	(760) 339-6229 (SWAP & CP)	**WF/CP** for nonviolent misdemeanants not already on probation. For CP, no violent offenders; participation voids credits; must have served ½ of sentence; no previous parole violations; not currently on probation or parole. For WF, must be employed or enrolled in school; must be court-ordered; employer must approve; generally no transfers.
	(760) 339-6387 (drug & alcohol)	**WKR** for weekends only with fee; must be court ordered. **Inmate Work Program** for sentenced inmates; may obtain early release with good behavior. **Breaking Free Program** offers drug or alcohol treatment in jail two or more times per week; 7-week program with credit at completion; transfers accepted; no residential beds. **EMP** with no GT/WT credits. If no court referral, judge will be informed and may deny. No transfers.
Inyo	(760) 878-0274	**WR** for nonviolent misdemeanants with sentences of not less than 10 or more than 30 days.
Kern	(661) 391-7849 (CP)	**CP** for minimum 60-day sentence with 20% of time served. Maximum loss of 5 days' credit; no escapes or other program failures. No transfers.
	(661) 391-7300 (WR)	**WR** for in-custody inmates. Must serve 15% of sentence and be within 150 days of release. No minimum or maximum sentence for court referrals. Generally no sex or violent offenders. No transfers; no GT/WT credit; no Pen C §§192, 207, 212.5, 273a(a), 368, or 12022. See http://www.kernsheriff.com/DETENTIONS/WORKRELEASE/.
	(661) 391-2231 (Probation-EMP)	**EMP** for 10 days to 1 year. No GT/WT credit. Transfers accepted. Excludes felons and high-risk inmates.
Kings	(559) 582-3211, x2993 (Sheriff)	**WKR** for sentences of 20 days or less. Work detail on weekends; not confined overnight. **Adult Offender Program** for sentences 30 days or less. Jobs assigned; not confined overnight.
	x2850 (Probation-EMP only)	**EMP** for 30 days or more, if no medical problems. Smaller sentences considered if medical problem. No escapees or violent or sex offenders. **CSW** at specific jobsites, with hours set by court order; no jail time.
Lake	(707) 262-0626	**SWAP** for sentences of 20 days or less; minimum work time 2 days per week. No GT/WT credits. **EMP** for minimum of 21 days. Must be employed; no self- or part-time employment. No sex or violent offenders. No GT/WT credit. **WKR** with fees. GT/WT credit. No violent or sex offenders; no repeat offenders. Lake County residency for all programs. May accept transfers from reciprocal counties.
Lassen	(530) 251-5245	**SWAP** for sentences of 20 days or less. **WF** for sentences of 20 days or more.
	(530) 251-8173 (EMP)	**EMP** for nonviolent misdemeanants where incarceration has adverse effect on small baby or child, long-term job or upcoming retirement, or health. No minimum or maximum; no GT/WT credit. Transfers accepted.
Los Angeles	(213) 893-5345	**WR** generally for short-term offenders. **WKR** program available.
	(213) 893-5369 (EMP)	**CP** available. **EMP** generally for nonviolent offenders; generally no drug sales or manufacture and no sex crimes. May work; alcohol & drug testing done. Court-sentenced participants must serve entire sentence; jail participants receive credits. **Note:** No prequalification for these programs. Persons who surrender to county jail directly through the counter book surrender desk will be evaluated more promptly. The county releases

		county jail inmates after they have served a percentage of their sentence, with routine changes in release percentages. WR is in place because of severe jail overcrowding, and the Sheriff's Department does not anticipate any change in the foreseeable future.
Madera	(559) 675-6739	**WF**/**WKR** (not restricted to weekends), and **CP** programs available. For WF, generally must have more than 60 days to serve; must test clean, be employed, and work 30 hours per week.
	(559) 675-6739 x223 (EMP only)	**EMP** with no minimum, maximum. No GT/WT credit. Transfers accepted. **Community Service Program** if court ordered.
Marin	(415) 499-6240 (WR)	**WR** (called Adult Offender Work Program—AOWP) for sentences of less than 29 days; minimum 1 day per week. 1 day of work substitutes for 1 day of jail.
	(415) 499-6596 (CP/EMP only)	**CP**/**EMP** for offenders ineligible for AOWP, with sentence of at least 30 days or more. **CSW** available. See http://www.co.marin.ca.us/depts/PB/main/altprogs.cfm#EHA.
Mariposa	(209) 966-3616 (WKR & WF)	**WKR** not restricted to weekends; requires overnight custody; 4-month maximum sentence. **WF** for sentences of 10 days or more; maximum 10 hours per day plus travel; generally no self-employment or sex offenders.
	(209) 966-3612 (Probation-CSW/EMP)	**CSW** on court order. **EMP** on case-by-case basis; some mountainous areas excluded. Minimum of 10 days; no maximum. No GT/WT credit. Transfers accepted.
Mendocino	(707) 463-4092 (WR)	**WR** for sentences of 45 days or less when 1/3 of sentence served. Generally, no history of suicide attempts or mental problems.
	(707) 463-4271 (Probation-WF)	**WF** for maximum of 6 days per week and generally minimum of 36 hours per week; must have served 20 days of sentence. Work over 8 hours a day must be approved; maximum 12 hours per day plus travel; work within 1 hour or less from jail. Valid self-employment accepted; generally no employment from relatives. No transfers. Felons must be court approved.
Merced	(209) 385-7520	**Work in lieu of jail** with no minimum or maximum sentence; 1-7 days per week. No sex crimes. **WKR** for sentences of 120 days or less; weekends only. **EMP** for 30 days to 1 year (exceptions considered). GT/WT credit. Transfers accepted. No sex offenders or weapons charges.
Modoc	(530) 233-6526	**WF** excludes 1st DUI offense; no weekends. **WKR** for sentences of at least 48 hours in custody; not restricted to weekends; no GT/WT credit.
Mono	(760) 932-5570	**Alternative Work Program** after 15-30 days served; may work inside or outside jail, or both. Reduces sentence 1 day for each day (8-10 hours) worked and fee paid. No violent offenders or repeat DUIs.
	(760) 932-5572 (EMP only)	**EMP** with no GT/WT credit.
Monterey	(831) 759-7230 (831) 784-5771 (EMP)	**SWAP** for sentences of 40 days or less; 2 days (16 hrs) per week minimum; 1 day of work substitutes for 1 day of jail. No GT/WT credit. Transfers accepted. No Pen C §§245, 186.22 or Health & S C §§11351-11351.1, 11352. Possible admittance with court recommendation for Pen C §§314, 261.5, 647.6, 647(b). **EMP** for 20 days to 1 year. No GT/WT credit. Transfers accepted.
Napa	(707) 253-4401 or (707) 253-6016	Several **WKR** programs with various eligibility and programming requirements. See county department of corrections. **WF** on case-by-case basis; no sex offenders; minimum of 10 and maximum of 32 hours per week within 50-mile range; nonworking hours spent in custody. No GT/WT credit. **EMP** may be available in future. Call for information.
Nevada	(530) 265-1200	**WR** requires no overnight confinement. No violent or sex offenders.

	1200 (Probation-WR) (530) 265-1471 (Sheriff-WF, WKR) (530) 470-2771 (EMP)	**WF** for offenders with sentences of 120 days or less; allows 12 hours maximum per day including commute; up to 6 days per week; must have set schedule. **WKR** not limited to weekends. **EMP** for 20 days to 1 year. No GT/WT credit.
Orange	(714) 935-6203 (Sheriff-CSW) (714) 796-0426 (EMP)	**CSW** for female offenders with sentences of 90 days or less and male offenders with sentences of 76 days or less; substitutes for incarceration. **EMP** for 4 days to 1 year. No GT/WT credit. Case-by-case exclusions.
Placer	(916) 543-7400	**WKR** when court ordered with ½ sentence served, but early assignment possible depending on jail population. No minimum or maximum sentence requirements; not restricted to weekends. **WR** with 1 day of jail credited for every 8-10 hours of work. No transfers. **Drug Court Track III Program** for defendants with substance abuse problems. Offense need not be drug-related. One year of outpatient counseling 4 times per week; court review every 30 days. Sentence, but not conviction, set aside on successful completion. **EMP** with no GT/WT credit. Transfers accepted. Note: All programs potentially available to both low- and medium-risk offenders as assigned by Intake Officer. No serious or violent or repeat DUI offenders; no violations of Pen C §§273.5, 667.5, or 1192.7(c). See http://www.placer.ca.gov/Departments/Probation/Alternative%20Sentencing%20Programs.aspx.
Plumas	(530) 283-6267 (WR, WKR) (530) 283-6200 (Probation-WF & House Arrest)	**WR** available 7 days a week; no overnight confinement; no serious medical problems. **WKR** when court ordered. **WF** for sentences of 10 days or more; minimum 20 hours per week; maximum 12 hours per day with travel; maximum 6 days per week. No sex or violent offenders. School requires 12 credits and no nights. **House Arrest** program when court ordered for low-risk offenders; no GT/WT credit. Random check-in calls and drug and alcohol testing conducted.
Riverside	(951) 922-7330 (WR) (951) 922-7638 (EMP)	**WR & WKR** with 2-day minimum, no maximum sentence for in-county participants; 30-day maximum sentence for out-of-county participants. An 8-10 hour workday equals 1 jail day. No DUI with injury or violent or sex offenders; maximum 2 manufacturing charges. **Sheriff's Alternative Labor Program** permits work by the hour, with 1 day of jail credit for 8 hours of work. **EMP** for 1 day to 1 year; minimum12 hours a day in house. Basic analog phone line only. GT/WT credit. Transfers accepted. No excessive failures-to-appear or violent offenders. See http://www.riversidesheriff.org.
Sacramento	(916) 874-1415 (Sheriff's Work Project, Power Program) (916) 567-3114 (Alternative Sentencing Project) (916) 874-1495 (EMP)	**Sheriff's Work Project** for sentences of 90 days or less (without credits) or 60 days or less (with credits). Minimum 7 hours work per day; minimum 1 day per week. No transfers. **Power Program** offers educational and pre-employment training. **EMP** for maximum of 1 year. Generally, must be employed or have medical condition needs. **Alternative Sentencing Project** requires court order; no arson or sex offenders. Work done for nonprofits and public organizations. See http://www.sacsheriff.com/organization/correctional_&_court_services/work_release/index.cfm.

San Benito	(831) 636-4060 (SWAP/WF) (831) 636-4070 (Probation-EMP)	**SWAP** for sentences of 40 days or less; 7 days per week. GT/WT credit. **WF** for minimum of 31 days, if court-approved. Maximum day including commute is 12 hours. **EMP** with no GT/WT credit.
San Bernardino	(909) 473-2660	**SWAP** available; no overnight confinement. **EMP** with minimum of 5 days, maximum 1 year and consecutive. GT/WT credit. Both programs accept transfers if authorized.
San Diego	(619) 615-2650 (Sheriff-WKR) (619) 574-5570 (Probation-WF) (619) 615-2487 (Sheriff-WR) (619) 615-2402 (Sheriff-CP) (858) 514-8477 (Probation-EMP) (858) 560-3258 (Probation-CSW)	**WKR** when court ordered; not restricted to weekends. **WF** with 10-day minimum; 1 year maximum. Employed for minimum of 35 hours/maximum of 72 hours per week. **WR** with court order for 30 days or less; no history of violence, domestic violence, sale of drugs; must be fit to work. No GT/WT credit; no transfers. **CP** after ½ sentence served; may extend to 2 years. Not eligible if more than 3 days good time lost or parole revoked in past 3 years. No warrants or holds. **EMP** with no minimum or maximum sentence; case-by-case exclusions, but generally no arson, violent, or predatory crimes. Out-of-supervision inmates may be charged with escape. **CSW** available.
San Francisco	(415) 575-6450 (415) 575-6412 (EMP)	**SWAP** generally limited to 90 days or less by court order or last 60 days of jail sentence; minimum 2 days per week. Specifically designed programs (below) for targeted classes of defendants; check with Sheriff's Department for details and eligibility. Transfers accepted. **PREP** program for high-school or GED graduates makes job placements; 5 days per week. **Charter School** program for GED or high-school diploma; must attend classes 5 days per week (transfers accepted). Classes available on Saturdays. No fees. **Special Study Program** allows participants to take classes once per week to complete degree. **Women's Reentry Program** gives support such as counseling, job preparation, child care, and help with governmental services. Coordinates exit strategies. **Drug & Alcohol Program** is state certified. No fees. **Anger Management Program** available. **CP** after 70% of sentence served; placed for 6 months and assigned to drug treatment, counseling, and other rehabilitation programs. **30-Day Early Release Program** available for screened participants. **EMP** for 30 days to 1 year. May join with **Nova Program,** which accepts violent offenders and provides counseling and job and housing services. GT/WT credit. Transfers accepted. See http://www.sfsheriff.com/jailalt.htm.
San	(209) 468-	**AWP** for sentences of 120 days or less; 2 days' jail credit for each 8-10 hours worked. GT/WT

Joaquin	4620	credit.
	(209) 468-4620 (Furlough)	**WF**/**SF** for sentence of 30 days or more. Nighttime confinement (shift work possible). GT/WT credit. **CP/CSW** available. **EMP** for 1 year maximum; 30 days minimum. Must live and work in county. GT/WT credit. No repeat drug or violent offenders. See http://www.sjgov.org/sheriff/custrules.htm.
San Luis Obispo	(805) 781-4635 (805) 781-4609 (AWP only) (805) 781-4639 (EMP)	**AWP** available 7 days per week; maximum of 20 days. Transfers accepted. **WKR** program for 20 days or less; not restricted to weekends; must be employed. **EMP** for 10 days to 1 year. No violent or sex offenders. GT/WT credit. Transfers accepted.
San Mateo	(650) 363-4655 (SWAP) (650) 363-3412 (WF/EMP) (650) 363-4474 (WKR)	**SWAP** generally for 90 days or less. No overnight confinement. Work available 7 days per week. **WF** for 60 days or more. No transfers. **WKR** program not restricted to weekends; hours as court ordered. **EMP** for minimum of 30 days. GT/WT credit. Transfers accepted. Other alternative sentencing options are being considered. Call for more information.
Santa Barbara	(805) 681-4221	**SWAP** through Sheriff's Department for 60 days or less. **CP** through Probation Department. **EMP** for maximum of 1 year. GT/WT credit. Case-by-case exclusions. A **Day Reporting Program** may be available to provide a variety of programs for nonviolent offenders, such as job training and substance abuse programs. Check with Sheriff's Department.
Santa Clara	(408) 957-5871 (408) 435-2090 (Probation-EMP only)	**WKR** for sentences of 120 days or less on court order only; not restricted to weekends. **Public Service Program** for sentences of 120 days or less available. 5 days per week mandatory. **Day Reporting Program** for sentences of 120 days or less; generally requires 20 hours education and 20 hours work per week. **Regimented Corrections Program** (substance abuse recovery) available. Call for information. **EMP** for minimum of 30 days. Generally excludes drug sale, domestic violence, sex crimes, violent crimes, gang members, and prior escapees. No Pen C §4019 credit. No transfers.
Santa Cruz	(831) 454-2434 (831) 454-2846 (EMP)	**WR** for sentences of 90 days or less; available 7 days per week. 1-work-day minimum for offenders with sentences of 9 days or less; 2-work-day minimum for offenders with longer sentences. No violent or sex offenders; no gang members; no behavior problems. Fee charged; GT/WT credit; transfers may be accepted. See "corrections" at www.scsheriff.com. **EMP** available for juveniles or pretrial only.
Shasta	(530) 245-6086 (530) 229-8408 (EMP)	**Sheriff's Office Work Release Program** available Mon.-Fri. Transfers may be accepted. **EMP** for 4-day minimum. GT/WT credit. Some transfers accepted. **Day Reporting** (check in and leave) for last ¼ of any sentence of 10 days or more, if no missed days; serve at least 4 days in program; ¼ credit in hours will also be credited against any sentence for *voluntary* participation in program such as AA, NA, education, and training.
Sierra	(530) 289-3700 (530) 289-3277 (EMP)	**WR** for nonviolent offenders; one 5-day work week (8-hour days) earns 1 day off sentence. GT/WT credit. **EMP** available.

Siskiyou	(530) 842-8156 (SWAP/WF) (530) 841-4155 (Probation-Felony EMP) (530) 841-4230 (EMP)	**SWAP** for 30 days or less; work 5 days per week for Caltrans, 8 hours per day. **WF** for minimum of 10 days; must not be self-employed; maximum 12 hours out of jail. **EMP** for minimum of 5 days for misdemeanors; case-by-case determination for felonies. No minimum or maximum; must be employed or in treatment program.
Solano	(707) 421-7183	**WR** with minimum participation of 2 days; maximum participation of 30 days. **WF** when court ordered; may work at only one location and within county or surrounding counties. **EMP** with no GT/WT credit. Transfers accepted.
Sonoma	(707) 565-8291 (WR) (707) 578-6042 (WF/CP/EMP)	**WR** for 6 days per week; minimum 1 day per week; for sentences of 90 days or less. See www.sonoma-county.org/probation/adult_services/jail_alternatives.htm **WF/CP/EMP** for 30 days or more. EMP maximum of 1 year; no GT/WT credit. CP available after ½ of sentence served.
Stanislaus	(209) 567-4200	**Alternative Work Program (AWP)** with maximum sentence of 135 days and no GT/WT credit; 2-for-1 program. **EMP** for 30 days or more; GT/WT credit. **Sheriff's Parole** with 1/3 of sentence served.
Sutter	(530) 822-7300 or (530) 822-7302	**Outside Work Release (OWR)** program available for sentences of 60 days or less; maximum time 45 days with credit. No violent crimes or sex offenders. Generally no transfers. See OWR agreement at http://sheriff.co.sutter.ca.us/PDF/OWR_agreement.pdf. **WF/SF** available; no Sundays or holidays; no violent or drug crimes or sex offenders. Must arrange transportation; offender cannot drive. **EMP** for inmates with medical issues.
Tehama	(530) 527-4052, x3023	**SWAP/WF/CP** available; generally no transfers. **EMP** available.
Trinity	(530) 623-1204 (Probation-EMP) (530) 623-8129 (Sheriff-SWAP/ WKR)	**EMP** with no GT/WT credit. **SWAP** on case-by-case basis; transfers with approval of judge; GT/WT credit unless other county calculated sentence. **WKR** restricted to weekends.
Tulare	(559) 730-2641 (WKR /SWAP) (559) 735-1669 (Drug & Alcohol, Day Reporting) (559) 713-2825 (EMP)	**WKR** program with 180-day maximum; available Sat. & Sun. unless judge assigns other days; requires nights in custody. **SWAP** with maximum of 210 days; minimum time determined by length of sentence. May work as many as 7 days per week. **Day Reporting Program** available 5 days per week with 2 days per week spent in school, counseling, or job training and 3 in work. Maximum of 210 days. **Drug & Alcohol Program** for medium-risk offenders at in-custody, residential facility. **EMP** for low- to medium-risk adult offenders.
Tuolumne	(209) 533-7522	**WF/SWAP** with maximum of 30 days; SWAP out-of-county maximum of 45 days. **Jail Overflow Program (JOP)** available. Offenders report each morning to jail, work, report back in evening, and then go home. JOP available only when jail overcrowded. **Note:** Failure to report for SWAP is probation violation, but failure to report for JOP can be charged as escape.

Ventura	(805) 654-2382 (WF/WR/Direct Work) (805) 981-5508 (Probation-Home Supervision) (805) 981-5504 (EMP)	**WF/SF** available with 235 beds. Facility includes **STAGES,** residential drug treatment program. **WR** for low-risk offenders; maximum of 30 days' credit for work done for governmental agencies. **Direct Work** with court order; work for nonprofit, community-based organizations or governmental agencies. **EMP** for juveniles only. See http://probation.countyofventura.org/AdultFacilities.htm.
Yolo	(530) 666-8686 (Probation-Alternative Sentencing Program) (530) 668-5260 (Sheriff-SWIP) (530) 406-5367 (EMP)	**Alternative Sentencing Program** for sentences generally no more than 60 days. Transfers accepted. See http://www.yolocounty.org/Index.aspx?page=1322. **Sheriff's Working Inmate Program (SWIP)** for no more than 45 days; prefer 2 days (8 hours each) per week minimum of county work; no confinement. **EMP** for 2 days to 1 year for nonviolent offenders.
Yuba	(530) 749-7740 (Jail-WF/WKR) (530) 749-7550 (Probation-Adult Offender/CSW)	**WKR** when court ordered; not restricted to weekends. **WF** for 40-hour work week but up to 7 days per week or 12 hours per day might be accepted. Generally no felons. Reciprocal transfers accepted. **Adult Offender Work Program (AOWP)** accepts no serious, violent, sex, or long-drug-history offenders. Maximum of 15 days. **CSW** accepts offenders with medical problems.

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VICTIM RESTITUTION

ANTONIO R. SARABIA II

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§40.1 I. OVERVIEW

The original purpose of victim restitution was to rehabilitate the defendant. *People v Richards* (1976) 17 C3d 614, 620, 131 CR 537, overruled on other grounds in *People v Carbajal* (1995) 10 C4th 1114, 1126 n13, 43 CR2d 681. See also *Kelly v Robinson* (1986) 479 US 36, 52, 93 L Ed 2d 216, 230, 107 S Ct 353. In California, victim restitution has been transformed from a simple sentencing issue into a powerful right of the victim. Now all persons who suffer losses as a result of criminal activity have the right to restitution from those convicted of that crime. Cal Const art I, §28(b); Pen C §1202.4(a)(1); Welf & I C §730.6. A sentence without victim restitution is invalid. *People v Rowland* (1997) 51 CA4th 1745, 1751, 60 CR2d 351.

Criminal defense counsel should realize that restitution can affect many areas of practice, including the fee agreement, bail, plea bargaining, sentencing, and counsel's postsentencing responsibilities. For prosecutors, restitution presents an opportunity to help victims in a positive way. The district attorney is authorized to provide specific help to victims to aid in the collection of restitution. Pen C §1202.4(h).

The victim's right to restitution cannot be deferred pending civil or administrative remedies. *In re Brittany L.* (2002) 99 CA4th 1381, 1390, 122 CR2d 376. A release given to the defendant by the victim in a civil case does not bar restitution. *People v Bernal* (2002) 101 CA4th 155, 123 CR2d 622.

A plea agreement may not fix victim restitution at less than the full amount due, because the prosecution may not negotiate victim restitution. *People v Brown* (2007) 147 CA4th 1213, 1225, 54 CR3d 887.

Other types of restitution, the restitution fine, and reimbursement from the state Restitution Fund are discussed in §§38.12-38.14.

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Source: Criminal Law/California Criminal Law Procedure and Practice/40 VICTIM RESTITUTION/ II. VICTIM'S RIGHT TO RESTITUTION/§40.2 A. Victim Defined

II. VICTIM'S RIGHT TO RESTITUTION

§40.2 A. Victim Defined

The victim of a crime who has sustained economic loss as a result of that crime is entitled to restitution from the defendant. Cal Const art I, §28(e); Pen C §1202.4.

The term "victim" includes any individual who has suffered direct or threatened physical, psychological, or financial harm as the result of criminal activity (Cal Const art I, §28(e)); the immediate surviving family of the actual victim (Pen C §1202.4(k)(1)); and any person who has sustained economic loss as a result of a crime and who meets any of the following conditions (Pen C §1202.4(k)(3)):

- At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim. See, *e.g.*, *People v Giordano* (2007) 42 C4th 644, 663, 68 CR3d 51 (spouse); *People v O'Neal* (2004) 122 CA4th 817, 820, 19 CR3d 202 (brother of child molestation victim entitled to restitution for counseling).
- At the time of the crime was living in the household of the victim.
- At the time of the crime was a person who had previously lived in the household of the victim for at least 2 years in a relationship substantially similar to a relationship listed above.
- Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime.
- Is the primary caretaker of a minor victim.

Ø **Note:** While restitution is generally limited to economic losses, this limitation does not apply to a felony conviction for child molestation. Pen C §1202.4(f)(3)(F).

A victim of crime does not have to be an individual. The term "victim" includes any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental agency, and other legal or commercial entity which is the "direct victim" of a crime. Pen C §1202.4(k)(2); *People v Slattery* (2008) 167 CA4th 1091, 1095, 84 CR3d 672 (hospital that treated victim not direct victim of defendant's crime). See, *e.g., People v Crow* (1993) 6 C4th 952, 26 CR2d 1 (county social services agency awarded restitution after defendant convicted of welfare fraud); *People v Bartell* (2009) 170 CA4th 1258, 88 CR3d 844 (bank was direct victim when defendant forged checks drawn on bank); *People v Ortiz* (1997) 53 CA4th 791, 62 CR2d 66 (trade association representing music labels was direct victim of defendant's scheme to sell counterfeit tapes).

Government agencies carrying out their assigned tasks are not "victims" under Pen C §1202.4. See, *e.g., People v Martinez* (2005) 36 C4th 384, 30 CR3d 779 (no restitution to state agency for cleanup costs of methamphetamine lab); *People v Torres* (1997) 59 CA4th 1, 4, 68 CR2d 644 (law enforcement agency cannot recover money expended in investigation); *People v Burnett* (1978) 86 CA3d 320, 323, 150 CR 126 (no restitution for cost of extradition); *People v Baker* (1974) 39 CA3d 550, 559, 113 CR 248 (no restitution for cost of prosecution). But see Pen C §1202.4(k)(5) ("victim" may be any governmental entity that is responsible for repairing or replacing private or public property that has been defaced with graffiti and has sustained economic loss as result of violations of certain Penal Code sections).

However, restitution may be available to government agencies through other provisions. For example, when restitution is ordered as a condition of probation under Pen C §1203.1, the court may order the defendant to reimburse a governmental entity for losses "resulting from unusual expenses directly incurred because of defendant's conduct." *People v Rugamas* (2001) 93 CA4th 518, 113 CR2d 271. Restitution to government agencies has been authorized for:

- Costs associated with investigating violations of the weights and measures law (Bus & P C §§12001-13741). See Bus & P C §12015.5; *People v Ozkan* (2004) 124 CA4th 1072, 1078, 21 CR3d 854.
- Expenses incurred in putting out fires and responding to emergencies and accidents. See Govt C §53150; Health & S C §13009; Pen C §§422.1, 1203.1(e), 1203.1*l*.
- The cost of medical or psychological treatment for a minor victim of sexual assault. Pen C §1203.1g.
- The cost of a medical examination performed on a minor victim of child abuse or neglect, or sexual assault for

evidentiary purposes. Pen C §1203.1h.

- The cost of medical or psychological treatment for an elderly victim of assault or battery. Pen C §1203.1j.
- The cleanup and disposal costs involved in dismantling a drug lab site. Health & S C §§11470.1, 11470.2.
- Costs incurred in locating and returning a child to the custodial parent in child theft cases. Fam C §3134; Pen C §278.6(c).

When an insured incurs the loss and is reimbursed by an insurance company, the company is not entitled to restitution. *People v Birkett* (1999) 21 C4th 226, 87 CR2d 205. But if the insurance company is the party that initially incurs the loss by paying sums directly to the criminal defendant as the result of a fraud *directed at* the insurance company, it is entitled to restitution. *People v O'Casey* (2001) 88 CA4th 967, 106 CR2d 263; *People v Moloy* (2000) 84 CA4th 257, 100 CR2d 676.

The crime charged can determine what entity the victim is. *People v Saint-Amans* (2005) 131 CA4th 1076, 32 CR3d 518, involved a commercial burglary from a bank. The account owner was reimbursed by the FDIC. The bank offered proof that it lost $10,000. Since the crime was commercial burglary, the bank was the victim and was entitled to restitution. 131 CA4th at 1086.

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§40.3 B. How the Sentencing Determination Affects Victim Restitution

The extent of the trial court's discretion to impose restitution is affected by whether the defendant is sentenced to prison or placed on probation.

Defendant sentenced to prison. Restitution granted in conjunction with a prison sentence without probation is limited to losses caused by the criminal conduct of which the defendant is convicted. *People v Lai* (2006) 138 CA4th 1227, 1248, 42 CR3d 444. A defendant sentenced to prison cannot ordinarily be required to pay restitution for losses not actually connected to the defendant's crime (*People v Scroggins* (1987) 191 CA3d 502, 506, 236 CR 569) nor for losses arising out of a charge of which the defendant is acquitted (*People v Percelle* (2005) 126 CA4th 164, 178, 23 CR3d 731). However, if a defendant sentenced to prison without probation gives a waiver under *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696, restitution may extend to victims under counts of which the defendant was not convicted. See *People v Beck* (1993) 17 CA4th 209, 215, 21 CR2d 250. On *Harvey* waivers generally, see §38.11; on *Harvey* waivers and restitution, see §40.4.

Restitution as condition of probation. If a defendant is granted probation, the discretion of the court to order restitution as a condition of probation is quite broad. The court's authority is limited only by the requirement that the restitution condition be reasonably related either to the crime of which the defendant was convicted or to the goal of deterring future criminality. Pen C §1203.1(j); *People v Giordano* (2007) 42 C4th 644, 663 n7, 68 CR3d 51; *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681. See also Welf & I C §730(b); *In re G.V.* (2008) 167 CA4th 1244, 1249, 84 CR3d 809 (juveniles). Under Pen C §1203.1(j), courts can order as a condition of probation restitution to victims of noncriminal conduct related to defendant's crime, victims of dismissed and uncharged counts, and victims of conduct that resulted in acquittal. See *Carbajal,* 10 C4th at 1120. For further discussion of restitution and probation, see §40.16.

Ø **Note**: Some of the discussion in this chapter related to victim restitution may not apply to restitution ordered as a condition of probation. For example, the definition of "victim" (see §40.2) and the types of losses covered by victim restitution (see §40.6) do not limit restitution ordered as a condition of probation.

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§40.4 C. Victim Restitution May Be Based on Dismissed Counts

A defendant may be required to pay victim restitution to victims in dismissed counts if the conviction on the remaining count(s) is made with a *Harvey* waiver. Pen C §1192.3; *People v Ozkan* (2004) 124 CA4th 1072, 1078, 21 CR3d 854. See *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696 (when plea bargain includes dismissal of some counts, trial court may not use dismissed counts as basis for imposing punishment without waiver by defendant). With a waiver, the plea agreement need not specifically refer to restitution on the dismissed counts in order for restitution to be imposed. *People v Campbell* (1994) 21 CA4th 825, 830, 26 CR2d 433.

A *Harvey* waiver may encompass unfiled charges; when it does, the court may base a restitution order on these uncharged offenses. *People v Goulart* (1990) 224 CA3d 71, 273 CR 477. When the defendant denies having committed uncharged or dismissed offenses, the prosecution has the burden of proving the defendant's culpability by a preponderance of the evidence. *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32.

> Ø **Note:** Disputes over culpability can be avoided by having the plea agreement pinpoint the matters on which the court may order restitution. *People v Moser* (1996) 50 CA4th 130, 133, 57 CR2d 647.

The court may make a valid restitution order under a *Harvey* waiver even when it does not place the defendant on probation. See *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250 (defendant sentenced to prison). Note that a juvenile defendant has been ordered as a condition of probation under Welf & I C §730 to pay restitution on dismissed counts even without a *Harvey* waiver. See *In re T.C.* (2009) 173 CA4th 837, 843, 93 CR3d 447.

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§40.5 D. When Amount of Victim Restitution May Be Determined

The amount of victim restitution may be determined at any time after a conviction. If the amount cannot be determined at the time of sentencing, the court retains jurisdiction to determine and set the amount. Pen C §§1202.4(f), 1202.46; *People v Amin* (2000) 85 CA4th 58, 101 CR2d 756 (plea bargain). In juvenile delinquency cases, when the amount of loss cannot be ascertained at the time of sentencing, the court can direct the probation officer to determine the amount of restitution. Welf & I C §730.6(h). See *In re Karen A.* (2004) 115 CA4th 504, 511, 9 CR3d 369.

If a court has ordered restitution in an amount to be determined, neither the passage of several years from initial sentencing nor the defendant's completion of his or her sentence causes the court to lose jurisdiction for the purposes of determining the amount of restitution. *People v Bufford* (2007) 146 CA4th 966, 53 CR3d 273. Even if the court fails to retain jurisdiction, a restitution order can be modified at the request of the prosecutor, the victim, or the court on its own motion. Pen C §1202.46; *People v Moreno* (2003) 108 CA4th 1, 9, 132 CR2d 918.

Victim restitution may be subsequently calculated and ordered even if a defendant is not advised of it at the time of sentencing. Pen C §1202.46; *Moreno,* 108 CA4th at 9 (sentence that fails to impose restitution is invalid sentence that can be corrected any time). In *People v Collins* (2003) 111 CA4th 726, 3 CR3d 889, the court of appeal held that the trial court's failure to advise the defendant of direct victim restitution, though error, did not entitle him to withdraw his plea when the amount of restitution ordered was within the range of restitution fines that defendant was advised he might have to pay.

Determination of the amount of restitution after remand is not double jeopardy, and the doctrines of estoppel and waiver do not apply to bar the determination. *People v Harvest* (2000) 84 CA4th 641, 101 CR2d 135.

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Source: Criminal Law/California Criminal Law Procedure and Practice/40 VICTIM RESTITUTION/§40.6 E. Types of Losses for Which Restitution May Be Ordered

§40.6 E. Types of Losses for Which Restitution May Be Ordered

Under Pen C §1202.4(f), all types of economic losses are eligible for restitution. Although Welf & I C §730.6(h) lists only certain economic losses for which a juvenile may pay restitution, this list is not exclusive and restitution in juvenile cases is meant to include all economic losses. *In re M.W.* (2008) 169 CA4th 1, 86 CR3d 545.

Economic losses include the following:

- The value of stolen or damaged property. Pen C §1202.4(f)(3)(A). "Value" is usually replacement value and may be determined by reference to the cost (*People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1), but if the property (*e.g.,* securities) has appreciated, the appreciated value may be considered (*People v Tucker* (1995) 37 CA4th 1, 4, 44 CR2d 1).
- Medical expenses (Pen C §1202.4(f)(3)(B)), including future medical expenses. *People v Phelps* (1996) 41 CA4th 946, 48 CR2d 855. See *People v Keichler* (2005) 129 CA4th 1039, 29 CR3d 120 (defendant properly ordered to reimburse victim for cost of Hmong healing ceremonies, which were Hmong equivalent of Western medical expenses).
- Mental health counseling expenses. Pen C §1202.4(f)(3)(C).
- Lost wages and profits. Pen C §1202.4(f)(3)(C)-(D). Examples are wages lost because of attending court proceedings, even when testimony was not required (*People v Moore* (2009) 177 CA4th 1229, 1231, 99 CR3d 555); lost sick leave (*In re K.F.* (2009) 173 CA4th 655, 666, 92 CR3d 784); future lost wages (*People v Millard* (2009) 175 CA4th 7, 30, 95 CR3d 751); attending trial (*People v Crisler* (2008) 165 CA4th 1503, 1509, 81 CR3d 887); and psychological trauma (*People v Brasure* (2008) 42 C4th 1037, 1075, 71 CR3d 675); and profits lost because of criminal counterfeiting (*People v Ortiz* (1997) 53 CA4th 791, 800, 62 CR2d 66). When computing lost profits, the correct measure is gross profits. *People v Thygesen* (1999) 69 CA4th 988, 994, 81 CR2d 886.
- Relocation and security expenses. Pen C §1202.4(f)(3)(I)-(J). See *People v Mearns* (2002) 97 CA4th 493, 501, 118 CR2d 511 (relocation expenses include difference between cost of new residence and sale price of old residence).
- Expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime. Pen C §1202.4(f)(3)(K).
- Child support to the children of a murder victim. Pen C §1203.1(j); *People v Clark* (1982) 130 CA3d 371, 384, 181 CR 682.
- Loss of future economic support to surviving spouse caused by murder of spouse. *People v Giordano* (2007) 42 C4th 644, 68 CR3d 51.
- Investigative expenses incurred by the victim related to the criminal case (*People v Ortiz* (1997) 53 CA4th 791, 797, 62 CR2d 66) or in a civil case between the victim and the defendant based on the same facts as the conviction (*People v Maheshwari* (2003) 107 CA4th 1406, 1409, 132 CR2d 903).
- Loss of use. *People v Thygesen* (1999) 69 CA4th 988, 995, 81 CR2d 886.
- Lost employee time (measured by costs of salary and benefits of employees who must spend time dealing with defendant's crime). *In re Johnny M.* (2002) 100 CA4th 1128, 123 CR2d 316.
- Attorney fees incurred by the victim:
- To establish the victim's right to restitution (Pen C §1202.4(f)(3)(H));
- To preserve the defendant's assets so that they may be available to pay restitution (*People v Lyon* (1996) 49 CA4th 1521, 1525, 57 CR2d 415);
- To collect on a restitution order in a civil action (Pen C §1202.4(f)(3)(H); *Downen's, Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 CA4th 856, 103 CR2d 644); and
- To pursue a civil action against the defendant based on the same facts as the crime (*People v Fulton* (2003) 109 CA4th 876, 135 CR2d 466; *People v Maheshwari* (2003) 107 CA4th 1406, 132 CR2d 903).

Ø **Note:** The rule on recovery of attorney fees applies in juvenile cases despite the absence of a statutory provision authorizing recovery of fees in juvenile cases. *In re Imran Q.* (2008) 158 CA4th 1316, 71 CR3d 121.

Noneconomic losses caused by violation of Pen C §288 (lewd acts with children) are also eligible for restitution under Pen C §1202.4(f)(3)(E).

Ø **Note:** Interest of 10 percent per year accrues on restitution orders made under Pen C §1202.4. Pen C §1202.4(f)(3)(G). Whether this rate applies to restitution ordered under other provisions is undecided.

Other statutes provide for restitution in specific situations, for example:

- Pen C §243(e)(2)(B) (if probation granted after battery conviction, restitution for victim's counseling costs and other reasonable expenses);
- Pen C §262(d)(2) (if probation granted after rape conviction, restitution for victim's counseling costs and other reasonable expenses);
- Pen C §273.5(h)(2) (if probation granted after specified domestic violence offenses, restitution for victim's counseling costs and other reasonable expenses);
- Pen C §273.6(h)(2) (if probation granted after conviction of violating protective order, restitution for victim's counseling costs and other reasonable expenses);
- Pen C §350(i) (restitution to the trademark owner after conviction for counterfeiting);
- Pen C §416(b) (restitution for damage to property after failure to disperse);
- Pen C §484.1(b) (restitution to pawnbroker for losses caused by false representation);
- Pen C §502(e)(1) (expenditures to determine whether a computer system was damaged by a computer crime) (statute uses term "compensatory damages" instead of "restitution");
- Pen C §1202.4(q) (restitution for victims of human trafficking (see Pen C §236.1));
- Pen C §1202.4(r) (restitution to owner, producer, or trade association in cases of criminal recording of performances);
- Pen C §1203.1j (if probation granted after conviction of assault or battery against elderly victims, restitution for medical or psychological treatment);
- Ins C §1871.4(b) (restitution to insurance carrier for fraudulently obtained workers' compensation benefits; see also *People v Amin* (2000) 85 CA4th 58, 101 CR2d 756); and
- Bus & P C §7159.14(c) (restitution for fraud in connection with repair of damage to structures caused by natural disaster).

Ø **Note:** Although not technically binding on a criminal trial court, CC §1431.2(b) contains definitions of economic and noneconomic damages that are helpful. "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities. "Noneconomic damages" means subjective, nonmonetary losses, including but not limited to pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.

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§40.7 F. Relation Between Victim Restitution and Fines, Penalties, and Assessments

All monetary payments, monies, and property collected from any defendant ordered to pay victim restitution must be applied to that victim restitution before being used to pay any other fine or penalty. Cal Const art I, §28(b)(13)(C).

There is no penalty assessment on victim restitution. *People v Martinez* (1999) 73 CA4th 265, 268, 86 CR2d 346. A restitution fine is not reduced by the amount of victim restitution. *People v Vazquez* (2009) 178 CA4th 347, 355, 100 CR3d 351; *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134. Statutory penalties may not be made part of a restitution order. *People v Boudames* (2006) 146 CA4th 45, 52 CR3d 629.

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§40.7A G. Prosecutor's Role

Prosecutors have a unique relationship to victims. Victims have a constitutional right to confer with the prosecutor about the arrest of and the charges against the defendant. Cal Const art I, §28(b)(6). Prosecutors are in the best position to advise victims of their constitutional right to representation under Cal Const art I, §28(c)(1), and to ensure that victims are notified of the restitution hearing.

A prosecutor may take positions that support the victim (*e.g.,* in a discovery dispute) without representing the victim because the prosecution may act to protect "its own interest in promoting victim cooperation." *People v Superior Court (Humberto S.)* (2008) 43 C4th 737, 754, 76 CR3d 276 (no recusal of prosecutor for conflict of interest because alignment of interests of victim and prosecution on particular issue does not mean prosecutor represents victim).

Although the prosecutor must be present at all restitution hearings (*People v Dehle* (2008) 166 CA4th 1380, 83 CR3d 461), a prosecutor cannot waive or reduce the amount of restitution to which a victim is entitled. "Victim restitution may not be bargained away by the People." *People v Brown* (2007) 147 CA4th 1213, 1226, 54 CR3d 887.

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III. RESTITUTION HEARING

§40.8 A. Notice to Defendant and to Victim

The defendant must be given notice of the restitution hearing. See Pen C §1214(b); Welf & I C §730.6(h) (minor defendant). Notice may be given to the defendant through the probation report. *People v Campbell* (1994) 21 CA4th 825, 26 CR2d 433. The probation officer is required to notify the victim of sentencing proceedings. Pen C §§679.02(a)(3), 1191.1. Since restitution is a constitutional right, a prudent prosecutor will make sure that the victim is notified of the restitution hearing as well, to avoid risking an invalid hearing.

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§40.9 B. Restitution and Insurance

The defendant's restitution obligation is the full amount of the victim's economic losses. Pen C §1202.4(f)(3). The trial court may not use reimbursements an insured victim has received from his or her own insurer or the insurer of a third party, such as a relative of the defendant, to reduce the amount of restitution the defendant owes. See Pen C §1202.4(f)(2); *People v Hamilton* (2003) 114 CA4th 932, 941, 8 CR3d 190 (defendant not entitled to credit for payments made to victim by his mother's insurer); *In re Brittany L.* (2002) 99 CA4th 1381, 1391, 122 CR2d 376 (defendant not entitled to credit for payments made to victims by their own homeowner's insurer). The trial court may credit the defendant with payments the *defendant's* insurance company makes to the victim (*People v Bernal* (2002) 101 CA4th 155, 165, 123 CR2d 622; *People v Jennings* (2005) 128 CA4th 42, 53, 26 CR3d 709) or payments the defendant's employer's insurance company makes to the victim under a policy covering the defendant. *People v Short* (2008) 160 CA4th 899, 903, 73 CR3d 154. However, the victim is entitled to restitution for the amount of attorney fees expended in obtaining payment from the defendant's insurer (*People v Pinedo* (1998) 60 CA4th 1403, 71 CR2d 151). When the insured is the parent or guardian of a minor and the restitution obligation arises out of a crime committed by the minor, the parent's or guardian's joint restitution obligation is reduced by the amount of the insurance payment. *In re Michael S.* (2007) 147 CA4th 1443, 1450, 54 CR3d 920.

Restitution for medical expenses is limited to the amount paid as distinguished from the amount billed. *People v Millard* (2009) 175 CA4th 7, 27, 95 CR3d 751 (private medical insurance); *In re Anthony M.* (2007) 156 CA4th 1010, 1015, 67 CR3d 734 (Medi-Cal). But see *Howell v Hamilton Meats* (2009) 179 CA4th 686, 690, 101 CR3d 805 (economic losses should be measured by amount billed).

A victim's release of liability to the defendant's insurance company as part of a settlement does not release the defendant from his or her restitution obligation. However, a defendant is entitled to credit for payment of economic damages to a victim through a civil settlement. *People v Short* (2008) 160 CA4th 899, 73 CR3d 154 (relationship between defendant and insurance company is such that victim is deemed to have received civil settlement "directly from the defendant" under Pen C §1202.4(a)(1)). A release cannot waive the People's right to have a defendant pay restitution. *People v Bernal* (2002) 101 CA4th 155, 160, 123 CR2d 622. However, a victim's release of the parent or guardian of a minor when a restitution order arises out of a crime committed by the minor releases the parent or guardian. *In re Michael S.* (2007) 147 CA4th 1443, 1450, 54 CR3d 920. An insurer can sue a defendant to recover losses it incurred as a result of the crime, even though the defendant already paid restitution. *Vigilant Ins. Co. v Chiu* (2009) 175 CA4th 438, 446, 96 CR3d 54.

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Source: Criminal Law/California Criminal Law Procedure and Practice/40 VICTIM RESTITUTION/§40.10 C. Victim's Rights

§40.10 C. Victim's Rights

Crime victims have important rights, including the constitutional right to restitution. Cal Const art I, §28(b)(13). The victim (or the parent or guardian of a minor victim, or the next-of-kin of a deceased victim) has the right to appear, either in person or through counsel, and be heard at each sentencing proceeding. Cal Const art I, §28(b)(8); Pen C §1191.1.

If an order of restitution is made without notice to the victim, the victim may vacate the order. *People v Green* (2004) 125 CA4th 360, 378, 22 CR3d 736. A victim also has the right to object to the terms of a plea agreement. *People v Stringham* (1988) 206 CA3d 184, 198, 253 CR 484. However, victims are not parties. Pen C §684; *People v Municipal Court (Pellegrino)* (1972) 27 CA3d 193, 207, 103 CR 645. See *People v Dehle* (2008) 166 CA4th 1380, 1386, 83 CR3d 461 (abuse of trial court's discretion to permit restitution hearing to proceed solely with victim's counsel and without district attorney present).

The law enforcement officer assigned to the case must provide a crime victim with a "Marsy Rights" card explaining the rights of crime victims enumerated in Cal Const art I, §28(b). Pen C §679.026(c).

The probation department must notify the victim of all sentencing proceedings. Pen C §1191.1. This notice must include an advisement that the victim can obtain the probation department's sentencing recommendations from the district attorney's office. Pen C §1203d. The probation officer must also provide the victim with information about victim restitution, the responsibility of the victim to provide information about losses, and the right to recovery from the state Restitution Fund. Pen C §1191.2. The victim may also receive police reports and witness statements under the California Public Records Act (Govt C §§6250-6270). Govt C §6254(f).

> Ø **Note:** Although confidentiality generally applies in cases involving juveniles, a victim may be entitled to information about the juvenile and his or her sentence, even for a related civil case. See Welf & I C §1764.2; *R.S. v Superior Court (M.L.)* (2009) 172 CA4th 1049, 1056, 91 CR3d 546.

On request, the court must provide the victim with all financial information provided by the defendant in connection with restitution. Pen C §§1202.4(f)(11), 1214(b). The Judicial Council has developed form interrogatories for use by victims who have not received complete payment on a restitution order. See CCP §2033.720(a); Form Interrogatories—Crime Victim Restitution (Judicial Council Form CR-200). The victim may serve these interrogatories on the defendant once a year as long as restitution is incomplete, whether or not the victim initiates a civil action to satisfy the restitution order. CCP §2033.720(b).

> Ø **Note:** It is crucial that the victim provide information about his or her losses to the probation officer, because the probation report is usually the foundation for the restitution order made by the trial court. Pen C §1203.1k; *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1.

> Ø **Note:** Counsel for a victim should file and serve a notice of appearance asking to be heard on and served with all matters involving victim restitution. See *People v Green* (2004) 125 CA4th 360, 378, 22 CR3d 736.

The county victim-witness assistance program, if one exists, must assist the victim in obtaining restitution if the victim requests it. Pen C §13835.5(a)(14). The court must provide the victim with a certified copy of the restitution order on request. Pen C §1214(b).

Like any other member of the public, a victim may get a copy of the probation report from the date of judgment through 60 days after the date of judgment. Pen C §1203.05(a).

Under Pen C §1202.4(f), a victim who disputes the amount of restitution may move to modify the restitution order. See also *Melissa J. v Superior Court* (1987) 190 CA3d 476, 478, 237 CR 5 (victim has standing to use procedures available to parties to assert right to restitution, including seeking appellate relief if unsuccessful in trial court).

Victims may have special rights or protections during hearings. In cases of sexual molestation of a minor or a dependent person with a substantial cognitive impairment, the victim's testimony and testimony about the victim may be closed to the public. Pen C §§859.1, 868.7(a)(1). In cases involving minor or disabled victims of sex crimes or domestic

violence, the court may take special precautions to comfort, and to prevent intimidation of, the victim. Pen C §§868.8, 1347.5. When the victim of specified crimes is a minor 15 years or younger or is developmentally disabled as a result of mental retardation, a videotape may be used if the court finds that testifying at the trial would traumatize the victim. Pen C §1346. But see *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. In certain situations, the testimony of a minor victim age 13 or younger may be by closed-circuit television. Pen C §1347. When the general public is excluded at the defendant's request, on motion of the prosecution, the victim's family may be present. Pen C §868. Victims of specified violent crimes are entitled to have support persons accompany them to hearings and trial, and may have a support person accompany them to the stand. Pen C §868.5. The presence of a support person during victim testimony does not violate a defendant's due process rights. *People v Ybarra* (2008) 166 CA4th 1069, 1076, 83 CR3d 340. Although there must be a showing of need (*People v Adams* (1993) 19 CA4th 412, 444, 23 CR2d 512), the victim also has the right to appear at parole hearings. Pen C §3043.

Victims have certain rights to confidentiality. Under the California Constitution, victims have the right to prevent disclosure of their addresses and information about medical treatment or counseling. Cal Const art I, §28(b)(4). See also Pen C §964. Defense counsel may not disclose victims' addresses to defendants. Pen C §1054.2. A victim of certain sex crimes or one forced to commit an act of prostitution as a result of being a victim of human trafficking may request that his or her name not become a matter of public record. Pen C §293; Govt C §6254(f)(2). In specified sex crimes, the victim's current address and telephone number may be excluded from evidence. Evid C §352.1. A victim of a sexual assault or domestic violence crime cannot be imprisoned or otherwise confined for contempt for refusing to testify. CCP §1219(b). If a victim receives assistance from the state Restitution Fund, information about the victim is exempt from the California Public Records Act (Govt C §§6250-6270) disclosure requirements. Govt C §6254.17. The prosecution, however, must inform the defense of any criminal convictions of a testifying victim. See *People v Santos* (1994) 30 CA4th 169, 178, 35 CR2d 719.

A victim of a violent felony (see Pen C §667.5(c)), a serious felony (see Pen C §1192.7(c)), or felony theft or embezzlement—or an immediate family member, registered domestic partner, or child of a registered domestic partner of such a victim—may have time off to attend judicial proceedings related to the crime. To obtain time off, the employer must be given documentation about the proceeding. An employer cannot discharge or threaten to discharge the employee for attending proceedings if the employee has met the statutory requirements. Lab C §230.2.

It is a crime to use force or threaten to use force against a victim or his or her property because the victim cooperated with law enforcement. Pen C §140. It is a crime to prevent or dissuade a victim from testifying. Pen C §136.1. A court may issue restraining and other orders to prevent intimidation of a victim. Pen C §136.2. On the other hand, a sexual assault or sexual crime victim cannot be imprisoned, confined, or placed in custody for contempt for refusing to testify about the crime. CCP §1219(b).

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§40.11 D. Victim Entitled to Full Restitution

Penal Code §1202.4(f) provides that when restitution is ordered, it must be sufficient to fully reimburse the victim for every determined economic loss incurred as a result of the defendant's criminal conduct. The trial court must award a victim the entire amount required to make him or her whole. Cal Const art I, §28(b)(13). Penal Code §1202.4(f)(3)(A)-(K) lists factors the court may take into account in computing the amount of the victim's loss, but these factors are not exclusive. *People v Thygesen* (1999) 69 CA4th 988, 994, 81 CR2d 886. In *Thygesen,* for example, it was appropriate to consider lost rental income in computing the value of the loss of an equipment rental company's cement mixer. 69 CA4th at 994.

Restitution encompasses losses incurred both at the time of the crime and after the crime. *People v Giordano* (2007) 42 C4th 644, 68 CR3d 51. Restitution may be adjusted by the comparative negligence of the victim. *People v Millard* (2009) 175 CA4th 7, 41, 95 CR3d 751.

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§40.12 E. Defendant's Obligation to Pay Restitution in Cases of Multiple Defendants

In multiple-defendant cases, each defendant is jointly and severally liable for restitution. See, *e.g., People v Madrana* (1997) 55 CA4th 1044, 64 CR2d 518; *People v Campbell* (1994) 21 CA4th 825, 26 CR2d 433. Each defendant is entitled to a credit for payments by the other. *People v Blackburn* (1999) 72 CA4th 1520, 1535, 86 CR2d 134. However, restitution may not be assessed jointly and severally for crimes committed only by one defendant. *People v Leon* (2004) 124 CA4th 620, 21 CR3d 394.

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§40.13 F. Special Restitution Rules Pertaining to Minors and Domestic Violence Cases

Minors. A minor made a ward of the court under Welf & I C §602 is responsible for restitution for economic losses to the victim sustained as a result of the minor's conduct, including any attorney fees or costs incurred to collect restitution. Welf & I C §730.6(a)(2)(B); *In re Imran Q.* (2008) 158 CA4th 1316, 1320, 71 CR3d 121 (rule on recovery of attorney fees applies to juveniles). See, *e.g., In re Ashlie M.* (2009) 173 CA4th 668, 93 CR3d 168 (restitution ordered for burial/cremation expenses on finding that minor's driving without license was substantial factor in pedestrian's death); *In re M.W.* (2008) 169 CA4th 1, 86 CR3d 545 (minor responsible for cost of victim's mental health services though not specifically enumerated under Welf & I C §730.6(h)). If the amount of restitution cannot be ascertained at the time of sentencing, the court can direct the probation officer to determine the amount; the minor has the right to a hearing to dispute the amount. Welf & I C §730.6(h). See *In re Karen A.* (2004) 115 CA4th 504, 511, 9 CR3d 369. At least one court has found that a *Harvey* waiver (see §40.4) is not necessary before imposing, as a condition of probation under Pen C §730, restitution for dismissed counts. See *In re T.C.* (2009) 173 CA4th 837, 843, 93 CR3d 447. A minor's restitution obligation does not end when the minor becomes an adult or is no longer a ward. *In re Michael S.* (2007) 147 CA4th 1443, 1456, 54 CR3d 920.

Parents and guardians are presumed to be jointly and severally liable for the minor's restitution obligations, subject to their ability to pay. Welf & I C §730.7. The defendant is a minor if he or she was under age 18 on the date of the offense. *In re Jeffrey M.* (2006) 141 CA4th 1017, 46 CR3d 533. The liability of parents and guardians is limited to $34,700 for each tort of the minor, unless caused by a firearm. See CC §1714.1(a), (c); Cal Rules of Ct App B. The liability of parents or guardians for injury to one person caused by a firearm is limited to $30,000, and the limit for injury to more than one person caused by a firearm is $60,000. CC §1714.3. *In re Michael S.* (2007) 147 CA4th 1443, 1450, 54 CR3d 920. The liability of the minor is not so limited. *In re Michael S., supra*.

If the victim is a minor, economic losses include wages and profits lost by the victim's parents or guardians as a result of the crime. Pen C §1202.4(f)(3)(D)-(E).

Domestic violence cases. Community property cannot be used as the source of the restitution payment if restitution is ordered as a condition of probation after a spouse is convicted of battery, rape, or corporal injury on the other spouse (Pen C §§243(e)(2)(B), 262(d)(2), 273.5(h)(2)) or of violating a protective order (Pen C §273.6(h)(2)(i)).

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§40.14 G. Restitution Hearing

Restitution hearing usually combined with sentencing hearing. The restitution hearing is usually held at sentencing, with the probation officer's report as the primary source of evidence about the amount of the victim's loss. See Pen C §1203(b)(2)(D)(ii) (probation report must state whether restitution should be required as condition of probation). The district attorney usually establishes the amount of the victim's losses, but private counsel representing the victim may participate. See Cal Const art I, §28(c)(1); Pen C §1191.1. The prosecutor must be present at the hearing. *People v Dehle* (2008) 166 CA4th 1380, 1388, 83 CR3d 461.

Defendant has right to be heard. The defendant has a right to a restitution hearing. Pen C §§1202.4(f)(1), 1203(d), 1203.1k; Welf & I C §730.6(h) (juveniles). Although the court may rely on the probation officer's report, it may not completely delegate to the probation officer its authority to determine the necessity for or the amount of restitution. *People v Hartley* (1984) 163 CA3d 126, 209 CR 131; *People v Cervantes* (1984) 154 CA3d 353, 201 CR 187. The defendant has the right to contest the probation officer's decision. Pen C §1203.1k; *People v Cain* (2000) 82 CA4th 81, 86, 97 CR2d 836 (defendant has due process right to challenge amount of restitution victim seeks). See also *In re Brittany L.* (2002) 99 CA4th 1381, 1391, 122 CR2d 376 (defendant must be given opportunity to present evidence); *People v Sandoval* (1989) 206 CA3d 1544, 1550, 254 CR 674 (court must give defendant meaningful opportunity to contest restitution amount). However, the defendant has no right to a jury trial. *People v Rivera* (1989) 212 CA3d 1153, 1161, 261 CR 93. See also *In re Ashlie M.* (2009) 173 CA4th 668, 674, 93 CR3d 168.

Ø **Note:** In all cases, defense counsel should review the probation report carefully with the defendant.

Burden of proof and admissible evidence. The victim must present evidence showing that there were losses and that the losses were caused by the crime committed by the defendant. *People v Rivera, supra*. The victim must prove that the defendant's conduct was a "substantial factor" in causing the events that harmed the victim; it need not be the sole cause. *In re Ashlie M.,* 173 CA4th at 673, citing jury instruction CALCRIM 240.

The amount of restitution must be proved by a preponderance of the evidence. *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32. Documentary evidence such as bills, business records, and "profits lost" is admissible when offered in support of the amount of the victim's losses. Pen C §1203.1d. A victim's testimony, without supporting documentation, is prima facie evidence of value. *People v Gemelli* (2008) 161 CA4th 1539, 1544, 74 CR3d 901. Such testimony shifts the burden to the defendant to prove that value is wrong. 161 CA4th at 1543. See also *People v Goulart* (1990) 224 CA3d 71, 83, 273 CR 477 (defendant has burden of proving inaccuracies in victim's proof). See Evid C §813(a)(2). Professional fees incurred may be proved by declaration, and the victim does not have to make the declarant available for cross-examination. *People v Cain* (2000) 82 CA4th 81, 97 CR2d 836 (defendant did not have due process right to cross-examine victim's psychotherapist on fees).

If the defendant fails to object to the victim's proof at the hearing, any objection is deemed waived. *In re S.S.* (1995) 37 CA4th 543, 547, 43 CR2d 768. See also *People v Foster* (1993) 14 CA4th 939, 947, 18 CR2d 1 (defendant has burden of proving that amount of restitution proposed by the probation report is incorrect).

A victim seeking to recover attorney fees for services toward restitution or in a related civil case must follow the lodestar method. *People v Millard* (2009) 175 CA4th 7, 32, 95 CR3d 751.

Ø **Note:** Despite the relative informality of restitution hearings (see *People v Foster* (1993) 14 CA4th 939, 947, 18 CR2d 1), these hearings are minitrials. Depending on the types of losses and the evidence needed to establish them, the hearing may take a few minutes, a full day, or more. Testimonial evidence, documentary evidence, and even expert testimony may be needed. Defense counsel should consider the possibility of a full restitution hearing when making fee arrangements.

Restitution order. At the conclusion of the restitution hearing, the trial court must specify the exact amount of restitution and identify the victim's losses. Pen C §1202.4(f)(3); *People v Frey* (1989) 209 CA3d 139, 142, 256 CR 810. A defendant's inability to pay restitution "shall not be considered a compelling and extraordinary reason not to impose a

restitution order, nor … be a consideration in determining the amount of a restitution order." Pen C §1202.4(g); *People v Draut* (1999) 73 CA4th 577, 582, 86 CR2d 469. The court must, however, find that the defendant has the ability to pay before making an order for "income deduction" (garnishment). Pen C §1202.42(a).

Ø **Note:** There is a conflict between Pen C §1202.4(g), which provides that ability to pay is not a factor in determining restitution, and Pen C §1203.2(a), which provides that restitution "shall be consistent with a person's ability to pay." The conflict may be resolved by keeping in mind that the primary purpose of §1203.2(a) is to decide whether probation should be revoked for failure to pay restitution; in that situation, the court is authorized to consider ability to pay.

Ø **Note:** In a juvenile case, the restitution order need not specify the amount if it cannot be ascertained at the time of sentencing. The order can provide that the court will decide the amount at any time during the term of commitment or probation. Welf & I C §730.6(h); see *In re Karen A.* (2004) 115 CA4th 504, 9 CR3d 369.

Ø **Note:** There is a split of authority on whether victim restitution paid by a defendant's business is tax deductible. Compare *Waldman* (1987) 88 TC 1384, aff'd (9th Cir 1988) 850 F2d 611 (not deductible) with *Stephens v Commissioner* (2d Cir 1990) 905 F2d 667 (deductible). Victim restitution paid to a government agency is unlikely to be deductible. See IRC §162(f).

Conditions for enforceable order. If the defendant has a hearing on restitution, stipulates to the amount of restitution, or waives hearing, any restitution order is deemed a money judgment and it is enforceable in the manner provided for any other money judgment. Pen C §1214(b). See also Pen C §1203.1k (defendant may consent to probation report). On collecting money judgments, see CCP §§695.010-709.030. On collecting restitution, see §§40.21A-40.29.

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IV. RESTITUTION AND PROBATION

§40.15 A. Probation Department's Responsibilities

When a defendant is convicted of a felony for which probation is available, the court must refer the defendant to the county probation department for a presentence report. Pen C §1203(b)(1). The probation officer's presentence report must include information about the victim's loss and the defendant's ability to make restitution. Cal Rules of Ct 4.411.5(a)(5), (8).

Ø **Note:** In a county that has a financial evaluation officer, the court may also order the defendant to appear before that officer, who will evaluate the defendant's ability to make restitution and report his or her findings to the probation officer. Pen C §1203(j).

The presentence report should also include recommendations about the following:

- The amount the defendant should be required to pay as a restitution fine (Pen C §1203(b)(2)(D)(i));
- Whether restitution should be ordered as a condition of probation (Pen C §1203(b)(2)(D)(ii)); and
- The amount of restitution (Pen C §1203(b)(2)(D)(ii)).

Within 30 days after entry of a restitution order, the probation officer must establish an account into which payments not deposited into the state Restitution Fund will be made. Pen C §1202.8(c).

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§40.16 B. Restitution as a Condition of Probation

When restitution is ordered under Pen C §1202.4 or another statutory provision that specifically authorizes restitution, the trial court's discretion is circumscribed by the terms of the applicable statute. When restitution is ordered as a condition of probation under Pen C §1203.1(a)(3), however, the court's discretion is circumscribed only by the purposes of probation: restitution must be reasonably related to the crime of which the defendant was convicted, the goal of deterring future criminality, or the defendant's rehabilitation. See *People v Carbajal* (1995) 10 C4th 1114, 1121, 43 CR2d 681; *People v Rugamas* (2001) 93 CA4th 518, 521, 113 CR2d 271. See also *In re G.V.* (2008) 167 CA4th 1244, 84 CR3d 809 (juvenile cases). Consequently, when ordering restitution as a condition of probation, the court has broad discretion. See, *e.g., In re I.M.* (2005) 125 CA4th 1195, 23 CR3d 375 (restitution ordered for losses caused by crime related to crime of which defendant convicted, even though defendant did not participate in crime causing loss); *People v Rugamas* (2001) 93 CA4th 518, 113 CR2d 271 (restitution order requiring defendant to reimburse police department for medical expenses incurred to treat defendant after police shot him with rubber bullets upheld on appeal); *People v Miller* (1967) 256 CA2d 348, 64 CR 20 (restitution ordered to victims of noncriminal conduct related to defendant's crime).

Ø **Note**: The California Supreme Court has granted review in *People v Anderson* (review granted Apr. 29, 2009, S170778; superseded opinion at 170 CA4th 910, 88 CR3d 269), a case in which the appellate court declined to follow *People v Slattery* (2008) 167 CA4th 1091, 84 CR3d 672 (hospital that treated victim not a direct victim for restitution purposes under Pen C §1202.4), and upheld as a condition of probation the imposition of restitution to the hospital that treated the victim.

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§40.17 C. Payments During Probation

When the court grants probation and orders the defendant to make restitution, timely payment is a condition of probation. Pen C §§1202.4(m), 1203(j). Willful failure to pay restitution can result in revocation of probation and imprisonment. *Bearden v Georgia* (1983) 461 US 660, 672, 76 L Ed 2d 221, 103 S Ct 2064. See Pen C §§1203(j), 1205(b); *People v Lawson* (1999) 69 CA4th 29, 39, 81 CR2d 283. The restitution order will survive revocation of probation. *People v Kleinman* (2004) 123 CA4th 1476, 1481, 20 CR3d 885.

The court may require the defendant to get a job to pay restitution as a condition of probation. Pen C §1203.1(d). When a defendant is convicted of sexual assault on a minor or of assault or battery against a person 65 years of age or older, the court must order the defendant to seek and maintain legitimate employment to pay the cost of the victim's medical and psychological treatment. Pen C §§1203.1g (minors), 1203.1j (seniors).

The court may order a defendant to make restitution payments to the Probation Department, which will disburse them to the victim. Pen C §1203.1(b). The county may impose an administrative fee of up to 10 percent of the amount ordered for restitution to cover costs of collecting and distributing it. Pen C §1202.4(*l*).

> Ø **Note:** This is not mandatory. To speed receipt by the victim and avoid the county's administrative fee, a defendant and victim may agree that payments be made directly to the victim. The statutes do not require that payment be made through the probation department.

The court may modify probation for the purpose of "measuring" the timely payment of restitution. Pen C §1203.3(b)(4).

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§40.18 D. Modification of Restitution

The amount of restitution may be modified while the defendant is on probation on a motion of the prosecutor, the victim, the defendant, or the court. Pen C §1202.4(f)(1). Although Pen C §1203.3(b)(4) authorizes the reduction of restitution for compelling and extraordinary reasons because of the defendant's good conduct, this provision has been overridden by constitutional amendment. See Cal Const art I, §28(b)(13)(B).

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§40.19 E. Special Probation Conditions

To be eligible for probation, a defendant convicted of certain specified offenses may have to meet special conditions, some of which relate to victim restitution. See, *e.g.,* Pen C §186.11(i)(1)(B) (special restitution provisions apply to defendant when aggravated white collar crime enhancement found true); Pen C §§1203.1g, 1203.1j (special restitution provisions apply to defendant convicted of sexual assault on minor or designated assaultive crimes on elderly victim); Pen C §1203.044(h)-(q) (special restitution provisions apply to defendant convicted of theft of more than $50,000 in single transaction).

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§40.20 F. Limits on Time of Probation

Even if victim restitution is not paid, probation cannot ordinarily be extended beyond the initial maximum sentence duration. *People v Medeiros* (1994) 25 CA4th 1260, 1267, 31 CR2d 83. However, under Pen C §1203.2(e), if probation is revoked based on a violation and the revocation is set aside, probation can be extended. *In re Hamm* (1982) 133 CA3d 60, 67, 183 CR 626. If the defendant has not completely met his or her restitution obligation by the end of the probationary period, the trial court can convert the remainder of the debt to a civil judgment. Pen C §1203(j); *People v Jackson* (2005) 134 CA4th 929, 937, 36 CR3d 477. If the defendant has failed to make restitution payments as ordered, the trial court may revoke probation, but it may not extend the probationary period beyond the statutory maximum even with the defendant's consent. *People v Jackson, supra*. However, if the defendant consents to extending the duration of probation, the defendant will be estopped from complaining of the trial court's error on appeal. 134 CA4th at 932.

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§40.21 G. Termination of Probation

Termination of probation does not terminate a restitution order. Pen C §1202.4(m); *People v Kleinman* (2004) 123 CA4th 1476, 1481, 20 CR3d 885.

Ø **Note:** A defendant who has an unpaid balance on a restitution order or fine 120 days before his or her scheduled release from probation or completion of a conditional sentence must prepare and file a new and updated financial disclosure. Pen C §1202.4(f)(11). On request, the court must give the victim a copy of the disclosure. Pen C §§1202.4(f)(11), 1214(b).

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V. COLLECTION OF RESTITUTION

§40.21A A. Payment of Restitution Has Priority

All monetary payments, monies, and property collected from any person who has been ordered to make restitution must be first applied to pay the amounts ordered as restitution to the victim. Cal Const art I, §28(b)(13)(C).

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§40.22 B. Preserving Defendant's Assets

Several avenues exist to preserve a defendant's assets, including the defendant's seized assets, to make them available for the payment of restitution:

- If seized property was stolen or embezzled and is in the custody of a magistrate or the police, the victim may recover the property. Pen C §§1409, 1413(b).
- If the fruits of the crime against the victim, such as cash, are seized by law enforcement from the defendant, the victim may commence a civil action and attach the fruits of the crime. *Golden Gate Candy Prods. Co. v Superior Court* (1934) 1 CA2d 426, 36 P2d 834.
- If funds are confiscated from the defendant at the time of the defendant's arrest, the court may apply those funds to the restitution order if they are not subject to forfeiture under Health & S C §11469. Pen C §1202.4(f). The first $300 of such funds is exempt. CCP §704.090(b).
- The victim may have standing to file a claim under Health & S C §11488.5 on assets subject to forfeiture. On asset forfeiture, see chap 57.
- If the complaint alleges facts to support an "aggravated white collar enhancement," the prosecution may act to preserve the defendant's assets for the payment of restitution. Pen C §186.11. See, *e.g., People v Semaan* (2007) 42 C4th 79, 64 CR3d 1. The assets of the defendant that may be frozen are not limited to assets involved in the crime with which the defendant is charged, because the obligation to pay restitution is a general obligation. *People v Semaan* (2007) 42 C4th 79, 86, 64 CR3d 1. A spouse or other third party claiming an interest in the assets has the burden of proving both innocence of the crime and that the assets are not the product of the defendant's criminal activity. 42 C4th at 87. See *Q-Soft, Inc. v Superior Court* (2007) 157 CA4th 441, 449, 68 CR3d 687.

Before the court may release seized assets to a victim, it must afford the defendant notice and opportunity to be heard in opposition to the victim's claim. See *People v Chabeear* (1984) 163 CA3d 153, 155, 209 CR 218 (due process violation to deny defendant opportunity to challenge robbery victim's claim to money seized during search of defendant's residence). However, in *People v Nystrom* (1992) 7 CA4th 1177, 1181, 10 CR2d 94, the court held that a defendant was not entitled to separate notice or hearing before money seized at the time of arrest was released to the victim, because the trial court had already entered a valid restitution order as part of a negotiated plea and thus there was no question that the victim was entitled to the money.

Ø **Note:** The attorney fees expended by a victim in commencing a civil action, obtaining an attachment, or filing a claim may be recovered as restitution. *People v Maheshwari* (2003) 107 CA4th 1406, 132 CR2d 903 (attorney fees and private investigator's fees incurred by victim in civil action for conversion properly included in restitution order); *People v Lyon* (1996) 49 CA4th 1521, 1525, 57 CR2d 415 (attorney fees).

After entry of a restitution order:

- If the defendant has used his or her own money or property to post bail, a victim may collect the ordered restitution from the bail. Pen C §1297.
- A victim may file and serve a judgment lien, which will give the restitution order priority with respect to many types of assets over unsecured creditors of the defendant. CCP §§697.530, 697.590(b)-(c).
- A victim can get a 1-year lien on all the defendant's personal property by obtaining and serving an order to examine the defendant about his or her assets. CCP §708.110(d).

If the prosecution fails to follow the statutory procedure of Pen C §186.11 to preserve the defendant's assets for restitution, the trial court cannot order the proceeds of the property to be distributed as restitution. If the defendant has given counsel a security interest in assets, and no preliminary injunction issued concerning those assets, the attorney will have a security interest in those assets with priority over a victim who will be a mere unsecured creditor. See

People v Green (2004) 125 CA4th 360, 22 CR3d 736.

Transfer of assets to avoid payment of restitution is a crime. Pen C §155.5. It may also give rise to civil remedies. CC §3439.07.

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§40.23 C. Requirement That Defendant Disclose Assets

No later than the date of sentencing, the defendant must disclose all assets using Judicial Council Form CR-115 (Defendant's Statement of Assets). Pen C §1202.4(f)(5), (7)-(8). Unreasonable failure to file the form may be considered in sentencing. Pen C §1202.4(f)(9). Financial information filed by the defendant under Pen C §987(c) to help the court assess the defendant's ability to employ counsel may be used instead of the required financial disclosure when the defendant fails to file the disclosure. Pen C §1202.4(f)(6). If this is necessary, the defendant shall be deemed to have waived confidentiality of the information. Pen C §1202.4(f)(6). Welfare and Institutions Code §730.6 does not impose financial disclosure requirements on juvenile offenders.

A defendant who is eligible for probation may be referred to a county financial evaluation officer for an evaluation of the defendant's ability to make restitution. The officer must report the findings to the probation officer. Pen C §1203(j).

The Judicial Council has promulgated interrogatories a victim can use to discover a defendant's assets. See Judicial Council Form CR-200, Form Interrogatories—Crime Victim Restitution; CCP §2033.720(a). The victim may serve the interrogatories once a year when there is an unpaid restitution balance. CCP §2033.720(b). In addition, the prosecutor may conduct a judgment debtor examination of a defendant to find assets. Pen C §1202.4(h). This is a significant exception to the general rule that a prosecutor does not have the right to examine an unwilling criminal defendant.

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D. Procedures for Enforcing Restitution Order

§40.24 1. Use of Income Deduction

If the trial court determines that the defendant has the ability to pay restitution, it must enter a separate order for income deduction (sometimes called wage garnishment) once restitution has been determined. Pen C §1202.42. The income deduction order must be stayed when issued and the stay remains in effect as long as the defendant pays restitution as ordered. Pen C §1202.42(b). If the county agency responsible for collecting restitution, usually the probation department, learns that the defendant has failed to make payments as required, it must begin procedures for lifting the stay. Pen C §1202.42(b). The defendant can defend against enforcement of the stay by showing that he or she actually made the required payments or by establishing good cause for the failure. Pen C §1202.42(b). The defendant is entitled to a court hearing on these issues on request. Pen C §1202.42(b). See Pen C §1202.42(f). If the stay is lifted, the defendant's employer will be required to deduct the amount specified in the income deduction order from the defendant's paycheck and send it to the court clerk. Once the employer has received notice of the order, it remains in effect until the employer no longer provides income to the defendant or until further order of the court. Pen C §1202.42(f). Judicial Council Form CR-118, Information Regarding Income Deduction Order, is an optional form that can be used to provide notice to the defendant of the effect of the income deduction order. Judicial Council Form CR-119, Order for Income Deduction, is an optional form that can be used to provide notice to the defendant's employer of its obligations under Pen C §1202.42. These forms are reproduced in California Criminal Law Forms Manual §§40.6-40.7 (2d ed Cal CEB 2005).

An income deduction order is not required in juvenile cases and when restitution was ordered for losses arising from conduct other than the commission of the crime. These two types of restitution are not based on §1202.4, which is a prerequisite for application of §1202.42.

Despite the court's broad power to enforce a crime victim's right to restitution, it may not order deductions to be made from an income source that is by law exempt from execution or other court process. *Board of Retirement v Superior Court (O'Riley)* (2002) 101 CA4th 1062, 124 CR2d 850 (Govt C §31452, which exempts retirement benefits of county employees from execution, was not impliedly repealed by restitution provisions; court could not order restitution payments deducted from defendant's pension). Also exempt are Social Security benefits (42 USC §407(a); *Montana v Eaton* (Mont 2004) 99 P3d 661, 665) and veterans' benefits (38 USC §5301(a)(1); *Higgins v Beyer* (3d Cir 2002) 293 F3d 683, 692).

Penal Code §1202.42 appears to contradict CCP §706.020, which provides that (except for child support orders) the procedures set forth in CCP §§706.100-706.109 are the only judicial procedures for withholding an employee's earnings. The apparent conflict is avoided by the principle first established by *Gonzales v Superior Court* (1935) 3 C2d 260, 44 P2d 320, and recently reiterated by *People v Superior Court (Laff)* (2001) 25 C4th 703, 729 n12, 107 CR2d 323, that certain sections of the Code of Civil Procedure (including Part 2, "Civil Actions," in which CCP §706.020 is located) do not apply in criminal proceedings unless "expressly made applicable thereto."

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§40.25 2. Availability of Civil Enforcement Procedures

A restitution order is enforceable as a civil judgment. Pen C §§1202.4(i), 1203(j), 1214(b). See Welf & I C §730.6(r) (juvenile cases). This means that all of the postjudgment tools, such as writs of execution, are available to the victim to collect the restitution. A restitution order is a "money judgment" as defined in CCP §§680.230 and 680.270. A victim granted restitution is a judgment creditor. CCP §680.240. In misdemeanor cases, cases involving violation of a city ordinance, and noncapital cases in which the defendant has pleaded guilty or no contest, after entry of a restitution order and on a motion, a restitution order may be enforced in the same manner as a judgment in a limited civil case. Pen C §1214(c). See CCP §582.5.

Some court clerks will not issue a writ of execution based on a restitution order in a criminal case. In that situation, the victim will need an order from the criminal court judge to the court clerk who issues writs. Such an order can be obtained by motion at the time restitution is ordered, or later. It should direct the clerk to issue any and all orders and writs authorized by CCP §§695.010-709.030, including but not limited to writs of execution, possession of personal property, possession of real property, sale of real property, and sale of personal property for enforcement of the (identified) restitution orders. The order may also direct the clerk to issue a civil case number, which may be necessary for certain enforcement of judgment proceedings. See Debt Collection Practice in California, chap 9 (2d ed Cal CEB 1999).

Because civil steps to collect on a restitution order are a continuation of the victim's rights to restitution and because Pen C §1202.4(f)(3)(H) provides that attorney fees are a loss for which restitution must be made, attorney fees incurred by the victim in civil collection efforts may be recovered. See *Downen's, Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 CA4th 856, 863, 103 CR2d 644. See also *In re Imran Q.* (2008) 158 CA4th 1316, 1320, 71 CR3d 121.

The district attorney or victim's attorney may request an order of examination under CCP §§708.110-708.205 to determine the defendant's assets for purposes of collecting on the restitution order. Pen C §1202.4(h). A victim will get a 1-year lien on all personal property of a defendant by obtaining and serving an order to examine the defendant about his or her assets. CCP §708.110(d).

Defendants convicted of certain theft offenses involving large sums may be subject to pretrial levies or restraining orders (see Pen C §186.11) or special asset reporting requirements (Pen C §1203.044(h)-(q)) that may assist victims in enforcing restitution orders.

After a restitution order is entered, concealment of assets to avoid payment of restitution is a felony if the underlying crime was a felony, and a misdemeanor if the underlying crime was a misdemeanor. Penal Code §155.5.

The victim may file and serve a judgment lien that will give the restitution order priority over the defendant's unsecured creditors. See CCP §§697.530, 697.590(b)-(c). However, a restitution order cannot create a lien on retirement benefits due a defendant under the County Employees Retirement Law. *Board of Retirement v Superior Court (O'Riley)* (2002) 101 CA4th 1062, 124 CR2d 850.

Generally, the first $1225 of any funds of an inmate (adult or juvenile) in an inmate's trust account is automatically exempt from enforcement of a money judgment, but if the debt is based on a restitution fine or restitution order, only $300 is exempt. CCP §704.090. *People v Willie* (2005) 133 CA4th 43, 34 CR3d 532.

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§40.26 3. Other Procedures

Franchise Tax Board enforcement. If a restitution payment is 90 days late, the court may refer collection to the Franchise Tax Board, which may use the same collection tools used to collect delinquent taxes to collect the restitution. Rev & Tax C §19280.

Bail. If the defendant posted bail with his or her own money, the victim may ask the court to order that money be used to pay restitution. Pen C §1297.

Prisoner's funds. The California Department of Corrections and Rehabilitation (CDCR) must deduct between 20 and 50 percent of an inmate's wages and trust account deposits to pay restitution. If there are both a restitution fine and a victim restitution order, the order must be paid first. Pen C §2085.5(b), (g). If a prisoner recovers damages in a civil action against a prison or prison official, after litigation costs and attorney fees the balance must be applied to any outstanding restitution order. Pen C §2085.5(j).

Inmate Joint Venture Program. Twenty percent of the net wages of an inmate participating in this program must go for victim restitution. 15 Cal Code Regs §3483(d)(2).

Impact of restitution on parole. Restitution payment is a mitigating factor to consider when setting a parole date for defendants convicted of property crimes. 15 Cal Code Regs §2317(c)(2)(C). Payment of outstanding restitution orders may be a condition of parole. Pen C §3000(b)(6). If there is an unsatisfied restitution order, a parolee may not be released to another state unless he or she posts a bond. Pen C §11177.2. The CDCR may collect amounts from a parolee to pay a restitution order. If there are both a restitution fine and a victim restitution order, the department may collect for the order first. Pen C §2085.5(e), (h).

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§40.27 E. State Agencies That May Provide Restitution

The following state agencies may provide at least partial restitution to victims of crime:

- The state Restitution Fund may provide reimbursement for expenses incurred in treating physical and related emotional injuries of crime victims. Govt C §§13950-13974.7. See also §38.14. More information can be found at http://www.boc.ca.gov/Victims.
- The Victims of Corporate Fraud Compensation Fund may provide compensation to victims of corporate fraud. Corp C §1502.5. See 2 Cal Code Regs §§22500-22519. See also http://www.vcgcb.ca.gov/Victims for more information.
- The Client Security Fund of the State Bar of California may provide compensation for financial losses caused by an attorney's dishonest conduct. Bus & P C §6140.5. Information on this Fund is available on the State Bar website at http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (click on "Public Services," then click on "Reimbursement for attorney misconduct"). A downloadable application for reimbursement is also available at http://www.calbar.ca.gov/calbar/pdfs/CSF/CSF_Application.pdf.
- The Department of Real Estate Recovery Account may provide compensation for financial losses caused by the fraudulent or other dishonest conduct of a licensed real estate agent or broker. Bus & P C §10471. See http://www.dre.ca.gov/cons_recovery_acct.html for more information.
- The Franchise Tax Board may enforce a delinquent restitution obligation as if it were a delinquent tax obligation if requested by a state or county agency. Rev & T C §19280.
- The Travel Consumer Restitution Corporation may reimburse losses caused by fraudulent or dishonest conduct by a registered travel agent. See Bus & P C §§17550.35-17550.58. Claimants can submit their claims online through the State Attorney General's office at http://ag.ca.gov/travel/consumer.htm.

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§40.28 F. Relation Between Restitution Obligation and Civil Liability

A crime victim has the right to bring a civil action for damages caused by the defendant's criminal act. See CCP §32 ("When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other"); Pen C §9 (civil remedies for criminal acts preserved). See also Pen C §§679.02, 1202.4(j); Govt C §13963; *Vigilant Ins. Co. v Chiu* (2009) 175 CA4th 438, 442, 96 CR3d 54 (Pen C §1202.4 does not preclude victim or assignee from bringing a civil action based on same facts that gave rise to criminal conviction); *Shore v Gurnett* (2004) 122 CA4th 166, 18 CR3d 583 (no constitutional impediment to punitive damage award in civil suit based on crime of which defendant convicted). A victim may recover attorney fees in a civil action against a defendant convicted of a felony. CCP §1021.4.

However, a victim is not ordinarily entitled to "double dip." In other words, restitution actually collected is credited against any other judgment for the same loss. Pen C §1202.4(j); *Vigilant Ins. Co.,* 175 CA4th at 446. See, *e.g.,* Govt C §13963 (if victim receives payment from state Restitution Fund, state is entitled to lien on subsequent judgment or settlement based on same conduct). In at least one circumstance, however, a civil payment will not be a credit toward restitution and the victim may "double-dip": If a victim is paid by a third party's insurer, the defendant is not entitled to a reduction in the amount of restitution because of that payment. *People v Hamilton* (2003) 114 CA4th 932, 940, 8 CR3d 190 (adult); *In re Tommy A.* (2005) 131 CA4th 1580, 1590, 33 CR3d 103 (minor). However, payments that the defendant's employer's insurance company made to the victim under a policy covering the defendant will be a credit toward restitution. *People v Short* (2008) 160 CA4th 899, 903, 73 CR3d 154.

A civil settlement between a victim and a defendant that covers only part of the victim's losses does not preclude an additional restitution award for the balance of losses, even if the settlement releases the defendant from further civil liability. *People v Clifton* (1985) 172 CA3d 1165, 1168, 219 CR 904. "Disposing of civil liability cannot be a function of restitution in a criminal case." *People v Richards* (1976) 17 C3d 614, 620, 131 CR 537, overruled on other grounds in *People v Carbajal* (1995) 10 C4th 1114, 1126, 43 CR2d 681.

A victim's release of liability to the defendant's insurance company as part of a settlement does not release the defendant from his or her restitution obligation. A release cannot waive the people's right to have a defendant pay restitution. *People v Bernal* (2002) 101 CA4th 155, 160, 123 CR2d 622 (adult); *In re Tommy A., supra* (minor).

A prior restitution award does not bar a subsequent civil action for different damages arising from the same events, because civil cases and criminal cases have different purposes. *Vigilant Ins. Co. v Chiu,* 175 CA4th at 445. Another reason to allow both cases is that a victim is not in privity with the People in a criminal case. *U.S. v Barnette* (11th Cir 1994) 10 F3d 1553, 1562. See also *Victa v Merle Norman Cosmetics, Inc.* (1993) 19 CA4th 454, 467, 24 CR2d 117 (prior EEOC claim does not bar subsequent civil action, because there is no privity between victim and agency). Because the claims are not the same in civil and criminal cases, there is no collateral estoppel. *U.S. v Barnette* (11th Cir 1994) 10 F3d 1553, 1560.

The Penal Code may provide for an award of compensatory damages and attorney fees in a civil suit. See, *e.g.,* Pen C §502(e) (compensatory damages available to reimburse expense of determining whether computer system was damaged by computer crime). Conversely, a civil statute multiplying damages may be used by the sentencing court to determine restitution when probation is ordered. *People v Baker* (2005) 126 CA4th 463, 23 CR3d 871 (victim restitution ordered in amount four times loss under Food & A C §21855).

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§40.29 G. Restitution Not Dischargeable in Bankruptcy

Bankruptcy has no effect on restitution. Restitution is not dischargeable in a liquidation or "straight" bankruptcy under Chapter 7 of the Bankruptcy Code. 11 USC §523(a)(7); *Kelly v Robinson* (1986) 479 US 36, 50, 93 L Ed 2d 216, 229, 107 S Ct 353. Nor is restitution a dischargeable debt under Chapter 13 (11 USC §§1301-1330). 11 USC §1328(a)(3). See, *e.g., Warfel v City of Saratoga (In re Warfel)* (BAP 9th Cir 2001) 268 BR 205 (conversion of restitution order to civil judgment does not make it dischargeable under Chapter 7); *People v Washburn* (1979) 97 CA3d 621, 158 CR 822 (Bankruptcy Act does not apply to restitution orders).

Because collection of restitution is a continuation of a criminal action, the automatic stay provisions of bankruptcy law do not apply. *In re Gruntz* (9th Cir 2000) 202 F3d 1074, 1085. 11 USC §362(b)(1).

It has been held that the discharge in bankruptcy of a judgment debt the defendant owed to the victims did not preclude the trial court from ordering restitution when the defendant was subsequently convicted of the theft of the property that was the subject of the judgment. *People v Moser* (1996) 50 CA4th 130, 57 CR2d 647. In *People v Dalvito* (1997) 56 CA4th 557, 65 CR2d 679, the court of appeal held that the discharge in bankruptcy of a debt the victim owed on the property the defendant was convicted of stealing did not preclude the trial court from ordering full restitution.

A parent jointly and severally liable for a minor's restitution under Welf & I C §730.7 cannot ordinarily get the restitution order discharged in bankruptcy. However, a bankruptcy court in a Chapter 7 action did discharge the parents' liability for their children's restitution. See *Mabey v Ellis (In re Ellis)* (Bankr D Idaho 1998) 224 BR 786. The court specifically held that not all restitution awards made against parents of juvenile offenders may be discharged in bankruptcy. 224 BR at 792. Differences between California and Idaho law may lead a bankruptcy court applying California law to a different conclusion.

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§40.30 VI. APPEAL

The standard of review for a restitution order is abuse of discretion. *People v Mearns* (2002) 97 CA4th 493, 498, 118 CR2d 511. When there is a factual and rational basis for an award, there is no abuse of discretion. *People v Gemelli* (2008) 161 CA4th 1539, 1542, 74 CR3d 901; *Mearns, supra*. See, *e.g., People v Phu* (2009) 179 CA4th 280, 101 CR3d 601 (despite lack of evidence establishing when power illegally diverted, reasonable to calculate reimbursement from date utility service started by defendant). When determining restitution, a court does not have to use the methods that a government agency may be required to use under its regulations. *People v Akins* (2005) 128 CA4th 1376, 1384, 27 CR3d 815. Victim restitution is mandatory; a sentence without restitution is invalid and an abuse of discretion. *People v Hudson* (2003) 113 CA4th 924, 929, 7 CR3d 114.

A parent or guardian ordered to pay restitution jointly and severally with a minor has an independent right to appeal the restitution order. *In re Michael S.* (2007) 147 CA4th 1443, 1448, 54 CR3d 920.

When a defendant is ordered to pay victim restitution at sentencing, failure to object forfeits the right to appeal the order. *People v Nystrom* (1992) 7 CA4th 1177, 10 CR2d 94.

An oral order reducing a defendant's restitution obligation is appealable by the prosecution under Pen C §1238(a)(5). *People v Hamilton* (2003) 114 CA4th 932, 938, 8 CR3d 190.

An appeal does not automatically stay the execution of a restitution order. Pen C §1243. Because restitution is part of the judgment, it is not automatically stayed. Pen C §1467. Therefore, a defendant must move for a stay of restitution. Because victims have a constitutional right to victim restitution (Cal Const art I, §28(b)), a defendant moving for a stay must demonstrate that his or her right under Pen C §1243 to have a court-ordered stay outweighs the victim's constitutional right. However, a stay of restitution is a stay for financial reasons, which may not be granted. See *In re Fishman* (1952) 109 CA2d 634, 241 P2d 603. If restitution is a condition of probation, it is not suspended pending appeal. *In re Bakke* (1986) 42 C3d 84, 88, 227 CR 663.

A victim participating in an appeal of a restitution order may seek attorney fees incurred on the appeal. Pen C §1202.4(f)(3)(H).

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§40.31 VII. RESTITUTION AND EXPUNGEMENT

If there is still a balance of restitution owed to a victim after a defendant has made all scheduled monthly payments of victim restitution and probation has terminated, the conviction will not be expunged until the balance of restitution is paid. Pen C §1203.4; *People v Covington* (2000) 82 CA4th 1263, 98 CR2d 852.

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41

TRIAL COUNSEL'S DUTIES AFTER JUDGMENT; CLEANSING AND SEALING OF CRIMINAL RECORDS

GARRICK A. BYERS

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§41.1 I. OVERVIEW

Trial counsel's duties concerning appeal. Defense counsel's duties to (1) advise the client concerning appeal, (2) file a notice of appeal, (3) seek a certificate of probable cause in guilty-plea cases, (4) assist in securing appellate counsel, (5) protect a favorable judgment when the prosecution appeals, and (6) cooperate with appellate counsel are all discussed in §§41.4-41.7.

Release from custody pending defense appeal. A defendant convicted of a misdemeanor is entitled to release on bail as a matter of right while the case is on appeal. Release on bail in a noncapital felony case is discretionary with the court. See §§41.6-41.7.

Trial court's jurisdiction after notice of appeal is filed. Once a notice of appeal is filed, the trial court has no jurisdiction to take action affecting the judgment, but retains certain powers over the parties and incidental aspects of the case. See §41.3.

Payment of appointed counsel fees. Appointed trial counsel must be paid a reasonable sum from the county general fund. The trial court may order an indigent defendant to reimburse the county for the cost of appointed counsel. See discussion in §§41.8-41.9.

Cleansing a criminal record. The methods for cleansing arrest and conviction records vary, depending on the nature of the charge and the case disposition. They may include record sealing or destruction, case dismissal, certificate of rehabilitation, and pardon. Most forms of relief are only partial, leaving in place such penalties as the obligation to disclose a conviction on state or local licensing applications, or to register as a convicted sex offender. See §§41.10-41.21. Charts summarizing the effect of various record-cleansing options are found in §41.24. For cleansing records resulting from diversion and deferred entry of judgment, see chap 27.

Registered sex offenders. Limited opportunities exist to have a registered sex offender's information taken off the Megan's Law website; even more limited opportunities exist for relief from the duty to register. Limited opportunities also exist for ending the registration requirement entirely. See §41.19A.

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§41.2 II. CHART: DEADLINES

Ø **Warning:** Counsel should also consult local rules. Many counties have specific time requirements not otherwise mandated by the Penal Code.

Action	Deadline	Authority
Appointed counsel's request for reimbursement.	Check local rules.	Pen C §987.2.
Time to modify or correct clerical errors in judgment.	Clerical error can be corrected at any time.	See *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497.
File notice of appeal.	From infraction or misdemeanor case: 30 calendar days after judgment or appealable order.	Cal Rules of Ct 8.853(a) (misdemeanor), 8.902(a) (infraction); see Pen C §1466.
	From felony case: 60 calendar days after judgment or appealable order.	Cal Rules of Ct 8.308(a); see Pen C §1237.
After guilty or no contest plea in felony case, file petition for certificate of probable cause.	60 calendar days after judgment.	Pen C §1237.5(a); Cal Rules of Ct 8.304(b), 8.308(a).
Trial court files order granting or denying certificate of probable cause.	20 calendar days after petition.	Cal Rules of Ct 8.304(b)(2).
Motion for release on appeal.	In trial court at any time.	Pen C §1272.
	In appellate court at any time after trial court denial.	Cal Rules of Ct 8.312, 8.854.
Hearing on defendant's reimbursement to county.	At end of court proceedings, second discretionary hearing within 6 months.	Pen C §987.8.
Sealing and destroying record of person factually innocent.	Up to 2 years after arrest or pleading; time limit waivable with good cause.	Pen C §851.8(*l*).
Sealing minor's misdemeanor arrest record.	No deadline.	Pen C §851.7.
Sealing arrest and court files after successful Pen C §1000, §1000.5, or §1000.8 program.	At the hearing when diverted charges are dismissed.	Pen C §851.90.
Sealing minor's adult court misdemeanor conviction.	No deadline.	Pen C §1203.45.
Sealing of juvenile court records.	After age 18, or 5 or more years after end of juvenile court jurisdiction, or other similar 5-year periods listed in statute.	Welf & I C §781.
Release from penalties for persons discharged from DJJ (formerly CYA) control.	No deadline.	Welf & I C §1772.
Dismissal for persons granted	After probation has ended.	Pen C §1203.4.

probation.		
Dismissal for misdemeanants not granted probation.	After 1 year since pronouncement of judgment.	Pen C §1203.4a.
Dismissal for narcotics addicts.	After Narcotic Addict Evaluation Authority files certificate.	Welf & I C §3200.
Destruction of records of petty marijuana offenders.	Records not to be kept more than 2 years after arrest or conviction.	Health & S C §11361.5.
Dismissal after treatment for nonviolent drug possession.	After successful completion of drug treatment.	Pen C §1210.1(d).
Certificate of rehabilitation.	Any time after specified rehabilitation period.	Pen C §4852.03(a).
Governor's pardon.	No deadline given.	Pen C §§4800-4813.
Court reduces felony to misdemeanor when no imposition of sentence.	When probation is granted, or on application.	Pen C §17(b)(3).
Petition DOJ for exclusion from Megan's Law website.	Any time.	Pen C §290.46(e).
Petition to end sex offender registration (eligible offense only).	Any time after receipt of certificate of rehabilitation.	Pen C §290.5.

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§41.3 III. TRIAL COURT JURISDICTION WHILE CASE IS ON APPEAL

While a case is on appeal, the trial court has no jurisdiction to take action affecting the judgment. CCP §916(a); *People v Johnson* (1992) 3 C4th 1183, 1257, 14 CR2d 702. The court retains certain powers over the parties and incidental aspects of the case (CCP §916(b)), including the power to do the following:

- Recall a prison sentence and resentence the defendant to no greater time, within 120 days on the court's own motion, or any time on recommendation of the Secretary of the California Department of Corrections and Rehabilitation (CDCR) or Board of Parole Hearings. *People v Superior Court (Cornelius)* (1995) 31 CA4th 343, 348, 37 CR2d 156; Pen C §1170(d). Resentencing does not extend to dismissing a count (*People v Nelms* (2008) 165 CA4th 1465, 1472, 82 CR3d 32) nor to permitting the defendant to withdraw the plea (*People v Alanis* (2008) 158 CA4th 1467, 71 CR3d 139), even if all parties agree. For more information on recall, see §35.10.
- Take procedural steps concerning the notice of appeal, and preparation and correction of the record. See Cal Rules of Ct 8.360-8.625 (felony appeals), 8.800-8.816, 8.850-8.929 (misdemeanor and infraction appeals); *People v Johnson, supra*. See also §§41.4-41.5.
- Grant a stay, bail, or O.R. release pending appeal. See Cal Rules of Ct 8.312; see also §§41.6 (bail and O.R. on appeal), 43.9 (release pending misdemeanor appeal), 44.18 (release pending felony appeal); and chap 5 (release procedures in the trial court).
- Grant, deny, modify, or revoke probation. *In re Bakke* (1986) 42 C3d 84, 88, 227 CR 663; see chaps 38, 46.
- Correct clerical errors, *i.e.,* errors made in recording the judgment, but not judicial errors, *i.e.,* errors made in rendering judgment. *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497. See §§35.30-35.33.
- Correct an unauthorized or void sentence. *People v Chagolla* (1983) 144 CA3d 422, 434, 193 CR 711. See §35.34.
- Hear a petition for a writ of habeas corpus involving matters outside the trial record. *In re Baker* (1988) 206 CA3d 493, 253 CR 615. See §§42.22-42.34.
- Hold a hearing within 6 months to assess appointed counsel's fees. Pen C §987.8.
- Take action to carry the judgment into effect, including rearrest. *People v Superior Court (Cornelius), supra*; Pen C §§1265(b), 1310.

The remittitur issued by the appellate court restores jurisdiction to the trial court. *People v Saunoa* (2006) 139 CA4th 870, 43 CR3d 287; Pen C §1265. For further discussion of the remittitur, see §§43.38-43.40 (misdemeanor cases), 44.67-44.68 (felony cases).

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IV. DUTIES OF TRIAL COUNSEL CONCERNING APPELLATE REVIEW

§41.4 A. Prosecution-Initiated Appellate Review

The prosecution can appeal in any of the 11 situations listed in Pen C §1238. Most prosecution appeals are taken from orders granting the defendant's Pen C §995 motion setting aside all or a portion of an indictment or information; the court's dismissal, on its own motion, of a case after granting the defendant's suppression motion; the court's refusal to reinstate a felony complaint under Pen C §871.5; or unauthorized sentences. Pen C §§1238(a)(1), (a)(7), (a)(9)-(10), and 1238(c). Petitions for writ of mandate or prohibition, not appeals, are authorized from orders granting probation. Pen C §1238(d). For further discussion of the prosecution's right of appeal, see Appeals and Writs in Criminal Cases §§1.19-1.33 (3d ed Cal CEB 2007).

The prosecutor files a notice of appeal with the same time limits, and in the same manner, as does the defendant. Pen C §1239; Cal Rules of Ct 8.308(a). See also §41.5. If the defendant or the prosecution files a timely appeal, the time for the opposing party to cross-appeal from the same judgment or order is 60 days after the rendition of the judgment or 30 days after the court clerk mails notification of the first appeal, whichever is later. Cal Rules of Ct 8.308(b).

Unlike defense counsel, who must file a notice of appeal when a meritorious ground exists, or when the defendant requests (see §41.5), the prosecutor has no statutory duty to file an appeal.

The clerk of the trial court must serve trial defense counsel with the prosecution's notice of appeal and the prosecutor must serve counsel with the appellate briefs, unless all parties have been notified that the defendant has new counsel on appeal. *People v Bouchard* (1957) 49 C2d 438, 441, 317 P2d 971. A defense attorney whose client obtains a favorable judgment has the duty and the authority to ensure that it is not reversed on appeal. *People v Bouchard, supra*. But see *People v Bailey* (1992) 9 CA4th 1252, 12 CR2d 339 (appellate court disapproved of appointed defense trial counsel handling defendant's appeal from conviction because of potential conflict of counsel's arguing his own inadequacy at trial). Trial counsel who will not handle the client's appeal should advise the court so that counsel is appointed.

In most situations, prosecution and defense have the same time limits in which to appeal. This is not true for a pretrial challenge to the trial court's ruling on a Pen C §995 motion. When the trial court denies the motion, the defendant can seek review of the *denial* before trial only if the motion was brought within 60 days after arraignment, and the defendant then has only 15 days from the date of the denial to seek review. Pen C §§999a, 1510. The prosecutor has 60 days to appeal from the court's order *granting* the defendant's §995 motion. Cal Rules of Ct 8.308(a). When the trial court grants the motion in part and denies it in part, and the prosecution files an appeal after the defense time limit to appeal has lapsed, the period for the defendant to appeal is reinstated as of the date the notice of appeal was filed. See Pen C §1238.5. See also 6 Witkin & Epstein, California Criminal Law, *Criminal Appeal* §81, *Criminal Writs* §90 (3d ed 2000).

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§41.5 B. Defense Counsel's Obligations to Help Client Appeal

Duty to advise the client about appeal. After conviction, the trial attorney must advise the defendant on whether there are meritorious grounds for appeal. See Pen C §1240.1(a). The duty to advise is not limited to cases in which counsel thinks the defendant wants to appeal or the defendant has asked for advice, but applies in all cases, including guilty and nolo contendere pleas. See Pen C §1240.1(a).

Ø **Warning:** Failure to consult with the client about an appeal is constitutionally deficient assistance of counsel when there is reason to believe either (1) that a rational defendant would have wanted to appeal, or (2) that this particular defendant reasonably demonstrated to counsel an interest in appealing. *Roe v Flores-Ortega* (2000) 528 US 470, 479, 145 L Ed 2d 985, 996, 120 S Ct 1029.

The attorney must also tell the client that he or she cannot give advice about the attorney's own competence but that the client may consult the State Public Defender or another lawyer for that advice. Pen C §1240.1(a). A trial attorney representing a "prospective indigent appellant" may also ask the State Public Defender for advice on whether meritorious grounds for reversal or modification exist. Pen C §1240.1(c).

Ø **Note:** Although Pen C §1240.1 is still in effect, the current practice of the State Public Defender is to refer these calls to the appellate projects, which administer the appointed counsel programs in each of California's appellate districts. A list of these projects and their telephone numbers is in §1.2.

Cooperation with appellate counsel. Trial counsel should fully and candidly cooperate with appellate counsel, even if this means disclosing trial counsel's ineffectiveness. California State Bar Formal Opinion No. 1992-127.

Duty to file the notice of appeal. Trial counsel representing an indigent defendant must execute and file a notice of appeal on the client's behalf:

- When counsel believes that arguably meritorious grounds exist for a reversal or modification of the judgment on appeal, *and* that it is in the client's best interests to appeal (Pen C §1240.1(b)); or
- When directed to by a defendant who has a right to appeal (Pen C §1240.1(b); see *Roe v Flores-Ortega* (2000) 528 US 470, 477, 145 L Ed 2d 985, 996, 120 S Ct 1029 (no showing of merit is needed).

When the client of retained counsel wants to appeal, counsel must file a notice of appeal, instruct the client how to do so, or see that the client has counsel for this task. *In re Benoit* (1973) 10 C3d 72, 88, 109 CR 785. The notice of appeal must be filed within 60 days of the judgment in felony cases (Cal Rules of Ct 8.308(a)) and within 30 days of the judgment in misdemeanor cases (Cal Rules of Ct 8.853(a)).

Importance of timely notice of appeal. The notice of appeal must be filed within 60 days of judgment or appealable order in felony cases (Cal Rules of Ct 8.308(a)) and within 30 days of judgment or appealable order in infraction and misdemeanor cases (Cal Rules of Ct 8.852, 8.902). Failure to file a timely notice of appeal is jurisdictional error. See, *e.g., People v Chapman* (1971) 5 C3d 218, 95 CR 533: The right to appeal is lost if the notice of appeal is not filed on time. See, *e.g., In re Chavez* (2003) 30 C4th 643, 650, 134 CR2d 54. The court of appeal cannot grant relief from the default of filing the notice of appeal late (Cal Rules of Ct 8.60(d), 8.812), nor can the trial court (*People v Lyons* (2009) 178 CA4th 1355, 101 CR3d 241).

However, the doctrine of constructive filing may apply to permit the court to review the case if trial counsel promised to file a notice of appeal and the defendant reasonably relied on the promise. *In re Benoit* (1973) 10 C3d 72, 109 CR 785. In addition, under the "prison-delivery rule," an inmate's notice of appeal is deemed constructively filed when it is delivered to prison officials. Cal Rules of Ct 8.308(e), 8.853(e), 8.902(e). See also *In re Jordan* (1992) 4 C4th 116, 13 CR2d 878. An attorney's failure to timely file the notice of appeal can result in State Bar discipline. *In re Benoit* (1973) 10 C3d 72, 88, 109 CR 785. Failure to file a notice of appeal may also constitute ineffective assistance of counsel if meritorious grounds for appeal exist.

Ø **Note:** It is good practice for defense counsel to have the defendant sign a notice of appeal at sentencing, and file the notice before leaving the courthouse. If an appeal will not be filed, defense counsel should document in the file, and consider stating on the record, the reason an appeal will not be filed, *e.g.,* the defendant asked that there be no appeal.

Judicial Council notice of appeal forms are available for both felony and misdemeanor cases. See Notice of Appeal-Felony (Defendant) (Judicial Council Form CR-120) and Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132). A sample request for appointment of counsel on appeal is in California Criminal Law Forms Manual §41.3 (2d ed Cal CEB 2005) and in Appeals and Writs in Criminal Cases §2.36 (3d ed Cal CEB 2007).

Ø **Note:** Form CR-120, not Form CR-132, should be used when the defendant was *charged* with a felony, even if convicted of a misdemeanor. Cal Rules of Ct 8.850; Advisory Committee Comment to Cal Rules of Ct 8.850. Felony appeals, including appeals from misdemeanor convictions charged as felonies or tried in conjunction with felony charges, are heard in the court of appeal for the district in which the court that rendered the judgment is located (see Cal Const art VI, §11(a)); misdemeanor appeals are heard in the appellate division of the superior court that rendered the judgment (Pen C §1466).

Completing and filing Form CR-120 (including, if necessary, the petition for a certificate of probable cause; see below) will generally conclude trial counsel's duties to perfect an appeal from a felony conviction. See chap 44.

Applying for, or designating, counsel on appeal. The trial attorney has no obligation to represent the defendant on the appeal. Filing a client's notice of appeal does not commit the attorney to represent the defendant on appeal (Pen C §1240.1(b)), and case law disapproves of allowing appointed trial counsel to be appointed to represent an indigent appellant on appeal. Pen C §1240.1(b); *In re Benoit, supra* (no obligation); *People v Bailey* (1992) 9 CA4th 1252, 1254, 12 CR2d 339 (appointed counsel).

Trial counsel must assist the defendant in moving for appointment of counsel on appeal if the defendant was represented by appointed trial counsel or if the defendant, because of indigence, may request appointed appellate counsel. Pen C §1240.1(b). Judicial Council Form CR-120 for felony appeals has a box that can be checked to request appointment of counsel on appeal. Indigent misdemeanor defendants subject to incarceration or a fine of more than $500, or who are likely to suffer significant adverse collateral consequences *and* who were represented by counsel in the trial court or who establish indigency, are entitled to appointed counsel on appeal and the court may appoint counsel in other cases (see Cal Rules of Ct 8.851(a)). Counsel may use Request for Court-Appointed Lawyer in Misdemeanor Appeal (Judicial Council Form CR-133) for this purpose. A sample request for appointment of counsel on appeal is in Crim Law Forms Man §41.3 and in Appeals & Writs §2.36.

Together with the notice of appeal, the attorney must file a statement of points to be raised on appeal and designate any additions or corrections to the normal record on appeal. Pen C §1240.1(b). However, failure to do so, or to mention any particular point, does not preclude the defendant from doing so later. Pen C §1240.1(b).

Ø **Note:** Form CR-120 does not require specification of appellate issues.

Obtaining certificate of probable cause. In a felony case, when the appeal is from a guilty or nolo contendere plea or an admission of probation violation, trial counsel, when requested to file a notice of appeal, must also assist the defendant in obtaining a certificate of probable cause when the certificate is necessary to perfect the appeal. *People v Hodges* (2009) 174 CA4th 1096, 1105, 94 CR3d 862. When the defendant's claim of probable cause to appeal is based on alleged ineffectiveness of counsel, counsel may file the Pen C §1237.5 statement, instruct the defendant how to file it, or secure other counsel for the defendant. *People v Johnson* (2009) 47 C4th 668, 684 n6, 101 CR3d 332. The application for a certificate of probable cause must be filed with the notice of appeal. Cal Rules of Ct 8.304(b)(1).

The attorney need not make frivolous contentions but need only assist in setting forth the relevant facts. *People v Ribero* (1971) 4 C3d 55, 66, 92 CR 692. Judicial Council Form CR-120, the felony notice of appeal, has a petition for a certificate of probable cause on the back. For further discussion, see chap 44. See also Appeals & Writs §§1.5-1.15.

Noncertificate grounds. The certificate of probable cause requirement does not apply when the defendant appeals the denial of a motion to suppress evidence under Pen C §1538.5 or an issue arising after the plea that does not go to the plea's validity. But if one of those noncertificate grounds applies, the notice of appeal must state that the basis of the appeal is an issue that does not require a certificate of probable cause and specify the exception to the certificate

rule. Pen C §1538.5(m); Cal Rules of Ct 8.304(b)(4).

Ø **Note:** If the defendant's notice of appeal from a guilty or no contest plea states that is it based on a denial of a suppression motion or other noncertificate ground that does not affect the plea's validity, the reviewing court will not consider any issue affecting the validity of the plea unless a statement for issuance of a certificate of probable cause is also included. Cal Rules of Ct 8.304(b)(5).

Perfecting a misdemeanor appeal. Counsel should review Judicial Council Form CR-131-INFO (Information on Appeal Procedures for Misdemeanors). Perfecting a misdemeanor appeal requires more than completing and filing Judicial Council Form CR-132 (Notice of Appeal (Misdemeanor)). Defense trial counsel must also, if they are aware an indigent defendant intends to appeal, apply for appointment of appellate counsel (Cal Rules of Ct 8.851(b)) and elect the manner of preparing the record. See Cal Rules of Ct 8.860-8.873 (record in misdemeanor appeals). For further discussion of the record on appeal in a misdemeanor case, see chap 43. Trial counsel's duties in connection with a misdemeanor appeal are also discussed in Appeals & Writs §§2.3-2.11.

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C. Stay and Release Pending Appeal

§41.6 1. Bail and Own Recognizance

Misdemeanor convictions. A defendant convicted of a misdemeanor is entitled to bail on appeal as a matter of right. Pen C §1272(1)-(2); *In re Newbern* (1961) 55 C2d 500, 503, 11 CR 547. This includes an appeal from an order modifying but reinstating probation. *In re O'Driscoll* (1987) 191 CA3d 1356, 236 CR 882. Although Pen C §1272 declares bail to be a matter of right in misdemeanor cases, the amount of bail is within the court's discretion. See *In re Newbern, supra*. The court may also set reasonable bail conditions related to public safety. See *In re McSherry* (2003) 112 CA4th 856, 863, 5 CR3d 497. See also Cal Rules of Ct 8.854 (obtaining release on appeal from misdemeanor conviction).

Felony convictions. In noncapital cases, bail pending appeal must be ordered for a convicted felon who demonstrates all the following (Pen C §1272.1):

- By clear and convincing evidence that the defendant is not likely to flee. The court should consider ties to the community, employment, family, property, record of appearances, and severity of sentence.
- By clear and convincing evidence that the defendant does not pose a danger to the safety of any other person or the community. The court should consider whether the crime was a violent felony as defined by Pen C §667.5(c).
- That the appeal is not for purpose of delay and raises a substantial legal question that is likely to result in reversal.

In making its decision, the court must include a statement of reasons supporting the grant or denial of bail that is sufficiently specific to permit meaningful review. Pen C §1272.1(c).

A defendant moving for bail after a sentencing hearing in a felony matter must give at least 5 court days' notice to the prosecutor. Pen C §1272(3).

Ø **Note:** O.R. release can also be granted pending appeal. *In re Robinson* (1971) 16 CA3d 539, 94 CR 148; Pen C §1318.

The defendant must first apply for bail or release in the trial court. If that is "unjustifiably" denied, then application can be made to the reviewing court. Cal Rules of Ct 8.312.

When case dismissed after suppression motion granted. When a suppression motion is granted in a misdemeanor case and the prosecution appeals, the court must grant the defendant O.R. release until trial court proceedings resume. Pen C §1538.5(k).

In most noncapital felony cases, when a suppression motion is granted and the prosecution appeals a dismissal or seeks writ review, the court must grant the defendant an O.R. release until trial court proceedings resume. Pen C §1538.5(k). The trial court may require a defendant charged with noncapital homicide to post bail. In capital cases, neither bail nor O.R. release is available when the "proof is evident and the presumption great." Pen C §1538.5(k). See §16.33.

For further discussion, see chap 5; Appeals and Writs in Criminal Cases §§2.12-2.14 (3d ed Cal CEB 2007). Sample motions are in Appeals & Writs §2.37 and California Criminal Law Forms Manual §41.10 (2d ed Cal CEB 2005).

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§41.7 2. Stay Pending Appeal

In noncapital cases, an appeal does not stay execution of judgment or probation conditions, except on court order. Pen C §1243. A stay without bail in a felony case in which probation was denied means that the defendant will remain in county jail rather than go to prison. Pen C §§1243, 1245. Bail or O.R. release, without a stay, means that, except for imprisonment, all other conditions of the sentence or probation are in effect. A stay may be granted with respect to a jail condition, but not other conditions such as no drugs or weapons. If unstayed conditions are violated while the appeal is pending, probation may be revoked. *In re Bakke* (1986) 42 C3d 84, 89, 227 CR 663.

The defendant should seek a stay or bail first from the trial court. The court of appeal may grant a stay or release only after the superior court unjustifiably refuses to grant one. Cal Rules of Ct 8.312(b) (felony), 8.854(b) (misdemeanor). The appellate court can grant interim relief pending its ruling on the application. Cal Rules of Ct 8.312(d). For further discussion, see Appeals and Writs in Criminal Cases §§2.15-2.17, 2.38 (3d ed Cal CEB 2007); California Criminal Law Forms Manual §41.10 (2d ed Cal CEB 2005).

Ø **Note:** The court cannot stay the duty to register as a convicted sex offender. Pen C §1243.

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V. COMPENSATION OF APPOINTED COUNSEL

§41.8 A. Statutory Authority for County Payment to Appointed Counsel

Private appointed counsel are entitled to be reimbursed a "reasonable sum" from the county general fund, both for compensation and for "necessary expenses." Pen C §987.2. The judge must consider the following (Pen C §987.3):

- The customary fee charged a nonindigent client for similar services;
- The time and labor spent;
- The difficulty of the defense;
- The novelty or uncertainty of the area of law involved;
- The degree of professional ability called for and exercised in performance of the services; and
- The professional character, qualifications, and standing of the attorney.

Many counties have contracts for appointed attorneys. Pen C §987.2. The courts may, in deciding whether to appoint a defendant's requested attorney, consider that attorney's willingness to abide by an appointed counsel's fee schedule. *Alexander v Superior Court* (1994) 22 CA4th 901, 27 CR2d 732. No matter how the court determines compensation, counsel should learn the rules in advance and keep careful records. Declarations in support of compensation should explain why any extra time was needed (*e.g.,* difficulty or novelty of the issue).

Ø **Note:** New attorneys should consult an experienced practitioner for billing questions. Generally, judges will not allow inexperienced counsel to charge more simply because it took them longer. Most judges consider "learning time" to be unbillable. In granting compensation, the court may consider whether counsel failed, without good cause, to keep a promise that the case would be ready within the time set. Pen C §987.05.

The trial court may also compensate appointed counsel for pretrial writ petitions filed in the court of appeal. *In re Head* (1986) 42 C3d 223, 226, 228 CR 184 (habeas challenging prison conditions); *Polakovic v Superior Court* (1972) 28 CA3d 69, 72, 104 CR 383 (Pen C §§995 and 1538.5 denials).

Ø **Note:** Appointed counsel should be wary of filing frivolous writ petitions. See *Gottlieb v Superior Court* (1991) 232 CA3d 804, 283 CR 771 (sanctions imposed).

Appointed counsel's necessary expenses can include the costs of investigators and experts (Pen C §§987.2(a), (f), 987.3), a psychotherapist's consultation (Evid C §1017), or expert witnesses (Evid C §§730-731). The court may require that the need for experts be shown, in camera if necessary. See generally *Corenevsky v Superior Court* (1984) 36 C3d 307, 204 CR 165; *Tran v Superior Court* (2001) 92 CA4th 1149, 112 CR2d 506.

Ø **Note:** Private appointed counsel should generally obtain court authorization in advance of hiring any experts. Some local court rules require court approval before appointed counsel may hire assistants such as investigators and experts.

An attorney who feels that payment is inadequate may petition for a writ of mandate. In such cases, the appellate court possesses the power to "determine the reasonable compensation and order the trial court to fix compensation in that amount." *Arnelle v City & County of San Francisco* (1983) 141 CA3d 693, 698, 190 CR 490. See *Trask v Superior Court* (1994) 22 CA4th 346, 27 CR2d 425.

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§41.9 B. Reimbursement by Defendants

Reimbursement to county. There are two statutory systems for determining reimbursement by adult defendants: Pen C §§987.8 and 987.81. The §987.8 procedures are effective throughout California, while the §987.81 procedures are effective only if adopted by that county's board of supervisors. Pen C §987.81(c).

Penal Code §987.8 procedures. Before appointing counsel, the trial court must notify the defendant that the court may, after a hearing, rule on the defendant's present ability to pay all or part of the cost of the legal representation. The notice must inform the defendant that an order to pay will have the same effect as a civil judgment. Pen C §987.8(f). The hearing to set the amount of payment is usually held at the conclusion of the case. Pen C §987.8(b). The court may also order the defendant to appear before a county officer to inquire into his or her ability to pay. Pen C §987.8(b). Absent notice and hearing, an order to reimburse legal fees is invalid. *People v Flores* (2003) 30 C4th 1059, 1068, 135 CR2d 63.

At the hearing, the defendant is entitled (but not limited) to the following rights: to be personally heard; to present witnesses and documents; to have the opportunity for confrontation and cross-examination; to have adverse evidence disclosed; and to have a written statement of findings. Pen C §987.8(e).

"Legal assistance" is defined in Pen C §987.8(g)(1) to include counsel and supportive services such as medical and psychiatric examinations, investigators and experts, and other services. "Ability to pay" is defined in Pen C §987.8(g)(2) as the defendant's "overall capability" to reimburse all or a part of the costs and includes consideration of (1) present financial position, (2) "reasonably discernible future financial position" up to 6 months, or (3) the likelihood of obtaining employment in 6 months, and (4) "any other factor [that] may bear" on this question. Absent unusual circumstances, a person sentenced to state prison must be considered unable to reimburse the county for legal representation. Pen C §987.8(g)(2)(B). Before ordering reimbursement from a person sentenced to prison, the court must make "an express finding of unusual circumstances." *People v Lopez* (2005) 129 CA4th 1508, 1537, 29 CR3d 586.

If the court finds present ability to repay, the court must set the amount, and order payments to be made in a reasonable manner. Pen C §987.8(e). If the defendant has been ordered to go to a county officer for further inquiry, failure to appear within 20 working days "shall" result in a recommendation to the court that the defendant pay the full cost of the legal assistance. Pen C §987.8(d). The notice must state the cost of legal assistance provided, the defendant's procedural rights, the time for response, and a warning of the consequences for not appearing. The order to pay may be enforced in the manner provided for enforcement of money judgments generally, but may not be enforced by contempt. Pen C §987.8(e). When the defendant was represented by the public defender, the cost of legal services is the pro rata share of the public defender's budget and includes any proven expenses to the county such as investigator's fees and expenses, expert witness fees or expenses, and long-distance telephone expenses. *People v Viray* (2005) 134 CA4th 1186, 1217, 36 CR3d 693.

A second hearing may be held in the next 6 months. Pen C §§987.8(b), 987.81(a). The 6 months is not tolled by the pendency of an appeal (*People v Turner* (1993) 15 CA4th 1690, 19 CR2d 736, disapproved on other grounds in *People v Flores* (2003) 30 C4th 1059, 1067, 135 CR2d 63), but it can be extended if the payment issue was on appeal (*People v Flores, supra*).

At any time during the pendency of an order to repay under §987.8, the defendant may petition for modification on grounds of change in circumstances. Pen C §987.8(h). (This provision is not included in §987.81, discussed below.)

Section 987.8 was upheld against a number of constitutional challenges in *People v Amor* (1974) 12 C3d 20, 114 CR 765. See also *Fuller v Oregon* (1974) 417 US 40, 40 L Ed 2d 642, 94 S Ct 2116 (Oregon statute similar to §987.8 held constitutional).

Penal Code §987.81 procedures. The county board of supervisors may adopt a resolution requiring a defendant who is provided legal assistance by the public defender or appointed counsel to appear before a county officer to inquire into the defendant's ability to pay, and on conclusion of criminal proceedings or withdrawal of the public defender or appointed counsel, the board may hold a hearing to determine present ability to repay. Pen C §987.81. This section appears to supplement rather than replace Pen C §987.

Ø **Note:** Reimbursement procedures vary widely from county to county. Many courts avoid both procedures in setting the repayment amount by asking the defendant to stipulate to payment of a nominal amount in lieu of a formal inquiry or hearing.

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VI. RELIEF FROM THE CONSEQUENCES OF ARREST AND CONVICTION RECORDS

§41.10 A. Overview

Although the past can never be completely eradicated, some relief from the civil consequences of criminal convictions is available in many situations. Most forms of relief require some postjudgment action by the court, such as sealing records, vacating convictions, or granting certificates of rehabilitation. Other forms, such as destruction of minor misdemeanor marijuana records, should occur automatically. See §41.12. A pardon requires gubernatorial action. See §41.20. The Department of Justice determines relief related to the posting of sex offender information on the Megan's Law website. See §41.19A.

Proper handling of a criminal case requires a knowledge of the civil consequences of criminal convictions. Counsel should also be knowledgeable about what relief may ultimately be available and what circumstances may warrant relief. Both sides may want to know, for example, whether a defendant can be relieved of the duty to admit a conviction on employment applications or whether a defendant will receive professional discipline. For discussion of criminal records, see chap 12. Effects on professional licenses are discussed in chap 53. Effects of conviction on immigration status are discussed in chap 52. See the chart on the effect of relief from disabilities in §41.24.

Employers, generally, cannot ask job applicants about arrests or detentions that did not result in conviction, or for information about a referral to, and participation in, any pretrial or posttrial diversion program. Lab C §432.7(a).

Exceptions to these prohibitions include:

- Persons seeking employment, or already employed, as peace officers, or seeking positions with the department of justice or other criminal justice agencies as defined, are not covered. Lab C §432.7(e).
- Employers at health facilities can ask applicants for positions with regular access to patients about arrests for the sex offenses listed in Pen C §290 and can ask applicants for positions with access to drugs or medication about arrests for offenses specified in Health & S C §11590. Lab C §432.7(f).

In addition, unless exempted by law, employers cannot ask about any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated, including records of juveniles and minors (see Welf & I C §389; Pen C §§851.7, 1203.45), and misdemeanor convictions dismissed under Pen C §1203.4. 2 Cal Code Regs §7827.4(d)(1).

The civil consequences of conviction are especially significant in sex offense cases. In particular, counsel should know what offenses will result, under "Megan's Law," in placement of the offender on the California Department of Justice's Internet website, which lists designated registered sex offenders. See http://www.meganslaw.ca.gov. The consequence of that listing can be more important than the jail or prison term. In some cases, a convicted sex offender can apply for an exclusion from the website listing. See §41.19A.

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B. Sealing of Records

§41.11 1. Finding of Factual Innocence

Under Pen C §851.8, a factually innocent person arrested for or charged with a crime may be able to have the records sealed by obtaining a declaration of factual innocence. An arrestee is "factually innocent" only if no reasonable cause exists to believe he or she committed the offense. Pen C §851.8(b). The procedure for obtaining a certificate of factual innocence varies, depending on whether an accusatory pleading was filed as a result of the arrest. The relief granted in each situation is the same: All records relating to the arrest and charges must be sealed for 3 years and must subsequently be destroyed. Pen C §851.8(b). The arrest is deemed never to have occurred. Pen C §851.8(f).

If no accusatory pleading was filed, the arrestee begins by petitioning the arresting agency and district attorney for a determination of factual innocence. Pen C §851.8(a). The Department of Justice provides forms for this purpose. Pen C §851.8(g). If the petition is denied, or deemed denied because it is not acted on in 60 days, the arrested person may petition the court for a finding of factual innocence. Pen C §851.8(b).

When charges were filed but the case was dismissed, the court may, if the district attorney concurs, grant the above relief at the time of dismissal. Pen C §851.8(d). Alternatively, the defendant may petition the court that dismissed the charges for a finding of factual innocence. Pen C §851.8(c).

When a trial results in an acquittal, the judge may find the person factually innocent and order relief. Pen C §§851.8(e), 851.85. Although the statute does not explicitly provide that a defendant acquitted after trial may petition for a determination of factual innocence, it has been so construed. See *People v Adair* (2003) 29 C4th 895, 903, 129 CR2d 799.

The arrestee may file the petition up to 2 years after the date of arrest or accusatory pleading, whichever is later; in the absence of prejudice, the court may permit later filing for good cause. Pen C §851.8(*l*). See *People v Bermudez* (2009) 172 CA4th 966, 969, 91 CR3d 510 (2-year time limit applies when charges were dismissed). Relief is not available if a related civil action is pending against the arresting officer or agency. Pen C §851.8(k). Nor is relief available for offenses classified as infractions. Pen C §851.8(n). For a sample petition, see California Criminal Law Forms Manual §41.9 (2d ed Cal CEB 2005).

The trial court may not deny a petition for a determination of factual innocence without an evidentiary hearing (*People v Chagoyan* (2003) 107 CA4th 810, 132 CR2d 419), but the burden the petitioner must meet to establish entitlement to relief is very high. The evidence must show that "no person of ordinary care and prudence [would] believe or conscientiously entertain any honest and strong suspicion that the person arrested [or acquitted] is guilty." The record must exonerate, not merely raise a substantial question about guilt. *People v Adair* (2003) 29 C4th 895, 907, 129 CR2d 799. Therefore, an acquittal does not necessarily require a finding of factual innocence. See, *e.g., People v Bleich* (2009) 178 CA4th 292, 300, 100 CR3d 288 (denial upheld); *People v Medlin* (2009) 178 CA4th 1092, 1094, 100 CR3d 810 (finding of factual innocence reversed).

On appeal, the reviewing court must review the trial court's determination of the issue by applying the independent review standard, rather than by the substantial evidence test, because a certificate of factual innocence may not be granted if *any* reading of the facts would establish probable cause. 29 C4th at 907. The arresting agency is not a party to the court proceedings on the petition and thus has no standing to appeal an order granting the petition. *People v Punzalan* (2003) 112 CA4th 1307, 1310, 6 CR3d 30.

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§41.11A 2. Juvenile Misdemeanor Arrest and Citation Records

An individual who, as a minor, was arrested for a misdemeanor may have the arrest record and any juvenile court records sealed if (Pen C §851.7):

- He or she was released for lack of probable cause;
- The juvenile court proceedings were dismissed or any adult proceedings were discharged without a conviction; or
- He or she was acquitted.

This provision applies to minors found unfit for juvenile court when criminal proceedings in adult court terminated without a conviction. Pen C §851.7. It also applies if the person cannot apply for record sealing under Welf & I C §781. Pen C §851.7(d). By its terms, §851.7 does not apply to arrests for registrable sex offenses, drug offenses, or traffic offenses. Pen C §851.7(e). But see *People v Pruett* (1975) 51 CA3d 329, 124 CR 273 (to extent that §851.7(e) denies relief to minors arrested for misdemeanor drug offenses, it denies equal protection). If the court makes the finding required for relief, the records will be sealed and the proceedings will be deemed not to have occurred. Pen C §851.7(b).

Ø **Note:** Section 851.7 does not apply to minors who are taken into temporary custody under Welf & I C §625 and subsequently released without further proceedings. Such individuals are not required to state that they have been arrested or detained on applications for jobs or educational opportunities. *T.N.G. v Superior Court* (1971) 4 C3d 767, 94 CR 813.

Records of juvenile arrests and juvenile court wardship proceedings also may be sealed and destroyed if the individual meets the requirements of Welf & I C §781. For discussion, see §§41.13-41.13A.

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§41.12 3. Marijuana Arrests and Convictions

Records of marijuana arrests and convictions (except cases concerning concentrated cannabis) are automatically destroyed 2 years after the arrest or conviction when the case involved these charges:

- Simple possession;
- Possession on school grounds; or
- Offering, giving away, or transporting less than 28.5 grams of marijuana.

Health & S C §§11357(b)-(e), 11360(b), 11361.5(a).

Once the records have been destroyed, the person can deny the conviction or arrest. Court records and drug diversion agency records are generally destroyed. They are deemed not accurate or relevant, and no public agency may, because of this, limit or in any way deny the individual any opportunity, privilege, or interest. Health & S C §§11361.5, 11361.7. These provisions are intended to eliminate "in the broadest terms possible" all collateral consequences of these arrests or convictions. *People v Boyd* (1979) 24 C3d 285, 155 CR 367 (criminal); *Governing Bd. v Mann* (1977) 18 C3d 819, 135 CR 526 (civil). No case has decided whether the federal government must recognize this relief. For discussion of the federal government's position on state dismissals, see §41.15.

Exempted from the destruction requirement are transcripts of court proceedings, published appellate opinions, and records relevant to a pending lawsuit. Health & S C §11361.5(d). Records will also not be destroyed if the conviction is still reviewable on appeal, a prison or jail term remains to be served, a fine is unpaid, probation has not been completed, or a bench warrant is outstanding. See *Younger v Superior Court (Mack)* (1978) 21 C3d 102, 145 CR 674 (upholding constitutionality of Health & S C §11361.5).

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§41.13 4. Juvenile Court Records

Sealing of records. To seal juvenile court records, a petition must be filed by either the subject of the records or the probation department. Welf & I C §781. The Judicial Council has promulgated mandatory Form JV-590 (Order to Seal Juvenile Records) for the court's order. Application may be made 5 years after the termination of juvenile court jurisdiction or when the subject of the records reaches age 18, whichever is earlier. To be eligible for relief, the individual must not have been convicted (presumably in adult court) of a felony or misdemeanor involving moral turpitude, and there must be no pending civil litigation concerning the incident.

Under Welf & I C §781(a) and (d), no sealing or destruction is permitted for an offense listed in Welf & I C §707(b) that was committed when the minor was age 14 or older. The age limit on eligibility for record sealing does not violate equal protection. *In re Chong K.* (2006) 145 CA4th 13, 51 CR3d 350. The age limit applies to persons honorably discharged from the Division of Juvenile Justice, even though Welf & I C §§1172 and 1179 provide that an honorable discharge relieves the individual from "all penalties and disabilities." 145 CA4th at 21. If any offense charged in a juvenile petition is subject to the prohibition on sealing, no charge in the petition can be sealed. *In re Jeffrey T.* (2006) 140 CA4th 1015, 1019, 44 CR3d 861.

Relief consists of sealing of arrest and other records, papers, and exhibits. Registration as a sex offender will be terminated, and the Department of Justice will be ordered to destroy records. Welf & I C §781(a). Once the records are sealed, "the proceedings … shall be deemed never to have occurred and the person may properly reply accordingly to any inquiry." Welf & I C §781(a). The records are not subject to any inspection, with limited exceptions: inspection by the person involved, for defamation actions, and by insurers concerned with certain Vehicle Code offenses. Welf & I C §781(b)-(c). See also *Parmett v Superior Court (Chrystal B.)* (1989) 212 CA3d 1261, 1266, 262 CR 387. Sealed records must be destroyed, unless good cause is presented, when a person charged under Welf & I C §602 reaches age 38. Welf & I C §781(d).

Destruction of records. Juvenile court records must be destroyed by court order when the subject reaches age 21 if the subject was alleged or adjudged under Welf & I C §601, or when the subject reaches age 38 if the subject was alleged or adjudged under Welf & I C §602, unless for good cause the court determines that the juvenile record is to be retained or unless it is released to the subject. Welf & I C §826(a). However, a juvenile court record that cannot be sealed under Welf & I C §781(e) must not be destroyed. Welf & I C §826(a).

When records are released or destroyed under this section, the proceedings "shall be deemed never to have occurred, and the person may reply accordingly to any inquiry." Welf & I C §826(a).

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§41.13A 5. Misdemeanor Convictions of Minors

It is rare for a person under age 18 to be convicted of a misdemeanor in adult court. When it does happen, Pen C §1203.45 provides for the sealing of such records. Relief is granted if the minor has already received, or is eligible for, postconviction dismissal of the case under Pen C §1203.4 or §1203.4a. For discussion, see §§41.15-41.16. Relief under §1203.45 goes beyond the relief available to an adult under §§1203.4 and 1203.4a. Under §1203.45, the records are sealed; the conviction, arrest, or other proceeding is deemed never to have occurred; and the person may answer accordingly to any question. California Criminal Law Forms Manual §41.9 (2d ed Cal CEB 2005) has a sample petition for relief.

With exceptions, to receive relief under Pen C §1203.45, the minor can have been convicted of only one charge or count, even in the same case. Pen C §1203.45(d); *People v Mgebrov* (2008) 166 CA4th 579, 587, 82 CR3d 778. Relief under §1203.45 is not available to minors convicted of offenses requiring sex offender registration or of certain Vehicle Code offenses; nor is it available for most cases involving conviction of more than one offense. However, a provision of §1203.45 prohibiting the sealing of records of misdemeanor drug offenses was declared unconstitutional in *People v Ryser* (1974) 40 CA3d 1, 114 CR 668.

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§41.13B 6. Sealing Records After Successful Completion of Pen C §1000 or §1000.5 Program

After a defendant successfully completes a drug diversion program (see Pen C §1000.5) or a deferred entry of judgment program (see Pen C §§1000, 1000.8), the judge, on written or oral motion, or on his or her own motion, may order that the records of the arresting agency and court be sealed. Pen C §851.90(a). The defendant may then, with specified exceptions, state that he or she was not arrested or granted diversion or deferred entry of judgment. Pen C §851.90(a)(4).

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§41.14 C. Reduction of Felony to Misdemeanor

When the court grants felony probation on a wobbler, *i.e.,* an offense chargeable either as a felony or a misdemeanor, without the imposition of sentence, the court, on application, may later declare the offense to be a misdemeanor. Pen C §17(b)(3). See, *e.g., People v Superior Court (Alvarez)* (1997) 14 C4th 968, 976, 60 CR2d 93. See also *People v Glee* (2000) 82 CA4th 99, 103, 97 CR2d 847 (grant of summary probation with termination to occur on completion of jail term; felony reduced to misdemeanor). The court cannot reduce a felony to a misdemeanor when a prison sentence had been imposed before probation was granted. *People v Wood* (1998) 62 CA4th 1262, 1266, 73 CR2d 308. The court's discretion to suspend imposition of sentence also does not authorize the court to reduce a nonwobbler to a misdemeanor. *People v Mauch* (2008) 163 CA4th 669, 674, 77 CR3d 751. Relief under Pen C §17(b) is not available when the court sentences the defendant to a term in state prison and then suspends execution of the sentence. Pen C §17(b)(3).

Ø **Note:** In deciding whether to reduce a felony to a misdemeanor, the court must give "individualized consideration of the offense, the offender, and the public interest." *People v Superior Court (Alvarez)* (1997) 14 C4th 968, 978, 60 CR2d 93.

Penal Code §17(b) states that once declared a misdemeanor, the crime is a misdemeanor "for all purposes." See *Gebremicael v California Comm'n on Teacher Credentialing* (2004) 118 CA4th 1477, 13 CR3d 777. However, there are several exceptions to the rule. The conviction remains a prior strike under the Three Strikes law unless the misdemeanor reduction occurred at the time of initial sentencing. Pen C §§667(d)(1), 1170.12(b)(1); *People v Superior Court (Alvarez), supra*. The federal government can still consider the conviction a felony for purposes of its gun statutes. *U.S. v Tallmadge* (9th Cir 1987) 829 F2d 767, 770. See also 18 USC §921(a)(20) (recognizing some state expungements and set-asides). Under Bus & P C §6102, the crime remains a felony for attorney disciplinary purposes. This is also true for several other state-regulated professions. But see *Gebremicael v California Comm'n on Teacher Credentialing, supra* (plaintiff, whose conviction had been reduced to misdemeanor, improperly denied teaching credential on ground of felony conviction).

Reduction to a misdemeanor under Pen C §17(b) precludes prosecution for a later-arising event requiring a predicate felony conviction, such as a felon-in-possession of a gun under Pen C §12021. *People v Gilbreth* (2007) 156 CA4th 53, 57, 67 CR3d 10. A person convicted of a wobbler that was designated as a felony should generally seek reduction to a misdemeanor under §17(b)(3) before—or while—seeking postjudgment dismissal under Pen C §1203.4 or Pen C §1203.4a. Note, however, that an offense can be reduced to a misdemeanor even after dismissal. *Meyer v Superior Court* (1966) 247 CA2d 133, 55 CR 350. Prosecutors may contest such reductions, even though they may not be able to contest the "dismissals" under §§1203.4 and 1203.4a. See also §8.40, chap 37. Judicial Council Form CR-180 (Petition for Dismissal) may be used to request the court to reduce an eligible felony to a misdemeanor. In addition, a sample motion to reduce a felony to a misdemeanor is in California Criminal Law Forms Manual §41.6 (2d ed Cal CEB 2005).

For a very small number of felonies, the legislature has prescribed a fine as an alternative to state prison. See, *e.g.,* Pen C §148.3(b) (false report of emergency under specified circumstances). For these crimes, Pen C §18 permits the court to sentence the defendant to county jail, thus making the conviction a misdemeanor, even though the statute of conviction itself does not provide for that alternative. See *People v Mauch* (2008) 163 CA4th 669, 675, 77 CR3d 751.

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Source: Criminal Law/California Criminal Law Procedure and Practice/41 TRIAL COUNSEL'S DUTIES AFTER JUDGMENT; CLEANSING AND SEALING OF CRIMINAL RECORDS/ D. Dismissal of Charges/§41.15 1. Dismissal of Felony or Misdemeanor Charges After Probation (Pen C §1203.4)

D. Dismissal of Charges

§41.15 1. Dismissal of Felony or Misdemeanor Charges After Probation (Pen C §1203.4)

Defendants who have successfully completed probation (including early discharge) can petition the court to set aside a guilty verdict or permit withdrawal of the guilty or nolo contendere plea and dismiss the complaint, accusation, or information. Pen C §1203.4. Defendants who have successfully completed a conditional sentence, *i.e.,* "revocable release … without the supervision of a probation officer" (Pen C §1203(a)), are also eligible to petition for dismissal under Pen C §1203.4. *People v Bishop* (1992) 11 CA4th 1125, 1129, 15 CR2d 539 ("conditional sentence" as defined in Pen C §1203(a) is same as former term "summary probation"). Penal Code §1203.4 provides that the court can also, in furtherance of justice, grant this relief "in any other case." See *People v McLernon* (2009) 174 CA4th 569, 577, 94 CR3d 570 (denial of prior request for §1203.4 relief will not bar subsequent §1203.4 petition brought under interests-of-justice provision). However, case law indicates that §1203.4 does not apply to someone who was denied probation and is currently on parole. See, *e.g., People v Borja* (1980) 110 CA3d 378, 167 CR 813. The petition can also be filed before probation ends when the court finds that it is in the interests of justice. Pen C §1203.4.

Section 1203.4 relief is not available for convictions of the offenses specified in Pen C §1203.4(b). These include most felony child molestation offenses, certain other sex offenses, a few traffic offenses, and infractions. However, when a defendant has been convicted of multiple counts, some of which qualify for §1203.4 dismissal, the guilty verdicts on the individual qualifying counts may be dismissed. See *People v Mgebrov* (2008) 166 CA4th 579, 591, 82 CR3d 778 (two of defendant's three convictions eligible for §1203.4 relief).

The probationer must be informed in the probation papers of the right to petition under §1203.4. The probationer may make a §1203.4 application in person, by attorney, or by the probation officer if authorized in writing. Reimbursement to the county of up to $150 for services related to the petition may be assessed, subject to waiver for indigency. Pen C §1203.4(d). The §1203.4 fee can be imposed only after the court determines the defendant's ability to pay, and, accordingly, the clerk cannot impose this as a filing fee. The court need not determine the actual cost of services but can impose all or part of a fee set by the board of supervisors, and no oral hearing on ability to pay is required. *Lewis v Clarke* (2003) 108 CA4th 563, 568, 133 CR2d 749.

The prosecuting attorney must be given 15 calendar days' notice of the petition for relief. If the prosecutor fails to appear and object, the prosecutor may not move to set aside or appeal the grant of the petition. Failure of the trial court to grant the petition is appealable under Pen C §1237 as an order made after judgment affecting the defendant's substantial rights. *People v Chandler* (1988) 203 CA3d 782, 789, 250 CR 730.

Ø **Note:** Judicial Council Form CR-180 (Petition for Dismissal) may be used to petition for dismissal under Pen C §1203.4. An attorney-drafted sample application to dismiss under Pen C §1203.4 is in California Criminal Law Forms Manual §41.7 (2d ed Cal CEB 2005).

The defendant's court record is not expunged or sealed when Pen C §1203.4 relief is granted. Instead, an extra entry, "dismissed," is made on the record. It remains a fully public document.

If probation has been successfully completed or terminated early, and the defendant is not then serving a sentence, on probation, or charged with any offense, relief must be granted. *People v Hawley* (1991) 228 CA3d 247, 249, 278 CR 389; *People v Lewis* (2006) 146 CA4th 294, 297, 53 CR3d 40. But relief need not be granted when probation has expired without successful completion. *People v Covington* (2000) 82 CA4th 1263, 98 CR2d 852 (failure to make full restitution). In considering whether to grant a petition when probation has not been successfully completed, the court can consider postprobation conduct. In addition, after a first denial, the court can consider a subsequent petition when circumstances have changed. *People v McLernon* (2009) 174 CA4th 569, 572, 94 CR3d 570. The court can dismiss some counts of a multicount complaint even if other counts cannot be dismissed. *People v Mgebrov* (2008) 166 CA4th 579, 586, 82 CR3d 778.

If the petition is granted, the petitioner must be released from all "penalties and disabilities" resulting from the

conviction. However, the limitations on relief available under §1203.4 are numerous and substantial. *People v Vasquez* (2001) 25 C4th 1225, 1230, 108 CR2d 610. The *Vasquez* court defined the terms in the statute, saying, "As used in section 1203.4 of the Penal Code the words 'penalties and disabilities' have reference to criminal penalties and disabilities or to matters of a kindred nature." 25 C4th at 1231 (internal quotation marks and citation omitted). Under Pen C §1203.4(a), the order dismissing the charges

- Does not prevent the conviction from being pleaded and proved just like any other prior in any subsequent prosecution. See *People v Diaz* (1996) 41 CA4th 1424, 49 CR2d 252 (dismissed charge used as strike under Three Strikes law);
- Does not relieve the defendant of the obligation to disclose the conviction in response to any direct question in any questionnaire or application for public office or licensure by any state or local agency, or for contracting with the state lottery;
- Does not permit a person prohibited from holding public office as a result of the charges to hold public office;

Ø **Note:** By regulation, a private employer may not ask a job applicant about any misdemeanor conviction dismissed under §1203.4. 2 Cal Code Regs §7287.4(d). However, whether a private employer can ask about a felony conviction dismissed under this provision is an unanswered question. Perhaps the best advice an attorney could give a client faced with this question would be that it is certainly proper to disclose both the conviction and the dismissal.

- Does not permit a person to own, possess, or have in his or her custody or control any firearm; nor does dismissal prevent a person from being convicted as an ex-offender in possession of a gun under Pen C §12021; and
- Does not relieve a defendant required to register as a sex offender under the Sex Offender Registration Act (Pen C §§290-290.023) of the obligation to register or exempt a defendant from inclusion on the Megan's Law Internet website (*Doe v Brown* (2009) 177 CA4th 408, 412, 99 CR3d 209).

Ø **Note:** A person required to register as a sex offender who receives §1203.4 relief may apply for a certificate of rehabilitation and pardon. Pen C §4852.01(c). If the offense is not listed in Pen C §290.5(a)(2), a pardon will end the duty to register. Pen C §290.5(a)(1). For further discussion, see §41.20.

Other statutes and court decisions impose additional limitations on the scope of a §1203.4 dismissal. For example:

- Dismissal does not affect any revocation or suspension of the defendant's driver's license, and a conviction may be considered a conviction for the purpose of revoking, suspending, or limiting the privilege because of prior convictions. Veh C §13555.
- Dismissal does not preclude the use of the conviction to impeach a testifying defendant. Evid C §788(c).
- Dismissal does not make the conviction records unavailable to the public. *People v Field* (1995) 31 CA4th 1778, 1787, 37 CR2d 803.
- Dismissal does not prevent state licensing agencies from using the conviction in their licensing decisions. See, *e.g.,* Bus & P C §§475, 480, 490; Educ C §44009; *Adams v County of Sacramento* (1991) 235 CA3d 872, 885, 1 CR2d 138 (denying peace officer status). See also *People v Vasquez* (2001) 25 C4th 1225, 1230, 108 CR2d 610, and cases cited there. On the effect of criminal conviction on professional licenses, see chap 53.
- Dismissal does not prevent a conviction from disqualifying an individual from obtaining a foster care license if the original offense is one for which an exemption for disqualification cannot be granted under Health & S C §1522(g). *Department of Children & Family Servs. v Superior Court (Cheryl M.)* (2003) 112 CA4th 509, 5 CR3d 182.

Furthermore, the federal government has no general obligation to recognize Pen C §1203.4 relief. See, *e.g., Dickerson v New Banner Inst.* (1983) 460 US 103, 74 L Ed 2d 845, 103 S Ct 986. However, the federal government does give limited recognition to state court dismissals. See 18 USC §921(a)(20) (recognizing state dismissal for firearms purposes, if dismissal permits the person to possess a firearm). See also *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, 749 (narcotics offenses that could have been prosecuted federally and expunged under Federal First Offender Act but were prosecuted by the state and expunged in state court are expunged for purposes of deportation).

Other circuits have declined to follow *Lujan-Armendariz,* and the Bureau of Immigration and Citizenship Services has refused to apply it outside of the Ninth Circuit. See *Acosta v Ashcroft* (3d Cir 2003) 341 F3d 218, 225; *Gill v Ashcroft* (7th Cir 2003) 335 F3d 574, 577.

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§41.16 2. Dismissal of Misdemeanor Charges When Probation Not Granted (Pen C §1203.4a)

Dismissal under Pen C §1203.4a is available to a person convicted of a misdemeanor and *not* granted probation. Relief is similar to dismissal under Pen C §1203.4, discussed in §41.15. To be eligible, the misdemeanant must have fully complied with and performed the sentence of the court, must not be serving any other sentence nor be charged with a crime, and must have, since judgment, "lived an honest and upright life," obeying the laws. Such a person must be permitted to withdraw the plea of guilty or nolo contendere and enter a not guilty plea. A jury verdict of guilty must be set aside and the case dismissed. The defendant is thereafter "released from all penalties and disabilities resulting" from the conviction, except as provided by law.

Penal Code §1203.4a, unlike Pen C §1203.4, does not explicitly require the person to disclose the conviction in an application for a state license, public office, or to contract with the state lottery. Both the statute and case law are silent on whether the person should disclose the conviction in response to a private employer's questions. Most private employers are prohibited by 2 Cal Code Regs §7287.4(d)(1)(B) from asking about misdemeanor convictions dismissed under §1203.4, but the regulation does not mention §1203.4a. Relief under §1203.4a does not end the requirement to register as a convicted sex offender under Pen C §290. Other differences between the relief available under §§1203.4a and 1203.4 are described in the chart in §41.24.

Judicial Council Form CR-180 (Petition for Dismissal) may be used to petition for dismissal under Pen C §1203.4a. An attorney-drafted application to dismiss under §1203.4a is in California Criminal Law Forms Manual §41.8 (2d ed Cal CEB 2005).

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§41.17 3. Dismissal After Completion of Treatment for Nonviolent Drug Possession Offense (Proposition 36)

Ø **Note:** During the 2005-2006 regular session, the California Legislature adopted SB 1137 (see Stats 2006, ch 63, §7), which made significant changes to the drug treatment laws enacted under Proposition 36. Among other things, the amended provisions change existing law by permitting incarceration of offenders placed on Proposition 36 probation who relapse during treatment. This legislation has been declared invalid in its entirety. See *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 101 CR3d 229. Even though the SB 1137 amendments have been declared invalid, they remain on the books. The bench and bar should be careful to use a pre-amendment version of the statute. The discussion in this section cites to the pre-amendment version of Pen C §1210.1.

A defendant who has completed drug treatment imposed under Pen C §1210.1 (Proposition 36) may petition the court under Pen C §1210.1(d) to dismiss the charges. The court must dismiss the charges if it finds that the defendant has (1) successfully completed drug treatment and (2) substantially complied with the conditions of probation. Pen C §1210.1(d). The term "successful completion of treatment" is defined in Pen C §1210(c) to mean "that a defendant who has had drug treatment imposed as a condition of probation has completed the prescribed course of drug treatment and, as a result, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future." See *People v Hinkel* (2005) 125 CA4th 845, 22 CR3d 895.

Ø **Practice tip:** As construed in *Hinkel,* dismissal after completion of Proposition 36 probation is not automatic. The burden of demonstrating the existence of reasonable cause to believe that the defendant will not abuse controlled substances in the future is on the defendant (125 CA4th at 853), and the mere fact that the defendant has completed the required treatment program may not persuade the court that the defendant will be able to stay clean after the treatment program has ended. If the defendant's performance in the treatment program was not exemplary, defense counsel might suggest that the client wait to file the dismissal petition until after establishing a record of not abusing controlled substances following completion of treatment. Note, however, that some courts hold the dismissal hearing automatically at the end of probation.

Like a §1203.4 dismissal, a §1210.1(d) dismissal is not a dismissal for all purposes. Even after dismissal, the defendant is barred (see Pen C §12021) from owning, possessing, or controlling a concealable firearm. Pen C §1210(d)(2). See *People v DeLong* (2002) 101 CA4th 482, 124 CR2d 293 (§1210.1(d) dismissal does not protect defendant from all disadvantageous consequences, including a "besmirched reputation" and use of the conviction as a prior felony for purposes of Pen C §12021).

Unlike §1203.4, however, §1210.1(d) explicitly states that except as provided in the subdivision, "the arrest and conviction shall be deemed never to have occurred." Pen C §1210(d)(1). After a §1210.1 dismissal, except in the situations listed in §1210.1(d)(3),

(1) The defendant may state in response to criminal history questions that he or she has never been arrested or convicted of the offense (Pen C §1210.1(d)(3)); and

(2) The arrest and conviction record cannot be used in any way that could result in the denial of any employment, benefit, license, or certificate without the defendant's consent.

The defendant must disclose the arrest and conviction in response to a direct question on any questionnaire or application for occupying public office, becoming a peace officer, contracting with the California State Lottery, being licensed by any state or local agency, or performing jury service. In addition, the Department of Justice may keep a record of the arrest and conviction and may disclose it in response to a law enforcement inquiry or a question about a peace officer application. Pen C §1210.1(d)(3).

Ø **Warning:** A §1210.1(d) dismissal does not necessarily eliminate the conviction under federal law. See, *e.g., Dickerson v New Banner Inst.* (1983) 460 US 103, 74 L Ed 2d 845, 103 S Ct 986 (meaning of term "convicted," as

used in federal statute requiring disclosure of conviction, is question of federal, not state, law). One corollary of this is that if the conviction makes a noncitizen defendant inadmissible or removable, a dismissal under §1210.1 may not affect the defendant's immigration status. For discussion, see §§52.12-52.16.

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§41.18 E. Commitments to Division of Juvenile Justice; Completion of Juvenile Parole

When a criminal defendant is committed to the DJJ for a crime punishable as either a felony or a misdemeanor, the offense is deemed a misdemeanor when the defendant is honorably discharged. Pen C §17(c); *People v Marshall* (1991) 227 CA3d 502, 277 CR 846; *People v Lassiter* (1988) 202 CA3d 352, 248 CR 320 (relief denied when discharge is dishonorable). For discussion of eligibility for commitment to a juvenile facility, see §37.67.

Every person honorably discharged from parole after commitment to the DJJ who was not placed in state prison *must* be released from the penalties and disabilities resulting from the crime for which the person was committed. Welf & I C §1772(a). Persons dishonorably discharged may petition the court of commitment to set aside the verdict of guilty and dismiss the accusation or information, thereby releasing the person from penalties and disabilities. Relief is discretionary. Welf & I C §1772(a); *People v Navarro* (1972) 7 C3d 248, 278, 102 CR 137.

When a person is honorably discharged from a juvenile facility, the DJJ must notify the committing court, which must dismiss the action. Welf & I C §1179(c). The person must be informed of this right when discharged. Welf & I C §1772(c).

The person remains subject to the weapon possession restrictions of Pen C §§12021 and 12021.1. Welf & I C §1772(b)(2). Evidence of the adjudication is admissible in a criminal, juvenile, or civil action if the person is over 18, or was 16 or 17 at the time the crime was committed, or was convicted of a Welf & I C §707(b) offense in adult court. Welf & I C §1772(b)(3), (5). The conviction may be used as an enhancement in subsequent offenses. Welf & I C §1772(b)(4). See, *e.g., People v Pride* (1992) 3 C4th 195, 256, 10 CR2d 636 (aggravating factor in death penalty case); *People v Daniels* (1996) 51 CA4th 520, 59 CR2d 395 (Three Strikes law). In addition, a minor who was sent to the DJJ because of commission, when age 14 or over, of an offense listed in Welf & I C §707(b) is not entitled to have the record sealed under Welf & I C §781. *In re Chong K.* (2006) 145 CA4th 13, 51 CR3d 350.

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§41.19 F. Discharge of Narcotic Addicts

If a drug addict successfully completes the inpatient and outpatient components of the California Rehabilitation Center (CRC) (see §§37.63-37.66) and is discharged by the Narcotic Addict Evaluation Authority (Welf & I C §3200), the trial court may modify the sentence, suspend further proceedings, and dismiss the charges. A person discharged from CRC because the term expired without successful completion (Welf & I C §3201) or the person was excluded from CRC as unsuitable (Welf & I C §3109) may also apply for a modification of the sentence. *People v Nubla* (1999) 74 CA4th 719, 88 CR2d 265.

A dismissal has the same force and effect as a dismissal under Pen C §1203.4. However, dismissal following a CRC commitment allows the defendant to become a peace officer. *Boyll v State Personnel Bd.* (1983) 146 CA3d 1070, 194 CR 717. As with §1203.4, the conviction may be used to enhance a sentence. *People v McCuiston* (1966) 246 CA2d 799, 55 CR 482. The conviction counts as a prior conviction for purposes of future drug criminal actions. Welf & I C §3200(b).

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Source: Criminal Law/California Criminal Law Procedure and Practice/41 TRIAL COUNSEL'S DUTIES AFTER JUDGMENT; CLEANSING AND SEALING OF CRIMINAL RECORDS/§41.19A G. Exclusion From Megan's Law Website, and Relief From Registration for Pen C §290 Registrants

§41.19A G. Exclusion From Megan's Law Website, and Relief From Registration for Pen C §290 Registrants

Exclusion from Megan's Law website. In addition to being required to register as a sex offender under the Sex Offender Registration Act (Pen C §§290-290.023), a person who has been convicted of committing or attempting to commit any of the sex offenses listed in Pen C §290.46(b)(2), (c)(2), or (d)(2) is subject to Megan's Law, which established a website that makes information about sex offenders available to the public. The Megan's Law website (http://www.meganslaw.ca.gov) makes the following information about convicted sex offenders available to the public: name and known aliases; a photograph; a physical description including sex, race, date of birth, and criminal history; and "any other information that the Department of Justice deems relevant." Pen C §290.46(b)(1), (c)(1), (d)(1). Certain additional information about the person's criminal record is to be added by July 1, 2010. Pen C §290.46(a)(2). Depending on the offense of conviction, the website lists either the offender's address or the offender's community and zip code.

Under Pen C §290.46(e), an individual with no other convictions of offenses that require registration under Pen C §290 can petition the Department of Justice (DOJ) for exclusion from the Megan's Law website if he or she

- Was convicted of sexual battery (Pen C §243.4(a));
- Was convicted of misdemeanor annoying or molesting a child (Pen C §647.6);
- Was convicted of a felony violation of certain listed obscenity offenses, if the person shows, as specified, that all victims were at least 16 years of age or older; or
- Is on probation or has successfully completed probation for the offense, and
- He or she is the victim's parent, stepparent, sibling, or grandparent, and
- The offense did not involve oral copulation or sexual penetration.

Commission of a new offense or a probation violation resulting in incarceration will terminate the person's eligibility for exclusion.

Ø **Note:** The criteria for exclusion under Pen C §290.46(e) were narrowed by amendment, effective September 30, 2006. See Stats 2006, ch 886. Under the amended provisions, the DOJ must rescind the exclusion for people who were excluded under the former version who would not qualify for an exclusion under the current version. Pen C §290.46(e)(3). This retroactive rescission of exclusions has been upheld against ex post facto and other challenges. *Doe v California Dep't of Justice* (2009) 173 CA4th 1095, 1109, 93 CR3d 736.

Beginning January 1, 2012, no person can be excluded from the website unless that person has a "risk level of low or moderate-low" on the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) being phased in by Pen C §§290.03-290.08. Pen C §290.46(e)(4).

The DOJ must grant the petition for exclusion if the defendant is eligible. Pen C §290.46(e)(1).

Relief from duty to register. A person required to register as a sex offender for an offense not listed in Pen C §290.5(a)(2) may be relieved of any further duty to register on obtaining a certificate of rehabilitation under Pen C §§4852.01-4852.21. This relief is available only if the person is not in custody, on parole, or on probation. Pen C §290.5(a)(1).

Ø **Note:** In *People v Hofsheier* (2006) 37 C4th 1185, 39 CR3d 821, the supreme court found an equal protection violation in the requirement of mandatory registration for violation of Pen C §288a(b)(1) (voluntary oral copulation with minor aged 16) when mandatory registration was not required for violation of Pen C §261.5 (unlawful sexual intercourse with minor aged 16). The court remanded the case to the trial court to determine if discretionary registration should be ordered (see Pen C §290.006). In the wake of *Hofsheier,* courts of appeal have divided on extending the ruling to such cases as those involving a minor who is 14 or 15 years old. See, *e.g., People v Cavallaro* (2009) 178 CA4th 103, 100 CR3d 139 (no violation); *People v Garcia* (2008) 161 CA4th 475, 74 CR3d

681 (violation). Pending further supreme court decisions in this area, postconviction defense counsel should consider similar equal protection challenges.

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H. Certificate of Rehabilitation; Pardon

§41.20 1. Description and Procedures

There are two types of Governor's pardons: a "direct" pardon (Pen C §§4800-4813), and a pardon based on a certificate of rehabilitation (Pen C §§4852.01-4852.21). Direct pardons are requests for pardon made directly to the Governor. Certificates of rehabilitation are first sought from the trial court. If a certificate issues, it is deemed to be a recommendation that the Governor grant a pardon. Pen C §4852.13. The Governor has discretion to grant or deny a pardon. Pen C §4852.16. The pardon may be granted without further investigation, except that a person twice convicted of felonies must also have the recommendation of a majority of the supreme court. Pen C §4852.16. The differences in availability and effect are set out below and in the chart in §41.21. A direct pardon is usually sought by persons who are not eligible for a certificate of rehabilitation, such as nonresidents and misdemeanants.

A full pardon, whether direct or through rehabilitation proceedings, restores all the "rights, privileges, and franchises" of which the person was deprived by reason of the conviction, with some exceptions. Pen C §4853. A pardon does *not* restore any license, permit, or certificate. Pen C §4852.15.

The Governor may provide that the person is entitled to exercise the right to own or possess and keep any type of firearm, unless the person was convicted of a felony involving use of a dangerous weapon. In the latter event, the provisions prohibiting ex-convicts from owning guns still apply. Pen C §4854.

Direct pardon. When seeking a direct pardon, at least 10 days' notice must be given to the district attorney of the county of conviction (except in unusual specified cases). Pen C §§4804, 4806. The Governor may require reports by the court of conviction. Pen C §4803. The Board of Parole Hearings may, on its own or at the Governor's request, investigate the case. See Pen C §§4803, 4812.

Certificate of rehabilitation. An individual who has been convicted of a felony and has been discharged from custody after the completion of the term to which he or she was sentenced may apply for a certificate of rehabilitation. The applicant must not have been incarcerated in any other state penal institution since his or her release and must present evidence that he or she has been a resident of California for the 3 years immediately preceding the application. Pen C §4852.01(a). An individual who was placed on probation for a felony or for a misdemeanor violation of one of the sex offenses listed in Pen C §290 may also apply for a certificate of rehabilitation if he or she has had the charges dismissed under Pen C §1203.4; has not been incarcerated in another penal institution, jail, or detention facility; is not currently on probation; and has been a resident of California for the 5 years immediately preceding the application. Pen C §4852.01(c).

The only effect of a certificate of rehabilitation stated in the statute is that it makes the person eligible for a gubernatorial pardon. Pen C §4852.16. Beyond this, the effect of a certificate is unclear. However, many government agencies do consider the granting of the certificate in particular circumstances. See, *e.g., In re Esperanza C.* (2008) 165 CA4th 1042, 1056, 81 CR3d 556 (county agency considers certificate of rehabilitation in deciding whether to grant criminal-record exemption in placing dependent child with relatives).

The following persons are not eligible for a certificate of rehabilitation: life parolees; individuals sentenced to death; individuals convicted of the sex offenses proscribed by Pen C §286(c), §288(c), §288a(c), §288.5(c), or §289(j); or individuals serving in the military. Pen C §4852.01(c)-(d). The Governor may, however, pardon individuals convicted of the sex offenses proscribed by Pen C §286(c), §288(c), §288a(c), §288.5(c), or §289(j) in extraordinary circumstances. Pen C §4852.01(e).

Special rules applicable to sex offenders. A sex offender required to register under the Sex Offender Registration Act (Pen C §§290-290.023) can obtain a certificate of rehabilitation only if (1) he or she is eligible to apply for one under Pen C §4852.01, and (2) the court finds that he or she is not a continuing threat to minors. Pen C §4852.13(b). Under Pen C §290.5(a)(1), the certificate of rehabilitation relieves the person of any further duty to register if:

- The offense requiring registration is not listed in Pen C §290.5(a)(2); and

- The individual is not in custody, on parole, or on probation.

Moreover, the district attorney can petition to revoke the certificate for any offense listed in §290. Pen C §4852.13(c).

Certificate seekers may retain counsel or have counsel appointed. Pen C §4852.08. They are also entitled to assistance from the probation or parole officer and, for persons under 30, from the Division of Juvenile Justice (formerly the California Youth Authority). Pen C §4852.04. There are no filing or court fees. Pen C §§4852.09, 4852.1.

See generally "*How to Apply for a Pardon*," available from the Office of the Governor, State Capitol, Sacramento, CA 95814, Attention: Legal Unit. An electronic copy is available at http://www.cdcr.ca.gov/BOPH/docs/apply_for_pardon.pdf. Instructions on how to apply for a certificate of rehabilitation and pardon are available from the California Department of Corrections and Rehabilitation (CDCR) website at http://www.cdcr.ca.gov/Divisions_Boards/BOPH/pardons.html.

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§41.21 2. Chart: Availability of Pardons and Certificates of Rehabilitation

Requirements	Pardon	Certificate of Rehabilitation
Felony conviction required.	No (Cal Const art V, §8)	Yes, or misdemeanor violation of a sex offense specified in Pen C §290 (Pen C §4852.01).
Available to those in military.	Yes	No (Pen C §4852.01(d)).
California residency required.	No	Minimum of 3 years before filing petition (Pen C §4852.01(a)); minimum of 5 years for individuals specified in Pen C §4852.01(c).
Period of rehabilitation required.	No	Minimum of 5 years; additional time varies with type of crime (Pen C §4852.03).
Dismissal of underlying charge under Pen C §1203.4 required.	No	No, except for misdemeanors that must be registered under Pen C §290. Pen C §4852.01(c).

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§41.22 I. EXPUNGEMENT OF DNA PROFILES AND SAMPLES

When a person's DNA profile was included in the DNA data bank after a felony arrest, the person may request that the DNA specimen and sample be destroyed and the database profile expunged if the person has no past or present offense or pending charge that qualifies that person for inclusion within the DNA Database and Data Bank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile. Pen C §299(a). If the specified conditions for the request are satisfied (see Pen C §299(b)), the trial court of the county where the arrest occurred, or the court that entered the conviction or rendered disposition in the case, has the discretion to grant or deny the request. Pen C §299(c)(1). The Petition for Expungement of DNA Profiles and Samples (Judicial Council Form CR-185/JV-796) may be used for the request.

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§41.23 VII. RETENTION POLICIES FOR RECORDS OF THE COURT AND DEPARTMENT OF JUSTICE

The courts must retain records of conviction and other criminal records for the times specified in Govt C §68152. For most felonies, this is 75 years. The California Department of Justice (DOJ) retains almost all criminal records until the subject reaches the age of 100. The only records that the DOJ does not retain are criminal records that have been sealed or that contain certain marijuana charges as specified in Health & S C §11361.5.

Anyone arrested or convicted for any charge specified in Health & S C §11361.5 can petition the DOJ to destroy the record. Form BCH 8033, Application to Destroy Arrest/Conviction Records, is available from the Records Management Unit.

The DOJ will notify the FBI when specific arrests or entire records are purged from DOJ files.

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Source: Criminal Law/California Criminal Law Procedure and Practice/41 TRIAL COUNSEL'S DUTIES AFTER JUDGMENT; CLEANSING AND SEALING OF CRIMINAL RECORDS/§41.24 VIII. CHARTS: EFFECT OF RELIEF FROM DISABILITIES

§41.24 VIII. CHARTS: EFFECT OF RELIEF FROM DISABILITIES

Ø **Warning:** These charts do not include federal law. Because statements are short for purposes of the chart, they do not state all details and nuances. For discussion of the effect of these statutes on immigration status, see §§52.12-52.16.

Ø **Note:** Only persons in state prison or on parole as a result of a felony conviction are disenfranchised from voting. Cal Const art II, §4. See *League of Women Voters v McPherson* (2006) 145 CA4th 1469, 1480, 52 CR3d 585. Once a person is no longer imprisoned or on parole, the right to vote is automatically restored.

Statute Granting Relief	Hold Public Office	Duty to Register	Use as Similar Offense
1. Pen C §1203.4	Must disclose conviction in application for public office.	Not relieved under Pen C §290.	No effect, because similar prior need not have been charged. Evid C §1101(b).
2. Pen C §1203.4a	No adverse effect stated.	Not relieved. Pen C §§290.5, 4852.01(c).	Same as above.
3. Pen C §1210.1(d)	Must disclose conviction in application for public office.	Under Health & S C §11590: unknown, but person released from penalties.	Unknown.
4. Pen C §4853 (pardon)	Unknown, no adverse effect stated.	Probably not relieved. See Pen C §290.5.	No effect, because similar prior need not have been charged. Evid C §1101(b).
5. Pen C §§4852.01-4852.21 (certificate of rehabilitation)	Unknown, no adverse effect stated.	Some relieved. Pen C §290.5.	Same as above.
6. Welf & I C §781 (sealing of juvenile records)	Case deemed never to have occurred.	Relieved.	Same as above.
7. Pen C §851.8 (finding of factual innocence)	Should not be disqualified because no conviction. Pen C §3045.	Not applicable.	Same as above.
8. Pen C §§1000, 1000.5, 1001.9, 1001.31, 1001.55 (deferred entry of judgment)	Unknown, no adverse effect stated.	Not applicable.	Same as above.
9. Welf & I C §3200 (narcotic addicts)	Not disqualified. *Boyll v State Personnel Bd.* (1983) 146 CA3d 1070, 194 CR 717.	Relieved. Welf & I C §3110.	Same as above.
10. Health & S C	Restored. Health	No duty. Health & S	Same as above.

§11361.5 (petty marijuana offenders)	& S C §11361.7.	C §11590(c).	
11. Welf & I C §1772 (CYA and DJJ parolees)	Restored, with exceptions. Welf & I C §1772(a)-(b).	Requires Welf & I C §781 relief. Pen C §290(d)(5).	Same as above.

Statute Granting Relief	Professional License	Use as Prior to Enhance Sentencing	Serve as Juror
1. Pen C §1203.4	Must disclose conviction. Pen C §1203.4(a).	Yes. Pen C §1203.4(a).	Can serve. See CCP §203(a)(5).
2. Pen C §1203.4a	Unknown.	Yes. Pen C §1203.4a(a).	Can serve. See CCP §203(a)(5).
3. Pen C §1210.1(d)	Must disclose arrest and conviction.	Unknown.	Probably disqualified if felony.
4. Pen C §4853 (pardon)	No automatic right to reinstatement or issuance. Pen C §4853.	Yes. *People v Dutton* (1937) 9 C2d 505, 71 P2d 218.	Yes, can serve. See CCP §203(a)(5).
5. Pen C §§4852.01-4852.21 (certificate of rehabilitation)	No automatic right to reinstatement or issuance. Pen C §4853.	Yes. See above.	Yes, can serve. See CCP §203(a)(5).
6. Welf & I C §781 (sealing of juvenile records)	Unknown; juvenile proceedings deemed never to have occurred.	Can be used as a prior "strike" under Pen C §§667 and 1170.12.	Not disqualified. See CCP §203(a)(5).
7. Pen C §851.8 (determination of factual innocence)	Should not affect right; person considered "exonerated."	No.	Not disqualified; no conviction. See CCP §203(a)(5).
8. Pen C §§1000, 1000.5, 1001.9, 1001.31, 1001.55 (diversion)	Many professions, and law enforcement agencies, can consider; see Pen C §1000(d).	Not a conviction. See also Pen C §§1000(d), 1000.4.	Not disqualified. See Pen C §1000.4.
9. Welf & I C §3200 (narcotic addicts)	Must disclose. Welf & I C §3200(b); Pen C §1203.4(a).	Yes, for violations of Controlled Substances Act (Health & S C §§11000-11651).	Yes. See CCP §203(a)(5); *Boyll v State Personnel Bd.* (1983) 146 CA3d 1070, 194 CR 717.
10. Health & S C §11361.5 (petty marijuana offenses)	No public agency to deny or revoke license once relief granted (Health & S C §11361.7(b)).	No. Health & S C §11361.7.	Yes. See CCP §203(a)(5).
11. Welf & I C §1772 (CYA and DJJ parolees)	Not disqualified; limited peace officer exception.	Yes, under circumstances listed in Welf & I C §1772(b)(3); *People v Shields* (1991) 228 CA3d 1239, 279 CR 403.	Yes. See CCP §203(a)(5).

Statute Granting Relief	Must Applicant Inform Employer of Conviction?	Impeach Criminal Defendant With Prior Felony Conviction
1. Pen C §1203.4	Unknown, but 2 Cal Code Regs §7287.4(d)(1)(B) prohibits employers from asking about misdemeanors dismissed under Pen C §1203.4.	Evid C §788(c).
2. Pen C §1203.4a	Unknown.	Not applicable.
3. Pen C §1210.1(d)	Generally no. Must disclose in peace officer and public office applications, for licenses, and to contract with State Lottery.	Unknown.
4. Pen C §4853 (pardon)	Not stated. See *People v Mendez* (1991) 234 CA3d 1773, 1777, 286 CR 216 (dictum implies yes).	Yes. *People v Hardwick* (1928) 204 C 582, 269 P 427.
5. Pen C §§4852.01-4852.21 (certificate of rehabilitation)	Not stated. Probably yes.	No. Evid C §788(b).
6. Welf & I C §781 (seal juvenile records)	Need not disclose. Welf & I C §781(a).	Case deemed never to have occurred.
7. Pen C §851.8 (determination of factual innocence)	No. See Pen C §851.8(f).	No conviction. See Pen C §851.8(f).
8. Pen C §§1000, 1000.5, 1001.9, 1001.31, 1001.55 (diversion)	Not a conviction. See, *e.g.,* Pen C §1000(d). Arrest reportable for peace officer applicants.	Probably not. See Pen C §1000.4.
9. Welf & I C §3200 (narcotic addicts)	Same effect as dismissal under Pen C §1203.4, above. Welf & I C §3200(b). Still drug prior.	Yes, with regard to most drug offenses.
10. Health & S C §11361.5 (petty marijuana offenses)	No. Health & S C §11361.7(c).	No felony conviction.
11. Welf & I C §1772 (CYA and DJJ parolees)	Unclear. Welf & I C §1772(a) says person is released from disqualification for any employment or occupational license, but 7 Ops Cal Atty Gen 272 (1946) required that employer be told, on basis of earlier version of §1772 with different language.	No. *People v Jackson* (1986) 177 CA3d 708, 222 CR 470.

Statute Granting Relief	Use of Conviction to Suspend or Revoke Driver's License	Right to Possess Concealable Firearm
1. Pen C §1203.4	Yes. Veh C §13555.	Not restored.
2. Pen C §1203.4a	Yes. Veh C §13555.	No, if original conviction was for crime listed in Pen C §12021.1.
3. Pen C §1210.1(d)	Unknown.	No.

4. Pen C §4853 (pardon)	Unknown.	Governor must specifically grant. Pen C §4854.
5. Pen C §§4852.01-4852.21 (certificate of rehabilitation)	Unclear; probably not affected.	Yes (Pen C §4852.17), unless conviction was felony involving dangerous weapon.
6. Welf & I C §781 (sealing of juvenile records).	No effect.	Not applicable.
7. Pen C §851.8 (determination of factual innocence)	No effect; see Pen C §851.8(f).	Presumably no effect. See 28 Ops Cal Atty Gen 178 (1956).
8. Pen C §§1000, 1000.5, 1001.9, 1001.31, 1001.55 (diversion)	Probably not affected. See Pen C §1000.4.	Probably not. See Pen C §1000.4.
9. Welf & I C §3200 (narcotic addicts)	No effect. Welf & I C §3200(b); Veh C §13555.	Not restored. Welf & I C §3200(b).
10. Health & S C §11361.5 (petty marijuana offenses)	DMV may not take adverse action. Health & S C §11361.7.	Not applicable.
11. Welf & I C §1772 (CYA and DJJ parolees)	No effect if person 18 or older when crime committed. Welf & I C §1772(b)(5). Unclear what effect otherwise.	Not restored. Welf & I C §1772(b)(2).

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§41.25 IX. PETITION FOR WRIT OF ERROR CORAM NOBIS; MOTION TO VACATE JUDGMENT

Writ of error coram nobis. It if often said that a writ of coram nobis is, in effect, a motion to vacate the judgment, and it can be so designated. See, *e.g.,* 6 Witkin & Epstein, California Criminal Law (3d ed 2000) chap XV, §189. It is more accurate to say that coram nobis is one type of motion to vacate the judgment.

The traditional grounds of a common law petition for a writ of error coram nobis are that (1) some fact existed that, without any fault or negligence by the defendant, was not presented to the court at or before the trial, and that if presented would have prevented the rendition of the judgment; (2) this newly discovered fact must not go to the merits of the issues tried; and (3) this fact must be one that could not in the exercise of due diligence have been discovered earlier. *People v Shipman* (1965) 62 C2d 226, 230, 42 CR 1. See also *People v Vasilyan* (2009) 174 CA4th 443, 453, 94 CR3d 260; *People v Cortez* (1970) 13 CA3d 317, 332, 91 CR 660 (district attorney erroneously promised that defendant would get mental health treatment after his guilty plea). If the judgment has been affirmed on appeal, a writ of error coram nobis must be filed in the appellate court (and is traditionally called coram vobis). Pen C §1265(a).

A petition for a writ of error coram nobis may lie after the time for a new trial motion or a motion to withdraw the plea, or an appeal has lapsed. See, *e.g., People v Gallardo* (2000) 77 CA4th 971, 92 CR2d 161; *People v Cortez* (1970) 13 CA3d 317, 91 CR 660. See §§24.38, 26.21. See generally Appeals and Writs in Criminal Cases, chap 11 (3d ed Cal CEB 2007); 6 Witkin & Epstein, California Criminal Law, *Criminal Judgment* §§182-193, *Criminal Writs* §99 (3d ed 2000). The petition may be denied for undue delay in bringing it after knowing of the need and for delay in developing the facts. *People v Kim* (2009) 45 C4th 1078, 1098, 90 CR3d 355.

Motion to vacate judgment. Motions to vacate the judgment are not limited to motions that could also be writs of error coram nobis. For example, a motion to vacate the judgment is appropriate when the judgment of conviction is void for lack of subject matter jurisdiction. *People v Vasilyan* (2009) 174 CA4th 443, 453, 94 CR3d 260. Recent years have seen motions to vacate brought by noncitizens who contended that the court did not give them proper admonishments, as required by Pen C §1016.5, of the possible immigration consequences of their plea. See, *e.g., People v Superior Court (Zamudio)* (2000) 23 C4th 183, 203, 96 CR2d 463.

In addition, under Pen C §1473.6, a person who is no longer in custody or restrained can, in specified circumstances, prosecute a motion to vacate a judgment that was obtained by government fraud or misconduct. Pen C §1473.6. This provision is intended to respond to the fact that habeas corpus relief is generally not available to those whose sentence is served before that misconduct comes to light. To make out a prima facie case for relief under this provision, the moving party must show that the misconduct or fraud took place in his or her case; evidence of misconduct by officials involved in movant's case that took place in other cases is not sufficient. *People v Germany* (2005) 133 CA4th 784, 35 CR3d 110.

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42

WRITS IN CALIFORNIA STATE COURTS

GRACE LIDIA SUAREZ

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§42.1 I. OVERVIEW

Writs are orders from higher courts to lower courts, agencies, or persons. See CCP §§§1068, 1085, 1102. They are requested through a petition filed in the court being asked to issue the writ. Counsel should attempt to request the proper writ, but the court may grant any writ as long as it has the jurisdiction to do so. See, *e.g., Loska v Superior Court* (1986) 188 CA3d 569, 574, 233 CR 213 (petitioner sought habeas; court issued writ of review).

Writs of mandate and prohibition. A writ of mandate orders a lower court to perform a duty; a writ of prohibition orders it to refrain from an action that exceeds its authority. See §42.3.

California Constitution article VI, §10, confers concurrent jurisdiction on superior courts, courts of appeal, and the state supreme court to correct lower court actions. See CCP §§1085, 1103. There is a strong judicial preference, however, for filing writ petitions in the lowest court that can issue the writ. Thus, a petition for writ of mandate or prohibition should be filed in the lowest court that is higher than the court to which the proposed writ would be directed. See §42.4. The appellate divisions of superior courts, the courts of appeal, and the supreme court use the same writ procedure. See §42.12A. Superior courts, considering writ requests directed to a magistrate, may also use the same procedure or they may use a notice of motion or order to show cause or some combination of these procedures. See §42.12.

Writs of habeas corpus. Habeas is generally used to challenge the lawfulness of imprisonment, conditions of confinement, or other actual or potential restraint on personal liberty. Pen C §1473 (primary grounds for seeking habeas). It is typically used to challenge the validity of the petitioner's conviction or sentence when facts supporting the claim are not apparent from the trial record. Pen C §1484; *In re Bell* (1942) 19 C2d 488, 501, 122 P2d 22 (habeas petitioner not confined to record to prove conviction violated constitution). Habeas is usually unavailable as a substitute for ordinary remedies at law such as direct appeal. *In re Crow* (1971) 4 C3d 613, 622 n9, 94 CR 254. But see *In re Crockett* (2008) 159 CA4th 751, 759, 71 CR3d 632 (when committing court exceeded its jurisdiction, failure to appeal did not prevent review of habeas petition). It may be used in conjunction with appeal when appellate counsel wishes to challenge an issue that requires evidentiary support from outside the record. See §42.34.

A habeas corpus petition may be filed in the superior court, the court of appeal, or the supreme court, but a petition filed in a reviewing court must state the petitioner's reasons for not filing in the superior court. See §42.26.

Other writs. Writs of supersedeas, coram nobis, coram vobis, and certiorari are not discussed in this chapter. On supersedeas, see Appeals and Writs in Criminal Cases, chap 7 (3d ed Cal CEB 2007). On coram nobis and coram vobis, see Appeals & Writs, chap 11, and §24.38 of this book. On certiorari, see Appeals & Writs, chap 7.

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§42.2 II. CHART: DEADLINES

Action	Court	Deadline	Authority
(1) *Writs of Mandate and Prohibition:*			
File petition for writ of mandate or prohibition challenging judgment or order in misdemeanor or infraction case.	Appellate division of superior court. See §42.4.	30 calendar days after court order, unless court permits later filing.	*People v Municipal Court (Mercer)* (1979) 99 CA3d 749, 752, 160 CR 455 (writ petition must usually be filed within period prescribed for appeals); see Cal Rules of Ct 8.853(a), 8.902(a).
File petition for writ of mandate or prohibition challenging order of magistrate in felony case.	Appellate division of superior court. See §42.4.	60 calendar days after court order; however, court can exercise discretion to hear later-filed petition.	See *People v Superior Court (Clements)* (1988) 200 CA3d 491, 496, 246 CR 122 (noting courts' reluctance to entertain writ petitions filed beyond deadline for appeal); *People v Municipal Court (Mercer), supra*.
File petition for writ of mandate or prohibition challenging action of trial court in felony case after indictment or information.	Court of appeal. See §42.4.	60 calendar days after judgment or order; however, court can exercise discretion to hear later-filed petition. (See different time limits below for writ petitions reviewing Pen C §§995, 1538.5 decisions.)	See *People v Municipal Court (Mercer), supra; People v Superior Court (Clements), supra; People v Superior Court (Duran)* (1978) 84 CA3d 480, 489, 148 CR 698 (court considered petition filed nearly 3 months after challenged sentence imposed); Cal Rules of Ct 8.308(a).
File petition for writ of mandate or prohibition challenging superior court's grant or denial of writ petition challenging action of trial judge (misdemeanor or infraction) or magistrate (felony).	Court of appeal. See §42.19.	60 calendar days after superior court judgment or order; however, court can exercise discretion to hear later-filed petition.	*People v Superior Court (Clements)* (1988) 200 CA3d 491, 495, 246 CR 122 (court entertained petition filed about 2½ months after superior court's challenged denial of mandate petitions).
File petition for writ of prohibition challenging denial of Pen C §995 motion. (Review available only if defendant made motion within 60 days after arraignment in superior court, except in limited circumstances. Pen C §1510. See discussion in §13.40.)	Court of appeal.	15 calendar days after Pen C §995 motion is denied, if basis for petition is that information or indictment lacked reasonable or probable cause. If petition is not based on alleged lack of reasonable or probable cause, 15-day rule does not apply.	Pen C §999a; *Ondarza v Superior Court* (1980) 106 CA3d 195, 200, 164 CR 892 (claim of illegal commitment by magistrate; time limit inapplicable); *Penney v Superior Court* (1972) 28 CA3d 941, 944, 105 CR 162 (challenge to denial of motion to dismiss indictment for due process violation; time limit inapplicable).
File petition for writ of	Court of appeal.	No time given; however, it	See Pen C §1238(a)(1).

mandate or prohibition challenging grant of Pen C §995 motion.		should be filed no later than deadline for filing appeal. (Appeal is usual avenue of review.)	
File petition for writ of mandate or prohibition challenging denial of Pen C §1538.5(i) motion. (Review available only if defendant made motion within 60 calendar days after arraignment in superior court, except in limited circumstances. Pen C §1510.)	Court of appeal.	30 calendar days after order denying motion.	Pen C §1538.5(i).
File notice of intention to file petition challenging grant of defendant's Pen C §1538.5(i) motion. (Required if trial is set for less than 30 days after grant of motion. Pen C §1538.5(o).)	Superior court. Pen C §1538.5(o).	Trial date or 10 calendar days after Pen C §1538.5(i) special hearing at which motion is granted, "whichever occurs last." (Conflicting authority on what this means.)	Pen C §1538.5(o). Compare *People v Superior Court (Sandoval)* (1972) 29 CA3d 135, 138, 105 CR 268 (prosecution must file notice of intention within 10 days after grant of motion or, if trial date is sooner, on or before trial date), with *People v Superior Court (Abrahms)* (1976) 55 CA3d 759, 765, 127 CR 672 (*Sandoval* statement is dictum contrary to statutory language).
File petition for writ of mandate or prohibition challenging grant of Pen C §1538.5(i) motion.	Court of appeal. Pen C §1538.5(o).	30 calendar days after motion is granted at special hearing.	Pen C §1538.5(o).
File petition for writ of mandate or prohibition challenging grant of probation in misdemeanor or infraction case (prosecution only).	Appellate division of superior court.	60 calendar days after probation is granted.	Pen C §1466(1)(H).
File petition for writ of mandate or prohibition challenging grant of probation in felony case (prosecution only).	Court of appeal.	60 calendar days after probation is granted.	Pen C §1238(d).
File preliminary ("informal") opposition.	Court in which writ petition filed.	Within 10 days after petition filed.	Cal Rules of Ct 8.487(a)(1), 8.933(a)(1).
File reply to preliminary opposition.	Court in which writ petition filed.	Within 10 days after opposition filed.	Cal Rules of Ct 8.487(a)(3), 8.933(a)(3).
File opposition to issuance of peremptory writ in first instance.	Court in which writ petition filed.	Within 30 days after court notifies parties that it is considering issuing peremptory writ (unless court orders otherwise).	Cal Rules of Ct 8.487(b)(2), 8.933(b)(2).
File return (by real party in interest or respondent) after court issues alternative writ.	Court that issued alternative writ.	30 days after court issues alternative writ (unless court orders otherwise).	Cal Rules of Ct 8.487(b)(2), 8.933(b)(2).
File reply to opposition or return.	Court in which writ petition filed.	Within 15 days after opposition or return filed	Cal Rules of Ct 8.487(b)(3), 8.933(b)(3).

		(unless court orders otherwise).	
File petition for rehearing after appellate division issues judgment.	Appellate division of superior court.	15 calendar days after decision is filed, publication order restarting finality period, or modification order changing appellate judgment.	Cal Rules of Ct 8.889(b).
File petition for rehearing after court of appeal issues judgment. **Note:** Not available if court denied writ petition without issuing alternative writ or order to show cause. Cal Rules of Ct 8.268(a)(1), 8.490(b)(1).	Court of appeal.	15 calendar days after decision is filed.	Cal Rules of Ct 8.268(b)(1).
File petition for rehearing after supreme court issues judgment. (Not available if court denied review or denied writ petition without issuing alternative writ or order to show cause. Cal Rules of Ct 8.268(a)(1), 8.532(b)(2), 8.536(a).)	Supreme court.	15 calendar days after decision is filed.	Cal Rules of Ct 8.268(a)-(b), 8.536(a)-(b).
File answer to petition for rehearing (only if requested by court).	Court in which petition for rehearing was filed.	8 calendar days after court's order requesting answer is served and filed.	Cal Rules of Ct 8.268(b)(2), 8.536(b), 8.889(b)(2).
File petition for review after court of appeal issues judgment.	Supreme court.	10 calendar days after summary denial by court of appeal, or within 40 days after filing by court of appeal of decision other than summary denial.	Cal Rules of Ct 8.490(b)(1)-(2), 8.500(e).
File answer to petition for review.	Supreme court.	20 calendar days after petition for review is filed.	Cal Rules of Ct 8.500(e)(4).
File reply to answer to petition for review.	Supreme court.	10 calendar days after answer to petition for review is filed.	Cal Rules of Ct 8.500(e)(5).
(2) *Writs of Habeas Corpus:*			
File petition for writ of habeas corpus.	Superior court, court of appeal, or supreme court. See §42.26.	No statutory time limit; however, passage of time may be deemed procedural default.	See *In re Sanders* (1999) 21 C4th 697, 703, 87 CR2d 899 (habeas petitions in both death penalty and noncapital cases must be filed "reasonably promptly"); *In re* C*lark* (1993) 5 C4th 750, 785, 21 CR2d 509 (unjustified delay barred consideration of merits).
(a) *Time Limits in Superior Court:*			
Grant, deny, request informal response, or issue order to show cause.	Superior court.	60 calendar days after filing or receipt of habeas petition.	Cal Rules of Ct 4.551(a)(3)(A).
Request for ruling.	Superior court.	After 60 calendar days have passed without ruling.	Cal Rules of Ct 4.551(a)(3)(B).
Informal response.	Superior court.	Within 15 calendar days of	Cal Rules of Ct 4.551(b)(2).

		request by court.	
Reply to informal response.	Superior court.	Within 15 calendar days after service of response upon petitioner.	Cal Rules of Ct 4.551(b)(2).
File return.	Superior court.	30 calendar days after issuance of order to show cause.	Cal Rules of Ct 4.551(d).
File denial following service of return.	Superior court.	30 calendar days after service and filing of return.	Cal Rules of Ct 4.551(e).
Evidentiary hearing.	Superior court.	30 calendar days after filing of denial or expiration of time for filing denial.	Cal Rules of Ct 4.551(f).
(b) *Time Limits in Court of Appeal:*			
File prosecution's appeal from superior court's order granting all or part of relief sought by defendant.	Court of appeal.	60 calendar days after the making of the order.	Pen C §1506; Cal Rules of Ct 8.308(a).
File return and traverse as part of habeas proceedings initiated in court of appeal.	Court of appeal.	Time limits set by court.	None.
File petition for rehearing after court of appeal issues judgment. **Note:** Available only if court issued order to show cause or filed decision in related appeal on same day. Cal Rules of Ct 8.268(a)(1), 8.387(b)(2).)	Court of appeal.	15 calendar days after decision is filed.	Cal Rules of Ct 8.268(b)(1).
File answer to petition for rehearing (only if requested by court).	Court of appeal.	8 calendar days after court's order requesting answer is served and filed.	Cal Rules of Ct 8.268(b)(2).
(c) *Time Limits in California Supreme Court:*			
File petition for review after court of appeal issues judgment.	Supreme court.	10 calendar days after court of appeal decision becomes final. See Cal Rules of Ct 8.264(b),(finality of decision).	Cal Rules of Ct 8.500(e)(1).
File return and traverse as part of habeas proceedings initiated in supreme court.	Supreme court.	Time limits set by court.	None.
File petition for rehearing after supreme court issues judgment. (Not available if court denied review or summarily denied writ petition. Cal Rules of Ct 8.268(a)(1), 8.532(b)(2), 8.536(a).)	Supreme court.	15 calendar days after decision is filed.	Cal Rules of Ct 8.268(a)-(b), 8.536(a)-(b).
File answer to petition for rehearing.	Supreme court.	8 calendar days after petition is filed.	Cal Rules of Ct 8.536(b).

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III. WRITS OF MANDATE AND PROHIBITION

§42.3 A. Comparison and Mechanics of Mandate and Prohibition; Statutes Providing for Writ Review

A writ of mandate, also called a writ of mandamus (CCP §1084), is used to compel a court, officer, or agency to perform a duty required by law or to compel a court to assume jurisdiction and exercise its discretion after its refusal to act. *Robbins v Superior Court* (1985) 38 C3d 199, 205, 211 CR 398. See also CCP §1085. A writ of prohibition is used to restrain or prevent a judicial act that is without jurisdiction or is in excess of the court's jurisdiction. CCP §1102.

Ø **Note:** Requests for relief by mandate and prohibition are frequently used interchangeably by attorneys. Writ attorneys working for the courts, however, distinguish between the two writs, and may look more favorably on a petition that requests the correct relief.

If counsel is unsure of the correct designation, or if both mandate and prohibition are desired, the petition may request a writ of mandate and/or prohibition. See, *e.g., Owens v Superior Court* (1980) 28 C3d 238, 243, 168 CR 466. When a petition has been misnamed, the court will grant the correct writ if it has the power to decide the case and there is a writ that is the proper procedural vehicle. See, *e.g., People v Superior Court (Manuel G.)* (2002) 104 CA4th 915, 924, 128 CR2d 794 (prosecution appeal treated as mandate petition); *People v Payne* (1988) 202 CA3d 933, 935, 249 CR 67 (appeal from nonappealable proceeding treated as petition for writ of mandate).

Statutes governing mandate are found in CCP §§1084-1097 and 1107-1108. Statutes governing prohibition are in CCP §§1102-1108.

Sometimes a statute will specify the type of writ required. For example, Pen C §999a requires a writ of prohibition to compel the trial court to set aside an information or indictment. Penal Code §1538.5(i) and (o) permit either mandate or prohibition to correct suppression rulings.

The most common issues in criminal cases for which statutes or rules provide writ review are the following:

- Denial of disqualification motion under CCP §§170.1 and 170.6 (CCP §170.3(d)).
- Denial of Pen C §995 motion (Pen C §999a; see also Pen C §1510).

Ø **Note:** A defendant who alleges that he or she was committed without reasonable or probable cause also may challenge the denial of a Pen C §995 motion in a petition for writ of habeas corpus. Pen C §1487(7).

- Finding of unfitness under Welf & I C §707 (Cal Rules of Ct 5.772(j)).
- Motion to return property under forfeiture statutes granted (Health & S C §11488.4(h)).
- Order granting severance or discovery (Pen C §1512).
- Probation granted (Pen C §§1238(d), 1466(1)(H)). See also *People v Bailey* (1996) 45 CA4th 926, 932, 53 CR2d 198 (prosecution cannot appeal from order granting probation; request to treat opening brief as mandate petition denied as untimely).
- Prosecution's motion to reinstate complaint under Pen C §871.5 granted (Pen C §871.5(f)).
- Preliminary hearing set beyond time specified in Pen C §859b, or preliminary hearing continued without good cause (Pen C §871.6).
- Search and seizure ruling (Pen C §1538.5(i), (o); see also Pen C §1510).

Ø **Note:** The Penal Code provides for pretrial writ review of suppression motions only in felony cases. In a misdemeanor case, either the prosecution or the defendant may take an appeal to the superior court's appellate division after the trial court rules on a suppression motion. Pen C §1538.5(j). The notice of appeal must be filed within 30 days after the trial court grants or denies the motion. Pen C §1538.5(i); Cal Rules of Ct 8.853(a). Except in limited circumstances, the defendant may seek pretrial review only if the suppression motion was made within 45 days after the defendant's arraignment on the complaint. Pen C §1510.

- Setting of felony trial beyond time specified in Pen C §1049.5, or continuing matter without good cause (Pen C §1511).

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§42.4 B. Court in Which to File Petition

Petitions for writ of mandate and/or prohibition may be filed in the first instance in the superior court, court of appeal, or the California Supreme Court. Cal Const art VI, §10; CCP §§1085, 1103. As a practical matter, however, higher courts seldom grant relief when a petition could have been filed in a lower court. If the petitioner bypasses a court, the petition must explain why this was done. Cal Rules of Ct 8.486(a)(1). When a petition is originally filed in the California Supreme Court, the court will in almost every instance transfer the petition to the appropriate lower court for initial determination, unless all parties and the court agree that the issue is of statewide importance and requires a conclusive answer. See, *e.g., People v Seijas* (2005) 36 C4th 291, 307, 30 CR3d 493 (habeas petition filed in supreme court after that court-granted review was transferred to court of appeal after remand to that court); *Raven v Deukmejian* (1990) 52 C3d 336, 276 CR 326. See Appeals and Writs in Criminal Cases, chap 7 (3d ed Cal CEB 2007).

In misdemeanor and infraction cases, superior court appellate divisions have jurisdiction to entertain mandate and prohibition petitions. CCP §§1085(b), 1103(b). See *Brant v Superior Court (City of Los Angeles)* (2003) 108 CA4th 100, 132 CR2d 783 (after trial court in misdemeanor case denied discovery motion, appellate division entertained mandate petition).

In felony cases pending before magistrates, superior courts have jurisdiction over mandate and prohibition petitions. *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 123 CR2d 31 (superior court is appropriate forum for mandate petition concerning peremptory challenge to magistrate). Review of a magistrate's decision may not be conducted by the same judge who conducted the preliminary hearing acting as a magistrate. Cal Const art VI, §23; Pen C §859c.

Courts of appeal have jurisdiction over mandate and prohibition petitions in felony cases after arraignment on the information. See Cal Const art VI, §§10-11.

On filing a writ petition that challenges a lower court's grant or denial of a petition for writ of mandate or prohibition, see §42.19.

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C. General Requirements for Issuance of Writ

§42.5 1. Trial Court Has Acted Beyond Its Jurisdiction or Abused Its Discretion

A writ issues when an inferior court or agency has acted without or in excess of its jurisdiction (prohibition) or has failed to act as prescribed by law (mandate). CCP §§1102 (prohibition), 1084, 1985 (mandate). Some cases suggest that a writ is not available to compel a court or agency to perform a "discretionary" act. See, *e.g., People v Superior Court (Maldonado)* (2006) 137 CA4th 353, 364, 40 CR3d 365 (denial of *Kelly-Frye* hearing not in excess of jurisdiction; prosecution could not seek writ); *Tirapelle v Davis* (1993) 20 CA4th 1317, 1328, 26 CR2d 666 (ministerial, but not discretionary, duty of state controller may be directed by writ of mandate); *People v Municipal Court (Kong)* (1981) 122 CA3d 176, 180, 175 CR 861 (mandate not available to prosecution to review magistrate's reduction of felony to misdemeanor); *Taliaferro v Locke* (1960) 182 CA2d 752, 755, 6 CR 813 (mandate will issue "only where a court has refused to perform a clear duty, unmixed with discretionary power or the exercise of judgment"). Other cases, however, hold that writ review is available to correct an abuse of discretion. See, *e.g., Rhyne v Municipal Court* (1980) 113 CA3d 807, 819, 170 CR 312 (mandate may issue to compel performance of "duty not to abuse discretion"). A pretrial writ generally will not lie to resolve a question about the admissibility of evidence, because the challenged pretrial ruling will not be binding on the trial court and may be reconsidered. *People v Municipal Court (Ahnemann)* (1974) 12 C3d 658, 660, 117 CR 20.

For further discussion of what kinds of trial court error are reviewable by writ of mandate or prohibition, see Appeals and Writs in Criminal Cases, chap 7 (3d ed Cal CEB 2007).

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§42.6 2. No Plain, Speedy, and Adequate Remedy at Law

Writ relief is available only when the petitioner has no plain, speedy, and adequate remedy at law. CCP §1086; *Phelan v Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951 (mandate); *Lewis v Superior Court* (2008) 169 CA4th 70, 77, 86 CR3d 565 (mandate); CCP §1103; *Duke v Justice Court* (1940) 42 CA2d 178, 180, 108 P2d 707 (prohibition). The petition must inform the court why extraordinary relief is necessary and why an ordinary appeal is insufficient. CCP §§1086, 1103. See *Schlick v Superior Court* (1992) 4 C4th 310, 14 CR2d 406.

Even when a remedy by appeal exists, it may be inadequate. See, *e.g., People v Superior Court (Bolden)* (1989) 209 CA3d 1109, 257 CR 678 (appeal inadequate to challenge order dismissing special circumstance allegation because trial might take place in meantime); *People v Phillips* (1985) 169 CA3d 632, 215 CR 394 (defendant should have filed writ petition before trial on speedy trial claim because prejudice would have been presumed then).

> Ø **Note:** Some statutes specifically provide for writ relief. See §42.3. That a statute specifically provides for writ relief, however, does not mean that the writ will necessarily issue; relief is discretionary. See CCP §§1085, 1103. Counsel may wish to argue, however, that if a statute specifically provides for writ relief, the legislature has determined that appeal does not provide speedy and adequate redress.

For further discussion of the requirement to show the inadequacy of appeal, see Appeals and Writs in Criminal Cases, chap 7 (3d ed Cal CEB 2007).

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§42.6A 3. Beneficial Interest

The petitioner must have a beneficial interest in the outcome. See CCP §1086 (mandate); *Wells v Municipal Court* (1981) 126 CA3d 808, 812, 179 CR 128 (prohibition). Thus, for example, a public defender "may not proceed in his official capacity, on his own initiative, to raise issues detached from the representation of a particular defendant." 126 CA3d at 813 (public defender lacked authority to seek writ review of sentencing guidelines). If the challenged action affects the public defender directly, however, the petition may be in that official's name. *Mowrer v Appellate Dep't* (1990) 226 CA3d 264, 276 CR 38 (appointment of public defender to represent indigent misdemeanor appellants).

A lower court is deemed to have no "beneficial interest" in seeking a writ directed to a reviewing court. *Municipal Court v Superior Court (Swenson)* (1988) 202 CA3d 957, 960, 249 CR 182 (municipal court lacked standing to seek mandate against superior court; "if no individual party finds it worth his or her while to champion the cause and seek judicial review, then review will not occur"). On a lower court's standing to *oppose* a writ petition in a reviewing court, see §42.16.

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§42.7 4. Objection Made in Trial Court

The petitioner must usually object in some way in the trial court in order to obtain writ review. *People v Superior Court (Dorsey)* (1996) 50 CA4th 1216, 58 CR2d 165 (prosecutor had no opportunity to object but had argued issue). The requirement may be waived by the court when a constitutional question appears on the face of the record. *Preston v Municipal Court* (1961) 188 CA2d 76, 10 CR 301. Nevertheless, because the granting of an extraordinary writ is discretionary (see *Castaneda v Municipal Court* (1972) 25 CA3d 588, 102 CR 230), counsel should always try to make a strong record in the trial court.

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§42.8 5. Timely Filing of Writ Petition

Some statutes specify a time period within which to file a writ petition. See, *e.g.,* Pen C §§999a, 1538.5(i). These statutory time limits are jurisdictional. *People v Superior Court (Brent)* (1992) 2 CA4th 675, 683, 3 CR2d 375 (review of motion to return property under Health & S C §11488.4(h)); *People v Superior Court (Sandoval)* (1972) 29 CA3d 135, 137, 105 CR 268 (Pen C §1538.5(o) review).

When there is no statutory deadline, the petition should be filed within the same time period designated for filing a notice of appeal; *i.e.,* 30 calendar days when challenging an action in a misdemeanor case (Cal Rules of Ct 8.853(a)), and 60 calendar days when the challenge is to an action in a felony case (Cal Rules of Ct 8.308(a)). An unexplained or unjustified delay is a ground for denying the writ. *People v Municipal Court (Mercer)* (1979) 99 CA3d 749, 752, 160 CR 455. The court does have jurisdiction, however, to consider a petition filed after the analogous appeal deadline has expired. *People v Superior Court (Clements)* (1988) 200 CA3d 491, 246 CR 122. If extraordinary circumstances exist that satisfactorily explain the delay, the petitioner should allege them. See *People v Municipal Court (Mercer), supra*.

> Ø **Note:** In *Lewis v Superior Court* (2008) 169 CA4th 70, 77, 86 CR3d 565, the defendant appealed the trial court's denial of his motion to set aside a lifetime sex offender registration requirement brought 20 years after the order had been made. Because the defendant had made an adequate showing of his right to relief and no plain, speedy, alternative remedy at law (see §42.6) existed, and because neither the prosecutor nor the attorney general objected to consideration on the merits, the court treated defendant's appeal as a petition for a writ of mandate directing the trial court to strike the registration order.

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§42.9 6. Sufficient Record Must Accompany Writ Petition

The petition to the reviewing court must include a record sufficient to permit review of the challenged ruling. Cal Rules of Ct 8.486(b), 8.931(b); *Sherwood v Superior Court* (1979) 24 C3d 183, 186, 154 CR 917. The record must, if possible, be lodged with the reviewing court at the time the original petition is filed. If the record is unavailable at the time of filing, counsel must submit a declaration with the petition that explains the petition's urgency and the unavailability of the record and fairly summarizes the proceedings below. Cal Rules of Ct 8.486(b)(2), 8.931(b)(2). If only the reporter's transcript is unavailable, Rule 8.486(b)(3) details what to do. Counsel should meet these same requirements when filing in the superior court unless local court rules have different requirements. The items that must be filed in the appellate courts, and their format, are set out in Rules 8.486(b)-(c), 8.931(b)(3). Each item in the record must be legible. *Sherwood v Superior Court, supra*.

In the superior court, an adequate record ordinarily includes any written motion and opposition, relevant pleadings, reporter's transcripts (if ready), written orders, and copies of any exhibits necessary for a complete understanding of the case.

The petitioner must make a formal motion to obtain a complete record if it cannot be obtained informally. *Herrera v Superior Court* (1985) 172 CA3d 1159, 1164, 218 CR 742.

Ø **Note:** Failing to file an available transcript with the writ petition can result in sanctions against counsel if it appears that the main purpose was to delay trial. See *Gottlieb v Superior Court* (1991) 232 CA3d 804, 814, 283 CR 771 (counsel fined $5000).

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§42.10 7. Verification

A petition filed on behalf of an individual (or a corporation) must be verified. CCP §§1086, 1103; Cal Rules of Ct 8.486(a)(4), 8.932(b)(4). Although this requirement may not apply to a petition filed by a state or public agency (see CCP §446), it is better practice for the attorney filing the petition on behalf of a public entity to verify the petition. The courts of appeal are divided on whether §446 applies to writ petitions. Compare *People v Superior Court (Alvarado)* (1989) 207 CA3d 464, 470, 255 CR 46 (prosecutor's writ petition must be verified), and *Municipal Court v Superior Court (Sinclair)* (1988) 199 CA3d 19, 25 n1, 244 CR 591 (same), with *Verzi v Superior Court* (1986) 183 CA3d 382, 228 CR 299 (prosecutor does not have to verify).

There is an additional danger in unverified pleadings: Even if otherwise authorized, they do not establish facts. *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 151 CR 721. Counsel may file exhibits and declarations that fill this gap (*People v Superior Court (Alvarado), supra; Perlman v Municipal Court* (1979) 99 CA3d 568, 574, 160 CR 567) or amend the verification (99 CA3d at 575).

The attorney may verify the petition when the facts are within the attorney's knowledge or when a party is unable to do so. CCP §446; *Perlman v Municipal Court, supra*. The attorney must state why the verification was not made by the party. CCP §446.

The verification should not be made on information and belief. A verification made on information and belief is insufficient to prove the facts stated in the petition. *North Shuttle Serv. v PUC* (1998) 67 CA4th 386, 392 n4, 79 CR2d 46. See *People v McCarthy* (1986) 176 CA3d 593, 597, 222 CR 291 (attorney's verification of habeas petition stating "I believe [the contents] to be true" was hearsay and insufficient to verify facts stated in petition); *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 204, 151 CR 721 (affidavit made on information and belief was hearsay and should have been disregarded). See the sample verification in California Criminal Law Forms Manual §42.1 (2d ed Cal CEB 2005).

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§42.11 8. Effect of Fugitive Defendant

An appellate court may refuse to hear an appeal when the defendant has fled custody. *People v Buffalo* (1975) 49 CA3d 838, 123 CR 308. The court has the same option in a writ proceeding when the petitioner escapes. See *Cooper v Superior Court* (1981) 118 CA3d 499, 173 CR 520 (court exercises discretion *not* to dismiss mandate petition by escaped prisoner, now in custody in another state, who is one of three co-petitioners).

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D. Procedure After Writ Petition Is Filed

§42.12 1. Superior Court

Writ petitions concerning preliminary matters handled by a magistrate may be filed in superior court. See, *e.g.*, *People v Toney* (2004) 32 C4th 228, 230 n2, 8 CR3d 577 (superior court judge sitting as magistrate has jurisdiction and powers of magistrate, not superior court judge); *People v Superior Court* (*Jimenez*) (2002) 28 C4th 798, 803, 123 CR2d 31 (writ regarding magistrate properly filed in superior court). Procedures vary in the superior courts for writs of mandate/prohibition. Some courts use the procedures employed in the appellate division of the superior court, courts of appeal, and supreme court (discussed in §42.12A). Other superior courts use a notice of motion procedure, and still others follow an order to show cause format.

In a court that follows the notice of motion procedure, counsel notices the petition as if it were a motion, setting it for a hearing. If the petitioner is successful, the court issues a peremptory writ following the hearing. See discussion of procedures applicable to writs in superior court in Appeals and Writs in Criminal Cases, chap 8 (3d ed Cal CEB 2007). See also chap 18 in this book (pretrial motion practice).

When the court uses the order to show cause procedure, the petitioner initiates the procedure by making an ex parte application for an order requiring the opposing party to attend a hearing and show cause why the court should not issue a peremptory writ. See discussion of order to show cause procedures used for writs in superior court in Appeals & Writs, chap 8. For discussion of ex parte and order to show cause procedures generally, see California Civil Procedure Before Trial, chap 13 (4th ed Cal CEB 2004).

Ø **Note:** Counsel must determine, either from local rules or (if there are none) from local practitioners or court personnel, what procedures are used.

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§42.12A 2. Appellate Division of Superior Court, Courts of Appeal, and Supreme Court

Appellate division of superior court. As of January 1, 2009, the appellate division of the superior court generally follows the same procedure as the courts of appeal and supreme court. After a petition is filed, the appellate division of the superior court may (Cal Rules of Ct 8.933(a)(4)):

- Deny the petition;
- Issue an alternative writ or order to show cause; or
- Notify the parties that it is considering issuing a peremptory writ in the first instance.

Courts of appeal and supreme court. The courts of appeal and supreme court follow the same procedure. After the petitioner files a petition, the court may (Cal Rules of Ct 8.487(a)(4)):

- Deny the petition without opinion or argument (see *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 24 CR2d 337);
- Issue an alternative writ or order to show cause ordering the respondent or real party in interest either to:
- Act as the petitioner has requested, or
- Show cause in the appellate court, at a date and time specified, why it should not be ordered to do so; or
- Notify the parties that it is considering issuing a peremptory writ in the first instance.

For further discussion of circumstances warranting issuance of a peremptory writ in the first instance, see §42.18.

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§42.13 E. Filing Fee Not Required

The county clerk may not charge a fee for services rendered in a criminal action, except for making or certifying copies of documents or other records in the court file. Govt C §70633(b). Because a petition for an extraordinary writ arising from a criminal case is considered to be part of the same proceeding, the court may not impose a filing fee on the petitioner. *Bravo v Cabell* (1974) 11 C3d 834, 838, 114 CR 618 (construing former Govt C §26857; now see Govt C §70633(b)).

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§42.14 F. Stay of Proceedings in Trial Court

The granting of an alternative writ of mandate or order to show cause does not automatically stay proceedings in the trial court. The reviewing court must issue a stay. See Cal Rules of Ct 8.486(a)(7), 8.932(b)(7). Although it can be argued that the granting of an alternative writ of prohibition does operate as a stay of proceedings, it is safer for counsel to simply request a stay when needed. Failure to obtain a stay could result in the trial court's going forward on the case and rendering moot the issue raised by the petition.

Counsel should apply first to the trial court for a continuance or stay. If the trial court denies the motion, or in the case of a prosecution petition, when a continuance may not be available because of speedy trial problems (Pen C §1382), the petitioner should apply to the reviewing court for a stay of proceedings. For discussion of requesting stays when the superior court is the reviewing court, see California Civil Writ Practice, chap 6 (4th ed Cal CEB 2008). When the court of appeal is the reviewing court, and a stay is sought, a statement to that effect ("STAY REQUESTED") must be placed on the front cover of the petition or opposition. Cal Rules of Ct 8.486(a)(7)(B). See discussion of requesting stays from the court of appeal in Civ Writ Prac, chap 19.

The respondent or real party in interest may file a memorandum in opposition to the stay. See Civ Writ Prac, chaps 6, 19. For further discussion of stays, see Appeals and Writs in Criminal Cases, chap 7 (3d ed Cal CEB 2007).

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§42.15 G. Form of Petition

Superior court. In the superior court, the civil law and motion rules (Cal Rules of Ct 3.1100-3.1804) apply to proceedings on a petition for writ of mandate or prohibition. Cal Rules of Ct 3.1103(a)(2). In addition, Cal Rules of Ct 2.100-2.119 govern the form and format of all documents filed in the superior court. The document first filed by the petitioner in the superior court will depend on whether the court uses an alternative/peremptory writ, notice of motion, or order to show cause procedure. See §42.12. A petition is filed when the alternative/peremptory writ procedure is used, and is commonly used in the order to show cause procedure as well. A standard pretrial motion format is common for the notice of motion procedure. See Appeals and Writs in Criminal Cases, chap 8 (3d ed Cal CEB 2007).

Counsel should consult with the court's writ clerk or local counsel to learn whether there are any unwritten local practices in writ proceedings.

Service and filing requirements are discussed in §42.15A.

Appellate division of superior court. California Rules of Court 8.930-8.936 apply to writs taken in the appellate division of the superior court. Unrepresented parties must use Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) (Judicial Council Form APP-151) to file a writ petition in the appellate division of superior court, unless the court permits otherwise. Cal Rules of Ct 8.931(a). This form may be used by counsel. Cal Rules of Ct 8.932(b)(1). The form and content of a petition and required supporting documents are set forth in Cal Rules of Ct 8.883 and 8.930-8.932. In addition, the civil law and motion rules (Cal Rules of Ct 3.1100-3.1312) apply to proceedings on a petition for writ of mandate or prohibition in the superior court. Cal Rules of Ct 3.1103(a)(2).

Service and filing requirements are discussed in §42.15A.

Courts of appeal. The form and content requirements for a petition for writ of mandate and/or prohibition in the courts of appeal are set forth in Cal Rules of Ct 8.486, among other rules. The petition should have a red cover. Cal Rules of Ct 8.40(b). The cover must display the name, address, telephone number, and State Bar number of the attorney filing the petition. Cal Rules of Ct 8.40(c), 8.204(b). The petition must be accompanied by a memorandum (Cal Rules of Ct 8.486(a)(5)) and by proof of service (Cal Rules of Ct 8.486(e)). The rules on the form of briefs in the court of appeal, primarily Cal Rules of Ct 8.204, generally apply to papers filed in writ proceedings in the court of appeal. See Cal Rules of Ct 8.485(a). See §42.15A.

Exhibits may be attached to the end of the petition or may be in a separate volume. Cal Rules of Ct 8.486(c). The exhibits must be index-tabbed and consecutively paginated. Cal Rules of Ct 8.486(c). A table of contents must preface the exhibits, listing each document by title and its index tab number or letter. Cal Rules of Ct 8.486(c).

For detailed discussion and sample forms and clauses, see Appeals and Writs in Criminal Cases, chap 8 (3d ed Cal CEB 2007). See also the sample form in California Criminal Law Forms Manual §42.1 (2d ed Cal CEB 2005).

Supreme court. The form and content requirements for petitions for writs of mandate and prohibition in the California Supreme Court are the same as in the courts of appeal. Cal Rules of Ct 8.40, 8.486.

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§42.15A H. Filing and Service Requirements

Superior court. In the superior court, one copy of a petition is usually filed, with attached or lodged exhibits, unless local rules require more copies. The petition must be served on each respondent and real party in interest named in it. CCP §1107. Some courts require proof of service to accompany the petition when it is filed. In other courts, the practice is for alternative writs to issue without prior service of the petition. This practice is allowed in the court's "discretion and for good cause." CCP §1107. The petition is then served with the alternative writ. It may be necessary to conform extra copies of the petition if the court requires that a copy be served again along with the alternative writ (when one issues).

When the notice of motion or order to show cause procedures discussed in §42.12 are used, proof of service is usually not required to be filed with the motion or petition. See CCP §§1088.5, 1107. However, proof of service must be filed before any hearing or action by the court on the petition. CCP §1088.5.

Appellate division of superior court. In the appellate division of the superior court, the court may allow the petition to be filed without a proof of service, but it may also insist that the proof of service be amended to correct any defects within 5 days of the clerk's notice of a defect. If the defect is not corrected, the court may strike the petition or impose a lesser sanction. Cal Rules of Ct 8.931(d)(4)-(5).

Courts of appeal. The original petition, opposition or return, and four copies must be filed in the court of appeal. Cal Rules of Ct 8.44(b)(3), 8.486(c)(3).

The petition must be accompanied by proof of service on the respondent, any real party in interest named in the petition, the attorney for each party separately represented, and each unrepresented party. Cal Rules of Ct 8.25(a)(1)-(2), 8.486(e)(3). A preliminary opposition or return by the respondent or real party must be served on all other parties, and proof of service must be filed with the opposition. Cal Rules of Ct 8.25(a), 8.487(a)(1), 8.487(b)(2). The proof of service must name each party represented by each attorney served. Cal Rules of Ct 8.25(a)(2).

The real party in interest must be served with both the petition and one set of supporting documents. If the respondent is not the superior court or a judge of that court, the respondent must also be served with both the petition and one set of supporting documents. If the respondent is the superior court or a judge of that court, only the petition (not the supporting documents) must be served on it. Cal Rules of Ct 8.486(e)(1)-(2). The petition must also be served on the Attorney General. Cal Rules of Ct 8.29(c), 8.486(e)(4).

Supreme court. The California Supreme Court requires an original and ten copies of a petition, opposition, or return. Cal Rules of Ct 8.44(a)(2), 8.486(c)(3). Service requirements are the same as in the courts of appeal.

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I. Response to Writ Petition

§42.16 1. Right to Respond to Writ Petition

A party who would be adversely affected by a proposed writ must be given an opportunity to respond to the petition. A writ petition may not be granted by default. CCP §1088. See *Kernes v Superior Court* (2000) 77 CA4th 525, 91 CR2d 765 (due process requires reviewing court to give real party in interest opportunity to file opposition, unless exceptional circumstances require immediate issuance of writ).

The respondent court generally may not defend itself or hire counsel to defend it, because it is presumed to be disinterested in the outcome. See *Ng v Superior Court* (1997) 52 CA4th 1010, 1016, 61 CR2d 49, disapproved on other grounds in *Curle v Superior Court* (2001) 24 C4th 1057, 1069 n6, 103 CR2d 751 (trial judge lacks standing to oppose writ petition, even though trial court is nominal respondent, if issue does not involve court's operating procedures or budget). But see *James G. v Superior Court* (2000) 80 CA4th 275, 95 CR2d 135 (trial court allowed to file opposition to writ petition when real party could not meaningfully oppose petition because both petition and underlying motion were filed under seal).

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§42.16A 2. Types of Response

The types of response to a writ petition that may be filed by an opposing party are preliminary opposition (sometimes referred to as an "informal" opposition), return, and opposition (when available).

Preliminary opposition. A preliminary opposition is filed as soon as possible after the petition to persuade the court not to issue an alternative writ. The court may request a preliminary opposition and give a deadline in its request. Otherwise, a preliminary opposition is optional.

Return. A return is the formal response to the court's issuance of an alternative writ or an order to show cause; it is the vehicle the respondent or real party in interest uses to dispute the factual or legal allegations set out in the petition. If the respondent or real party in interest fails to deny material allegations, the court deems them admitted. *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45.

Opposition. If the court notifies the parties that it is considering issuing a peremptory writ in the first instance (frequently called *Palma* notice after *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 203 CR 626), the respondent or any real party in interest may file an opposition.

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§42.17 3. Procedures for Responding

Superior court. Responses are served on the petitioner, on other parties, and on the court. CCP §465. The type of response depends on which of the three procedures is used to file the petition. When the alternative/peremptory writ procedure is used, the same responses can be filed as in the courts of appeal: preliminary opposition, return, and opposition (when available). When the noticed motion procedure is used, the return is commonly in the same format as a response to a motion in a civil case. When the order to show cause procedure is used, the practice varies.

When an alternative writ is requested, the return must be filed at least 5 court days before the time appointed for the hearing. Cal Rules of Ct 3.1300(a) (states rule for law and motion); Cal Rules of Ct 3.1103(a) (defines law and motion as including writs of review, mandate, and prohibition); CCP §1089 (Judicial Council rules to be followed to determine date for filing of return in mandate proceedings); CCP §1105 (relevant mandate rules apply to prohibition).

If no alternative writ is sought (*i.e.,* when the notice of motion or order to show cause procedures are used), the time for filing the return depends on the record. If the record was filed with the petition, or if no record is required, the return must be filed within 30 calendar days after service of the petition. CCP §1089.5. When the record has been ordered, the return is required to be filed within 30 calendar days following receipt of a copy of the record. CCP §1089.5.

If the court's order does not specify a filing date or a format for the return, counsel should consult local rules or the clerk's office to ascertain local practice.

For discussion of procedures for filing the return when *Palma* notice has been given, see §42.18.

The formats of the preliminary opposition and the return are governed by Cal Rules of Ct 2.100-2.119, 3.1110-3.1113, local rules, and local practice. In counties with a writ clerk, counsel may be able to call with questions. For further discussion of responsive pleadings in the superior court, see Appeals and Writs in Criminal Cases, chap 8 (3d ed Cal CEB 2007).

Appellate division of superior court, courts of appeal, and supreme court. On receipt of a writ petition, the respondent or real party in interest should consider filing a written preliminary opposition. A preliminary opposition is optional and may be filed within 10 days after the petition is filed. CCP §1107; Cal Rules of Ct 8.487(a)(1) (courts of appeal and supreme court), 8.933(a)(1) (appellate division of superior court).

> Ø **Note:** If the petition requests issuance of a peremptory writ in the first instance, the real party in interest should file a complete preliminary opposition because this may be the only opportunity to file any opposition to the petition. See Cal Rules of Ct 8.487(a)(4) (courts of appeal and supreme court), 8.933(a)(4) (appellate division of superior court). See also *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 203 CR 626.

The preliminary opposition must include a memorandum, and a statement of any material fact that was missing from the petition. Cal Rules of Ct 8.487(a)(2) (courts of appeal and supreme court), 8.933(a)(2) (appellate division of superior court). In the court of appeal and supreme court, unless the court specifies otherwise, the preliminary opposition should adhere to the form requirements discussed in §42.15. See Cal Rules of Ct 8.40(b) (opposition to writ petition should have red cover); Cal Rules of Ct 8.4 (indicating that Title 8, Division 1, of Cal Rules of Ct applies to original proceedings in reviewing courts).

Once an alternative writ or order to show cause issues, the opposing party may file a return. The return consists of a verified answer, a demurrer, or both. See Cal Rules of Ct 8.487(b)(1) (courts of appeal and supreme court), 8.933(b)(1) (appellate division of superior court).

> Ø **Note:** If the return is by demurrer alone and the demurrer is overruled, the court may issue the peremptory writ without granting leave to answer. Cal Rules of Ct 8.487(b)(4) (courts of appeal and supreme court), 8.933(b)(4) (appellate division of superior court).

An answer may consist of admissions, denials, and affirmative defenses. CCP §431.30. An answer filed by a public official need not be verified if it is used "merely to join the issues raised in the petition." *Hall v Superior Court* (2005) 133 CA4th 908, 914 n9, 35 CR3d 206.

The respondent or real party should admit only the allegations conceded to be true. The return must deny contested allegations and should affirmatively allege the points necessary to apprise the court of factual or legal reasons for denying the petition. Failure to deny a material allegation in the petition admits its truth (*Rice v Superior Court* (1975) 49 CA3d 200, 202, 122 CR 389; *Rodriguez v Municipal Court* (1972) 25 CA3d 521, 526, 102 CR 45), as does failure to answer the petition at all (*Block v Superior Court (Downey)* (1998) 62 CA4th 363, 72 CR2d 610).

Unless another date is specified by the court, the return should be filed within 30 days after the court issues the alternative writ or order to show cause. Cal Rules of Ct 8.487(b)(2) (courts of appeal and superior court), 8.933(b)(2) (appellate division of superior court). The rules on the form of papers in the courts of appeal and supreme court discussed in §42.15 apply as well to opposition papers filed in writ proceedings. See Cal Rules of Ct 8.40.

If the court notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or real party in interest may serve and file an opposition. Cal Rules of Ct 8.487(b)(1) (courts of appeal and supreme court), 8.933(b)(1) (appellate division of superior court). Unless the court orders otherwise, the opposition must be filed within 30 days after the court issues its notification. Cal Rules of Ct 8.487(b)(2) (courts of appeal and supreme court), 8.933(b)(2) (appellate division of superior court).

Service and filing are discussed in §42.15A.

For further discussion of procedures in the courts of appeal, see Appeals and Writs in Criminal Cases, chap 8 (3d ed Cal CEB 2007).

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§42.17A J. Replication or Reply

The petitioner may file a responsive pleading replying to the allegations set out in the respondent's return. This pleading is known as a "replication." *Scott v Superior Court* (1927) 83 CA 25, 256 P 603. See *People v Superior Court (Maury)* (2006) 145 CA4th 473, 485, 51 CR3d 670. Factual matters alleged by the respondent in the return that are not controverted in the replication or by proof presented by the petitioner are deemed true. *Miller v Eisenhower Med. Ctr.* (1980) 27 C3d 614, 625 n10, 166 CR 826; see CCP §1091.

The petitioner may not, however, raise a new challenge to the trial court's orders in the replication unless there is good cause for the failure to raise the issue in the petition. *People v Superior Court (Maury), supra*.

In the appellate division of the superior court, the replication is called a reply and may be served and filed within 15 days after the return or opposition is filed, unless ordered otherwise. Cal Rules of Ct 8.933(b)(3).

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§42.17B K. Oral Argument

Oral argument may be available following issuance of an alternative writ or order to show cause. See *Kowis v Howard* (1992) 3 C4th 888, 899, 12 CR2d 728. However, there is no oral argument when the court issues a peremptory writ in the first instance. *Lewis v Superior Court* (1999) 19 C4th 1232, 1242, 82 CR2d 85. On issuance of a peremptory writ without issuance of an alternative writ or order to show cause, see §42.18. There is no right to oral argument when the court summarily denies a writ petition. *Calhoun v Vallejo City Unified Sch. Dist.* (1993) 20 CA4th 39, 45, 24 CR2d 337.

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§42.18 L. Procedures When Peremptory Writ May Issue in First Instance

A reviewing court may issue a peremptory writ in the first instance; *i.e.,* without issuing an alternative writ first. CCP §§1088, 1107. However, the California Supreme Court has cautioned that this procedure should be used only when the petitioner's right to relief is obvious or unusual urgency justifies expediting the writ application. *Lewis v Superior Court* (1999) 19 C4th 1232, 1241, 82 CR2d 85; *Palma v U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 203 CR 626; *Campbell v Superior Court* (2008) 159 CA4th 635, 71 CR3d 594. When the petitioner seeks a peremptory writ in the first instance, the petition must give notice to the opposing party and to the court. This is usually done by requesting a peremptory writ in the first instance in the prayer of the petition. See CCP §§1088, 1107; *Palma v U.S. Indus. Fasteners, Inc., supra*. When the court initiates *Palma* procedures, it sends notice to all parties. *Palma* notice must be received by the opposing party at least 10 calendar days before a peremptory writ may issue. CCP §1088; 36 C3d at 178. For further discussion of *Palma* procedures, see Appeals and Writs in Criminal Cases, chap 8 (3d ed Cal CEB 2007).

Opposition to the writ petition must be filed within 30 days after the court notified the parties that it is considering issuing a peremptory writ. Cal Rules of Ct 8.487(b)(2) (courts of appeal and supreme court), 8.933(b)(2) (appellate division of superior court). See *Palma,* 36 C3d at 179. The respondent should file a complete, not just a preliminary, opposition following such a notice; otherwise, it may lose its only opportunity to be heard in the proceeding.

When the *Palma* procedure is used in the court of appeal, a peremptory writ should issue only when the decision becomes final as to both the court of appeal and the California Supreme Court. *Ng v Superior Court* (1992) 4 C4th 29, 13 CR2d 856.

The court does not have to hear oral argument before it issues a peremptory writ, but it must at least solicit opposition. Cal Rules of Ct 8.487(a)(4), 8.933(a)(4); see *Lewis v Superior Court* (1999) 19 C4th 1232, 1242, 82 CR2d 85; *Kernes v Superior Court* (2000) 77 CA4th 525, 91 CR2d 765. The court does not consider evidence that was not submitted to the trial court. However, the court may consider new evidence to the extent necessary to determine whether, in the interests of justice, further proceedings before the trial court are necessary on an issue previously submitted to it. *Campbell v Superior Court* (2008) 159 CA4th 635, 647, 71 CR3d 594.

> Ø **Note:** While an appellate court may, without first having solicited opposition, issue a "suggestive *Palma* notice," encouraging the trial court to grant the relief sought in the petition, the trial court must allow the parties to be heard before following the suggestion. *Brown, Winfield & Canzoneri, Inc. v Superior Court* (2010) 47 C4th 1233, 104 CR3d 145.

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§42.19 M. Appellate Remedies Following Grant or Denial of Writ of Mandate or Prohibition

If a party is unhappy with the court's disposition of the writ petition, there are two possibilities for judicial relief: (1) a petition for rehearing, which is authorized only in limited situations (see §42.20); and (2) review by a higher court.

After the superior court grants or denies a petition for writ of mandate, if either side wishes further review, an appeal should be filed in the court of appeal. CCP §904.1(a)(1). After the appellate division of the superior court grants or denies a writ in a misdemeanor case, a party wishing review should petition for a writ in the court of appeal. CCP §904.3.

The losing party in the court of appeal may file a petition for review in the California Supreme Court. Cal Rules of Ct 8.500. Review is preferable to an original writ petition. See *Hagan v Superior Court* (1962) 57 C2d 767, 769, 22 CR 206. The grounds on which the California Supreme Court will grant review are set out in Cal Rules of Ct 8.500(b), and the petition for review must allege one or more of those grounds.

If the court of appeal denies a petition and the petitioner files for review in the California Supreme Court, that court may (1) summarily deny review; (2) grant review, decide one or more issues, and transfer the rest back to the court of appeal (Cal Rules of Ct 8.528(c)); (3) grant review and transfer the case to the court of appeal without decision but with instructions (Cal Rules of Ct 8.528(d)); or (4) grant review and decide the matter itself (Cal Rules of Ct 8.528(a)).

For additional discussion of petitions for review, see §§44.69-44.76; Appeals and Writs in Criminal Cases §§5.41-5.46 (3d ed Cal CEB 2007). A sample petition for review appears in Appeals & Writs §5.54.

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§42.20 N. Rehearings

The losing party should consider whether a petition for rehearing is in order, especially if the court files a written opinion rather than a summary denial. In any appellate court and in the appellate division of the superior court, a party is *entitled* to rehearing if the opinion decides the case on the basis of an issue not briefed by the parties. Govt C §68081. In the court of appeal, the losing party should review the opinion carefully to ensure that it reflects the material facts and addresses all the issues. See Cal Rules of Ct 8.500(c)(2) (the supreme court "normally will accept the Court of Appeal opinion's statement of the issues and facts" unless the party has filed a petition for rehearing that called to the court of appeal's attention any issues or facts that were omitted or misunderstood by the court of appeal).

Often, however, the rules do not authorize a petition for rehearing. In the court of appeal, if no order to show cause or alternative writ is issued, the court's order denying the writ petition becomes final immediately, and no petition for rehearing is permitted. Cal Rules of Ct 8.268(a)(1), 8.490(b)(1). The same is true when the supreme court denies a writ petition without issuing an order to show cause or an alternative writ. Cal Rules of Ct 8.268(a)(1), 8.532(b)(2), 8.536(a). Similarly, in the appellate division of the superior court, a judgment denying a writ petition becomes immediately final when filed (Cal Rules of Ct 8.935(a)(2)) and a petition for rehearing is not permitted (see Cal Rules of Ct 8.889(a) (order of rehearing must be made before decision is final)).

There are no rule provisions for rehearing after a single superior court judge grants or denies a writ petition.

On the time limit for filing or responding to a petition for rehearing, see chart in §42.2. On petitions for rehearing in the court of appeal, see also Cal Rules of Ct 8.40(b). On petitions for rehearing in the supreme court, see Cal Rules of Ct 8.40(a), 8.536. On petitions for rehearing in the appellate division of the superior court, see Cal Rules of Ct 8.889.

For further discussion of petitions for rehearing, see Appeals and Writs in Criminal Cases §§5.39-5.40 (3d ed Cal CEB 2007).

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§42.21 O. Res Judicata Effect of Denial of Petition for Writ of Mandate or Prohibition

If the reviewing court summarily denies the petition, it is not res judicata. *People v Durrett* (1985) 164 CA3d 947, 210 CR 874. This is also true when the court summarily denies with a brief supporting statement but without an alternative writ, oral argument, or a full written opinion. See *Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728. But if the court issues an opinion, that opinion becomes the law of the case. *People v Veitch* (1982) 128 CA3d 460, 465, 180 CR 412.

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IV. WRIT OF HABEAS CORPUS

A. Nature and Function of Writ of Habeas Corpus

§42.22 1. Purpose of Habeas; Statutory Authorities

The right to petition for a writ of habeas corpus antedates the federal Constitution. See *Bushnell's Case* (1677) 124 Eng Rep 1006. Habeas corpus is explicitly recognized in the federal Constitution (US Const art I, §9) and the California Constitution (Cal Const art VI, §10; art I, §11). The historic function of the writ of habeas corpus (Latin for "you have the body"; also called the Great Writ) is to compel one having custody of a person to bring that person before the issuing court. Habeas corpus proceedings are directed at determining the lawfulness of imprisonment, conditions of confinement, or other actual or potential restraints on personal liberty. Pen C §1473 (sets out primary grounds for seeking habeas). See also Pen C §1473.5 (availability of writ of habeas corpus when expert testimony relating to intimate partner battering not introduced at trial court proceedings). Habeas is usually unavailable as a substitute for ordinary remedies at law such as direct appeal. *In re Walker* (1974) 10 C3d 764, 773, 112 CR 177. But see *In re Crockett* (2008) 159 CA4th 751, 759, 71 CR3d 632 (when committing court exceeded its jurisdiction, failure to appeal did not prevent review of habeas petition).

A crucial difference between a writ of habeas corpus and a writ of mandate and/or prohibition is that a writ of habeas corpus is not the ultimate relief sought by the petitioner; rather, it is an interim step in determining whether the petitioner is entitled to relief. If the habeas petition is sufficient on its face, the court *must* issue a writ of habeas corpus (or its functional equivalent, an order to show cause). Then the parties litigate the merits. *People v Romero* (1994) 8 C4th 728, 737, 35 CR2d 270.

Some of the common uses of habeas by persons convicted or accused of crimes are the following:

- Reaching issues that cannot be raised on direct appeal (or cannot be argued as effectively on direct appeal), because the supporting facts are outside the appellate record (see *People v Pope* (1979) 23 C3d 412, 428, 152 CR 732 (ineffective assistance of counsel); *People v Bautista* (2004) 115 CA4th 229, 237, 8 CR3d 862 (same)).
- Permitting the late filing of a notice of appeal that defendant had relied on trial counsel to file (*People v Knauer* (1988) 206 CA3d 1124, 253 CR 910). See also *People v Byron* (2009) 170 CA4th 657, 664, 88 CR3d 386 (given possible ineffective-assistance claim for counsel's failure to timely file, untimely notice of appeal construed as petition for writ of habeas corpus).
- Challenging false evidence "that is substantially material or probative on the issue of guilt or punishment" and was introduced against the petitioner at a hearing or trial (Pen C §1473(b)(1)). See also *In re Pratt* (1999) 69 CA4th 1294, 82 CR2d 260.
- Challenging false physical evidence that was a material factor leading the defendant to plead guilty (Pen C §1473(b)(2)).
- Asserting actual innocence based on newly discovered evidence or proof of false evidence introduced at trial. See, *e.g., In re Lawley* (2008) 42 C4th 1231, 1238, 74 CR3d 92; *In re Bell* (2007) 42 C4th 630, 637, 67 CR3d 781; *In re Hardy* (2007) 41 C4th 977, 1016, 63 CR3d 845.

Other common applications for habeas corpus include review of bail, extradition, and contempt orders, denial of fundamental procedural rights, invalid probation orders, and illegal conditions of prison confinement. Habeas corpus is available to collaterally attack criminal convictions in order to avoid deportation. See *People v Kim* (2009) 45 C4th 1078, 1099, 90 CR3d 355.

Habeas corpus also is available in some contexts unrelated to crime. For example, it may be used to challenge civil commitment proceedings under the Lanterman-Petris-Short Act (Welf & I C §§5000-5550) and related statutory proceedings. See Welf & I C §§5254.1, 5275-5278. It may also be used in various types of child custody matters. See, *e.g., Adoption of Alexander S.* (1988) 44 C3d 857, 866, 245 CR 1; *In re Darlice C.* (2003) 105 CA4th 459, 129 CR2d

472.

For a more exhaustive treatment of the Great Writ, see Appeals and Writs in Criminal Cases, chaps 9-10 (3d ed Cal CEB 2007). Statutory provisions are in Pen C §§1473-1508 and Cal Rules of Ct 4.550-4.552, 8.380.

Federal habeas corpus proceedings are beyond the scope of this chapter. For discussion of federal habeas, see chap 45. See also Appeals & Writs, chaps 12-18.

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§42.23 2. Required Allegations in Petition for Writ of Habeas Corpus

Generally, a habeas corpus petition must allege all of the following:

- The petitioner is suffering from actual or constructive custody or some other restraint of liberty. Pen C §1473(a); *In re Wessley W.* (1981) 125 CA3d 240, 246, 181 CR 401 (writ not available when probationary period had ended). "Restraint" and "constructive custody" are broadly construed. See, *e.g., Maleng v Cook* (1989) 490 US 488, 104 L Ed 2d 540, 109 S Ct 1923 (defendant "in custody" because authorities placed detainer on him); *In re Catalano* (1981) 29 C3d 1, 8, 171 CR 667 (among those who may apply for habeas writ are prisoner released on bail, prisoner released on own recognizance, parolee, and defendant sentenced to pay fine or face arrest). However, collateral consequences of a criminal conviction do not of themselves constitute constructive custody of a person. *People v Villa* (2009) 45 C4th 1063, 1070, 90 CR3d 344 (petitioner in federal immigration detention who had completed sentence and was no longer in actual California custody was not in state's constructive custody for habeas purposes). In addition, a petition that raises a recurring issue of substantial public importance may proceed even if it is moot with respect to the petitioner. *In re Lois M.* (1989) 214 CA3d 1036, 263 CR 100.

Ø **Note:** Actual or constructive custody is a jurisdictional requirement that cannot be waived. *In re Stier* (2007) 152 CA4th 63, 81, 61 CR3d 181 (collateral consequence of conviction, *i.e.,* sex offender registration, did not render petitioner "in custody").

- The restraint suffered by petitioner is unlawful. Pen C §1473(a).
- Appeal is unavailable or otherwise is not an adequate remedy under the circumstances. See *In re Duran* (1974) 38 CA3d 632, 635, 113 CR 442. Habeas corpus is not a mere substitute for an appeal (*In re Terry* (1971) 4 C3d 911, 95 CR 31), but it may lie when appeal is an inadequate remedy in a variety of situations. See Appeals and Writs in Criminal Cases, chap 9 (3d ed Cal CEB 2007). When an appellate remedy exists, the petitioner's failure to seek it in a timely manner may bar habeas corpus relief. See *In re Ronald E.* (1977) 19 C3d 315, 137 CR 781 (minor's failure to appeal previous detention orders barred constitutional challenge by habeas corpus); *In re Brown* (1973) 9 C3d 679, 108 CR 801, overruled on another ground in *People v Mendez* (1999) 19 C4th 1084, 81 CR2d 301 (defendant failed to perfect appeal by not filing certificate of probable cause; habeas relief denied). But see *People v Byron* (2009) 170 CA4th 657, 88 CR3d 386 (given possible ineffective-assistance claim, untimely notice of appeal construed as petition for writ of habeas corpus). However, "a prisoner may claim on habeas corpus that he was sentenced to a term in excess of that permitted by the Constitution, even if his claim was previously rejected on direct appeal." *In re Huffman* (1986) 42 C3d 552, 555, 229 CR 789.
- If relevant, the petition should state how administrative remedies have been exhausted. *In re Muszalski* (1975) 52 CA3d 500, 503, 125 CR 286.

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B. Outline of Pleading and Procedure

§42.24 1. Three Pleadings

There are three habeas corpus pleadings:

- The petition, alleging that the confinement or other restriction is unlawful (see Pen C §1474);
- The return, filed on behalf of the confining authority when the court does not deny the petition at the outset (see Pen C §1480); and
- The traverse, which is the petitioner's response to the return. Pen C §1484. It is called a denial in superior court. Cal Rules of Ct 4.551(e).

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§42.25 2. Court Responses

On receipt of a petition for writ of habeas corpus, the court may summarily deny the petition, issue an order to show cause (or grant the writ), or request an informal response.

Summary denial. The court may summarily deny a habeas petition when the petition does not state a prima facie case for relief or when the claims in the petition are procedurally barred. *People v Romero* (1994) 8 C4th 728, 737, 35 CR2d 270; see Cal Rules of Ct 4.551(a)(3)-(4). In the superior court, an order denying a habeas petition must be accompanied by a brief recital of the reasons. Cal Rules of Ct 4.551(g).

Order to show cause. If the petition alleges facts that, if true, would entitle the petitioner to relief, and there is no facial procedural bar to relief, the court will ordinarily issue an order to show cause. See *People v Romero, supra*; Cal Rules of Ct 4.551(a)(4)(A), (c)-(d). Issuance of an order to show cause represents a preliminary determination that the petitioner would be entitled to relief if his or her factual allegations were proved. Cal Rules of Ct 4.551(c). The issuance of an order to show cause on a specific issue is an implicit determination that a prima facie case has not been made on the other issues presented. *People v Bloyd* (1987) 43 C3d 333, 363, 233 CR 368.

The order to show cause has evolved as a substitute for the statutory procedure, issuance of the writ, which requires the petitioner's custodian to produce the petitioner. Pen C §§1477, 1480, 1483; see *Romero,* 8 C4th at 738. The order to show cause is the functional equivalent of the writ but does not require the custodian to produce the petitioner. See *In re Hochberg* (1970) 2 C3d 870, 873 n2, 87 CR 681.

In considering a petition for writ of habeas corpus, the court has the authority to restate an inartfully phrased claim or to invite the petitioner to file a supplemental or amended petition. *Board of Prison Terms v Superior Court (Ngo)* (2005) 130 CA4th 1212, 1239, 31 CR3d 70. The court, however, does not have the authority to issue an order to show cause on the basis of claims not explicitly stated in the petition. 130 CA4th at 1236.

Informal response. Before denying the writ or issuing an order to show cause, the court can request informal opposition to the petition. Cal Rules of Ct 4.551(b)(1), 8.385(b)(1). A copy of the request for an informal response must be served on petitioner, as must the informal response itself. The response must be in writing and served and filed within 15 days, or within the time specified by the court in its request. Cal Rules of Ct 4.551(b)(2), 8.385(b)(2). The court must then inform the petitioner that he or she has the right to reply within 15 days of service of the response on the petitioner. The court may not deny the petition until the petitioner has filed a reply or the time for filing the reply has expired. Cal Rules of Ct 4.551(b)(2)-(3), 8.835(b)(3). After the informal response and reply have been filed (or the time for filing them has expired), the court may deny the petition, issue an order to show cause, or grant the writ. It may not, however, order the relief requested in the petition without first allowing the respondent to file a formal return. *People v Romero* (1994) 8 C4th 728, 744, 35 CR2d 270; *In re Olson* (2007) 149 CA4th 790, 800, 57 CR3d 284. Habeas corpus litigation has no procedure analogous to the issuance of a peremptory writ of mandate in the first instance (discussed in §42.18). *Romero,* 8 C4th at 742.

> Ø **Note:** In the rare event that the confining authority does not wish to contest the habeas petition, it may stipulate to the truth of the petition's allegations and to the requested relief. In such a case, the court may grant relief without issuing a writ of habeas corpus or an order to show cause. 8 C4th at 740 n7.

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C. Preparation, Filing, and Service of Petition

1. Court in Which to File Petition

§42.26 a. Subject Matter Jurisdiction

A habeas corpus petition may legally be filed in the superior court, the court of appeal, or the supreme court. Cal Const art VI, §10.

The appellate division of the superior court does not have jurisdiction over habeas petitions. *In re Ramirez* (2001) 89 CA4th 1312, 108 CR2d 229. A single judge of the superior court must decide the petition. Cal Rules of Ct 4.552(d). Unless the parties agree, a habeas petition filed in the superior court cannot be assigned to the judge who made the ruling or order being challenged by the petition. Pen C §859c; *Fuller v Superior Court* (2004) 125 CA4th 623, 23 CR3d 204.

Although the superior court loses jurisdiction over most aspects of a case while the direct appeal is pending, it retains jurisdiction over habeas corpus matters. *In re Carpenter* (1995) 9 C4th 634, 38 CR2d 665. The court must not, however, exercise its habeas corpus jurisdiction in a way that interferes with the appellate jurisdiction of the reviewing court. Compare *People v Mayfield* (1993) 5 C4th 220, 19 CR2d 877 (superior court lacked authority to grant habeas relief on claim that could have been decided in pending direct appeal), with *In re Carpenter,* 9 C4th at 646 (superior court properly entertained habeas petition raising juror misconduct claim that did not appear of record in pending appeal). See also *People v Superior Court (Gregory)* (2005) 129 CA4th 324, 28 CR3d 276 (superior court lost jurisdiction over habeas corpus petition while appeal from grant of petition was pending in court of appeal).

Although both the court of appeal and the supreme court have original jurisdiction in habeas corpus cases, the appellate courts have discretion to deny a petition for writ of habeas corpus on the ground that the petitioner has not applied for a writ in a lower court. *In re Ramirez, supra*; *In re Hillery* (1962) 202 CA2d 293, 294, 20 CR 759 (same). A habeas petition filed in the first instance in the reviewing court must explain why the petitioner has not sought relief in the superior court.

When a habeas corpus petition is related to a direct appeal that is pending in the court of appeal or the supreme court, it is common practice to file the petition in the reviewing court, but even in this situation the reviewing court is not required to entertain a habeas claim that has not been presented to the lower court. See *In re Baker* (1988) 206 CA3d 493, 253 CR 615. Even if the reviewing court issues an order to show cause, it may make the order returnable in the superior court. *In re Hochberg* (1970) 2 C3d 870, 873, 87 CR 681. For further discussion, see Appeals and Writs in Criminal Cases §§9.36, 10.5-10.6 (3d ed Cal CEB 2007).

Ø **Note:** If the petitioner does not expect the California courts to grant relief but is filing a state habeas petition merely to "exhaust" federal issues so that they can be presented in federal court, the better practice may be to save time by filing the state habeas petition in the California Supreme Court in the first instance. For detailed discussion of exhaustion, see Appeals & Writs, chap 14.

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§42.26A b. Territorial Jurisdiction

Under the California Constitution, every California court has territorial jurisdiction over habeas corpus petitions filed by California petitioners. Cal Const art VI, §10; *Griggs v Superior Court* (1976) 16 C3d 341, 344, 128 CR 223. The existence of territorial jurisdiction does not, however, mean the court should exercise that jurisdiction in every case. 16 C3d at 346.

Petitions challenging judgment or sentence or conditions of confinement. As a general rule, the superior court that rendered judgment in a criminal case should hear and decide a habeas petition challenging the judgment or sentence. 16 C3d at 347. When conditions of confinement are challenged, the superior court located in the county in which the petitioner is incarcerated should hear the petition. 16 C3d at 347.

If a petition challenging the judgment or sentence is filed in a superior court in a county other than the county where the judgment was rendered, or if a petition challenging conditions of confinement is filed in a superior court in a county other than the county in which the petitioner is incarcerated, the court *may,* but is not required to, transfer the petition to the appropriate court. Cal Rules of Ct 4.552(b). The court is not required to determine whether the petition states a prima facie case before transferring the petition. Cal Rules of Ct 4.552(b)(2).

Similarly, when a petition is filed in the court of appeal challenging the judgment or sentence imposed by a trial court located outside the appellate court's judicial district, or challenging the conditions of confinement or conduct of correctional officers outside the appellate court's district, the court *may,* but is not required to, deny the petition without prejudice. Cal Rules of Ct 8.385(c)(1).

Petitions challenging parole decisions. A habeas corpus petition that challenges a determination that a prisoner is unsuitable for parole or challenges a denial of parole must be heard and decided by a court in the county that rendered the judgment of conviction. *In re Roberts* (2005) 36 C4th 575, 587, 31 CR3d 458.

When a petition challenging a parole denial or unsuitability determination is filed in a superior court in a county other than the one in which the underlying judgment was rendered, the court *must* transfer the petition to the superior court in the county that rendered judgment. Cal Rules of Ct 4.552(c). When a petition challenging a parole determination is filed in a court of appeal, the court must deny the petition without prejudice if the issue was not first adjudicated by the court that rendered the underlying judgment. Cal Rules of Ct 8.385(c)(2).

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§42.26B 2. Form and Contents of Petition

A pro se petitioner ordinarily must use the official Judicial Council form Petition for Writ of Habeas Corpus (Judicial Council Form MC-275). Cal Rules of Ct 4.551(a)(1), 8.380(a). The court may accept a petition that is not on the approved form if there is good cause. Cal Rules of Ct 4.551(a)(2), 8.380(a)(1). A petition submitted by an attorney need not be on the Judicial Council form, but it must meet the requirements of Pen C §1474 and contain the information specified in the official form. Cal Rules of Ct 4.551(a)(2), 8.384(a)(1).

If an attorney files a petition in a reviewing court, the petition must also comply with the content and form requirements of Cal Rules of Ct 8.40(b)-(c) and 8.204(a)-(b). Cal Rules of Ct 8.384(a)(1). The petition must have a red cover. Cal Rules of Ct 8.40(b). The cover must display (Cal Rules of Ct 8.204(b)(10)(D), 8.384(a)(1)):

- The title of the petition;
- The title, trial court number, and court of appeal number of the case;
- The names of the trial court and each participating trial judge; and
- The name, address, State Bar number, and telephone number of each attorney filing or joining in the petition.

Ø **Practice Tip:** It is strongly recommended that attorneys draft their own habeas petitions, because the Judicial Council form is confining.

The petition must state whether any prior applications for a writ concerning the same issue have been made, and briefly describe them, including any rulings. Pen C §1475. The petition must be verified by oath or affirmation and signed either by the person seeking relief or by someone on that person's behalf. Pen C §1474.

The title of a petition for writ of habeas corpus proceeding is "In re [petitioner's name]," not the "Petitioner v. Respondent; Real Party in Interest" format used in mandate/prohibition proceedings. All the necessary parties, who otherwise would be identified as respondents or real parties in interest, are described and identified in the paragraphed allegations. There are usually three interested parties: the People, the trial court, and the custodial authority. *In re Scott* (1994) 27 CA4th 946, 33 CR2d 27 (person having custody of petitioner is entitled to notice and opportunity to be heard).

Before preparing a petition for a writ of habeas corpus, counsel should decide whether it is necessary or desirable to have the petitioner personally brought into the courtroom for the hearing. In a court that uses the statutory writ procedure, counsel or the court will need to prepare a formal writ if the petitioner is to be brought into court. See Pen C §§1476-1479, 1481-1482. Counsel should check local court rules or practice to learn whether counsel or the court prepares forms such as the writ. When proceeding by order to show cause instead of by writ, the petitioner's presence can be secured by an ancillary order if it later becomes necessary. See Pen C §2620.

A petition for writ of habeas corpus must be given priority by the court to which it is presented. See Pen C §1476. To make sure that this occurs in fact, counsel should note on the face of the petition that immediate action is requested and ask the clerk to bring the case to the judge's immediate attention.

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§42.27 3. Filing and Service Requirements

When to file. There are no statutory or other specific time limits for filing a petition for writ of habeas corpus. As a rule, however, it should be filed as soon as is practicable after discovery of the claim. The court may decline to consider a petition if it finds any unreasonable delay in seeking relief. See *In re Sanders* (1999) 21 C4th 697, 703, 87 CR2d 899 (habeas petitions in both death penalty and noncapital cases must be filed "reasonably promptly"); *In re Clark* (1993) 5 C4th 750, 21 CR2d 509 (unjustified delay barred consideration of merits). In addition, the passage of time may render the issue moot. See, *e.g., In re Mehdizadeh* (2003) 105 CA4th 995, 997, 130 CR2d 98 (petitioner's case "technically moot" after his release from custody, but court issued order to show cause because petition raised important questions that otherwise would escape review).

Preserving right of federal review. Because of the 1-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 USC §2244(d)), if the petition raises federal issues that the petitioner may wish to renew in federal court after "exhausting" them in state court, it is especially important to file the petition promptly and to proceed through the state collateral review process in good time. See *Carey v Saffold* (2002) 536 US 214, 222, 153 L Ed 2d 260, 269, 122 S Ct 2134 (AEDPA limitations period tolled for one full round of state collateral review process); *Evans v Chavis* (2006) 546 US 189, 163 L Ed 2d 684, 126 S Ct 846 (even when state court does not deny petition as untimely, federal court cannot permit statutory tolling if it finds unreasonable delay at any stage of state collateral review process). On statutory tolling under AEDPA, see §45.13. For a detailed discussion of the AEDPA limitations period, see Appeals and Writs in Criminal Cases, chap 15 (3d ed Cal CEB 2007). On exhaustion of state remedies, see §45.23; Appeals & Writs, chap 14.

Other filing considerations. No filing fee may be charged. See Govt C §6101. In the superior court, unless local practice or rule imposes a different requirement, only the original petition need be filed, but it is a good idea to file at least one copy with the original. The court may accept a single original petition from an unrepresented prisoner and direct its clerk to make and serve copies. In the court of appeal, a petitioner must file an original petition and four copies. Cal Rules of Ct 8.44(b)(1). When a petition is filed in the court of appeal by an unrepresented petitioner, only the original need be filed. Cal Rules of Ct 8.44(b)(2). The California Supreme Court requires an original and ten copies, but this requirement can be waived by court order. Cal Rules of Ct 8.44(a)(2).

Service. The petition must be served on the district attorney of the county in which the defendant is held (and on the city attorney, if the confinement is based on a city ordinance). Pen C §1475. No application for a writ may be heard without proof that the petition was served on the district attorney. Pen C §1475. Although no statute requires service on anyone else, if the petitioner is in state custody, the petition should be served on the Attorney General, who represents the California Department of Corrections and Rehabilitation (CDCR). See Govt C §12511 (Attorney General has charge "of all legal matters in which the State is interested").

> Ø **Note:** When filing a habeas petition in an appellate court, the better practice is to serve the petition as if it were an appellant's brief in a direct appeal (in addition to the service required by Pen C §1475) and to reflect such service in the proof of service filed with the petition. On service of an appellant's brief, see §44.44.

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§42.28 D. Preparation, Filing, and Service of Return

If the court issues an order to show cause or a writ, the confining authority may dispute facts in the petition by filing a return. Pen C §1480. In the superior court, any material allegation in the petition that is not controverted by the return is deemed admitted. Cal Rules of Ct 4.551(d). The objective of the return is to justify the imprisonment or other restraint of which the petitioner complains. *People v Romero* (1994) 8 C4th 728, 738, 35 CR2d 270.

In certain respects, the return in a habeas corpus proceeding is analogous to a complaint in a civil case. Once filed, the return becomes the principal pleading. *People v Romero, supra*; *In re Lawler* (1979) 23 C3d 190, 194, 151 CR 833. The return is unlike a civil complaint, however, in other respects. It must be responsive to the petition's allegations, whereas a complaint is not a response to any other document. The return seeks to defend the status quo and avoid judicial relief, whereas a complaint usually seeks relief to alter the current state of affairs. *People v Romero* (1994) 8 C4th 728, 739 n6, 35 CR2d 270.

Contents. The return must allege facts that establish the legality of the petitioner's detention. *In re Lewallen* (1979) 23 C3d 274, 277, 152 CR 528. It may include matters outside the trial record. *In re Lewallen, supra*.

The return cannot simply deny the petitioner's allegations; it must recite the facts on which denial is founded and provide supporting evidence when appropriate. *In re Lewallen, supra*. The rule that the return must state facts, however, must be tempered when such facts are not readily available to the respondent, and the respondent alleges that (1) it has acted diligently; (2) crucial information is not readily available; and (3) there is good reason to dispute facts or question witness credibility. *People v Duvall* (1995) 9 C4th 464, 37 CR2d 259.

The return must also include the following information (Pen C §1480):

- Whether the person on whom the writ was served has custody of the petitioner;
- If the petitioner is in custody, the authority and causes for imprisonment or restraint; and
- Whether the petitioner is being detained by written authority (a copy of the writing must be attached to the return).

If the person on whom the writ is served has transferred custody of the petitioner to another, the person served must state to whom, when, where, why, and the authority for the transfer.

The return must be signed by the person who made it, and verified, unless made by a sworn public officer in his or her official capacity. Pen C §1480(5); see *Hall v Superior Court* (2005) 133 CA4th 908, 914 n9, 35 CR3d 206 (return to writ of mandate).

Form of papers, filing, and service. The form of the return is similar to that of the petition (see §42.26A), except that there is no official Judicial Council form for a return.

In the court of appeal and the supreme court, the court customarily sets a due date for the return when it issues a writ of habeas corpus or an order to show cause. In the superior court, the return should be filed within 30 days after the court issues an order to show cause.

> Ø **Note:** If the superior court does not rule on a petition for writ of habeas corpus within 60 days after it is filed, the petitioner may file a notice and request for ruling. Cal Rules of Ct 4.551(a)(3). The respondent must file the return within 30 days after an order to show cause issues. Cal Rules of Ct 4.551(d).

The petitioner must be served (Cal Rules of Ct 4.551(d)), and an original return with proof of service must be filed in the court in which the petition is pending. In the court of appeal, the respondent must file an original and four copies (Cal Rules of Ct 8.44(b)(1)); in the supreme court, an original and ten copies (Cal Rules of Ct 8.44(a)(2)).

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§42.29 E. Preparation, Filing, and Service of Traverse

Once the return is filed, the petitioner has an opportunity to controvert it by filing an additional document, traditionally called a traverse. See Pen C §1484; *People v Romero* (1994) 8 C4th 728, 739, 35 CR2d 270. The superior court rules also refer to it as a denial. Cal Rules of Ct 4.550(b)(4), 4.551(e). In the superior court, the traverse must be filed within 30 calendar days after service and filing of the return. Cal Rules of Ct 4.551(e). In the court of appeal and the supreme court, the deadline for filing a traverse is set by the court.

In a habeas corpus proceeding, the return is "the central pleading in the action, to which another pleading must respond." *People v Romero* (1994) 8 C4th 728, 739 n6, 35 CR2d 270. In that sense, the traverse is analogous to the answer in a civil case. Any allegations in the return that are not controverted by the traverse are deemed admitted. 8 C4th at 739; *In re Lawler* (1979) 23 C3d 190, 194, 151 CR 833. Thus, in nearly every case in which a return is filed, the petitioner should respond with a traverse or denial.

Ø **Note:** By stipulation of the parties, the petition may be deemed the traverse. See *People v Jackson* (1980) 28 C3d 264, 288, 168 CR 603, overruled on other grounds in *People v Cromer* (2001) 24 C4th 889, 901 n3, 103 CR2d 23. See also *In re Stafford* (1958) 160 CA2d 110, 113, 324 P2d 967 (no stipulation, but "at the argument the parties treated the matter as if the petition was a traverse to the return and we shall do the same").

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§42.30 F. Petitioner's Custody Status

When the court issues the order to show cause, it generally has three options concerning the petitioner's custodial status (see Pen C §§1476, 1491-1492, 1494):

- Do nothing;
- Direct the release of the petitioner on his own recognizance pending final disposition of the habeas petition (see, *e.g., In re Hall* (1981) 30 C3d 408, 416, 179 CR 223; *In re Kreitman* (1995) 40 CA4th 750, 752, 47 CR2d 595); or
- Set bail (see, *e.g., In re Dean* (1970) 12 CA3d 264, 266, 90 CR 473).

Ø **Note:** In some circumstances, release on bail or on the petitioner's own recognizance is not legally available. See, *e.g., In re Walton* (2002) 99 CA4th 934, 947, 122 CR2d 87 (Pen C §1550.1 makes prisoner challenging extradition ineligible for release on bail).

A proposed order to show cause should always contain a section concerning the release of the petitioner that gives the court the option of releasing the petitioner with or without bail, unless the subject matter of the petition does not challenge the petitioner's current custody.

Ø **Note:** Occasionally, the superior court judge to whom habeas corpus petitions are normally assigned has established a particular order to show cause form that has appropriate blanks to be filled in. Counsel should ask the judge's clerk and use the judge's form, if one exists.

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§42.30A G. Discovery

Filing a habeas corpus petition does not institute a cause of action. The *court* institutes the cause of action by issuing an order to show cause, which represents a preliminary determination that the facts set forth in the petition state a prima facie case for relief. *People v Gonzalez* (1990) 51 C3d 1179, 1258, 275 CR 729. Without a specific legislative grant of jurisdiction, the court has no authority to order discovery when no matter is pending before it. 51 C3d at 1256.

Ø **Note:** When the defendant has received the death penalty or a sentence of life in prison without the possibility of parole, the legislature has authorized courts to grant limited discovery, even when no cause of action is pending. See Pen C §1054.9. For further discussion, see §11.31.

No such legislative grant of jurisdiction exists in habeas matters involving a petitioner who has not received a sentence of death or life without the possibility of parole. Consequently, the court is without jurisdiction to order discovery in a habeas corpus proceeding before issuing an order to show cause. *Board of Prison Terms v Superior Court (Ngo)* (2005) 130 CA4th 1212, 1239, 31 CR3d 70. The court may, however, include a discovery order in the order to show cause. 130 CA4th at 1242. See also *In re Scott* (2003) 29 C4th 783, 814, 129 CR2d 605 (discovery available after court has issued order to show cause); *In re Avena* (1996) 12 C4th 694, 730, 49 CR2d 413 (same). The court may order discovery at the request of the petitioner, at the request of the respondent, or on its own motion. *Ngo,* 130 CA4th at 1242.

Ø **Note:** Although Pen C §§1054-1054.10 do not apply in habeas corpus proceedings, both the petitioner and the respondent are entitled to discovery. *In re Scott, supra*. It is reasonable for a court to look at the reciprocal discovery law to determine the scope of discovery on habeas corpus. *In re Scott, supra*.

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§42.31 H. Evidentiary Hearing

After the pleadings have been filed, if factual issues are in dispute, the court may order an evidentiary hearing. See *In re Lawler* (1979) 23 C3d 190, 194, 151 CR 833. A superior court entertaining a habeas petition is *required* to conduct an evidentiary hearing if a reasonable likelihood exists that the petitioner is entitled to relief and the entitlement depends on resolving a factual issue. Cal Rules of Ct 4.551(f).

Because neither the court of appeal nor the supreme court can take testimony directly, an order to show cause issued by either tribunal calling for an evidentiary hearing is generally made returnable before a superior court. Pen C §1508; *In re Hochberg* (1970) 2 C3d 870, 873, 87 CR 681. The issuance of an order to show cause by an appellate court is a determination that the allegations stated a prima facie case for relief. Afterward, the petition may not be summarily denied by a trial court. *Rose v Superior Court* (2000) 81 CA4th 564, 96 CR2d 843.

Alternatively, the reviewing court may appoint a referee to determine facts necessary for adjudication of the petition. See *In re Weber* (1974) 11 C3d 703, 114 CR 429. See also, *e.g., In re Bell* (2007) 42 C4th 630, 67 CR3d 781. A referee's findings of fact are not binding on the court but are entitled to great weight when supported by substantial evidence (*In re Miranda* (2008) 43 C4th 541, 554, 76 CR3d 172), especially those findings involving credibility determinations. *In re Bell* (2007) 42 C4th 630, 639, 67 CR3d 781.

When the return denies the allegations of the petition but does not refute the accuracy of any documentary evidence submitted by the petitioner, it is deemed that there are no disputed issues of fact. *In re Lewallen* (1979) 23 C3d 274, 278, 152 CR 528; *In re Lawler, supra*. The respondent does, however, have the right to examine the declarants on request. See *In re Fields* (1990) 51 C3d 1063, 1073, 275 CR 384.

At the evidentiary hearing, the petitioner carries the burden of proof by a preponderance of the evidence. *In re Merkle* (1960) 182 CA2d 46, 5 CR 745. Ordinarily, the petitioner calls witnesses first, followed by the opposing party (normally the confining authority, represented by a prosecutor). The conduct of argument is subject to the court's control. The usual practice is to allow the petitioner to argue first, the opposing party to argue second, and the petitioner to close. The hearing must be conducted in accordance with the rules of evidence. Evid C §300; *In re Fields, supra*. Out-of-court declarations are not admissible unless they come within a hearsay exception. Evid C §1200; *In re Fields, supra*. The referee's conclusions of law, as well as resolutions of mixed questions of law and fact, are subject to independent review by the appellate court. *In re Williams* (1994) 7 C4th 572, 29 CR2d 64.

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§42.32 I. Relief Granted

The court entertaining a petition for writ of habeas corpus has broad powers to fashion almost any relief. See, *e.g., In re Miranda* (2008) 43 C4th 541, 582, 76 CR3d 172 (vacation of death sentence); *In re Marquez* (2003) 30 C4th 14, 131 CR2d 911 (award of custody credits); *In re Hall* (1981) 30 C3d 408, 435, 179 CR 223 (vacation of criminal conviction); *In re Underwood* (1973) 9 C3d 345, 351, 107 CR 401 (order that petitioner be afforded opportunity to post reasonable bail); *In re Harrell* (1970) 2 C3d 675, 706, 87 CR 504 (modification of conditions of prison confinement); *In re Lopez* (1970) 2 C3d 141, 151, 84 CR 361 (discharge from custody); *In re Estrada* (1965) 63 C2d 740, 750, 48 CR 172 (order that prison officials consider petitioner's eligibility for parole under correct statute).

The court may grant all or part of the relief requested without ever formally granting the writ of habeas corpus itself. See, *e.g., In re Frye* (1983) 150 CA3d 407, 197 CR 755 (challenge to commissioner's contempt jurisdiction resulted in release of defendant, but petition treated as one for certiorari in annulling contempt order).

Habeas may be used to grant relief to a class. *In re Arias* (1986) 42 C3d 667, 700, 230 CR 505.

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§42.33 J. Appellate Remedies Following Grant or Denial of Habeas Corpus Relief

After superior court disposition of habeas petition. The prosecution may appeal after the superior court grants habeas corpus relief. Pen C §§1506-1507. See Cal Rules of Ct 8.388. The defendant is presumptively entitled to bail or own recognizance release on the prosecution's appeal if the relief granted was that he or she be discharged or released. Pen C §1506. See also *People v Huff* (1975) 46 CA3d 361, 120 CR 210. Generally, the time limit for filing the notice of appeal is 60 calendar days from the judgment or order challenged. Pen C §1506; Cal Rules of Ct 8.308(a), 8.388. However, when the People or the defendant timely appeals from a judgment or appealable order, the time for the opposing party to appeal from the same judgment or order is 30 days after the court clerk mails notification of the first party's appeal. Cal Rules of Ct 8.308(b).

A losing petitioner may not appeal but must file another habeas corpus petition in the court of appeal. *In re* C*lark* (1993) 5 C4th 750, 767 n7, 21 CR2d 509.

After court of appeal disposition of habeas petition. When the court of appeal issues its judgment in a habeas proceeding, it may be possible to file a petition for rehearing (see §42.20), depending on how the court responded to the habeas petition. If the court of appeal issued an order to show cause, its subsequent judgment does not become final for 30 days, and a petition for rehearing is permissible. Cal Rules of Ct 8.268(a)(1), 8.387(b)(1). If the court summarily denies the habeas petition, the judgment generally becomes final on filing and then there is no right to seek rehearing. Cal Rules of Ct 8.387(b)(2)(A). There is an exception, however: when a related appeal is decided on the same day, the date of finality is the same for both proceedings. Cal Rules of Ct 8.387(b)(2)(B). See §42.34.

On deadlines for filing a petition for rehearing and an answer to a petition for rehearing, see chart in §42.2. For discussion of when a petition for rehearing should be filed to preserve the client's issues for further review, see §42.20. For further discussion of petitions for rehearing, see Appeals and Writs in Criminal Cases §5.39 (3d ed Cal CEB 2007).

After rehearing is denied, or when no rehearing is possible, either side may seek relief from the court of appeal's judgment by filing a petition for review in the California Supreme Court. Such a petition must comply with the rules governing petitions for review in criminal cases. On petitions for review in criminal cases, see Appeals & Writs §§5.41-5.46, 5.54.

As an alternative to a petition for review, the habeas petitioner may file a new habeas corpus petition in the supreme court. See Cal Rules of Ct 8.486; Appeals & Writs §10.30.

After supreme court disposition of habeas petition or petition for review. An order by the California Supreme Court denying a petition for review is final upon filing. Cal Rules of Ct 8.532(b)(2)(A). In a habeas proceeding, if the court denies the habeas petition without issuing an order to show cause, that decision also is final immediately. Cal Rules of Ct 8.532(b)(2)(C). No petition for rehearing is permitted in either case. Cal Rules of Ct 8.268(a)(1), 8.536(a).

If the supreme court issues an order to show cause in a habeas proceeding, its ultimate judgment becomes final 30 days after filing, and a petition for rehearing may be filed in the meantime. Cal Rules of Ct 8.268(a)(1), 8.532(b), 8.536(a).

On deadlines for filing a petition for rehearing and an answer to a petition for rehearing, see chart in §42.2.

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§42.34 K. When Habeas Is Filed in Conjunction With Appeal

Habeas corpus is sometimes used together with a pending appeal when the allegations require evidence outside the regular appellate record. See *People v Pope* (1979) 23 C3d 412, 426, 152 CR 732 (habeas used to litigate ineffective assistance of counsel claim when evidence not in record; inquiry needed into reasons for counsel's actions). In most appellate districts, the habeas petition may be filed in the same court as the related direct appeal. See §42.26. The court may consolidate the two cases. See, *e.g., People v Frierson* (1979) 25 C3d 142, 158 CR 281; *People v Corona* (1978) 80 CA3d 684, 706 n10, 145 CR 894.

Appointed counsel in a noncapital appeal has no duty to investigate possible bases for collateral attack or to file a habeas petition. *In re Clark* (1993) 5 C4th 750, 783 n20, 21 CR2d 509. Many appointed appellate attorneys do, however, seek habeas relief for their clients, especially when the record suggests the existence of a substantial claim (*e.g.,* when it appears that trial counsel forfeited a potentially meritorious appellate issue by failing to object). The courts of appeal have different policies on whether an appellate appointment includes filing a habeas petition. In some districts, counsel must seek and obtain an expanded appointment in order to be compensated for work on a habeas proceeding related to the appeal.

If the losing party in the court of appeal wishes to file a petition for review in the California Supreme Court, that petition must be filed within 10 days after the decision is final as to the court of appeal. Cal Rules of Ct 8.500(e)(1). Although most court of appeal decisions are final 30 days after the court of appeal files the decision, the denial of a writ petition "without issuance of an order to show cause" is final immediately on filing. Cal Rules of Ct 8.387(b)(2)(A). An exception exists, however, when the order denying a habeas petition is filed on the same day as the decision in a related appeal. In that event, denial of the writ petition has the same date of finality as the decision of the court of appeal in the related appeal. Cal Rules of Ct 8.387(b)(2)(B). If the appeal and the petition for habeas corpus were not consolidated and the habeas petition is denied without issuance of an order to show cause, a defendant seeking review of the denial of the habeas petition and the decision on appeal must file a separate petition for review in each proceeding. Cal Rules of Ct 8.500(d).

For further discussion of using habeas in conjunction with appeal, see §44.27.

Capital cases. The California Supreme Court has established special rules, including time limits, for habeas petitions related to automatic appeals in capital cases. These rules are set forth in Policy 3 of the Supreme Court Policies Regarding Cases Arising From Judgments of Death, available in the Death Penalty section of the California Supreme Court's website (http://www.courtinfo.ca.gov/courts/supreme). For further discussion, see Appeals and Writs in Criminal Cases §§6.7, 6.21-6.22, 6.34-6.36 (3d ed Cal CEB 2007).

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MISDEMEANOR APPEALS

BRENTFORD J. FERREIRA
DOUGLAS W. OTTO

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§43.1 I. OVERVIEW

This chapter is concerned solely with appeals brought by the prosecution or the defense from judgments made in misdemeanor criminal matters. It provides a complete overview of the various requirements and rules applicable to misdemeanor cases, with particular emphasis on areas in which the rules vary significantly from the rules applicable to felony cases. For discussion of extraordinary writs in misdemeanor cases, see chap 42 and Appeals and Writs in Criminal Cases, chaps 7-10 (3d ed Cal CEB 2007).

The rules for misdemeanor appeals changed significantly as of January 1, 2009. The goal of the new rules is to make it easier for pro per appellants to understand and accomplish their appeals and, where possible, to conform the misdemeanor rules to the felony rules. The forms created to implement these rules are as important as the rules themselves especially for pro per defendants. The forms can be found at http://courtinfo.ca.gov/forms/.

All appeals from appealable orders in infraction and misdemeanor cases are heard in the appellate divisions of the superior courts. Cal Const art VI, §11; Pen C §1466. A misdemeanor or infraction case is one in which only misdemeanors or infractions are charged. See Pen C §691(g). If the defendant is held to answer for a felony, the case is a felony case, even if the defendant ultimately is convicted only of a misdemeanor or misdemeanors. See Pen C §691(f); *People v Nickerson* (2005) 128 CA4th 33, 36, 26 CR3d 563.

Procedure in the appellate divisions is governed exclusively by statute, local rule, and the California Rules of Court.

The Rules of Court provide generally for various time limits on filing notices, briefs, and other documents. In many respects, these rules are more detailed and demanding than the equivalent provisions on felony appeals. For example, on appeal from a felony conviction, a full record, including transcripts, is automatically prepared by the superior court. Cal Rules of Ct 8.616. In a misdemeanor case, the appellant must notify the court whether the appeal will proceed with a record of the oral proceedings and which form of the record of the oral proceedings he or she elects to use. Cal Rules of Ct 8.864. In addition, the appellant must file the notice of appeal in a misdemeanor case, in the trial court, within 30 calendar days after the rendition of judgment or the making of the order being appealed. Cal Rules of Ct 8.852-8.853(a).

Once the record on appeal is received in the reviewing court, briefing requirements are similar to those in felony cases, except for different time limits. Time limits for misdemeanor appeals are generally shorter than those for felony appeals. Even so, the misdemeanor appellate process usually takes at least 3 months, and often takes much longer. Some of the variables include whether it is necessary to prepare a statement on appeal (Cal Rules of Ct 8.869), the length of time counsel has to wait for a date for oral argument (Cal Rules of Ct 8.885), and the time it takes the appellate division to issue an opinion (see Cal Rules of Ct 8.886-8.888).

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§43.2 II. CHART: DEADLINES

Action	Deadline	Authority
Initiating the Appeal		
Notice of appeal filed with clerk of trial court.	30 days after rendition of judgment or making of order.	Cal Rules of Ct 8.853(a).
Cross-appeal filed.	30 days after rendition of judgment or making of order, or 15 days after trial court clerk sends notice of first appeal, whichever is later.	Cal Rules of Ct 8.853(b).
Record Preparation		
Trial court clerk's transcript (or trial court file, when local rules provide) completed.	20 days after notice of appeal filed.	Cal Rules of Ct 8.862(d), 8.863(b).
Appellant notifies trial court whether appeal will proceed with record of oral proceedings and, if so, what form of record appellant elects: reporter's transcript, transcript or copy of official electronic recording, or statement on appeal.	20 days after notice of appeal filed or, if application for counsel is filed within those 20 days, 10 days after appellate counsel appointed or denied, whichever is later.	Cal Rules of Ct 8.864(a)-(b).
Court notifies appellant who fails to file election under Rule 8.864.	Appellant has 15 days after notice to file an election about oral proceedings or no such record will be considered.	Cal Rules of Ct 8.864(c).
Party designates exhibits to be considered by appellate division.	Appellant must file notice within 10 days after respondent's last brief is or could have been filed; respondent's notice must be filed within 10 days after appellant's notice is filed.	Cal Rules of Ct 8.870(b).
Option A: Reporter's Transcript of Oral Proceedings		
Trial court clerk notifies reporter(s) that appeal will proceed with reporter's transcript.	"Promptly" on receiving appellant's election of reporter's transcript.	Cal Rules of Ct 8.864(a)(1).
Reporter begins preparing transcript.	"Immediately" on receipt of notice from trial court clerk, if defendant was represented by appointed counsel or in case of prosecution appeal; non-indigent-defendant appellants must deposit estimated transcript cost with clerk in advance.	Cal Rules of Ct 8.866(a).
Reporter delivers certified copies of transcript to trial court clerk.	20 days after reporter must begin preparing record.	Cal Rules of Ct 8.866(d).

Record of oral proceedings complete.	When certified reporter's transcript is delivered to trial court clerk.	Cal Rules of Ct 8.872(a)(2)(A).

Option B: Electronically Recorded Proceedings

Preparation of transcript or copy of electronic recording begins.	"Immediately" on receiving appellant's election of transcript or copy of electronic record, if defendant was represented by appointed counsel or in the case of prosecution appeal; non-indigent-defendant appellants must deposit estimated transcript or electronic copying cost with clerk.	Cal Rules of Ct 8.868(d).
Record of oral proceedings complete.	When transcript or copy of electronic recording has been prepared.	Cal Rules of Ct 8.872(a)(2)(B), (a)(2)(C).

Option C: Statement on Appeal

Appellant files proposed statement on appeal.	20 days after filing election of statement on appeal.	Cal Rules of Ct 8.869(b)(1).
Respondent files proposed amendments to statement on appeal.	10 days after proposed statement on appeal filed.	Cal Rules of Ct 8.869(d)(1).
Parties request hearing to review and correct proposed statement on appeal.	10 days after respondent files (or could file) proposed amendments to statement on appeal.	Cal Rules of Ct 8.869(d)(2).
Trial judge reviews and corrects statement on appeal, or orders transcript or electronic copy of recorded proceedings as local rules provide.	Trial judge corrections must be made within 10 days after hearing, or, if no hearing, within 10 days after time to request hearing expires.	Cal Rules of Ct 8.869(d)(4), (d)(6).
Parties file objections to trial judge's corrections.	10 days after clerk mails notice of corrections to parties.	Cal Rules of Ct 8.869(e)(2).
Trial judge certifies statement on appeal.	"Promptly" if judge does not make corrections or order transcript or recording; if judge makes corrections, 5 days after deadline for parties to object to corrections.	Cal Rules of Ct 8.869(f).
Record of oral proceedings complete.	When trial judge has certified statement on appeal, or transcript or electronic recording has been prepared.	Cal Rules of Ct 8.872(a)(2)(D).

Sending and Filing Completed Record

Record on appeal complete.	When trial court clerk's transcript is certified as correct (or court file prepared for transmission under local rules), and, if appellant elected a record of oral	Cal Rules of Ct 8.872(a).

	proceedings, the record of oral proceedings is complete.	
Trial court clerk sends record to appellate division and parties.	"Promptly" on completion of record.	Cal Rules of Ct 8.872(b).
Appellate division clerk files record and notifies parties of filing date.	"Promptly" on receipt of the record.	Cal Rules of Ct 8.872(c).
Briefing Deadlines		
Appellate division clerk sends notice to parties of briefing deadlines.	"Promptly" on filing of record.	Cal Rules of Ct 8.881.
Appellant files opening brief.	30 days after record filed in appellate division.	Cal Rules of Ct 8.882(a)(1).
Respondent files brief.	30 days after appellant's opening brief filed.	Cal Rules of Ct 8.882(a)(2).
Appellant files reply brief.	20 days after respondent's brief filed.	Cal Rules of Ct 8.882(a)(3).
Oral Argument		
Appellate division clerk must place appeal on next regular appellate division session calendar.	After last reply brief has been filed or date for filing it has been expired for at least 45 days.	Cal Rules of Ct 8.885(a).
Appellate division clerk notifies parties of oral argument date.	20 days before oral argument date.	Cal Rules of Ct 8.885(c).
Parties may apply for video-conferenced oral argument.	10 days after court sends notice of oral argument.	Cal Rules of Ct 8.885(b)(1)(A).
Rehearing and Finality of Decision		
Party files petition for rehearing.	15 days after decision filed, generally.	Cal Rules of Ct 8.889(b)(1).
Answer to petition for rehearing, if requested by court.	8 days after order requesting answer filed.	Cal Rules of Ct 8.889(b)(2).
Decision final.	30 days after decision filed, generally.	Cal Rules of Ct 8.888(a)(1), (3).

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III. APPEALABLE JUDGMENTS AND ORDERS

§43.3 A. In General

In a misdemeanor case, both the prosecution and the defense have the right to appeal from various judgments and orders of the trial court, as prescribed by Pen C §§1466 and 1538.5. Those judgments and orders are discussed in §§43.4 (prosecution appeals), 43.5-43.7 (defense appeals). The parties may not confer appellate jurisdiction on a court by agreement or stipulation. *People v A-1 Roofing Serv.* (1978) 87 CA3d Supp 1, 9, 151 CR 522.

For discussion of the standards of review on appeal, see §44.36.

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§43.4 B. Appeals by Prosecution

Order recusing district attorney. The prosecution can appeal in misdemeanor cases from an order recusing the district attorney or city attorney under Pen C §1424. Pen C §1466(1)(A).)

Order or judgment terminating an action. The prosecution may appeal from an order or judgment dismissing, striking, or otherwise terminating one or more of several charges or a special allegation such as a prior conviction, before the defendant has been placed in jeopardy, when the defendant has waived jeopardy or after a verdict or finding of guilty. Pen C §1466(1)(B); *People v Smith* (1983) 33 C3d 596, 189 CR 862 (dismissal of case in furtherance of justice on defense motion following declaration of mistrial because jurors could not agree on verdict reversed on appeal); *People v Kirk* (1992) 7 CA4th 855, 9 CR2d 270 (prosecution may appeal pretrial ruling striking drunk driving conviction); *People v Gonzales* (1965) 235 CA2d Supp 887, 891, 46 CR 301 (prosecutor has right to notice and appeal of court order of dismissal).

The prosecution may not appeal from a dismissal order that the prosecution has itself requested. *People v Gallagher* (2009) 171 CA4th Supp 1, 6, 90 CR3d 695; *People v Caserta* (1971) 14 CA3d 484, 92 CR 382. Note, however, the supreme court held that Pen C §1238(a)(8), a felony provision equivalent to Pen C §1466(1)(b), allowed the prosecution to appeal an order of dismissal entered at the prosecutor's request when the prosecution requested dismissal because it was unable to proceed after an adverse evidentiary ruling. *People v Chacon* (2007) 40 C4th 558, 564, 53 CR3d 876.

Judgment after defense demurrer sustained. The prosecution may appeal directly from an order sustaining a demurrer to all or any part of a complaint. Pen C §1466(1)(C).

Order granting new trial. The prosecution may appeal from an order granting a new trial. Pen C §1466(1)(D); *People v Rothrock* (1936) 8 C2d 21, 63 P2d 807.

Order arresting judgment. The prosecution may appeal from an order arresting judgment. Pen C §1466(1)(E); *People v Andrews* (1959) 170 CA2d Supp 840, 339 P2d 648.

Order made after judgment affecting prosecution's substantial rights. The prosecution may appeal from any order made after judgment affecting the "substantial rights of the people." Pen C §1466(1)(F). To affect the prosecution's "substantial rights," an order must in some way affect the judgment or its enforcement or hamper the further prosecution of the particular proceeding in which it is made. *People v McGuire* (1993) 14 CA4th 687, 701, 18 CR2d 12; *People v Garcia* (1931) 120 CA Supp 767, 770, 7 P2d 401. See also *People v Benavides* (2002) 99 CA4th 100, 104, 120 CR2d 755.

This provision permits the prosecution to appeal an order unlawfully suspending a sentence already imposed and granting probation. *People v Belton* (1978) 84 CA3d Supp 23, 149 CR 231. Note, however, that an order simply granting probation is not appealable by the prosecution. A petition for writ of mandate may be brought instead within 60 days after an order granting probation. Pen C §1466(1)(H).

Imposition of unlawful sentence. The prosecution may appeal from the imposition of an unlawful sentence. An "unlawful sentence" is a sentence not authorized by law or one based on an unlawful order of the court that strikes or modifies the effect of an enhancement or prior conviction. The defendant has the same right to counsel that he or she would have under Pen C §1238(a). Pen C §1466(1)(G).

Order granting Pen C §1538.5 motion. The prosecution may appeal from any decision of a court made in a misdemeanor case before trial relating to a motion to suppress evidence brought under §1538.5. This may be accomplished in one of two ways. The prosecution may (1) directly appeal the order while the misdemeanor charge remains pending (Pen C §1538.5(j)) or (2) indicate that the prosecution is unable to proceed in light of the ruling, thus provoking a dismissal under Pen C §1385, and challenge the order suppressing evidence in an appeal from that dismissal. Pen C §§1466(1)(B), 1538.5(j). But see *People v Gallagher* (2009) 171 CA4th Supp 1, 6, 90 CR3d 695 (court's dismissal per Pen C §1385 *at prosecutor's request* following order granting suppression motion was nonappealable invited error).

If the prosecution chooses to litigate the issue while charges are pending, the defendant, if in custody, must be

released under Pen C §1318 until proceedings are resumed in the trial court (Pen C §1538.5(k)), and the trial must be stayed pending appeal (Pen C §1538.5(*l*)).

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C. Appeals by Defense

§43.5 1. Appeal From Judgment; Certificate of Probable Cause Not Required

The defendant may appeal from a final judgment of conviction. Pen C §1466(2)(A). "Judgment" is broadly defined to include sentences, orders granting probation, and presentence commitments for insanity or narcotics addiction. The defense can raise denials of pretrial motions when appealing from a judgment following trial. See *People v Woods* (1978) 84 CA3d 149, 148 CR 312.

Ø **Note:** An appeal following denial of a motion for a new trial is from the judgment and not from the court's order denying the motion. See Pen C §1466(2)(A).

Unlike felony appeals, defendants who appeal misdemeanor cases are not required to obtain a certificate of probable cause to appeal issues following a plea of guilty. *People v Woods, supra*. It is probable, however, that the defendant's plea of guilty or nolo contendere bars appellate review of certain rulings after such a plea, as it does in felony cases. *People v Egbert* (1997) 59 CA4th 503, 68 CR2d 913. See *People v Lockheed Shipbldg. & Constr. Co.* (1977) 69 CA3d Supp 1, 6, 138 CR 445; *People v Singer* (1976) 56 CA3d Supp 1, 5, 128 CR 920. For rulings that cannot be reviewed in felony cases, see chart in §44.13. For discussion, see Appeals and Writs in Criminal Cases §1.11 (3d ed Cal CEB 2007). *Avila v Municipal Court* (1983) 148 CA3d 807, 196 CR 286, held that the defendant in a misdemeanor case could appeal the denial of a speedy trial motion after a guilty or nolo plea. However, *Avila* has been criticized in *People v Hernandez* (1992) 6 CA4th 1355, 8 CR2d 324, *People v Egbert, supra,* and *People v Aguilar* (1998) 61 CA4th 615, 71 CR2d 411. Pointing out that there is no distinction between misdemeanor and felony prosecutions that has any bearing on the defendant's right to appeal a speedy trial violation in a misdemeanor case, the court in *Egbert* formulated a bright-line rule precluding misdemeanor appellants from appealing speedy trial violations. 59 CA4th 503.

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§43.6 2. Appeal From Order After Judgment Affecting Defendant's Substantial Rights

The defendant may appeal from an order after judgment affecting his or her substantial rights. Pen C §1466(2)(B). Such orders usually concern probation, such as the enforcement of conditions, revocation, and modification, but they may also include refusals to grant dismissals, *e.g.,* under Pen C §1203.4. See, *e.g., People v Johnson* (1955) 134 CA2d 140, 285 P2d 74.

Ø **Note:** A motion to modify probation that is heard and decided more than 30 calendar days after judgment and is denied is not an appealable order made after judgment affecting the defendant's substantial rights within the meaning of §1466(2)(B) when the modification sought is actually a request to modify the original sentence. *People v Djekich* (1991) 229 CA3d 1213, 280 CR 824. Nor can the trial court extend the time to appeal by "re-entering the judgment." (However, the probation condition may be reviewed by writ of habeas corpus. *In re Bushman* (1970) 1 C3d 767, 83 CR 375, overruled on other grounds in *People v Lent* (1975) 15 C3d 481, 486 n1, 124 CR 905.) *Djekich* distinguished cases in which probation really was modified, which are generally appealable under §1466(2)(B).

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§43.7 3. Order Denying Pen C §1538.5 Motion

A defendant may file a pretrial appeal from an order denying his or her motion to suppress evidence. Pen C §1538.5(j). This is unlike felony pretrial review, which is only by a petition for extraordinary writ. Pen C §1538.5(j). While the appellate court has discretion to refuse to hear a writ, it must rule on an appeal. However, there are problems with appealing a Pen C §1538.5 ruling before judgment. Unlike Pen C §1538.5(*l*), which allows the prosecutor an automatic stay when appealing a §1538.5 ruling, no statute, rule, or court decision requires the trial court to stay proceedings while a defendant appeals a misdemeanor §1538.5 ruling, and many courts will not do so. The disadvantage of an appeal following conviction is that the defendant must then show prejudice; no such showing is required on a pretrial §1538.5 appeal. See *People v Miller* (1983) 33 C3d 545, 550, 189 CR 519.

Ø **Note:** When a defendant successfully appeals a search and seizure ruling following a plea of guilty or nolo contendere under Pen C §1538.5(m), the appellate court must reverse the case to allow the defendant to decide whether to withdraw his or her plea. *People v Miller, supra*.

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IV. INITIATING THE APPEAL

§43.8 A. Filing Notice of Appeal

Time for filing. The notice of appeal must be filed in the trial court within 30 calendar days of the rendition of the judgment or the making of the order being appealed. Cal Rules of Ct 8.853(a).

Ø **Note:** In determining the 30-day period, the first day is not counted. For example, a notice of appeal from an order made on October 1 would have to be filed on or before October 31. If the 30th day falls on a holiday, then the notice must be filed on or before the next following court day. See CCP §12. Court furlough days are considered holidays. See Govt C §68106(b)(1).

The notice of appeal must be signed by the appellant, or his or her attorney, and must specify the judgment or order, or part of it, from which the appeal is taken. Cal Rules of Ct 8.852(a). For a sample notice of appeal, see Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132).

Late filing of notice of appeal extinguishes right to appeal. The filing of a timely notice of appeal is a prerequisite to the right to appeal, and the deadline for filing the notice of appeal is strictly enforced. While the clerk may file a premature notice of appeal as if it had been filed immediately after a final judgment or appealable order (Cal Rules of Ct 8.853(c)), the time for filing a notice of appeal cannot be extended. See Cal Rules of Ct 8.853(d). The reviewing court cannot grant a litigant relief from default for failure to file a timely notice of appeal. Cal Rules of Ct 8.812; *In re Chavez* (2003) 30 C4th 643, 134 CR2d 54.

The doctrine of constructive filing may apply in some circumstances. See, *e.g., In re Jordan* (1992) 4 C4th 116, 13 CR2d 878 (notice of appeal deemed constructively filed when inmate delivered it to prison officials) (see also Cal Rules of Ct 8.853(e)); *In re Benoit* (1973) 10 C3d 72, 109 CR 785 (incarcerated defendant reasonably relied on trial counsel's promise to file notice of appeal).

A petition for a writ of habeas corpus is the appropriate method of raising the issue of constructive filing. The defendant may be able to claim on habeas corpus that trial counsel's failure to file a notice of appeal is ineffective assistance of counsel. See *Roe v Flores-Ortega* (2000) 528 US 470, 145 L Ed 2d 985, 120 S Ct 1029.

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§43.9 B. Appointment of Counsel on Appeal for Indigent Defendants

Indigent defendants are entitled to counsel on appeal in all criminal and juvenile felony cases and in all misdemeanor cases resulting in jail or a fine of $500 or more, or that may result in "significant adverse collateral consequences" for the defendant if convicted. Cal Rules of Ct 8.851 (criminal cases); Cal Rules of Ct 5.585 (amended effective July 1, 2010) and 8.403 (effective July 1, 2010) (juvenile cases). See *People v Wong* (1979) 93 CA3d 151, 153, 155 CR 453. Appointment of counsel on appeal for misdemeanants whose cases are appealed to the appellate division of the superior court is *required* if they are "subject to" incarceration or a fine of more than $500 (including penalty and other assessments) or are likely to suffer significant adverse collateral consequences as a result of the conviction and either were represented by appointed counsel in the trial court or establish indigency. Cal Rules of Ct 8.851(a)(1). See also Cal Rules of Ct 4.306. An appellant is subject to incarceration or a fine if the sanction is included as part of a sentence, is a condition of probation, or could be imposed for a violation of probation. Cal Rules of Ct 8.851(a)(3). The appellate division may appoint counsel for other indigent appellants who apply. See Cal Rules of Ct 8.851(a)(2).

A request for appointment of counsel on appeal is filed in the trial court. Defense trial counsel who has reason to believe that an indigent client will appeal must prepare and file the request. Cal Rules of Ct 8.851(b)(1). The request must include defense counsel's declaration that the defendant was represented by appointed counsel in the trial court. Cal Rules of Ct 8.851(b)(2). Judicial Council Form CR-133 (Request for Court-Appointed Lawyer in Misdemeanor Appeal) may be used for the request. See California Criminal Law Forms Manual §41.3 (2d ed Cal CEB 2005). A defendant seeking appointment of counsel on appeal in a misdemeanor case who was not represented by appointed counsel in the trial court must include a declaration of indigency on Judicial Council Form MC-210 (Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense). Cal Rules of Ct 8.851(b)(2); Advisory Committee Comment to Cal Rules of Ct 8.851. See Crim Law Forms Man §3.4.

The trial court clerk must promptly send the application for counsel to the appellate division along with the clerk's transcript of proceedings in the trial court or, if local rules provide, the original court file. Cal Rules of Ct 8.851(b)(3), 8.860(a).

> Ø **Note:** A *defendant* may apply directly to the appellate division for the appointment of counsel at any time after filing the notice of appeal. Cal Rules of Ct 8.851(b)(3).

The public defender cannot be required to accept appointment as counsel for an indigent misdemeanor appellant. *Mowrer v Appellate Dep't* (1990) 226 CA3d 264, 276 CR 38.

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§43.10 V. BAIL OR RELEASE PENDING APPEAL

Those convicted of misdemeanors are entitled to bail or release on their own recognizance (O.R.) pending appeal. Pen C §§1272, 1291, 1318. See also Pen C §1270, concerning O.R. release in the trial court before conviction (O.R. release in misdemeanor cases must be granted unless the court makes a finding on the record that an O.R. release would compromise public safety or would not reasonably assure defendant's appearance in court).

When the prosecution files a pretrial notice of appeal from an order granting a motion to suppress evidence (Pen C §1538.5(j)), the defendant must be granted an O.R. release. Pen C §1538.5(k). When the defense appeals an adverse Pen C §1538.5 ruling, however, the defendant is only entitled to bail, although he or she may be granted O.R. release at the court's discretion. Pen C §1538.5(*l*).

For additional discussion of release on appeal, see §§41.6-41.7, 44.18.

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§43.11 VI. GENERAL RULES FOR TIME LIMITS AND EXTENSIONS OF TIME

The time limits for filing most documents and completing most tasks in misdemeanor appeals are set forth in Cal Rules of Ct 8.800-8.817, 8.880-8.891. See generally *People v Jenkins* (1976) 55 CA3d Supp 55, 60, 127 CR 870. These provisions have the force of law. *Albermont Petroleum, Ltd. v Cunningham* (1960) 186 CA2d 84, 89, 9 CR 405.

Extensions of time limits are available from the trial court or from the appellate division for every step of the appellate process *except filing the notice of appeal*. Cal Rules of Ct 8.812. See §43.8. Requests for extensions must comply with Cal Rules of Ct 8.806-8.812. For good cause shown, the trial court may extend record preparation deadlines, so long as time has not expired. Cal Rules of Ct 8.810(b)(1). The initial extension request may be an ex parte motion. Cal Rules of Ct 8.810(b)(3). The appellate division can grant further relief for good cause, shown by affidavit or declaration. Cal Rules of Ct 8.810(c). Good cause factors and policies governing extensions are outlined in Cal Rules of Ct 8.811. Unless specified otherwise in the rules, the Code of Civil Procedure governs all time extensions and calculations, and generally extensions may be granted for no more than 30 calendar days under CCP §1054. Cal Rules of Ct 8.810(a).

See deadline chart in §43.2.

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VII. RECORD ON APPEAL

§43.12 A. Normal Record

When a notice of appeal is filed in a misdemeanor case, the following documents will be assembled and included in the clerk's transcript (Cal Rules of Ct 8.860, 8.861):

- The complaint;
- The plea, demurrer, or other pleas;
- Jury instructions submitted in writing, cover page (Cal Rules of Ct 2.1055(b)(2)), and any written instructions given by the trial court;
- The verdict;
- Certain written motions with supporting or opposing memoranda;
- The court's minutes;
- The judgment or order appealed from;
- The notice of appeal;
- Any written opinion or findings of the trial court;
- Any written documents sent between the trial court and jury or a juror;
- Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under Cal Rules of Ct 2.1040; and,
- If defendant is the appellant:
- Defense motions denied in whole or in part;
- Relevant search warrants and return;
- Prior-conviction documents, including juvenile adjudications and records of prison terms served, if admitted into evidence (however, if closed to the public at trial, documents must remain private on appeal); and
- Probation officer's report.

If permitted by local rule, instead of the clerk's transcript, the appellant may elect to use the original court file (Cal Rules of Ct 8.863). Cal Rules of Ct 8.860(a)(1)(B). All exhibits (admitted, refused, or lodged) are considered part of the record, but appellant must designate which exhibits should be transferred to the appellate division. Cal Rules of Ct 8.870.

The written records contained in the clerk's transcript or the original court file are considered the "normal record" on appeal. Cal Rules of Ct. 8.860. The normal record may be limited under certain circumstances when the prosecution appeals (Cal Rules of Ct 8.867) or when the parties so stipulate (Cal Rules of Ct 8.860(b)). For discussion of the record of oral proceedings, see §43.13.

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§43.13 B. Record of Oral Proceedings

In a felony prosecution, a stenographic reporter is routinely present at all oral proceedings in the case. The filing of a notice of appeal in a felony case triggers preparation of the normal record on appeal, which includes a verbatim transcript of the oral proceedings at trial and sentencing. See Cal Rules of Ct 8.320. This is not true in misdemeanor and infraction cases. Making sure that there is an adequate record of the oral proceedings in a misdemeanor case to permit appellate review is the responsibility of the appellant. The appellant must file with the trial court a notice of election to proceed with a record of the oral proceedings and specify which of the following he or she elects to use (Cal Rules of Ct 8.864):

- A reporter's transcript under Cal Rules of Ct 8.865-8.867;
- An official electronic recording of the trial court proceedings made according to Govt C §69957 under Cal Rules of Ct 8.868(c) (which must be permitted in the appellate division by local rule and either stipulated to by the parties or ordered by the trial court);
- A transcript of an official electronic recording made according to Govt C §69957 under Cal Rules of Ct 8.868(b); or
- A corrected and court-certified statement on appeal under Cal Rules of Ct 8.869; see §43.14.

The notice of election to proceed with a record of oral proceedings is due (Cal Rules of Ct 8.864(b)):

- 20 calendar days after the notice of appeal is filed, or,
- If an application for appointment of counsel is filed within those 20 days, then the later of:
- 10 calendar days after the court either appoints or denies the appointment of counsel; or
- 20 calendar days after the notice of appeal is filed.

Counsel may use Judicial Council Form CR-134 (Notice Regarding Record of Oral Proceedings (Misdemeanor)) to file the notice of election to proceed with a record of the oral proceedings. If the appellant elects to use an official electronic recording of the trial proceedings, he or she must attach the stipulation of the parties to the election notice (Cal Rules of Ct 8.864(a)(2)), unless the court orders its use under Cal Rules of Ct 8.869(d)(6). Cal Rules of Ct 8.868(c).

When the appropriate records are certified as complete, the clerk must promptly send them to the appellate division. Cal Rules of Ct 8.872(b).

Neither the prosecution nor an appellant formerly represented by appointed counsel is charged for the preparation of a reporter's transcript, a copy of the official electronic recording made according to Govt C §69957, or a transcript from an official electronic recording. See Cal Rules of Court 8.866(a) (reporter's transcript), 8.868 (official electronic recording or transcript of same). An indigent defendant who was not formerly represented by appointed counsel has the option of filing a declaration of indigency to avoid payment for these transcripts. An unrepresented appellant must use Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210) to show indigency. Advisory Committee Comment to Cal Rules of Ct 8.851.

Ø **Note:** For financial reasons, a non-indigent defendant may have to choose not to use a verbatim record of oral proceedings, even though verbatim records are usually more accurate than the narrative statement based on the memory of counsel reflected in a certified statement on appeal (Cal Rules of Ct 8.869). If the appellant elects to use a statement on appeal, the court may decide to save court time and resources by ordering a copy of an official electronic recording or a transcript at its own cost. Cal Rules of Ct 8.869(d)(6). For discussion of the statement on appeal, see §43.14.

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§43.14 C. Proposed Statement on Appeal

An indigent defendant in a criminal case has a federal due process right to a free transcript or an adequate substitute on appeal. *Williams v Oklahoma City* (1969) 395 US 458, 459, 23 L Ed 2d 440, 442, 89 S Ct 1818 (misdemeanor appeals). In a misdemeanor or infraction case, an appellant who wants the reviewing court to consider the oral proceedings, or any other part of the trial record not listed in Cal Rules of Ct 8.861, has the option under Cal Rules of Ct 8.864(a)(3) to file a proposed statement on appeal in the trial court. See Cal Rules of Ct 8.869. An appellant may choose this option when he or she cannot afford a verbatim record of the oral proceedings. For discussion of available alternative records of the oral proceedings in a trial court, see §43.13.

Filing deadlines. Appellant's counsel must file the proposed statement on appeal in the trial court 20 calendar days after filing the notice to elect to proceed with a statement on appeal. Cal Rules of Ct 8.869(b)(1). This time limit can be extended for good cause for 15 calendar days by the trial court. Cal Rules of Ct 8.869(g). Any further extensions must be sought in the appellate division. Cal Rules of Ct 8.810(c). An appellant who is not represented by counsel *must* file the proposed statement on appeal on Judicial Council Form CR-135 (Proposed Statement on Appeal (Misdemeanor)), although, for good cause shown, the court may allow a statement to be filed that is not on this form. Cal Rules of Ct 8.869(b)(2). If the proposed statement is not timely filed, the trial court clerk will warn the appellant that the appeal will be dismissed if the proposed statement is not filed within 15 calendar days of the mailing of that notice and warning. Cal Rules of Ct 8.869(b)(3).

Required contents. The required contents of a proposed statement on appeal are found in Cal Rules of Ct 8.869(c). The following are the most important parts of the statement:

- A "condensed narrative" of the oral proceedings that the appellant believes necessary for the appeal, a summary of the trial court's holding, and the sentence imposed on the defendant; and
- A statement of the points the appellant is raising on appeal.

Narrative. When drafting the proposed statement on appeal, counsel should keep in mind the basic rule that it is the appellant's duty to present a record showing trial court error. The statement of evidence may be simply in narrative form drafted by counsel. This narrative should set forth the testimony of all relevant witnesses, describe all relevant exhibits, and describe all court rulings that may come into issue in the appeal. Drafting this statement may be extremely difficult if the trial was long or the issues complex. With court approval, the appellant may present some or all of this evidence in a question-and-answer format. Cal Rules of Ct 8.869(c)(1).

> Ø **Note:** Often, when a criminal defendant appeals from an adverse judgment, he or she is represented by a different attorney on appeal than at trial. This is especially true when the defendant has been represented by appointed counsel. Although not specifically set forth either by statute or court rule, it would appear better for the proposed statement on appeal to be prepared and filed by the trial attorney. That attorney will have a better command of the facts. He or she may also be better able to identify the probable grounds for appeal and the specific portions of the proceedings that might not otherwise be included in the normal record on appeal, *e.g.,* pretrial motions.

Grounds for appeal. The statement of the points the appellant is raising on appeal should include the grounds for appeal and as much of the evidence that is necessary to support those grounds. Cal Rules of Ct 8.869(c)(2)(A)-(B). Any evidence or portion of a proceeding that is not included in support of the grounds raised on appeal will be presumed to support the judgment or order being appealed. Cal Rules of Ct 8.869(c)(2)(B). Counsel is cautioned to carefully prepare this statement because the appeal will be limited to the points raised unless the court decides that the record was developed to allow full consideration of another point. Cal Rules of Ct 8.869(c)(2). If one of the grounds for appeal is insufficiency of the evidence, the proposed statement must set forth in what specific areas the evidence is insufficient. Cal Rules of Ct 8.869(c)(2)(C). If there is an issue concerning the admission, exclusion, or modification of a jury instruction, the statement must include any instructions that were submitted orally, identify the party who requested

the instruction, and explain any modifications made. Cal Rules of Ct 8.869(c)(2)(D).

Exhibits. If the appellant intends to rely on exhibits (admitted, refused, or lodged), he or she must serve and file a notice in the trial court designating those exhibits within 10 calendar days after the last respondent's brief is filed or the time to do so has expired. Any other party must serve and file a notice designating requested exhibits within 10 calendar days after the appellant serves his or her notice. Any notice designating exhibits also must be served on the appellate division. Cal Rules of Ct 8.870(b).

Ø **Note:** If it appears necessary, the proposed statement on appeal may include other matters, such as a procedural history of the case. However, the statement need not include copies of any documents relied on in the trial court. They need only be identified in the statement; the clerk will include them in the normal record on appeal. Cal Rules of Ct 8.860-8.861, 8.863.

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§§43.15-43.17 [Deleted]

The material formerly in these sections has been moved to §43.14.

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§43.18 D. Respondent's Amendments (Corrections and Additions)

Within 10 calendar days after the appellant files the proposed statement, the respondent may file proposed amendments to the statement. Cal Rules of Ct 8.869(d)(1). If either party wants a hearing on the contents of the statement, the hearing *must* be requested within 10 calendar days after the respondent files his or her proposed amendments or the time to do so expires. Cal Rules of Ct 8.869(d)(2). In its discretion, the court may order a hearing to resolve material issues in dispute. The hearing will be promptly set, giving the parties at least 5 calendar days' written notice. Cal Rules of Ct 8.869(d)(3).

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§43.19 E. Corrected and Certified Statement on Appeal

If the trial court makes any corrections or modifications to the proposed statement, the parties are allowed, within 10 calendar days after the statement is sent to them, to review those changes and file proposed modifications or objections. Cal Rules of Ct 8.869(e). The trial court must certify the final statement on appeal (Cal Rules of Ct 8.869(f)):

- "[P]romptly" if the judge does not make any corrections or modifications to the proposed statement; or
- Within 5 calendar days of reviewing and correcting any proposed modifications or objections filed by the parties or of the time for filing such modifications or objections has expired. Cal Rules of Ct 8.869(f)(2).

In the authors' experience, courts may not act quickly on an appeal once the fixed time limits have been satisfied. Accordingly, the parties should keep track of the appeal to see that the statement is certified and sent to the reviewing court. This is particularly true for the prosecution, because a prolonged delay may deny the defendant due process of law, thus aborting the criminal prosecution. *People v Ruhl* (1976) 63 CA3d Supp 6, 134 CR 62. But see *People v Hernandez* (1985) 166 CA3d Supp 1, 5, 212 CR 563.

It is the duty of the judge to settle the statement. *People v Jenkins* (1976) 55 CA3d Supp 55, 64, 127 CR 870. The judge is the final arbiter of any factual disputes as long as he or she does not act arbitrarily. *In re Apperson* (1961) 188 CA2d 830, 10 CR 738. This can be a major problem when counsel and the judge disagree over crucial facts or evidence, and is a good reason to request a verbatim record whenever possible. See §43.13 on right to a verbatim record.

Although the judge is the final arbiter of what the statement on appeal will contain and may recall witnesses to repeat their testimony if necessary, the judge may not engage in ex parte communications with witnesses in order to settle the statement on appeal. *People v Marcroft* (1992) 6 CA4th Supp 1, 8 CR2d 544 (trial judge held improper ex parte off-the-record conversation with police officer who was only witness in traffic infraction case in order to settle statement on appeal).

The judge may direct any additional matter to be included in the statement on appeal and once the record is complete, the clerk must "promptly" send it to the appellate court. Cal Rules of Ct 8.872(a)(2)(D), (b). However, neither the court nor the respondent may in any way alter, delete, or add to the specification of grounds for appeal submitted by the appellant. See Cal Rules of Ct 8.869(d)(5); *People v Jenkins* (1976) 55 CA3d Supp 55, 65, 127 CR 870.

Once the statement is in final form, the judge must certify its correctness. This action may be taken by the trial court judge even after he or she ceases to be a judge. If the trial judge dies, is removed from office, is disqualified, or is absent from the state at the time for certifying a statement or transcript, it may be certified by any other qualified judge of the court. *People v Jenkins, supra*.

The court clerk must mail copies of the certified statement on appeal to the parties when it is sent to the appellate division. Cal Rules of Ct 8.872(b)(2)-(3).

Finally, if the court determines that correcting and certifying the statement on appeal will waste too much of the court's time and resources, it may instead order a copy of an official electronic recording or a transcript at its own cost. Cal Rules of Ct 8.869(d)(6).

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§43.20 F. Transmittal of Record on Appeal to Appellate Division

As soon as the trial court clerk's transcript or original court file is prepared and, if elected, any record of oral proceedings are ready, the clerk or judge of the court transmits them to the clerk of the appellate division of the superior court to which the appeal is taken. Cal Rules of Ct 8.872(a)-(b). Once the appellate division receives the record, it must file it and notify the parties of the filing date. Cal Rules of Ct 8.872(c).

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VIII. TRIAL COURT JURISDICTION DURING APPEAL

§43.21 A. Trial Court Loses Jurisdiction to Change Judgment

The filing of a timely notice of appeal divests the trial court of jurisdiction to take any action affecting the judgment until the case is remanded by the appellate court (*People v Haynes* (1969) 270 CA2d 318, 75 CR 800), except in the two situations discussed in §§35.31 (correcting clerical errors) and 35.34 (setting aside void judgment). However, the trial court does retain certain other powers and duties that do not affect the judgment. They are discussed in §43.22.

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§43.22 B. Powers Retained by Trial Court

The trial court retains the right to do the following things after the notice of appeal is filed:

- Set bail or release on his or her own recognizance a misdemeanor defendant who has filed a notice of appeal. Pen C §1272, §1291, or §1318.
- Correct and certify the statement on appeal, if one is necessary, and forward its record to the reviewing court. Cal Rules of Ct 8.869(d), (f), 8.872(b). The trial court has additional limited authority to grant extensions of time in connection with the preparation of that record. Cal Rules of Ct 8.869(g).
- Augment the record to reflect any recalled or amended judgments or other orders of the trial court made after certification. Cal Rules of Ct 8.873(a).
- Augment the record to include any previously omitted documents or transcripts that any rule requires. Cal Rules of Ct 8.873(b).
- Correct clerical errors in its records. *In re Roberts* (1962) 200 CA2d 95, 19 CR 147. See §35.31 on correcting clerical errors.

Ø **Note:** The court cannot correct judicial errors. *In re Candelario* (1970) 3 C3d 702, 91 CR 497.

- Set aside a judgment that is void on its face, *e.g.,* for lack of jurisdiction. *People v Karaman* (1992) 4 C4th 335, 345, 14 CR2d 801; *People v Blume* (1960) 183 CA2d 474, 7 CR 16.
- Stay execution of a judgment. Pen C §1467. Ordinarily, such an order is entered to stay the service of jail time imposed as a condition of probation until after the appeal is heard. In the context of a misdemeanor, bail on appeal is mandatory and thus an order staying the service of jail time is common. See §43.10. However, a stay of execution of judgment does not relieve the defendant of the obligation to comply with the other terms of probation; the trial court retains jurisdiction to modify or revoke probation if the defendant misbehaves during the pendency of an appeal. *In re Bakke* (1986) 42 C3d 84, 88, 227 CR 663. Registration requirements imposed on sex offenders under Pen C §290 cannot be stayed. Pen C §1467.

The appellate division may order the record augmented or corrected at any time on its own motion or on the motion of any party. Cal Rules of Ct 8.873(c), 8.841.

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§43.23 IX. ABANDONING APPEAL

An appellant may at any time abandon his or her appeal by filing a written statement to that effect or Judicial Council Form CR-137 (Abandonment of Appeal (Misdemeanor)) in the appellate division. Cal Rules of Ct 8.855. The appellant should personally sign the abandonment. Cal Rules of Ct 8.855(a). See *Conservatorship of Oliver* (1961) 192 CA2d 832, 13 CR 695 (client later denied giving authorization to abandon appeal). If the record has not yet been filed in the appellate division of the superior court, the filing effects a dismissal and the trial court may resume jurisdiction of the case. If the record has been filed in the appellate division of the superior court, that court then dismisses the appeal and issues a remittitur. Cal Rules of Ct 8.855(b).

If the appellate court will not consent to an abandonment and appellant's counsel can find no viable issues on which to base an appeal, he or she should file a *Wende* brief (see *People v Wende* (1979) 25 C3d 436, 158 CR 839). *Wende* applies to misdemeanor appeals. *In re Olsen* (1986) 176 CA3d 386, 221 CR 772. An appellate court must conduct a review of the entire record in a misdemeanor appeal whenever *appointed* counsel submits a brief that raises no specific issues or describes the appeal as frivolous. This obligation does not depend on the subsequent receipt of a brief from the defendant personally. *In re Olsen, supra*. See §§44.37-44.38; Appeals and Writs in Criminal Cases §§2.26-2.27, 2.38 (3d ed Cal CEB 2007).

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X. APPELLATE BRIEFS

A. Rules That Apply to Appellant and Respondent

§43.24 1. Filing Dates

The appellant's opening brief must be served and filed within 30 calendar days after the record on appeal is filed in the appellate division. Cal Rules of Ct 8.882(a)(1). The respondent's brief must be served and filed within 30 calendar days after the opening brief is filed. Cal Rules of Ct 8.882(a)(2). If the appellant prepares a reply brief, it must be filed within 20 calendar days after the respondent's brief is filed. Cal Rules of Ct 8.882(a)(3). Unless permitted by the presiding judge, no other briefs may be filed. Cal Rules of Ct 8.882(a)(4).

It is the duty of the clerk of the appellate division to advise all parties of the date the record on appeal is filed and the date briefs are due. Cal Rules of Ct 8.881.

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§43.25 2. Contents, Form, Filing, and Service of Briefs

Contents. A brief filed in the appellate division of the superior court must state each point under a separate heading, or subheading, which summarizes the point and supports each point by argument and, if possible, by citation to authority. Cal Rules of Ct 8.883(a)(1). A reference to any matter in the record should be supported by citation to the volume and page number of the record where it appears. Cal Rules of Ct 8.883(a)(1)(B).

An appellate division brief, produced on a computer, may not exceed 6800 words, including footnotes. The brief must include a certificate by the appellant stating the number of words in the brief. Cal Rules of Ct 8.883(b)(1). A brief produced on a typewriter must not exceed 20 pages. Cal Rules of Ct 8.883(b)(2). The presiding judge may permit a longer brief for good cause. If a longer brief is permitted, the court may order that the brief contain a table of contents and a table of authorities. Cal Rules of Ct 8.883(b)(4).

Form. California Rules of Court 8.883(b), which governs the format of briefs filed in the appellate division of the superior court, generally adopts the formatting requirements set forth in Cal Rules of Ct 8.204(b) for briefs filed in the court of appeal. See Cal Rules of Ct 8.883(c). Briefs filed in the appellate division should be bound on the left side, unless a local rule requires that they be bound at the top. Cal Rules of Ct 8.883(c)(8). Both sides of the paper may be used if the brief is not bound at the top. Cal Rules of Ct 8.883(c)(1).

> Ø **Note:** Counsel should check local practice to learn whether the clerk's office wants briefs to be two-hole punched at the top. See Cal Rules of Ct 2.115. But see Cal Rules of Ct 2.3(2) (word "paper" does not refer to briefs filed in appellate division).

A brief filed in the appellate division should be on 8½ × 11 inch paper and of at least 20-pound weight. The typeface may be proportionally spaced or monospaced but the type size, including footnotes, must be no smaller than 13-point. Lines of type should be at least 1½ spaces apart. Quotations may be block-indented and single-spaced. Cal Rules of Ct 8.883(c). Typewritten briefs are subject to exceptions outlined in Cal Rules of Ct 8.883(c)(10).

Noncomplying briefs. The court clerk has the option of filing a brief that does not comply with formatting rules or returning it with a warning "received but not filed." If the brief is filed, the court has these options, with or without notice (Cal Rules of Ct 8.883(d)):

- Return the brief, requesting it be corrected and refiled within a specified time;
- Strike the brief entirely and advise the party that they can file a new brief within a specified time; or
- Disregard the noncompliance.

An appellate division brief should have covers in the color prescribed by Cal Rules of Ct 8.40(b). Cal Rules of Ct 8.204(b)(10). The front cover should state the title of the case; the trial court number; the appellate division number (if different); whether the brief is the appellant's opening or reply brief or the respondent's brief; the name, address, telephone number, and State Bar number of each attorney filing or joining in the brief; and the name of the party that the attorney represents. Cal Rules of Ct 8.204(b)(10).

Unlike a brief filed in the court of appeal or supreme court (Cal Rules of Ct 8.204(a)(1)), an appellate division brief does not need to have a table of contents or a table of authorities. See Cal Rules of Ct 8.883(b)(4). Some attorneys include them because they can provide a very persuasive outline.

Filing and service. Unless otherwise provided by local rule, a single original copy of any brief is filed in the appellate division, together with proof of service of one copy on the trial court and one copy on each opposing party or their counsel. Cal Rules of Ct 8.882(e), 8.25.

Sample briefs (appellant's, respondent's, and appellant's reply) are in California Criminal Law Forms Manual §§43.1-43.3 (2d ed Cal CEB 2005).

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§43.26 3. Untimely Briefs; Failure to File

Untimely briefs may invite sanctions. If the appellant fails to file a timely opening brief, the clerk will mail a notice that the brief must be filed within 30 calendar days of the mailing of the notice or the court may (Cal Rules of Ct 8.882(c)(2)):

- Relieve appointed counsel and appoint new counsel (if appellant is defendant and represented by appointed counsel); or
- Dismiss the appeal (in all other circumstances).

If a defendant respondent fails to timely file a brief, the clerk will mail a notice warning that it must be filed within 30 calendar days of the mailing of the notice or the court will decide the appeal on the record, the appellant's opening brief, and any oral argument by appellant. Cal Rules of Ct 8.882(c)(3).

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§43.27 4. Service

Before filing, every brief must be served on each adverse party who has appeared separately, and a copy showing proof of service must be provided to the trial court clerk for delivery to the trial judge. Cal Rules of Ct 8.882(e), 8.25. Service may be by any method permitted by the Code of Civil Procedure. Cal Rules of Ct 8.882(e), 8.25.

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§43.28 B. Appellant's Opening Brief

Procedural and factual summary. Following the standard headings and titles illustrated in the opening brief in California Criminal Law Forms Manual §43.1 (2d ed Cal CEB 2005), the first part of an opening brief should consist of a description of the procedural and factual posture of the case. This first part may be divided into a statement of the case and a statement of facts, or these statements may be combined if that appears more efficient. The statement must include citations to the parts of the record supporting each assertion of fact (see Cal Rules of Ct 8.883(a)(1)), which may be the volume and page number where the matter appears. No assertions of fact may be made that are outside the record on appeal. *People v Thurmond* (1985) 175 CA3d 865, 875, 221 CR 292.

Statement of issues. Although not required, it is good practice to follow the factual statement with a list of the issues to be raised in the appeal, especially if the issues are numerous or complex. Such a listing may be headed "Issues on Appeal." A table of contents can provide the same information to the court.

When there is no issue to be raised on appeal, a *Wende* (*People v Wende* (1979) 25 C3d 436, 158 CR 839) brief may be filed. See discussion in §§44.37-44.38. *Wende* briefs, however, are not usually filed in misdemeanor appeal cases.

Argument. The next portion of the brief is the argument. Discussion of each point to be made must be presented separately under an appropriate heading. Subheadings may be used. Cal Rules of Ct 8.883(a)(1). Counsel should tell what the standard of review is, citing authority. The many considerations that may go into drafting a good opening brief are discussed in Appeals and Writs in Criminal Cases, chap 4 (3d ed Cal CEB 2007). It cannot be emphasized too strongly that it is the appellant's responsibility to show error. The respondent has no duty to demonstrate that a judgment or an order is proper in the absence of a proper attack. The appellant must not merely suggest the presence of error, but must clearly show it by proper presentation of facts and assertion of legal argument. *People v Justice* (1959) 167 CA2d 616, 334 P2d 1031. For discussion of stare decisis, see §18.3.

Conclusion. The final part of the brief should be a conclusion that briefly reiterates the legal errors committed by the trial court and the appellant's entitlement to relief from those errors. The relief sought, *e.g.,* a new trial or modified sentence, should be clearly stated.

The brief should then be signed by appellate counsel.

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§43.29 C. Respondent's Brief

The respondent's brief should be in the same form as the appellant's opening brief. The respondent may accept the appellant's factual statement unconditionally, accept it with changes, or provide a completely new factual statement.

The respondent's only duty is to respond to the arguments presented by the appellant. Thus, if the appellant claims that the evidence is insufficient to support the judgment, the respondent should refer the reviewing court to the evidence and explain how it is sufficient. If the appellant asserts legal error, the respondent should provide the court with authority demonstrating the legal validity of the trial court's ruling.

On a prosecution appeal, the appellate court may review any issue of law involved without an objection having been made in the trial court. Pen C §1469. Therefore, the respondent to a prosecution appeal may ask the court to consider any issue of law that the appellate court can review under §1469.

On a defense appeal, the appellate court may review only questions of law concerning things that were said or done after an objection was made and "considered" by the trial court, and that affected the defendant's substantial rights. The one exception is that instructions that affect the defendant's substantial rights may be considered even though no objection was made to them.

See the sample respondent's brief in California Criminal Law Forms Manual §43.2 (2d ed Cal CEB 2005).

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§43.30 D. Appellant's Reply Brief

The appellant may file a reply brief if he or she wishes, but is not required to file one. See Cal Rules of Ct 8.882(a)(3). Its purpose is to answer any new matter raised by the respondent, or to respond to any arguments presented by the respondent that were not adequately addressed in the opening brief. However, the appellant may not raise any new arguments not previously presented in the opening brief, except when such arguments are in response to matter in the respondent's brief. *Nelson v Gaunt* (1981) 125 CA3d 623, 641, 178 CR 167.

The form of the reply brief may be quite simple, and, unless there is some dispute over the facts, they need not be reiterated. See the sample reply brief in California Criminal Law Forms Manual §43.3 (2d ed Cal CEB 2005).

Ø **Note:** Some appellate judges assume that the appellant is conceding the issues raised in the respondent's brief if no reply brief is filed.

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§43.31 XI. ORAL ARGUMENT

All appeals in which the last reply brief has been filed, or the date for filing it has expired 45 days or more before, must be placed on the calendar of the next regularly scheduled appellate division session, unless otherwise ordered. Cal Rules of Ct 8.885(a). The clerk must send a notice of the time and place of argument at least 20 calendar days before the date set. Time may be shortened for good cause; if time is shortened, the clerk must immediately notify the parties of the date set by telephone or other expeditious method. Cal Rules of Ct 8.885(c). Oral argument may be conducted by video conference on application of a party filed within 10 days after the court sends notice of the oral argument date, or on the court's own motion. Cal Rules of Ct 8.885(b). The clerk must notify the parties of the location of the appellate division judges either in the initial notice or in a supplemental notice sent no less than 5 days before the video-conferenced oral argument. Each appellate division judge assigned to the case must participate in the entire oral argument in person or through video conference from a court, and all parties must appear in person in the superior court that issued the judgment or order being appealed, unless local rules, the presiding judge, or his or her designee allows otherwise. Cal Rules of Ct 8.885(b)(2)(B). Each litigant is entitled to appear and give oral argument as a matter of right. See Pen C §1468.

Although Pen C §1253 provides that a reversal may not be ordered without argument in felony cases, no such provision concerns misdemeanor appeals in the superior court appellate division.

The appellate division will restrict argument to one attorney for each represented party. Cal Rules of Ct 8.885(e)(3). Represented defendants need not personally appear at argument. Parties will be given 10 minutes for argument, and the appellant may reserve time for a reply argument. The court may apportion or expand time if there are multiple parties, each separately represented by counsel, or if amicus curiae (see Cal Rules of Ct 8.882(e)) has been granted the right to argue. Cal Rules of Ct 8.885(e)(2).

Many practical and tactical considerations regarding oral argument are discussed in Appeals and Writs in Criminal Cases §§5.1-5.7, 5.49 (3d ed Cal CEB 2007). Perhaps the most important point to remember is that the reviewing court is familiar with the facts and with the arguments in the briefs and does not want to hear them repeated. Oral argument, however, does present counsel with an opportunity to go to the heart of the matter and state in as few words as possible the strongest position in support of his or her side. If the issues have been sufficiently addressed in the briefs, then an offer to submit the matter on the briefs, unless the court has questions, is appropriate. If both sides agree to submit the case on the briefs, they should let the court clerk know so that the court does not need to schedule formal argument. See Cal Rules of Ct 8.885(d).

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§43.32 XII. DETERMINATION OF APPEAL

Each appeal must be determined or submitted for decision at the session at which it is set for hearing unless the hearing is continued for good cause or the appeal is submitted on the briefs without argument. See Cal Rules of Ct 8.886(a). If the matter is submitted, the court must rule on it within 90 days; otherwise, the judge forfeits his or her salary. Cal Const art VI, §19. The decision need not be accompanied by a written opinion, but it may be if the judges of the appellate division deem it advisable or in the public interest. Cal Rules of Ct 8.887(a).

New rules for the conduct of criminal prosecutions will be applied retroactively to all state and federal cases pending on direct review or not yet final, with no exception for cases that establish a "clear break" with the past. *Griffith v Kentucky* (1987) 479 US 314, 93 L Ed 2d 649, 107 S Ct 708 (case involved issue of peremptory challenges of black jurors; court abandoned its "clear break" standard). The rule of retroactivity pronounced in *Griffith* "applies only to rules based on the federal Constitution, or upon the federal judicial supervisory power." It does not apply "to rules of criminal procedure derived solely from state law," *e.g.,* a rule requiring a jury instruction on unreasonable self-defense. *People v Murtishaw* (1989) 48 C3d 1001, 1013, 258 CR 821.

A reviewing court that intends to rule on an issue that was not proposed or briefed by any party to the appeal must allow the parties the opportunity to provide supplemental briefing on that issue. Govt C §68081. The court's failure to follow §68081 requires it to grant a timely petition for rehearing made on that ground.

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§43.33 XIII. FINALITY OF JUDGMENT

A judgment of the appellate division becomes final 30 calendar days after the decision is filed, with certain exceptions. Those exceptions and finality dates are (Cal Rules of Ct 8.888):

- 30 calendar days from the filing date of an order for publication, if the order was filed after the decision and before finality;
- 30 calendar days from the filing of a modification order that changes the appellate judgment;
- 30 calendar days from a party's consent to an increase or decrease in the judgment; and
- Immediately on filing of a decision denying a petition for writ of supersedeas, denying an application for bail or to reduce bail pending appeal, or dismissing an appeal on request or stipulation.

The appellate division may modify a decision at any time before it becomes final. If the clerk's office is closed on the date of finality, the court may modify the decision on the next day that the clerk's office is open. Cal Rules of Ct 8.888(b). If the modification changes the judgment, the finality period runs from the date the modification is filed. If the modification does not change the judgment, the date the judgment becomes final is not extended. Cal Rules of Ct 8.888(b)(2).

If any of these time limits expires on a Saturday, Sunday, or holiday, the time limit is extended to the next court day. CCP §12a; Govt C §6806; Cal Rules of Ct 8.888(b)(1). Court furlough days are considered holidays. See Govt C §68106. See §1.16 on holidays, court days, and computation of time.

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§43.34 XIV. PETITION FOR REHEARING

The appellate division may order rehearing on its own motion or on petition by a party at any time before its judgment becomes final. Cal Rules of Ct 8.889(a)(1). Any party may serve and file a petition within 15 calendar days after (Cal Rules of Ct 8.889(b)):

- The decision is filed;
- The filing of a modification order that changes the appellate judgment;
- A publication order restarting the finality period; or
- The filing of a consent to an increase or decrease in the amount of the judgment.

A rehearing may not be sought on grounds not presented in the original briefs or at argument unless it is based on subsequent developments that could not have been brought to the court's attention. *People v Payne* (1977) 75 CA3d 601, 605, 142 CR 320. See the sample petition for rehearing in California Criminal Law Forms Manual §43.4 (2d ed Cal CEB 2005).

If the court requests an answer to a petition for rehearing, it must be served and filed within 8 calendar days after the order is filed, unless the court orders otherwise. No answer may be filed without a court request. Cal Rules of Ct 8.889(b)(2). The answer must be accompanied by proof of service on the petitioning party. Cal Rules of Ct 8.889(b)(3). For good cause shown, the court may grant an extension to file a petition or answer. Cal Rules of Ct 8.889(b)(4). But, the court may not extend the time in which to grant or deny the petition. If the court does not rule on the petition before the decision is final, it is presumed that the court denied the petition. Cal Rules of Ct 8.889(c). The grant of a petition for rehearing vacates the decision and any opinion filed in the case. If the appellate division orders a rehearing, it may conduct further argument or may order the matter submitted for decision. Cal Rules of Ct 8.889(d).

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Source: Criminal Law/California Criminal Law Procedure and Practice/43 MISDEMEANOR APPEALS/§43.35 XV. CERTIFICATION AND TRANSFER FOR HEARING

§43.35 XV. CERTIFICATION AND TRANSFER FOR HEARING

The appellate division of the superior court may certify a case for transfer to the court of appeal on its own motion or on application of one of the parties when it appears necessary to secure uniformity of decision or to settle important questions of law. Cal Rules of Ct 8.1005. A majority of the appellate division judges who have been assigned to the case or who have decided the appeal, or any two of the appellate division judges if the case has not yet been assigned, may certify a case for transfer. Cal Rules of Ct 8.1005(a)(2).

Ø **Note:** The Rules of Court appear to contemplate that the appellate division may certify a case to the court of appeal without determining the appeal itself. See Cal Rules of Ct 8.1005(a)(2), (d). The authors, however, have never known of an instance in which this has happened.

A party may serve and file an application to certify a case for transfer any time after the record on appeal is filed in the appellate division and within 15 days of pronouncement of judgment or the filing of a modification order changing the appellate judgment. Cal Rules of Ct 8.1005(b). The application must explain why transfer to the court of appeal is necessary. Cal Rules of Ct 8.1005(b)(2). See the sample form in California Criminal Law Forms Manual §43.4 (2d ed Cal CEB 2005). Within 5 days of the filing of an application, any other party may serve and file an opposition. Cal Rules of Ct 8.1005(b)(3). No hearing will be held on an application. Cal Rules of Ct 8.1005(b)(4). A case may be certified for transfer any time after the record on appeal is filed in the appellate division and before the appellate division judgment is final. Cal Rules of Ct 8.1005(c)-(d). With some exceptions, an appellate division decision is final 30 days after the decision is filed. See Cal Rules of Ct 8.888, 8.1005(c).

If the appellate division orders certification, the clerk must promptly send a copy of the order to the court of appeal clerk, the parties, and the Attorney General. Cal Rules of Ct 8.1005(f). If the appellate division fails to certify a case for transfer to the court of appeal, it is considered a denial of the application. Cal Rules of Ct 8.1005(b)(4).

Ø **Note:** When a party wishes to apply for certification and also wants to request a rehearing, he or she should file a request for certification concurrently with the petition for rehearing. See Cal Rules of Ct 8.1005(b)(1). Any party served with a petition for rehearing who desires certification should file a request as soon as possible.

The court of appeal may order a case in the appellate division of the superior court transferred to itself following certification by the appellate division, or on its own motion, or on a party's petition, if it determines that transfer is necessary to secure uniformity of decision or to settle important questions of law. Pen C §1471; Cal Rules of Ct 8.1002, 8.1008(a). When the appellate division of the superior court denies a party's application to certify a case for transfer to the court of appeal and does not certify its decision for publication, the party may petition the court of appeal explaining why transfer is necessary. Cal Rules of Ct 8.1008(b). The petition to the court of appeal must be served and filed within 15 days after the appellate division judgment is final. Cal Rules of Ct 8.1008(b)(2). A party must not file an answer to a petition for transfer unless the court requests one. Cal Rules of Ct 8.1008(b)(4). The court of appeal may order the transfer within 20 days after the record on transfer, or petition for transfer, is filed in the court of appeal. Cal Rules of Ct 8.1008(c)(1). If the court of appeal does not timely order transfer, the transfer is considered denied. Cal Rules of Ct 8.1008(c)(3).

Ø **Note:** If a party applies to the appellate division of the superior court for certification of a case for transfer to the court of appeal and the appellate division denies the application or if it certifies the case but the court of appeal refuses the transfer, the party may petition for a writ of habeas corpus. *In re Wallace* (1970) 3 C3d 289, 292, 90 CR 176.

If the court of appeal grants a discretionary transfer of a case, it will place the matter on calendar for oral argument in that court (Cal Rules of Ct 8.1008(e)(2)) and decide the matter in due course. The court of appeal is required to decide all issues necessary to a resolution of the appeal when it grants a discretionary transfer. *Snukal v Flightways Mfg.* (2000) 23 C4th 754, 765, 98 CR2d 1. However, the court may specify the issues that are dispositive and the

parties must limit their briefs to those issues and issues fairly included within them. Cal Rules of Ct 8.1008(e)(1). On reasonable notice, the court may order argument on other or fewer issues. Cal Rules of Ct 8.1008(e)(2). The court of appeal's decision is subject to review in the California Supreme Court in the same manner as any other court of appeal decision (see Cal Rules of Ct 8.500-8.552), except for the denial of transfer of a case from the appellate division of the superior court. Cal Rules of Ct 8.500(a)(1).

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§43.36 XVI. PUBLICATION OF OPINIONS

The appellate divisions have authority to publish their opinions. See Cal Rules of Ct 8.887(c), 8.1105(c). However, such published opinions are automatically reviewed by the court of appeal in the same manner as if the appellate division had certified the case to the court of appeal. See Cal Rules of Ct 8.1002. Thus, if the opinion is published, no request for certification is necessary. For further discussion of certification, see §43.35.

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§43.37 XVII. FURTHER REVIEW OF JUDGMENT

As far as most misdemeanor cases are concerned, the appellate division is the end of the line unless the case is transferred to the court of appeal. See §43.35. Indeed, an unpublished and noncertified opinion will probably never be seen by any higher court. However, if the appellate division erred so greatly in its judgment that it exceeded its jurisdiction, the judgment then may be challenged by a petition for writ of mandate filed in the court of appeal. If the writ is denied, a petition for review may be filed in the supreme court. See *Dvorin v Appellate Dep't* (1975) 15 C3d 648, 125 CR 771; *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 20 CR 321.

If a substantial federal issue is involved and state remedies are exhausted by filing a petition for a writ of habeas corpus in the California Supreme Court (*Larche v Simons* (9th Cir 1995) 53 F3d 1068, 1072), a petition for writ of habeas corpus may be filed in federal district court or a writ of certiorari may be sought in the U.S. Supreme Court directly from the judgment. See *Talley v California* (1960) 362 US 60, 4 L Ed 2d 559, 80 S Ct 536. Important federal constitutional issues are often ignored in preparing misdemeanor appeals in favor of state court precedent. If a substantial federal question exists, it should be raised in addition to any applicable California issues.

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XVIII. REMITTITUR

§43.38 A. When Remittitur Issues

The appellate division must issue a remittitur after a decision in an appeal. Cal Rules of Ct 8.890(a). The appellate division clerk issues the remittitur immediately after the court of appeal denies transfer or the period for granting transfer expires—or, if the case is transferred, on receiving the court of appeal remittitur. Cal Rules of Ct 8.890(b).

After a decision, the appellate division may direct the immediate issuance of a remittitur only on the stipulation of the parties. Cal Rules of Ct 8.890(c)(1). On its own motion or by motion or on stipulation of the parties, and for good cause, the court may stay the issuance of a remittitur for a reasonable period (Cal Rules of Ct 8.890(c)(2)), or recall the remittitur (see Cal Rules of Ct 8.890(c)(3)). Late issuance of a remittitur can be challenged but is not likely to result in a favorable decision unless prejudice can be shown. See *Gallenkamp v Superior Court* (1990) 221 CA3d 1, 270 CR 346 (no relief despite 17-month delay because defendants did nothing to assert their rights, no actual prejudice was shown, and no statutory or constitutional rights were violated). See also §19.36 on appellate review of speedy trial issues in misdemeanor cases.

The court may issue a bench warrant for the defendant if it is necessary to obtain personal jurisdiction of him or her in order to carry the judgment into effect, and if other means of contacting the defendant have been unsuccessful. Pen C §1265(b).

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§43.39 B. Effect of Affirming Judgment

If a judgment of conviction is affirmed, the original judgment must be enforced. See Pen C §1263. The court has the authority, however, to reconsider a denial of probation or to modify the conditions of a probationary order to reflect a defendant's conduct while the case was being appealed. *In re Medina* (1983) 143 CA3d 562, 191 CR 783. Of course, if a judgment is only affirmed in part, then only the parts of the judgment affirmed are effective. If a judgment in the defendant's favor is affirmed, the original order remains in full force and effect.

Following a ruling on appeal that affirms a judgment, the trial court has the power to impose a jail sentence that was stayed at the defendant's request pending appeal. This is true even when the appeal process lasts longer than the probationary period. *In re Bakke* (1986) 42 C3d 84, 89, 227 CR 663 (court stayed execution of 60-day jail sentence pending appeal at defendant's request; therefore, defendant had consented to an extension of court's jurisdiction).

If the People prosecute an appeal of an order suppressing evidence to decision, the decision is binding on them. Pen C §1538.5(j).

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§43.40 C. Effect of Reversing Judgment; New Trial

If a judgment of conviction is reversed, the decision is considered an order for a new trial unless the appellate court states otherwise. If the appellate court, however, directs a final disposition of an action in the defendant's favor, the defendant must be released from custody or have bail exonerated, and any fines paid must be returned to the defendant. Pen C §1262. Reversal of a judgment or order leaves a proceeding in the same situation in which it stood before the entry of the order or judgment appealed, unless the reviewing court has directed otherwise (*e.g.,* reversed with directions to enter a different order). *Odlum v Duffy* (1950) 35 C2d 562, 219 P2d 785.

If an appellate decision results in a new trial, then all other trial proceedings become a nullity, and the matter is conducted as if the first trial had not occurred. A defendant, however, may not be penalized for exercising the right to appeal. Thus, the prosecution may not add more serious charges than those of which the defendant was convicted (*In re Bower* (1985) 38 C3d 865, 876, 215 CR 267; *In re David B.* (1977) 68 CA3d 931, 137 CR 577), and the defendant may not receive a more severe punishment on a conviction following retrial (*People v Henderson* (1963) 60 C2d 482, 35 CR 77; *People v Superior Court (Harris)* (1990) 217 CA3d 1332, 266 CR 563).

Ø **Note:** The Double Jeopardy Clause of the U.S. Constitution does not necessarily preclude a more severe punishment after a reversal on appeal. *North Carolina v Pearce* (1969) 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072. However, *Henderson* continues to be followed in California on state constitutional law grounds. *People v Hanson* (2000) 23 C4th 355, 365, 97 CR2d 58. For discussion, see Appeals and Writs in Criminal Cases §5.25 (3d ed Cal CEB 2007).

An unauthorized sentence, however, may be set aside judicially and a proper sentence may be imposed by the trial court even if the second sentence is more severe than the original one. *People v Serrato* (1973) 9 C3d 753, 763, 109 CR 65, overruled on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855; *People v Hill* (1986) 185 CA3d 831, 836, 230 CR 109. But see *People v Brown* (1987) 193 CA3d 957, 238 CR 697 (criticizing *Serrato*).

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FELONY APPEALS

A. J. KUTCHINS

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§44.1 I. OVERVIEW

This chapter is intended as a brief guide for practitioners handling noncapital felony appeals in state court. A more detailed treatment of this subject and other areas of appellate practice (including misdemeanor appeals, state and federal writs, and U.S. Supreme Court procedure) is found in Appeals and Writs in Criminal Cases (3d ed Cal CEB 2007), cited hereafter as Appeals & Writs. See also chap 42 on state writs, chap 43 on misdemeanor appeals, and chap 45 on federal writs.

The materials in this chapter generally apply to juvenile delinquency appeals as well as adult felony appeals. With some exceptions, the California Rules of Court governing criminal appeals from the superior court apply as well to appeals from the juvenile court. See Cal Rules of Ct 8.4, 8.400-8.416. Effective July 1, 2010, Cal Rules of Ct 8.400-8.416, governing juvenile appeals, are renumbered and amended, and new Rules 8.401, 8.403, 8.404, 8.405, 8.406, 8.410, 8.411 are added.

For tactical or substantive discussions, defense counsel may wish to consult with the attorney of the day in the offices of the State Public Defender. The contract appellate offices, created under Cal Rules of Ct 8.300 (see list in §1.2), also offer varying degrees of support and assistance over the telephone, and some maintain websites offering valuable resources to defense attorneys involved in the appellate process. These include the California Appellate Project, Los Angeles (http://www.lacap.com); the Central California Appellate Program, or CCAP (http://www.capcentral.org); and the Sixth District Appellate Program (http://www.sdap.org). Prosecutors with questions about an appeal should contact the California Attorney General's office. Sample felony appeal forms are in California Criminal Law Forms Manual, chap 44 (2d ed Cal CEB 2005).

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§44.2 II. CHART: DEADLINES

Noncapital appeals in felony cases are heard in the court of appeal. The California Supreme Court has the discretionary power to grant review in felony cases. Appellate procedures in these courts are governed by Cal Rules of Ct, Title 8, Division 1. Rules 8.304-8.482 are specifically applicable in criminal cases.

Action	Deadline	Authority
Initiating the Appeal		
Counsel files notice of appeal with superior court clerk. See §§44.5, 44.7.	60 calendar days after rendition of judgment or order.	Cal Rules of Ct 8.308(a).
Counsel files statement of grounds for appeal under Pen C §1237.5 with trial court. See §§44.6, 44.8-44.13.	60 calendar days after rendition of judgment.	Pen C §1237.5; Cal Rules of Ct 8.304(b), 8.308(a).
Opposing party appeals from the same judgment or order ("cross-appeal").	30 days after superior court clerk mails notification of the first appeal, or 60 calendar days after rendition of judgment or order, whichever is later.	Cal Rules of Ct 8.308(b).
Superior court issues certificate of probable cause or order denying certificate. See §§44.8-44.13.	20 calendar days after statement of grounds for appeal filed.	Cal Rules of Ct 8.304(b)(2).
Record Preparation		
Counsel files application in superior court for additional record. See §44.23A.	With notice of appeal or as soon thereafter as possible.	Cal Rules of Ct 8.324(c).
Superior court enters order for additional record.	5 calendar days after application is filed.	Cal Rules of Ct 8.324(d).
Court reporter delivers completed reporter's transcript to superior court clerk. See §§44.20-44.20A.	20 calendar days after filing of notice of appeal or, when required, after trial court files certificate of probable cause.	Cal Rules of Ct 8.336(b), (d).
Superior court clerk completes clerk's transcript. See §44.20A.	20 calendar days after filing of notice of appeal or, when required, after trial court files certificate of probable cause.	Cal Rules of Ct 8.336(b)-(c).
Superior court clerk transmits reporter's and clerk's transcripts to reviewing court and appellate counsel. See §44.20A.	Promptly after certification by reporter(s) and clerk.	Cal Rules of Ct 8.336(f).
Record Settlement		
Appellate counsel files application in superior court for permission to prepare settled statement. See §44.25.	As soon as party becomes aware that any part of oral proceedings cannot be transcribed.	Cal Rules of Ct 8.346(a).
Superior court judge rules on application. See §44.25.	5 calendar days after application is filed.	Cal Rules of Ct 8.346(b).

Applicant delivers proposed settled statement to judge. See §44.25.	30 calendar days after order allowing preparation.	Cal Rules of Ct 8.346(b); see also Cal Rules of Ct 8.137.
Transmitting Exhibits to Reviewing Court		
Party wanting reviewing court to consider exhibits that were admitted in evidence, refused, or lodged, but not copied in clerk's transcript or appendix, gives notice designating exhibits in superior court. See §44.26.	10 days after last respondent's brief is (or could be) filed (Cal Rules of Ct 8.220), or 10 days after another party files notice designating exhibits.	Cal Rules of Ct 8.224(a).
Superior court clerk transmits designated exhibits to reviewing court. See §44.26.	20 days after first notice designating exhibits is filed.	Cal Rules of Ct 8.224(b).
Court of Appeal Deadlines		
Appellant's opening brief.	40 calendar days after record filed in reviewing court.	Cal Rules of Ct 8.360(c)(1).
Respondent's brief.	30 calendar days after appellant's opening brief filed.	Cal Rules of Ct 8.360(c)(2).
Appellant's reply brief.	20 calendar days after respondent's brief filed.	Cal Rules of Ct 8.360(c)(3).
Petition for rehearing.	15 days after filing of (1) decision, (2) publication order restarting finality period, (3) modification order changing appellate judgment.	Cal Rules of Ct 8.268(b)(1), 8.366(a).
Answer to petition for rehearing.	8 days after court files order requesting answer (unless court orders otherwise).	Cal Rules of Ct 8.268(b)(2), 8.366(a).
Finality of Court of Appeal Decision		
Decision for which another date of finality is not specified, *e.g.,* decision on direct appeal, decision in writ proceeding issued after order to show cause and oral argument.	30 calendar days after filing; date of publication, if later than filing date; or date of order modifying decision that affects judgment.	Cal Rules of Ct 8.366(b).
Denial of habeas corpus petition filed on same day as decision in related direct appeal.	Final on date on which decision on appeal is final.	Cal Rules of Ct 8.387(b)(2)(B).
Denial of habeas corpus petition without issuance of order to show cause.	Final on filing.	Cal Rules of Ct 8.387(b)(2)(A).
Denial of application for bail or to reduce bail pending appeal.	Final on filing.	Cal Rules of Ct 8.366(b)(2).
Supreme Court Deadlines		
Petition for review.	10 calendar days after court of appeal decision is final as to that court.	Cal Rules of Ct 8.500(e).
Answer to petition for review.	20 calendar days after filing of petition.	Cal Rules of Ct 8.500(e).
Reply to answer to petition for review.	10 calendar days after filing of answer.	Cal Rules of Ct 8.500(e).
Petitioner's opening brief on	30 calendar days after	Cal Rules of Ct

merits (or brief petitioner filed in court of appeal).	supreme court grants review.	8.520(a)(1).
Answer brief on merits (or brief opposing party filed in court of appeal).	30 days after petitioner files its brief or time to do so expires.	Cal Rules of Ct 8.520(a)(2).
Reply brief on merits (or reply brief petitioner filed in court of appeal).	20 days after opposing party files its brief.	Cal Rules of Ct 8.520(a)(3).
Petition for rehearing.	15 days after filing of decision or modification order changing appellate judgment.	Cal Rules of Ct 8.268(b)(1), 8.366(a), 8.536(b).
Answer to petition for rehearing.	8 days after filing of petition for rehearing.	Cal Rules of Ct 8.536(b).
Finality of Supreme Court Decision		
Decision for which another date of finality is not specified, *e.g.,* decision on direct appeal.	Generally 30 calendar days after filing, unless court orders shorter time or additional time not to exceed 60 days, or 30 days after date of order modifying decision that affects judgment.	Cal Rules of Ct 8.264(c), 8.366(a), 8.532(b).
Denial of petition for review of court of appeal decision; denial of petition for writ of supersedeas; denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause; dismissal of review; transfer or retransfer of review to court of appeal without decision.	Final on filing.	Cal Rules of Ct 8.528, 8.532(b)(2).
Deciding Appeal		
Deadline.	90 calendar days after submission of case or judges may not receive salary.	Cal Const art VI, §19.

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III. DEFENDANTS' APPEALS

§44.3 A. Right to Counsel; No Right to Self-Representation

There is no established federal constitutional right to appeal a criminal conviction. However, when that right is provided by state law—as it is in California—the federal Constitution guarantees an indigent defendant the right to counsel on appeal at public expense. See *Douglas v California* (1963) 372 US 353, 9 L Ed 2d 811, 83 S Ct 814 (felony cases); *Halbert v Michigan* (2005) 545 US 605, 162 L Ed 2d 552, 125 S Ct 2582 (appeal after guilty plea); *Argersinger v Hamlin* (1972) 407 US 25, 32 L Ed 2d 530, 92 S Ct 2006 (misdemeanor cases resulting in jail time); *In re Barnett* (2003) 31 C4th 466, 473, 3 CR3d 108; *In re Kevin S.* (2003) 113 CA4th 97, 6 CR3d 178. There is no Sixth Amendment right to self-representation on direct appeal. *Martinez v Court of Appeal* (2000) 528 US 152, 145 L Ed 2d 597, 120 S Ct 684.

Ø **Note:** Some courts take the view that a criminal defendant's trial counsel should *not* represent the defendant on appeal because the need to assess possible ineffective assistance of counsel issues creates "an inherent conflict" of interest. *People v Bailey* (1992) 9 CA4th 1252, 1253, 12 CR2d 339. But see *People v Kipp* (2001) 26 C4th 1100, 1139, 113 CR2d 27 (although it is not technically conflict of interest for same attorney to represent defendant on direct capital appeal and habeas, court policy is to appoint separate counsel).

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Source: Criminal Law/California Criminal Law Procedure and Practice/44 FELONY APPEALS/§44.4 B. Alternatives to Appeal; Steps to Take in Conjunction With Appeal

§44.4 B. Alternatives to Appeal; Steps to Take in Conjunction With Appeal

In some circumstances, there are procedures that should be used instead of, or in addition to, an appeal.

Ø **Warning:** Counsel should be sure not to miss the deadline for filing a notice of appeal while researching or pursuing these alternatives.

Among the more important alternatives and additional procedures are:

- Under Pen C §1170(d), a trial court may, within 120 calendar days after the date of commitment, recall a prison commitment and resentence the defendant on its own motion. The new sentence cannot be greater than the original sentence. The trial court may recall a sentence under §1170(d) even when an appeal is pending. *Portillo v Superior Court* (1992) 10 CA4th 1829, 1834, 13 CR2d 709. While an appeal is pending, the trial court's power to recall extends *only* to resentencing, and *not* to modifying the judgment of conviction. *People v Nelms* (2008) 165 CA4th 1465, 1472, 82 CR3d 32 (court exceeded jurisdiction dismissing count, even with agreement of all parties). Although a defendant has no standing to bring a motion to recall his or her sentence (*People v Chlad* (1992) 6 CA4th 1719, 1724, 8 CR2d 610), he or she may informally request the trial court to initiate §1170(d) proceedings (see *Dix v Superior Court* (1991) 53 C3d 442, 465 n17, 279 CR 834; see also *People v Laue* (1982) 130 CA3d 1055, 1060, 182 CR 99). If the trial court refuses, however, its decision is not reviewable. *Portillo v Superior Court, supra*; *People v Delson* (1984) 161 CA3d 56, 62, 207 CR 244; *People v Gainer* (1982) 133 CA3d 636, 641, 184 CR 120. For further discussion, see §35.5.
- When a sentence is unauthorized by law, the trial court can correct it even if it has been entered in the minutes and the defendant has begun serving it. *People v Culpepper* (1994) 24 CA4th 1134, 29 CR2d 719; *People v Chagolla* (1983) 144 CA3d 422, 434, 193 CR 711. See §44.53.
- Clerical errors can be corrected by the trial court at any time—even while the case is on appeal—on the motion of a party or on the court's own motion. *People v Mitchell* (2001) 26 C4th 181, 185, 109 CR2d 303; *In re Candelario* (1970) 3 C3d 702, 705, 91 CR 497.
- A petition for writ of error coram nobis informs the trial court of the defendant's discovery of a new fact, unrelated to the merits, that would have affected the judgment. *People v Dubon* (2001) 90 CA4th 944, 950, 108 CR2d 914. It is essentially a form of nonstatutory "motion to vacate the judgment." 90 CA4th at 950. Such a petition is typically used to withdraw a guilty plea either induced by official promises that were not kept or entered without knowledge of essential facts. See, *e.g., People v Welch* (1964) 61 C2d 786, 40 CR 238 (guilty plea in capital case vacated on discovery of defendant's massive brain damage); *In re Azurin* (2001) 87 CA4th 20, 104 CR2d 284 (coram nobis was appropriate vehicle of relief when defendant was not advised of immigration consequences of plea); *People v Cortez* (1970) 13 CA3d 317, 332, 91 CR 660 (prosecutor inaccurately informed defendant that, by pleading guilty, he would receive treatment for mental condition). Although the grounds on which coram nobis are available are very limited, it is an important alternative because, unlike habeas corpus, coram nobis has no requirement that the petitioner still be in custody when the petition is filed. See *People v Kim* (2009) 45 C4th 1078, 1104, 90 CR3d 355.
- A petition for writ of error coram vobis is the same as coram nobis, except that it is addressed to an appellate court. *In re Derek W.* (1999) 73 CA4th 828, 831 n3, 86 CR2d 742. See also *People v Welch* (1964) 61 C2d 786, 790, 40 CR 238. The trial court lacks jurisdiction to grant coram nobis relief while an appeal is pending. *People v Haynes* (1969) 270 CA2d 318, 75 CR 800. In this situation the defendant should file a coram vobis petition, addressed to the appellate court. See generally Appeals & Writs, chap 11.
- A motion to vacate the conviction based on the trial court's violation of Pen C §1016.5(a) may be made when the trial court failed to ensure that a noncitizen defendant was advised before plea about each of three possible adverse immigration consequences: removal, exclusion from admission to the United States, and denial of naturalized citizenship. See, *e.g., People v Superior Court (Zamudio)* (2000) 23 C4th 183, 96 CR2d 463.
- A petition for writ of habeas corpus may be used in some situations, either in conjunction with an appeal or as

an alternative to an appeal. See §44.27.

- It may sometimes be in the client's best interest not to appeal or otherwise challenge the judgment. For example, when the trial court has made sentencing errors that benefit the client, an appeal may give the appellate court an opportunity to correct those errors. See §44.53. Although trial counsel must advise an indigent defendant of grounds for reversal or modification of the judgment (Pen C §1240.1(a)), appellate counsel should never assume that a client has comprehended the potential adverse consequences of prevailing on appeal. Appellate counsel should use simple, everyday language to ensure that the client understands both the risks and the potential benefits of an appeal. Counsel should inform the client *in writing* of all potential adverse consequences.

If a notice of appeal already has been filed and the defendant decides not to pursue the appeal, counsel must file a written notice of abandonment. See §44.55.

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C. Procedural Prerequisites to Appeal

1. Notice of Appeal

§44.5 a. Generally

A felony appeal is taken from a final judgment or appealable order of the superior court by filing a written notice of appeal with the clerk of that court within 60 calendar days after the judgment or order. Cal Rules of Ct 8.308(a). A similar procedure applies to juvenile appeals. Cal Rules of Ct 8.400(d) (before July 1, 2010); Cal Rules of Ct 8.400, 8.405, 8.406(a), effective July 1, 2010.

Ø **Note:** An optional form for the notice of appeal, Judicial Council Form CR-120 (Notice of Appeal—Felony (Defendant) (Criminal)), is available on the Judicial Council's website (http://www.courtinfo.ca.gov/forms).

The notice of appeal is usually filed by trial counsel. See §41.5 for discussion of counsel's duties concerning the notice of appeal.

Ø **Note:** Though discouraged as an inefficient practice, unless a local rule has been promulgated to the contrary, a pro se defendant may file a notice of appeal in a criminal case with the courtroom clerk of the judge who imposed sentence. *In re Gray* (2009) 179 CA4th 1189, 1200, 102 CR3d 551.

As a general rule, once an appeal is filed and sentence commenced, the trial court loses jurisdiction over the case. See *People v Alanis* (2008) 158 CA4th 1467, 1476, 71 CR3d 139 (with appeal pending, trial court had no jurisdiction to recall sentence, permit withdrawal of plea, hold court trial, and enter new judgment despite consent of all parties). The effect of appeal on the trial court's jurisdiction is discussed in §41.3. See also §44.4 on the trial court's jurisdiction to modify sentence within 120 calendar days of the date of commitment.

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§44.6 b. After Guilty or Nolo Contendere Plea

Generally, by pleading guilty or nolo contendere, or by admitting a probation violation, the defendant implicitly waives issues that could otherwise be raised on appeal. See, *e.g., People v Ramirez* (2008) 159 CA4th 1412, 1427, 72 CR3d 340. Although complex rules govern what issues may be raised on appeal following such a plea or admission (see §§44.8-44.13), there are two categories of exceptions to the general rule of waiver, both of which require the filing of a notice of appeal. One category requires the defendant to obtain a "certificate of probable cause" from the trial court as well; the other does not.

Certificate of probable cause. Unless the ground for appeal is one of the specifically enumerated issues known as "non-certificate" grounds, an appeal after a guilty plea requires the defendant to obtain a "certificate of probable cause" from the trial court. See Cal Rules of Ct 8.304(b)(1). The defendant must file *both* a notice of appeal *and* a statement in support of a certificate of probable cause, *i.e.,* a written statement, executed under oath or penalty of perjury, stating appropriate grounds for the appeal. Pen C §1237.5; Cal Rules of Ct 8.304(b). See §44.10. The application for a certificate of probable cause is *not* the equivalent of the notice of appeal. The statement must be filed with the notice of appeal within 60 days of the judgment. Cal Rules of Court 8.304(b), 8.308(a).

> Ø **Note:** At least one appellate court has observed the contrast between Rule 8.304(b)(1), which indicates what materials must be filed but does not indicate when, and Rule 8.308(a), which imposes a 60-day filing requirement for both the notice of appeal and the statement in support of a certificate of probable cause but does not require that they be filed together. See *Drake v Superior Court* (2009) 175 CA4th 1462, 1465, 97 CR3d 323 (because rules unclear, due process demands that writ of mandate issue directing trial court to vacate untimeliness order and to consider defendant's application for certificate of probable cause).

Many issues are simply not cognizable on appeal following a plea of guilty or nolo contendere even if a certificate of probable cause is obtained. *People v DeVaughn* (1977) 18 C3d 889, 895, 135 CR 786. For a chart showing what issues are and are not appealable with a certificate of probable cause, see §44.13. Certificates of probable cause are discussed in more detail in §§44.8-44.13.

Noncertificate grounds. The second exception to the rule of waiver exists when the appeal is limited to noncertificate grounds. A defendant need not seek a certificate of probable cause if the appeal is based on:

- Grounds that arose after the entry of the plea and that do not challenge its validity (*e.g.*, sentencing errors); and
- The denial of a motion to suppress evidence under Pen C §1538.5. Cal Rules of Ct 8.304(b)(4).

The notice of appeal must state that it is based on noncertificate grounds; otherwise the appeal may simply be dismissed. *People v Jones* (1995) 10 C4th 1102, 43 CR2d 464, overruled on other grounds in *In re Chavez* (2003) 30 C4th 643, 656, 134 CR2d 54; *People v Way* (2003) 113 CA4th 733, 736, 6 CR3d 644.

As long as some noncertificate ground is specified in the notice of appeal, the defendant may raise additional *noncertificate* grounds on appeal that were not specified. *People v Jones, supra* (although notice of appeal specified only denial of motion to suppress as ground for appeal, defendant's challenge to probation condition was also cognizable). The defendant may not, however, raise grounds requiring a certificate of probable cause without also obtaining the certificate.

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§44.7 c. Consequences of Untimely Filing

When the superior court receives a late notice of appeal (see §44.5), the clerk must mark it "Received [date] but not filed" and notify the party who submitted it that it was not filed, because it was late. Cal Rules of Ct 8.308(c). If the clerk mistakenly files the late notice of appeal, the appellate court must dismiss the appeal, either on a party's motion or on its own. *People v Mendez* (1999) 19 C4th 1084, 1094, 81 CR2d 301. Although Cal Rules of Ct 8.60(d) generally allows a reviewing court, for good cause, to relieve a party who fails to comply with an appellate rule from the consequences of that default, relief is *not* available for failure to timely file a notice of appeal. Cal Rules of Ct 8.60(d). See *People v Ramirez* (2008) 159 CA4th 1412, 1427, 72 CR3d 340. There are, however, two recognized situations in which a notice of appeal filed more than 60 calendar days after the judgment is considered timely under the doctrine of "constructive filing":

- When an incarcerated defendant delivers a notice of appeal to prison authorities within the 60-day period, but the superior court clerk does not receive it until after the period has expired. *In re Jordan* (1992) 4 C4th 116, 130, 13 CR2d 878; Cal Rules of Ct 8.308(e).

  Ø **Note:** The incarcerated defendant bears the burden of demonstrating that he or she timely delivered the notice of appeal to prison authorities. *In re Jordan, supra*.

- When an incarcerated defendant reasonably relies on counsel's promise or representation that counsel will timely file a notice of appeal on the defendant's behalf, but counsel fails to do so. *In re Benoit* (1973) 10 C3d 72, 109 CR 785; *People v Zarazua* (2009) 179 CA4th 1054, 1061, 101 CR3d 902. But see *People v Aguilar* (2003) 112 CA4th 111, 4 CR3d 802 (constructive filing did not apply when defendants were not incarcerated).

The appellate court rules on the applicability of the constructive filing doctrine to a particular case. *Zarazua,* 179 CA4th at 1062. Such relief may be requested by way of a petition for a writ of habeas corpus (*In re Benoit* (1973) 10 C3d 72, 78, 109 CR 785) or by filing a motion (*Zarazua*, *supra*). If the appellate court will not consider the notice of appeal to have been constructively filed, the defendant's only other remedy is a petition for writ of habeas corpus alleging that trial counsel's failure to timely file the appeal deprived the defendant of the constitutional right to the effective assistance of counsel. See *Roe v Flores-Ortega* (2000) 528 US 470, 145 L Ed 2d 985, 120 S Ct 1029. See also *People v Byron* (2009) 170 CA4th 657, 664, 88 CR3d 386 (given possible ineffective-assistance claim, untimely notice of appeal construed as petition for writ of habeas corpus). (On the preparation and filing of a habeas corpus petition, see chap 42.)

Ø **Warning:** "California imposes on trial counsel a *per se* duty to consult with defendants about the possibility of an appeal." *Roe v Flores-Ortega* (2000) 528 US 470, 479, 145 L Ed 2d 985, 996, 120 S Ct 1029. Trial counsel's failure to file a timely notice when the defendant requested it can result in State Bar discipline. See *In re Benoit* (1973) 10 C3d 72, 88, 109 CR 785. Counsel should be particularly careful about calendaring these deadlines and, if he or she will not be filing the notice, should notify the defendant *in writing* of that fact.

Ø **Note:** The best practice is for trial counsel to bring the notice of appeal—and for indigent clients, a request for appointment of counsel—to court when the defendant is sentenced and to file it before leaving the courthouse. Many attorneys *always* file a notice of appeal from *any* conviction. When an appeal is not filed, defense counsel should record in the file the reason it was not, *e.g.,* the defendant asked that an appeal not be filed.

In certain circumstances, an appeal by the prosecution can reinstate the defendant's lapsed opportunity to seek appellate review. See Pen C §1238.5.

On the consequences of untimely filing of a statement of reasonable grounds for appeal under Pen C §1237.5, see §44.11.

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2. Certificate of Probable Cause

§44.8 a. When Required; Exceptions

A defendant must generally obtain a certificate of probable cause when appealing from a judgment of conviction following a plea of guilty or nolo contendere or from a revocation of probation based on an admission of violation. Pen C §1237.5(b); Cal Rules of Ct 8.304(b); *People v Puente* (2008) 165 CA4th 1143, 1149, 81 CR3d 380; *People v Navarro* (2008) 161 CA4th 1100, 1105, 74 CR3d 828. The certificate requirement does not apply if the appeal is based solely on grounds (1) occurring after entry of the plea that do not challenge its validity or (2) involving a search or seizure, the validity of which was contested under Pen C §1538.5. Pen C §1237.5(b); Cal Rules of Ct 8.304(b); *People v Young* (2000) 77 CA4th 827, 91 CR2d 916. See the chart in §44.13 for case law on whether particular issues may be raised on appeal without a certificate of probable cause, are cognizable on appeal only if a certificate has been obtained, or simply are not cognizable at all.

When the requirement of a certificate of probable cause applies, it cannot be waived by the court. *People v Mendez* (1999) 19 C4th 1084, 1098, 81 CR2d 301; *People v Thurman* (2007) 157 CA4th 36, 41, 68 CR3d 425.

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§44.9 b. Effect on Appealable Issues

Although a defendant must obtain a certificate of probable cause to proceed on appeal (unless the appeal raises only noncertificate grounds), the defendant is not limited to issues specified by the trial court in the certificate, or even to the issues specified in the defendant's statement of reasonable grounds for issuance of the certificate. Once the trial court has timely issued a certificate of probable cause, the defendant may argue any cognizable issue whether or not it was identified in the statement or the certificate. *People v Hoffard* (1995) 10 C4th 1170, 43 CR2d 827.

By the same token, an issue that is not cognizable on appeal after a guilty plea does not become cognizable just because the trial court erroneously grants a certificate of probable cause for that issue. *In re Chavez* (2003) 30 C4th 643, 649, 134 CR2d 54; *People v Panizzon* (1996) 13 C4th 68, 51 CR2d 851; *People v Kaanehe* (1977) 19 C3d 1, 9, 136 CR 409; *People v DeVaughn* (1977) 18 C3d 889, 896, 135 CR 786. The chart in §44.13 lists common issues that are not appealable following a guilty plea.

If the defendant pleads guilty in reliance on an erroneous representation that a given issue could be raised in a subsequent appeal, the appellate courts will usually reverse the judgment and remand it to the trial court to permit the defendant to withdraw his or her guilty plea. *People v Geitner* (1982) 139 CA3d 252, 255, 188 CR 486 (admissibility of extrajudicial statement); *People v Haven* (1980) 107 CA3d 983, 167 CR 376 (denial of defendant's motion to sever).

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§44.9A c. Effect on Waiver of Right to Appeal

When a defendant has *expressly* waived the right to appeal issues that would normally be appealable even after a guilty plea, a certificate of probable cause will not salvage those issues for appeal. See *People v Charles* (1985) 171 CA3d 552, 217 CR 402 (defendant waived right to appeal Pen C §1538.5 ruling as part of negotiated plea).

The terms of a plea bargain sometimes include a general waiver of the right to appeal. Such waivers are valid if voluntarily and intelligently made. See, *e.g., People v Vargas* (1993) 13 CA4th 1653, 17 CR2d 445. The scope of a general waiver will ordinarily include errors occurring before, but not after, the waiver. 13 CA4th at 1661. If, however, the defendant agrees to a plea bargain that includes a specific sentence, and if that is the sentence actually imposed, the defendant's waiver will foreclose appellate review of the sentence; any challenge to the sentence will be deemed a challenge to an integral component of the bargain. See *People v Panizzon* (1996) 13 C4th 68, 51 CR2d 851; *In re Uriah R.* (1999) 70 CA4th 1152, 83 CR2d 314; *People v Nguyen* (1993) 13 CA4th 114, 16 CR2d 490. Such a waiver will not preclude claims that the trial court imposed a sentence in excess of its fundamental jurisdiction, or violated the terms of the bargain. However, the waiver *will* bar review of alleged error in the computation or imposition of the sentence. *In re Uriah R., supra; People v Nguyen, supra*.

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§44.10 d. Where to Obtain

Certificates of probable cause are obtained from the trial court. To obtain one, the defendant must timely file a written statement, executed under oath or penalty of perjury, showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. Pen C §1237.5(a); Cal Rules of Ct 8.304(b); *People v Mendez* (1999) 19 C4th 1084, 81 CR2d 301. On what constitutes "timely" filing of the statement, see §§44.6, 44.11.

A defendant who has obtained a certificate of probable cause may raise any cognizable issue on appeal, even if that issue was neither listed in his or her statement of reasonable grounds nor specified in the certificate. See §44.9. Nonetheless, because the trial court will decide whether to issue a certificate of probable cause on the basis of the statement of grounds for appeal, counsel should include in the statement *all* issues that may be raised on appeal in the statement of probable cause. A sample application for a certificate of probable cause appears in Appeals & Writs §§2.33-2.35.

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§44.11 e. When to File

The request for a certificate of probable cause must be filed with the notice of appeal within 60 days of the judgment. Cal Rules of Ct 8.304(b), 8.308(a). For additional discussion, see §44.6.

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§44.12 f. Review

Defense counsel can challenge a trial court's refusal to issue a certificate of probable cause by filing a petition for writ of mandate in the court of appeal. *In re Brown* (1973) 9 C3d 679, 683, 108 CR 801, overruled on other grounds in *People v Mendez* (1999) 19 C4th 1084, 1097, 81 CR2d 301. See also *Drake v Superior Court* (2009) 175 CA4th 1462, 1465, 97 CR3d 323 (writ issued directing trial court to consider application for probable cause on merits or on procedural grounds other than timeliness) (see §44.6); *Lara v Superior Court* (1982) 133 CA3d 436, 183 CR 796 (writ of mandate issued to compel trial court to issue a certificate of probable cause); *People v Nigro* (1974) 39 CA3d 506, 114 CR 213 (appeal from order denying certificate of probable cause treated as petition for writ of mandate). On preparing and filing a mandate petition, see chap 42.

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§44.13 3. Chart: Appealability After Guilty Plea

This chart is designed to enable readers to quickly find existing case law identifying (1) issues that are appealable following a plea of guilty or nolo contendere with a certificate of probable cause, (2) issues that are appealable without a certificate of probable cause, and (3) issues that are not appealable at all.

Issue	Authority
(1) Issues appealable with certificate of probable cause:	
Denial of opportunity to bring motion to withdraw plea.	*People v Johnson* (2009) 47 C4th 668, 680, 101 CR3d 332 (resolving conflict in courts of appeal). See also *People v Brown* (2010) 181 CA4th 356, 104 CR3d 528.
Mental competence at time of plea.	*People v Laudermilk* (1967) 67 C2d 272, 281, 61 CR 644; *People v Hodges* (2009) 174 CA4th 1096, 1106, 94 CR3d 862. See *People v Panizzon* (1996) 13 C4th 68, 76, 51 CR2d 851.
Ineffective waiver of constitutional rights.	*People v Ribero* (1971) 4 C3d 55, 63, 92 CR 692; *People v Navarro* (1966) 243 CA2d 755, 758, 52 CR 686.
Denial of right to self-representation (*Faretta* error).	*People v Robinson* (1997) 56 CA4th 363, 65 CR2d 406.
Ineffective assistance of counsel.	*In re Brown* (1973) 9 C3d 679, 682, 108 CR 801; *People v Natividad* (1963) 222 CA2d 438, 441, 35 CR 237.
Plea induced by misrepresentation.	*People v DeVaughn* (1977) 18 C3d 889, 896, 135 CR 786. See *People v Panizzon, supra*.
Denial of motion to withdraw guilty plea, when motion challenged validity of plea.	*People v Ribero* (1971) 4 C3d 55, 63, 92 CR 692.
Denial of request for pretrial diversion.	*People v Padfield* (1982) 136 CA3d 218, 227, 185 CR 903.
Denial of motion to dismiss on grounds of collateral estoppel.	*People v Meyer* (1986) 183 CA3d 1150, 1157, 228 CR 635.
Violation of Interstate Agreement on Detainers, which bars prosecution.	*People v Cella* (1981) 114 CA3d 905, 915 n5, 170 CR 915.
Inadequate advisement of rights when admitting prior conviction (*Yurko* error).	*People v Breckenridge* (1992) 5 CA4th 1096, 8 CR2d 1, overruled on other grounds in *In re Chavez* (2003) 30 C4th 643, 657 n6, 134 CR2d 54.
Conviction for both stealing and receiving same property.	*People v Jones* (1995) 33 CA4th 1087, 39 CR2d 530.
Challenge to sentence negotiated as part of plea bargain.	*People v Cuevas* (2008) 44 C4th 374, 79 CR3d 303 (Pen C §654 challenge to term *within* specified maximum sentence); *People v Shelton* (2006) 37 C4th 759, 763, 37 CR3d 354 (Pen C §654 challenge to imposition of specified maximum sentencing "lid"); *People v Panizzon* (1996) 13 C4th 68, 78, 51 CR2d 851 (claim of cruel and unusual punishment); *People v Hodges* (2009) 174 CA4th 1096, 1104, 94 CR3d 862 (challenge to

	sentence enhancement imposed after plea); *People v Rushing* (2008) 168 CA4th 354, 85 CR3d 437 (claim of cruel and unusual punishment for imposition of agreed-on maximum); *People v Puente* (2008) 165 CA4th 1143, 81 CR3d 380 (challenge to imposition of *Vargas* and *Cruz* waivers); *People v McNight* (1985) 171 CA3d 620, 624, 217 CR 393 (claim that trial court should have considered mitigating circumstances).
Inapplicability of enhancement imposed as part of plea bargain. (Conflict among courts of appeal on this point suggests that counsel should be safe and seek certificate.)	Compare *People v Loera* (1984) 159 CA3d 992, 998, 206 CR 60 (certificate not required to challenge "unlawful" sentence), with *People v Arwood* (1985) 165 CA3d 167, 172, 211 CR 307 (certificate required because challenge is to validity of plea). See also *People v Jones* (1995) 33 CA4th 1087, 39 CR2d 530 (discussing both cases and following *Arwood*).
Claim of procedural irregularity in obtaining admission to enhancement.	*People v Fulton* (2009) 179 CA4th 1230, 1235, 102 CR3d 229.

(2) Issues appealable without certificate of probable cause:

Denial of postplea, presentencing *Marsden* motion.	*People v Caravajal* (2007) 157 CA4th 1483, 1487, 69 CR3d 270; *People v Vera* (2004) 122 CA4th 970, 977, 18 CR3d 896.
Sentencing claims that did not challenge validity of plea.	*People v French* (2008) 43 C4th 36, 41, 73 CR3d 605 (*Cunningham* challenge); *People v Buttram* (2003) 30 C4th 773, 134 CR2d 571 (challenge to exercise of sentencing discretion within agreed maximum sentence); *People v Ward* (1967) 66 C2d 571, 58 CR 313; *People v Oglesby* (2008) 158 CA4th 818, 824, 70 CR3d 443 (challenge to failure to hold competency hearing before sentencing); *People v Narron* (1987) 192 CA3d 724, 730, 237 CR 693 (challenge to probation condition).
Denial of motion to withdraw guilty plea, when motion did not challenge validity of plea.	*People v Delles* (1968) 69 C2d 906, 73 CR 389 (challenge to imposition of sentence contrary to plea bargain without giving defendant opportunity to withdraw plea).
Search and seizure.	Pen C §1538.5(m); *People v West* (1970) 3 C3d 595, 601, 91 CR 385 (search issue raised only at preliminary hearing cannot be reviewed on appeal unless defense renewed motion in superior court); *People v Lilienthal* (1978) 22 C3d 891, 150 CR 910 (trial court unification has not abrogated renewal requirement); *People v Garrido* (2005) 127 CA4th 359, 25 CR3d 494 (admission or confession attacked in trial court as product of unlawful arrest or search may be pursued on appeal after guilty plea); *People v DeVaughn* (1977) 18 C3d 889, 896 n6, 135 CR 786; *People v Brown* (1981) 119 CA3d 116, 173 CR 877; *People v Massey* (1976) 59 CA3d 777, 780, 130 CR 581.
Juvenile matters (appealable issues).	*In re Joseph B.* (1983) 34 C3d 952, 196 CR 348; *In re John B.* (1989) 215 CA3d 477, 481, 263 CR 607 (fact that certificate is not required for juvenile appeal does not mean that all issues are appealable).

(3) Issues not appealable even with certificate of probable cause:

Constitutional invalidity of prior conviction that was element of current offense.	*People v La Jocies* (1981) 119 CA3d 947, 956, 174 CR 100 (guilty plea to possession of firearm by ex-felon).
Admissibility of extrajudicial statement (other than on grounds of unlawful search and seizure).	*People v DeVaughn* (1977) 18 C3d 889, 896 n6, 135 CR 786; *In re John B.* (1989) 215 CA3d 477, 480, 263 CR 607 (minor cannot appeal voluntariness of confession after Welf & I C §602 admission); *People v Komatsu* (1989) 212 CA3d Supp 1, 6, 261 CR 681 (*Miranda* issue; court chose to review issue anyway).
Inadequate factual basis for plea.	*People v Suite* (1980) 101 CA3d 680, 689, 161 CR 825; *People v Pinon* (1979) 96 CA3d 904, 909, 158 CR 425.
Denial of motion to suppress identification evidence.	*People v Stearns* (1973) 35 CA3d 304, 110 CR 711.
Denial of motion to change venue.	*People v Krotter* (1984) 162 CA3d 643, 208 CR 695.
Erroneous in limine evidentiary ruling.	*People v Shults* (1984) 151 CA3d 714, 718, 199 CR 33.
Violation of Pen C §859b (timely preliminary hearing).	*People v Perez* (1985) 172 CA3d 806, 218 CR 417.
Destruction of evidence (conflict among courts of appeal on appealability).	Compare *People v Avalos* (1996) 47 CA4th 1569, 1576, 55 CR2d 450 (failure to preserve evidence is due process claim waived by entry of guilty plea), and *People v Wakefield* (1987) 194 CA3d 67, 239 CR 277 (claim of failure to preserve evidence not preserved through Pen C §1538.5 motion), with *People v Aguilar* (1985) 165 CA3d 221, 224, 211 CR 333 (Pen C §1538.5(m) preserves issue for appellate review).
Denial of motion to dismiss under *People v Mejia* (1976) 57 CA3d 574, 129 CR 192.	*People v Lopez* (1988) 198 CA3d 135, 141, 243 CR 590.
Denial of motion to disclose identity of confidential informant.	*People v Collins* (2004) 115 CA4th 137, 148, 8 CR3d 731.

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D. Communicating With Client

§44.14 1. First Contact

Appellate counsel often enter felony cases before meeting their clients, frequently after the clients have been sent to state prison. In such cases, one of counsel's first steps should be to write a letter to the client. The letter should introduce counsel to the client; briefly explain the appellate process (including that it takes an average of 18 months for a criminal appeal to be resolved); ask the client to describe any issues he or she thinks should be raised; and invite the client to contact counsel by letter or collect telephone call with any questions about the appellate process, counsel's background and qualifications, and about the case itself. The letter should be written in the plainest possible language, avoiding legal jargon.

Ø **Note:** For help in finding a current address for a client in the state prison system, call the Inmate Locator in Sacramento at (916) 445-6713. You will need the number assigned to the client by the California Department of Corrections and Rehabilitation (CDCR) ("CDC number") or the client's date of birth. The Department will provide you with the prisoner's location and mailing address, but not his or her release date. This number operates 24 hours a day.

Counsel should consider having a policy of accepting all collect calls from imprisoned clients, except the most obstreperous. Counsel may also contact the client's prison "counselor" or "case manager" to arrange phone calls to the client.

Clients often hope or even expect that counsel will visit the prison to meet with them. While prison visits can be reassuring to the client, they are not generally necessary to appellate litigation. Particularly given the remote locations of certain state prisons, such as Susanville and Pelican Bay, prison visits can consume a disproportionate amount of counsel's time and the financial resources available for the appeal. In noncapital court-appointed cases, counsel will not be paid for time or reimbursed for expenses incurred in visiting a client in prison unless a case-specific reason for the visit exists and the supervising appellate project authorizes the visit in advance. When appellate counsel is privately retained, the client and the client's family will likely agree that a prison visit is not the best use of limited resources.

However, in some situations, a prison visit with the client is advisable and can be essential. Examples include investigation of an issue to be raised on habeas corpus in which the client's personal knowledge and recollection is important; discussion of a complex and sensitive decision about whether to dismiss the appeal; and, most important, communication with a client who is actually or functionally illiterate. When a prison visit is called for, appointed counsel should immediately seek authorization from the supervising appellate project.

All counsel must contact the prison to arrange for a "legal visit" and to learn the applicable rules. The schedules and rules governing legal visits vary greatly from prison to prison and can include such details as clothing colors a visitor is not allowed to wear, the number of keys a visitor is allowed to carry, and how much money a visitor can bring in.

Contact information for all California state prisons is available on the CDCR's website at http://www.cdcr.ca.gov/Visitors/index.html.

When going to see a client in prison, counsel should make sure to bring any necessary documents. For example, if a habeas petition is a possibility, counsel should bring any necessary release forms. If counsel will be advising the client to dismiss the appeal, the reasons for that advice should be brought in writing to be given to the client and a dismissal form should be brought for the client's signature.

Ø **Note:** It is considered courteous for visiting counsel to offer to buy the incarcerated client a soda or other snack from the vending machines often located in the visiting area.

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§44.15 2. While Appeal Is Pending

Counsel must keep the client reasonably informed about significant developments in the case and promptly comply with reasonable requests for information. See Cal Rules of Prof Cond 3-500. Counsel should provide the client with a copy of every brief and other substantive document filed on the client's behalf, and, if the client desires, copies of the Attorney General's briefs as well.

The more often counsel corresponds with clients, the more confidence clients generally have in the quality of counsel's representation. When the client is asked to send or return a document, counsel should enclose a self-addressed, stamped envelope. Including such envelopes in every letter can also help foster a positive relationship and reduce time lags in correspondence.

> Ø **Note:** In child molestation and other sensitive cases, counsel probably should not discuss the charges or facts of the case in letters with the client. The client also may wish to have copies of the briefs sent to a friend or relative, rather than directly to the client. Inmates convicted of child molestation have been beaten and killed in prison.

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§44.16 3. At Conclusion of Case

Promptly notify client of decision. Defense counsel must promptly notify the client of the court's decision. It is common for counsel to mail the defendant a copy of the opinion. See Cal Rules of Prof Cond 3-500, 3-700(A)(2); but see Note in §44.15 on exception for child molestation cases.

When appeal is successful. If the appeal is successful, counsel should consider making extra efforts to contact the client right away by, for example, contacting the client's counselor or case manager to arrange for a telephone conversation, either by direct or collect call. This is not simply because the client is entitled to get the good news as soon as possible. Unfortunately, good fortune can arouse jealousy and ill-will in other prisoners for which the client should be prepared. In addition, a client can become so excited by good news that he or she stops managing his or her own behavior in the careful manner demanded by life inside. Thus, when conveying news of a positive outcome, counsel should advise the client to remain calm and circumspect and remind the client that it could be several weeks or even months before the client can actually enjoy the effects of victory.

Appellate counsel should be sure to follow up the favorable judgment in whatever way is necessary to ensure an expeditious conclusion.

> Ø **Note:** Penal Code §1382(a)(2) requires that the criminal action against a previously convicted defendant be dismissed if he or she is not brought to trial within 60 days after the trial court and prosecutor are given notice of an appellate order which "in effect" grants the defendant a new trial. This time limit is extended to 90 days if the reversal is from a conviction on a guilty plea entered into before a preliminary hearing and the prosecutor elects to resubmit the case for preliminary hearing. Appellate counsel should consider promptly filing and serving the requisite notice to expedite the final resolution of a successful appeal.

When appeal is unsuccessful. If the appellate court did not grant the relief the appellant sought, counsel should send the client a letter explaining the client's right to pursue the matter further (*e.g.,* by seeking direct review in a higher court or by filing a state or federal habeas corpus petition). If counsel will not be seeking further review on the client's behalf, counsel should usually send the entire record (clerk's and reporter's transcripts) to the appellant. See Cal Rules of Prof Cond 3-700(D)(1).

> Ø **Note:** In some cases, the client may not want the transcripts sent to him or her. The client may wish to prevent others in the prison from learning the nature of the case, especially if it involves a sex offense against a child.

When counsel's appointment or retainer does not include proceeding to the next stage (*i.e.*, the state supreme court or federal court), but the client's case may have some chance of success there, many attorneys view it as their duty to the client, or at least a necessary kindness, to prepare a simple pleading, such as a petition for review or federal habeas petition, for the client to file in propria persona.

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§44.17 E. Communicating With Trial Counsel

Early on, appellate counsel should contact the lawyer(s) who represented the client at trial in order to get their view of the proceedings below and their ideas about potential issues on appeal. Trial counsel can be an invaluable source of ideas about the case, and may have set up issues for appeal—ideas and issues that appellate counsel might otherwise miss from just reviewing the transcripts.

It is worthwhile to attempt to develop a cordial and cooperative relationship with trial counsel early in the process. Although both trial and appellate counsel represent the same client, albeit at different stages of the proceedings, they do not always view themselves as a team. The ever-present possibility that appellate counsel will assert (either on direct appeal, or in a related habeas proceeding) that trial counsel provided ineffective assistance leads some trial counsel to become defensive and to refuse to assist appellate counsel and their common client. In negotiating this sometimes tricky relationship with trial counsel, tact and kindness are useful tools for the appellate advocate.

Appellate counsel should ask to review or copy trial counsel's file. A recalcitrant trial attorney should be gently reminded that the file is the property of the client, not the attorney, and that "a trial attorney is obligated to turn over the litigation file to the client or new counsel once that attorney's representation has terminated." *In re Steele* (2004) 32 C4th 682, 693, 10 CR3d 536; see California State Bar Formal Opinion No. 1992-127. If the trial lawyer still refuses to cooperate, however, appellate counsel should send a formal demand letter and consider seeking a motion to compel. See the sample form in California Criminal Law Forms Manual §44.1 (2d ed Cal CEB 2005). Often, just telling trial counsel that a motion to compel will be filed if the file is not turned over will be enough to achieve the desired result.

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§44.18 F. Bail on Appeal

In theory, a convicted defendant *must* be released on bail pending appeal as long as the defendant establishes by "clear and convincing evidence" that (Pen C §1272.1):

- He or she is not likely to flee;
- He or he does not pose a danger to any person or to the community; and
- The appeal is not for the purpose of delay and raises a substantial legal question which (if the defendant prevails) is likely to result in reversal.

In practice, however, courts rarely exercise their discretion to grant bail on appeal, and challenges to a trial court's refusal to grant bail are seldom successful.

After a review of the merits of the case, if it appears that bail pending appeal is a possibility, the matter should be discussed with the client. A motion for bail on appeal is made to the trial court in the first instance. Cal Rules of Ct 8.312(b). See chap 5, §41.6 for discussion of bail.

If bail on appeal was denied or set too high in the trial court, counsel may file an application for bail or to reduce bail on appeal in the appellate court. Cal Rules of Ct 8.312(a). The application is served on both the district attorney and the Attorney General. Cal Rules of Ct 8.312(c). A sample application for bail pending appeal is in Appeals & Writs §4.46.

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§44.18A G. Motions on Appeal

A substantive motion filed in a reviewing court must be accompanied by a memorandum of law and proof of service on all other parties. Cal Rules of Ct 8.25(a)(2), 8.54(a)(2). Any opposition to a motion must be served and filed within 15 days after the motion is filed. Cal Rules of Ct 8.54(a)(3). An adverse party who fails to file a written opposition may be deemed to consent to the court's granting the motion. Cal Rules of Ct 8.54(c).

The first page of either a motion or an opposition should contain the name, address, phone number, and State Bar number of the attorney filing the motion. Cal Rules of Ct 8.40(c), 8.204(b)(10)(D). The original and all copies must be printed on recycled paper. Cal Rules of Ct 8.40(a), 8.204(b)(1). The number of copies required by Cal Rules of Ct 8.44(a)-(b) (three copies in the court of appeal; eight copies in the supreme court) should accompany the original.

The reviewing court may rule on the motion at any time after an opposition or other response is filed or the deadline for opposition passes. Cal Rules of Ct 8.54(b).

Ø **Note:** On its own or a party's motion, the court may place a motion on the calendar for oral argument. Cal Rules of Ct 8.54(b)(2). This rarely happens.

For discussion of motions for extension of time, see §44.31.

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H. Record on Appeal

§44.19 1. Appeal Is Based on Record

Appeal is based on record. Matters not part of the record cannot be considered on appeal, even if counsel gives the court affidavits to support the new information. *People v Szeto* (1981) 29 C3d 20, 35, 171 CR 652. See also Cal Rules of Ct 8.204(a) ("appellant's opening brief must … [p]rovide a summary of the significant facts limited to matters in the record"); *People v Collie* (1981) 30 C3d 43, 57 n10, 177 CR 458 (declarations concerning facts not in record will be stricken); *People v Green* (1979) 95 CA3d 991, 1001, 157 CR 520 (appellant's burden to provide adequate appellate record). The items that must be included in the record on appeal are covered in §44.20.

Right to transcript on appeal. The federal Constitution guarantees indigent defendants convicted of felonies the right to a free transcript on appeal or an adequate substitute. *Roberts v La Vallee* (1967) 389 US 40, 19 L Ed 2d 41, 88 S Ct 194. California law goes further and guarantees both indigent and nonindigent defendants in felony cases the right to a record of sufficient completeness for proper review, furnished at state expense. *In re Armstrong* (1981) 126 CA3d 565, 570, 178 CR 902.

Appellant must ensure that record is adequate. The appellant bears the burden of ensuring that an adequate appellate record is provided. *People v Barton* (1978) 21 C3d 513, 518, 146 CR 727; *People v Green* (1979) 95 CA3d 991, 1001, 157 CR 520. When appellate counsel fails to ensure that the record is sufficient for full consideration and resolution of the appeal, he or she has provided constitutionally ineffective assistance. *People v Barton, supra*.

What constitutes an "adequate record" is determined by the issues to be decided on appeal in a given case. At a minimum, however, certain items must be included in any appellate record. The items are referred to as the "normal record," discussed in §44.20. In contrast, material that was not before the trial court cannot be part of the appellate record and generally cannot be considered by the court deciding the appeal, even if counsel provides the appellate court with affidavits or other means or proving up new material. *People v Szeto* (1981) 29 C3d 20, 35, 171 CR 652. See also Cal Rules of Ct 8.204(a)(2)(B); *People v Collie* (1981) 30 C3d 43, 57 n10, 177 CR 458 (declarations concerning facts not in the record will be stricken). But see §44.26A on judicial notice on appeal.

This does not mean, however, that appellate counsel is simply limited to what appears in the transcripts that are initially processed by the clerk. Various methods of expanding the appellate record to include matters not in the original transcripts are discussed in §§44.22-44.23A (augmentation of record), §44.24 (correction of record), and §44.25 (settled statements). Also, material not tendered in the trial court can be presented to the appellate courts through other procedural vehicles, such as a habeas corpus petition. For discussion of habeas corpus in the state courts, see chap 42 and Appeals & Writs, chaps 9-10.

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Source: Criminal Law/California Criminal Law Procedure and Practice/44 FELONY APPEALS/§44.20 2. What Record Should Include

§44.20 2. What Record Should Include

The California Rules of Court use the term "normal record" to refer to items that must be included in the record in every criminal appeal. Cal Rules of Ct 8.320(a), (d). The normal appellate record consists principally of the clerk's transcript and the reporter's transcript on appeal.

Ø **Note:** The "normal record" does not include transcripts of jury voir dire proceedings or counsels' opening statements. These omissions can be unfortunate for appellate counsel who did not also represent the client at trial because matters of potential significance on appeal often take place during those early parts of the trial. Such material can include motions, such as *Batson-Wheeler* motions alleging invidious discrimination in jury selection; objections, such as one asserting prosecutorial misconduct in the opening statement; and other errors. See, *e.g.*, *People v Johnson* (2004) 119 CA4th 976, 14 CR3d 780 (judge committed reversible error by amplifying on reasonable doubt instruction during voir dire). Appellate counsel should be particularly careful to check the clerk's minutes in the clerk's transcript, and to consult recollections of trial counsel and the client, to ascertain whether the reporter's transcript is complete and whether augmentation is needed.

Ø **Practice tip:** The Ninth Circuit has held that when a defendant presents a "plausible" *Batson-Wheeler* claim, the U.S. Constitution *requires* that the record on appeal include a complete transcript of the jury voir dire. *Boyd v Newland* (9th Cir 2006) 467 F3d 1139, 1150. In these instances, the record should (but rarely does) include juror questionnaires, since the "questionnaire is a part of the voir dire itself." *Lesher Communications, Inc. v Superior Court* (1990) 224 CA3d 774, 778, 274 CR 154; *Bellas v Superior Court* (2000) 85 CA4th 636, 640 n2, 102 CR2d 380.

The local rules of some courts of appeal automatically augment the normal record to include additional material. See, *e.g.,* 1st App Dist Local R 6 (*Marsden* hearings, specified pretrial motions); 2d App Dist Local R 1 (jury selection when *Batson-Wheeler* motion made; counsel's opening statements; waivers of constitutional rights; proceedings involving guilty or nolo contendere pleas and sentencing; and certain pretrial proceedings). On completing or augmenting the reporter's transcript, see §§44.21-44.23A.

Ø **Note:** Juvenile appeals have a different normal record. Cal Rules of Ct 8.404 (amended and renumbered as Cal Rules of Ct 8.407, effective July 1, 2010).

Clerk's transcript. The clerk's transcript is a compendium of various documents filed in the trial court, such as orders of the court, motions and briefs, the clerk's daily minutes, copies of jury instructions, the verdict, confidential probation reports, and confidential court-ordered diagnostic and psychological reports. The specific content required by law depends on the nature of the appeal. The items that the clerk's transcript must contain in a defendant's appeal from a judgment of conviction or a People's appeal from an order granting a new trial are listed in Cal Rules of Ct 8.320(b). The items required in a People's appeal from a judgment on a demurrer to the accusatory pleading, or a People's or defendant's appeal from an appealable order other than an order on a motion for a new trial, are listed in Cal Rules of Ct 8.320(d).

Reporter's transcript. The reporter's transcript is the verbatim record of official trial proceedings. The items that must be included in this transcript in a defendant's appeal from a judgment of conviction or a People's appeal from an order granting a new trial are listed in Cal Rules of Ct 8.320(c). In other appeals, the normal record includes a reporter's transcript of any proceedings incident to the judgment or order being appealed. Cal Rules of Ct 8.320(d).

Exhibits. The record officially includes exhibits admitted in evidence, refused or lodged, but these are not copied and transmitted to the parties. See Cal Rules of Ct 8.320(e). An exception is made for transcripts of taped or videotaped recordings furnished to the trial judge or jury; these transcripts, commonly designated as trial exhibits, along with the tapes themselves must be included in the clerk's transcript. Cal Rules of Ct 8.320(b)(11). On viewing exhibits and having them transmitted to the reviewing court, see §44.26.

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§44.20A 3. Preparation, Certification, and Transmittal of Record

When there has been a trial on the merits, the superior court clerk must ordinarily begin preparing the clerk's transcript, and the reporter must start preparing the reporter's transcript, immediately after a finding or verdict of guilt is announced; when the appeal is from a plea of guilty or nolo contendere, or from the admission of a probation violation, preparation must begin immediately after a notice of appeal or certificate of probable cause is filed. Cal Rules of Ct 8.336(a)-(d). Deadlines for completing these transcripts are set forth in §42.2. See also Cal Rules of Ct 8.336(b)-(d). Extensions of time are governed by Cal Rules of Ct 8.336(e). Once the transcripts are certified as correct, the clerk must send the originals to the reviewing court and copies to the Attorney General or the district attorney (whichever is counsel for the People on appeal) and to the defendant's appellate counsel (or to the district appellate project if the defendant is not represented by appellate counsel when the transcripts are certified). Cal Rules of Ct 8.336(f). Transcripts must comply with Cal Rules of Ct 8.144, 8.328, 8.336.

Ø **Note:** The confidential transcript of any *Marsden* hearing, held on a defendant's request to replace one court-appointed attorney with another (see *People v Marsden* (1970) 2 C3d 118, 84 CR 156), must be sent as part of the record to the reviewing court and to the defendant's appellate counsel. The Attorney General does not receive the transcript of a *Marsden* hearing unless the defendant raises a *Marsden* issue in the opening brief. Even then, the defendant may seek to shield confidential material in the transcript from the Attorney General. Cal Rules of Ct 8.328(b).

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§44.21 4. Determining Whether Record Is Complete; Informal Notice of Incomplete Record

Appellate counsel should check the record closely to make sure that all items designated as part of the "normal record" by Cal Rules of Ct 8.320 and any pertinent local rules are, in fact, included in the copy received by counsel and that they are legible. If an item listed as part of the normal record was omitted, counsel can informally ask the clerk to prepare the missing item, certify it, and transmit it as an augmentation to the record without the need for a court order. Cal Rules of Ct 8.155(b), 8.340(b). See generally Appeals & Writs §3.7.

This type of notice is usually in the form of a letter addressed to the criminal appeals section of the superior court. Copies should be served on opposing counsel and on the reviewing court. Cal Rules of Ct 8.155(b).

As an alternative to the informal notice, or if the clerk or reporter fails to comply within 10 days, counsel may file a motion for augmentation. Cal Rules of Ct 8.155(a)-(b), 8.320(d). On motions for augmentation, see §44.23.

> Ø **Note:** Local rules of courts of appeal may *require* counsel to utilize the informal notice procedure set out in Rule 8.155(b) before filing an augmentation motion to obtain omitted material (see 5th App Dist Local R 1(a)) or require counsel to notify the superior court clerk to forward the omitted item in lieu of a motion (see 2d App Dist Local R 2(a)).

Counsel who has any doubt whether the record is complete should go to the superior court clerk's office and compare the contents of the record with the contents of the clerk's file. Larger counties have branch offices of the superior court, so it may be wise to call ahead to make certain where the files are kept.

Going through the clerk's file, counsel may find references to reporters' transcripts, exhibits, or other items that were not made part of the record on appeal. Procedures vary, but many clerks' offices keep a separate file for exhibits, so counsel should ask to review *all* files relating to the superior court action number of the case.

> Ø **Note:** Appointed counsel whose offices are far from the court housing the file should find out from the supervising appellate project whether counsel can be reimbursed for travel to review the file. Some appellate projects will, on request, send a staff member to review the file on counsel's behalf.

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5. Augmentation of Record

§44.22 a. What May Be Added Through Augmentation

The reviewing court's authority to augment the record extends primarily to material on file in, or lodged with, the superior court, including certified transcripts of oral proceedings. Cal Rules of Ct 8.155(a). See also *People v Preslie* (1977) 70 CA3d 486, 490, 138 CR 828. If a reporter's transcript is unavailable, the court may expand the record to include an agreed or settled statement. Cal Rules of Ct 8.130(g), 8.134, 8.137, 8.155(a), 8.346. See §44.25. Augmentation is otherwise unavailable for adding material that is not part of the trial court record. *People v Brooks* (1980) 26 C3d 471, 484, 162 CR 177.

Motions made in the trial court are often the subject of augmentation requests. Although the normal record includes both written papers and oral proceedings on certain types of motions (see Cal Rules of Ct 8.320(b)-(c)), many other types are not included. Whether such motions exist in a particular case and whether they may be relevant to the appeal are determined principally from the trial court minute orders, which are part of the normal clerk's transcript, and by discussions with trial counsel and the defendant.

Other materials that may be added through augmentation are reporter's transcripts of jury voir dire and opening statements, which are not part of the normal record. See Cal Rules of Ct 8.320(c)(3). See, *e.g.*, *People v Johnson* (2004) 119 CA4th 976, 14 CR3d 780 (judge committed reversible error by amplifying on reasonable doubt instruction during voir dire).

Ø **Note:** In some appellate districts, local rules automatically augment the record with materials not included in the Cal Rules of Ct 8.320 normal record. See, *e.g.,* 2d App Dist Local R 1.

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§44.23 b. Procedure for Augmenting Record

The appellate court may augment the record on appeal in response to a party's motion or on its own motion. Cal Rules of Ct 8.155(a)(1), 8.340(d). If a copy of the document or transcript the party wants to include in the record is available, it must be attached to the motion to augment. Cal Rules of Ct 8.155(a)(2). The motion (and any opposition) should adhere to the general rules governing motions in a reviewing court (see §44.18A). A sample motion is in Appeals & Writs §3.47.

Ø **Note:** The statewide rules do not set a deadline for filing an augmentation motion, but a reviewing court may be disposed to deny a motion filed after the party has received one or more extensions to file its brief. See 2d App Dist Local R 2(b) (deadlines for filing augmentation motions, after which motion will not be granted absent showing of good cause for delay).

To obtain an order augmenting the record beyond what is normally provided under Cal Rules of Ct 8.320, counsel must show good cause by describing with particularity how and in what manner the material sought may be useful to the appellant on appeal. *People v Silva* (1978) 20 C3d 489, 143 CR 212; *People v Gaston* (1978) 20 C3d 476, 143 CR 205. See also 2d App Dist Local R 2(d). A motion to augment is likely to be denied if it does not explain why the additional record is needed. *People v Ballard* (1969) 1 CA3d 602, 604, 81 CR 742. Every motion to augment should include the following (*People v Gaston, supra*):

- A description of the document or proceeding sought;
- A synopsis of the point that may be argued on appeal in connection with the document;
- If necessary, a declaration that establishes the contents and relevance of the document being sought, referring to information from trial counsel, if appropriate; and
- For an additional reporter's transcript, an indication of the nature of the proceedings in question, the date of the proceedings, the number or letter of the department in which the proceedings were held, and the name of the court reporter as indicated in the superior court minute order.

Counsel can take various steps to expedite an augmentation:

- Make sure that the motion to augment is complete and includes all items needed to pursue potential issues;
- Submit a proposed order with the motion (which local rules may require; see, *e.g.,* 2d App Dist Local R 2(g)); and
- When a transcript is requested, establish contact with the court reporter to learn how soon the transcript can be prepared.

Ø **Note:** Court reporters can be located through the trial court clerk's office.

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§44.23A c. Application to Superior Court for Additional Record

Under Cal Rules of Ct 8.324 the parties may apply to the superior court to include in the record certain items, specified by the rule, in addition to the normal record. The application must be filed with the notice of appeal or as soon after that as possible, and it must explain how the material will be useful on appeal. Cal Rules of Ct 8.324(c). The trial judge must rule on the application within 5 days; otherwise, the materials automatically become part of the record. Cal Rules of Ct 8.324(d). A parallel provision for juvenile cases is in Cal Rules of Ct 8.404(c) (amended and renumbered as 8.407(c), effective July 1, 2010).

Ø **Note:** If trial counsel is aware of a potential appellate issue, *e.g.,* denial of a *Batson-Wheeler* motion, that will not be sent to the appellate court as part of the "normal record" (see Cal Rules of Ct 8.320), he or she might want to request an additional record when filing the notice of appeal.

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§44.24 6. Correction of Record

If any part of the record is inaccurate, the appellate court can order it corrected on the motion of a party, on its own motion, or by stipulation. Cal Rules of Ct 8.155(c)(1), 8.340(c). The clerk must send a copy of any document or transcript added to the record to all the parties listed in Rule 8.340(a)(1). Cal Rules of Ct 8.340(c). For juvenile appeals, see Cal Rules of Ct 8.410, effective July 1, 2010. The appellate court can order the superior court to settle disputes about the record's accuracy. Cal Rules of Ct 8.155(c)(2). The reporter's transcript is presumed accurate, and the party challenging its accuracy must introduce evidence to rebut that presumption. *People v Kronemyer* (1987) 189 CA3d 314, 234 CR 442.

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§44.25 7. Missing Record and Settled Statements

Particular proceeding not reported. Occasionally, an unreported proceeding (such as a bench or chambers conference) may be material to an issue to be raised in the opening brief. In such cases, it may be possible to fill the gap in the record by obtaining a settled statement. See *People v Hardy* (1992) 2 C4th 86, 183 n30, 5 CR2d 796. An application to prepare a settled statement should be filed in the trial court and explain why there is no transcript and how the material requested may be useful on appeal. Cal Rules of Ct 8.130(g), 8.137, 8.346; *People v Castro* (1982) 138 CA3d 30, 187 CR 658. If the application is made in the appellate court, the court may remand the matter to the trial court to decide whether a settled statement can be obtained. *People v Gzikowski* (1982) 32 C3d 580, 584 n2, 186 CR 339. An evidentiary hearing is often necessary in the trial court. See *People v Hardy, supra*; *People v Gzikowski, supra*.

If there is any doubt about whether a proceeding was reported, counsel should make a motion in the appellate court to augment the record. See §44.23.

Loss of all or part of record. Sometimes a portion of the record is missing because of the loss or destruction of the court reporter's notes or the death of the court reporter. Appellate counsel faced with an incomplete record should attempt to obtain a settled statement of the missing portion. See *People v Moore* (1988) 201 CA3d 51, 56, 248 CR 31.

The loss or destruction of a material portion of the record, or the absence of a record, through no fault of the defendant, may constitute a denial of meaningful appellate review, requiring reversal. See Pen C §1181(9); *People v Moore*, *supra*. There is no presumption of prejudice from the absence of materials in the appellate record; the defendant bears the burden of showing that the record is inadequate to permit meaningful appellate review. *People v Harris* (2008) 43 C4th 1269, 1280, 78 CR3d 295. To prevail on such a claim, the defendant must show that the missing record is critical to an issue the defense intended to raise on appeal and that an adequate substitute for the record cannot be obtained. See *People v Galland* (2008) 45 C4th 354, 370, 86 CR3d 841. The result is highly dependent, therefore, on the facts. See, *e.g., People v Wilson, supra* (incomplete record in capital case did not require reversal; reviewing court gave defendant benefit of doubt on unavailable facts); *In re Steven B.* (1979) 25 C3d 1, 157 CR 510 (destruction of portion of juvenile jurisdictional proceedings entitled defendant to new hearing); *People v Everett* (1990) 224 CA3d 932, 274 CR 429 (destruction of record, as allowed by statute, 5 years after defendant failed to appear for sentencing, did not deny defendant right to appeal when defendant was arrested several years later); *People v Moore, supra* (court reporter's failure to provide transcript of closing argument because of theft of tapes from her car was harmless); *People v Jones* (1981) 125 CA3d 298, 178 CR 44 (new trial required when all trial notes destroyed; impossible to reconstruct record); *People v Gloria* (1975) 47 CA3d 1, 120 CR 534 (defendant prejudiced by reporter's failure to provide written record of jury instructions). But see *People v DeFrance* (2008) 167 CA4th 486, 84 CR3d 204 (no prejudicial error when counsel stipulated to not reporting jury instructions, did not object to instructions as read, and settled statement indicated error was harmless).

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§44.26 8. Viewing and Transmitting Exhibits

Although trial court exhibits are considered part of the record on appeal, they are not transmitted to the reviewing court and the parties as part of the normal record. Instead, Cal Rules of Ct 8.320(e) states that exhibits admitted in evidence, refused, or lodged may be transmitted to the reviewing court under the procedure in Cal Rules of Ct 8.224 (described below).

> Ø **Note:** An exception exists when audio- or videotape recordings are put into evidence at trial. In such cases, a transcription of the tape must be offered by the proponent of the evidence, marked for identification, and then included in the clerk's transcript on appeal. Cal Rules of Ct 2.1040, 8.320(b)(11). However, if the trial court has failed to enforce this rule, appellate counsel will be confronted with a record containing only a reference in the reporter's transcript to a tape's having been played for the jury, but no transcription of the tape in either the reporter's transcript or the clerk's transcript on appeal. In that circumstance, appellate counsel should take necessary measures to complete, augment, or correct the record. See §§44.21-44.25.

Appellate counsel should review trial exhibits, including audio- and videotapes, whenever they are potentially relevant to an issue on appeal. Storage of exhibits varies from county to county, so counsel should contact the appropriate court clerk for the local procedure for viewing exhibits. It is often possible to arrange with the appellate court clerk to have the exhibits transmitted to the court of appeal for counsel to view there. Although this method may be more convenient for counsel than a trip to the clerk's office, it runs the risk of bringing unfavorable material to the attention of both opposing counsel and the court.

Counsel must serve and file a notice in the superior court, designating exhibits to be transmitted to the reviewing court, within 10 days after the last respondent's brief is filed or could be filed. Cal Rules of Ct 8.224(a)(1). After that notice is served, if any other party wants the reviewing court to consider additional exhibits, that party must file and serve its own notice within 10 days. Cal Rules of Ct 8.224(a)(2). All notices designating exhibits must be served on the reviewing court. Cal Rules of Ct 8.224(a)(3). A sample notice to the superior court clerk is in Appeals & Writs §5.52.

> Ø **Note:** Another way to bring an important exhibit to the court's attention is to attach it to a brief. A party may attach up to 10 pages of exhibits (or other parts of the record) to any brief, and on request, a presiding judge may permit a party to attach additional pages for good cause. Cal Rules of Ct 8.204(d).

If the Rule 8.224 deadline is missed, a party can ask the reviewing court for permission to send an exhibit. Cal Rules of Ct 8.224(c). An appellate court may, at any time, direct the superior court to send it an exhibit. Cal Rules of Ct 8.224(d).

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§44.26A 9. Request for Judicial Notice; Motion to Take Additional Evidence

Evidence Code §459 specifies the matters of which an appellate court must or may take judicial notice. To request that an appellate court take judicial notice, a party must serve and file a separate motion with a proposed order. Cal Rules of Ct 8.252(a)(1), 8.366(a). The motion must explain why the matter to be noticed is relevant to the appeal, whether the matter was presented and taken notice of in the trial court, and whether the matter relates to proceedings occurring after the order or judgment that is the subject of the appeal. Cal Rules of Ct 8.252(a)(2), 8.366(a). A sample motion for judicial notice appears in Appeals & Writs §4.48.

Ø **Note:** Although an appellate court can take judicial notice of records in another proceeding, it may not take notice of the *truth* of the (hearsay) contents of those records. *People v Woodell* (1998) 17 C4th 448, 455, 71 CR2d 241. See *People v Esayian* (2003) 112 CA4th 1031, 1037, 5 CR3d 542.

California Rules of Court 8.252 also prescribes how to ask a reviewing court to take evidence on appeal or to make factual findings under CCP §909. Cal Rules of Ct 8.252(b)-(c), 8.366(a). Parties rarely try to use those procedures, and when they do, it seems that the appellate courts usually rebuff them. See, *e.g., In re L.B.* (2003) 110 CA4th 1420, 1423 n1, 3 CR3d 16.

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§44.27 10. Use of Writ of Habeas Corpus When Record on Appeal Is Inadequate

Occasionally, appellate counsel will learn of issues arising at trial, such as ineffective assistance of trial counsel or juror misconduct, that cannot be resolved by the record on appeal and for which correction or augmentation is inappropriate. See, *e.g., People v Cunningham* (2001) 25 C4th 926, 108 CR2d 291 (when trial counsel's reasons for various acts and omissions are not discernable on the record, ineffective assistance claim cannot be sustained on direct appeal but should be brought on habeas); *People v Hayes* (1999) 21 C4th 1211, 1260, 91 CR2d 211 (claim based on trial court's refusal to hold hearing on juror misconduct was not supported by record but could be raised on habeas). In such situations, habeas corpus is an appropriate vehicle to present necessary declarations or other extra-record evidence to the appellate court. A habeas petition may be pursued simultaneously with the direct appeal. See *People v Frierson* (1979) 25 C3d 142, 158, 158 CR 281; *People v Pope* (1979) 23 C3d 412, 426, 152 CR 732.

For further discussion of state court habeas, see chap 42 and Appeals & Writs, chaps 9-10.

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I. Mechanics of Briefing

1. Reading and Digesting Transcripts

§44.28 a. Procedure

After receiving the record, counsel should begin by reviewing the clerk's transcript to learn the procedural history of the case and to try to ascertain whether the record is complete. In addition, the jury instructions are generally more easily reviewed in their written form in the clerk's transcript where they are separated from each other, usually contain CALCRIM or CALJIC numbers or other references to their source, and often show, by hand-written interlineation, whether and how the pattern instruction has been altered.

In reviewing the reporter's transcript, some attorneys find it helpful to read the closing arguments first to get an overview of the case and then read the rest of the transcript from the beginning. While reviewing the reporter's transcript, counsel should have two purposes in mind: (1) developing a coherent narrative for the statement of facts and (2) spotting potential issues for the appeal.

Taking careful notes (with page citations) during the first review of both the clerk's and reporter's transcripts can save an enormous amount of time when drafting the briefs, particularly in writing the statements of the case and facts. Especially helpful are detailed notes prepared with a word-processing program that permits the attorney to run a search for given phrases, facts, witnesses, etc.

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§44.29 b. Issue Spotting

Counsel should list all potential appellate issues while reviewing the record, without undue concern about their relative importance or whether they will actually result in reversal. Although issues may arise anywhere in the record, particularly fruitful sources of appellate issues are jury voir dire, all substantive motions, hearings on the admissibility of evidence, objections to evidence, jury instructions, and sentencing. Counsel should consider the conduct of both the prosecutor and trial counsel: prosecutorial misconduct and ineffective assistance of counsel may be discovered through a pattern of repeated errors or omissions.

Sidebar (bench) conferences are often noted in the transcript but unreported. Trial counsel should be questioned about the issues discussed at sidebar. If an objection or ruling related to an issue to be raised on appeal was made in an unreported bench conference, counsel should obtain a settled statement about what occurred. See §44.25. See also *People v Tuggles* (2009) 179 CA4th 339, 355, 100 CR3d 820 (when court later memorializes timeliness of objection made at unreported sidebar conference, issue is preserved for review).

Once counsel has a list of possible issues, he or she must then determine which ones are arguable issues. In deciding which issues are arguable, counsel should bear in mind that the law is constantly evolving and changing; thus, even if current law is unfavorable, counsel should consider advocating a change in, or an exception to, current law when appropriate and reasonable.

Whenever possible, an appellate issue should be "federalized"; *i.e.,* presented as an error of federal constitutional law as well as state law. Even an issue that seems certain to fail under California case law should be considered if there is reason to think that federal courts will be more sympathetic. A defendant whose appeal is unsuccessful may have an opportunity to seek habeas corpus relief in federal court, but *only* as to federal issues that have been "exhausted" by presenting them to the California courts, necessarily including the supreme court. See generally §45.23.

Choosing which issues to brief is a crucial component of appellate strategy and it is up to appellate counsel to make that call. See *Jones v Barnes* (1983) 463 US 745, 754 n7, 77 L Ed 2d 987, 995 n7, 103 S Ct 3308 (criminal defendant has no constitutional right to have appellate counsel raise every issue that defendant wishes argued). The appellate courts regularly inveigh against what they see as unnecessary litigation of frivolous issues (see, *e.g.*, *People v Craig* (1991) 234 CA3d 1066, 1068, 286 CR 16), and larding a brief with hopeless claims can lead a reviewing court to give short shrift to other, meritorious claims.

Nonetheless, appellate counsel has the fundamental duty to raise every issue that has any likelihood of success (either in the court of appeal or in a higher court) and that would benefit the client if successful. The courts have engaged in a prolonged, talmudic effort to define the precise limit of this duty as a matter of a defendant's constitutional rights. See *Jones v Barnes, supra*; *In re Spears* (1984) 157 CA3d 1203, 1210, 204 CR 333 (defendant has constitutional right to have appellate counsel raise all "crucial assignments of error, which arguably might [result] in a reversal," as long as appellate counsel "believes" the issues to be "meritorious"); *People v Valenzuela* (1985) 175 CA3d 381, 390, 222 CR 405, disapproved on other grounds in *People v Flood* (1998) 18 C4th 470, 76 CR2d 180 (appellate counsel's duty includes raising unmeritorious issues that are nonetheless "arguable"). Regardless of how the constitutional minimum is defined, the diligent appellate practitioner will not let the client lose any opportunity to obtain a reversal or a favorable modification of the judgment.

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§44.30 c. Determining Whether Issue Has Been Preserved for Appeal

Some errors may be raised on appeal even without a timely trial court objection. See, *e.g.,* Pen C §1259 (appellate court may review any instruction given, refused, or modified, even when no objection was made in the lower court, if the instruction affected any substantial rights of the defendant); *People v Scott* (1994) 9 C4th 331, 354, 36 CR2d 627 ("unauthorized sentence" correctable by reviewing court in first instance); *People v Anderson* (2006) 141 CA4th 430, 439, 45 CR3d 910 (appellate court could review purely legal issue on matter of public importance despite failure to object); *People v Ary* (2004) 118 CA4th 1016, 13 CR3d 482 (issue of competence to stand trial may not be waived). See also *People v Partida* (2005) 37 C4th 428, 35 CR3d 644 (defendant forfeited claim that due process required exclusion of gang evidence; however, he could argue on appeal that admission of challenged evidence had legal consequence of violating due process).

In *People v Boyer* (2006) 38 C4th 412, 441 n17, 42 CR3d 677, the supreme court explained that when the appellant properly objects to error in the trial court, federal constitutional grounds may be asserted and considered for the first time on appeal so long as

> the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution.

For the most part, however, an appellate court will not consider procedural defects or erroneous rulings when an objection could have been, but was not, presented to the lower court by some appropriate method. *People v Jenkins* (2000) 22 C4th 900, 1000, 95 CR2d 377. Trial counsel has a duty to preserve issues for appeal by placing any objections on the record. See *People v Daniels* (1991) 52 C3d 815, 841, 277 CR 122. Obviously, the more complete the record the better, but appellate counsel's role is often to comb the record looking for some language that could be construed as a valid objection, *i.e.,* an objection that is sufficiently specific and timely. If no valid objection appears in the record, appellate counsel should ask trial counsel whether any unreported discussions occurred during which objections were made.

Even if it appears that an otherwise viable claim has been forfeited by a failure to object in the trial court, appellate counsel should still strongly consider raising it on appeal. For one thing, the fact that the *right* to raise an issue on appeal may have been forfeited by failure to raise it below does not preclude the appellate court from considering the issue and granting relief. See *People v Smith* (2003) 31 C4th 1207, 1215, 7 CR3d 559; *People v Johnson* (2004) 119 CA4th 976, 984, 14 CR3d 780.

Moreover, if trial counsel has forfeited an important claim of error by failing to object, appellate counsel can then raise the issue through a claim of ineffective assistance of counsel, asserted either on direct appeal, in a habeas corpus petition, or both. See generally Appeals & Writs §4.44. If the underlying issue is raised on direct appeal, and the respondent's brief depends entirely or primarily on the asserted waiver (as opposed to arguing the merits of the issue), that can help frame a subsequent ineffective assistance claim on habeas corpus.

> Ø **Note:** Although the loss of the right to appeal because of a failure to object below is commonly referred to as a "waiver," it is actually a "forfeiture." A waiver is the intentional relinquishment of a known right; a forfeiture is what results from unintentional failure to preserve a claim. See *In re S.B.* (2004) 32 C4th 1287, 1293, 13 CR3d 786; *People v Simon* (2001) 25 C4th 1082, 1097 n9, 108 CR2d 385.

For a detailed discussion of procedural obstacles to appellate review of particular issues, see Appeals & Writs §§4.26-4.29.

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2. Appellant's Opening Brief

§44.31 a. Time Deadlines; Application for Extension of Time

The appellant's opening brief is due 40 calendar days after the record has been filed in the reviewing court. Cal Rules of Ct 8.360(c)(1). The court of appeal can dismiss an appeal for failure to file an opening brief. Cal Rules of Ct 8.220(a)(1). See §44.56. However, the court clerk must first notify the appellant by mail that sanctions, including dismissal of the appeal, will result if the brief is not filed within 30 days after the notice is mailed. Cal Rules of Ct 8.220(a), 8.360(c)(5). When appellant's defense counsel is court-appointed, the court clerk gives notice that if the brief is not filed, counsel will be relieved and new counsel will be appointed. Cal Rules of Ct 8.360(c)(5)(A)(ii). When appellant's defense counsel is not court-appointed, or when the prosecution is the appellant, the court clerk gives notice that failure to comply will result in dismissal. Cal Rules of Ct 8.360(c)(5)(A)(i), (iii). For juvenile appeals, see Cal Rules of Ct 8.412, amended effective July 1, 2010.

Ø **Note:** Rules 8.220 and 8.360 effectively give counsel an automatic, one-time 30-day extension to file the opening brief. Counsel need not file an extension request if he or she can file the brief within the time allowed by Rules 8.220 and 8.360. Cal Rules of Ct 8.212(b)(4).

Unfortunately, the courts of appeal are not altogether consistent in their application of these rules. Some courts encourage counsel to make use of the 30-day period. See 1st App Dist Local R 11 (request for extension not necessary if counsel anticipates brief will be filed within 30 days of due date). Other courts are clearly displeased when counsel fails to file the brief within the time formally granted, *i.e.,* before the Cal Rules of Ct 8.220 and 8.360 period begins and the 30-day letter issues. Indeed, some attorneys have received letters stating that the court will replace counsel or dismiss the appeal if the brief is not filed in some shorter period, *e.g.,* 15 days. This may result from the unfortunate fact that Cal Rules of Ct 8.220 specifies a 15-day period and does not mention that Cal Rules of Ct 8.360 fixes the period at 30 days for appellants in criminal cases. Counsel is well advised to consult the indigent appellate project for the appellate district in which the appeal is pending about local practice regarding extensions of time.

In criminal cases, the parties may not stipulate to extend the time. Pen C §1252; Cal Rules of Ct 8.360(c)(4). Applications to extend time for filing briefs are addressed to the presiding justice of the court of appeal and must be served on all parties to the appellate proceeding. Cal Rules of Ct 8.50, 8.60(c). The party applying for an extension must provide the court with postage-paid envelopes addressed to all parties; the court uses these to mail its order granting or denying the extension. See Cal Rules of Ct 8.50.

Ø **Note:** Although a request for an extension of time is considered a "routine" application under Rule 8.50 rather than a "motion" under Rule 8.54, it is advisable to provide the court with the original and three copies, as required for motions under Cal Rules of Ct 8.44(b)(4), rather than the single copy required for an "other document or paper" under Cal Rules of Ct 8.44(b)(6).

The application must be in the form of a declaration of counsel, setting forth specific facts justifying the extension, not just conclusory statements that more time is needed because of the press of business (see Cal Rules of Ct 8.63(b)(9)), and it must include (Cal Rules of Ct 8.60(c)(2)):

- The date the brief is currently due;
- The length of the extension requested;
- Whether any prior extensions have been granted, and, if so, for how long; and
- Reasons sufficient to constitute "an exceptional showing of good cause" for granting the extension.

Additional requirements may be imposed by local rule. See, *e.g.,* 1st App Dist Local R 11. Some districts require or suggest a particular form for extension applications. These forms and local rules are available in the Courts section of the Judicial Council's website (http://www.courtinfo.ca.gov).

Factors that the court may consider in deciding whether there is an exceptional showing of good cause for an

extension are in Cal Rules of Ct 8.63(b).

Ø **Note:** Although the rules do not specify how long an extension may be sought, appellate lawyers commonly seek extensions of 30 days at a time. The courts of appeal usually grant a first request for a 30-day extension, but counsel should not count on receiving further extensions. If an extension is granted, the court will sometimes indicate that no further extensions will be entertained. See Cal Rules of Ct 8.63 (general policy statement on enforcement of deadlines).

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b. Format of Opening Brief

§44.32 (1) Components

Counsel must adhere to the format set forth in Cal Rules of Ct 8.204. For juvenile cases, see Cal Rules of Ct 8.412(a), amended effective July 1, 2010. See generally Appeals & Writs §§3.26-3.41.

Appellant, like any other party, may join in or adopt by reference all or part of a brief in the same or a related appeal. Cal Rules of Ct 8.200(a)(5).

The components of the opening brief consist of (Cal Rules of Ct 8.204(a)):

- Table of contents;
- Table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities;
- Statement of the nature of the case, relief sought at the trial court, and judgment or order appealed from;
- Statement of appealability of the case;
- Statement of facts, limited to matters in the record;
- Statement of each point with summary headings, supported by argument and, if possible, citation to authority; and
- Conclusion that concisely describes the relief sought on appeal (not required by Rule 8.204(a) but routinely included).

The tables of contents and authorities must appear at the beginning of the brief. Cal Rules of Ct 8.204(a)(1)(A)-(B). The brief must support any reference to a matter in the record by a citation to the volume and page number where the matter appears. Cal Rules of Ct 8.204(a)(1)(C). References to portions of the record submitted electronically must be equally specific. Cal Rules of Ct 8.204(a)(1)(C).

A sample opening brief is in California Criminal Law Forms Manual §44.4 (2d ed Cal CEB 2005).

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§44.33 (2) Statement of Case

The statement of the case should concisely describe the procedural history of the case, including the charges and any amendments; the pleas, motions, and court rulings relevant to the issues raised on appeal; a brief summary of the course of the trial; the verdict; the sentence; and the timely filing of the notice of the appeal. See Cal Rules of Ct 8.204(a)(2)(A).

The statement of the case is basically a chronological outline and should be written with page references to the clerk's transcript, including volume number if there is more than one volume. See Cal Rules of Ct 8.204(a)(1)(C).

Because the content and function of the statement of the case is so well defined, many appellate lawyers pay scant attention to its drafting. It can, however, provide an early opportunity for the advocate to direct the reviewing court's attention to important aspects of the case. For instance, when a claim may turn on the vigor with which the issue was raised below, appellate counsel should clearly note each motion tendered and each hearing held regarding that claim. Likewise, when jury deliberations continued for several days, that fact should be chronicled, because lengthy jury deliberations are a classic indicia of a "close case," and support an argument that a given error was prejudicial to the appellant. See, *e.g., People v Rucker* (1980) 26 C3d 368, 391, 162 CR 13; *People v Fuentes* (1986) 183 CA3d 444, 456, 237 CR 465.

While including all items of procedural history that could be significant to the court's decision, counsel should take care not to burden the statement of the case with extensive references to procedural matters that could not have any bearing on the issues before the appellate court, such as evidentiary proceedings that did not give rise to a colorable claim. Above all, it is crucial that the statement of the case be complete, accurate, and neutral in tone.

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Source: Criminal Law/California Criminal Law Procedure and Practice/44 FELONY APPEALS/§44.34 (3) Statement of Facts

§44.34 (3) Statement of Facts

The statement of facts often presents a difficult and subtle challenge for appellate counsel. On one hand, it must be a thoroughly accurate summary of the trial evidence, neutral in tone and fairly stated. An overly partisan or (worse) factually inaccurate statement may lead the reviewing court to view everything that counsel asserts with skepticism, if not unbridled irritation. On the other hand, a well-written statement of facts will engage the readers—the reviewing judges and their staffs—and prepare them to consider (favorably, one hopes) the substantive arguments that follow. It is, in short, counsel's opportunity to tell the story of "what happened," and at its conclusion, the reviewing court at least should be open to the possibility that the result below was unjust and should be remedied.

The statement of facts should refer only to matters that are in the record on appeal. Cal Rules of Ct 8.204(a)(2)(C). All factual assertions should be supported by appropriate citations to the reporter's transcript. Cal Rules of Ct 8.204(a)(1)(C). Technically, an issue cannot be considered if the opening brief fails to point out the page of the record where the alleged error supposedly occurred. *People v Gidney* (1937) 10 C2d 138, 142, 73 P2d 1186, overruled on other grounds in *People v Hutchinson* (1969) 71 C2d 342, 347, 78 CR 196. See also *People v Dougherty* (1982) 138 CA3d 278, 188 CR 123.

Perhaps the most important factor in presenting a fair and credible version of the facts is to choose the correct lens through which the trial evidence is to be viewed. Except when there is a challenge to the legal sufficiency of the evidence, it is a mistake to attempt to convince the court of appeal that the jury got it wrong; the reviewing court cannot reweigh credibility or the general question of guilt or innocence. See *People v Culver* (1973) 10 C3d 542, 548, 111 CR 183.

> Ø **Note:** For a discussion of how to properly set forth a challenge to the legal sufficiency of the evidence, including instructions to appellate attorneys on the content of the opening brief, see *People v Sanghera* (2006) 139 CA4th 1567, 43 CR3d 741.

The basic rule is that all factual presumptions are in favor of the judgment or order. See, *e.g., People v Ochoa* (1993) 6 C4th 1199, 1206, 26 CR2d 23; *People v Leyba* (1981) 29 C3d 591, 596, 174 CR 867 (search and seizure); *People v Johnson* (1980) 26 C3d 557, 576, 162 CR 431 (jury verdict); *In re Eric J.* (1979) 25 C3d 522, 527, 159 CR 317 (*Miranda* finding); *People v Jimenez* (1978) 21 C3d 595, 609, 147 CR 172, overruled on other grounds in *People v Cahill* (1993) 5 C4th 478, 510 n17, 20 CR2d 582 (voluntariness of confession); *In re James G.* (1985) 165 CA3d 462, 469, 211 CR 611 (juvenile adjudication). Thus, to the extent that a given fact was disputed at trial, the version that is consistent with the defendant's guilt is generally the version that the appellate court will accept, and the statement of facts should reflect that.

There are, however, important exceptions and qualifications to this rule. First, the version of the facts that supports the judgment is not always synonymous with the prosecution's version of the facts—even when the defendant is convicted. When the jury returns a verdict of guilt on a lesser offense, it has necessarily rejected the prosecution's evidence on the greater offense. Thus, some of the most prejudicial evidence, which the appellate court might reflexively accept as true, may be relegated to a footnote in which counsel explains why it should be disregarded.

Second, some issues require the reviewing court to examine the evidence in the light most favorable to the *defendant*. An example is a claim of prejudicial instructional error. See, *e.g., People v Ramkeesoon* (1985) 39 C3d 346, 351, 216 CR 455. In these situations, counsel might use the statement of facts to summarize the disputed evidence on both sides, impartially, again providing some explanation for why this approach was taken.

Third, defense evidence that will be relied on in the argument section of the brief when addressing the prejudicial impact of an error in a "close case" should be included in the statement of facts.

Finally, the fact that evidence supports the judgment below does not necessarily make it pertinent to the issues before the court on appeal. Indeed, some appeals turn entirely on issues, such as the denial of certain pretrial motions, or *Batson-Wheeler* claims (asserting invidious discrimination in jury selection), that do not require any evaluation of the trial evidence. In these cases, counsel should pare the discussion of the facts of the offense itself, particularly the parts

likely to cast the defendant in an unsympathetic light, to a minimum. Even when some of the facts of the offense are pertinent, counsel should take care not to include details that are neither relevant to the legal issues nor helpful to the defendant.

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§44.35 c. Effective Organization

A well-organized, precise brief is the first step toward obtaining a favorable result for the client. The following steps will aid counsel in achieving this result:

- What is the theory that will persuade the court and win the appeal? Counsel should envision the final opinion that he or she would like the court to sign and form the issues and arguments around that opinion, taking into account that there may be issues or cases that are contrary to that position.
- Counsel should make sure each legal argument has a separate heading, and may include subheadings stating each point. The headings should be concise and summarize the point, and should be supported by argument and, if possible, by citation to authority. Cal Rules of Ct 8.204(a)(1)(B). The argument headings set the tone for the entire brief. Each should be a clear sentence that will advise the reader of the issue and begin the process of persuasion.
- Counsel should typically start the argument with a brief summary of the factual basis for the argument; *i.e.,* what happened in the trial court that gives rise to the claim of error. Most issues must have been raised in the trial court before they can be raised on appeal (see §44.30), so the brief should specify when and how each issue was raised in the trial court. This should be followed by a statement of the general applicable law (*e.g.,* the relevant text of a statute that the appellant contends the trial court violated) and the standard of appellate review applicable to the type of error alleged (see §44.36). Next, counsel should emphasize the facts in conjunction with fact-specific case law that supports each issue and distinguish contrary authority. Counsel should then demonstrate that the trial court's error was prejudicial (see §44.37) and therefore requires the judgment to be reversed (or modified). Thoroughly researched, well-organized, succinct arguments will be noticed. A long argument may be more academically complete, but it may not be as persuasive.

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§44.36 d. Standards of Review

Except for certain issues (such as pure questions of law) that are subject to independent (or "de novo") appellate review, assertions of trial court error are judged according to standards of review that give varying amounts of deference to the determinations below.

For example, a reviewing court cannot reverse a conviction simply because the appellate justices are not convinced beyond a reasonable doubt that the defendant was guilty. Instead, the appellate courts apply a "substantial evidence" standard that affords a great deal of deference to the jury's verdict. The court views the evidence in the light most favorable to the prosecution, and if any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the verdict stands. See *People v Johnson* (1980) 26 C3d 557, 576, 162 CR 431.

Other standards of appellate review, such as the "abuse of discretion" standard, apply to other kinds of alleged error. Counsel should consult case law to ascertain the standard of review applicable to the particular error alleged, and the standard should be set forth as part of the argument in the opening brief. See §44.35.

For a more detailed discussion of standards of appellate review, see Appeals & Writs §§4.22-4.25.

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§44.37 e. Demonstrating Prejudice

To obtain reversal of a conviction, appellate counsel must do more than prove that error occurred in the proceedings below; he or she must also show that the error was prejudicial. In most cases, once the appellate court determines that there was error below, it uses one of three standards to measure prejudice:

- The "reasonable probability" or *Watson* test: This test, first set forth in *People v Watson* (1956) 46 C2d 818, 299 P2d 243, applies to errors of state law that do not implicate any federal constitutional guarantees. Such errors will be found prejudicial if the defendant shows that it is reasonably probable that he or she would have obtained a more favorable result in the absence of the error. Erroneous admission of evidence is a type of error that is generally evaluated under this standard. See, *e.g., People v Price* (1991) 1 C4th 324, 3 CR2d 106.
- The "harmless beyond a reasonable doubt" or *Chapman* test: This test, first announced in *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, applies to federal constitutional errors. Such errors will be found prejudicial unless the prosecution can show beyond a reasonable doubt that the error did not contribute to the verdict. See *Neder v U.S.* (1999) 527 US 1, 144 L Ed 2d 35, 119 S Ct 1827 (erroneous jury instructions that omitted element of crime harmless beyond a reasonable doubt); *People v Ducu* (1991) 226 CA3d 1412, 277 CR 464 (limiting cross-examination of witness harmless beyond a reasonable doubt).
- The "prejudicial per se" test: A federal constitutional error that amounts to a "structural defect affecting the framework within which the trial proceeds" (*e.g.,* total deprivation of right to counsel at trial, or judge who was not impartial) is considered prejudicial per se and thus always requires reversal. *Arizona v Fulminante* (1991) 499 US 279, 309, 113 L Ed 2d 302, 331, 111 S Ct 1246. See *People v Tena* (2007) 156 CA4th 598, 612, 67 CR3d 412.

The opening brief should set forth the appropriate standard of prejudice applicable to each alleged error and include a particularized showing that the prejudice resulting from each error requires reversal under the applicable standard. Even when it seems likely that the error is prejudicial per se, and thus not subject to harmless error analysis, it is generally both prudent and helpful to argue, in the alternative, the prejudicial effects of the error.

For further discussion of the standards for evaluating prejudice, see Appeals & Writs §§4.30-4.32.

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f. Type of Brief Filed When No Arguable Issue (*Wende* Brief)

§44.38 (1) Description of *Wende* Brief

***Wende* and its constitutionality.** When appointed appellate counsel concludes, after reviewing the record, that there are no issues that are even arguable on appeal, counsel may file a brief that simply summarizes the procedural and factual history of the case and asks the appellate court to review the record independently to determine if, in the court's judgment, there are any arguable issues that counsel overlooked. *People v Wende* (1979) 25 C3d 436, 158 CR 839. This procedure was challenged in the federal courts as being inconsistent with *Anders v California* (1967) 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396, which required counsel to file a brief that identified any grounds that could potentially support an appeal. However, in *Smith v Robbins* (2000) 528 US 259, 145 L Ed 2d 756, 120 S Ct 746, the Supreme Court upheld the *Wende* procedure.

Procedures under *Wende*. A *Wende* brief should summarize the proceedings and facts with citations to the record. The brief should note that no specific issues are being raised. However, counsel may *not* argue against the client. Counsel should request that the appellate court thoroughly review the entire record to decide for itself whether there are any arguable issues. *Wende*, 25 C3d at 441.

Appellant's counsel should append a declaration stating that a copy of the brief is being sent to the defendant and that counsel has advised the defendant of the nature of the brief, the fact that the defendant may ask the court to relieve counsel (25 C3d at 442), and the fact that the defendant is entitled to file a brief in pro per raising any points he or she chooses (see 25 C3d at 439).

> Ø **Note:** The defendant's right to file his or her own brief in pro per applies only to *Wende* appeals. Courts of appeal sometimes allow a defendant to file a supplemental brief after counsel has filed a brief raising one or more issues, but this is discretionary with the court, because criminal defendants have no general right to self-representation on appeal (see §44.3).

Counsel should consult with the client and trial counsel before deciding whether there are any arguable issues. The appellate lawyer is one step removed from the trial court proceedings; the client or trial counsel may therefore offer useful information from his or her perspective of unfairness in the trial court. If appellate counsel decides that no arguable issue exists, the client should be informed of the basis of counsel's decision to file a *Wende* brief and the client's right to bring any issues to the court's attention despite that brief.

Once a *Wende* brief has been filed, the appellate court will thoroughly examine the record and decide for itself whether any arguable issues exist. If an issue is found, the court will inform counsel for both sides of the issue and provide an opportunity for counsel to brief and argue the issue. 25 C3d at 442 n3; see *People v Coleman* (1991) 53 C3d 949, 281 CR 146. Even if no issue is found, the appellate court is required to file a written opinion that contains "a *brief* description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed," and that should also include "any other information from the record that [the court] anticipate[s] will be relevant in further challenges to the judgment." (Emphasis added.) *People v Kelly* (2006) 40 C4th 106, 110, 51 CR3d 98.

If, after filing a *Wende* brief, counsel subsequently files a supplemental opening brief that identifies and argues a specific issue, the appeal is no longer subject to the dictates of *Wende. People v Skenandore* (1982) 137 CA3d 922, 924, 187 CR 368. Similarly, equal protection principles do not require an independent *Wende* review when counsel has raised a specific issue. *People v Woodard* (1986) 184 CA3d 944, 229 CR 350 (sentencing issue raised and resulted in favorable change in defendant's sentence; no *Wende* review required); *In re Edward S.* (1982) 133 CA3d 154, 157, 183 CR 733 (appellant made two sufficiency-of-the-evidence arguments; although weak, they were enough to preclude *Wende* review); *People v Johnson* (1981) 123 CA3d 106, 176 CR 390.

Several appellate districts have developed rules for the format of *Wende* briefs. Counsel should check local practice in the district in which a *Wende* brief is to be filed.

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§44.39 (2) *Wende* Does Not Apply to Appeals Handled by Retained Counsel

The *Wende* procedure (see §44.37) does not apply to retained counsel. *People v Placencia* (1992) 9 CA4th 422, 11 CR2d 727. If, after reviewing the record, retained counsel believes that no arguable issue can be presented, counsel must discuss that conclusion with the client and either obtain permission to dismiss the appeal or move to withdraw from the case. Counsel must also advise the client to consider obtaining other counsel. *People v Placencia, supra*.

Ø **Note:** The *Wende* procedure, likewise, does not apply to appeals from commitments under the Mentally Disordered Offenders Act (MDOA); *Wende* review is only for appointed counsel's representation of indigent *criminal* defendants and MDOA proceedings are defined as civil. *People v Taylor* (2008) 160 CA4th 304, 312, 72 CR3d 740.

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§44.40 g. Failure to File Brief

Retained counsel's failure to file the appellant's opening brief on time can result in dismissal of the appeal. If counsel is court appointed, failure to file the opening brief may result in the relief and replacement of counsel. See §44.31. Counsel may approach the court for relief from default arising from failure to file the opening brief. See Cal Rules of Ct 8.60(d). A sample motion for relief from default is in California Criminal Law Forms Manual §44.3 (2d ed Cal CEB 2005).

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§44.41 3. Respondent's Brief

The answering brief—called the "respondent's brief on appeal"—is filed by the state Attorney General's office. The structure of a respondent's brief substantially parallels that of an appellant's opening brief. See §§44.32-44.34. The respondent may join in a brief or may adopt by reference any brief in the same or a companion case. Cal Rules of Ct 8.200(a)(5). The respondent may adopt in whole or in part the statement of the case or the facts in the appellant's brief. See Cal Rules of Ct 8.200(a)(5).

The Attorney General may ask the appellate court to "consider and pass upon all rulings of the trial court adverse to the State." Pen C §1252. The Attorney General may not, however, obtain review in a *defendant's* appeal of matters that could have been raised in a *prosecution* appeal. See §44.77. The only rulings adverse to the prosecution that will be reviewed are those essential to affirmance of the judgment and those likely to arise on retrial after a reversal. See *People v Braeseke* (1979) 25 C3d 691, 698, 159 CR 684, vacated on other grounds sub nom *California v Braeseke* (1980) 446 US 932, 64 L Ed 2d 784, 100 S Ct 2147.

> Ø **Note:** Because an "unauthorized sentence" (see §44.53) can be corrected at any time, the Attorney General also may challenge such a sentence for the first time in the respondent's brief on a defendant's appeal. *People v Rowland* (1988) 206 CA3d 119, 126, 253 CR 190.

The respondent's brief must be served and filed within 30 calendar days after the appellant's opening brief is filed. Cal Rules of Ct 8.360(c)(2). The rules on extensions of time for filing the appellant's opening brief also apply to the respondent's brief. See §44.31. If the respondent fails to file a timely brief, the clerk of the reviewing court must notify the parties that if the brief is not filed within 30 days after the notice is mailed, the court will decide the case on the record, the appellant's opening brief, and any oral argument by the appellant. Cal Rules of Ct 8.220(a), 8.360(c)(5).

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§44.42 4. Appellant's Reply Brief

The purpose of the reply brief is to counter arguments made in the respondent's brief. New issues should not be raised for the first time in the reply brief; if they are, the appellate court need not consider them. *People v Jackson* (1981) 121 CA3d 862, 873, 176 CR 166. Although counsel is not required to file a reply brief, it is usually in the client's best interest to do so. The reply brief need not respond to every argument made in the respondent's brief, but it should respond to any argument not already addressed in the opening brief. Frequently, every issue in the respondent's brief does require a response.

The appellant's reply brief must be served and filed within 20 calendar days after the respondent's brief is filed. Cal Rules of Ct 8.360(c)(3).

Ø **Note:** Counsel may wish to make certain of the date on which the respondent's brief was filed, because the reply brief deadline runs from that date, *not* the date on which it was served or received by appellant's counsel. The courts of appeal (and the supreme court) have docket information available online (http://appellatecases.courtinfo.ca.gov) for all adult criminal cases. Users can sign up to be notified by e-mail whenever a brief is filed (and when other events occur) in a particular case.

A sample appellant's reply brief is in California Criminal Law Forms Manual §44.5 (2d ed Cal CEB 2005).

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§44.43 5. Additional Briefs

Supplemental briefs. Any further briefing requires the permission of the presiding justice. Cal Rules of Ct 8.200(a)(4). It is not uncommon for an appellant's appointed counsel to file a supplemental brief raising an issue that was omitted from the opening brief. A motion for leave to file the supplemental brief should either accompany the proposed brief or be submitted in advance. The motion should explain why the new issue was not raised in the opening brief.

Before the case is submitted, most districts will accept a letter, with proof of service on the other party, citing new cases that were decided after briefing.

Amicus curiae briefs. Requirements for amicus curiae ("friend of the court") briefs in the court of appeal are set forth in Cal Rules of Ct 8.200(c). For juvenile appeals, see Cal Rules of Ct 8.412, amended effective July 1, 2010.

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§44.44 6. Length, Filing, and Service of Briefs; Cover Colors

Length. A brief in a noncapital criminal appeal may not exceed 25,500 words if produced on a computer, or 75 pages if typewritten. The presiding justice can allow a longer brief on request, for good cause. Cal Rules of Ct 8.360(b)(5).

Each computer-produced brief must include a certificate by counsel stating the number of words in the brief. Counsel may rely on the software used to prepare the brief to supply the word count. Cal Rules of Ct 8.360(b)(1).

Ø **Note:** The word count certificate, tables of contents and authorities, and any attachment under Cal Rules of Ct 8.204(d) (see §44.26) are not counted against the length limits. Cal Rules of Ct 8.360(b)(3).

Filing. Under Cal Rules of Ct 8.40(b), the cover of appellant's opening brief must be green; the cover of respondent's brief must be yellow; the cover of appellant's reply brief must be tan. The colors for the covers of other briefs are also prescribed in Cal Rules of Ct 8.40(b). The cover must contain the title of the brief; the title, trial court number, and court of appeal number of the case; the names of the trial court and each participating trial judge; the name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief (except that Bar numbers of supervisors are not required); and the name of the party represented by each attorney. Cal Rules of Ct 8.40(c), 8.204(b)(10)(D). Counsel should file the original and the number of copies required by Cal Rules of Ct 8.44(a)-(b). Proof of service should accompany the brief. See Cal Rules of Ct 8.25(a)(2).

Ø **Note:** A brief is generally "filed" on the day the clerk receives it. However, if a brief is mailed on the due date by priority or express mail or delivered to a carrier promising overnight delivery, it is considered timely. See Cal Rules of Ct 8.25(b). This rule also applies to petitions for rehearing and review and to the answers to petitions for rehearing and review.

Service. A defendant's appellate brief must be served on both the district attorney and the Attorney General. Cal Rules of Ct 8.360(d)(1). A copy must also be served on the superior court clerk for delivery to the trial judge. Cal Rules of Ct 8.360(d)(4).

Every defense brief must be served on the defendant, unless he or she has requested otherwise in writing. Cal Rules of Ct 8.360(d)(1)-(2). Counsel must either include in the proof of service an indication that a copy of the brief was sent to the defendant or file with the court a signed statement that the defendant requested in writing that no copy be sent. Cal Rules of Ct 8.360(d)(2).

When appellate counsel is court-appointed, the appellate project must receive a copy of each defense brief. Appellate counsel should also consider sending a copy of each defense brief to the defendant's trial attorney.

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§44.45 7. Defective Briefs

If a brief does not comply with the form and content requirements of Cal Rules of Ct 8.204, the clerk may decline to file it, instead marking it "received but not filed" and returning it to the party. Cal Rules of Ct 8.204(e)(1). If the clerk files the brief despite the noncompliance, the court may do the following (Cal Rules of Ct 8.204(e)(2)):

- On its own motion or on a party's motion, with or without notice, order the brief to be returned to counsel for correction and to be refiled with the clerk within a time specified in the order;
- Order the brief stricken from the files, with leave to file a new brief within a specified time; or
- Disregard defects and consider the brief as if it had been properly prepared.

In addition, a brief that has little or no citation to authority and does not fully state the pertinent evidence with transcript references may be returned, the contentions deemed waived, or counsel reprimanded. See, *e.g., People v Dougherty* (1982) 138 CA3d 278, 188 CR 123; *People v Taylor* (1974) 39 CA3d 495, 114 CR 169.

Ø **Warning:** California Rules of Court 8.18 says that the clerk of the reviewing court "must" not file any record or document that fails to comply with the Rules of Court. As a practical matter, however, papers that violate the rules often *are* filed, as Rule 8.204(e)(2) implicitly recognizes.

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§44.46 J. Oral Argument

The court of appeal may not summarily affirm a conviction without affording the opportunity for oral argument. *People v Brigham* (1979) 25 C3d 283, 285, 157 CR 905. See also Pen C §1253, which provides that "[t]he judgment may be affirmed if the appellant fail[s] to appear, but can be reversed only after argument, though the respondent fail[s] to appear." In practice, however, some appellate courts routinely send notices to appellate counsel indicating that the court is prepared to rule without argument, and a judgment may be reversed even though argument has been waived.

The mechanics of calendaring oral argument in the courts of appeal vary greatly from district to district, and sometimes within divisions of the same district. The court will generally send a calendar notice after the reply brief has been filed or the time for filing the reply brief has expired, asking whether either party wishes to request oral argument, and in some instances, indicating whether the court believes oral argument would be useful. In districts where telephonic oral argument is available, the notice will also ask whether the parties intend to appear in person or by telephone.

Although some appellate judges have suggested that oral argument is a useless formality, many experienced appellate practitioners believe that the appellant should never waive oral argument in an appeal. Nevertheless, oral argument is waived in many appellate cases. In deciding whether to waive oral argument, counsel should consider first whether oral argument will help or hurt the case. Another consideration is the view of the particular panel of judges toward the usefulness of argument. But see *People v Pena* (2004) 32 C4th 389, 398, 9 CR3d 107 (oral argument waiver notice used by Division Two of Fourth District created risk of interfering with right to oral argument). On oral argument generally, see Appeals & Writs §§5.1-5.7.

Once counsel has requested oral argument, he or she should honor the commitment to argue. The argument itself should not be a restatement of the entire contents of the briefs; instead, counsel should select one or two strong points and address them in an interesting and concise manner. It is a good idea to come prepared with a few opening sentences that set out whatever counsel believes to be the most important thing for the court to hear about the case. Most courts will allow counsel to get at least that far in presenting the argument, but the rest of the allotted time could well be taken up with answering the court's questions. Counsel should pay close attention to any questions from the court and should adjust the presentation to focus on the issues that seem particularly interesting to the justices. If an issue unexpectedly arises that counsel is not prepared to discuss, counsel should offer to submit supplemental briefing on that issue if the court desires. See Cal Rules of Ct 8.256 on time limits, order of argument, and other requirements. Cal Rules of Ct 8.366(a).

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K. Result

§44.47 1. What to Expect

A cause pending in the court of appeal is deemed submitted when the court has heard oral argument or has approved the waiver of oral argument and the time has passed for the filing of all briefs and papers. Cal Rules of Ct 8.256(d), 8.366(a). Although, strictly speaking, there is no requirement that a case before the court of appeal be decided within a certain time after submission, a judge's salary may not be paid whenever any matter has been pending for 90 calendar days or more after the case has been submitted for decision. Cal Const art VI, §19. In the great majority of cases, opinions are filed within 90 days after oral argument. It is possible, however, for an appellate court to resubmit a pending appeal and start the 90-day period running anew when an opinion cannot be filed within the original 90 days.

The court can resolve an appeal by means of an opinion on the merits (see §§44.48-44.54) or by dismissing the appeal without reaching the merits (see §§44.55-44.60).

Ø **Note:** The appellate court sends its opinion (or order dismissing the appeal) to counsel by postal mail. Counsel can be informed of the disposition more quickly by signing up for e-mail notification (see §44.42).

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2. Opinion on Merits

§44.48 a. Published and Unpublished Opinions

All supreme court opinions are published in the official reports. Cal Rules of Ct 8.1105(a).

An opinion of the court of appeal is published only if it meets the requirements in Cal Rules of Ct 8.1105(b)-(c). The court may also choose "partial publication," publishing only part of the opinion. Cal Rules of Ct 8.1110. Unpublished or depublished opinions generally may not be cited as precedent or authority. Cal Rules of Ct 8.1115.

Ø **Note:** The supreme court may order the publication or depublication of a court of appeal opinion. Cal Rules of Ct 8.1120-8.1125. For discussion of requests that opinions be published or depublished, see §44.61.

The reviewing court's decision is filed with the clerk, who then transmits a copy of the opinion to the lower court and to the parties. Cal Rules of Ct 8.264(a), 8.366(a). See Cal Const art VI, §14 (decisions of supreme court and courts of appeal that determine causes must be in writing with reasons stated).

Both published and unpublished opinions are posted, soon after filing, in the Opinions section of the Judicial Council's website (http://www.courtinfo.ca.gov/opinions).

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§44.49 b. Affirmance

Most direct appeals by defendants are affirmed in full with no modification or reversal. See Judicial Council of California, 2009 Court Statistics Report, p 28 (of defendants' criminal appeals in which written opinions were filed in fiscal year 2007-2008, 72 percent were affirmed in full, 21 percent were affirmed with modification, 5 percent were reversed, and 1 percent were dismissed). The report is available on the Judicial Council's website at http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf.

If a judgment against a defendant is affirmed, the original judgment of the trial court must be enforced. Pen C §1263. If the defendant is out of custody, the court must try to secure the defendant's presence without issuing a warrant. Pen C §1265.

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§44.50 c. Reversal or Modification of Judgment

If a judgment against a defendant is reversed, the reversal is deemed an order for a new trial unless the appellate court directs otherwise. Pen C §1262. The parties return to their status before the trial, and the matter is returned to the court of the county from which the appeal was taken. Pen C §1261.

If a conviction on a greater offense is reversed, a previously dismissed lesser included offense conviction may be reinstated. *People v Medina* (2007) 41 C4th 685, 702, 61 CR3d 677; *People v Davidson* (2008) 159 CA4th 205, 210, 70 CR3d 913 (attempted murder conviction reinstated as matter of law after subsequent murder conviction reversed). See *People v Kelly* (1992) 1 C4th 495, 528, 3 CR2d 677 (prosecutor has option to retry greater offense or accept reduction to a lesser included, so long as the lesser offense does not have the same legal defect).

If the appellate court reverses with instructions to dismiss the information or indictment, the defendant will be released from custody or bail exonerated, and any fine paid will be refunded. Pen C §1262.

> Ø **Note:** If the defendant will be released from custody once the remittitur issues, defense counsel should seek its immediate issuance. See §44.67.

A judgment may be affirmed and modified on an appellate court's correction of the sentence. See, *e.g., In re Eric J.* (1979) 25 C3d 522, 538, 159 CR 317. A judgment may also be either affirmed or reversed with directions. The appellate court may, for example, order the lower court to determine issues (see *In re Ricky H.* (1981) 30 C3d 176, 191, 178 CR 324), to resentence the defendant properly (see *People v Bolton* (1979) 23 C3d 208, 218, 152 CR 141), to pronounce judgment after the appellate court reduces the degree of the offense (see *People v Anderson* (1968) 70 C2d 15, 36, 73 CR 550), or to grant the appellant the option to withdraw his or her plea of guilty (see *People v Miller* (1983) 33 C3d 545, 556, 189 CR 519).

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3. Effect of Decision on Merits

§44.51 a. Retrial; Double Jeopardy

When a defendant pursues an appeal that results in reversal, the courts generally infer that the defendant has consented to a retrial and thereby waived the constitutional protection against double jeopardy by virtue of pursuing an appeal that results in reversal. See *People v Tong* (1909) 155 C 579, 585, 102 P 263.

In limited circumstances, a defendant is protected from retrial following appeal by the Double Jeopardy Clause:

- Insufficiency of the evidence bars retrial (*Burks v U.S.* (1978) 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141);
- A jury verdict of guilty on a lesser degree of the offense charged bars retrial on the greater offense (see *People v Lohbauer* (1981) 29 C3d 364, 372, 173 CR 453; *Gomez v Superior Court* (1958) 50 C2d 640, 652, 328 P2d 976; see also *People v Mercer* (1962) 210 CA2d 153, 161, 26 CR 502).

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§44.52 b. Greater Punishment

The California double jeopardy provision (Cal Const art I, §15) protects defendants from receiving greater sentences following retrial after a successful appeal. *People v Henderson* (1963) 60 C2d 482, 495, 35 CR 77. See *People v Monge* (1997) 16 C4th 826, 66 CR2d 853 (imposition of greater sentence would unreasonably impair defendant's right to appeal erroneous judgment); *People v Torres* (2005) 127 CA4th 1391, 26 CR3d 518. This rule also precludes the court from imposing a longer aggregate term after a remand for resentencing. *People v Craig* (1998) 66 CA4th 1444, 78 CR2d 659. There is no protection against greater punishment on resentencing if the original sentence was unauthorized by law. For discussion, see §44.53.

Federal law is less protective of the defendant. See, *e.g., Alabama v Smith* (1989) 490 US 794, 104 L Ed 2d 865, 109 S Ct 2201 (presumption of vindictiveness does not apply when first case ended in guilty plea and second case went to trial); *Colten v Kentucky* (1972) 407 US 104, 32 L Ed 2d 584, 92 S Ct 1953 (two-tiered trial de novo system). However, federal law is not controlling on this issue. See *Raven v Deukmejian* (1990) 52 C3d 336, 355, 276 CR 326 (invalidating portion of Proposition 115 that would have required construction of numerous California constitutional provisions, including prohibition on double jeopardy, to afford no greater rights than federal Constitution).

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§44.53 c. Unauthorized Sentences

When a sentence is deemed to have been pronounced in excess of the court's jurisdiction or in violation of law, it is considered unauthorized. An unauthorized sentence may be set aside with no limit on the imposition of a greater sentence. *People v Serrato* (1973) 9 C3d 753, 763, 109 CR 65, overruled on other grounds in *People v Fosselman* (1983) 33 C3d 572, 583 n1, 189 CR 855.

Ø **Note:** The California Department of Corrections and Rehabilitation (CDCR) does not have the authority to correct unauthorized sentences. *In re Sandel* (1966) 64 C2d 412, 50 CR 462.

An error of law in sentencing may be corrected at any time if it does not involve the court's exercise of discretion and thus can be characterized as involving a ministerial duty. *People v Jack* (1989) 213 CA3d 913, 917, 261 CR 860; *People v Chagolla* (1983) 144 CA3d 422, 434, 193 CR 711 (trial court resentenced defendant 5 days after notice of appeal filed).

Ø **Warning:** Beware of the difference between resentencing because of an error at trial not involving sentencing, and an error directly related to the illegality of the original sentence. See discussion in §44.55 of when voluntary abandonment is in the client's best interest.

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§44.54 d. Further Proceedings on Remand

An appellate court has the power to remand a case to the trial court for such further proceedings as may be just under the circumstances. Pen C §1260. This is most commonly done when a conviction's validity depends on an unresolved or improperly resolved factual issue that does not have to be decided by a jury. The issue can then be decided at a hearing in the trial court, and, if resolved in the prosecution's favor, the conviction may stand. *People v Minor* (1980) 104 CA3d 194, 163 CR 501 (*Marsden* motion); *People v Ingram* (1978) 87 CA3d 832, 842, 151 CR 239 (motion to disclose informant); *People v Vanbuskirk* (1976) 61 CA3d 395, 405, 132 CR 30 (fairness of pretrial identification). See discussion in Appeals & Writs §5.31.

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4. Disposition Not on Merits

§44.55 a. Voluntary Dismissal

When a client decides for either personal or tactical reasons not to pursue an appeal, the appeal may be abandoned. This is accomplished by filing a written abandonment signed by the appellant or counsel of record, which results in dismissal of the appeal. If dismissal is sought before the record is filed in the reviewing court, the abandonment is filed with the superior court clerk. If dismissal is sought after the record is filed in the reviewing court, the abandonment is filed in the reviewing court. Cal Rules of Ct 8.316. If dismissal of an appeal is sought before the record is filed in the reviewing court, the notice of abandonment effects the dismissal without requiring any action by the trial court. If the record has already been filed, the reviewing court has discretion to determine whether to dismiss the appeal. *People v Nelms* (2008) 165 CA4th 1465, 1470, 82 CR3d 32 (trial court exceeded jurisdiction by dismissing charge while appeal pending).

Although Cal Rules of Ct 8.316(a) provides that the abandonment may be signed by either the appellant or the attorney of record, some districts prefer that both sign the notice. Counsel should check with the clerk of the district court of appeal where the matter is pending. For the abandonment of a juvenile appeal, see Cal Rules of Ct 8.411, effective July 1, 2010. For a Notice of Abandonment form, see Appeals & Writs §2.40.

Ø **Note:** It is recommended that appellate counsel always have the appellant sign the notice of abandonment to avoid any question about whether the appellant actually wanted to abandon the appeal.

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§44.56 b. Dismissal of Appeal for Irregularity

The court of appeal may dismiss an appeal for failure to file an opening brief (Cal Rules of Ct 8.220(a), 8.360(c)(5); see §§44.31, 44.40) or because the appeal "is irregular in any substantial particular" (Pen C §1248). For examples of "irregularity" that can lead to dismissal, see Appeals & Writs §5.16.

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§44.57 c. Mooted Appeal

A moot appeal is subject to dismissal. However, California has a liberal policy that often permits the appellate court to address an issue that would otherwise be considered "moot." For example, "if a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot." *In re William M.* (1970) 3 C3d 16, 23, 89 CR 33.

When a defendant has fully served a sentence, including the parole period, an appeal on the underlying conviction is not moot per se; however, the defendant's sentencing issue may be deemed moot. *In re Katherine R.* (1970) 6 CA3d 354, 356, 86 CR 281. Nonetheless, the court may address an otherwise moot sentencing issue if the sentence that was imposed inflicts a stigma on the appellant. See, *e.g., People v Feagley* (1975) 14 C3d 338, 345, 121 CR 509.

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§44.58 d. Dismissal Because Appellant Escaped or Left Country

If an appellant escapes and remains at large while an appeal is pending, the appeal may be dismissed. *People v Mutch* (1971) 4 C3d 389, 399, 93 CR 721. See Appeals & Writs §5.17. See also *People v Brych* (1988) 203 CA3d 1068, 250 CR 402 (appellant's conduct in leaving country and refusing to communicate with his attorneys evidenced abandonment of appeal, justifying dismissal). However, if a fugitive is returned to custody before the notice of appeal is filed, the "fugitive dismissal rule" does not apply. *People v Byron* (2009) 170 CA4th 657, 666, 88 CR3d 386.

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§44.59 e. No Dismissal Because Defendant Incompetent on Appeal

The court is not allowed to dismiss an appeal because the appellant is incompetent. *People v Kelly* (1992) 1 C4th 495, 544, 3 CR2d 677.

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§44.60 f. Abatement of Appeal After Appellant's Death

A criminal defendant's death while his or her appeal is pending abates appellate proceedings and automatically vacates the judgment of conviction. On confirming that a client is deceased, counsel should file a motion to abate, requesting that the appeal be dismissed, the judgment of conviction vacated, and the case remanded to the trial court with directions that the information or indictment be dismissed. A certified copy of the death certificate should be attached. See *In re Jackson* (1985) 39 C3d 464, 480, 216 CR 760. See also Appeals & Writs §5.18.

The court may choose to rule on an issue even if the appellant dies during the pendency of the appeal. See, *e.g., In re Sheena K.* (2007) 40 C4th 875, 879, 55 CR3d 716 (court ruled on constitutional challenge to probation condition); *In re Jackson* (1985) 39 C3d 464, 480, 216 CR 760 (court ruled on parole suitability hearings).

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§44.61 L. Request for Publication or Depublication

Requests for publication (Cal Rules of Ct 8.1120). Anyone may request publication of an unpublished court of appeal opinion. The request must be made by letter to the court that issued the opinion, with service on all parties, and should concisely state why the opinion meets one or more of the standards for publication listed in Cal Rules of Ct 8.1105(b). The request must be made within 20 days after the opinion is filed. Cal Rules of Ct 8.1120(a)(3). If the court of appeal does not grant the request, or cannot do so because the opinion has become final (see §44.66), it will transmit the request to the supreme court with its recommendation on whether the request should be granted. The supreme court will then grant or deny the request. Cal Rules of Ct 8.1120(b).

For further discussion of requests for publication, including strategic considerations, see Appeals & Writs §5.15.

Requests for depublication (Cal Rules of Ct 8.1125). Anyone may request depublication of a published opinion of the court of appeal. The request must be made by separate letter (*i.e.*, not as part of a petition for review) to the supreme court, with service on all parties, and should concisely state (in 10 pages or less) why the opinion should not remain published. The request must be made within 30 calendar days after the decision becomes final as to the court of appeal. The court of appeal or any person may file a response within 10 calendar days, either joining in the request or opposing it. The supreme court will then grant or deny the request.

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M. Petition for Rehearing

§44.62 1. Grounds for Rehearing

Court rules do not specify the grounds for petitions for rehearing. As a practical matter, however, there is at least one circumstance in which filing a petition for rehearing is required: when the court of appeal has left out or misstated either essential facts or a legal issue tendered. The supreme court will not consider any claim of "omission or misstatement of an issue or fact" in the court of appeal opinion unless the alleged omission or misstatement was first called to the court of appeal's attention in a petition for rehearing. Cal Rules of Ct 8.500(c)(2). Another reason for filing a petition for rehearing is to advise the court of appeal of a new appellate decision published after the filing of its opinion that might alter the result.

The court will not ordinarily consider an issue raised for the first time by a petition for rehearing. See *Brown v Superior Court* (1982) 137 CA3d 778, 782, 187 CR 324.

Ø **Note:** Unfortunately, some attorneys, having lost on appeal, use the petition for rehearing procedure as a means of venting their displeasure with what they consider to be unfair or poorly reasoned appellate court decisions. As tempting as it might seem to give the court a piece of one's mind, it is rarely a good idea to do so. It is, of course, no help to the client, and may well redound to the detriment of future clients represented by that attorney in the same court. It can also result in public reproval and the imposition of severe sanctions. See, *e.g., In re Koven* (2005) 134 CA4th 262, 35 CR3d 917.

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§44.63 2. Time Limits, Form and Content, and Service and Filing of Petition and Answer

A petition for rehearing must be served and filed within 15 days after the court of appeal files its decision, a postdecision publication order restarting the finality period, or a modification order changing the appellate judgment. Cal Rules of Ct 8.268(b)(1), 8.366(a).

A party is not allowed to file an answer to a petition for rehearing unless the court of appeal requests it. Once requested, an answer to a petition for rehearing must be served and filed within 8 days after the order requesting an answer is filed. The rule states that rehearing normally will not be granted unless the court has requested an answer. Cal Rules of Ct 8.268(b)(2), 8.366(a).

> Ø **Note:** A separate rule, Cal Rules of Ct 8.536, governs petitions for rehearing in the supreme court. That rule allows a party to file an answer without any court order. Cal Rules of Ct 8.536(b).

On the format of the petition or answer, the rules provide that "the relevant provisions of rule 8.204" apply. Cal Rules of Ct 8.268(b)(3), 8.366(a). On what Cal Rules of Ct 8.204 requires, see §44.32. A sample petition for rehearing is in Appeals & Writs §5.53. Filing and service is governed by Cal Rules of Ct 8.25.

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§44.64 3. Grant of Rehearing

If a rehearing is granted, there is no fixed rule on whether additional briefing will be ordered or whether the case will be set for a second oral argument. See Cal Rules of Ct 8.268(d), 8.366(a), 8.536(e).

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§44.65 4. Denial of Rehearing; Modification of Opinion

If the court of appeal does not rule on a petition for rehearing before the date the opinion is final (see §44.66), the petition is deemed denied. Cal Rules of Ct 8.268(c), 8.366(a). The same is true of a rehearing petition in the supreme court. Cal Rules of Ct 8.536(c).

When it denies a petition for rehearing, or at any other time before its decision is final, the court may modify its opinion in the case, including changing the language, citations, or even the result. Cal Rules of Ct 8.264(c), 8.366(a), 8.532(c). On the effect of a modification on finality, see §44.66.

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N. Finality of Decisions

§44.66 1. When Decision Becomes Final

It is important to keep track of the date on which the appellate decision becomes "final" because other deadlines are determined by that date. Notably, the 10-day period in which a petition for review may be filed in the California Supreme Court starts to run when the court of appeal decision becomes final. See §44.71.

A court of appeal decision generally becomes final 30 calendar days after it is filed. Cal Rules of Ct 8.366(b)(1). Certain decisions (such as denial of an application for bail or to reduce bail pending appeal, or voluntary dismissal of an appeal) are final on filing. Cal Rules of Ct 8.366(b)(2).

Ø **Note:** The denial of a petition for writ of habeas corpus filed in the appellate court ordinarily becomes final when it is filed. Cal Rules of Ct 8.387(b)(2)(A). There is, however, an exception for habeas corpus petitions submitted in the appellate court in conjunction with a pending direct appeal. If the court of appeal denies a habeas corpus petition on the same day that it affirms a related direct appeal, the decisions denying the habeas petition and affirming the judgment on appeal become final at the same time, *i.e.,* 30 calendar days after the decisions are filed. Cal Rules of Ct 8.387(b)(2)(B). On filing a state court habeas petition in the court of appeal in conjunction with a pending appeal, see chap 42; Appeals & Writs §§9.35, 10.28.

If the court of appeal orders publication (full or partial) of a decision after it is filed and before it is final, the finality period runs from the date of the publication order. Cal Rules of Ct 8.366(b)(3). If the court orders the opinion modified in a way that changes the appellate judgment, the finality period runs from the date of the modification order. Cal Rules of Ct 8.366(b)(4). The finality of an opinion is determined by the California Rules of Court and is not affected by the possibility that the U.S. Supreme Court might grant certiorari. *In re Edgerly* (1982) 131 CA3d 88, 91 n1, 182 CR 235.

On when a California Supreme Court decision becomes final, see the chart in §44.2. See also Appeals & Writs §5.33.

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§44.67 2. Issuance of Remittitur

The filing of a valid notice of appeal transfers jurisdiction of a case to the appellate court until a remittitur is issued. *People v Saunoa* (2006) 139 CA4th 870, 872, 43 CR3d 287. Remittitur is the final step in the appellate process and consists of remitting the certificate of judgment to the court below. See Pen C §1265(a). Practitioners usually refer to the certificate of judgment as a remittitur, as do the California Rules of Court; accordingly, this chapter uses that term.

If the California Supreme Court does not grant review of a court of appeal decision, the court of appeal issues its remittitur immediately after the supreme court denies or dismisses review or the period for granting review expires. Cal Rules of Ct 8.272(b)(1), 8.366(a).

The court of appeal may direct that the remittitur be issued immediately after decision only on the parties' stipulation or on a requested or stipulated dismissal of an appeal. Cal Rules of Ct 8.272(c)(1), 8.366(a). The court may stay issuance of the remittitur for a reasonable period on its own motion, the motion of a party, or the stipulation of the parties, for good cause. Cal Rules of Ct 8.272(c)(2), 8.366(a).

After supreme court review of a court of appeal decision, the supreme court issues a remittitur. Cal Rules of Ct 8.540(a)(1). The clerk normally must send the remittitur to the court of appeal when the supreme court's decision becomes final. Cal Rules of Ct 8.540(b)(1)-(2). The supreme court may, however, order that the clerk issue the remittitur immediately after decision or that the remittitur's issuance be stayed for a reasonable time. Cal Rules of Ct 8.540(c)(1)-(2). The court of appeal issues its remittitur immediately on receiving the supreme court's remittitur, if there will be no further proceedings in the court of appeal. Cal Rules of Ct 8.272(b)(2)(A), 8.366(a).

The issuance of the remittitur transfers jurisdiction from the appellate court to the court whose decision was reviewed. *People v Saunoa* (2006) 139 CA4th 870, 872, 43 CR3d 287; *Gallenkamp v Superior Court* (1990) 221 CA3d 1, 12, 270 CR 346. This action deprives the appellate court of jurisdiction to take any further action in the matter (Pen C §1265(a)), except to recall the remittitur (see §44.68). All orders necessary to carry out the judgment of the appellate court must be made by the court to which the remittitur is sent. Pen C §1265(a). If the appellate court remands the case with directions, the trial court is authorized only to implement the judgment; it cannot modify or add to those directions. *People v Oppenheimer* (1965) 236 CA2d 863, 865, 46 CR 476.

For further discussion, see Appeals & Writs §§5.34-5.36.

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§44.68 3. Recall of Remittitur

The court of appeal may recall the remittitur on its own motion, the motion of a party, or the stipulation of the parties, for good cause. Cal Rules of Ct 8.272(c)(2), 8.366(a). The remittitur may be recalled for correction of clerical errors, or on the ground of fraud, mistake, or inadvertence, but not to correct judicial error. *Pacific Legal Found. v California Coastal Comm'n* (1982) 33 C3d 158, 165, 188 CR 104. An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. *People v Mutch* (1971) 4 C3d 389, 396, 93 CR 721. See also *People v Kang* (2003) 107 CA4th 43, 131 CR2d 447 (remittitur recalled and appeal—previously dismissed because appellant was fugitive—reinstated because court could not say with confidence that dismissal would not "work a palpable injustice" on defendant).

Ø **Note:** Recall of the remittitur rarely occurs.

Counsel is likely to seek recall of the remittitur in three circumstances:

- A claim that prior appellate counsel provided ineffective assistance may be raised by means of a motion to recall the remittitur. *People v Rhoden* (1972) 6 C3d 519, 529, 99 CR 751; *People v Valenzuela* (1985) 175 CA3d 381, 388, 222 CR 405, disapproved on other grounds in *People v Flood* (1998) 18 C4th 470, 76 CR2d 180. See also *In re Serrano* (1995) 10 C4th 447, 458, 41 CR2d 695 (ineffective assistance on appeal raised by way of habeas corpus following denial of motion to recall remittitur; remedy was recall of remittitur); *In re Grunau* (2008) 169 CA4th 997, 1002, 86 CR3d 908 (same). Claims of ineffective assistance on appeal may be grounded on appellate counsel's failure to argue a potentially meritorious issue (*People v Rhoden, supra; People v Valenzuela, supra*) or on counsel's failure to provide the appellate court with a record adequate to permit it to review every arguable issue. *People v Barton* (1978) 21 C3d 513, 519, 146 CR 727.
- If counsel did not receive notice of the court of appeal's decision and missed the deadline for filing a petition for rehearing or review, recall of the remittitur may be requested to effectively give the opinion a new filing date and thus allow for timely filing of a petition for rehearing or review. See *People v Hickok* (1949) 92 CA2d 539, 207 P2d 620 (good cause to recall remittitur when defendant had substituted appellate counsel, and criminal appeal had been dismissed after notice of default had been sent to former appellate counsel).
- If counsel seeks to file a federal habeas corpus petition raising a new federal issue that was not previously asserted, it may be desirable to attempt to satisfy the exhaustion of state remedies requirement by way of an application to recall the remittitur and an accompanying writ petition. See *Hayward v Stone* (9th Cir 1974) 496 F2d 844. On exhaustion generally, see Appeals & Writs, chap 14.

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O. Review in California Supreme Court

§44.69 1. Review Is Discretionary

Except for death penalty cases (which the California Supreme Court always reviews), a criminal defendant's right to appellate review is limited to review by the court of appeal; review by the supreme court is discretionary. Although the court is empowered to conduct review on its own motion (Cal Rules of Ct 8.512(c)), it is normally the obligation of the aggrieved party to seek such review.

If the supreme court grants review, it need not decide every issue on which review is sought but can pick and choose among the issues raised by the petition. Cal Rules of Ct 8.516. The supreme court may also dismiss review or transfer or retransfer a cause to the court of appeal without decision. Cal Rules of Ct 8.528. See generally Cal Const art VI, §12.

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§44.70 2. Grounds for Review

The supreme court may grant review of a case if (Cal Rules of Ct 8.500(b)):

- A decision by the supreme court appears necessary to secure uniformity of decision or settle important questions of law;
- The court of appeal lacked jurisdiction of the cause;
- The court of appeal decision lacks the concurrence of the required majority of qualified judges; or
- The matter is to be transferred to the court of appeal for such proceedings as the supreme court may order.

The supreme court will not normally consider any issue that could have been but was not timely raised in the court of appeal. Cal Rules of Ct 8.500(c). However, the supreme court may decide any issues that are raised or fairly included in the petition or answer and may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and an opportunity to brief and argue it. Cal Rules of Ct 8.516(b); *People v Braxton* (2004) 34 C4th 798, 809, 22 CR3d 46.

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§44.71 3. Time Limits, Form, and Content of Petition

The petition for review must be filed within 10 calendar days after the court of appeal decision becomes final as to that court. Cal Rules of Ct 8.500(e). Ordinarily, this means that the petition for review is due in the supreme court between 30 and 40 days after the court of appeal decision is filed. The petition must conform to "the relevant provisions of" Cal Rules of Ct 8.204, which sets out the form for briefs. Cal Rules of Ct 8.504(a). On what Rule 8.204 requires, see §44.32.

The petition must have white covers. Cal Rules of Ct 8.40(b).

The petition for review must begin with a concise and nonargumentative statement of the issues presented for review, framed in terms of the facts of the case but without unnecessary detail. Cal Rules of Ct 8.504(b)(1). The petition must explain why the case merits review on one of the grounds listed in Cal Rules of Ct 8.500(b). Cal Rules of Ct 8.504(b)(2). If a petition for rehearing could have been filed in the court of appeal, the petition for review must state whether it was filed and, if so, how the court ruled. Cal Rules of Ct 8.504(b)(3). On petitions for rehearing, see §§44.62-44.65.

If the court of appeal issued an opinion, a copy of that opinion and of any order modifying it or directing its publication must be bound at the back of the original petition and each copy filed in the supreme court. Cal Rules of Ct 8.504(b)(4). If the court of appeal issued an order, a copy of the order showing the date it was entered must be bound at the back of the original petition and each copy filed in the supreme court. Cal Rules of Ct 8.504(b)(5). The title of the case and designation of the parties on the cover of the petition must be identical to those in the court of appeal opinion or order that is the subject of the petition. Cal Rules of Ct 8.504(b)(6).

Length. If computer-generated, the petition for review must not exceed 8400 words, including footnotes, and must include a certificate by appellate counsel or an unrepresented party stating the number of words in the petition. Cal Rules of Ct 8.504(d)(1). If typewritten, a petition must not exceed 30 pages. Cal Rules of Ct 8.504(d)(2). These limits do not include the tables, the court of appeal opinion, the certificate of word count, or any permitted attachments. Cal Rules of Ct 8.504(d)(3).

> Ø **Note:** The chief justice may permit a longer petition for review (or answer, reply, or attachment) on application, for good cause. Cal Rules of Ct 8.504(d)(4).

Attachments. In addition to the opinion or order from which the party seeks relief, the party may attach any exhibits or orders of a trial court or court of appeal that the party considers unusually significant; copies of relevant local, state, or federal regulations and other citable materials that are not readily accessible; and any opinion required to be attached under Rule 8.1115(c). These materials, with the exception of any opinion required to be attached under Rule 8.1115(c), must not exceed a combined total of 10 pages, and no other attachments to a petition for review are allowed. Cal Rules of Ct 8.504(e). No incorporation by reference is permitted, except a reference to a petition, answer, or reply filed by another party in the same case or filed in a case that raises the same or similar issues and in which a petition for review is pending or has been granted. Cal Rules of Ct 8.504(e)(3).

> Ø **Note:** The court of appeal transmits the full record filed before it to the supreme court (see Cal Rules of Ct 8.512(a)), so attaching exhibits is usually unnecessary.

For detailed discussion of petitions for review, see Appeals & Writs §5.43. A sample petition for review is in Appeals & Writs §5.54.

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§44.71A 4. Abbreviated Petition to Exhaust State Remedies

An abbreviated petition for review may be filed; the sole purpose of an abbreviated petition is to "exhaust" federal issues in state court before presenting them in a federal habeas corpus petition. Cal Rules of Ct 8.508(a). Instead of the statement of issues presented and explanation of grounds for review usually required by Cal Rules of Ct 8.504(b)(2), the abbreviated petition must contain "a statement that the case presents no grounds for review under [Cal Rules of Ct 8.500(b)] and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes." The petition must also contain a brief statement of the underlying proceedings and of the factual and legal bases of the federal claims. Cal Rules of Ct 8.508(b)(3).

Ø **Warning:** Some appellate practitioners have expressed concern that an abbreviated petition filed under the new rule may subsequently be deemed insufficient to exhaust state remedies. An "Advisory Committee Comment" accompanying Cal Rules of Ct 8.508 notes that "federal courts will decide whether a petition filed in compliance with this rule satisfies federal exhaustion requirements." Other practitioners have suggested that complying with the requirement to state "that the case presents no grounds for review under rule 8.500(b)" would violate an ethical prohibition on arguing against one's own client. See *People v Feggans* (1967) 67 C2d 444, 447, 62 CR 419.

On exhaustion generally, see Appeals & Writs, chap 14.

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§44.72 5. Time Limits, Form, and Content of Answer and Reply

The party prevailing in the court of appeal may wish to file an answer in order to present issues not raised in the petition for review. An answer may also be desirable to counter assertions in the petition. See Cal Rules of Ct 8.500(a)(2). An answer may, however, enhance the perceived importance of the petitioner's issues and thus increase the prospect of the petition's being granted.

An answer to a petition for review must be filed within 20 days after the petition is filed. Cal Rules of Ct 8.500(e)(4). An answer that raises additional issues for review must contain a concise and nonargumentative statement of those issues, framed in terms of the facts of the case but without unnecessary detail. Cal Rules of Ct 8.504(c). The rules on page limitations, attachments, and incorporation by reference applicable to a petition for review (see §44.71) also apply to an answer. Cal Rules of Ct 8.504(d)-(e).

The answer should have blue covers. Cal Rules of Ct 8.40(b).

A reply to an answer, if any, must be filed within 10 days after the answer is filed. Cal Rules of Ct 8.500(e)(5). If computer-generated, the reply must not exceed 4200 words, including footnotes, and must include a certificate by appellate counsel or an unrepresented party stating the number of words in the petition. Cal Rules of Ct 8.504(d)(1). If typewritten, a reply must not exceed 15 pages. Cal Rules of Ct 8.504(d)(2). The rules on attachments and incorporation by reference applicable to a petition for review (see §44.71) also apply to a reply. Cal Rules of Ct 8.504(e). Like the petition, any reply should have white covers. Cal Rules of Ct 8.40(b).

Both an answer and a reply "must comply with the relevant provisions of rule 8.204." Cal Rules of Ct 8.504(a). On what Cal Rules of Ct 8.204 requires, see §44.32.

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§44.72A 6. Filing and Service of Petition, Answer, and Reply

Petitions for review and answers to petitions for review are subject to the filing and service requirements of Cal Rules of Ct 8.25. In addition, a petition for review must be served on the court of appeal clerk. Cal Rules of Ct 8.500(f)(1).

Counsel should file an original and 13 copies of a petition for review or an answer to a petition for review. Cal Rules of Ct 8.44(a)(1).

Ø **Note:** If the petition is an abbreviated petition for review to exhaust state remedies (see §44.71A), an original and eight copies must be filed in the supreme court. Cal Rules of Ct 8.44(a)(4). An exhaustion petition must be served on the court of appeal clerk, but it need not be served on the superior court clerk. Cal Rules of Ct 8.508(c).

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§44.73 7. Time for Granting or Denying Review

The supreme court may order review within 60 days after the last petition for review was filed. Cal Rules of Ct 8.512(b)(1). Before the initial 60-day period (or any extension of it) expires, the court may order one or more extensions to a date no later than 90 days after the last petition was filed. Cal Rules of Ct 8.512(b)(1). If the court does not rule within the time limit, the petition is deemed denied. Cal Rules of Ct 8.512(b)(2).

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§44.74 8. Issues to Be Reviewed

After granting review of a decision of a court of appeal, the supreme court may specify the issues to be argued and can review and decide any or all issues. Cal Rules of Ct 8.516. Unless the court orders otherwise, briefs on the merits and oral argument must be confined to the specified issues and to the issues fairly included in them. Cal Rules of Ct 8.516(a)(1). The court need not decide every issue the parties raise or the court specifies. Cal Rules of Ct 8.516(b)(3).

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§44.75 9. Briefs on Merits

Within 30 days after the supreme court files an order granting review, the petitioner must serve and file in that court either an opening brief on the merits or the brief it filed in the court of appeal. Cal Rules of Ct 8.520(a)(1). Within 30 days after the petitioner files its brief or the time to do so expires, the opposing party must serve and file either an answer brief on the merits or the brief it filed in the court of appeal. Cal Rules of Ct 8.520(a)(2). The petitioner may file a reply brief on the merits, or the reply brief it filed in the court of appeal, within 20 days after the opposing party files its brief. Cal Rules of Ct 8.520(a)(3).

Form and content requirements and length limitations for merits briefs are set forth in Cal Rules of Ct 8.520(b)-(c). Requirements for supplemental briefs are in Cal Rules of Ct 8.520(d). Further requirements for attachments are in Cal Rules of Ct 8.520(h). The supreme court may request additional briefs on any or all issues, whether or not the parties have filed briefs on the merits. Cal Rules of Ct 8.520(e). For further discussion of briefs on the merits in the supreme court, see Appeals & Writs §5.48.

Amicus curiae briefs. Requirements for amicus curiae briefs in the supreme court are in Cal Rules of Ct 8.520(f).

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§44.76 10. Proceedings After Briefing

Procedures for oral argument in the supreme court are prescribed in Cal Rules of Ct 8.524. See also Appeals & Writs §5.49. The court's practices in the preparation and filing of opinions are discussed in detail in a court publication titled Internal Operating Practices and Procedures of the Supreme Court, which is available in the Courts section of the Judicial Council's website (http://www.courtinfo.ca.gov/courts).

On rehearing in the supreme court, see §§44.63-44.65 and Cal Rules of Ct 8.536. On finality of supreme court decisions, see §44.2 and Cal Rules of Ct 8.532. On issuance of a remittitur by the supreme court, see §44.67 and Cal Rules of Ct 8.540.

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§44.77 IV. PROSECUTION APPEALS

When prosecution has right to appeal. The prosecution may appeal from the following (Pen C §1238):

- An order setting aside or sustaining a demurrer to all or any portion of an accusatory pleading (Pen C §1238(a)(1)-(2));
- An order granting a new trial (Pen C §1238(a)(3));
- An order arresting judgment (Pen C §1238(a)(4));
- An order made after judgment affecting the prosecution's substantial rights (Pen C §1238(a)(5));
- An order modifying the verdict or finding in specified ways (Pen C §1238(a)(6));
- An order dismissing the case before trial because of a defendant's successful motion to suppress evidence (Pen C §1238(a)(7));
- An order or judgment dismissing or otherwise terminating all or any portion of the action (Pen C §1238(a)(8));
- An order denying a motion to reinstate the complaint under Pen C §871.5 (Pen C §1238(a)(9));
- Imposition of an unlawful sentence (Pen C §1238(a)(10)); or
- An order under Pen C §1424 recusing the district attorney (Pen C §1238(a)(11).

Ø **Note:** The prosecution may also appeal from an order granting habeas corpus relief to a defendant. See §42.33.

The prosecution may *not* appeal from an order granting probation. It must instead seek review by a petition for writ of mandate within 60 calendar days after the order granting probation. Pen C §1238(d). The prosecution may, however, appeal from an order made after a judgment granting probation if the appeal does not challenge the grant of probation. *People v Douglas* (1999) 20 C4th 85, 82 CR2d 816.

The prosecution may appeal from an evidentiary ruling made before jeopardy attached, if the ruling brings the case within one of the grounds listed in Pen C §1238. Thus, in *People v Yarbrough* (1991) 227 CA3d 1650, 278 CR 703, the prosecution was permitted to appeal from dismissal following a common law motion to suppress the result of an allegedly suggestive lineup. In *People v Jackson* (1991) 1 CA4th 697, 700, 2 CR2d 308, and *People v Goodner* (1990) 226 CA3d 609, 276 CR 542, the prosecution was permitted to appeal pretrial rulings striking prior conviction allegations.

Because the summary denial of a petition for writ of mandate is not a decision on the merits, the prosecution may appeal from the dismissal of an information following a successful motion to suppress, even after its petition for writ of mandate seeking review of the trial court's ruling on the motion to suppress has been summarily denied. *People v Allison* (1988) 202 CA3d 1084, 249 CR 218. But see *People v Carrington* (1974) 40 CA3d 647, 115 CR 294 (denial of petition by minute order is a decision on the merits and prosecution may not appeal).

A city and its police department do not have standing to appeal a trial court's order under Pen C §851.8 to seal and destroy an arrest record after finding the defendant factually innocent. *People v Punzalan* (2003) 112 CA4th 1307, 6 CR3d 30. The court in *Punzalan* did not explicitly state whether the prosecution would have had standing to appeal.

Ø **Note:** The law concerning when the prosecution has the right to appeal is complex and should therefore be carefully considered by counsel responding to a prosecution appeal. See, *e.g., People v Drake* (1977) 19 C3d 749, 139 CR 720.

Procedure in prosecution appeals. Most of the rules that apply to defendants' appeals also apply to prosecution appeals, but some are different. For example, what constitutes the "normal record" (see §44.20) is different in a prosecution appeal. Cal Rules of Ct 8.320.

Ø **Note:** When both the defendant and the prosecution appeal, special briefing rules apply. See Cal Rules of Ct 8.216(b), 8.360(b)(4), (e).

Application of *Wende* to prosecution appeals. No court has addressed whether *Wende* principles (see §44.37)

apply to appointed counsel defending against a prosecution appeal. The issue is unlikely to come up, because in nearly every prosecution appeal, a defense argument has been made in the trial court and found persuasive by the trial judge. At the least, appellate defense counsel should be able to restate that argument.

For a detailed discussion of prosecution appeals in felony cases, see Appeals & Writs §§1.19-1.30. A sample respondent's brief in a prosecution appeal is in California Criminal Law Forms Manual §44.6 (2d ed Cal CEB 2005).

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FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS

CAROLYN M. WIGGIN

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§45.1 I. OVERVIEW

This chapter focuses on federal habeas corpus proceedings challenging the *constitutionality* of a state-court-imposed criminal conviction and the sentence that results from that judgment. The role of federal habeas corpus is codified in 28 USC §§2241, 2254, and 2261-2266 (state custody; remedies in federal court). The statute is enforced through a companion set of rules: Rules Governing §2254 Cases in the U.S. District Courts (hereafter cited as Habeas Rules). This chapter does not address federal capital habeas corpus litigation, a complex area requiring specific training and expertise. A practitioner who wants to obtain federal habeas relief for a convicted person should be thoroughly familiar with the statute and rules. There is an appendix of model forms in the back of the Habeas Rules. This chapter is a summary treatment of federal habeas corpus. For more detailed discussions of substantive and procedural aspects of federal habeas review, see Appeals and Writs in Criminal Cases, chaps 13-18 (3d ed Cal CEB 2007) (hereafter cited as Appeals & Writs); Hertz & Liebman, Federal Habeas Corpus Practice and Procedure (5th ed 2005).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub L 104-132, 110 Stat 1214) made significant amendments to the statutes governing habeas petitions in federal courts. This chapter discusses the changes in federal habeas procedure brought about by AEDPA. Also, because AEDPA partially codifies preexisting law, and because AEDPA's substantive provisions apply only to habeas petitions filed after its enactment (*Lindh v Murphy* (1997) 521 US 320, 138 L Ed 2d 481, 117 S Ct 2059; see also *Jeffries v Wood* (9th Cir 1997) 114 F3d 1484, 1493), the chapter also discusses pre-AEDPA habeas practice. AEDPA has brought about far-reaching changes in federal habeas practice, and the courts are still grappling with its implications. Therefore, counsel should carefully check all references in this chapter for any modifications by the U.S. Supreme Court, lower federal courts, or legislative enactment.

Review in the U.S. Supreme Court is discussed only briefly in this chapter. For further discussion, see Appeals & Writs, chap 12, and Stern, Gressman, Shapiro & Geller, Supreme Court Practice (9th ed 2007). United States Supreme Court Rules are abbreviated in this chapter as US Sup Ct R. Original writs of habeas corpus filed in the Court are rarely granted. US Sup Ct R 20.4(a).

Although 28 USC §2241 (power to grant writ of habeas corpus) authorizes the federal courts to hear constitutional challenges to other state court actions (*e.g.,* pretrial detention without bail, extradition proceedings, and detention that continues beyond the time authorized by the judgment of conviction), such challenges to custody are beyond the scope of this chapter.

An attorney handling a federal habeas matter must be admitted to practice before the district court in which the petition is filed or apply to appear pro hac vice. Counsel should have a copy of the local rules for that particular court. References to the four local district court rules are abbreviated in this chapter as "CD" (Central District), "ED" (Eastern District), "ND" (Northern District), and "SD" (Southern District), followed by "Cal Local R." Local court rules vary among these four federal district courts and are periodically updated. The local rules can be quite detailed. See, *e.g.,* ED Cal Local R 130-131.

In addition to district rules, the Federal Rules of Appellate Procedure also control the progress of the federal habeas proceeding. The Federal Rules are abbreviated in this chapter as Fed R App P, and the rules of the U.S. Court of Appeals for the Ninth Circuit are abbreviated as "9th Cir R."

There are three pleadings in a federal habeas corpus proceeding: the petition, which states the claim or claims and the factual grounds for the claim or claims; the answer; and the reply (traditionally called a traverse). After reviewing a properly submitted and verified petition, the district court judge or magistrate judge (see Habeas Rules 8(b), 10) will order the state to file a response within a fixed time unless it plainly appears from the face of the petition and any exhibits submitted along with it that the petitioner is not entitled to federal habeas relief. Habeas Rules 4. This response may be a motion, an answer, or other response. Habeas Rules 4.

The state's answer must respond to the allegations in the petition, and must state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, nonretroactivity, or a statute of limitations. Habeas Rules 5(b). It must be accompanied by those portions of the state court reporter's transcripts the state considers relevant; the state court appellate briefs of both prosecution and defendant; and the opinions and dispositive orders of

the state appellate court. Habeas Rules 5(c). If the court orders the respondent to answer, it will also set a date by which the petitioner may file a reply to the answer. See Habeas Rules 5(e).

Once the petition is before a judge, he or she may grant or deny relief on the pleadings and the record, authorize discovery or expansion of the record, or hold an evidentiary hearing before granting or denying habeas relief. Habeas Rules 6-8. Discovery is not available until after the habeas petition is filed. *Calderon v U.S. Dist. Court* (9th Cir 1996) 98 F3d 1102. A magistrate judge may authorize discovery or expansion of the record or order an evidentiary hearing. See Habeas Rules 8(b), 10. He or she does not, however, have independent authority to grant or deny habeas relief, unless both parties consent to granting the magistrate judge this authority. Assuming the parties have not consented to allowing the magistrate judge to issue a final order, the magistrate judge must submit written findings of fact and recommendations for disposition to a district court judge. Habeas Rules 8(b). The parties may file written objections to the findings and recommendations within 14 days after their filing. For any proposed finding or recommendation to which an objection is made, the district judge must conduct de novo review. Habeas Rules 8(b). Failure to object to proposed findings and recommendations can severely limit the right to further appellate review. *Martinez v Ylst* (9th Cir 1991) 951 F2d 1153. After reviewing the objections, the district court judge will issue an order accepting, modifying, or rejecting the magistrate judge's findings and recommendations. Habeas Rules 8(b). At this point, the petition will be either granted or denied.

The state may appeal the grant of habeas relief without prior certification. Fed R App P 22(b). In most cases, the petitioner must obtain a certificate of appealability from the district court or the court of appeals in order to appeal the denial of relief. 28 USC §2253(c); Fed R App P 22(b).

The major deadlines applicable to federal habeas litigation are given in §45.2.

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§45.2 II. CHART: DEADLINES

Deadlines for particular pleadings are set by the Habeas Rules, local rules of court, and standards established by court decisions. The Ninth Circuit requirements are summarized in the appellate processing schedule for noncriminal cases for the Ninth Circuit, reproduced in Appeals & Writs, chap 18. (Habeas corpus proceedings are considered civil actions.)

Action	Deadline	Authority
File habeas petition in federal district court.	Noncapital cases—1 year after date on which (1) conviction becomes final by conclusion of direct review or expiration of time for seeking review; (2) state-imposed impediment to petitioner's ability to file a petition is removed; (3) constitutional right asserted in petition is initially recognized and made retroactively applicable by U.S. Supreme Court; or (4) claim reasonably could have been discovered, unless limitations period tolled.	28 USC §2244(d).
File motion to proceed in forma pauperis.	At same time as habeas petition.	28 USC §1915.
File motion for appointment of counsel.	As soon as possible, but no later than when it is determined that counsel's assistance is necessary to make full use of discovery or evidentiary hearings.	18 USC §3006A (noncapital cases only).
File response to petition.	Court sets date.	Habeas Rules 4-5.
File petitioner's reply.	Date set by court.	28 USC §2248; Habeas Rules 5(e).
Begin discovery.	Under court order.	Habeas Rules 6.
Expand record.	Under court order.	Habeas Rules 7.
Conduct evidentiary hearing.	Discretionary, under court order.	Habeas Rules 8.
File objections to findings and recommendations of magistrate judge.	14 days.	Habeas Rules 8(b).
District judge adopts, modifies, or rejects findings and recommendations of magistrate judge and issues appropriate order.	Within reasonable time.	28 USC §636; Habeas Rules 8, 10.
District judge issues order following evidentiary hearing.	Within reasonable time.	28 USC §2243; Habeas Rules 8.
File notice of appeal to review ruling on habeas petition in federal district court and obtain certificate	Within 30 calendar days after entry of judgment unless petitioner, within 60 calendar days after entry of judgment, successfully seeks	Fed R App P 4(a)(1), (5).

of appealability.	extension of time for filing from federal district court.	
Request extension to file notice of appeal.	No later than 30 calendar days after expiration of the time otherwise set to file a notice of appeal, unless clerk grants 14-day extension.	28 USC §2107; Fed R App P 4(a)(5).
File appellant's brief in Ninth Circuit Court of Appeals.	In accordance with briefing schedule issued by Ninth Circuit or, if no briefing schedule issued, within 40 calendar days after date on which excerpts from district court record are filed with Ninth Circuit.	Fed R App P 31 (see also Fed R App P 10); 9th Cir R 31-2.1.
Request extension of time to file brief.	Before due date. Written motion must be filed 1 week before the brief is due; a telephonic request (which generally precludes further extensions of time) can be made up until due date.	Fed R App P 26(b); 9th Cir R 31-2.2.
File appellee's brief in Ninth Circuit Court of Appeals.	As stated in Ninth Circuit's scheduling order or within 30 calendar days after service of appellant's brief, unless extension is granted.	Fed R App P 31(a)(1); 9th Cir R 31-2.
File appellant's reply brief in Ninth Circuit Court of Appeals.	As stated in Ninth Circuit's scheduling order or within 14 calendar days after service of appellee's brief and at least 3 days before argument.	Fed R App P 31(a)(1); 9th Cir R 31-2.
File petition for writ of certiorari in U.S. Supreme Court to review Ninth Circuit Court of Appeals' decision.	Within 90 calendar days after entry of judgment.	US Sup Ct R 13.1; 28 USC §2101(c).

Note: The time for filing a cert. petition may be extended by no more than 60 calendar days. US Sup Ct R 13.5. An extension request filed less than 10 days before the filing deadline will be granted only "in the most extraordinary circumstances." US Sup Ct R 30.2.

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III. ADMISSION AND APPOINTMENT OF COUNSEL

§45.3 A. Federal District Courts

The requirements for admission to practice before the four federal district courts in California vary. In general, any member of the State Bar of California is eligible for admission into a federal district court. See CD Cal Local R 83-2.2; ED Cal Local R 180; ND Cal Local R 11-1; SD Cal Local R 83.3.

An indigent state prisoner has no constitutional right to court-appointed counsel in habeas corpus proceedings. See *Miranda v Castro* (9th Cir 2002) 292 F3d 1063, 1068. The Criminal Justice Act of 1964, as amended (18 USC §3006A(a)(2)(B)), authorizes the district court to appoint counsel at the beginning of a noncapital habeas proceeding when "the interests of justice so require" and the person is "financially eligible." The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) specifically authorizes the appointment of counsel under Criminal Justice Act of 1964 standards. 28 USC §2254(h). In determining whether counsel should be appointed in a noncapital habeas case, the district court must evaluate the likelihood of success on the merits and the petitioner's ability to articulate his or her claims pro se. *Wilborn v Escalderon* (9th Cir 1986) 789 F2d 1328; *Weygandt v Look* (9th Cir 1983) 718 F2d 952. See also *Chaney v Lewis* (9th Cir 1986) 801 F2d 1191. In some cases, it may be appropriate to appoint counsel for a limited purpose, for example, to represent the petitioner at a competency hearing when there is a substantial question about the petitioner's mental competency. See *Allen v Calderon* (9th Cir 2005) 408 F3d 1150.

Even when the court has denied an application for appointment of counsel accompanying the petition, it may grant a later application if the petition survives the pleading stage and appears to have some merit. The court must appoint counsel for a financially eligible petitioner:

- If discovery is ordered and counsel is necessary for the effective use of discovery procedures (Habeas Rules 6(a)); or
- If an evidentiary hearing is required (Habeas Rules 8(c)).

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§45.4 B. Ninth Circuit Court of Appeals

The procedure for applying for admission to practice before the Ninth Circuit is set out in Fed R App P 46(a). Application forms can be obtained from the clerk of the Ninth Circuit Court of Appeals. The completed form should be returned by mail with a check for the admission fee made out to the clerk. Under Fed R App P 46(a) and 9th Cir R 46-1.2, an attorney who is not already a member of the Ninth Circuit Bar must apply for admission immediately on docketing an appeal with the court. In practice, this is done when the notice of appeal is filed. For further discussion, see Appeals & Writs, chap 18.

Ø **Note:** The California courts of appeal use the singular "appeal" in their name, whereas the federal circuit courts of appeals use "appeals."

If counsel was appointed in the district court, the appointment automatically continues in the Ninth Circuit Court of Appeals if a notice of appeal is filed. 9th Cir R 4-1(a). The converse, however, is not generally true. If the Ninth Circuit appoints counsel and the case is remanded to the district court for further proceedings, the petitioner will have to apply to the district court for the appointment of counsel.

Ø **Note:** Habeas corpus proceedings are treated as civil matters. Ninth Circuit Rule 42-1 mandates automatic dismissal of a civil appeal and possible disciplinary and monetary sanctions for failure to diligently prosecute an appeal.

An appellant who was not represented by counsel in the district court proceedings may request court-appointed counsel on appeal. The petitioner should file a financial affidavit (CJA (Criminal Justice Act) Form 23, available from the court clerk) and a motion for appointment of counsel in the district court along with the notice of appeal. 9th Cir R 4-1(b). In addition, counsel who was not originally appointed in the district court may move the circuit court for appointment. 9th Cir R 4-1(b).

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§45.5 C. United States Supreme Court

Each party represented by counsel in a U.S. Supreme Court case must be represented by at least one attorney in good standing with the U.S. Supreme Court Bar. See US Sup Ct R 5. The requirements for Supreme Court admission appear in Appeals & Writs, chap 12.

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IV. BAIL AND STAYS

§45.6 A. Pending Decision

Federal district courts have the inherent power to admit a habeas corpus petitioner to bail pending a decision, but the standards for such relief are extremely high. Generally, the movant must demonstrate a strong likelihood of success on the merits *and* "exigent circumstances" that make immediate release appropriate. *Woodcock v Donnelly* (1st Cir 1972) 470 F2d 93. See also *Marino v Vasquez* (9th Cir 1987) 812 F2d 499.

The court in which a habeas proceeding is pending may stay state court proceedings, including imposition of the death penalty. 28 USC §2251. It is exceedingly rare, however, for a federal district court to stay imposition of any state court sentence other than the death penalty. See Appeals & Writs, chap 18.

For further discussion of bail and stays during federal habeas proceedings, see Appeals & Writs, chap 13.

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§45.7 B. After Relief Is Denied

The district court has inherent authority to release the petitioner on appeal after the denial of habeas corpus relief in the district court. Fed R App P 23(b). However, such release (with or without bail) is almost never granted. See *U.S. v Dansker* (3d Cir 1977) 561 F2d 485 (explaining appropriateness of restrictive standards for granting bail in collateral attacks). An initial order on custody or release generally remains in effect pending review unless the petitioner can persuade the reviewing court (or a judge or justice of the court) that "special reasons" exist for modifying the initial order or making a new order. Fed R App P 23(d).

For discussion of stays in the U.S. Supreme Court, see Appeals & Writs, chap 12.

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§45.8 C. After Relief Is Granted

When the district court grants habeas corpus relief, the order is typically made in the form of a conditional writ, directing the prisoner's release unless retrial is commenced within a specified time. Conditional writs essentially accommodate the state in that they give the state time to take remedial action. The consequence if the state fails to take action is release of the prisoner. *Wilkinson v Dotson* (2005) 544 US 74, 87, 161 L Ed 2d 253, 125 S Ct 1242 (Scalia, J., concurring). A district court does, however, have authority to modify a conditional writ to give the state more time, even after the original deadline has passed. *Harvest v Castro* (9th Cir 2008) 531 F3d 737, 744. Any such modification is governed by the habeas rules and the federal rules of civil procedure, including Fed R Civ P 60. 531 F3d at 745. If the state fails to comply with the writ's conditions and cannot demonstrate it deserves relief under the habeas rules or Fed R Civ P 60, the prisoner must be released. 531 F3d at 750. If the state appeals a conditional writ, the petitioner must be released "unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise." Fed R App P 23(c). Respondent may request the judge who issued the order to issue a stay pending appeal. Fed R App P 8. The motion should address such issues as the possibility of flight, the state's interest in continued custody and rehabilitation, the state's likelihood of success on appeal, and the dangerousness of the petitioner. See *Hilton v Braunskill* (1987) 481 US 770, 95 L Ed 2d 724, 107 S Ct 2113.

If the district court denies the stay, the state may ask it to grant a temporary stay to allow the Ninth Circuit to consider its stay request. A temporary stay of at least 21 calendar days should be requested. If the district court denies the temporary stay, the state may seek an emergency stay from the Ninth Circuit. See 9th Cir R 27-3.

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V. PROCEDURE FOR HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS IN FEDERAL DISTRICT COURT

§45.8A A. Preliminary Investigation

Because of the 1-year statute of limitations for federal habeas corpus petitions, it is important that counsel begin investigating all potential claims as early as possible. This applies whether counsel begins representation before a federal petition has been filed or after being appointed by the court to represent an individual who has already filed a petition pro se. Most pro se petitions need to be amended following the appointment of counsel, and a petition cannot be amended with new claims after the statute of limitations has run unless the new claims and the original claims have a "common core" of operative facts. *Mayle v Felix* (2005) 545 US 644, 162 L Ed 2d 582, 590, 125 S Ct 2562; *Hebner v McGrath* (9th Cir 2008) 543 F3d 1133, 1137.

Before preparing a petition or amending a pro se petition, counsel should review the state court appellate briefs and state habeas petitions, as well as other items in the state court record, including orders and trial transcripts. Although the state court clerk's transcript, reporter's transcript, appellate briefs, and habeas petitions may be lodged by the respondent in the district court, it is usually quicker for petitioner's counsel to obtain them from the petitioner. Occasionally, it is necessary to obtain a court order requiring respondent's counsel to lodge these items with the district court. Transcripts can be obtained by court order at government expense. 28 USC §2250.

Petitioner's counsel should also confer with the petitioner's trial, appellate, and state habeas counsel, if any, to review possible habeas claims and review their files, and conduct preliminary investigation necessary to verify claims to be set forth in the petition. It is helpful to have the petitioner sign a release form allowing counsel to interview former counsel and obtain copies of confidential legal, medical, financial, academic, military, and other information, and then to make requests to former attorneys, doctors, and other institutions for records relating to the client. If former counsel resists producing a file, habeas counsel can remind him or her that under Cal Rules of Prof Cond 3-700(D) and California State Bar Formal Opinion No. 1992-127, the attorney must release client files to the client on the client's request after the representation has terminated. See also *Bernstein v State Bar* (1990) 50 C3d 221, 266 CR 625; *Rosenthal v State Bar* (1987) 43 C3d 612, 238 CR 377; LA County Bar Ass'n Formal Opinion No. 475 (1994) (file related to client's case belongs to client, not attorney). The attorney is not at liberty to remove client papers or property compiled during the course of the representation before giving the file to the client. LA County Bar Ass'n Formal Opinion No. 509 (2002). "'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation." Cal Rules of Prof Cond 3-700(D). If former counsel wants to keep a copy of the file, copying expenses fall on former counsel absent a contrary agreement with client. California State Bar Formal Opinion No. 1994-134.

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§45.9 B. Obtaining and Preparing Habeas Petition

The Habeas Rules include a model form for a petition for writ of habeas corpus, and require that a petition filed in the federal district court be in substantially that form, unless a local rule requires use of a different form. Habeas Rules 2(d). Each California district court has its own rule about the use of forms; the forms can be obtained from the court clerk. CD Cal Local R 83-16.1; ED Cal Local R 190; ND Cal Local R 2254-3(e); SD Cal Local R HC.2(b). The local rules may have other requirements pertaining to habeas cases.

The clerks of each district can be reached at the following addresses:

Clerk, Central District 312 N. Spring Street Los Angeles, CA 90012-4793 (213) 894-1565 or 894-2215	Clerk, Eastern District 501 "I" Street Sacramento, CA 95814 (916) 930-4000
Clerk, Northern District U.S. District Courthouse 450 Golden Gate Avenue, 16th Floor San Francisco, CA 94102 (415) 522-2000	Clerk, Southern District U.S. Courthouse 880 Front Street, Suite 4290 San Diego, CA 92101-8900 (619) 557-5600

The habeas corpus petition should be filed in the federal judicial district that has venue over the county in which the sentencing court is located. Although both this district and the federal judicial district in which the defendant is in custody have jurisdiction over a federal habeas petition (28 USC §2241(d)), as a matter of practice in California, a habeas petition filed in the district in which the petitioner is in custody will be transferred to the district in which the sentencing court is located. See Appeals & Writs, chap 16.

Habeas Rule 3(b) provides that the clerk must file a federal habeas corpus petition and enter it on the docket. The Advisory Committee Notes accompanying the 2004 revision of Rule 3(b) specifies that the clerk may not refuse to accept a filing solely because it fails to comply with the Habeas Rules or a particular court's local rules.

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§45.9A C. Specificity of Pleading

To obtain relief or an evidentiary hearing in a federal habeas corpus proceeding, the petitioner must allege facts with sufficient specificity to support the claim for relief. Bald assertions and conclusory allegations are insufficient. *Blackledge v Allison* (1977) 431 US 63, 52 L Ed 2d 136, 97 S Ct 1621; *Wacht v Cardwell* (9th Cir 1979) 604 F2d 1245. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if it plainly appears from the face of the habeas petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the court may summarily deny the petition on the merits; if the petition is unexhausted, the court is not required to give the petitioner an opportunity to exhaust state remedies. 28 USC §2254(b)(2); Habeas Rules 4. However, if the petition contains both exhausted and unexhausted claims, the court may dismiss only the unexhausted claims, and hold the exhausted claims in abeyance until the petitioner has had an opportunity to exhaust the unexhausted claims. See *Rhines v Weber* (2005) 544 US 269, 161 L Ed 2d 440, 125 S Ct 1528. For discussion, see §45.23.

If the petition alleges only a violation of state law, it is subject to dismissal for failure to present a valid federal claim. *Stewart v Nix* (8th Cir 1992) 972 F2d 967, 970; *Cox v Lockhart* (8th Cir 1992) 970 F2d 448, 453.

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§45.9B D. Electronic Filing Rules

All of the U.S. District Courts in California now require attorneys to file and serve pleadings and documents using the federal courts' "Case Management/Electronic Case Files" (CM/ECF) system unless a special exemption is obtained. In the Eastern District of California, both petitions and all subsequent filings are to be done electronically. ED Cal Local R 133(a). In other districts, pleadings that initiate a case (*e.g.,* the petition) must be filed in paper and, perhaps, electronically as well. CD Cal Local R 3-2 (originally paper, then by e-mail within 24 hours); ND Cal General Order 45(V)(A) (originally paper, then e-mail filed within 10 days); SD Cal Electronic Case Filing Administrative Policies and Procedures Manual §2(c) (paper only). Parties appearing without attorneys, or "pro se," are exempted from the electronic filing requirement unless they obtain the court's approval to file electronically. See, *e.g.,* ED Cal Local R 183(c). Thus, habeas corpus petitioners without counsel will generally use traditional filing and service methods, but when counsel is appointed, counsel will be required to file and serve electronically unless exempted by the court. The CM/ECF system is integrated with PACER (Public Access to Court Electronic Records) and allows users to obtain case and docket information about all cases pending in the court.

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§45.10 E. In Forma Pauperis Status and Appointment of Counsel

An in-custody petitioner who wishes to proceed in forma pauperis, *i.e.,* without paying court fees, must file an affidavit listing all the petitioner's assets. The affidavit must state the nature of the action and must attest both to the affiant's belief that the petitioner is entitled to relief and to the petitioner's inability to pay costs or give security. 28 USC §1915(a)(1); Habeas Rules 3(a)(2). The affidavit must be accompanied by a certificate of the warden or other appropriate officer of the institution of confinement stating the amount of money or securities on deposit to the petitioner's credit. Habeas Rules 3(a)(2). For further discussion, see Appeals & Writs, chap 16.

Ø **Note:** The district court clerk normally sends a blank affidavit or declaration form to request in forma pauperis status with each blank habeas corpus petition. This form includes the warden's certificate.

Petitioner or counsel may file a request for appointment of counsel or a motion to stay execution of the state court judgment or to set bail at the same time the habeas petition is filed. For discussion and sample forms, see Appeals & Writs, chap 13.

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F. Jurisdictional Requirements

§45.11 1. Custody

To be eligible for federal habeas corpus relief under 28 USC §2254, the petitioner must be in custody pursuant to the judgment of a state court at the time the petition is filed. 28 USC §2241(c). "In custody" can mean either physical or constructive confinement. The custody requirement is met if the petitioner is on probation or parole, if execution of sentence is suspended pending further legal action, if the petitioner is on furlough, or if the petitioner was released on his or her own recognizance. 28 USC §§2241, 2254(a); *Sperl v Deukmejian* (9th Cir 1981) 642 F2d 1154; *Chaker v Crogan* (2005) 428 F3d 1215, 1219. See also *Wilson v Belleque* (9th Cir 2009) 554 F3d 816, 821 (petitioner "in custody" for purposes of habeas review though he brought claim of double jeopardy against new charges filed and did not challenge convictions for which he was incarcerated).

An individual whose confinement period has expired is not in custody unless he or she can show "some concrete and continuing injury other than the now-ended incarceration." *Spencer v Kemna* (1998) 523 US 1, 7, 140 L Ed 2d 43, 50, 118 S Ct 978; *Jackson v Department of Mental Health* (9th Cir 2005) 399 F3d 1069, as amended (2005) 417 F3d 1029. A petitioner in custody on an immigration hold is not in custody within the meaning of 28 USC §2241(c), even though the hold is the direct consequence of the conviction the petition challenges. *Resendiz v Kovensky* (9th Cir 2005) 416 F3d 952.

The "in-custody" requirement is met if the petitioner is currently in custody on a sentence enhanced by an allegedly unlawful conviction, even if the petitioner is no longer in custody on the allegedly unlawful conviction. *Maleng v Cook* (1989) 490 US 488, 492, 104 L Ed 2d 540, 546, 109 S Ct 1923. However, federal habeas is rarely available to challenge the validity of a prior conviction. As a matter of policy, a prisoner may not use the federal courts to mount a collateral attack on a current sentence on the ground that it was enhanced by an unlawful prior conviction, if the prior conviction "is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully)." *Daniels v U.S.* (2001) 532 US 374, 386, 149 L Ed 2d 590, 600, 121 S Ct 1578 (28 USC §2255); *Lackawanna County Dist. Attorney v Coss* (2001) 532 US 394, 402, 149 L Ed 2d 608, 617, 121 S Ct 1567 (28 USC §2254). In *Coss,* the Supreme Court recognized an exception to this rule for habeas petitions that challenge an enhanced sentence on the ground that "the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 23 Ohio Op. 2d 258 (1963)." 532 US at 404. For further discussion, see Appeals & Writs, chap 14.

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§45.12 2. Time Requirements for Filing

Federal habeas corpus petitions have a 1-year filing deadline. 28 USC §2244(d). Time begins to run from (28 USC §2244(d)(1)):

- The conclusion of direct review or expiration of the time for seeking review (the most common situation);

  Ø **Note:** When a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, the judgment is "final" for purposes of 28 USC §2244(d)(1)(A) at the conclusion of the out-of-time direct appeal or the expiration of the time for seeking review of that appeal. *Jimenez v Quarterman* (2009) ___ US ___, 172 L Ed 2d 475, 129 S Ct 681.

- The removal of any unconstitutional state impediment to filing a habeas petition;
- The recognition by the Supreme Court of a new constitutional right that has been made retroactively applicable to cases on collateral review; or
- The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

In *Bowen v Roe* (9th Cir 1999) 188 F3d 1157, 1158, the Ninth Circuit held that direct review does not conclude under 28 USC §2244(d)(1) until the expiration of the period during which the defendant could apply for a writ of certiorari in the U.S. Supreme Court, *i.e.,* 90 days after the state supreme court denies review. See also *U.S. v Schwartz* (9th Cir 2001) 274 F3d 1220 (same, federal conviction). Thus, the limitations period does not begin to run in California until 90 days after the date on which the California Supreme Court denies review of the decision of the court of appeal on direct appeal. See Cal Rules of Ct 8.532(b)(2) (denial of petition for review final when filed). However, if the defendant does not ask the California Supreme Court to review the court of appeal's decision, the conviction is final for federal habeas corpus purposes 40 days after the court of appeal issues its decision on direct review. Cal Rules of Ct 8.264(b)(1), 8.500(e)(1). If a petitioner does not pursue direct review of his or her conviction at all, the conviction is final for federal habeas purposes 60 days after the date the sentence is imposed, the last day on which a notice of appeal could have been filed in the case, except in cases of cross-appeal. Cal Rules of Ct 8.308(a).

In *Hasan v Galaza* (9th Cir 2001) 254 F3d 1150, 1154, the Ninth Circuit held that the date on which the petitioner discovered the factual predicate of a claim of ineffective assistance of counsel was not the date on which he became aware of facts that suggested that his trial attorney's performance might have been somewhat deficient, but the date on which he became aware of facts that allowed him to assert in objective good faith that he was prejudiced by counsel's deficient performance. The court therefore remanded the case to the district court to determine when the petitioner, exercising due diligence, could have discovered the facts that allowed him to claim prejudice. In *Whalem/Hunt v Early* (9th Cir 2000) 233 F3d 1146, 1148 (en banc), the Ninth Circuit held that the prison law library's failure to make available to the petitioner a copy of the AEDPA's (Antiterrorism and Effective Death Penalty Act of 1996) statute of limitations could be a state-created "impediment" to filing that would delay commencement of the 1-year limitations period, and remanded the case to district court for further factual development.

In computing the 1-year limitations period pursuant to Fed R Civ P 6(a), the date of the event that triggers commencement of the period is excluded, whereas the last day of the period, *i.e.*, the date the federal petition is due, is included unless the court is closed that day. In addition, for a state prisoner petitioning pro se, the "mailbox" rule applies: A petition is considered filed when it is delivered to the prison's legal mail system for mailing to the court. Habeas Rule 3(d).

Under Ninth Circuit precedent, the Constitution requires an exception to the statute of limitations (and other procedural defaults) for a petitioner who can establish, in light of reliable new evidence, that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." See *Schlup v Delo* (1995) 513 US 298, 327, 130 L Ed 2d 808, 836, 115 S Ct 851; *Griffin v Johnson* (9th Cir 2003) 350 F3d 956, 960 ("actual innocence gateway" requires presentation of newly presented, not newly discovered, evidence). The petitioner's case

must be extraordinary to warrant review on the merits of an otherwise barred claim. See *House v Bell* (2006) 547 US 518, 537, 165 L Ed 2d 1, 126 S Ct 2064. To qualify for the "miscarriage of justice exception," a petitioner must show that a constitutional violation has "probably resulted" in a conviction when he or she was actually innocent. *Cook v Schriro* (9th Cir 2008) 538 F3d 1000, 1028. Therefore, the exception does not apply to an untimely petition when the petitioner asserts only procedural violations without claiming actual innocence. *Johnson v Knowles* (9th Cir 2008) 541 F3d 933, 937.

In *Day v McDonough* (2006) 547 US 198, 164 L Ed 2d 376, 387, 126 S Ct 1675, the Supreme Court held that district courts are "permitted, but not obliged" to consider the timeliness of a state prisoner's habeas petition sua sponte. If the court does raise the timeliness issue sua sponte, it must (164 L Ed 2d at 388)

> accord the parties fair notice and an opportunity to present their positions. … [It] must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and "determine whether the interests of justice would be better served" by addressing the merits or by dismissing the petition as time barred.

Note that at least one circuit has held that notwithstanding *Day,* if neither the respondent nor the district court raises the issue of timeliness in the district court, it cannot be raised as a defense on appeal. *Grigsby v Cotton* (7th Cir 2006) 456 F3d 727, 731.

Amending a timely petition after the AEDPA filing deadline. Under Fed R Civ P 15(c)(1)(B), it is possible to amend a pleading with a new claim or defense when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Such an amendment is said to relate back to the original pleading. In the habeas context, the Supreme Court has construed this rule narrowly to preclude the petitioner from adding new claims after the AEDPA filing deadline has expired unless the original claims and the new claims are based on a "common core" of operative facts. *Mayle v Felix* (2005) 545 US 644, 162 L Ed 2d 582, 590, 125 S Ct 2562; *Hebner v McGrath* (9th Cir 2008) 543 F3d 1133, 1137.

> Ø **Note:** As the dissent points out, this ruling disadvantages pro se habeas petitioners who may not be aware of all their federal claims at the time they file their petitions. *Mayle v Felix* (2005) 545 US 644, 162 L Ed 2d 582, 605, 125 S Ct 2562 (Souter, J., dissenting). Even if counsel is appointed for a pro se petitioner, the appointment is likely to be made after the AEDPA limitations period has expired. An attorney representing an indigent appellant in state court can provide substantial assistance to a client with viable federal constitutional claims by drafting a federal habeas petition for the client that includes all potential claims, whether they have been exhausted or not, even if the attorney does not plan to represent the client in the federal habeas proceedings. The client can then file this petition in federal court as a "protective petition." See §45.13. Note that while some Ninth Circuit case law suggests that a "Pace" protective petition must contain at least one exhausted claim, the rationale of *Pace* itself indicates that a protective petition could consist entirely of unexhausted claims. See *Heleva v Brook* s (3d Cir 2009) 581 F 3d 187, 192.

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§45.13 a. Statutory Tolling

The 1-year statute of limitations is tolled during the time a "properly filed" state court petition for postconviction or other collateral review is pending. 28 USC §2244(d)(2). A state postconviction petition is "properly filed" and thus tolls the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996) statute of limitations if it complies with the applicable laws and rules governing filing, even if some or all of the claims are procedurally barred. *Artuz v Bennett* (2000) 531 US 4, 148 L Ed 2d 213, 121 S Ct 361; *Smith v Duncan* (9th Cir 2002) 297 F3d 809; *Pace v DiGuglielmo* (2005) 544 US 408, 413, 161 L Ed 2d 669, 676, 125 S Ct 1807. See *Allen v Siebert* (2007) 552 US 3, 169 L Ed 2d 329, 128 S Ct 2. In *Bonner v Carey* (9th Cir 2005) 425 F3d 1145, amended at (9th Cir 2006) 439 F3d 993, the Ninth Circuit held that when a California state court denied a petition because the petitioner did not explain his delay in asserting certain claims, it was denying the petition as untimely and thus, under *Pace,* the petition was not "properly filed."

> Ø **Practice tip:** If there is any doubt about the timeliness of a state petition for collateral relief, the petitioner should file a protective petition in federal district court and ask the court to "stay and abey the federal habeas proceedings until state remedies are exhausted." *Pace,* 544 US at 416, 161 L Ed 2d at 678. On stay and abeyance, see §45.23.

For petitioners exhausting state remedies by seeking collateral relief in California state courts, tolling extends for one complete round of the state's established review process, *i.e.,* from the initial filing of a habeas corpus petition in superior court to the supreme court's denial of relief. *Carey v Saffold* (2002) 536 US 214, 222, 153 L Ed 2d 260, 269, 122 S Ct 2134. For pro se prisoners, the state petition is deemed filed the moment the prisoner delivers it to prison authorities for forwarding to the court. *Ramirez v Yates* (9th Cir 2009) 571 F3d 993, 996 n1. The tolling period includes the intervals or gaps between the petition's denial in the lower court and its refiling in a higher court, if the petitioner complies with the state's timeliness rules. 536 US at 216, 153 L Ed 2d at 266. In *Evans v Chavis* (2006) 546 US 189, 163 L Ed 2d 684, 126 S Ct 846, the Supreme Court held that even when a California court denies a petition for collateral relief on the merits, if the California court does not explicitly state that the petition was timely, the federal court must decide whether the petitioner's request for appellate review of a lower court's denial of the petition "was made within what California would consider a 'reasonable time.'" 546 US at 198, 163 L Ed 2d at 694. The federal court cannot permit tolling under 28 USC §2244(d)(2) if, in its judgment, the California courts would conclude that the petitioner unreasonably delayed filing a petition for collateral relief at any level of the California judicial system.

In *Chavis,* the Supreme Court held that an unexplained 6-month gap between the filing of habeas petitions in California courts was unreasonable and therefore untimely. 546 US at 201, 163 L Ed 2d at 696. In carrying out the task of determining whether California courts would have considered particular periods of time before and between the filing of state habeas petitions to be unreasonable, the Ninth Circuit and lower federal courts have reached a variety of conclusions. See *Winston v Sisto* (ED Cal 2008) 2008 WL 2119918 *28 n5 (collecting cases). A critical variable in these cases is whether or not a particular delay is explained. For example, in *Winston* the district court held that because a petitioner explained and justified each segment of the 212-day period between denial of one state petition and the filing of the next, he was entitled to gap tolling for the 212-day period between petitions. *Winston,* 2008 WL 2119918 *25. On the other hand, in *Chaffer v Prosper* (9th Cir 2010) 592 F3d 1046, 1048, the petitioner was not entitled to "gap tolling" for unjustified delays of just over 100 days between denial of one state petition and the filing of the next. For situations in which courts have excused lengthy delays that were adequately explained, see *Chandler v Moore* (ED Cal, Aug. 6, 2009, No. CIV S-07-1762) 2009 US Dist Lexis 72365 [citation n2].

The limitations period is *not* tolled during these periods:

- While state clemency proceedings are in progress (*Malcom v Payne* (9th Cir 2002) 281 F3d 951); or
- While a habeas petition is pending in *federal* court (*Duncan v Walker* (2001) 533 US 167, 172, 150 L Ed 2d 251, 258, 121 S Ct 2120.

The limitations period is not tolled during the time available to seek a writ of certiorari in the U.S. Supreme Court after denial of the state habeas petition. *Lawrence v Florida* (2007) 549 US 327, 166 L Ed 2d 924, 127 S Ct 1079. A habeas petition that is fully exhausted when filed does not become "unexhausted" upon a decision to seek certiorari, and a district court has no cause to dismiss such a petition as premature. *Roper v Weaver* (2007) 550 US 598, 167 L Ed 2d 966, 127 S Ct 2022.

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§45.14 b. Equitable Tolling

The doctrine of equitable tolling may also be available in extraordinary circumstances. In *Herbst v Cook* (9th Cir 2001) 260 F3d 1039, 1043, the Ninth Circuit ruled that the district court erred in dismissing a habeas corpus petition as untimely without giving the petitioner an adequate opportunity to develop the facts underlying his claims of equitable tolling and state-created impediment to filing. See also *Ford v Pliler* (9th Cir 2009) 590 F3d 782, 786 (because he could not show he had been affirmatively misled by district court about statute of limitations before it dismissed his mixed petitions, petitioner not entitled to equitable tolling); *Ramirez v Yates* (9th Cir 2009) 571 F3d 993, 997 (district court instructed to make necessary findings of fact to resolve petitioner's equitable tolling claim); *Townsend v Knowles* (9th Cir 2009) 562 F3d 1200, 1206 (petitioner entitled to equitable tolling when delay in filing federal petition was due to reliance on Ninth Circuit precedent subsequently overruled by U.S. Supreme Court); *Harris v Carter* (9th Cir 2008) 515 F3d 1051, 1057 (same); *Roy v Lampert* (9th Cir 2006) 465 F3d 964, 969 (pro se petitioners entitled to evidentiary hearing on equitable tolling when they alleged prison had "woefully deficient law library"); *Mendoza v Carey* (9th Cir 2006) 449 F3d 1065, 1069 (petitioner, a Spanish-speaker, entitled to evidentiary hearing on equitable tolling when he alleged that prison law library failed to provide Spanish-language books or Spanish-speaking clerks or librarians to assist Spanish-speaking inmates); *Espinoza-Matthews v California* (9th Cir 2005) 432 F3d 1021 (prison's refusal to allow petitioner access to his legal papers for 11 months despite his diligent attempts to obtain them was extraordinary circumstance that entitled him to equitable tolling); *Laws v Lamarque* (9th Cir 2003) 351 F3d 919, 923 (district court abused discretion by denying petition without ordering development of record on petitioner's eligibility for equitable tolling owing to his mental incompetence during limitations period); *Corjasso v Ayers* (9th Cir 2002) 278 F3d 874 (district court's erroneous dismissal of pro se petitioner's writ petition because of technical deficiencies on cover sheet, and court's subsequent loss of petition, were extraordinary circumstances that justified equitable tolling); *Calderon v U.S. Dist. Court (Kelly V)* (9th Cir 1998) 163 F3d 530, 542, overruled on other grounds in *Woodford v Garceau* (2003) 538 US 202, 155 L Ed 2d 363, 369, 123 S Ct 1398 (existence of genuine question about petitioner's mental capacity justified district court's application of doctrine of equitable tolling to toll statute of limitations until reasonable period after determination that petitioner was competent).

Equitable tolling was not available to a petitioner whose failure to file the federal habeas petition on time arose from his attorney's negligence in computing the time. Although the attorney's miscalculation was beyond the petitioner's control, it was not extraordinary. *Frye v Hickman* (9th Cir 2001) 273 F3d 1144. See also *Malcom v Payne* (9th Cir 2002) 281 F3d 951 (neither statutory nor equitable tolling available to petitioner who decided to pursue state clemency proceedings rather than filing a second habeas petition). Equitable tolling may be available if an attorney's conduct is sufficiently egregious. *Spitsyn v Moore* (9th Cir 2003) 345 F3d 796, 800 (equitable tolling may be appropriate when counsel retained to file habeas petition failed to do so and disregarded requests to return petitioner's files until well after deadline had passed). Pro se status, on its own, is not enough to warrant equitable tolling. *Johnson v U.S.* (2005) 544 US 295, 161 L Ed 2d 542, 125 S Ct 1571.

In *Fail v Hubbard* (9th Cir 2002) 315 F3d 1059, the Ninth Circuit held that neither statutory nor equitable tolling was available to a petitioner whose totally unexhausted federal habeas petition was dismissed after the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deadline had passed. Note, however, that if at least one claim is exhausted, it may be possible to preserve the unexhausted claims. See *Jefferson v Budge* (9th Cir 2005) 419 F3d 1013 (when trial court erroneously dismissed mixed petition without offering petitioner opportunity to amend petition to omit unexhausted claims, petitioner was entitled to equitable tolling while state exhaustion proceedings pending). For discussion, see §45.23.

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§45.15 3. Scope of Federal Habeas Corpus

Federal habeas corpus is available only on behalf of a person in custody in violation of the Constitution or laws or treaties of the United States. 28 USC §§2241(c)(3), 2254(a); *Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475. See *Benitez v Garcia* (9th Cir 2007) 495 F3d 640 (claim founded on extradition treaty between United States and Venezuela). For discussion of the custody requirement, see §45.11. For discussion of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limitations on the scope of federal habeas corpus, see §45.16.

The following are examples of issues that may be raised by way of a habeas petition:

- **Fifth Amendment claims,** including involuntary confessions (*Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602; *Withrow v Williams* (1993) 507 US 680, 123 L Ed 2d 407, 113 S Ct 1745 (Fifth Amendment *Miranda* claims may be raised in federal habeas proceeding after full and fair opportunity to litigate claim in state court); *Milton v Wainwright* (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174); prosecutor's comments on defendant's silence (*Wainwright v Greenfield* (1986) 474 US 284, 88 L Ed 2d 623, 106 S Ct 634); double jeopardy (*Schiro v Farley* (1994) 510 US 222, 127 L Ed 2d 47, 114 S Ct 783; *Robinson v Neil* (1973) 409 US 505, 35 L Ed 2d 29, 93 S Ct 876); and privilege against self-incrimination (*Carter v Kentucky* (1981) 450 US 288, 67 L Ed 2d 241, 101 S Ct 1112 (when requested, trial court must give instruction that jury cannot draw inference from defendant's claim of right of silence)).
- **Sixth Amendment claims,** including the right to confrontation (*Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354; *Mancusi v Stubbs* (1972) 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308; *Holley v Yarborough* (9th Cir 2009) 568 F3d 1091, 1098 (limits on cross-examination of alleged victim unreasonable); *Christian v Rhode* (9th Cir 1994) 41 F3d 461 (right of confrontation extends to pretrial depositions by prosecution for trial use)); the right to counsel (*Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 969, 129 S Ct 2079 (doctrines ensuring voluntariness of Fifth Amendment waiver of right to counsel simultaneously ensure voluntariness of Sixth Amendment waiver of right to counsel); *Cordova v Baca* (9th Cir 2003) 346 F3d 924 (defective *Faretta* waiver)); the right to self-representation (*Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525; *Adams v Carroll* (9th Cir 1989) 875 F2d 1441 (request to represent self must be knowing, intelligent, timely, unequivocal, and not for purpose of delay)); claims of ineffective assistance of counsel (*Williams v Taylor* (2000) 529 US 362, 390, 146 L Ed 2d 389, 416, 120 S Ct 1495; *Smith v Robbins* (2000) 528 US 259, 285, 145 L Ed 2d 756, 780, 120 S Ct 746; *Lockhart v Fretwell* (1993) 506 US 364, 122 L Ed 2d 180, 113 S Ct 838 (for remedy to be available, prejudice from ineffective assistance must have made proceeding unfair or unreliable); *Richter v Hickman* (9th Cir 2009) 578 F3d 944 (ineffective assistance of counsel to fail to make reasonable investigation before settling on trial strategy); *Chacon v Wood* (9th Cir 1994) 36 F3d 1459 (interpreter's errors can render assistance of counsel ineffective despite counsel's own competence)); the right to speedy trial (*Doggett v U.S.* (1992) 505 US 647, 120 L Ed 2d 520, 112 S Ct 2686); the right to present a defense (*Crane v Kentucky* (1986) 476 US 683, 90 L Ed 2d 636, 106 S Ct 2142 (exclusion of testimony regarding circumstances of confession violated defendant's right to present defense)); the right to a jury trial (*Sullivan v Louisiana* (1993) 508 US 275, 124 L Ed 2d 182, 113 S Ct 2078 (right to jury trial and due process violated by instruction permitting jury to find guilt by standard less than "beyond a reasonable doubt"); *Smith v Curry* (9th Cir 2009) 580 F3d 1071, 1079 (jury instruction deprived defendant of right to jury trial by coercing verdict)); and defendant's right to testify (*Rock v Arkansas* (1987) 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704).

Ø **Note:** Ineffective assistance of counsel in state or federal habeas proceedings is *not* a ground for relief in federal habeas corpus proceedings. 28 USC §§2254(i), 2261(e).

- **Eighth Amendment claims,** such as unreasonable bail (*Murphy v Hunt* (1982) 455 US 478, 71 L Ed 2d 353, 102 S Ct 1181) and disproportionate penalty (*Gonzalez v Duncan* (9th Cir 2008) 551 F3d 875).
- **Fourteenth Amendment due process claims,** such as prosecutorial misconduct (*Donnelly v DeChristoforo* (1974) 416 US 637, 40 L Ed 2d 431, 94 S Ct 1868); failure to collect or preserve potentially exculpatory

evidence (*Arizona v Youngblood* (1988) 488 US 51, 102 L Ed 2d 281, 109 S Ct 333; *Lord v Wood* (9th Cir 1999) 184 F3d 1083); involuntary confession (*Miller v Fenton* (1985) 474 US 104, 88 L Ed 2d 405, 106 S Ct 445); insufficient evidence (*Briceno v Scribner* (9th Cir 2009) 555 F3d 1069, 1078); involuntary guilty plea (*Hayes v Kincheloe* (9th Cir 1986) 784 F2d 1434 (failure to inform defendant of elements of crime rendered plea involuntary)); the right to be present at trial proceedings (*Kentucky v Stincer* (1987) 482 US 730, 96 L Ed 2d 631, 107 S Ct 2658); competency to stand trial, plead guilty, or waive right to counsel (*Godinez v Moran* (1993) 509 US 389, 125 L Ed 2d 321, 113 S Ct 2680); jury instructions that render trial fundamentally unfair (*Hendricks v Vasquez* (9th Cir 1992) 974 F2d 1099); the right to psychiatric assistance (*Ake v Oklahoma* (1985) 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087; *Harris v Vasquez* (9th Cir 1990) 949 F2d 1497); evidentiary rulings by the trial court (*Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475); impermissibly suggestive pretrial identification (*Manson v Brathwaite* (1977) 432 US 98, 53 L Ed 2d 140, 97 S Ct 2243; *U.S. v Givens* (9th Cir 1985) 767 F2d 574 (in-court identification)); and cumulative effect of multiple errors that so infected the trial with unfairness as to make the resulting conviction a denial of due process (*Parle v Runnels* (9th Cir 2007) 505 F3d 922).

- **Fourteenth Amendment equal protection claims,** such as the right to the race-neutral use of peremptory challenges (*Batson v Kentucky* (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712; *Miller-El v Dretke* (2005) 545 US 231, 162 L Ed 2d 196, 125 S Ct 2317; *Ali v Hickman* (9th Cir 2009) 584 F3d 1174, 1176; *Paulino v Harrison* (9th Cir 2008) 542 F3d 692; *Gonzalez v Brown* (9th Cir 2009) 585 F3d 1202; *Kesser v Cambra* (9th Cir 2006) 465 F3d 351; *Williams v Runnels* (9th Cir 2006) 432 F3d 1102).

Ø **Note:** Fourth Amendment issues cannot be raised on federal habeas unless the petitioner was deprived of the opportunity for a full and fair hearing on the issue in state court. *Stone v Powell* (1976) 428 US 465, 494, 49 L Ed 2d 1067, 1088, 96 S Ct 3037. However, a claim of ineffective assistance of counsel may be asserted against both trial and appellate counsel for failing to raise meritorious Fourth Amendment suppression issues. *Kimmelman v Morrison* (1986) 477 US 365, 91 L Ed 2d 305, 106 S Ct 2574.

More-detailed lists of possible federal habeas issues can be found in Appeals & Writs, chap 13 and in Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §9.1 (5th ed 2005).

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a. Standard of Review for State Court Legal Rulings

§45.16 (1) State Court's Interpretation of State Law

When reviewing a state court conviction on federal habeas corpus, the federal court is bound by the state's interpretation of its own law. *Bradshaw v Richey* (2005) 546 US 74, 163 L Ed 2d 407, 126 S Ct 602. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v McGuire* (1991) 502 US 62, 67, 116 L Ed 2d 385, 112 S Ct 475. This rule includes an interpretation "announced on direct appeal of the challenged conviction." *Richey,* 163 L Ed 2d at 411.

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§45.17 (2) State Court's Interpretation of Federal Law

Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in exercising their habeas corpus jurisdiction, the federal courts reviewed all questions of law and mixed questions of fact and law de novo. See *Thompson v Keohane* (1995) 516 US 99, 133 L Ed 2d 383, 116 S Ct 457; *Wright v West* (1992) 505 US 277, 299, 120 L Ed 2d 225, 242, 112 S Ct 2482 (O'Connor, J., concurring). Under AEDPA, the federal court's review of state court rulings is highly deferential. If the petitioner's claim was adjudicated on the merits in state court, the federal court may grant federal habeas relief only if the decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 USC §2254(d)(1)-(2). For further discussion of state court findings of fact, see §45.20.

"Adjudication on the merits" does not require an evidentiary hearing; it requires only that the petition was denied on substantive, as opposed to procedural, grounds. *Lambert v Blodgett* (9th Cir 2004) 393 F3d 943, 965.

AEDPA's heightened deference requirements do not apply to claims for which no adjudication on the merits in state court was possible because, for example, the evidence upon which the adjudication must be based was adduced for the first time at a federal evidentiary hearing. *Killian v Poole* (9th Cir 2002) 282 F3d 1204, 1207. In addition, if the state court fails to provide procedural protections required by federal law when it denies a claim, then the deference normally required by AEDPA does not apply. *Panetti v Quarterman* (2007) 551 US 930, 168 L Ed 2d 662, 127 S Ct 2842.

Ø **Note:** If the petitioner has filed multiple petitions in state courts, the federal habeas court is to review only the most recent reasoned state court decision denying a claim. *Barker v Fleming* (9th Cir 2005) 423 F3d 1085, 1091.

In *Williams v Taylor* (2000) 529 US 362, 379, 146 L Ed 2d 389, 409, 120 S Ct 1495, the Supreme Court held the following:

- The phrase "clearly established federal law" partially codifies the retroactivity doctrine of *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (529 US at 379) (see §45.21);
- The phrase "as determined by the Supreme Court" limits the source of law to the holdings of the high Court (529 US at 412);
- A decision is contrary to clearly established Supreme Court law if it either (1) "applies a rule that contradicts the governing law set forth in our cases" or (2) arrives at a different result on facts that are materially indistinguishable from the facts in a U.S. Supreme Court case (529 US at 406); and
- An unreasonable application of clearly established Supreme Court precedent is one that "identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case [or] either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply" (529 US at 407).

In *Fisher v Roe* (9th Cir 2001) 263 F3d 906, 914, overruled on other grounds in *Payton v Woodford* (9th Cir 2003) 346 F3d 1204, 1218, the Ninth Circuit considered the term "clearly established" in the context of a claim that is not factually on all fours with claims the U.S. Supreme Court has addressed, holding that a rule is clearly established if the high Court has "set forth a working constitutional standard by which to evaluate" the claim. Although the Supreme Court has not completely delineated the term "unreasonable application," a standard that equates the term with "clear error" does not give enough deference to state courts. *Lockyer v Andrade* (2003) 538 US 63, 75, 155 L Ed 2d 144, 158, 123 S Ct 1166. If "fair-minded jurists could disagree," the state court adjudication is clearly reasonable. *Yarborough v Alvarado* (2004) 541 US 652, 664, 158 L Ed 2d 938, 951, 124 S Ct 2140.

Ø **Warning:** When litigating standard of review issues, counsel should not rely on Ninth Circuit cases decided under the clear error standard of *Tuan Van Tran v Lindsey* (9th Cir 2000) 212 F3d 1143, 1152, which was rejected in *Lockyer v Andrade, supra*.

In determining whether a claim is arguable on federal habeas corpus after AEDPA, and in preparing the petition and supporting argument, counsel should keep in mind that "[a]nalysis of an AEDPA habeas corpus appeal begins with identification of what Supreme Court decisions plaintiff claims the state court decision was contrary to or misapplied." *Garvin v Farmon* (9th Cir 2001) 258 F3d 951, 955; see, *e.g.*, *Brodit v Cambra* (9th Cir 2003) 350 F3d 985, 989 (habeas challenge failed owing to absence of clearly established U.S. Supreme Court precedent contrary to California appellate decision).

While only Supreme Court precedent constitutes "clearly established federal law" for this purpose, federal circuit court precedent is instructive in determining what law is "clearly established" and what constitutes "reasonable application" of the governing law. *Duhaime v Ducharme* (9th Cir 2000) 200 F3d 597, 600. "However, when the Supreme Court has expressly reserved consideration of an issue, … the petitioner cannot rely on circuit authority to demonstrate that the right he or she seeks to vindicate is clearly established." *Alberni v McDaniel* (9th Cir 2006) 458 F3d 860, 864. But see 458 F3d at 874 (McKeown, J., concurring in part and dissenting in part).

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§45.18 (3) Procedural and Postcard Denials

In many cases, the California courts will not have provided a reasoned decision for denying a state habeas petition. If the last reasoned state court decision denied a state habeas petition on purely procedural grounds, then the deference to the state court's decision called for by 28 USC §2254(d) does not apply. *Lewis v Mayle* (9th Cir 2004) 391 F3d 989, 996 (de novo review, rather than AEDPA's deferential standard, is applicable to claim that state court did not reach on merits).

In addition, frequently, the California Supreme Court issues a "postcard denial" of a habeas corpus petition, that is, a one-line denial of the petition that does not reject the petition on procedural grounds or provide the legal reasoning behind the court's denial of the petition on the merits. In these cases, the federal court will first determine whether a lower state court rejected the claim in a reasoned legal opinion. See *Robinson v Ignacio* (9th Cir 2004) 360 F3d 1044, 1055 (federal court reviews "last reasoned decision" by state court).

When there is no reasoned state court decision regarding a claim, the court must perform an independent review of the record to determine whether the state court decision was objectively unreasonable. *Dung The Pham v Terhune* (9th Cir 2005) 400 F3d 740, 742.

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§45.19 (4) Cases Applying AEDPA Standard of Review for Legal Rulings

A state court decision is "contrary to" clearly established federal law if it applies a rule that contradicts the governing law set forth in Supreme Court cases, for example, by using the wrong legal rule or framework. *Frantz v Hazey* (9th Cir 2008) 533 F3d 724, 734. A state court decision amounts to an "unreasonable application" of federal law if it identifies the correct legal rule but applies it in an unreasonable manner. *Williams v Taylor* (2000) 529 US 362, 413, 146 L Ed 2d 389, 429, 120 S Ct 1495 (O'Connor concurring).

In *Williams,* the high Court applied the "unreasonable application" analysis to a claim of ineffective assistance of counsel, holding that the state court's conclusion that trial counsel's failure to present available evidence in mitigation at the penalty phase of a capital trial did not constitute ineffective assistance of counsel was an unreasonable application of *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052. *Williams,* 529 US at 390, 146 L Ed 2d at 416. See also *Wiggins v Smith* (2003) 539 US 510, 156 L Ed 2d 471, 123 S Ct 2527. But see *Bobby v Van Hook* (2009) ___ US ___, 175 L Ed 2d 255, 130 S Ct 13 (scope of counsel's investigation reasonable; ABA guidelines describe prevailing professional norms, but *Strickland* describes standard for claims of ineffective assistance of counsel). The following are some Ninth Circuit cases analyzing errors under the rules set forth in *Williams v Taylor:*

- *Pinholster v Ayers* (9th Cir 2009) 590 F3d 651 (counsel's failure to investigate defendant's background for mitigating evidence objectively unreasonable and prejudicial; California Supreme Court's denial of habeas petition was contrary to and unreasonable application of Supreme Court precedent under *Strickland*);
- *Bradway v Cate* (9th Cir 2009) 588 F3d 990 (defendant failed to show how distinction drawn by California courts between first degree lying-in-wait murder statute and lying-in-wait special circumstance was contrary to or unreasonable application of federal law);
- *Smith v Curry* (9th Cir 2009) 580 F3d 1071 (instruction to deadlocked jury that was directed to concerns of holdout juror was unreasonable);
- *Bible v Ryan* (9th Cir 2009) 571 F3d 860 (Arizona court's determination that defendant suffered no prejudice from counsel's failure to introduce speculative mitigating evidence was not unreasonable);
- *Holley v Yarborough* (9th Cir 2009) 568 F3d 1091, 1101 (given absence of clear Supreme Court precedent, Ninth Circuit could not conclude that state court's ruling regarding admission of irrelevant and prejudicial sexually explicit evidence was unreasonable);
- *Delgadillo v Woodford* (9th Cir 2008) 527 F3d 919, 922 (in light of holding in *Danforth v Minnesota* (2008) 552 US 264, 169 L Ed 2d 859, 128 S Ct 1029, that federal rule of nonretroactivity for federal habeas proceedings is not binding on state courts, state court decision to retroactively apply *Crawford* was reasonable);
- *Gautt v Lewis* (2007) 489 F3d 993 (state court's inadequate analysis of discrepancy between crime charged and crime of conviction, and its conclusion that defendant's constitutional right to notice of charges against him was not violated, was objectively unreasonable);
- *Carey v Musladin* (2006) 549 US 70, 166 L Ed 2d 482, 127 S Ct 649 (given absence of Supreme Court precedent on conduct by spectators, state court's ruling that buttons depicting victim worn by spectators during defendant's trial did not deprive defendant of due process was not unreasonable application of clearly established federal law);
- *Arnold v Runnels* (9th Cir 2005) 421 F3d 859 (because defendant's statement that he did not want to talk on tape was clear and unequivocal invocation of right to remain silent that was never revoked, permitting recording to be used at trial was unreasonable application of clearly established federal law);
- *Inthavong v LaMarque* (9th Cir 2005) 420 F3d 1055 (state court's conclusion that coerced confession was harmless error was not unreasonable application of clearly established federal law);
- *Hirschfield v Payne* (9th Cir 2005) 420 F3d 922 (denial of *Faretta* motion on ground that defendant did not have sufficient legal knowledge to represent himself was contrary to clearly established federal law);
- *Campbell v Rice* (9th Cir 2005) 408 F3d 1166 (state court's conclusion that harmless error analysis could be used to determine whether reversal was required because of defendant's absence during proceedings to decide

whether trial counsel had disqualifying conflict of interest was not objectively unreasonable);

- *Martinez v Garcia* (9th Cir 2004) 371 F3d 600, 601 (when instructions combined two theories of guilt, one of which was untenable, and conviction could have rested on untenable theory, state court's conclusion that structural error did not occur was objectively unreasonable);
- *Su Chia v Cambra* (9th Cir 2004) 360 F3d 997, 1003 (California court's decision to exclude hearsay statements that inculpated declarant and exonerated defendant was objectively unreasonable application of clearly established federal law);
- *Clark v Murphy* (9th Cir 2003) 331 F3d 1062 (California court's finding that defendant's statement, "I think I would like to talk to a lawyer," was ambiguous invocation of right to counsel was neither contrary to nor unreasonable application of federal constitutional law);
- *Powell v Galaza* (9th Cir 2003) 328 F3d 558 (trial court's instruction that defendant's testimony established element of charged offense contrary to reasoning and result of controlling U.S. Supreme Court authority);
- *Benn v Lambert* (9th Cir 2002) 283 F3d 1040 (prosecution's failure to disclose impeachment material about its star witness violated *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194; decided under "clear error" standard);
- *Bailey v Newland* (9th Cir 2001) 263 F3d 1022 (difference of opinion among federal courts indicated that state court's ruling was not unreasonable application of clearly established law);
- *Gunn v Ignacio* (9th Cir 2001) 263 F3d 965, 968 (prosecutor's breach of plea agreement violated due process under *Santobello v New York* (1971) 404 US 257, 30 L Ed 2d 427, 92 S Ct 495; relief granted under clear error standard);
- *Fisher v Roe* (9th Cir 2001) 263 F3d 906, overruled on other grounds in *Payton v Woodford* (9th Cir 2003) 346 F3d 1204, 1218 (several Supreme Court cases read together establish defendants' right to be present at readback if their absence could have undermined fairness of proceedings; relief granted under clear error standard);
- *Wildman v Johnson* (9th Cir 2001) 261 F3d 832 (trial counsel's choice of experts was not ineffective under Supreme Court precedents);
- *Garvin v Farmon* (9th Cir 2001) 258 F3d 951, 955 (state court's ruling that violation of petitioner's constitutional rights on Friday did not taint confession on Monday was not unreasonable application of *Wong Sun v U.S.* (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct 407, and other fruit of the poisonous tree cases);
- *La Crosse v Kernan* (9th Cir 2001) 244 F3d 702, 707 (state court's ruling that defendant did not have right to be present at readback was not unreasonable application of clearly determined federal law because of lack of clear guidance from Supreme Court);
- *Lockhart v Terhune* (9th Cir 2001) 250 F3d 1223, 1228 (state court's rulings that trial counsel did not have actual conflict of interest and that petitioner failed to establish prejudice were contrary to Supreme Court precedent, and state court's determination that petitioner had waived the conflict was unreasonable application of Supreme Court precedent);
- *Depetris v Kuykendall* (9th Cir 2001) 239 F3d 1057, 1061 (erroneous exclusion of crucial evidence corroborating defendant's testimony was contrary to *Chambers v Mississippi* (1973) 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038, and *Washington v Texas* (1967) 388 US 14, 19, 18 L Ed 2d 1019, 1023, 87 S Ct 1920); and
- *Loi Van Nguyen v Lindsey* (9th Cir 2000) 232 F3d 1236 (Supreme Court cases indicating that prosecutor denies due process by knowingly using false evidence or otherwise acting in bad faith did not require conclusion that prosecutor's use of inconsistent arguments at different trials denied due process, when each argument was consistent with evidence introduced at that trial).

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§45.20 b. Standard of Review for Findings of Fact

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), like pre-AEDPA law, requires the federal courts to review state court findings of fact with particular deference. When the state court has adjudicated a claim on the merits, federal court review of the state court's findings of fact is limited to the question of whether the state court made an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 USC §2254(d)(2). "[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v Maddox* (9th Cir 2004) 366 F3d 992, 999. The presumption that the state court's factual findings are correct may be rebutted only by clear and convincing evidence. 28 USC §2254(e)(1); *Torres v Prunty* (9th Cir 2000) 223 F3d 1103.

Ninth Circuit cases holding that the state court made an unreasonable determination of facts include the following:

- *Ali v Hickman* (9th Cir 2009) 584 F3d 1174, 1181 (state court's conclusion that jury selection process was not discriminatory was unreasonable in light of comparative juror analysis and other facts);
- *Davis v Woodford* (9th Cir 2006) 446 F3d 957 (when plea agreement explicitly stated that defendant's conviction of eight robberies would be treated as one conviction for all purposes, state court's treatment of conviction as eight strikes was unreasonable determination of facts and unreasonable application of clearly established Supreme Court precedent (*Santobello v New York* (1971) 404 US 257, 30 L Ed 2d 427, 92 S Ct 495));
- *Davis v Grigas* (9th Cir 2006) 443 F3d 1155 (state court's reliance on erroneous factual statement by defense counsel to deny relief was objectively unreasonable);
- *Juan H. v Allen* (9th Cir 2005) 408 F3d 1262 (no reasonable fact-finder could have found that petitioner aided and abetted first degree murder);
- *Taylor v Maddox*, *supra* (state court conclusion that 16-year-old's confession was voluntary was objectively unreasonable);
- *Hall v Director of Corrections* (9th Cir 2003) 343 F3d 976 (reviewing court's rejection of facts necessarily found by trial judge who granted state habeas petition was unreasonable);
- *Avila v Galaza* (9th Cir 2002) 297 F3d 911 (referee's findings of fact supporting its conclusion that trial counsel was not ineffective were unreasonable in light of evidence at hearing on petitioner's state habeas petition); and
- *McClain v Prunty* (9th Cir 2000) 217 F3d 1209, 1220 (trial court's factual finding that defendant had not made out prima facie case of intentional racial discrimination in jury selection unreasonable in light of serious disproportion in number of black prospective jurors the prosecutor excluded.

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§45.21 c. The Rule of *Teague v Lane*

In *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, the Supreme Court held that federal habeas corpus is unavailable if the claim rests on a "new rule" of constitutional law that was announced after petitioner's state appeal. For discussion of what constitutes a new rule, see *Beard v Banks* (2004) 542 US 406, 159 L Ed 2d 494, 501, 124 S Ct 2504; *O'Dell v Netherland* (1997) 521 US 151, 138 L Ed 2d 351, 117 S Ct 1969; *Stringer v Black* (1992) 503 US 222, 117 L Ed 2d 367, 112 S Ct 1130; *Saffle v Parks* (1990) 494 US 484, 108 L Ed 2d 415, 110 S Ct 1257; *Butler v McKellar* (1990) 494 US 407, 108 L Ed 2d 347, 110 S Ct 1212; *Butler v Curry* (9th Cir 2008) 528 F3d 624, 633 (case does not announce new rule if result was dictated by precedent).

The *Teague* rule is subject to two exceptions. A new rule may be applied to provide federal habeas relief if it (1) places certain kinds of private conduct beyond the reach of the criminal law, or (2) is implicit in the concept of ordered liberty. *Butler v McKellar* (1990) 494 US 407, 108 L Ed 2d 347, 110 S Ct 1212. See also *Lambrix v Singletary* (1997) 520 US 518, 137 L Ed 2d 771, 117 S Ct 1517; *Jackson v Ylst* (9th Cir 1990) 921 F2d 882. The second category is "reserved for watershed rules of criminal procedure … without which the likelihood of an accurate conviction is seriously diminished." *Schriro v Summerlin* (2004) 542 US 348, 352, 159 L Ed 2d 442, 449, 124 S Ct 2519 (internal quotation marks omitted). It is important to note that the rule set out in *Teague* is subject to waiver, and that the respondent's failure to raise an objection to the petition, on the basis of the *Teague* rule, may permanently bar the respondent from asserting that objection. *U.S. v Barron* (9th Cir 1999) 172 F3d 1153; *Boardman v Estelle* (9th Cir 1992) 957 F2d 1523, 1534; *Falconer v Lane* (7th Cir 1990) 905 F2d 1129, 1137.

As the high Court stated in *Williams v Taylor* (2000) 529 US 362, 380 n11, 146 L Ed 2d 389, 410 n11, 120 S Ct 1495, 28 USC §2254(d)(1) partially codifies *Teague v Lane*.

> Ø **Note:** In *Danforth v Minnesota* (2008) 552 US 264, 169 L Ed 2d 859, 128 S Ct 1029, the high court clarified that the *Teague* rule is not intended to limit a state court's authority to grant relief for a violation of a new rule of constitutional law when reviewing a conviction. 169 L Ed 2d at 871. Therefore, a state court is not precluded from applying a broader retroactivity standard than that set out in *Teague*. 169 L Ed 2d at 863. See *Delgadillo v Woodford* (9th Cir 2008) 527 F3d 919, 922 (in light of *Danforth*, state court's retroactive application of *Crawford* reasonable).

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§45.22 d. Other Limitations on Federal Review of State Court Decisions

Violation of federal right required. Federal habeas corpus relief will not be granted for erroneous interpretations or applications of state law. *Estelle v McGuire* (1991) 502 US 62, 116 L Ed 2d 385, 112 S Ct 475; *Engle v Isaac* (1982) 456 US 107, 119, 71 L Ed 2d 783, 795, 102 S Ct 1558; *Hinman v McCarthy* (9th Cir 1982) 676 F2d 343, 349 n2. But if state law, whether statutory or decisional, creates a liberty interest protected by the federal Due Process Clause, or if the error in interpretation or application of state law is so egregious as to offend federal due process standards, federal habeas relief may be available. *Carter v Kentucky* (1981) 450 US 288, 67 L Ed 2d 241, 101 S Ct 1112; *Hicks v Oklahoma* (1980) 447 US 343, 65 L Ed 2d 175, 100 S Ct 2227; *Ellard v Alabama Bd. of Pardons & Paroles* (11th Cir 1987) 824 F2d 937, 944 n7.

Federal issue must be presented to state court. Many state law errors have federal constitutional dimensions. For example, restrictions on defense counsel's cross-examination of a prosecution witness may violate state evidentiary rules on the admissibility of impeachment evidence *and* unconstitutionally interfere with the defendant's Sixth Amendment right of cross-examination. However, raising the claim in state court solely as a violation of state evidence law will not ordinarily preserve the federal issue for federal habeas review because the exhaustion rule, discussed in §45.23, precludes the federal courts from granting habeas relief unless the petitioner has fairly presented the federal constitutional claim to the state court of last resort. It is therefore crucial for trial and appellate counsel to raise any claims that arguably implicate the federal Constitution as both state law and constitutional errors. The trial objection, the direct appeal, the petition for review, and any petition for collateral review should be based on both guaranties. For an excellent resource showing the relationship between common state law errors and federal constitutional errors, see Weinheimer, *Federalization Table,*
http://www.fdap.org/downloads/articles_and_outlines/WeinheimerFederalizationTable.htm (rev. Sept. 30, 2006). For further discussion of exhaustion, see §45.23; Appeals & Writs, chap 14.

Newly discovered evidence ordinarily not ground for relief. The mere existence of newly discovered evidence relevant to guilt is generally not a ground for federal habeas relief. Newly discovered evidence may be the basis for habeas relief when it is shown that that evidence would probably have resulted in acquittal. Evidence that simply suggests that another might have committed the crime is not a sufficient basis to grant federal habeas relief. *Jeffries v Blodgett* (9th Cir 1993) 5 F3d 1180.

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§45.22A e. Harmless Error

Even if the state court's decision was contrary to, or was an unreasonable application of, clearly established federal law, if the error was other than "structural" within the meaning of *Arizona v Fulminante* (1991) 499 US 279, 311, 113 L Ed 2d 302, 332, 111 S Ct 1246, habeas corpus relief will be denied unless the petitioner was prejudiced. *Medina v Hornung* (9th Cir 2004) 386 F3d 872, 877. In *Brecht v Abrahamson* (1993) 507 US 619, 123 L Ed 2d 353, 113 S Ct 1710, the Supreme Court adopted a test for harmless error in federal habeas cases that is less stringent than the standard of *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, which governs direct review of constitutional claims. Under the *Brecht* standard, the burden remains on the state to show that the error was harmless. However, the state need not show that the error was harmless beyond a reasonable doubt, only that the error did not have a "substantial and injurious effect" on the jury's decision. *Brecht v Abrahamson, supra*. See also *Fry v Pliler* (2007) 551 US 112, 168 L Ed 2d 16, 127 S Ct 2321; *Calderon v Coleman* (1998) 525 US 141, 142 L Ed 2d 521, 119 S Ct 500; *O'Neal v McAninch* (1995) 513 US 432, 130 L Ed 2d 947, 115 S Ct 992.

As on direct appeal from the judgment, an error that constitutes a "structural defect in the constitution of the trial mechanism" (*Arizona v Fulminante, supra*) is not subject to harmless error analysis. *Brecht v Abrahamson* (1993) 507 US 619, 629, 123 L Ed 2d 353, 367, 113 S Ct 1710. See *Sullivan v Louisiana* (1993) 508 US 275, 281, 124 L Ed 2d 182, 113 S Ct 2078 (structural error includes trial errors that allow conviction on the basis of less than proof of guilt beyond a reasonable doubt regarding all elements of offense). See also *Byrd v Lewis* (9th Cir 2009) 566 F3d 855, 861 (error in scope-of-consent instruction did not vitiate *all* of jury's findings and therefore harmless error review applicable).

For discussion of the harmless error standard in the habeas context, see Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, chap 31 (5th ed 2005).

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4. Procedural Considerations

§45.23 a. Exhaustion of State Remedies

The exhaustion requirement. As a matter of federalism and comity, to be eligible for habeas corpus relief in federal court, a petitioner must exhaust state remedies by presenting all of his or her claims to the court of last resort in the state of conviction. 28 USC §2254(b)-(c); *Rose v Lundy* (1982) 455 US 509, 71 L Ed 2d 379, 102 S Ct 1198. If a state provides for review in the state supreme court, exhaustion requires the petitioner to seek review in the supreme court before filing a federal habeas petition, even if supreme court review is discretionary, as it is in California. *O'Sullivan v Boerckel* (1999) 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728.

Fair presentation. The federal claim must be fairly presented, *i.e.,* the state court must have a full and fair opportunity to decide the substance of the claim. *Picard v Connor* (1971) 404 US 270, 276, 30 L Ed 2d 438, 444, 92 S Ct 509. To be fairly presented, the claim must refer to the specific constitutional guaranty it relies on and must state facts that, if proved, would entitle the petitioner to relief. *Gray v Netherland* (1996) 518 US 152, 162, 135 L Ed 2d 457, 470, 116 S Ct 2074. See *Robinson v Kramer* (9th Cir 2009) 588 F3d 1212 (petitioner failed to raise unconstitutional denial of right to self-representation in state appeals, state habeas petitions, and district court habeas petition). Presenting all the facts necessary to support the federal habeas claim without referring to the relevant principle of federal constitutional law will not meet the exhaustion requirement, nor will making a state law claim that is similar to a federal constitutional claim. *Duncan v Henry* (1995) 513 US 364, 130 L Ed 2d 865, 115 S Ct 887.

The federal nature of the claims must have been made apparent to the state court of last resort. See *Baldwin v Reese* (2004) 541 US 27, 158 L Ed 2d 64, 124 S Ct 1347 (defendant who rested petition for discretionary review on state law grounds did not fairly present claim, even though decision of intermediate appellate court rested on federal grounds).

The fair-presentation requirement applies to pro se petitions as well as to petitions drafted by counsel, although pro se petitions are to be read generously. See *Davis v Silva* (9th Cir 2008) 511 F3d 1005 (pro se petitioner exhausted claim in state petition by citing case regarding federal constitutional right and including operative facts); *Castillo v McFadden* (9th Cir 2005) 399 F3d 993, 999 (general appeal to fair-trial right did not preserve federal due process claim); *Rose v Palmateer* (9th Cir 2005) 395 F3d 1108 (argument that counsel was ineffective with respect to handling of allegedly unlawful confession that did not independently raise Fifth Amendment claim did not exhaust Fifth Amendment issue); *Peterson v Lampert* (9th Cir 2003) 319 F3d 1153, 1159 (argument citing state cases and using state law terminology did not preserve federal claim, even though state and federal standards were similar).

> Ø **Note:** When a petitioner's procedural and substantive claims are sufficiently related or intertwined, a federal court may find that presentation of one fairly presents the other. See, *e.g., Lounsbury v Thompson* (9th Cir 2004) 374 F3d 785 (procedural challenge to burden of proof in competency hearing fairly presented substantive challenge to petitioner's competency to stand trial).

Limits on exhaustion doctrine. Exhaustion is not a jurisdictional requirement. See *Strickland v Washington* (1984) 466 US 668, 679, 80 L Ed 2d 674, 688, 104 S Ct 2052. Failure to exhaust may be raised by the respondent as a defense to a specific unexhausted claim, but it may also be waived. This waiver must be express in cases governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 USC §2254(b).

The exhaustion requirement does not apply when state remedies are unavailable or inadequate. 28 USC §2254(b)(1)(B); *Engle v Isaac* (1982) 456 US 107, 71 L Ed 2d 783, 102 S Ct 1558. For example, if the claims in the petition cannot be presented to the state court because they are procedurally barred under state law, they are considered exhausted. *Coleman v Thompson* (1991) 501 US 722, 115 L Ed 2d 640, 111 S Ct 2546; *Harmon v Ryan* (9th Cir 1992) 959 F2d 1457. Federal habeas review may still be barred, however, if the state procedural bar is "independent and adequate." See *Deere v Calderon* (CD Cal 1995) 890 F Supp 893. See also §45.24.

Mixed petitions. A "mixed" petition, one containing both exhausted and unexhausted claims, cannot be adjudicated. *Rose v Lundy* (1982) 455 US 509, 521, 71 L Ed 2d 379, 389, 102 S Ct 1198; *Rhines v Weber* (2005) 544 US 269, 161

L Ed 2d 440, 125 S Ct 1528. Before enactment of the AEDPA limitations period (see 28 USC §2244(d)), it was standard practice for the district court to dismiss a mixed petition without prejudice. See *Pliler v Ford* (2004) 542 US 225, 236 n2, 159 L Ed 2d 338, 351 n2, 124 S Ct 2441 (Ginsburg, J., dissenting). After dismissal, the petitioner would return to state court to exhaust the unexhausted claims, and then file a new federal petition containing both the previously exhausted and newly exhausted claims. The AEDPA's 1-year filing deadline makes it impossible in some circumstances to accomplish this. See, *e.g., Jefferson v Budge* (9th Cir 2005) 419 F3d 1013, 1015 n2 (AEDPA limitations period expired before mixed petition dismissed).

Another option, dismissing only the unexhausted claims and proceeding on the exhausted claims, risks forfeiture of the unexhausted claims. If the original petition is no longer pending when the petitioner files a new petition containing the previously unexhausted claims, the later petition will be treated as a second or successive petition under 28 USC §2244(b)(2), which bars review of such petitions except in extremely limited circumstances. See *Slack v McDaniel* (2000) 529 US 473, 146 L Ed 2d 542, 120 S Ct 1595; §45.26.

Stay and abeyance; *Rhines* procedure. To avoid these potential dilemmas, several circuits, including the Ninth Circuit, have adopted a procedure known as "stay and abeyance" or "withdrawal and abeyance" to deal with mixed petitions. This procedure, as described and approved by the Supreme Court in *Rhines v Weber* (2005) 544 US 269, 276, 161 L Ed 2d 440, 450, 125 S Ct 1528, allows the district court to "stay" a mixed petition rather than dismiss it, and to hold it in abeyance while the petitioner exhausts the unexhausted claims in state court. Once the petitioner has exhausted the claims in state court, the federal court can lift the stay and proceed with litigation on all the claims. The *Rhines* Court approved the use of this procedure for cases in which the unexhausted claims are not plainly meritless, the petitioner has not engaged in abusive litigation tactics or intentional delay, and there is good cause for the petitioner's failure to exhaust state remedies. 544 US at 277, 161 L Ed 3d at 451. In *Jackson v Roe* (9th Cir 2005) 425 F3d 654, 661, the Ninth Circuit clarified that the petitioner need show only "good cause," and not "extraordinary circumstances," to be entitled to a stay and abeyance of the federal case so that the petitioner can exhaust state remedies. In *Riner v Crawford* (D Nev 2006) 415 F Supp 2d 1207, 1211, the court suggested that the petitioner can establish good cause by showing that "he was prevented from raising the claim, either by his own ignorance or confusion about the law or the status of his case, or by circumstances over which he had little or no control, such as the actions of counsel either in contravention of the petitioner's clearly expressed desire to raise the claim or when petitioner had no knowledge of the claim's existence." However, courts should interpret good cause in light of the *Rhines* instruction that petitions should only be stayed in limited circumstances. *Wooten v Kirkland* (9th Cir 2008) 540 F3d 1019 (petitioner's "impression" that appellate attorney had exhausted all claims not good cause).

***Kelly* procedure.** A petitioner may take advantage of another and "distinct" procedure for exhausting claims. See *King v Ryan* (9th Cir 2009) 564 F3d 1133, 1140. Under the *Kelly* procedure, a district court may (1) allow the petitioner to amend a mixed petition to delete unexhausted claims; (2) stay and hold in abeyance the *fully exhausted* petition; and (3) then permit the petitioner to amend the stayed petition to include the newly exhausted claims. 564 F3d at 1138; *Kelly v Small* (9th Cir 2002) 315 F3d 1063, 1070, overruled on other grounds in *Robbins v Carey* (9th Cir 2007) 481 F3d 1143, 1149; *Calderon v U.S. Dist. Court (Taylor)* (9th Cir 1998) 134 F3d 981, 988. The *Kelly* procedure remains viable after *Rhine,* and unlike the *Rhine* procedure its availability is not premised on a showing of good cause for failure to exhaust state court remedies. *King v Ryan,* 564 F3d at 1140. However, under *Mayle v Felix* (2005) 545 US 644, 162 L Ed 2d 582, 590, 125 S Ct 2562, any newly exhausted claims must relate back to the claims that were exhausted at the time of the original filing. *King v Ryan,* 564 F3d at 1141.

It is error for the trial court simply to dismiss a mixed petition without offering the petitioner the opportunity to amend the petition to delete the exhausted claims. *Jefferson v Budge* (9th Cir 2005) 419 F3d 1013. If the trial court does erroneously dismiss the petition, the petitioner may be entitled to equitable tolling while state court exhaustion proceedings are pending. 419 F3d at 1016. However, a district court is not required to consider, sua sponte, the stay and abeyance procedure. *Robbins v Carey* (9th Cir 2007) 481 F3d 1143, 1147 (overruling *Kelly* to extent it held otherwise).

Ø **Warning:** It is important to include *all* federal claims in an initial petition, whether they are exhausted or not. Claims in an amended petition that were not included in the original petition do not relate back to the initial petition if they are based on "facts that differ in both time and type from those the original pleading set forth." *Mayle v Felix* (2005) 545 US 644, 162 L Ed 2d 582, 590, 125 S Ct 2562; *Hebner v McGrath* (9th Cir 2008) 543

F3d 1133.

For further discussion of stay and abeyance, see Appeals & Writs, chap 14; Hertz & Liebman, Federal Habeas Corpus Practice and Procedure §23.5 (5th ed 2005).

On exhaustion generally, see Appeals & Writs, chap 14; Hertz & Liebman, Habeas Corpus Practice, chap 23.

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§45.24 b. Procedural Default

If a state court denies relief for failure to comply with state procedural (or substantive) rules, and the state bar rests on an "independent and adequate state ground," federal habeas corpus is also barred except in very limited situations.

Procedural default is an affirmative defense (*Vang v Nevada* (9th Cir 2003) 329 F3d 1069, 1073) that must be raised in the first responsive pleading, *i.e.,* the answer to the petition, to avoid waiver. *Morrison v Mahoney* (9th Cir 2005) 399 F3d 1042, 1046. See Habeas Rules 5(b); Fed R Civ P 8(c). See also *Franklin v Johnson* (9th Cir 2002) 290 F3d 1223 (state cannot raise procedural default for first time on appeal). The defense is not waived by failure to include it in a motion to dismiss, filed before the first responsive pleading. *Morrison,* 399 F3d at 1045.

> Ø **Practice tip:** Unlike a dismissal for failure to exhaust state remedies, a dismissal grounded in a procedural default is a decision on the merits, and bars consideration of the same claim in a subsequent petition. See *Henderson v Lampert* (2005) 396 F3d 1049 and discussion of second or successive petitions in §45.26.

To be "independent," the denial of relief must rest on state law alone; it cannot be interwoven with federal law. *Harris v Reed* (1989) 489 US 255, 264, 103 L Ed 2d 308, 318, 109 S Ct 1038; *Michigan v Long* (1983) 463 US 1032, 1039, 77 L Ed 2d 1201, 1213, 103 S Ct 3469; *Park v California* (9th Cir 2000) 202 F3d 1146, 1152. "[U]nless the state court makes clear that it is resting its decision denying relief on an independent and adequate state ground, it is presumed that the state denial was based at least in part upon federal grounds, and the petitioner may seek relief in federal court." *Siripongs v Calderon* (9th Cir 1994) 35 F3d 1308, 1317. The question of whether a state procedural rule is "adequate," that is, firmly established and regularly followed, is a question of federal law. *Cone v Bell* (2009) ___ US ___, 173 L Ed 2d 701, 715, 129 S Ct 1769.

A state procedural rule will ordinarily be considered adequate when it is "strictly or regularly followed" and "consistently applied." See, *e.g., Scott v Schriro* (9th Cir 2009) 567 F3d 573, 580; *Morales v Calderon* (9th Cir 1996) 85 F3d 1387, 1393. A state procedural rule is not automatically "inadequate" because it is discretionary; if it is "firmly established" and "regularly followed," it can serve as an adequate ground to bar federal habeas review. *Beard v Kindler* (2009) ___ US ___, 175 L Ed 2d 417, 130 S Ct 612. In *Bennett v Mueller* (9th Cir 2003) 322 F3d 573, 586, the Ninth Circuit adopted a burden-shifting analysis to determine adequacy. Under this analysis, the state may plead petitioner's failure to satisfy a state procedural rule as an affirmative defense. 322 F3d at 586. The burden then shifts to the petitioner to challenge the adequacy of the state procedural bar by asserting specific factual allegations that demonstrate its inadequacy at the time of the alleged default. 322 F3d at 586. However, if the Ninth Circuit has previously determined that a state procedural bar is inadequate, the petitioner can fulfill this burden by simply challenging the adequacy of the procedure without necessarily putting forth factual allegations in support of the challenge. *King v LaMarque* (9th Cir 2006) 464 F3d 963, 967.

> Ø **Warning:** From the petitioner's standpoint, it is critical that the petitioner do something to put the adequacy of the state procedural bar in issue. If the petitioner fails to do this, then the court will rule that the petitioner has not shifted the burden back to the state to prove the adequacy of the state procedural default rule at issue and then conclude that the state has fulfilled its burden and therefore the claim cannot be considered by the federal court. See, *e.g., Flores v Hickman* (CD Cal 2008) 533 F Supp 2d 1068, 1085 (when state contends petitioner has procedurally defaulted claim by failing to contemporaneously object in trial court and petitioner fails to put adequacy of contemporaneous objection rule in issue, claim procedurally defaulted).

Assuming the petitioner does fulfill the burden of putting the adequacy of the state procedural ground in issue, the state has the ultimate burden of proving adequacy at the time of the purported default. *Bennett,* 322 F3d at 586.

Federal courts may consider both published and unpublished state court decisions and minute orders in analyzing the adequacy of a procedural bar. *Powell v Lambert* (9th Cir 2004) 357 F3d 871, 879; *Dennis v Brown* (ND Cal 2005) 361 F Supp 2d 1124, 1131. It is the "actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights." *Powell,*

357 F3d at 879. The California Supreme Court frequently denies habeas petitions with a citation to a California case in which a procedural bar to relief was established. See, *e.g., In re Robbins* (1998) 18 C4th 770, 77 CR2d 153 (relief barred when claim untimely); *In re Waltreus* (1965) 62 C2d 218, 225, 42 CR 9 (relief barred when claim was denied on merits on appeal); *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513 (relief barred for claim that could have been but was not raised on direct appeal); *In re Lindley* (1947) 29 C2d 709, 723, 177 P2d 918 (sufficiency of evidence claim must be raised on direct appeal and cannot be considered on habeas corpus).

In *Carter v Giurbino* (9th Cir 2004) 385 F3d 1194, 1196, the Ninth Circuit held that the *Lindley* rule, limiting consideration of sufficiency of the evidence claims to direct review, is an independent and adequate procedural bar; therefore, a citation to *Lindley* bars federal habeas review. Note that in *Carter* the petitioner did not try to shift the burden to the respondent by identifying cases where the rule had not been applied, so that challenge, therefore, remains to be taken up.

In *Bennett v Mueller* (9th Cir 2003) 322 F3d 573 (*Bennett*), the Ninth Circuit held that California's timeliness bar, as defined in *In re Clark* (1993) 5 C4th 750, 21 CR2d 509, and *In re Robbins, supra,* is an *independent* state procedural bar to habeas review, *i.e.,* not interwoven with federal law. However, the Ninth Circuit has also held that the timeliness bar is not adequate or consistently applied to noncapital habeas corpus petitions and therefore cannot serve as a procedural bar. *Townsend v Knowles* (9th Cir 2009) 562 F3d 1200, 1207.

In *Dennis v Brown* (ND Cal 2005) 361 F Supp 2d 1124, the district court ruled that *Bennett*'s analysis of the untimeliness bar compelled the conclusion that two procedural default rules not considered in *Bennett* are also independent of federal law after the California Supreme Court's decision in *In re Robbins* (1998) 18 C4th 770, 77 CR2d 153. These rules are California's rule barring consideration of claims that could have been but were not presented in a previous petition (successive petitions) and the rule of *In re Dixon* (1953) 41 C2d 756, 759, 264 P2d 513, which bars consideration of claims that could have been but were not presented on direct appeal (pretermitted claims). See *Dennis,* 361 F Supp 2d at 1127.

The district court concluded, however, that none of the three procedural bars that were potentially applicable in the case—the untimeliness bar, the successive-petitions bar, or the *Dixon* bar—had been consistently applied during the relevant time frames. 361 F Supp 2d at 1132. See also *Carpenter v Ayers* (ND Cal 2008) 548 F Supp 2d 736, 756 (California's untimeliness bar and *Dixon* bar were not consistently applied during relevant time frame).

A citation to *In re Waltreus, supra,* does not bar federal review. *Calderon v U.S. Dist. Court (Bean)* (9th Cir 1996) 96 F3d 1126, 1131; *Cone v Bell* (2009) ___ US ___, 173 L Ed 2d 701, 716, 129 S Ct 1769 (fact that claim has been presented more than once to state court is not a procedural bar to federal habeas review). For further discussion of California procedural bars, see Appeals & Writs, chap 15.

> Ø **Note:** The equitable doctrine of judicial estoppel prohibits a state from taking one legal position in state court and another in federal court in order to create a procedural default that would bar a federal habeas petition. *Whaley v Belleque* (9th Cir 2008) 520 F3d 997, 1002 (remanded to district court to hear merits when state represented that petitioner's complaints were moot for purposes of direct appeal but not moot for purposes of raising procedural default defense).

In extraordinary circumstances, an independent and consistently applied procedural bar may not be adequate. Thus, in *Lee v Kemna* (2002) 534 US 362, 151 L Ed 2d 820, 122 S Ct 877, the Supreme Court held that a state's independent and regularly applied requirement that a request for continuance be in writing was not adequate to bar federal review of the federal question of whether the trial court's denial of the defendant's motion for continuance deprived him of due process, when defense counsel's oral motion presented the issue clearly enough to permit the trial court to rule on the question. 534 US at 381, 151 L Ed 2d at 839. This ruling was based on "the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." 534 US at 378, 151 L Ed 2d at 837. See also *Osborne v Ohio* (1990) 495 US 103, 122, 109 L Ed 2d 98, 117, 110 S Ct 1691.

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§45.25 c. Cause and Prejudice

Even a petitioner who has procedurally defaulted may escape the consequence of the default by showing "cause and prejudice." The petitioner has the burden of establishing both. *Murray v Carrier* (1986) 477 US 478, 91 L Ed 2d 397, 106 S Ct 2639; *Harmon v Ryan* (9th Cir 1992) 959 F2d 1457. See also *Keeney v Tamayo-Reyes* (1992) 504 US 1, 118 L Ed 2d 318, 112 S Ct 1715 (extensive discussion of federal rules pertaining to procedural default).

To show "cause," the petitioner must show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. Objective factors include interference by officials that made compliance with the state's procedural rule impracticable, or facts showing that the factual or legal basis for the claim was not reasonably available. *Murray v Carrier, supra*. Ineffective assistance of counsel (IAC) that itself constitutes an independent constitutional claim satisfies the "cause" requirement, if the petitioner exhausts the claim of IAC. *Edwards v Carpenter* (2000) 529 US 446, 450, 146 L Ed 2d 518, 523, 120 S Ct 1587. A newly announced rule will not constitute cause unless the rule is cognizable on federal habeas corpus. See 28 USC §2254(d)(1); *Williams v Taylor* (2000) 529 US 362, 390, 146 L Ed 2d 389, 416, 120 S Ct 1495; *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060. See also *Tyler v Cain* (2001) 533 US 656, 662, 150 L Ed 2d 632, 642, 121 S Ct 2478.

To show prejudice, the petitioner must show that the error or errors complained of worked to the petitioner's actual and substantial disadvantage so as to infect the entire trial. *U.S. v Frady* (1982) 456 US 152, 71 L Ed 2d 816, 102 S Ct 1584; *White v Lewis* (9th Cir 1989) 874 F2d 599. The petitioner's burden is substantial and greater than that required to establish plain error on direct appeal. *Perry v Montana* (9th Cir 1992) 972 F2d 1113. See, *e.g., Strickler v Greene* (1999) 527 US 263, 144 L Ed 2d 286, 119 S Ct 1936 (relief from default unavailable; petitioner demonstrated cause —*Brady* violation—but failed to show prejudice).

"Cause and prejudice" is a federal question. *Keeney v Tamayo-Reyes, supra; Campbell v Blodgett* (9th Cir 1993) 997 F2d 512; *Tacho v Martinez* (9th Cir 1988) 862 F2d 1376.

An exception to the cause and prejudice requirement arises if a petitioner can establish that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v Delo* (1995) 513 US 298, 327, 130 L Ed 2d 808, 115 S Ct 851. See *Jaramillo v Stewart* (9th Cir 2003) 340 F3d 877. For further discussion of the miscarriage of justice exception, see §45.12.

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§45.26 d. Second or Successive Petition

Among the most significant restrictions on the right to federal habeas corpus brought about by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) are the stringent limitations it imposes on second and successive petitions. Under 28 USC §2244(b)(1), the federal district court may not consider any claim in a second or subsequent application for federal habeas relief that has already been decided on the merits. A dismissal grounded in a state procedural default is a decision on the merits and bars a second or successive petition raising the same claim. *Henderson v Lampert* (2005) 396 F3d 1049.

Furthermore, generally, even if the claim is new (*i.e.,* it has not been presented in a previous federal habeas petition), it may be considered only if it relies on either (28 USC §2244(b)(2)):

- A "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"; or
- Facts that (1) could not have been discovered earlier through the exercise of due diligence, and (2) if proved, would establish by clear and convincing evidence that but for the error, no reasonable fact-finder would have found the petitioner guilty.

In *Tyler v Cain* (2001) 533 US 656, 662, 150 L Ed 2d 632, 642, 121 S Ct 2478, the Supreme Court construed 28 USC §2244(b)(2) to hold that the word "made" in the phrase "made retroactive to cases on collateral review by the Supreme Court" means "held."

> Ø **Note:** A habeas petitioner, like other civil litigants, may seek relief from an adverse result by filing a motion under Fed R Civ P 60(b). Some Rule 60(b) motions are subject to the limitations on second or successive petitions; others are not. See *Gonzalez v Crosby* (2005) 545 US 524, 162 L Ed 2d 480, 125 S Ct 2641. If the motion is in essence a claim, that is, if it seeks to add a new ground for relief or attacks the federal court's judgment on the merits, it will be treated as a second or successive petition; if it is not a claim, that is, if it attacks the judgment on procedural grounds or attacks a defect in the integrity of the proceedings, it is not subject to the limitations on second or successive petitions. 162 L Ed 2d at 493. Thus, for example, when a district court dismissed a petition for failure to pay a filing fee and failure to prosecute, a petitioner's Rule 60(b) motion asking for relief from the decision on the ground that procedural errors were the fault of counsel and not the petitioner would not be considered a second or successive petition. *Butz v Mendoza-Powers* (9th Cir 2007) 474 F3d 1193. A motion for relief under Rule 60(b) based on an intervening change in the law requires a showing of "extraordinary circumstances." The court will consider on a case-by-case basis the following factors, among others: (1) whether the change in the law overruled a settled legal principle; (2) petitioner's diligence in seeking review; (3) the parties' reliance interest in the finality of the case; (4) the delay between the finality of judgment and the Rule 60(b) motion; (5) the relationship between the decisions embodying the original judgment and the change in law; and (6) the need for comity between state and federal courts. *Phelps v Almeida* (9th Cir 2009) 569 F3d 1120, 1134.

An application to present a second or successive habeas petition must be made before a panel of three appellate judges, and it may be granted only if the applicant makes a prima facie showing that the petition comes within one of the exceptions to the bar against successive petitions. 28 USC §2244(b)(3). The appellate panel must grant or deny authorization to file a subsequent petition within 30 days after the petitioner applies. 28 USC §2244(b)(3).

The Ninth Circuit has held that the AEDPA limitations on successive petitions do not violate the Constitution by suspending the writ of habeas corpus. See *Greenawalt v Stewart* (9th Cir 1997) 105 F3d 1268.

Because of the bar against second or successive petitions, it is critical that all claims related to a single judgment, that is, the conviction and sentence, be brought in a single petition, even if the conviction and sentence are challenged separately in state court. *Burton v Stewart* (2007) 549 US 147, 166 L Ed 2d 628, 127 S Ct 793. However, certain claims that would necessarily be unripe at the time the petition is filed, such as a claim that a prisoner cannot be executed because he became insane after the federal petition was filed but before the time of execution, are exempt

from this rule. *Panetti v Quarterman* (2007) 551 US 930, 168 L Ed 2d 662, 127 S Ct 2842.

A pro se petitioner's subsequent petition filed before adjudication of the first petition is complete should be construed as a motion to amend the first petition rather than a second or successive application. *Woods v Carey* (9th Cir 2008) 525 F3d 886, 890.

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G. Proceedings in District Court

§45.27 1. Pleadings

Petition. A habeas corpus proceeding is initiated by a petition. The petition must specify all grounds for relief, state the facts supporting each ground, and state the relief requested. Habeas Rules 2(c). The petition should correspond closely to the model form appended to the rules. See Habeas Rules 2(d).

Each federal district court in California has its own version of the model form that it will make available without charge on request. The address and telephone number of the clerk's office for each California district are listed in §45.9.

Ø **Practice tip:** Although counsel representing a habeas petitioner is not required to use the model form, it is a useful reference because it includes all the necessary jurisdictional allegations.

The petitioner is not required to attach documentary evidence supporting the facts alleged to justify relief. However, an attorney who is representing or assisting a petitioner may want to attach parts of the record that support the claim.

On receipt, the clerk must "promptly" forward the petition to a judge who must "promptly examine it." Habeas Rules 4. The judge may refer it to a magistrate judge under 28 USC §636 and Habeas Rules 10. The magistrate judge may then perform all the duties of the district judge, except for granting or denying the petition, unless all parties consent to the magistrate judge's jurisdiction. See 28 USC §636(b); Habeas Rules 8(b), 10.

Ø **Note:** Referral to a magistrate judge may be automatic by local rule or general order.

The petition may be dismissed at this stage if it does not state a claim for relief or if it is apparent on the face of the petition that it is procedurally barred.

Response. If the petition states facts that would warrant relief if proved, and if there is no apparent procedural bar to relief, the court will order the state to respond and will set a due date for the response. Habeas Rules 4. The response may be an answer, a motion, or "other response." Habeas Rules 4.

Ø **Note:** If the petition contains arguably unexhausted claims, or other procedural defects that would preclude consideration on the merits, the likely response will be a motion to dismiss, accompanied by a request for an extension of time to file the answer.

The answer must address the allegations in the petition and allege any procedural bars to relief. Habeas Rules 5(b). The respondent must attach to the answer the parts of the record the respondent deems relevant to the proceeding, and must indicate in the answer what transcripts are available, when they can be furnished, and what portions of the proceedings have been recorded but not transcribed. Habeas Rules 5(c).

If the record the parties submit is inadequate for review, the district court has a duty to obtain the state court transcript. *Vicks v Bunnell* (9th Cir 1989) 875 F2d 258.

Reply (traverse). The petitioner may file a reply (traditionally called a "traverse") to the respondent's answer "within a time fixed by the judge." Habeas Rules 5(e). Although a reply is not technically required, if the petitioner does not file a reply, the factual allegations in the answer will be deemed true, "except to the extent that the judge finds from the evidence that they are not true." 28 USC §2248.

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§45.27A 2. Applicability of Rules of Civil Procedure

After a habeas corpus action has been filed, the case generally proceeds as a civil action under the Federal Rules of Civil Procedure to the extent those rules are not inconsistent with the Habeas Rules (Habeas Rules 12), with the exception of discovery, which can be undertaken only with leave of court (Habeas Rules 6(a)). See *Bracy v Gramley* (1997) 520 US 899, 138 L Ed 2d 97, 117 S Ct 1793.

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§45.28 3. Fact-Finding in District Court

After receiving the respondent's answer and the record of state court proceedings designated by the parties (and any traverse), the district court will grant or deny the requested relief unless it determines that the record requires further factual development. The court may order discovery or expansion of the record under Habeas Rules 6-7, or an evidentiary hearing under Habeas Rules 8. The district court must appoint counsel for a pro se petitioner if counsel is necessary for effective discovery (Habeas Rules 6(a)) or if it orders an evidentiary hearing (Habeas Rules 8(c)).

For further discussion of proceedings in the district court, see Appeals & Writs, chap 17.

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§45.29 a. Evidentiary Hearing

When the petitioner alleges "specific facts which, if true, would entitle him to relief" (*Ortiz v Stewart* (9th Cir 1998) 149 F3d 923, 934), and the truth of those facts cannot be determined from the record, an evidentiary hearing may be appropriate. *Baja v Ducharme* (9th Cir 1999) 187 F3d 1075, 1078. Under AEDPA's deferential standard of review of state court proceedings, the district court must first determine whether the petitioner "has failed to develop the factual basis of a claim in state court proceedings." 28 USC §2254(e)(2); *Alberni v McDaniel* (9th Cir 2006) 458 F3d 860, 873. If the petitioner has failed to develop the factual basis for the claim, the inquiry ordinarily stops: With two very narrow exceptions involving claims of actual innocence (see Appeals & Writs, chap 17), the petitioner is not entitled to an evidentiary hearing in federal court. 28 USC §2254(e)(2).

The phrase "failed to develop" implies lack of diligence or some other fault on the part of the petitioner or the petitioner's attorney. *Williams v Taylor* (2000) 529 US 420, 431, 146 L Ed 2d 435, 448, 120 S Ct 1479. Therefore, if the district court concludes that the failure to develop the facts in the state court is not the fault of the petitioner or the petitioner's attorney, it next considers whether an evidentiary hearing is appropriate or required under *Townsend v Sain* (1963) 372 US 293, 9 L Ed 2d 770, 83 S Ct 745, overruled on other grounds in *Keeney v Tamayo-Reyes* (1992) 504 US 1, 118 L Ed 2d 318, 112 S Ct 1715. Under *Townsend,* an evidentiary hearing is necessary if the defendant can show that

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

372 US at 313. In short, when a petitioner has done everything in his or her power to develop the claim, but further factual development is necessary, the district court must hold an evidentiary hearing. *Baja v Ducharme* (9th Cir 1999) 187 F3d 1075, 1078. See also *Insyxiengmay v Morgan* (9th Cir 2005) 403 F3d 657, 669; *Williams v Woodford* (9th Cir 2004) 384 F3d 567, 586.

> Ø **Note:** An evidentiary hearing in federal district court is not required if the state court has reliably found the relevant facts, or if there are no disputed facts and the claim presents a purely legal question. See *Hendricks v Vasquez* (9th Cir 1992) 974 F2d 1099; 28 USC §2254(e)(1) (presumption of correctness of state findings of fact).

> Ø **Practice tip:** California has made the identification of factual disputes and ordering of evidentiary hearings a sua sponte duty of the state habeas court when appropriate. Pen C §1484; Cal Rules of Ct 4.551(f); *People v Romero* (1994) 8 C4th 728, 739, 35 CR2d 270. It can therefore be argued that the petitioner's failure to move for an evidentiary hearing in state court does not show a lack of "diligence" under federal habeas law.

After the evidentiary hearing, the judge will generally allow the parties to submit post-evidentiary-hearing briefs. The judge will then normally issue a written decision addressing the issues presented by the petition. If either party has objections to the decision, it is recommended that a motion for reconsideration be promptly filed to preserve issues for appeal.

For further discussion of evidentiary hearings, see Appeals & Writs, chap 17.

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§45.30 b. Discovery

There is no codified informal discovery in federal habeas proceedings, but opposing counsel will often agree to provide each other with relevant materials in the parties' possession. A party seeking discovery must file a request with the court, along with a statement detailing the information sought. Habeas Rules 6(a)-(b). The entire range of discovery tools authorized by Fed R Civ P 26-37 (*e.g.,* depositions, interrogatories, and subpoenas for the production of documents and other materials) is available to the parties in habeas corpus proceedings if authorized by the court. Habeas Rules 6(a).

The district court has discretion to grant a request for discovery on showing of good cause. Habeas Rules 6(a). The court has a duty to grant a discovery request when the petitioner makes specific allegations that provide the court reason to believe that if the facts were fully developed, the petitioner would be able to demonstrate that he or she is entitled to relief. *Bracy v Gramley* (1997) 520 US 899, 908, 138 L Ed 2d 97, 106, 117 S Ct 1793; *Pham v Terhune* (9th Cir 2005) 400 F3d 740, 743.

Although discovery usually follows the grant of an evidentiary hearing, "there may be instances in which discovery would be appropriate beforehand." See Note to Habeas Rules 6; *Wagner v U.S.* (9th Cir 1969) 418 F2d 618, 621 (remanding to district court for further factual development, and suggesting that discovery might help the court determine whether an evidentiary hearing was required).

If respondent moves for permission to conduct discovery, the district judge must honor the petitioner's attorney-client privilege with the attorneys who represented him or her in the state trial and appellate courts. Fed R Evid 1101(c); Fed R Civ P 26(b)(1), (b)(3), (b)(5). See *In re Lott* (6th Cir 2005) 424 F3d 446, 452. In that case, the Sixth Circuit held that a habeas petitioner who asserted a claim of "actual innocence" did not thereby waive his attorney-client privilege with respect to his trial lawyer. 424 Fed at 454. Therefore, the district court erred in granting the respondent's request to depose and seek production of documents from the petitioner's trial counsel. 424 F3d at 456.

For further discussion of discovery, see Appeals & Writs, chap 17.

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§45.30A c. Subpoenas

Subpoenas are not technically considered discovery under the Federal Rules of Civil Procedure, but as a practical matter, the district court will ordinarily grant a habeas petitioner's motion for authority to issue subpoenas on a showing of "good cause." See, *e.g., Carrera v Stokes* (ED Cal, Aug. 18, 2005, No. CIV. F-90-478-AWI-P) 2005 US Dist Lexis 23744 (unpublished order). Procedures for obtaining and serving subpoenas directing nonparties to testify or produce documents are set forth in Fed R Civ P 45. Rule 45 subpoenas can be used, for example, to obtain materials in the district attorney's file. If a party is proceeding "in forma pauperis," his or her request for authority to issue a subpoena should also include a request for certification from the appropriate office, directing the U.S. Marshal's office to pay witness fees pursuant to 28 USC §1825(b).

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§45.30B d. Expansion of the Record

Rule 7 of the Habeas Rules allows the district court to expand the record of a habeas corpus case to include additional materials relevant to disposition of the petition. The Advisory Committee Notes to Habeas Rules 7 clarify that the record can be expanded in lieu of, or as a complement to, an evidentiary hearing. If a petitioner exercised "diligence" in his or her efforts to develop the factual basis for the claims in state court proceedings, generally the petition need only show that the materials he or she seeks to add to the record are relevant. *Cooper-Smith v Palmateer* (9th Cir 2005) 397 F3d 1236, 1241. If the petitioner cannot establish diligence in trying to develop the record in state court, the petitioner must show that the request to expand the record is allowed under 28 USC §2254(e)(2). *Cooper-Smith,* 397 F3d at 1241. Under 28 USC §2254(e)(2), the petitioner must show that the claim is based either on

- A new retroactive rule of constitutional law; or
- A factual predicate that
- Could not have been previously discovered through the exercise of due diligence *and*
- Demonstrates that, but for the claimed error, no reasonable fact-finder would have found the petitioner guilty.

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§45.31 4. Referral to Magistrate Judge

The district court judge to whom a habeas corpus petition is assigned may, without the consent of the parties, refer the matter to a U.S. Magistrate Judge for all purposes except decision. 28 USC §636(b); Fed R Civ P 72(b); Habeas Rules 8, 10. The magistrate judge then reviews the pleadings and the record and decides whether the record needs to be expanded, and whether to hold an evidentiary hearing. Habeas Rules 8(b). Unless the parties have consented to the magistrate judge's jurisdiction, the magistrate judge may not dispose of the petition but must instead submit to the trial judge proposed findings of fact and recommendations for disposition. 28 USC §636(b); Habeas Rules 8(b). Any objection to the magistrate judge's report must be filed within 14 days. 28 USC §636(b)(1)(C). Failure to object may limit the right to contest the magistrate judge's findings of fact on appeal. See, *e.g., Britt v Simi Valley Unified Sch. Dist.* (9th Cir 1983) 708 F2d 452.

The judge may accept, reject, or modify all or part of the magistrate judge's recommendation. The district court must make a de novo determination of all findings of fact to which objection was made. Habeas Rules 8(b). The court, however, must review the magistrate's legal conclusions de novo even if no objections are filed. *Barilla v Ervin* (9th Cir 1989) 886 F2d 1514, 1518.

For further discussion, see Appeals & Writs, chap 17.

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§45.31A 5. Consent to Magistrate Judge's Exercise of Jurisdiction

The parties to a federal habeas corpus action may consent to have a magistrate judge exercise jurisdiction over the case under 28 USC §636(c)(1). If both parties voluntarily consent to the magistrate judge's exercise of jurisdiction under this subsection, the district judge plays no role in the district court litigation. Instead, all proceedings are conducted by the magistrate judge, and the magistrate judge has the power to enter a final order and judgment. The losing party may appeal the magistrate judge's final order and judgment directly to the Ninth Circuit. 28 USC §636(c)(3). The magistrate judge has the authority to issue a certificate of appealability in these cases. *Hanson v Mahoney* (9th Cir 2006) 433 F3d 1107, 1111.

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§45.32 H. Mandamus to Compel District Court to Act

The habeas corpus statutes and rules generally contemplate the prompt processing of habeas petitions in the district court. See, *e.g.,* Habeas Rules 4. However, the district court has no deadlines and, because of caseload pressures in many districts, delays of several months or more are common. If a petition has been pending for a long time without action by the court or magistrate judge, counsel may file a motion with the district court requesting expedited treatment.

If no response is received, or if no action is taken within a reasonable time after the motion is filed, the petitioner may file a petition for a writ of mandamus with the Ninth Circuit Court of Appeals in San Francisco, asking the court of appeals to order the district court to decide the case. See 28 USC §1651; Fed R App P 21. Such petitions are granted only in extraordinary circumstances. See *Helstoski v Meanor* (1979) 442 US 500, 61 L Ed 2d 30, 99 S Ct 2445. Just what those circumstances may be is difficult to determine. In *In re Blodgett* (1992) 502 US 236, 116 L Ed 2d 669, 112 S Ct 674, the Supreme Court refused to issue a writ of mandamus to the Ninth Circuit in a capital habeas case that had been under submission for over 2 years. On the other hand, in the context of an appeal from a stay order in a habeas corpus action involving detention by immigration authorities, the Ninth Circuit observed that "[t]he writ of habeas corpus, challenging illegality of detention, is reduced to a sham if … trial courts do not act within a reasonable time." *Yong v INS* (9th Cir 2000) 208 F3d 1116, 1120 (quoting *Jones v Shell* (8th Cir 1978) 572 F2d 1278, 1280 (footnote omitted)).

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§45.33 I. Disposition

If the district court finds a habeas corpus petition to be meritorious, it may order the prisoner released outright, although this action is rare. When such relief is granted, the state usually moves for a stay pending its appeal to the Ninth Circuit. Usually, the court grants the writ subject to the state's right to retry the prisoner within a specified length of time. *McHenry v California* (9th Cir 1971) 447 F2d 470. See Appeals & Writs, chap 17. If the state decides to appeal the district court's decision granting the petition, rather than retrying the petitioner, it should request a stay pending the appeal. See §45.8.

Ø **Note:** If the petitioner proves that the government violated the terms of a plea agreement, and the government has already received the benefit it bargained for under the plea agreement, the federal habeas court can order specific enforcement of the plea agreement. *Buckley v Terhune* (9th Cir 2006) 441 F3d 688, 699.

If relief is denied, the petitioner may seek permission to appeal to the Ninth Circuit. Fed R App P 22(a). See §45.39 for discussion.

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§45.34 J. Death Penalty Cases

Each district court has adopted special procedures for processing habeas corpus petitions by state prisoners sentenced to death. CD Cal Local R 83-17; ED Cal Local R 191; ND Cal Local R 2254-20—2254-31; SD Cal Local R HC.3. This chapter does not address federal capital habeas corpus litigation, a complex area requiring specific training and expertise.

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§45.35 K. Motion for Reconsideration or Rehearing in District Court

If counsel believes that the district court's judgment was based on an erroneous legal premise or a misunderstanding of the facts that could be readily corrected, counsel may wish to move the district court for reconsideration or rehearing under Fed R Civ P 59-60. The Supreme Court has clarified that a motion for relief under Fed R Civ P 60(b) is not considered a "successive petition" if it attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v Crosby* (2005) 545 US 524, 162 L Ed 2d 480, 493, 125 S Ct 2641. If counsel decides to take this tack, special care must be taken to serve the Fed R Civ P 59 motion within 28 calendar days after judgment is entered and, if the motion is denied, to file a timely appeal under Fed R App P 4(a)(4). Unless it is filed within 10 days of entry of the judgment, a motion under Fed R Civ P 60(b) does not toll the time for filing a notice of appeal, and special procedures must be followed carefully for both types of motions. *Carriger v Lewis* (9th Cir 1992) 971 F2d 329. For a detailed discussion of the complexities raised by motions for hearing and reconsideration, see 9 Moore's Federal Practice §204.12 (3d ed 1997).

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VI. APPEAL OF DISTRICT COURT RULING ON HABEAS CORPUS PETITION

§45.36 A. Ninth Circuit Chart of Time Limits

When an appeal is filed, the clerk of the Ninth Circuit transmits to the appellant and appellee a chart of due dates, chronologically summarizing the procedural events that are to occur in completing the appeal. The chart shows what action is to be taken and by whom, when each event is to occur, and includes informative comments on each event.

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§45.37 B. Miscellaneous Information About Ninth Circuit Cases

In 2008, the Ninth Circuit put in place a "Case Management/Electronic Case Files" (CM/ECF) system for filing most documents with the court. Use of the CM/ECF system is mandatory for all attorneys who have not been granted an exemption and is voluntary for all parties proceeding without counsel. Information about the system can be found on the Ninth Circuit's website at http://www.ca9.uscourts.gov. Ninth Circuit Rule 25-5 contains the Ninth Circuit's rules regarding electronic filing. In general, attorneys are required to file and serve briefs and motions electronically (with paper copies of briefs submitted later, as well), while case opening materials and Excerpts of Record are still filed and served in paper. The CM/ECF system is integrated with PACER (Public Access to Court Electronic Records) and allows users to obtain case and docket information about all cases pending in the court.

For answers to specific procedural questions, counsel should consult the Federal Rules of Appellate Procedure, the Ninth Circuit Rules, the Ninth Circuit General Orders (*i.e.,* internal operating procedures of the Ninth Circuit), Appeals & Writs, chap 18, or another attorney before contacting the court. If necessary, counsel may call a docketing unit with specific procedural questions. If the clerks are unable to assist, counsel may ask to speak with a criminal motions attorney.

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§45.38 C. Notice of Appeal

A party desiring to appeal the district court decision must file a notice of appeal within 30 calendar days after the entry of judgment. Fed R App P 4(a)(1). On a motion made no later than 60 calendar days after the entry of judgment, the district court may grant leave to file an untimely notice of appeal. This requires a showing of "excusable neglect" or "good cause." Fed R App P 4(a)(5). See *Pettibone v Cupp* (9th Cir 1981) 666 F2d 333. The 60-day time limit is jurisdictional. No appeal may be taken after its expiration. The court of appeals does not have the power to extend the time for filing a notice of appeal. Fed R App P 26(b). Nor does it have the authority to create equitable exceptions (*e.g.,* "unusual circumstances") to that jurisdictional requirement. *Bowles v Russell* (2007) 551 US 205, 168 L Ed 2d 96, 127 S Ct 2360. A notice of appeal filed by a pro se prisoner is deemed filed on the date it is delivered to prison authorities for forwarding to the court. *Houston v Lack* (1988) 487 US 266, 269, 101 L Ed 2d 245, 251, 108 S Ct 2379; *Davis v Woodford* (9th Cir 2006) 446 F3d 957, 959; *Miller v Sumner* (9th Cir 1989) 872 F2d 287; Fed R App P 4(c)(1).

The appellant should file the notice of appeal with the clerk of the federal district court that ruled on the habeas corpus petition. Fed R App P 3(a). The appellant must furnish the clerk with sufficient additional copies of the notice to allow the clerk to serve a copy on each party other than the appellant. See 9th Cir R 3-1; Fed R App P 3(d).

The state has an appeal of right from the granting of a petition for writ of habeas corpus. The petitioner must obtain a certificate of appealability (COA) for each issue he or she wants to raise in the appeal. Fed R App P 22(b). See also *U.S. v Asrar* (9th Cir 1997) 116 F3d 1268.

The certificate of appealability is discussed in §45.39. For further discussion, including a sample notice of appeal, see Appeals & Writs, chap 18.

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§45.39 D. Certificate of Appealability

When the detention being challenged on federal habeas corpus "arises out of process issued by a state court," a petitioner seeking review of the district court's ruling must obtain a certificate of appealability (COA) for any issue he or she wants the appellate court to review. 28 USC §2253(c)(1)(A); Fed R App P 22(b). A COA pertains to each issue individually and may be issued only if the applicant makes a substantial showing of the denial of a constitutional right. 28 USC §2253(c)(2). Note, however, that when the petitioner "challenges an administrative decision regarding the execution of his sentence," a COA is not required. *White v Lambert* (9th Cir 2004) 370 F3d 1002, 1011 (transfer to privately run prison in another state); *Rosas v Nielsen* (9th Cir 2005) 428 F3d 1229, 1231 (denial of parole).

Either the district court or the court of appeals may issue a COA. Rule 11 of the Habeas Rules requires the district court to grant or deny a COA at the same time that it issues a final order adverse to the petitioner. If the district court grants a COA, the petitioner must still file a timely notice of appeal to pursue an appeal. If the district court denies a COA, the petitioner can still seek a COA from the court of appeals. Habeas Rules 11; Fed R App P 22(b)(1). If the district court has denied a COA and the petitioner wishes to pursue an appeal, the petitioner must file a timely notice of appeal with the district court. This will require the district court clerk to send the court of appeals the notice of appeal and any part of the district court record that is not available electronically. Fed R App P 22(b)(1); 9th Cir R 22-1(b). The petitioner then has the option of filing a request for a COA with the Ninth Circuit within 35 days of the date the district court denied the COA. 9th Cir R 22-1(d). If the petitioner does not file a request for a COA with the Ninth Circuit, the notice of appeal itself will be deemed a request to the court of appeals for a COA. Fed R App P 22(b)(2).

A request for a COA should identify each issue to be raised on appeal and state briefly why each presents a "substantial question." To obtain a certificate of appealability, the petitioner must make a substantial showing of the denial of a constitutional right, a showing that is very similar to the showing required for granting a certificate of probable cause. 28 USC §2253(c)(2); *Slack v McDaniel* (2000) 529 US 473, 483, 146 L Ed 2d 542, 554, 120 S Ct 1595 (COA requirement largely codifies standard set forth in *Barefoot v Estelle* (1983) 463 US 880, 893, 77 L Ed 2d 1090, 1104, 103 S Ct 3383). A COA must issue if the petitioner is able to show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Tennard v Dretke* (2004) 542 US 274, 282, 159 L Ed 2d 384, 394, 124 S Ct 2562.

If a COA is granted only in part, counsel may brief uncertified issues in a section of the brief entitled "Uncertified Issues." The Ninth Circuit panel considering the certified issues will treat the "Uncertified Issues" section of the brief as a motion to expand the COA. 9th Cir R 22-1(e).

When a certificate of appealability is issued to the petitioner, the clerk of the Ninth Circuit establishes a briefing schedule for the appeal that includes filing dates for the appellant's opening brief, appellee's brief, and appellant's optional reply brief. See 9th Cir R 22-1(c).

The most important distinction between a certificate of appealability and the pre-AEDPA certificate of probable cause is that a COA applies only to the issue on which it is granted (28 USC §2253(c)); whereas, under former practice, the appeal was not limited to the issues designated in the certificate of probable cause (*Chacon v Wood* (9th Cir 1994) 36 F3d 1459, 1466). The court of appeal lacks jurisdiction to resolve the merits of any claim for which a COA was not granted. *Rios v Garcia* (9th Cir 2004) 390 F3d 1082, 1086.

For further discussion and sample forms, see Appeals & Writs, chap 18.

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E. Other Steps in Perfecting Appeal

§45.40 1. Docketing Fees; In Forma Pauperis Status

At the time a notice of appeal is filed with the district court, the petitioner must pay a filing and docketing fee for the appeal unless he or she is proceeding in forma pauperis. If the petitioner was granted in forma pauperis status in the district court, that status continues automatically on appeal unless revoked by order of the district court. Fed R App P 24(a).

If in forma pauperis status was denied or revoked by the district court, the petitioner may request in forma pauperis status from the Ninth Circuit. See Appeals & Writs, chap 18.

When the state is the petitioner, no filing and docketing fee is required.

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§45.41 2. Designating Reporter's Transcript

Unless the appellant intends to order the entire transcript or the parties have agreed on what portions of the transcript should be ordered, the appellant must serve the appellee with notice of what portions of the transcript the appellant intends to order, as well as a statement of issues appellant intends to raise on appeal, within the time limits set by 9th Cir R 10-3.1(a), in most instances within 10 calendar days after the notice of appeal was filed. 9th Cir R 10-3(a). If no transcript is needed, the appellant must serve on the appellee a statement indicating that the appellant does not intend to order a reporter's transcript. 9th Cir R 10-3.1(a). The appellee then has 10 days to notify the appellant of any additional transcripts the appellee deems necessary to the appeal. 9th Cir R 10-3.1(b). If the parties agree that no transcripts are necessary, the appellant must file a notice so stating in the district court and provide copies of the notice to the court reporter and the Ninth Circuit. 9th Cir R 10-3.1(c).

The parties must designate and order the court reporter's transcript within 30 days of filing the notice of appeal, using the district court's transcript designation form. 9th Cir R 10-3.1(d). These forms vary from district court to district court. They are available in the clerk's office of each court, and on each district court's website. When the appellant files this form with the district court, he or she must simultaneously provide a copy of the form to the court reporter. 9th Cir R 10-3.1(d).

Appeals arising from writs of habeas corpus proceedings are considered civil, not criminal, cases. The schedule order setting forth due dates for records and briefings is issued by the Ninth Circuit at the time the case is docketed in the court of appeals.

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§45.42 3. Clerk's Records

In the Ninth Circuit, the clerk's record, which is the set of original documents filed in the district court action, is not automatically sent from the district court to the Ninth Circuit for every appeal. However, the Ninth Circuit can request all or part of the clerk's record from the district court at any time. 9th Cir R 11-4.4. Documents from the district court clerk's record are tabbed and identified by the docket control number given them when they were initially entered on the trial court docket. This task is performed by the district court clerk. 9th Cir R 11-6.1.

In referencing documents in their briefs, all parties should use the same docket control number. For example, if the trial court's findings are numbered "28" on the trial court docket, a reference to that document in a brief should read "CR 28." The abbreviation "CR" is understood to mean the trial court *clerk's record*.

When numerous pages are in a single document and the passage referred to is on a particular page, the reference in the brief should read "CR 28," followed by the page number in the document.

Counsels' briefs should refer to passages in the reporter's transcript as "RT," along with the exact page number.

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§45.43 F. Preparing and Filing Briefs and Excerpts of Record

Once the court sets a briefing schedule, briefing should proceed as described in Appeals & Writs, chap 18. Appellant's counsel should carefully observe the requirements of 9th Cir R 30-1 on the excerpts of record, a set of documents to be filed along with, but separate from, the opening briefs in lieu of the appendix described in Fed R App P 30. The excerpts of record should include, among other documents, the notice of appeal, the district court docket sheet, the judgment or interlocutory order appealed from, and any other rulings sought to be reviewed. 9th Cir R 30-1.4. In addition, the Ninth Circuit Local Rules provide that the excerpts of record must include the final petition and response filed in district court. 9th Cir R 30-1.4(c)(i). If the excerpts of record will exceed 75 pages, they must be divided into at least two volumes, and Ninth Circuit rules specify how documents should be organized for appeals arising out of habeas petitions brought under 28 USC §2254. 9th Cir R 30-1.6. For further discussion, see Appeals & Writs, chap 18.

If the appellee believes that the appellant's excerpt of record omits relevant documents, the appellee should file a Supplemental Excerpt of Record that includes the missing documents. 9th Cir R 30-1.7.

Under Fed R App P 32.1, circuit courts must allow parties to cite to unpublished opinions, orders, judgments, and other dispositions issued after January 1, 2007. The Ninth Circuit has implemented this directive with 9th Cir R 36-3, which continues to provide that unpublished dispositions and orders of the court are not precedent (9th Cir R 36-3(a)) but allows attorneys to cite unpublished dispositions and orders issued on or after January 1, 2007 (9th Cir R 36-3(b)).

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§45.44 G. Standards of Review

The Ninth Circuit reviews de novo a district court's decision to grant or deny a habeas petition. *Moses v Payne* (9th Cir 2008) 543 F3d 1090, 1097. The Ninth Circuit reviews de novo questions of law and mixed questions of law and fact. *Jackson v Brown* (9th Cir 2008) 513 F3d 1057, 1069. Factual findings relevant to a district court's decision are reviewed for clear error. *Moore v Czerniak* (9th Cir 2008) 534 F3d 1128, 1136.

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§45.45 H. Oral Argument

The Ninth Circuit schedules oral argument on the appeal unless the panel members assigned to hear the case unanimously agree that oral argument would not significantly aid the decisional process. Generally, the Ninth Circuit hears oral argument on a much more frequent basis than does the California Court of Appeal.

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§45.46 I. Requests for Rehearing

The losing party may move the panel for rehearing within 14 calendar days after entry of the judgment. The petition for rehearing must state the points of law or fact that in the petitioner's opinion the court has overlooked or misapprehended and must contain all arguments in support of the petition. Fed R App P 40(a). See Appeals & Writs, chap 18.

If the case involves a question of exceptional importance, or if the decision conflicts with other authority, the petitioner may suggest that the rehearing be conducted en banc. En banc hearings or rehearings are not favored, however. Fed R App P 35. Although review by all judges of the Court of Appeals is theoretically possible under 9th Cir R 35-3, virtually all en banc proceedings are heard by a limited en banc court, which consists of the chief judge of the circuit and a specified number of additional active judges of the circuit who are drawn by lot. 9th Cir R 35-3. See Appeals & Writs, chap 18.

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§45.47 VII. REVIEW IN UNITED STATES SUPREME COURT

A party seeking further review of a Ninth Circuit decision may seek review by the U.S. Supreme Court only by writ of certiorari. See 28 USC §§1254, 1257. See also Appeals & Writs, chap 12. Under 9th Cir R 4-1(e), an attorney appointed to represent a habeas corpus petitioner in the Ninth Circuit is required to petition for certiorari if the petitioner requests counsel to file a petition. There is, however, no constitutional right to have appointed counsel assist in seeking Supreme Court review. *Ross v Moffitt* (1974) 417 US 600, 610, 41 L Ed 2d 341, 351, 94 S Ct 2437.

Although appointed counsel is generally required to file a petition for a writ of certiorari at the petitioner's request, if in counsel's considered judgment there are no legitimate grounds for seeking certiorari under US Sup Ct R 10, counsel must so notify the client and inform the client that if he or she insists on moving for a writ of certiorari, counsel will move to withdraw. The motion to withdraw as counsel must be filed within 21 days of the Ninth Circuit's judgment or denial of rehearing (9th Cir R 4-1(e)).

Ø **Practice tip:** Because the deadline for the motion to withdraw is so short, counsel must promptly determine if a petition for a writ of certiorari is warranted and, if it is not, must notify the client right away so that the client can decide whether he or she wants the attorney to withdraw and thereby allow the client to file a petition for a writ of certiorari pro se.

If counsel decides a petition for a writ of certiorari is not warranted and so informs the client, it is a good practice to send the client a copy of the Supreme Court's *Guide to Filing In Forma Pauperis Cases*, along with a copy of the Supreme Court Rules referenced in the guide. Both the guide and the rules are available as PDF files on the Supreme Court's website at http://www.supremecourtus.gov (see the "Case Handling Guides" and "Court Rules" links respectively).

A person not represented by appointed counsel in the Ninth Circuit may move the Ninth Circuit to appoint counsel for the purpose of petitioning for certiorari. The request must state the grounds for seeking certiorari and the reasons the ends of justice require the appointment of counsel. 9th Cir R 4-1(e).

The petition for writ of certiorari in the Supreme Court is due within 90 calendar days after entry of judgment unless permission is granted by a Justice of the Court allowing a 60-day extension. An application to extend time is not favored. 28 USC §2101(c); US Sup Ct R 13.5. An extension requested in an application filed less than 10 calendar days before the final filing date is granted only "in the most extraordinary circumstances." US Sup Ct R 30.2.

Ø **Note:** The time for seeking certiorari runs from entry of the circuit court's *judgment,* not from issuance of the court's mandate. Fed R App P 41(b); US Sup Ct R 13.3. If a timely petition for rehearing was filed in the Ninth Circuit, the time limits run from the date of disposition of the petition. US Sup Ct R 13.3.

The procedures for requesting Supreme Court review are discussed in detail in Appeals & Writs, chap 12, and in Stern, Gressman, Shapiro & Geller, Supreme Court Practice (9th ed 2007).

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PROBATION REVOCATIONS

ALBERT J. MENASTER

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§46.1 I. OVERVIEW

Revocation of probation is a sanction against probationers who fail to comply with the terms and conditions of their probation grant, including the condition to refrain from committing a new crime. Pen C §1203.2. In recent years, probation revocations have been a major prosecutorial instrument against probationers who are arrested for new offenses. District attorneys and probation officers routinely move to revoke probation concurrently with charges on the new offense. A probation revocation is sometimes filed instead of a new prosecution, sometimes referred to as a filing "in lieu of" a new prosecution. Either way, the prosecutor has a considerable advantage because motions to revoke are decided without some of the procedural protections of standard criminal cases. The due process rights of California defendants at probation revocation hearings were originally set forth in *People v Vickers* (1972) 8 C3d 451, 461, 105 CR 305, and *People v Coleman* (1975) 13 C3d 867, 120 CR 384, and are derived from the due process requirements set forth by the Supreme Court in *Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593, for parole revocation hearings. These rights are described in this chapter as *Morrissey-Vickers* rights. For further discussion, see §§46.15-46.20.

When a motion to revoke probation is filed concurrently with a new prosecution, the district attorney has added leverage to force a plea bargain on the district attorney's terms. When a motion to revoke probation is filed instead of a new prosecution, the district attorney can dispense with taking the case through the various steps that a new case would require. Moreover, probation revocation hearings need not be prepared in the exacting manner required for criminal jury trials.

Probation revocations usually involve two steps: a preliminary revocation and a full revocation hearing. The court may preliminarily revoke probation after making a judicial determination that there is probable cause to believe the probationer has violated a condition of probation. When the probationer is at large, the determination of probable cause is usually based on the judge's review of a probation report or on the police report in a new case. See *People v Coleman* (1975) 13 C3d 867, 894, 120 CR 384. Once the probationer is before the court, the second step is the formal probation revocation hearing. *Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593; *People v Vickers* (1972) 8 C3d 451, 461, 105 CR 305; *People v Coleman* (1975) 13 C3d 867, 120 CR 384. Bail or own recognizance (O.R.) release for felony defendants charged with a probation violation is at the court's discretion. Pen C §1272(3). Bail or O.R. release for misdemeanor defendants charged with a probation violation may be mandatory.

A unitary hearing that combines the prerevocation and revocation hearings is usually sufficient, as long as sufficient notice is given to the defendant. *People v Coleman, supra*. At the formal probation revocation hearing, the probationer is entitled only to a court trial. *Morrissey v Brewer, supra*. The rules of evidence are comparable to the rules of evidence at a criminal trial, with a few exceptions (*People v Arreola* (1994) 7 C4th 1144, 31 CR2d 631), but the standard for revocation is by a preponderance of the evidence, not by proof beyond a reasonable doubt (*People v Rodriguez* (1990) 51 C3d 437, 272 CR 613). A preliminary hearing in a felony or a misdemeanor case can serve as the formal probation revocation hearing if the probationer receives fair notice of the effect and dual purpose of the proceeding. *People v Mosley* (1988) 198 CA3d 1167, 1174, 244 CR 264. For discussion of the defendant's due process rights at a probation revocation hearing, see §§46.15-46.20.

Many issues arise at probation revocation proceedings. Is the defendant actually still on probation? If the defendant failed to make restitution or pay a fine, can the defendant be found in violation absent a showing that he or she had the ability to make such payments? What is the impact of Proposition 36 on probation revocations? These topics are among the subjects that this chapter will address.

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§46.2 II. DEADLINES

There are no statutory time limits within which a probation revocation hearing must be held. Revocation hearings must be held as "promptly as convenient after arrest while information is fresh and sources are available." *Morrissey v Brewer* (1972) 408 US 471, 485, 33 L Ed 2d 484, 496, 92 S Ct 2593.

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§46.3 III. TWO-STEP PROCEDURE FOR PROBATION REVOCATION

Probation revocations involve a two-step process: a preliminary revocation based on a judge's finding of probable cause (see §46.12), and a formal revocation hearing (see §§46.14-46.34). *People v Coleman* (1975) 13 C3d 867, 894, 120 CR 384.

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IV. INITIATING PROBATION REVOCATION PROCEEDINGS

§46.4 A. Moving Party; Probationer's Procedures as Moving Party

Motions to revoke probation can be initiated by the probation department, the district attorney, the probationer, or the court on its own motion. Pen C §1203.2(b). If a motion to revoke is made, the court must refer the motion to the probation department for a report. Pen C §1203.2(b). A sample motion to revoke probation is in California Criminal Law Forms Manual §46.1 (2d ed Cal CEB 2005).

Probationers can ask the court to have a sentence on a previous probation case run concurrently with the prison term in a new case. Pen C §1203.2a. A probationer who wishes to do that should be aware that Pen C §1203.2a operates with three different jurisdictional time limits:

(1) The probation department must notify the court within 30 calendar days after being notified in writing by the probationer, probationer's counsel, or the prison of the probationer's confinement, or jurisdiction over the defendant is lost (*i.e.,* probation is terminated).

(2) If imposition of the probationer's sentence was suspended, the court, on being notified of the probationer's valid request under Pen C §1203.2a for absentee sentencing, must impose sentence and issue its commitment within 30 calendar days; otherwise, it loses jurisdiction.

(3) If the probationer's sentence was imposed but execution had been suspended, the court must order execution of sentence within 60 calendar days "after being notified of the confinement." Otherwise, jurisdiction is again lost. See *In re Hoddinott* (1996) 12 C4th 992, 999, 50 CR2d 706.

Under Pen C §1203.2a, it is not required that the probationer make a formal demand of the court, only that the court be notified. The notification can occur if the court is advised by the probation department of the probationer's confinement for a minor offense. *People v Hall* (1997) 59 CA4th 972, 983, 69 CR2d 826. The confinement can be for a parole or probation violation as well as for a new offense. The court must be clearly advised that it is a confinement for another offense (as opposed, *e.g.,* to a transfer to a diagnostic facility). 59 CA4th at 982.

However, Pen C §1203.2a requires that certain formalities be followed:

- The request must be signed by an authorized representative of the warden attesting to the confinement, or a certificate from the warden must be provided to the court; and
- The probationer must indicate that he or she wishes to be absent at the revocation and wishes to proceed without being represented by counsel (the request, however, can be made to the probation department by counsel). *In re Hoddinott* (1996) 12 C4th 992, 1001, 50 CR2d 706.

If a probationer sends a request lacking one or more of these formal requirements, and the court has been notified of the confinement, the court cannot act until the deficiency is corrected (*e.g.,* if the request fails to state that the probationer wishes to proceed in absentia and without counsel, that must be clarified). 12 C4th at 1001. Requiring the probationer to proceed in absentia without a waiver is unconstitutional. See *People v Wagner* (2009) 45 C4th 1039, 1054, 90 CR3d 26. See also *In re Flores* (1983) 140 CA3d 1019, 1023, 190 CR 388 (summary revocation procedure of Pen C §1203.2a ignores constitutional rights of probationers with execution of sentence suspended).

Whether or not the formalities are observed, the probation department has the duty to inform the court within 30 calendar days after notification that the defendant is serving a prison sentence in another case; otherwise, the court will lose jurisdiction. *In re Hoddinott,* 12 C4th at 1005. However, despite the plain language of Pen C §1203.2a, the court's loss of "all jurisdiction" does not entitle a probationer to dismissal of his or her case. The court of appeal held that when a sentence is imposed and execution is suspended, the order directing execution of that sentence is void, but the original probationary sentence is effectively reinstated. *People v Murray* (2007) 155 CA4th 149, 158, 65 CR3d 731.

Ø **Note:** Penal Code §1203.2a does not provide the exclusive revocation and sentencing procedure available to probationers with imposition of sentence suspended who are subsequently imprisoned on another charge. Those

individuals may opt to seek sentencing under Pen C §1381. *Wagner,* 45 C4th at 1052. The court's failure to meet the 90-day time limit in Pen C §1381 results in dismissal of the probation revocation proceedings. 45 C4th at 1052. The refiling of an action to revoke probation is subject to the limitations of Pen C §1387. 45 C4th at 1059. The *Wagner* court "expressed no view" whether Pen C §1381 applies to probationers with execution of sentence suspended. 45 C4th at 1051 n5.

For discussion of Pen C §§1381 and 1381.5, see §§19.31-19.32.

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§46.5 B. Grounds for Revocation

A motion to revoke probation must be based on one or more of the grounds set out in Pen C §1203.2(a) and the cases interpreting it. They are:

- A violation of the conditions of probation, *e.g.,* failure to pay a fine, obey a stay-away order, or attend court-ordered counseling;
- The probationer's abandonment to improper associates or a vicious life, *e.g.,* associating with known criminals (this ground is very rarely used);
- Subsequent commission of other criminal offenses;

Ø **Note:** California courts may enforce only California laws, not federal laws. Thus, for example, when California law bars sanctions for legitimate marijuana use, California courts cannot find a violation of the probation condition that a defendant "obey all laws" when a defendant violates the federal marijuana laws. See *People v Tilehkooh* (2003) 113 CA4th 1433, 1445, 7 CR3d 226.

- Conduct indicating that the probationer is no longer fit to remain at large, *e.g.,* overall determination that the probationer is incapable of leading a law-abiding life (see *People v Delles* (1968) 69 C2d 906, 911 n2, 73 CR 389) or it is not safe that he or she remain in society (*People v Monette* (1994) 25 CA4th 1572, 1575, 31 CR2d 203); and
- Willful failure to pay a fine or restitution, despite the ability to pay, or refusal to work after having been given the opportunity to work as an alternative to paying restitution.

Ø **Note:** Failure to pay that results solely from an inability to pay cannot be the basis of a revocation and punishment. See §46.32.

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§46.6 C. Bringing Probationer Before Court

When the probationer is out of custody and the probation department decides to revoke probation, it is common for the department to send a letter to the probationer, indicating the time and place of the court date set for a prerevocation hearing. Instead of sending a letter to an out-of-custody probationer, the court or the probation officer can arrange for the probationer to appear in court. Moreover, either a peace officer or a probation officer can make a warrantless arrest of anyone on probation when probable cause exists to believe that he or she is violating a term or condition of probation. Pen C §1203.2(a).

At the time set for hearing, the court decides whether there is probable cause to support revocation, usually on the basis of the probation report or an arrest report. If the probationer is present, and the court finds probable cause to support revocation, the court revokes probation preliminarily and sets a date for a revocation hearing. Pen C §1272(3); *People v Coleman* (1975) 13 C3d 867, 894, 120 CR 384. If the defendant is not present, the court is still required to make the probable cause determination in order to revoke probation preliminarily. *People v Coleman, supra*.

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§46.7 D. Release Pending Hearing

With one exception, felony probationers are not entitled to release pending the outcome of the probation revocation hearing. Pen C §1272(3); *People v Kading* (1988) 204 CA3d 1500, 251 CR 916. The court has discretion to set bail or release the probationer on his or her own recognizance but is not required to do so. Pen C §1272. The exception involves Proposition 36: Unless a showing of danger or flight is made, a defendant on Proposition 36 drug program probation has a right to release pending a hearing on a violation of that probation, when the result of any revocation will be reinstatement on Proposition 36 probation. *In re Mehdizadeh* (2003) 105 CA4th 995, 130 CR2d 98.

In misdemeanor probation cases, it can be argued, based on Pen C §1272(1)-(2), that the defendant is entitled as a matter of right to bail pending the outcome of the revocation issue. See *In re O'Driscoll* (1987) 191 CA3d 1356, 236 CR 882.

When a defendant appeared on a warrant issued for an alleged probation violation, it was improper for the court to remand the defendant to custody pending a hearing on the claimed violation; the remand violated due process because the defendant was not given notice he would be remanded and was not given counsel. *In re Wagner* (2005) 127 CA4th 138, 25 CR3d 201.

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§46.8 E. Notice Requirements for Formal Revocation Hearing

The probationer must be given notice of the formal probation revocation hearing. Pen C §1203.2. The defendant is entitled to written notice of the alleged violation of probation, disclosure of the evidence against him or her, and an opportunity to respond to the charges. *People v Self* (1991) 233 CA3d 414, 419, 284 CR 458.

When the prosecutor initiates a revocation, he or she must also notify the probation officer. Pen C §1203.2(b). The reverse is also true: If a probationer seeks to modify, terminate, or revoke the probation grant, he or she must serve notice on the probation officer and the prosecutor. Pen C §1203.2(b).

If the alleged violation is based on a criminal case, the notice should refer to the specific violation. *In re Moss* (1985) 175 CA3d 913, 929, 221 CR 645. The revocation notice can refer to facts recited in a police report. *People v Santellanes* (1989) 216 CA3d 998, 1003 n4, 265 CR 281. If the probation department moves to revoke probation based on a violation other than a new criminal charge, the nature of the violation should be included in the probation report. Pen C §1203.2(a)-(b).

The notice must indicate the time and place of the probation revocation proceedings. The probationer should have at least enough time to investigate and prepare against a specific allegation. *People v Mosley* (1988) 198 CA3d 1167, 1174, 244 CR 264. It is not proper for the court to base a revocation on facts other than those cited in the notice. *People v Mosley, supra*.

If the court will hold a revocation hearing simultaneously with the preliminary hearing or trial, notice of that intent is required so that the probationer will have the opportunity to defend. *People v Mosley, supra*. Notice will be deemed waived if the probationer or his or her attorney, without objection, proceeds with the hearing. *People v Baker* (1974) 38 CA3d 625, 629, 113 CR 244.

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§46.9 F. Expiration of Probation

Probation must be revoked before the end of the term of probation. See Pen C §1203.3(a). A preliminary revocation order tolls the running of the term of probation, allowing the court to retain jurisdiction to hold a formal hearing and to sentence for a violation after the original probation expiration date has passed. *People v Mosley* (1988) 198 CA3d 1167, 1174, 244 CR 264. However, the court must actually revoke probation; an order merely issuing a bench warrant is insufficient to qualify as an order revoking probation and thus does not toll the time. *People v Broadway* (1981) 123 CA3d Supp 19, 177 CR 106. Moreover, for tolling to take effect, the court must ultimately find that the probationer committed a violation within the original period of probation. If the court does not find that a violation of probation occurred during the original period of probation, even if a preliminary revocation order was made that tolled the running of the term of probation, the tolling will not be effective so as to permit a finding of a violation of probation before probation expired. *People v Burton* (2009) 177 CA4th 194, 200, 99 CR3d 169; *People v Tapia* (2001) 91 CA4th 738, 741, 110 CR2d 747, disapproved on other grounds in *People v Wagner* (2009) 45 C4th 1039, 1061 n10, 90 CR3d 26.

In the absence of an order revoking probation, probation expires on the last day of the probationary period, after which the court has no jurisdiction over the probationer. *People v White* (1982) 133 CA3d 677, 682, 184 CR 134. The period of time from the date probation is revoked until it is reinstated is not counted in calculating the expiration of the probationary period. *People v DePaul* (1982) 137 CA3d 409, 187 CR 82. An agreement by defense counsel to a probationary period longer than the maximum statutory period estops any claim that probation expired. *People v Jackson* (2005) 134 CA4th 929, 933, 36 CR3d 477.

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§46.10 G. Timeliness of Motion to Revoke

A motion to revoke probation must be initiated within a reasonable time after the alleged violation. *People v Young* (1991) 228 CA3d 171, 181, 278 CR 784. The courts have not enunciated strict standards. In one case, *People v Buford* (1974) 42 CA3d 975, 117 CR 333, a 2½-month delay was found to be unreasonable. In cases involving a long delay, defense counsel could argue that circumstances such as the fading memory of witnesses or of the probationer, or the destruction of evidence, have made it harder for the probationer to defend against the alleged violation. See *U.S. v Hamilton* (9th Cir 1983) 708 F2d 1412 ("[r]evocation of probation after unreasonable delay or under circumstances misleading to the probationer is an abuse of discretion"; quoted approvingly in *People v Villines* (1987) 192 CA3d 1298, 1304, 237 CR 868); *People v Young, supra* (probation revocation reversed because trial court failed to determine whether lack of notice to probationer serving prison sentence about revocation of probation precluded his rights to speedy trial, whether delay was justifiable, and whether probationer suffered any prejudice.) On the other side, the prosecutor could presumably argue that, unless the delay created some prejudice to the probationer's ability to defend against the allegations, lack of timeliness is not a reason to prevent a hearing on the issue if other facts can explain the delay. Defense counsel could attempt to show such prejudice from the loss of the opportunity to obtain concurrent sentencing.

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§46.10A H. What Judge Must Preside at Probation Revocation Proceeding

When a judge issues an order in a probation revocation proceeding, he or she assumes exclusive jurisdiction over the case; no other judge can interfere with the exercise of that jurisdiction without the defendant's consent. *People v Ellison* (2003) 111 CA4th 1360, 4 CR3d 713. See also *Williams v Superior Court* (1939) 14 C2d 656, 662, 96 P2d 334. Note, however, that a probationer has no right to have the judge who originally granted probation preside at a probation revocation hearing. *People v Martinez* (2005) 127 CA4th 1156, 26 CR3d 234.

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§46.11 I. Tolling Time

A summary revocation of probation during the probation period tolls the running of probation until the probationer's status is resolved. *People v Mosley* (1988) 198 CA3d 1167, 244 CR 264. See Pen C §1203.2(a). See discussion in §46.9. It has been held that, during the time that probation is tolled, the probationer is still subject to the terms and conditions of the probation grant. *People v Barkins* (1978) 81 CA3d 30, 33, 145 CR 926. Thus, a probationer's failure to report a new arrest, as the probation order requires, can be the basis of a revocation even if it occurs during a tolled period. *People v Lewis* (1992) 7 CA4th 1949, 1954, 10 CR2d 376. See also *People v Burton* (2009) 177 CA4th 194, 195, 99 CR3d 169, and *People v Tapia* (2001) 91 CA4th 738, 110 CR2d 747, disapproved on other grounds in *People v Wagner* (2009) 45 C4th 1039, 1061 n10, 90 CR3d 26, holding that if a court finds that the defendant committed *any* violation of probation within the probationary period—not just the alleged violation for which probation was originally summarily revoked—time was tolled and the court can revoke probation. Given this, practitioners are well advised to counsel probationers that a summary revocation does not necessarily relieve them of the duty to comply with probationary orders.

Penal Code §1203.2(e) provides for certain results if the court revokes and reinstates probation after the expiration of the probationary period. This section is a vestige of a time before tolling was provided for in the law. If probation is revoked before expiration of probation, §1203.2(e) will never apply. *People v Ottovich* (1974) 41 CA3d 532, 116 CR 120. Section 1203.2(e) can apply only when probation is in fact revoked and reinstated and the court actually finds a valid violation of probation. *People v Medeiros* (1994) 25 CA4th 1260, 31 CR2d 83. Now that the statutory scheme provides for tolling of time, it would appear that §1203.2(e) can never be invoked. See discussion in §46.9.

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§46.12 V. PREREVOCATION HEARING

To issue a warrant for a probationer's arrest, or to detain a probationer, the court must be satisfied that there is probable cause to support a probation violation. *People v Coleman* (1975) 13 C3d 867, 120 CR 384. The hearing at which this determination is made is called a prerevocation hearing. If the court finds insufficient probable cause to revoke probation preliminarily, the motion is denied. However, this rarely happens. When the court finds probable cause to support a probation violation and revokes probation, the action is called "summary revocation," to distinguish it from a formal revocation order that occurs after a formal revocation hearing.

The prerevocation determination guarantees that a probationer will not be arrested or held in custody for a formal revocation hearing without cause. See *People v Coleman, supra*. Often, a unitary hearing that combines the prerevocation and revocation hearings will be sufficient. *People v Coleman, supra*. However, there are situations (such as when probation revocation is based on new criminal charges) when a prerevocation hearing is required. *People v Coleman, supra*.

Summary revocation allows the court to retain jurisdiction of the probationer when the probationer is at large because it tolls the running of the probationary period. Pen C §1203.2(a); *People v Ham* (1975) 44 CA3d 288, 293, 118 CR 591. See discussion in §46.11.

Summary revocation of probation is only a temporary suspension (*People v Pipitone* (1984) 152 CA3d 1112, 201 CR 18); it does not terminate the conditions of probation (*People v Barkins* (1978) 81 CA3d 30, 145 CR 926). But does it suspend those conditions? There is no clear answer to this question. See §46.11.

At the prerevocation hearing, the court must consider the information in the probation officer's request to revoke probation. Pen C §1203.2(b). The court can summarily revoke on the basis of that request or on some other basis, *i.e.,* on information of equal gravity, if it has reason to believe that the probationer has violated probation. See Pen C §1203.2(b); *People v Santellanes* (1989) 216 CA3d 998, 1002, 265 CR 281. If the basis for revoking probation is a violation of the terms or conditions of probation, there must be facts in the report from which the court can find that the probationer violated those terms or conditions. *People v Smith* (1970) 12 CA3d 621, 90 CR 811.

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§46.13 VI. STIPULATING TO PROBATION VIOLATION

A probationer may want to waive his or her *Morrissey-Vickers* rights (discussed in §§46.15-46.20) and stipulate to a violation rather than insisting on a hearing. *People v Martin* (1992) 3 CA4th 482, 486, 4 CR2d 548; *In re Moss* (1985) 175 CA3d 913, 930, 221 CR 645. A probationer has a personal and fundamental right to admit a probation violation, even against the advice of counsel. *People v Robles* (2007) 147 CA4th 1286, 1290, 54 CR3d 916. Due process requires that any waiver of the probationer's rights be knowing and intelligent. *Johnson v Zerbst* (1938) 304 US 458, 465, 82 L Ed 1461, 1467, 58 S Ct 1019. At a minimum, the probationer must have been advised by counsel or by the court of the *Morrissey-Vickers* rights. See, *e.g., In re La Croix* (1974) 12 C3d 146, 153 n4, 115 CR 344 (parole case). However, the courts have not been as exacting in the requirements for waivers in revocation cases as they have been for guilty pleas in criminal cases. See, *e.g., People v Martin, supra* (waiver because probationer filed letter in mitigation and because he did not object to procedure or grounds for revocation); *People v Garcia* (1977) 67 CA3d 134, 136, 136 CR 398 (*Boykin-Tahl* admonishments and waiver not required for probation revocation); *People v Dale* (1973) 36 CA3d 191, 194, 112 CR 93 (probationer deemed to have waived his right to hearing by his silence when his attorney submitted the violation on supplemental probation report).

When probationers attempt to represent themselves in motions to revoke probation, the record must affirmatively reflect that the defendant was warned of the disadvantages of self-representation and that a knowing and intelligent waiver of the right to counsel was made. *People v Hall* (1990) 218 CA3d 1102, 1106, 267 CR 494.

As a practical matter, both the court and the attorneys should make sure that the record reflects that a probationer who is stipulating to a violation understands the rights being given up, and the consequences of admitting to the violation. Consequences include the possible sentence and, when appropriate, secondary consequences, *e.g.,* the effect of a prison term on enhancement or immigration status.

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VII. FORMAL REVOCATION HEARING

§46.14 A. Advantages of Negotiating Probation Violation

Motions to revoke probation place probationers in a position of great disadvantage. Because *Morrissey-Vickers* rights (discussed in §46.15) give the probationer limited protection against revocation, the defense attorney must carefully weigh the advisability of going forward with a hearing against attempting to bargain for leniency for the client. With congested courtrooms and crowded calendars, judges and prosecutors may be willing to settle for something less than the maximum possible sentence. By stipulating to a violation of probation with an agreed sentence, probationers are often reinstated to probation (albeit with additional jail time) or sent to prison for minimum or concurrent terms.

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§46.15 B. Probationer's Rights at Hearing

A probation revocation hearing differs from a criminal trial in major respects. It is heard before a judge, not a jury. Pen C §1203.2(b). The standard for revocation is proof by a preponderance of the evidence, not proof beyond a reasonable doubt. *People v Rodriguez* (1990) 51 C3d 437, 272 CR 613. Nevertheless, the probation hearing is a proceeding of great moment because the result for the probationer can be jail or prison. Therefore, defense counsel is held to high standards of professional competence. See *People v Shaw* (1984) 35 C3d 535, 541, 198 CR 788. Defense counsel has a duty to investigate the facts of the allegations, research the law, and consult with the client in the same way as in a criminal trial. *People v Shaw, supra*. See *People v Gayton* (2006) 137 CA4th 96, 40 CR3d 40 (defense counsel incompetent for failing to check probation department records to determine accuracy of defendant's claim (which was true) that he had been reporting to the probation officer).

The probationer has the following rights in probation revocation proceedings (*Black v Romano* (1985) 471 US 606, 612, 85 L Ed 2d 636, 643, 105 S Ct 2254; *Morrissey v Brewer* (1972) 408 US 471, 489, 33 L Ed 2d 484, 499, 92 S Ct 2593; *People v Malabag* (1997) 51 CA4th 1419, 1422, 59 CR2d 847):

- Written notice of the claimed violation of probation;
- Disclosure to the probationer of the evidence against him or her;
- The opportunity to be heard in person and to present witnesses and documentary evidence;
- The right to confront and cross-examine adverse witnesses;

  Ø **Note:** Because a probation revocation hearing is not a criminal trial, the right to confront witnesses in such proceedings stems from the Due Process Clause of the Fourteenth Amendment, rather than the Confrontation Clause of the Sixth Amendment. *People v Johnson* (2004) 121 CA4th 1409, 18 CR3d 230. Consequently, according to the court, the restrictions on the admissibility of "testimonial" hearsay imposed by the Supreme Court in *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, do not govern probation revocation proceedings. See discussion in §46.19.

- A neutral and detached hearing body;
- A written statement by the factfinder about the evidence relied on and the reasons for the revocation, if the court has not stated its reasons on the record (*People v Ruiz* (1975) 53 CA3d 715, 125 CR 886); and
- A right to an attorney (this is not on constitutional grounds, but on the California Supreme Court's supervisory authority. *People v Vickers* (1972) 8 C3d 451, 461, 105 CR 305).

Morrissey v Brewer, supra, was a parole revocation case. Its guidelines were adopted by the California Supreme Court for probation revocation cases in *People v Vickers* (1972) 8 C3d 451, 457, 105 CR 305, and *People v Coleman* (1975) 13 C3d 867, 120 CR 384.

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§46.16 C. When and Where Revocation Hearing Should Be Held

When revocation hearing should be held. There are no statutory time limits on when a probation revocation hearing must be held. In *Morrissey v Brewer* (1972) 408 US 471, 485, 33 L Ed 2d 484, 496, 92 S Ct 2593, the court spoke of a hearing held as "promptly as convenient after arrest while information is fresh and sources are available" and found that a 2-month delay was not unreasonable. See also *People v Buford* (1974) 42 CA3d 975, 117 CR 333 (hearing held in felony case 21 days after filing of revocation petition not unreasonable); *In re Williams* (1974) 36 CA3d 649, 111 CR 870 (2-month and 25-day delay following filing of parole revocation petition not unreasonable).

The rule that the hearing must be held within a reasonable time requires balancing all relevant circumstances, including whether there is a new offense and whether the probationer is in custody on that offense. See *In re La Croix* (1974) 12 C3d 146, 156, 115 CR 344 (parole revocation case).

A probationer incarcerated in state prison on another case is entitled on request to be sentenced on a pending probation revocation before the intervening sentence has been served in order to receive concurrent time. Pen C §1203.2a.

When a new criminal case is the basis for a probation violation, it is "most desirable" for the hearing on the probation violation to follow the criminal case, not precede it. *People v Coleman* (1975) 13 C3d 867, 896, 120 CR 384. See also *People v Jasper* (1983) 33 C3d 931, 191 CR 648; *People v Samuels* (1983) 147 CA3d 1108, 195 CR 598. Some courts have held that the exclusionary rule does not apply in probation revocation proceedings (see, *e.g., People v Harrison* (1988) 199 CA3d 803, 245 CR 204; but see *People v Washington* (1987) 192 CA3d 1120, 236 CR 840); however, when a motion to suppress evidence is granted under Pen C §1538.5, the suppressed evidence may not be used to revoke probation (*People v Willis* (1983) 149 CA3d Supp 56, 60, 197 CR 281; *People v Zimmerman* (1979) 100 CA3d 673, 161 CR 188). Thus, when a motion to suppress evidence is made, the hearing on that motion should occur before the hearing on the revocation of probation. *People v Fuller* (1983) 148 CA3d 257, 210 CR 1, 195 CR 853. See also *People v Howard* (1984) 162 CA3d 8, 208 CR 353. For further discussion of procedures when a new case is pending, see §§46.22-46.25.

Where probation revocation should be held. Probation revocations must usually be held in the court and county where probation was granted. *People v Klockman* (1997) 59 CA4th 621, 69 CR2d 271. Unless a transfer of supervision has been made under Pen C §1203.9, a court of equal jurisdiction in another county does not have jurisdiction to hear the motion to revoke probation. It does not appear that a probationer can waive this jurisdictional requirement. 59 CA4th at 625.

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§46.17 D. Reciprocal Discovery

A probationer has the right to obtain the evidence against him or her in a probation revocation proceeding. See *People v Moore* (1983) 34 C3d 215, 218, 193 CR 404. The probationer may also be entitled to inspect nonconfidential portions of the probation officer's file on a showing of good cause. See *County of Placer v Superior Court (Stoner)* (2005) 130 CA4th 807, 30 CR3d 617 (trial court has authority under Pen C §1203.10 to permit the probationer to inspect nonconfidential portions of the probation file).

Ø **Practice tip:** Because the probation department is a third party to the revocation proceedings (see 130 C4th at 814), a subpoena duces tecum served on the county's chief probation officer is the appropriate way to request inspection of probation files. On subpoenas duces tecum, see §§4.44, 11.25.

In *Jones v Superior Court* (2004) 115 CA4th 48, 8 CR3d 687, the court of appeal concluded that the reciprocal discovery provisions of Proposition 115 (Pen C §§1054-1054.7) do not apply to probation revocations. Therefore, the prosecution is not entitled to discovery under Pen C §1054.3 of materials in the possession of the defense. The court held that a probation revocation proceeding is not a "criminal trial" within the meaning of §1054.3. 115 CA4th at 57.

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§46.18 E. Standard of Proof

The standard of proof that the prosecuting party must sustain at a probation revocation hearing is far less than that at a criminal trial. The court need only be satisfied that there is a preponderance of the evidence that probation has been violated. *People v Rodriguez* (1990) 51 C3d 437, 272 CR 613.

A violation of probation may only be found if the violation was willful. *People v Galvan* (2007) 155 CA4th 978, 66 CR3d 426. In *Galvan,* the defendant was convicted, given probation, ordered to serve a year in the county jail, and ordered to report to probation within 24 hours of his release from jail, or, if he was deported, within 24 hours of his reentry into the United States. The defendant was deported, reentered, and never reported. The court of appeal noted that since the record contained no evidence of when the defendant reentered, there was no evidence that the defendant failed to report to probation 24 hours after his reentry. Although the defendant did fail to report 24 hours after his release, the government made reporting impossible by deporting him. Because a violation of probation may only be found if the violation was willful, the defendant could not be found in violation of probation. 155 CA4th at 983.

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Source: Criminal Law/California Criminal Law Procedure and Practice/46 PROBATION REVOCATIONS/§46.19 F. Hearsay Evidence Generally Not Admissible

§46.19 F. Hearsay Evidence Generally Not Admissible

Hearsay ordinarily not admissible absent good cause. Hearsay evidence is generally not admissible at probation revocation hearings. *People v Arreola* (1994) 7 C4th 1144, 31 CR2d 631. Transcripts of trial proceedings or of preliminary hearings involving the probationer as a defendant cannot be introduced against the probationer at a probation revocation hearing unless the prosecution can demonstrate good cause for its admission in lieu of live testimony. Good cause, which is determined on a case-by-case basis, exists when the declarant is unavailable; when the declarant can be brought to the hearing only through great difficulty or expense; or when the declarant's presence would pose a risk of harm to the declarant. *People v Arreola, supra*; *People v Shepherd* (2007) 151 CA4th 1193, 1202, 60 CR3d 616. It is important that the trier of fact be able to observe the demeanor of witnesses and that the accused have the opportunity to cross-examine them. *People v Arreola, supra*. For example, a trial court erred in permitting a probation officer to testify regarding alleged out-of-court statements made by a third person that the probationer had violated his probation by consuming alcohol. The court of appeal noted that no showing of good cause was made for relying on the probation officer's hearsay (or double hearsay) testimony in lieu of live testimony. *People v Shepherd* (2007) 151 CA4th 1193, 1202, 60 CR3d 616. Note, however, that at least one appellate court has held that a spontaneous statement admissible under Evid C §1240 is a special breed of hearsay that automatically satisfies a probationer's due process confrontation rights without requiring the trial court to find good cause for the witness's absence under *Arreola* or perform the federal due process balancing test set out in *U.S. v Comito* (9th Cir 1999) 177 F3d 1166. *People v Stanphill* (2009) 170 CA4th 61, 81, 87 CR3d 643.

Documentary evidence is admissible if reliable. Reliable documentary evidence that does not have live testimony as its source is admissible, even if it does not meet all the requirements of an exception to the hearsay rule. See *People v Maki* (1985) 39 C3d 707, 716, 217 CR 676. Court of appeal cases have reached inconsistent results on the admissibility of documentary hearsay. In *People v Brown* (1989) 215 CA3d 452, 454, 263 CR 391, the court ruled that corroborated drug test reports were admissible at a probation revocation hearing. In *People v O'Connell* (2003) 107 CA4th 1062, 132 CR2d 665, the court ruled that a program manager's report about a probationer's absences was admissible at a probation revocation hearing. However, in *People v Shepherd* (2007) 151 CA4th 1193, 1202, 60 CR3d 616, the court ruled that a probation officer's testimony about an administrator's hearsay statement recounting the defendant's failed alcohol test was inadmissible under the good-cause standard. The *Shepherd* court specifically rejected the *Brown* case, noting that it preceded the supreme court's decision in *People v Arreola, supra*. *People v Shepherd* (2007) 151 CA4th 1193, 1202, 60 CR3d 616. Relying on *Maki* and *O'Connell*, the Second District in *People v Abrams* (2007) 158 CA4th 396, 398, 69 CR3d 742, held that evidence of routine matters in probation reports, such as whether a defendant made and kept appointments and made restitution payments, is nontestimonial and, therefore, admissible hearsay at revocation hearings. However, the *Abrams* court made it clear that everything in a probation report is not necessarily admissible at a violation hearing: "Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely" is inadmissible. 158 CA4th at 405.

Ø **Note:** The Sixth Amendment right of confrontation is violated by the introduction in a criminal trial of "testimonial" hearsay unless both (1) the declarant is unavailable as a witness, and (2) the defendant has had an opportunity to cross-examine the declarant. *Crawford v Washington* (2004) 541 US 36, 53, 158 L Ed 2d 177, 203, 124 S Ct 1354. Because the right to confront witnesses at probation revocation hearings stems from the Due Process Clause of the Fourteenth Amendment, not the Sixth Amendment Confrontation Clause, "*Crawford*'s interpretation of the Sixth Amendment does not govern probation revocation hearings." *People v Johnson* (2004) 121 CA4th 1409, 1411, 18 CR3d 230. However, Sixth Amendment cases like *Crawford* may shed light on the scope of the Fourteenth Amendment right of confrontation available at probation revocation hearings. 121 CA4th at 1412. It does not appear that *Johnson* will be the last word on the subject. The challenged hearsay in that case was a lab report that the court reasoned was not a substitute for live testimony but rather routine documentary evidence that did not fit within the definition of "testimonial" and the admission of which was consistent with the rationale of *Arreola.* 121 CA4th at 1412. That reasoning has been undermined by the Supreme

Court's ruling in *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 321, 129 S Ct 2527, that, whether routinely generated or not, statements prepared to be used as evidence against the defendant at trial, namely, sworn statements contained in lab reports indicating the results of forensic analysis, are testimonial for the purposes of confrontation under the Sixth Amendment. Notably, the Court referred to the report, Strengthening Forensic Science in the United States: A Path Forward, issued by the National Research Council of the National Academies, and questioned the assumption of reliability underlying forensic science and testing. 174 L Ed 2d at 326. An argument can be made that after *Crawford* and *Melendez-Diaz,* in the absence of other compelling reasons to limit cross-examination, "good cause" for the introduction of testimonial hearsay at a probation revocation hearing requires a showing that the declarant is unavailable and that the probationer has had a prior opportunity to cross-examine.

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§46.20 G. Admissibility of Illegally Obtained Evidence

Although some courts have stated that the exclusionary rule does not apply in probation revocation proceedings (see, *e.g., People v Harrison* (1988) 199 CA3d 803, 245 CR 204), when the police conduct shocks the conscience of the court, evidence obtained by that conduct must be suppressed. Compare *People v Washington* (1987) 192 CA3d 1120, 236 CR 840 (police conduct affronted sense of justice), with *People v Harrison* (1988) 199 CA3d 803, 245 CR 204 (conduct not egregious). Clearly, the defense is entitled to a hearing on a claim that improperly seized evidence will be offered at a probation revocation proceeding.

In addition, several cases say that evidence that has been previously suppressed cannot be used at a probation revocation hearing. See Pen C §1538.5(d); *People v Zimmerman* (1979) 100 CA3d 673, 161 CR 188; *People v Willis* (1983) 149 CA3d Supp 56, 60, 197 CR 281 (accord). See *Schlick v Superior Court* (1992) 4 C4th 310, 314, 14 CR2d 406 (it appears that *Zimmerman* has survived amendment to Cal Const art I, §28(a)); *People v Superior Court (Brotherton)* (1983) 147 CA3d 281, 287, 195 CR 96. See also §46.16.

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§46.21 H. No Requirement of Accomplice Corroboration

In probation revocation hearings, the moving party does not have to corroborate the testimony of accomplices as it would in a criminal trial under Pen C §1111. *People v McGavock* (1999) 69 CA4th 332, 81 CR2d 600.

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I. Effect of Other Proceedings

§46.22 1. Acquittal or Dismissal; Appeal

Acquittal or dismissal. An acquittal or a dismissal of a criminal charge that is the underlying basis for a motion to revoke probation does not bar a probation revocation on those same facts. See *In re Coughlin* (1976) 16 C3d 52, 56, 127 CR 337 (probation revocation allowed on same facts as criminal trial acquittal); *People v Ortiviz* (1977) 74 CA3d 537, 541, 141 CR 483 (revocation allowed based on same facts as preliminary hearing discharge). The court can consider the factual issues de novo to determine whether a violation of probation occurred. *People v Oritiviz, supra*. Conversely, a finding that there was no violation of probation, when it had been alleged that the probationer had committed a crime, does not operate as collateral estoppel and thereby prevent a criminal case from proceeding. *Lucido v Superior Court* (1990) 51 C3d 335, 341, 272 CR 767.

Appeal. When a probationer appeals the judgment in the underlying case on which the probation revocation is based, and probation expires before the appeal is decided, the probationary period ends when probation expires unless some exception to that rule exists. *In re Bakke* (1986) 42 C3d 84, 89, 227 CR 663. After the appeal is decided, the probationer can be required to fulfill the conditions of probation that were stayed at his or her request, *e.g.,* jail time. *In re Bakke, supra*. If, and to what extent, this rule applies to nonpenal conditions is unclear.

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§46.23 2. Convictions

A conviction in a criminal case can provide the basis for probation revocation. The court can accept the conviction without having to relitigate the facts underlying the conviction. *People v Sturgeon* (1975) 53 CA3d 711, 713, 125 CR 903. The probationer, however, must be given the opportunity to show facts in mitigation. *People v Sturgeon, supra*.

Reversal of a criminal conviction that was the basis of a revocation does not necessarily warrant setting aside the revocation if a sufficient factual basis exists to find a violation of probation. *In re Coughlin* (1976) 16 C3d 52, 57, 127 CR 337.

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§46.24 3. Preliminary Hearings and Trials in Felony Cases

A motion to revoke can be heard on the evidence presented at a preliminary hearing or trial as long as the notice of motion to revoke indicates that this is to occur. *People v Mosley* (1988) 198 CA3d 1167, 1174, 244 CR 264. However, if the preliminary hearing is conducted by the use of hearsay under Proposition 115, this would mean that only hearsay evidence would be presented. As discussed in §46.19, hearsay evidence is usually inadmissible at a probation revocation hearing. Even when a verdict of guilty has been rendered, the probationer has a right to be heard to explain himself or herself or to attempt to mitigate the effect of adverse evidence. *People v Coleman* (1975) 13 C3d 867, 895 n22, 120 CR 384. See also *People v Avery* (1986) 179 CA3d 1198, 1204, 225 CR 319.

Transcripts of trial proceedings or of preliminary hearings involving the probationer as a defendant cannot be introduced against the probationer at a probation revocation hearing unless the prosecution can demonstrate the declarant's unavailability or some other good cause for their admission. *People v Arreola* (1994) 7 C4th 1144, 31 CR2d 631. Good cause can include great cost, difficulty in bringing the declarant to court, or some risk of harm to the declarant's physical, emotional, or mental state. It is important that the trier of fact be able to observe the demeanor of witnesses and that the accused have the opportunity to cross-examine them. *People v Arreola, supra*.

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§46.25 4. Previous Revocation Hearing

A motion to revoke can be refiled on the same allegation, despite a previous dismissal, if no evidence was presented at the first hearing. *People v Villines* (1987) 192 CA3d 1298, 1305, 237 CR 868. If evidence was presented at the first hearing, a ruling in the defendant's favor should be res judicata or collateral estoppel at a second hearing on the same evidence. The outcome is unclear if the prosecution has new evidence to present at a subsequent hearing.

Motions to revoke can be made in different courts or different counties based on the same alleged violation. *People v Bracey* (1994) 21 CA4th 1532, 26 CR2d 730. Relitigation of the same facts under these circumstances does not violate double jeopardy protections or collateral estoppel principles. *People v Bracey, supra*.

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§46.26 J. Limited Immunity for Probationer's Testimony at Revocation Hearing

Frequently, a motion to revoke and a criminal charge are filed for the same underlying criminal act. If the motion to revoke is heard first, and the probationer testifies, the prosecution is prohibited from using that testimony in its case-in-chief at the later criminal trial. *People v Coleman* (1975) 13 C3d 867, 889, 120 CR 384. In other words, the probationer is granted limited immunity for testimony at the revocation hearing. This limited immunity survived the addition of the truth-in-evidence provision to the California Constitution (Cal Const art I, §28(f)(2)). *People v Weaver* (1985) 39 C3d 654, 660, 217 CR 245. The testimony can be used, however, to impeach the probationer at trial, *e.g.,* in cross-examination about contradictions between testimony at the revocation hearing and at trial, or in rebuttal. 39 C3d at 658; *People v Bracey* (1994) 21 CA4th 1532, 26 CR2d 730.

The prosecution is not required to prove the identity of the accused as the probationer unless the accused raises that issue. The proper time to raise the identity issue is at the arraignment on the probation revocation. If the accused raises the issue of identity for the first time during the probation revocation hearing, the prosecution is entitled to a recess or a continuance. *People v Perez* (1994) 30 CA4th 900, 36 CR2d 391.

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§46.27 K. Reliance on Probation Report

On a motion to revoke, the court must refer the matter to the probation department for a report. Pen C §1203.2(b). The court can base its ultimate sentencing decision on that report or on a showing comparable to or of equal gravity with the probation officer's report. Pen C §1203.2. See *People v Santellanes* (1989) 216 CA3d 998, 1002, 265 CR 281 (preliminary hearing transcript used). However, the probation report must be obtained, read, and considered before the probationer can be sentenced on the revocation. 216 CA3d at 1005.

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L. Sentencing

§46.28 1. Importance of Type of Sentence in Underlying Case

If the court decides that probation should be revoked, the nature of the revocation sentence depends on the manner in which sentence was pronounced in the underlying case. When a person is originally placed on probation, the court sentences a defendant in one of two ways:

(1) The court does not impose any particular sentence (called "imposition of sentence suspended"; discussed in §46.29) but sets out the terms and conditions of probation, *e.g.*:

> Imposition of sentence is suspended, and the defendant is placed on probation for two years with the following terms and conditions: serve five months in the county jail, obey all laws, and do not use drugs or alcohol.

(2) Alternatively, the court imposes sentence but suspends its execution (called "execution of sentence suspended"; discussed in §46.30), *e.g.*:

> The defendant is sentenced to three years in state prison, but execution of sentence is suspended, with the defendant ordered to be on probation for three years with the following terms and conditions: obey all laws and do not use drugs or alcohol.

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§46.29 2. Imposition of Sentence Suspended

When the imposition of sentence was suspended at the time a probationer was placed on probation, a court revoking probation must decide the sentence to be imposed. Pen C §1203.2(c).

In felony cases involving imposition of sentence suspended and a determinate sentence, the revocation judge must choose one of three possible prison terms: mitigated, middle, or aggravated. See Cal Rules of Ct 4.435. The court must base its choice on the circumstances that existed at the time probation was granted. Cal Rules of Ct 4.435(b)(1). The court is not allowed to consider subsequent events, including events surrounding the probation violation, in choosing the term or in ordering additional punishment for enhancements found to be true. Cal Rules of Ct 4.435(b)(1); *People v Griffith* (1984) 153 CA3d 796, 799, 200 CR 647. When imposition of sentence was suspended, the court must state reasons for a particular term. Cal Rules of Ct 4.433(c), 4.435(b)(1). But see *People v Slaughter* (1987) 194 CA3d 95, 98, 239 CR 337 (held opposite, but appears contrary to Rule 4.435(b)(1)).

A court that previously reinstated probation, and later revokes it, can consider events between the initial grant of probation and the reinstatement. *People v Harris* (1990) 226 CA3d 141, 145, 276 CR 41. See also *People v Black* (2009) 176 CA4th 145, 150, 97 CR3d 338 (*Harris* set forth exception to Cal Rules of Ct 4.435(b)(1) for revocation after reinstatement on probation). Further, a court in revoking probation and imposing sentence can consider the circumstances of the probation violation in deciding whether to run the term consecutively with another term. *People v Leroy* (1984) 155 CA3d 602, 605, 202 CR 88.

Sometimes a plea agreement will specify a maximum sentence, sometimes called a "lid" or a "backup sentence," that can be imposed if probation is not granted. If probation is granted and no sentence is imposed, it has been argued that Cal Rules of Ct 4.435(b)(1) limits the court that revokes probation to imposition of a sentence of no more than 2 years. However, the weight of authority is that the judge who sentences the defendant on revocation of probation is not bound by a lid stated by the original sentencing judge if imposition of sentence was suspended. See *People v Hopson* (1993) 13 CA4th 1, 16 CR2d 399; *People v Martin* (1992) 3 CA4th 482, 487, 4 CR2d 548.

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§46.30 3. Execution of Sentence Suspended

When the trial court that initially places the defendant on probation imposes a specific sentence but suspends its execution, that exact sentence must be imposed if probation is revoked and the defendant is sentenced to prison. *People v Howard* (1997) 16 C4th 1081, 68 CR2d 870. However, under Pen C §1170(d), the trial court retains the power to recall any prison sentence within 120 days after imposing it and to sentence the defendant to a lesser term. 16 C4th at 1087.

While the court that imposes but suspends execution of a sentence retains the authority to modify the sentence at any time before a defendant is rearrested on a probation violation (Pen C §1203.2(a); *People v Howard* (1997) 16 C4th 1081, 1092, 68 CR2d 870; see also *People v Karaman* (1992) 4 C4th 335, 14 CR2d 801), if a rearrest occurs and the court had previously imposed prison, the court lacks such authority and must allow the full force of the sentence to take effect. *People v Howard*, *supra*. The court has no authority to modify that sentence at the time probation is revoked if prison is imposed. *People v Colado* (1995) 32 CA4th 260, 38 CR2d 57. However, if the sentence was unauthorized, the trial court can order execution of the correct sentence, even if it results in a longer or shorter sentence than previously imposed. *In re Renfrow* (2008) 164 CA4th 1251, 1253, 79 CR3d 898 (execution of enhancement proper even though court had neglected to impose or strike it when sentence suspended). Because the court has no choice of sentence, it does not have to state reasons for the choice of term in felony cases. *People v Latham* (1988) 206 CA3d 27, 253 CR 379; *People v Cushway* (1987) 193 CA3d 776, 238 CR 527; *People v Chagolla* (1984) 151 CA3d 1045, 1050, 199 CR 181.

Under Pen C §1170(d), the trial court retains the power to recall any prison sentence within 120 days after imposing it and to sentence the defendant to a lesser term. *People v Howard* (1997) 16 C4th 1081, 1087, 68 CR2d 870. The imposition of the previously imposed but suspended prison term is required only if the court actually imposes prison after the revocation of probation. The trial court retains the power to reinstate probation after revoking it. *People v Medina* (2001) 89 CA4th 318, 106 CR2d 895. If the court does reinstate probation, the court may modify the terms of probation. *People v Medina*, *supra*. In *People v Ramirez* (2008) 159 CA4th 1412, 1417, 72 CR3d 340, the court reinstated probation but increased the previously imposed but suspended prison sentence. The appellate court held that though the lower court had exceeded its jurisdiction by modifying the suspended sentence, the defendant could not complain when it was later executed because he had agreed to the increased penalty as part of a plea bargain and he had never appealed the imposition of the increased sentence. Also, in *In re Renfrow, supra,* the court ruled that on a finding of a violation of probation, the trial court did have to power to impose a greater sentence than the one imposed initially, when the initially imposed sentence was actually unauthorized by law. 164 CA4th at 1256.

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§46.31 4. Possible Outcomes of Motions to Revoke

After hearing a motion to revoke, a court has several options. It can:

- Revoke probation and sentence the probationer; sentence may be limited by the original sentencing order in the underlying case (see §§46.28-46.30). Pen C §1203.2(a)-(c).
- Reinstate probation on the same terms and conditions. See Cal Rules of Ct 4.435(a) (court may make any disposition of case authorized by statute).
- Reinstate probation and impose new conditions the court feels are appropriate, *e.g.,* additional fines, community service, additional term of probation, or jail. Pen C §1203.2(b).

The maximum length of probation is discussed in §§38.26-38.28. The time probation was tolled is not counted for this purpose. Pen C §1203a. Tolling is discussed in §46.11.

In a felony case, if the probationer has already served the maximum amount of time in county jail (*i.e.,* 1 year), the court, on the probationer's stipulation, can order additional time in county jail instead of sentencing the defendant to state prison, as would otherwise be required. *People v Johnson* (2002) 28 C4th 1050, 123 CR2d 700; *People v Johnson* (1978) 82 CA3d 183, 188, 147 CR 55. The probationer must stipulate to a waiver of the credit-for-time-served provisions of Pen C §2900.5. *People v Johnson* (2002) 28 C4th 1050, 123 CR2d 700; *People v Johnson* (1978) 82 CA3d 183, 188, 147 CR 55.

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§46.32 5. Inability to Pay

The defendant's failure to pay a fine or restitution, when the failure results solely from an inability to pay, cannot be the basis for a probation revocation. Pen C §§1203.2(a), 1214.2; *People v Cookson* (1991) 54 C3d 1091, 1096, 2 CR2d 176; *In re Antazo* (1970) 3 C3d 100, 89 CR 255; *People v Medeiros* (1994) 25 CA4th 1260, 31 CR2d 83; *People v Self* (1991) 233 CA3d 414, 284 CR 458; *Bearden v Georgia* (1983) 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064.

Probation can be extended for nonwillful failure to pay restitution in order to allow a longer period in which to complete payment, even though no violation of probation has occurred, when the probationer's inability to pay results from a change of circumstances. *People v Cookson* (1991) 54 C3d 1091, 1098, 2 CR2d 176. The change of circumstances must be some fact not known at the time probation was granted. *People v Cookson, supra*. Of course, no modification of probation can extend the probationary period beyond the maximum period allowable for the underlying offense. 54 C3d at 1094 n2.

> Ø **Note:** If a probationer wishes to admit the facts underlying a motion to revoke probation, the court does not have to give a *Boykin-Tahl* admonition setting forth the specific rights that the probationer would be giving up. *People v Clark* (1996) 51 CA4th 575, 581, 59 CR2d 234. See *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 81 CR 577. For discussion of *Boykin-Tahl* rights, see §§26.10-26.11.

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Source: Criminal Law/California Criminal Law Procedure and Practice/46 PROBATION REVOCATIONS/§46.33 6. Credit for Time Served

§46.33 6. Credit for Time Served

When probation is revoked, the court must credit any time served as a condition of probation and any time served awaiting the hearing on the motion to revoke toward the term the probationer is ordered to serve. See Pen C §2900.5(a), (c). The probationer is also entitled to custody credits for time spent in a residential rehabilitation program as a condition of his or her Proposition 36 probation. *People v Davenport* (2007) 148 CA4th 240, 55 CR3d 473. Difficulties arise when a probationer has been held on both a probation hold and a criminal charge and seeks credit against each term. Penal Code §2900.5(b) states (in pertinent part):

> [C]redit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

When the probationer seeks credit against both a sentence on a new crime and on a probation violation, the court must apply the supreme court's interpretation of §2900.5(b) (*In re Joyner* (1989) 48 C3d 487, 489, 256 CR 785):

> [A] period of time previously credited against a sentence for unrelated offenses cannot be deemed "attributable to proceedings" resulting in a later-imposed sentence unless it is demonstrated that the claimant would have been at liberty during the period were it not for a restraint relating to the proceedings resulting in the later sentence. In other words, duplicative credits against separately imposed concurrent sentences for unrelated offenses will be granted only on a showing of strict causation.

- **Note:** *Joyner* does not prohibit concurrent time when it is part of a plea bargain.

The following are some of the cases that have applied *Joyner* to parole and probation revocation cases:

- *In re Bustos* (1992) 4 CA4th 851, 855, 5 CR2d 767: The defendant in his new criminal conviction sought credit for time served for time spent in custody on a parole hold initially based on his failure to report. The trial court denied presentence credit because the parole hold was lodged independently of the charge on which he was convicted. The court of appeal agreed: "The arrest warrant issued by the Board of Prison Terms was done by reason of the defendant's failure to report to his parole office. Even though the defendant's parole revocation proceedings may have been premised in part upon the new charge, when the strict causation test of *Joyner* is applied, defendant failed to sustain his burden of proving he is entitled to duplicative credits."
- *In re Nickles* (1991) 231 CA3d 415, 417, 282 CR 411: The defendant was arrested on new criminal charges. His parole was revoked based on those charges and also on administrative violations unrelated to the new criminal case. When the defendant was sentenced on the new case, no credit was given for the parole revocation term. The court stated: "We will hold that, where a defendant's presentence custody arises from conduct which is only partially attributable to the conduct for which he was convicted and sentenced, he has the burden of proving entitlement to credit therefor. That burden was not discharged in this case."
- *People v Huff* (1990) 223 CA3d 1100, 1106, 273 CR 44: A probationer was arrested on warrants and later on a new criminal charge. He was held in custody, unable to make bail. After prosecution on the new charge was begun, a motion to revoke was filed against him based on the facts of the new charge. He was remanded without bail on the motion to revoke. The new criminal case was later dismissed, but probation was still revoked. The court held that the probationer was entitled to credit from the time he was remanded to custody on the motion to revoke even though he was already in custody on the new case. The court stated: "During that period, appellant was held without bail and could not have secured his release even if he had made bail on the new case. [A]ppellant satisfies the strict causation test of *Joyner*." See also *People v Pruitt* (2008) 161 CA4th 637, 649, 74 CR3d 368 (*Huff* still good law; defendant not entitled to credit against probation revocation sentence for time spent in jail between arrest on new charges and summary revocation of probation, despite fact that new charges, which also formed basis for probation violation, were ultimately dismissed). But see *In re Marquez* (2003) 30 C4th 14, 27, 131 CR2d 911 (Moreno, J., concurring; *Huff* is incorrect in light of *People v Bruner* (1995) 9 C4th 1178, 40 CR2d 534).

- *People v Gibbs* (1991) 228 CA3d 420, 421, 278 CR 338: A probationer was given duplicative credits in a probation revocation and new criminal case for time spent undergoing diagnostic evaluation under Pen C §1203.3 in the new case. The court reasoned that the probation revocation and sentence were based on the diagnostic evaluation recommendation and that "there is no counterpart to Section 2900.5 subdivision (b) in Section 1203.03."

When a defendant waives time-served credits on a probation violation to permit a county jail sentence instead of prison, and the defendant then violates probation again, he or she does not get credit for credits previously waived if that waiver was knowing and intelligent. *People v Arnold* (2004) 33 C4th 294, 308, 14 CR3d 840; see *People v Burks* (1998) 66 CA4th 232, 77 CR2d 698; *People v Salazar* (1994) 29 CA4th 1550, 35 CR2d 221. The same is true when the defendant made a knowing and intelligent waiver of future credits to be earned in a residential drug treatment program. *People v Jeffrey* (2004) 33 C4th 312, 14 CR3d 852.

The sentencing court should expressly admonish a defendant waiving custody credits that the waiver will apply to any future prison term if probation is subsequently revoked and a prison sentence imposed. *People v Arnold* (2004) 33 C4th 294, 309, 14 CR3d 840.

Ø **Note:** It may be that a defendant can limit the waiver of credits at the time of the waiver, indicating that the waiver applies only to the time imposed on the new grant of probation, not against any ultimate prison sentence. 33 C4th at 311 (Kennard, J., concurring). However, when a defendant waived his credits and failed to limit the waiver, the credits were waived with respect to an eventual state prison sentence. *People v Hilger* (2005) 131 CA4th 1528, 33 CR3d 135.

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§46.34 7. Written Findings

Although the court should state the reasons for its determination and indicate the evidence relied on, formal findings of fact and conclusions of law are not required. *Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593; *People v Vickers* (1972) 8 C3d 451, 456, 105 CR 305. For example, a written statement of reasons for revocation was not required when the court had stated its reasons on the record, and they were in the transcript. *People v Ruiz* (1975) 53 CA3d 715, 125 CR 886.

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§46.35 M. Setting Aside Revocation Order

If probation has been revoked but judgment has not been pronounced, the court on motion can set aside the order revoking probation for good cause. Pen C §1203.2(e). After judgment has been pronounced, the court may set aside the order for good cause within 30 calendar days after the court has notice that execution of sentence has begun. Pen C §1203.2(e).

If an order revoking probation is set aside after the expiration of the probationary term, the trial court "may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction." Pen C §1203.2(e). In *People v Jackson* (2005) 134 CA4th 929, 36 CR3d 477, however, the appellate court ruled that probation could not expire while probation was revoked. Therefore, in most circumstances, on a reinstitution of probation, the court cannot extend probation under Pen C §1203.2(e). 134 CA4th at 937. The opinion implies but does not state that the defendant can waive this limitation, which might be in the defendant's best interest if the alternative is a prison sentence. However, with respect to the defendant in *Jackson,* the court stated that the probationary period had expired while the case was on appeal, and therefore the trial court would have jurisdiction to impose a new period of probation upon a finding that the defendant had violated probation.

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VIII. PROPOSITION 36

§46.36 A. General Provisions: Drug Treatment for Nonviolent Drug Offenders

Proposition 36, enacted by voters at the November 7, 2000, general election and effective July 1, 2001, mandates drug treatment rather than prison for the vast majority of nonviolent drug offenders. Among the many provisions added by its enactment is Pen C §1210.1, which (1) drastically curtails the court's discretion to impose a jail term or a prison sentence for an individual convicted of a nonviolent drug possession offense, and (2) dramatically changes probation revocation proceedings for individuals placed on probation for such offenses.

Ø **Note:** In 2006, the legislature purportedly amended Proposition 36 in various ways, including permitting judges to incarcerate offenders for brief periods of time, called "flash incarceration." These amendments have been struck down as inconsistent with the initiative that enacted Proposition 36. See *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 101 CR3d 229. The references in this chapter to Pen C §1210.1 are to the pre-amendment version.

With certain exceptions set forth in Pen C §1210.1(b), under Pen C §1210.1(a), when an individual is convicted of a nonviolent drug possession offense (NOVIDPO), the court must suspend the imposition of sentence, grant probation, and require the defendant to participate in and complete an appropriate drug treatment program as a condition of probation.

The probation revocation procedures of Proposition 36 apply not only to defendants convicted of drug-related offenses after July 1, 2001, but also to defendants already on probation on July 1, 2001, who violate probation after the effective date of the provision. See §46.38.

Unless a showing of danger or flight is made, a defendant on Proposition 36 drug program probation has a right to release pending a hearing on a violation of that probation, when the result of any revocation will be reinstatement on Proposition 36 probation. *In re Mehdizadeh* (2003) 105 CA4th 995, 130 CR2d 98. See also §46.7.

The probation revocation procedures of Proposition 36 apply only when the probationer commits a drug-related probation violation or offense. If a defendant, even one already on probation for a NOVIDPO, commits a violation of probation that does not involve a drug-related condition of probation or the commission of a new NOVIDPO, the usual rules for probation revocations apply. Pen C §1210.1(e)(2), (e)(3)(D)-(F); *In re Taylor* (2003) 105 CA4th 1394, 130 CR2d 554.

Note that the trial court may not bargain with the defendant by agreeing to inappropriate treatment in exchange for a predetermined sentence on a probation violation. *People v Campbell* (2004) 119 CA4th 1279, 15 CR3d 188. Here, after the defendant's second drug-related violation of probation, the trial court, despite its better judgment, agreed to defendant's request to participate in outpatient drug treatment instead of inpatient drug treatment, in exchange for the defendant's agreement that any probation violation would result in imposition of the upper term. This was an illegal bargain. 119 CA4th at 1289. Compare *Campbell* with *People v Sizemore* (2009) 175 CA4th 864, 96 CR3d 638 (given defendant's record and desire to "opt out," trial court properly removed him from Proposition 36 program and, following violation of "regular" felony probation, properly sentenced him to prison term).

A detailed discussion of the provisions of Proposition 36 may be found at Menaster, Prop. 36 Manual (2001). On a defendant's initial eligibility for Proposition 36 probation, see §38.3A.

Ø **Note:** As a result of California's budget crisis, funding for Proposition 36 has been greatly curtailed. Therefore, many programs will be unable to provide treatment for defendants on Proposition 36 probation. This raises the issue of whether a defendant may be found in violation of Proposition 36 probation for conduct that occurred because the defendant was not in treatment as required by the initiative. Defense counsel should argue that the failure of the system to provide proper resources precludes a finding that the defendant has failed on Proposition 36 probation, and that any claimed violation of probation was not willful in light of the lack of treatment.

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§46.37 B. Proposition 36 Probation

Proposition 36 sets up a three-tier system for probation violations, with different rules and standards, depending on whether the violation is the first, second, or third violation of probation under Proposition 36. The scheme bars a court from revoking probation on the first or second probation violation for a defendant on Proposition 36 probation, absent the showings of dangerousness or unamenability found in Pen C §1210.1(e)(3). A court does not have discretion to incarcerate a defendant on Proposition 36 probation for the first violation solely on the basis that the defendant is unamenable. *People v Davis* (2003) 104 CA4th 1443, 129 CR2d 48; *People v Murillo* (2002) 102 CA4th 1414, 126 CR2d 358.

The rules governing Proposition 36 probation violations apply only if the defendant was initially convicted solely on a nonviolent drug possession offense (NOVIDPO). *People v Goldberg* (2003) 105 CA4th 1202, 130 CR2d 192.

First violation. The first time a person on Proposition 36 probation violates probation, either by commission of a new NOVIDPO or by violation of a drug-related condition of probation, the court must keep the probationer on probation unless the violation is proved, and the state proves by a preponderance of the evidence that the defendant is a danger to the safety of others. Pen C §1210.1(e)(3)(A).

The court may modify the conditions of probation and may intensify or alter the Proposition 36 treatment program. If dangerousness is proved, the court must revoke probation and sentence the defendant outside of Proposition 36. Pen C §1210.1(e)(3)(A).

Second violation. For the second violation, either by commission of a new NOVIDPO or by violation of a drug-related condition of probation, the court must keep the probationer on Proposition 36 probation unless the violation is proved, and the state proves by a preponderance of the evidence that the defendant is a danger to the safety of others *or* that the defendant is not amenable to drug treatment. Pen C §1210.1(e)(3)(B).

The court may intensify or alter the Proposition 36 treatment program. Pen C §1210.1(e)(3)(B). If such dangerousness or unamenability is proved, the court must revoke probation and sentence the defendant outside of Proposition 36. Pen C §1210.1(e)(3)(B).

Third violation. For the third violation of Proposition 36 probation, either by commission of a new NOVIDPO or by violation of a drug-related condition of probation, the court must revoke probation and sentence the defendant outside of Proposition 36 on proof of the violation. Pen C §1210.1(e)(3)(C). Even after the court terminates Proposition 36 probation, the court retains the power to grant probation and order a drug program.

The statutory scheme contemplates that each established violation will result in a revocation of probation, with the defendant having three chances to reform before losing eligibility for Proposition 36 probation. *People v Tanner* (2005) 129 CA4th 223, 235, 28 CR3d 201. In *Tanner,* the Fourth District held that the court may not simply add up the number of violations pending before it to make a probation revocation a second or third revocation. There must be a separate noticed hearing for each claimed revocation; the statutory scheme requires three noticed motions to revoke Proposition 36 probation before the court may revoke probation solely on the basis of drug-related violations. 129 CA4th at 234.

However, the Third District, not citing *Tanner,* has ruled that separate hearings are not required; the court may hold a consolidated single hearing on a defendant charged with multiple probation violations of Proposition 36, find several violations, and terminate Proposition 36 probation. *People v Budwiser* (2006) 140 CA4th 105, 109, 44 CR3d 296.

These cases are in conflict. However, it appears that the *Budwiser* decision fails to focus on language in Pen C §1210.1(e)(3)(A)-(C) requiring a separate noticed motion for each probation revocation. See Pen C §§1210.1(e)(3)(B) (if "the state moves for a second time to revoke probation"), 1210.1(e)(3)(C) (if "the state moves for a third time to revoke probation"); *Tanner,* 129 CA4th at 234. On the basis of this language, the *Tanner* court concluded that the statutory scheme is designed to ensure that a defendant found to have violated probation by committing a NOVIDPO or violating a drug-related probation condition is given three separate chances to reform. 129 CA4th at 235. A consolidated hearing in which several violations are found at one time eliminates these extra chances, and is therefore contrary to the statutory scheme. A consolidated hearing would be permissible so long as the outcome was only a single probation revocation.

However, a subsequent Third District opinion holds that when no notice of one petition is given before the conduct underlying the next petition occurs, although a consolidated hearing on the two petitions may be proper, it would be improper to treat the circumstances as if the prosecution had made separate noticed motions. *People v Hazle* (2007) 157 CA4th 567, 577, 69 CR3d 16. When the facts relied on for the third violation happened before the second probation revocation petition was filed, this qualified only as a second violation, not both a second and third. Likewise, separately filed petitions must be treated as a single motion to revoke probation (thus permitting the defendant additional chances at probation and drug treatment) when the defendant is not on notice of a previously filed petition at the time of the conduct giving rise to a subsequently filed petition. *People v Enriquez* (2008) 160 CA4th 230, 233, 72 CR3d 718.

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§46.38 C. Defendants on Probation July 1, 2001

Proposition 36 also sets up a three-tier system for dealing with probation violations for individuals on probation on July 1, 2001, after conviction of a nonviolent drug possession offense (NOVIDPO) before that date. Pen C §1210.1(e)(3)(D)-(F). Probation revocation procedures under Pen C §1210.1(e)(3)(D)-(F) are substantially similar to procedures under Pen C §1210.1(e)(3)(A)-(C). See §46.37. A defendant on probation for a NOVIDPO that occurred before July 1, 2001, who violates a drug-related condition of probation or commits a new NOVIDPO on or after that date, comes under Proposition 36. *People v Williams* (2003) 106 CA4th 694, 131 CR2d 546. However, the court must count pre-Proposition 36 probation violations in the three-tier system described in §46.37. *People v Williams, supra*.

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§46.39 D. Probation Violation Proceedings Initiated by Probation Department

Proposition 36 also permits the probation department to seek to modify or revoke probation. Under Pen C §1210.1(c)(1), the treatment provider may, at any point during the course of drug treatment, notify the probation department that the defendant is unamenable to the treatment being provided but may be amenable to other treatment; the probation department may then move the court to modify probation. Under Pen C §1210.1(c)(2), the treatment provider may, at any point during the course of drug treatment, notify the probation department that the defendant is unamenable to any treatment; the probation department may then move the court to revoke probation.

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§46.40 E. What Qualifies as Drug-Related Condition of Probation?

When a defendant who is on Proposition 36 probation (or who is eligible for Proposition 36 probation because he or she is already on probation for a nonviolent drug possession offense (NOVIDPO) committed before July 1, 2001 (see §46.38)) commits a new NOVIDPO or violates a "drug-related condition of probation," the court's options for dealing with the violation are governed by the three-tiered probation violation scheme described in §46.37. Pen C §1210.1(e)(3).

Examples of drug-related probation violations include failure to appear for drug testing (*In re Taylor* (2003) 105 CA4th 1394, 130 CR2d 554), failure to participate in drug-treatment counseling (*People v Atwood* (2003) 110 CA4th 805, 2 CR3d 67), and failure to report to a mental health "gatekeeper" for an initial evaluation (*People v Dagostino* (2004) 117 CA4th 974, 995, 12 CR3d 223).

In *Atwood,* the Third District Court of Appeal held that failure to follow the probation officer's orders may or may not be drug related, depending on the circumstances. 110 CA4th at 810. The court further held that the burden of establishing that a probation violation is not drug related rests with the prosecution. 110 CA4th at 811. The First District Court of Appeal in *People v Goldberg* (2003) 105 CA4th 1202, 1209, 130 CR2d 192, stated in dictum that a general condition of probation requiring a defendant to report to a probation officer is a not a drug-related condition. In light of *Atwood,* which relied on firmly established evidentiary principles (see Evid C §§500, 550), there should not be a rigid rule; the reason the defendant was ordered to *personally* report to a probation officer should establish whether that condition is drug related. See, *e.g., People v Johnson* (2003) 114 CA4th 284, 298, 7 CR3d 492 (under facts, failure to report was violation of non-drug-related condition). A probation condition requiring the defendant to report *by mail* has been held to be not drug related, because it could not involve testing and nothing about reporting by mail was related to the defendant's drug problems or treatment. *People v Dixon* (2003) 113 CA4th 146, 152, 5 CR3d 917.

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§46.41 F. Defendants on Probation for Non-NOVIDPOs

Although an individual who commits a nonviolent drug possession offense (NOVIDPO) while on parole for a nonserious, nonviolent felony is eligible for the benefits of Proposition 36 (see Pen C §3063.1), the act is silent on whether its three-tiered probation violation scheme applies to a defendant who commits a NOVIDPO while on probation for a nonserious, nonviolent offense that is not a NOVIDPO. The California Supreme Court has ruled that Proposition 36 does not apply to the prior probation grant. Therefore, a trial court may use the NOVIDPO as a ground for violating the defendant's probation on the non-drug-related offense and order execution of the previously suspended prison term for that offense. *People v Guzman* (2005) 35 C4th 577, 25 CR3d 761 (rejecting argument that equal protection requires probationers to be treated in the same way as parolees, who are eligible for Proposition 36 drug treatment under similar circumstances).

Ø **Note:** A defendant on parole when charged with a NOVIDPO is not automatically disqualified from Proposition 36, because a defendant on parole will not necessarily return to prison. See, *e.g.,* Pen C §3000.03. If a defendant on parole is placed in Proposition 36 treatment and subsequently parole is revoked and the defendant is sent back to prison, he or she is then unavailable for drug treatment. *People v Muldrow* (2006) 144 CA4th 1038, 1048, 50 CR3d 848. The court would then vacate the Proposition 36 order.

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PAROLE HEARINGS

DYLAN SULLIVAN
DAVID HURD

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I. OVERVIEW

§47.1 A. Parole Defined

Being on parole is the transitional legal status of all prisoners on release from a California prison after serving their sentence. Pen C §3000. Prisoners on parole include both determinately sentenced prisoners and indeterminately sentenced prisoners serving a sentence of life with the possibility of parole. Pen C §3000.

The purpose of parole is to provide a period of transition after incarceration to allow the former inmate to become reintegrated into the community. The object of parole is to mitigate the rigor of the prison system by replacing continued incarceration with a conditional freedom controlled by a series of parole conditions and supervision by a parole agent. See Pen C §3056; *People v Denne* (1956) 141 CA2d 499, 507, 297 P2d 451. Parole should entail not only effective supervision and surveillance, including the judicious use of revocation actions, but also should include educational, vocational, family, and personal counseling necessary to assist parolees in this process. Pen C §3000(a)(1). The three most important goals of the parole process are public safety, reintegration of the parolee back into society, and making parole decisions that are fiscally responsible on behalf of the people of California. See, *e.g.,* Pen C §3000(a).

All prison sentences must include a period of parole unless waived by the parole authority, the Board of Parole Hearings, for good cause. Pen C §3000(a)(1), (b). Parole is an additional penal consequence of conviction, and if a prisoner is not advised of the parole requirement before his or her guilty plea, he or she may withdraw the plea on a showing of prejudice, *i.e.,* but for the error the defendant would not have entered the plea (*In re Moser* (1993) 6 C4th 342, 24 CR2d 723), or be relieved of the parole requirement when the sentence already served exceeds the bargained-for sentence (*Carter v McCarthy* (9th Cir 1986) 806 F2d 1373, 1377).

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§47.1A B. Distinction Between Parole Revocation and Life Parole Consideration Hearings

The focus of this chapter is on the procedures used and counsel's role in two types of hearings: parole revocation and life parole consideration. These two types of hearings are very different.

Parole revocation determinations. Parole revocation and parole revocation extension proceedings (15 Cal Code Regs §§2600-2744) are evidentiary hearings. The Division of Adult Parole Operations (DAPO) begins the proceedings by writing a revocation report charging a parolee with specific violations of parole. The violation report is packaged with other information concerning the parolee and presented to a deputy commissioner (DC) for evaluation. The DC has the authority to dismiss, amend, or add charges on the basis of the information provided. If the DC sustains the charges, the revocation process proceeds through three stages: the return to custody assessment (RTCA) offer, the probable cause hearing (PCH), and finally the revocation or extension hearing.

At revocation and revocation extension hearings, the DAPO is required to prove the charges by a preponderance of the evidence using relevant evidence, including witness testimony. *People v Rodriguez* (1990) 51 C3d 437, 441, 272 CR 613. Hearsay evidence may be used. See 15 Cal Code Regs §2665. The use of hearsay testimony is limited by the parolee's right to confrontation as set forth under *U.S. v Comito* (9th Cir 1999) 177 F3d 1166. *U.S. v Hall* (9th Cir 2005) 419 F3d 980, 986; *People v Stanphill* (2009) 170 CA4th 61, 78, 87 CR3d 643; Valdivia Injunction §24 (discussed in §47.1B). The parolee, through counsel, has the right to present a defense, including subpoenaing witnesses and documents, to the same extent and under the same terms as the state. Valdivia Injunction §21.

If good cause is not found, the charges are dismissed and the parolee continues on parole. If good cause is found on any charge, the hearing reconvenes for the disposition phase on the issue of what sanction, if any, the Board of Parole Hearings (BPH) should impose on the parolee. In determining the appropriate sanction, the BPH should remain mindful of the goals of parole, as well as take into consideration the parolee's criminal history, the parolee's adjustment on parole, and the gravity and circumstances of the instant violation.

Life parole suitability determinations. Life parole consideration (suitability) hearings (15 Cal Code Regs §§2268-2329, 2400-2439.1) are very different from those outlined above. The issue is whether the prisoner, who has been sentenced to life in prison with the possibility of parole, should be released from custody. The standard is whether or not there is some evidence that the inmate is a current danger if released to society. The BPH examines the commitment offense, prior criminal and social history, the prison disciplinary record, the prisoner's programming while incarcerated, psychological reports, confidential information, and input from the public. The prisoner attempts to persuade the panel that he or she is suitable by testifying and presenting documents. The prisoner is in turn questioned by the hearing panel, the district attorney, and his or her own attorney. Finally, the district attorney, the prisoner's attorney, and the prisoner make closing statements. Thereafter, a victim or next of kin of a victim may make an oral statement, or submit an audio- or videotaped statement, about the crime and its impact. In addition, any member of the public may submit a letter to the BPH on the issue of whether the prisoner should be paroled, and it must be considered by the hearing panel. The decision of the hearing panel is subject to very limited judicial review. A life inmate may file a writ asking the appellate court to review any denial; however, the board's decision will be upheld if it is based on pertinent criteria and is supported by some evidence. The Governor has the right to review all decisions (Pen C §3041.1), but as a practical matter, the Governor reviews only grants of parole. In murder cases, the Governor has the discretion to reverse the decision and, in other cases, can ask that the BPH reconsider the matter "en banc." On the limits of judicial review of BPH decisions in life parole suitability hearings, see *In re Dannenberg* (2005) 34 C4th 1061, 23 CR3d 417; *In re Lawrence* (2008) 44 C4th 1181, 82 CR3d 169; *In re Shaputis* (2008) 44 C4th 1241, 82 CR3d 213. If the prisoner is found suitable, a term of confinement based on the commitment offense(s) and other factors is determined in accord with BPH regulations.

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§47.1B C. Parole Revocation Reform

In *Valdivia v Davis* (ED Cal 2002) 206 F Supp 2d 1068, a federal district court judge found that California's unitary parole revocation procedure violates due process. On March 17, 2004, Judge Lawrence K. Karlton signed a stipulated order for permanent injunctive relief in the case (now titled *Valdivia v Schwarzenegger* (ED Cal Civ S-94-0671)), which calls for substantial reforms in California's parole revocation procedures. These reforms are outlined below. The order itself is unpublished, but a copy is available on the Prison Law Office's website at http://www.prisonlaw.com/pdfs/Val.pdf. This chapter contains numerous citations to this order (hereafter Valdivia Injunction). For further discussion of *Valdivia,* see §§47.10-47.11.

Determining the state of the law, including the Board of Parole Hearing's current policy, is sometimes difficult because agreements made between the parties under the Valdivia Injunction have not been incorporated into regulations. Existing regulations have yet to be amended to reflect the changes brought about by *Valdivia*. The BPH negotiates all policies and procedures related to the revocation process with *Valdivia* plaintiffs' counsel before implementation. Valdivia Injunction §§10-11. The agreements made pursuant to the Valdivia Injunction have the force of law in that the entire revocation process is under the jurisdiction of the federal court. The BPH implements these agreed-on policies and procedures, some of which conflict directly with the BPH's regulations, by issuing memoranda to its Deputy Commissioners and support staff. Disagreements between the state and plaintiffs' counsel undergo litigation, and the BPH implements the resultant court orders also by memoranda. In addition to memoranda, the BPH has issued a Deputy Commissioner Manual that includes resource documents stating the BPH's policy regarding the revocation process. While the BPH must adhere to these agreements for compliance with the Valdivia Injunction, the memoranda and the DC Manual, themselves, amount to underground regulations according to *Tidewater Marine Western, Inc. v Bradshaw* (1996) 14 C4th 557, 570, 59 CR2d 186. The BPH has no legal authority to issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is a regulation as defined in Govt C §11342.600 unless it has been adopted as a regulation and filed with the Secretary of State pursuant to Govt C §11340.5. Govt C §11340.5. See also *Tidewater,* 14 C4th at 570. As a practical matter, however, the BPH does enforce the policies issued through memoranda, and the practitioner needs to be familiar with them in order to effectively represent parolees.

Any citation in this chapter to Title 15 of the California Code of Regulations, the regulations that govern the BPH, should be carefully compared with the Valdivia Injunction and any memoranda issued by the BPH to confirm the state of the law. Also, in addition to implementing the Valdivia Injunction, the BPH is contemplating some major changes to its parole revocation regulations. Counsel should be diligent in substantiating the legal bases for any procedural rule enunciated by a Deputy Commissioner in a revocation hearing.

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§47.1C D. Parole Violation Decision-Making Instrument (PVDMI)

As part of the parole reform effort and in relation to the Stipulation and Order Regarding Remedial Sanctions (April 2007) in the *Valdivia* litigation, CDCR enlisted the Center for Evidence-Based Public Policy to design a predictive tool, called the "Parole Violation Decision Making Instrument" (PVDMI). The PVDMI is a guide for determining appropriate dispositions for parole violations. Effective January 26, 2010, the CDCR is required to use a parole violation decision-making instrument for the parole revocation process as part of the Parole Reentry Accountability Program. Pen C §3015(b). The purpose of the PVDMI is to provide uniformity and predictability to the revocation process.

For all violations of parole, DAPO's parole agents enter the alleged violations into the PVDMI, which assesses the parolee's risk level on the basis of a severity index using the California Static Risk Assessment (CSRA) in combination with the alleged violations. The PVDMI, acting as an actuarial, determines the "appropriate" response level. The PVDMI contains five levels of response ranging from increased supervision to incarceration (found in section "F" of the multipage PVDMI documentation submitted with every parole violation packet to the BPH).

Penal Code §3015(b)(1) requires the PVDMI to consider the relevant case factors, including the risk of reoffense based on a validated risk assessment tool and prior parole violations. The PVDMI currently used by CDCR does not evaluate the violation history of the parolee during the current term, arguably the most relevant data related to current risk to public safety. Neither the CSRA nor the PVDMI has been validated in the California parole population, although the PVDMI is currently being studied. The PVDMI relies on the original violations alleged by DAPO and does not make adjustments for the actual violations determined after adjudication by the BPH. Deputy Commissioners consider the PVDMI recommendations and other recommendations made by DAPO, and follow the guidelines found in 15 Cal Code Regs §2646.1 in issuing dispositional decisions. Counsel should argue the strengths or limitations of the PVDMI, depending on the benefit to his or her client.

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§47.1D E. Restructuring of State Correctional System

The entire system of state corrections underwent a radical reorganization in 2005. See Stats 2005, ch 10. The reorganization brought all of the entities that affect prisoners and parolees under the auspices of one state agency, called California Department of Corrections and Rehabilitation (CDCR). As of July 1, 2005, the Board of Prison Terms, previously an independent agency that conducted parole suitability and parole revocation hearings, was renamed the Board of Parole Hearings (BPH) and made a part of the new Department of Corrections and Rehabilitation. The Division of Adult Parole Operations (DAPO), which brings parole violation charges, and the Division of Adult Institutions (DAI), which incarcerates parolees, are also part of the CDCR. See Stats 2005, ch 10.

Under the new structure, a single agency, the CDCR, alleges violations of parole, and also makes determinations about the legitimacy of those alleged violations. Parolees have a right to "neutral and detached" hearing officers. *Morrissey v Brewer* (1972) 408 US 471, 488, 33 L Ed 2d 484, 498, 92 S Ct 2593. Entrusting both the charging function and the adjudicatory function to the same agency arguably creates the potential for competing interests and an appearance of impropriety.

Ø **Note:** On November 4, 2008, the voters passed Proposition 9 (Marsy's Law) which, among other things, added Pen C §3044. Section 3044 provides for the protection of victims' rights during the parole process and sets out the procedural rights of a parolee after revocation of parole. On March 26, 2009, the District Court for the Eastern District of California granted a motion to enforce the Valdivia Injunction and declared that to the extent that the Valdivia Injunction conflicted with Pen C §3044, the Injunction superseded Pen C §3044. *Valdivia v Schwarzenegger* (2009) 603 F Supp 2d 1275. The BPH appealed the order, and on January 11, 2010, oral argument was presented before the Ninth Circuit Court. Penal Code §3044(b) calls for the Board's autonomy from the CDCR but has yet to be implemented by the CDCR.

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§47.1E F. Law Governing Parole Hearings

Parole hearings are unique. While most practitioners consider parole hearings administrative, the procedural rules that normally govern how an administrative hearing is to be conducted do not apply to parole hearings. Pen C §3066. Nonetheless, Title 15 of the California Code of Regulations, the regulations governing the BPH, must go through the usual approval processes. Pen C §5076.2(a); *American Friends Serv. Comm. v Procunier* (1973) 33 CA3d 252, 269, 109 CR 22, disapproved on other grounds in *Engelmann v State Bd. of Educ.* (1991) 2 CA4th 47, 59, 3 CR2d 264. See Pen C §5076.2. But see §47.1B. Although the Penal Code applies to the extent that it specifically addresses parole matters and provides the basis for the elements of a crime when a parolee violates parole by committing a crime, the proceedings are not considered criminal. *Morrissey v Brewer* (1972) 408 US 471, 489, 33 L Ed 2d 484, 499, 92 S Ct 2593; *In re Carroll* (1978) 80 CA3d 22, 30, 145 CR 334. Attorneys practicing in this area should be aware that the body of law that addresses parole matters is not well developed and consists of case law, of which there is little, a few specific references in the Penal Code (Part 1, Title 15; Part 3, Titles 1 and 2), the Valdivia Injunction, policy memoranda issued by the BPH, and Chapter 8 of the Department Operations Manual (DOM).

Ø **Note:** The administrative rules in the operations manual (*i.e.,* DOM) of the California Department of Corrections and Rehabilitation (CDCR) are public records, and parolees, prisoners, and the public have the right to inspect them. Pen C §5058; Govt C §6253; *American Friends Serv. Comm. v Procunier, supra*. On obtaining or inspecting public records, see chap 12. The DOM provisions have not been adopted in accordance with the Administrative Procedure Act (Govt C §§11340-11529) and therefore do not have the force of law. See *Tidewater Marine Western, Inc. v Bradshaw* (1996) 14 C4th 557, 570, 59 CR2d 186. They do, however, reflect the CDCR's internally approved procedures. Specifically, the DOM represents the procedures parole agents are expected to adhere to and may be a useful tool for interpreting the applicable statutes and regulations. See *In re Carr* (1995) 38 CA4th 209, 213, 45 CR2d 34 (discharge review under Pen C §3001). The DOM is available on the CDCR's website at http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.2 II. CHART: DEADLINES

§47.2 II. CHART: DEADLINES

Event	Time	Authority
Life parole hearings		
Prisoner receives notice of week during which hearing will be held.	1 month before week of hearing.	15 Cal Code Regs §2246.
Victim/next of kin receives notice of hearing date (if requested).	90 days before hearing.	Pen C §3043(a)(1).
Victim/next of kin provided confirmation of date, time, and location of the hearing.	14 days before hearing.	Pen C §3043(a)(3).
Prosecutor receives notice of hearing.	30 days before hearing.	Pen C §3042; 15 Cal Code Regs §2030(b).
Prosecutor notifies prison of intention to attend.	30 days before hearing.	Pen C §3043(a)(2).
Prisoner receives notice that prosecutor will attend.	Before hearing.	
Prisoner requests waiver of scheduled hearing.	45 working days before hearing (presumed valid); less than 45 working days before hearing (presumed invalid).	15 Cal Code Regs §2253(b).
Prisoner requests postponement of scheduled hearing.	As soon as prisoner knows, or should have known, of need to delay; prisoner *must* show a diligent effort to obtain essential documents or information.	15 Cal Code Regs §2253(d)(2).
Prisoner requests review of central file (*Olsen* review).	10 days before hearing.	Pen C §3041.5(a)(1).
Prisoner presents documentary evidence not in central file.	Before or at hearing.	15 Cal Code Regs §2249.
Media requests to attend hearing.	3 working days before hearing.	15 Cal Code Regs §2031.
Rescission hearings		
Notice of hearing.	30 days before hearing.	15 Cal Code Regs §2465(d).
Notice to district attorney.	30 days before hearing.	15 Cal Code Regs §2466(a).
Notice from district attorney of intent to participate in hearing.	14 days before hearing.	15 Cal Code Regs §2466(a).
Prisoner given opportunity to review file.	10 days before hearing.	Pen C §3041.5(a)(1); 15 Cal Code Regs §2247. See 15 Cal Code Regs §2465.

Present documentary evidence not in central file.	Before or at hearing.	15 Cal Code Regs §2249.
Media requests to attend hearing.	3 working days before hearing.	15 Cal Code Regs §2031.
Revocation hearings under Valdivia Injunction		
Probable cause determination by parole agent and parole supervisor.	Within 48 hours after parole hold or next business day if hold placed on a weekend or holiday.	Valdivia Injunction §11(b)(ii).
Parolee served with notice of alleged parole violations.	3 business days after placement of hold.	Valdivia Injunction §11(b)(iii).
Appointed counsel provides parolee with return to custody assessment (RTCA) made by BPH.	Before probable cause hearing (see below).	Valdivia Injunction §11(b)(i).
Probable cause hearing/negotiation held for parolees who do not waive hearing or seek continuance.	Within 13 business days of placement of hold.	Valdivia Injunction §11(d) (amended by agreement of the parties); see *In re Marquez* (2007) 153 CA4th 1, 62 CR3d 429.
Final revocation hearing held.	Within 35 calendar days of parole hold or by the next business day if the 35th day falls on a holiday or weekend.	Valdivia Injunction §§11(b)(iv), 23; see *In re Marquez* (2007) 153 CA4th 1, 62 CR3d 429.
Media requests to attend hearing.	3 working days before hearing.	15 Cal Code Regs §2031.
Revocation extension hearings		
Parolee's incarceration extended 35 days beyond the discovery date of the misconduct to allow for the revocation extension hearing.	Only if conduct occurred within 35 days of scheduled release date.	15 Cal Code Regs §2742(d)-(e). (The 35 days is pursuant to the Valdivia Injunction §§11(b)(iv), 23.)

Ø **Note:** By agreement of the parties under the Valdivia Injunction, the prisoner is to be given notice of the alleged misconduct and of his or her rights within 3 business days of the "discovery date," which is the date that staff discovered that the prisoner engaged in misconduct. A probable cause hearing is then to be held within 13 business days of the discovery date and the revocation extension hearing is to be scheduled within 35 days of the discovery date. The BPH only processes "A, B, or C" disciplinary violations as determined by 15 Cal Code Regs §3323. The BPH is not bound by 15 Cal Code Regs §3323 for purposes of disposition.

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III. BASIC RULES PERTAINING TO PAROLE

§47.3 A. The Parole Period

Unless parole is waived by the Board of Parole Hearings for good cause, all prisoners not placed on nonrevocable, or "summary," parole must serve a period of supervised parole. Pen C §3000(a). Nearly all determinately sentenced prisoners are subject to 3 years of parole. That period can be extended to 4 years for misconduct that results in parole revocation. Pen C §§3000(b)(5), 3057(a). Determinately sentenced prisoners convicted of rape, spousal rape, sodomy, oral copulation, or sexual penetration by force or fear; lewd acts on a child under age 14; continuous sexual abuse of a child under age 14; or rape, spousal rape, or sexual penetration in concert are subject to a 5-year parole period. Pen C §3000(b)(1).

Most life prisoners who are released on parole serve 5 years of parole that can be extended to 7 years for misconduct that results in revocation. Pen C §3000(b)(2), (b)(5)(B). Prisoners convicted of first or second degree murder serve life parole. Pen C §3000.1(a). Prisoners who have received a life sentence under one of the alternative sentencing schemes for sex offenders set out in Pen C §667.61 or §667.71 are subject to a 10-year parole period. Pen C §3000(b)(3). Prisoners subject to a 10-year parole period may have their parole extended to 15 years. Pen C §3000(b)(5)(C).

Ø **Note:** Parole is a penal consequence of conviction. Therefore, it appears likely that the Ex Post Facto Clause of the U.S. Constitution bars retroactive application of any amendment that would extend the parole period to prisoners convicted of crimes committed before the effective date of the amendment. See *Collins v Youngblood* (1990) 497 US 37, 42, 111 L Ed 2d 30, 110 S Ct 2715; *People v McVickers* (1992) 4 C4th 81, 84, 13 CR2d 850.

Parolees on parole for life who have their parole revoked may be returned to the status of life prisoners with the possibility of parole. See Pen C §3000.1(d).

Parolees who abscond from supervision can have an indefinite period of parole. Absconding triggers suspension of parole, which means that the parolee does not receive any credit toward the parole period for that time. Pen C §§3000(b)(5), 3064. See *People v Pearl* (2009) 172 CA4th 1280, 1290, 92 CR3d 85.

For discussion of the commitment of parolees and former prisoners under the mentally disordered offender statutes, see §§48.63-48.68.

Summary/Nonrevocable Parole. On October 11, 2009, Pen C §3000.03 was enacted, effective January 25, 2010. Under Pen C §3003.03, qualified parolees cannot have a Pen C §3056 hold placed on them, be reported to the BPH, or be returned to prison for any misconduct whatsoever that does not result in a new felony conviction.

Practitioners should be knowledgeable about the eligibility requirements for nonrevocable parole in order to verify that his or her client is properly on supervised parole and to ensure that the Board has jurisdiction before subjecting the parolee to the revocation process.

The eligibility requirements for nonrevocable parole are (Pen C §3000.03):

- No high risk-assessment score (either drug, property, or violence) on the California Static Risk Assessment (CSRA);
- No prior or current violent felony convictions pursuant to Pen C §667.5C. Note that there is no washout;
- No prior or current serious felony convictions pursuant to Pen C §§1192.7, 1192.8. Note that there is no washout;
- No Pen C §290 registration or prior or current conviction pursuant to Welf & I C §6600(b). Note that there is no washout;
- No validation as an active prison gang member or associate as defined by CDCR regulation;
- No serious (A, B, or C) 115's during the current term. The possession and/or manufacture of inmate alcohol is excluded; and
- No refusal by parolee to sign any written notification of parole requirements or conditions, including but not

limited to the written notification requirements pursuant to Pen C §3067 (Notification of Non-Revocable Parole CDCR Requirements, CDCR Form 1515A). See 15 Cal Code Regs §§3000, 3075.2(b)(4).

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§47.3A B. Parole Location

Ordinarily, a prisoner is paroled to the county that was his or her last legal residence before incarceration. See Pen C §3003(a). Subject to agreements with the California Department of Corrections and Rehabilitation (CDCR) on the maximum number of transferred parolees a county is required to accept, a parolee may be paroled to another county in California if that result would be in the public's best interest. Pen C §3003(b), (i). In determining whether to parole a prisoner to another county, the Division of Adult Parole Operations (DAPO) should consider these factors: the need to protect the victim, the parolee, a witness, or any other person; any public concern that would reduce the parolee's chances for success in that community; a verified work offer or educational or vocational training opportunity for the parolee; strong family support in another county that would increase the parolee's chances for success; and the lack of necessary outpatient treatment programs, giving the greatest weight to protecting the victim and the safety of the community. Pen C §3003(b).

Ø **Note:** Many counties have an agreement with the CDCR that transferred parolees cannot exceed 5 percent of the county's parole caseload. As a result, counties are frequently closed to transfers.

Restrictions on location. When the prisoner's commitment offense involves a violent felony, specific enhancements involving great bodily injury, or stalking, there are restrictions on the place to which the prisoner may be paroled. If the victim or a witness requests protection from the parolee, and DAPO determines that there is a need to protect the victim or a witness, the parolee may not be returned to a location within 35 miles of the protected person's residence. Pen C §3003(f), (h).

No individual convicted of a sex offense for which registration is required under the Sex Offender Registration Act (Pen C §§290-290.023) may reside in a single-family dwelling with another person subject to sex offender registration, unless they are related. Pen C §3003.5(a). In addition, individuals subject to sex offender registration may not live within 2000 feet of a school (K-12) or a park. Pen C §3003.5(b); *In re E.J.* (2010) 47 C4th 1258, 104 CR3d 165.

Ø **Note:** A federal district court has held that Pen C §3003.5 does not apply retroactively to offenders who were convicted and who were paroled or otherwise released from incarceration before its effective date of November 7, 2006. *Doe v Schwarzenegger* (ED Cal 2007) 476 F Supp 2d 1178, 1179. See also *In re E.J.,* 47 C4th at 1273 (presumption against nonretroactivity not implicated when inmates were released and secured noncompliant housing *after* effectiveness date of statute).

Ø **Note:** Often, DAPO will cite compliance with Pen C §3003(f)-(h) as the justification for a parole condition that prohibits the parolee from entering entire counties. Not allowing the parolee to enter an entire county for any reason may be constitutionally overbroad and also invalid under the test set out in *People v Lent* (1975) 15 C3d 481, 124 CR 905, discussed in §47.4. The parolee may obtain review of any parole condition or geographical restriction by filing an administrative appeal of that issue. See Pen C §§3000(b)(4), (b)(7), 3003(b). See §47.51 for discussion of administrative appeals.

Under the Interstate Compact for Adult Offender Supervision (ICAOS) (Pen C §11180), California can request transfer of a paroling offender to another compact state 120 days or less before the planned prison release date. ICAOS Rule 3.105(a) (rules available online at http://www.interstatecompact.org). See also Pen C §3003(j). An interstate parolee may be returned to the sending state if the parolee commits three or more significant violations arising from separate incidents. ICAOS Rule 5.103. See ICAOS Rule 5.108 (due process procedural requirements).

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.4 C. Parole Conditions

§47.4 C. Parole Conditions

A parolee's liberty is subject to parole conditions. Pen C §§3052-3053.5. Before release on parole, a prisoner will be notified of the conditions that apply to his or her release and into what county he or she will be released. A prisoner will not be released on parole until he or she signs the conditions of parole. If a prisoner refuses to sign, he or she will have parole revoked for 6 months in a proceeding held under *Valdivia*. Pen C §3060.5. Ordinarily, the parolee is afforded the opportunity to sign the conditions of parole at the revocation proceeding to avoid incarceration. If the parolee earns work-time credits, the 6-month period will be reduced to 3 months, at which time the parolee will be afforded another opportunity to sign the parole conditions. A parolee who continues to refuse to sign may complete the entire parole period in revoked status, 6 months at a time. Pen C §3060.5.

General conditions of parole. Certain conditions of parole, called general conditions, are imposed on all parolees. See 15 Cal Code Regs §2512. The general conditions of parole require the parolee to report to the agent of record (AOR) within 24 hours of release, or the next business day, to report an address, to provide notice of changing residence before moving, and to provide notice of changes in employment within 72 hours. 15 Cal Code Regs §2512(a)(2). The general conditions of parole also require the parolee to obtain prior approval before traveling more than 50 miles from the parolee's residence or leaving his or her county of residence for more than 48 hours; not to engage in criminal contact; to immediately report any felony or misdemeanor arrest under federal, state, or county law to the AOR; and not to own, use, have access to, or have under control specified weapons. 15 Cal Code Regs §2512.

Special conditions of parole. Other conditions, called special conditions, may also be imposed, such as submitting to narcotics or tuberculosis testing, not using alcohol, not having contact with gang members or other specified individuals, having an approved address (for those required to register their addresses pursuant to another statute), or participating in psychiatric treatment. See Pen C §3053(b); 15 Cal Code Regs §2513. A special condition of parole will not be deemed invalid unless it (1) has no relationship to the crime for which the parolee was convicted; (2) relates to conduct that is not criminal; and (3) requires or forbids conduct that is not reasonably related to future criminality. *People v Lent* (1975) 15 C3d 481, 124 CR 905; *People v Knox* (1979) 95 CA3d 420, 427, 157 CR 238. See also *In re Juan G.* (2003) 112 CA4th 1, 7, 5 CR3d 34 (probation conditions).

If the special condition impinges on a constitutional right such as freedom of speech, association, or travel, the condition must be reasonably related to the commitment offense and it must be reasonable and narrowly drawn. *People v Keller* (1978) 76 CA3d 827, 838, 143 CR 184. See also *In re White* (1979) 97 CA3d 141, 146, 158 CR 562. The Penal Code specifies conditions of parole for certain offenders:

- Offenders whose crimes involved minor victims are required to participate in psychological counseling. Pen C §3002.
- Sex offenders required to register pursuant to the Sex Offender Registration Act (Pen C §§290-290.023) may not reside with unrelated registered sex offenders or within 2000 feet of a school (K-12) or a park. Pen C §3003.5.
- Sex offenders determined to be at high risk for committing violent sex crimes may be required to undergo relapse prevention treatment as a condition of parole. Pen C §3008.
- Sex offenders determined by the BPH to be intoxicated at the time of the offense, or addicted to the excessive use of alcohol at the time of or immediately preceding the crime, must completely abstain from the use of alcohol. Pen C §3053.3.
- Prisoners who the BPH reasonably suspects have, have had, or have been exposed to an infectious stage of tuberculosis must undergo testing for tuberculosis. Pen C §3053.5.
- Offenders convicted of a domestic violence offense (see Fam C §6211) involving threatening, stalking, sexually abusing, harassing, or violent acts may be subject to no-contact orders, and may be required to attend and complete a batterer's treatment program. Pen C §3053.2.
- Offenders convicted of hate crimes may be subject to no-contact orders and may be required to attend a class on civil rights sensitivity specific to the classification of the person victimized. Pen C §3053.4.

- All parolees may be required to participate in electronic monitoring as a condition of release. Pen C §3004(a). All inmates required to register under the Sex Offender Registration Act (Pen C §§290-290.023) who are committed to prison and subsequently released on parole are subject to mandatory monitoring with a global positioning device for life. Pen C §3004(b). A federal district court has held that Pen C §3004 does not apply retroactively to offenders who were convicted and who were paroled or otherwise released from incarceration before its effective date of November 7, 2006. *Doe v Schwarzenegger* (ED Cal 2007) 476 F Supp 2d 1178, 1179.

Ø **Note:** When the alleged parole violation involves a special condition of parole, the hearing officer must find as a preliminary matter that the condition is valid, using the test provided in *People v Lent, supra*. This requirement is often overlooked. The parolee's attorney should require a finding on the validity of the condition before a determination is made about whether the parolee violated the condition. It is not uncommon for conditions of parole to exist that have no nexus to the parolee's criminality. Even when the purpose of the condition is to prevent future criminality, it must relate to the *parolee's* criminal conduct. See *Lent,* 15 C3d at 486. Also, while the condition can be reasonably related to past criminality, the behavior cannot be so remote in time as to make the condition unreasonable. See *People v Burgener* (1986) 41 C3d 505, 530, 224 CR 112, overruled on other grounds in *People v Reyes* (1998) 19 C4th 743, 753, 80 CR2d 734.

Limitations on parole conditions. Because a parolee has a right to liberty that "includes many of the core values of unqualified liberty" (*Morrissey v Brewer* (1972) 408 US 471, 482, 33 L Ed 2d 484, 495, 92 S Ct 2593), a parole condition restricting the exercise of certain fundamental rights is allowed by the courts only to the extent actually required by the legitimate demands of the parole process (*People v Burgener* (1986) 41 C3d 505, 530, 224 CR 112, overruled on other grounds in *People v Reyes* (1998) 19 C4th 743, 753, 80 CR2d 734).

Parole conditions restricting constitutional rights must be reasonably related to a compelling state interest and restrictively drafted. *People v Keller* (1978) 76 CA3d 827, 143 CR 184, disapproved on other grounds in *People v Welch* (1993) 5 C4th 228, 232, 19 CR2d 520. Because the compelling state interest in parole conditions is to foster rehabilitation of criminal behaviors, a parole condition must have a nexus with the parolee's past criminality. *People v Lent* (1975) 15 C3d 481, 124 CR 905; *In re Hudson* (2006) 143 CA4th 1, 9, 49 CR3d 74.

A parole condition must be reasonable. *People v Burgener,* 41 C3d at 532. See, *e.g.*, *In re Stevens* (2004) 119 CA4th 1228, 15 CR3d 168 (parole condition prohibiting use of computers and Internet was unreasonable when paroled child molester's crime did not involve computer). But see *In re Hudson,* 143 C4th at 9 (computer limitations permissible as conditions of parole when defendant used computer in second offense and deliberately withheld and encrypted computer when previously on probation). In addition, a parole condition may not be vague or overbroad. See also *People v Burden* (1988) 205 CA3d 1277, 253 CR 130 (condition that parolee, convicted of writing checks with insufficient funds, not work in "outside or commission sales" invalid as overbroad and not required by compelling state interest).

Last, a parole condition must not contravene public policy. Thus, for example, although a parole condition can place reasonable restrictions on the right to travel and on the parolee's place of residence, such conditions may be invalid if they are unreasonable. See *People v Blakeman* (1959) 170 CA2d 596, 339 P2d 202 (condition requiring probationer to absent himself from county in which crime occurred ("banishment") barred by fundamental public policies); *People v Beach* (1983) 147 CA3d 612, 195 CR 381; *People v Bauer* (1989) 211 CA3d 937, 940, 260 CR 62.

Ø **Note:** Although *People v Blakeman, supra,* continues to be cited for the principle that a probation (or parole) condition must not contravene public policy (see, *e.g., People v Welch* (1993) 5 C4th 228, 240, 19 CR2d 520 (Arabian, J., concurring)), conditions similar to the one imposed in that case, although not as broad—for example, conditions that the probationer or parolee stay away from certain individuals or neighborhoods—are frequently imposed, especially in cases involving drugs or gang activity. In *U.S. v Watson* (2009) 582 F3d 974, 983, the court upheld a condition prohibiting the probationer from entering the entire city and county of San Francisco without the prior permission of his probation officer.

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§47.5 D. Special Conditions Relating to Sex Offenders

California has implemented a program to assess the risk of reoffense posed by individuals convicted of crimes for which they are required to register under the Sex Offender Registration Act (Pen C §§290-290.023). Under this program, all individuals required to register as sex offenders are to be assessed using a risk assessment tool known as the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO). See generally Pen C §§290.04-290.06. Under Pen C §3005(a), all sex offenders who are deemed to pose a high risk of reoffense as determined by their score on the SARATSO must be placed on intensive and specialized parole supervision and required to report frequently to designated parole officers. Other sex offenders may be placed on such intensive parole supervision. Pen C §3005(a).

In addition, the following mandatory parole conditions apply:

- Sex offenders required to register pursuant to the Sex Offender Registration Act (Pen C §§290-290.023) may not reside with other registered sex offenders. Pen C §3003.5.
- Sex offenders determined to be at high risk for committing violent sex crimes may be required to undergo relapse prevention treatment as a condition of parole. Pen C §3005.
- Sex offenders determined by the BPH to be intoxicated at the time of the offense or addicted to the excessive use of alcohol at the time of or immediately preceding the crime must completely abstain from the use of alcohol. Pen C §3053.5.
- All individuals convicted of a felony violation of a "registerable sex offense," or attempt, committed to prison, and released on parole under Pen C §3000 or §3000.1 are subject to global positioning system monitoring for life. Pen C §3004(b).

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.6 E. Termination of Parole Period; Discharge Review

§47.6 E. Termination of Parole Period; Discharge Review

A parolee's parole period terminates (1) after the parolee has served the entire term of parole (see §47.3), (2) when the parole authority discharges the parolee from parole for good cause (see Pen C §3000(b)(1)-(2)), or (3) by operation of law (Pen C §3001).

Under Pen C §3001, depending on the commitment offense, a parolee must be discharged within 30 days after the end of the first, second or third continuous year on parole if the BPH does not order retention. See *In re Carr* (1995) 38 CA4th 209, 212, 45 CR2d 34, citing California Department of Corrections and Rehabilitation Operations Manual (DOM) §81080.1.1, available on the CDCR's website at http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html. A period of "continuous parole" begins when the parolee is initially released on parole. It is interrupted when parole is properly suspended because the parolee has absconded from supervision (see §47.14) or when parole is revoked. 15 Cal Code Regs §2535(b)(4); DOM §81080.1.1. A "Continued on Parole" (COP) disposition does not interrupt a period of continuous parole unless the parolee signs a waiver as part of the disposition of an absconding or other time-loss charge. A parolee who has violated parole and has been returned to custody in certain custodial drug treatment programs cannot have his or her parole period interrupted.

The presumptive discharge date for a parolee who was imprisoned for a felony not listed as a violent felony in Pen C §667.5(c) is no later than 30 days after the completion of 1 year of continuous parole. Pen C §3001(a). The presumptive discharge date for a parolee who was imprisoned for a violent felony under Pen C §667.5(c) and subject to 3 years of parole is no later than 30 days after the completion of 2 years of continuous parole. Pen C §3001(a). Parolees convicted of violent offenses listed in Pen C §667.5(c) and subject to 5 years of parole are presumptively discharged from parole after 3 years of continuous parole. Pen C §3001(a). The presumptive discharge date for an individual sentenced to a life term for a sex offense under Pen C §§667.61, 667.71 is 6 years. Pen C §3001(c). The presumptive discharge date for a parolee sentenced to an indeterminate term under Pen C §1168 for a crime other than first or second degree murder is no later than 30 days after the completion of 3 years of continuous parole. Pen C §3001(b). The presumptive parole discharge date is no later than 30 days after completion of 5 years of continuous parole for an individual paroled after a conviction of second degree murder, and 7 years of continuous parole for an individual paroled after a conviction of first degree murder. Pen C §3000.1(b). See also 15 Cal Code Regs §2535; *In re Chaudhary* (2009) 172 CA4th 32, 37, 90 CR3d 678 (time in prison between grant of parole and release from custody cannot be applied to satisfy any part of 5-year parole discharge eligibility requirement of Pen C §3000.1).

Retention on parole after the presumptive discharge date is initiated by a request from the Division of Adult Parole Operations (DAPO) and requires a finding of good cause by the BPH. Pen C §3001; 15 Cal Code Regs §2535. Factors listed in 15 Cal Code Regs §2535(d)(1)-(5) are used to determine whether there is good cause to retain on parole. Generally, the BPH will note applicable reasons under Title 15, without further comment, on the back of the form ordering retention. Retention is usually based on DAPO's recommendation and the commitment offense or offenses, with great consideration given to public safety. The BPH's decision regarding retention must be made within the 30-day period; otherwise, parole terminates by operation of law and the BPH loses jurisdiction over the parolee. *In re Carr* (1995) 38 CA4th 209, 213, 45 CR2d 34.

A parolee has no right to a hearing or to be present during the BPH's review of DAPO's request for retention. However, within 10 days after the BPH action, the agent of record (AOR) must provide the parolee with a copy of CDCR Form 1632 (Discharge Review Report) and BPH Form 1130 (BPH Decision). If the BPH decides to retain the parolee, the notification must include the reasons for that decision and CDCR Form 602 (Inmate/Parolee Appeal). A single deputy commissioner may retain a parolee. See *Terhune v Superior Court* (1998) 65 CA4th 864, 875, 76 CR2d 841. However, the signatures of two deputy commissioners are required to discharge a parolee. DOM §81080.1.2. The CDCR must also notify the parolee that he or she has been retained. See *In re Ruzicka* (1991) 230 CA3d 595, 281 CR 435. The remedy for CDCR failure to notify the parolee of review *was* an administrative appeal of the decision; however, those appeal regulations (former 15 Cal Code Regs §2535(c)) have been repealed.

Ø **Note:** Despite the language of Pen C §3000(b)(5) mandating the release of a parolee following either the

successful completion of parole or the end of the maximum statutory period of parole specified for that parolee, the Third District has determined that Welf & I C §6601.3 authorizes the BPH to hold an inmate for 45 days past his parole discharge date to allow the Department of Mental Health to complete a sexually violent predator evaluation. See *In re Hovanski* (2009) 174 CA4th 1517, 1524, 95 CR3d 370 (petition for habeas corpus denied).

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IV. REVOCATION OF PAROLE

§47.7 A. Consequences of Parole Revocation

Revocation can result in the parolee's receiving up to 1 year of imprisonment for each return to custody. Pen C §3057(a). Acts of misconduct in prison while serving a revocation term may result in up to a total of 12 additional months of custody (called a revocation extension), with maximums of 180 days of custody assessed for each act punishable as a felony, 90 days for each act punishable as a misdemeanor, and 30 days for each act amounting to a serious rule violation. Pen C §3057(c). Currently the BPH initiates revocation extension proceedings only for violations constituting Division A, B, or C violations under 15 Cal Code Regs §3323.

Time spent in custody on a parole violation does not count against the maximum period of parole. Instead it extends the parole period. However, if the prescribed period for a prisoner is 3 years, he or she may not be retained on parole supervision or in custody on a parole violation for more than 4 years. Pen C §3000(b)(5); *People v Pearl* (2009) 172 CA4th 1280, 1288, 92 CR3d 85. If the prisoner was subject to a maximum 5 years of parole, he or she may not be retained for more than 7 years. Pen C §3000(b)(5). If the prisoner was subject to a maximum of 10 years of parole, he or she may not be retained for more than 15 years. Pen C §3000(b)(5)(C). A parolee facing a revocation hearing may have his or her parole period extended in order to encompass the hearing date. 15 Cal Code Regs §2637(b)(12).

Parolees may earn credit under Pen C §2933 for each day in prison during a parole revocation period if they qualify under Pen C §3057(d), unless they are denied credit because of the circumstances or gravity of the parole violation or because of prior criminal history. See Pen C §3057(d)(2)(E).

Parolees on parole for life (those convicted of first or second degree murder) who have their parole revoked may be returned to the status of life prisoners with annual parole consideration hearings. See Pen C §3000.1(d).

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B. Grounds for Parole Revocation

§47.8 1. In General

The following are examples of good cause to revoke parole:

- Violating any general or special condition of parole (see §47.4) (15 Cal Code Regs §§2512(a), 2513; *In re Monzo* (1973) 33 CA3d 144, 146, 108 CR 795);
- Absconding from parole (15 Cal Code Regs §2616(a)(5); see also 15 Cal Code Regs §§2000(b)(75), 2637(b)(1), 2731(a), 2732(a));
- Failing to sign a parole agreement containing lawfully imposed conditions of parole or a statement regarding registration under the Sex Offender Registration Act (Pen C §§290-290.023), when required (Pen C §3060.5);
- Failing to provide blood or saliva samples, if required (Pen C §3060.5);
- Failing to be tested or examined for tuberculosis when that medical procedure has been required (Pen C §3053(b)); and
- Failing to pay court-ordered restitution imposed as a condition of parole (Pen C §3000(b)(6)).

Parole may be revoked for the commission of any misdemeanor or felony charge, whether arising under federal, state, or county law. 15 Cal Code Regs §2512(a)(4). Parole may not be revoked for the commission of an infraction. Pen C §19.8. A Vehicle Code violation not listed as a felony or misdemeanor in the code (see Veh C §§40000.3-40000.28) is an infraction. Veh C §40000.1. In addition, parole may be revoked for any technical violation. A technical violation is a violation of parole that does not constitute the commission of a misdemeanor or felony. Technical violations include violations of general conditions, special conditions, or any other instructions or order imposed by DAPO or the BPH.

For limitations on revocation of parole for parolees who have committed nonviolent drug possession offenses, or drug-related parole violations, see §47.30.

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§47.9 2. For Psychiatric Treatment

As a result of the Valdivia Injunction and under pressure from the Coleman litigation related to mental health treatment at the California Department of Corrections and Rehabilitation, in 2007 both the CDCR and the Board of Parole Hearings issued policy memoranda ending so-called "psych returns." The BPH now has no authority to revoke parole on the sole basis of a finding that the parolee has a mental condition, needs psychiatric treatment, and cannot receive necessary treatment in the community alone. Therefore, the BPH no longer will revoke a parolee for psychiatric treatment. Parole is only revoked for parolees who commit misdemeanors, felonies, or technical violations of the conditions of their parole. *Terhune v Superior Court* (1998) 65 CA4th 864, 878, 76 CR2d 841; *In re Naito* (1986) 186 CA3d 1656, 1662, 231 CR 506. Regulations appearing to authorize parole revocations solely for mental health treatment are outdated. See, *e.g.,* 15 Cal Code Regs §§2620(c), 2641(c), 2646(d), 2646.1(u).

If a parolee has, as a result of a deteriorating mental condition, violated parole, the BPH will seek to revoke parole for the conduct. If the mental condition of the parolee deteriorates to such a degree that the parolee cannot effectively participate in the proceedings, the Board will postpone the proceedings 2 weeks at a time until such time as the parolee is mentally competent to participate in the proceedings. It is the attorney's responsibility to monitor the parolee's condition and inform the Board's staff if the parolee's mental condition is deemed improved enough to participate in the proceedings. With limited exceptions relating to misconduct, a parolee cannot be held for more than 12 months. Pen C §3057(a). If the parolee never becomes competent to participate, the Board will release the parolee at or before the expiration of time assessed at the initial revocation screening (see §47.15A). 2009 BPH policy memorandum.

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C. Procedural Rights of Parolee

§47.10 1. Constitutional Basis for Procedural Rights

The U.S. Supreme Court has long recognized that the freedom parolees enjoy, although conditional, is protected by the Due Process Clause of the Fourteenth Amendment. Thus, parolees have certain constitutionally guaranteed procedural protections in a parole revocation proceeding. *Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593. See also *Gagnon v Scarpelli* (1973) 411 US 778, 781, 36 L Ed 2d 656, 93 S Ct 1756. They do not, however, have the full range of constitutional protections available to defendants in criminal prosecutions. *U.S. v Hall* (9th Cir 2005) 419 F3d 980, 985. Under *Morrissey v Brewer, supra,* when a parolee is taken into custody for a suspected parole violation, he or she has a right to a prompt hearing to determine whether probable cause exists to believe that he or she committed the alleged violation. 408 US at 485. The parolee also has a due process right to an adversarial hearing at which evidence is presented to establish the violation. 408 US at 487. Despite *Morrissey*, California traditionally had a unitary parole revocation procedure, which did not routinely afford the parolee a separate probable cause determination after arrest on an alleged violation.

In *Valdivia v Davis* (ED Cal 2002) 206 F Supp 2d 1068, the Federal District Court for the Eastern District of California ruled that California's parole revocation procedures denied parolees due process primarily because of the length of time parolees were being held in custody without a hearing to determine whether there was probable cause to believe that the parolee violated parole. An order for permanent injunctive relief in the case (now titled *Valdivia v Schwarzenegger*) was filed March 9, 2004, which calls for a number of far-reaching reform measures, including bifurcation of the revocation process to include a separate probable cause determination soon after the arrest. See "Stipulated Order for Permanent Injunctive Relief" (the Valdivia Injunction), *Valdivia v Schwarzenegger* (ED Cal Civ S-94-0671), available on the Prison Law Office's website at http://www.prisonlaw.com/pdfs/Val.pdf. See also §47.11.

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§47.11 2. Rights of Parolees Under *Valdivia v Schwarzenegger*

Implementation of the Valdivia Injunction began July 1, 2004, with most implementation required by July 1, 2005. When this chapter went to press, the BPH had not yet proposed implementing regulations. Therefore, citations in this section are to the injunction.

Ø **Note:** The *Valdivia* requirements do not apply to out-of-state parolees being supervised in California. Valdivia Injunction §9.

Under the Valdivia Injunction, as of July 1, 2005:

(1) No later than 48 hours after a parole hold is placed (no later than the next business day if the hold is placed on a weekend or holiday), the parole agent and unit supervisor must confer to determine whether there is probable cause to continue the hold and document their determination. Valdivia Injunction §11(b)(ii).

(2) No later than 3 business days after the placement of the parole hold by DAPO, the parolee must be served with actual notice of the alleged parole violation, including a short factual summary of the charged conduct and written notice of the parolee's rights during the revocation process, including time frames. Valdivia Injunction §11(b)(iii).

(3) All parolees retained in custody on a parole hold, who do not waive time or request a continuance, must have a probable cause hearing within 13 business days after the hold is placed. Valdivia Injunction §11(d), and as agreed by all parties to the *Valdivia* settlement agreement.

Ø **Note:** This can be up to 14 days after the hold is placed. The day of the hold is not counted.

(4) A parolee is entitled to an expedited probable cause hearing when there is a sufficient offer of proof by appointed counsel that there is a complete defense to all charges. Valdivia Injunction §11(b)(i).

(5) All parolees have the right to appointed counsel, beginning at the stage in the proceedings at which the return to custody assessment (RTCA) (discussed in §47.15) is made. Valdivia Injunction §11(b)(i). The appointment must allow counsel adequate time to represent the parolee properly at each stage of the revocation process. Valdivia Injunction §13.

(6) At the time of the appointment, counsel must be provided with legible copies of all nonconfidential reports and any other documents the state intends to rely on at the probable cause or final revocation hearing. After appointment, if the state learns of additional evidence or documents, and intends to rely on such additional evidence or documents, it must provide a legible copy to counsel as soon as practicable before the hearing. Nonconfidential portions of the parolee's field file must be available to parolee's counsel unless good cause exists for failure to provide access to the file. Valdivia Injunction §§14, 16.

Note that the Valdivia Injunction required CDCR and the BPH to develop policies for designating information as confidential. See Valdivia Injunction §15. By agreement between the parties in *Valdivia,* attorneys now receive complete reports and redact any confidential information before providing copies to their clients, the parolees.

(7) At the probable cause hearing, the parolee must be allowed to testify or present documentary evidence in defense or mitigation of the charges and disposition. Both documents and testimony may include hearsay. Valdivia Injunction §22.

(8) If a parolee who has been retained in custody on a parole hold does not waive time or request a continuance, the final parole revocation hearing must take place within 35 calendar days of the hold. Valdivia Injunction §11(b)(iv).

Ø **Note:** The first day occurs after the parolee has been in custody for 24 hours. If the 35th calendar day falls on a federal or state holiday or weekend, the hearing must be held by the next business day as agreed by all parties to the *Valdivia* settlement agreement.

Ø **Practice tip:** The BPH has maintained a policy of permitting revocation hearings to go forward on holds that have extended beyond the maximum 35 calendar days. The BPH permits these hearings on a case-by-case basis when it has designated a revocation a "priority" case either because the current charges reflect a serious risk to

public safety, or because the parolee's historical factors, regardless of the current violation charged, make the parolee a heightened risk to public safety. In a "priority" case, counsel should argue that the Valdivia Injunction does not provide for a "public safety" exception to the time frames. See also §47.20.

The Valdivia Injunction also provides that at the revocation hearing, the parolee's counsel will be able to subpoena and present witnesses and evidence "to the same extent and under the same terms as the state." Valdivia Injunction §21. Parolee's counsel submits a request for witnesses and documentary evidence at the probable cause hearing, subject to DC approval. The DC generally inquires about the purpose of each witness to ensure that the testimony is relevant to the charges. All relevant evidentiary witnesses are generally approved. Character witnesses may be limited if the testimony sought is overly duplicative. The parolee's counsel then issues the subpoenas for the parolee's witnesses. The regulations governing the presentation of evidence by the parolee at a parole revocation hearing are in 15 Cal Code Regs §§2665-2668. The regulations governing the issuance of subpoenas are in 15 Cal Code Regs §§2675-2682.

Ø **Practice tip:** Counsel for the parolee should make sure to request subpoenas for all witnesses he or she believes to be reasonably necessary. If any requests are denied, or if witnesses are not available at the revocation hearing, counsel should make sure that the record reflects the request and the BPH response to the request. For further discussion, see §47.18.

The Valdivia Injunction provides for service of notice of charges within 3 business days of the hold, a probable cause hearing within 13 business days of the hold, and a revocation hearing within 35 calendar days of the hold. The Injunction does not specify what relief, if any, is available if any of these three time frames is violated. When the parolee can show actual prejudice, the BPH will either dismiss the charges or order the parolee to have the revocation hearing in the community. If the violation is egregious or if definable injury has resulted from the delay, DCs will consider this case by case for purposes of mitigation or other remedies. If the proceedings are not completed by the end of the 35th day, all pending charges must be dismissed and the hold must be removed. DAPO will refile charges dismissed solely as a result of violating the *Valdivia* time frame. Failure to comply with the *Valdivia* time frame is also grounds for habeas relief if prejudice is demonstrated. See *In re Marquez* (2007) 153 CA4th 1, 62 CR3d 429.

Under current Board policy, any request for review of any Board ruling must be received by the BPH Headquarters (at the Special Processing Unit) within 10 days of the disputed action. Requests for review will be decided in writing in a miscellaneous decision (CDCR Form 1135). See 15 Cal Code Regs §§2041(b), 2042.

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§47.12 D. Effective Representation of Parolees

Parolee has right to impartial arbiter. Due process entitles a parolee to a parole revocation hearing before a neutral and detached arbiter. *Morrissey v Brewer* (1972) 408 US 471, 488, 33 L Ed 2d 484, 498, 92 S Ct 2593. See also *Withrow v Larkin* (1975) 421 US 35, 47, 43 L Ed 2d 712, 723, 95 S Ct 1456 (requirement of neutral arbiter applies in administrative hearings); *In re Murchison* (1955) 349 US 133, 136, 99 L Ed 942, 946, 75 S Ct 623 (a "fair trial in a fair tribunal is a basic requirement of due process").

Counsel for the parolee should move to disqualify a DC (or the DC should disqualify himself or herself) if a close personal relationship exists between the DC and the parolee or between their immediate families; the DC was involved in a past incident with the parolee that might cause him or her to be prejudiced against the parolee (*e.g.,* the DC was responsible for the arrest of the parolee or the parolee has assaulted the DC or a member of the DC's family); or the DC is actually biased against or in favor of the parolee to the extent that he or she cannot make an objective decision. See 15 Cal Code Regs §2250.

Counsel must ensure compliance with regulations. Under 15 Cal Code Regs §2245, it is the prisoner's responsibility to bring "to the attention of the hearing panel any issues pertaining to his rights under this article or any failure to comply with these rules." Therefore, counsel should be familiar with the rights of parolees under the regulations and as stated in court decisions, and should object with specificity to any errors that implicate the parolee's rights under the federal Constitution, the laws of California, or the regulations affecting the BPH.

Counsel must ensure that documents and witnesses are available for the hearing. One of the most important duties of counsel for the parolee at a revocation hearing is to make sure that documents and witnesses requested on the parolee's behalf are actually available at the hearing. Witnesses entering jails or correctional facilities must be appropriately dressed (no jeans) and must carry appropriate photo identification or they will be refused admittance. Minors are not allowed in correctional facilities or jails and are usually not called as witnesses by the BPH and DAPO even if they are victims or witnesses of the violation. If counsel needs to call a minor or a person who does not have adequate identification as a witness, he or she may need to exercise creativity. One approach might be to move to have a witness who cannot enter the facility examined in the reception area. When a minor is needed as a witness, counsel can argue that minority should be treated like any other disability and accommodated unless the witness is too young to competently testify. See Evid C §§700-702.

When a witness or document in the custody of the California Department of Corrections and Rehabilitation (CDCR) is subpoenaed, CDCR may decline to produce the witness or document, citing institutional security. If the witness or information is important, counsel should make a record of the nature of the evidence and its relevance to the hearing and argue that a bald assertion of institutional security should not be deemed to constitute "good cause" to deny the parolee his or her right to present witnesses and documentary evidence. See *Morrissey v Brewer* (1972) 408 US 471, 488, 33 L Ed 2d 484, 499, 92 S Ct 2593. Counsel for the parolee should request the regulatory basis for the exclusion of or failure to call any witness and should make appropriate objections. If a continuance for an absent witness or document in the CDCR's custody would make it impossible to hold the revocation hearing within the *Valdivia* time limits (see Valdivia Injunction §23), counsel may want to argue that the parolee should be released for a not-in-custody hearing.

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E. Parole Revocation Procedures

§47.13 1. Initiation of Revocation Proceedings

Whenever a parole agent receives information suggesting that a parolee on his or her caseload has committed a parole violation, the agent is required to investigate and prepare a report. 15 Cal Code Regs §§2617-2618. The agent (commonly referred to as the agent of record or AOR) may also begin parole revocation proceedings and may place the parolee on a Pen C §3056 hold. See 15 Cal Code Regs §§2600-2606. The parolee will then be immediately arrested and placed in custody. See Pen C §3060. The §3056 hold is a no-bail hold. *In re Law* (1973) 10 C3d 21, 28, 109 CR 573. The parolee may be released from custody only on order of the AOR removing the hold, or on the order of a deputy commissioner of the Board of Parole Hearings (BPH). Once a hold is placed, the AOR does not have the authority in all circumstances to remove the hold on the parolee. See 15 Cal Code Regs §§2615, 2616.1, discussed below.

In many cases of suspected parole violation, the AOR has the authority to permit the parolee to remain in the community. If the AOR does not initiate a parole hold, the parolee is said to have been continued on parole or "COP'd."

The primary consideration of the DAPO in determining whether to initiate parole revocation proceedings is whether the parolee, because of his or her actions and background, poses a serious risk to public safety.

Revocation actions should be used judiciously. Pen C §3000(a)(1); 15 Cal Code Regs §2620. Proposition 36 places stringent limitations on the circumstances under which parole may be revoked when the alleged violation is the commission of a nonviolent drug possession offense, or any other drug-related parole violation. For discussion, see §47.30.

Parole holds are generally placed when the AOR has information that the parolee may have committed a crime or committed a technical violation, or is avoiding parole supervision. Despite the broad language of 15 Cal Code Regs §2601, parole holds are not placed because a parolee may be a danger to himself or herself, in anticipation of a possible future abscond, or as a result of a deteriorating mental state, unless there is a manifestation in criminal conduct or technical misconduct. See 15 Cal Code Regs §2602.

If the agent believes that the parolee should be retained in custody on the parole hold, the agent and the unit supervisor must confer to determine whether probable cause exists to continue the hold. This determination must be made within 48 hours after the arrest, or no later than the next business day if the hold is placed on a weekend or holiday, and it must be documented. Valdivia Injunction §11(b)(ii).

No later than 3 business days after the hold has been placed, the parolee must be given actual notice of the alleged violation (including a short factual summary of the charged conduct), his or her rights during the revocation process, and the time frames for the various stages of the process. Valdivia Injunction §11(b)(iii).

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§47.14 2. Suspension of Parole

The Board of Parole Hearings is the parole authority. Pen C §3000(b)(7). As such, the BPH has plenary authority to revoke or suspend parole. Pen C §3060. An order of the BPH is sufficient warrant for any peace officer or prison officer to return any parolee to actual custody. Pen C §3060. However, the BPH cannot suspend or revoke parole without cause. The order to revoke or suspend must state the cause in the order. Pen C §3063. The most common causes for suspending parole are absconding, failing to report, failing to follow instructions, changing address without informing the parole officer in advance, traveling more than 50 miles from the residence of record without informing the parole officer, or leaving the county of residence for more than 48 hours.

Ø **Note:** The cause for the suspension must be stated in the suspension action. Pen C §3063. Counsel for the parolee should ascertain whether this was done. But see *In re Etie* (1946) 27 C2d 753, 756 167 P2d 203 (order suspending parole that stated suspension made pending investigation of charge of parole violation sufficiently stated cause).

If the BPH suspends parole, the time during which parole is suspended does not count towards the parole term. From the time that parole is suspended or revoked until the parolee is returned to custody he or she is regarded as an escapee and a fugitive from justice and the clock is stopped on his parole period. Pen C §3064; *People v Pearl* (2009) 172 CA4th 1280, 1290, 92 CR3d 85. When parole is suspended, the parole period can be extended beyond the maximum applicable parole period to account for the time that the parolee was in suspended status. Once in custody, the clock begins again and the parole clock, while running, cannot exceed the maximum parole period for the crime of conviction.

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§47.14A 3. Grounds for Suspension

The BPH may revoke and suspend the parole of any parolee who has absconded from parole, or has otherwise made himself or herself unavailable for supervision. 15 Cal Code Regs §2601(a)(3). Under 15 Cal Code Regs §2731(a) or §2732(a) (multijurisdictional prisoner), a parolee absconds when he or she (1) leaves California without permission, (2) leaves California with permission but does not return within the authorized time, or (3) has not been available for contact for 30 days.

The BPH may revoke and suspend the parole of any parolee who fails to report in a timely manner on release from custody. All parolees must report to the agent of record (AOR) within 24 hours of release, or on the next working day if released on the day before a holiday or weekend. If the parolee fails to report, the AOR may file a violation report with the BPH requesting that parole be suspended and a warrant issued. 15 Cal Code Regs §2512.

More-stringent rules apply to parolees designated as "high control" parolees under Pen C §3060.7. If a high-control parolee fails to report within 48 hours of release from custody (or within 24 hours if ordered by the AOR), the AOR *must* file a report with the BPH within 24 hours requesting that parole be suspended and a warrant issued. Pen C §3060.7.

> Ø **Practice tip:** Despite the seemingly stringent rules pertaining to "high control" parolees, the standard parole conditions reflected in CDCR Form 1515 (Notice and Conditions of Parole), signed by all inmates paroled in California, require all parolees to report within 24 hours of release and the fact that a high-control parolee is a mandatory referral to the BPH has no practical consequences for counsel. See 15 Cal Code Regs §2512(c).

The BPH may also revoke and suspend parole of any parolee who changes address without informing DAPO in advance; fails to inform DAPO of any change in employment location, employer, or termination of employment within 72 hours after the act occurring; travels more than 50 miles from the residence of record; is absent from the county of residence for more than 48 hours; or fails to inform DAPO of any misdemeanor or felony arrest. 15 Cal Code Regs §2512.

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§47.14B 4. Suspension and Reinstatement

The agent initiates the suspension process by contacting BPH, stating a factual basis for the request for suspension and the issuance of a warrant. The agent generally files a request for a warrant because he does not know the parolee's whereabouts and has reason to believe that the parolee has either committed a technical violation or engaged in activities placing the public at risk. Armed with this information, the BPH suspends parole and issues a warrant. In many cases, the parolee is promptly arrested only to be released without time loss when it is discovered that the information provided to the AOR was a false alarm.

If a parolee absconds and remains within California, the reinstatement date on parole is the date that the parolee is arrested or located, whichever is earlier. If, for example, a parolee is arrested on June 1, 2006, but DAPO does not discover this until June 3, 2006, and places a hold effective June 3, 2006, the reinstatement date would be June 1. 15 Cal Code Regs §2731(c)(2)(A).

If a parolee absconds out of state and is arrested out of state, the reinstatement date becomes more complicated. If the parolee is arrested out of state on the parole hold only, the reinstatement date is the date the parolee became available to California. The date the parolee becomes available to California occurs on one of three alternative dates: the date the parolee signs a waiver of extradition, the date the holding state accepts the pre-signed CDCR Form 1515 (Notice and Conditions of Parole) and agrees to extradite the parolee back to California, or the date a Governor's warrant is issued. The date a parolee is available to California arises under only one of the three different scenarios set forth above. Counsel should ask to see CDCR Form 1737, which is a worksheet that identifies the earliest day that the parolee was available to California. If the parolee is arrested on a local hold as a result of local charges, the parolee is entitled to exercise a *Shapiro* waiver of personal appearance at a revocation hearing. See *In re Shapiro* (1975) 14 C3d 711, 721, 122 CR 768. When a parolee is in abscond status out of state and subject to a local hold, the *Shapiro* waiver authorizes the Board to conduct a parole revocation proceeding without the parolee being present. See 15 Cal Code Regs §2731(c)(2)(B). For further discussion of *Shapiro* waivers, see §47.22.

Parolees subject to INS holds are often deported upon release from custody. A parolee that reenters the county illegally may be subject to revocation for failing to report, absconding, or illegal reentry into the United States. Counsel should note any charges for illegal reentry that are not accompanied by INS documentation to sustain the charge.

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§47.15 5. Deputy Commissioner's Alternatives on Receipt of Violation Report

When the agent of record (AOR) files a violation report, it is submitted to a parole administrator (PARAD), who reviews the report for corrections, needed documents, and amendments, including additions or deletions to the charges. Once the violation report is cleared, it is forwarded to a deputy commissioner (DC) for evaluation. The DC first reviews the reports to determine if there is probable cause for the alleged violations. The DC can dismiss charges that lack probable cause, accept the charges as submitted, or amend the charges. The DC then determines the appropriate action. The DC may make a return to custody assessment (RTCA), propose alternative sanctions, known as remedial sanctions (*e.g.,* drug treatment under the Parolee Substance Abuse Program or Proposition 36), or remove the hold and order the parolee's immediate release. See 15 Cal Code Regs §2620.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.15A 6. Return to Custody Assessment

§47.15A 6. Return to Custody Assessment

If the deputy commissioner (DC) concludes that the violation warrants returning the parolee to prison, he or she may offer the parolee a certain amount of prison time to begin on the date that DAPO placed the hold. A DC may return a parolee to prison for up to 12 months for a violation. 15 Cal Code Regs §2740.

> Ø **Practice tip:** Counsel should review 15 Cal Code Regs §2646.1, which provides a guideline for return to custody times for all violations that a parolee may face at a revocation hearing. The guidelines only apply to parolees who have not previously been returned to custody for any violation. The parolee's prior parole history is made available to counsel in CDCR Form 1244. Counsel should review the 1244 parole adjustment form, and if there are no prior violations which resulted in a return to custody, examine the return to custody assessment (RTCA) to ensure that it falls within the §2646.1 guidelines. Counsel should argue at the probable cause hearing (PCH) that the offer should fall within the guidelines. Occasionally, a DC will make an offer at the RTCA stage invoking Pen C §3057(d)(2)(E), which converts an offer eligible for work-time credits ("eligible offer") to an offer ineligible for work-time credits ("ineligible offer"). When counsel is faced with such a "d2E" offer at the PCH stage from the RTCA, counsel should argue that Pen C §3057 does not authorize any "d2E" disposition or offer, except at a revocation hearing. The RTCA stage is not a revocation hearing and therefore a "d2E" offer is arguably improper.

If the offer is to return the parolee to prison, the offer will state whether the parolee, under the offer, is eligible to earn work-time credits under Pen C §2933. Work-time credits under §2933 can reduce the actual time the parolee spends in prison by as much as one-half. Effective January 25, 2010, Pen C §2933(e) provides for work-time credits for parolees housed in county jails.

Eligibility for parole work-time credits is governed by Pen C §3057. Under Pen C §3057(d)(2), a parolee is ineligible for credits if

- He or she is on parole after conviction of an offense listed in Pen C §3057(d)(2)(C);
- He or she violated parole by committing an offense listed in Pen C §3057(d)(2)(C);
- He or she violated a condition of parole prohibiting association with a specified person or entering a particular place, or requiring attendance at a parole outpatient clinic or psychiatric attention; or
- The DC at a revocation hearing determines that the parolee should not receive work-time credits, because of the gravity and circumstances of the violation or prior criminal history. Pen C §3057(d)(2)(E).

This offer and a copy of the revocation packet is then made available to the California Parole Advocacy Program (CalPAP) administered by an administrative branch of the University of the Pacific's McGeorge School of Law. CalPAP assigns an attorney to represent the parolee, and the attorney schedules an interview with the parolee in custody normally within 1 business day after receipt of the violation packet. Valdivia Injunction §11(b)(i). This packet contains the parole violation report, any law enforcement report, and all other relevant and material evidence, including a copy of the RTCA "offer." See Valdivia Injunction §14. If counsel believes that there is a complete defense to all the charges that form the basis of the hold, counsel should make an offer of proof concerning the defense at the PCH. Valdivia Injunction §11(b)(i). As a practical matter, the probable cause hearing is ordinarily scheduled within 1 or 2 days after the attorney interviews the parolee.

An offer at the RTCA stage may be accepted by the parolee before the commencement of the PCH. The parolee is not required to admit the charge or charges and any acceptance of an offer is not res judicata as to any other proceeding. Few offers are accepted at the RTCA stage because there is usually nothing to gain by accepting an offer prior to the actual PCH. No offer made at RTCA can be raised at a PCH. If an offer is accepted by the parolee at the initial attorney interview before commencement of the PCH, counsel will have the parolee sign a Summary of Revocation Decision (CDCR Form 1104B) indicating acceptance of the RTCA offer, and this form will be presented to the DC at the PCH. The parolee may still choose to appear at the PCH, even though he or she has already accepted

the offer, or may waive appearance and be represented by counsel. The DC will complete the paperwork by entering the settlement in a BPH 1103-PCH form. The paperwork will either be handed to the parolee or forwarded to him or her later that day.

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7. Probable Cause Determination

§47.16 a. Parolee's Right to Probable Cause Determination

When a parolee is taken into and retained in custody for a suspected parole violation, the parolee has a right to a prompt hearing to decide whether there is probable cause to believe that he or she has committed the alleged violation. *Morrissey v Brewer* (1972) 408 US 471, 488, 33 L Ed 2d 484, 496, 92 S Ct 2593; *Gagnon v Scarpelli* (1973) 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756. See *Valdivia v Davis* (ED Cal 2002) 206 F Supp 2d 1068 (California's unitary parole revocation procedure denied parolees due process).

All parolees incarcerated on a parole hold who do not waive time or ask for a continuance are entitled to a probable cause hearing within 13 business days after the placement of the hold. Valdivia Injunction §11(b)(iii), (d). A parolee is entitled to an expedited probable cause hearing when there is a sufficient offer of proof by appointed counsel that there is a complete defense to all charges. Valdivia Injunction §11(b)(i). See §47.11.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.17 b. Probable Cause Hearing

§47.17 b. Probable Cause Hearing

At the probable cause hearing (PCH), the parolee and counsel ordinarily meet face to face with a deputy commissioner (DC). The BPH attempts to hold the hearings in person; however, there are some instances when hearings are held by telephone.

The probable cause hearing is very informal and is sometimes compared to a combination of a preliminary hearing and a pretrial settlement conference. The DC writes a computerized report of the proceedings on a BPH 1103-PCH form. The DC makes a finding regarding probable cause for each of the alleged violations. The probable cause standard is whether a reasonable person would have a strong suspicion that the parolee violated parole. Assuming probable cause exists on at least one of the allegations, the DC must then decide whether to hold the parolee in custody. The DC sometimes places notes and comments in the 1103-PCH form on the charges, the parolee's behavior or history, and other matters. The probable cause determination typically rests entirely on reports and other documents. Counsel should take the time to review the 1103-PCH form to make sure that it accurately reflects the decisions made by the DC and any negotiated settlement of the case.

The Valdivia Injunction provides that the parolee may present evidence in defense or mitigation at the probable cause hearing, including the parolee's testimony. Valdivia Injunction §22.

Counsel will note any objections to the charges in order to persuade the DC to dismiss the charges for lack of probable cause. Given the short time frames required under *Valdivia* to hold the probable cause hearing, the DC and counsel are not provided with a field file, nor are any witnesses present other than the parolee.

The DC will commonly dismiss charges at the PCH if there is inadequate evidence to sustain the charge. For example, if the parolee is charged with violating a special condition, the AOR must have submitted the signed special condition in order to avoid dismissal of the violation. If the AOR alleges battery on an unnamed victim, the charge will likely be dismissed if the victim is not identified and cannot be subpoenaed to testify. The AOR retains the right to refile the charge, or charges, if new facts are discovered and presented.

If probable cause is found on a charge, the parolee may either admit, deny, or enter a no contest plea. If the parolee admits a charge, it is deemed admitted whether the matter is settled at the PCH stage or goes to a full revocation hearing.

Although counsel can have the parolee testify on one or more of the charges or the disposition and can present documentary evidence regarding the charges or disposition, the PCH is not a full revocation hearing. If the evidence proffered by the parolee is subject to dispute by adverse witnesses, *e.g.,* the AOR or the victim, the parolee needs to schedule a revocation hearing. The DC will generally advise the parolee to this effect.

> Ø **Practice tip:** Counsel must be provided at the time of appointment with all nonconfidential reports and all documents that the state intends to rely on at the probable cause or final revocation hearing. Valdivia Injunction §14. If critical documents are missing at the PCH, counsel should argue that the missing documents constitute a due process violation under *Morrissey* and *Valdivia* mandating a dismissal of the charges. Counsel may also argue that there is insufficient information to find probable cause without the documents, necessitating dismissal.

If the DC finds probable cause, he or she will attempt to negotiate a settlement of DAPO's charges by offering a proposed disposition. This proposed disposition can be no more severe than the initial RTCA offer. The parolee and the parolee's counsel can often negotiate about what charges the parolee will plead to, if any, and the sanction to be imposed, including whether the parolee will be returned to prison.

If the matter is settled, the parolee and his or her counsel will fill out a CDCR Form 1104B, waiving the right to a parole revocation hearing and marking "accept" to the agreed-on sanction.

In addition to Form 1104B, the DC will print out BPH 1103-PCH. The 1103-PCH form in conjunction with Form 1104B represent the record of the PCH. The parolee is not required to admit any charge(s) upon which probable cause has been found. Generally the DC enters denials or no pleas on any sustained charge in the 1103-PCH form, regardless of the outcome. Forms 1104B and 1103-PCH will also state whether the parolee is eligible for Pen C §2933

credits. In addition, 1103-PCH will include any special conditions imposed as part of the settlement proposal, such as a no-contact order, a geographical limitation, or a no-alcohol condition.

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§47.18 8. Requesting Witnesses and Documents

If the probable cause hearing does not produce a settlement, a full revocation will be scheduled. Counsel for the parolee will be required to specify what witnesses, documents, and other evidence he or she, through investigating, has determined will be necessary to present the parolee's case at a revocation hearing. If an evidentiary witness sought by counsel is a parolee, it is the California Department of Corrections and Rehabilitation's (CDCR's) policy not to transport witness-parolees to revocation hearings. Counsel should advise the client that although counsel can issue the subpoena, it will generally not be honored by the CDCR.

Therefore, to provide the parolee with effective assistance of counsel, it appears to be necessary for counsel to request every evidentiary and disposition witness reasonably necessary to present the parolee's side of the case. The attorney can be prepared to do this only by thoroughly reviewing the parole agent's report, any law enforcement report, any drug or alcohol test, any parole condition that may be at issue, any parole agent's notes, and the parolee's field file, and by investigating the allegations and proposed disposition and talking with potential witnesses. The AOR will normally arrive at a revocation hearing with the field file. However, when requesting witnesses and documentary evidence at the PCH, counsel may consider a subpoena duces tecum for the AOR's "field file," or "record of supervision." On rare occasions, counsel may need to review the "C" file in advance of the hearing and should arrange scheduling promptly for the C-file review with CDCR's Records Department.

Counsel for the parolee should also prepare for the possibility that not all requested witnesses will be approved or subpoenaed. Counsel should (1) make and retain a copy of any request for witnesses, documents, videotapes, or requests for subpoenas or subpoenas duces tecum so that there is a record of the request if it becomes an issue; (2) be ready to make an offer of proof regarding the relevance of and the necessity for the testimony of any requested witness; (3) make sure that the BPH provides a reason on the decision for any denial of a request for a witness or other evidence; and (4) be prepared to challenge the adequacy of the reason for the denial. Some attorneys have developed the habit of having the deputy commissioner initial all forms requesting witnesses, and all completed Summary of Revocation Decision forms (CDCR 1104B).

It may be important to request that the parole agent who wrote the parole violation report and summary of parole adjustment be present for cross-examination. If so, he or she should be requested as a witness. Although it has been held that the parolee is entitled to call witnesses, if requested and relevant (see *In re Carroll* (1978) 80 CA3d 22, 32, 145 CR 334), the Ninth Circuit holds that a probationer normally does not have a right to confront an agent when hearsay entries made by that agent are used in a proceeding by another agent. *U.S. v Walker* (9th Cir 1997) 117 F3d 417, 420. The CDCR has a policy under which it does not call parole agents to testify if the agent has an office out of the area (more than 50 miles away). Also, the CDCR usually refuses to produce prisoners in its custody at revocation or revocation extension hearings. Although these policies may change in the aftermath of *Valdivia,* counsel should be prepared to make a record of the relevancy of the testimony of a requested witness in the event that the witness is not made available for the hearing.

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9. Parole Revocation Hearing

§47.19 a. Time for Hearing

Under the Valdivia Injunction, unless the parolee waives time or requests a continuance, when the parolee is retained in custody on a parole hold, the final revocation hearing must take place within 35 calendar days after the placement of the hold or, if the 35th day falls on a weekend or holiday, on the next business day. Valdivia Injunction §§11(b)(iv), 23. Counting begins on the day after the parolee is placed in custody. However, an exception to the time frame may be made in a "priority case." See §47.20.

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§47.20 b. BPH Guidelines on Postponement

The guidelines the BPH has adopted (see discussion in §47.1B) provide that, unless the parolee waives time or there is "a good cause finding to a misdemeanor, felony, or violation of a condition of parole, no parolee shall be held in custody for more than 35 calendar days from the date of the hold unless there is a determination of good cause for delay or postponement." 2004 BPH policy memorandum. However, "priority" cases, those in which the parolee's commitment offense or revocation offense is a violent felony as defined by Pen C §667.5(c) or a serious felony as defined by Pen C §1192.7(c), may not be dismissed without the concurrence of a supervisor. Hearing Directive 05/07 (Nov. 30, 2005).

The determination of good cause for postponement is to be made by the deputy commissioner (DC) conducting the hearing, and requires a finding that "the reason for delay includes unforeseen circumstances beyond the control of the state." Hearing Directive 04/10 (Dec. 23, 2004). Examples of "unforeseen circumstances" are listed; they include "a family emergency by a witness, a vehicle collision, hospitalization of a witness, a court conflict, parolee illness or counsel illness." Hearing Directive 04/10 (Dec. 23, 2004). Other circumstances may qualify, as determined by the DC. All determinations of good cause to delay or postpone a hearing must be documented on the day of the decision. In the absence of good cause or a waiver, the DC is required to remove the hold "if failure to do so will result in the parolee being held in custody for more than 35 calendar days from the date of the hold. If all the charges are not dismissed at that time, a not-in-custody hearing shall be ordered." Hearing Directive 04/10 (Dec. 23, 2004).

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§47.21 c. Postponement of Hearing by Parolee

Postponement request. The parolee may request a postponement or waive time for the revocation hearing or any of the hearing time constraints with or without good cause. Valdivia Injunction, §11(b)(iv), Exhibit A, ¶5, p5. By agreement of the parties to *Valdivia,* however, parolee postponements require a showing of good cause. If a postponement is necessary because the BPH failed to subpoena a defense witness or document, or the state is otherwise responsible for the nonavailability of evidence the parolee needs for his or her defense, and postponement of the revocation hearing will place the time for the hearing beyond the 35th day after the placement of the hold, counsel for the parolee should request that the charges be dismissed for failure to comply with the Valdivia Injunction. Counsel also should argue that a finding be made on the unavailability and the basis for the unavailability of each witness.

Optional waivers. If the parolee is being prosecuted in a state or federal court located in California on one or more of the charges that are the subject of a revocation, the parolee may want to postpone the revocation hearing until after the conclusion of the criminal proceeding. This is done by signing a conditional waiver (called an "optional waiver"). 15 Cal Code Regs §2641(b). Although the regulations do not specify that the criminal charges must involve the same behaviors involved in the parole revocation proceeding, the BPH has interpreted §2641 to require that the criminal charges must involve the same behavior that the parole violation charges are based on, and they must be actually pending at the time the parolee signs the waiver. This is typically, but not always, done at the probable cause hearing (PCH). By signing an optional waiver, the parolee accepts a return to custody and is in revoked status. The parolee may later rescind the revoked status and request a hearing on the matter.

After the parolee signs the waiver, the BPH will review the parolee's file and revoke parole, usually for the same period as the screening offer. Once the state or federal charges have been disposed of, the parolee has 15 days to request an activation of the waiver, which will result in the scheduling of an optional-waiver review on the calendar for PCHs. Even though the regulations require 60 days remaining before the parolee's revocation release date (RRD), because of the Valdivia Injunction, the BPH will allow a parolee to activate his or her waiver so long as there are at least 35 days remaining before the RRD. At the optional-waiver review, the DC has the authority to modify the original offer or leave it unchanged and negotiate a disposition with the parolee. If the parolee rejects the offer, the term imposed on the basis of the waiver is no longer effective and the parolee is free to enter a denial on the charges and schedule a full revocation hearing. A parolee who has signed and thereafter activated an optional waiver is in revoked status; nonetheless, by agreement of the parties to *Valdivia,* the Board complies with *Valdivia* time frames. If, at the revocation hearing, good cause to revoke parole is found, the parolee may receive more or less time than would have been imposed on the basis of the waiver. 15 Cal Code Regs §2641(b). Also, when there is a criminal conviction, the Board will find good cause on the charges on the basis of the conviction for the same conduct, and the revocation hearing will be for dispositional purposes only.

There are tactical advantages in having a criminal prosecution proceed first: A defendant's rights in a criminal case are far more extensive than are a parolee's rights in a revocation proceeding. Public defenders and other defense attorneys thus have resources that are not readily available to revocation counsel. In preparing for trial, defense counsel in the criminal case can bring discovery and other pretrial motions, obtain public funding for investigators and experts, adduce damaging testimony at preliminary hearings and trial, and develop legal theories. If the waiver is withdrawn after trial, revocation counsel can present the same witnesses and information and can, if desirable, call trial counsel to testify about the evidence at the trial, including trial counsel's opinion on the credibility of witnesses and the sufficiency of evidence under the preponderance burden.

Occasionally, however, it will be advisable to have the revocation hearing first, as in cases with minor charges in which the state court judge is waiting to see what the revocation disposition will be. When serious charges are involved, and the parolee is likely to remain in custody for a year litigating the state court case, the parolee loses nothing by having the revocation hearing first even if the parolee does not testify at the revocation hearing. Previously undisclosed information about witnesses and evidence may be discovered. Strategically, defense counsel in the criminal matter may want a revocation hearing in order to obtain discovery. Coordination with the parolee's state court counsel is important

here as well.

A parolee under criminal investigation but not yet charged with a criminal offense faces a difficult quandary. The parolee is not entitled to exercise an optional waiver, since criminal charges are not pending, yet proceeding to a revocation hearing and offering testimony in defense of the parole violation charge or charges may provide prosecutors with information needed to file felony criminal charges. All testimony given by a parolee in a parole revocation hearing is public record and obtainable by prosecuting authorities. See §47.28. Prudent counsel will not permit the parolee to testify in a hearing if he or she perceives a risk that charges will be filed. On the other hand, obtaining testimony from prosecution witnesses could be advantageous to the parolee.

Ø **Note:** Postponements are sometimes more practical than optional waivers because delays can occur with an optional waiver. A postponement puts the case on calendar at a specific time. If the attorney can anticipate when the county case will conclude, a postponement may make more sense, especially when there are issues regarding sentencing credits or when the parolee's eligibility for programs depends on the local adjudication.

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§47.22 d. Parolees Arrested Out of State

Parolees arrested out of state are reinstated on parole when they become available to the jurisdiction of California. Time frames applicable to the revocation process under the Valdivia Injunction do not commence until the parolee arrives in California. Credit for time spent in custody elsewhere depends on the parolee's availability to the jurisdiction of California. Parolees who contest extradition to California do not receive credit for time served in the foreign jurisdiction. California considers parolees who sign a waiver of extradition and who do not face charges in the other state available to California on the date the parolee signs the waiver of extradition.

A parolee who is incarcerated by an intervening sentence in a foreign jurisdiction has the right to compel BPH to conduct an in absentia revocation proceeding for any parole violations being brought against the parolee in California. Forcing the BPH to conduct a revocation hearing while the parolee remains incarcerated in the other state ensures that the parole revocation time runs concurrent to the time the parolee is serving in the other jurisdiction. The parolee compels the Board to immediately conduct an in absentia revocation hearing by submitting a written waiver of his right to appear at the hearing. This waiver is called a *Shapiro* waiver. *In re Shapiro* (1975) 14 C3d 711, 723, 122 CR 768.

The BPH interprets *Shapiro* broadly, which works to the parolee's benefit. The BPH permits a parolee to compel a revocation hearing in order to receive concurrent time while the parolee is incarcerated on a local hold in another jurisdiction, even if not yet convicted and even if never convicted.

The BPH processes a *Shapiro* waiver by conducting a probable cause hearing and assessing a disposition when appropriate. In order to preserve the parolee's rights, the BPH considers the *Shapiro* waiver a request for an optional waiver on the revocation charges (see §47.21 for a discussion of optional waivers). By treating the parolee's *Shapiro* waiver as both a demand for an in absentia hearing and a request by the parolee to optionally waive the hearing, the parolee retains the right to contest both cause on the revocation charges and the dispositional assessment on return to California.

The California Code of Regulations specifies that any return to custody time assessed in the in absentia hearing will commence on the date the BPH conducted the hearing. When the BPH waits an unreasonable amount of time to conduct the hearing after receipt of the *Shapiro* waiver, counsel should argue that the parolee should not be harmed by the BPH's inability to conduct a timely hearing and should receive credits back to the date the parolee signed the *Shapiro* waiver. If the parolee does not submit a *Shapiro* waiver, the revocation hearing will not occur until he or she returns to California. 15 Cal Code Regs §2731(c)(2)(B)(4)(b); *In re Shapiro* (1975) 14 C3d 711, 723, 122 CR 768. The burden of proof is on the state to show the parolee was timely provided a *Shapiro* waiver by DAPO, which in practice is considered by BPH to be within 10 days; there is no regulation on point.

> Ø **Note:** A parolee arrested out of state has the right to a telephone hearing with the BPH or a hearing in the state in which he or she was arrested (15 Cal Code Regs §§2245, 2367); however, in practice, the BPH does not recognize these regulations. Given the broad interpretation of *Shapiro,* counsel will have a difficult time showing harm to the parolee in this instance.

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§47.23 e. The Revocation Hearing

A hearing panel, usually composed of just one Deputy Commissioner, hears the case. Pen C §3063.6. Parole revocation hearings are divided into two distinct parts, the evidentiary phase and the dispositional phase. In the evidentiary phase, the Deputy Commissioner considers the evidence to determine the validity of the alleged violations of parole. All witnesses are examined under oath. 15 Cal Code Regs §2645(b).

The parole agent's report acts as the charging document and outlines the violations. It is not evidence; it serves (or should serve) only as the jurisdictional basis for the hearing. Parole violations are proven by sworn testimony and documents with definite evidentiary value, such as authenticated law enforcement reports, test results, and signed parole conditions.

Parole agents are required to keep notes of contacts with parolees and other matters related to each case. Occasionally the parole agent's notes, called the "Record of Supervision" and located in the agent's field file, are relevant to the charges. The parolee's field file and the agent's notes are available for review by counsel, unless good cause is found for not providing it. Valdivia Injunction §16.

Ø **Note:** During the hearing, evidence on the parolee's criminality and behavior on parole is generally not offered until the disposition phase of the hearing, so as not to bias the deputy commissioner (DC), but if the parole agent asserts that the parolee has committed other crimes using the same "modus operandi," the agent may seek to present evidence about previous crimes to prove the parole violation.

Ø **Note:** The parolee should refrain from opening the door to evidence of prior criminality by denying conduct for which he or she has been convicted, which makes evidence of prior crimes admissible for impeachment.

At the end of the first phase of the hearing, the DC adjourns the hearing and considers the evidence for and against the charges. 15 Cal Code Regs §§2645, 2646. The possible findings on each charge are "violation found," "no violation found," and "charge dismissed." 15 Cal Code Regs §2646. In many hearings, the DC will waive adjournment and proceed directly into the dispositional phase of the hearing. When a parolee has been convicted of or has pleaded guilty to a crime, the panel must find good cause on at least the crime of which the parolee has been convicted. See 15 Cal Code Regs §2645(a). If good cause is found on any charge (or on an amended charge), the hearing panel convenes the second part of the hearing, known as the disposition phase.

In the disposition portion of the hearing, evidence is again taken. However, only relevant evidence goes to the issue of what penalty the hearing panel should impose on the parolee, if any. This may be evidence of residence, employment, social stability, family support, and the attendance or willingness to attend a program. At this point, the DC often relies on the summary of parole adjustment, which is part of the parole agent's report.

The dispositional choices are to return the parolee to custody for some period of time, including credit for time served, to impose a remedial sanction, to impose conditions of parole, or to continue the parolee on parole. See 15 Cal Code Regs §§2511(b)(3), 2646. See also §47.7. After the evidence is presented and all parties have spoken, the hearing panel again adjourns to consider the disposition. The panel returns to announce its decision. Again, many DCs do not adjourn the hearing before announcing their decision.

The hearing is discussed in greater depth in §§47.24-47.28.

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§47.24 (1) Establishing Jurisdiction

The first action of the BPH deputy commissioner at the parole revocation hearing should be to establish jurisdiction. Jurisdiction over the parolee is presumed, but the presumption is rebuttable, and jurisdiction may be challenged at the hearing. For example, the parolee may contend that his or her parole period has expired because a current or previous suspension of parole was invalid. For discussion of suspension of parole, see §47.14. Subject matter jurisdiction is based on the parole agent's report, which should be admitted at the beginning of the hearing for the limited purpose of establishing jurisdiction, establishing what the charges are, and establishing what conduct of the parolee the charges are based on.

BPH deputy commissioners sometimes skip over this phase of the proceedings. Counsel for the parolee should, however, insist on a formal statement of the basis for jurisdiction. A formal statement clarifies the proceeding and gives counsel an opportunity to make an informal statement of the case. It also gives counsel an opportunity to make a due process notice objection to ambiguous charges. The parole agent's report should charge specific violations based on specific facts. Counsel should object to ambiguous charges (one count of spousal abuse, for example, with a report stating that abuse occurred on more than one date).

Once the charges are in place, the parolee is asked to enter a plea of "admit," "deny," or "no plea" to each charge. There is no regulatory or statutory basis for this "plea" procedure, but it serves to save time on uncontested charges.

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§47.25 (2) Record of Hearing

The revocation hearing is tape recorded and the record of the proceedings consists of this tape, the parole agent's report, and the written hearing decision. Documentary evidence considered by the hearing officer is not retained as part of the record. The tape must include or incorporate by reference the evidence considered, the evidence relied on, and the findings of the hearing panel with supporting reasons (15 Cal Code Regs §2254), and in the decision itself, the hearing officer must indicate the evidentiary basis for his or her findings (15 Cal Code Regs §2255). Although the written decision and the parole agent's report stay in the parolee's file, the tape of the hearing is destroyed after 6 months.

Ø **Note:** By department policy, the parolee is informed that he or she is entitled to receive a tape of the hearing on request within 120 days of the hearing. Although the issue has never been addressed, there is no written rule which prohibits counsel from bringing a tape recorder and recording the hearing.

Establishing a record of what evidence was offered and received is an important responsibility for the parolee's attorney. BPH regulations provide that the record must include or incorporate by reference the evidence the deputy commissioner (DC) has considered, the evidence the DC has relied on, and the DC's findings, together with supporting reasons. 15 Cal Code Regs §2254. Counsel for the parolee should make sure that the hearing officer complies with this regulation. Under the traditional practice, documents or exhibits are not marked in evidence and are not retained. It is therefore incumbent on counsel for the parolee to take whatever steps are necessary to ensure that any reviewing body is able to determine what the evidence was and what evidence the DC relied on in making a decision. Counsel should seriously consider requesting the DC to describe with particularity the documents and exhibits being considered as the hearing proceeds (it might be best to give a detailed description of the document or exhibit in the request). It may also be important to describe the return of service on the subpoena for a witness who does not appear at the hearing, since subpoenas will not be saved as part of the record. Counsel should also object to the admission of adverse hearsay evidence that does not pass the balancing test required in *U.S. v Comito* (9th Cir 1999) 177 F3d 1166. See §47.26. This objection is referred to as a *Comito* objection.

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§47.26 (3) Use of Hearsay

In general. At revocation hearings, all relevant evidence, including most hearsay, is admissible. 15 Cal Code Regs §2665. To be admissible, hearsay (1) must be relevant, *i.e.,* it must tend to prove or disprove an issue or fact in dispute (15 Cal Code Regs §2000(b)(91)), and (2) must not violate the parolee's due process right to confront and cross-examine witnesses. *People v Arreola* (1994) 7 C4th 1144, 1158, 31 CR2d 631 (although cited for informational purposes, California is bound by federal law under the Valdivia Injunction); *U.S. v Comito* (9th Cir 1999) 177 F3d 1166, 1170. See *U.S. v Hall* (9th Cir 2005) 419 F3d 980, 985 (parolee's right of confrontation grounded in Due Process Clause, not Sixth Amendment).

Admissibility. Under Valdivia Injunction §24, the use of hearsay is limited by the parolee's confrontation right under the U.S. Constitution. The current state of the law requires the BPH to use the balancing test described in *U.S. v Comito* (9th Cir 1999) 177 F3d 1166, to determine whether to admit hearsay evidence from a witness adverse to the parolee in parole revocation proceedings. *In re Miller* (2006) 145 CA4th 1228, 1236, 52 CR3d 256. This test requires the deputy commissioner to "weigh the [parolee's] interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." *Comito,* 177 F3d at 1170. See *Morrissey v Brewer* (1972) 408 US 471, 488, 33 L Ed 2d 484, 498, 92 S Ct 2593; *U.S. v Hall* (9th Cir 2005) 419 F3d 980. As *Hall* explains, even reliable evidence is subject to this balancing test. 419 F3d at 987. A parolee's "otherwise strong interest in confrontation" is not extinguished by the reliability of proffered hearsay evidence. 419 F3d at 988. See *U.S. v Martin* (9th Cir 1993) 984 F2d 308, 313 (even laboratory report not sufficiently reliable to support blanket rule of admissibility). See also *U.S. v Perez* (9th Cir 2008) 526 F3d 543.

Factors to consider in determining the weight to be given to the parolee's right of confrontation include (1) the importance of the evidence to the ultimate question and (2) the nature of the facts to be proved by the evidence, *i.e.,* whether the hearsay in question is reliable proof of those facts. *U.S. v Comito* (9th Cir 1999) 177 F3d 1166, 1171. When the facts to be proved by hearsay are crucial to the decision, and the hearsay itself is an unsworn oral statement (the least reliable form of hearsay), the parolee's interest in the opportunity to cross-examine "is at its apogee." *U.S. v Comito, supra*. In such circumstances, only a very strong reason for failing to produce a witness will defeat the parolee's right to confrontation and permit the use of hearsay evidence.

As the court in *Comito* explained, "[w]hether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the [parolee's] right." 177 F3d at 1172. See also *U.S. v Hall* (9th Cir 2005) 419 F3d 980. In short, the more important the evidence from the absent adverse witness is to the state's case, and the less reliable the hearsay, the greater the parolee's interest in confronting and cross-examining the adverse witness to test his or her veracity. The greater the parolee's interest in confrontation, the heavier the burden on the government to produce the witness before the hearsay can be admitted.

These principles mean that a showing of good cause that would support admitting an item of hearsay evidence that is well corroborated or is being used to prove a minor issue might *not* be sufficient to support admitting the same item of evidence on an issue central to the violation allegation. See *U.S. v Hall, supra*.

Ø **Practice tip:** Counsel for the parolee should *always* make a *Comito* objection when DAPO attempts to introduce hearsay evidence of absent adverse witnesses without a showing of good cause. If the DC accepts DAPO's showing of good cause, counsel should request him or her to state the reasons for the finding on the record. If the good cause showing appears to be insufficient to outweigh the parolee's right to confrontation, counsel should object to the admission of the evidence on confrontation grounds. This will protect the parolee's right to writ review of the confrontation issue.

Weight. In addition to admissibility issues, counsel should consider the reliability of hearsay evidence that the DC proposes to consider. Hearsay that has been admitted because it has met the *U.S. v Comito* balancing test must be weighed like any other evidence in determining whether to find good cause on a given parole violation. The fact that a statement of an adverse witness has been admitted does not necessarily prove any fact. Its weight, if any, is a

separate issue from its admissibility. See *In re Lucero L.* (2000) 22 C4th 1227, 1244, 96 CR2d 56; *People v Maki* (1985) 39 C3d 707, 715, 217 CR 676.

Ø **Note:** When the only evidence offered to support the charges is hearsay, counsel should make a motion to dismiss the charges at the close of the state's case, before putting on a defense, on the ground that hearsay evidence alone is not reliable enough to provide the deputy commissioner with the assurance needed to find that it is more likely than not that the parolee committed the alleged violation.

Admissibility of law enforcement reports. DAPO frequently relies on police or parole officers' reports to prove violations. Such reports should not be deemed automatically admissible. See *Downie v Klincar* (ND Ill 1991) 759 F Supp 425; *U.S. v Bell* (8th Cir 1986) 785 F2d 640, 643. Counsel for the parolee should argue that a police or parole officer's report is admissible only if it meets the balancing test of *U.S. v Comito* (9th Cir 1999) 177 F3d 1166. See *Downie,* 759 F Supp at 428 (police reports based on first-hand observations subject to case-by-case examination for indicia of reliability); *Bell,* 785 F2d at 643 ("[w]hile police reports may be demonstrably reliable evidence of the fact that an arrest was made [citation], they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true"). When a police or parole officer's report contains the hearsay statements of victims or witnesses, its admissibility should be scrutinized even more carefully, since "third-party reports, which are essentially double hearsay, are generally less reliable than eyewitness reports." *Downie,* 759 F Supp at 429. See also *Bell,* 785 F2d at 644; *In re Miller* (2006) 145 CA4th 1228, 1238, 52 CR3d 256; *People v Hernandez* (1997) 55 CA4th 225, 240, 63 CR2d 769 (police reports not admissible under business records exception, because they might be based on observations of victims and witnesses who have no duty to report); *People v Ayers* (2005) 125 CA4th 988, 23 CR3d 242 (hearsay in official report not admissible under exception that makes report itself admissible).

Ø **Practice tip**: When DAPO attempts to introduce a police or a parole officer's report to prove a violation, counsel for the parolee should insist that it first establish good cause for failing to bring in the witness or witnesses for live testimony, object on confrontation grounds (see *Comito*, *supra*), and make the Deputy Commissioner aware that even if he or she believes the report is *admissible* under *Bell* and *Comito,* third party statements are double hearsay and thus even less reliable than if admitted through a police officer who can at least testify to his or her perception of the witness's credibility.

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§47.27 (4) Burden of Proof

The Division of Adult Parole Operations (DAPO) bears the burden of proving the charged parole violation, but unlike criminal charges, which must be proved beyond a reasonable doubt, a parole violation needs to be proved only by a preponderance of the evidence. 15 Cal Code Regs §2000(b)(50). See *People v Rodriguez* (1990) 51 C3d 437, 272 CR 613 (due process permits use of preponderance of evidence as burden of proof in probation revocation proceeding). A party's obligation to sustain the burden of proof requires the production of evidence for that purpose. Charges or written statements of witnesses are not evidence but are merely the materials on which the charges and disposition, if any, are based, and they must be proved in order to sustain a good cause finding. *Parker v City of Fountain Valley* (1981) 127 CA3d 99, 179 CR 351.

Preponderance of the evidence means that one body of evidence has more convincing force than the evidence opposed to it. *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 276 CR 430; 1 Witkin, California Evidence*, Burden of Proof* §35 (4th ed 2000). There can be no "preponderance of elements" (*i.e.,* more elements of the crime or violation proved than not). Under a preponderance burden, every element of a cause of action must be proved by that standard (7 Witkin, California Procedure, *Trial* §305 (4th ed 1996)).

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.28 (5) Privilege Against Self-Incrimination

§47.28 (5) Privilege Against Self-Incrimination

The Fifth Amendment privilege against self-incrimination protects any disclosure that a witness may reasonably believe could be used in a criminal prosecution or that could lead to other evidence that might be so used. "The availability of the privilege does not turn on the type of proceeding in which it is invoked but on the nature of the statement or admission and the exposure which it invites." *In re Gault* (1967) 387 US 1, 49, 18 L Ed 2d 527, 558, 87 S Ct 1428. It can be claimed in any judicial proceeding, criminal or civil (see *Murphy v Waterfront Comm'n* (1964) 378 US 52, 94, 12 L Ed 2d 678, 704, 84 S Ct 1594), and applies in administrative proceedings, such as parole revocation hearings, as well. *Borror v Department of Inv.* (1971) 15 CA3d 531, 542, 92 CR 525.

The privilege against self-incrimination, applicable in parole revocation proceedings, includes both a parolee's right not to be called as a witness against himself or herself and the right not to answer incriminating questions. However, the familiar remedy of excluding evidence obtained in violation of the right to remain silent is generally not available in revocation proceedings. Although a coerced or involuntary statement may be subject to exclusion, there is no bar in BPH proceedings to considering a statement obtained in violation of *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602. *In re Martinez* (1970) 1 C3d 641, 650, 83 CR 382. See also *People v Fuller* (1983) 148 CA3d 257, 262, 210 CR 1, 195 CR 853 (evidence obtained as result of illegal search inadmissible at revocation hearing only if police conduct so egregious as to offend traditions and collective conscience of society or shock the conscience).

Consequently, if a parolee makes an incriminating statement to the agent of record (AOR), it is likely to be admitted into evidence at the hearing and used as the basis for revoking parole, even if it was illegally obtained. Furthermore, the DOM advises agents that when criminal proceedings are probable, *Miranda* warnings must be given but should not be given when only parole violations are alleged, because giving the warnings "may lead to a perceived right to silence which could be detrimental in securing all information." DOM §81030.4. Because it is common for the AOR to interview the parolee before counsel is appointed, by the time revocation counsel is appointed and has an opportunity to speak to the parolee about the importance of not discussing the alleged parole violation with the AOR, the parolee may well have made a statement to the AOR.

> Ø **Practice tip:** Although failure to give *Miranda* warnings does not by itself provide a basis for excluding the parolee's statement, given the AOR's supervisory relationship with the parolee, which affects practically every aspect of the parolee's life (*In re Carabes* (1983) 144 CA3d 927, 931, 193 CR 65) and requires that the parolee report any arrest to the agent (15 Cal Code Regs §2512(a)(4)), counsel might be able to argue that such a statement is involuntary within the meaning of the Fifth Amendment, because the parolee may reasonably have felt coerced into making self-incriminating statements. See *Gagnon v Scarpelli* (1973) 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756 (parole officer's recommendation to revoke parole "surely" compromises his or her role as counselor to parolee); *Ramona R. v Superior Court* (1985) 37 C3d 802, 210 CR 204 (statements by minor in fitness hearing and interview with probation officer cannot be used against her in subsequent criminal proceeding); *People v Gordon* (1978) 84 CA3d 913, 925, 149 CR 91 (parole agent placing hold on defendant to make him submit to lie detector test is coercive, and evidence from test and from interview after test is inadmissible in state court).

It may not be in the parolee's best interest to testify about some matters when a related criminal case has been or may be filed. Although a parolee's testimony at a revocation hearing is inadmissible in a related criminal trial in the prosecution's case-in-chief, it may be admissible for impeachment or rebuttal in a subsequent trial if the parolee's testimony in the criminal proceeding is "so clearly inconsistent" with the testimony at the revocation hearing that the trial court is warranted in revealing to the jury the probability that the probationer has committed perjury at one of the hearings. *People v Coleman* (1975) 13 C3d 867, 889, 120 CR 384; *People v Allen* (1989) 216 CA3d 208, 211, 264 CR 621 (probation revocation cases).

> Ø **Practice tip:** If the parolee does not testify about a matter, it may be difficult or impossible to contest the charges unless another witness is available. Even when counsel believes there is a sound argument that the

evidence introduced by DAPO is insufficient to prove the charges, it is advisable, if possible, to present some evidence supporting that position.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.29 10. Parole Revocation Extension

§47.29 10. Parole Revocation Extension

A parolee who engages in misconduct while being held in custody, whether in a local lockup, a county jail, or a state prison, can be charged with a parole violation for such misconduct. If the conduct occurred while in custody, but before parole was revoked, the misconduct is processed as a new revocation of parole violation. If the parolee has already had parole revoked, the misconduct is processed as a parole extension violation. The difference may be of great consequence. A number of potential parole revocation offenses may result in the parolee's serving up to an additional 1 year in custody, whereas the maximum that can be imposed in extending a parolee who has already been revoked is 180 days. A misbehaving parolee whose parole has already been revoked will be subject to the parole revocation extension process. See 15 Cal Code Regs §2742.

The hearing rights and procedures are similar to those at a parole revocation hearing except that the probable cause hearings, called "REACs" (Revocation Extension Assessment Conferences), are conducted telephonically rather than in person. 15 Cal Code Regs §2742(i). The parolee is assigned counsel and the parolee is given an RTCA or "extension offer." A telephonic PCH (REAC) is scheduled with the parolee represented by counsel. In the telephonic PCH, the deputy commissioner will discuss the case with the parolee and counsel. If the case does not settle at the PCH, an in-person revocation extension hearing is scheduled.

If the violation occurs within 35 days of the parolee's release date, an emergency 35-day hold is placed on the parolee. The emergency order will authorize a hold for up to 35 days, commencing on the date of discovery of the incident charged as a violation. This can result in the parolee's being held beyond the normal release date, even if the charges are dismissed. Policies and procedures agreed upon pursuant to *Valdivia* supersede 15 Cal Code Regs §2742(d).

The charging document that details the alleged prohibited behavior in this situation is generally a "rule violation report" (a term of art in the California Department of Corrections and Rehabilitation (CDCR); see 15 Cal Code Regs §3315), or "CDC-115." The evidence usually consists of testimony by one or more correctional officers, or another inmate, or a confidential source. If the charge involves a prison riot, maps showing where the prisoners were are frequently created and should be in the central file. Ordinarily, everyone accused of fighting or being in a riot is examined by medical staff, and a drawing of each alleged participant with listed injuries is done. If the charge is possession of drugs or alcohol ("pruno"), the deputy commissioner must make sure that the drugs or alcohol are what they are claimed to be, because this behavior is a felony (Pen C §4573.5) and can lead to up to 180 more days in prison as a revocation offense. See Pen C §§4573, 4573.5-4573.6. See also Pen C §3057(c). See Board of Prison Terms Hearing Directive 02/05 (Apr. 10, 2002), requiring lab tests to confirm that a controlled substance is present.

Ø **Practice tip:** Counsel should be alert to violations that occur in a dormitory setting. It is not uncommon for 200 to 400 inmates to be housed in a single facility in which the assigned lockers, bunks, and floor space are accessible to all. Charging the parolee with possession of contraband under these circumstances can be suspect.

Ø **Practice tip:** If the parolee is charged with possession of contraband or any prohibited item found within a secure cell area, counsel should examine how long the parolee has resided in that cell. Questions to consider include the following: Was the cell thoroughly searched by staff before parolee's entrance into the cell? There should be a cell search clearance document, sometimes called a "B" document—Is the item properly chargeable to a "cellie"? If the pruno is fully fermented, was the parolee in the cell long enough to have concocted the mix? Pruno violations are a common occurrence. Counsel should be aware that to be charged with manufacturing or possessing pruno, there must be evidence of a drinkable liquid. It is not uncommon for a charging document (CDC 115) charging possession of pruno to mistake "kicker" for drinkable pruno. "Kicker" is a yeast product generally made by combining fruit with a yeast product, such as bread or potato, tightly wrapped and fermented to create a powerful "quick" yeast, which is then added to the sugar water component. "Kicker" is not drinkable and is only chargeable as contraband, a maximum 30-day extension violation.

The period by which the revocation period may be extended depends on the prisoner's conduct. For each act of

misconduct punishable as a felony, the revocation period may be extended for up to 180 days. Pen C §3057(c). For each act of misconduct punishable as a misdemeanor, the revocation period may be extended for up to 90 days. Pen C §3057(c). For each act of misconduct punishable only as a serious disciplinary infraction (see 15 Cal Code Regs §§3313, 3315), the revocation period may be extended for up to 30 days. Pen C §3057(c). A parolee is subject to up to 12 months of extension during any single period of revocation. Pen C §3057(a). Because some Deputy Commissioners will attempt to incarcerate parolees for longer than 30 or 90 days for nonfelonious behavior, counsel should be prepared to argue that parolees cannot be incarcerated longer than the mandates of Pen C §3057(c).

Ø **Note:** The BPH currently only accepts 115 violations that constitute Division A, B, or C violations. See 15 Cal Code Regs §3323.

The extended period of return to custody may be reduced by credits if the parolee is eligible to earn them. See Pen C §3057(d). But note that if the parolee is found guilty in a 115 hearing, the institution may take his work-time credits. The BPH may then extend the parolee's parole revocation period. This "double jeopardy" is commonly complained of and is perfectly legal. The substantive law pertaining to extension violations is complicated. Counsel should be familiar with Pen C §4502 and related statutes, and be cognizant that CDCR institutions sometimes charge non-crimes as crimes, or charge misdemeanor crimes with punishments appropriate only to felony crimes.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.30 V. PROPOSITION 36 DRUG TREATMENT

§47.30 V. PROPOSITION 36 DRUG TREATMENT

Under Pen C §3063.1 (Proposition 36), parole may not be suspended or revoked for a nonviolent drug possession offense or drug-related violation of parole, unless the parolee:

- Has at some time in the past been convicted of a serious or violent felony listed in Pen C §667.5(c) or §1192.7(c);

  Ø **Note:** A delinquency adjudication does not count as a conviction for this purpose. *People v Westbrook* (2002) 100 CA4th 378, 122 CR2d 514.

- Has committed a non-drug-related misdemeanor or any felony concurrently with their drug offense; or
- Refuses drug treatment as a condition of parole.

  Ø **Note:** Any disqualifying conviction, no matter how remote, makes the parolee ineligible for Proposition 36's parole provisions. There is no "washout" period.

Technical violations of parole disqualify the parolee from Proposition 36 treatment unless the hearing officer makes a specific finding that the conduct was drug related.

Any parolee who is eligible and agrees to participate must be given an individualized drug treatment plan and drug treatment, rather than having parole revoked. If the initial treatment provider notifies the parole authority that the parolee is unamenable to the treatment offered, an alternative program or treatment must be provided unless the treatment provider states that the parolee is unamenable to all drug treatment. Pen C §3063.1(c)(1)-(2).

Although initial treatment services may not exceed 12 months, additional aftercare of up to 6 months may be made a condition of parole. Pen C §3063.1(c)(3).

If a parolee who has been placed in drug treatment under Proposition 36 commits a subsequent offense or violates a parole condition, the BPH may but is not required to revoke parole. Pen C §§3063.1(d)(2)-(3)(A). If the BPH decides to revoke parole, and the new violation is a nonviolent drug possession offense or a drug-related parole violation, the parolee may be continued on Proposition 36 parole (usually with additional, more stringent conditions) unless a preponderance of the evidence establishes the violation and indicates that the parolee is a danger to others. Pen C §3063.1(d)(3)(A). A finding of danger to others requires parole revocation. Pen C §3063.1(d)(3)(A).

Ø **Note:** The judgment enjoining the enforcement of SB 1137 has been affirmed. See *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 1377, 101 CR3d 229. Senate Bill 1137 was signed into law in 2006 and amended the provisions of Proposition 36 to permit, among other things, the incarceration of offenders who relapse during treatment. Counsel and the court should be careful to refer to the pre-amendment versions of Pen C §§1210.1 and 3063.1 because the amended versions still appear "on the books."

If the BPH initiates parole revocation proceedings after a second nonviolent drug possession offense or drug-related parole violation, and if the violation is proved, the parolee is no longer eligible for Proposition 36 parole. Pen C §3063.1(d)(3)(A).

Ø **Practice tip:** Counsel should be aware that the BPH may condition a screening offer or other proposed disposition on the parolee's agreement to sign an unconditional waiver (see §47.21) of his or her rights related to the revocation process and the right to a hearing before being subject to residential drug treatment. Failure to sign a waiver may disqualify the parolee from further Proposition 36 treatment. Also, many counties no longer have Proposition 36 funding and thus cannot provide drug treatment to parolees under Proposition 36. Penal Code §3063.1 remains in effect, however, and does not allow the revocation of parole for certain drug-related offenses. Counsel should urge the BPH, which is generally amenable, to order the parolee to participate in Proposition 36 treatment or a similar program in the community. Counsel for the parolee should make sure that the parolee does not sign a waiver unless it fully and explicitly discloses the consequences of signing.

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VI. RULES GOVERNING RELEASE OF LIFE PRISONERS

§47.31 A. Parole Consideration Hearing

Prisoners serving indeterminate sentences that include the possibility of parole (also called life prisoners or "lifers") are not entitled to release on parole, but they are entitled to *be considered* for parole. *In re Dannenberg* (2005) 34 C4th 1061, 1078, 23 CR3d 417. The Board of Parole Hearings (BPH) is responsible for making this determination at a parole consideration hearing.

A two-person panel, consisting of two commissioners or a commissioner and a deputy commissioner, hears the matter. Pen C §5076.1. Commissioners are appointed by the Governor. Pen C §5075(b).

For a life prisoner, the first life parole consideration hearing takes place 1 year before the minimum eligible parole date. Pen C §§669, 3041(a), 3046, 3049. This date is calculated as follows:

- One year before the minimum term that must be served for the offense; plus
- Whatever amount of time has been lost by the prisoner against the minimum term for the life offense for misconduct in custody; plus
- Any term for determinately sentenced crimes that has been imposed consecutively to the life term less credits earned against this term.

Pen C §3041(a); 15 Cal Code Regs §§2000(b)(66), 2282(b)-(c), 2403(b)-(c), 2423(b).

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§47.32 1. Rights of Prisoner

Life prisoners have the following rights in parole consideration proceedings:

- To receive notice of the week of the hearing at least 1 month before the week during which the hearing will be held. 15 Cal Code Regs §2246.
- At least 10 days before the hearing, the right to review the file which the BPH will examine and have the opportunity to submit a written response to any materials contained therein. Pen C §3041.5(a)(1).
- To be personally present, speak, and ask and answer questions (Pen C §3041.5(a)(2); 15 Cal Code Regs §2247; *In re J.G.* (2008) 159 CA4th 1056, 1067, 72 CR3d 42), provided that prisoners and their attorneys may not ask questions of persons considered victims. Pen C §3041.5(a)(2).

Ø **Note:** Out-of-state prisoner hearings are generally held by telephone. 15 Cal Code Regs §2367(d). However, 15 Cal Code Regs §2367(d) has been held void to the extent it limits an out-of-state prisoner's statutory right to personally appear at a parole consideration hearing pursuant to Pen C §3041.5. *In re J.G.* (2008) 159 CA4th 1056, 1066, 72 CR3d 42.

- To present relevant documents. 15 Cal Code Regs §2249.
- To appear before an impartial hearing panel. 15 Cal Code Regs §2250.
- To have language or communications assistance, if needed. 15 Cal Code Regs §2251; see Govt C §11435.15.
- To be represented by an attorney. Pen C §3041.7; 15 Cal Code Regs §2256(c).
- To have reasonable accommodation for a disability, as defined in 42 USC §12102 (Americans with Disabilities Act). See 15 Cal Code Regs §2251.5.

Ø **Note:** If a reasonable accommodation is denied, the prisoner is entitled to file a grievance to be heard by the board. See 15 Cal Code Regs §2251.6; 15 Cal Code Regs §2251.7.

- To receive a copy of the decision specifying the decision, the information considered, and the reasons for the decision. 15 Cal Code Regs §2255.
- To receive, on request, a copy of the transcript of the hearing. Pen C §3041.5(a)(4). But see *In re Lugo* (2008) 164 CA4th 1522, 1540, 80 CR3d 521 (no statutory deadline within which transcript must be provided).
- If confidential information has affected a decision, to be notified of reports containing confidential information on which the panel relied. 15 Cal Code Regs §2235.
- To respond in writing to any material in his or her file. 15 Cal Code Regs §2247.
- When previously denied parole, to have a commissioner who was on the panel that previously considered parole, if feasible, be a member of the panel at the following parole consideration hearing. Pen C §3041. However, this requirement is rarely adhered to due to the logistical limitations associated with scheduling parole suitability hearings.

Additionally, life prisoners may request a waiver before the hearing for any reason. Waivers delay the hearing for 1, 2, 3, 4, or 5 years. The prisoner gives up his or her rights under Pen C §§3041 and 3041.5 during the time period of the waiver. 15 Cal Code Regs §2253(b). If the request is made at least 45 days before the scheduled hearing date, it is presumed valid. 15 Cal Code Regs §2253(b)(2). Requests made within 45 days of the hearing are presumed invalid. To overcome the presumption of invalidity, the prisoner must show good cause and that the reasons for the waiver could not have been known to the prisoner 45 days before the hearing. 15 Cal Code Regs §2253(b)(3).

The prisoner may also stipulate to unsuitability for 3, 5, 7, 10, or 15 years in accordance with the denial periods mandated by Pen C §3041.5(b). The BPH may either accept or reject the request to stipulate based on the reasonableness of the request. 15 Cal Code Regs §2253(c).

Postponements are only valid under limited circumstances. 15 Cal Code Regs §2253(d). Postponements occur when the BPH does not have a panel available; when necessary reports, documents, or accommodations are either not

completed or untimely; and when exigent circumstances arise such as emergencies, prison lockdowns, or illness of hearing participants.

Other than reasons attributable to the state, the BPH will grant a prisoner's request to postpone a hearing when the inmate shows good cause, which is defined as the excused inability to obtain essential documents or information despite a diligent effort, and only if the prisoner did not and could not have known of the need before making the request. 15 Cal Code Regs §2253(d).

A continuance of an ongoing hearing requires good cause that was unknown before the commencement of the hearing. 15 Cal Code Regs §2253(e).

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§47.33 2. Rights of Victim

Right to be notified of hearing. The victim of any crime committed by the prisoner may request the BPH to notify him or her of any parole suitability hearing. If the victim is deceased, the victim's next of kin may request notification of the hearing. Pen C §3043(a). The notice must be sent at least 90 days before the hearing. Pen C §3043(a). Additionally, the Board must confirm the date, time, and place at least 14 days before the scheduled hearing. Pen C §3043.

Right to appear at hearing. The victim, next of kin, members of the victim's family, and two designated representatives of the victim or the victim's next of kin may appear personally or by counsel and adequately and reasonably express their views about the crimes, the person responsible for the crimes, and the prisoner's suitability for parole. Pen C §3043(b). A representative must be designated in writing before the particular hearing, may speak even when the victim or next of kin speak, and may comment in the same manner as victims and next of kin. Pen C §3043(b)-(d). The BPH must consider the entire and uninterrupted statements of victims, next of kin, family members, and representatives in deciding whether to release the prisoner on parole. Pen C §3043(d).

Evidence designated confidential (see 15 Cal Code Regs §2235) does not have to be produced. 15 Cal Code Regs §2666.

Right to submit recorded statement in lieu of appearance. In lieu of a personal appearance, the victim, next of kin, family members, designated representatives, or household member of the victim or next of kin may submit a written, audiotaped, or videotaped statement. Pen C §3043.2(a)(1)-(2). The board must consider any statement filed before it makes its decision. Pen C §3043.2(a)(3).

The victim, the victim's representative or next of kin, or the prosecutor, when representing the views of the victim, the victim's family, or the next of kin, has the right to speak last. Pen C §3043.6. However, this right is subject to the power of the person presiding at the hearing to take whatever steps he or she considers appropriate to make sure that only accurate and relevant statements are considered in determining parole. Pen C §3043.6. See also 15 Cal Code Regs 2030(d)(1). Such steps can include permitting the prisoner or his or her attorney to rebut inaccurate statements. Pen C §3043.6.

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3. Attorney Preparation

a. Prisoner's Counsel

§47.34 (1) Advance Preparation

The prisoner's counsel should be familiar with the statutes and regulations governing parole suitability hearings for life prisoners. See Pen C §§3041-3046, 5075-5076.3; 15 Cal Code Regs §§2268-2329, 2400-2439.1.

Counsel should also be familiar with the concepts in the following cases:

- *Greenholtz v Inmates of Neb. Penal & Correctional Complex* (1979) 442 US 1, 7, 60 L Ed 2d 668, 675, 99 S Ct 2100, and *Board of Pardons v Allen* (1987) 482 US 369, 376, 96 L Ed 2d 303, 311, 107 S Ct 2415. These two cases dealt with statutes that, like Pen C §3041, governed parole decisions for inmates eligible for, but not entitled to, parole. The Court held that language very similar to the language of Pen C §3041(a) imposed a mandatory duty on the state parole authority to release prisoners on parole except in certain specified circumstances, and that consequently the prisoners had a cognizable liberty interest in release on parole protected by due process.
- *McQuillion v Duncan* (9th Cir 2002) 306 F3d 895. The Ninth Circuit held that because California's parole scheme closely resembles those interpreted in *Greenholtz* and *Allen,* a California state prisoner serving a life sentence has a cognizable liberty interest in release on parole protected by due process.
- *In re Rosenkrantz* (2002) 29 C4th 616, 128 CR2d 104. The California Supreme Court noted that statutes and regulations governing indeterminate life prisoners, which require the Board "normally" to set a parole date in a manner that provides for uniform terms for crimes of similar gravity, create an expectation in parole giving rise to a protected liberty interest. Consequently, the factual basis of a Board decision granting or denying parole is subject to limited judicial review under the some-evidence standard to ensure the Board's decision comports with the requirements of due process. Further, because the Governor's statutory authority to review Board decisions is limited to an evaluation of the same factors the Board considered, the Governor's decision is likewise subject to limited judicial review to determine whether it is supported by some evidence relevant to those factors. Applying the extremely deferential "some evidence" standard to the Governor's decision to reverse the Board's grant of parole to Rosenkrantz, the court opined that the nature of the prisoner's offense alone could constitute a sufficient basis for denying parole. The court cautioned, however, that in some circumstances, a denial of parole on the basis of the committing offense alone might rise to the level of a due process violation when no circumstances of the offense could reasonably be considered more aggravated than the minimum necessary to sustain a conviction for that offense. Denial of parole under those circumstances would be inconsistent with the statutory requirement that a parole date normally be set in a manner that will provide for uniform terms for offenses of similar gravity and magnitude.
- *In re Dannenberg* (2005) 34 C4th 1061, 23 CR3d 417. The supreme court held that the public safety provision of Pen C §3041(b) (which states the BPH shall set a parole date unless the gravity of the offense is such that a concern for public safety warrants a longer period of incarceration) trumps any expectancy an indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders. Furthermore, there is nothing about the statutory scheme that prevents the BPH from first determining suitability and denying parole when the offender's criminality presents a continuing public danger. Having determined that a particular inmate is unsuitable for parole, the BPH is not required to engage in comparative analysis. Reviewing the Board's decision in *Dannenberg,* the court concluded that there was some evidence to support the determination that the circumstances of Dannenberg's crime were especially egregious so that the crime could be used to find him unsuitable to receive a parole date.
- *Sass v California Board of Prison Terms* (2006) 461 F3d 1123. The Ninth Circuit held that a life prisoner has a constitutionally protected liberty interest in parole. Although the court found no infringement of a protected liberty

interest in this case, the court reaffirmed its holding in *Biggs v Terhune* (9th Cir 2003) 334 F3d 910 that continued reliance on unchanging factors such as the commitment offense and preincarceration conduct runs contrary to the rehabilitative goals of the prison system and could result in a due process violation.

- *In re Lawrence* (2008) 44 C4th 1181, 82 CR3d 169. The court recognized that its decisions in *Rosenkrantz* and *Dannenberg* had resulted in a split among courts in the application of the deferential some-evidence standard of review. Some courts were reviewing parole decisions to determine whether some evidence supported the factual determination that the commitment offense was particularly egregious, while other courts were evaluating whether some evidence supported the decision that the inmate continued to pose a threat to public safety. The court held that because the core statutory determination of the Board and the Governor is whether the inmate poses a current threat to public safety, the standard of review is "properly characterized as" whether some evidence supports *the decision* the inmate is unsuitable for parole because he or she is *currently* dangerous and not merely whether some evidence confirms the existence of certain factual findings. Further, to the extent *Rosenkrantz* and *Dannenberg* have been read to imply that a particularly egregious commitment offense *always* will provide the requisite modicum of evidence to support the denial of parole, the assumption is inconsistent with the mandate that the Board and the Governor consider *all* relevant statutory factors when evaluating an inmate's suitability for parole and with the inmate's due process liberty interest in parole. The court noted that the immutable circumstances of the commitment offense will not provide some evidence inevitably supporting a decision that an inmate remains a threat to public safety when evidence of the inmate's rehabilitation and suitability for parole is overwhelming and the offense is both temporally remote and mitigated by circumstances indicating the conduct is not likely to recur.
- *In re Shaputis* (2008) 44 C4th 1241, 82 CR3d 213. In this companion case to *Lawrence,* the court clarified how courts should apply the some-evidence standard of review to evaluate the evidentiary value of the gravity of the commitment offense. The court stated that the determination whether an inmate poses a current threat to public safety does not depend on whether the commitment offense is more or less egregious than another or whether the circumstances of the offense exhibit viciousness above the minimum elements necessary for conviction of the offense. The relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after the commission of the offense. The inquiry is an individualized one, taking into account the passage of time and changes in the inmate's psychological and mental attitude.

Ø **Note:** For cases applying *Lawrence* and *Shaputis,* see, *e.g., In re Reed* (2009) 171 CA4th 1071, 1083, 90 CR3d 303 (failure to remain discipline-free, given Board's specific order that he do so, was some evidence that inmate was unsuitable for parole); *In re Palermo* (2009) 171 CA4th 1096, 1112, 90 CR3d 101 (given nature of crime, passage of time, inmate's rehabilitative efforts, positive psychological reports, and job prospects, no evidence supported Board's finding that he posed threat to public safety).

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.35 (2) Duties of Counsel

§47.35 (2) Duties of Counsel

The prisoner's counsel should meet with the prisoner as soon as possible after counsel is appointed. See 15 Cal Code Regs §2256. Counsel should be aware of the 45-day deadline to request a waiver with the presumption of validity (that shifts to a presumption of invalidity after the 45-day deadline) when scheduling the appointment. 15 Cal Code Regs §2253(b)(2)-(3).

Before the interview, counsel should review the Prisoner's central file ("C-file") and "board packet," obtained from the institution's "Lifer Desk," which contains most of the pertinent documentation including the probation officer's report, disciplinary violations, psychological reports, and "Board reports" (a report prepared by the California Department of Corrections and Rehabilitation (CDCR) for each life parole consideration hearing). At the first interview, counsel should obtain any pertinent information concerning the prisoner, such as recent "chronos" (informational notes about prisoners) that have not yet been placed in the prisoner's C-file, letters of support for parole, or contact information to obtain letters of support, and the transcript from the last parole suitability hearing. Counsel should review pertinent documents in the prisoner's C-file to ensure that there are no discrepancies, and review additional relevant documents excluded from the Prisoner board packet, such as the details of a particular disciplinary action (known as a "115") against the prisoner.

Ø **Note:** If this is not the first parole consideration hearing, counsel should review transcripts of prior hearings to learn what the prisoner has previously said about the facts of the life crime. See 15 Cal Code Regs §2247.

In determining the prisoner's suitability for parole, the panel may consider all "relevant, reliable information." 15 Cal Code Regs §2402(b). In addition, 15 Cal Code Regs §2402(c)-(d) lists specific factors the panel may consider in deciding whether a prisoner is suitable for parole. It should be noted, however, that these factors are intended only as general guidelines and that the significance of the presence or absence of any circumstance in a particular case is "left to the judgment of the panel." 15 Cal Code Regs §2402(c)-(d). Counsel should be aware of information that the panel will generally view as contraindications of parole suitability, such as the following:

- Prison gang membership or affiliation;
- An "R" suffix, indicating conviction for one or more serious sex offenses;
- One or more recent disciplinaries (CDC-115s, 15 Cal Code Regs §§3314-3315) or one or more administrative disciplinaries (CDC-128As, 15 Cal Code Regs §3312(a)(2)) for serious misconduct;
- Any CDC-115s, regardless of timing, that discipline the prisoner for violence or for drug or alcohol use;
- Comments in the current or most recent psychiatric or psychological evaluation predicting or indicating uncertainty about possible negative future behavior by the prisoner;

Ø **Note:** For the prisoner to have a meaningful opportunity for parole, the current psychological report, and probably the last several reports, should indicate, without condition, that the prisoner poses a low degree of threat for future violence. The panel will pay particular attention to the clinician's opinion about the prisoner's level of insight into the causative factors of his or her criminality. A current psychological diagnosis on Axis I or Axis II of the DMS IV, unless "in remission," or past psychiatric evaluations with negative comments or diagnoses that are not resolved, will seriously jeopardize the prisoner's possibility of receiving a parole date.

- If drugs or alcohol had any role in the commitment offense or in the prisoner's preprison lifestyle, failure to demonstrate ongoing participation in a program addressing addiction over a period of many years and current knowledge of the tenets of that program;

Ø **Note:** The prisoner's stated belief that he or she no longer desires drugs and that drugs are no longer an issue indicates to the BPH that the prisoner does not have a realistic prevention plan for drug or alcohol relapse. A prisoner without such a plan would pose a greater risk to the public and therefore probably would not be found suitable for parole.

- Failure to develop viable and recent parole plans, including a job offer and an offer of residence in the county to which he or she will be paroled or the country to which he or she will be deported. See *In re Lawrence* (2008) 44 C4th 1181, 1188, 82 CR3d 169. If deportation is a near certainty, the BPH cannot require the prisoner to have parole plans in California. See *In re Andrade* (2006) 141 CA4th 807, 46 CR3d 317. On deportation as the result of a criminal conviction, see chap 52.

The lack of realistic parole plans may be the biggest stumbling block in the way of parole for an otherwise suitable life prisoner. It is therefore very important for the prisoner's attorney to document the efforts the prisoner has made to formulate realistic parole plans and develop marketable job skills and to present evidence of these efforts to the hearing panel. See 15 Cal Code Regs §2402(d)(8). The best evidence of a realistic plan for release is undoubtedly an offer of a residence when released and a documentable job offer, but these are not always obtainable even when the prisoner appears otherwise to be a good candidate for release.

If it appears that the lack of a job offer will be an important factor in the denial of a parole date, counsel should make sure the record contains evidence showing that the prisoner "has developed marketable skills that can be put to use upon release" and should argue that the development of such skills demonstrates that the prisoner has an adequate parole plan within the meaning of 15 Cal Code Regs §2402(d)(8). In an appropriate case, counsel may also want to argue that the lack of a job offer does not constitute "some evidence" of unsuitability within the meaning of *In re Lawrence* (2008) 44 C4th 1181, 82 CR3d 169. In addition, denying parole to prisoners who lack a job offer may result disproportionately in the denial of parole to prisoners who have no families or whose families are poor. Prisoners whose families have greater social standing or wealth can usually find someone to provide employment opportunities.

The existence of *any* of the factors listed in this section could result in a finding that the prisoner is unsuitable for parole. Counsel will not be able to exclude negative information in the prisoner's central file from being considered by the hearing panel, so it is very important for counsel to find out from the prisoner whether controverting documentary evidence or responsive material is available. It is crucial to submit such evidence, or have the prisoner place it in the file. It is better practice to make sure that the panel is aware of negative factors, especially when the prisoner can discuss the negativity in a reasonable manner. This gives the panel the opportunity to make a finding of suitability in spite of negative factors by reasoning that the positive factors tending to show suitability outweigh the negative circumstances, making the person a reasonable candidate for parole. Failing to take negative factors into account is a ground for rescission of a parole date as improvidently given. See §§47.49-47.50. These documents may be submitted at the hearing (see 15 Cal Code Regs §§2247, 2249), but it is more courteous, and better practice, to provide them before the hearing.

In determining suitability, the hearing panel may consider other crimes that resulted in convictions, but these must be reliably documented. 15 Cal Code Regs §§2281(b), 2402(b), 2422(b), 2432(b).

Ø **Practice tip:** Counsel should argue that *arrest* reports do not constitute reliable documentation of the prisoner's involvement in "other criminal misconduct" under 15 Cal Code Regs §2402(b). On the reliability issues involved in arrest reports, see *U.S. v Bell* (8th Cir 1986) 785 F2d 640, 644.

Conduct that did not result in a conviction or a dismissal with a *Harvey* waiver is irrelevant unless the prisoner has admitted the illegal conduct or other evidence shows that the prisoner engaged in the conduct. See 15 Cal Code Regs §2000(b)(63) (material defined), (91) (relevancy defined). Despite this, BPH reports routinely include every arrest and charge on the prisoner's rap sheet, regardless of whether prosecuted or dismissed, and it is a common practice of hearing panels to ask the prisoner about dismissed or uncharged conduct. Counsel for the prisoner should object to these questions. If the panel persists in asking such questions, counsel should instruct the prisoner not to answer.

Counsel should find out about the prisoner's in-prison accomplishments (completion of programs and courses; obtaining a general education, high school, or college degree; vocational training; and attendance at self-help groups or programs addressing addiction). Counsel should make sure that documentation on these accomplishments is in the file or available at the hearing. If the prisoner's commitment offense or preprison lifestyle involved drugs or alcohol, the panel will want to know the extent of the prisoner's in-prison attendance at, and knowledge of the tenets of, drug or alcohol rehabilitation programs. It is advisable for the prisoner to have support on the street such as an AA or an NA sponsor. Counsel should present that information to the panel.

Ø **Note:** If the prisoner participates in Alcoholics Anonymous (AA) or Narcotics Anonymous (NA), expect the

hearing panel to ask about the prisoner's knowledge of the 12 steps.

The Division of Adult Parole Operations (DAPO) has assistance programs for parolees. See Pen C §5060. However, parole will not commit any resources before release and the prisoner must have viable and realistic plans at the hearing. Requesting help of DAPO is not a realistic option and will only cause frustration for both the prisoner and the panel.

In most cases, the negative indications for suitability discussed in this section foreclose any realistic possibility that the panel will find the prisoner suitable for parole. In that situation, counsel may decide to advise the prisoner to waive the hearing or stipulate to unsuitability for some period of time. It is advisable to waive the hearing, when possible, rather than stipulating to unsuitability, because a waiver does not require the prisoner to state that he or she is unsuitable for parole. When stipulating is unavoidable, stress to the prisoner that if he or she accomplishes the goals that he or she has set out in the request to stipulate to unsuitability, it will increase his or her future credibility with the BPH and may even be looked at as a turning point in the prisoner's rehabilitation.

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§47.36 b. District Attorney Representative

A representative of the district attorney's office from the county of conviction must be invited to attend and participate in the hearing to represent the People's interests. That person should be, but does not have to be, an attorney. Pen C §3041.7. See also Pen C §3042; 15 Cal Code Regs §2030(b) (notice of hearing must be sent to district attorney's office at least 30 days before hearing). Before the hearing, the CDCR will send an information packet, commonly referred to as the "board packet," to the prisoner's counsel, the district attorney, and the BPH. This packet should contain excerpts from the prisoner's central file (C-file), including Board reports, psychological reports, letters of support, responses to Pen C §§3042 and 3043 notices, records of any prior hearings, and hearing notification documentation.

Even if the attorney assigned to represent the prosecutor's office does not intend to make a personal appearance at the parole hearing, he or she should send a letter to the BPH stating the position of the prosecution and the reasons for it, especially if the office opposes parole. A great variety of materials may be submitted to the BPH at the hearing, including important sections of the trial transcript, police reports, photographs, and autopsy protocols.

In addition, reports and other documentation on previous crimes committed by the prisoner may be submitted. This material must be submitted 10 days before the Monday preceding the hearing. See 15 Cal Code Regs §2030(c).

It is not uncommon and is accepted practice for a representative from the district attorney's office to appear at the hearing via video teleconferencing.

> Ø **Warning:** Counsel should be particularly careful to observe the 10-day rule on submission of supplementary materials. Expect an objection to the panel considering any materials submitted after the 10 days in violation of Pen C §3041.5(a), and expect that objection to be sustained. Occasionally, material presented within the 10 days will be admitted if the same office had submitted similar materials opposing parole in the past.

As soon as is feasible, the CDCR will forward copies of new documents submitted by the district attorney's representative to the prisoner and/or the prisoner's counsel. See 15 Cal Code Regs §2030(c). The hearing panel must review all materials submitted if relevant and reliable. Pen C §3043.5; 15 Cal Code Regs §2042(b). The prisoner's attorney must be notified if the prosecutor will attend. 15 Cal Code Regs §2030(b).

> Ø **Note:** The attorney representing the district attorney's office may want to contact the victim or the next of kin of a deceased victim and inform (or remind) him or her of the right to attend the hearing. Pen C §3043. BPH hearing panels are occasionally intimidated by the appearance of victims or victims' representatives and are sometimes disinclined to grant parole because of their statements. On victim's rights at a parole consideration hearing, see also Pen C §§3043.2, 3043.25, 3043.5(b).

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§47.37 4. Additional Individuals Who May Attend or Submit Information

Media representatives may attend a parole consideration hearing with the BPH's permission, but they may not participate in the hearing. 15 Cal Code Regs §§2031-2032.

Observers for educational or informational purposes are allowed with prior approval, but may not participate in the hearing. 15 Cal Code Regs §2029.1.

In addition, anyone interested in the grant or denial of parole may submit, as part of the record, a statement of that person's views supporting or opposing parole. All such statements must be considered by the hearing panel. Pen C §3043.5.

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§47.38 5. Hearing Procedures

A panel of the BPH determining a life prisoner's suitability for parole is an administrative body. It follows procedures set out in Title 15 of the California Code of Regulations. Criteria for determining suitability for parole are set out in 15 Cal Code Reg §§2281 and 2402, but the BPH is vested with very broad discretion in considering these factors and determining what weight to give them. *In re Lawrence* (2008) 44 C4th 1181, 1204, 82 CR3d 169; *In re Dannenberg* (2005) 34 C4th 1061, 23 CR3d 417; *In re Fain* (1976) 65 CA3d 376, 389, 135 CR 543. See *In re Cerny* (2009) 178 CA4th 1303, 1315, 101 CR3d 200. "The exercise of this discretion involves the deliberate assessment of a wide array of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and of the public." *In re Fain, supra*. Procedural rules, including the rules of evidence, are somewhat relaxed. The BPH is "not required to proceed with the formality required of the courts." *In re Powell* (1988) 45 C3d 894, 904, 248 CR 431, quoting from *In re Stanton* (1915) 169 C 607, 609, 147 P 264.

Hearings are held in a designated hearing room. The prisoner is brought into the room and sits with counsel across from the hearing panel. The prisoner is placed under oath.

The hearing usually follows a chronological format, and proceeds from past, to present, to future. The "past" addresses the commitment offense, prior criminal history, and prior social, family, educational, and job history. See §47.40. The "present" addresses institutional adjustment, including psychological status. See §47.41. The "future" addresses parole plans and plans for the future if a date is given. See §47.42.

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§47.39 a. Preliminary Matters

The presiding commissioner first puts the case factors on the record. The case factors are the commitment offense and other noncontrolling offenses, the case numbers, the county of commitment, and the prisoner's name and CDCR number. All parties then identify themselves for the record, spelling their last names. The commissioner then goes over the prisoner's rights under *Armstrong v Davis* (9th Cir 2001) 275 F3d 849 (required accommodations for disabled prisoners under Americans with Disabilities Act). Finally, the commissioner reviews the prisoner's rights, and rules on any objections made by the prisoner through counsel. At the beginning of the hearing, counsel may challenge the impartiality of the panel or a panel member to the hearing panel itself; the prisoner has the burden of proving that the panel or any member is not impartial. See 15 Cal Code Regs §2250; *O'Bremski v Maass* (9th Cir 1990) 915 F2d 418, 422.

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§47.40 b. Precommitment Matters

Commitment offense. After preliminary matters are taken care of, the presiding commissioner puts on the record the facts of the commitment offense, using the facts found in an appellate court opinion or, if no appellate decision is available, the facts stated in the probation officer's report. The panel takes as true the appellate court's factual findings or, if there are none, the statement of facts in the probation officer's report. The prisoner may refuse to admit guilt or to discuss the facts of the crime; any refusal may not be held against the prisoner. Pen C §5011(b); 15 Cal Code Regs §2236.

Ø **Warning:** Experienced practitioners disagree on whether it is advisable for the inmate to exercise his or her right not to admit guilt of a crime of which he or she was convicted. Some practitioners believe that prisoners who fail to discuss their culpability in the commitment offense have virtually no chance of being found suitable for parole. Other practitioners believe that the prisoner has no obligation to discuss the crime, and doing so can only create further questioning by the panel which will ultimately be used to deny parole. However, because the BPH has almost limitless discretion in determining a life prisoner's suitability for parole (see *In re Dannenberg* (2005) 34 C4th 1061, 23 CR3d 417), it would be all but impossible to establish that a finding of unsuitability was improperly based on the prisoner's decision to exercise his or her rights under Pen C §5011(b).

A prisoner who does agree to discuss the facts of the crime should be prepared to be cross-examined about the life crime by the hearing panel and the district attorney's representative, if one is present. Whether or not the prisoner chooses to discuss the facts of the crime, the panel must attempt to determine the extent of the prisoner's personal culpability. 15 Cal Code Regs §2236.

Some attorneys advise the client not to discuss the commitment offense if other deficiencies indicate that the granting of a date is unlikely. There are two reasons. First, prisoner testimony about the offense or related matters will be used by subsequent panels to impeach the prisoner and may cause irreparable harm. Prisoner testimony is particularly dangerous at an initial hearing, because the prisoner is unfamiliar with the procedure, may be particularly stressed, and is very unlikely to receive a date in any event. Testimony in such circumstances cannot benefit the prisoner in future hearings, and it may do a great deal of harm. Second, as a rule, hearing panels and district attorney representatives view any sanitizing of the facts or refusal to accept complete guilt as failing to come to grips with the commitment offense and as lacking remorse and insight, making the prisoner an unsuitable candidate for parole.

If other factors suggest that there is a realistic chance of getting a parole date, counsel should consider advising the prisoner to discuss the commitment offense. It is unrealistic for a life prisoner to expect to obtain parole unless he or she can discuss that offense in detail, although parole has been granted in circumstances where the prisoner discussed the offense at previous hearings, but not at the hearing where the BPH granted parole. This is the appropriate time for the prisoner to express remorse for his or her actions and demonstrate understanding of the factors that led to the commission of the offense and its ramifications. Counsel should advise the prisoner that it is essential to be unflinchingly self-critical in any discussions of his or her criminal past and the circumstances involving the commitment offense. The prisoner should be counseled to use direct and honest language and avoid words or phrases that suggest a sanitizing of the past or shifting the blame to a codefendant or the victim. Any failure to admit established elements of the crime will be seen by the district attorney's representative, and sometimes the panel, as a failure to come to grips with the commitment offense and as negating any expression of remorse.

Prior convictions and social history. The panel then considers prior convictions and reliably documented criminal behavior that did not result in a conviction. 15 Cal Code Regs §§2281, 2402(b). Counsel should argue that arrest reports are not reliable enough to support a finding of unsuitability. See 15 Cal Code Regs §2404(b). On the reliability issues involved in arrest reports, see *U.S. v Bell* (8th Cir 1986) 785 F2d 640, 644.

Finally, the panel considers the prisoner's social history, including, but not limited to, family background, relationship with family members, education, military service, drug or alcohol abuse, and psychological issues.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/§47.41 c. Institutional Behavior

§47.41 c. Institutional Behavior

The second substantive stage of the hearing focuses on institutional behavior or adjustment. See 15 Cal Code Regs §§2281(c)(6), 2281(d)(9) (life prisoners), 2402(c)(6), 2402(d)(9) (prisoners convicted of murder). Ordinarily, the second commissioner, usually a deputy commissioner, conducts this part of the hearing with the prisoner's C-file as a reference.

The panel presumes that the prisoner's conduct in prison reflects rehabilitation (or its lack) and maturation. Thus, in-prison misconduct presents a serious problem. Specifically, the panel looks at the prisoner's disciplinary history, participation in self-help and therapy groups (*e.g.,* programs addressing addiction, victim awareness groups, prisoner-youth prevention groups, anger management, stress reduction), educational and vocational upgrading, performance in work assignments, current psychological and board reports, laudatory "chronos" (informational notes about prisoners), and any other relevant information about the prisoner's incarceration. Remorse and insight may also be issues.

The institutional adjustment portion of the hearing ordinarily addresses five areas ("compliance areas") in which the prisoner must demonstrate progress in order to obtain a parole date: education, vocational training, self-help, psychological reports, and disciplinary history.

Ø **Note:** A sixth mandatory compliance area, "parole plans," is addressed in the third phase of the suitability hearing.

Education. A prisoner must obtain at least a high school equivalency (either a GED or a high school diploma is sufficient) if he or she is capable of doing so. Additional higher education is viewed positively, but is not a threshold requirement.

Vocational training. The prisoner must generally complete a vocational training program within an institution. See 15 Cal Code Regs §§2281(d)(8) (life crimes other than murder), 2402(d)(8) (murder). In other words, during his or her time in the custody of the California Department of Corrections and Rehabilitation (CDCR) the prisoner must complete training in a recognized trade, *e.g.*, mill and cabinet making, refrigeration, auto body, office services, computer technology. If the prisoner was an experienced professional or tradesperson before the commitment offense, the requirement may be waived. In addition, some prisoners of advanced age who are not likely to obtain employment on release and who can indicate prospective income from Social Security benefits may have the requirement waived. In addition, one or more job offers from relatives with offers to train the prisoner may suffice in individual cases. Multiple vocations are regarded positively. Information on vocational and self-help achievements is found under the "Miscellaneous" section of the prisoner package.

Self-help. Prisoners are expected to avail themselves of all available self-help programs. See 15 Cal Code Regs §§2281(d)(9) (life crimes other than murder), 2402(d)(9) (murder). Given the general unavailability of individual or group psychotherapy, it is a common expectation for prisoners to attend rehabilitative group programs. The most common groups are Alcoholics or Narcotics Anonymous (AA or NA), but there are also groups that deal with anger and stress management, violence prevention, and youth diversion, to name a few. The availability of such programs varies from institution to institution.

During the parole suitability hearing, the prisoner should expect to be questioned about his or her understanding of the basic tenets of the programs and how he or she has incorporated these principles into daily life. If the prisoner's life offense involved drugs or alcohol, BPH expects the prisoner to participate in substance abuse prevention counseling and to have concrete plans for substance abuse counseling in the community if paroled. Strong parole candidates have information about programs in their local communities, and many already have AA or NA sponsors, or other support systems, available to them outside the prison system.

Ø **Note:** If institutional programs are limited, or if there are specific issues such as domestic violence in the life prisoner's past and no groups in the prison to address the issue, the lifer should seek counseling materials from the community and prepare documentation to provide to the BPH in the form of a report that outlines the materials studied, including the basic principles presented in the materials and their effect on the prisoner.

Psychological reports. Hearing panels want to know what, if any, psychological issues were involved in causing the commitment offense; what, if anything, is currently psychologically wrong with, troubling about, or unknown about the prisoner (such as the likelihood and effect of returning to drugs or alcohol if either played a role in the prisoner's commitment offense or precommitment lifestyle); and how dangerous he or she is—meaning what is the likelihood that the prisoner will resort to future criminality? See 15 Cal Code Regs §§2281(c)(5) (life crimes other than murder), 2402(c)(5) (murder). The latter is expressed as the clinician's opinion of the prisoner's risks for future violence. A prisoner who is not found to have a low risk of future dangerousness is unlikely to be paroled.

Historically, psychological reports varied greatly in quality and depth and frequent complaints were heard by hearing panels regarding the quality of reports made by prison psychologists, which frequently fail to recognize or resolve problems or issues identified in previous reports or in earlier psychological testing. In 2007, the Forensic Assessment Division (FAD) of the BPH took responsibility for the psychological reports. The BPH issued a guideline on January 1, 2009, for psychological reports that limits the scope of psychological reports to the clinician's opinion of future violence potential, that requires the clinician to use specific assessment tools to evaluate the prisoner, and that does not allow panels to order clinicians to address issues specific to the prisoner such as likelihood of relapse to drugs or level of remorse.

Prisoners who disagree with the clinician's report will have the opportunity during the hearing to present evidence that contradicts the psychological report as well as an opinion as to their own psychological state. Inmates can present independent evaluations, however a report made by an outside psychiatrist or psychologist is likely to be regarded with suspicion.

Disciplinary history. The prisoner must attempt to remain discipline-free for his or her entire period of incarceration. See 15 Cal Code Regs §§2281(d)(9) (life crimes other than murder), 2402(d)(9) (murder). At the very minimum, the prisoner should be discipline-free for at least the previous 5 years before the suitability hearing, and possibly longer, depending on the nature, frequency, and seriousness of previous disciplinaries received.

Although classification scores themselves are not considered at the hearing, the prisoner should have a classification score of less than 51 points (level-three prison custody or less).

> Ø **Note:** Depending on several CDCR institutional factors, a prisoner can reduce his or her classification score by only 4, 6, or 8 points each year. A single serious 115 can add 15 or more points to the classification score. A prisoner with a poor disciplinary history can accumulate a classification score of as many as 300 points after 20 years in prison. Although it is acknowledged that the point system is a CDCR function and not specifically a BPH parole consideration, it is nevertheless common knowledge that a level-four classification does not bode well for a finding of suitability.

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§47.42 d. Parole Plans

After institutional adjustment is considered, the panel considers the prisoner's plan for residence and support after release. See 15 Cal Code Regs §§2281(d)(8) (life crimes other than murder), 2402(d)(8) (murder). Ordinarily, prisoners are paroled to the county in which they resided at the time of the commitment offense, but the prisoner may be paroled to another county if it is in the prisoner's or the public's best interest. Pen C §3003(a)-(b).

Also, under the Interstate Compact for Adult Offender Supervision (ICAOS) (Pen C §11180), California can request transfer of a paroling offender to another compact state up to 120 days before the planned prison release date (ICAOS Rule 3.105(a)). See http://www.interstatecompact.org. Generally, out-of-state transfers occur after the inmate has been granted parole. Thus, if the only support is outside California, then the inmate should find a transitional living arrangement such as a half-way house.

The prisoner should always submit a plan for parole within California. Also, if the prisoner has out-of-state parole support, the prisoner should submit multiple parole plans. The prisoner should also obtain and submit information about the viability of an out-of-state transfer through the interstate compact agreement. It is presumed that the prisoner will be paroled to the county of last legal residence (Pen C §3000(a)), which is usually the committing county. However, the BPH can parole the prisoner to the county where he or she is most likely to succeed on parole. Pen C §3000(b). The prisoner should submit both residence and employment plans for any jurisdictions to which the prisoner seeks to be paroled.

Prisoners with immigration holds should first determine whether or not they are certain to be deported. If deportation is certain, the prisoner should submit parole plans for the country of deportation. *In re Andrade* (2006) 141 CA4th 807, 46 CR3d 317. If there is a question whether the prisoner will be deported, he or she should develop parole plans both in California and in the country of deportation.

The parole plan should include an offer of residential placement and a job offer. These offers should be in the same geographic area, and if possible, within commuting distance of one another. Although the regulations require "marketable skills," the strongest candidates will have job offers. 15 Cal Code Regs §§2281(d)(8), 2402(d)(8).

The commissioner usually goes over the prisoner's support letters, making them part of the record, and sometimes discusses the letters with the prisoner. During this section of the hearing, the prisoner should also be prepared to discuss his or her intentions about continuing in self-help or therapy groups (*e.g.,* AA/NA, counseling, church) on release, and should demonstrate knowledge of specific programs available in the community to which the prisoner expects to be released.

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§47.43 e. Concluding Matters

Penal Code §3042 letters. After presenting evidence on the offense and other precommitment factors, the prisoner's prison record, and future plans, the presiding commissioner goes over letters from interested parties submitted under Pen C §§3042 and 3043.5. Section 3042 requires the BPH to send notification of a parole suitability hearing to the trial judge, the defendant's attorney, the prosecuting attorney, the investigating law enforcement agency, and in the case of a murder of a peace officer, the employer of the victim, at least 30 days before the hearing, and gives those entitled to notice a right to submit a statement of views in support of or opposition to parole. Section 3043.5 extends the right to submit views on the prisoner's release to "any person interested in the grant or denial of parole." These letters usually oppose a finding of suitability.

Clarifying questions for prisoner. Prior to summations, the commissioners, the district attorney, and the prisoner's attorney can ask clarifying questions. 15 Cal Code Regs §§2030(d)(2) (prosecutor), 2247 (prisoner). By listening to what the panel says at the hearing, counsel should be able to correct errors in their understanding of the facts of the crime, prior criminal background, in-prison behavior, and in-prison accomplishments. The attorney can also give the life prisoner an opportunity to address the subject of remorse for the offense that led to commitment and for his or her involvement in other crimes or activities that produced victims. It is essential that the prisoner discuss both remorse and insight into the causes of his or her criminality in real terms, avoiding empty generalizations.

The prisoner also has a right to ask questions (15 Cal Code Regs §2247), but this right is rarely exercised.

Summation. At the end of the hearing, the prosecutor from the county of commitment, or his or her representative, if present, gives a summation of the people's position and, if the people oppose parole, the length of the denial that should be given. See 15 Cal Code Regs §2030(d)(2).

This is followed by the prisoner's counsel's summation. If the prosecutor makes claims that counsel cannot verify as accurate, the prisoner's attorney should query the prisoner about the accuracy of the prosecutor's statements. Rebuttal to such claims should be incorporated into counsel's closing arguments. The prisoner's counsel should be able to tell the panel why the prisoner should be paroled or for how many years the denial of parole should last. See Pen C §3041.5(b).

Statements by victim and victim's family. After closing statements from both sides but before deliberation, the victim, next of kin, or family members may make a statement of their views on any felonies or crimes with personal injuries, the life crime, the person responsible for these crimes, and the prisoner's suitability for parole. See Pen C §§3043, 3043.6.

Decision. Finally, the panel adjourns to consider the matter, and then returns to announce its decision on suitability. If the panel finds the prisoner suitable for parole, it must then set a term.

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Source: Criminal Law/California Criminal Law Procedure and Practice/47 PAROLE HEARINGS/ 6. Determination/ §47.44 a. Broad Discretion

6. Determination

§47.44 a. Broad Discretion

Penal Code §3041 provides that the BPH must set a release date for indeterminate life prisoners unless it determines that the gravity of the current offense, or the timing and gravity of current or past offenses, is such that public safety requires a more lengthy incarceration period. This statutory language and the BPH regulations governing parole decisions create an expectation in parole, giving rise to a protected liberty interest. *In re Rosenkrantz* (2002) 29 C4th 616, 654, 661, 128 CR2d 104. Accordingly, the factual basis for a BPH decision granting or denying parole is subject to limited judicial review to ensure the decision comports with the requirements of due process. The standard of review is extremely deferential. The Board's discretion in parole matters is "great" and resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board. 29 C4th at 656. A BPH decision will be upheld when premised on some evidence relevant to the factors it is required to consider. 29 C4th 664. See also *In re Cerny* (2009) 178 CA4th 1303, 101 CR3d 200; *In re Powell* (1988) 45 C3d 894, 904, 248 CR 431 (applying standard to rescission of parole date).

Ø **Note:** Because the Governor's authority to review decisions of the BPH is limited to an evaluation of the same factors that the Board considered, which give rise to a protected liberty interest, the Governor's parole decisions are also subject to limited judicial review under the "some evidence" standard. *Rosenkrantz,* 29 C4th at 664.

In *In re Dannenberg* (2005) 34 C4th 1061, 23 CR3d 417, the California Supreme Court emphasized the extensive scope of the parole board's discretion and the limited nature of judicial review of its decisions, holding that "the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders" (34 C4th at 1084) and concluding that "[t]he BPT acts properly in determining unsuitability, and the inmate receives all constitutional process due, if the Board provides the requisite procedural rights, applies relevant standards, and renders a decision supported by 'some evidence.'" 34 C4th at 1071. In this context, "some evidence" simply means that, in support of its decision, the Board must be able to point to "factors beyond the minimum elements of the crime for which the inmate was committed." 34 C4th at 1071. Such factors could involve the crime itself, prior crimes, or another unsuitability factor, such as the prisoner's institutional adjustment.

In *In re Lawrence* (2008) 44 C4th 1181, 82 CR3d 169, and the companion case *In re Shaputis* (2008) 44 C4th 1241, 82 CR3d 213, the California Supreme Court granted review to resolve a growing conflict among appellate courts concerning the proper scope of the deferential "some evidence" standard of review. The court held that because the core statutory determination of both the Board and the Governor is whether the inmate poses a current threat to public safety, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* that the inmate constitutes a current threat to public safety and not merely whether some evidence confirms the existence of certain factual findings. *In re Lawrence,* 44 C4th at 1191; *In re Shaputis,* 44 C4th at 1254. With regard to immutable factors such as the circumstances of the commitment offense or an inmate's criminal history, some evidence will support a denial of parole decision *only* if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety. The relevant inquiry for a reviewing court is whether the identified facts are probative to the central issue of current dangerousness. *In re Shaputis,* 44 C4th at 1254. For cases applying *Lawrence* and *Shaputis,* see, *e.g., In re Reed* (2009) 171 CA4th 1071, 1083, 90 CR3d 303 (failure to remain discipline-free, given Board's specific order that he do so, was some evidence that inmate was unsuitable for parole); *In re Palermo* (2009) 171 CA4th 1096, 1106, 90 CR3d 101 (given nature of crime, time elapsed since crime, affirmative evidence of preconviction and postconviction conduct and current mental state, and future prospects if granted parole, no evidence supported Board's finding that inmate posed threat to public safety).

While the BPH may not adopt an across-the-board policy denying parole on the basis of the type of offense committed (*In re Minnis* (1972) 7 C3d 639, 647, 102 CR 749; *In re Rosenkrantz, supra*), it can be difficult to prove that this is what the Board in fact has done, given the deferential view of what constitutes "some evidence." It is important

for the prisoner's attorney to argue to the hearing panel that *Biggs v Terhune* (9th Cir 2003) 334 F3d 910; *In re Lawrence, supra; In re Shaputis, supra; and In re Dannenberg, supra,* do not allow the BPH to use unchanging factors such as the commitment offense and prior criminality, without more, to deny parole. There must be a nexus between the immutable circumstances of the commitment offense or the inmate's criminality and his or her current threat to public safety.

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§47.45 b. Prisoner Found Unsuitable for Parole

On November 4, 2008, the voters of California passed Proposition 9 (Marsy's Law), the Victims' Bill of Rights of 2008. In addition to increasing the scope of victims and victim participation in parole suitability hearings, Marsy's Law significantly changed the denial scheme. Before Marsy's Law, if the BPH did not find the prisoner suitable for parole, subsequent hearings occurred annually thereafter unless the BPH further found that a longer period of time was required before the next hearing because the prisoner would not likely be found suitable in the interim. Former Pen C §3041.5(b)(2)(A). This finding permitted the BPH to defer the next hearing for up to 5 years if the commitment offense was murder, or for up to 2 years if it was any other life crime.

Marsy's Law substantially changed Pen C §3041.5(b) by eliminating the distinction between murderers and nonmurderers, and by creating denial lengths of 3, 5, 7, 10, and 15 years. The new denial scheme requires the panel to consider the views and interests of the victims in setting the next hearing. To give less than 15 years, the panel must find by clear and convincing evidence that, considering the victim and public safety, the inmate does not require a more lengthy incarceration than 10 years. Likewise, to set the next hearing date in less than 10 years, the panel must find by clear and convincing evidence that, considering the victim and public safety, the prisoner does not require a more lengthy period of incarceration than 7 years. There is no evidentiary standard proscribed for distinguishing between 7-, 5-, or 3-year denials. Pen C §3041.5(b)(3).

Inmates are now afforded the opportunity to petition the BPH to advance the next hearing date where there is a change in circumstances or new information makes it reasonably likely that, considering the victim and public safety, the prisoner does not require an additional period of incarceration. Pen C §§3041.5(b)(4), (d)(1)-(3).

Multiyear denials of up to 5 years have been held not to violate the Ex Post Facto Clause. *California Dep't of Corrections v Morales* (1995) 514 US 499, 507, 131 L Ed 2d 588, 595, 115 S Ct 1597. The new denial scheme will undoubtedly face judicial scrutiny related to the Ex Post Facto Clause.

Offense committed on or before July 1, 1977. The Ex Post Facto Clause applies to the granting or denial of parole. *In re Stanworth* (1982) 33 C3d 176, 183, 187 CR 783. Under *Stanworth,* a life prisoner who committed an offense before July 1, 1977, when the determinate sentencing law was enacted, is entitled to a second term setting, called a PBR (Parole Board Rules) or *Stanworth* hearing, under the formula in effect at the time of the offense. The more favorable of the term calculations controls. Attorneys are not permitted in *Stanworth* hearings. *In re DeMond* (1985) 165 CA3d 932, 935, 211 CR 680.

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§47.46 c. Prisoner Found Suitable

When a prisoner is found suitable for parole, the BPH must fix a term, which will be used in projecting the prisoner's release date. The term must be set in a way that will provide uniform terms of imprisonment for similar offenses, measured in terms of the gravity of the offense and the threat it poses to the public. See Pen C §3041(a). Fixing the term is referred to as a "term set."

The BPH has established term set matrices for the major life crimes:

- Pre-November 8, 1978, first degree murder. See 15 Cal Code Regs §2282(b).
- Kidnapping. 15 Cal Code Regs §2282(c).
- First degree murder (attempted first degree murder is one-half of this matrix). 15 Cal Code Regs §2403(a)-(b), (d). See Pen C §664.
- Second degree murder. 15 Cal Code Regs §2403(c).
- Habitual offenders sentenced to life terms under Pen C §667.7. 15 Cal Code Regs §2423(b).
- Sex offenders sentenced to life terms under Pen C §667.61. 15 Cal Code Regs §2433.

Life crimes for which no matrix has been provided by regulation receive terms based on those provided for offenses of similar gravity and magnitude. 15 Cal Code Regs §2282(d).

Ø **Note:** In some cases, counsel may consider suggesting an appropriate base term (see 15 Cal Code Regs §2282(a), §2403, or §2423) because the categories often overlap, and the difference between matrix columns and rows may mean several additional years in prison. Counsel may also argue factors in aggravation and mitigation.

The remaining elements of a "term set" (*e.g.,* aggravating and mitigating factors, weapons enhancements, prior prison terms, and other offenses) are set forth in the regulations following the term matrixes indicated above.

From the term set, the hearing panel will deduct any credits it awards to the prisoner for time served in prison on the life crime. See 15 Cal Code Regs §§2290, 2410-2411, 2429, 2439.

When a life prisoner is found suitable and given a projected future release date that is less than 10 months after the hearing, no "progress hearing" will be scheduled to consider further time credits for performance, participation, or behavior. See 15 Cal Code Regs §2269(b)(1). When the parole date is more than 10 months after the hearing, progress hearings will be scheduled at intervals specified in the regulations to consider granting credit. See 15 Cal Code Regs §2269.

It is very common that when a lifer is found suitable, he or she has already served time under the appropriate matrix. A lifer who has served time in excess of the base term is entitled to immediate release but not to credit towards time on parole. *In re Bush* (2008) 161 CA4th 133, 138, 74 CR3d 256.

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7. Review of Panel's Decision

§47.47 a. En Banc Review

At the close of any parole hearing for a life prisoner, any member of the hearing panel can request en banc review of the panel's decision. When en banc review is requested, a prisoner can be granted parole only if a majority of the full Board votes in favor of parole. Pen C §3041(a). The need for en banc review arises when one panel member believes that the prisoner is suitable for parole and the other believes that he or she is not suitable, or when the panel members do not agree on the period of the denial.

All proposed decisions relating to parole for life prisoners may be reviewed by the Board's Chief Counsel or a designee after the hearing, and all grants of parole and a random sample of denials are reviewed. 15 Cal Code Regs §2041(h). Proposed decisions become final 120 days after the hearing. Pen C §3041(b); 15 Cal Code Regs §2041(h).

Ø **Note:** The legal staff of the BPH are employees of CDCR, assigned to work there by CDCR's General Counsel, although the Chief Counsel now reports directly to the Executive Officer of the Board.

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§47.47A b. Executive Case Summaries

After a hearing panel grants parole, the decision, together with the prisoner's central file and all case information, goes to the Chief Counsel of the BPH, who supervises the preparation of an executive case summary for the Governor. An analyst goes through every page of the prisoner's central file and the transcript of the decision, producing a report covering each factor of suitability and unsuitability. Likewise, the prisoner's entire confidential folder is reviewed and, when relevant, is incorporated into the case summary report. After approval by the Chief Counsel, the report goes to the Governor with the decision for review.

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§47.47B c. Review by General Counsel; Review by Governor

As part of the decision review process, and armed with the executive case summary, the Chief Counsel or designee may affirm the panel's decision, order a new hearing, or modify the decision. If he or she affirms the decision or modifies it in a way that does not adversely affect the prisoner, the proposed decision becomes final no later than 120 days after the hearing. Pen C §3041(b); 15 Cal Code Regs §2041(h).

If the Chief Counsel or designee reviews new information that is adverse to the prisoner, the new information will be sent to the prisoner and counsel, who may respond to it in writing "within a reasonable amount of time." 15 Cal Code Regs §2041(h). If the proposed modification is adverse to the prisoner, the matter must be referred to the Board for en banc review. A new hearing will be held on majority vote of the en banc Board. 15 Cal Code Regs §2041(h). The prisoner may waive the right to the new hearing and accept the proposed modification. 15 Cal Code Regs §2041(j). A prisoner who was represented by counsel at the first hearing has 10 days to consult with counsel before waiving the new hearing. 15 Cal Code Regs §2041(j).

> Ø **Practice tip:** Counsel representing the prisoner at a new hearing should review the prior decision and find out why it was disapproved and by whom, who testified at that hearing and who did not, and what evidence was available at that hearing. The rehearing should be conducted in a manner that allows the new panel to avoid mistakes made during the first hearing. Counsel should focus the new panel on the issues that caused the case to be sent back to the BPH during the decision review process, and make suggestions to resolve the issues.

Finally, when the commitment offense is murder, under Cal Const art V, §8(b), the Governor may reverse or modify any parole decision within 30 days after the date the decision becomes final as to the BPH. Pen C §3041.2; *In re Arafiles* (1992) 6 CA4th 1467, 1474, 8 CR2d 492.

> Ø **Note:** In nonmurder cases, the Governor cannot reverse the decision but can request that the BPH reconsider the case en banc.

If the Governor reverses or modifies any decision, he or she must send a written statement to the inmate, stating the reasons for the reversal or modification. Pen C §3041.2(b). This gubernatorial power does not violate constitutional ex post facto clauses. *In re Rosenkrantz* (2002) 29 C4th 616, 638, 128 CR2d 104; *Johnson v Gomez* (9th Cir 1996) 92 F3d 964. Like the BPH when it determines suitability for parole, the Governor has exceptionally broad discretion in reversing a grant of parole. *In re Rosenkrantz,* 29 C4th at 652. However, the decision cannot be arbitrary and capricious, and it must be supported by some evidence that the inmate poses a current threat to public safety. *In re Lawrence* (2008) 44 C4th 1181, 1227, 82 CR3d 169 (immutable circumstances of commitment offense did not constitute some evidence in support of Governor's reversal of Board's grant of parole); *In re Shaputis* (2008) 44 C4th 1241, 1259, 82 CR3d 213 (committing offense and failure to gain insight into previous violent behavior constituted some evidence supporting Governor's decision that petitioner was currently a threat to public safety); *In re Scott* (2005) 133 CA4th 573, 34 CR3d 905 (Governor's reversal of Board's grant of parole not supported by "some evidence"). When there is no evidence to support the Governor's reversal of the Board's decision to grant parole, the court has the authority to reinstate the Board's decision without remanding the matter to the Governor. *In re Masoner* (2009) 179 CA4th 1531, 1534, 102 CR3d 463.

Even after the time for review by the BPH or intervention by the Governor has expired, a parole decision favorable to the prisoner can be rescinded for any of the reasons stated in 15 Cal Code Regs §2450. For discussion, see §§47.49-47.50.

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§47.48 8. Release

A life prisoner may be released on parole if each of the following conditions is met:

- The prisoner is found suitable at a life parole consideration hearing.
- A Pen C §3041.2 Governor's review has not resulted in reversing the grant of parole.
- At least 60 days have passed since the hearing at which parole was granted. Pen C §3042(b).
- Neither the Governor nor the Board has instituted en banc proceedings. See Pen C §3041.1; 15 Cal Code Regs §2044.
- The term fixed by the BPH, less applicable credits, has been served in its entirety.

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B. Rescission of Parole Date

§47.49 1. Life Parole Rescission Hearing

Even after a life prisoner has been granted a parole date and the time for review of the decision has passed, the date can be rescinded under various circumstances. See 15 Cal Code Regs §2451 (decision to initiate rescission proceedings is wholly within the BPH's discretion).

Prisoner has right to hearing. Procedural due process requires a hearing for the rescission of a previously set parole date. *In re Powell* (1988) 45 C3d 894, 901, 248 CR 431. Ordinarily, a rescission hearing must occur before release on parole. *In re Fain* (1983) 145 CA3d 540, 552, 193 CR 483. However, rescission may occur after release, if the parole grant is found unlawful. *In re Johnson* (1995) 35 CA4th 160, 173, 41 CR2d 449. A rescission hearing occurs in one of the following circumstances: (1) misconduct after the grant, (2) new information unknown to the granting panel, or (3) fundamental error in the grant of parole.

Misconduct or new information. A parole date can be rescinded when events that occur, or information that is received, after the grant of parole, suggest that the prisoner should not be released. 15 Cal Code Regs §2451. Prisoner misconduct is perhaps the most common subsequently occurring ground for rescission. Examples of misconduct that can result in rescission include escape attempts, assaults, weapon possession, or possession of controlled substances. 15 Cal Code Regs §2451(a). Rescission can also be based on psychiatric deterioration. 15 Cal Code Regs §2451(b). When the decision involves after-occurring conduct or information not available to the panel that found the prisoner suitable for parole (the "granting panel"), the rescission panel will determine whether the granting panel would maintain its decision, given the new information.

Ø **Note:** Under 15 Cal Code Regs §2451, CDCR staff members must report conduct that might result in rescission of a parole date to the BPH.

Fundamental errors. A parole date can also be rescinded if "fundamental errors occurred resulting in the improvident granting of a parole date." 15 Cal Code Regs §2451(c); *In re Powell* (1988) 45 C3d 894, 902, 248 CR 431; *In re Johnson* (1995) 35 CA4th 160, 168, 41 CR2d 449. Rescission proceedings can be initiated on this ground either by the BPH itself (see 15 Cal Code Regs §2451) or by the Governor. Under Pen C §3041.1, the Governor may, up to 90 days before a scheduled release date, request review of any parole decision. The Governor must state the reasons for the request and state whether the request is based on a public safety concern, on a concern that the gravity of current or past offenses may have been given inadequate consideration, or on other factors. The Board must review the parole decision en banc and a decision to grant parole can be upheld only if a majority of the Board approve the release. The Board may, on the basis of its inherent powers, reconsider the decision even if the Governor's request is untimely. *In re Johnson* (1992) 8 CA4th 618, 623, 10 CR2d 460.

When the ground for rescission is that fundamental errors occurred in the original decision granting parole, the panel at the rescission hearing looks separately at each issue considered by the granting panel to decide whether the panel properly considered the evidence before it in finding the prisoner suitable for parole. If the rescission panel finds some evidence that the granting panel reached its decision improperly with respect to at least one issue, it has three choices: it can maintain the parole date, withdraw the parole grant, or extend the parole grant to a future date.

Ø **Note:** The best preparation for a rescission hearing is to be the attorney of record at the hearing where the prisoner is found suitable. It is important when representing prisoners with strong cases for parole that the attorney make the granting panel aware of any and all negative aspects of the prisoner's history to ensure that the granting panel completely considers the person's suitability factors. To prepare for a rescission hearing, obtain copies of the transcript of the hearing at which the BPH granted parole and all pertinent documents from the prisoner's C-file. Take each issue in controversy and go through the transcript to identify where the granting panel discussed the issue and to what extent. Compare the transcript with the prisoner's record to decide whether the granting panel adequately considered the evidence before it in granting parole.

Basis for rescission. Like the decision to deny parole in the first instance (see §47.44), a decision to rescind a grant of parole must be supported by some evidence. *In re Powell* (1988) 45 C3d 894, 903, 248 CR 431; *In re Johnson, supra*. However, when a parole date is rescinded not on the basis of new evidence but on the ground that it was improvidently granted, something more than simple disagreement with the original panel's ultimate determination is required. *In re Caswell* (2001) 92 CA4th 1017, 1034, 112 CR2d 462. When the BPH rescinds a grant of parole on this ground, there must be "some evidence" that the panel that originally granted the prisoner a parole date failed to adequately consider the evidence before it, *i.e.,* there must be some evidence that the panel reached findings and conclusions that cannot be reconciled with the evidence before it, misstated facts, or explicitly declined to consider information germane to the issue before it. *In re Caswell, supra*. See also *Caswell v Calderon* (9th Cir 2004) 363 F3d 832; *McQuillion v Duncan* (9th Cir 2002) 306 F3d 895, 905.

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§47.50 2. Rights of Prisoners at Rescission Hearings

Life prisoners have the following rights at rescission hearings (see Pen C §3041.5; 15 Cal Code Reg §2465):

- To receive notice of the charges and receive the supporting evidence unless it is designated confidential (15 Cal Code Regs §2465(a));
- To receive notice of the date of the hearing at least 30 days before the hearing (15 Cal Code Regs §2465(d));
- To review nonconfidential documents in the prisoner's central file (15 Cal Code Regs §2247);
- To be present, speak, and ask and answer questions (15 Cal Code Regs §2247);
- To be represented by an attorney (Pen C §3041.7); if the prisoner is indigent, an attorney will be provided at state expense (15 Cal Code Regs §2256(c));
- To receive notice if the district attorney from the county of commitment or his or her representative will attend (15 Cal Code Regs §2466(a));
- To present documents (15 Cal Code Regs §2249);
- To receive a copy of documents submitted by the district attorney from the county of commitment before the hearing (15 Cal Code Regs §2466(a));
- To have an impartial hearing panel (15 Cal Code Regs §2250);
- To have language or communication assistance, if necessary (15 Cal Code Regs §2251);
- To have reasonable accommodation for a disability, as defined in 42 USC §12102 (Americans with Disabilities Act). See 15 Cal Code Regs §2251.5.

Ø **Note:** If a reasonable accommodation is denied, the prisoner is entitled to file a grievance to be heard by the Board (15 Cal Code Regs §§2251.6-2251.7);

- To receive, on request, a stenographic transcript of the hearing (Pen C §3041.5(a)(4); 15 Cal Code Regs §2465(e)); and
- To receive a written statement of the decision (15 Cal Code Regs §2255).

Additionally, the BPH on request may do the following:

- Grant the prisoner a continuance (15 Cal Code Regs §2253(c));
- Permit the presence of both friendly and adverse witnesses (15 Cal Code Regs §2465(c)); see *In re Johnson* (1995) 35 CA4th 160, 171, 41 CR2d 449 (requested witnesses must be called unless BPH has specific reasons to deny request and advises prisoner of those reasons in writing); and
- Issue subpoenas and subpoenas duces tecum to secure the attendance of witnesses or production of documents (15 Cal Code Regs §2465(c)).

For discussion of standards applicable to considerations of requests for witnesses and subpoenas, see §47.18.

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VII. REVIEW OF BOARD OF PAROLE HEARINGS DECISIONS

§47.51 A. No Administrative Appeal

The Board of Parole Hearings does not have an administrative appeals process. To appeal a decision of the BPH, the parolee needs to file a writ of habeas corpus in the superior court. See §47.52. Before August 30, 2004, any person under the jurisdiction of the former Board of Prison Terms (BPT) could take an administrative appeal from any decision that affected that person, other than the decision to schedule a hearing or to deny an appeal. See former 15 Cal Code Regs §§2050-2052. Because there is no administrative review, there is no need to exhaust administrative remedies before seeking judicial review.

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§47.52 B. Judicial Review

Habeas corpus. There is no direct review of an adverse parole decision. However, judicial review may be obtained by filing a petition for a writ of habeas corpus. See Pen C §§1473-1508; Cal Rules of Ct 4.551; *In re Powell* (1988) 45 C3d 894, 903, 248 CR 431. Under Pen C §1473(a), "[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

If counsel for the parolee has preserved any federal constitutional issues by making a record of both the federal claim and the facts supporting it before the deputy commissioner or panel, such claims can also be addressed in the state habeas petition. Federal constitutional issues may be cognizable in a federal habeas corpus proceeding if the parolee preserves these issues by raising them in the state habeas petition and exhausting state remedies.

On habeas corpus in state court, see chap 42. See also Appeals and Writs in Criminal Cases, chaps 9-10 (3d ed Cal CEB 2007). On exhaustion of state remedies, see §45.23. On federal habeas corpus generally, see chap 45 and Appeals & Writs, chaps 13-18.

Revocation decisions. If only the sufficiency of the evidence is challenged on judicial review, a good cause finding will be upheld if there is "any evidence" to support it. *Superintendent v Hill* (1985) 472 US 445, 86 L Ed 2d 356, 105 S Ct 2768 (revocation of prisoner's good-time credits); *Douglas v Buder* (1973) 412 US 430, 37 L Ed 2d 52, 93 S Ct 2199 (probation revocation).

Appropriate constitutional challenges are subject to the rule of *Chapman v California* (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824: errors that violate federal constitutional rights require reversal unless the beneficiary of the error can prove beyond a reasonable doubt that it did not affect the result. In *In re La Croix* (1974) 12 C3d 146, 115 CR 344, the California Supreme Court held, in determining whether a parolee is prejudiced by the denial of a prerevocation hearing, that the measure of prejudice necessary to the granting of relief from a restraint of liberty resulting from improper proceedings before an administrative agency is the *Chapman* standard. 12 C3d at 154. See, *e.g., In re Marquez* (2007) 153 CA4th 1, 62 CR3d 429 (habeas granted when *Valdivia* time lines not followed and counsel was not appointed in time).

Life parole suitability hearings. Habeas corpus review of the panel's conclusion that a life prisoner is not suitable for parole is quite limited. The BPH's decision will be upheld on judicial review if there is "some evidence" to support it. *In re Powell* (1988) 45 C3d 894, 904, 248 CR 431 (reviewing and upholding BPT decision to rescind parole date); *In re Johnson* (1995) 35 CA4th 160, 169, 41 CR2d 449 (same). Compare *In re Van Houten* (2004) 116 CA4th 339, 10 CR3d 406 (BPT unsuitability decision supported by some evidence), with *In re Scott* (2004) 119 CA4th 871, 15 CR3d 32 (BPT decision denying parole not supported by some evidence), and *In re Barker* (2007) 151 CA4th 346, 366, 59 CR3d 746 (same). See also *In re Roderick* (2007) 154 CA4th 242, 65 CR3d 16 (case remanded; of five factors relied on by Board in denying parole, only one, criminal history, constituted some evidence supporting denial); *In re DeLuna* (2005) 126 CA4th 585, 24 CR3d 643 (case remanded to BPT; some findings supporting BPT's unsuitability finding supported by "some evidence"; others not supported by any evidence).

The "some evidence" standard also applies to the Governor's decision to override a BPH finding of suitability. *In re Rosenkrantz* (2002) 29 C4th 616, 652, 128 CR2d 104; see, *e.g., In re Smith* (2003) 114 CA4th 343, 7 CR3d 655 (Governor's decision rescinding parole not supported by some evidence); *In re McClendon* (2003) 113 CA4th 315, 6 CR3d 278 (Governor's parole decision need not itemize all parole suitability factors).

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48

MENTAL COMPETENCE, MENTAL DEFENSES, AND RELATED ISSUES

JOHN T. PHILIPSBORN

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I. INTRODUCTION

§48.1 A. Overview

This chapter discusses the primary ways in which mental illness and other mental conditions are relevant in criminal cases: competence to stand trial, mental defenses, extended commitments for mentally disordered offenders, including commitments under the Sexually Violent Predator Act (Welf & I C §§6600-6609.3) (SVP commitments), and civil commitment proceedings.

Incompetence to stand trial. Criminal proceedings may be adjourned if a defendant is unable to understand the nature of the proceedings or aid in his or her defense. Pen C §§1367-1375.5. Adjournment is more common in felony cases than in misdemeanor cases. In misdemeanor cases courts usually use Pen C §4011.6 or §4011.8 to evaluate a defendant believed to be too mentally ill to proceed with the criminal case. See §§48.6-48.25.

Mental defenses. When a specified intent or mental state is an element of a crime, a defendant who did not form the requisite intent or mental state cannot be convicted of that crime. A temporary or permanent mental condition, cognitive disabilities, and voluntary or involuntary intoxication can form the basis of a mental defense that negates the intent element of the offense. See checklist of defenses in §32.12. Guilt phase mental defenses are discussed in §§48.27-48.41.

The insanity defense is tried in a separate phase following the guilt phase. In presenting evidence concerning mental defenses, counsel should be sure to lay the foundation necessary to introduce expert testimony, hospital records, and other essential items. See *People v Babbitt* (1988) 45 C3d 660, 248 CR 69. See §§48.42-48.59.

Extended commitments. Civil commitments are available to extend the custody of mentally ill individuals who are dangerous. See §§48.77-48.82. These include conservatorships for individuals who have been found incompetent to stand trial, extended commitments for mentally disordered offenders (MDOs) and persons found not guilty by reason of insanity, and proceedings to commit sexually violent predators (SVPs). These commitments have been found to be constitutionally valid. On sexually violent predator (SVP) commitments, see §§48.62-48.69; on mentally disordered offender (MDO) commitments, see §§48.71-48.76.

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§48.2 B. Resources

It is important to get an expert evaluation of the defendant's mental functioning when the facts of a case suggest a possible mental state defense or insanity plea, when the defendant may not be competent to stand trial, or when the defendant's mental status is otherwise at issue (such as in SVP, MDO, and Lanterman-Petris-Short (LPS) proceedings).

Counsel should be familiar with standard works relating to diagnoses, diagnostic criteria, acceptable protocols for certain types of assessments, bases for opinions on mental states, and the effects of psychotropic medications. Useful texts on mental health and the law include Parry, Criminal Mental Health and Disability Law, Evidence and Testimony (2009), and Melton, et al., Psychological Evaluations for the Courts (3d ed 2007). The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed, rev 2000) (DSM-IV-TR) is also an essential text. The DSM provides a framework of classifications of mental disorders. Counsel should become very familiar with the introduction to the DSM before using it in connection with a case, particularly the section of the introduction titled "Use of DSM-IV in Forensic Settings," which describes "risks and limitations" of the DSM in courtroom settings.

Authoritative sources on developmental disabilities include DSM-IV-TR; Intellectual Disability: Definition, Classification, and Systems of Support (11th ed 2010), and other materials available at http://www.aaidd.org; and Kaplan & Sadock's Comprehensive Textbook of Psychiatry (8th ed 2004).

Good sources for help understanding aspects of psychological testing are Mental Measurements Yearbook and Tests in Print, both updated regularly by the Buros Institute of Mental Measurements and available at http://www.unl.edu/buros.

The website of the American Psychiatric Association, http://www.psych.org, provides information about current publications and professional standards, as does the website of the American Psychological Association, http://www.apa.org. See also Slovenko, Psychiatry in Law/Law in Psychiatry (2009); Simon & Gold, eds., Textbook of Forensic Psychiatry (2004), concerning the standards and assessment methodologies that should be applied by psychiatrists in forensic settings; and Scientific Evidence in California Criminal Cases, chap 16 (Cal CEB 2008).

> Ø **Practice tip:** Counsel preparing to examine mental health experts might consider reviewing Ziskin & Faust, Coping with Psychiatric and Psychological Testimony (5th ed 1995).

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§48.3 C. Ethical Standards of Mental Health Professionals

Counsel should be aware of the various ethics rules governing mental health expertise in the courts. The American Psychology-Law Society has developed a set of ethical standards for forensic psychologists. The society's website is at http://www.ap-ls.org.

The American Psychological Association also has an ethics code (see http://www.apa.org/ethics/homepage.html), and the American Academy of Psychiatry and the Law publishes Ethical Guidelines for the Practice of Forensic Psychiatry (see http://www.aapl.org/ethics.htm).

The American Psychiatric Association has several task forces that review the role of psychiatrists in the criminal court process. See, *e.g.*, Liebert & Foster, *The Mental Health Evaluation in Capital Cases: Standards and Practice*, 151 Am J Forensic Psychiatry 4:43 (1994). In addition, the American Medical Association publishes Principles of Medical Ethics of the AMA, and the American Psychiatric Association publishes Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry.

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§48.4 D. Evidentiary Considerations

Gathering evidence relevant to mental competence or status usually begins with a mental health evaluation of the defendant. What constitutes a sufficient mental health evaluation depends on context and is subject to case-by-case determination. For a detailed discussion of the factors one court used in assessing the sufficiency of a psychological assessment of a defendant's competence to stand trial, see *U.S. v Duhon* (WD La 2000) 104 F Supp 2d 663.

***Kelly-Frye* test not applicable.** When the defendant's mental condition is at issue, expert psychiatric or psychological testimony is admissible if it meets the criteria set out in Evid C §801. The *Kelly-Frye* test does not apply to psychological or psychiatric evidence or to retrospective assessments of a mental state. See *People v Stoll* (1989) 49 C3d 1136, 1151, 265 CR 111 (extensive discussion of psychological tests attorneys are likely to encounter); *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 98 CR2d 431. The *scope* of the expert's testimony is limited by Pen C §28, which bars the admission of evidence of mental disease, defect, or disorder to show or negate the *capacity* to form a mental state required for conviction, and by Pen C §29, which bars an expert from testifying to "whether the defendant had or did not have the required mental states." On Pen C §29, see §48.29.

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§48.5 II. CHART: DEADLINES

Action	Deadline	Authority
Incompetent to stand trial:		
Declaration of doubt about competence to stand trial.	Any time before entry of judgment.	Pen C §1368(a).
Mandatory judicial redetermination of competence.	18 months after initial commitment.	Pen C §1370(b)(2).
Length of commitment as incompetent to stand trial.	Lesser of 3 years or maximum punishment permissible.	Pen C §1370(c)(1).
Insanity:		
Enter plea of not guilty by reason of insanity (NGI).	Before trial. Often done at arraignment in superior court.	See Pen C §§1016(6), 1017(5).
Eligibility for outpatient treatment after finding of NGI for crime involving death, great bodily injury, or act posing threat of serious bodily harm.	After 180 calendar days of inpatient treatment.	Pen C §1601(a).
Extension of defendant's NGI commitment beyond maximum term.	90 calendar days before commitment expires or later on showing of good cause.	Pen C §1026.5(b)(2).
Trial on extension of NGI commitment.	Within 30 calendar days after expiration of maximum term.	Pen C §1026.5(b)(4).
SVP Commitment:		
SVP screening evaluation referral.	At least 6 months before release date.	Welf & I C §6601(a)(1).
Petition to have prisoner or parolee designated SVP.	While prisoner is in custody under determinate prison term, parole revocation term, or hold authorized by Welf & I C §6601.3.	Welf & I C §6601(a)(2).
Petition to extend SVP commitment.	Must be filed before expiration of current commitment term.	See *People v Superior Court (Ramirez)* (1999) 70 CA4th 1384, 83 CR2d 402.
MDO:		
Determination that prisoner is a mentally disordered offender.	Before release on parole.	Pen C §2962(d)(1).
Board of Parole Hearings hearing on MDO status determination.	At prisoner's request.	Pen C §2966(a).
Hearing on whether prisoner meets criteria of Pen C §2962 or requires inpatient treatment.	Within 60 calendar days after prisoner files petition challenging determination of Board of Parole Hearings.	Pen C §2966(b).
Department of Mental Health or California Department of Corrections and Rehabilitation (CDCR) written evaluation	180 days before parole release date.	Pen C §2970.

concerning remission.

Petition for involuntary treatment beyond expiration of parole period.	Sufficiently in advance of parole release date so that trial commences 30 days beforehand.	*People v Tatum* (2008) 161 CA4th 41, 56, 73 CR3d 718.
Commencement of trial on petition for involuntary treatment.	30 calendar days before release date (or later if time waived or for good cause).	Pen C §2972(a).
Petition for recommitment.	Before expiration of commitment under Pen C §§2970, 2972.	Pen C §2972(e); *People v Allen* (2007) 42 C4th 91, 64 CR3d 124.

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III. COMPETENCY TO STAND TRIAL

§48.6 A. Purpose and Constitutional Basis; Summary of Procedures Available

Competency proceedings deal with a defendant's mental status during the pendency of a criminal case. The conviction of an incompetent defendant, who is essentially not "mentally present" (*In re Dennis* (1959) 51 C2d 666, 672, 335 P2d 657) during proceedings, violates the Due Process Clause. *Pate v Robinson* (1966) 383 US 375, 15 L Ed 2d 815, 86 S Ct 836; *People v Hale* (1988) 44 C3d 531, 244 CR 114. The trial court lacks jurisdiction to pass judgment on or sentence a defendant while he or she remains incompetent. Pen C §1367(a); *People v Laudermilk* (1967) 67 C2d 272, 282, 61 CR 644. Although the issue of incompetence is typically raised early in the proceedings, it can be raised after trial (Pen C §§1191, 1449), during the penalty phase of a capital case (*People v Stanley* (1995) 10 C4th 764, 42 CR2d 543), or during probation violation hearings (*People v Humphrey* (1975) 45 CA3d 32, 119 CR 74).

Ø **Note:** Incompetency is not a defense. The focus of competency proceedings is the defendant's *current* mental status and its impact on his or her *current* functional capacity, whereas defenses focus on the defendant's mental status at the time of the crime.

Competency proceedings may occur under several different statutes:

- Pen C §1368 (available for defendants accused of felonies, misdemeanors, or both; see discussion in §§48.10-48.22).
- Pen C §1367.1 (available for defendants accused of misdemeanors; see chart in §48.13).
- Pen C §1370.1 (available for incompetent or developmentally disabled defendants; see discussion in §48.24).

Ø **Note:** Because the conviction of an incompetent defendant violates due process, the protective reach of Pen C §1368 extends to Welf & I C §602 proceedings in juvenile court. See §48.25. Under Cal Rules of Ct 5.645, when the court believes that a minor in a juvenile delinquency proceeding is mentally disabled or may be mentally ill, the court may stay the proceedings and order the minor taken to a mental health facility for 72-hour treatment and evaluation. On §602 proceedings generally, see chap 56.

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B. Role of Defense Counsel

§48.7 1. Defense Counsel's Obligations

Mental disability. When evidence of incompetence exists, defense counsel has an affirmative duty to carefully investigate the client's mental competency. *People v Corona* (1978) 80 CA3d 684, 145 CR 894. See also *In re Saunders* (1970) 2 C3d 1033, 88 CR 633. Defense counsel may not "waive" or unilaterally discard this issue. *Pate v Robinson* (1966) 383 US 375, 384, 15 L Ed 2d 815, 821, 86 S Ct 836; *People v Hale* (1988) 44 C3d 531, 541, 244 CR 114.

Counsel should consult appropriate mental health experts on the defendant's mental status. *People v Corona, supra*. See *U.S. v Duhon* (WD La 2000) 104 F Supp 2d 663 (detailed description of competence assessment protocol used when defendant had been diagnosed as mildly mentally retarded). See also *People v Leonard* (2007) 40 C4th 1370, 1388, 58 CR3d 368 (procedure when mental retardation is suspected, or has been found, and competence issue is brought to court's attention). On a proper showing of need, an indigent defendant has a right to have the court appoint and compensate an expert to assess his or her mental competency. *People v Mayes* (1988) 202 CA3d 908, 916, 248 CR 899; *People v Campbell* (1987) 193 CA3d 1653, 1664, 239 CR 214; *People v Worthy* (1980) 109 CA3d 514, 518, 167 CR 402. When there is "substantial evidence" of incompetence, proceedings must be suspended to permit inquiry into the issue. *People v Lewis* (2008) 43 C4th 415, 525, 75 CR3d 588 (trial court's observations, combined with lack of expert input on competency, overcame defense counsel's stated view that competency hearing was necessary); *People v Pennington* (1967) 66 C2d 508, 518, 58 CR 374. If a psychiatrist or qualified psychologist "has had sufficient opportunity to examine the accused," the expert's testimony that the accused is incompetent is substantial evidence. 66 C2d at 518. A trial court's failure to recognize substantial evidence of incompetence can result in a remand for a postconviction competence determination even if defense counsel fails to raise the issue. *People v Ary* (2004) 118 CA4th 1016, 1022, 13 CR3d 482.

> Ø **Warning:** Because competency proceedings are completely separate from the trial, an attorney who opposes a competency hearing on the ground that it will have an adverse impact at trial is virtually confessing failure to provide constitutionally adequate representation. See *People v Corona* (1978) 80 CA3d 684, 712, 145 CR 894.

Defense counsel may pursue a finding of incompetency even when the client opposes such a finding. *People v Harris* (1993) 14 CA4th 984, 994, 18 CR2d 92; *Shephard v Superior Court* (1986) 180 CA3d 23, 225 CR 328. In that event, defense counsel should allow the client to testify on his or her own behalf. *People v Harris, supra*.

In addition, the appointment of separate counsel to present evidence of the defendant's competency, notwithstanding the defense attorney's pursuit of a finding of incompetency, does not violate the defendant's due process rights. *People v Stanley* (1995) 10 C4th 764, 805, 42 CR2d 543. See *People v Jernigan* (2003) 110 CA4th 131, 136, 1 CR3d 511 (*Stanley* does not require that second defense counsel be appointed whenever prima facie incompetent defendant contends that he or she is in fact competent); *People v Panah* (2005) 35 C4th 395, 25 CR3d 672 (opinion of one of two lawyers representing defendant in capital case that a competency concern existed did not trigger need for an inquiry, on basis of particular circumstances and other available evidence).

The attorney-client privilege is not violated when the attorney states his or her opinion on the defendant's incompetency. *People v Bolden* (1979) 99 CA3d 375, 160 CR 268. With respect to competency proceedings, defense counsel may "waive" a variety of procedural rights that could not be waived in the criminal phase without the defendant's participation. *People v Masterson* (1994) 8 C4th 965, 972, 35 CR2d 679; *People v Harris,* 14 C4th at 992; *People v Mickle* (1991) 54 C3d 140, 284 CR 511. These rights include the right to present witnesses, to confront and cross-examine witnesses, and to have the case decided by a 12-person jury. *People v Masterson, supra*; *People v Harris, supra*.

Competency proceedings under Pen C §§1367.1(a) and 1368(a) each require that, on initiating competency proceedings, the judge ask defense counsel about the client's competency. If the defendant is unrepresented, the court is required to appoint counsel. Pen C §1368(a). Such an appointment is required even when the court previously

permitted the defendant to represent himself or herself. *People v Robinson* (2007) 151 CA4th 606, 615, 60 CR3d 102; *People v Powell* (1986) 180 CA3d 469, 225 CR 703. In practice, the court's inquiry of defense counsel rarely occurs, because it is often the defense attorney who initially raises the issue, and despite the code provisions, the defense attorney is not obliged to answer the judge's question. *Tarantino v Superior Court* (1975) 48 CA3d 465, 122 CR 61. Nevertheless, counsel should not simply ignore the incompetency issue if the court raises the issue, particularly if the court expresses doubt about the defendant's competency. See *e.g., Pate v Robinson* (1966) 383 US 375, 385, 15 L Ed 2d 815, 822, 86 S Ct 836; see §48.11.

Developmental disabilities. Commitment as an incompetent developmentally disabled person under Pen C §1370.1 may help defendants who need long-term care, because those defendants may remain in outpatient status after commitment. Penal Code §§1001.20-1001.34 allow diversion in misdemeanor cases for defendants with cognitive developmental disabilities, whether or not the defendant is competent.

The state contracts with private agencies that act as Regional Centers for the Care and Treatment of Developmentally Disabled Individuals (Regional Centers), helping match developmentally disabled individuals with the services they need. See Welf & I C §§4620-4669. Defense counsel should call the local Regional Center for assistance whenever a defendant may be developmentally disabled. These agencies can also help victims and witnesses. See Welf & I C §§4620-4669. A list of Regional Centers is available at the California Department of Developmental Services' website at http://www.dds.ca.gov/RC/Home.cfm. See also *People v Leonard* (2007) 40 C4th 1370, 1388, 58 CR3d 368.

In *Atkins v Virginia* (2002) 536 US 304, 349, 153 L Ed 2d 335, 371, 122 S Ct 2242, the Supreme Court held that the Eighth Amendment prohibits the execution of a mentally retarded offender. California has implemented the *Atkins* rule by establishing a procedure in capital cases for determining whether a defendant is mentally retarded. See Pen C §1376. For discussion, see §54.18A.

> Ø **Practice tip:** Counsel defending capital cases may wish to review A Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation (Oct. 2006) (see http://www.internationaljusticeproject.org/retardationResources.cfm) and Weithorn, *Conceptual Hurdles to the Application of Atkins v Virginia*, 59 Hastings LJ 1203 (May 2008). Another helpful resource is Division 33 of the American Psychological Association, which publishes a newsletter entitled *Psychology in Mental Retardation and Developmental Disabilities*.

Specific competency issues can arise when a defendant may be mentally retarded. See, *e.g., People v Ary, supra* (postconviction competency hearing ordered despite defense failure to declare doubt regarding defendant's competence); *People v Castro* (2000) 78 CA4th 1402, 93 CR2d 770, disapproved on other grounds in *People v Leonard* (2007) 40 C4th 1370, 1391 n3, 58 CR3d 368 (conviction after guilty plea vacated). Several cases have reviewed the protocol for competency determinations. See, *e.g., U.S. v Duhon* (WD La 2000) 104 F Supp 2d 663, which describes in detail a protocol to determine whether a person deemed mildly mentally retarded had been restored to competence.

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§48.8 2. Self-Representation and Substitution of Attorney After Criminal Proceedings Have Been Suspended

Self-representation. Except as provided in Pen C §1368.1 (see §48.14), the trial court's order for a hearing to determine a defendant's competency to stand trial suspends all further proceedings until the defendant's competency has been decided. Pen C §1368(c); *People v Marks* (1988) 45 C3d 1335, 1340, 248 CR 874. Thus, the trial court lacks jurisdiction to rule on a defendant's motion for self-representation at trial until the question concerning the defendant's competency has been resolved. *People v Horton* (1995) 11 C4th 1068, 1108, 47 CR2d 516. If a defendant is not represented by counsel, the court must appoint counsel to represent the defendant during competency proceedings. Pen C §1368(a). The trial court must appoint counsel whenever it expresses a doubt about a defendant's competency even if the defendant has been representing himself or herself. *People v Robinson* (2007) 151 CA4th 606, 616, 60 CR3d 102 (court's doubt of self-represented defendant's competency should extend to defendant's competency to waive counsel and represent self); *People v Jenan* (2007) 148 CA4th 1144, 56 CR3d 360. A trial court may take a "realistic account" of a defendant's mental capacities in deciding whether to allow self-representation, even if the evidence supports the view that the accused is competent to stand trial. *Indiana v Edwards* (2008) ___ US ___, 171 L Ed 2d 345, 357, 128 S Ct 2379. California does not require "greater competency" for a person seeking self-representation than the competency-to-stand-trial standard. *People v Taylor* (2009) 47 C4th 850, 102 CR3d 852.

A defendant who has been found competent to stand trial may waive the assistance of counsel under *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525. See *Godinez v Moran* (1993) 509 US 389, 400, 125 L Ed 2d 321, 333, 113 S Ct 2680 (waiver of right to counsel and waiver of Fifth Amendment rights do not require higher standard of competency). See also *Jenan,* 148 CA4th at 1165 (standard of competence to stand trial is same as standard of competence to waive counsel). In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the defendant's waiver of his or her constitutional rights is knowing and voluntary. *Godinez v Moran, supra*. See also *People v Welch* (1999) 20 C4th 701, 733, 85 CR2d 203 (focus of competency hearing is whether defendant has *ability* to understand proceedings; focus of *Faretta* hearing is whether defendant *actually* understands significance and consequences of decision to forgo counsel).

However, despite both the Sixth and Fourteenth Amendment rights to self-representation, it is constitutionally permissible for a court to insist on representation by counsel for those defendants competent enough to stand trial but who suffer from severe mental illness to the point that they are not competent to conduct trial proceedings by themselves. *Indiana v Edwards* (2008) ___ US ___, 171 L Ed 2d 345, 357, 128 S Ct 2379.

> Ø **Note:** In a decision predating *Indiana v Edwards, supra*, the California Supreme Court found a trial court's denial of a competent defendant's motion for self-representation, on the ground that he lacked the mental capacity to prepare and conduct a trial in a rational manner, invalid. See *People v Halvorsen* (2007) 42 C4th 379, 433, 64 CR3d 721.

Substitution of attorney. The trial court retains jurisdiction to hear motions to substitute counsel after criminal proceedings have been suspended under Pen C §1368. *People v Stankewitz* (1990) 51 C3d 72, 270 CR 817 (defendant's incompetency related specifically to attorney; substitution would avoid need for full competency hearing).

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§48.9 C. Access to Lanterman-Petris-Short (LPS) System Through Pen C §4011.6

A formal bridge between the criminal justice system and the mental health system exists in Pen C §4011.6. Under this statute, a person in charge of a jail or juvenile detention facility or a judge who determines that a person in custody meets the admission criteria of the Lanterman-Petris-Short Act (LPS Act) may cause that person to be taken to a facility for 72-hour treatment and evaluation under Welf & I C §5150. If the evaluation results in detention, the LPS Act may play out through all of its detention stages, up to and including long-term involuntary treatment by conservatorship. Section 4011.6 specifically provides that the accused may be concurrently subject to criminal proceedings and to the LPS Act. Unless the treating facility certifies that arraignment or trial would be detrimental to the prisoner's well-being, however, the speedy trial provisions of Pen C §1382 apply. Penal Code §4011.8 allows a prisoner to apply for, and the custody facility to permit, voluntary mental health treatment. For further discussion of LPS commitments, see §§48.79-48.82.

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D. Procedures for Determining Competency

§48.10 1. Criteria for Determining Competency

Under Pen C §1367(a), a defendant is mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." This statute has been judicially interpreted to require determinations that a competent defendant is able to (*People v Conrad* (1982) 132 CA3d 361, 182 CR 912; see CALCRIM 3451):

- Have a rational and factual understanding of the charges and of the nature and purpose of the proceedings;
- Comprehend his or her own status and condition in reference to such proceedings; and
- Assist his or her attorney in conducting the defense.

Because the U.S. Supreme Court continues to elaborate the attributes of competence, the elements of competence contained in Pen C §1367 are similar to those announced by the Supreme Court, but not exactly the same.

For example, in *Godinez v Moran* (1993) 509 US 389, 399, 125 L Ed 2d 321, 332, 113 S Ct 2680, the Court included among the attributes of competence, not only awareness of procedural rights, but also the abilities to decide whether to exercise procedural rights such as the privilege against self-incrimination, to put on a defense, and to raise one or more affirmative defenses. See also *Cooper v Oklahoma* (1996) 517 US 348, 364, 134 L Ed 2d 498, 512, 116 S Ct 1373. Reference works recognizing the importance of case law in defining competence include Parry, Criminal Mental Health and Disability Law, Evidence and Testimony (2009); Drogin & Parry, Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony (2000); Grisso, Evaluating Competencies: Forensic Assessments and Instruments (2d ed 2003); and Philipsborn, *Searching for Uniformity in Adjudications of the Accused's Competence to Assist and Consult in Capital Cases,* 10 Psychology, Pub Policy & L 417 (2004).

> Ø **Note:** Neither statutes nor case law concisely defines a "mental disorder." In most cases, questions of competency center on the functional effect of the mental disorder on the defendant's lack of comprehension or incapacity. Moreover, the U.S. Supreme Court has not required incompetence to stand trial to be rooted in a "mental disorder or developmental disability," as Pen C §1367 does. For that reason, any medically or psychologically identified mental disorder or disability or state of mind might be accepted as the basis for a claim of incompetence. In addition, CALCRIM 3451 incorporates some but not all of the U.S. Supreme Court's "elements" of incompetence.

The fact that a defendant is recalcitrant or uncooperative does not necessarily mean that he or she is incompetent. *People v Lewis* (2008) 43 C4th 415, 523, 75 CR3d 588. The test of a Pen C §1368 proceeding is *capacity* to cooperate, not cooperation in fact. *People v Superior Court (Campbell)* (1975) 51 CA3d 459, 124 CR 158. See also *People v Welch* (1999) 20 C4th 701, 733, 85 CR2d 203; *People v Bradford* (1997) 15 C4th 1229, 1373, 65 CR2d 145; *People v Davis* (1995) 10 C4th 463, 527, 41 CR2d 826; *People v Rodrigues* (1994) 8 C4th 1060, 1112, 36 CR2d 235.

> Ø **Note:** As a practical matter, experienced counsel often provide examining mental health experts the pertinent legal definitions and some of the seminal cases discussed above, to ensure that a 'relevant' examination is conducted.

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§48.11 2. Initiating Pen C §1368 Proceedings

Competency proceedings are available for defendants accused of felonies, misdemeanors, or both. See Pen C §§1367.1, 1368, 1368.1. They may be undertaken at any time before judgment, including during probation violation hearings. *People v Humphrey* (1975) 45 CA3d 32, 119 CR 74. Incompetency is not, however, an issue in a proceeding to extend an insanity commitment under Pen C §1026.5. *People v Angeletakis* (1992) 5 CA4th 963, 7 CR2d 377.

Section 1368 proceedings must be initiated when (Pen C §1368(a)-(b)):

- The trial judge expresses doubt about the defendant's competence to stand trial. In this situation, an incompetency trial must be held regardless of the defense or prosecution position on this issue; it cannot be waived by either or both parties when the trial court has expressed such a doubt. *People v Marks* (1988) 45 C3d 1335, 248 CR 874; *People v Hale* (1988) 44 C3d 531, 244 CR 114.

  Ø **Note:** A trial court's mere expression of concern, or preliminary inquiry into the defendant's competence, does not trigger a full competency proceeding in the absence of a reasonable doubt of the defendant's competence. *People v Danielson* (1992) 3 C4th 691, 723, 13 CR2d 1, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n5, 108 CR2d 409. See also *People v Garcia* (2008) 159 CA4th 163, 169, 70 CR3d 837.

- Counsel informs the court that he or she believes the defendant is or may be mentally incompetent. Pen C §1368(b). A declaration of doubt by *counsel*, *alone*, is not sufficient to trigger a statutory right to a competency hearing. *People v Garcia, supra*.

Due process requires the court to initiate Pen C §1368 proceedings on its own motion when substantial evidence exists that the defendant is incompetent, even when the trial judge harbors no doubt and there is contrary evidence of the defendant's competency. *People v Pennington* (1967) 66 C2d 508, 518, 58 CR 374; *People v Ary* (2004) 118 CA4th 1016, 1024, 13 CR3d 482; *People v Campbell* (1987) 193 CA3d 1653, 1661, 239 CR 214; *People v Tomas* (1977) 74 CA3d 75, 90, 141 CR 453.

Substantial evidence of incompetency is "that [which] raises a reasonable doubt on the issue." *People v Howard, supra*; *People v Jones* (1991) 53 C3d 1115, 282 CR 465. Substantial evidence is something more than defense counsel's verbal opinion. *People v Rodrigues* (1994) 8 C4th 1060, 1111, 36 CR2d 235; *People v Howard* (1992) 1 C4th 1132, 1164, 5 CR2d 268; *People v Garcia, supra*. Evidence supporting a trial court's finding that the accused was not competent to waive the right to the assistance of counsel did not as a matter of law constitute "substantial evidence" of incompetence to stand trial. *People v Welch* (1999) 20 C4th 701, 736, 85 CR2d 203.

Evidence of incompetence may come from several sources, including the defendant's demeanor, irrational behavior, and prior mental examinations; however, to be entitled to a competency hearing, a defendant must exhibit more than "a preexisting psychiatric condition that has little bearing on the question… whether the defendant can assist his defense counsel," particularly when trial counsel did not raise competence questions during the trial. *People v Rogers* (2006) 39 C4th 826, 847, 48 CR3d 1 (quoting *People v Ramos* (2004) 34 C4th 494, 21 CR3d 575). The bizarre actions or statements of the accused may alone be insufficient. *People v Marshall* (1997) 15 C4th 1, 33, 61 CR2d 84; *People v Medina* (1995) 11 C4th 694, 735, 47 CR2d 165; *People v Laudermilk* (1967) 67 C2d 272, 285, 61 CR 644. See also *People v Hayes* (1999) 21 C4th 1211, 91 CR2d 211. One certain instance of substantial evidence of incompetency is the statement of a qualified doctor who, after examining the defendant, states that in his or her opinion the defendant is incompetent. *People v Tomas, supra; People v Bute* (1969) 275 CA2d 143, 79 CR 721.

Ø **Note:** It must appear that the doctor had a sufficient opportunity to examine the accused in order to arrive at such a conclusion. *People v Rodrigues, supra*.

When substantial evidence of incompetence exists, the trial court cannot proceed with the case against the defendant without first holding a competency hearing. Lack of objection does not waive the error. *People v Pennington*

(1967) 66 C2d 508, 521, 58 CR 374; *People v Ary* (2004) 118 CA4th 1016, 1025, 13 CR3d 482. Failure to conduct proceedings at the time during which substantial evidence of incompetency appears cannot be subsequently cured by a nunc pro tunc finding of competency. *Pate v Robinson* (1966) 383 US 375, 15 L Ed 2d 815, 86 S Ct 836; *People v Hale, supra; People v Pennington* (1967) 66 C2d 508, 58 CR 374; *People v Tomas, supra*. In rare circumstances, a retrospective competency hearing may be held. See *People v Ary, supra*. When a trial court suspends criminal proceedings on the basis of doubt that a criminal defendant is competent to stand trial, but then fails to hold a competency hearing, the court deprives defendant of a fair trial and any subsequent criminal conviction must be set aside. *People v Leonard* (2007) 40 C4th 1370, 1390, 58 CR3d 368. Once a competency hearing has been held and the defendant has been found competent to stand trial, the trial court is obliged to initiate a second incompetency hearing only when it is presented with a substantial change of circumstances or with new evidence casting serious doubt on the finding that the defendant was competent. *People v Weaver* (2001) 26 C4th 876, 111 CR2d 2; *People v Jones* (1991) 53 C3d 1115, 1153, 282 CR 465. See also *People v Medina* (1995) 11 C4th 694, 734, 47 CR2d 165. Apparent drowsiness resulting from the voluntary ingestion of antipsychotic medication used to restore competency is not, alone, a substantial change of circumstances justifying a subsequent competency hearing. *People v Jones* (1997) 15 C4th 119, 150, 61 CR2d 386, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656.

Competency proceedings are "special proceedings" ancillary to the criminal case. They are neither criminal nor civil. *People v Fields* (1965) 62 C2d 538, 42 CR 833.

Ø **Note:** In *Sell v U.S.* (2003) 539 US 166, 178, 156 L Ed 2d 197, 211, 123 S Ct 2174, the Supreme Court held it constitutional to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant in order to render him competent to stand trial for serious but nonviolent crimes "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." The Court noted that cases that fit these criteria "may be rare." *Sell v U.S., supra*. Subsequent decisions have confirmed this view. See *Carter v Superior Court* (2006) 141 CA4th 992, 46 CR3d 507. See Pen C §§1369(a), 1370.

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§48.12 3. LPS Referral Under Pen C §1367.1 in Misdemeanor Cases

If a misdemeanor defendant's behavior or other evidence leads a judge to conclude that the defendant may be mentally disordered and thus may be incompetent to stand trial, the judge may refer the defendant for evaluation and treatment under Pen C §4011.6 (see §48.9). Pen C §1367.1(a)-(b). Such a referral initiates an involuntary mental health evaluation and treatment under the Lanterman-Petris-Short Act (Welf & I C §§5000-5550), discussed in §§48.79-48.82. This requirement for mental health evaluation and treatment before the competency determination does not apply to felony defendants under Pen C §1368. In *Pederson v Superior Court* (2003) 105 CA4th 931, 130 CR2d 289, the Second District ruled that the requirement of Pen C §1367.1 for evaluation and treatment before the competency determination denies misdemeanor defendants equal protection and ordered the courts in its district to use the competency procedures applicable to felony defendants in misdemeanor cases.

Penal Code §1367.1(d) provides that after the period of evaluation and treatment, the court must resume criminal proceedings. That section further provides that the court may initiate full competency proceedings "if the judge has reason to believe that the defendant may be incompetent to stand trial despite the treatment ordered pursuant to this section."

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§48.13 4. Chart: Comparing Procedures Under Pen C §§1367.1 and 1368

Competency proceedings are available under Pen C §1367.1 when the defendant is charged with a misdemeanor. See §48.12. Competency for defendants in both misdemeanor and felony cases may be determined under Pen C §1368. Those procedures are described in §§48.10-48.22. The chart below compares some of the more important aspects of determining competency under §§1367.1 and 1368.

Issue	Procedure Under Pen C §1368	Procedure Under Pen C §1367.1
Court entertains doubt about defendant's competence to stand trial (*People v Marks* (1988) 45 C3d 1335, 1340, 248 CR 874); There is substantial evidence of defendant's incompetence (*People v Ary* (2004) 118 CA4th 1016, 1022, 13 CR3d 482); or Qualified mental health professional states belief that defendant is incompetent (*People v Pennington* (1967) 66 C2d 508, 518, 58 CR 374).	Court is required to hold hearing to decide whether defendant is competent. Pen C §1368(b).	Court is required to refer defendant for evaluation and treatment under Pen C §4011.6. Pen C §1367.1(b). But see *Pederson v Superior Court* (2003) 105 CA4th 931, 130 CR2d 289 (mandatory LPS evaluation for misdemeanants denies equal protection).
Standard for court finding that defendant should be referred for evaluation and treatment.	Defendant is unable to understand nature of criminal proceedings or to assist counsel in conduct of defense in rational manner. Pen C §1367.	There is reason to believe that defendant is mentally disordered. Pen C §1367.1(a).
Must counsel be appointed to represent defendant?	Yes, as soon as court is aware of any doubt concerning defendant's competence. Pen C §1368(a).	Yes, when court has reason to believe that defendant is mentally disordered. Pen C §1367.1(a).
What type of mental illness is covered?	Mental disorder or developmental disability. Pen C §1367(a).	Mental disorder or developmental disability. Pen C §1367(a).
How long can defendant be held?	No longer than maximum sentence.	No longer than 1 year after date of commitment, or maximum sentence, whichever is shorter. Pen C §1370.01(c)(1).
Are speedy trial provisions tolled?	Criminal proceedings suspended until question of defendant's present mental competence determined. Pen C §1368(c).	Criminal proceedings suspended until evaluation and treatment concluded. Pen C §1367.1(c).
Type of hearing.	Described in Pen C §1369.	Described in Pen C §1369.

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§48.14 5. Proceedings That May Take Place After Competency Hearing Ordered

Under Pen C §1368(c) the court's order for a competency hearing suspends all trial proceedings except the defense-initiated actions specified in §1368.1. But see *People v Cadogan* (2009) 173 CA4th 1502, 1512, 93 CR3d 881 (under extraordinary circumstances, trial court properly allowed conditional examination of terminally ill witness to proceed before ordered competency hearing).

In felony cases, if the defendant's competence is questioned before the information is filed, defense counsel may request a preliminary hearing. Pen C §1368.1(a). At the preliminary hearing, defense counsel may demur, move to dismiss for lack of probable cause, or move to suppress evidence under Pen C §1538.5.

Defense counsel for a misdemeanor defendant may also demur, move to dismiss for lack of probable cause, or move to suppress evidence under Pen C §1538.5 before the proceedings on the defendant's competency take place. Pen C §1368.1(b). On competency proceedings in misdemeanor cases, see §48.12. On pretrial procedures in misdemeanor cases, see chap 6.

The purpose of §1368.1(a) is to ensure that an incompetent felony defendant will not be committed to a mental institution without due process (see Pen C §1370(a)(1)(B)(ii)) unless there is probable cause to believe that he or she is guilty of the charged offense. See *Hale v Superior Court* (1975) 15 C3d 221, 228, 124 CR 57. But if the magistrate finds probable cause and the court subsequently finds the defendant incompetent, the preliminary hearing or grand jury proceeding held while the defendant was incompetent cannot form the basis for a valid holding order. In this situation, a new preliminary hearing or grand jury proceeding should be held when the defendant has been restored to competency. *Hale v Superior Court, supra*.

Ø **Note:** In such cases, the prosecution usually concedes a Pen C §995 motion challenging the holding order.

In *Miller v Superior Court* (1978) 81 CA3d 132, 146 CR 253, the defendant had been found incompetent 2 weeks after the preliminary hearing, and the court of appeal held that the defendant was entitled to a new preliminary hearing. A later case, *Booth v Superior Court* (1997) 57 CA4th 91, 98, 66 CR2d 758, criticized *Miller* and held that in the absence of evidence that a defendant found incompetent 3 months after the preliminary hearing was incompetent at the time of the challenged preliminary hearing, the trial court properly denied the defendant's §995 motion. See also *People v Smith* (2003) 110 CA4th 492, 1 CR3d 779 (defendant's jury trial waiver, taken a few days before finding of incompetency, was valid because there was no evidence that defendant was incompetent at time of waiver). For further discussion, see §48.20.

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§48.15 6. Appointment of Experts; Statements by Defendant

Appointment of experts. Once the court declares a doubt about a defendant's competence to stand trial, or whenever there is substantial evidence of incompetence, the trial court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding of incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. *People v Harris* (1993) 14 CA4th 984, 18 CR2d 92. See also Pen C §1369(a). An examining psychiatrist or psychologist must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. Pen C §1369(a).

The court may appoint other kinds of experts, as appropriate, to assist with a determination of competency. See Pen C §1369(a). For instance, courts commonly appoint attorneys with expertise in the area of incompetency to testify as experts after examining the defendant, especially when the defendant's ability to cooperate with counsel is at issue or when there are especially complex legal issues that the defendant needs to understand.

Before any examination, the parties may wish to provide expert witnesses with pertinent information about the issue of the defendant's competency. In practice, experts appointed under §1369(a) must usually produce written reports to the court of their examinations and findings and make those reports available to both parties.

Statements by defendant. No statement made by the defendant during a Pen C §1369 psychiatric examination, nor any "fruit" of such a statement, may be introduced against the defendant at a later stage of the case. *People v Weaver* (2001) 26 C4th 876, 111 CR2d 2; *People v Arcega* (1982) 32 C3d 504, 186 CR 94; *Tarantino v Superior Court* (1975) 48 CA3d 465, 122 CR 61. See also *Powell v Texas* (1989) 492 US 680, 106 L Ed 2d 551, 109 S Ct 3146. The statements a defendant makes during a competency examination may not be used for impeachment purposes at any proceeding other than the competency trial. *People v Pokovich* (2006) 39 C4th 1240, 1244, 48 CR3d 158.

On the evolution of the judicially declared rule conferring immunity for statements made in the course of competency proceedings, see *Baqleh v Superior Court* (2002) 100 CA4th 478, 496, 122 CR2d 673. On the difference in scope between the immunity granted in competency hearings and the limited immunity granted in sanity proceedings, see *Centeno v Superior Court* (2004) 117 CA4th 30, 44, 11 CR3d 533.

> Ø **Warning:** Defense counsel should consider possible later uses of materials such as psychiatric reports at mentally disordered offender proceedings. See discussion of those proceedings in §§48.71-48.76.

Although the presence of defense counsel at the expert's examination of the defendant is not constitutionally required (*Tarantino v Superior Court* (1975) 48 CA3d 465, 122 CR 61), defense counsel may be present and participate in the examination. The prosecution has no right to be present during any examinations. *Tarantino v Superior Court, supra*.

> Ø **Note:** Counsel may wish to have the doctor's interview videotaped. Videotaping is a method that can be employed to ensure an efficient examination, which protects the right to counsel by permitting defense counsel to state objections to the scope of, or methodology employed during, a competence assessment. See, *e.g.*, *U.S. v Johnson* (ND Iowa 2005) 362 F Supp 2d 1043, 1074.

Appropriateness of antipsychotic medication. Examining psychiatrists must evaluate whether treatment with antipsychotic medication is medically appropriate for the defendant and is likely to restore the defendant to competency. If it is the examining psychologist's opinion that such medication may be medically appropriate, the psychologist must inform the court and recommend that a psychiatrist examine the defendant. Both psychiatrists and psychologists must also address whether the defendant has the capacity to make a decision concerning antipsychotic medication and whether the defendant is a danger to self or others. Even if a psychiatrist believes that antipsychotic medication may be medically appropriate, the psychiatrist must report to the court any possible alternative treatments and the medication's likely or possible side effects and efficacy. Pen C §1369(a).

> Ø **Note:** Texts relevant to assessing the appropriateness of antipsychotic medication include Kaplan & Sadock's

Comprehensive Textbook of Psychiatry (8th ed 2004), the Physician's Desk Reference, and other works on the effects of psychotropic medications published by the American Psychiatric Association.

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§48.16 7. Competency Trial Procedures

Competency trials under Pen C §1368 are held in the superior court. Pen C §1368(b). Both parties have the right to a jury on demand to decide competency. Pen C §1369; *People v Superior Court (McPeters)* (1985) 169 CA3d 796, 215 CR 482. The verdict must be unanimous. Pen C §1369(f).

Before evidence is introduced, the defendant is presumed to be competent. Pen C §1369(f); *Booth v Superior Court* (1997) 57 CA4th 91, 99, 66 CR2d 758. The defense has the burden of offering evidence of incompetency. Pen C §1369(b). The prosecution, however, may present such evidence if the defense does not. See Pen C §1369(b)(2). The burden of proof falls to the party trying to prove incompetence. *People v Medina* (1990) 51 C3d 870, 274 CR 849, aff'd on other grounds sub nom *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572. Incompetency is established by a preponderance of the evidence. Pen C §1369(f). See *Medina v California* (1992) 505 US 437, 120 L Ed 2d 353, 112 S Ct 2572; *People v Medina, supra*. See also *Cooper v Oklahoma* (1996) 517 US 348, 134 L Ed 2d 498, 116 S Ct 1373 (requirement that defendant prove incompetence by clear and convincing evidence violates Due Process Clause of U.S. Constitution).

In the rare situation when neither party proceeds with evidence of the defendant's incompetence, the trial court may assume the burden of doing so. *People v Skeirik* (1991) 229 CA3d 444, 280 CR 175. In such cases, however, the court should instruct the jury only on the legal standard of incompetency; no instruction should be given on burden of proof. See 229 CA3d at 460.

The parties may present any relevant evidence, including:

- Testimony by experts appointed under Pen C §1369(a). (Their testimony, however, is not required by statute.)

  Ø **Note:** The trial court may not condition a defendant's right to present expert testimony at a competency hearing on the requirement that the defendant cooperate with the court-appointed expert. *People v Mayes* (1988) 202 CA3d 908, 248 CR 899.

- Testimony by experts other than those appointed by the court to examine the defendant, such as trial lawyers. *People v Mayes, supra*. See also *People v Marshall* (1997) 15 C4th 1, 32, 61 CR2d 84.
- Testimony by lay witnesses about behavior that is relevant to the determination of incompetency. *People v Medina, supra*.
- The defendant's nontestimonial behavior at the counsel table. *People v Prince* (1988) 203 CA3d 848, 250 CR 154.

Incompetency trials are covered by CALCRIM 3451. The jury's verdict must be based on "substantial evidence." *People v Marshall, supra; People v Samuel* (1981) 29 C3d 489, 174 CR 684. See also *People v Marks* (2003) 31 C4th 197, 2 CR3d 252.

Ø **Note:** A trial judge can reverse a jury determination of competency and render judgment notwithstanding the verdict if the judge determines that no substantial evidence supports the verdict. *People v Conrad* (1982) 132 CA3d 361, 182 CR 912.

If defense counsel requests §1368 proceedings, and the judge also expresses doubt about the defendant's competence under §1368, the issue must be resolved. The court cannot cancel the proceedings on defense request. *People v Hale* (1988) 44 C3d 531, 244 CR 114.

A formal trial is not required when jury trial has been waived. *People v Harris* (1993) 14 CA4th 984, 18 CR2d 92. The parties may stipulate to a trial that is based on the experts' written reports (*People v McPeters* (1992) 2 C4th 1148, 9 CR2d 834); if the experts reach different conclusions, the trial court may undertake to resolve the competence question without holding an evidentiary hearing. *People v Taylor* (2009) 47 C4th 850, 102 CR3d 852. The trial court must make a clear record of its findings and the basis for its rulings. *People v Marks* (1988) 45 C3d 1335, 248 CR 874. On the unusual responsibilities of defense counsel in competency proceedings, see §48.7.

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§48.17 8. Consequences of Finding of Incompetence

When a defendant is judged incompetent to stand trial, the trial proceedings (or judgment) remain suspended until the defendant is restored to competency. Pen C §1370(a)(1)(B). However, a defendant's incompetence does not prevent the court from making discovery orders. See *Echavarria v Superior Court* (1979) 94 CA3d 467, 156 CR 527. See also *People v Superior Court (Hulbert)* (1977) 74 CA3d 407, 141 CR 497 (court of appeal had jurisdiction to rule on prosecutor's pretrial writ petition challenging trial court's suppression of evidence at Pen C §1538.5 hearing while trial proceedings were suspended under Pen C §1370).

After a finding of incompetency, the trial court must also make orders for the purpose of restoring the defendant to competency. Three options are available to the court: state hospital, public or private treatment facility, or outpatient treatment. Pen C §§1370(a)(1)(B)(i), 1370.01(a)(1). See Pen C §§1370.01(a)(1)-(2), 1370.1(a)(1)-(2), 1600-1620.

Before choosing among these options, the court must obtain a written evaluation of the defendant's treatment needs from the Community Program Director. Pen C §§1370(a)(2)(A), 1370.01(a)(2)(A). See *People v Stanley* (1980) 103 CA3d 599, 163 CR 270. The court must also hear whether the defendant, with the advice of counsel, consents to the administration of antipsychotic medication. If the defendant consents, the court order will state that the defendant consents to being given that medication as prescribed by a treating psychiatrist. The defendant may subsequently withdraw consent. Pen C §§1370(a)(2)(B)(i), (C), 1370.01(a)(2)(B)(i), (C). If the defendant does not consent, the court must decide whether to order the involuntarily medication of the defendant as prescribed by a treating psychiatrist. Involuntarily medication may be ordered only if the court finds, among other things, that the defendant is a danger to self or others, or that a defendant charged with a serious crime is likely to be rendered competent by the medication. See Pen C §§1370(a)(2)(B)(ii)-(iii), 1370.01(a)(2)(B)(ii)-(iii). See, *e.g., People v McDuffie* (2006) 144 CA4th 880, 50 CR3d 794. The initial commitment must be inpatient confinement for at least 180 days if the defendant is charged with any of the serious offenses specifically listed in Pen C §1601(a). See *People v Superior Court (Lopez)* (2005) 125 CA4th 1558, 1567, 24 CR3d 66; *People v Amonson* (2003) 114 CA4th 463, 7 CR3d 831. A defendant who is charged with a crime specified in Pen C §290 must be committed to a state hospital or other secure treatment facility unless the court specifically finds that an alternative placement would provide more appropriate treatment. Pen C §§1370(a)(1)(B)(ii), 1370.1(a)(1)(B)(ii).

The purpose of commitment under Pen C §1368 is to treat the defendant and restore him or her to competency. In fact, the defendant has a "right" to such treatment; in its absence, the defendant may turn to the court for relief. See Pen C §§1370(b)(3), 1370.1(b)(3); *In re Ingram* (1978) 76 CA3d 495, 142 CR 825.

To monitor the defendant and assure his or her progress toward restoration of competency, the treatment facility or agency must make periodic written reports to the court on the defendant's progress toward recovery. Pen C §§1370(b)(1), 1370.01(b), 1370.1(b)(1). The court must provide copies of these reports to the prosecution and defense attorneys.

If during the commitment it appears that there is no substantial likelihood that the defendant's competency will be restored, he or she must be returned to court for proceedings to determine whether the defendant is eligible for "alternate commitment" proceedings. See *In re Davis* (1973) 8 C3d 798, 106 CR 178. See §§48.79-48.82 for a discussion of alternate commitments.

In felony cases, defendants must be returned to court for mandatory competency hearings at 18-month intervals without regard to their progress. Pen C §§1370(b)(2), 1370.1(b)(2).

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§48.18 9. Length of Commitment; Credit for Time Served

Length of commitment. The defendant has a constitutional right not to be confined as incompetent for an unreasonably long period. *Jackson v Indiana* (1972) 406 US 715, 32 L Ed 2d 435, 92 S Ct 1845; *In re Davis* (1973) 8 C3d 798, 106 CR 178; *In re Newmann* (1976) 65 CA3d 57, 134 CR 886.

In felony cases, this period has been legislatively interpreted to mean either the maximum term of confinement, if convicted, or 3 years, whichever is shorter. Pen C §§1370(c)(1), 1370.1(c)(1). The 3-year limitation applies to the aggregate of all periods of commitment relating to the same offense. *In re Polk* (1999) 71 CA4th 1230, 84 CR2d 389.

In misdemeanor cases, the maximum confinement period has been legislatively interpreted to be either the maximum term of confinement for the most serious charge in the complaint or 1 year, whichever is shorter. Pen C §1370.01(c).

Credit for time served. Time spent in outpatient treatment as an incompetent must be credited on any term of imprisonment subsequently imposed in the same criminal case. Pen C §1375.5. No credit is given, however, for good conduct. *People v Waterman* (1986) 42 C3d 565, 229 CR 796.

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10. Resumption of Criminal Proceedings

§48.19 a. Return to Court; When Defendant Must Be Placed in Secure Treatment Facility After Return

When an incompetent defendant regains mental competence, the director or supervisor of the treatment facility or program to which the defendant was committed, or the conservator, must certify that the defendant has regained mental competency by filing a certificate of restoration with the court by certified mail, return receipt requested. Pen C §§1372(a)(1), 1372(b), 1374. The defendant must be returned to the committing court within 10 calendar days after the certificate of restoration has been filed. Pen C §1372(a)(3)(C). For purposes of this section, the date of filing is the date on the return receipt. Pen C §1372(a)(1).

The court then holds a hearing on the issue of the defendant's restoration. The burden of proof at this "restoration hearing" is preponderance of the evidence. *People v Rells* (2000) 22 C4th 860, 94 CR2d 875. The defendant is not entitled to a jury trial. *People v Murrell* (1987) 196 CA3d 822, 242 CR 175. A defendant who opposes the certification of restoration has the burden of proving that incompetency remains. *People v Mixon* (1990) 225 CA3d 1471, 275 CR 817.

Criminal proceedings are resumed at the stage at which they were suspended. *People v Rothrock* (1936) 8 C2d 21, 63 P2d 807; *People v Powell* (1986) 180 CA3d 469, 225 CR 703.

The court may house an in-custody defendant in a secure treatment facility if, in the opinion of the director of the mental health facility at which the defendant was formerly treated, placement in a jail environment would create a substantial risk that the defendant would again become incompetent. Pen C §1372(e). The costs of housing a defendant who is now competent to stand trial are the responsibility of the original county of commitment. Pen C §1372(f).

Ø **Note:** The question of how to assess whether an individual has been restored to competency can be difficult to answer. It is not uncommon for a defendant to be returned to court as "restored" when defense counsel and consulting experts observe no significant improvements in either the underlying condition or in the defendant's abilities, capacities, and situational awareness. Counsel are often left to inquire into what was actually done with the defendant as part of the restoration process.

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§48.20 b. Pen C §995 Motion in Felony Cases

If the defendant was mentally incompetent at the preliminary hearing, the commitment order is illegal (*People v Duncan* (2000) 78 CA4th 765, 93 CR2d 173; *Chambers v Municipal Court* (1974) 43 CA3d 809, 118 CR 120), and defense counsel may want to file a Pen C §995 motion to obtain a new preliminary hearing following the defendant's return to competence.

If a finding of incompetence was made before the preliminary hearing, the prosecutor will usually concede the issue and set the case for a new preliminary hearing. If the competency issue was not raised until after the preliminary hearing, defense counsel should notice an evidentiary hearing to be held at the same time as the hearing on the §995 motion, because the court will have to decide whether the defendant was mentally competent during the preliminary hearing. See *Bayramoglu v Superior Court* (1981) 124 CA3d 718, 729, 176 CR 487. This is one of the rare occasions when counsel can go outside the record of the preliminary hearing to establish denial of a substantial right in conducting the hearing. *Bayramoglu v Superior Court, supra*. Reports of psychiatrists or psychologists and treatment records have been held to support a finding of incompetency at the preliminary hearing. *People v Duncan, supra*.

If defense counsel knows at the time of the preliminary hearing that the defendant's competency is in doubt but prefers not to raise the competency issue at the preliminary hearing, a psychotherapist may nonetheless conduct the examinations necessary to support a later *Bayramoglu* §995 hearing. Defense counsel may also go on record about the defendant's incompetence at the preliminary hearing but continue with the hearing anyway.

A §995 motion granted because of the defendant's incompetency does not count toward the two-dismissal bar of Pen C §1387. Pen C §1387(c)(2)(A).

A defendant who was first found incompetent under §1368 at sentencing is not entitled to a new trial of the underlying charges on the ground that he or she was incompetent at trial if no question of incompetency was raised during the trial and if no motion for new trial on that ground was made in the trial court. *People v Day* (1988) 201 CA3d 112, 247 CR 68.

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§48.21 c. Medications

A defendant's competency is often "restored" by psychopharmaceutical medications. Such medications often produce a remission of the defendant's symptoms; ceasing their use sometimes leads to a relapse. It is unclear whether a defendant who has been restored to competency can be forced to take medications in order to maintain his or her competency. *Riggins v Nevada* (1992) 504 US 127, 118 L Ed 2d 479, 112 S Ct 1810, did not resolve this issue but held that the state must establish the need for administering psychotropic medication to the defendant during trial after a request has been made to discontinue. In *Sell v U.S.* (2003) 539 US 166, 178, 156 L Ed 2d 197, 211, 123 S Ct 2174, the Supreme Court held that forced medication is constitutionally permissible "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." Moreover, courts have expressed concern that forced-medication orders based on a slightly better than 50 percent chance of restoration to competence may not be justifiable. See, *e.g., U.S. v Rivera-Morales* (2005) 365 F Supp 2d 1139, aff'd without opinion, 160 Fed Appx 648 (9th Cir 2005). See also *Carter v Superior Court* (2006) 141 CA4th 992, 46 CR3d 507 (forced-medication order related to competence vacated when *Sell* analysis was erroneously conducted by trial court and insufficient attention paid to medication's side effects). See also Siegel, *Involuntary Psychotropic Medication to Competence*: *No Longer an Easy Sell,* 12 Mich St UJ Med & L 1 (2008).

A competent criminal defendant's voluntary ingestion of medication that has been provided by the state does not deprive him or her of due process of law because it causes drowsiness during the proceedings. *People v Jones* (1997) 15 C4th 119, 150, 61 CR2d 386, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656. See also *People v Medina* (1995) 11 C4th 694, 733, 47 CR2d 165.

Ø **Note:** Specialized literature is available on the effects of the many psychotropic medications. See Physician's Desk Reference; Schatzberg & Nemeroff, eds., American Psychiatric Publishing Textbook of Psychopharmacology (3d ed 2004); and Marangell & Martinez, Concise Guide to Psychopharmacology (2d ed 2006). Scientists who specialize in pharmacology also can be very helpful in describing the known effects of the combination of various medications.

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§48.22 11. Appeal Rights

A finding that a defendant is competent is a nonappealable interlocutory ruling, which may be reviewed only on appeal from a final judgment in the underlying criminal proceeding. *People v Mickle* (1991) 54 C3d 140, 180, 284 CR 511. A determination that a defendant is incompetent and should be committed to a state hospital is appealable as a final judgment in a special proceeding. *People v Fields* (1965) 62 C2d 538, 42 CR 833.

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§48.23 E. Extended Commitment

After the maximum term of commitment has expired, a defendant who has not been restored to competency may be involuntarily confined further only under "alternate commitment proceedings." See *Jackson v Indiana* (1972) 406 US 715, 32 L Ed 2d 435, 92 S Ct 1845; *In re Davis* (1973) 8 C3d 798, 106 CR 178. The available alternates are:

- A mental health conservatorship under the Lanterman-Petris-Short Act. See Welf & I C §§5008(h)(1)(A), 5350. See also §§48.79-48.82; California Conservatorship Practice, chap 23 (Cal CEB 2005); California Guardianship Practice §§11.19-11.20 (Cal CEB Annual).
- A special Lanterman-Petris-Short Act conservatorship for defendants who have been charged with one of specified violent felonies, who remain "incompetent" as defined in Pen C §1367, and who have been proven beyond a reasonable doubt to be dangerous. Welf & I C §5008(h)(1)(B). These special conservatorships are known as *Hofferber* conservatorships after the case that upheld their provisions, *Conservatorship of Hofferber* (1980) 28 C3d 161, 167 CR 854. Conservatorships are renewable yearly, and the defendant retains due process and procedural protections. *Conservatorship of Hofferber, supra*. See Welf & I C §§5008(h)(1)(B), 5350.
- Extended commitment as a sexually violent predator. See §§48.79-48.82.

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§48.24 F. Procedures Concerning Incompetent Developmentally Disabled Defendants

A defendant who is "developmentally disabled" as defined in Pen C §1370.1 and who may be incompetent to stand trial undergoes the same Pen C §§1368-1375.5 competency hearings as a non-developmentally disabled defendant (see §§48.10-48.22), with a few exceptions:

- If a defendant is developmentally disabled, the evaluation is provided by the director of the state-contracted Regional Center for the Care and Treatment of Developmentally Disabled Individuals (Regional Center). Pen C §1370.1(a)(1). See *People v Leonard* (2007) 40 C4th 1370, 1388, 58 CR3d 368. This evaluation may not be waived. *People v Stanley* (1980) 103 CA3d 599, 163 CR 270.
- Treatment of developmentally disabled individuals is handled by the Regional Centers. Pen C §1370.1. A list of California's Regional Centers can be found at http://www.dds.ca.gov.

Developmental disability is defined by Pen C §1370.1(a)(1)(H) as a disability that begins before age 18, continues or can be expected to continue indefinitely, and is a substantial handicap. It includes mental retardation (and similar conditions), cerebral palsy, epilepsy, and autism but does not include solely physical handicaps. See also Welf & I C §4512.

Other procedures involving developmentally disabled defendants include proceedings analogous to LPS conservatorships (see *In re Hop* (1981) 29 C3d 82, 171 CR 721) and commitment to the State Department of Developmental Services for people with mental retardation who may be a danger to self or others (see Welf & I C §§6500-6513).

A useful source material on mental retardation and developmental disability is Mental Retardation: Definition, Classification, and Systems of Supports (10th ed 2002), published by the American Association on Intellectual and Developmental Disability (AAIDD) and available to order at http://bookstore.aaidd.org.

> Ø **Note:** In *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, the Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders. California has implemented the *Atkins* rule by establishing a procedure in capital cases for determining whether a defendant is mentally retarded. See Pen C §1376. For discussion, see §54.18A.

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§48.25 G. Competency Proceedings in Juvenile Court

Although juvenile law does not specifically provide for competency proceedings, the juvenile court has inherent power to determine whether a minor is incompetent. *James H. v Superior Court* (1978) 77 CA3d 169, 143 CR 398. The standard for determining competency is whether the minor has the *present* ability to factually understand the proceedings and consult with his or her attorney, not whether he or she can become competent in the future with assistance. *In re Ricky S.* (2008) 166 CA4th 232, 236, 82 CR3d 432. Minors who are incompetent are not committed for treatment in the same way as adults but instead are referred for evaluation and treatment under the Lanterman-Petris-Short Act. *In re Hadley B.* (2007) 148 CA4th 1041, 56 CR3d 234; *In re Patrick H.* (1997) 54 CA4th 1346, 63 CR2d 455; *In re Mary T.* (1985) 176 CA3d 38, 221 CR 364.

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§48.26 H. Incompetence on Appeal and During Postconviction Proceedings

In *Rohan ex rel Gates v Woodford* (9th Cir 2003) 334 F3d 803, 808, a capital case, an attorney appointed as "next friend" to the petitioner in federal habeas corpus proceedings requested a stay on the ground that the petitioner was unable to communicate rationally on matters of importance to the litigation. The Ninth Circuit granted the stay, holding that the statutory right to counsel in federal habeas corpus proceedings (see 21 USC §848(q)(4)(B)), entails a requirement that the petitioner be competent to assist counsel. See also *Calderon v U.S. Dist. Court* (*Kelly V*) (9th Cir 1998) 163 F3d 530, 541 (en banc), overruled on other grounds in *Woodford v Garceau* (2003) 538 US 202, 206, 155 L Ed 2d 363, 369, 123 S Ct 1398 (habeas petitioner's incompetence tolls AEDPA statute of limitations). The statutory right to competence recognized in *Rohan* applies to an appeal from denial of habeas relief. *Nash v Ryan* (9th Cir 2009) 581 F3d 1048, 1050.

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IV. ABSENCE OF CRIMINAL MENTAL STATE

A. Failure to Form Intent Required for Commission of Crime

1. Admissibility of Exculpatory Mental State Evidence

§48.27 a. Mental State Evidence Available to Negate Specific Intent and Other Specified Mental States

Evidence of mental disease, defect, or disorder is admissible in the prosecution of a specific intent crime on the issue of whether the accused formed a required specific intent, premeditated, deliberated, or harbored malice aforethought. Pen C §28(a). Similarly, evidence of the defendant's voluntary intoxication is admissible on whether the defendant formed a required specific intent or, when charged with murder, whether or not the defendant premeditated, deliberated, or harbored express malice aforethought. Pen C §22(b). This evidence is sometimes referred to as evidence of "diminished actuality."

Note the statutory distinction between evidence of mental disease, defect, or disorder and evidence of voluntary intoxication. Compare Pen C §28(a) with Pen C §22(b). Evidence of mental disease, defect, or disorder is admissible in a murder prosecution whether the prosecution relies on a theory of express or implied malice. Evidence of voluntary intoxication may also negate express malice, *i.e.,* specific intent to kill (see *People v Saille* (1991) 54 C3d 1103, 1114, 2 CR2d 364); it will not, however, negate implied malice. Similarly, voluntary intoxication will not negate criminal negligence. See also *Montana v Egelhoff* (1996) 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (due process does not require that defendant be allowed to introduce evidence of voluntary intoxication as defense to intent element of crime).

Evidence of mental disease, defect, or disorder or voluntary intoxication is not available to negate what has traditionally been known as general criminal intent or mens rea. See, *e.g., People v Rocha* (1971) 3 C3d 893, 896, 92 CR 172.

Ø **Note:** The Judicial Council of California Criminal Jury Instructions (CALCRIM) pertinent to mental state defenses (see CALCRIM 3425-3455) and impairment defenses specific to homicide cases (see CALCRIM 625-627) reiterate many of the concepts previously found in the CALJIC instructions. It has been observed that the CALCRIM instructions, while in accessible and uncomplicated language, do not cover all of the mental state defenses available and may not, in certain specific instances, comport with all current, pertinent case law. For this reason, defense counsel should not rely solely on CALCRIM and should conduct independent research before drafting and submitting instructions.

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§48.28 b. Distinguishing Between Specific and General Intent

Most criminal acts are general intent crimes. To determine whether a crime is a specific intent offense, the first question is whether the statutory definition makes any express or implied reference to a mental state. See *People v Atkins* (2001) 25 C4th 76, 82, 104 CR2d 738 (holding that arson requires only general criminal intent); *People v Hering* (1999) 20 C4th 440, 445, 84 CR2d 839. Examples of specific intent crimes include robbery (see Pen C §211); burglary (see Pen C §459); assault with intent to commit rape (see Pen C §220); felony murder (see, *e.g., People v Gutierrez* (2002) 28 C4th 1083, 1140, 124 CR2d 373 (intent element of felony murder is specific intent to commit underlying felony)); conspiracy (see *People v Russo* (2001) 25 C4th 1124, 108 CR2d 436).

In addition, in the following situations, evidence of voluntary intoxication (or mental disease, defect, or disorder) is admissible on the question of whether the defendant formed the required mental state:

- When the prosecution's theory of liability is that the defendant aided and abetted another individual who was the actual perpetrator of the crime (see *People v Mendoza* (1998) 18 C4th 1114, 1126, 77 CR2d 428 (proof of liability of aider and abettor requires proof of specific intent));
- When the defendant is charged with an attempt to commit another crime (see Pen C §21(a) ("attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission")); or
- When knowledge is an element of an offense (*People v Reyes* (1997) 52 CA4th 975, 983, 61 CR2d 39 (evidence of voluntary intoxication admissible to show that defendant did not know that property was stolen)).

On the distinction between general and specific intent, see generally *People v Mendoza* (1998) 18 C4th 1114, 77 CR2d 428; *People v Hood* (1969) 1 C3d 444, 456, 82 CR 618. On the use of exculpatory mental state evidence in homicide prosecutions, see §48.30.

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§48.29 c. Statutory Limitations on Use of Exculpatory Mental State Evidence

Under Pen C §§22 (voluntary intoxication) and 28 (mental disorder or defect), exculpatory mental state evidence is admissible in the guilt phase of a criminal prosecution only on the question of whether the defendant *actually formed* the required specific intent. It is not admissible on the question of whether the defendant *had the capacity to form* the required intent. Pen C §§22(a), 28(b).

Ø **Note:** Evidence of both capacity to form and actual existence of a mental state are admissible at the sentencing phase. Pen C §25(c).

In addition, Pen C §29 prohibits an expert who is testifying about a defendant's mental illness, disorder, or defect from testifying "as to whether the defendant had or did not have the required mental states for the crimes charged." See *People v Bordelon* (2008) 162 CA4th 1311, 1321, 77 CR3d 14 (§29 prohibits hypothetical questions that may be interpreted to call for ultimate opinion on mental state); *People v Czahara* (1988) 203 CA3d 1468, 250 CR 836 (§29 prohibits psychiatrist from presenting opinion that defendant was acting in heat of passion at time of killing, because this is legal equivalent of saying defendant lacked malice). In *People v Coddington* (2000) 23 C4th 529, 583, 97 CR2d 528, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n5, 108 CR2d 409, the California Supreme Court explained that §§28 and 29 permit the defendant to offer (1) evidence that he or she suffered from a mental disease or defect and (2) evidence about that mental disease or defect from which the jury could infer that he or she did not form the mental states required for deliberation. The court held that the exclusion of expert testimony on the ultimate question of fact, *i.e.,* whether he did form the required mental states, did not deprive the defendant of due process of law. *People v Coddington, supra*. See *People v Bordelon* (2008) 162 CA4th 1311, 1327, 77 CR3d 14 (trial court properly prohibited expert from answering hypothetical regarding defendant's specific intent). Expert testimony on how the defendant's experiences and background might have affected the defendant's perceptions and conduct at the time of the crime is permitted. See Pen C §29; *People v Adan* (2000) 77 CA4th 390, 91 CR2d 584 (prosecution experts' testimony that defendant was malingering held admissible); *People v Nunn* (1996) 50 CA4th 1357, 58 CR2d 294 (defense expert permitted to testify that defendant tended to overreact to stress and apprehension, which could result in his acting impulsively in certain situations, but not permitted to testify that defendant had acted impulsively in committing charged acts); *People v Young* (1987) 189 CA3d 891, 906, 234 CR 819 (psychiatrist allowed to testify to diagnosis of mental disease at time of homicide but not to ultimate legal issue of whether defendant acted with malice aforethought); *People v McCowan* (1986) 182 CA3d 1, 14, 227 CR 23 (court limited opinion testimony to defendant's mental state at time of crime and barred psychiatric testimony on ultimate conclusion of law).

Ø **Note:** The trial court has no sua sponte duty to instruct the jury on evidence admitted to show that the defendant did not actually form a required specific intent (or other mental state). These instructions are pinpoint instructions, and the defense must request them. *People v Saille* (1991) 54 C3d 1103, 1120, 2 CR2d 364.

For discussion of the effect of a finding of lack of intent based on voluntary intoxication or mental disease or disorder, see §48.37.

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§48.30 d. Mental Defenses in Homicide Cases

Malice aforethought. An unlawful homicide committed with malice aforethought is murder. Pen C §188. Malice is express when the defendant intended to kill. See *People v Saille* (1991) 54 C3d 1103, 1114, 2 CR2d 364. Malice is implied when the defendant is subjectively aware that his or her conduct endangers the life of another and acts in conscious disregard of the risk. *People v Watson* (1981) 30 C3d 290, 296, 179 CR 43. The defendant can introduce evidence of mental disease, defect, or disorder, or of voluntary intoxication to raise a reasonable doubt about whether he or she acted with express or implied malice aforethought. Pen C §§22(b), 28(a). Voluntary intoxication cannot be used to negate the inference that the defendant acted with implied malice, although it may be used to show that the defendant did not intend to kill. Pen C §22(b). An unlawful homicide committed without malice aforethought may be voluntary or involuntary manslaughter, depending on the circumstances. See *People v Lasko* (2000) 23 C4th 101, 96 CR2d 441.

Premeditation and deliberation. An intentional killing done with premeditation and deliberation is first degree murder. Pen C §189. Evidence of mental disease, defect, or disorder, or of voluntary intoxication will reduce first degree murder to second degree murder if it raises a reasonable doubt about whether a defendant who killed intentionally acted with premeditation and deliberation. Pen C §§22(b), 28(a). In this context, "premeditated" means the decision to kill was made before the act of killing is done. See CALCRIM 521. "Deliberate" means the careful weighing of considerations for and against the choice to kill before making the decision to do so. See CALCRIM 521. See also Pen C §189.

Unreasonable self-defense. A defendant who kills intentionally but in the unreasonable belief in the need for self-defense is guilty not of murder but of voluntary manslaughter. *People v Flannel* (1979) 25 C3d 668, 160 CR 84. The *Flannel* doctrine survived the abolition of the diminished capacity defense. *In re Christian S.* (1994) 7 C4th 768, 774, 30 CR2d 33. Thus, evidence of mental disease, defect, or disorder or of voluntary intoxication can be used to establish that a defendant subjectively believed in the need for self-defense, even if the evidence shows that such a belief was unreasonable. However, imperfect self-defense may not be based on mental "delusion" alone. *People v Mejia-Lenares* (2006) 135 CA4th 1437, 1446, 38 CR3d 404.

Felony murder. In cases involving the felony murder rule, a specific intent to commit the underlying felony is necessary even if the felony was a general intent crime. *People v Nichols* (1970) 3 C3d 150, 163, 89 CR 721; *People v Martinez* (1980) 105 CA3d 938, 942, 165 CR 11; *People v Jentry* (1977) 69 CA3d 615, 628, 138 CR 250. Thus, evidence showing that, because of mental disease, defect, or disorder or because of voluntary intoxication, the defendant did not have the specific intent to commit the underlying felony is relevant and admissible in a felony murder prosecution. See Pen C §§22(b), 28(a).

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§48.31 e. Presenting Mental State Evidence at Trial

Uses of mental state evidence. Although absence of a required mental state is usually referred to as a "defense," when a mental state other than general criminal intent is an element of the crime, the prosecution bears the burden of proving that the defendant acted with the mental state required for conviction. See *In re Winship* (1970) 397 US 358, 364, 25 L Ed 2d 368, 90 S Ct 1068. Therefore, when the defendant's mental state at the time of the commission of the crime is at issue, the prosecution will want to establish the existence of the requisite mental state.

Mental state evidence may serve several functions for the defense. Counsel may use evidence that the defendant was mentally impaired or intoxicated at the time of the crime to support a substantive mental state defense, to lay the foundation for an insanity defense, or as mitigation evidence in a capital case. Both parties may need to combine witness observations, anecdotal information, and circumstantial evidence to establish the defendant's mental state.

Finding expert witnesses. The presentation of mental state evidence usually includes expert witnesses. Because contemporaneous observations are usually more persuasive than retrospective analysis, counsel should learn whether any experts saw the defendant at or near the time of the crime and assess whether they have the qualifications to provide expert mental state testimony.

If no "time of crime" experts are available, or if counsel concludes that additional expert testimony will be helpful, retrospective assessment of the defendant's mental state will be necessary. The law recognizes that, although this is an esoteric subject matter, it is not so intricate as to require imposition of an elevated threshold for the admission of expert testimony. See *People v Stoll* (1989) 49 C3d 1136, 1151, 265 CR 111; *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. See also Simon & Shuman, Retrospective Assessment of Mental States in Litigation (2002); Rogers & Shuman, Conducting Insanity Evaluations (2d ed 2000). Counsel can review current literature to ensure that the experts contacted appear to display knowledge of the standards of practice, and of the pertinent assessment or evaluation protocols, involved in the specific issues of the case. For a general discussion of standards applicable to mental health experts, see Simon & Shuman, Clinical Manual of Psychiatry and Law (2006); Rogers & Shuman, Fundamentals of Forensic Practice: Mental Health and Criminal Law (2005).

Preparing the expert. The value of an expert's opinion depends entirely on the foundation on which the opinion rests. When mental state is an important issue, counsel should expect the opposing party to attack the foundation of the expert's opinion if possible and should guard against that attack by working with the expert to develop an appropriate protocol for the expert to follow. Counsel may need to review both the standards of practice for psychiatrists and psychologists, and the case law discussing the reliability, validity, and usefulness of expert psychological and psychiatric testimony to develop such a protocol. Counsel should bear in mind that special standards may apply to those who hold themselves out as "forensic experts."

Providing effective assistance of counsel may require investigating defendant's mental condition. When the facts suggest the possibility that mental state evidence could be used as a defense to the charge or in mitigation of punishment, defense counsel may need to investigate the defendant's background and mental functioning to provide effective assistance of counsel. See, *e.g., Wiggins v Smith* (2003) 539 US 510, 519, 156 L Ed 2d 471, 483, 123 S Ct 2527. Especially in capital cases, cursory consultation with experts may be inadequate. The failure to research, investigate, prepare, and present a mental state defense based on available evidence may constitute ineffective assistance of counsel. See, *e.g., Williams v Taylor* (2000) 529 US 362, 146 L Ed 2d 389, 120 S Ct 1495; *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181.

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2. Presenting Evidence of Absence of Criminal Mental State

§48.32 a. Introducing Evidence; Instructions

The defendant has the burden of producing evidence on the absence of the required mental state unless the prosecution's case-in-chief contains substantial evidence of lack of intent. See *People v Henderson* (1963) 60 C2d 482, 489, 35 CR 77. Although such evidence can be presented through expert testimony and testimony of people who are well acquainted with the defendant, it is often advisable for the defendant to testify, because the jury will want to hear the defendant's version of what happened. Counsel must carefully consider how a defendant, especially one with a serious mental disorder, will hold up to cross-examination. It may be advisable to make an opening statement to focus the jury's attention on evidence supporting the conclusion that the defendant did not have the required mental state. If counsel anticipates that the prosecutor's case-in-chief will raise questions about the defendant's mental condition at the time of the offense, it may be a good idea to make an opening statement at the outset of the case.

A defendant can choose not to be medicated at trial so that the jury may observe him or her in an unmedicated state, unless the government has a compelling interest in having the defendant medicated. See *Riggins v Nevada* (1992) 504 US 127, 118 L Ed 2d 479, 112 S Ct 1810. See also *Sell v U.S.* (2003) 539 US 166, 178, 156 L Ed 2d 197, 211, 123 S Ct 2174 (involuntary administration of antipsychotic medication constitutionally permissible "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests").

The trial court has no sua sponte obligation to give instructions on the absence of a required mental state. *People v Saille* (1991) 54 C3d 1103, 2 CR2d 364 (on voluntary intoxication). Consequently, defense counsel must request the court to give any relevant instructions. The trial court is required to give such "pinpoint" instructions on request when the evidence supports the theory. *People v Saille, supra*. See also *People v Ervin* (2000) 22 C4th 48, 90, 91 CR2d 623. Note, however, that the evidence of mental disease or defect must be specific enough to support an inference that the defendant did not actually have the required mental state. See, *e.g., People v Moore* (2002) 96 CA4th 1105, 117 CR2d 715.

Instructions that may be relevant include CALCRIM 3428 (jury may consider evidence of mental disease for limited purpose of determining whether defendant formed required intent or mental state), CALCRIM 3426-3427 (same, intoxication), CALCRIM 3425 (same, unconsciousness). Counsel may need to draft instructions supported by case law when the specific defense is not contained in a CALCRIM instruction.

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§48.33 b. Hiring Mental Health Expert

The defense may hire its own expert witnesses to testify to the defendant's state of mind at the time he or she committed a crime and its effect on the defendant's legal culpability or responsibility. See Evid C §733. An indigent defendant may request the appointment of such experts at public expense because the Sixth Amendment right to effective assistance of counsel incorporates court-appointed experts necessary for preparation of a defense. *Corenevsky v Superior Court* (1984) 36 C3d 307, 318, 204 CR 165. This includes mental health experts to assist in evaluation, preparation, and presentation of the defense. *Ake v Oklahoma* (1985) 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087.

Defense counsel should ensure that the mental health expert hired spends enough time with the defendant to be competent to testify. See *People v James* (1989) 208 CA3d 1155, 256 CR 661 (testimony of defense psychotherapist in sanity phase properly disallowed because he had spent only half an hour with defendant). Counsel must also consider what information and documents will be given to the mental health expert. Counsel should give the expert enough information to have a sound basis for his or her opinion but should also think of the consequences of discovery of information given to the expert. See §48.34 for discussion of the psychotherapist-patient privilege, and chap 11 for discussion of discovery concerning information given to experts. Counsel must also be aware that the State has the ability to seek a court-ordered examination of a defendant who puts his or her mental state at issue. Pen C §1054.3(b)(1).

Ø **Note:** The resources listed in §48.31 discuss ways to interact with mental health experts.

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§48.34 c. Psychotherapist-Patient Privilege

There is generally no psychotherapist-patient privilege if the therapist is appointed by the court. Evid C §1017. However, §1017 provides an exception that in practice is more generally invoked than the principle itself. The exception occurs when the court appoints a psychotherapist to advise defense counsel on whether to enter or withdraw an insanity plea or to present a defense based on the defendant's mental or emotional condition. Appointment under this exception invokes the attorney-client privilege of Evid C §954. *People v Lines* (1975) 13 C3d 500, 511, 119 CR 225.

Ø **Note:** There is no client-litigant exception to the attorney-client privilege analogous to this patient-litigant exception. Therefore, communications between the defendant and his or her lawyer are protected even after the client has put his or her mental or emotional condition in issue. *People v Lines, supra* (relying on *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 231 P2d 26).

The subject matter of both the psychotherapist-patient and attorney-client privileges is not limited to verbal communications but includes observations made while examining or interviewing the patient or client. See Evid C §§952, 1012; *People v Meredith* (1981) 29 C3d 682, 693, 175 CR 612.

There is an exception to the psychotherapist-patient privilege for child abuse reporting, which is mandatory in certain circumstances. See Pen C §§11164-11174.3 (Child Abuse and Neglect Reporting Act). Experienced mental health experts will often admonish the person being examined on this provision of law, and may request a signed acknowledgment of the admonishment. This exception applies only to information reported to the authorities under the Act; other communications retain their confidentiality. *People v Stritzinger* (1983) 34 C3d 505, 511, 194 CR 431; *People v John B.* (1987) 192 CA3d 1073, 237 CR 659. In addition, Pen C §1054.3(b) allows the court to order an examination of a defendant who has placed his or her mental condition at issue; no admonishment on child abuse reporting is required.

Another exception to the psychotherapist-patient privilege occurs when the therapist has reasonable cause to believe that the patient's mental or emotional condition renders him or her a danger to him- or herself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger. Evid C §1024; *Menendez v Superior Court* (1992) 3 C4th 435, 11 CR2d 92 (only tapes with threats allowed to be played for jury); *People v Wharton* (1991) 53 C3d 522, 563, 280 CR 631.

For further discussion of the psychotherapist-patient and lawyer-client privileges, see California Trial Objections, chaps 34, 37 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chaps 40, 42 (4th ed CJA-CEB 2009).

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§48.35 d. Limited Use Immunity for Previous Pen C §1368 Testimony

Sometimes a defendant raising a mental defense at trial has had earlier proceedings under Pen C §1368 to determine whether he or she is competent to stand trial. See §§48.6-48.22. Even though the defense expert may have expressed an opinion at the earlier §1368 trial that is contrary to the defendant's asserted guilt phase defense of lack of mental capacity to commit the offense, the defendant is protected by a limited use immunity that prevents the prosecutor from calling the defense's §1368 expert to rebut the lack of mental capacity defense at trial. *Centeno v Superior Court* (2004) 117 CA4th 30, 44, 11 CR3d 533; *Baqleh v Superior Court* (2002) 100 CA4th 478, 502, 122 CR2d 673. If the defense "opens the door," however, an evaluation may be offered by the prosecution to rebut a claim of extreme mental disturbance. *Buchanan v Kentucky* (1987) 483 US 402, 97 L Ed 2d 336, 107 S Ct 2906. Furthermore, if the defendant testifies at trial, statements made to a psychiatrist during a competency evaluation and given to the prosecution during plea negotiations may be used to impeach that testimony. *People v Crow* (1994) 28 CA4th 440, 452, 33 CR2d 624. But see *People v Pokovich* (2006) 39 C4th 1240, 48 CR3d 158.

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§48.36 e. Direct and Cross-Examination of Mental Health Expert

Defense mental health experts. A defense mental health expert may testify that the defendant suffered from a particular condition at the time of the offense, and may give evidence about the condition and the defendant's background and experience from which the jury may infer that the defendant did not formulate the required mental state. *People v Coddington* (2000) 23 C4th 529, 583, 97 CR2d 528, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069 n5, 108 CR2d 409. The expert may not, however, testify that the defendant did or did not formulate the required mental state. See Pen C §29. See, *e.g., People v Nunn* (1996) 50 CA4th 1357, 58 CR2d 294.

Prosecution cross-examination of defense mental health experts. The prosecutor should make sure that he or she has received all discovery concerning the defense expert. There are frequently quite damaging pieces of information in the expert's reports and in the information given to the defense expert to review in conjunction with the case. This information usually provides the main basis for prosecution cross-examination.

> Ø **Note:** Not everything is fair game, however, for cross-examination. For example, in a joint murder trial, the prosecution, on cross-examination of defense psychiatric experts, cannot bring out extrajudicial statements of the nontestifying codefendant that tend to incriminate the defendant. *People v Anderson* (1987) 43 C3d 1104, 1123, 1124, 240 CR 585.

Prosecution mental health experts. In response to *Verdin v Superior Court* (2008) 43 C4th 1096, 77 CR3d 287, the legislature enacted Pen C §1054.3(b), which permits the court to order, on timely request by the prosecution, the examination of a defendant who "places in issue his or her mental state at any phase" of a criminal proceeding. This is a significant change in California law that can apply in a wide variety of situations in addition to a mental state defense during the adjudication of guilt, such as the penalty phase of a capital case and bail and sentencing hearings.

The prosecution must submit a list of proposed tests to be administered by the expert. On the defendant's request, a hearing must be held to consider any objections to the tests. Before ordering the defendant to submit to the examination, the trial court must determine that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant. Pen C §1054.3(b)(1)(B). The prosecution is responsible for the fees of any such expert for examination and testimony at trial. Pen C §1054.3(b)(1)(A).

> Ø **Note:** The Sixth Amendment right to counsel precludes using a state-ordered or arranged psychiatric evaluation against the defendant, either directly or in rebuttal, unless defense counsel was given notice of the examination and of the issues to be covered in the examination. *Powell v Texas* (1989) 492 US 680, 106 L Ed 2d 551, 109 S Ct 3146.

The prosecution may present fact witnesses who will testify to events and conversations from which the jury can conclude that the defendant was not suffering from a mental condition that affected his or her ability to form the required mental state at the time of the crime. In addition, once a defendant raises his or her mental condition as an issue at the guilt or penalty phase of a trial, and the law allows the prosecution examination of the defendant, a prosecution psychiatrist may testify to the defendant's refusal to cooperate when he or she was ordered by counsel not to cooperate with prosecution experts. *Buchanan v Kentucky* (1987) 483 US 402, 97 L Ed 2d 336, 107 S Ct 2906.

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§48.37 3. Effect of Successful Lack of Intent Defense

When the trier of fact accepts the defense of lack of the required intent, the result will be a not guilty verdict for any crime charged for which the negated intent is an element. *People v Wetmore* (1978) 22 C3d 318, 327, 149 CR 265. If there is a lesser offense that does not contain the negated intent, a verdict of guilty of the lesser offense is still possible.

When this defense results in a total acquittal, the prosecution's only resource is to attempt to institute proceedings for civil commitment under the Lanterman-Petris-Short Act. See §§48.79-48.82.

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§48.38 4. Mental Defenses in Juvenile Court

It appears that the legal principles discussed in §§48.27-48.37 apply to juvenile proceedings. Penal Code §§21(b), 25(a)-(b), and 28(b) specifically apply to juvenile court. Although Pen C §§22 and 29 do not mention juvenile proceedings, the basic substance of Pen C §22 is found in Pen C §25.

A minor in a juvenile proceeding under Welf & I C §602 who places in issue his or her mental state through the proposed testimony of any mental health expert may be ordered, on timely request by the prosecution, to submit to examination by a prosecution-retained mental health expert. Pen C §1054.3(b)(1).

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B. Unconsciousness

§48.39 1. Definition

Persons who commit a criminal act without being conscious of committing it are legally incapable of having committed the crime. Pen C §26(4). The unconsciousness defense can exist despite a defendant's ability to walk, speak, and perform other physical actions. There is no need to show a coma in the medical sense. *People v Chaffey* (1994) 25 CA4th 852, 855, 30 CR2d 757; *People v Newton* (1970) 8 CA3d 359, 376, 87 CR 394. All that is necessary to establish the defense is to prove that the defendant was not conscious of his or her actions. *People v Kelly* (1973) 10 C3d 565, 572, 111 CR 171; *People v Newton, supra;* CALCRIM 3425.

Ø **Warning:** Although unconsciousness is ordinarily a complete defense to criminal homicide, it is not a complete defense if it resulted from the voluntary consumption of alcohol or another intoxicating substance. The defendant may be convicted of involuntary manslaughter even if he or she was unconscious at the time of the homicide; the act of becoming intoxicated to such a degree is deemed criminally negligent. See *People v Ochoa* (1998) 19 C4th 353, 423, 79 CR2d 408.

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§48.40 2. Procedure and Effect

Evidence of unconsciousness is admitted at the guilt phase of the trial in the same manner as evidence of lack of criminal intent. See, *e.g., People v Wilson* (1967) 66 C2d 749, 760, 59 CR 156. See §§48.32-48.36 for discussion of those procedures.

When the unconscious state is caused by voluntary intoxication from drugs or alcohol, the condition can have the effect only of negating a specific state of mind. *People v Ray* (1975) 14 C3d 20, 30, 120 CR 377, disapproved on other grounds in *People v Blakely* (2000) 23 C4th 82, 89, 96 CR2d 451; *People v Kelly* (1973) 10 C3d 565, 573, 111 CR 171; *People v Conley* (1966) 64 C2d 310, 322, 49 CR 815; *People v Walker* (1993) 14 CA4th 1615, 18 CR2d 431; CALCRIM 3426. When the unconscious state is caused by anything else, including involuntary intoxication, it is a complete defense to any criminal charge (both general and specific intent crimes). *People v Ray* (1975) 14 C3d 20, 25, 120 CR 377, disapproved on other grounds in *People v Blakely* (2000) 23 C4th 82, 89, 96 CR2d 451; *People v Kelly, supra; People v Wilson, supra;* CALCRIM 3425, 3427. For discussion of specific intent crimes, see §48.27.

Ø **Note:** The prosecution will probably request CALCRIM 3425, which tells jurors that if the evidence proves beyond a reasonable doubt that the defendant acted as if he or she were conscious at the time of the crime, jurors should conclude the defendant was conscious. See *People v Babbitt* (1988) 45 C3d 660, 693, 248 CR 69 (instruction does not unconstitutionally shift burden of proof to defendant).

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§48.41 C. Involuntary Intoxication

A person becomes involuntarily intoxicated when he or she unknowingly ingests an intoxicating liquor, drug, or other substance as a result of force, fraud, duress, or trickery by another person. CALCRIM 3427. For example, if a person thinks she is drinking a soft drink, but someone has put vodka in it, any resulting intoxication is involuntary. But if a person smoking marijuana unknowingly becomes intoxicated on PCP, it is not involuntary, because he or she chose to smoke marijuana, which is an intoxicant. See *People v Velez* (1985) 175 CA3d 785, 221 CR 631. A person who becomes unconscious by taking a drug to commit suicide is not involuntarily intoxicated for crimes committed while driving in an unconscious state if the person realized that some impairment of consciousness could result. *People v Chaffey* (1994) 25 CA4th 852, 855, 30 CR2d 757.

Involuntary intoxication may result in unconsciousness, or it may deprive the defendant of the ability to intend the prohibited act. If involuntary intoxication results in unconsciousness, it is a complete defense to both general and specific intent criminal charges. *People v Cruz* (1978) 83 CA3d 308, 330, 147 CR 740; *People v Heffington* (1973) 32 CA3d 1, 8, 107 CR 859. If involuntary intoxication results in depriving the defendant of the ability to intend the prohibited act, it is also a complete defense to both a specific and a general intent crime. See CALCRIM 3425, 3427.

The concept that an alcoholic is involuntarily intoxicated because he or she cannot refrain from drinking has been rejected. *People v Wyatt* (1972) 22 CA3d 671, 677, 99 CR 674.

Involuntary intoxication is raised at the guilt phase of trial in the same manner as voluntary intoxication or lack of intent. See §§48.32-48.36.

Ø **Note:** Counsel should carefully consider the expertise necessary to present state-of-mind evidence, including evidence of unconsciousness or intoxication (and its effects in very specific circumstances). The neurosciences are constantly evolving, as are the diagnostic and assessment methods available to qualified experts. See, for example, Yudovsky & Hales, American Psychiatric Publishing Textbook of Neuropsychiatry and Behavioral Neurosciences (5th ed. 2008); Hurley & Taber, Windows to the Brain: Insights From Neuroimaging (2008).

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V. INSANITY

A. Modified *M'Naghten* Insanity Rule

§48.42 1. Statement of Rule

California presently uses a modified version of the *M'Naghten* rule of insanity. The test is set out in Pen C §25(b):

> In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

See also CALCRIM 3450.

The insanity defense cannot be based solely on a personality or adjustment disorder, a seizure disorder, or an addiction to or abuse of intoxicating substances. Pen C §25.5.

The codification of the *M'Naghten* rule in §25(b) is constitutional and is not impermissibly vague. *People v Kelly* (1992) 1 C4th 495, 532, 3 CR2d 677.

Although §25(b) states the two means of demonstrating insanity in the conjunctive (incapable of knowing or understanding *and* of distinguishing right from wrong), in *People v Skinner* (1985) 39 C3d 765, 217 CR 685, the supreme court ruled that they remain alternatives and are not both required.

Once the existence of a delusional system has been proved, the trier of fact must look to the nature of the delusion and its relationship to the crime to determine whether insanity has been proved. In other words, the delusion and its effect on sanity must be judged as if its contents were real. If under that assumption the delusionary material would constitute justification for the crime, the defendant is insane. *People v Skinner* (1985) 39 C3d 765, 781, 217 CR 685; *People v Nash* (1959) 52 C2d 36, 45, 338 P2d 416; *People v Hubert* (1897) 119 C 216.

Ø **Example:** In a homicide case, if the defendant's delusion is that someone is trying to kill him or her, and the defendant believes that he or she is acting in self-defense, the trier of fact should find the defendant insane. If, however, in response to that delusion, the defendant kills for revenge, a finding of insanity is not justified. See *People v Skinner* (1986) 185 CA3d 1050, 1060, 228 CR 652.

Ø **Note:** In 2006, the U.S. Supreme Court ruled on Arizona's insanity test procedure which, like California's, permits an insanity trial to occur after a guilt phase. *Clark v Arizona* (2006) 548 US 735, 165 L Ed 2d 842, 126 S Ct 2709. Counsel preparing for an insanity case should review *Clark,* because the court reviewed the use of the *M'Naghten* rule.

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§48.43 2. Defendant Must Know or Understand Nature and Quality of Act

The insanity defense as stated in *M'Naghten's Case* (1843) 10 Clark & Fin 200, 8 Eng Rep 718, did not contain the word "understand." It is assumed that by including this word in Pen C §25, adopted in 1982, its authors intended to adopt the liberalized California reformulation of the *M'Naghten* rule. In *People v Wolff* (1964) 61 C2d 795, 800, 40 CR 271, the California Supreme Court held that a defendant's mere articulation that he or she knew the wrongfulness of the act charged is insufficient to sustain an opinion of sanity. This knowledge must be accompanied by understanding.

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§48.44 3. Definition of Wrongfulness

The term "wrong" in the *M'Naghten* rule refers to *moral,* not legal, wrongfulness. *People v Skinner* (1985) 39 C3d 765, 217 CR 685. See also *People v Torr*es (2005) 127 CA4th 1391, 1401, 26 CR3d 518 (test is whether defendant can distinguish not legal rightness or wrongness of his or her act but its moral rightness or wrongness). This formulation has been held to describe an objective or public morality rather than a subjective or personal morality constructed by the defendant. See *People v Stress* (1988) 205 CA3d 1259, 1274, 252 CR 913 (whether defendant understood that his conduct was morally wrong determined by asking whether he understood that it violated "society's generally accepted standards of moral obligation" rather than "those standards peculiar to the accused"). Therefore, cases such as *People v Nash* (1959) 52 C2d 36, 338 P2d 416, and *People v Kerrigan* (1887) 73 C 222, 14 P 849, in which the courts held that moral insanity arising from a perverted moral sense is not legal insanity, are still the law.

Ø **Note:** The *Stress* court noted that in most cases knowledge that an act is forbidden by law will permit the inference of knowledge that it also violates accepted moral standards. However, the two are not always equivalent, and a defendant is free to urge that, although he or she may have been able to distinguish legal right from wrong, he or she could not distinguish between moral right and wrong in the sense that they are generally accepted by society.

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§48.45 4. Volitional and Settled Insanity; Alcoholics and Drug Addicts

A defendant's capacity to control his or her conduct is immaterial under the *M'Naghten* rule as well as Pen C §25(b). California courts have consistently rejected irresistible impulse as a part of the insanity defense (*People v Noah* (1971) 5 C3d 469, 477, 96 CR 441; *People v Hoin* (1882) 62 C 120), except during the period that the ALI insanity rule was followed in California (see *People v Drew* (1978) 22 C3d 333, 346, 149 CR 275).

Voluntary intoxication cannot constitute the sole basis of an insanity defense. Pen C §§22, 25.5; *People v Kelly* (1973) 10 C3d 565, 575, 111 CR 171; *People v Griggs* (1941) 17 C2d 621, 625, 110 P2d 1031. While *Kelly* also held that when the intoxication, through prolonged use of alcohol or drugs, results in a condition that remains after the effect of the alcohol or drug has worn off, the resulting condition could constitute the foundation of an insanity defense (see CALCRIM 3450), courts of appeal have held that §25.5 creates an absolute bar to the use of voluntary ingestion of intoxicants as the sole basis of an insanity defense "regardless whether the substances cause organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off." *People v Robinson* (1999) 72 CA4th 421, 427, 84 CR2d 832. See also *People v Cabonce* (2009) 169 CA4th 1421, 1433, 87 CR3d 719.

The effect of §25.5 on settled insanity is unclear. Certainly, if a mental condition can be said to have solely arisen from the prolonged use of alcohol or drugs, the condition could not give rise to legal insanity under the statute. The author, however, has never heard of a psychiatrist or clinical psychologist who has testified to a mental illness, disorder, or defect caused by a single factor.

> Ø **Note:** Whether a defendant's chronic addiction resulted in insanity is for the jury to decide. That power cannot be usurped by experts. *People v Skinner* (1986) 185 CA3d 1050, 1060, 228 CR 652 (defendant properly found sane despite unanimous opinion of four expert witnesses that defendant was insane at time he killed his wife because of toxic cocaine psychosis).

A paranoid schizophrenic in a blackout state from an overdose of medication intended to alleviate schizophrenic symptoms is not in a state of settled insanity. *People v Randolph* (1993) 20 CA4th 1836, 1844, 25 CR2d 723.

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B. Procedure for Presenting Insanity Defense

§48.46 1. Entering and Withdrawing Plea

The procedure for an adjudication of insanity at the time of the offense requires the entry of a specific and timely insanity plea. The procedure is regulated by statute. See Pen C §1016 defining the types of pleas, and permitting the entry of multiple pleas. See also Pen C §1026(a). Counsel should be familiar with both the statutory framework for insanity determinations and the extensive case law that discusses both substantive and procedural aspects of insanity pleas.

Ø **Note:** When an insanity plea appears likely, it is common for both prosecution and defense to retain and consult with one or more qualified experts before entry of the plea and initiation of the statutory procedure requiring a court-ordered examination. Often, as a practical matter, the court may take suggestions from counsel as to whom the appropriate experts might be, although, on occasion, counsel for both parties stand firm on the requirement that the court, not counsel, should choose the examining experts. See Pen C §1027.

As in other areas related to the intersection between mental health issues and the law, this is an area in which there is specific, and useful literature. See, *e.g.,* Rogers & Shuman, Conducting Insanity Evaluations (2d ed 2000).

A plea of not guilty by reason of insanity (NGI) must be made in open court and may be oral or in writing. Pen C §1017. The defendant must personally enter it. Pen C §1018; *People v Gauze* (1975) 15 C3d 709, 717, 125 CR 773; *People v Vanley* (1974) 41 CA3d 846, 854, 116 CR 446. If the defendant does not voice his or her concurrence in an NGI plea, the court must refuse to enter the plea. *People v Hofferber* (1977) 70 CA3d 265, 137 CR 115. However, the defendant's verbal assent in open court is sufficient. *People v Weaver* (2001) 26 C4th 876, 111 CR2d 2. A defendant may enter an NGI plea despite his or her attorney's opposition to the plea. *People v Henning* (2009) 178 CA4th 388, 100 CR3d 419; *People v Clemons* (2008) 160 CA4th 1243, 1252, 74 CR3d 248. However, a trial court's failure to allow a defendant to plead NGI over his or her attorney's objection is harmless when the record affirmatively shows that the insanity defense lacks evidentiary support. *People v Henning, supra*.

Ø **Note:** Although an NGI plea refers to the defendant's sanity at the time of the offense rather than to his or her competence to stand trial (*People v Hofferber, supra*), the "somewhat suspect" procedure of allowing a possibly insane defendant to decide whether to enter an NGI plea is mandated by statute (*People v Lomboy* (1981) 116 CA3d 67, 71, 171 CR 812).

When a defendant refuses to enter an NGI plea, defense counsel can invoke Pen C §§1368-1369 if the client appears incompetent to make that decision. *People v Bolden* (1979) 99 CA3d 375, 160 CR 268. Under Pen C §§1368-1369, the court must hold a hearing to decide whether the defendant is competent to stand trial. Defense counsel's failure to present an NGI defense or to make a record on that issue can be considered ineffective assistance of counsel. *In re Kubler* (1975) 53 CA3d 799, 805, 126 CR 25. If the defendant appears competent, refuses to consent to an NGI plea, and defense counsel thinks an NGI defense should be entered, there are several options. Counsel might inform the court on the record that counsel advised the defendant to enter an NGI plea but the client declined, and then proceed to try the case. Alternatively, counsel might ask to be relieved as the defendant's attorney. See *People v Gauze* (1975) 15 C3d 709, 717, 125 CR 773.

An insanity plea should be entered at arraignment but may be entered after trial begins when good cause is shown. *People v Lutman* (1980) 104 CA3d 64, 163 CR 399.

An NGI plea must be substantially in the following form (Pen C §§1017(5), 1016(6)):

The defendant pleads that _ _[*he/she*]_ _ is not guilty of the offense charged, because _ _[*he/she*]_ _ was insane at the time that _ _[*he/she*]_ _ is alleged to have committed the unlawful act.

Ø **Note:** The defendant should also plead not guilty if a trial on the issue of guilt is desired.

When a defendant enters an NGI plea *only,* he or she is presumed to have admitted guilt to the underlying offense. Pen C §1016; *People v Rizer* (1971) 5 C3d 35, 36, 95 CR 23; *People v Wolff* (1964) 61 C2d 795, 799, 40 CR 271. As a result, such a defendant must be advised of and waive the same rights as a person pleading guilty (*Boykin-Tahl* rights). *People v Rizer, supra*. See §§26.11-26.22. In a court trial, however, a stipulation that sanity phase evidence be heard before determination of guilt is not tantamount to a plea of guilty; therefore, self-incrimination rights need not be waived. *People v Stone* (1994) 27 CA4th 276, 284, 32 CR2d 494. See discussion of those rights in chap 26. In addition, when a court accepts an NGI plea, it must advise the defendant that a successful defense might result in commitment to a state mental hospital (*People v Wetmore* (1978) 22 C3d 318, 322 n2, 149 CR 265; *People v Vanley* (1974) 41 CA3d 846, 855, 116 CR 446), that possible periodic extensions might result in lifetime confinement (*In re Robinson* (1990) 216 CA3d 1510, 265 CR 574; *People v McIntyre* (1989) 209 CA3d 548, 257 CR 271; see also *People v Superior Court (Wagner)* (1989) 210 CA3d 1146, 258 CR 740), and that the commitment might extend beyond the maximum imprisonment for the underlying offense (*People v Minor* (1991) 227 CA3d 37, 277 CR 615; *People v Lomboy* (1981) 116 CA3d 67, 71, 171 CR 812). When a defendant pleads NGI in addition to a not guilty plea, the trial court is not required to advise the defendant of his or her *Boykin-Tahl* rights. *People v Weaver, supra*.

A defendant may withdraw the insanity plea at any time before verdict on that plea. *People v Redmond* (1971) 16 CA3d 931, 938, 94 CR 543. See *Knowles v Mirzayance* (2009) ___ US ___, 173 L Ed 2d 251, 129 S Ct 1411 (defendant was not deprived of effective assistance of counsel when his attorney recommended withdrawing insanity defense even if defendant had "nothing to lose" by going forward with insanity plea). However, if the court believes that the defendant is incompetent, the court's remedy is either to have the defendant examined under Pen C §1368 or §4011.6 to assess whether he or she is competent to withdraw the plea, or to initiate civil commitment proceedings. *People v Redmond, supra*. The requirements of *Redmond* do not apply, however, when a defendant is obviously sane. The trial court is then required only to make clear the consequences of withdrawing the NGI plea and to explain the constitutional rights being waived. *People v Bloom* (1989) 48 C3d 1194, 1214, 259 CR 669 (no error to fail to advise defendant of constitutional rights on withdrawal of NGI plea before trial when evidence was insufficient to raise doubt about sanity); *People v Guerra* (1985) 40 C3d 377, 220 CR 374.

If a defendant who entered pleas of not guilty and NGI is acquitted at the guilt phase, the NGI plea is considered withdrawn. See Pen C §1026.

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§48.47 2. Court Appointment of Experts

Before the defendant enters a plea, defense counsel may ask the court to appoint a psychiatrist to advise the attorney on whether to enter a plea of insanity. Evid C §§730, 1017. An appointment for this purpose invokes the protection of the attorney-client privilege, which is not abrogated by raising a defense based on the defendant's mental or emotional state; it can only be waived by the defendant. Evid C §§954, 1017; *People v Lines* (1975) 13 C3d 500, 513, 119 CR 225; *People v Superior Court (Campbell)* (1975) 51 CA3d 459, 463, 124 CR 158. Defense counsel may also request such an appointment to advise him or her on having the defendant withdraw an NGI plea. Evid C §1017.

After a defendant pleads not guilty by reason of insanity, the court must appoint two and may appoint three psychiatrists, or licensed psychologists with a doctorate in psychology and at least 5 years' postgraduate experience in the diagnosis and treatment of emotional and mental disorders, to examine the defendant. Pen C §1027(a). The trial court has the discretion to refuse to appoint a third expert, even when requested by the defense. See, *e.g., People v Panah* (2005) 35 C4th 395, 435, 25 CR3d 672. Either party may call and examine these experts as witnesses. Pen C §1027(e). The psychotherapist-client privilege does not apply to psychotherapists appointed by the court under Pen C §1027(a). Evid C §1017. Statements made to the psychotherapist during this interview, however, are inadmissible in the guilt trial unless the defendant puts his or her mental condition in issue. *In re Spencer* (1965) 63 C2d 400, 411, 46 CR 753. See *People v Williams* (1988) 197 CA3d 1320, 1324, 243 CR 480. See also *People v Jantz* (2006) 137 CA4th 1283, 1295, 40 CR3d 875.

Some courts allow defense counsel and the prosecutor to each recommend a psychotherapist for appointment. However, the court is not required to select a psychotherapist suggested by counsel. See *People v Young* (1987) 189 CA3d 891, 234 CR 819.

> Ø **Practice tip:** Mental health experts, even those familiar with the criminal court system, may not be familiar with the procedures or the substantive law involved in adjudicating insanity. Experienced trial lawyers consider it good practice to provide the expert with an information packet that includes current, approved jury instructions and all information that counsel believes is (1) ethically appropriate to present to a mental health professional under the circumstances, and (2) worthy of consideration according to the relevant mental health literature, including protocols suggested by professional organizations such as the American Psychiatric Association and American Psychological Association.

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3. Trial Procedure

§48.48 a. Bifurcated Trial

When a defendant pleads not guilty and not guilty by reason of insanity (NGI), or joins some other plea with that of insanity, he or she is tried last on the insanity plea. Trial on the issue of guilt is commonly called the guilt stage, and trial of the NGI issue is frequently called the sanity stage. During the initial or guilt stage, the defendant is conclusively presumed sane (Pen C §1026(a)); however, evidence of mental disease or defect may be presented on the issues of unconsciousness, absence of intent, and idiocy. *People v Eckstrom* (1977) 71 CA3d 259, 262, 139 CR 341. See also *People v Cruz* (1980) 26 C3d 233, 252, 162 CR 1; *People v Wetmore* (1978) 22 C3d 318, 327, 149 CR 265. See §§48.27-48.38 on absence of required mental state, and §§48.39-48.41 on unconsciousness.

A defendant who is found not guilty at the guilt phase is released with the same effect as if the insanity plea had not been entered. If found guilty, the defendant is immediately tried on the issue of sanity.

The two stages may be tried by the same jury or by separate juries at the court's discretion. Pen C §1026(a); *People v Weaver* (2001) 26 C4th 876, 111 CR2d 2; *People v Williams* (1988) 44 C3d 883, 952, 245 CR 336.

The parties may waive their right to a bifurcated trial. *People v Kelly* (1973) 10 C3d 565, 568, 111 CR 171; *People v Dessauer* (1952) 38 C2d 547, 554, 241 P2d 238; *People v McCoy* (1953) 115 CA2d 565, 567, 252 P2d 371.

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§48.49 b. Evidence During Guilt and Sanity Phases

The defense usually presents expert witnesses to testify that the defendant was insane at the time the crime was committed, while the prosecution either presents experts who reached a contrary conclusion, or experts who do not believe that psychotherapists are capable of making such judgments. The trier of fact, however, can reject such expert testimony and come to a contrary conclusion based on the facts of the case. *People v Skinner* (1986) 185 CA3d 1050, 1061, 228 CR 652 (trial court's ruling that defendant was not insane even though four psychiatrists testified that he was insane was upheld).

A lay witness may testify to a defendant's sanity or insanity only if the witness is a close friend of the defendant or if the witness qualifies under Evid C §800. Evid C §870(a).

Despite *Griffin v California* (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229 (discussed in §23.33), the prosecution may introduce evidence during the sanity phase of a trial to rebut the defendant's silence to psychiatric personnel, for the purpose of establishing that he or she consciously chose silence, and was not mentally incapable of communicating. *People v Jones* (1997) 15 C4th 119, 174, 61 CR2d 386, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823 n1, 72 CR2d 656.

The Penal Code is not explicit on whether the jury during the sanity phase can consider the testimony presented to them at the guilt phase without a stipulation to that effect. No cases hold that a stipulation is necessary, and evidence at the guilt phase is so interrelated with evidence at the sanity phase that the author does not believe a stipulation is necessary.

The defense may request an instruction that explains the disposition of a defendant found not guilty by reason of insanity. *People v Moore* (1985) 166 CA3d 540, 211 CR 856 (proper instruction set out in opinion). However, it is unclear what, if any, particular factual situation would prompt the court to approve a similar instruction today. See *People v Dunkle* (2005) 36 C4th 861, 897, 32 CR3d 23, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (declining to extend *Moore* outside its "original context" and stating that instruction patterned after *Moore* and CALJIC 4.01 is necessarily "speculative"); see also *People v Marks* (2003) 31 C4th 197, 222, 2 CR3d 252. However, CALCRIM 3450 does discuss the disposition of a defendant found legally insane in an optional subpart, and the Bench Notes to CALCRIM 3450 state that this subpart of the instruction must be given on request.

If the trial court discharges a jury before it has reached a decision on the sanity issue, it cannot be reconvened. See *People v Hendricks* (1987) 43 C3d 584, 238 CR 66, discussed in §33.36.

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§48.50 c. Burden of Proof

In the sanity phase of a trial, the burden of proving insanity is on the defendant. Evid C §522. The defendant must prove insanity by a preponderance of the evidence. *People v Drew* (1978) 22 C3d 333, 348, 149 CR 275; *In re Franklin* (1972) 7 C3d 126, 141, 101 CR 553.

Although the prosecution is not entitled to move under Pen C §1118.1 for dismissal of an NGI plea, the trial court has inherent authority to dismiss the plea if the defendant fails to present sufficient supporting evidence. *People v Ceja* (2003) 106 CA4th 1071, 131 CR2d 601.

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§48.51 d. Order of Proof

There are no requirements concerning the order of proof at the sanity phase of a trial, or the order in which argument is made. The defendant often presents his or her proof first, probably because the defendant has the burden of proof. Courts differ, however, with respect to argument to the jury. The order of argument is left to the discretion of the court. *People v Letourneau* (1949) 34 C2d 478, 495, 211 P2d 865; *People v Kimball* (1936) 5 C2d 608, 611, 55 P2d 483.

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§48.52 e. Unanimous Verdict

The verdict of sanity or its lack must be made by a unanimous jury. *People v Bales* (1974) 38 CA3d 354, 356, 113 CR 141. See also *People v Troche* (1928) 206 C 35, 44, 273 P 767. If the verdict is not unanimous, the sanity phase must be retried. See *People v Bales, supra*.

Ø **Note:** At least one California court has ruled that the trial court may grant a directed verdict for the prosecution when there is no substantial evidence of insanity. *People v Ceja* (2003) 106 CA4th 1071, 131 CR2d 601.

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§48.53 C. Commitment Procedure

If the verdict is that the defendant was sane, he or she is sentenced in the same manner as other convicted defendants. Pen C §1026(a). If the verdict is that the defendant was insane, the court must decide whether the defendant has fully recovered his or her sanity. Pen C §1026(a)). If "there is any evidence that the defendant is still suffering from a mental illness," the defendant is remanded to the custody of the sheriff until evaluation of the defendant's sanity is made under Welf & I C §§5000-5579. *People v De Anda* (1980) 114 CA3d 480, 489, 170 CR 830. See Pen C §1026(b). For discussion of Welf & I C §§5000-5579 (the civil commitment statutes), see §§48.79-48.82.

If the defendant is found not to have fully recovered his or her sanity, the court must decide whether to confine the defendant in a state hospital or other treatment facility, or to place him or her on outpatient status. Pen C §1026(a). Before making this choice, the court must refer the defendant to the county mental health director for a recommendation on which order to make. After receiving this report, the court orders either confinement or outpatient status. Pen C §1026(b).

If the verdict is that the defendant was sane as to some counts and insane as to others, and the defendant's sanity has not been fully restored at the time of sentencing, the defendant must first be committed to a state hospital rather than a state prison. *People v Chavez* (2008) 160 CA4th 882, 896, 73 CR3d 189.

Defendants who have been found not guilty by reason of insanity are not entitled to a jury trial to determine whether they should be placed in a local mental health program under Pen C §1026.2(e); *Barnes v Superior Court* (1986) 186 CA3d 969, 231 CR 158.

Once the defendant has been committed as insane, it is presumed that he or she lacks capacity to consent to care, and medication may be administered involuntarily. *In re Locks* (2000) 79 CA4th 890, 94 CR2d 495.

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D. Outpatient Status

§48.54 1. Granting Outpatient Status

Outpatient status may be granted instead of actual confinement in a state hospital or other treatment facility if the defendant's crime was not a dangerous act (see Pen C §1601(b); *People v De Anda* (1980) 114 CA3d 480, 170 CR 830) and if the community program director reports that the defendant will not be a danger to the health and safety of others and will benefit from such status. Pen C §1602. The director must identify an appropriate program of supervision and treatment for the defendant. Pen C §1602(b).

If the defendant was found not guilty by reason of insanity of a felony involving death, great bodily injury, or an act that poses a threat of serious bodily harm to another person, or of one of the felonies expressly enumerated in Pen C §1601, the defendant cannot be released on outpatient status until he or she has been confined in a state hospital or other treatment facility for at least 180 calendar days. Pen C §1601(a).

After 180 days of confinement are over, the defendant can be released on outpatient status only if it is recommended by the director of the state hospital or other treatment facility and the court approves, following a hearing; notice of the hearing must be given to both counsel. Pen C §1602. The director's recommendation must be based on the finding that the defendant is no longer likely to be a danger to the health and safety of others while on outpatient status, and that he or she will benefit from outpatient status. Pen C §1602(a). The community program director must also identify an appropriate program of supervision and treatment. Pen C §1602(b). At the hearing (see Pen C §1604), the burden is on the defendant to prove by a preponderance of the evidence that he or she is no longer dangerous. *People v Cross* (2005) 127 CA4th 63, 72, 25 CR3d 186; *People v Sword* (1994) 29 CA4th 614, 624, 34 CR2d 810.

Time spent on outpatient status, except when placed in a locked facility, is not counted as actual custody and is not credited toward the person's maximum term of commitment. Any time spent in a locked facility must be credited as actual custody. Pen C 1600.5. See also *In re Moye* (1978) 22 C3d 457, 149 CR 491.

Whether a defendant is entitled to credit against the maximum term of commitment for time served while placed in a halfway house depends on whether the placement is sufficiently restrictive so that the defendant was "in custody" while there. This is a factual question that turns on consideration of how many restrictions are placed on the defendant's freedom of movement, regulations governing visitation, rules on physical appearance, and the rigidity of the program's daily schedule. *People v Mord* (1988) 197 CA3d 1090, 243 CR 403; *People v Minahen* (1986) 179 CA3d 180, 224 CR 460.

Ø **Note:** In calculating accumulated time credits, counsel should not rely exclusively on state hospital calculations, particularly for defendants who have been on outpatient status. Typically, those calculations will not include short-term stays in county mental wards and local locked facilities.

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§48.55 2. Annual Review

A defendant on outpatient status is supervised by the community program director or his or her designee. The supervisor must submit reports to the court, prosecutor, and defense counsel on the defendant's progress and status at 90-day intervals. Pen C §1605. Outpatient status can last no longer than 1 year. Pen C §1606. At the end of that period, the court conducts a hearing after notice to the parties and the mental health director. At the hearing, the court may discharge the defendant, renew outpatient status, or order confinement to a treatment facility. Pen C §1606.

There is no guidance in Pen C §§1605-1606 or case law concerning who has the burden of proof or what the standard is. Common law principles as embodied in Evid C §500 place the burden of proof on the party seeking relief. It may be argued that, outpatient status having been granted, the burden would be on the party seeking to change that status. Under Evid C §115, because no standard is set forth in the statute, the burden would be by a preponderance of the evidence.

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§48.56 3. Revocation of Outpatient Status

If the outpatient supervisor believes that the defendant "requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision" (Pen C §1608), or if the prosecutor believes that the defendant "is a danger to the health and safety of others while on outpatient status" (Pen C §1609), they may petition the court to hold a hearing to decide whether to revoke the defendant's outpatient status (Pen C §§1608-1609). In that hearing, the burden is on the People to show by a preponderance of the evidence that the defendant is a danger while an outpatient. *People v DeGuzman* (1995) 33 CA4th 414, 39 CR2d 137. If the court grants the petition, it must order confinement in a state hospital or treatment facility approved by the county mental health director. Pen C §§1608-1609.

A defendant may be hospitalized pending a decision on a request for revocation when such a request has been filed and it is the county mental health director's opinion that the defendant is a danger to self or another and that to deny hospitalization until the revocation hearing would pose an imminent risk to the defendant or another. Pen C §1610. On the request of the community program director, a peace officer must take the defendant into custody and transport him or her to a treatment facility. Pen C §1610. A person so hospitalized has a right to judicial review and an explanation of rights under Welf & I C §§5254.1, 5275-5278, and 5325. Pen C §1610.

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§48.57 4. Authority for Outpatient Treatment

Community-based treatment programs are supervised by a community program director (see Pen C §1605) designated by the State Department of Mental Health and are available through the procedures set out in Pen C §§1600-1620. Names and addresses of the designated community program directors for specific counties can be obtained from the office of the director of the State Department of Mental Health, 1600 9th Street, Sacramento, CA 95814. A directory of county mental health departments is available at http://www.dmh.ca.gov/docs/CMHDA.pdf.

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§48.58 E. Restoration of Sanity and Release

A defendant may apply to the superior court of the county from which his or her commitment was made for release from a state hospital or other treatment facility on the ground that his or her sanity has been restored. Pen C §1026.2(a). The medical director of the state hospital or other treatment facility or the community program director may also apply for the defendant's release. Pen C §1026.2(a). A copy of the application must be given to the community program director or his or her designee. The court then gives notice of the hearing to the prosecutor, community program director, and medical director or person in charge of the treatment facility. Pen C §1026.2(a). No hearing may be had on an application until the defendant has been confined or is on outpatient status or parole for 180 calendar days. Pen C §1026.2(d).

Penal Code §1026.2(e) establishes a two-step procedure for processing an application for restoration of sanity. First, the trial court holds a *hearing* (known as an "outpatient placement hearing") to determine whether the applicant "would be a danger to the health and safety of others due to mental defect, disease or disorder, if under supervision and treatment in the community." A court may not summarily deny an application without a hearing. A defendant is entitled to full due process rights at this hearing, other than jury trial rights, including the right to call and cross-examine witnesses and the right to counsel and to a neutral and detached judicial officer. *People v Soiu* (2003) 106 CA4th 1191, 131 CR2d 421. A trial court's determination at this stage is reviewed for abuse of discretion. *People v Dobson* (2008) 161 CA4th 1422, 1433, 75 CR3d 238. When the petition is denied, a new application may be filed after 1 year and the court must, again, hold a hearing. Pen C §1026.2(j); 161 CA4th at 1434.

If the court finds that the applicant would not be a danger to others, and the applicant is no longer subject to the custody of the California Department of Corrections and Rehabilitation (CDCR), it must release the applicant to a forensic conditional release program (CONREP) in the community for 1 year. At the end of the year, the court must conduct a *trial* (known as a "restoration-of-sanity trial") to determine if the applicant's sanity has been restored. The applicant has the burden at trial of establishing by a preponderance of the evidence that he or she is "no longer a danger to the health and safety of others, due to a mental defect, disease or disorder." Pen C §1026.2(e). See *In re Moye* (1978) 22 C3d 457, 462, 149 CR 491; *In re Franklin* (1972) 7 C3d 126, 145, 101 CR 553; *People v Mapp* (1983) 150 CA3d 346, 198 CR 177.

> Ø **Note:** Counsel should be aware that the area of risk-and-dangerousness assessments by mental health experts remains controversial. Counsel for both parties should review the literature discussing the merits of various risk-and-dangerousness assessment protocols and testing procedures. The MacArthur Research Network on Mental Health and the Law (http://www.macarthur.virginia.edu/mentalhome.html) has sponsored some pioneering work on dangerousness assessment. See, *e.g.*, Slobogin, Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness (2007); Monahan & Steadman, Violence and Mental Disorder: Developments in Risk Assessment (1996). Hearings or trials that involve assessments of future dangerousness often involve extensive litigation about the accuracy of the protocol or instrument used as the foundation for the expert's opinion. Adequate preparation, therefore, requires counsel to be familiar with a variety of testing and assessment instruments and their reliability. Although several commentators have opined that risk assessment has generally improved in the last decade, questions about the reliability of various risk-assessment methodologies are ongoing. See Rogers & Shuman, Fundamentals of Forensic Practice: Mental Health and Criminal Law, chap 11 (2005).

Restoration-of-sanity trials are by jury, unless waived by both the applicant and the prosecution. *People v Coleman* (1978) 86 CA3d 746, 150 CR 415. The court may not set the trial before the person has completed 1 year of outpatient treatment, unless the CONREP program director recommends an earlier release. *People v Superior Court (Woods)* (1990) 219 CA3d 614, 268 CR 379.

The community release provisions of Pen C §1026.2(e) do not apply if the applicant has additional time to serve on a prison sentence, or if restoration of sanity ends a stay of a previously imposed sentence. Pen C §1026.2(m). Such

individuals are not eligible for outpatient treatment and on a finding of restoration of sanity must be transferred to the CDCR or the original sentencing court. Pen C §1026.2(m).

Defendants seeking restoration of sanity are entitled to be represented by appointed counsel when indigent. A defendant confined in a state hospital or other treatment facility as NGI is not able to waive counsel absent receiving psychiatric evidence that the defendant is competent to make that decision. *People v Burnett* (1987) 188 CA3d 1314, 234 CR 67.

The requirement that the restoration-of-sanity applicant remain for a year in a CONREP program is intended to expose him or her to intensive and prolonged evaluation in a noninstitutional setting before unconditional release so as to "prevent premature release." *People v Tilbury* (1991) 54 C3d 56, 62, 284 CR 288. This requirement does not violate constitutional due process or equal protection principles, because the evaluation requirement is of limited duration and serves the legitimate governmental interest of not releasing individuals who may be mentally ill and dangerous before a "trial run" in the community. *People v Beck* (1996) 47 CA4th 1676, 1684, 55 CR2d 340. Indefinite detention of insanity acquittees who are not mentally ill but who cannot prove that they would not be dangerous to others, however, is constitutionally impermissible. *Foucha v Louisiana* (1992) 504 US 71, 118 L Ed 2d 437, 112 S Ct 1780. When the restoration-of-sanity applicant is still subject to the custody of the CDCR because of an uncompleted prison term or a stayed sentence of imprisonment, the court may find that he or she has been restored to sanity without requiring a year's stay in a community release program. Pen C §1026.2(m).

The law is unclear on how a defendant's behavior with and without medication affects the outcome of restoration of sanity proceedings. The court in *People v Williams* (1988) 198 CA3d 1476, 244 CR 429, held that, when a defendant requires medication in order to be considered restored to sanity, the jury must make two findings based on a preponderance of the evidence:

- The defendant is not a danger to others in a medicated state; and
- The defendant will continue to take the medication.

The *Williams* court interpreted its holding to be consistent with *Cramer v Tyars* (1979) 23 C3d 131, 151 CR 653, even though the *Cramer* court disallowed an instruction similar to that in *Williams* because it focused on future speculation rather than current condition. The court in *People v De Anda* (1980) 114 CA3d 480, 170 CR 830, however, held that restoration through psychopharmaceuticals should not be considered a full recovery.

The trial court should not tell jurors in a restoration-of-sanity trial that a finding of restored sanity will mean that the defendant will no longer receive mandatory treatment. *People v Kipp* (1986) 187 CA3d 748, 232 CR 87.

Because a trial on restoration of sanity is essentially a civil proceeding, the court may *direct a verdict* if the defendant does not produce substantial evidence to the effect that he or she has recovered his or her sanity. *People v Mapp* (1983) 150 CA3d 346, 350, 198 CR 177.

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§48.59 F. Extension of Commitment; Credit for Time Served

General rule; credit for time served. With one exception (discussed below), the maximum term of commitment for a defendant found not guilty by reason of insanity is the longest term of imprisonment that could have been imposed for the offenses of which he or she was convicted, including the upper term of the base offense and any additional terms for enhancements or consecutive sentences that could have been imposed. Pen C §1026.5(a)(1). See *In re Moye* (1978) 22 C3d 457, 467, 149 CR 491. Credit for time served under Pen C §2900.5 may be deducted, but the term may not be reduced for good behavior or time worked while in custody ("good time" and "worktime") under Pen C §§2930-2935. Pen C §1026.5(a)(1); *People v Sage* (1980) 26 C3d 498, 165 CR 280 (conduct credit allowed only for presentence jail time); *People v Saffell* (1979) 25 C3d 223, 233, 157 CR 897 (good behavior); *People v Smith* (1981) 120 CA3d 817, 175 CR 54 (no conduct credits).

Exception when defendant presents substantial danger of physical harm to another. A defendant may be committed beyond the maximum term when (Pen C §1026.5(b)(1); *People v Wilder* (1995) 33 CA4th 90, 39 CR2d 247; *People v Bennett* (1982) 131 CA3d 488, 182 CR 473; *In re Fuller* (1981) 124 CA3d 251, 177 CR 233; see *In re Moye, supra*):

- The defendant's original commitment arose from an underlying felony conviction; and
- The defendant presents a substantial danger of physical harm to others because of a mental disease, defect, or disorder.

An extended commitment of a defendant presenting a substantial danger requires proof that the defendant has serious difficulty in controlling his or her dangerous behavior. *People v Sudar* (2007) 158 CA4th 655, 662, 70 CR3d 190; *People v Zapisek* (2007) 147 CA4th 1151, 54 CR3d 873; *People v Bowers* (2006) 145 CA4th 870, 52 CR3d 74.

Setting term and requesting extensions. The committing court states the length of the term in its order of commitment. Pen C §1026.5(a)(1).

The medical director of the state hospital or treatment facility in which the defendant is confined must submit to the prosecuting attorney, within 180 calendar days before expiration of the maximum term of commitment, his or her opinion on whether the defendant fits the statutory criteria for extension. The prosecutor may then file a petition for extension setting out the reasons for requesting it. The request must be made no later than 90 calendar days before the defendant's original commitment expires unless good cause is shown. Pen C §1026.5(b)(2). It is unclear whether the time limits in §1026.5(b)(2) are jurisdictional. Compare *People v Pacini* (1981) 120 CA3d 877, 888, 174 CR 820 (yes), with *People v Mitchell* (2005) 127 CA4th 936, 26 CR3d 163 (no as long as defendant has time to prepare for trial), *In re Johns* (1981) 119 CA3d 577, 580, 175 CR 443 (no), and *People v Dougherty* (1983) 143 CA3d 245, 247, 191 CR 668 (no). See also *People v Minahen* (1986) 179 CA3d 180, 224 CR 460 (deadlines are jurisdictional only if DA cannot show good cause for missing them), *People v Mord* (1988) 197 CA3d 1090, 243 CR 403 (followed *Minahen*), and *People v Superior Court (Wagner)* (1989) 210 CA3d 1146, 258 CR 740 (defendant waived error by unexcused delay in challenging it).

Trial on extension of commitment. A defendant is entitled to be represented by counsel, to a jury trial (Pen C §1026.5(b)(3)), and to all other rights guaranteed under the federal and California constitutions in criminal cases (Pen C §1026.5(b)(7)). For example, the privilege against self-incrimination bars the prosecution from questioning the defendant about his or her mental state. *People v Haynie* (2004) 116 CA4th 1224, 11 CR3d 163. The rules of criminal discovery apply. Pen C §1026.5(b)(3). On discovery, see chap 11. A jury trial may be waived by counsel over the client's objection. *People v Powell* (2004) 114 CA4th 1153, 1157, 8 CR3d 441. Counsel must be appointed if the defendant is indigent. Pen C §1026.5(b)(7).

If a defendant requests a trial, it must begin within 30 calendar days after expiration of the maximum term. Pen C §1026.5(b)(4). At trial, the prosecution has the burden of proving beyond a reasonable doubt that the defendant is mentally ill and presents a physical danger. Whether an individual has a mental disease, disorder, or defect is a question of fact to be decided by the trier of fact with the assistance of expert testimony. *People v Superior Court*

(Blakely) (1997) 60 CA4th 202, 213, 70 CR2d 388; *People v Buttes* (1982) 134 CA3d 116, 125, 184 CR 497. There is no requirement that a defendant be found amenable to treatment in order to continue the stay in a state hospital. *People v Superior Court (Blakely)* (1997) 60 CA4th 202, 214, 70 CR2d 388; *People v Bennett* (1982) 131 CA3d 488, 494, 182 CR 473; *People v Goff* (1981) 127 CA3d 1039, 1046, 179 CR 190. The mental disorder that underlies the extended commitment may be different from that on which the defendant was found insane. *People v McCune* (1995) 37 CA4th 686, 692, 43 CR2d 804. The prosecutor does not have to show that the defendant committed a recent overt act indicating dangerousness. *People v Buttes* (1982) 134 CA3d 116, 127, 184 CR 497; *People v Martin* (1980) 107 CA3d 714, 725, 165 CR 773. However, the extended-detention scheme requires proof that a defendant has serious difficulty controlling his or her dangerous behavior. *People v Zapisek* (2007) 147 CA4th 1151, 54 CR3d 873; *People v Galindo* (2006) 142 CA4th 531, 536, 48 CR3d 241. See also *In re Howard N.* (2005) 35 C4th 117, 132, 24 CR3d 866. If the trier of fact finds that a defendant's commitment to a state mental facility should be extended, the court may return the defendant for an additional 2 years. Time spent on outpatient status, except in a locked facility at the direction of the outpatient supervisor, shall not count as actual custody and shall not be credited toward the person's maximum term of commitment or toward the person's term of extended commitment. Pen C §1026.5(b)(8). Section 1026.5(b)(8) does not violate due process or equal protection even though it excludes time spent on outpatient status from the maximum term of commitment. *People v Crosswhite* (2002) 101 CA4th 494, 124 CR2d 301.

A person whose commitment has been extended is eligible for outpatient status as described in §§48.54-48.57.

Counsel should check the law as it existed at the time of the original commitment whenever dealing with an extension petition. For example, until 1985, §1026.5(b) allowed extensions only for persons who had committed violent felonies. Other felons could not be extended. Persons committed before that date for nonviolent felonies may have a right to withdraw their NGI plea.

The criminal law concept of ex post facto does not apply to law changes concerning restoration-of-sanity proceedings, because these proceedings are considered civil. *People v Juarez* (1986) 184 CA3d 570, 229 CR 145 (law change applied retroactively because ex post facto concept did not apply, and statute was expressly retroactive). However, a retroactive change in civil law may be a denial of due process if it deprives a person of vested rights. See, *e.g.,* 1 Witkin & Epstein, California Criminal Law, *Introduction to Crimes* §12 (3d ed 2000). If the *Juarez* court had considered the law change in terms of the vested interest/due process approach, the court might have reached a different result.

Authority is split on whether an accused in California has any Fifth Amendment privileges against compelled testimony in civil proceedings, including NGI extension proceedings. In *People v Lopez* (2006) 137 CA4th 1099, 40 CR3d 789, the Fourth District extended the Fifth Amendment privilege against compelled testimony to all forms of civil commitments related to criminal adjudications. In *People v Haynie* (2004) 116 CA4th 1224, 11 CR3d 163, the Fifth District took the view that the privilege does apply in NGI-related proceedings.

Extended commitments for sexually violent predators are discussed in §48.62.

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VI. COGNITIVE DEVELOPMENTAL DISORDERS

§48.60 A. "Idiocy"

Under Pen C §26, "idiots" are incapable of committing crimes. As construed by the California courts, an idiot is an individual who, owing to mental retardation, is incapable of understanding the nature or his or her act or cannot distinguish right from wrong. *People v Phillips* (2000) 83 CA4th 170, 99 CR2d 448. See also *In re Ramon M.* (1978) 22 C3d 419, 425, 149 CR 387 (noting that California courts have traditionally used same test for insanity and idiocy). Idiocy is a complete defense. *In re Ramon M., supra*.

Trials are seldom necessary, however, because a defendant with a cognitive developmental disability who meets the definition of idiocy will probably be deemed incompetent. Pen C §1368. Diversion is another alternative for defendants who suffer from severe cognitive impairments. See Pen C §§1001.20-1001.34. Organic brain deterioration, fetal alcohol syndrome, and head trauma are conditions that could cause impairments serious enough to give rise to the idiocy defense.

The idiocy defense can be used by defense counsel at preliminary hearings to weed out groundless charges and avoid unnecessary confinement under Pen C §§1368-1370.

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§48.61 B. Mental Retardation as Defense to Death Penalty

In *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, the Supreme Court held that the execution of mentally retarded individuals is cruel and unusual punishment prohibited by the Eighth Amendment. California has implemented the *Atkins* rule by enacting Pen C §1376, which defines "mentally retarded" and establishes a procedure in capital cases for determining whether a defendant is mentally retarded. See *People v Superior Court (Vidal)* (2007) 40 C4th 999, 56 CR3d 851. See also *Campbell v Superior Court* (2008) 159 CA4th 635, 71 CR3d 594. For further discussion, see §54.18A.

Ø **Note:** A postconviction claim of mental retardation by a defendant who has been sentenced to death is raised by a habeas corpus petition and adjudicated substantially in accordance with the procedure established in Pen C §1376. See *In re Hawthorne* (2005) 35 C4th 40, 24 CR3d 189.

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Source: Criminal Law/California Criminal Law Procedure and Practice/48 MENTAL COMPETENCE, MENTAL DEFENSES, AND RELATED ISSUES/ VII. SEXUALLY VIOLENT PREDATOR COMMITMENTS/§48.62 A. The Sexually Violent Predator (SVP) Act

VII. SEXUALLY VIOLENT PREDATOR COMMITMENTS

§48.62 A. The Sexually Violent Predator (SVP) Act

Welfare and Institutions Code §§6600-6609.3 provide for the civil commitment of individuals known as Sexually Violent Predators (SVPs).

The Sexually Violent Predator Act establishes an extended commitment scheme that is somewhat analogous to extended commitments for persons found not guilty by reason of insanity (NGI), *Hofferber* conservatorships (see *Conservatorship of Hofferber* (1980) 28 C3d 161, 167 CR 854), and persons committed as Mentally Disordered Offenders (MDOs) under Pen C §2962. For discussion of MDOs, see §§48.71-48.76.

The legislative intent section of the SVP Act reflects the legislature's finding (Stats 1995, ch 762, §1) that a

> small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These persons are not safe to be at large and if released represent a danger to the health and safety of others.... It is the intent of the legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes.

Constitutionality. In *Hubbart v Superior Court* (1999) 19 C4th 1138, 81 CR2d 492, the supreme court held that the SVP Act does not violate constitutional principles of due process, equal protection, and the prohibition of ex post facto punishment. Courts of appeal continued to hold the SVP Act constitutional following amendments to it which, among other things, created indeterminate commitments. Again, in *People v McKee* (2010) 47 C4th 1172, 104 CR3d 427, the supreme court rejected due process and ex post facto challenges to the SVP Act. However, with respect to equal protection challenges, the court concluded that the state had not carried its burden of demonstrating why SVPs, but not other ex-felons subject to civil commitment, such as MDOs, were subject to indefinite commitment. The court remanded the case to the trial court to allow the prosecution the opportunity to justify the differential treatment in accord with established equal protection principles. 104 CR3d at 451. The U.S. Supreme Court upheld a substantively similar law in *Kansas v Hendricks* (1997) 521 US 346, 138 L Ed 2d 501, 117 S Ct 2072.

Definition of sexually violent predator. A sexually violent predator (SVP) is defined as a person who has been convicted of a sexually violent offense against one or more victims; and suffers from a diagnosable mental disorder that makes him or her a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. Welf & I C §6600(a).

> Ø **Note:** Recent overt criminal acts while in custody are not required to establish the individual's danger to the health and safety of others. Welf & I C §6600(d), (f).

A mental disorder is defined in the statute as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." Welf & I C §6600(c).

A "sexually violent offense" is an offense committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury, or threatening to retaliate in the future against the victim or any other person, and which is either a felony violation of an act described in Pen C §261, §262, §264.1, §269, §286, §288, §288a, §288.5, or §289 or any felony violation of Pen C §207, §209, or §220 committed with the intent to commit a violation of Pen C §261, §262, §264.1, §286, §288, §288a, or §289. Welf & I C §6600(b).

If the victim of an offense specified in Welf & I C §6600(b) is under the age of 14, the offense will automatically constitute a sexually violent offense for the purposes of Welf & I C §6600. Welf & I C 6600.1.

Welfare and Institutions Code §6600(a)(2) specifies that the conviction of a sexually violent offense includes any conviction of an offense specified in §6000(b), whether it resulted in a determinate prison term, an indeterminate prison term, a grant of probation, or commitment to the California Department of Corrections and Rehabilitation (CDCR), Division of Juvenile Facilities, under Welf & I C §1731.5; a conviction in another jurisdiction of a crime that contains all

the elements of a crime listed in §6000(b); a conviction under a predecessor statute of a crime that contains all the elements of a crime listed in §6000(b); an NGI finding of a crime listed in §6000(b); and a conviction that resulted in a finding that the defendant was a mentally disordered sex offender. Welf & I C §6600(a)(2)(A)-(I); *People v Franklin* (2003) 105 CA4th 532, 129 CR2d 518.

Under Welf & I C §6600(g), a juvenile adjudication may also qualify as a predicate offense under the SVP Act if:

- The minor was at least age 16 at the time he or she committed the offense;
- The offense is a sexually violent offense listed in §6600(b);
- The minor was made a ward of the juvenile court under Welf & I C §602 because of the offense; and
- The minor was committed to the CDCR, Division of Juvenile Facilities.

A previous finding that the defendant was not a mentally disordered sex offender does not bar relitigation of the issue of mental health in sexually violent predator proceedings. Collateral estoppel applies only to the facts in issue as they existed at the time. Thus, a determination that the defendant was not an MDSO made years before in a proceeding with different statutory purposes and different procedural settings was not binding in an SVP proceeding at which the defendant's current mental condition was at issue. *People v Carmony* (2002) 99 CA4th 317, 120 CR2d 896.

Ø **Note:** Prior convictions from no contest pleas taken before the 1982 statutory amendment to Pen C §1016 qualify under the SVP Act. *People v Yartz* (2005) 37 C4th 529, 36 CR3d 328.

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§48.63 B. Filing of SVP Petition

SVP commitments may be sought only for prisoners who are in custody under a determinate sentence with the California Department of Corrections and Rehabilitation (CDCR) or whose parole has been revoked. Welf & I C §6601(a).

> Ø **Note:** A petition for SVP commitment should not be dismissed if it is later learned that the prisoner is in unlawful custody, so long as the custody was the result of a good faith mistake of fact or law. Welf & I C §6601(a)(2); *People v Superior Court (Small)* (2008) 159 CA4th 301, 309, 71 CR3d 462 (bad faith; remedy is dismissal). However, if the *conviction* that forms the basis for the prisoner's custodial status and initiation of SVP proceedings is reversed, and the prisoner is not retried and reconvicted, then the petition for SVP commitment must be dismissed. *In re Smith* (2008) 42 C4th 1251, 1269, 73 CR3d 469.

At least 6 months before the release of a person in custody under its jurisdiction, the CDCR must refer him or her for screening by the CDCR and the Board of Parole Hearings (BPH). Welf & I C §6601(a)-(b). If it is found by the CDCR and the BPH that the prisoner is likely to be an SVP, he or she is referred for a "full evaluation" by the Department of Mental Health (DMH). Welf & I C §6601(c). The BPH may order the prisoner to remain in custody for no more than 45 days beyond his or her scheduled release date for the full evaluation. Welf & I C §6601.3. See *In re Hovanski* (2009) 174 CA4th 1517, 95 CR3d 370. A standardized assessment protocol is used, administered by two practicing psychiatrists or psychologists, either one or both of whom may be independent professionals. If the two mental health professionals agree that the prisoner is an SVP, the DMH must forward a request for the filing of a petition for commitment to the district attorney or county counsel (as designated by the board of supervisors) of the county in which the prisoner was originally convicted. Welf & I C §6601(d), (f), (h)-(i).

> Ø **Note:** If a prisoner's convictions are from more than one court, each court has concurrent jurisdiction under the SVP Act. Discretion to decide where to file the petition belongs to prosecutors in each county. *People v Krah* (2003) 114 CA4th 534, 541, 7 CR3d 853; *Cheek v Superior Court* (2002) 103 CA4th 520, 126 CR2d 820.

Absent such concurrence, the DMH must "arrange" for examination by two independent mental health professionals. Welf & I C §6601(d)-(e). If those professionals concur that the prisoner meets the SVP criteria, the DMH must forward a request for the filing of a petition for commitment, as described above. All proceedings are heard in the superior court. Welf & I C §§6601(i), 6602.

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§48.64 C. Probable Cause Hearing

After a petition for SVP commitment is filed, a superior court judge conducts a probable cause hearing at which the prisoner is represented by an attorney. Welf & I C §6602(a).

Ø **Note:** An offender in an SVP proceeding does not have the right to self-representation under *Faretta* or the Due Process Clause, because SVP proceedings are "civil in nature"; other procedural safeguards inherent in the SVP proceedings protect the defendant's dignitary interest. *People v Fraser* (2006) 138 CA4th 1430, 42 CR3d 424.

The probable cause hearing requires witness testimony and may include written evidence and expert testimony subject to cross-examination. A paper review procedure violates due process. *In re Parker* (1998) 60 CA4th 1453, 71 CR2d 167. Victim hearsay statements in a probation report are admissible at the probable cause hearing to establish the details of an underlying prior conviction. *People v Superior Court (Howard)* (1999) 70 CA4th 136, 82 CR2d 481. The defendant remains in custody pending the completion of the hearing. Welf & I C §6602.

In *Cooley v Superior Court (Marentez)* (2002) 29 C4th 228, 246, 127 CR2d 177, the supreme court explained that, at the probable cause hearing, the superior court must decide whether a reasonable person could entertain a strong suspicion that:

(1) The offender has been convicted of a qualifying sexually violent offense against at least two victims (now see Welf & I C §6600(a)(1) providing for "one or more" victims);

(2) The offender has a diagnosable mental disorder;

(3) the disorder makes it likely that he or she will engage in sexually violent criminal conduct if released; and

(4) This sexually violent criminal conduct will be predatory in nature.

The phrase "likely to engage in sexually violent predatory criminal behavior upon … release" requires the superior court to rule on whether the potential SVP presents a *serious and well-founded risk* of committing sexually violent criminal acts that will be of a predatory nature. 29 C4th at 254. The superior court must consider the offender's amenability to voluntary treatment when making this determination. *People v Superior Court (Ghilotti)* (2002) 27 C4th 888, 921, 119 CR2d 1. Evidence of proposed involuntary treatment (*e.g.*, LPS conservatorship) is not relevant. See *People v Calderon* (2004) 124 CA4th 80, 88, 21 CR3d 92.

If probable cause is found, the judge orders a trial to rule on whether the person is an SVP. The judge must order that the alleged SVP remain in custody in a secure facility pending the outcome of the trial. Welf & I C §6602(a). Welfare and Institutions Code §6602.5 and Pen C §4002(b) permit the trial court to order precommitment treatment for alleged SVPs who have had a probable cause finding or who have already begun a course of psychiatric treatment. *People v Ciancio* (2003) 109 CA4th 175, 134 CR2d 531. If probable cause is not found, the petition must be dismissed. Despite the dismissal of the petition, anyone who is subject to parole must report to the parole authorities. Welf & I C §6602(a).

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§48.65 D. Trial

Procedural requirements. Trial should occur within a reasonable time after the probable cause hearing. See *People v Litmon* (2008) 162 CA4th 383, 406, 76 CR3d 122 (court should have granted motion to dismiss for untimeliness). The alleged SVP has rights at the trial stage to trial by jury, the assistance of counsel, the right to retain experts, and access to all relevant medical and psychological records and reports. Welf & I C §6603(a). The alleged SVP also has the right to testify at trial over counsel's objection. *People v Allen* (2008) 44 C4th 843, 869, 80 CR3d 183. The Civil Discovery Act (CCP §§2016.010-2036.050) applies to SVP proceedings, which are "special proceeding[s] of a civil nature." *People v Yartz* (2005) 37 C4th 529, 537 n4, 36 CR3d 328.

Ø **Note:** Because SVP proceedings are "special proceedings of a civil nature," the rules in Part 2 of the Code of Civil Procedure (CCP §§307-1062.20), pertaining to civil actions, are generally not applicable. *People v Evans* (2005) 132 CA4th 950, 955, 34 CR3d 35 (CCP §583.310, which requires dismissal if civil trial has not begun within 5 years of filing or 3 years of reversal or mistrial, does not apply to SVP proceedings; court may, however, exercise its discretion under CCP §187 to dismiss petition for unreasonable prosecutorial delay); *Bagration v Superior Court* (2003) 110 CA4th 1677, 3 CR3d 292 (motions for summary judgment (CCP §437c) not available in sexually violent predator proceedings).

If the alleged SVP does not demand a jury trial, the petitioner (the district attorney) may demand one, but if neither party demands a jury, the trial is heard by the court sitting alone. Welf & I C §6603(b)-(c). The burden of proof is on the petitioner to show beyond a reasonable doubt that the person is an SVP. Welf & I C §6604. Each side is entitled to six peremptory challenges. CCP §231(c); *People v Calhoun* (2004) 118 CA4th 519, 523, 13 CR3d 166. Jury verdicts must be unanimous. Welf & I C §6603(f).

Noncompliance with the procedural prerequisites of the SVP Act does not ordinarily deprive the trial court of jurisdiction. See, *e.g., People v Ward* (2002) 97 CA4th 631, 118 CR2d 599 (failure to obtain two written psychological assessments did not require dismissal); *People v Badura* (2002) 95 CA4th 1218, 116 CR2d 336 (failure to hold probable cause hearing until after termination of original commitment did not divest court of jurisdiction to proceed on recommitment petition).

Evidence. The details of prior convictions may be shown by documentary evidence, including transcripts, probation and sentencing reports, and DMH evaluations. Welf & I C §6600(a)(3). See *People v Otto* (2001) 26 C4th 200, 211, 109 CR2d 327 (victim's hearsay statements had sufficient indicia of reliability to satisfy due process); *People v Dean* (2009) 174 CA4th 186, 94 CR3d 478. Documents used as proof of prior convictions must be certified in accordance with Evid C §§1530-1531. *In re Kirk* (1999) 74 CA4th 1066, 88 CR2d 648.

Ø **Note:** In *People v Angulo* (2005) 129 CA4th 1349, 30 CR3d 189, the defendant claimed that admission of police reports of prior convictions following guilty pleas violated *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. The court of appeal rejected the argument, concluding both that *Crawford* did not apply to civil recommitment proceedings and that the defendant had an opportunity to cross-examine the victims and police officers involved in the prior offenses through deposition.

Welfare and Institutions Code §6601(a)(2) provides that an SVP petition may not be attacked on the basis of a later determination that the individual's custody was unlawful, as long as the custody was the result of a good faith mistake of fact or law. See also *People v Ibanez* (1999) 76 CA4th 537, 544, 90 CR2d 536; *People v Moore* (1998) 69 CA4th 626, 81 CR2d 658 (defendant may not attack validity of conviction as basis for commitment, because proceedings under SVP law are not "immediate" consequence of plea of guilty to underlying sexual offense). However, if the *conviction* that forms the basis for the prisoner's custodial status and initiation of SVP proceedings is reversed, and the prisoner is not retried and reconvicted, then the petition for SVP commitment must be dismissed. *In re Smith* (2008) 42 C4th 1251, 1269, 73 CR3d 469. In a case in which the qualifying prior conviction under the SVP Act was a court-martial conviction in Germany for indecent acts with a child, the court held that the use of the term "conviction in

another state" is limited to convictions in one of the United States and does not encompass a conviction by a military court-martial in Germany. *People v Hunt* (1999) 74 CA4th 939, 88 CR2d 524.

Even though there must be two concurring expert opinions before a request for filing a commitment petition may be forwarded by the Director of Mental Health to the county, that rule does not mean that two psychiatrists or psychologists must testify at trial. One witness, if credible, is enough. See Evid C §411 (testimony of one witness sufficient unless statute requires more). *People v Scott* (2002) 100 CA4th 1060, 123 CR2d 253. Psychological or psychiatric testimony in SVP proceedings is not scientific evidence of a nature subject to the *Kelly-Frye* rule. *People v Ward* (1999) 71 CA4th 368, 373, 83 CR2d 828.

Ø **Note:** Although it has been held that the *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, interpretation of the Sixth Amendment does not apply to an SVP proceeding that requires only adherence to due process rights (see *People v Angulo* (2005) 129 CA4th 1349, 30 CR3d 189), it is debatable whether this interpretation will survive federal review.

Due process. A defendant in an SVP proceeding is entitled to due process protections because civil commitment involves a significant deprivation of liberty. *People v Otto* (2001) 26 C4th 200, 209, 109 CR2d 327. However, due process under the SVP Act is not measured by the terms applicable to a defendant in criminal proceedings but by the standard applicable to civil proceedings. *People v Superior Court (Howard)* (1999) 70 CA4th 136, 154, 82 CR2d 481. See also *People v Lopez* (2006) 146 CA4th 1263, 1273, 53 CR3d 549. An alleged SVP does have a right to trial within a "meaningful time" as a matter of due process. *People v Litmon* (2008) 162 CA4th 383, 399, 76 CR3d 122 (proceedings dismissed for lack of timeliness). An alleged SVP also has a constitutional right under both the federal and state Due Process Clauses to testify at trial over the objection of counsel. *People v Allen* (2008) 44 C4th 843, 869, 80 CR3d 183.

Required findings. The determination of whether the defendant is "likely" to engage in sexually violent criminal behavior is the same at trial as in the probable cause hearing; *i.e.,* the trier of fact must find that there is a *serious and well-founded risk* that the defendant will commit sexually violent criminal acts on release that will be of a predatory nature. *People v Roberge* (2003) 29 C4th 979, 129 CR2d 861. The fact finder must determine not only whether the defendant is likely to "engage in sexually violent criminal behavior" (§6600(a)) but whether that behavior is likely to be *predatory*. Welf & I C §6600(e) ("predatory" means directed toward a stranger, casual acquaintance, or relationship created for victimization); *People v Hurtado* (2002) 28 C4th 1179, 124 CR2d 186.

Amenability to treatment is not required for a finding that the person is an SVP, nor is it required that the person recognize his or her need for, or be willing to participate in, treatment. Welf & I C §6606(b).

Jury instructions. CALJIC 4.19 (now see CALCRIM 3454) (definition of sexually violent predator) was ruled constitutionally adequate in *People v Williams* (2003) 31 C4th 757, 3 CR3d 684. CALCRIM 224 (sufficiency of circumstantial evidence) must be given sua sponte when the issue primarily depends on circumstantial evidence. Bench Notes to CALCRIM 224.

If evidence of the defendant's "amenability to voluntary treatment" is presented, the trial court has a sua sponte duty to instruct the jury that it must determine whether custody in a secure facility is necessary to ensure that the defendant is not a danger to the health and safety of others. *People v Grassini* (2003) 113 CA4th 765, 777, 6 CR3d 662 (failure to instruct was harmless error).

Ø **Practice tip**: SVP cases often involve intricate litigation over the qualifications of experts, the foundation for their opinions, and the accuracy of their assessment procedures. The State of California provides certification for experts who deal with sex offenders, and the evaluation of such offenders in specific contexts. With the emergence of the SVP laws, some district attorney and public defender offices have developed groups of lawyers who specialize in litigating these cases. These lawyers are valuable resources because they are familiar with both the legal issues and the current state of the pertinent sciences. Counsel unfamiliar with SVP litigation should understand that specialized literature for the mental health professions addresses the assessment of the characteristics of sexual offenders, and that specific sections of standard works such as the DSM-IV-TR deal specifically with the diagnostic criteria attached to certain conditions associated with sexual offenders. In addition, a number of scholars have developed testing procedures to assess the characteristics and dangerousness of sex offenders. Examples include RRASOR (Rapid Risk Assessment of Sexual Offense); SVR-20 (Sexual Violence

Recidivism-20); VRAG (Violence Risk Appraisal Guide); and SORAG (Sexual Offense Risk Appraisal Guide). Counsel will need to become thoroughly familiar with the relevant literature, because some of the specific tests and assessment procedures have been identified as problematic, for several reasons. See Rogers & Jackson, *Sexually Violent Predators: The Risky Enterprise of Risk Assessment,* 33 J Am Acad Psychiatry L 523 (2005). Therefore, counsel will want to be conversant with the data that will assist in resolving objections to the reliability and relevance of the expert opinions expressed.

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§48.66 E. Commitment as SVP

If found to meet the criteria of Welf & I C §6600, the SVP is committed by the court to the custody of the DMH for an indeterminate term. The commitment is for appropriate treatment and confinement, but it must be at a secure facility on the grounds of an institution under CDCR jurisdiction. Welf & I C §6604. The DMH has an affirmative obligation to provide treatment. Welf & I C §6606(a), (c).

In a nonemergency, an SVP has the right to refuse the involuntary administration of antipsychotic medication unless found by a court to be incompetent to refuse treatment or to be a danger to others. *In re Calhoun* (2004) 121 CA4th 1315, 1354, 18 CR3d 315. See *In re Qawi* (2004) 32 C4th 1, 20, 7 CR3d 780.

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§48.67 F. Annual Review of Commitment and Release

A person committed as an SVP has the right to an annual review of his or her mental condition, including an examination by a retained or appointed qualified expert or professional. Welf & I C §6605(a). If the report concludes that the person committed as an SVP no longer meets the SVP criteria or that conditional release is appropriate, the DMH must authorize the person to petition the committing court for release. Welf & I C §6605(b). On receipt of the petition, the court must order a show cause hearing. If the court determines there is probable cause to believe the petition has merit, it must set a hearing on the issue. At that hearing, the committed person is entitled to all of the constitutional protections provided at the initial commitment hearing. Welf & I C §6605(c)-(d). Either the defense or the prosecution may demand a trial by jury and may retain experts to examine the committed individual. Welf & I C §6605(d). The burden of proof is on the state to prove beyond a reasonable doubt that the committed individual remains an SVP. Welf & I C §6605(d).

Ø **Note:** A committed person petitioning the court for release without the recommendation or concurrence of the DMH bears the burden of proving he or she is not an SVP. Welf & I C §6608(i). See §48.68.

The DMH is obligated to seek judicial review *any* time it believes a committed person is no longer an SVP, not just at the annual review. Welf & I C §§6605(f), 7250. If the court finds that the person is no longer an SVP, he or she is unconditionally released and discharged. Welf & I C §6605(f).

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§48.68 G. Conditional Release Program

After a confinement of at least 1 year, a person found to be an SVP may be placed in a conditional release program. Welf & I C §6608(c)-(d). A hearing on this issue may be generated by a report to the court by the DMH (Welf & I C §6607(a)) or by a petition by the person committed, without the consent of the DMH. Welf & I C §6608(a). The DMH is obligated to provide written notice annually to the person committed of the right to petition the court for conditional release, and the notice must contain a waiver of rights. Welf & I C §6605(b).

The issue at the conditional release hearing is whether the person would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior owing to his or her diagnosed mental disorder if under supervision and treatment in the community. Welf & I C §6608(d). The person committed has the burden of proof by a preponderance of the evidence at the hearing. Welf & I C §§6608(i), 6607(b). If the court finds that the person is not a danger to others owing to his or her diagnosed mental disorder, if under supervision and treatment in the community, the court must order him or her placed in a forensic conditional release program operated by the state for 1 year. The program must include outpatient care. Welf & I C §6608(d). The period of this placement is 1 year, during which the court retains jurisdiction of the person. Welf & I C §6608(d).

Before a person is actually placed on conditional release, the local community program director designated under Pen C §1605(a) must recommend a particular program to the court. The court may reject this recommendation and specify the reasons for its order on the record. Welf & I C §6608(e). Actual placement must occur within 21 days after notification of the court's order, unless good cause is shown. Welf & I C §6608(f).

When a person files a petition for conditional release without the recommendation or concurrence of the DMH, certain special provisions apply. If the person committed previously filed a petition without DMH concurrence that was found to be "frivolous," or the committed person's condition was found not to have changed so that it no longer met the SVP criteria, the court may deny the current petition without a hearing. However, the court may set a hearing if the petition contains facts on which a court could find that the committed person's condition had so changed that a hearing is warranted. Welf & I C §6608(a). A court cannot deny a petition for conditional release as frivolous if the petition is supported by substantial evidence not totally and completely without merit; the court must hold a hearing on the petition. *People v Collins* (2003) 110 CA4th 340, 1 CR3d 641.

If the court rules against the committed person at a hearing for conditional release, it may nonetheless place him or her on outpatient status in accordance with Pen C §§1600-1620. Welf & I C §6608(g). If release is denied, the person committed may not file a new application until 1 year has passed after the date of denial.

Time spent in a conditional release program does not count toward the term of commitment as an SVP unless the person is confined in a locked facility. Welf & I C §6608(k). The Penal Code's outpatient revocation procedures apply to the conditional release. Welf & I C §6608(e).

There must be an annual written notification to the person committed as an SVP of his or her right to petition for conditional release. If the person neither files a petition nor affirmatively waives his or her right to do so, the court must set a show cause hearing to assess whether facts exist to warrant a full hearing on the issue of whether he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged. Welf & I C §6605(b). The person has a right to be present and to have an attorney at the show cause hearing. Welf & I C §6605(b). If at the hearing the court rules in favor of the person committed, then a hearing must be set on the issue. Welf & I C §6605(d). That "hearing" is substantially identical to the commitment trial. If at the hearing the person is found to be an SVP, a new indeterminate term of commitment commences. If the court or jury "rules for the committed person," he or she is then unconditionally released and discharged. Welf & I C §6605(e).

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§48.69 H. Notice of SVP's Release; Placement

Notice of an SVP's release into the community must be given to specified law enforcement authorities and individuals. Welf & I C §§6609-6609.3.

An SVP who is conditionally released must be placed in the county that was his or her domicile before incarceration, unless the court finds that extraordinary circumstances require placement outside the county of domicile. Welf & I C §6608.5(a). In recommending a specific placement for community outpatient treatment, specified factors must be taken into account, including the concerns and proximity of the victim or the victim's next of kin, as well as the age and profile of the victim or victims in the sexually violent offenses committed by the SVP. Welf & I C §6608.5(e). The SVP must not be placed within a quarter-mile of any K-12 school if the court finds that the SVP has "a history of improper sexual conduct with children" or if the SVP has been previously convicted of certain enumerated sex crimes. Welf & I C §6608.5(f).

Ø **Practice tip:** Counsel in SVP cases should review current literature on developments in the science involved in SVP proceedings. For a review of current literature, see Shajnfeld & Krueger, Reforming (Purportedly) Non-Punitive Responses to Sexual Offending, 25 Dev Mental Health L 81 (2006).

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§48.70 VIII. MENTALLY DISORDERED SEX OFFENDER (MDSO) PROCEDURES STILL APPLY TO PERSONS COMMITTED UNDER REPEALED PROVISIONS

A special postconviction disposition of some persons, called mentally disordered sex offenders (MDSOs), was possible under former Welf & I C §§6300-6330 until January 1, 1982, when the MDSO statutes' repeal became effective (Stats 1981, ch 928, §2). The repeal legislation contained a specific "prospective only" provision, which has been interpreted as follows:

- Persons committed as MDSOs before the effective date of the repeal (Jan. 1, 1982) could remain under such commitments subject to continuing jurisdiction under the now-repealed statutes (*Baker v Superior Court* (1984) 35 C3d 663, 200 CR 293; *People v Superior Court (Martin)* (1982) 132 CA3d 658, 183 CR 563); and
- Regardless of the date of the crime, persons not committed as MDSOs before the effective date of the repeal (Jan. 1, 1982) could not be so committed (*Stickel v Superior Court* (1982) 136 CA3d 850, 186 CR 560).

Consequently, extension of commitment under former Welf & I C §§6300-6330 is still possible for an individual originally committed under these provisions.

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IX. MENTALLY DISORDERED OFFENDER (MDO) PROCEEDINGS

§48.71 A. Nature of MDO Proceedings

Mentally disordered parolees and former prisoners may be involuntarily committed to a state hospital or outpatient program and treated by the Department of Mental Health in 1-year increments as long as they meet certain statutory criteria. Pen C §2962. Known as "Mentally Disordered Offender" or "MDO" commitments, these proceedings are most common in counties in which major state mental hospitals are located.

Attorneys who specialize in mental health and similar commitments usually represent parolees and prisoners in these proceedings. Because these commitments are based in part on elements of the original conviction, however, criminal practitioners must be prepared to deal with the future consequences of a conviction of their mentally disordered clients.

Although described in the legislation as a "civil hearing" (see Pen C §§2966(b), 2972(a)), the courts of appeal have split on the question of whether or not MDO commitments are subject to constitutional analysis as criminal laws. In *People v Collins* (1992) 10 CA4th 690, 12 CR2d 768, and *People v Gibson* (1988) 204 CA3d 1425, 252 CR 56, the courts held that such commitments are essentially penal in nature and therefore subject to the ex post facto and equal protection limitations of the U.S. and California constitutions. In *People v Superior Court (Myers)* (1996) 50 CA4th 826, 835, 58 CR2d 32, the court found that the statute did not expose the MDO to any punitive ramifications and was not, therefore, penal in nature and subject to those limitations. See *People v Fisher* (2009) 172 CA4th 1006, 91 CR3d 609 (due process requires personal waiver of presence at MDO commitment hearing); *People v Cosgrove* (2002) 100 CA4th 1266, 1270, 123 CR2d 535; *People v Francis* (2002) 98 CA4th 873, 877, 120 CR2d 90 (double jeopardy protection inapplicable). See also discussion in §48.62. The MDO laws can be applied to any prisoner who committed a qualifying crime on or after their effective date of January 1, 1986, despite the fact that the legislation became operative on July 1, 1986. *People v Jenkins* (1995) 35 CA4th 669, 41 CR2d 502.

Ø **Note:** If double jeopardy protection is unavailable, res judicata and collateral estoppel may apply to bar the relitigation of issues resolved against the People in a prior action involving the same defendant. See *People v Parham* (2003) 111 CA4th 1178, 4 CR3d 609.

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Source: Criminal Law/California Criminal Law Procedure and Practice/48 MENTAL COMPETENCE, MENTAL DEFENSES, AND RELATED ISSUES/§48.72 B. Criteria for Mandatory Commitment as Condition of Parole

§48.72 B. Criteria for Mandatory Commitment as Condition of Parole

A prisoner who meets the following criteria may be subject as a condition of parole to commitment and treatment as a mentally disordered offender (MDO) (Pen C §2962):

- The prisoner has a severe mental disorder (SMD), which is statutorily defined as "an illness or disease or condition which substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or which demonstrates evidence of an acute brain syndrome for which prompt remission in the absence of treatment is unlikely." Personality disorders and developmental disabilities (as defined by Pen C §1370.1(a)(1)(H)) are excluded. See Pen C §2962(a).
- The SMD is not in remission or cannot be kept in remission without treatment. Remission is defined as "a finding that the overt signs and symptoms of the severe mental disorder are controlled either by psychotropic medication or psychosocial support." A person is not in remission if he or she has been physically violent, damaged property, made a threat that caused the "target" individual reasonable fear, or refused to follow a treatment plan. See Pen C §2962(a).
- The SMD was one of the causes or was an aggravating factor in the commission of the original crime. Pen C §2962(b).
- The prisoner has been in treatment for the SMD for 90 days or more within the year before the prisoner's parole or release. Pen C §2962(c).
- The original crime is one of those listed in Pen C §2962(e)(2)(A)-(Q), and the prisoner received a determinate sentence on it. Penal Code §2962(e)(2)(Q) includes as a "crime" any "crime not enumerated in subparagraph (A) to (O), inclusive, in which the prisoner used force or violence, or caused serious bodily injury as defined in [Pen C §243(f)(4)]." For the definition of "used force or violence, or caused serious bodily injury," see *People v Collins* (1992) 10 CA4th 690, 12 CR2d 768. In concluding that an offense meets the "force or violence" criteria, a qualified mental health professional may refer to and consider the probation report for the original offense. *People v Miller* (1994) 25 CA4th 913, 31 CR2d 423. A finding that an individual is a mentally disordered offender may be supported by an underlying crime of cruelty to an animal involving force or violence. The violence does not have to be aimed at a human being. *People v Dyer* (2002) 95 CA4th 448, 115 CR2d 527. Conviction under Pen C §452 for recklessly setting a fire *cannot* as a matter of law support a commitment under the MDO law. *People v Hayes* (2003) 105 CA4th 1287, 129 CR2d 885.

Ø **Note:** A plea bargain may not be conditioned on a judicial finding that the offense falls outside the MDO law so as to preclude a later commitment based on that offense. *People v Renfro* (2004) 125 CA4th 223, 228, 22 CR3d 680.

- Before release on parole, the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the Department of Mental Health have evaluated the prisoner and a chief psychiatrist of the California Department of Corrections and Rehabilitation (CDCR) has certified to the Board of Parole Hearings that the prisoner meets the above criteria and that by reason of the prisoner's SMD, the prisoner represents a substantial danger of physical harm to others. Pen C §2962(d)(1). Other than as limited by Evid C §352, the People may introduce evidence of prior violent crimes to support an allegation of substantial danger of physical harm to others. *People v Pace* (1994) 27 CA4th 795, 799, 33 CR2d 352. The duties of evaluation and treatment may be delegated by the person in charge of treating the prisoner. *People v White* (1995) 32 CA4th 638, 642, 38 CR2d 267.

A defendant does not qualify as an MDO if he or she has not received 90 days or more of treatment within the year before his or her parole release date. In *People v Del Valle* (2002) 100 CA4th 88, 121 CR2d 889, the defendant received 85 days of treatment, but the 5 days of outpatient treatment in a community clinic did not count towards the 90 days, because the treatment had to have been supervised by CDCR and not provided by a private facility. But see

People v Martin (2005) 127 CA4th 970, 974, 26 CR3d 174 (inpatient treatment in county jail outside auspices of CDCR counted towards 90-day credit; *Del Valle* did not apply, because it concerned outpatient care and legislature contemplated that some inpatient jail treatment would be included in 90-day treatment time). In *People v Sheek* (2004) 122 CA4th 1606, 1611, 19 CR3d 737, the court held that the treatment the defendant received for his depressive disorder, which was in remission, did not meet the requirement of 90 days of treatment for his qualifying diagnosis of pedophilia.

If circumstances change while the prisoner is released on parole, and he or she is reincarcerated, the People are not foreclosed from seeking an MDO commitment when release is again imminent. *People v Coronado* (1994) 28 CA4th 1402, 1406, 33 CR2d 835.

Continued mandatory treatment. A parolee is subject annually to extended or continued mandatory treatment for another year as a condition of parole if the following criteria are met (Pen C §2966(c); *People v Bell* (1994) 30 CA4th 1705, 1710, 36 CR2d 746):

- The parolee has an SMD;
- The SMD is not in remission or cannot be kept in remission without treatment; and
- By reason of the SMD, the parolee represents a substantial danger of physical harm to others.

These criteria relate to the current mental status of the parolee, the only issue at the hearing for recommitment. *People v Merfield* (2007) 147 CA4th 1071, 1075, 54 CR3d 834. A parolee who disputes an order for continuing mandatory treatment as an MDO may file a petition challenging the ruling. See §48.74.

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§48.73 C. Treatment as MDO

If a parolee is ordered to receive mandatory treatment and disputes that order, he or she may request a hearing before the Board of Parole Hearings. At such a hearing, the burden is on the Department of Mental Health (DMH) to establish that the parolee meets the criteria for treatment as an MDO. Pen C §2966(a).

Mandatory treatment during the parole period must be inpatient unless the DMH certifies that reasonable cause exists to believe that the parolee can be safely and effectively treated as an outpatient. Pen C §2964(a).

If a parolee remains an inpatient longer than 60 calendar days, the parolee may request a hearing to decide whether he or she should be treated as an outpatient. Pen C §2964(b). At the hearing, the burden of proof is on the person or agency who certified the prisoner as having met the criteria for mandatory treatment. Pen C §2964(b).

Mandatory treatment is terminated if the severe mental disorder (SMD) is put, and can be kept, in remission. Pen C §2968.

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§48.74 D. Court Review of MDO Commitment Order

If the Board of Parole Hearings (BPH) agrees that a parolee qualifies for mandatory treatment as an MDO, the parolee may file a petition in the superior court challenging that ruling. A petition challenging the BPH's ruling filed after the commitment period has expired is moot. *People v Merfield* (2007) 147 CA4th 1071, 1074, 54 CR3d 834.

A hearing must be held within 60 days after the petition is filed. See Pen C §2966(b). The parolee has the right to a jury trial and, if indigent, the right to appointed counsel. The waiver of a jury trial by the attorney on behalf of his or her MDO client does not violate constitutional rights to a jury trial. *People v Montoya* (2001) 86 CA4th 825, 103 CR2d 579. The burden of proof is beyond a reasonable doubt, and the jury must be unanimous. The parolee must have qualified for treatment as an MDO as of the date of the initial commitment hearing or the most recent recommitment hearing before the Board. *People v Tate* (1994) 29 CA4th 1678, 1682, 35 CR2d 250; *People v Bell* (1994) 30 CA4th 1705, 1710, 36 CR2d 746. Both civil and criminal discovery are available. Pen C §2966(b). Although the court has the inherent authority to grant a defendant's pretrial motion to terminate MDO proceedings on the ground of insufficiency of the evidence (*People v Sheek* (2004) 122 CA4th 1606, 1611, 19 CR3d 737), it may not grant a district attorney's motion for directed verdict under CCP §630, because to do so violates a defendant's statutory right to a jury trial. However, because the right to a jury trial in MDO proceedings is statutory, improper denial of the right is subject to harmless error analysis. 122 CA4th at 1613; *People v Cosgrove* (2002) 100 CA4th 1266, 1273, 123 CR2d 535.

Continued mandatory treatment. The doctrines of collateral estoppel and res judicata apply to petitions challenging the extension or continuation of treatment for another year and limit the ability of the parolee to contest the criteria that were initially found to establish his or her MDO status. *People v Merfield* (2007) 147 CA4th 1071, 1075, 54 CR3d 834. The issue to be determined when an MDO extension is at issue is whether the Board of Parole Hearings' assessment of the parolee's current mental condition is correct. *People v Bell* (1994) 30 CA4th 1705, 1710, 36 CR2d 746.

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Source: Criminal Law/California Criminal Law Procedure and Practice/48 MENTAL COMPETENCE, MENTAL DEFENSES, AND RELATED ISSUES/§48.75 E. Postprison or Postparole Involuntary Commitments

§48.75 E. Postprison or Postparole Involuntary Commitments

Involuntary mental health treatment for unlimited, renewable 1-year periods can be imposed on a person about to be released from parole or prison, if the person refused to agree to treatment as a condition of parole under Pen C §2962. These proceedings are referred to as involuntary commitments and recommitments. A person may be subject to these proceedings under the following circumstances (Pen C §2970; *People v Kirkland* (1994) 24 CA4th 891, 29 CR2d 863):

- The person's severe mental disorder (SMD) is not in remission or cannot be kept in remission without treatment.
- The district attorney reviews a Department of Mental Health (DMH) or California Department of Corrections and Rehabilitation (CDCR) written evaluation on the issue of "remission," submitted not later than 180 calendar days in advance of the person's release on parole or from prison, and files a petition for continued involuntary commitment.
- The district attorney's petition is accompanied by affidavits to the effect that the person while on parole received continuous treatment by the DMH in a state hospital or outpatient program; has an SMD that is not in remission or cannot be in remission without treatment; and that by reason of the SMD, the person represents a substantial danger of physical harm to others.

Ø **Note:** The district attorney has no independent power to initiate involuntary civil commitments under §2970 and is permitted to file a petition only on receipt of the written evaluation from the DMH or CDCR (*People v Garcia* (2005) 127 CA4th 558, 562, 25 CR3d 660), which must be unfavorable on the issue of remission. *People v Marchman* (2006) 145 CA4th 79, 89, 51 CR3d 369. Failure of the DMH or CDCR to meet the 180-day deadline for submission of the written evaluation does not require dismissal of the petition if good cause exists and no prejudice is shown. *People v Fernandez* (1999) 70 CA4th 117**,** 130, 82 CR2d 469 (180-day rule for filing evaluation "directory" not "mandatory"; delay not prejudicial); *People v Kirkland* (1994) 24 CA4th 891, 29 CR2d 863 (good cause found).

After filing the petition, the district attorney has the burden of going forward with the involuntary commitment proceeding. The trial must begin no later than 30 calendar days before the date the person would otherwise have been released from parole or prison, unless good cause is shown. Pen C §2972(a). However, the 30-day rule, like the 180-day rule, is directory not mandatory. *People v Williams* (1999) 77 CA4th 436, 450, 92 CR2d 1. A violation of the 30-day rule is evaluated according to due process principles and does not automatically divest the court of jurisdiction and render the proceedings invalid. *People v Kirkland* (1994) 24 CA4th 891, 913, 29 CR2d 863. See also *People v Tatum* (2008) 161 CA4th 41, 56, 73 CR3d 718. There is a split in authority whether due process requires the trial to both begin *and end* before the time the person would otherwise have been released. See, *e.g., Zachary v Superior Court* (1997) 57 CA4th 1026, 1031, 67 CR2d 532 (required); *People v Williams* (1999) 77 CA4th 436, 452, 92 CR2d 1 (not required). The California Supreme Court may resolve this question. See *People v Cobb* (review granted Mar. 12, 2008, S159410; superseded opinion at 157 CA4th 393, 68 CR3d 625).

Ø **Note:** While there is no express statutory deadline by which the district attorney must file the petition seeking involuntary commitment of an MDO otherwise due to be released from parole or prison, there is an implicit requirement that the district attorney do so "sufficiently in advance" of the person's release date to allow trial to "reasonably commence" 30 days beforehand. Complaints regarding untimely petitions will be evaluated according to the principles of due process, weighing the reason for the delay against the prejudice to the person facing release. *People v Tatum, supra* (unexcused, 6-month delay filing petition at expiration of parole period violated due process).

The burden of proof for the commitment proceeding is beyond a reasonable doubt. Either party is entitled to a jury trial, and the jury must reach a unanimous verdict. If the former prisoner is indigent, the "county public defender" must be appointed. Because an MDO proceeding is civil, there is no federal constitutional right to self-representation. But because the MDO commitment statutes give defendants the right to counsel, petitioner could refuse appointed counsel

and represent himself. See *People v Williams* (2003) 110 CA4th 1577, 2 CR3d 890. Because the right is statutory only, the decision in *Williams* to not allow defendant's self-representation is governed by due process principles and lies within the trial court's sound discretion. 110 CA4th at 1592.

Both civil and criminal discovery provisions apply. Pen C §2972(a)-(b). The county in which the latest conviction occurred is the "county of commitment" in determining venue in an MDO proceeding filed under §2970. *People v Superior Court (Jump)* (1995) 40 CA4th 9, 46 CR2d 829.

Ø **Note:** Neither continuous nor involuntary treatment of the offender is a jurisdictional requirement for such proceedings. *People v Kirkland, supra*.

The privilege against self-incrimination does not bar the prosecution from calling the alleged MDO as a witness in its case-in-chief or questioning him or her. *People v Merfeld* (1997) 57 CA4th 1440, 67 CR2d 759. See also *People v Lopez* (2006) 137 CA4th 1099, 40 CR3d 789.

Appellate rules dealing with instructions in criminal cases apply to MDO extensions. *People v Collins* (1992) 10 CA4th 690, 12 CR2d 768. Specifically, it is error for the trial court to instruct the jury on the consequences of a verdict in an MDO proceeding. 10 CA4th at 695. Also, a trial court cannot allocate to the defendant, by way of instructions, the burden to prove by a preponderance of the evidence that a mental disorder is in remission as a result of medication and that he or she is not dangerous to others. *People v Noble* (2002) 100 CA4th 184, 121 CR2d 918 ("medication defense" is not affirmative defense, but a claim that criteria for extending commitment is not met).

A court is not required to instruct the jury to presume that the defendant was not an MDO, even though in criminal trials due process requires that the jury be informed on the presumption of innocence. "[A] defendant in an MDO proceeding, despite the statutorily required proof beyond a reasonable doubt standard, does not have a constitutional right to the additional procedural safeguards generally reserved for criminal defendants, including a presumption of innocence instruction." *People v Beeson* (2002) 99 CA4th 1393, 1404, 122 CR2d 384.

Involuntary recommitment. Before the termination of an involuntary commitment under Pen C §2970, the district attorney has authority to file a petition to extend an MDO's commitment for another year. Pen C §2972(e); *People v Garcia, supra*. See also *People v Allen* (2007) 42 C4th 91, 94, 64 CR3d 124. This petition for recommitment must be filed before the MDO's prior commitment ends. Pen C §2972(e). While a prosecutor's failure to file a petition for recommitment divests the court of jurisdiction over the prisoner under the MDO laws, the defendant may still be subject to involuntary commitment under the LPS Act. 42 C4th at 103.

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§48.76 F. Right to Treatment; Outpatient Status

Once committed for mandatory mental health treatment under Pen C §2970, a mentally disordered offender has a statutory right to treatment. Pen C §2972(f). In addition, an MDO is entitled to the statutory rights granted involuntary mental patients under the Lanterman-Petris-Short Act (LPS). Pen C §2972(g). Like an involuntary LPS patient, a mentally disordered offender has the right to refuse the involuntary administration of antipsychotic medication unless determined by a court to be incompetent to refuse treatment or a danger to others within the meaning of Welf & I C §5300. *In re Qawi* (2004) 32 C4th 1, 7 CR3d 780. See also *Thor v Superior Court* (1993) 5 C4th 725, 21 CR2d 357.

Outpatient treatment under Pen C §§1600-1620 is available to a parolee. The procedural provisions of those sections, however, do not apply to postprison MDOs. Pen C §2964(a).

The court may order outpatient treatment for anyone committed as an MDO if it finds reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis. Pen C §2972(d). However, there is no *sua sponte* duty on the part of the court to determine whether the MDO can be safely and effectively treated on an outpatient basis; the MDO must present the issue at the recommitment hearing. *People v Rish* (2008) 163 CA4th 1370, 1382, 78 CR3d 455. In this situation, it appears that the procedural provisions of Pen C §§1600-1620 apply, except that the standard for revocation of outpatient treatment is that the person cannot be safely and effectively treated on an outpatient basis. Pen C §2972(d).

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X. COMMITMENT ALTERNATIVES

§48.77 A. Treatment for Developmentally Disabled Individuals Under Lanterman Developmental Disabilities Services Act (LDDSA)

Developmental disability is defined as "a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for such individual." Pen C §1370.1(a)(1)(H). The term includes mental retardation (and similar conditions), cerebral palsy, epilepsy, and autism but does not include handicaps that are solely physical. Pen C §1370.1(a)(1)(H). See also Welf & I C §4512(a).

The Lanterman Developmental Disabilities Services Act (LDDSA) (Welf & I C §§4500-4867) defines both the state's duty to provide services for the developmentally disabled and the right of developmentally disabled individuals to receive care and treatment. In compliance with the LDDSA, the state contracts with private agencies that act as Regional Centers for the Care and Treatment of Developmentally Disabled Individuals (Regional Centers), helping match developmentally disabled individuals with the services they need. See Welf & I C §§4620-4669. A list of Regional Centers is available at the California Department of Developmental Services' website at http://www.dds.ca.gov/RC/Home.cfm.

A developmentally disabled defendant should receive "suitable treatment," defined as the least restrictive residential placement necessary, at a state hospital, licensed community care facility, or health facility. Welf & I C §6509. A Regional Center may use a *Hop* commitment to admit a developmentally disabled person to long-term hospital care. Once admitted under *Hop,* the patient cannot initially leave the hospital or refuse treatment but does retain the right to resist or later challenge the commitment. See *In re Hop* (1981) 29 C3d 82, 171 CR 721. Although technically voluntary, such hospitalizations are analogous to involuntary commitments of mentally disordered individuals under the Lanterman-Petris-Short Act. See Pen C §2972(g).

Mentally retarded individuals who are a danger to self or others may be committed to a state hospital upon request by the Regional Center or other designated entities under Welf & I C §§6500-6513. The mentally retarded individual has the right to oppose the involuntary hospitalization and is entitled to counsel and a jury trial on the matter. See Welf & I C §§6500, 6504, 6507; *People v Sweeney* (2009) 175 CA4th 210, 95 CR3d 557; *People v Alvas* (1990) 221 CA3d 1459, 271 CR 131.

Practitioners who need to learn the subtleties of clinical issues involving mental retardation should consult Intellectual Disability: Definition, Classification, and Systems of Support (11th ed 2010), published by the American Association on Intellectual and Developmental Disabilities (AAIDD). Considered the definitive resource for treatment professionals, this book can be ordered on the AAIDD's website at http://bookstore.aaidd.org.

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§48.78 B. Diversion for Misdemeanants With Cognitive Developmental Disabilities Under Pen C §§1001.20-1001.34

Formal diversion is available for misdemeanants with cognitive developmental disabilities. Pen C §§1001.20-1001.34. For purposes of this type of diversion, "cognitive developmental disability" is defined as any of the following (Pen C §1001.20(a)):

- "Mental retardation," meaning a condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
- "Autism," meaning a diagnosed condition of markedly abnormal or impaired development in social interaction, in communication, or in both, with a markedly restricted repertoire of activity and interests.
- Disabling condition closely related to mental retardation or autism, or that requires similar treatment, and that would qualify an individual for services under the Lanterman Developmental Disabilities Services Act (LDDSA) (Welf & I C §§4500-4867).

Unless they are mentally retarded, misdemeanor defendants are eligible for diversion only if they are clients of a Regional Center at the time of the offense. Pen C §1001.21(c). After consulting with the defendant, defense counsel, the prosecution, any probation officers involved, and the Regional Center, the court can choose to divert the defendant to a program of single- or dual-agency supervision. Pen C §§1001.22, 1001.23(a)-(b). Diversion may be for up to 2 years, with progress reports to be filed with the court and the prosecutor every 6 months. Pen C §1001.28. On successful completion of diversion, the arrest on which the diversion was based is deemed to have never occurred. Pen C §1001.33. Criminal proceedings against the defendant resume if the defendant withdraws consent or fails to meet the terms and conditions of diversion. Pen C §§1001.29-1001.30.

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§48.79 C. Treatment of Mentally Disordered Individuals Under Lanterman-Petris-Short Act (LPS Act)

The Lanterman-Petris-Short Act (LPS Act) (Welf & I C §§5000-5550) provides for the involuntary treatment of people with mental disorders. For an in-depth review of this civil mental health law, see California Conservatorship Practice, chap 23 (Cal CEB 2005).

Ø **Note:** While diversion is available under Pen C §§1001.20-1001.34 for misdemeanants with cognitive developmental disabilities, courts often use the LPS Act informally as a basis for granting diversion. Some courts have noted, however, that using the LPS Act as an alternative to criminal commitment proceedings may not "provide adequate protection against premature release of dangerous persons to society." *People v Poggi* (1980) 107 CA3d 581, 588 n6, 165 CR 758; *People v Balderas* (1980) 104 CA3d 942, 948, 164 CR 275.

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§48.80 1. Persons Subject to LPS Act

The following persons are subject to the LPS Act:

- Persons who, as a result of a mental disorder, are a danger to others, a danger to self, gravely disabled, or any combination of the above (Welf & I C §5150); and
- Persons who, as a result of inebriation, are a danger to others, a danger to self, gravely disabled, or any combination of the above (Welf & I C §5170).

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§48.81 2. Definitions

Mental disorder. For purposes of the LPS Act, a "mental disorder" is any of the mental disorders set out in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). *Conservatorship of Chambers* (1977) 71 CA3d 277, 282 n5, 139 CR 357.

Danger to self; danger to others. There is no straightforward definition of "danger to self" or "danger to others" in case law. By statute, a person can be certified for up to 14 days of involuntary treatment if he or she is "a danger to others, or to himself or herself, or gravely disabled." Welf & I C §5250. A person can be confined for an additional 14 days if he or she has threatened or attempted to take his or her own life during the period of detention. Welf & I C §5260. People who present a "demonstrated danger of inflicting substantial physical harm upon others" may be detained for an additional 180 days beyond the initial period of confinement. Welf & I C §5300.

Gravely disabled. "Gravely disabled" is defined in Welf & I C §5008(h)(1)(A) as a "condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter." Defendants who are incompetent to stand trial and have already been hospitalized for as long as allowed by Pen C §1370(c)(1) or §1370.1(c)(1) must meet the additional requirements outlined in Welf & I C §5008(h)(1)(B) to be considered gravely disabled.

A minor is gravely disabled when, as a result of a mental disorder, the minor cannot "use the elements of life which are essential to health, safety, and development, including food, clothing, and shelter, even though provided to the minor by others." Welf & I C §5008(*l*). A person is not gravely disabled under §5008(h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends, or third parties. *Conservatorship of Early* (1983) 35 C3d 244, 197 CR 539.

The term "gravely disabled" is not unconstitutionally vague and overbroad. *Conservatorship of Chambers* (1977) 71 CA3d 277, 284, 139 CR 357; *Doe v Gallinot* (CD Cal 1979) 486 F Supp 983, 991, aff'd (9th Cir 1981) 657 F2d 1017.

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§48.82 3. Types of Commitment Under LPS Act

The most common mechanism for long-term involuntary mental health treatment is the LPS conservatorship. LPS conservatorships expire automatically after 1 year but are renewable for as long as the conservatee is gravely disabled. Welf & I C §5361. Welf & I C §5352.5 defines how LPS conservatorships apply to criminal defendants.

The LPS Act protects against inappropriate commitment by limiting the ways in which a person can be admitted for services. Only a peace officer, a member of the attending staff of designated mental health facilities, and members of a mobile crisis team can refer a mentally disordered person to commitment under LPS, and even then only if there is probable cause that the person they seek to admit is gravely disabled or a danger to self or others. Welf & I C §5150. Family, personal doctors, attorneys, and judges cannot involuntarily commit a mentally disordered person under §5150.

Involuntary commitment to treatment of mentally ill individuals may be made under the LPS Act in increasing lengths of 3 days (Welf & I C §5150), 14 days (Welf & I C §§5250, 5260), and 30 days (Welf & I C §§5270.20, 5352.1). After these periods, involuntary treatment by way of judicial commitment under Welf & I C §5300 is available in successive periods of 180 days for individuals who are dangerous to others. One-year conservatorships, in which the patient may be hospitalized, are available for gravely disabled individuals. At each stage of involuntary treatment, the patient is entitled to a substantial breadth of rights and hearings to resist the involuntary commitment.

A conservatorship is a legal device whereby one person, known as the conservatee, is deprived of certain civil powers and civil rights, and concomitant powers over the conservatee are awarded to another person, known as the conservator. See Prob C §1801; Welf & I C §5350. LPS conservatorships may be initiated only by public officers, called conservatorship investigators, on application of the professional person in charge of certain designated agencies and facilities. Welf & I C §5352. The proposed conservatee has a variety of rights to resist the imposition of the conservatorship, including the right to a jury trial. Welf & I C §§5350(d), 5358.3, 5359, 5364. The specific disabilities suffered by an LPS conservatee and the powers that may be awarded to the LPS conservator are described in Welf & I C §§5356-5357. The powers that may be granted to the conservator include the option to have the conservatee involuntarily housed in a mental hospital or other treatment facility. Welf & I C §5358(a). The conservator may also require the conservatee to undergo mental health treatment, even against the conservatee's will. Welf & I C §5358(b). This treatment usually includes the administration of antipsychotic medication. These kinds of powers are not available under Probate Code conservatorships. See Prob C §§1801, 2356(a). Conservatorships are not the functional equivalent of judicial commitment or permanent hospitalization.

Conservatorships for individuals who have been committed as incompetent and who have reached the maximum detention period under Pen C §1370(c)(2) are discussed in §48.23.

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IMMUNITY FOR TESTIMONY

GARRICK S. LEW
JEFFREY G. ADACHI

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§49.1 I. OVERVIEW

The privilege against self-incrimination entitles a witness to refuse to give testimony or evidence that may tend to incriminate him or her. Various forms of statutory and nonstatutory immunity have been used by the prosecution to compel testimony despite the privilege.

There are two major forms of immunity: transactional and use immunity. Use immunity only prevents authorities from using the actual testimony or evidence that was obtained under the immunity grant. Transactional immunity provides immunity from later prosecution related to any matter about which the witness testified. *People v DeFreitas* (1983) 140 CA3d 835, 837, 189 CR 814.

In California, the following are the primary immunity statutes:

- Pen C §1324 (by the prosecution, in felony cases; statutory "use").
- Pen C §1324.1 (essentially by the prosecution, with the witness's agreement in misdemeanor cases; transactional).
- Pen C §1099 (by the prosecution, to codefendant during trial; implied transactional).
- Pen C §1100 (at the defense's request or on judge's own motion, to codefendant during trial; transactional).
- Pen C §4001.1 (special rules for in-custody informants).
- Health & S C §11367 (immunity for peace officers and those working for them in drug cases).

Various statutes grant immunity—use or transactional—to witnesses in noncourt proceedings or in juvenile court. See list in §49.20.

Judicial use immunity may be granted. See §49.14. Defense-initiated immunity is nonexistent except when the prosecution's intimidation of a witness has caused the witness to take the Fifth, and has deprived the defendant of the constitutional compulsory process right.

Statutory "use" immunity may be granted on the prosecutor's request. *Judicial* immunity—use or transactional—may be granted by a court on the prosecutor's request in felony cases. If immunity is granted, a witness who still refuses to testify, can be held in contempt. Pen C §§1324-1324.1. See §49.9.

Despite an immunity grant, a witness may be prosecuted for committing perjury, false swearing, or contempt in failing to comply with the court's order during his or her testimony. Pen C §§1324-1324.1.

For discussion of representation of witnesses, see chap 51.

Other good sources of information on immunity and on the privilege against self-incrimination include California Trial Objections, chap 46 (Cal CEB Annual); 2 Witkin, California Evidence, *Witnesses* §§355-502 (4th ed 2000).

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§49.2 II. CHART: DEADLINES

Action	Deadline	Authority
Prosecution request for immunity.	Must be raised when witness (other than defendant) refuses to answer question on self-incrimination grounds.	Pen C §§1324, 1324.1.

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§49.3 III. TYPES OF IMMUNITY: TRANSACTIONAL AND USE IMMUNITY

Transactional and use immunity described. The two major types of immunity are transactional and use immunity. Use immunity is more limited. It prevents law enforcement authorities from using only the actual testimony that was obtained under a grant of immunity, or its fruit, in a subsequent prosecution of that witness. Transactional immunity provides immunity from prosecution for any criminal conduct related to any matter about which the individual testified; it is not limited to use of the testimony itself or its fruits. *People v DeFreitas* (1983) 140 CA3d 835, 837, 189 CR 814. See also 2 Witkin, California Evidence, *Witnesses* §§470-494 (4th ed 2000). Transactional immunity thus gives much broader protection to the witness than use immunity provides. *People v Campbell* (1982) 137 CA3d 867, 873, 187 CR 340. California provides transactional immunity in misdemeanor cases. Pen C §1324.1. In felony cases, the prosecutor may choose between transactional and use immunity. Pen C §1324.

Limitations on transactional immunity. There are three important limitations on the scope of transactional immunity. First, transactional immunity does not prevent prosecution for perjury based on the immunized testimony. See *U.S. v Apfelbaum* (1980) 445 US 115, 63 L Ed 2d 250, 100 S Ct 948. See also *People v Hathcock* (1971) 17 CA3d 646, 95 CR 221.

Second, transactional immunity does not extend to an event described in an answer totally unresponsive to the question asked. Thus, a witness cannot gain immunity from prosecution for all previous acts by simply including a reference to them in his or her testimony, when that reference is not responsive to a question. See *Zicarelli v New Jersey State Comm'n of Investigation* (1972) 406 US 472, 32 L Ed 2d 234, 92 S Ct 1670 (state statute granting use and derivative use immunity only for "responsive" answers upheld).

Third, if the prosecution offers immunity for fewer than all crimes committed by the witness, and the witness agrees to that immunity grant, the witness is not protected with regard to any crimes not covered by the grant. *People v St. Joseph* (1990) 226 CA3d 289, 298, 276 CR 498.

Ø **Note:** The witness is still required to invoke the privilege against self-incrimination regarding any unprotected areas of inquiry. *People v St. Joseph, supra*.

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§49.4 IV. FIFTH AMENDMENT PRIVILEGE MUST APPLY BEFORE IMMUNITY APPLIES; DETERMINATION BY COURT

Neither transactional nor use immunity can be granted unless the witness is privileged under the Fifth Amendment to withhold the answer requested. See *Cohen v Superior Court* (1959) 173 CA2d 61, 70, 343 P2d 286. The commonly used phrase "privilege against self-incrimination" is not an entirely accurate description of a person's constitutional protection against being "compelled in a criminal case to be a witness against himself." *U.S. v Hubbell* (2000) 530 US 27, 34, 147 L Ed 2d 24, 34, 120 S Ct 2037. The Fifth Amendment privilege is limited to compelled communications that are "testimonial" in character. *U.S. v Hubbell, supra*. Thus, for example, a person can be compelled to provide a blood sample (*Schmerber v California* (1966) 384 US 757, 765, 16 L Ed 2d 908, 86 S Ct 1826) or an example of his or her handwriting (*Gilbert v California* (1967) 388 US 263, 266, 18 L Ed 2d 1178, 87 S Ct 1951) without violating the privilege against self-incrimination, even though, by so doing, he or she may be providing incriminating information.

Similarly, an individual cannot avoid a summons or subpoena for production of documents on the ground that the documents may contain incriminating assertions of fact or belief, when the creation of those documents was not "compelled." *Fisher v U.S.* (1976) 425 US 391, 48 L Ed 2d 39, 96 S Ct 1569 (individual could not avoid production of voluntarily created papers used to prepare tax returns on ground that documents contained incriminating information). However, the act of production itself might "constitute protected testimonial communication because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." *Doe v U.S.* (1988) 487 US 201, 209, 101 L Ed 2d 184, 196, 108 S Ct 2341; *U.S. v Hubbell* (2000) 530 US 27, 37 n19, 147 L Ed 2d 24, 37 n19, 120 S Ct 2037. If the act of production provides a link in the chain of evidence needed for prosecution, and the witness is properly asserting his or her Fifth Amendment right, the prosecution would need to offer immunity to compel production of the subpoenaed documents. 530 US at 38, 147 L Ed 2d at 37.

The Fifth Amendment applies if the testimony to be given would furnish a link in the chain of evidence needed to prosecute the witness for a crime. *Hoffman v U.S.* (1951) 341 US 479, 486, 95 L Ed 1118, 1124, 71 S Ct 814. The word "crime" covers state, local, and federal offenses. *U.S. v (Under Seal)* (4th Cir 1986) 794 F2d 920, 926; 2 Witkin, California Evidence, *Witnesses* §469 (4th ed 2000).

A witness may not invoke the Fifth Amendment privilege against self-incrimination based solely on the possibility of prosecution by a foreign country. See *U.S. v Balsys* (1998) 524 US 666, 141 L Ed 2d 575, 118 S Ct 2218, discussed in §49.27.

A witness may not be granted immunity for a crime to which he or she pleaded guilty; the guilty plea (or plea of no contest) waives the privilege against self-incrimination. *People v Stewart* (1969) 1 CA3d 339, 343, 81 CR 562.

Whether the Fifth Amendment privilege applies is determined by the judge as a preliminary fact under Evid C §§402, 404, and 940. In felony cases, this determination is made following a witness immunity hearing. See §49.19. In misdemeanor cases, there is no formal procedure for making this determination. See Pen C §1324.1. It is common for the judge to question the witness out of the jury's presence once the privilege has been asserted if the prosecutor wants immunity granted under Pen C §1324.1.

Although the court should make a particularized inquiry about whether a claim of privilege is well founded, the threshold for its invocation is a low one. It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer, or an explanation of why it cannot be answered, might be dangerous because injurious disclosure might result. *People v Lucas* (1995) 12 C4th 415, 454, 48 CR2d 525.

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V. IMMUNITY PROCEDURES IN CALIFORNIA STATE COURTS

§49.5 A. Immunity Available in Felony Cases

Immunity may be requested by prosecutors in felony cases under Pen C §1324. Procedures are discussed in §§49.7-49.9.

Immunity for a codefendant in either a felony or a misdemeanor case may be requested by the prosecution under Pen C §1099. The defense can initiate a request for immunity for a codefendant in both felony and misdemeanor cases, and the court can grant such immunity on its own motion, under Pen C §1100. Procedures are discussed in §§49.11 (Pen C §1099) and 49.12 (Pen C §1100).

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§49.6 B. Immunity Available in Misdemeanor Cases

Witnesses in misdemeanor cases may volunteer testimony in return for immunity. Pen C §1324.1. See discussion in §49.10.

When codefendants are involved, the prosecution may seek immunity for a codefendant under Pen C §1099. Either the defense may request, or the court on its own motion may grant, immunity to codefendants under Pen C §1100. Procedures are discussed in §§49.11 (Pen C §1099) and 49.12 (Pen C §1100). Judges may grant use immunity on their own motion, but this is rarely done. See discussion in §49.14.

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C. Immunity Grants in Felony Cases Under Pen C §1324

§49.7 1. Prosecution Request Required

The decision to initiate a request for immunity under Pen C §1324 is vested exclusively in the prosecutor. *Daly v Superior Court* (1977) 19 C3d 132, 146, 137 CR 14. Prosecutors have no general obligation to provide immunity to a witness to assist the defense. *People v Samuels* (2005) 36 C4th 96, 127, 30 CR3d 105.

Ø **Note:** The argument that the prosecution has failed to exercise due diligence in making a witness "available" if the prosecution's refusal to request immunity for that witness results in the witness claiming the privilege against self-incrimination has been rejected. *People v Williams* (2008) 43 C4th 584, 622, 75 CR3d 691.

The prosecution's exclusive right to grant immunity under §1324 is not, however, without limits. See *People v Hunter* (1989) 49 C3d 957, 974, 264 CR 367 (citing rule but finding no violation); *People v Cooke* (1993) 16 CA4th 1361, 1367, 20 CR2d 506 (declining to grant use immunity to defense witness because of dictum in *Hunter*). The prosecutor may seek a grant of immunity in any felony investigation or proceeding, including proceedings before a grand jury. See Pen C §1324. The prosecutor must then ask a superior court judge to formally grant the witness immunity. Pen C §1324. The prosecutor's request to grant immunity and dismiss charges should be made promptly. *People v Walther* (1938) 27 CA2d 583, 590, 81 P2d 452. Appellate courts, however, examine each case individually. *People v Manson* (1976) 61 CA3d 102, 134, 132 CR 265.

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§49.8 2. Prosecutor Can Request Use or Transactional Immunity

The prosecution may request either transactional or use immunity. Pen C §1324. Section 1324 was amended in 1996; the amendment is modeled on the federal Immunity Act (18 USC §§6001-6005). Committee Analysis, AB 988 (1996). Therefore, reference by California courts to the federal legislative history and to federal court interpretations of the federal act is appropriate. See *American Civil Liberties Union Found. v Deukmejian* (1982) 32 C3d 440, 447, 186 CR 235.

Ø **Note:** Counsel should be aware that there are sometimes different interpretations of the same issue by different federal courts. For example, the Ninth Circuit's interpretation of the definition of "use" in *U.S. v Koon* (9th Cir 1994) 34 F3d 1416, aff'd in part and rev'd in part in *Koon v U.S.* (1996) 518 US 81, 135 L Ed 2d 392, 116 S Ct 2035, is narrower than that of the court in *U.S. v North* (DC Cir 1990) 910 F2d 843, modified at 920 F2d 940.

The prosecutor may limit a grant of transactional immunity to a specified time period or to specified offenses. *People v St. Joseph* (1990) 226 CA3d 289, 298, 276 CR 498.

If transactional immunity is granted, the order should read as follows:

> That person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he/she was required to answer or produce evidence.

The phrase "in accordance with the order" prevents the unintended grant of immunity for a nonresponsive answer. See §49.3.

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§49.9 3. Procedures for Granting Immunity

Witness refuses to answer. The procedure to obtain a grant of immunity under Pen C §1324 is initiated by a witness's refusal to answer a question or produce evidence on the ground of self-incrimination. The prosecutor then requests that the court order the witness to answer. The court responds by issuing an order to show cause and sets a time for a witness immunity hearing. See *People v Brunner* (1973) 32 CA3d 908, 912, 108 CR 501. It is preferable for the determination of this issue to occur outside the jury's presence. *People v Hill* (1992) 3 C4th 959, 991, 13 CR2d 475, overruled on other grounds in *Price v Superior Court* (2001) 25 C4th 1046, 1069, 108 CR2d 409. See §51.2. For further discussion of when and where this determination should be made, see California Trial Objections §§33.13, 46.9 (Cal CEB Annual).

Immunity hearing. At the immunity hearing, the claimant of the privilege has the burden of showing that a question may be incriminating (Evid C §404), as a preliminary fact (Evid C §§402, 404, 940). *People v Campbell* (1982) 137 CA3d 867, 877, 187 CR 340. If the claimant presents such evidence, the judge must sustain the claim of privilege unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the claimant. *Cohen v Superior Court* (1959) 173 CA2d 61, 70, 343 P2d 286. If the assertion of privilege is sustained, counsel may wish to raise the question of whether the witness is subject "to a criminal prosecution in another jurisdiction" (Pen C §1324). The Fifth Amendment's privilege against self-incrimination does not extend to foreign criminal prosecutions outside of the United States. *U.S. v Balsys* (1998) 524 US 666, 141 L Ed 2d 575, 118 S Ct 2218. See §49.4. It does, however, protect a witness from the use of testimony or its fruits by the prosecution in other states or by the federal government. *Murphy v Waterfront Comm'n* (1964) 378 US 52, 79, 12 L Ed 2d 678, 84 S Ct 1594 (witnesses granted immunity under state law refused to answer questions that might incriminate them under federal law; federal government was prohibited from using testimony and its fruits in criminal prosecution against witnesses). See also §49.27.

The prosecutor may request *in writing* that immunity be granted under §1324. If statutory immunity is sought, the terms are in the statute. If judicial immunity is requested, the request should specify the following:

- The terms of the agreement;
- The subject matter of the testimony that the prosecutor expects to elicit (the prosecutor usually has a written statement from the witness explaining or summarizing his or her proposed testimony);
- The proceedings at which the testimony will be given;
- Representations of the witness or his or her counsel on the specific content of the witness's testimony; and
- The witness's promise to testify fully and truthfully in return for the promised grant of immunity.

Court's order when immunity granted. Once the prosecutor requests immunity for a witness, the court must grant immunity and "order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction." Pen C §1324. Thus, if there are no compelling reasons against it, the court must accede to the prosecutor's request and compel the testimony. *People v Superior Court (Taylor)* (1975) 53 CA3d 996, 1001, 126 CR 297.

Effects on witness of immunity grant. Once a judge has granted a witness immunity and ordered the witness to testify, the witness can be punished by contempt if he or she refuses to testify. Pen C §1324; *People v Clemmons* (1962) 208 CA2d 696, 700, 25 CR 467. A witness who refuses to testify following the immunity grant waives the immunity. See Pen C §1324.

Despite a grant of immunity, a witness may be prosecuted for perjury committed while testifying under the grant of immunity. Pen C §1324.

The prosecutor should follow the procedures set forth in §1324. *People v Superior Court (Perry)* (1989) 213 CA3d 536, 539, 261 CR 665. In the absence of such compliance, the prosecutor's unilateral offer of immunity is not enforceable by the court unless it has been accepted or relied on by the witness. *People v St. Joseph* (1990) 226 CA3d 289, 298, 276 CR 498; *People v Superior Court (Crook)* (1978) 83 CA3d 335, 339, 147 CR 856 (rule stated and

followed regarding crimes for which immunity offered; no immunity for crimes not specifically included in immunity offer).

Additional rules apply to immunity granted to in-custody informants held within a correctional institution with the defendant. See §§17.14, 49.16.

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§49.10 D. Immunity Grants in Misdemeanor Cases Under Pen C §1324.1

Penal Code §1324.1 allows a witness in a misdemeanor case to volunteer testimony in return for immunity. After claiming the privilege, a witness may agree in writing with the prosecutor "to testify voluntarily." Pen C §1324.1. Court approval of the written agreement by a judge with jurisdiction of the case is mandatory unless the judge finds "that to do so would be clearly contrary to the public interest." Pen C §1324.1. The immunity granted is transactional immunity (Pen C §1324.1): If, but for the grant of immunity, the witness would have been privileged to withhold the answer given or the evidence produced, "that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with such agreement he answered or produced evidence." The phrase "in accordance with such agreement" prevents an unintended grant of immunity for a nonresponsive answer. See §49.3.

Because there is no order compelling the witness to testify under §1324.1, a witness who refuses to testify after agreeing to do so merely loses immunity and may be prosecuted "in the same manner and to the same extent as he would be prosecuted… but for this section." Pen C §1324.1.

Despite a grant of immunity, a witness may be prosecuted for perjury while testifying under the grant of immunity. Pen C §1324.1.

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E. Granting Immunity to Codefendant During Trial

§49.11 1. Prosecution Request (Pen C §1099)

The prosecution may request immunity during trial for a codefendant to testify for the People in that trial. Pen C §1099. The immunity operates as an acquittal and a bar to further prosecution for that offense. Pen C §1101.

The prosecution should move for discharge of the codefendant's case before the defense begins to present its case. Pen C §1099; *People v Robinson* (1960) 184 CA2d 69, 78, 7 CR 202 (rule stated, but court found that prosecution had not yet rested when case dismissed). The discharge can only be for testimony at trial; a magistrate should not discharge a codefendant under §1099 to testify at a preliminary hearing. Compare *People v Spencer* (1956) 140 CA2d 97, 100, 294 P2d 997 (§1099 does not empower magistrate to order discharge), with *Bates v Superior Court* (1951) 107 CA2d 656, 658, 237 P2d 544 (magistrate's dismissal at prosecutor's request during preliminary hearing upheld by appellate court even though in error).

It is preferable for the prosecutor's request for an immunity grant to be made out of the jury's presence. *People v Brown* (1971) 14 CA3d 334, 340, 92 CR 370. See discussion in California Trial Objections §46.9 (Cal CEB Annual).

The prosecutor moves to discharge a codefendant's case under Pen C §1099 after providing notice to attorneys for all codefendants. The prosecution must disclose to the remaining defendants all offers made to codefendants, whether accepted or not. *People v Westmoreland* (1976) 58 CA3d 32, 46, 129 CR 554. Although all parties may argue the motion, there is no statute authorizing either side to introduce evidence. *People v Dillon* (1924) 68 CA 457, 474, 229 P 974. The granting of the motion is discretionary with the court. Pen C §1099. Discharge may be ordered even if there is a prima facie case against the discharged defendant. *People v Frahm* (1930) 107 CA 253, 263, 290 P 678.

A defendant does not have standing under Pen C §1099 to suggest to the trial court that it sever the trial of codefendants and grant immunity under §1099. *People v Freeny* (1974) 37 CA3d 20, 30, 112 CR 33. (The defendant can request immunity under Pen C §1100, discussed in §49.12.) A defendant who is not discharged does not have standing to object to a court's discharge of a codefendant. *People v Chapman* (1949) 91 CA2d 854, 857, 206 P2d 4.

See discussion of the effects of a dismissal under §1099 in §49.13.

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§49.12 2. Defense Request or Judge's Own Motion (Pen C §1100)

A defendant may move that the trial judge discharge the case against a codefendant so that the codefendant can be a witness for the defendant. Pen C §1100. See *People v DeFreitas* (1983) 140 CA3d 835, 189 CR 814. It appears that a codefendant may also request discharge of his or her own case under §1100 on the condition that he or she be a witness for the defendant. In addition, the trial judge can discharge a codefendant on the judge's motion. Pen C §1100.

Immunity under §1100 does not automatically apply to a codefendant who voluntarily agrees to testify for or against a defendant. *People v Snyder* (1925) 74 CA 138, 142, 239 P 705, disapproved on other grounds in *People v McFarland* (1962) 58 C2d 748, 762, 26 CR 473. Court approval is required. Pen C §1100.

When a defendant moves to discharge a codefendant to secure his or her testimony, the defendant should make an offer of proof as to what the codefendant's testimony will be. *People v Williams* (1942) 20 C2d 273, 283, 125 P2d 9. See also *People v Stewart* (1931) 115 CA 681, 688, 2 P2d 195.

A judge deciding a discharge issue must order that the codefendant be discharged and be a witness in the defendant's case, if the judge believes that the evidence against the codefendant is insufficient to force him or her to stand trial. Pen C §1100. Although §1100 provides that, if its terms are met, the court "must" discharge the codefendant, a denial of the motion for discharge does not necessarily constitute prejudicial error. *People v Williams* (1942) 20 C2d 273, 283, 125 P2d 9 (defendant on appeal showed no prejudice from court's denial of §1100 motion; judgment affirmed).

The effect of dismissal under Pen C §1100 is discussed in §49.13.

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§49.13 3. Effect of Dismissal Under Pen C §§1099, 1100

A court's action under Pen C §§1099 and 1100 is "an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense." Pen C §1101; *People v Woodberry* (1968) 265 CA2d 351, 357, 71 CR 165. The "acquittal" achieved under these provisions is not an acquittal on the merits, however, and does not mean that the person acquitted has been found not guilty of the offense. *People v Hadden* (1947) 79 CA2d 635, 638, 180 P2d 371.

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§49.14 F. Judicial Use Immunity

No statutory authority exists in California that allows judges to confer immunity on potential witnesses absent the consent of the prosecutor. The California Supreme Court, however, indicated in dicta in *People v Hunter* (1989) 49 C3d 957, 974, 264 CR 367, that trial courts do have the authority to grant use immunity without the prosecution's consent if the requirements set out in *Government of V.I. v Smith* (3d Cir 1980) 615 F2d 964 are met. The requirements of that case are these (615 F2d at 972):

> [T]he opportunities for judicial use of this immunity power must be clearly limited:… the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity….
>
> [T]he defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.

Basing its decision on the facts of the case, the Ninth Circuit reversed a conviction because of a trial court's refusal to grant a defense witness immunity. *U.S. v Westerdahl* (9th Cir 1991) 945 F2d 1083. See *People v Samuels* (2005) 36 C4th 96, 127, 30 CR3d 105 (court assumed without deciding that trial court had authority to order use immunity for defense witness); *People v Stewart* (2004) 33 C4th 425, 468, 15 CR3d 656 (court assumed without deciding that trial court had authority to order transactional or use immunity for defense witness). Conversely, in *People v Lucas* (1995) 12 C4th 415, 460, 48 CR2d 525, the court stated in dicta that it is a doubtful proposition that trial courts have the inherent authority to grant a witness immunity absent a request by the prosecution. Although the *Government of V.I.* case, establishing judicially granted immunity, has not been rejected in California, it has been hotly contested throughout the country and has been rejected by other courts. See, *e.g., Curtis v Duval* (1st Cir 1997) 124 F3d 1, 9. Its opponents argue that judicial immunity is an infringement on the executive prosecutorial power, absent an express statutory grant that does not exist in California. Thus, the present status of judicially granted immunity as a reliable defense instrument is by no means settled, especially since the court in *People v Cooke* (1993) 16 CA4th 1361, 1371, 20 CR2d 506, made it clear that, absent a ruling by the California Supreme Court, defendants will be unsuccessful in appeals based on failure to grant judicial immunity. The *Cooke* court does, however, seem to leave room for defendants to request, and courts to grant, judicial immunity at the trial level, saying that "California courts have exercised their inherent powers to grant use immunity in limited circumstances." 16 CA4th at 1368. Thus, this procedure should not yet be abandoned by practitioners.

See discussion of judicial use immunity in the context of defense-requested immunity in Thorman, *Defense-Requested Immunity*, 18 CACJ Forum 32 (Mar./Apr. 1991).

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§49.15 G. Defense-Initiated Immunity Is Usually Unavailable

The defense does not have the right to obtain immunity from the trial court for a defense witness under Pen C §§1324, 1324.1, or 1099 over the prosecutor's objection. See *People v Hunter* (1989) 49 C3d 957, 973, 264 CR 367; *People v Cooke* (1993) 16 CA4th 1361, 1366, 20 CR2d 506; *People v Estrada* (1986) 176 CA3d 410, 418, 221 CR 922; *People v DeFreitas* (1983) 140 CA3d 835, 841, 189 CR 814.

The denial of defense witness immunity has been held not to violate the defendant's rights to due process (*People v Lucas* (1995) 12 C4th 415, 48 CR2d 525), equal protection (*People v Traylor* (1972) 23 CA3d 323, 332, 100 CR 116), fair trial (*In re Marshall K.* (1970) 14 CA3d 94, 99, 92 CR 39), or compulsory process, *i.e.,* the right to present and cross-examine witnesses (*People v DeFreitas, supra*; *People v Sutter* (1982) 134 CA3d 806, 816, 184 CR 829). Neither §1324 nor the right to present exculpatory testimony extend a correlative right to the defendant to obtain immunity for a defense witness. *People v Traylor* (1972) 23 CA3d 323, 100 CR 116 (refusal to grant immunity to defense witness does not deny defendant equal protection of the laws); *People v Williams* (1970) 11 CA3d 1156, 1164, 90 CR 409 (defendant's constitutional rights not violated by trial court's failure to apply §1324).

Thus, when a defense attorney is approached by a victim, codefendant, or other witness, who possesses evidence that may exculpate the defendant or is crucial to his or her cause but will not testify unless granted immunity, defense counsel's only options are judicially granted use immunity (discussed in §49.14) and immunity for a codefendant under Pen C §1100 (discussed in §49.12).

Despite the California rule against defense-initiated immunity, the California Supreme Court and the federal courts have recognized that prosecutorial misconduct and intimidation that cause a witness to invoke the Fifth Amendment may deprive the defendant of the constitutional right to compulsory process. See *In re Martin* (1987) 44 C3d 1, 30, 241 CR 263, and cases cited therein (habeas granted; district attorney investigator arrested defense witness as he left courtroom, in front of other defense witnesses). The Ninth Circuit has recognized exceptions to the rule when prosecutorial misconduct fundamentally distorts the fact-finding process and results in an unfair trial (see *U.S. v Lord* (9th Cir 1983) 711 F2d 887, 891; see also *Williams v Woodford* (9th Cir 2004) 384 F3d 567, 600) or when the prosecution grants immunity to a government witness while denying immunity to a defense witness whose testimony contradicts the government witness (see *U.S. v Straub* (9th Cir 2008) 538 F3d 1147, 1162 (court should have compelled use-immunity when prosecutor's selective grants of immunity effectively distorted fact-finding); *U.S. v Duran* (9th Cir 1999) 189 F3d 1071, 1087; *U.S. v Westerdahl* (9th Cir 1991) 945 F2d 1083, 1086; *U.S. v Condo* (9th Cir 1984) 741 F2d 238, 239 (trial court properly denied defendant's requested immunity for certain defense witnesses when witnesses were themselves the target of prosecutorial investigation)).

If defense counsel intends to request immunity for a defense witness, he or she must make the motion in the trial court to ensure appellate review. *People v Lucas* (1995) 12 C4th 415, 460, 48 CR2d 525; *People v Sutter* (1982) 134 CA3d 806, 813, 184 CR 829. The motion should be in writing and should include an offer of proof stating the type of immunity requested and showing that

- The proffered testimony is clearly exculpatory;
- The testimony is essential; and
- No strong governmental interest countervails against a grant of immunity.

See *People v Hunter* (1989) 49 C3d 957, 974, 264 CR 367; *People v DeFreitas* (1983) 140 CA3d 835, 837, 189 CR 814; *Government of V.I. v Smith* (3d Cir 1980) 615 F2d 964, 972. See also *U.S. v Castro* (1st Cir 1997) 129 F3d 226, 232 (declining to recognize "effective defense theory" as an exception to rule prohibiting courts from granting immunity to witnesses).

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§49.16 H. Immunity for In-Custody Informants Under Pen C §4001.1

Actions by a law enforcement agent (including an informant) that deliberately seek to obtain incriminating information from a defendant in a criminal case after the right to counsel has attached violate the Sixth Amendment to the United States Constitution. See *Massiah v U.S.* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199; *U.S. v Henry* (1980) 447 US 264, 65 L Ed 2d 115, 100 S Ct 2183. Under Pen C §4001.1(b), in-custody informants working as agents for law enforcement are prohibited from taking any action (other than listening) deliberately designed to elicit incriminating remarks from a defendant. The language of §4001.1(b) is derived from *Kuhlmann v Wilson* (1986) 477 US 436, 459, 91 L Ed 2d 364, 384, 106 S Ct 2616.

To help ensure that in-custody informants do not fabricate stories, informants who are held within the same correctional institution as defendants may not be paid more than $50 in exchange for their testimony. Pen C §4001.1(a). They may, however, be reimbursed for specified expenses incurred for relocation and for traveling to testify. Pen C §4001.1(a). Notice must be given to the victims of the crime for which the informant is in custody. Pen C §1191.25. There are also special rules concerning discovery and instructions. They are discussed in §17.14.

Despite Pen C §4001.1(b), the existence of a prior working relationship between an informant and the police does not, by itself, establish a violation of the defendant's right to counsel. Nor does a general police policy that encourages inmates to provide useful information to the police violate a defendant's right to counsel. *In re Williams* (1994) 7 C4th 572, 597, 29 CR2d 64.

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§49.17 I. Immunity Under Health & S C §11367 for Informants in Drug Buys

Duly authorized peace officers performing their official duties in investigating violations of Health & S C §§11000-11651 and those working under their immediate direction, supervision, or instruction are immune from prosecution. Health & S C §11367. Police officers, however, are not absolved from all unlawful activities engaged in during such investigations. *People v Backus* (1979) 23 C3d 360, 382, 152 CR 710 (order setting aside indictment of police officers reversed; Pen C §995 ruling had been based on overly broad reading of §11367).

There is no requirement in the statute that judicial approval of this immunity be obtained.

Ø **Note:** The immunity applies only to crimes being investigated. See *People v Sipress* (1975) 51 CA3d 98, 123 CR 884.

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§49.18 J. Appellate Review of Immunity Bargain

The trial court's decision to enforce a grant of immunity is subject to appellate review. *People v Brunner* (1973) 32 CA3d 908, 108 CR 501. The avenue of review depends on when and how the issue was raised in the trial court. If the issue was raised at the preliminary hearing, counsel can seek review under Pen C §995. See *People v Bittaker* (1989) 48 C3d 1046, 1095, 259 CR 630. Section 995 motions are discussed in chap 13. When the alleged error occurs before or during trial, defense counsel may seek a writ. See, *e.g., Nelson v Municipal Court* (1972) 28 CA3d 889, 105 CR 46 (writ of prohibition sought before trial). See chap 42 on writs. When there is a trial, the defendant must raise the issue at trial. *People v Wisely* (1990) 224 CA3d 939, 943, 274 CR 291. After trial, the defense may raise immunity issues through an appeal (see Pen C §§1237, 1466(2)(A)) or, when available, through a writ of habeas corpus (see §§42.22-42.34).

Writ review of immunity rulings is usually not available to prosecutors. *People v Superior Court (Howard)* (1968) 69 C2d 491, 72 CR 330. In *People v Superior Court (Perry)* (1989) 213 CA3d 536, 261 CR 665, however, the prosecution's writ petition concerning immunity issues was ruled on by the court of appeal. An appeal may be available under one of the grounds listed in Pen C §§1238, 1466(1). For further discussion of appellate review by prosecutors, see §§43.4, 44.77.

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VI. DEFENSE RESPONSE TO GRANT OF IMMUNITY

§49.19 A. Possible Defense Arguments Against Grant of Immunity to Witness to Testify for Prosecution

Improper coercion. When the defense challenges a grant of immunity, it must demonstrate either that the bargain amounts to improper coercion of the immunized witness's testimony or that the bargain has adversely affected the witness's veracity. *People v Wisely* (1990) 224 CA3d 939, 944, 274 CR 291. A defendant is denied a fair trial if the prosecutor's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion, *e.g.,* when the accomplice is granted immunity subject to the condition that his or her testimony substantially conform to an earlier statement given to police, or that the testimony result in the defendant's conviction. See *People v Maury* (2003) 30 C4th 342, 417, 133 CR2d 561. An agreement requiring only that the witness testify fully and truthfully, however, is valid. *People v Badgett* (1995) 10 C4th 330, 358, 41 CR2d 635; *People v Reyes* (2008) 165 CA4th 426, 433, 80 CR3d 619.

Improper conditions on immunity grant. A grant of immunity that requires the witness to testify in a particular way or that is subject to a condition that the witness's testimony result in the defendant's conviction is invalid. *People v Sully* (1991) 53 C3d 1195, 1216, 283 CR 144. This rule, stated in *People v Medina* (1974) 41 CA3d 438, 116 CR 133 (condition in plea agreement that witnesses' testimony would be consistent with prior statements made to police was unduly coercive), was endorsed by the California Supreme Court in *People v Fields* (1983) 35 C3d 329, 361, 197 CR 803. See also *People v Knox* (1979) 95 CA3d 420, 430, 157 CR 238 (agreement that in return for witness's testimony he would not be prosecuted for murder "provided that he was not the triggerman" held not to put witness under a "strong compulsion to testify in a particular fashion").

California courts have been reluctant to extend this principle to other arguably coercive conditions. See, *e.g., People v Gurule* (2002) 28 C4th 557, 616, 123 CR2d 345 (immunity agreement conditioned on absence of new evidence showing that accomplice was actual killer was not unduly coercive); *People v Sully, supra* (requirement that witness pass polygraph not unduly coercive); *People v Bittaker* (1989) 48 C3d 1046, 1093, 259 CR 630 (plea agreement giving district attorney right to determine whether witness testified truthfully, followed by trial court review of his decision, not unduly coercive); *People v Meza* (1981) 116 CA3d 988, 172 CR 531 (agreement giving defendant's cellmate 50-50 chance of lenient sentence if testimony was beneficial to prosecution not unduly coercive); *People v Sepeda* (1977) 66 CA3d 700, 136 CR 119 (agreement with *paid* informer, which provided that he would be paid only if his testimony at all trials was consistent with statements given to the police and grand jury, was disapproved by court but remedied by strong corroborating evidence).

Choosing one codefendant or another. Another factual basis for challenging immunity bargains is that the prosecutor unfairly chose one codefendant for the immunity grant. Although the prosecutor's ability to select the person who is granted immunity is not unconstitutional (*People v Boehm* (1969) 270 CA2d 13, 20, 75 CR 590), criteria do exist to guide the prosecutor's discretion in the selection process. See California District Attorneys Association, Uniform Crime Charging Standards 44 (1996). Counsel should compare the attributes of the codefendants with these criteria to show unfair or unequal law enforcement.

Certain drug cases. In drug cases, the prosecution may seek immunity for informants participating in a drug buy under Health & S C §11367. Defense counsel may challenge the immunity if it goes beyond the statute's guidelines. See *People v Sipress* (1975) 51 CA3d 98, 123 CR 884 (informant properly refused to answer questions about defense theory because informant's answers might have incriminated him and would not have been covered by immunity conferred by §11367).

In-custody informants. Special rules apply to immunity grants involving in-custody informants held in the same correctional institution as the defendant. For discussion, see §§17.14, 49.16.

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§49.20 B. Defense Right to Discovery

Once defense counsel learns of a prosecutor's request for witness immunity, he or she should request judicial permission to appear at all hearings at which the terms of the immunity bargain will be subjected to judicial review. The request will probably be refused because the defense has no clear right to receive notice of or be present at immunity hearings. Compare *People v Randolph* (1970) 4 CA3d 655, 660, 84 CR 559 (witness immunity hearing was not a "critical stage" of proceeding and did not concern defendant), with *People v Boehm* (1969) 270 CA2d 13, 20, 75 CR 590 (court recognized that circumstances might be presented in which defendant might be prejudiced by absence from conference at which immunity is granted to codefendant; no such prejudice found here).

Ø **Note:** The defense should use discovery to try to unearth all the uses to be made of the immunized testimony.

Once trial begins, the prosecutor must disclose to the defense and jury any inducements made to prosecution witnesses in exchange for trial testimony. *People v Westmoreland* (1976) 58 CA3d 32, 46, 129 CR 554.

Similarly, when two or more persons are accused of complicity in the same offense, and when the prosecutor plans to call one of them as a prosecution witness (see Pen C §1099), the prosecutor must disclose to the remaining defendants all offers made to the prospective witness such as guilty pleas to lesser offenses or any other lenient treatment. The prosecution must also disclose all discussions with the potential witness on the possibility of leniency in exchange for testimony, even if no offer was actually made or accepted. *People v Westmoreland* (1976) 58 CA3d 32, 47, 129 CR 554. Moreover, the prosecuting attorney must correct any false or misleading impression that he or she knows a prosecution witness has created concerning discussions or offers of leniency, or other inducements for testifying, regardless of whether the prosecutor had any affirmative part in creating the false or misleading impression. *People v Westmoreland, supra; Giglio v U.S.* (1972) 405 US 150, 154, 31 L Ed 2d 104, 108, 92 S Ct 763. Failure to do so denies the defense access to material evidence, which can result in the denial of a fair trial. See *People v Ruthford* (1975) 14 C3d 399, 406, 121 CR 261, overruled on other grounds in *In re Sassounian* (1995) 9 C4th 535, 545, 37 CR2d 446. See also Pen C §§1127a, 1191.25, 4001.1 (jailhouse informant legislation); *People v Badgett* (1995) 10 C4th 330, 41 CR2d 635 (rule stated but no denial found on facts). Whether there have been other grants of immunity should be checked (*e.g.,* Govt C §§9410, 18676-18677; Ins C §12924(b); Wat C §1106; Welf & I C §§300, 355.1(d); Corp C §25531(e); Cal Rules of Ct 5.548).

Ø **Note:** Defense counsel should request discovery of this information before trial. If the immunity grant was put in writing, that writing should probably be given to the defense as part of pretrial discovery. See Pen C §1054.1(d)-(f).

In cases involving in-custody informants who give immunized testimony based on statements made by the defendant while both the defendant and the informant were within the same correctional institution, the prosecution is required to give the defense, before trial, a statement that sets out all consideration promised to or received by the in-custody informant. Pen C §1127a(c). "Consideration" is defined by Pen C §1127a(d) to mean "any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony." This statement must also be given to the trial court by the prosecution when the immunized witness is called to the stand. Pen C §1127a(c).

Defense counsel who objects to an immunity grant should consider a pretrial writ petition. See §49.18.

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§49.21 1. Suggested Areas for Defense Discovery Requests, and for Defense Questioning at Immunity Bargain Hearing, Trial, or Both

The following are suggested areas for defense discovery requests, and for defense questioning at an immunity bargain hearing, trial, or both:

- Prior convictions and present criminal cases that were or will be dismissed or reduced in exchange for testimony or other services. See Evid C §780(e)-(f).
- Information on the arrest of the witness that resulted in these charges and the witness's culpability in the case. See Evid C §780(e)-(f); *People v Lyons* (1958) 50 C2d 245, 265, 324 P2d 556 (dictum: this type of information is material on issue of credibility, and as such was used to challenge witness's testimony).
- Information on all police contacts the witness has had since the date of the arrest in the case. See *Hoover v Maryland* (4th Cir 1983) 714 F2d 301 (relevant to extent of witness's illegal activities, which might be forgiven for testifying for prosecution).
- Names and arrest information on persons the witness has testified against in other proceedings, and names and arrest information on persons who have been set up for arrest by this witness. See Evid C §§780, 785-786, 1100-1101, 1103.
- Any grounds on which the witness's competency might be attacked. See Evid C §§701-702; *People v St. Andrew* (1980) 101 CA3d 450, 161 CR 634. See also *People v Castro* (1979) 99 CA3d 191, 203, 160 CR 156 (defense elicited from informer on cross-examination that informer was paid by police, was a heroin addict, and had prior felony convictions).
- Questioning about possibility of existence of other crimes, either state or federal, not covered by the immunity grant, that may be admissible to impeach the witness.

Ø **Note:** An immunized witness may not be compelled to testify to possible criminal involvement that is not covered by the immunity. *People v Label* (1974) 43 CA3d 766, 774, 119 CR 522.

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§49.22 2. Cross-Examination During Trial

Defense counsel is entitled to a copy of the transcript of the immunity hearing and to cross-examine at trial a witness who has been granted immunity to testify. See *People v Boehm* (1969) 270 CA2d 13, 20, 75 CR 590. Permitted questions include the nature of the charges pending against the witness, the amount of imprisonment that could result from those charges, the witness's subjective understanding of his or her bargain with the prosecutor, and any assistance to the witness by the prosecution in a criminal case subsequent to the immunity grant. *People v Rodriguez* (1986) 42 C3d 730, 749, 230 CR 667; *Hoover v Maryland* (4th Cir 1983) 714 F2d 301. See also *People v Boehm, supra* (can be inferred from opinion that these questions were asked). For sample questions, see §49.21.

Ø **Note:** Defense counsel may be able to impeach the witness with the witness's written summary of testimony, which is usually given to the prosecutor as part of the immunity bargain.

When an in-custody informant, as defined by Pen C §1127a(a), is called to testify, defense counsel can use the statement that sets out the consideration received by the informant for purposes of cross-examination. See Pen C §1127a(c), discussed in §§17.14, 49.16.

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§49.23 3. Instructions

If an immunized witness is an in-custody informant, as defined by Pen C §1127a(a), the defense, on request, is entitled to a cautionary instruction telling the jury to view the witness's testimony "with caution and close scrutiny." See Pen C §1127a(b); CALCRIM 336. The trial court is not required to give cautionary instructions on the testimony of other witnesses testifying under plea bargains or grants of immunity, even on request. *People v Hunter* (1989) 49 C3d 957, 977, 264 CR 367. Consequently, there are no pattern instructions on witnesses who have been granted immunity; counsel must prepare his or her own. In *People v Castro* (1979) 99 CA3d 191, 196, 160 CR 156, the defense requested the following instruction from the trial court:

> The testimony of an informer who provides evidence against the defendant for pay or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against defendant.

Although the trial court refused to give this instruction, and the appellate court found any error to be harmless, this does not mean that individual trial judges will uniformly refuse similar instructions. See §§32.24-32.27 on tailored instructions generally. CALCRIM 336 can also be used as a model. For other examples of defense instructions on immunity, see *People v Harvey* (1984) 163 CA3d 90, 112, 208 CR 910; Rucker & Overland, California Criminal Practice, Motions, Jury Instructions and Sentencing §44.30 (3d ed 2004) (need to treat testimony of immunized informant with mistrust; motive to falsify when giving immunized testimony; standard of credibility of immunized witness's testimony).

The general posttrial instruction on witness credibility is CALCRIM 226. See also CALCRIM 105; *People v Hampton* (1999) 73 CA4th 710, 721, 86 CR2d 665. CALCRIM 226 allows the jury to consider whether a witness was promised immunity or leniency in exchange for his or her testimony when evaluating a witness's testimony. The court has a sua sponte duty to instruct on factors, including promised immunity or leniency, relevant to a witness's credibility. *People v Rincon-Pineda* (1975) 14 C3d 864, 883, 123 CR 119; Evid C §780(e), (i), (k). If the witness who was granted immunity was an accomplice, the court must give the instruction that an accomplice's testimony must be corroborated. See CALCRIM 334, 335. If there is only one witness, defense counsel can request the instruction that the testimony of one witness is sufficient for proof but should be carefully reviewed. See CALCRIM 301.

In a case in which the jury knows that an unjoined accomplice has received immunity to testify, defense counsel should oppose a request for the instruction that a jury cannot speculate on the prosecutor's reason for not prosecuting others. See CALCRIM 373. The California Supreme Court stated on several occasions that when the prosecution is relying on the immunized testimony of unjoined accomplices (see, *e.g., People v Lawley* (2002) 27 C4th 102, 162, 115 CR2d 614), CALJIC 2.11.5 (now see CALCRIM 373) should be omitted or clarified. Many defense lawyers opined that giving CALJIC 2.11.5 in this situation could be very prejudicial to the defendant. The high court, however, declined to characterize giving CALJIC 2.11.5 in these circumstances as error and has consistently held that no prejudice occurs as long as a reasonable juror understands that he or she should consider criminal activity of a witness who is not being prosecuted in the current trial. *People v Lawley, supra*; *People v Fonseca* (2003) 105 CA4th 543, 129 CR2d 513.

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§49.24 VII. WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION OR OF IMMUNITY BY IMMUNIZED WITNESS

Waiver of privilege. A witness may waive the privilege against self-incrimination. *Mitchell v U.S.* (1999) 526 US 314, 321, 143 L Ed 2d 424, 433, 119 S Ct 1307; *People v Williams* (2008) 43 C4th 584, 615, 75 CR3d 691. In that event, the witness is not entitled to immunity. *People v St. Joseph* (1990) 226 CA3d 289, 298 n3, 276 CR 498.

Waiver of immunity. When an immunized witness asserts the Fifth Amendment and refuses to testify after having been granted immunity, and this refusal amounts to a repudiation of the immunity agreement, the witness may be held to have waived the claim to immunity. See *People v Brunner* (1973) 32 CA3d 908, 917, 108 CR 501. When the witness testifies favorably to the prosecution but in a later proceeding invokes his or her privilege against self-incrimination, the court must decide whether the People received the benefit of the bargain. 32 CA3d at 916. A sample prosecution petition to compel a witness to testify under Pen C §1324 is in California Criminal Law Forms Manual §49.1 (2d ed Cal CEB 2005).

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VIII. PROSECUTION OF WITNESSES WHO HAVE RECEIVED IMMUNITY

§49.25 A. When Prosecution Is Possible

Witness waived privilege or immunity grant. Prosecution of a witness who has been given immunity is possible when the witness waived the privilege against self-incrimination or the immunity grant. See §49.24.

Immunized witness. Whether prosecution of an immunized witness is possible depends on several factors. Assuming that the witness satisfactorily complied with the immunity grant, the requirements differ depending on whether use or transactional immunity was granted. If use immunity was granted, the witness is protected only from use of his or her compelled testimony, and evidence derived directly or indirectly from it. *U.S. v Montoya* (9th Cir 1995) 45 F3d 1286; *People v DeFreitas* (1983) 140 CA3d 835, 837, 189 CR 814. If transactional immunity was granted, the prosecution is precluded from charging the witness with any crime related to any matter about which the witness testified. *People v DeFreitas, supra*. The scope of immunity varies, depending on the statute involved. See §49.20.

A witness who testified previously under a grant of immunity who is subsequently prosecuted need only show that he or she testified under a grant of immunity in order to shift to the government a heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources. *U.S. v Mendoza* (9th Cir 1996) 78 F3d 460, 464. The witness's/defendant's burden in proving the breach of an immunity contract is only by a preponderance of the evidence. 78 F3d at 465.

Two procedures protect against the improper use of immunized testimony. First, privileged material is redacted from the witness's statements by prosecutors who are not involved in the new investigation before they are given to prosecutors in the new case, or presented to the grand jury. *In re Grand Jury Subpoena* (9th Cir 1996) 75 F3d 446, 448. Second, a *Kastigar* hearing must be held (*Kastigar v U.S.* (1972) 406 US 441, 32 L Ed 2d 212, 92 S Ct 1653). At that hearing, the government bears a heavy burden of proving a legitimate independent source. *In re Grand Jury Subpoena* (9th Cir 1996) 75 F3d 446. See *U.S. v McDaniel* (8th Cir 1973) 482 F2d 305 (showing of independent source of evidence was insufficient because prosecutor had requested and read immunized testimony); *U.S. v Henderson* (D Del 1975) 406 F Supp 417 (indictment not dismissed although prosecutor was familiar with immunized testimony because that same evidence, obtained from independent sources, would have been presented to grand jury in any event); *Griego v Superior Court* (2000) 80 CA4th 568, 95 CR2d 351 (defendant's criminal complaint dismissed because prosecution inadvertently bestowed transactional immunity on defendant for subsequent known but uncharged criminal activity by asking him questions pertaining to that particular act during deposition in which defendant had transactional immunity); *People v Lawrence* (1972) 25 CA3d 498, 102 CR 16 (conviction for conspiracy to murder upheld even though defendant had federal immunity for related facts because subsequent murder charge was completely separate transaction not known by authorities at time of testimony).

No per se rule exists, however, prohibiting prosecuting attorneys from seeing or screening privileged evidence. *In re Grand Jury Subpoena, supra*. When a person is compelled to testify against himself or herself under a grant of immunity and is later prosecuted, the government may protect against a claim of indirect use by assigning the case to prosecutors not exposed to earlier testimony, and by barring communication between them and prosecutors who obtained the compelled testimony. A detailed declaration filed by the government establishing that the indictment rested entirely on sources independent of the defendant's immunized testimony may suffice. *U.S. v Montoya* (9th Cir 1995) 45 F3d 1286, 1294.

Major unanswered questions exist concerning whether nonevidentiary uses of immunized testimony are allowed. Nonevidentiary uses include assistance in focusing the investigation, refusing to plea bargain, developing opening and closing arguments, and otherwise planning trial strategy.

If the new prosecution is challenged, the prosecutor should be able to produce a summary of the anticipated testimony to be used against the defendant, and its sources and date of receipt.

It is common for prosecutors and police investigators who will work on a case against a previously immunized witness to refuse to see the witness's prior testimony. The prosecutor and investigator may wish to file affidavits or

declarations to that effect with the court. See *People v Lawrence* (1972) 25 CA3d 498, 510, 102 CR 16.

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§49.26 B. Raising Immunity as Defense to Prosecution

Once-in-jeopardy plea. If immunity was granted under Pen C §1099 or §1100, the defendant is considered to have been acquitted (see §49.13), and should enter a plea of once in jeopardy (see §§26.23-26.28).

When to raise as motion. If a witness with any other type of immunity is later prosecuted and wishes to raise the defense of immunity, the claim can be asserted at the preliminary hearing (see chap 8) and, if denied, can be challenged by a Pen C §995 motion (see chap 13). *People v Backus* (1979) 23 C3d 360, 368, 152 CR 710; *People v King* (1967) 66 C2d 633, 645, 58 CR 571. This defense can also be raised as a common law motion to dismiss. *People v Brunner* (1973) 32 CA3d 908, 108 CR 501.

Ø **Note:** The prosecutor can ignore an unfavorable legal ruling at the preliminary hearing and add the count in the superior court information (*Jones v Superior Court* (1971) 4 C3d 660, 666, 94 CR 289) or can challenge the ruling in superior court under Pen C §871.5. For further discussion of these prosecutorial options, see §§13.32-13.38.

Procedures on common law motion to dismiss. At the hearing on the motion, the defendant has the burden of establishing that he or she testified under a grant of immunity. Once the defendant proves the immunity grant, the burden shifts to the government to prove that the crime against the witness is outside the immunity grant. *Kastigar v U.S.* (1972) 406 US 441, 460, 32 L Ed 2d 212, 226, 92 S Ct 1653). See also the discussion in §9.12.

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§49.27 IX. WITNESS'S LIABILITY TO PROSECUTION IN OTHER JURISDICTIONS

When the state grants immunity to a witness, any compelled testimony given by that witness in the state prosecution, and its fruits, cannot be used by the federal government in investigating and prosecuting a crime against that witness (*i.e.,* use immunity). See *Murphy v Waterfront Comm'n* (1964) 378 US 52, 79, 12 L Ed 2d 678, 84 S Ct 1594 (witnesses granted immunity under state law refused to answer questions that might incriminate them under federal law; court held that federal government was prohibited from using testimony and its fruits in criminal prosecution against witnesses); *Nelson v Municipal Court* (1972) 28 CA3d 889, 892, 105 CR 46 (witness in state court took Fifth despite transactional immunity grant under Pen C §1324, arguing that he was subject to prosecution in federal courts; court said witness required to testify even though his federal protection would be limited to use immunity).

Informal nonjudicial immunity agreements with California law enforcement or prosecutors will not suffice to create immunity under *Murphy,* which will leave the state-immunized person vulnerable to a federal prosecution that uses the state-immunized statements or information against the person. Similarly, state prosecutors are not bound by federal informal immunity. The scope of federal informal immunity is determined by the agreement between the prosecutor and witness and is governed by principles of contract law. *U.S. v Plummer* (9th Cir 1991) 941 F2d 799, 802. The separate sovereigns need not respect an agreement made by the other with a third party. Therefore, a witness who supplies testimony in exchange for federal informal immunity is vulnerable to state prosecution. See 18 US NITA 6003 (2009 Commentary, National Institute for Trial Advocacy).

When the possibility of "foreign jurisdiction" (*e.g.,* federal) prosecution exists, careful attention to the state immunity procedure is required. *U.S. v Camp* (9th Cir 1995) 72 F3d 759 (state letter immunity "pursuant to" Montana immunity statute insufficient to prevent use of state-immunized material by federal court when defendant did not first invoke his right against self-incrimination). A question arises in *Camp*'s wake: Will California courts take the same view in the reverse situation in which federal informal immunity has been first granted?

A witness may not invoke the Fifth Amendment privilege against self-incrimination solely on the basis of the possibility of prosecution by a foreign country. In *U.S. v Balsys* (1998) 524 US 666, 141 L Ed 2d 575, 118 S Ct 2218, the defendant witness (a suspected Nazi collaborator) claimed Fifth Amendment protection against self-incrimination because of his fear that testimony elicited from him in his deportation hearing could be used in criminal prosecution by other countries of his wartime activities. The U.S. Supreme Court held that the defendant's asserted fear of foreign criminal prosecution based on his testimony was beyond the scope of the Fifth Amendment.

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EXTRADITION

PETER H. SMITH

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Source: Criminal Law/California Criminal Law Procedure and Practice/50 EXTRADITION/§50.1 I. OVERVIEW

§50.1 I. OVERVIEW

Extradition between states is guaranteed by US Const art IV, §2(2), which has been implemented by 18 USC §3182 (referred to in this chapter as the "Federal Act"). However, the Federal Act is somewhat limited in scope. For example, it does not provide for extradition of someone who, while in one state, commits an act resulting in a crime in another state, or establish procedures for the arrest and detention of a fugitive before the issuance of a Governor's warrant (a formal demand for return of the fugitive by the governor of the state seeking extradition), waiver of extradition, or judicial review of extradition procedures. Because the Federal Act has been held to be nonexclusive, the states are free to enact statutes expanding the scope of interstate extradition. *New York v O'Neill* (1959) 359 US 1, 3 L Ed 2d 585, 79 S Ct 564; *South Dakota v Brown* (1978) 20 C3d 765, 771, 144 CR 758. Accordingly, almost all the states and territories, as well as the District of Columbia, have enacted the Uniform Criminal Extradition Act (UCEA), or variations of it, using it as a model. See 11 Uniform Laws Annotated.

The scope of the UCEA goes beyond that of the Federal Act. See Pen C §§1547-1558. Under the UCEA, California must honor a request for extradition even if the demanding state has not enacted similar provisions; reciprocity is not required. *In re Morgan* (1948) 86 CA2d 217, 194 P2d 800. The UCEA was intended to facilitate extradition, not to make it more difficult than under federal law. See *People ex rel Schank v Gerace* (App Div 1997) 661 NYS2d 403; *State v Luster* (Fla 1992) 596 So2d 454.

Generally, a suspected fugitive is arrested on the basis of a demanding state's warrant charging the suspect with a crime. The prosecutor in the "asylum" state may then file a "fugitive complaint" against the suspect. When that occurs, the suspect is arraigned and held in custody or admitted to bail pending issuance of the Governor's warrant. The fugitive may deny the allegations in the complaint or waive formal extradition at this time.

Meanwhile, the prosecutor in the demanding state assembles the appropriate extradition papers, which are submitted to the governor of the demanding state. If the papers are approved as to form by the Attorney General, the governor of the demanding state submits a requisition, or formal demand, accompanied by the supporting documents, to the governor of the asylum state. The governor of the asylum state after review by his or her office and the office of the state Attorney General then issues a warrant of extradition that commands the arrest and rendition of the fugitive. The fugitive is then arraigned on the Governor's warrant and, on request, given the opportunity to challenge its validity by habeas corpus.

Although there is a judicial procedure for the arrest and detention of a fugitive pending issuance of a Governor's warrant, as well as a procedure for limited judicial review, extradition is intended to be a summary executive function. *Michigan v Doran* (1978) 439 US 282, 288, 58 L Ed 2d 521, 99 S Ct 530; *In re Golden* (1977) 65 CA3d 789, 135 CR 512. Extradition may be challenged before the Governor's warrant is issued at an identity hearing in the trial court or, in rare nonfugitive cases (see §50.4), at a Governor's hearing. After the warrant is issued, extradition may be challenged by habeas corpus. If the challenge is unsuccessful, the appropriate agency in the demanding state is notified and sends its agents to return the fugitive to the demanding state.

In addition to formal extradition, there are several other types of interstate rendition. The Uniform Interstate Family Support Act (Fam C §§4900-5005) provides a means by which a person may be compelled to abide by his or her support obligation, including involuntary removal to a state where he or she may be charged with criminal nonsupport. The Interstate Compact for Adult Offender Supervision (Pen C §§11180-11181), provides an administrative procedure for the return of probationers or parolees who are under another state's supervision. See §50.48.

The Agreement on Detainers (Pen C §§1389-1389.8, sometimes called the Interstate Agreement on Detainers) is a compact that provides for the administrative transfer of prisoners from one jurisdiction to another jurisdiction that has criminal charges pending against the prisoner. Its basic purpose is to protect the speedy trial rights of both the prisoner and the prosecutor and to dispose of detainers so as to minimize disruption of the prisoner's rehabilitation program. See §50.49.

The Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (Pen C §§1334-1334.6) sets forth a means by which both prosecution and defense witnesses who are located outside the state may be compelled to appear in criminal trials within the state. See §50.50.

The Interstate Compact for Juveniles (Welf & I C §§1400-1403) provides an alternative to extradition of juveniles who are accused of a crime. It also establishes a means for compelling the return of runaways or other wards who have not been accused or found guilty of criminal conduct. Finally, it provides for interstate parole or probation supervision of juveniles. See §50.51.

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§50.2 II. CHART: DEADLINES

Action	Deadline	Authority
Arrest to arraignment.	"With all practicable speed."	Pen C §1551.1.
Request for governor's hearing following arrest. (Nonfugitive cases only; see §50.4.)	As soon as possible following arrest.	See §50.26.
Arraignment to identity hearing (also called probable cause and Pen C §1551.2 hearing).	Within 10 calendar days or court can discharge defendant.	Pen C §1551.2.
Commitment to governor's warrant.	Within 30 calendar days after identity hearing, or court can discharge defendant or recommit for additional 60 calendar days. If this 90-day period passes without defendant's arrest on governor's warrant, defendant must be discharged.	Pen C §§1552, 1552.2.
Service of governor's warrant to arraignment.	"Forthwith"; probably within 2 court days.	Pen C §1550.1; see Pen C §825 (criminal defendant must be brought to court within 48 hours after arrest, excluding Sundays and holidays).
Arraignment on governor's warrant to filing of habeas corpus petition.	"Reasonable time."	Pen C §1550.1.
Denial of writ of habeas corpus to filing petition for writ of habeas corpus in another court.	"Reasonable time."	Pen C §1550.1.
Denial of habeas corpus (or magistrate's rendition order if no habeas corpus sought) to delivery to demanding state's agent.	Within 30 calendar days, or magistrate may release fugitive from custody.	18 USC §3182.
Waiver of extradition to release of fugitive to agents of demanding state.	"Forthwith." Defendant may be released if not accomplished within 30 calendar days.	Pen C §1555.1; 18 USC §3182; *People v Superior Court (Lopez)* (1982) 130 CA3d 776, 786, 182 CR 132.
Time of hearing in asylum state after fugitive's refusal to sign waiver regarding fugitive's alleged prior waiver of extradition in demanding state.	No time limit given; hearing is held at prosecutor's request.	Pen C §1555.2(a).
Time allowed fugitive to seek writ of habeas corpus to test judge's order under Pen C	"Reasonable time."	Pen C §1555.2(e).

§1555.2(c).

Time allowed fugitive to seek new writ of habeas corpus after first petition testing judge's order under Pen C §1555.2(c) denied.	If appellate court finds probable cause for application, it fixes time.	Pen C §1555.2(e).

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III. UNIFORM CRIMINAL EXTRADITION ACT (UCEA)

A. Persons Subject to Extradition

§50.3 1. Fugitives

Anyone who, while present in the demanding state, commits a crime there and is subsequently found in any other state is a "fugitive from justice" and is subject to extradition, regardless of the reason for the person's departure from the state of the crime. *Appleyard v Massachusetts* (1906) 203 US 222, 227, 51 L Ed 161, 163, 27 S Ct 122. The motive for the person's departure is irrelevant (*In re Murdock* (1936) 5 C2d 644, 55 P2d 843), as is the fact that he or she may have left involuntarily (Pen C §1549; *In re Patterson* (1966) 64 C2d 357, 364, 49 CR 801). See *New Mexico ex rel Ortiz v Reed* (1998) 524 US 151, 141 L Ed 2d 131, 118 S Ct 1860; *White v Armontrout* (8th Cir 1994) 29 F3d 357, 359 (person need not have knowledge of charges); *Marini v Gibson* (Ga 1996) 478 SE2d 767.

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§50.4 2. Nonfugitives: Crime in Demanding State Occurred in California or in Another State

The Uniform Criminal Extradition Act (UCEA) (Pen C §§1547-1558) provides that someone who commits an act in California or in a state other than the demanding state that intentionally results in a crime in the demanding state may be extradited. Pen C §1549.1.

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§50.5 3. Juveniles

Juveniles who are alleged to have committed a crime are treated like adults for purposes of extradition, except that they must be detained in an appropriate juvenile facility if one is available, with some specified exceptions. Welf & I C §216. See §50.51.

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§50.6 B. Only Persons Charged With Crime Are Subject to Extradition

Only persons charged with crimes are subject to extradition. For purposes of the Uniform Criminal Extradition Act (UCEA) (Pen C §§1547-1558), a person can be "charged" with a crime without the institution of formal adversary judicial proceedings. See Pen C §1548.2 (the extradition demand may be accompanied by indictment, information, or affidavit before a magistrate in the demanding state).

Persons "charged" with crimes include individuals (1) convicted and alleged to have escaped from confinement, (2) charged with a crime who violated the terms of bail, (3) on probation or parole who violated the terms of their probation or parole, and (4) who have not satisfied the criminal judgment against them. See *In re Fedder* (1956) 143 CA2d 103, 299 P2d 881. A crime need not be a felony to be an "extraditable" offense (Pen C §1548.1) nor is it necessary that the offense be a crime under the law of the asylum state. *Appleyard v Massachusetts* (1906) 203 US 222, 51 L Ed 161, 27 S Ct 122. The charge must simply state an offense under the laws of the demanding state. It is sufficient if the crime is stated in the language of the statute. *In re Brown* (1929) 102 CA 97, 282 P 538, citing *Ex parte Reggel* (1885) 114 US 642, 29 L Ed 250, 5 S Ct 1148.

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C. Proceedings Before Governor's Warrant Issues

§50.7 1. Arrest of Suspected Fugitive

A suspected fugitive may be arrested in California with or without an arrest warrant before any formal demand is made by the governor of another state. Pen C §§1551, 1551.1; see *Ex parte Rosenblat* (1876) 51 C 285. An arrest made without a warrant must be on reasonable information that the person is charged in another state with an offense punishable by death or imprisonment for more than 1 year, or that the person has been convicted of such an offense and thereafter escaped or violated the terms of bail, probation, or parole. When arrested without a warrant, the accused must be brought before a magistrate "with all practicable speed" (see §50.8), and a complaint must be filed charging him or her in accordance with Pen C §1551. Pen C §1551.1.

A person may also be arrested on a "fugitive warrant." These are issued by a California magistrate on seeing either a verified complaint or an unverified complaint based on the affidavit of a credible person from another state. Pen C §1551. In the latter instance, the complaint must charge that the accused is a fugitive from justice in that the person has been *charged* with a crime or convicted of a crime in another state and has escaped from confinement or violated the conditions of his or her bail, probation, or parole. In the former case, the verified complaint need only charge that the person *committed* a crime in another state, or was convicted. Pen C §1551.

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§50.8 2. Arraignment

The accused must be taken before a magistrate with "all practicable speed." Pen C §1551.1. The magistrate should perform the following functions at the defendant's first appearance:

- Inform the accused of the reason for the arrest (Pen C §1551.2);
- Inform the accused of his or her right to demand and procure counsel (Pen C §1551.2);
- Inform the accused that he or she has the right to waive extradition (see §50.45);
- Ask the accused if he or she wishes to waive extradition;
- Ask the accused if he or she wants to admit the facts and that he or she is the person named in the warrant;
- Schedule a hearing within 10 calendar days if the accused denies being the same person named in the fugitive complaint or denies being charged with or convicted of a crime in the demanding state; and
- Fix bail, if appropriate, under Pen C §§1552-1552.1 (see §50.9).

Ø **Warning:** Defense counsel appearing at arraignment should not give the defendant's name to the court during that appearance. Counsel should state only that he or she is appearing "on behalf of the alleged fugitive." The reason for not using the defendant's name is that naming the client may itself be an admission of identity, which is one of the few issues that can be challenged. See §50.10.

Although the accused has a statutory right to counsel in extradition proceedings, the commencement of extradition proceedings does not trigger the attachment of the constitutional right to counsel. *People v Wheelock* (2004) 117 CA4th 561, 11 CR3d 796. The court in *Wheelock* pointed out that, under *Massiah v U.S.* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199, the Sixth Amendment right to counsel with respect to the underlying charge attaches only when formal adversarial judicial proceedings begin on that charge. The court therefore rejected the defendant's claim that questioning by police in the absence of his attorney for the extradition proceedings was a *Massiah* violation. *People v Wheelock* (2004) 117 CA4th 561, 565, 11 CR3d 796.

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§50.9 3. Bail Before Governor's Warrant Served

A person arrested as a suspected fugitive may be admitted to bail before the service of the Governor's warrant unless the charged offense is punishable by death or life imprisonment or unless the accused is alleged to have escaped or violated the terms of his or her parole following conviction of a crime punishable by imprisonment for more than 1 year in the demanding state. Pen C §1552.1. See *In re Walton* (2002) 99 CA4th 934, 122 CR2d 87 (escaped fugitive may not be granted bail but must be held in custody pending service of Governor's rendition warrant under Pen C §1552.1). See also §50.13 on bail when the Governor's warrant is not issued within 30 calendar days after the commitment order.

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4. Identity Hearing (Also Called Probable Cause or Pen C §1551.2 Hearing)

§50.10 a. When Required; Time Limits

A magistrate must hold a hearing, called an identity, probable cause, or Pen C §1551.2 hearing, if the alleged fugitive denies being the person charged with or convicted of a crime in the demanding state. Pen C §1551.2. The hearing must be held within 10 calendar days after arraignment. Pen C §§1550.1, 1551.2.

Ø **Note:** If the hearing is not held within 10 calendar days, defense counsel might want to ask for a dismissal, although there is no authority for this remedy in Pen C §§1550.1 and 1551.2.

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§50.11 b. Procedures at Identity Hearing

To establish the charge or conviction, the magistrate must accept as conclusive proof of its contents a certified copy of an indictment, information, verified complaint, judgment, sentence, or other judicial proceeding against the accused. These documents are not the only evidence that may be accepted to prove the essential facts. The magistrate, however, may not require witnesses from the demanding state to be present. Pen C §1551.2.

It is unclear whether the Evidence Code applies to extradition proceedings. This question is most relevant to the key issue: whether there is probable cause to believe that the person arrested is in fact the fugitive. Defense counsel will usually want to argue that the Evidence Code applies, on the basis of Evid C §300. The prosecutor will usually maintain that California should follow the majority rule in the United States. Other jurisdictions have overwhelmingly held that the formal rules of evidence do not apply in extradition proceedings. See, *e.g., Munsey v Clough* (1905) 196 US 364, 49 L Ed 515, 25 S Ct 282; *In re Mahan* (Neb 1982) 319 NW2d 760; *Commonwealth v Rowe* (Pa 1979) 398 A2d 1060; *Shields v State* (Md 1970) 263 A2d 565; *State v Rosati* (RI 1991) 594 A2d 885; *Smith v Idaho* (9th Cir 1967) 373 F2d 149, 154.

If the rules of evidence do not apply and the magistrate looks to what other jurisdictions do, the prosecutor can make a prima facie showing of identity by submitting an affidavit from the demanding state incorporating a photograph, fingerprint card, or both, or merely by showing that the name of the accused is the same as the person named on the fugitive complaint and extradition documents. See, *e.g., Munsey v Clough* (1905) 196 US 364, 372, 49 L Ed 515, 25 S Ct 282; *Dovel v Adams* (Neb 1981) 301 NW2d 102, 103; *Reeves v Cox* (NH 1978) 385 A2d 847, 850; *Shields v State* (Md 1970) 263 A2d 565, 568.

If the rules of evidence do apply, the prosecutor can usually have records that establish identity admitted most easily as official records under the state or public entity exception in Evid C §1530. They must be properly authenticated. See Evid C §§1401, 1452-1454. For further discussion, see Effective Introduction of Evidence in California, chap 36 (2d ed Cal CEB 2000).

Defense counsel should focus on whether the records the prosecutor seeks to introduce are admissible. If the rules of evidence apply, this usually means combating admission of documents under either the official records or business records exception to the hearsay rule. The demanding state often fails to provide the affidavit of the custodian of records, which is required under both Evidence Code sections. There may be other reasons as well that the records sent do not qualify for admission into evidence under the California Evidence Code. For discussion of the business record and official record exceptions to the hearsay rule, including requirements, objections, and sample questions, see Effective Intro of Evidence, chaps 11, 13, 36.

Either attorney can subpoena witnesses to testify. For example, defense counsel may wish to have an expert compare the defendant's fingerprints with those sent by the demanding state and testify at the identity hearing if they do not match the defendant's prints. Witnesses are not usually presented, however, because Pen C §1551.2 states that witnesses from other states are not to be required to attend the hearing.

In some cases, the person being sought was never booked or fingerprinted in the demanding state. Proof of identity in these cases often consists of a photograph and an affidavit. Defense counsel may argue that these are not adequately connected to the defendant.

Ø **Note:** Defendant's silence or statements made at the extradition hearing may be admissible in the demanding state. See *People v Jaspal* (1991) 234 CA3d 1446, 286 CR 337.

Once a prima facie showing has been made, the accused bears the burden of proving by clear and convincing evidence that he or she is not the person named. *Miller v Debekker* (Colo 1983) 668 P2d 927; *State v Perrera* (Fla 1983) 443 So2d 1016. Arguments against extradition are discussed in §50.19.

Ø **Note:** Whether the accused is guilty or innocent of the crime charged in the demanding state may not be inquired into at this or any other stage of the extradition proceedings in the asylum state. Pen C §1553.2; *In re Golden* (1977) 65 CA3d 789, 135 CR 512. See also *California v Superior Court (Smolin)* (1987) 482 US 400, 96 L

Ed 2d 332, 107 S Ct 2433; *Michigan v Doran* (1978) 439 US 282, 58 L Ed 2d 521, 99 S Ct 530.

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§50.12 c. Effect of Dismissal

It is unclear whether an accused fugitive who has been discharged because of a violation of the 10-day time limit for holding an identity hearing (see §50.10) may be rearrested on the same fugitive warrant. Although it seems that the two/three dismissal rule of Pen C §§1387-1387.1 should apply because of the similarity between the conditions that give rise to the dismissal in each case, no case has so held. But see §50.13.

Defense counsel should ask the court to release a fugitive on O.R. if the fugitive has been rearrested after a dismissal under the 10-day rule.

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§50.13 5. Commitment Order; Arrest on Governor's Warrant

If the court finds probable cause to believe that the accused is the same person named in the fugitive complaint and that the person is charged with or has been convicted of a crime in the demanding state, the court must issue an order committing the person to custody for up to 30 calendar days to allow time for the issuance of a Governor's warrant. Pen C §1552.

If the person is otherwise eligible for bail (see §50.9), the court may continue bail or set new bail. Pen C §1552.1.

Ø **Note:** If the defendant is committed to custody to wait for the Governor's warrant, defense counsel should be sure to request an order from the court that the alleged fugitive not be extradited without further order of the court. This request should be renewed at each court appearance.

At the end of 30 calendar days, if the defendant has not been arrested on the Governor's warrant, the court may either release the defendant or continue the matter for up to an additional 60 calendar days to allow more time for the warrant to issue. Pen C §1552.2. If the case is continued beyond the 30-day period, a judge of the superior court or a justice of the court of appeal or the California Supreme Court may again set bail. Pen C §1552.2. If the Governor's warrant has not been issued by the end of the 90-day period, the fugitive complaint may be dismissed. However, there is no prohibition against a new fugitive complaint being filed, or the direct arrest of the defendant on the Governor's warrant if a new complaint is not filed (see Pen C §§1549.3, 1552.1; *In re Bembry* (Okla 1995) 907 P2d 1076).

The 30- and 60-day deadlines do not apply if the defendant is also charged with a crime committed in California. Pen C §1553.1(b).

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D. Procedures to Secure Governor's Warrant

§50.14 1. Documents Needed to Support Extradition Warrant; Required Contents of Requisition

Before the governor of the asylum state may issue an extradition warrant, he or she must receive these items:

- A formal written demand for extradition (called a requisition) from the executive authority of the demanding state (Pen C §1548.2);
- A certified copy of an indictment, information, or affidavit made before a magistrate, or a certified copy of a judgment or sentence if the person has been convicted (Pen C §1548.2); and
- A copy of any warrant issued (Pen C §1548.2); a warrant is not required, however, unless one has actually been issued (*In re Cooper* (1960) 53 C2d 772, 3 CR 140).

The prosecutor in the demanding state uses an application for requisition to ask the demanding state's governor to demand extradition of the accused from the asylum state's governor. The requisition must be signed by the governor of the demanding state or a person performing the function of the governor (Pen C §1548(b)) and should state the name of the person sought and the crime charged or the reason that person is to be returned. The executive authority must certify as authentic the accompanying charging document, judgment, or sentence. Pen C §1548.2.

A California prosecutor applying for a requisition on another state's governor should make sure that the copy of the charging document is properly certified by the document's custodian and that the custodian is in turn certified by a superior court officer whose signature can be verified by the Secretary of State.

The requisition must contain the following allegations; otherwise, it is defective and extradition may be successfully resisted (*In re Brewer* (1943) 61 CA2d 388, 143 P2d 33):

- The case falls within one of the statutory bases for extradition. Pen C §1548.2.
- The person sought was present in the demanding state at the time the crime was committed and thereafter fled from the demanding state. Pen C §1548.2. In the alternative, the allegation should state that the person sought committed an act in another state intentionally resulting in a crime in the demanding state (nonfugitive). Pen C §1549.1.

An additional allegation that should be added if appropriate is that the person sought has escaped from confinement or has violated the terms of his or her bail, probation, or parole. Pen C §1548.2. A requisition is not insufficient under §1548.2 if this allegation is missing as long as the requisition shows that the individual stands convicted and that the judgment remains unsatisfied. See *In re Fedder* (1956) 143 CA2d 103, 299 P2d 881; *Gottfried v Cronin* (Colo 1976) 555 P2d 969.

These allegations may appear in the requisition, in the accompanying indictment or information, or in an "affidavit made before a magistrate." Pen C §1548.2; *In re Cooper, supra*. An affidavit made before a magistrate is usually a complaint, sworn before and signed by a magistrate. See *People v Mack* (1977) 66 CA3d 839, 136 CR 283; *People v Evans* (Ill Ct App 1984) 467 NE2d 631; *Petition of Upton* (Mass 1982) 439 NE2d 1216; *Langley v Hayward* (Utah 1982) 656 P2d 1020.

The definition of "magistrate" is not entirely uniform from state to state and may be troublesome. Although a magistrate is usually a judicial officer (see Pen C §808), in some circumstances, others, a court clerk or notary public, for example, may be considered magistrates (*Compton v Alabama* (1909) 214 US 1, 53 L Ed 885, 29 S Ct 605).

The affidavit should not be made "on information and belief." *In re Spears* (1891) 88 C 640, 26 P 608. It will not, however, be considered defective if the sources of the information and belief are explained or included through supplementary documents such as affidavits or police reports. *In re Cooper, supra*. These documents must be properly incorporated in the complaint. 53 C2d at 778.

When an information is relied on by the prosecutor as the charging document, it should be accompanied by a supporting affidavit setting forth the facts of the crime charged. Although in California an information is filed only after a magistrate has found probable cause that the crime was committed, some states do not require such a finding before

an information may be filed. In those states an information simply signed by a prosecutor is insufficient as a basis for extradition. *Battles v State* (Ala 1980) 389 So2d 957.

Generally, any record of a conviction is acceptable as a "judgment" to support extradition. *Blackwell v Johnson* (Colo 1982) 647 P2d 237; *Wynsma v Leach* (Colo 1975) 536 P2d 817. These records may include a judgment; an order of commitment, sentence, or probation; a minute order; a court docket; an abstract of judgment; or a guilty plea or verdict. *Blackwell v Johnson, supra; State v Luster* (Fla 1992) 596 So2d 454. There should also be a showing that the judgment is unsatisfied. *In re Fedder* (1956) 143 CA2d 103, 110, 299 P2d 881.

The information, indictment, or affidavit must "substantially" charge a crime. Pen C §1548.2.

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§50.15 2. Review by Attorney General of Incoming and Outgoing Extradition Cases

The Governor may refer any requisition he or she receives to the Attorney General or any prosecutor in California to investigate the demand and to report the situation and circumstances of the person demanded and whether he or she should be surrendered. Pen C §1548.3. The Attorney General also examines the papers for legal sufficiency.

Any deficiencies in the papers are explained to the appropriate officials, who may correct them accordingly. Once found legally sufficient, the papers are returned to the Governor's office.

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§50.16 3. Review by Extradition Secretary; Reasons Extradition Usually Approved

After the Attorney General examines and approves the documents, he or she returns them to the Governor's extradition secretary. In virtually all cases, the extradition secretary will then prepare the Governor's warrant to be sent to the local sheriff where the fugitive was arrested. There are very few cases that require review to determine the inherent justice of the case, because the Governor has no discretion to deny extradition in the vast majority of cases. See *Puerto Rico v Branstad* (1987) 483 US 219, 97 L Ed 2d 187, 107 S Ct 2802.

Governors do have discretion to grant or deny extradition when the accused is *not a fugitive* from the demanding state. Pen C §1549.1. Therefore, in rare cases in which the requisition requests the extradition of a nonfugitive, the issuance of the Governor's warrant may be withheld if the extradition secretary seriously questions the inherent justice of the extradition. In an extremely rare situation, the extradition secretary may grant a hearing before deciding whether a Governor's warrant should be issued. Historically, a very small number of discretionary extradition requests are denied.

Even in fugitive cases in which serious questions about the extradition arise, the extradition secretary may merely delay issuance of the warrant, contact the demanding state to make sure officials there are aware of all the circumstances, and ask demanding state officials if they want to consider withdrawing the extradition request.

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E. Tactical Considerations for Resisting Extradition Before Governor's Warrant Issues

§50.17 1. Deciding Whether to Resist Extradition

Defense counsel should request a court date for an identity hearing (see §50.10) at the defendant's first appearance to give counsel time to evaluate the case and decide what to do. When the defendant denies being the person charged, the court must set an identity hearing. Pen C §1551.2.

When the fugitive faces very serious charges in the demanding state, particularly capital charges, defense counsel should contact the attorney or agency who will represent the defendant and factor in their needs for more time to prepare for trial in making a decision on whether and how to resist extradition.

Resisting extradition is not always the best course of action. Few attorneys, and even fewer fugitives, give adequate consideration to what is accomplished when the Governor refuses to honor an extradition request. Denial of extradition in no way marks a final disposition of the case. It may not even amount to a final disposition of the extradition request. The requisition can be reinstituted at a future date by the demanding state, and there is no assurance that it will not be honored by a new governor, or even by the governor who originally denied it if he or she feels that a change in circumstances has occurred. Moreover, the fugitive can never leave California with any real sense of security because, if the demanding state learns of the fugitive's presence in a third state, it may cause his or her arrest in that state and a request for extradition from the governor of that state. In addition, a person may be subject to rearrest in California despite a denial of extradition. Presently, a denial of extradition does not appear on the computerized records of police agencies, nor does it remove the other state's arrest warrant from those records. Finally, the demanding state may not give credit against an eventual prison term for time spent in the asylum state resisting extradition. See §50.44.

If the fugitive decides not to fight extradition, defense counsel should attempt to work out some form of plea bargain with the extraditing authorities. See §50.32.

The various ways of resisting extradition are listed in §50.18.

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§50.18 2. Procedures for Resisting Extradition

To resist extradition, defense counsel can:

- Request an identity hearing (if client denies identity) (see §50.10);
- Seek withdrawal of the extradition request by the prosecutor in the demanding state (see §50.31);
- Seek a negotiated settlement from the prosecutor of the demanding state (see §50.32);
- Request a Governor's hearing (see §§50.26-50.30); and
- File a petition for writ of habeas corpus after the Governor's warrant has issued (see §§50.39-50.42).

See §50.46 on procedures when the prosecutor alleges that the defendant waived extradition in the demanding state as a condition of release.

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3. Arguments Against Extradition

§50.19 a. Arguments That May Be Raised and When They May Be Raised

At an identity hearing, identity is the only issue. Defense counsel should request an identity hearing only if the defendant denies being the person named in the charging document. Pen C §1551.2. Other arguments against extradition are available at subsequent hearings.

The following arguments may be made before the magistrate at the extradition hearing:

- The defendant denies being charged with or convicted of a crime in the demanding state.
- The extradition request is legally insufficient, *e.g.,* a required allegation is missing from the demanding state's extradition request. See §50.14.
- The defendant denies being a fugitive. *People v Superior Court (Lopez)* (1982) 130 CA3d 776, 783, 182 CR 132.
- The statute in the demanding state that the defendant is charged with violating has been declared void in the demanding state. *In re Cooper* (1960) 53 C2d 772, 3 CR 140. Any question of statutory interpretation, however, must be left to the courts of the demanding state. *In re Cooper, supra*. See *California v Superior Court (Smolin)* (1987) 482 US 400, 411, 96 L Ed 2d 332, 342, 107 S Ct 2433.

The following arguments may be raised with officials from the demanding state, or at a Governor's hearing, and should be made before the Governor's warrant issues, if possible (see §50.29):

- The defendant is innocent (to be raised with demanding state; may not be inquired into by Governor). See Pen C §1553.2.
- The defendant is suffering extreme hardship.
- The crime is insubstantial.
- The crime charged is not illegal in California.
- The defendant has been rehabilitated.

The following arguments may be made after arrest on the Governor's warrant by writ of habeas corpus (see §50.39):

- The defendant is not the same person named in the Governor's warrant.
- The defendant was not in the demanding state at the time of the offense.
- The defendant is not charged with or was not convicted of a crime in the demanding state.
- The extradition documents are not in order on their face.

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§50.20 b. Innocence

A defendant's alleged innocence is not a proper basis for contesting an extradition request in the asylum state. Pen C §1553.2. The demanding state usually has stated only that it believes the fugitive committed the crime and that it wishes to bring him or her to trial. However, proof of innocence can help influence a magistrate to release the fugitive on O.R. or to set a low bail, and to discharge the case if any of the time requirements are violated, *e.g.,* the 30-day or 60-day limits of Pen C §§1552 and 1552.2. It could also persuade the prosecutor in the demanding state to withdraw the extradition request altogether. Guilt or innocence may occasionally become a collateral issue if the fugitive claims mistaken identity, admits the acts but denies their criminal implication, or denies being a fugitive in the legal sense of the word.

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§50.21 c. Legal Insufficiency

Arguments that relate to the legal sufficiency of the extradition request include the following:

- The defendant denies being the person named in the fugitive document. See Pen C §1551.2; *People v Superior Court (Lopez)* (1982) 130 CA3d 776, 783, 182 CR 132.
- The defendant denies being charged with or convicted of a crime in the demanding state. See *California v Superior Court (Smolin)* (1987) 482 US 400, 96 L Ed 2d 332, 107 S Ct 2433.
- A required allegation is missing from the demanding state's extradition request. See §50.14.
- The defendant denies being a fugitive (*People v Superior Court (Lopez), supra*) or being otherwise extraditable.
- The statute in the demanding state that the defendant is charged with violating has been declared void in the demanding state. *In re Cooper* (1960) 53 C2d 772, 3 CR 140. Any question of statutory interpretation, however, must be left to the courts of the demanding state. *In re Cooper, supra*.
- The extradition documents are not in order on their face. See §50.14.

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§50.22 d. Inherent Justice

Occasionally a situation of such extreme hardship exists that extradition is simply not in the best interests of justice. Each case must be judged on its own merits. Certainly the seriousness of the crime charged is a factor to consider. Another factor given weight is the extreme youth or old age of the fugitive. The health of the fugitive may be significant, as may be the extreme hardship on the fugitive's family caused by his or her extradition. Whatever the facts, counsel must make a showing of extreme circumstances to avoid extradition.

Ø **Note:** These arguments are usually most successful when made to authorities from the demanding state.

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§50.23 e. Lack of Seriousness of Crime

The most common cases in which defense attorneys have successfully resisted a client's extradition include nonviolent offenses involving very small amounts of money (*e.g.,* $100 or less), child custody cases, and nonsupport cases in which the fugitive is making or promises to begin making regular payments. In a nonsupport case, the extradition secretary may merely withhold rendition until it appears likely that the fugitive will continue making regular support payments. Nonsupport cases are also governed by the Uniform Interstate Family Support Act (Fam C §§4900-5005), discussed in §50.47.

In most cases, the demanding state is the proper entity to determine what is or is not a "serious" crime. There is a strong presumption in favor of extradition, and if there is any substantial basis for requesting extradition on even a minor charge, counsel for the fugitive faces a formidable obstacle. As a practical matter, many states will not seek extradition for minor cases.

The costs of extradition are a factor in less serious cases. Some foreign jurisdictions are much more likely to consider alternatives to extradition in less serious cases because of the cost, particularly if the foreign state is far away.

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§50.24 f. Offense Charged Not Crime in California

The argument that an offense, though criminal in the demanding state, is not criminal in California, is rarely effective. The states tend to have fairly standard definitions of what types of conduct constitute criminal violations. Minor variations exist and penalties vary from state to state, but what is considered illegal in one state is probably similarly considered illegal in another state. If, however, counsel becomes involved in a case in which conduct not criminal in California is criminal in the demanding state, that fact should certainly be called to the attention of the extradition secretary.

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§50.25 g. Rehabilitation

All attorneys are familiar with the classic situation in which a person who commits a crime in another state flees to California, lives here for many years, and becomes a law-abiding and respected member of the community. Suddenly he or she is faced with the possibility of extradition to the other state to stand trial for the old offense. Depending on the seriousness of the original offense, the length of time that has elapsed, and the degree of the fugitive's rehabilitation, that person may resist extradition successfully.

Occasionally, if the fugitive can show that he or she has entered a drug rehabilitation or other program (especially one with a good reputation in the demanding state), the demanding prosecutor or parole board may be convinced to forgo extradition conditioned on successful completion of the program.

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4. Governor's Hearing

§50.26 a. Hearing Is Not a Right; Limited Primarily to Nonfugitives

The holding of an extradition hearing by the Governor is a matter of grace; it is not a matter of legal right. *Utt v State* (Md 1982) 443 A2d 582; *Cadle v Cauthron* (Ark 1979) 584 SW2d 6. The Penal Code does not mention such a procedure, but the Governor may grant an extradition hearing to a *nonfugitive* accused (defined in §50.4) if the request is made before the Governor's warrant of rendition is issued and if the request is accompanied by a sufficient showing that valid cause exists. Because governors lack "discretion" to deny extradition requests for fugitives (see §50.16), Governor's hearings are rarely granted in those cases. See §§50.23, 50.27 for unusual situations in which fugitives may wish to file a request for a Governor's hearing.

A request for a hearing is rarely granted after the warrant of rendition has issued, and then it may be granted only if the nonfugitive is prepared to demonstrate to the Governor that his or her extradition was legally improper from its inception. The hearing must be requested at the earliest possible opportunity. See §50.27 on how to request the hearing.

Because Governor's hearings are so rarely granted, they should be considered only as a last resort. Counsel should first exhaust all efforts to present his or her arguments to the prosecuting attorney in the demanding state.

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§50.27 b. Request for Governor's Hearing

Before requesting a Governor's hearing, defense counsel should determine whether grounds exist for a legitimate appeal to the Governor to deny extradition. See §§50.17-50.25. If such grounds appear, and the prosecutor in the demanding state has declined to reconsider his or her extradition request, defense counsel should as soon as possible request, by letter or telegram, a Governor's hearing. The request for a Governor's hearing need not be in the form of a formal motion or pleading. See Pen C §1554.

It is important to send an immediate request because the Governor's warrant may arrive at any time, even during the initial 30-day period discussed in §50.13. Further proceedings on the fugitive warrant become moot when the Governor's warrant is served because the fugitive warrant was instituted for the sole purpose of detaining the fugitive under some form of judicial restraint (custody or bail) so that the formal extradition request could be processed. Pen C §1552.2; see *In re Fedder* (1956) 143 CA2d 103, 299 P2d 881. Therefore, no obligation exists to hold the warrant until the date of the fugitive's next court hearing. That hearing may then be dismissed. A request for a Governor's hearing may delay issuance of the Governor's warrant.

Within 10 days after the initial request, defense counsel should send the extradition secretary a written detailed explanation of the reasons extradition should be denied, accompanied by any supporting documents. Even if a hearing is not granted, this information may persuade the extradition secretary to contact the demanding state about reconsideration of the request.

In the rare case in which service of the Governor's warrant is the first notice of the extradition proceedings that the client receives, counsel should feel free to present the matter to the extradition secretary. If the client can show that he or she did not know of the possibility of extradition, the Governor's warrant may be recalled and a hearing granted. See Pen C §1554.

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§50.28 c. Decision to Grant or Deny Hearing

The extradition secretary normally asks the Attorney General to review and investigate the arguments offered in support of the hearing request. The views of the demanding state's prosecutor are almost always sought. A hearing may be granted only if, after investigation, the circumstances militate strongly against extradition.

Notice of the decision to grant or deny a hearing will be provided to counsel. The Governor's warrant usually issues shortly after a denial. If a hearing is granted, counsel will be notified well in advance of its time and place. If a hearing is granted, or even if an investigation takes place, the extradition secretary will ask counsel to waive the time limits under Pen C §§1552 and 1552.2. There is some authority that these periods are tolled when the delay is for the fugitive's benefit. *People ex rel Gilbert v Babb* (Ill 1953) 114 NE2d 358, 361.

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§50.29 d. Conduct of Hearing; Argument

Hearings are normally conducted by the extradition secretary on the Governor's behalf. A Deputy Attorney General from California represents the demanding state in defending the legal sufficiency of the papers and generally serves as an adviser to the extradition secretary with respect to legal or factual matters arising at the hearing.

As a rule, defense counsel should advise the extradition secretary of the number of witnesses or visitors who will be present at the hearing in order to allow the secretary to arrange for appropriate hearing facilities.

Hearings are informal, and the usual rules of evidence do not apply. Defense counsel should be present. It is desirable that the client be present as well, but this is not required. The hearing consists largely of the arguments of counsel. Formal presentation of testimony by witnesses is not usually necessary or desirable. Any documentary proof to substantiate an argument should be submitted. After any questions of the legal sufficiency of the demand and the identity of the accused are disposed of, the arguments of counsel as to why extradition should be denied are considered. Counsel should be prepared to demonstrate that every reasonable effort has been made to resolve the matter with officials of the demanding state. See §50.32.

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§50.30 e. Proceedings After Governor's Hearing

After a Governor's hearing, the extradition secretary may call to the attention of the demanding state the substance of the arguments presented by counsel for the fugitive if he or she feels they merit a response.

If the Governor decides to honor the request for extradition, counsel usually will be advised by telephone. If extradition is denied, a letter setting out in detail the reasons for the Governor's decision is sent to the governor of the demanding state. A copy is sometimes sent to counsel.

The Governor will sometimes conditionally deny an extradition request (*e.g.,* for nonsupport), subject to the fugitive's continued good conduct in California and his or her obedience to its laws or to special conditions imposed by the Governor. However, the requisition may be reinstated at any time in the future, and no particular legal cause need be shown for reinstatement. See §50.17.

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§50.31 5. Seeking Withdrawal of Extradition Request

The best place to stop an extradition is at its source—the prosecutor in the demanding state. The attorney for the fugitive should consider communicating immediately with the prosecuting attorney in the demanding state to attempt to work out a disposition of the case by means other than extradition. It may be possible to convince the prosecuting attorney in the demanding state to withdraw the requisition. Sometimes, for example, the prosecutor may be unaware of facts showing extreme hardship or other extenuating circumstances that might lead him or her to reconsider the request.

When the accused is wanted for a probation violation, defense counsel should contact the probation officer in the demanding state.

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§50.32 6. Seeking Case Settlement on Extradition Request

If defense counsel is unable to convince the prosecutor from the demanding state to withdraw the request, or feels that such effort would be futile, he or she can attempt to reach a negotiated disposition. Sometimes a demanding state prosecutor will be satisfied with a certain amount of custody time spent during the extradition proceedings, or with a plea bargain in a case in the asylum state that informally includes a sanction for the extradition case. The agreement might call for the defendant to return to the demanding state or to enter a plea by mail. See chap 26 on plea bargaining.

The demanding state prosecutor's major concerns will be these:

- The nature of the crime with which the defendant is charged;
- The defendant's past record;
- The reasonableness of defense counsel's offer;
- The expense of returning the defendant;
- Crowded court calendars in the demanding state;
- Crowded prison systems in the demanding state (especially if the fugitive is charged with a parole violation); and
- Availability of officers to return the defendant to the demanding state.

Defense counsel should keep the Governor's office advised of the progress of negotiations. On a timely request, the Governor or his or her agent may withhold issuance of a warrant pending completion of those negotiations. The Governor usually requires a time waiver on the fugitive complaint proceedings as a condition of withholding the warrant. In addition, the Governor's staff or, when requested, the Attorney General, may independently evaluate the likely outcome of the negotiations.

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§50.33 7. Guidelines of National Association of Extradition Officials

The National Association of Extradition Officials (NAEO) has issued suggested but nonbinding guidelines on what offenses justify extradition. For example, they suggest that jurisdictions not extradite for bad checks under $500. NAEO Resolution No. 39. Counsel may cite these guidelines when urging the demanding state's prosecutor to withdraw the fugitive warrant or agree to a case settlement ("deal the case"). These guidelines, however, are in no way binding on prosecutors, who may elect to seek extradition for even very minor offenses. These guidelines also may be argued to the California trial court in support of setting a lower bail or release the defendant on his or her own recognizance, or in support of releasing the defendant after any time limits have passed (see, *e.g.,* Pen C §§1551.2, 1552.2, 1555.2).

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§50.34 F. Issuance of Governor's Warrant

If the Governor honors the requisition presented by the demanding state, the Governor or an authorized agent signs a rendition warrant and forwards it to the local law enforcement agency holding the fugitive under the fugitive warrant. Pen C §1549.2. It is the duty of the Governor to "arrest and deliver up" fugitives on request of the states from which they have fled. Pen C §1548.1; *Puerto Rico v Branstad* (1987) 483 US 219, 97 L Ed 2d 187, 107 S Ct 2802.

If a local criminal prosecution is pending against the fugitive, the Governor may either surrender the fugitive to the demanding state or hold the Governor's warrant until local proceedings are concluded and any sentence served. The time limits under Pen C §§1552 and 1552.2 are tolled while the local prosecution is pending. Pen C §1553.1.

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G. Procedures After Governor's Warrant Issues

§50.35 1. Arrest

Once the Governor's warrant is issued and served, the fugitive must be taken into custody. A Governor's warrant is an original arrest warrant and authorizes the immediate arrest of the person named in the warrant. It does not matter that the person has not previously been arrested or in custody, that he or she was released on bail, or that local charges are pending against him or her. Pen C §§1549.3, 1550.1. The Governor's warrant supersedes any existing fugitive warrant, complaint, and commitment order. Its issuance and service renders moot any defects or deficiencies in the proceedings under Pen C §§1551-1552.2. *In re Bembry* (Okla 1995) 907 P2d 1076; *State v Luster* (Fla 1992) 596 So2d 454; *Parks v Bourbeau* (Conn 1984) 477 A2d 636; *Schumm v Nelson* (Colo 1983) 659 P2d 1389.

Occasionally, the person having the authority to arrest the defendant will agree to hold the warrant for a short time at defense counsel's request and with the Governor's approval. Possible reasons may be that a personal emergency prevents extradition, *e.g.,* the fugitive is having a baby. In these cases, defense counsel should contact the sheriff who is to serve the warrant. The sheriff will call the Governor's office to see if the arrest can be delayed.

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§50.36 2. Arraignment on Governor's Warrant

A person arrested on a Governor's warrant must be taken immediately before a magistrate and arraigned before he or she may be turned over to an agent of the demanding state. Pen C §1550.1. Failure to do so is a misdemeanor. Pen C §1550.2.

The magistrate must advise the fugitive of the reason for his or her arrest, of the right to demand and procure counsel, and of the right to challenge the validity of the warrant within a reasonable time by seeking a writ of habeas corpus. Pen C §1550.1. See also §§50.39-50.42.

A fugitive's competence to assist counsel with the defenses available by way of writ of habeas corpus may be raised at arraignment on the Governor's warrant. Pen C §1550.1; *State v Patton* (Kan 2008) 176 P3d 151.

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§50.37 3. No Bail After Governor's Warrant Served

Bail, or any other conditional release from custody, is expressly precluded after service of the Governor's warrant, even if a stay of the extradition is granted pending litigation on a habeas corpus petition. Pen C §1550.1; *People v Superior Court (Ruiz)* (1986) 187 CA3d 686, 234 CR 214.

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§50.38 4. Stay of Extradition

If the fugitive wishes to challenge extradition by way of habeas corpus, the court must allow a "reasonable time" within which to file the petition, and the actual surrender of the fugitive to the demanding state's agents must be stayed during that period. Typically, California courts allow about 10 days within which to file the petition. The fugitive must remain in custody during the period the habeas corpus attack on the Governor's warrant is pending. Pen C §1550.1.

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H. Habeas Corpus

§50.39 1. Issues That May Be Raised

Only four issues may be raised on habeas corpus to challenge a fugitive's extradition: (1) whether the person in custody is the same person named in the Governor's warrant; (2) whether the person is a fugitive from justice, *i.e.,* whether the accused was in the demanding state at the time of the offense, or is otherwise extraditable (Pen C §1549.1); (3) whether the person is charged with or convicted of a crime in the demanding state; and (4) whether the extradition documents on their face are in order. Pen C §1550.1; *California v Superior Court (Smolin)* (1987) 482 US 400, 96 L Ed 2d 332, 107 S Ct 2433; *Pacileo v Walker* (1980) 449 US 86, 66 L Ed 2d 304, 101 S Ct 308; *Michigan v Doran* (1978) 439 US 282, 289, 58 L Ed 2d 521, 527, 99 S Ct 530.

The question of guilt or innocence may not be raised. Pen C §1553.2. Asylum states may not go behind an extradition request to try to determine who is right or wrong. *California v Superior Court (Smolin), supra; In re Walton* (2002) 99 CA4th 934, 122 CR2d 87. Nor may other defenses be raised. *Pacileo v Walker, supra; Biddinger v Commissioner of Police* (1917) 245 US 128, 62 L Ed 193, 38 S Ct 41 (statute of limitations); *In re Murdock* (1936) 5 C2d 644, 648, 55 P2d 843. Furthermore, challenges based on alleged constitutional violations must be litigated in the demanding state, not in the state or federal courts of the asylum state. See, *e.g., New Mexico ex rel Ortiz v Reed* (1998) 524 US 151, 141 L Ed 2d 131, 118 S Ct 1860; *Pacileo v Walker, supra* (constitutionality of prison conditions in demanding state); *In re Cooper* (1960) 53 C2d 772, 3 CR 140 (constitutionality of statute under which fugitive was charged). But see *Commonwealth ex rel Mattox v Superintendent of County Prison* (Pa 1943) 31 A2d 576. See also *The Case of the Fugitive From a Chain Gang,* 2 Stan L Rev 174 (1949).

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§50.40 2. Where Habeas Corpus Petition Is Filed; Burden of Proof

Filing. A petition for habeas corpus is filed in the superior court of the county in which extradition proceedings are pending. Pen C §1550.1. If the writ is denied, a petition may be filed in the court of appeal. Pen C §1506. See Pen C §1550.1.

Burden of proof. The petitioner bears an extremely heavy burden of proof. The petitioner must show "beyond reasonable doubt" that he or she is not the person named in the extradition warrant or is not a fugitive from justice. *South Carolina v Bailey* (1933) 289 US 412, 422, 77 L Ed 1292, 1297, 53 S Ct 667. The burden has also been described as "clear and convincing, conclusive," and "practically conclusive." Essentially, these terms mean that habeas corpus relief will be denied as long as the court remains in doubt. *In re Rock* (1958) 161 CA2d 723, 326 P2d 865; *In re Fedder* (1956) 143 CA2d 103, 112, 299 P2d 881. For discussion of applicable rules of evidence in extradition proceedings, see §50.11.

On habeas corpus, see chap 42; Appeals and Writs in Criminal Cases, chaps 9-10 (3d ed Cal CEB 2007).

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3. Court Procedures After Decision

§50.41 a. Habeas Corpus Denied

If the habeas petition is denied, the petitioner may seek relief in a higher court. However, unless the order denying the writ specifically grants additional time in which to seek such relief, or unless the court by separate order stays extradition, the extradition may proceed. The court in which the petitioner was arraigned on the Governor's warrant has no jurisdiction to grant a stay of extradition following denial of habeas relief by a higher court. See Pen C §1550.1. The fugitive is to remain in custody while seeking relief from higher courts. Pen C §1550.1.

Once habeas relief has been denied, agents from the demanding state may come to receive custody of the fugitive and return him or her to the demanding state. The Uniform Criminal Extradition Act (UCEA) does not prescribe a time in which the agents must take custody. However, the Federal Act provides that, if no agent appears in the asylum state within 30 calendar days after the date of the fugitive's arrest on the Governor's warrant, the prisoner may be discharged. 18 USC §3182. This 30-day provision has been held to be permissive, not mandatory. *People v Superior Court (Lopez)* (1982) 130 CA3d 776, 182 CR 132.

The 30-day period commences on service of the Governor's warrant and is tolled during the time the defendant is challenging extradition. *People v Superior Court (Lopez), supra*.

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§50.42 b. Habeas Corpus Granted

If a petition for writ of habeas corpus is granted, the petitioner must be released from custody. See Pen C §1550.1. Note that bail is expressly precluded after a Governor's warrant is served on a defendant unless defendant's habeas petition is granted. Pen C §1550.1.

If a petition for writ of habeas corpus is granted, the People may appeal (Pen C §1506) or seek speedier review by extraordinary writ (*People v Superior Court (Lopez)* (1982) 130 CA3d 776, 182 CR 132). Alternatively, the demanding state may initiate new extradition proceedings to correct whatever defect existed in the prior attempt. *In re Russell* (1974) 12 C3d 229, 115 CR 511. See §50.44.

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§50.43 I. Effect of Prior Failure or Unsuccessful Attempt to Extradite

Failure of a state to extradite a fugitive whose whereabouts are known to the demanding state is not a defense to a later extradition attempt. *In re Walton* (2002) 99 CA4th 934, 122 CR2d 87; *People v Superior Court (Lopez)* (1982) 130 CA3d 776, 784, 182 CR 132. Similarly, a previous unsuccessful attempt to extradite does not bar a subsequent extradition. *In re Russell* (1974) 12 C3d 229, 233, 115 CR 511 (res judicata and double jeopardy do not apply).

If the demanding state fails to extradite within a reasonable time after the fugitive's request for a speedy trial, the delay may constitute denial of the right to a speedy trial. See *Smith v Hooey* (1969) 393 US 374, 21 L Ed 2d 607, 89 S Ct 575; *Zimmerman v Superior Court* (1967) 248 CA2d 56, 56 CR 226. However, a challenge based on denial of speedy trial rights, like challenges on other constitutional grounds, must be raised in the demanding state. *Price v Pitchess* (9th Cir 1977) 556 F2d 926. See also *Pacileo v Walker* (1980) 449 US 86, 66 L Ed 2d 304, 101 S Ct 308; *Michigan v Doran* (1978) 439 US 282, 58 L Ed 2d 521, 99 S Ct 530. For discussion of speedy trial rights of sentenced prisoners, see chap 19. See also §50.49.

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§50.44 J. Credit for Time in Custody Awaiting Extradition

A defendant who has been in custody in another jurisdiction because of an untried charge in California, when finally tried and sentenced in California, is entitled to credit for presentence time served even though he or she resisted extradition, if the presentence time served in the other jurisdiction was for the same offense for which the defendant was convicted in California. *In re Watson* (1977) 19 C3d 646, 139 CR 609 (defendant granted credit for 285 days under Pen C §2900.5 for presentence time spent in Texas jail fighting extradition to California). If the defendant was in custody in the other jurisdiction for related and unrelated offenses, California must grant credit only for time served if the defendant was arrested first on the California warrant. *In re Joyner* (1989) 48 C3d 487, 256 CR 785 (no credit for time served because California hold put on defendant after he was arrested in Florida for crime allegedly committed there).

Defense counsel should be cautioned, however, that *Watson* is not binding on other states and probably represents a minority view. This should be considered in deciding whether to resist extradition, because the fugitive may be doing "dead time" in California while he or she is fighting extradition to another state. When the fugitive faces very serious charges in the demanding state, defense counsel in California should contact the attorney or agency who will represent the defendant in the demanding state and find out what the law is in that state on credit for time served, and factor that into the decision of whether and how to resist extradition.

A defendant who escaped from custody in the demanding state may not be entitled to any credit against the original sentence. See *In re O'Neil* (1977) 74 CA3d 120, 141 CR 338.

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K. Waiver of Extradition

§50.45 1. Waiver Before California Magistrate

A fugitive may waive the issuance and service of a Governor's warrant by executing a written waiver before a magistrate in California. Pen C §1555.1. Once the fugitive signs a waiver of extradition, bail is not permitted unless the prosecutor, with the concurrence of the appropriate officials from the demanding state, stipulates that bail may be set. Pen C §1551.1. However, the court may permit the fugitive to return to the demanding state voluntarily if officials of the demanding state have expressed their consent. Pen C §1555.1.

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§50.46 2. Waiver Signed in Demanding State

Often, as a condition of release on bail, probation, or parole, a person is required to waive extradition should he or she be found outside that state. Penal Code §1555.2 provides a procedure whereby such waivers must be honored in California as long as certain prerequisites are met. The prerequisites are:

- The person was required to waive extradition in advance as a condition of bail, parole, or probation;
- The offense for which the person was in custody must be punishable by imprisonment for more than 1 year; and
- The alleged violation of the person's conditional release must have occurred within the past 5 years.

The prosecutor may apply to the court for a judicial determination that a person may be returned under Pen C §1555.2 (previous waiver of extradition) at any time after the fugitive's arrest. This application should be made to the magistrate who arraigned the fugitive under §1551.2.

A hearing must be held at which the prosecuting attorney presents a certified copy of the demanding state's order conditionally releasing the fugitive, along with the condition that the person was required to waive extradition, and a certified copy of the order directing the fugitive's return for violating the conditions of his or her release. The magistrate must accept the certified copies as conclusive proof of their contents and presume the validity of the extradition waiver condition. If the magistrate finds probable cause to believe that the arrested person is the same person named in the conditional release order and order commanding his or her return, the magistrate remands the person to custody and directs that he or she be delivered to agents of the demanding state. Pen C §1555.2(b)-(c).

If the magistrate remands the person to custody for delivery to the demanding state's agents, bail may not be granted unless the prosecutor stipulates, with the demanding state's concurrence, that bail may be set. Pen C §1555.2(d).

If defense counsel wishes to challenge the order by seeking a writ of habeas corpus, he or she should ask the trial court to stay the order. The court must allow a "reasonable time" within which to file a habeas petition. Unless the prosecutor and the demanding state consent, the fugitive must remain in custody without bail during the pendency of the habeas petition. Pen C §1555.2(e).

If the fugitive and defense counsel decide to waive extradition, defense counsel should set a "status" appearance to make sure that the client was picked up by the demanding state. If the fugitive is not picked up within a reasonable time, counsel can argue for dismissal or release on own recognizance. See §50.42 on what is a "reasonable time" under 18 USC §3182; see §50.9 on bail.

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IV. ALTERNATIVES TO EXTRADITION

§50.47 A. Interstate Family Support Act

The Uniform Interstate Family Support Act (Fam C §§4900-5005) provides a procedure to compel a person to abide by his or her support obligation, and, if necessary, to remove the person to the state in which his or her dependents reside when charged there with the crime of failing to support them.

The Governor may require that a civil action for support under the Uniform Interstate Family Support Act be brought before making a demand on the governor of another state, or before honoring the demand of the governor of another state, for the surrender of a person charged with criminal nonsupport. Fam C §4971. While this is discretionary, it has been the usual practice in California that before the Governor will seek or grant extradition, he or she must be convinced that such a civil action has been unsuccessfully attempted or that such an attempt would be futile.

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§50.48 B. Interstate Compact for Adult Offender Supervision

The Interstate Compact for Adult Offender Supervision (Pen C §§11180-11181) provides for supervision of qualifying probationers and parolees in another state. See §38.41. The compact includes an administrative procedure for the return to the "sending" state of probationers or parolees who have been allowed to serve probation or parole in another, "receiving" state. All the states, along with the territories of Puerto Rico and the Virgin Islands, and the District of Columbia, are parties to the compact. By its terms, the compact has the force of federal statutory law and is binding on the member states. See Pen C §11180, arts V, XIV. The compact itself, the rules for its operation, and other information can be found at the website of the Interstate Commission for Adult Offender Supervision, http://www.interstatecompact.org.

Under the compact, subject to certain due process requirements and disposition of any charges in the receiving state, the agent of the sending state is entitled to enter the receiving state to retake a probationer or parolee, and for this purpose the offender and the state waive the requirements of formal extradition. Interstate Comm'n for Adult Offender Supervision (ICAOS) Rules 3.109, 5.101, 5.107. Before this compact applies, the probation or parole authorities must establish that the person in custody was originally released on probation or parole either to this state or to a third state for interstate supervision. See *Seward v Heinze* (9th Cir 1958) 262 F2d 42. Officials of the sending state should notify the compact administrator or local authorities of the receiving state to place the probationer or parolee in custody pending arrival of the sending state's agent. See ICAOS Rule 5.111. The arrest may be made without a revocation warrant. See 38 Ops Cal Atty Gen 205 (1961).

Before a person may be actually surrendered to the authorized agent of the sending state, a probable cause hearing must be held, unless it is waived by the probationer or parolee. ICAOS Rule 5.108. At the hearing, the person arrested may have the right to counsel; however, it is unsettled whether the same protections are required in a purely "retaking" proceeding under the compact as are required in a revocation proceeding. Compare *Gagnon v Scarpelli* (1973) 411 US 778, 36 L Ed 2d 656, 93 S Ct 1756, with *Morrissey v Brewer* (1972) 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593. The hearing officer or magistrate must decide whether there is probable cause to believe that the parolee or probationer committed one or more significant violations of the terms and conditions of his or her supervision. ICAOS Rules 5.102-5.103, 5.108. The compact also provides that the parolee or probationer may request to be returned to the sending state and must be allowed to do so unless he or she is charged with or is being investigated for a crime in the receiving state. ICAOS Rule 4.111.

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§50.49 C. Agreement on Detainers

The Agreement on Detainers (sometimes called the Interstate Agreement on Detainers, or IAD) is a compact entered into by virtually all states (Louisiana and Mississippi are exceptions), the United States, and the District of Columbia, and provides for the administrative transfer of prisoners who are wanted by other states for trial on criminal charges. Pen C §§1389-1389.8. For the IAD to apply, a detainer must have been lodged, based on an untried indictment, information, or complaint, against someone in actual custody in a penal or correctional institution of a party state. *People v Brooks* (1987) 189 CA3d 866, 234 CR 573; *People v Reyes* (1979) 98 CA3d 524, 159 CR 572. It is a reciprocal act and applies only if the other jurisdiction has adopted the IAD. Pen C §1389. It does not apply to persons in pretrial custody in local jails. Pen C §1389, art III(a); *People v Zetsche* (1987) 188 CA3d 917, 233 CR 720.

The IAD provides a procedure not only for a prosecutor to secure the presence of the defendant for trial, but also for a defendant prisoner to submit a formal demand for a speedy trial. If the defendant prisoner demands trial under article III of the IAD (Pen C §1389, art III), trial must begin within 180 calendar days after the actual delivery of the demand to the prosecutor and court in the other jurisdiction. *Fex v Michigan* (1993) 507 US 43, 122 L Ed 2d 406, 113 S Ct 1085. The demand must be submitted through the warden or superintendent of the institution in which the defendant is incarcerated. Unless good cause is shown, failure to bring the defendant to trial within the specified time requires dismissal of the charge under Pen C §1389. See *People v Wilson* (1977) 69 CA3d 631, 138 CR 259. Also, dismissal is required if the defendant is returned to the sending state without having been brought to trial on the charges underlying the detainer. *Alabama v Bozeman* (2001) 533 US 146, 150 L Ed 2d 188, 121 S Ct 2079; *Marshall v Superior Court* (1986) 183 CA3d 662, 228 CR 364. This remedy must be obtained in the state in which the charges are pending, however, because the state of incarceration has no jurisdiction over the pending charges. *In re Fabricant* (1981) 118 CA3d 115, 173 CR 245.

If the prosecutor in the demanding state requests temporary custody of a prisoner under article IV of the IAD (Pen C §1389, art IV), trial must begin within 120 calendar days after the defendant's arrival in the state where the charges are pending. Because an article IV request is an involuntary removal, the U.S. Supreme Court has held that the prisoner is entitled to the same due process protections provided to persons being extradited under the Uniform Criminal Extradition Act (UCEA), except that the prisoner may not insist on the issuance of a Governor's rendition warrant. *Cuyler v Adams* (1981) 449 US 433, 66 L Ed 2d 641, 101 S Ct 703. Essentially, it entitles the prisoner to a pretransfer arraignment similar to that provided under Pen C §1551.2 for fugitives. See §50.8.

A defendant may waive his or her protections under the IAD by requesting treatment in violation of its provisions, *e.g.,* trial beyond the 180- or 120-day period. *People v Nitz* (1990) 219 CA3d 164, 268 CR 54; *Drescher v Superior Court* (1990) 218 CA3d 1140, 267 CR 661; *People v Sampson* (1987) 191 CA3d 1409, 237 CR 100. Also, the periods are tolled during any time the defendant is unable to stand trial, *e.g.,* if the defendant is under disciplinary segregation or on trial in a third state. *Netzley v Superior Court* (2008) 160 CA4th 348, 356, 72 CR3d 773; *People v Garner* (1990) 224 CA3d 1363, 274 CR 298.

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§50.50 D. Uniform Act to Secure Attendance of Witnesses From Without the State in Criminal Cases

California has passed the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (Pen C §§1334-1334.6), as has almost every other state. In addition to other foreign jurisdictions, the Act applies to the Navajo Nation. *People v Superior Court (Jans)* (1990) 224 CA3d 1405, 274 CR 586. The Act provides that a person may be compelled to attend and give testimony at a criminal proceeding in another state if the other state has a similar statute. The judge of a court of record may issue a certificate stating that a person's presence is required in a pending criminal proceeding. However, the judge, in his or her discretion, may decline to order even a material witness from outside the state to appear in court. *People v Cavanaugh* (1968) 69 C2d 262, 70 CR 438.

The certificate is presented to a judge of a court of record in the county in which the witness is found, who then holds a hearing at which the requested person is directed to appear to determine whether he or she is a material and necessary witness, will not be caused undue hardship if compelled to attend and testify, and will be protected from arrest and service of process by the laws of the requesting state. If the judge finds in the affirmative, he or she issues a subpoena directing the witness to attend and testify. On recommendation in the certificate, the judge may order that the witness be taken into custody and delivered to an officer of the requesting state to ensure his or her attendance. Pen C §1334.2.

When the witness in a criminal proceeding is a prisoner, some states (not including California) either require that the certificate and subpoena be supported by an executive agreement promising to return the prisoner after his or her testimony is taken, or hold that special legislation pertaining to the production of prisoners as witnesses must be enacted in the demanding state. See the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act §4 (Model Act, 11 Uniform Laws Anno 547), not adopted in California. See also *People v Laursen* (1972) 8 C3d 192, 104 CR 425 (lack of statutory authority to compel prisoner's attendance).

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§50.51 E. Interstate Compact for Juveniles

Juveniles accused of committing crimes are subject to extradition. Welf & I C §216. In cases involving delinquent juveniles who are runaways or absconders and who are likely to endanger their own health, morals, and welfare or the health, morals, and welfare of others, and juveniles charged with being delinquent because of the violation of any criminal law, the rendition procedures to be followed are in Welf & I C §§1400-1403.

The compact also provides that delinquent juveniles on parole or probation may be allowed to reside and be supervised in another party state.

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§50.52 F. Death Penalty Extradition Cases

Sometimes the demanding state seeks to extradite a fugitive with a pending judgment of death. In some cases, the fugitive will also have a pending judgment of death in the asylum state. These cases are usually on appeal. Extradition counsel in this situation should contact the attorneys for his or her client on both capital cases. Defense counsel must develop a unified strategy in consolidation with the client's attorneys in both states. It is often in the client's best interest to remain in one state, while the government wants the client transferred to another, in which the execution date is sooner. These cases are the most serious of extradition situations for defense counsel and demand fast action and creativity.

If the death verdict in the demanding state was based on aggravating facts in the case in the asylum state, and the asylum state case is still on appeal, counsel may argue that the asylum state appeal must be completed before the capital extradition to the demanding state is carried out. See *Johnson v Mississippi* (1988) 486 US 578, 100 L Ed 2d 575, 108 S Ct 1981 (death judgment based partially on evidence of prior conviction that was later set aside must be reexamined).

There are no "general rules" for these extradition situations. Each capital extradition case requires a case-specific analysis, usually by an attorney who is familiar with the various stages of capital litigation. Ultimately, however, there may be little the attorney can do when multiple states have cases against a defendant, since it is up to the states, not the defendant, where he or she should be in custody. See *Poland v Stewart* (9th Cir 1998) 169 F3d 573; *Pitsonbarger v Gramley* (7th Cir 1998) 141 F3d 728; *State v Robbins* (NJ 1991) 590 A2d 1133.

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ADVISING WITNESSES

KIMBERLY KUPFERER

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§51.1 I. OVERVIEW

From time to time, defense counsel is asked to represent and advise a witness in a criminal case. The most common situations are the following:

- During the course of a trial, preliminary hearing, or other examination, a witness appears to risk self-incrimination and counsel is appointed by the trial court to advise the witness.
- A criminal defendant-client of counsel is contacted about prospective testimony by the prosecutor or the defense in another case.
- A witness subpoenaed by a grand jury seeks advice (for discussion of role of counsel when a witness has been summoned before a grand jury, see chap 9).
- A witness is subpoenaed by the prosecution and because of noncooperation with the prosecutor or the threat of nonattendance is incarcerated pending testimony. Pen C §1332. See *In re D.W.* (2004) 123 CA4th 491, 498, 20 CR3d 274.
- A witness appears in court but refuses to testify, thereby facing contempt charges, incarceration, or both. Pen C §881. See chap 58 on contempt.

Other closely related topics are immunity for testimony, discussed in chap 49, and jailhouse informants, discussed in §§49.16-49.17, 51.13.

Counsel must be prepared to give competent advice and assistance in these situations or to decline representation when ethical or other considerations prevent this. Inexperienced counsel should not undertake such representation. Cal Rules of Prof Cond 3-110. Representation should be immediately declined when a conflict of interest is discovered. Cal Rules of Prof Cond 3-310.

All prosecutors should familiarize themselves with the practical and ethical complications that may arise when they interview or call witnesses who have pending criminal cases. A sample prosecution petition to compel a witness to testify under Pen C §1324 is in California Criminal Law Forms Manual §49.1 (2d ed Cal CEB 2005).

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II. OBLIGATIONS OF SUBPOENAED WITNESS AND WITNESS'S COUNSEL

§51.2 A. Obligations of Witness

Any witness properly served with a valid subpoena must comply on pain of contempt. Pen C §§1331, 1331.5. See also CCP §1991.

Ø **Note:** A witness is not properly served with a subpoena that is mailed to the witness, unless the witness acknowledges receipt of the subpoena by telephone, mail, or in person. Pen C §1328d.

On pain of contempt, a witness called to testify at a criminal trial must answer all questions (Pen C §1331) unless a question is objected to and the objection is sustained, or a valid claim of privilege is asserted by the witness and upheld. See CCP §2064; *Crittenden v Superior Court* (1964) 225 CA2d 101, 36 CR 903; *In re Moore* (1928) 93 CA 488, 269 P 664.

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§51.2A B. Duties of Counsel

An attorney may be asked to advise someone who has been subpoenaed to testify in a criminal trial in several different situations.

Motion to quash. If the subpoena is invalid or was improperly issued, counsel should consider filing a motion to quash the subpoena. CCP §1987.1; *People v Superior Court (Long)* (1976) 56 CA3d 374, 378, 126 CR 465; *People v Rhone* (1968) 267 CA2d 652, 657, 73 CR 463. See §§4.43-4.45 on quashing subpoenas. A sample form is in California Criminal Law Forms Manual §4.2 (2d ed Cal CEB 2005).

> Ø **Note:** If counsel believes a served subpoena has not been properly issued or is invalid, counsel should file a motion to quash the subpoena. In that situation, doing nothing and advising the witness not to appear is not appropriate and will likely result in a warrant being issued for the arrest of the witness.

A motion to quash may also be the appropriate remedy when the witness fears that complying with a subpoena will be incriminating within the meaning of the privilege against self-incrimination. In this situation, counsel may be able to persuade the party that issued the subpoena to withdraw it by pointing out that, under CCP §1987.2, a party who issues a subpoena deemed "oppressive" or who, in bad faith or without substantial justification, makes or opposes a motion to quash, may be ordered to pay the opposing party's reasonable expenses, including attorney fees.

Advice about privileges. A major duty of counsel advising a witness about his or her prospective testimony is to inform the witness about all legal and extralegal consequences of giving or withholding testimony to assist the witness to assert the claim of privilege when it is warranted by the facts and the law of the case. When the witness has a valid claim of privilege to some but not all questions that may be asked, counsel should consider whether to remain at the witness's side (when the proceeding is not before a grand jury) throughout the testimony because some questions may be objectionable.

The privileges most often asserted by witnesses and sustained by the courts in criminal cases are the attorney-client privilege (usually when the witness called is the attorney) and the privilege against self-incrimination. US Const amend V; Cal Const art I, §15. See Evid C §§952, 954. Other privileges to be aware of are the privilege for confidential marital communications (Evid C §980), physician-patient privilege (Evid C §994), psychotherapist-patient privilege (Evid C §1014), privilege of penitent and clergy (Evid C §§1033-1034), sexual assault counselor-victim privilege (Evid C §1035.8), and domestic violence counselor-victim privilege (Evid C §1037.5). Other privileges are recognized by statute in California. Evid C §§900-1070. Because different privileges may apply, the witness should assert the privilege against self-incrimination or other applicable privilege for each question that calls for an answer that is subject to a privilege. *People v Ford* (1988) 45 C3d 431, 441, 247 CR 121. This questioning should occur outside the jury's presence. *People v Holloway* (2004) 33 C4th 96, 130, 14 CR3d 212; *People v Mincey* (1992) 2 C4th 408, 441, 6 CR2d 822; *People v Frierson* (1991) 53 C3d 730, 743, 280 CR 440. See also *People v Lopez* (1999) 71 CA4th 1550, 84 CR2d 655 (if witness has waived privilege against self-incrimination, court can require witness to be put on stand and claim privilege). If the witness has answered substantive questions before asserting the privilege against self-incrimination, the court may, on motion of opposing counsel who has been deprived of the opportunity to fully cross-examine, strike all of the witness's testimony.

> Ø **Note:** A witness who asserts the privilege against self-incrimination is "unavailable as a witness" (see Evid C §240(a)(1)) for purposes of introducing hearsay statements admissible only when the witness is unavailable. See, *e.g.,* Evid C §§1202 (hearsay to attack or support credibility), 1230 (declarations against interest), 1251 (statement of declarant's previously existing mental or physical condition), 1291 (former testimony). See also *People v Williams* (2008) 43 C4th 584, 617, 75 CR3d 691; *People v Seijas* (2005) 36 C4th 291, 303, 30 CR3d 493.

Incarceration of material witness. Counsel may also be asked to represent a witness in proceedings under Pen C §1332. This provision permits the court to order an uncooperative material witness to give a written undertaking to appear and testify or forfeit a sum of money the court considers proper. Pen C §1332(a). If the witness is unwilling (or

unable) to give the required undertaking, the witness can be incarcerated. Pen C §1332(b).

Because §1332 authorizes the court to detain an innocent person, the courts have adopted procedural safeguards to protect the witness. See *In re D.W.* (2004) 123 CA4th 491, 20 CR3d 274; *In re Francisco M.* (2001) 86 CA4th 1061, 1076, 103 CR2d 794. See also Cal Const art I, §10 (witness may not be unreasonably detained). To ensure that the witness receives the process he or she is due, at any hearing under §1332 the witness is entitled to be represented by retained or appointed counsel. *In re D.W.* (2004) 123 CA4th 491, 498, 20 CR3d 274.

To initiate the process, the prosecutor (although §1332 applies equally to prosecution and defense witnesses, the party utilizing its procedures is usually the prosecution) must provide "proof on oath" that establishes good cause to believe that the witness (1) is material and (2) will not appear and testify without security. Pen C §1332(a); *In re Francisco M., supra*. At this initial hearing, the witness is entitled (86 CA4th at 1076):

- To have notice of the grounds for which detention is sought;
- To controvert the allegations; and
- To be heard and present evidence on all relevant issues.

Among the relevant issues at this hearing are whether the witness "will agree to return if released and whether other alternatives to incarceration in lieu of security are feasible and adequate." *In re Francisco M., supra*.

Factors the court should consider in deciding whether to require the witness to give the undertaking authorized by Pen C §1332(a) include (86 CA4th at 1076):

- The seriousness of the charges;
- The importance of the witness's testimony to the case;
- The length of the proposed detention;
- Evidence relevant to whether the witness will appear and testify (*e.g.,* employment, community ties);
- The age and maturity of the witness;
- The harm to the witness and his or her family flowing from incarceration;
- The witness's financial resources;
- The circumstances of any continuance of the prosecution that will prolong the witness's incarceration; and
- Whether steps short of incarceration will assure the witness's presence at the trial.

A witness who is incarcerated under §1332(b) is entitled to a review hearing within 2 days after the order of commitment and every 10 days thereafter as long as he or she remains in custody. Pen C §1332(c)-(d); *In re Francisco M.* (2001) 86 CA4th 1061, 1079, 103 CR2d 794. The initial review may not be before the judge or magistrate who issued the order of commitment. Pen C §1332(c). At each review of the commitment order, the court should consider "any relevant change in circumstances…, including whether the witness credibly has changed his attitude toward appearing at trial, or toward accepting a lesser, feasible alternative to custody." *In re Francisco M., supra*.

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§51.3 III. DEFENDANT'S PRIVILEGE NOT TO BE CALLED AS WITNESS DISTINGUISHED

The Fifth Amendment privilege against being *called* as a witness is available only to a charged defendant in the case against that defendant. Evid C §930. For other witnesses, there is no privilege not to be called to the stand (Evid C §911) absent a showing that the subpoena is improperly issued (Pen C §1331). See *People v Sisneros* (2009) 174 CA4th 142, 151, 94 CR3d 98. Otherwise, the witness must appear in response to the subpoena and must assert the Fifth Amendment privilege on the witness stand in response to particular questions. On motions to quash, see §§4.43-4.45.

Ø **Note:** The court may require that a witness's assertion of the Fifth Amendment privilege be withheld from the jury. See *People v Frierson* (1991) 53 C3d 730, 743, 280 CR 440; *People v Ford* (1988) 45 C3d 431, 247 CR 121. As a practical matter, this may affect whether the witness is called to the stand.

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§51.4 IV. WHETHER TO ADVISE WITNESS TO REFUSE TO TESTIFY

Counsel must determine from the totality of the circumstances and the substance of the witness's proposed testimony whether the privilege against self-incrimination may be claimed. The test is whether the answer to a given question would subject the witness to a possible criminal prosecution or, assuming that such a prosecution were instituted, would arguably be admissible against the witness in that prosecution. Once a prosecution is initiated, the scope of the self-incrimination privilege is broad. See *Prudhomme v Superior Court* (1970) 2 C3d 320, 326, 85 CR 129. See also *People v Mincey* (1992) 2 C4th 408, 441, 6 CR2d 822.

The privilege against self-incrimination applies if the witness would be subject to prosecution in any domestic jurisdiction on either state or federal level. *Murphy v Waterfront Comm'n* (1964) 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594. A witness may not, however, claim the privilege if the fear of criminal prosecution is from a foreign government. *U.S. v Balsys* (1998) 524 US 666, 141 L Ed 2d 575, 118 S Ct 2218. See generally 2 Witkin, California Evidence, *Witnesses* §§446-484 (4th ed 2000) on the applicability of the privilege.

The privilege against self-incrimination survives a judgment of conviction as long as the witness is pursuing an appeal from the conviction or retains the right to file a notice of appeal. *People v Fonseca* (1995) 36 CA4th 631, 42 CR2d 525. When the time to appeal the conviction has run without an appeal being filed, the privilege no longer exists. *People v Sisneros* (2009) 174 CA4th 142, 151, 94 CR3d 98; *People v Lopez* (1999) 71 CA4th 1550, 1554, 84 CR2d 655.

Ø **Example 1:** A witness is called by the defense to testify to an alibi for the charged defendant. This prospective testimony would reveal that the witness was engaged in an act that was illegal, although uncharged and unconnected with the pending prosecution. The privilege applies even if a witness is not presently charged with nor under investigation for criminal conduct whenever the testimony would be admissible against the witness in a subsequent prosecution, or could give rise to criminal proceedings once discovered.

Ø **Example 2:** A witness is called to testify for the prosecution in a murder case while the witness is a suspect and under investigation as a possible coparticipant. If the witness's proposed testimony discloses that he or she was present at the scene of the crime, that information might well further the prosecution's investigation. If the witness's proposed testimony offers an alibi, that would amount to a compelled disclosure of a defense, which could lighten the prosecution's burden of proof in a subsequent prosecution.

In either case, compelling the witness-suspect's testimony would violate the witness's privilege against self-incrimination. In the first example, answering the question calls for an admission against penal interest. In the second example, the witness's answers would create a potential link in a chain of evidence. See *People v Lucas* (1995) 12 C4th 415, 48 CR2d 525. The innocent, as well as the guilty, are protected by the privilege against self-incrimination. *Grunewald v U.S.* (1957) 353 US 391, 421, 1 L Ed 2d 931, 953, 77 S Ct 963.

It is prudent practice for counsel to memorialize any discussion with witnesses who are being advised. Claims by witnesses or other attorneys that the witness was deceived, misled, coerced, or threatened by the counseling attorney can occur. Any conduct that resembles bribing or threatening a witness may trigger a criminal prosecution. See Pen C §§133, 136.1, 137. However, an attorney advising a client may not be prosecuted under Pen C §137(c), which makes it a misdemeanor to advise another to give false testimony or material information or withhold true testimony or material information from a law enforcement official. Pen C §137(f).

For the scope of the Fifth Amendment privilege as it relates to liability to prosecution in other jurisdictions, see §49.27.

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§51.5 V. BURDEN OF PROOF; COURT'S POWER TO INQUIRE INTO FACTS

Burden of proof. A person who claims the privilege against self-incrimination has the burden of showing that the privilege applies. See Evid C §404. According to §404, the person claiming the privilege "has the burden of showing that the proffered evidence might tend to incriminate" and bars use of the evidence "unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege." See also *Blau v U.S.* (1950) 340 US 159, 95 L Ed 170, 71 S Ct 223; *People v Lucas* (1995) 12 C4th 415, 454, 48 CR2d 525; 2 Witkin, California Evidence, *Witnesses* §§85-87 (4th ed 2000).

Ø **Note:** The court may not consider the likelihood of an actual prosecution in deciding whether to permit the privilege, and cannot force a witness to make incriminating statements because it believes actual prosecution is unlikely. The standard is whether a statement could be used against a witness, not whether or not it would be used. *People v Seijas* (2005) 36 C4th 291, 305, 30 CR3d 493.

Court's power to inquire. A court may make a particularized inquiry about a claim of privilege but may not require disclosure of the assertedly privileged information to rule on the claim. Evid C §915(a). With most privileges, including the privilege against self-incrimination, the court must sustain the claim if it is evident that a response, or an explanation of why the question cannot be answered, might result in an injurious disclosure. *People v Lucas, supra*. Note that with certain claims of privilege, *e.g.,* informant confidentiality (see Evid C §1041) or attorney work product privilege (see CCP §2018.030), the court may require disclosure at an ex parte hearing in chambers (Evid C §915(b)). See also *U.S. v Zolin* (1989) 491 US 554, 105 L Ed 2d 469, 109 S Ct 2619 (approving in camera review of material allegedly subject to attorney-client privilege).

Standard of review of trial court's ruling on witness's assertion of privilege. When the trial court's ruling permitting a witness to assert the privilege affects the defendant's right to confront the witness, and the relevant facts are undisputed, the appellate court will independently review the trial court's ruling. *People v Seijas* (2005) 36 C4th 291, 304, 30 CR3d 493.

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§51.6 VI. OPTIONS OF PARTY CALLING WITNESS WHEN PRIVILEGE IS ALLOWED

Prosecution calls witness. When a claim of privilege based on self-incrimination is allowed and the prosecutor is the party calling the witness, he or she may elect to grant explicit immunity to the witness under Pen C §1324 (in felony proceedings) or Pen C §1324.1 (in misdemeanor proceedings), as discussed in chap 49. See *People v Williams* (2008) 43 C4th 584, 621, 75 CR3d 691 (prosecutor not obligated to offer immunity to prosecution witness to assist defendant). Once immunity has been granted in a felony case, the claim of privilege must be disallowed and the witness must testify on pain of contempt. See Pen C §1324; *People v Clemmons* (1962) 208 CA2d 696, 25 CR 467. When immunity is granted in misdemeanor cases, a written agreement is required and contempt is not available if the witness refuses to testify (see §49.10). A criminal defendant has no standing to challenge an immunity agreement. *People v Wisely* (1990) 224 CA3d 939, 943, 274 CR 291.

A special situation arises when a witness is involved in a pending criminal case other than the one in which he or she is being called. In that event, a grant of immunity and subsequent threat of contempt (in a felony case) may not be sufficient to persuade the witness to testify on the prosecution's behalf, particularly when the witness is in physical custody as a result of the other pending matter. See §51.10.

If there is other testimony of the witness, *e.g.,* a preliminary hearing transcript, the transcript may be admissible in place of testimony (see Evid C §1291), because a witness who refuses to testify on grounds of the privilege against self-incrimination is unavailable under Evid C §240(a)(1). See *People v Williams* (2008) 43 C4th 584, 614, 75 CR3d 691. However, under the Confrontation Clause, prior testimony is admissible on behalf of the prosecution only if the defendant has had a full and complete opportunity to cross-examine the witness. *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. The court's determination as to whether a defendant had that "full and complete opportunity" at a prior hearing is tied to the facts of the specific case. It is important to make a clear record of confrontation issues and objections ruled on by the trial court or else the confrontation issue will be forfeited on appeal. See *Williams,* 43 C4th at 619.

> Ø **Note:** A witness may waive the privilege against self-incrimination if he or she voluntarily testifies about a subject generally. The witness cannot then invoke the privilege when questioned about the details of the testimony in the same hearing. *People v Williams,* 43 C4th at 615, citing *Mitchell v U.S.* (1999) 526 US 314, 321, 143 L Ed 2d 424, 119 S Ct 1307.

Defense calls witness. When a defense witness successfully asserts the self-incrimination privilege, immunity is rarely an option because the prosecution's cooperation is required. See discussion in §49.15. As with a prosecution witness, earlier relevant testimony can be introduced. See *People v Williams* (2008) 43 C4th 584, 614, 75 CR3d 691; *People v Seijas* (2005) 36 C4th 291, 303, 30 CR3d 493. See also §51.2.

Jury not to draw inferences. The jury is not supposed to draw any inferences from a witness's exercise of the privilege against self-incrimination, whether about the witness's credibility or any other issue at trial. Evid C §913. The court is required, therefore, at the request of an adversely affected party, to instruct the jury that it may not draw any inferences from the exercise of the privilege. Evid C §913(b); *People v Mincey* (1992) 2 C4th 408, 441, 6 CR2d 822. See CALCRIM 320. The California Supreme Court has held that Evid C §913 does not infringe on a defendant's constitutional rights to due process and to present a defense. *People v Mincey, supra*. See also *People v Frierson* (1991) 53 C3d 730, 743, 280 CR 440.

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§51.7 VII. REPRESENTING WITNESS WITH CRIMINAL CASES PENDING WHO IS NOT CODEFENDANT

A witness who is a defendant in a pending criminal case may be subpoenaed (or asked) to testify on behalf of a defendant in another case. There is a risk in this situation that the prosecutor may retaliate by pursuing the criminal case pending against the defendant-witness more zealously, particularly when the same prosecutor, or prosecutor's office, is involved in the witness's case and that of the defendant on whose behalf the witness proposes to testify. If this risk is thought to be present, counsel for the witness should carefully discuss it with the witness-client. Assessment of the risk of prosecutorial retaliation may influence a decision to invoke the Fifth Amendment privilege in a borderline case (see §51.14).

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VIII. REPRESENTING WITNESS WHO IS OFFERED IMMUNITY

§51.8 A. Attorney Needs Special Expertise

Representing a witness who is being asked to testify for the prosecution in exchange for leniency requires much more than a knowledge of the legal principles involved. It is common for the prosecution to ask for the testimony before making a firm agreement to reduce or drop the charges in the witness's case. Counsel for the potential witness needs to be familiar with the practices (and players) in a particular jurisdiction to know whether a prosecutor's offer to assist the witness after he or she testified can be trusted.

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§51.9 B. Plea Bargain Options; Security

Counsel for a witness offered immunity should advise the client of the risks attendant to becoming a snitch. See §§51.10-51.11. Often, a witness-defendant will elect to suffer contempt sanctions rather than risk the extralegal consequences of being branded an informant. A witness who testifies against a prison gang member may not be safe from harm, out of custody or in state prison. Counsel should negotiate necessary measures to protect the client from retaliation. The main options are discussed in §51.10.

If an informant-defendant is to testify, counsel should attempt to strike a bargain with the prosecutor for immunity, a reduced sentence, dismissed charge, or other benefit, including special security arrangements, in exchange for the client's testimony against the target defendant.

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§51.10 C. Options to Protect Informant

If a witness is or will be incarcerated following testimony against a criminal defendant (as when counsel for the witness has negotiated a reduction in sentence instead of outright release), these measures are possible ways to protect the witness:

- A guaranty of protective custody (PC). Protective custody usually keeps the witness alive. PC status, however, is often considered undesirable because the witness-prisoner is then formally marked by the authorities as an informant (one who has a "snitch jacket"). The witness-prisoner may also be deprived of benefits enjoyed by other prisoners, such as free time (protected prisoners are often locked down in their cells 23 of 24 hours of the day), access to phones, access to other inmates, access to jail or prison programs, and may be denied the work-time sentence reduction provisions of Pen C §4019.
- Transfer to county custody in another California jurisdiction. Counties are authorized to maintain facilities to provide security for witnesses who are intimidated or threatened. Govt C §25360.
- Transfer to another state's penal authority. This step requires the full cooperation of the authorities in both states and is rarely achieved without aggressive prosecutorial intervention.
- Assignment to a remote state prison facility in California. This step requires the cooperation of the Director of the California Department of Corrections and Rehabilitation (CDCR).
- "Keep separate" orders from certain inmates or gangs.
- Placement in a special federal witness protection program (see §51.17).

For cases involving actual or potential witness intimidation, the trial court should be asked to issue a protective order under Pen C §136.2. This order can be issued to a defendant, another subpoenaed witness, or anyone else entering the courtroom. Pen C §136.2(a).

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§51.11 D. Plea Bargains That Are Not Explicit

A district attorney has inherent powers to grant general or limited immunity without complying with the formalities of Pen C §1342. *People v Superior Court (Crook)* (1978) 83 CA3d 335, 339, 147 CR 856. Many experienced prosecutors are understandably reluctant to make an explicit plea bargain guaranty to obtain an informant's testimony, because such an arrangement becomes the subject of discovery and proper cross-examination by the accused's counsel. See, *e.g., People v Ruthford* (1975) 14 C3d 399, 405, 121 CR 261, overruled on other grounds in *In re Sassounian* (1995) 9 C4th 535, 545, 37 CR2d 446.

Ø **Note:** It is improper to withhold information about an executed explicit plea bargain guaranty between the prosecutor and the witness's counsel until after the witness has testified. *People v Phillips* (1985) 41 C3d 29, 48, 222 CR 127. Penal Code §1127a requires a prosecutor to record any benefits promised or delivered to an "in-custody informant" and to disclose that record to the court and criminal defense counsel. See also Pen C §§1191.25, 4001.1.

This impeachment is thought to impair the credibility of an informant-witness who has been given an inducement to testify. Thus, defense counsel representing a witness may be asked to participate in an arrangement in which the benefit to the witness is not explicit ("Trust me—I'll do the right thing"). Whether and to what extent such an arrangement can or should be entered into by defense counsel is a matter for the informed judgment of counsel experienced in the local jurisdiction.

There is a clear ethical duty to disclose to the defense any agreements with witnesses. See Cal Rules of Prof Cond 5-220; *People v Phillips* (1985) 41 C3d 29, 47, 222 CR 127. See also *People v Pensinger* (1991) 52 C3d 1210, 1272, 278 CR 640 (prosecutor should have corrected false impression left by informant's testimony about benefits; harmless error); *People v Morris* (1988) 46 C3d 1, 30 n14, 249 CR 119, disapproved on other grounds in *In re Sassounian* (1995) 9 C4th 535, 545, 37 CR2d 446. Ethical problems presented to the prosecution in this situation are beyond the scope of this chapter. See Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors, chap 7 (2001) from the California District Attorneys Association.

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§51.12 E. Disclosures Made Outside Court Not Covered by Immunity Grant

If part of the inducement for a witness to testify is an explicit grant of immunity, defense counsel should keep in mind that disclosures made outside court, *e.g.,* in discussions with prosecutors or law enforcement agents or in testimony, are typically not covered by judicial immunity orders. It is good practice for defense counsel to obtain a written agreement setting out the scope of the contemplated immunity and of the questioning, especially if there is any concern about law enforcement's later use of the conversations or proffers of testimony (or leads developed therefrom).

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§51.13 IX. IN-CUSTODY INFORMANTS

If the prosecution calls an "in-custody" informant as a witness, the prosecutor must file with the trial court, and provide to defense counsel before trial, "a written statement setting out any and all consideration promised to, or received by, the in-custody informant." Pen C §1127a(c). See also Pen C §1191.25. A prosecutor who offers a benefit to an informant-witness in exchange for testimony is under an affirmative duty to disclose the arrangement to the defendant against whom the informant-witness will testify. See *Giglio v U.S.* (1972) 405 US 150, 31 L Ed 2d 104, 92 S Ct 763; *People v Ruthford* (1975) 14 C3d 399, 406, 121 CR 261, overruled on other grounds in *In re Sassounian* (1995) 9 C4th 535, 545, 37 CR2d 446.

A jailhouse informant who expects to have the charges against him or her reduced or dropped altogether has a compelling motive to testify falsely. Given the potential for abuse, many prosecuting agencies have developed specific policies to deal with the use of jailhouse informant testimony. The specifics of these policies vary among agencies and jurisdictions. See also Pen C §1127a (on request, court must instruct that testimony of in-custody informant should be viewed with caution and given close scrutiny).

For further discussion of in-custody informants, see §§49.16-49.17.

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§51.14 X. REPRESENTING WITNESS IN BORDERLINE FIFTH AMENDMENT CASE

A borderline case of invocation of the Fifth Amendment privilege occurs when the privilege may technically be stretched to cover the situation, but there is little or no realistic chance that the witness's testimony would actually result in a criminal prosecution.

Ø **Example:** A witness who is not charged with possession of narcotics reveals during testimony that she has committed that offense. If the narcotics are no longer in existence, there may be no other proof of the corpus delicti of the crime. If so, the witness's admissions could not be used, over proper objection, in a criminal prosecution for possession. See *People v Campbell* (1982) 137 CA3d 867, 187 CR 340.

Great caution should be used in analyzing these situations and advising the witness because (1) counsel may not have access to all relevant information in the hands of the authorities that would govern prosecutorial decision, and (2) a witness may be asked to testify about a transaction that is not subject to direct criminal prosecution for some reason (such as a grant of immunity, the absence of a corpus, or the expiration of the statute of limitations), but may nevertheless be admissible in a separate criminal prosecution, such as a probation or parole violation hearing, or because the transaction evinces a pattern of conduct that would be admissible to show modus operandi, criminal intent, identity, or another factor relevant to guilt. See §§24.52-24.55. See also Jefferson's California Evidence Benchbook, chap 35 (4th ed CJA-CEB 2009). All doubts should be resolved in favor of exercising the privilege.

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Source: Criminal Law/California Criminal Law Procedure and Practice/51 ADVISING WITNESSES/§51.15 XI. WHEN COUNSEL MAY NOT ADVISE WITNESS ON SELF-INCRIMINATION ISSUES

§51.15 XI. WHEN COUNSEL MAY NOT ADVISE WITNESS ON SELF-INCRIMINATION ISSUES

Advice by the prosecution. A member of the California State Bar has an obligation to refrain from representing conflicting interests. Cal Rules of Prof Cond 3-310. Accordingly, a prosecutor should not advise a witness on the scope or application of the Fifth Amendment privilege. See *In re Martin* (1987) 44 C3d 1, 41 n8, 241 CR 263. This bar does not prevent a prosecutor from perceiving that the subject matter of future testimony would incriminate a witness and that a grant of immunity should thus be considered. If a grant of immunity is not appropriate, the prosecutor should advise the trial court that the witness may need counsel's assistance.

If the prosecutor grants immunity to a witness, the prosecution is free to warn the witness about the contempt sanction.

A prosecutor must not use threats or intimidation to cause a defense witness to invoke the privilege against self-incrimination and refuse to testify on the defendant's behalf. Doing so is misconduct and may constitute reversible error. *People v Warren* (1984) 161 CA3d 961, 207 CR 912; *People v Bryant* (1984) 157 CA3d 582, 203 CR 733.

Ø **Note:** Likewise, a court's admonition to a witness regarding self-incrimination cannot be so intimidating as to "effectively drive a witness off the stand" in violation of a defendant's Sixth Amendment rights. *Webb v Texas* (1972) 409 US 95, 98, 34 L Ed 2d 330, 333, 93 S Ct 351 (per curiam).

Advice by the defense. When defense counsel knows or learns that the testimony of a potential defense witness may incriminate that witness, the attorney should not advise the witness on the scope or application of the Fifth Amendment privilege. See Cal Rules of Prof Cond 3-310. The attorney's duty to the client poses a clear conflict of interest in this situation.

Ø **Note:** Defense counsel should be extremely careful about suggesting to the trial court the need for a witness to have counsel appointed regarding a potential Fifth Amendment privilege, especially when there is former testimony that could be offered against the defendant if a Fifth Amendment privilege claim by a witness is upheld. A defense counsel's request and supporting argument that counsel be appointed for a witness because of a potential Fifth Amendment privilege claim was held by the California Supreme Court to be a waiver of the appropriateness of that claim on appeal. *People v Seijas* (2005) 36 C4th 291, 301, 30 CR3d 493. In *Seijas,* after the prosecutor refused a grant of immunity, the trial court found the witness to be unavailable because of the privilege claim and then allowed in the former testimony of the witness from a preliminary hearing. In the trial court, the defense attorney in *Seijas* fought for the finding that the witness had a Fifth Amendment privilege. In finding that the defense waived the right to challenge on appeal whether the privilege even applied, the supreme court pointed out that the defense attorney had never raised the issue at the trial court level.

When the defense seeks to call as an exculpatory witness someone who faces criminal charges in the same or another criminal jurisdiction, several ethical problems surface, especially when the witness is represented by counsel. A member of the State Bar may not interview another attorney's client on the subject matter of that representation. See Cal Rules of Prof Cond 2-100. Specifically, the rule requires that neither direct nor indirect communication "about the subject of the representation" occur without the other lawyer's consent. Cal Rules of Prof Cond 2-100(A). This applies both to defense counsel and to the prosecutor. Practice varies on interpreting the scope of this restriction; defense counsel who seeks to interview a witness represented by an attorney may seek to construe the subject matter narrowly. Caution should be used when the nature of the pending criminal charge against the witness is such that the subject matter of the interview with the witness might arguably be admissible in the witness's criminal case.

When the same attorney or law firm represents *both* the witness and the defendant on whose behalf the interview is sought, a conflict of interest may arise if it appears necessary to advise the witness on the scope of any Fifth Amendment privilege. See Cal Rules of Prof Cond 3-310. When no possible incrimination question is present and the witness to be interviewed is not adverse to the defendant, there may not be an actual conflict of interest. Counsel should warn a prospective witness-client if there is any appreciable risk of retaliation by the prosecutor that could result

from one client's testifying on behalf of another.

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§51.16 XII. USING SUBPOENA TO SECURE WITNESS'S ATTENDANCE

Occasionally, defense counsel has information suggesting that a witness might be able to give helpful testimony, but the witness will not agree to an interview, or it would be unethical for the attorney to interview the witness. Counsel for a defendant who wishes to obtain another criminal defendant's testimony is free to subpoena the witness or secure a removal order for the witness to appear at a trial or hearing. See Evid C §700; Pen C §1328(a). See also Pen C §§1334-1334.6. This is true even if ethical rules or other considerations would bar an out-of-court conversation between counsel or counsel's investigator and the witness in question. See Cal Const art I, §15. See also Pen C §686(3).

Ø **Note:** At the hearing or trial, counsel should advise the trial court that this witness is represented by another attorney.

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§51.17 XIII. STATE AND FEDERAL WITNESS PROTECTION: PITFALLS AND TRAPS

California's Witness Relocation and Assistance Program (Pen C §§14020-14033) is administered by the Attorney General, who issues guidelines for reimbursing state and local agencies for the costs of providing witness protection services. Pen C §§14022, 14027. Local law enforcement agencies, however, usually make the actual arrangements and should be contacted first. Protection under the program may be given when credible evidence exists of a substantial danger that a witness may suffer intimidation or retaliatory violence in criminal proceedings. Pen C §14022. A "witness" includes persons summoned or expected to be summoned to testify for the prosecution in a criminal matter, including grand jury proceedings. Accomplices may also be eligible for protection. The witness's family, friends, and associates who are considered to be endangered may also be provided with protection. Pen C §14021.

Any state witness protection agreement must be in writing and must state the conditions set forth in Pen C §14025. The State of California, including its counties and cities and their agents, is not liable for any condition in the agreement that cannot reasonably be met because of a witness's commission of a crime during participation in the program. Pen C §14025.5. The state, counties, and cities and their officers and employees are immune from civil liability for any decision declining or revoking protection to a witness. Pen C §14028.

Prisoners in state institutions are now eligible to participate in the Federal Witness Protection Program. 18 USC §§3521(a)(1), 3526(b). The federal Witness Security Reform Act of 1984 (18 USC §§3521-3528) authorizes the U.S. Attorney General to provide protection to state and local witnesses if the state agrees to reimburse the federal government. Detailed provisions implementing protection and relocation are set out in the Act, and regulations exist to implement the process. The witness protection program is discretionary. *Piechowicz v U.S.* (4th Cir 1989) 885 F2d 1207 (Federal Witness Protection Program is "discretionary function" insulating federal agents and attorneys from liability).

Before undertaking any discussion with the government about federal witness protection, counsel should read all of the United States Attorney's Manual: Criminal Resource Manual, 9-21.100, *Witness Security*. The manual is available on the Department of Justice's website at http://www.usdoj.gov.

Dealing with the Federal Witness Protection Program presents many pitfalls for the uninformed practitioner. It is essential that any state defense attorney or prosecutor who will use it have experience with its regulations and knowledge of case law *and practical operations* in the area. For instance, when requesting information about benefits received by a government witness, it is important to be aware that the federal government has many different types of witness protection programs. If only the "Federal Witness Protection Program" is requested, no results may be forthcoming, because the witness may be in an Informant Program or other named program. Each federal agency may also have grants or monies for informants or witnesses that are completely separate from the "Federal Witness Protection Program."

Counsel should never rely exclusively on any representation by a law enforcement agent or prosecutor, either state or federal, as to how the Federal Witness Protection Program will handle a particular client. Only the U.S. Marshals Service is authorized to make promises concerning individual witnesses. A witness must be sponsored by either the U.S. Marshals Service or the U.S. Attorney's office. Sponsorship can be negotiated as part of a plea bargain agreement. See United States Attorney's Manual, 9-21.100.

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REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

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§52.1 I. OVERVIEW

Immigration consequences of criminal conviction. Strategic decisions made by an immigrant's criminal defense attorney are crucial; strategic plea bargaining or amelioration of criminal convictions may soon be the only avenues that remain for many noncitizen defendants to avoid removal or permanent bars to immigration, which can be far worse than the criminal penalties.

Ø **Note:** The term "removal" now includes both deportability under 8 USC §1227 and inadmissibility under 8 USC §1182. The process of excluding someone from the United States now also occurs during a "removal" hearing. The term for "excludable" is "inadmissible." See Pub L 104-208, 110 Stat 3009.

Immigration consequences of a criminal conviction can include removal, permanent ineligibility for lawful immigration status, extended or even indefinite periods of immigration detention, and permanent separation from family members who are U.S. citizens. No matter how long one has lived in the United States, and regardless of whether that residence has been in accordance with the law, convicted noncitizens can be ordered deported and will sometimes be permanently ineligible to return. With proper planning, however, defense counsel representing a noncitizen in a pending criminal case may be able to obtain a disposition that avoids serious immigration consequences.

Ø **Note:** Practitioners should not rely exclusively on this chapter but should seek guidance from immigration attorneys experienced in crime-related issues or from the Immigrant Legal Resource Center, discussed in "Resources," below.

Reentering the United States. All noncitizens, even those legally admitted to the United States on a permanent basis, are subject to the grounds of inadmissibility when entering the United States. Any trip outside the United States has the potential of bringing the existence of one or more of these grounds to the attention of the Department of Homeland Security's Bureau of Citizenship and Immigration Services. This means that a lawful permanent resident who goes outside of the United States can be forever excluded and never allowed to return to home, job, and family if he or she is inadmissible. In addition, corollary (but not identical) grounds of deportability exist and can make any noncitizen removable, regardless of the legality of his or her latest admission to the United States. As a rule, there are no statute of limitations or laches defenses applicable in immigration law.

Defense counsel's duty to noncitizen client. Because of the structure of immigration law, a defense attorney's goal is always to seek a result that avoids creating a ground of inadmissibility or deportability, or an outcome that could result in a bar to potential future immigration relief. Defense counsel must also avoid immigration consequences while pursuing the traditional goals of shorter sentences and less serious dispositions, since a noncitizen with a removable disposition will very likely have an immigration hold that will sabotage many standard criminal dispositions, such as drug treatment, domestic violence classes, work furlough, release to probation or parole, and the like. The first step in analyzing a case is to find out the defendant's current or potential immigration status. This information is necessary to identify the specific immigration effects of a disposition. Counsel must investigate the client's immigration status, research the immigration law, and inform the client very specifically about the actual, not merely the possible, consequences. In addition, counsel must actively attempt to avoid unfavorable consequences if possible. Anything less constitutes ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 241, 8 CR3d 862.

Because even relatively minor offenses (*e.g.,* possession of a small amount of a controlled substance) can carry drastic immigration consequences, an especially vigorous defense may be required for a noncitizen. Defense counsel may need to arrange an unusual plea or sentencing agreement or take the case to trial. Some defendants are willing to risk or sacrifice all other considerations to avoid adverse immigration consequences. The defense may have to be conducted completely differently from the typical criminal defense of a U.S. citizen.

The court must advise a defendant pleading guilty or no contest that, if he or she is a noncitizen, the plea could result in deportation, denial of naturalization, or exclusion from reentry. Pen C §1016.5. Defense counsel must go beyond this general warning, however, and advise the client of the *actual,* specific immigration consequences the plea

will trigger in the defendant's case, and attempt to defend against them. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328. (Note that the Judicial Recommendations Against Deportation (JRADs) discussed in *Barocio* and *Soriano* are no longer available; see discussion in §52.11.) In fact, defense counsel's incorrect advice to the client on the immigration consequences of a criminal case can constitute ineffective assistance of counsel, requiring reversal if prejudice is shown. *In re Resendiz* (2001) 25 C4th 230, 105 CR2d 431. This issue is currently pending before the Supreme Court in *Padilla v Kentucky* (cert granted 2009) 173 L Ed 2d 582, 129 S Ct 1317.

Prosecutors may request that a defendant stipulate to deportation as part of a plea bargain. A stipulation to deportation made by a defendant in state or federal criminal proceedings will be considered a deportation for purposes of enhancing his or her sentence following a subsequent conviction of the federal offense of illegal reentry after conviction of an aggravated felony and deportation. 8 USC §1326(b). See discussion in §52.8.

Resources. This chapter is an overview rather than an exhaustive discussion. Counsel should obtain expert advice on individual cases. The Immigrant Legal Resource Center (http://www.ilrc.org) in San Francisco will provide consultation to attorneys and agencies on the immigration consequences of criminal cases, for a fee. For information, call (415) 255-9499. The address is 1663 Mission Street, Suite 602, San Francisco, CA 94103. For referrals to immigration attorneys, contact the American Immigration Lawyers Association, 918 F Street NW, Washington, DC 20004, (202) 216-2400 (http://www.aila.org); the local bar association; or the National Immigration Project of the National Lawyers Guild, 14 Beacon Street, Suite 602, Boston, MA 02108, (617) 227-9727 (http://www.nationalimmigrationproject.org). Although community agencies generally cannot advise criminal defense counsel on questions involving the adverse immigration consequences of convictions, they may be able to accept an indigent defendant's immigration case after the criminal issues have been resolved.

A chart detailing the immigration consequences of common California offenses, together with notes describing plea strategies in criminal court for immigrants, is available without charge from the Immigrant Legal Resource Center at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php. This chart is frequently updated. A federal chart is available at the website of the National Immigration Project of the National Lawyers Guild (http://www.nationalimmigrationproject.org).

Defense counsel should also consult an in-depth research guide, such as Brady et al., Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (10th ed 2008) (Defending Immigrants), which contains advice for criminal counsel tailored to California law and is available from the Immigrant Legal Resource Center in San Francisco at the above address; Kesselbrenner & Rosenberg, Immigration Law and Crimes (2009), available from West Group, COP, 610 Opperman Drive, Eagan, MN 55123, (800) 344-5009 (http://west.thomson.com/store); or Tooby & Rollin, Criminal Defense of Immigrants (2007), Tooby, California Post-Conviction Relief for Immigrants (2009), available from Law Offices of Norton Tooby, 6333 Telegraph Avenue, Suite 200, Oakland, CA 94609, (510) 601-1300, and Tooby's Guide to Criminal Immigration Law (2008), available without charge as a pdf file at http://www.NortonTooby.com.

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II. UNIQUE ASPECTS OF NONCITIZEN DEFENDANT CASES

§52.2 A. Checklist: Basic Procedure for Criminal Defense of Immigrants

- **Ascertain client's nationality and immigration status.**

The starting point for criminal defense of immigrants is always to ascertain and verify the client's nationality. This can be done by obtaining a reliable answer to the question, "Are you a citizen of the United States?" This must be done in every single criminal case, because the nationality of the defendant is often not obvious. He or she may be Canadian or may have immigrated to the United States as a child and grown up here and thus be superficially indistinguishable from a native-born "American." About 20 percent of the time, a California criminal defendant will not be a citizen of the United States and will need the special defense outlined in this chapter.

It is crucial to obtain reliable evidence of nationality. Many clients may give an incorrect answer to the citizenship question because they misunderstand it. For example, a client may believe the concept of "citizen" includes a lawful permanent resident with papers legalizing his or her immigration status in the United States (see *People v Castro-Vasquez* (2007) 148 CA4th 1240, 1246 n6, 56 CR3d 406) or a client may truly be unaware that he or she is not a U.S. citizen due to having been brought here as an infant and never being told of their citizen status. It is crucial to verify that the defendant's stated immigration status is accurate. Counsel should explain the importance of obtaining a correct answer and ask where the client was born and (if born abroad) how he or she obtained U.S. citizenship. If the defendant has any immigration documents, counsel should photocopy them and check with immigration counsel if necessary to verify immigration status.

It is also important to learn whether one or both of the defendant's parents (or the sole custodial parent) were naturalized while the defendant was an unmarried lawful permanent resident under 18. If so, the defendant may have automatically become a U.S. citizen when the parent(s) naturalized, even without filing any application or any official government action. A child may also under certain circumstances acquire U.S. citizenship from his or her U.S. citizen parents, even if born abroad. See Brady et al., Defending Immigrants §11.20 (10th ed 2008).

- **Obtain from the client the information necessary to formulate a strategy to avoid unnecessary immigration consequences.**

The client can provide initial information on his or her immigration status that counsel will need to assess what immigration effect various possible convictions and sentences will have. For a suggested "Basic Immigration Status Questionnaire," see §52.3. Counsel will also need the client's rap sheet and charge of conviction, plea, and sentence for significant prior convictions, as well as information on the current charges, likely plea bargains, and likely sentences.

- **Call an immigration expert or research the exact immigration consequences of any proposed plea or option.**

Calling an expert is the easiest way to obtain up-to-date information on the immigration consequences of the various possible alternative dispositions and sentences. Unless counsel has personally researched the specific immigration questions facing the individual client, using up-to-date resource material, expert immigration advice is absolutely necessary. It is very dangerous simply to send the client to an immigration lawyer, because the best strategy for the defense of the criminal case must be determined by criminal and immigration counsel conferring together. As a layperson, the client may be unable to understand and convey the complexities of immigration law from the immigration lawyer to the criminal lawyer, and certainly cannot relay information in the back-and-forth discussion necessary to formulate a joint strategy. It is therefore necessary for criminal and immigration counsel to speak directly to one another after first assembling the necessary information.

Potential adverse immigration consequences may be eliminated or ameliorated through a variety of techniques, often without sacrificing traditional criminal defense goals. Criminal defense counsel should establish an ongoing relationship with an office such as the Immigrant Legal Resource Center (see §52.1) or a specific immigration attorney with

experience of criminal problems of immigrants to receive consistent advice in this area as needed.

- **Explain the specific immigration consequences to the client.**

Counsel must discover the actual, specific immigration consequences—*e.g.,* disqualification from political asylum or naturalization, loss of lawful permanent resident status, deportation, permanent ineligibility for lawful status, disqualification from waivers—and explain them clearly to the client. A general or uninformed presentation is insufficient. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (client given general Pen C §1016.5 advice; conviction nonetheless vacated on grounds of ineffective counsel for failure to warn about *actual* consequences).

- **Ask the client how high a priority he or she places on the immigration consequences.**

Once the client understands what the actual immigration consequences will be, he or she may or may not make them a defense priority. Some clients are not willing to risk more time in jail in an effort to safeguard their immigration status. Others place the right to remain with their families in the United States as their highest priority and will sacrifice almost any other consideration. Such clients may be willing to plead to additional counts or serve extra time in custody, for example, to alter the conviction to one that will not trigger deportation. These difficult choices must be made by the client, once he or she is fully informed.

- **Attempt to avoid the adverse immigration consequences.**

It is not enough simply to tell the client the problem: it is necessary to attempt to achieve a solution. See *People v Bautista* (2004) 115 CA4th 229, 241, 8 CR3d 862. Placing a high priority on immigration consequences may cause a drastic change in defense strategy. First, counsel must determine precisely what disposition will minimize or eliminate immigration consequences. Doing so requires a good knowledge of the immigration law or expert advice. Some ideas for safe dispositions are discussed in this chapter. They can include diversion without a guilty plea (see §52.29), dismissal, acquittal, delay of a conviction, a carefully framed sentencing disposition, or a plea to another "safe" offense, even one only tenuously connected, or not connected at all, to the offense charged. For a comprehensive discussion of how to avoid all grounds of deportation, see Tooby & Rollin, Safe Havens: How to Identify and Construct Non-Deportable Convictions (2005).

> Ø **Note:** Deferred entry of judgment under Pen C §1000 or drug program probation under Proposition 36 constitutes a conviction under immigration law, even after dismissal, if a guilty plea has been entered at any time. See *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771; 8 USC §1101(a)(48)(A). Once dismissal occurs, the conviction has been eliminated for immigration purposes only if it is a conviction of first-offense simple possession or certain other minor first drug offenses, and only if the client has never violated that probation. See §§52.14, 52.29. Preplea diversion for drug offenses is available in some counties under Pen C §1000.5. On diversion and deferred entry of judgment, see chap 27.

Vigorous criminal defense work—including strategies not normally used in defense of a minor charge—may be required. For example, clients may choose to take minor cases to trial, even if there is only a slim possibility of acquittal, if the alternative is certain deportation, or to delay the finality of the conviction by appeal so the client can spend more time with his or her family before removal.

- **Advise client not to talk about noncitizen status.**

Counsel should advise the defendant, and his or her family, not to volunteer or admit to noncitizen status when speaking with anyone, particularly court personnel. See *In re Adolfo M.* (1990) 225 CA3d 1225, 1230, 275 CR 619 (juvenile court found that minor was noncitizen based on his mother's statements to probation officer; minor transferred to Mexican juvenile authorities).

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Source: Criminal Law/California Criminal Law Procedure and Practice/52 REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT/§52.3 B. Interviewing Noncitizen Criminal Defendants and Basic Immigration Status Questionnaire

§52.3 B. Interviewing Noncitizen Criminal Defendants and Basic Immigration Status Questionnaire

Defense counsel should inform a noncitizen criminal defendant of the following rights:

- The right to refuse to speak with immigration officials or to answer any questions about country of birth, nationality, immigration status, or manner of entry into the United States. This right is based on the privilege against self-incrimination, because certain immigration violations also carry criminal penalties. See, *e.g., Bong Youn Choy v Barber* (9th Cir 1960) 279 F2d 642; *Estes v Potter* (5th Cir 1950) 183 F2d 865. Persons who have reentered the United States after deportation for criminal convictions should especially decline to speak with the DHS, which may interview them in jail if they are incarcerated for another offense. The DHS conducts interviews to identify detainees for federal criminal prosecution for unlawful reentry under 8 USC §1326(b)(2), which can carry a potential 20-year federal prison sentence (see §§52.8, 52.63), as well as to identify persons for removal.
- The right not to reveal the defendant's immigration status to a judge. Pen C §1016.5(d).

BASIC IMMIGRATION STATUS QUESTIONNAIRE

Purpose: To obtain the facts necessary for an immigration lawyer to determine the exact immigration consequences of a criminal conviction.

Documents: Photocopy any immigration documents or passport. [See §52.2.]

Criminal History: Information on rap sheets; charge of conviction, plea, and sentence for significant prior conviction(s); current charges; and possible dispositions should be in hand before calling immigration counsel.

_____ _____ _____
Client's name Date of interview Date of birth

_____ _____
Client's immigration attorney Attorney's phone no.

Immigration hold? YES ___ NO ___[See §5.42.]

1. *Entry:* Date first entered U.S.: _____ Visa Type: _____

Significant departures: Date: _____ Length: _____

Purpose:_____

Date last entered U.S.: _____ Visa Type: _____

2. *Nationality:* Country of birth: _____ Would client have any fear about returning? YES ___ NO ___ If yes, why?

_____

What language (and dialect) does client speak? _____

Is an interpreter needed? YES ___ NO ___[See §52.7.] (Often, defendants who do not need an interpreter for office or jail interviews will need one for formal court sessions.)

3. *Immigration Status:* Lawful permanent resident? YES ___ NO ___ If yes, date client obtained green card:

Other special immigration status: (refugee) (asylee) (temp. resident) (work permit) (TPS) (Family Unity) (ABC) (undocumented) (visa type: _____). Date obtained: _____

Did anyone ever file a visa petition for client? YES ___ NO ___
Name and number: _____ Date: _____

Type of visa petition: _____ Was it granted? YES ___ NO ___

Has the INS or DHS been involved with client in this case or earlier? YES ___ NO ___

Does client have a pending immigration case or application? YES ___ NO ___

4. *Deportations:* Has client ever been deported? YES ___ NO ___ Date:_____

Reason:_____

Has client ever been excluded? YES ___ NO ___ Date: _____

Reason:_____

Does client have an immigration court date pending? YES ___ NO ___

Reason: _____ Date:_____

5. *Prior Immigration Relief:* Has client ever before received a waiver of deportability (former INA §212(c) relief or cancellation of removal) or suspension of deportation?
YES ___ NO ___ Which: _____ Date: _____

6. *Relatives With Status:* Does client have a U.S. citizen: (parent) (spouse) (child(ren)) (DOB(s) _____), (brother) or (sister)? YES ___ NO ___

Does client have a lawful permanent resident (spouse) or (parent)? YES ___ NO ___

7. *Employment:* Would client's employer help client immigrate? YES ___ NO ___

Occupation:_____

Employer's name and number:_____

8. *Possible Unknown U.S. Citizenship:* Was client's or spouse's parent or grandparent born in the U.S. or granted U.S. citizenship?
YES ___ NO ___

Was client a permanent resident under age 18 when one or both parents (or the sole custodial parent) naturalized to U.S. citizenship? YES ___ NO ___ Date(s) of naturalization:

9. *Abuse:* Has client been abused by his or her spouse or parents?
YES ___ NO ___

10. *Criminal Record:* What prior convictions does client have in California or in other jurisdictions or countries? Include all offenses to which a plea or verdict was entered, even if rehabilitative relief was later obtained.

Date Committed	Date of Plea	Exact Statute of Conviction	Date of Sentence

(Counsel should examine the wording of the exact statute and charge of each conviction, the plea transcript, and sentence to determine whether a prior conviction will affect client's immigration status.)

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§52.4 C. Main Defense Goals in Representing Juveniles

Dispositions in juvenile proceedings do not constitute convictions for immigration purposes. *Matter of Ramirez-Rivero* (BIA 1981) 18 I&N Dec 135; *Matter of C.M.* (BIA 1953) 5 I&N Dec 327. Thus, a finding of delinquency in juvenile court will not be considered a conviction to make a juvenile deportable or inadmissible, or for purposes of the three-misdemeanor/one-felony bar to amnesty and similar bars in other programs. A conviction in adult court, however, of a person who was under 18 at the time of the offense will constitute a conviction for immigration purposes. *Vargas-Hernandez v Gonzales* (9th Cir 2007) 497 F3d 919.

Family Unity benefits. In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, however, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104-208, 110 Stat 3009) denies Family Unity benefits to persons who commit an act of juvenile delinquency that if committed by an adult would be a violent felony involving the use or attempted use of physical force against another or a felony involving a substantial risk that physical force against another will be used in its commission. IIRIRA §383.

The 1996 statute applies the new Family Unity rule to benefits "granted or extended" after September 30, 1996. See IIRIRA §383. Arguably, the new rule applies only to acts of juvenile delinquency *committed* after September 30, 1996, because there is a general presumption against retroactive application of laws. See *INS v St. Cyr* (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271.

In the future, Congress may well single out drug trafficking as a juvenile offense that triggers special immigration penalties and apply that provision retroactively. Consequently, whenever possible, juvenile defenders should, as with crimes involving violence, avoid dispositions finding trafficking.

Juvenile dispositions might be held to bring a noncitizen within a *conduct-based* ground of inadmissibility or deportability, *i.e.,* one that does not depend on a conviction. See §52.50 for discussion of these grounds. For example, one ground for deportation and inadmissibility applies to persons who are or have been drug addicts or drug abusers. 8 USC §§1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii). The definition of "drug abuser" has not been firmly established, but some U.S. consulates currently define it as anything more than a one-time experimentation with an illegal drug. In juvenile proceedings, the best course is not to admit any drug offense. If an admission is inevitable, it is better to admit possession than sale or possession for sale. Admissions of drug addiction might be held to be a basis for inadmissibility or deportation.

A finding in juvenile court of a moral turpitude offense might bar the immigrant from later receiving the benefit of the petty offense exception to inadmissibility, based on a later adult moral turpitude conviction, because the petty offense exception is available only to those who have *committed* only one crime involving moral turpitude (*i.e.,* the current adult conviction). 8 USC §1182(a)(2)(A)(ii)(II). See §§52.38-52.40.

Juveniles bound over to adult court after a hearing under Welf & I C §707 and tried or convicted by plea there will suffer convictions under immigration law. See Brady et al., Defending Immigrants, chap 2A (10th ed 2008).

Ø **Note:** Review the defendant's entire criminal history before making a disposition.

It may be possible to avoid these immigration consequences by having the juvenile court record sealed, because the DHS is thereby precluded from seeing the record. See Welf & I C §826. The DHS may, however, have other sources of information, in which event sealing the record may be ineffective. Juveniles who are tried as adults may also be eligible for sealing of records under Pen C §1203.45 or Welf & I C §§1772 and 1179. An expungement, under Welf & I C §§1179, 1772, of a first-offense simple possession conviction will eliminate it for all immigration purposes. See *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728. Sealing the records may eliminate evidence that the defendant has suffered a conviction of a drug offense as well as a crime involving moral turpitude. *Matter of Lima* (BIA 1976) 15 I&N Dec 661; *Matter of Andrade* (BIA 1974) 14 I&N Dec 651. See §52.14.

Ø **Note:** Juveniles in dependency proceedings and, possibly, delinquency proceedings may be eligible for permanent residency as "special immigrant juveniles." 8 USC §1101(a)(27)(J). Juveniles who have been abused by a parent who is either a permanent resident or a U.S. citizen may be eligible for permanent residency under

the Violence Against Women Act (see 8 USC §§1154(a)(1)(A)(iv), (B)(iii), 1229b(b)(2)), even if they are not in dependency proceedings. See §52.61.

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D. Noncitizen Status

§52.5 1. Noncitizen Status as Affecting Bail

A defendant's lack of citizenship may be a factor justifying high postconviction bail. Bail on appeal of $200,000 was upheld in *People v Marghzar* (1987) 192 CA3d 1129, 239 CR 130, because, among other things, the defendant was not a U.S. citizen.

Ø **Note:** The DHS has the authority to place immigration holds on certain noncitizens. See 8 CFR §§236.1, 287.7. See also §5.42.

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§52.6 2. Noncitizen Status as Affecting Other Issues

Denial of probation. Trial courts may properly consider a defendant's status as an undocumented noncitizen when deciding whether to grant probation. *People v Sanchez* (1987) 190 CA3d 224, 235 CR 264 (probation denied).

Probation conditions. A probation condition requiring the defendant to leave the state is unconstitutional banishment. *Alhusainy v Superior Court* (2006) 143 CA4th 385, 48 CR3d 914. The failure to appear in court for a review hearing is not a probation violation if it is impossible for the undocumented noncitizen probationer to appear because he or she is in immigration custody. *People v Cervantes* (2009) 175 CA4th 291, 95 CR3d 858.

California Rehabilitation Center (CRC). The CRC may properly exclude an undocumented noncitizen because he or she would probably not be available to complete the outpatient component of the program. *People v Arciga* (1986) 182 CA3d 991, 227 CR 611. For immigration purposes, such a commitment is adverse in any event because it defines the individual, in effect, as a "drug addict" and thus deportable and inadmissible. See §52.50.

Proposition 36. In *People v Espinoza* (2003) 107 CA4th 1069, 132 CR2d 670, the court of appeal held that Proposition 36 probation was not mandatory for a defendant who was an undocumented noncitizen with a substantial criminal history, because it was impossible to condition probation on completion of a drug treatment program in view of the substantial likelihood that the defendant would be deported.

Illegal detention. Border stops are deemed reasonable. *U.S. v Ramsey* (1977) 431 US 606, 619, 52 L Ed 2d 617, 628, 97 S Ct 1972. Stops by border agents at reasonably located, fixed checkpoints are deemed reasonable. *U.S. v Martinez-Fuerte* (1976) 428 US 543, 562, 49 L Ed 2d 1116, 1131, 96 S Ct 3074. Other immigration detentions, however, *e.g.,* stops by roving patrols of border patrol agents, must be supported by specific, articulable facts giving rise to a reasonable suspicion. *U.S. v Brignoni-Ponce* (1975) 422 US 873, 884, 45 L Ed 2d 607, 618, 95 S Ct 2574; *U.S. v Garcia-Camacho* (9th Cir 1995) 53 F3d 244; *People v Valenzuela* (1994) 28 CA4th 817, 33 CR2d 802 (stop at agricultural station must be supported by probable cause; single factor of Mexican appearance insufficient to support belief that person is illegal alien).

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§52.7 E. Interpreters

Criminal defendants who do not understand English are entitled to have an interpreter throughout the criminal proceedings. Cal Const art I, §14. The interpreter must be available exclusively for the defendant; the defendant cannot be required to share an interpreter with others, *e.g.,* witnesses. *People v Aguilar* (1984) 35 C3d 785, 200 CR 908 (conviction reversed; trial court "borrowed" interpreter to translate state witnesses' testimony); *People v Baez* (1987) 195 CA3d 1431, 241 CR 435 (conviction reversed because error not harmless beyond reasonable doubt). The court in *People v Rodriguez* (1986) 42 C3d 1005, 1013, 232 CR 132, held that it is best that each defendant have an interpreter assigned to him or her who remains with the defendant throughout the proceedings.

A mere request for an interpreter does not necessarily mean that the defendant is entitled to one. The defendant must show a lack of sufficient English. *In re Raymundo B.* (1988) 203 CA3d 1447, 250 CR 812.

There is no right to a certified interpreter, only to a competent one. *People v Estrada* (1986) 176 CA3d 410, 221 CR 922. See Evid C §§750-755.5 for special rules on interpreters and translators. See also Govt C §§68560.5, 68561-68562, 68565-68566 (requirements for court interpreters).

English-speaking defendants do not have the right to have their own interpreter, separate from the court interpreter, for witnesses who testify in another language. *People v Aranda* (1986) 186 CA3d 230, 230 CR 498. Counsel who believes that an interpreter has erred or is not interpreting correctly should request an evidentiary hearing and request appropriate relief, *e.g.,* a motion for mistrial or replacement of the interpreter with a new interpreter, contemporaneous with the violation if possible, but at least with counsel's discovery of the violation. See *People v Cabrera* (1991) 230 CA3d 300, 281 CR 238. The trial court also has the option of appointing a "check interpreter" to verify the first interpreter's translation. See *People v Aranda, supra*.

See generally Ramirez, ed., Cultural Issues in Criminal Defense, chaps 2-3 (2d ed 2007).

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§52.8 F. Requirements Concerning Immigration Status When Pleading Guilty or No Contest

Court advisement to defendant of immigration consequences of guilty plea. Before a defendant pleads guilty or no contest to a misdemeanor or felony offense, the court taking the plea must ensure that the defendant is warned that conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization. Pen C §1016.5(a). Failure to make a record that the required warning was given creates a presumption that it was not given. Pen C §1016.5(b). Failure to warn of any of the three required potential consequences requires the reviewing court to vacate the judgment if prejudice is shown and there exists, at the time of the motion to vacate, more than a remote possibility that the conviction will have one or more of those adverse immigration consequences. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 199, 96 CR2d 463; *People v Castro-Vasquez* (2007) 148 CA4th 1240, 56 CR3d 406. The exact language of the statute need not be used; substantial compliance is all that is required. *People v Gutierrez* (2003) 106 CA4th 169, 130 CR2d 429. See also *People v Ramirez* (1999) 71 CA4th 519, 83 CR2d 882 (warning need not be verbal; signing of waiver form held sufficient). However, the advisement must occur during the actual taking of the plea; an advisement given on an earlier date is inadequate. *People v Akhile* (2008) 167 CA4th 558, 564, 84 CR3d 236.

The proper way to raise a violation of this statute is by a statutory motion to vacate, rather than a petition for a writ of coram nobis. *People v Carty* (2003) 110 CA4th 1518, 2 CR3d 851. A direct appeal can be taken from the denial of such a motion. *People v Totari* (2002) 28 C4th 876, 123 CR2d 76. A defendant making the motion has the burden of establishing reasonable diligence in bringing it. *People v Kim* (2009) 45 C4th 1078, 90 CR3d 355; *People v Totari* (2003) 111 CA4th 1202, 4 CR3d 613. The trial court's denial of the motion is reviewed for abuse of discretion. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 200, 96 CR2d 463.

Counsel's advice to defendant concerning immigration consequences of guilty plea. A general warning of the possible consequences similar to what the court is required to give (see Pen C §1016.5), however, is not sufficient advice by *defense counsel,* who must also advise a client of the specific immigration consequences that will be triggered in the defendant's particular case. See, *e.g., People v Barocio* (1989) 216 CA3d 99, 264 CR 573; *People v Soriano* (1987) 194 CA3d 1470, 240 CR 328 (note that the "judicial recommendation against deportation" (JRAD), discussed in *Barocio* and *Soriano*, is no longer available; see §52.11). Defense counsel who fails to investigate and advise the defendant of the specific immigration consequences of a guilty plea, and who fails to try to avoid those consequences by obtaining an alternative disposition, may be found to have provided ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 237, 8 CR3d 862; *People v Soriano, supra*. The Ninth Circuit held that counsel who gives affirmative erroneous advice concerning the immigration consequences of a disposition renders ineffective assistance, requiring reversal if the error deprives the defendant of the opportunity to have a decision-maker, such as the prosecutor or the court, make a discretionary decision in his or her favor. *U.S. v Kwan* (9th Cir 2005) 407 F3d 1005. This is the same prejudice standard employed by the court of appeal in *People v Barocio, supra,* in which counsel failed to make a motion for a nondeportable sentence.

Counsel renders ineffective assistance by affirmatively misadvising the defendant of the immigration effects of a plea. *In re Resendiz* (2001) 25 C4th 230, 105 CR2d 431. To obtain a reversal of the conviction, prejudice must be shown, *i.e.,* a reasonable probability that the client would not have entered this plea if the client had been told the truth about its immigration consequences. *In re Resendiz, supra; People v Castro-Vasquez, supra*. Counsel also renders ineffective assistance by not trying for an alternative disposition that will avoid adverse immigration consequences. *People v Bautista* (2004) 115 CA4th 229, 241, 8 CR3d 862. Any violation of counsel's duties in these respects should be raised in a motion for a new trial or in a petition for a writ of habeas corpus. See *People v Kim* (2009) 45 C4th 1078, 1104, 90 CR3d 355.

Ø **Note:** Prosecutors too should become familiar with the immigration consequences of a plea or conviction to better deal with the prosecution of noncitizens. On one hand, the prosecution may be convinced that the defendant should be deported and may wish to become aware of the nature of the conviction and sentence necessary to achieve this result. On the other hand, prosecutorial discretion is very broad. Because immigration

laws now trigger drastic and mandatory immigration consequences for an increasing number of minor convictions and sentences, the interests of the community and innocent family members in avoiding deportation of certain immigrants should be reflected in the discretion exercised by prosecutors. For example, a misdemeanor conviction for corporal injury of a spouse with a 1-year suspended sentence is considered an "aggravated felony" and would trigger mandatory deportation, even for an immigrant who has lived lawfully in this country for 30 years, is married to a U.S. citizen, and has many children and numerous other family members who are all U.S. citizens. Prosecutorial discretion is legally broad enough to allow a nondeportable result through a plea bargain or postconviction relief under these circumstances. See §7.12. The Los Angeles County District Attorney's office has a policy allowing prosecutors to take collateral immigration consequences into account in unusual circumstances when they have such a powerful impact that the punishment may not be proportionate to the crime. See http://da.co.la.ca.us/sd03-04.htm.

There is as yet no requirement that judges advise defendants of the possible immigration consequences of a "slow plea" (see §26.19; *People v Limones* (1991) 233 CA3d 338, 343, 284 CR 418), but counsel must of course do so.

Stipulation to removal. Attorneys in state as well as federal criminal proceedings may face having to advise clients whether to stipulate to removal before the criminal court judge. The definition of "removal" for criminal penalties for illegal reentry of certain previously deported or removed aliens includes "any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law." 8 USC §1326(b). United States Attorneys sometimes request stipulations to removal, and state prosecutors may begin doing so as well. Criminal defense counsel will be in the position of advising clients whether to accept such a condition. This situation requires an accurate understanding of the defendant's immigration position. If the defendant truly has nothing to lose by conceding removability, he or she may gain valuable concessions in the criminal sentence. But if the defendant has family or an established life in the United States and some possible defense to removal, the defendant may be gravely harmed by giving up the right to contest removal and apply for or maintain lawful status.

Judicial removal. Federal district court judges are permitted in certain circumstances to decide at sentencing whether a defendant is removable and to order removal. 8 USC §1228(c). The person must be removable under 8 USC §1227(a)(2) for crimes involving moral turpitude, aggravated felonies, controlled substance offenses, or offenses involving firearms and destructive devices. See 8 USC §1228(a). The judge may exercise jurisdiction over the removal only if the U.S. Attorney requests it with the concurrence of the DHS. 8 USC §1228(c)(1). The Commissioner of the INS wrote a memorandum, including sample forms, to District Directors on the subject of judicial removals on February 22, 1995, reprinted in 72 Interpreter Releases 462 (Mar. 31, 1995).

Illegal reentry. If the defendant pleads guilty or no contest to an "aggravated felony," the plea will trigger negative and possibly surprising consequences if the client is deported and thereafter reenters the country illegally. Illegal reentry after conviction and removal occurring after an aggravated felony conviction can trigger federal criminal prosecution carrying a sentence of up to 20 years in federal prison. 8 USC §1326(b)(2). See also 8 USC §1325(a).

Ø **Note:** It is likely that a criminal noncitizen will be detected and apprehended by the DHS after conviction and a sentence involving any incarceration, because the DHS now has extensive systems that support its efforts to identify the immigration status of every single person admitted to county jail or state prison.

California state courts are required to cooperate with immigration authorities in identifying and placing a deportation hold on defendants convicted of felonies who are held to be deportable. Govt C §68109. The California Department of Corrections and Rehabilitation (CDCR) and the Division of Juvenile Justice (DJJ) are also required to identify undocumented noncitizens subject to deportation. Within 48 hours after such a person's release from criminal custody, these departments must transfer the inmate to the custody of the U.S. Attorney General. Pen C §5025(c). They must also make their case files available to the DHS for investigation purposes. Pen C §5025(a). If the DHS does not pick up the person within the time allotted (see 8 CFR §287.7(d)), continued detention under the DHS hold becomes illegal, and state habeas as well as false imprisonment remedies become available.

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§52.9 G. Availability of Noncitizen Witnesses

If "state action has made a material witness unavailable (by deportation), dismissal is mandated." *People v Mejia* (1976) 57 CA3d 574, 579, 129 CR 192. Today's courts generally hold that the *Mejia* standards for determining whether a witness was "material" have been superseded by the federal standards. *People v Valencia* (1990) 218 CA3d 808, 819, 267 CR 257; *People v Lopez* (1988) 198 CA3d 135, 243 CR 590; *People v Jenkins* (1987) 190 CA3d 200, 235 CR 268. See *People v Fauber* (1992) 2 C4th 792, 829, 9 CR2d 24 (assuming but not deciding that federal standard applies to destruction of evidence cases).

Conflicting authority exists on which federal standard to apply. *People v Lopez, supra,* held that the standard to apply is that of *California v Trombetta* (1984) 467 US 479, 81 L Ed 2d 413, 104 S Ct 2528. Under this standard, the lost evidence is material for purposes of sanctions if its exculpatory value was apparent before it was destroyed. But *Jenkins* (in what may be considered dictum) and *Valencia* said that the standard to apply is that of *U.S. v Valenzuela-Bernal* (1982) 458 US 858, 73 L Ed 2d 1193, 102 S Ct 3440. Under that standard, which specifically concerned deported witnesses, testimony is material for purposes of sanctions if a "plausible" showing is made that it was material, was favorable to the defendant, and was not cumulative. The U.S. Supreme Court, however, now applies the *Trombetta* standard to the loss of both physical evidence and witnesses. See *Kyles v Whitley* (1995) 514 US 419, 433, 131 L Ed 2d 490, 505, 115 S Ct 1555.

The *Lopez* court declined to follow *Valenzuela-Bernal* because that case is older than *Trombetta* and, according to the *Lopez* court, because *Valenzuela-Bernal* did not intend to announce a separate standard for loss of testimonial evidence as distinguished from loss of other evidence. The *Jenkins* court did not discuss *Trombetta* at all. At this writing, the Supreme Court has cited *Valenzuela-Bernal* with approval (see *People v Coffman* (2004) 34 C4th 1, 52, 17 CR3d 710), followed by a majority of the later cases on this question.

A person arrested along with undocumented persons may be given a form advising of the right to have the noncitizen witnesses detained. The form also advises that, if deported, it may be impossible to obtain the witness's presence at trial and that the person arrested has the right to consult with counsel before deciding whether detention of the noncitizen is desired. This form is based on *U.S. v Lujan-Castro* (9th Cir 1979) 602 F2d 877.

Mejia error is waived by a guilty plea. *People v McNabb* (1991) 228 CA3d 462, 279 CR 11.

Sanctions other than dismissal may be available. For example, a federal court may exclude the former testimony of a witness deported with insufficient notice to the defense or with insufficient effort to make the witness available at retrial. *U.S. v Yida* (9th Cir 2007) 498 F3d 945.

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§52.10 H. Consequences of Sentence in Criminal Cases

The sentence received in a criminal case can have significant immigration consequences, and counsel can sometimes exert a great influence over the immigration process by controlling the length and nature of the sentence imposed. Obtaining a certain sentence may be sufficient to avoid adverse immigration results for the client. Counsel must determine whether the sentence is important, and, if so, exactly what the sentence requirements are in the client's particular situation. Sentences can be especially significant for aggravated felonies and crimes involving moral turpitude.

General definition of "sentence" for immigration purposes. For immigration purposes, "sentence" includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution … in whole or in part." 8 USC §1101(a)(48)(B).

Thus, "sentence" includes a state prison sentence that has been imposed even though execution of all or part of the sentence has been suspended. *Matter of Castro* (BIA 1988) 19 I&N Dec 692.

It also includes court-ordered confinement as a condition of probation.

It does *not* include potential state prison or county jail sentences when imposition of sentence has been suspended, because the court has not ordered any specific term of incarceration or confinement to be served. See *Matter of F.* (BIA 1942) 1 I&N Dec 343.

It does *not* include any noncustody period of probation, because that does not qualify as "incarceration or confinement." 8 USC §1101(a)(48)(B). See discussion of suspending imposition and execution of sentence in §§36.5, 46.29-46.30.

> Ø **Note:** For immigration purposes, all sentences refer to the nominal sentences ordered by the court, rather than the actual time spent incarcerated, except for (1) the 180-day bar to establishing good moral character referred to below, and (2) eligibility for former INA §212(c) waiver of deportability, which is lost if the person actually serves 5 years or more as a result of aggravated felony convictions. See *Matter of Ramirez-Somera* (BIA 1992) 20 I&N Dec 564. See §52.53 for discussion. Only these two latter bars refer to days actually spent in custody.

Presentence time in custody in a criminal case, which is credited as time served in a sentence imposed after conviction, is considered confinement as a result of a conviction for immigration purposes. *Arreguin-Moreno v Mukasey* (9th Cir 2008) 511 F3d 1229.

> Ø **Examples:** If the client receives imposition of sentence suspended and no custody as a condition of probation, it counts as zero sentence for immigration purposes. If the client receives imposition of sentence suspended and 6 months' custody as a condition of probation, it counts as 6 months. If the client receives a 5-year sentence, execution of which is suspended, and is placed on probation with no custody time as a condition of probation, it counts as a 5-year sentence.

Concurrent sentences and indeterminate sentences (*e.g.,* 5 years to life) are evaluated as the length of the longest sentence. *Matter of Fernandez* (BIA 1972) 14 I&N Dec 24.

Recidivist sentence enhancements. A sentence includes any recidivist sentence enhancement that may be imposed on the defendant. *U.S. v Rodriguez* (2008) 553 US 377, 170 L Ed 2d 719, 128 S Ct 1783 (determining maximum sentence under Armed Career Criminal Act).

Deportability for sentence imposed of 1 year or more. A client who is here legally will not want to become deportable. Many common offenses become aggravated felonies and trigger removal only if a court orders 1 year or more of custody, either as part of the judgment and sentence or as a condition of probation:

- A "crime of violence" as defined in 18 USC §16 (see §52.47);
- A theft offense (including receipt of stolen property) (see §52.46);
- Burglary;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles that have had their

identification numbers altered;
- Offenses relating to obstruction of justice (including accessory after the fact under Pen C §32), perjury or subornation of perjury, or bribery of a witness; and
- Using fraudulent documents to obtain an immigration benefit (except for a first offense solely to help a listed immediate family member).

8 USC §1101(a)(43)(F)-(G), (P), (R)-(S). All other aggravated felony convictions trigger deportation regardless of the sentence imposed.

Strategy. For offenses depending on sentence, a sentence of 364 days or less (either as part of a judgment or condition of probation) will prevent the conviction from becoming an aggravated felony, so long as imposition of sentence has been imposed. Conviction of three counts of theft, with a 364-day sentence for each to run consecutively, for example, would not be considered an aggravated felony conviction, because each count is assessed separately to see whether it carries a 1-year sentence. It is necessary to avoid a state prison sentence, even if execution of sentence is suspended, because a suspended sentence would still be considered a sentence imposed for immigration purposes. Counsel may be able to negotiate an official sentence of 364 days (and thus avoid an aggravated felony) by waiving past and future credits. Such a waiver could result in the defendant's spending an amount of time in custody that is equivalent to the amount of time he or she would serve on a 2-year sentence if custody credits were awarded; more, if before the 364-day sentence is imposed, extra time is served and credits for that time are also waived. Similarly, on a probation violation, it is sometimes possible for the defendant to waive past credits, vacate the former sentence, and receive a new sentence that falls short of a total of 1 year or more, thus avoiding an aggravated felony sentence. If the original sentence is not vacated before the probation violation sentence is imposed, the original sentence will be added to the probation violation sentence. A total sentence of 1 year or more (*e.g.,* an original sentence of 9 months and a probation violation sentence of 3 months) will be considered a sentence of 12 months and trigger deportation as an aggravated felony.

Inadmissibility. A client who is not here legally will wish to avoid becoming inadmissible, *i.e.,* becoming ineligible to immigrate lawfully through a U.S. citizen-spouse or otherwise. Two grounds of inadmissibility depend on the sentence:

- A noncitizen is inadmissible under 8 USC §1182(a)(2)(B) if he or she is convicted of two or more offenses of any kind for which the aggregate sentences imposed equal 5 or more years, regardless of the number of days actually served; and
- A noncitizen who would otherwise be inadmissible because of one conviction of a crime involving moral turpitude is *not* inadmissible if the offense qualifies under the "petty offense exception." To qualify, the sentence imposed must be 6 months or less and the maximum possible sentence for the offense must be no more than a year. 8 USC §1182(a)(2)(A)(ii)(II).

Ø **Note:** The petty offense exception to exclusion on grounds of moral turpitude is available only to noncitizens who have *committed* only one crime involving moral turpitude. A defendant who has *committed* a second moral turpitude offense is disqualified from receiving the petty offense exception, even if no second conviction occurred, because, for example, the charges were dismissed or no charges were filed. A previous conviction, even if expunged, will destroy eligibility for the benefit of this exception. *Matter of S.R.* (BIA 1957) 7 I&N Dec 495. A defendant charged with a felony may be found eligible for the petty offense exception if the felony is reduced to a misdemeanor under Pen C §17. See §52.39.

Bar to establishing good moral character. A noncitizen must establish "good moral character" to obtain many immigration benefits, including naturalized citizenship, voluntary departure, cancellation of removal for nonpermanent residents, suspension of deportation, and registry. The immigration law bars certain persons from establishing good moral character, and this concept sometimes depends on sentence:

- Physically serving 180 or more actual days in jail, as a total from all convictions, during the period for which good moral character must be shown precludes the defendant from establishing good moral character under 8 USC §1101(f)(7). *Matter of Valdovinos* (BIA 1982) 18 I&N Dec 343.
- If the person is held in custody for a few days and the charges are dismissed or the person is acquitted, the time in jail does not count as part of the 180 days, because it was not served "as a result of conviction." 8 USC

§1101(f)(7). In fact, anyone trying to avoid the 180-day bar who has served significant pretrial time might waive credit for that time as time served in an attempt to lower the total below 180 days actual custody "as a result of conviction." See *Arreguin-Moreno v Mukasey* (9th Cir 2008) 511 F3d 1229. A pardon should erase the effect of time served for that conviction. *Matter of H.* (BIA 1956) 7 I&N Dec 249. Pardons are discussed in §§41.19-41.20. Expungements are discussed in §§41.13, 41.18. Their immigration effects are discussed in §§52.14, 52.29.

Bar to restriction of removal. Restriction of removal, like political asylum, is available to some noncitizens who face death threats and similar perils if deported to their home countries. However, an applicant who has been convicted of a particularly serious crime or who the DHS has reason to believe committed a serious nonpolitical crime outside the United States is ineligible. 8 USC §1231(b)(3)(B). An alien who has been convicted of an aggravated felony for which a sentence of at least 5 years of imprisonment was imposed has committed a particularly serious crime that bars this relief. 8 USC §1231(b)(3)(B); 8 CFR §208.16. Even if the sentence for an aggravated felony is less than 5 years, care must be taken to determine whether the crime is nonetheless particularly serious, by reviewing the nature of the conviction, the sentence imposed, and the individual facts and circumstances surrounding the actual offense. 8 CFR §208.16.

Fees and restitution. Even when no confinement has been imposed, a conviction exists under 8 USC §1101(a)(48)(A) when court fees or restitution has been ordered. *Matter of Cabrera* (BIA 2008) 24 I&N Dec 459 (costs and surcharges imposed in Florida deferred adjudication proceeding constituted form of "punishment" or "penalty" for purposes of establishing that noncitizen had suffered "conviction" for immigration purposes; court sought to establish national standard rather than relying on Florida state law in including amounts paid in restitution as a cost constituting "punishment"). If the fee or fine has been suspended, however, this is not the case. *Retuta v Holder* (9th Cir 2010) 591 F3d 1181.

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§52.11 I. Former Judicial Recommendation Against Deportation (JRAD)

Until 1990, the judicial recommendation against deportation (JRAD) offered protection to persons convicted of a crime of moral turpitude or an aggravated felony that would ordinarily result in deportation. See *Nguyen v Chertoff* (2d Cir 2007) 501 F3d 107. The JRAD was a discretionary order, signed by the sentencing judge, requiring the INS to withhold immigration penalties based on conviction of a covered crime. The JRAD was eliminated by the Immigration Act of 1990 (IA 90) (Pub L 101-649, 104 Stat 4978). Although the repeal was intended to be retroactive (see *U.S. v Murphey* (9th Cir 1991) 931 F2d 606), the INS agreed to honor JRADs that were actually signed by a judge before November 29, 1990. Memorandum by INS Commissioner Gene McNary, Feb. 4, 1991, reprinted in Interpreter Releases, p 220 (Feb. 25, 1991). Now that JRADs have been abolished, it is an open question what the proper remedy would be for a defendant whose counsel rendered ineffective assistance by failing to request a JRAD at sentencing. One possibility is for the court to grant a JRAD nunc pro tunc dated before November 29, 1990. Another possibility would be to vacate the conviction or sentence entirely. See *People v Barocio* (1989) 216 CA3d 99, 264 CR 573. The constitutional right to effective assistance of counsel requires that the defendant should be placed in the same position he or she would have occupied if the error had not been committed. See *Castillo-Perez v INS* (9th Cir 2000) 212 F3d 518.

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§52.12 J. Effect of Postconviction Relief on Immigration Status

California has several statutes providing postconviction relief in the form of pardons, certificates of rehabilitation, destruction or sealing of records, vacation of judgment, dismissal of accusation, and reduction of charge:

- Pen C §§4800-4854 (reprieves, pardons, commutations of sentence, certificates of rehabilitation);
- Pen C §1203.45 (sealing misdemeanor records for persons under age 18 when crime committed);
- Health & S C §11361.5 (automatic destruction of certain marijuana conviction records);
- Pen C §1203.4 (vacation of judgment and dismissal of accusation for felony or misdemeanor probationer who successfully completed probation, often called "expungement"; see §52.14);
- Pen C §1203.4a (vacation of judgment and dismissal of accusation for misdemeanant not granted probation, often called "expungement"; see §52.14);
- Welf & I C §§1179, 1772 (dismissal of accusation for person honorably discharged from juvenile parole);
- Pen C §17 (reduction of felony to misdemeanor under various circumstances, including application of defendant at any time after probation granted); and
- Welf & I C §828 (destruction of juvenile records or their release to the person).

The effect of each type of postconviction relief on immigration status varies. (State relief is discussed in chap 41.)

An executive pardon will eliminate a conviction of one or more crimes involving moral turpitude, an aggravated felony conviction, or a conviction of high-speed flight from an immigration checkpoint as grounds of deportation, but probably not a controlled substances conviction, domestic violence conviction, firearms conviction, or any other conviction not listed in 8 USC §1227(a)(2)(A)(vi). *Matter of Suh* (BIA 2003) 23 I&N Dec 626 (pardon does not eliminate deportability of domestic violence conviction). Further, a pardon does not eliminate a listed conviction as a ground of inadmissibility. *Aguilera-Montero v Mukasey* (9th Cir 2008) 548 F3d 1248.

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§52.13 1. Vacating Conviction

Vacating the conviction on a ground of legal invalidity will eliminate all immigration effects that flow from the conviction itself. See, *e.g., Nath v Gonzales* (9th Cir 2006) 467 F3d 1185; *Wiedersperg v INS* (9th Cir 1990) 896 F2d 1179 (postconviction writ vacating criminal conviction entitled alien to reopen deportation proceeding even after he had been deported). Direct appeal, habeas corpus, coram nobis, and motions to withdraw the plea or vacate the conviction will have this effect. *Matter of Kaneda* (BIA 1979) 16 I&N Dec 677; *Matter of Sirhan* (BIA 1970) 13 I&N Dec 592. See also *People v Vasilyan* (2009) 174 CA4th 443, 94 CR3d 260 (motion to vacate filed in 2007 for 1994 convictions that resulted in deportation in 2004).

Vacating the judgment will also eliminate the effect of any sentence or imprisonment resulting from the conviction. *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849. Moreover, a petition for extraordinary writ may be brought simply for purposes of vacating the original sentencing and obtaining a fresh sentencing hearing. A new sentence imposed by the judge will be the one considered by the immigration authorities, even if the defendant has already completed serving the original sentence. *Matter of Cota-Vargas, supra; Matter of Martin* (BIA 1982) 18 I&N Dec 226 (correction of illegal sentence); *Matter of H.* (BIA 1961) 9 I&N Dec 380 (new trial and sentence); *Matter of J.* (BIA 1956) 6 I&N Dec 562 (commutation).

To be effective the court must vacate the conviction on some ground of legal invalidity—constitutional or statutory. If the court vacates the conviction purely on humanitarian or discretionary grounds, immigration officials will not regard the conviction as eliminated for immigration purposes. See *Matter of Pickering* (BIA 2003) 23 I&N Dec 621, rev'd on other grounds, *Pickering v Gonzales* (6th Cir 2006) 465 F3d 263; *Beltran-Leon v INS* (9th Cir 1998) 134 F3d 1379. If it is not clear whether the conviction was vacated on a ground of legal invalidity or for rehabilitative reasons, the noncitizen cannot be deported, since the government bears the burden of proving deportability by clear and convincing evidence. *Nath v Gonzales* (9th Cir 2006) 467 F3d 1185. The BIA has held, however, that a noncitizen seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez-Martinez* (BIA 2007) 24 I&N Dec 272. A *sentence* vacated on any ground at all, even on discretionary or immigration grounds, is eliminated for immigration purposes. *Matter of Song* (BIA 2001) 23 I&N Dec 173; *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849.

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§52.14 2. Expungement (Pen C §1203.4) and Other Forms of State Rehabilitative Relief

Deferred entry of judgment under Pen C §§1000-1000.8 requires entry of a guilty plea, and thus constitutes a conviction under current immigration law. 8 USC §1101(a)(48)(A); *Matter of Punu* (BIA 1998) 22 I&N Dec 224. An exception to the necessity for a guilty plea exists for counties that implement a preplea "drug court" program under Pen C §1000.5. Counsel should always investigate the possibility of preplea diversion in such a county. See §52.29.

Expungements under state rehabilitative statutes such as Pen C §1203.4 no longer eliminate the immigration consequences of most criminal convictions. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771.

A state drug conviction of the type that would be amenable to expungement under the Federal First Offender Act (FFOA) (18 USC §3607) if the case had been brought in federal court can be effectively expunged under a general state expungement statute, despite the fact that the state statute is not an exact counterpart of the FFOA. *Garberding v INS* (9th Cir 1994) 30 F3d 1187. A possession conviction, however, is not considered a first conviction if it was preceded by a diversion dismissal of a prior case, even if no plea was ever entered in that case. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019.

Ø **Note:** The FFOA does not permit an expungement if the defendant has suffered, before the commission of the current offense, a controlled-substances conviction under "federal or state" law; this provision does not include foreign convictions as a disqualification from relief.

If relief from removal would not be available under the FFOA, it also will not be available when a conviction was expunged under state law. See, *e.g., Estrada v Holder* (9th Cir 2009) 560 F3d 1039 (relief from removal not available when person whose conviction was expunged under state law violated a condition of probation).

A conviction of a first offense of simple possession of any controlled substance is not a "conviction" for immigration purposes if it has been subject to rehabilitative treatment, such as dismissal of charges under Pen C §1203.4 or Proposition 36 (Pen C §1210.1). *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 (state offense that could have been treated under FFOA if the case had been brought in federal court does not trigger adverse immigration consequences if same kind of state relief was granted). This rule also applies to certain convictions of a first offense less serious than simple possession of a drug. *Ramirez-Altamirano v Holder* (9th Cir 2009) 563 F3d 800 (conviction of possession of paraphernalia eliminated by expungement); *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132 (same).

The court's reasoning in *Cardenas-Uriarte v INS, supra,* could be applied to any first drug conviction that is (a) more minor than simple possession and (b) not forbidden under federal law. This would include using or being under the influence of a controlled substance (Health & S C §11550), driving under the influence of drugs (Veh C §23152(a)), being under the influence of drugs in public (Pen C §647(f)), visiting a place where drugs are being used (Health & S C §11365), possession of a hypodermic needle (Bus & P C §4140), and various prescription violations as long as they do not involve trafficking.

Ø **Note:** Since various forms of state rehabilitative relief are basically similar to FFOA treatment under 18 USC §3607, any of the following types of postconviction relief will have the same beneficial effects as an expungement under Pen C §1203.4(a) to eliminate convictions of this limited list of minor first-offense controlled substances offenses: deferred entry of judgment under Pen C §1000; Proposition 36 dismissal under Pen C §1210.1(d); and expungements of youthful offenders' convictions for honorable DJJ completion under Welf & I C §§1179, 1772. The same is true of foreign expungements of qualifying offenses. *Dillingham v INS* (9th Cir 2001) 267 F3d 996.

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§52.15 3. Other Postconviction Relief

If all records of a marijuana conviction have been destroyed under Health & S C §11361.5, the conviction probably cannot be proved by the government. See, *e.g., Matter of Rodriguez-Perez* (Simonet, IJ, Dec. 12, 1989) No. 18-364-484, digested in Interpreter Releases p 67 (Jan. 12, 1990) (INS could not prove conviction, because records sealed under similar Florida statute). However, if the DHS obtains records of conviction before they are destroyed or obtains a transcript of court proceedings or an appellate opinion not subject to destruction (Health & S C §11361.5(d)), it may still be able to prove the conviction exists. See *Matter of Moeller* (BIA 1976) 16 I&N Dec 65. But see Health & S C §11361.7 (records subject to destruction under §11361.5 are not considered accurate after they should have been destroyed).

A successful motion to withdraw a plea of guilty for "good cause" before entry of judgment will eliminate any conviction. When entry of judgment is suspended and probation is granted, this motion must be made within 6 months after probation was granted. Pen C §1018. The defendant's lack of knowledge of immigration consequences can constitute good cause to withdraw a guilty plea. *People v Superior Court (Giron)* (1974) 11 C3d 793, 114 CR 596. Withdrawal of a guilty plea is discussed in §26.10.

When a sentence is corrected (see chap 34, §§35.5, 35.30-35.34) or commuted by a judge (see §35.10), the reduced sentence is the one considered by immigration authorities. *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849; *Matter of Song* (BIA 2001) 23 I&N Dec 173; *Matter of Martin* (BIA 1982) 18 I&N Dec 226 (correction); *Matter of J.* (BIA 1956) 6 I&N Dec 562 (commutation). A motion to modify the custody condition of probation from 365 to 364 days is effective to eliminate the immigration consequences of the original sentence, but it must be made before the sentence has been served. *People v Mendoza* (2009) 171 CA4th 1142, 90 CR3d 315. Moreover, such a reduction must not violate the plea agreement or the court cannot order it. *People v Segura* (2008) 44 C4th 921, 80 CR3d 715.

Reduction of a felony to a misdemeanor under Pen C §17 (see §8.40) may aid a noncitizen who would be disqualified from relief by having a felony conviction, *e.g.,* an applicant for Temporary Protected Status. See §52.58. Also, a noncitizen is eligible for the petty offense exception to the moral turpitude ground of inadmissibility only if the conviction has a maximum possible sentence of 1 year or less, which means it must be a misdemeanor. See §52.39. This relief can also protect a defendant against a conviction for an aggravated felony crime of violence under 18 USC §16(b), which requires the conviction to be a felony before it can be an aggravated felony.

When judgment is vacated, *e.g.,* on a writ of error coram nobis (see §24.38) or habeas corpus (see §24.38), even a drug conviction has been held erased. See *People v Wiedersperg* (1975) 44 CA3d 550, 118 CR 755 (writ can be granted when counsel did not know of defendant's noncitizen status when plea was entered); *Matter of Sirhan* (BIA 1970) 13 I&N Dec 592; Pen C §1016.5 (judgment vacated on defense motion when record does not reflect that judge advised defendant that guilty plea could result in deportation, exclusion, or denial of naturalization); *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 96 CR2d 463 (failure to advise defendant of potential exclusion consequence requires vacation of plea when prejudice is shown; nonstatutory motion to vacate based on court's inherent power to correct constitutional error, such as ineffective assistance of counsel); *Matter of Adamiak* (BIA 2006) 23 I&N Dec 878 (Ohio drug conviction vacated because trial court failed to advise defendant of immigration consequences of guilty plea). For extensive discussion of obtaining California postconviction relief for immigrants, see Tooby, California Post-Conviction Relief for Immigrants (2009); Brady et al., Defending Immigrants, chap 8 (10th ed 2008).

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§52.16 4. Responsibilities of Original Counsel When Client Seeks Postconviction Relief

Original counsel is free to assist the client in obtaining postconviction relief absent an active conflict of interest. For example, counsel may assist the client to obtain an expungement, writ of coram nobis, order vacating the conviction, pardon, and similar relief as long as the grounds for relief do not include an allegation that the original counsel rendered ineffective assistance of counsel.

If a potential ineffective assistance claim is present, however, counsel should declare a conflict of interest and refer the client to independent counsel, *i.e.,* counsel who is not employed by the same law office as the original counsel. *Cuyler v Sullivan* (1980) 446 US 335, 64 L Ed 2d 333, 100 S Ct 1708; *U.S. v Miskinis* (9th Cir 1992) 966 F2d 1263; *People v Bailey* (1992) 9 CA4th 1252, 12 CR2d 339.

New and old counsel share a common professional obligation to act in their mutual client's best interests. Original counsel has a legal duty to cooperate with successor counsel and promptly return the client's papers (*i.e.,* the entire case file) on termination of the representation. The original client file, including every piece of paper, investigative report, and item of work product, physically belongs to the client and must be turned over to the client on request. Cal Rules of Prof Cond 3-700(A)(2), (D); *Finch v State Bar* (1981) 28 C3d 659, 665, 170 CR 629 (duty to forward file to client or successor counsel); *Kallen v Delug* (1984) 157 CA3d 940, 950, 203 CR 879; California State Bar Formal Opinion No. 1992-127 (original counsel must turn over entire file (which belongs to client), including attorney's notes, and must answer all oral questions if failure to do so would prejudice client). Absent contrary instructions from the client, counsel must retain the file indefinitely. LA County Bar Ass'n Formal Opinion No. 420 (1983).

Although it is certainly difficult to balance the desire to protect oneself from a finding of ineffective assistance of counsel against the obligation to ensure that the client does not suffer from counsel's mistakes, the better view is that professional integrity and enlightened self-interest combine to motivate counsel to aid the client as much as the truth will allow. Nothing counsel says to aid the client can be used against counsel in a malpractice action. *Smith v Lewis* (1975) 13 C3d 349, 118 CR 621, disapproved on other grounds in *Marriage of Brown* (1976) 15 C3d 838, 851 n14, 126 CR 633. It is also wise for counsel to attempt to mitigate any damage suffered by the client. It is impossible for a criminal defendant to win a malpractice action unless he or she is actually innocent. *Lynch v Warwick* (2002) 95 CA4th 267, 270, 115 CR2d 391. Finally, the State Bar has never taken, and presumably never will take, disciplinary action against counsel solely on the basis of a mistake. It is simply not an ethical violation. See Cal Rules of Prof Cond 3-110(A) (incompetence must be intentional, reckless, or repeated to warrant discipline). In fact, a single isolated negligent mistake is not grounds for discipline. See *Call v State Bar* (1955) 45 C2d 104, 109, 287 P2d 761. A candid admission of a mistake, if one has been made, is professionally less damaging, and personally less distasteful, than being cross-examined and having one's credibility assailed by new counsel for a former client.

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III. APPLICABLE IMMIGRATION LAW

§52.17 A. Effect of Criminal Record on Immigration

Ø **Note:** See the chart in §52.24 for grounds for deportation, inadmissibility, and preclusion from establishing good moral character.

American immigration law is based on the premise that certain individuals are "undesirables" and should therefore not be admitted to or should be expelled from the United States. Under the Immigration and Nationality Act (INA) (8 USC §§1101-1537), certain criminal convictions or criminal behavior result in immigration penalties by constituting a ground of inadmissibility, a ground of deportability, or a bar to establishing good moral character or other relief.

Aggravated felony. Conviction of an aggravated felony brings the harshest immigration penalties. See §§52.21, 52.41-52.47 for discussion of penalties. In almost all cases, the noncitizen will be removable from the United States and barred from eligibility for any discretionary waiver of removal regardless of the equities involved. 8 USC §1228(b)(5). See §52.44. The person is barred from ever returning legally to the United States, although a waiver is theoretically available. Illegal reentry into the United States following conviction of an aggravated felony and removal is a serious and commonly prosecuted federal felony under 8 USC §1326(b)(2) with a potential 20-year prison sentence. See §52.63. Aggravated felony offenses are listed in 8 USC §1101(a)(43) and are discussed in §§52.41-52.47.

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§52.18 1. Grounds for Inadmissibility

Admission of a noncitizen means the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 USC §1101(a)(13). If a noncitizen is inadmissible, that person cannot enter the United States unless he or she is granted a waiver of the inadmissibility ground. See 8 USC §1182 for grounds of inadmissibility. The grounds for inadmissibility (called grounds of exclusion under pre-1996 law) create a bar to both initial and later admissions to the United States. Even a lawful permanent resident ("green card" holder) attempting to reenter after a trip abroad may be considered inadmissible in some circumstances, *e.g.,* commission of a listed criminal offense. 8 USC §1101(a)(13)(C)(v) (crime of moral turpitude or controlled substance offense). A noncitizen who manages to enter the United States despite being inadmissible may be charged in removal proceedings as being deportable for having been inadmissible at his or her last admission. 8 USC §1227(a)(1).

Moreover, a noncitizen who is inadmissible is not eligible for most means of immigration, *i.e.,* acquiring lawful permanent resident status. For example, a noncitizen who marries a U.S. citizen is normally able to become a permanent resident on the basis of the marriage. If the noncitizen is inadmissible, however, he or she is barred from permanent residency despite the marriage, unless a waiver of the ground of inadmissibility is legally available and is granted in the DHS's discretion. A noncitizen who is inadmissible because of a criminal problem is usually also ineligible to establish good moral character, which is a requirement for naturalized U.S. citizenship, cancellation of removal for nonpermanent residents, registry, or some forms of voluntary departure in lieu of deportation. See 8 USC §1101(f) and discussion in §§52.52-52.62.

In sum, one can view the grounds for inadmissibility as the standard for a person attempting to obtain some benefit from immigration authorities. An undocumented person who applies for permanent residency, a person with lawful immigration status who leaves the United States and needs to reenter, and a permanent resident who wishes to become a U.S. citizen can all be barred by being inadmissible on the crimes-related grounds. However, a noncitizen who has been lawfully admitted to the United States at some point cannot be deported merely for being inadmissible (unless he or she was inadmissible at the time of the last admission); to be deported, the person must come within a ground of deportability.

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§52.19 2. Grounds for Deportability

The grounds for deportability are the legal basis to remove individuals after they have been admitted into the United States, *i.e.,* the noncitizen was inspected by immigration authorities at a border or border equivalent before entering the country. 8 USC §1101(a)(13) (admission defined). The grounds for deportation (8 USC §1227) are similar but not identical to those for admissibility (8 USC §1182). For example, a noncitizen with one conviction for a crime involving moral turpitude is inadmissible if the sentence was more than 6 months or carried a potential sentence of more than a year, and is deportable if the maximum sentence was 1 year or more and the offense occurred within 5 years after the date of admission. See §52.39. Furthermore, if the noncitizen was not admissible at the time of entry or adjustment of status, on the grounds of inadmissibility applicable at the time of entry, that noncitizen is deportable. 8 USC §1227(a)(1)(A).

Once noncitizens have been lawfully admitted, they can be removed only if they come within one or more grounds of deportability. In contrast, a noncitizen who avoided checkpoints and surreptitiously crossed the border will be removed on the grounds of inadmissibility. "Admission" for this purpose includes entry based on fraudulent documents if the noncitizen was officially inspected and admitted, as well as the "adjustment of status to permanent residency" (obtaining a green card through processing at a DHS office in the United States). Thus noncitizens entering the United States on a valid document, someone else's border crossing card, or a tourist visa obtained through fraud, and noncitizens who became permanent residents through adjustment of status, have all been admitted.

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3. Procedures for Determining Admissibility or Deportability

§52.20 a. Removal Proceedings

Removal is the procedure for determining whether an alien who has been admitted to the United States may be removed, or for contesting a denial of admission at the border. 8 USC §1229a. A noncitizen with a criminal record may be brought to a removal proceeding from jail via an immigration hold or detainer; others come under removal proceedings after being caught up in DHS raids or denied an affirmative application for lawful status. Once before an immigration judge, a noncitizen may accept removal, contest the charge of removability, or concede removability but apply for some form of relief from removal.

With two exceptions, only an immigration judge can order removal. The exceptions are as follows:

(1) A federal district court judge can order removal of a noncitizen convicted of certain crimes (8 USC §1228(c)(1); see discussion in §52.8); and

(2) The DHS can order removal of a nonpermanent resident who is convicted of an aggravated felony; most forms of relief from removal are not available in this procedure (8 USC §1228(b)).

Otherwise, a noncitizen who the DHS has cause to believe is removable may be brought before an immigration judge for removal proceedings. The DHS can, however, pressure the noncitizen to accept "voluntary departure" instead of removal from the United States before the institution of removal proceedings, or the judge may grant voluntary departure after proceedings begin. See 8 USC §1229c.

Ø **Note:** Even a stipulation to deportation or removal as part of a plea bargain in federal or state court is a deportation or removal for purposes of federal prosecution for illegal reentry after conviction of an aggravated felony and deportation or removal. 8 USC §1326(b)(2). See discussion in §52.8.

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§52.21 b. Expedited Proceedings for Aggravated Felonies

If convicted of an aggravated felony, a noncitizen who is not a lawful permanent resident is subject to administrative removal proceedings (8 USC §1228), is conclusively presumed to be deportable (8 USC §1228), and is presumed not to have a good moral character (8 USC §1101(f)(8)). The procedures to remove a nonpermanent resident convicted of an aggravated felony are meant to be completed, including any administrative appeals, before the nonpermanent resident's release from incarceration for the underlying aggravated felony. 8 USC §1228(a)(3)(A).

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§52.22 c. Waiver of Deportability and Inadmissibility

Some grounds of inadmissibility and deportability may be waived in certain circumstances at the discretion of an immigration judge or DHS officer. For example, a noncitizen immigrating through a relative's visa petition may be able to apply, under 8 USC §1182(h), for a discretionary waiver of the moral turpitude ground of inadmissibility. A noncitizen who has been a permanent resident for 5 years and who has continuously resided in the United States for at least 7 years following lawful admission may apply for the discretionary waiver "cancellation of removal" under 8 USC §1229b(a). This waiver can potentially cure any of the grounds of inadmissibility and deportability, but it is not available to a permanent resident convicted of an aggravated felony. See §52.53.

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§52.23 4. Bar to Establishing Good Moral Character

A noncitizen's criminal record can result in statutory ineligibility to establish good moral character. See 8 USC §1101(f). A noncitizen who cannot establish good moral character is ineligible to apply for U.S. citizenship and is ineligible for some means of immigration or relief from removal, including cancellation of removal for certain nonpermanent residents, registry, and voluntary departure. See §§52.52-52.62. Good moral character need only be established for a specific amount of time for each benefit, *e.g.,* the 5 years preceding an application for naturalization to U.S. citizenship, 10 years preceding an application for cancellation of removal on a ground of inadmissibility, and a reasonable period of time for registry. Conviction of an aggravated felony on or after November 29, 1990, or of murder at any time, is a permanent bar to establishing good moral character. Immigration Act of 1990 (Pub L 101-649, §509, 104 Stat 4978).

The bar to establishing good moral character overlaps several grounds for inadmissibility. A noncitizen may not establish good moral character if he or she is inadmissible on grounds relating to crimes involving moral turpitude, controlled substances, prostitution, a 5-year sentence for two or more convictions, or smuggling of aliens. 8 USC §1101(f). A crime of moral turpitude conviction that falls within the petty offense exception to inadmissibility (8 USC §1182(a)(2)(A)(ii)(II)) does not create a bar to good moral character. *Matter of Gonzalez-Zoquiapan* (BIA 2008) 24 I&N Dec 549.

Other grounds are unique to the good moral character bar and are not grounds of inadmissibility. To be able to establish good moral character, a noncitizen must not have been actually confined as a result of a conviction for 180 days or more during the period for which good moral character must be shown. The 180-day period is strictly calculated and depends on actual time in jail, not on suspended imposition or execution of sentence, or nominal sentence that includes good time or work time or other conduct credits that were not actually served. 8 USC §1101(f)(7). (Contrast this with measurement of "sentence imposed" for moral turpitude or some aggravated felony convictions, which depends on the nominal custody ordered by the court and not on time actually spent in jail. See §§52.10, 52.38-52.40, 52.42.)

Finally, a noncitizen who is a habitual drunkard, has been convicted of two or more gambling offenses, or has given false testimony under oath to receive immigration benefits is barred from showing good moral character. 8 USC §1101(f).

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§52.24 B. Chart: Comparing Grounds for Inadmissibility, Deportability, and Bar to Establishing Good Moral Character

The following chart, prepared by the Immigrant Legal Resource Center and reproduced with permission, has been updated by the authors.

For explanation of inadmissibility, see §52.18; for deportability, see §52.19; for the bar to establishing good moral character, see §52.23. See also provisions relating to visa fraud, diplomatic immunity, child abduction in violation of a custody decree, AIDS, mental or physical defects, Communist and subversive beliefs, and gambling, discussed in §52.50.

Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
Controlled substances.	One conviction (except possession of 30 grams or less of marijuana). 8 USC §1227(a)(2)(B)(i). First conviction simple possession is not aggravated felony (unless drug was flunitrazepam or more than 5 grams cocaine base), but second conviction may be so held. Under the influence, transportation, and offering to commit a drug crime are not aggravated felonies; any offense relating to trafficking is. 8 USC §1101(a)(43)(B).	One conviction or admission of elements of one offense (single offense involving 30 grams or less of marijuana for personal use can be waived). 8 USC §1182(a)(2)(A)(i). "Reason to believe" was or is drug trafficker. 8 USC §1182(a)(2)(C).	Same as Inadmissibility. 8 USC §1101(f)(3).
Moral turpitude.	Two convictions after admission to U.S., not single scheme; or 1 conviction within 5 years after admission with possible sentence of 1 year or more. 8 USC §1227(a)(2)(A)(i)-(ii).[1]	One conviction or admission; petty offense exception for 1 conviction, 6-month sentence or less, with 1-year maximum possible sentence, or admission of 1 offense with 1-year maximum possible sentence. 8 USC §1182(a)(2)(A)(i)(I)-(II).	Same as Inadmissibility. 8 USC §1101(f)(3).
Prostitution.	None.	Engaging in, procuring, supported by prostitution (not customers) within last 10 years. 8 USC §1182(a)(2)(D).	Same as Inadmissibility. 8 USC §1101(f)(3).
Firearms offenses.	One conviction of any offense related to firearm or destructive device. 8 USC §1227(a)(2)(C).[2] Sale of firearms or felon-in-possession offenses are aggravated felonies. 8	None (unless offense also is crime involving moral turpitude).	Some can be aggravated felonies.[2]

	USC §1101(a)(43)(C), (E).		
Sentences.	1-year sentence for violent crime, theft, receiving, burglary, document fraud, forgery, perjury, and a few less common offenses is aggravated felony.[1] See also moral turpitude.	5-year total sentence for 2 or more convictions of any kind. 8 USC §1182(a)(2)(B). See also moral turpitude.	Same 5-year total for 2 or more convictions as Inadmissibility, or physically confined 180 days. 8 USC §1101(f)(3).
Noncitizen smuggling.	Before, at time of, or within 5 years after admission, aiding or encouraging noncitizen to enter U.S. illegally; waiver for some noncitizens. 8 USC §1227(a)(1)(E).	At any time has encouraged or aided alien to enter illegally; waiver for some noncitizens. 8 USC §1182(a)(6)(E).	Same as Inadmissibility. 8 USC §1101(f)(3).
Drug addiction and abuse; Alcoholism.	Is or has been after admission a drug addict or abuser. 8 USC §1227(a)(2)(B)(ii).	Is currently drug addict or abuser 8 USC §1182(a)(1)(A)(iv); is an alcoholic and therefore person with mental or physical defect who poses threat. 8 USC §1182(a)(1)(A)(iii). See requirements for waiver in 8 USC §1182(g).	Habitual drunkard ineligible. 8 USC §1101(f)(1).
Gambling.	Second gambling conviction with 1-year sentence of imprisonment is an aggravated felony. 8 USC §1101(a)(43)(J).	None.	Conviction of 2 or more gambling offenses or deriving income from gambling. 8 USC §1101(f)(4)-(5).
False testimony in immigration matter.	Falsification of documents or falsely claiming citizenship. 8 USC §1227(a)(3).	Misrepresentation of facts or falsely claiming citizenship. 8 USC §1182(a)(6)(C).	Giving false testimony to obtain benefits under Immigration Act of 1990. 8 USC §1101(f)(6).
Domestic violence, stalking, child abuse.	Conviction after admission and after 9/30/96. 8 USC §1227(a)(2)(E)(i). Limited waiver possible. 8 USC §1227(a)(7)(A).	None (but see if the DV offense also is a crime involving moral turpitude; if so, complete that analysis).	Same as inadmissibility ground.
Court finds violation of domestic violence order.	Civil or criminal court finding that enjoined noncitizen who violated domestic violence protection order. 8 USC §1227(a)(2)(E)(ii). Limited waiver possible. 8 USC §1227(a)(7)(A).	None (unless offense is crime involving moral turpitude).	Same as inadmissibility ground.
Aggravated felony.	Conviction. 8 USC §1101(a)(43) (definition of aggravated felony), §1227(a)(2)(A)(iii) (deportation ground). See §§52.10, 52.12-52.16, 52.41-52.47.	Aggravated felons who have been deported are inadmissible for 20 years; waiver available. 8 USC §1182(a)(9)(A)(ii).	Aggravated felony conviction after November 29, 1990, is permanent bar. 8 USC §1101(f)(8).

[1] Some moral turpitude offenses, such as murder and certain common offenses (*e.g.,* crimes of violence, burglary, theft with a 1-year sentence imposed), are also aggravated felonies. See 8 USC §1101(a)(43)(F)-(G), (P), (R)-(S).

[2] Conviction of trafficking in firearms and certain federal firearms offenses (*e.g.,* ex-felon in possession) are aggravated felonies. 8 USC §1101(a)(43)(C), (E).

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C. Convictions and Sentences With Adverse Immigration Consequences

1. Definition of "Conviction" for Immigration Purposes; Record of Conviction

§52.25 a. Definition of Conviction

In many cases, a person must be convicted of an offense to suffer immigration penalties. Under the Immigration and Nationality Act (INA), a conviction occurs when there is a formal judgment of guilt or when an alien has been found or has pleaded guilty or no contest and some form of punishment or restraint has been imposed, even though adjudication has been withheld. 8 USC §1101(a)(48)(A). See Brady et al., Defending Immigrants §2.1 (10th ed 2008). Imposition of court fees or costs, or restitution, is a sufficient penalty to constitute a conviction. *Matter of Cabrera* (BIA 2008) 24 I&N Dec 459. This is not true if the fine has been suspended. See §52.10. Some dispositions do not constitute convictions for immigration purposes and thereby avoid adverse immigration consequences that flow from convictions. Juvenile dispositions, convictions on direct appeal, and dispositions with a not guilty or no contest plea do not constitute convictions for immigration purposes. See §§52.27-52.29. A conviction of an offense, such as an infraction (see Pen C §19.6), so minor that no custody may be imposed and there is no right to a jury trial, is not considered a conviction for immigration purposes. See *Matter of Eslamizar* (BIA 2004) 23 I&N Dec 684 (en banc).

Ø **Note:** Some activities have adverse immigration consequences whether or not a conviction occurs, particularly prostitution, alien smuggling, using false documents (under state or federal law), and drug addiction, abuse, or trafficking. See §52.50. Avoiding or eliminating a conviction may not avert those immigration consequences that do not require a conviction.

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§52.26 b. Divisible Statute and Record of Conviction

A "divisible statute" is a code section whose terms encompass both offenses that have immigration consequences and offenses that do not. For example, Health & S C §11360(a) prohibits both sale and offering to sell controlled substances. Sale of a controlled substance is an aggravated felony, while offering to sell is not. See *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905. See discussion of controlled substances in §§52.30-52.34. Similarly, Pen C §12020(a) includes both possession of a dirk, dagger, or billy, which is not a basis for deportation on the firearms ground, and possession of a sawed-off shotgun, which is. See discussion of the firearms ground in §§52.35-52.36.

When a conviction under a divisible statute is ambiguous about whether the noncitizen was convicted of the offense with immigration consequences, immigration and other reviewing authorities will generally resolve the question using only information from the record of conviction. If that record does not indicate that the offense was one carrying immigration penalties, the authority must decide in the defendant's favor. For discussion of this principle, see *Taylor v U.S.* (1990) 495 US 575, 109 L Ed 2d 607, 110 S Ct 2143 (burglary under federal definition may exclude certain state burglary convictions for federal sentence enhancement purposes; courts look only to record of conviction to determine elements of offense); *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080. The record of conviction consists of:

- The charging papers (indictment, complaint, information), specifically limited to the count(s) of conviction;
- The plea or judgment, including a stipulated factual basis; and
- Sentencing.

See, *e.g., Wadman v INS* (9th Cir 1964) 329 F2d 812, 814 n3; *Matter of Madrigal-Calvo* (BIA 1996) 21 I&N Dec 323 (transcript of defendant's plea and sentence hearing, including defendant's admission, is part of record of conviction); *Matter of Mena* (BIA 1979) 17 I&N Dec 38.

The record of conviction does not include:

- Dismissed counts (*Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072);
- The trial record;
- The presentence report (*Penuliar v Mukasey* (9th Cir 2008) 528 F3d 603, 611);
- The prosecutor's sentencing remarks; or
- The trial judge's opinion about immigration consequences.

See, *e.g., Matter of Teixeira* (BIA 1996) 21 I&N Dec 316 (police report not included); *Matter of Pichardo-Sufren* (BIA 1996) 21 I&N Dec 330; *Matter of Short* (BIA 1989) 20 I&N Dec 136; *Matter of Mena, supra*; *Matter of Goodalle* (BIA 1967) 12 I&N Dec 106; *Matter of Cassisi* (BIA 1963) 10 I&N Dec 136. Nor does the record of conviction include subsequent testimony by the noncitizen; *e.g.,* deportability on the firearms ground was not shown even when the noncitizen testified in immigration proceedings that the unnamed weapon he was convicted of possessing was a gun. *Matter of Pichardo-Sufren, supra*. See *Morales v Gonzales* (9th Cir 2007) 478 F3d 972; *Garcia-Lopez v Ashcroft* (9th Cir 2003) 334 F3d 840, 844 n4.

In determining what part of a divisible offense a defendant was convicted of, the U.S. Supreme Court has held that the record of conviction which may be considered only includes "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or.... some comparable judicial record of this information." *Shepard v U.S.* (2005) 544 US 13, 20, 161 L Ed 2d 205, 125 S Ct 1254. A "comparable judicial record" includes a minute order. *U.S. v Snellenberger* (9th Cir 2008) 548 F3d 699.

The Ninth Circuit has held that abstracts of judgment may only be used to establish the fact of a conviction, as opposed to the nature of a conviction. See *U.S. v Navidad-Marcos* (9th Cir 2004) 367 F3d 903, 908. When a minute order of the entry of plea and the information are considered together, the critical phrase "as charged in the Information" must be used in the minute order to establish that the defendant necessarily pleaded guilty or no contest to the exact language of the complaint or information. *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072, 1087.

However, the Ninth Circuit held that a noncitizen's decision to incorporate the police report into his guilty plea made the report an explicit statement "in which the factual basis for the plea was confirmed by the defendant" and, in that circumstance, relying on the police report to establish the elements of the crime did not undermine the purposes of the court's limited modified categorical inquiry. *Suazo Perez v Mukasey* (9th Cir 2008) 512 F3d 1222, 1226. Defense counsel should therefore use a carefully worded factual admission by the defendant, which does not admit a fact bringing the conviction within a ground of deportation, instead of a stipulation to the police report, when the report contains facts that might bring a conviction within a ground of removal.

Ø **Note:** In some cases, defense attorneys will negotiate a plea to an amended charge that does not reveal which subsection of the statute was violated. For example, if a complaint charges the entire criminal section, and neither the judgment nor the sentencing record indicates which subsection was violated, a conviction of violating a divisible statute will have no immigration consequence when at least one part of the divisible statute does not fall within the grounds of deportability.

Ø Some immigration authorities have asserted that they can go beyond the record of conviction to determine deportability under the domestic violence ground in 8 USC §1227(a)(2)(E)(i). They assert that, because of the unusual wording of the domestic violence deportation ground, the required relationship to the victim, *e.g.,* current or ex-spouse or cohabitant, can be proved by information outside the record. See §§52.48-52.49. The Ninth Circuit has held that the court may look only at the record of conviction to determine whether a crime is one of "domestic violence." See *Tokatly v Ashcroft* (9th Cir 2004) 371 F3d 613, 624 (testimonial evidence in immigration proceedings was outside record of conviction; therefore, inadmissible to show that convictions for burglary and kidnapping were convictions of crimes of domestic violence). The Supreme Court, however, held in a criminal context that the domestic violence nature of a conviction could be determined by evidence outside the elements of conviction. *U.S. v Hayes* (2009) ___ US ___, 172 L Ed 2d 816, 129 S Ct 1079. This reasoning may be extended to the immigration context. In *Nijhawan v Holder* (2009) ___ US ___, 174 L Ed 2d 22, 129 S Ct 2294, the Court held that the categorical approach does not apply to the loss amount in a fraud/deceit aggravated felony case.

With respect to other grounds of deportation, the BIA has attempted to allow resorting to evidence outside the record of conviction. See *Matter of Gertsenshteyn* (BIA 2007) 24 I&N Dec 111, reversed and remanded by (2d Cir 2008) 544 F3d 137 (evidence outside the record can be used to establish "commercial advantage" for 8 USC §1101(a)(43)(K) aggravated felony).

Ø **Note:** Although the BIA decision in *Gertsenshteyn* was reversed by the Second Circuit, the BIA decision remains operative within the Ninth Circuit unless overruled, and the Ninth Circuit has not done so.

The U.S. Supreme Court has suggested that immigration counsel must do more than apply "legal imagination" to a state statute's language and must show

> a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition [of the deportation ground]. To show that realistic probability, an offender… must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v Duenas-Alvarez (2007) 549 US 183, 166 L Ed 2d 683, 693, 127 S Ct 815. The Ninth Circuit, however, has limited this doctrine, stating that when

> a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text.

U.S. v Grisel (9th Cir 2007) 488 F3d 844, 850 (en banc) (citation omitted).

Ø **Note:** In *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, the Attorney General held that in determining whether a conviction constitutes a crime of moral turpitude, the immigration court may consider any facts, even those outside the elements of the statute of conviction and outside the record of conviction. The Attorney General explicitly claimed that he had discretion to interpret the immigration statutes in this fashion, regardless of prior inconsistent case law from the federal circuits. While this decision is limited to the moral turpitude removal

grounds, and is being challenged, defense counsel should attempt to choose dispositions as to which there is no evidence that would bring it within the moral turpitude category. The circuits have not approved this analysis. See, *e.g., Jean-Louis v Attorney General* (3d Cir 2009) 582 F3d 462 (rejecting *Silva-Trevino*). While the Ninth Circuit has so far ignored *Silva-Trevino,* the immigration courts are following it.

A preponderance is insufficient to establish a fact by the "clear and convincing" evidence required for deportability. *Matter of Velazquez-Herrera* (BIA 2008) 24 I&N Dec 503.

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2. Dispositions That May Not Constitute Convictions

§52.27 a. Juvenile Court Dispositions

A disposition in juvenile proceedings does not constitute a conviction. *Matter of C.M.* (BIA 1953) 5 I&N Dec 327. On representing juveniles, see §52.4.

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§52.28 b. Appeal of Conviction Not Exhausted

A conviction is not final for immigration purposes unless direct appeals have been waived or exhausted or the appeal period has lapsed. *Pino v Landon* (1955) 349 US 901, 99 L Ed 1239, 75 S Ct 576; *Morales-Alvarado v INS* (9th Cir 1981) 655 F2d 172. In some cases, the need to avoid adverse immigration consequences permanently or for some period of time is an important factor in deciding whether to take a case to trial or to appeal a conviction. A late-filed appeal, however, will not delay the finality of a conviction. *Matter of Cardenas-Abreu* (BIA 2009) 24 I&N Dec 795.

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§52.29 c. Disposition Without Guilty Plea

Before a conviction exists for immigration purposes, a plea or finding of guilt must be made and some punishment or restraint imposed. 8 USC §1101(a)(48)(A). Diversions granted in 1996 and earlier did not involve a plea of guilty or no contest, and thus do not constitute "convictions" for immigration purposes. See *Matter of Grullon* (BIA 1989) 20 I&N Dec 12. After January 1, 1997, drug diversion via deferred entry of judgment under Pen C §1000 requires a guilty or no contest plea and therefore *does* constitute a conviction for immigration purposes even after dismissal. 8 USC §1101(a)(48)(A); *Matter of Punu* (BIA 1998) 22 I&N Dec 224. In most cases, expungement, *e.g.,* under Pen C §1203.4, will *not* eliminate the conviction for immigration purposes. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. However, there is a Ninth Circuit exception for a first conviction of simple possession and other minor drug offenses that are not forbidden under federal law; diversion dismissal or expungement *will* eliminate these convictions for immigration purposes so long as the defendant did not violate probation. See §52.14.

Even after 1996, however, courts continued to grant diversions with no plea in four circumstances:

(1) When courts were slow to learn of or implement the new procedure;

(2) When the offense occurred in 1996 or earlier, the Ex Post Facto Clause requires granting old-style diversion with no guilty plea (see *Collins v Youngblood* (1990) 497 US 37, 111 L Ed 2d 30, 110 S Ct 2715);

(3) When counties exercise their authority under the new diversion law to establish drug courts authorized to grant old-style diversions with no plea (Pen C §1000.5); and

(4) When diversion programs that pertain to other types of cases, *e.g.,* defendants with cognitive developmental disabilities under Pen C §1001.20, do not require a plea.

> Ø **Note:** For diversions granted in 1997 and later, counsel should check the record. If there was a plea, the diversion is a conviction for immigration purposes, at least until dismissal (depending on the offense of conviction). But if there was no plea, it is not. Dispositions under diversion, deferred adjudication, or first-offender programs in other states must be carefully analyzed to ascertain whether a conviction has occurred. For further discussion of diversion and deferred entry of judgment, see chap 27.

If the defendant would have been eligible for Federal First Offender Act (FFOA) treatment if prosecuted in federal court, diversion or expungement with a guilty plea does *not* constitute a conviction for immigration purposes. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 (first conviction of simple possession of any drug). See §52.14 for further discussion of this exception.

A plea of guilty or no contest with imposition of sentence suspended constitutes a conviction even though technically no judgment of conviction is entered. *Gutierrez v INS* (9th Cir 1963) 323 F2d 593.

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§52.30 3. Offenses Involving Controlled Substances

Sections 52.30-52.34 discuss *conviction* of controlled substance offenses. Drug addicts and abusers are deportable and inadmissible, even without a conviction. Likewise, those who the government has reason to believe are or were drug traffickers or their assistants are inadmissible, even without a conviction. See §52.50.

Ø **Note:** For advice in pleading drug cases, see Note titled "Drug Offenses" accompanying the California Chart on Immigration Consequences at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

Ø **Note:** Arresting agencies must notify the appropriate U.S. agency whenever they arrest a suspected noncitizen of violating Health & S C §§11350-11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368, or 11550. Health & S C §11369. See *Fonseca v Fong* (2008) 167 CA4th 922, 936, 84 CR3d 567 (Section 11369 is not preempted by federal law and "does not require any state or local law enforcement agency to independently determine whether an arrestee is a citizen of the United States, let alone whether he or she is present in the United States lawfully or unlawfully").

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§52.31 a. Controlled Substances Grounds of Deportability and Inadmissibility, and Bar to Good Moral Character

With few exceptions, drug convictions permanently destroy current lawful immigration status and prevent the person from obtaining that status in the future. A noncitizen who is convicted of an offense "relating to" controlled substances, or of attempt or conspiracy to commit such an offense, is inadmissible under 8 USC §1182(a)(2)(A)(i)(II), deportable under 8 USC §1227(a)(2)(B), and barred from establishing good moral character under 8 USC §1101(f). Even conviction of the most minor drug offense, such as presence in a place where drugs are used, will make a person deportable and inadmissible. *Matter of Hernandez-Ponce* (BIA 1988) 19 I&N Dec 613. Convictions under state or federal law as well as laws of other countries incur these penalties.

Many drug offenses are classed as aggravated felonies under 8 USC §1101(a)(43)(B), although there are important exceptions. See §52.32. Conviction of an aggravated felony brings additional severe penalties beyond making the person deportable and inadmissible, including subjecting an aggravated felon who reenters the United States after deportation to severe federal criminal sanctions. See §52.33.

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§52.32 b. Exceptions: Offenses That Are Not Classed as Controlled Substance Offenses for Immigration Purposes

Some dispositions either are not classed as controlled substance convictions at all for immigration purposes, or at least are not classed as aggravated felonies.

Specific controlled substance not identified. Controlled substances are defined in 21 USC §802 to include most illegal drugs as well as precursor and "essential" chemicals. The federal and state lists are not the same. California's list prohibits certain drugs that are not on the federal list. Unless the record of conviction specifies a drug that is prohibited by federal law, the conviction will not trigger any consequences as a conviction relating to a controlled substance. For example, if the record of conviction (consisting of the charging papers, plea or judgment, sentence, and legally defined elements of the offense) refers only to "a controlled substance" without specifying which substance, the conviction does not come within the grounds of deportability or inadmissibility relating to controlled substance convictions, and is not a controlled substance aggravated felony. *Matter of Paulus* (BIA 1965) 11 I&N Dec 274; *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072 (when record of conviction under Health & S C §11377(a) does not identify substance, there is no controlled substance conviction for immigration purposes); *S-Yong v Holder* (9th Cir 2009) 578 F3d 1169 (when record of conviction inconclusive regarding whether conviction under Health & S C §11378 involved controlled substance under federal list, no controlled-substance conviction in removal proceeding). The Health & Safety Code provisions governing possession of controlled substances also include some substances not found in the federal list, *e.g.,* apomorphine. On the record of conviction, see §§52.10, 52.26. Counsel frequently bargain to amend the charging papers to eliminate the identification of the controlled substance or to have the client plead to the exact language of the statute when the statute specifies drugs not on the federal list.

Driving under the influence of drugs, or alcohol and drugs, should not be ruled an offense "relating to a controlled substance" unless a specific controlled substance (that is on the federal list) is identified in the record of conviction, because the charge of driving while impaired may also arise as the result of legal or prescribed drugs as well as alcohol. Veh C §23152; *People v Keith* (1960) 184 CA2d Supp 884, 7 CR 613 (insulin). See Veh C §312 (definition of drug).

> Ø **Note:** The Ninth Circuit has held that possession of paraphernalia under an Arizona statute was an offense relating to a controlled substance, despite the lack of proof of the specific substance. *Luu-Le v INS* (9th Cir 2000) 224 F3d 911. In *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072, the court distinguished *Luu-Le* by saying that, at least when the offense charged is possession, the substance must be identified. In *Ramirez-Altamirano v Holder* (9th Cir 2009) 563 F3d 800, the court held that paraphernalia possession under Health & S C §11364(a) is an offense relating to a controlled substance even though the particular controlled substance is not identified. The BIA has also held that maintaining a place where drugs are used, or sale of a noncontrolled substance as a "look-alike" controlled substance "relates to" a controlled substance on the federal list even if no specific substance is identified in the record of conviction. *Matter of Martinez-Espinoza* (BIA 2009) 25 I&N Dec 118.

Accessory after the fact. Being an "accessory after the fact" (see 18 USC §3) to a controlled substances offense does not itself constitute a controlled substances offense. *Matter of Batista-Hernandez* (BIA 1997) 21 I&N Dec 955. The federal offense consists of aiding a criminal to escape arrest, trial, or punishment, and is so similar to the California offense defined in Pen C §32 that the same result should follow for the California offense. In some cases, vigorous negotiation can result in a plea bargain to being an accessory even when the original charge did not involve this act.

A plea to accessory after the fact can have other adverse consequences, however. It must result in a sentence of no more than 364 days of custody to avoid being considered an aggravated felony under the obstruction of justice provision. 8 USC §1101(a)(43)(S); *Matter of Batista-Hernandez, supra* (18 USC §3). The Board of Immigration Appeals (BIA) held that the federal crime of misprision of felony is not obstruction of justice and is not an aggravated felony even with a 1-year sentence. *Matter of Espinoza-Gonzalez* (BIA 1999) 22 I&N Dec 889. The government will likely assert that accessory after the fact is a crime of moral turpitude. Although the Ninth Circuit held that accessory after the

fact is categorically not a crime of moral turpitude (*Navarro-Lopez v Gonzales* (9th Cir 2007) 503 F3d 1063 (en banc), the BIA held that the similar misprision of felony is a crime of moral turpitude (*Matter of Robles-Urrea* (BIA 2006) 24 I&N Dec 22). After *Navarro-Lopez,* the Ninth Circuit held that it will defer to a published BIA decision holding that an offense involves moral turpitude, if the holding is reasonable. *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903 (en banc).

First offense simple possession (or less serious offense) that has received any rehabilitative treatment. Conviction of a first offense of simple possession of any controlled substance is not a "conviction" for immigration purposes if the offense has received any kind of rehabilitative treatment such as deferred adjudication under Pen C §1000 or dismissal of charges under Pen C §1203.4. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728. A first offense that is less serious than simple possession and that is not analogous to a federal felony also comes within this rule. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132 (expungement of conviction of possession of paraphernalia). Under federal statute, giving away a small amount of marijuana ought to receive the same treatment. See 21 USC §841(b)(4). However, if there was a preplea diversion under Pen C §1000 before its amendment as of January 1, 1997, then rehabilitative treatment under postplea diversion or Proposition 36, or dismissal under Pen C §1203.4, will constitute a "conviction" for immigration purposes. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. See §52.34. Rehabilitative relief will not eliminate the conviction for immigration purposes if the defendant violated probation before obtaining the rehabilitative relief. *Estrada v Holder* (9th Cir 2009) 560 F3d 1039.

Soliciting or offering to commit any drug offense. In *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, 909, the Ninth Circuit held that *offering* to sell, transport, or deliver a drug is not an aggravated felony. Thus, a plea to offering to transport, or a plea to the statute that takes advantage of the disjunctive "or," is not a plea to an aggravated felony. However, if a noncitizen with a solicitation of drug offense is arrested or returns from a trip abroad outside the Ninth Circuit, the noncitizen can be removed, since no circuit other than the Ninth Circuit recognizes this defense. *Matter of Zorilla-Vidal* (BIA 2009) 24 I&N Dec 768. See additional advice at §52.33. Even in the Ninth Circuit, offering to commit a drug offense under Health & S C §11352(a), §11360(a), or §11379(a) is a deportable offense "relating to" controlled substances because these statutes are specifically aimed at controlled substances. *Mielewczyk v Holder* (9th Cir 2009) 575 F3d 992. But the court stated that the generic solicitation statute in Pen C §653f(d) is not a deportable controlled-substance offense. 575 F3d at 998 (dicta). This plea will also make the person *inadmissible,* however, so that it is a bad option for an undocumented person or anyone who is applying for permanent residency, for example, through a family visa petition. Offering to sell drugs is also a crime of moral turpitude. For further discussion of pleas in drug cases, see Note "Drug Offenses" accompanying the Chart on Immigration Consequences for Selected California Offenses at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

> Ø **Warning:** It is very possible that legislation will erase the use of "offering" as a defense, and there is a small possibility that any such legislation would be retroactive. Therefore, the best practice is for defense practitioners, when possible, to use another alternative.

Exception for one conviction of simple possession of 30 grams or less of marijuana or hashish. Conviction of this offense is not a basis for deportability or a bar to establishing good moral character and is subject to discretionary waiver of inadmissibility under 8 USC §1182(h) if the person otherwise qualifies for the waiver. The plea or sentence transcript should contain a stipulation or finding that the quantity was 30 grams or less. Conviction of being under the influence of marijuana has the same benefit. See *Flores-Arellano v INS* (9th Cir 1993) 5 F3d 360. See also *Medina v Ashcroft* (9th Cir 2005) 393 F3d 1063 (Nevada conviction for attempting to be under influence of THC comes within this exception). If a paraphernalia offense, such as possession of a marijuana pipe, relates to an offense of simple possession of 30 grams or less of marijuana, the noncitizen will have the same benefit. *Matter of Martinez-Espinoza* (BIA 2009) 25 I&N Dec 118. For this reason, if a paraphernalia conviction is unavoidable and relates to a marijuana pipe, it is best to put that in the record of conviction. The BIA has ruled that the exception to deportability for simple possession of 30 grams or less of marijuana does not apply to a conviction under a state statute containing an element requiring that the offense occurred in a prison or other protected location, or when an enhancement increased the maximum punishment for possession, such as an enhancement for possession within a "drug-free zone." *Matter of Moncada-Servellon* (BIA 2007) 24 I&N Dec 62 (possession in prison); *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424 (enhancement for "drug-free zone").

The INS (now DHS) General Counsel ruled that conviction of simple possession of 30 grams or less of hashish or

other cannabis products comes within the marijuana exception to the deportation ground and can be waived under INA §212(h) (8 USC §1182(h)). In the context of the §212(h) waiver, the General Counsel recommended that the INS deny a waiver to one who possessed an amount of hashish equivalent to more than 30 grams of marijuana leaves. See INS General Counsel Legal Opinion 96-3 (Apr. 23, 1996), withdrawing previous INS General Counsel Legal Opinion 92-47 (Aug. 9, 1992). See also 21 USC §802(16), defining "marihuana" to include all parts of the cannabis plant, including hashish.

In delinquency proceedings. As always, a delinquency disposition is not a "conviction" for immigration purposes. A plea to possession, under the influence, etc., is not a basis for deportation or inadmissibility, nor is it a plea to an aggravated felony. However, defense counsel should conservatively assume that a delinquency plea to sale, possession for sale, or other trafficking offenses will make the person inadmissible, because it will provide DHS with "reason to believe" that the minor has been or assisted a trafficker. See §52.33. This may not be such a serious result for a permanent resident, but if the minor is undocumented, this plea is likely to permanently bar him or her from ever getting lawful immigration status.

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§52.33 c. Which Drug Offenses Are Aggravated Felonies

Ø **Note:** The strategies outlined in §§52.32 and 52.34 to prevent classification as a controlled substance offense also prevent classification as a controlled substance aggravated felony.

An aggravated felony subjects the person convicted of it to the penalties and restricted rights discussed in §52.44. The definition of aggravated felonies includes "illicit trafficking in a controlled substance… including a drug trafficking crime [defined under federal statute]." 8 USC §1101(a)(43)(B). A state or federal drug offense, or an attempt or conspiracy to commit such an offense (8 USC §1101(a)(43)(U)), will be considered an aggravated felony in immigration proceedings in the Ninth Circuit if:

- It is generally considered to be a trafficking offense (*e.g.,* sale or possession for sale); or
- It is listed in 18 USC §924(c)(2) or, if a state crime, is analogous to one of the federal crimes listed in that section that carries a potential sentence of 1 year or more.

Offer to commit an offense: **the *Rivera-Sanchez* rule.** In a highly significant and unanimous en banc decision, the Ninth Circuit ruled that *offering* to commit a trafficking offense is not an aggravated felony, and that therefore parts of Health & S C §11360(a) and similar offenses do not constitute a controlled-substance aggravated felony under 8 USC §1101(a)(43)(B). *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, 909. The court held that offering to commit an offense was not included in the statutory definition of aggravated felony, which cites only the principal offense, conspiracy, and attempt. 8 USC §1101(a)(48)(B). A noncitizen who is convicted of offering to sell, transport, or distribute a drug under Health & S C §11360(a), or who has a "record of conviction" (charging papers, plea or judgment, sentence, legally defined elements of the offense) that does not indicate whether the plea was to the principal act or to offering, has not been convicted of an aggravated felony. For further discussion of the record of conviction, see §§52.10, 52.26. The *Rivera-Sanchez* court's reasoning applies equally to Health & S C §11352(a); the court noted that the two statutes were nearly identical and overruled prior cases finding that conviction under §11352(a) necessarily constitutes an aggravated felony. See also Health & S C §11379(a).

Ø **Important practice tip:** The best plea in drug trafficking cases is transportation (not for gain) and, when possible, to an unidentified controlled substance. Although it was previously good practice to plead to "offer to transport" or "offer to sell or transport" because "offer to sell" was arguably not a deportable offense as a controlled-substance violation, "offering" to commit a drug offense has been held to be a deportable controlled-substance offense even though it is not an aggravated felony. *Mielewczyk v Holder* (9th Cir 2009) 575 F3d 992.

Note that offenses such as possession for sale under Health & S C §11351 do not include offering and therefore do not come within the beneficial *Rivera-Sanchez* rule. For this reason, it has been held ineffective assistance of counsel not to advise a noncitizen defendant of the immigration benefit of declining a plea to possession for sale and instead pleading up to offering to sell. *People v Bautista* (2004) 115 CA4th 229, 239, 8 CR3d 862.

Ø **Note:** Offering to commit a solicitation offense in violation of a controlled-substance statute such as Health & S C §11360, §11352, or §11379 and transportation of controlled substances under these sections are deportable controlled-substance offenses. See §52.32. A conviction of offering to commit a drug transaction also will establish inadmissibility on the ground that the noncitizen is a person who authorities have reason to believe is or has assisted a drug trafficker. In contrast, offering to transport may not have this disadvantage. See 8 USC §1182(a)(2)(C) and discussion in §52.50.

Simple possession as an aggravated felony. A state drug conviction is an aggravated felony if the offense is exactly analogous to a federal felony offense that appears in any of the federal drug statutes. See 8 USC §1101(a)(43)(B).

First conviction for simple possession. The Supreme Court held that a first conviction for simple possession of a controlled substance is not an aggravated felony, even if the state classifies the offense as a felony. *Lopez v Gonzales*

(2006) 549 US 47, 166 L Ed 2d 462, 127 S Ct 625. This affirmed the rule already in existence in the Ninth Circuit under *Ferreira v Ashcroft* (9th Cir 2004) 382 F3d 1045. The exception is that a first conviction for simple possession of more than five grams of cocaine base or any amount of flunitrazepam is an aggravated felony. See 21 USC §841(a).

Two or more possession convictions. In contrast to a first conviction for simple possession, defense counsel should view a *second* possession conviction as a very dangerous offense and should assume that it will be held to be an aggravated felony if the individual's status as a recidivist drug offender was charged in the second prosecution and admitted or found to be true. *Matter of Carachuri-Rosendo* (BIA 2007) 24 I&N Dec 382. The Supreme Court has granted certiorari in a case concerning this issue. *Carachuri-Rosendo v Holder* (2009) 175 L Ed 2d 617, 130 S Ct 1012. A second possession conviction also is dangerous because under *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, it cannot be eliminated for immigration purposes by deferred entry of judgment or other rehabilitative relief. Moreover, if the second offense occurred during the probation period for the first offense, the first conviction also cannot be eliminated by expungement under *Lujan-Armendariz*. See §52.14.

Ø **Practice tip:** To avoid an aggravated felony for two or more possession convictions, either plead to an offense other than a possession offense, or make sure that the prior possession offense(s) is not charged and admitted or found to be true in the second possession prosecution.

Ø **Note:** A noncitizen defendant's first conviction of simple possession, even of more than five grams of cocaine base or any amount of flunitrazepam, will not have an immigration consequence if it is successfully eliminated by "rehabilitative relief," such as withdrawal of plea under deferred entry of judgment, Proposition 36, or Pen C §1203.4. See *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, 735. However, a drug conviction is not eliminated for immigration purposes under Pen C §1203.4(a) until the expungement is actually granted; mere prospective eligibility for a later expungement does not remove the conviction. *Chavez-Perez v Ashcroft* (9th Cir 2004) 386 F3d 1284. It has not yet been determined if the same rule applies to deferred entry of judgment or Proposition 36. One limitation on rehabilitative relief is that a preplea diversion under the diversion law before its amendment on January 1, 1997, will disqualify a defendant from the benefits of a *Lujan* expungement just as though it had been a first drug conviction. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. Another limitation is that if there is a probation violation but the noncitizen ultimately receives rehabilitative relief, the conviction will not be eliminated for immigration purposes. *Estrada v Holder* (9th Cir 2009) 560 F3d 1039. See also §52.13. The second conviction of simple possession cannot be eliminated in this way for immigration purposes.

Minor drug offenses without federal analogues; **transportation.** Many minor drug offenses, *e.g.,* Health & S C §11550 (under the influence) and Pen C §647(f) (under the influence), do not involve trafficking and also have no federal analogue, and thus should not be held to be aggravated felonies. Further, conviction of a first offense less serious than simple possession, which is not a federal offense, can be eliminated by any state rehabilitative relief. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132. Transportation for personal use (*e.g.,* Health & S C §§11352(a), 11360(a), 11379(a)) has no exact federal analogue and for that reason has been held not to be an aggravated felony. *U.S. v Almazan-Becerra* (9th Cir 2007) 482 F3d 1085, 1089. Convictions for under the influence and transportation also will not be counted when calculating whether a noncitizen has a "first" possession conviction. However, transportation and the other minor drug offenses discussed here do subject the defendant to deportability and inadmissibility because they are offenses "relating to" drugs under 8 USC §1227(a)(2)(B). See §52.31. Offering to transport is not an aggravated felony under *U.S. v Rivera-Sanchez, supra*.

Cultivation of marijuana. Cultivation of marijuana (Health & S C §11358) is categorically an aggravated felony as a drug trafficking offense as an analogue to 21 USC §841(b)(1)(D). *U.S. v Reveles-Espinoza* (9th Cir 2008) 522 F3d 1044.

Prescription offenses; maintaining a place where drugs are sold. A conviction of obtaining a controlled substance by means of a fraudulent or forged prescription under Bus & P C §4324 or Health & S C §11173 or §11368 might be held to be an aggravated felony, because the offense might be held analogous to 21 USC §843(a)(3). A safer plea would be to a forgery offense that does not contain the drug element. Note, however, that a conviction of any kind of forgery is an aggravated felony if a 1-year sentence is imposed. See §52.41. Maintaining a place where drugs are sold might be held an aggravated felony as analogous to a federal felony, while being in a place where drugs are used

would not be.

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§52.34 d. Strategy

Defense counsel should try to prevent the client from being convicted of any offense—even a minor one—related to controlled substances. If that option is not possible, the following strategies provide some protection under current law, but this area of law changes rapidly and often against the interests of the noncitizen. For more detailed instructions about dealing with controlled substance charges, see Note "Drug Offenses" accompanying the Quick Reference Chart for Determining Immigration Consequences of Selected California Offenses (http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php), and extensive discussion in Brady et al., Defending Immigrants, chap 3 (10th ed 2008). Note that some of the following strategies avoid aggravated felon status but still leave the person deportable and inadmissible for having a drug conviction.

"Rehabilitative relief," such as withdrawal of a plea under deferred entry of judgment under Pen C §1000, §1203.4 or Proposition 36, will eliminate the immigration effect of a *first* conviction for certain minor drug offenses. These include a first offense, whether felony or misdemeanor, of simple possession of any controlled substance (*Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, 735), or a first offense that is less serious than simple possession and that is not analogous to a federal felony, such as being under the influence or possession of paraphernalia (*Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132, 1137 (expungement of conviction for possession of paraphernalia)). A first conviction of giving away a small amount of marijuana ought to receive the same treatment. See 21 USC §841(b)(4). However, rehabilitative relief will *not* eliminate the effect of a conviction for transportation for personal use, or for a second drug conviction of any kind, and will also not eliminate the effect of a conviction if there was a prior preplea diversion. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. Nor will it eliminate the conviction if there was violation of probation. *Estrada v Holder* (9th Cir 2009) 560 F3d 1039. Counsel must make sure that the instant conviction is actually the defendant's first conviction *in any jurisdiction* and that there was no prior preplea diversion.

The conviction retains its immigration effect until it is actually eliminated under state law, *e.g.*, until probation or other requirements are completed and the plea is withdrawn. *Chavez-Perez v Ashcroft* (9th Cir 2004) 386 F3d 1284, 1290. Counsel can protect a noncitizen defendant by structuring a disposition that does not leave the defendant exposed. This could be accomplished, for example, through an informal arrangement for a deferred prosecution in which the case is continued without a plea while the defendant fulfills certain conditions, with the understanding that the prosecution will consider dropping the charges based on good performance. Alternatively, if possible, a very short probation period or an arrangement for probation to end on release from criminal incarceration would permit the conviction to be expunged quickly under §1203.4. Once a conviction is so treated, the original guilty plea should no longer constitute a formal "admission" of a drug offense that causes inadmissibility under 8 USC §1182(a)(2)(A)(i). See, *e.g.*, *Matter of E.V.* (BIA 1953) 5 I&N Dec 194.

A first conviction for simple possession is a deportable offense, but not an aggravated felony unless it is for possession of flunitrazepam or more than five grams of cocaine base. A first conviction can be eliminated for immigration purposes by rehabilitative relief under *Lujan-Armendariz v INS, supra*. A second conviction for possession will probably be deemed an aggravated felony if it is pleaded as a specific-drug recidivist enhancement and proved or admitted; the second conviction then cannot be eliminated for immigration purposes except by vacation for cause. However, if the first conviction was or could be eliminated by rehabilitative relief, arguably the second conviction becomes the "first" for purposes of defining an aggravated felony. See §52.33.

A very good alternative is to negotiate a conviction of accessory after the fact for a controlled substance offense with less than a 1-year sentence imposed (*Matter of Batista-Hernandez* (BIA 1997) 21 I&N Dec 955). This is not a drug conviction involving deportability or inadmissibility, or an aggravated felony. There is, however, the danger that DHS will allege that accessory after the fact, when the record shows that the principal offense involved drug *trafficking,* makes the defendant inadmissible by providing "reason to believe" he or she assisted in trafficking; therefore this is not an optional plea for an undocumented person. See §52.50. But this offense may be a crime of moral turpitude, since the BIA held that a similar offense of misprision of felony is a crime of moral turpitude. *Matter of Robles-Urrea* (BIA 2006) 24 I&N Dec 22. Although the Ninth Circuit held that accessory after the fact is not a crime of moral turpitude (*Navarro-*

Lopez v Gonzales (9th Cir 2007) 503 F3d 1063 (en banc)), a subsequent decision held that the court would defer to BIA published decisions regarding whether a crime is deemed a crime of moral turpitude as long as the decision is reasonable. *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903 (en banc).

Another very good alternative is to ensure that the record of conviction (charging papers, plea or judgment, sentence, definition of the offense) does not indicate the specific controlled substance involved. The reason is that California statutes concerning "controlled substances," such as Health & S C §§11350-11351, 11352(a), 11377-11378, 11379(a), cover substances that are not defined as controlled substances under the federal Controlled Substances Act and therefore are not included in the immigration definition. Thus, in evaluating a conviction under a broadly defined statute such as Health & S C §11377, DHS cannot prove that the offense involved a federally controlled substance unless the substance is identified on the record. See *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072; *Matter of Paulus* (BIA 1965) 11 I&N Dec 274. A plea to an original or amended charge phrased in the language of the statute or to "a controlled substance on the state list of controlled substances" will avoid identification of the substance and avoid deportability and inadmissibility for a drug offense.

Ø **Practice tip:** To avoid deportation or inadmissibility for any overinclusive or divisible statute, consider entering a no contest plea under *People v West* (1970) 3 C3d 595, 91 CR 385, without any admission that the defendant is pleading guilty "as charged" in the complaint and without admitting any facts. The Ninth Circuit held that "unless the record of the plea proceeding reflects that the defendant admitted to facts, a *West* plea, without more, does not establish the requisite factual predicate." *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072, 1090 (en banc). In *Vidal,* the defendant's waiver-of-rights form specified "*People v. West*" in the section requesting a description of "facts as to each charge" to which he pleaded no contest.

Conviction under Health & S C §11352(a), §11360(a), or §11379(a) is not an aggravated felony if the conviction is for offering to commit the act or for transportation. A very good plea would rely on the language of the statute in the disjunctive, leaving open the possibility that the offense involved either transportation or offering to commit some offense (including, if possible, transportation). But "offer to sell" and "transportation" are still *deportable offenses* if the controlled substance is identified and it is on the federal list. For this reason, it is good to have a client plead to "offer to sell or transport" or "transportation" (not for gain) of a controlled substance that is an *unidentified* controlled substance or a "controlled substance on the state list of controlled substances." Such a plea would be a nondeportable drug offense as long as there was no admission in the "record of conviction" regarding what the drug was.

Ø **Practice tip:** Possession for sale will be held to be an aggravated felony. When it will not be possible to plead to a lesser offense, counsel should advise the noncitizen defendant of the option of pleading up to transportation or offering to sell, offenses that have more serious criminal consequences but are not aggravated felonies. See *People v Bautista* (2004) 115 CA4th 229, 237, 8 CR3d 862 (failure to try to negotiate agreement in which client pleaded guilty to offering to sell deemed ineffective assistance of counsel). Even better, when possible, counsel should make every attempt to plead to a drug offense without identification of the controlled substance, which is not a deportable offense at all.

Ø **Warning:** A fact contained in a sentence enhancement that serves to increase the maximum penalty for a crime and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, will be treated as an element of the underlying offense. *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424. For example, to avoid an aggravated felony drug trafficking offense, do not have a client admit an enhancement based on sale, manufacturing, or possession for sale, among other things.

Some dispositions do not constitute a conviction for immigration purposes. See §§52.27-52.29. A conviction that is up on direct appeal is not a conviction for immigration purposes. Removal proceedings based on the conviction cannot be brought until direct appeal is waived or exhausted. A disposition in juvenile proceedings is not a conviction for immigration purposes.

Ø **Practice tip:** When a plausible basis exists for a motion to suppress evidence, counsel should consider filing the motion if conviction would render a client deportable. If the suppression motion fails in the trial court, the defendant can plead to the offense and still pursue an appeal under Pen C §1538.5(m). If the appeal is still pending when the noncitizen's sentence is up, any removal proceeding would be subject to a motion to terminate

by immigration counsel because the conviction is not "final." If this is the noncitizen's only deportable offense, DHS will be unable to further detain the noncitizen and proceed with removal proceedings while the appeal is pending.

In juvenile court, counsel should seek to obtain a finding of possession only, not of sale or possession for sale, because sale or possession for sale might give rise to a "reason to believe" that the juvenile is or was a drug trafficker even though no conviction exists for immigration purpose, thereby making the juvenile inadmissible. Preplea diversion (under the law in effect before Jan. 1, 1997, or in a county that has established a drug court program under Pen C §1000.5) is not a conviction, but a deferred adjudication when a guilty plea was taken is a conviction for immigration purposes (unless it is a first conviction for one of the minor offenses that can be eliminated for immigration purposes by state rehabilitative relief under *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728).

If a first offense involving simple possession of a small amount of marijuana or hashish is involved, counsel should obtain a stipulation on the record that it was less than 30 grams, to avoid removability and preserve eligibility for a waiver of inadmissibility. See 8 USC §§1227(a)(2)(B), 1182(h). See also §52.32.

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4. Offenses Involving Firearms or Destructive Devices

§52.35 a. Firearms Ground of Deportability; Definition of Firearm and Destructive Device

Conviction of almost any offense containing an element relating to firearms is a basis for deportability. A noncitizen is deportable if convicted in the United States "under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying… any weapon, part, or accessory which is a firearm or destructive device" or for conspiracy or attempt to commit such an act. 8 USC §1227(a)(2)(C). There is no corresponding ground of inadmissibility.

Defined in 18 USC §921(a)(3)-(4), "firearm" includes all guns and other firearms, frames and receivers, mufflers and silencers; "destructive device" includes bombs, grenades, rockets, missiles, mines or similar items, and parts used to convert them. An exception is made for antique firearms and devices not intended to be used as weapons. Conviction of conspiracy or attempt to commit a firearms offense triggers deportability under 8 USC §1227(a)(2), regardless of the date of the conviction. *Matter of Saint John* (BIA 1996) 21 I&N Dec 593.

Thus, conviction of even minor firearms offenses that do not involve violent behavior, such as possessing an unregistered firearm, are a basis for deportability. Firearms offenses that do involve violence may have immigration consequences beyond the firearms ground of deportability. For example, an assault with intent to commit great bodily harm is a crime involving moral turpitude. See discussion in §§52.38-52.40. A "crime of violence" with a 1-year sentence imposed is an aggravated felony. See discussion in §52.47.

Finally, some firearms offenses, notably "trafficking in firearms" and "ex-felon in possession of a firearm," are aggravated felonies. See discussion in §52.36. Alternative pleas that avoid immigration consequences are discussed in §52.37.

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§52.36 b. Firearms Offenses That Are Aggravated Felonies

Any state or federal offense involving trafficking in firearms or destructive devices is an aggravated felony under 8 USC §1101(a)(43)(C). Under 8 USC §1101(a)(43)(E), a host of specific federal offenses involving firearms and destructive devices are aggravated felonies:

- 18 USC §842(h) (receiving stolen explosives);
- 18 USC §842(i) (shipping or receiving explosives in interstate or foreign commerce by indictee, felon, fugitive, addict, mental defective, or committee);
- 18 USC §844(d) (transporting or receiving explosives in interstate or foreign commerce with intent to injure, intimidate, or damage property);
- 18 USC §844(e) (communication of threat or false information about attempt to injure, intimidate, or damage property by fire or explosive);
- 18 USC §844(f) (malicious damage by fire or explosive of property of United States or organization receiving federal funds);
- 18 USC §844(g) (illegal possession of explosive in airport);
- 18 USC §844(h) (use or carrying of explosive in committing federal felony);
- 18 USC §844(i) (malicious destruction by fire or explosive of property used in or affecting commerce);
- 18 USC §922(g)(1)-(5) (possession of firearms or ammunition by felon, fugitive, addict, mental defective, committee, alien unlawfully in United States, dishonorable dischargee, or person who renounced U.S. citizenship);
- 18 USC §922(j) (receiving stolen arms or ammunition);
- 18 USC §922(n) (shipping or receiving arms or ammunition by felony indictee);
- 18 USC §922(o) (possession of machine gun);
- 18 USC §922(p) (possession of undetectable firearm);
- 18 USC §922(r) (assembly of illegal rifle or shotgun from imported parts);
- 18 USC §924(b) (shipping or receipt of firearm or ammunition with intent to use in commission of felony); and
- 18 USC §924(h) (transfer of firearm with knowledge it will be used to commit crime of violence or drug trafficking offense).

See also IRC §5861 (*e.g.,* failure to pay firearms tax, possession of unregistered firearm or one with altered serial number).

For a state offense to be held analogous to one of the listed federal offenses and therefore to be held to be an aggravated felony, the offense must have exactly the same substantive elements as the federal offense (or, if the state offense is broader, the official record of conviction must demonstrate that the conviction at issue was for an offense described in the federal law). *U.S. v Sandoval-Barajas* (9th Cir 2000) 206 F3d 853 (Washington state offense, possession of a firearm by a noncitizen, is not an aggravated felony, because it is broader than cited federal offense, possession of a firearm by noncitizen in unlawful status). See discussion of record of conviction in §§52.10-52.26. The state offense, however, need not include federal jurisdictional elements in the analogous federal offense, *e.g.,* crossing state lines. *U.S. v Castillo-Rivera* (9th Cir 2001) 244 F3d 1020 (despite lack of interstate commerce element, felon in possession of firearm under Pen C §12021 is sufficiently similar to 18 USC §922(g)(1) to be aggravated felony under federal sentencing guidelines); *Matter of Vasquez-Muniz* (BIA 2002) 23 I&N Dec 207 (following *Castillo-Rivera*). However, Pen C §12021(a) is a divisible offense because 18 USC §922(g)(1) requires a prior felony conviction and §12021(a) includes the possession of a firearm by an individual convicted of certain misdemeanors and by "anyone who is addicted to the use of any narcotic drug." To the extent that a defendant pleads to a complaint worded in the exact language of the statute in the disjunctive or to those discrete offenses, a §12021(a) conviction will not be deemed an aggravated felony, but it will still be a deportable offense as a firearms offense.

Other than a §12021(a) conviction with the record showing that the defendant had a prior felony, most common

California firearms offenses do not appear to have an exact federal substantative analogue. Some less common California offenses, such as possession of a machine gun, may have a federal analogue. Counsel should review the listed federal offenses to identify whether the state offense charged may be an aggravated felony. Again, any offense relating to trafficking in firearms or destructive devices may be held to be an aggravated felony, even if it is not exactly analogous to a federal offense.

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§52.37 c. Strategy

Conviction of any offense relating to firearms will make a noncitizen deportable, but not inadmissible. Undocumented persons may not have as a high priority avoiding the grounds of deportability, because they are already deportable for lack of lawful status. In contrast, a lawful permanent resident will lose lawful status and face removal if convicted of even the most minor firearms offense such as possession of an unregistered weapon.

A well-constructed plea to Pen C §12020(a) may avoid this ground. This is a divisible statute that includes offenses that do not relate to firearms, *e.g.,* possession of a blackjack in Pen C §12020(a)(1) or carrying a concealed dirk or dagger under Pen C §12020(a)(4). If the record of conviction does not establish that a firearm was involved in the offense, the conviction does not trigger deportability on the firearms ground. Thus a defendant could plead guilty to possessing a specific weapon that was not a firearm, or to possession of an "illegal weapon" listed in §12020(a) or (a)(1), as long as the record of conviction (charging papers, judgment or plea colloquy and sentence) does not state that the weapon was a gun or an explosive. This particular plea would have no other immigration consequences.

Penal Code §245(a) also is a divisible statute for purposes of the firearms ground. Penal Code §245(a)(1) penalizes assault with weapons other than a firearm, and Pen C §245(a)(2) penalizes assault with a firearm. If the defendant pleads to §245(a)(1), or if the record of conviction does not reveal whether the offense involved was (a)(1) or (a)(2), the conviction does not make the defendant deportable on the firearms ground. This offense, however, is likely to be deemed an aggravated felony as a crime of violence if the sentence imposed is 1 year or more and the offense is a crime involving moral turpitude.

A conviction under a statute that does not explicitly involve a weapon does not incur deportability under the firearms ground even if the record reveals that a firearm was used. *Matter of Perez-Contreras* (BIA 1992) 20 I&N Dec 615 (conviction under Washington statute of "criminal negligence causing… substantial… pain" not firearms offense, although record showed that defendant shot victim). Conviction under a statute that has as an element use of a weapon, but not necessarily a firearm, is not a basis for deportation on the firearms ground—especially if the record of conviction (charge, plea, verdict, sentence) is cleared of any reference to firearm use. *Matter of Madrigal-Calvo* (BIA 1996) 21 I&N Dec 323; *Matter of Teixeira* (BIA 1996) 21 I&N Dec 316; *Matter of Pichardo-Sufren* (BIA 1996) 21 I&N Dec 330.

Ø **Practice tip:** If the record of conviction (complaint, judgment, plea colloquy, sentencing hearing and documents) does not establish whether the firearm is an antique weapon or not, there is a chance that the defendant can avoid deportability since the "antique firearm exception" has gained traction in unpublished Board of Immigration Appeal decisions in 2008. However, the use of other strategies mentioned above are the first line of defense for a noncitizen defendant faced with a firearms offense. See §52.35 for the antique firearm exception.

Ø **Warning:** A fact contained in a sentencing enhancement that serves to increase the maximum penalty and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, is treated as an element of the underlying offense. *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424. To avoid deportability for a firearms offense, avoid any sentence enhancement dealing with firearms or explosive devices.

Expungement under Pen C §1203.4 does not eliminate a firearms conviction for immigration purposes. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. Vacation of judgment for cause does.

Conviction of accessory after the fact is not a firearms offense. However, if a sentence of 1 year or more is imposed, the conviction is an aggravated felony. See §52.34. Accessory after the fact may be considered a crime of moral turpitude, although this issue is still being litigated. See §52.32.

Some relief from removal is available to qualified persons despite being deportable under the firearms ground. A person who could immigrate through a relative's or employer's visa petition is still eligible to apply for an adjustment of status or, possibly, immigration through consular processing. *Matter of Gabryelsky* (BIA 1993) 20 I&N Dec 750; *Matter of Rainford* (BIA 1992) 20 I&N Dec 598.

For removal proceedings filed on or after April 1, 1997, the immigration court has discretionary power to grant

cancellation of removal to permanent residents under 8 USC §1229b if the conditions are met. See §52.55. Cancellation is barred if there is an aggravated felony conviction. Deportability on the firearms ground does not "stop the clock" for purposes of establishing residency for cancellation. For more information on firearms convictions and strategies, see Brady et al., Defending Immigrant §§6.1, 9.18, 11.10 (10th ed 2008).

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5. Crime Involving Moral Turpitude

§52.38 a. Definition

Many offenses, both minor and serious, are held to be crimes involving moral turpitude and carry serious immigration consequences concerning inadmissibility (8 USC §1182(a)(2)(A)), deportability (8 USC §1227(a)(2)(A)(i)), and establishing good moral character (8 USC §1101(f)(3)). See §52.39. The term "crime of moral turpitude" (sometimes called a "turpitudinous" crime) is defined by federal immigration law, and is different from the same term as used in California criminal law to determine whether a witness may be impeached with a prior conviction.

Ø **Note:** This section discusses how to determine whether an offense involves moral turpitude. Whether a moral turpitude conviction will cause deportability or inadmissibility depends on the number of moral turpitude convictions, the actual and potential sentence, and the date of commission or conviction of the offense relative to the person's admission to the United States. See §52.39.

The term "crime involving moral turpitude" has been defined by the Attorney General as "a reprehensible act with some form of scienter." *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, 706. Most regulatory offenses and crimes with a mens rea of negligence usually will not be considered crimes of moral turpitude. The definition does not depend on whether the offense is classified as a misdemeanor or felony or on the severity of the punishment. (However, whether a particular moral turpitude conviction will bring immigration consequences may depend on such factors; see §52.39.) On one hand, murder, rape, most sexual offenses including sex with a minor, drug trafficking offenses, voluntary manslaughter, robbery, burglary with intent to commit theft, burglary when there is unlawful entry, theft (grand or petty, when there is an intent to permanently deprive), arson, aggravated forms of assault, crimes that have a specific intent to defraud, and forgery have consistently been held to involve moral turpitude. On the other hand, involuntary manslaughter, simple assault or battery, and driving under the influence (when no injury occurs) have not. A crime of moral turpitude includes a conviction that requires proof that the defendant willfully or knowingly committed an act that causes "significant societal harm" or reprehensible conduct that is committed intentionally or with willfulness or recklessness. *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, 706 n5. For discussion of *Silva-Trevino,* see Tooby & Kesselbrenner, *Living Under Silva-Trevino* at http://www.ilw.com/articles/2009,0409-tooby.shtm. For further discussion of specific crimes, see chart at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Notes Accompanying Quick Reference Chart; Brady et al., Defending Immigrants, App 4-A, Table: Crimes Involving Moral Turpitude Under the California Penal Code (10th ed 2008) (annotated chart of 70 common violations of the California Penal Code); Tooby, Crimes of Moral Turpitude (2008) (federal and out-of-state convictions); Tooby, Criminal Defense of Immigrants, App C (2003) (comprehensive list including federal and out-of-state convictions); Kesselbrenner & Rosenberg, Immigration Law and Crimes, App E (2008). See also Anno, 23 ALR Fed 480 (what constitutes "crime involving moral turpitude").

Evidence outside "record of conviction" can be introduced by government. Before *Matter of Silva-Trevino, supra,* facts outside the formal "record of conviction" (complaint, judgment, plea transcript, sentencing document) could not be considered when determining whether a conviction constituted a crime of moral turpitude. Reversing nearly a century of precedent, the Attorney General held in *Silva-Trevino* that in making that determination, the immigration court may consider any facts, even those outside the elements of the statute of conviction and outside the record of conviction to determine if an offense is a crime of moral turpitude. It is unclear if the Ninth Circuit will find this decision controlling. The Attorney General outlined the new crime of moral turpitude analysis as follows:

> In short, to determine whether an alien's prior conviction triggers application of the Act's moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez;* (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator

determines is necessary or appropriate to resolve accurately the moral turpitude question.

Matter of Silva-Trevino (AG 2008) 24 I&N Dec 687, 704.

In *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903, 907 n6 (en banc), the Ninth Circuit specifically stated that it was not ruling on *Silva-Trevino,* because the issue did not arise. Until there is more clarity, criminal defense counsel should attempt to choose dispositions for which there is no evidence that would bring the offense within the moral turpitude category. See §52.40 for strategy.

Ninth Circuit will defer to published BIA decisions on whether particular offense is crime of moral turpitude so long as decision is reasonable. A crime is decided to be one of moral turpitude by case law of the Board of Immigration Appeals (BIA) and the U.S. Courts of Appeals. The Ninth Circuit will defer to the BIA when it issues a published decision that an offense is a crime of moral turpitude, unless the decision is unreasonable. *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903 (en banc). This means that many prior Ninth Circuit decisions holding that an offense is not a crime of moral turpitude may no longer apply. Ninth Circuit cases that may be affected by *Marmolejo-Campos* and that may no longer be good law are too numerous to list but include the following:

- *Quintero-Salazar v Keisler* (9th Cir 2007) 506 F3d 688 (consensual unlawful sexual intercourse between minor under 16 and adult at least 4 years older (Pen C §261.5(d)) is not categorically a crime of moral turpitude). Compare with *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687 (any crime involving intentional sexual contact with minor is crime of moral turpitude).
- *Plasencia-Ayala v Mukasey* (9th Cir 2008) 516 F3d 738, 747, overruled on other grounds in *Marmalejo-Campos v Holder* (9th Cir 2009) 558 F3d 903, 911 (failure to register as a sex offender under Nevada statute is not crime of moral turpitude). Compare with *Matter of Tobar-Lobo* (BIA 2007) 24 I&N Dec 143.
- *Nicanor-Romero v Mukasey* (9th Cir 2008) 523 F3d 992, overruled on other grounds in *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903, 911 (annoying or molesting a child under Pen C §647.6(a) not categorically crime of moral turpitude). Compare with *Silva-Trevino, supra,* under which this offense might be considered "sex with a minor."
- *Cuevas-Gaspar v Gonzales* (9th Cir 2005) 430 F3d 1013 (burglary with intent to commit any felony not categorically a crime of moral turpitude). Compare with *Matter of Louissaint* (BIA 2009) 24 I&N Dec 754 (unlawful entering into or remaining in dwelling with intent to commit any crime is crime of moral turpitude).
- *Navarro-Lopez v Gonzales* (9th Cir 2007) 503 F3d 1063 (en banc) (Pen C §32 (accessory after the fact) is categorically not crime of moral turpitude). Compare with *Matter of Robles-Urrea* (BIA 2006) 24 I&N Dec 22 (misprision of felony is crime of moral turpitude).

Ø **Warning:** Counsel should not rely on a chart stating whether a crime is a crime of moral turpitude, because the chart may rely on Ninth Circuit law that may conflict with or be overruled by BIA decisions under *Marmelejo-Campos, supra,* and, under *Silva-Trevino,* an immigration judge can now go outside the record of conviction to determine if the offense involves moral turpitude.

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§52.39 b. Consequences of Conviction or Admission of Crime Involving Moral Turpitude; Remedies

Deportability. A noncitizen is deportable under 8 USC §1227(a)(2)(A) if, after admission to the United States, he or she is convicted of:

- Two crimes involving moral turpitude (CMT) not arising from a single scheme of misconduct (8 USC §1227(a)(2)(A)(ii)) (see, *e.g., Gonzalez-Sandoval v INS* (9th Cir 1990) 910 F2d 614; see also 19 ALR Fed 598); or
- One crime involving moral turpitude when the person committed the offense within 5 years after admission if the possible sentence was 1 year or more (8 USC §1227(a)(2)(A)(i)).

Example of two crimes of moral turpitude as ground for deportation. Jane obtained her "green card" in 1967. She then had two petty theft convictions, one in 1968 and one in 2008. Jane is deportable for two crimes of moral turpitude committed at any time after admission. If Jane's attorney had negotiated a petty theft infraction under Pen C §490.1(a) or a trespass, Jane would not be deportable under this ground.

Example of one crime of moral turpitude within 5 years of admission with potential 1-year sentence as ground for deportation. John obtained his "green card" on January 20, 2003. He was charged with violation of Pen C §484e(a) (theft of access card), a misdemeanor, committed on January 20, 2008, and he was convicted the next day on January 21, 2008. Because his crime was one of moral turpitude committed within 5 years of admission with a potential sentence of 1 year or more, conviction of this offense makes John deportable even if he receives no actual jail time and even though his conviction occurred more than 5 years after admission. If John's attorney had negotiated a disposition to an offense with a maximum potential sentence of less than 1 year, such as attempted misdemeanor theft under Pen C §484g, the conviction would not make John deportable under this ground.

Reduction to a misdemeanor and deportability. Many offenses become aggravated felonies if a 1-year sentence is *imposed*. See §52.42. In contrast, convictions trigger consequences under the moral turpitude deportability and inadmissibility grounds partly on the basis of *potential* sentence. A first conviction for a moral turpitude offense that was committed within 5 years of admission will make a permanent resident deportable if it has a *potential sentence of 1 year or more*. Therefore, reducing a "wobbler" to a misdemeanor under Pen C §17(b) will not help the client avoid deportability, because a misdemeanor still has a potential sentence of 1 year. However, conviction for attempt to commit a wobbler offense, which then is reduced to a misdemeanor, will have a potential sentence of only 6 months and will avoid deportability on the grounds of moral turpitude. However, reduction to a misdemeanor has a different effect on inadmissibility on the grounds of moral turpitude.

> Ø **Practice tip:** Conviction of petty theft within 5 years of admission will not be a deportable offense because the maximum punishment for petty theft is 6 months under Pen C §490. But a petty theft with a prior conviction under Pen C §666 would have a possible 1-year sentence if the Ninth Circuit follows *U.S. v Rodriquez* (2008) 553 US 377, 170 L Ed 2d 719, 128 S Ct 1783, in which the Supreme Court held that, in a criminal law context, the "maximum term of imprisonment prescribed by law" includes a recidivist sentence enhancement that may be imposed on the defendant.

Reduction to a misdemeanor and inadmissibility. Because the one CMT must have been committed after admission to trigger deportability, a person who committed the CMT before admission (and was admitted because the offense was waived or was not a basis for inadmissibility at the time) is not deportable. Whether an admission has occurred, or whether a new admission has possibly occurred for purposes of restarting the 5-year clock, can be a complex question; in case of doubt, consult with an immigration expert. "Admission" is defined as lawful entry into the United States with inspection. 8 USC §1101(a)(13)(A). A person who entered surreptitiously without inspection at a border point has not been admitted, but a person who entered with inspection by means of a tourist visa, permanent resident card, or other document has been admitted, even if fraud was committed. In some cases lawful permanent residents who return from a trip abroad do not make a new "admission" (8 USC §1101(a)(13)(C)), and in some cases a

person who "adjusts status" to permanent residency at a government office within the United States is deemed to be making an admission (see *Shivaraman v Ashcroft* (9th Cir 2004) 360 F3d 1142; see also §52.19). Immigration counsel should be consulted when there is a question about when or whether a client has been "admitted" to the country.

Inadmissibility; exceptions. A noncitizen is inadmissible if convicted either before or after admission to the United States of one crime involving moral turpitude (8 USC §1182(a)(2)(A)(i)), unless the event comes within the petty-offense or youthful-offender exception. 8 USC §1182(a)(2)(A)(ii).

Under the important petty-offense exception, a noncitizen is not inadmissible if he or she committed only one crime involving moral turpitude, the sentence actually imposed was 6 months or less, and the maximum possible sentence for the offense was no more than 1 year. 8 USC §1182(a)(2)(A)(ii)(II). A previous moral turpitude conviction, even if vacated, may destroy eligibility for the exception, if the conviction is vacated on technical grounds. *Matter of S.R.* (BIA 1957) 7 I&N Dec 495. Because the offense cannot have a maximum penalty of more than 1 year, a person convicted of a felony, with imposition of sentence suspended, is *not* eligible for the petty-offense exception and will be found inadmissible. That person will be eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17, because the offense then has a maximum sentence of only 1 year. *La Farga v INS* (9th Cir 1999) 170 F3d 1213. To qualify for the petty-offense exception, the sentence imposed must be no greater than 6 months' incarceration, either as part of a judgment (even if execution is suspended) or as a condition of probation. This refers to the nominal sentence ordered by the court, rather than the actual time incarcerated. See §52.10.

The youthful-offender exception to the CMT ground of inadmissibility benefits youths who were tried as adults. (Because a juvenile delinquency disposition is not a conviction of a crime, youths in delinquency proceedings do not need this exception.) It provides that a person who committed one moral turpitude offense while under the age of 18 is not inadmissible if the act and release from resulting imprisonment took place more than 5 years before the current application. 8 USC §1182(a)(2)(A)(ii)(I).

Formal admission of a crime involving moral turpitude. A formal admission of a crime involving moral turpitude, even without a conviction, is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I). It might appear that a plea of guilty, as an admission, would make a defendant inadmissible even if the conviction were eliminated. However, if a court has disposed of charges in a way that does not amount to a conviction (*e.g.,* dismissing the charges, vacating the conviction, delinquency disposition), the DHS must accept this order as binding on both the admission (plea) and the conviction. See *Matter of E.V.* (BIA 1953) 5 I&N Dec 194. Moreover, the DHS faces many technical difficulties in attempting to remove someone on the basis of an admission as opposed to a conviction. See Kesselbrenner & Rosenberg, Immigration Law and Crimes §3.2 (2008).

Postconviction relief. An expungement under Pen C §1203.4 will not eliminate the immigration effects of a conviction of a moral turpitude offense. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. Vacation of judgment for cause will. Neither a delinquency disposition nor infractions will constitute a basis for deportability.

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§52.40 c. Strategy

Counsel should seek a plea to an offense with a scienter element less than "specific intent, deliberateness, willfulness, or recklessness." See *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687. Examples are mens rea of mere negligence or strict liability, as well as forms of "recklessness" that amount to no more than gross negligence, and nearly all "regulatory offenses" punishing conduct not itself reprehensible other than being unauthorized. 24 I&N Dec at 689 n1.

When a statute is divisible, *i.e.,* one part defining a crime of moral turpitude and another part defining an offense that is not a crime of moral turpitude, the defendant should plead to the specific part of the statute that is not a crime of moral turpitude. A vague record of conviction will allow an immigration court to take testimony that often would be detrimental to the defendant. For example, Veh C §10851 (vehicle theft) can be violated with intent either to permanently or temporarily deprive the owner of the vehicle. While intent to permanently deprive would constitute moral turpitude, joyriding with intent only to temporarily deprive does not constitute moral turpitude. If the plea specifies that the conviction is for intent only to temporarily deprive, that should be conclusive because it specifies that the conviction occurred under the non-moral turpitude part of the statute, and the defendant is not removable. Other divisible crimes include possession of stolen property that may encompass possession with intent to temporarily deprive an owner, which is not a crime of moral turpitude (*Castillo-Cruz v Holder* (9th Cir 2009) 581 F3d 1154); spousal or cohabitant battery under Pen C §243(e), which may be violated with mere offensive touching, which is not a crime of moral turpitude; and burglary under Pen C §459 with a plea to "entering a structure or vehicle with intent to commit trespass," which should not be a crime of moral turpitude.

Counsel must gather and review a defendant's entire criminal history in the United States and other countries before setting a disposition goal. A prior conviction of a crime involving moral turpitude (CMT) from another jurisdiction will be joined with the instant conviction by immigration authorities in calculating whether the person is deportable or inadmissible. Counsel should gather and review information on the number of moral turpitude convictions, the actual and potential sentences, and the dates of commission or conviction of the offense.

Counsel should remember that a formal admission of a crime involving moral turpitude, even without a conviction, is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I).

When considering a plea to a moral turpitude offense, counsel should carefully review 8 USC §1101(a)(43) and the discussion in §§52.41-52.47 to assess whether the offense might also be an aggravated felony. For example, conviction of theft, burglary, a crime of violence, perjury, bribery, or forgery is an aggravated felony *if* a 1-year sentence is imposed. See §52.46. Conviction of rape, murder, or sexual abuse of a minor is an aggravated felony regardless of the sentence.

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6. Aggravated Felonies

§52.41 a. Definition of Aggravated Felony: Overview

The list of offenses that qualify as "aggravated felonies" includes some that are neither "aggravated" nor "felonies." The current definition consists of 21 paragraphs, some containing many offenses, in 8 USC §1101(a)(43). The statutory definition of aggravated felony includes these offenses:

- "Murder" (in the authors' opinion, this includes first and second degree murder, but not manslaughter) (8 USC §1101(a)(43)(A));
- Rape (8 USC §1101(a)(43)(A));
- Sexual abuse of a minor (8 USC §1101(a)(43)(A); see discussion in §52.45);
- Trafficking in drugs (any offense) plus certain federal drug felonies and violations of state statutes that punish exactly the same act (state "analogues") (8 USC §1101(a)(43)(B); see discussion in §§52.30-52.34);
- Trafficking in firearms, plus several federal crimes relating to firearms or destructive devices (*e.g.,* bombs, grenades), including felon in possession of a firearm (8 USC §1101(a)(43)(C), (E); see §§52.35-52.37);
- Money laundering (as defined in 18 USC §1956 or a state analogue) or monetary transactions in property derived from unlawful activity (as defined in 18 USC §1957 or a state analogue), if the amount of the funds exceeded $10,000 (8 USC §1101(a)(43)(D));
- Fraud or deceit, or certain tax offenses, when the loss to the victim or government exceeded $10,000 (8 USC §1101(a)(43)(M));
- A "crime of violence" resulting in a sentence imposed of 1 year or more (8 USC §1101(a)(43)(F); see §52.47);
- Theft, receipt of stolen property, or burglary if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(G); see §52.46);
- Alien smuggling, transporting, or harboring, except for immediate family (8 USC §1101(a)(43)(N));
- Certain false-document offenses if the sentence imposed is at least 1 year (note that Proposition 187 (Pen C §113) made document fraud a state criminal offense with a mandatory sentence of 5 years) (8 USC §1101(a)(43)(P));
- Vehicle trafficking with altered identification numbers if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(R));
- Perjury, bribery, forgery, or obstruction of justice if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(S));
- Failure to appear to serve a sentence if the underlying offense is punishable by a term of 5 years or more, or to face charges if the underlying sentence is punishable by a term of 2 years or more (8 USC §1101(a)(43)(Q), (T)); see *Renteria-Morales v Mukasey* (9th Cir 2008) 551 F3d 1076, 1079 (conviction for violation of 18 USC §3146 for bail jumping is not categorically an aggravated felony under 8 USC §1101(a)(43)(T), but it is categorically an aggravated felony for obstruction of justice if 1-year sentence is imposed);
- Various offenses, such as demand for ransom, child pornography, and RICO offenses punishable with a 1-year sentence; running a prostitution business; slavery; and offenses relating to national defense, sabotage, or treason; (see 8 USC §1101(a)(43)); and
- Attempt or conspiracy to commit any listed offense (see 8 USC §1101(a)(43)(U)).

These types of offenses are included in the list of aggravated felonies whether they are in violation of federal or state law (*Matter of Barrett* (BIA 1990) 20 I&N Dec 171), or are in violation of foreign law if release from the resulting imprisonment occurred within the previous 15 years. See 8 USC §1101(a)(43) (paragraph following (U)).

Ø **Practice tip:** Solicitation to commit an aggravated felony has been held not to constitute an aggravated felony. However, it is possible that legislation will erase this defense, so the best practice is for defense practitioners to not rely upon it when there is an alternative. See §52.33.

Ø **Note:** Defining aggravated felonies is a complex and quickly changing area of the law with harsh consequences. For a more detailed discussion, see chart at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Notes Accompanying Quick Reference Chart; Brady et al., Defending Immigrants, chap 9 (10th ed 2008); Tooby, Criminal Defense of Immigrants (2008); Tooby, Aggravated Felonies (2008); Kesselbrenner & Rosenberg, Immigration Law and Crimes (2008).

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§52.42 b. Sentence Requirements for Some Aggravated Felonies

Many generic aggravated felony offenses require that a sentence of 1 year or more must be imposed before the offense will be considered an aggravated felony: a crime of violence (8 USC §1101(a)(43)(F)); theft, receiving stolen property, or burglary (8 USC §1101(a)(43)(G)); passport or document forgery (8 USC §1101(a)(43)(P)); commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered (8 USC §1101(a)(43)(R)); and obstruction of justice, perjury, subornation of perjury, or bribery of a witness (8 USC §1101(a)(43)(S)). For this purpose, the offense is an aggravated felony if (a) a sentence of 1 year or more is imposed, even if execution is suspended, or (b) the court ordered 365 days or more of custody as a condition of probation (8 USC §1101(a)(48)(B)). Note that other aggravated felonies, such as sexual abuse of a minor (8 USC §1101(a)(43)(A)) or drug trafficking (8 USC §1101(a)(43)(B)), have no sentence requirement.

Strategy. To avoid an aggravated felony in this context, counsel should obtain "imposition of sentence suspended" and a maximum custody, as a condition of probation, of no more than 364 days. Even if several consecutive 364-day terms of custody as a condition of probation are imposed, no single offense is punished by 1 year or more, and therefore none of the offenses constitutes an aggravated felony. While the Ninth Circuit had held that a sentence enhancement imposed for recidivism does not constitute a "sentence" for this purpose (*U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201 (en banc)), the Supreme Court later held, in a criminal law context, that a recidivist sentence enhancement constituted part of the "maximum term of imprisonment prescribed by law." *U.S. v Rodriquez* (2008) 553 US 377, 170 L Ed 2d 719, 128 S Ct 1783. See further discussion of sentencing and strategy in §52.10.

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§52.43 c. Analysis of State Offenses as Aggravated Felonies

The aggravated felony definition provides in the unnumbered paragraph immediately following 8 USC §1101(a)(43)(U) that "[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law." Courts employ federal definitions of aggravated felony offenses, and a state offense that does not sufficiently match the federal definition of the offense will not be held to be an aggravated felony.

> Ø **Note:** Criminal counsel should stay as far away as possible from any offense that might be an aggravated felony. Failing that, counsel should consider that some state offenses might not constitute aggravated felonies under the federal definition. The aggravated felony analysis is best done in conjunction with expert immigration counsel.

The aggravated felony statute contains two classes of definition:
(1) Plain-language definitions (*e.g.,* 8 USC §1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor")), and
(2) Definitions framed in terms of specific federal statutes (*e.g.,* 8 USC §1101(a)(43)(D) ("an offense described in section 1956 of title 18, United States Code" (money-laundering)).

Plain-language definitions. Courts will construct a "generic" or plain language federal definition of the offense, gleaned from sources such as common law, the Model Penal Code, the laws of several states, and federal statutes. If the state offense does not meet the generic federal definition (or if the state offense is broader than the federal, and the official record of conviction does not identify that the offense actually involved was one included in the federal definition), the state offense is not an aggravated felony. See, *e.g., Ye v INS* (9th Cir 2000) 214 F3d 1128 (burglary of automobile under California law is not "burglary" for aggravated felony purposes, because federal generic definition includes only burglary of building); *U.S. v Anderson* (9th Cir 1993) 989 F2d 310 (defining extortion under Armed Career Criminal Act sentence enhancement provision, 18 USC §924(e)). See discussion in Brady et al., Defending Immigrants §9.5, pt A (10th ed 2008).

Specific statute definitions. Regarding offenses defined in relation to specific federal statutes, the substantive elements of the state offense must match *exactly* in order for the state offense to be an aggravated felony. *U.S. v Sandoval-Barajas* (9th Cir 2000) 206 F3d 853. The offense, however, need not include the federal jurisdictional element in the listed federal offense, *e.g.,* a requirement that the offense was carried out across state lines. *U.S. v Castillo-Rivera* (9th Cir 2001) 244 F3d 1020 (despite lack of interstate commerce element, Pen C §12021 is sufficiently similar to 18 USC §922(g)(1) to be aggravated felony under U.S. sentencing guidelines); *Matter of Vasquez-Muniz* (BIA 2002) 23 I&N Dec 207 (following *Castillo-Rivera*). See further discussion relating to firearms aggravated felonies in §52.36 and in Brady et al., Defending Immigrants §9.5, pt C.

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§52.44 d. Consequences of Conviction of Aggravated Felony

Conviction of an aggravated felony under 8 USC §1101(a)(43) after the noncitizen is admitted to the United States is a basis for deportability. 8 USC §1227(a)(2)(A)(iii). Other penalties from this type of conviction, whether it occurs before or after admission to the United States, include:

- Ineligibility for political asylum. 8 USC §1158(b).
- Ineligibility for cancellation of removal. 8 USC §1229b.
- Permanent ineligibility to establish good moral character (8 USC §1101(f)), a requirement for cancellation of removal for certain nonpermanent residents, suspension of deportation, voluntary departure, and U.S. citizenship, if the conviction occurred after November 29, 1990. See §52.1.
- Permanent ineligibility for immigration after deportation. 8 USC §1182(a)(9)(A)(ii); discretionary waiver is available.
- Barring of permanent residents from applying for a waiver of inadmissibility for crimes involving moral turpitude and other offenses. 8 USC §1182(h).
- No eligibility for release on bond from immigration detention (8 USC §1226(c)), at least for noncitizens passing from criminal custody on or after October 9, 1998. A person who cannot secure an immigration bond will remain in immigration jails during the pendency of the hearing and any appeals, with little access to counsel and almost no means of obtaining pro bono immigration counsel. The U.S. Supreme Court held that this requirement of mandatory detention for certain criminal aliens was constitutional as applied to a permanent resident alien. *Demore v Hyung Joon Kim* (2003) 538 US 510, 515, 155 L Ed 2d 724, 732, 123 S Ct 1708. Once the noncitizen has a final removal order, he or she will be detained at least for the period reasonably necessary to bring about removal. If removal appears impossible (*e.g.*, if it is to a country to which the United States is not currently deporting people), the individual has some right to release. See *Clark v Martinez* (2005) 543 US 371, 160 L Ed 2d 734, 125 S Ct 716; *Zadvydas v Davis* (2001) 533 US 678, 150 L Ed 2d 653, 121 S Ct 2491; *Ma v Ashcroft* (9th Cir 2001) 257 F3d 1095.
- Being subject to a speeded-up schedule for removal hearings and appeals. 8 USC §1228(a)(3).

Ø **Note:** Aggravated felons who reenter the United States illegally after removal face up to 20 years in prison if convicted under 8 USC §1326(b)(2). Counsel should advise defendants accordingly. This sentence can be enhanced if the defendant has prior felony convictions. See §52.63.

A nonpermanent resident can be removed by a DHS officer in an administrative procedure without a hearing before an immigration judge if, in the officer's opinion, the nonpermanent resident has been convicted of an aggravated felony and is not eligible for immigration relief. 8 USC §1228(b).

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§52.44A e. Specific Aggravated Felonies and Exceptions

An offense may be an "aggravated felony" for immigration purposes even if it is a misdemeanor under California law. Ascertaining whether a particular California offense is an aggravated felony is not always easy, and there is not always a definitive answer. To determine whether a particular crime is likely to be considered an aggravated felony, counsel may want to consult the Quick Reference Chart at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

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§52.45 (1) Rape, Sexual Abuse of a Minor

The terms "rape" and "sexual abuse of a minor" are included in the aggravated felony definition under 8 USC §1101(a)(43)(A). In a major reversal of Ninth Circuit precedent, the court held en banc that the following offenses are categorically not aggravated felonies as "sexual abuse of a minor" since they are overbroad in comparison with the federal crime under 18 USC §2243: Pen C §261.5(c) (unlawful sexual intercourse with a minor more than 3 years younger), Pen C §286(b)(1) (consensual sodomy with minor), Pen C §288a(b)(1) (consensual oral copulation with minor), and Pen C §289(h) (consensual sexual penetration by foreign object of person between ages 14 and 18). *Estrada-Espinoza v Mukasey* (9th Cir 2008) 546 F3d 1147. The Ninth Circuit found that the generic offense of "sexual abuse of a minor" under 18 USC §2243 requires (1) a mens rea level of knowing; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least 4 years between the defendant and the minor. 546 F3d at 1152. The Ninth Circuit held that Pen C §261.5(d) (unlawful sexual intercourse with minor under age 16 with defendant over age 21) is not categorically an aggravated felony for "sexual abuse of a minor," but it left open the possibility that if the record of conviction shows that the victim was especially young (under age 14, and possibly under age 15), the offense might be an aggravated felony; this ruling also should apply to offenses under Pen C §§286(b)(2), 288a(b), and 289(i). *Pelayo-Garcia v Holder* (9th Cir 2009) 589 F3d 1010. In *U.S. v Medina-Villa* (9th Cir 2009) 567 F3d 507, 514, the court held that *Estrada-Espinoza* (characterized as applying only to consensual sex with older teenagers) did not overrule precedent holding that a broadly defined "lewd act" with a child under the age of 14 is categorically an aggravated felony under Pen C §288(a) (see, *e.g., U.S. v Baron-Medina* (9th Cir 1999) 187 F3d 1144), nor did it overturn *U.S. v Pallares-Galan* (9th Cir 2004) 359 F3d 1088, which held that a statute punishing less serious behavior, such as Pen C §647.6 (annoying or molesting child), is a divisible statute encompassing both conduct that may be "sexual abuse of a minor" and conduct that is not abusive.

> Ø **Warning**: Under *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, these offenses will be deemed crimes of moral turpitude if the defendant knew or should have known that the victim was a minor. In addition, these offenses will be charged by Immigration and Customs Enforcement as deportable crimes of child abuse. See California Chart and "Note: Safer Alternatives, Alternate Pleas with Less Severe Immigration Consequences" (for violent or sexual offenses) at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

The Ninth Circuit has also held that "rape" includes rape by means of intoxication under Pen C §261 (*Castro-Baez v Reno* (9th Cir 2000) 217 F3d 1057).

Alternative pleas could include battery, sexual battery, false imprisonment under Pen C §§236-237, nonviolent attempt to dissuade a victim from filing a police report under Pen C §136.1(b), or less onerous pleas supported by the facts. Misdemeanor molest/annoy under Pen C §647.6(a) is not an aggravated felony if the record of conviction does not indicate that the act amounted to "abuse." *U.S. v Pallares-Galan, supra*. However, Pen C §647.6(a) may have other immigration consequences. Under *Silva-Trevino,* the immigration court can take evidence outside the record of conviction to determine if the facts indicate that the offense actually was a crime of moral turpitude, and this crime is a deportable crime of child abuse if the record of conviction shows that the offense was harmful.

One recourse for a defendant in a case involving sex with a minor is that there remain some possibilities for immigration relief and waivers, despite the fact that these offenses are aggravated felonies. Depending on the individual situation, this might include withholding of removal (an asylum-like relief), adjustment of status for a person already granted asylum, or a family visa petition, with or without a waiver of inadmissibility. In some cases it is very helpful to obtain a misdemeanor conviction, including a felony reduced to a misdemeanor under Pen C §17, rather than a straight felony. See Brady et al., Defending Immigrants §9.1 (10th ed 2008).

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Source: Criminal Law/California Criminal Law Procedure and Practice/52 REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT/§52.46 (2) Burglary, Theft, Receipt of Stolen Property, Forgery, Crime of Fraud or Deceit With Loss Exceeding $10,000

§52.46 (2) Burglary, Theft, Receipt of Stolen Property, Forgery, Crime of Fraud or Deceit With Loss Exceeding $10,000

Burglary, theft, or receipt of stolen property. Burglary, theft, or receipt of stolen property is an aggravated felony if a 1-year sentence is imposed. 8 USC §1101(a)(43)(G). Aggravated felon status can be prevented in all cases by obtaining a sentence of 364 days or less. See §§52.10, 52.42 for discussion of sentence.

Burglary with a 1-year sentence imposed has the potential to be an aggravated felony in three ways: as burglary, as a crime of violence (8 USC §1101(a)(43)(F), see §52.47 for discussion), or possibly as attempted theft. For this purpose, the Ninth Circuit adopted the Supreme Court's generic definition of burglary as unlawful entry into a building to commit a crime. It therefore held that burglary of an automobile under Pen C §459 was not an aggravated felony as a burglary. It further found that felony burglary of a car is not an aggravated felony as a crime of violence. *Ye v INS* (9th Cir 2000) 214 F3d 1128, citing *Taylor v U.S.* (1990) 495 US 575, 109 L Ed 2d 607, 110 S Ct 2143 (burglary under federal definition may exclude certain state burglary convictions for federal sentence enhancement purposes; generic definition is unlawful entry into a building with intent to commit a crime). In addition, because Pen C §459 does not require that an entry be "unlawful or unprivileged," the statute lacks an element of the generic definition of burglary of a dwelling and this missing element may not be added to by a complaint or admission in the record of conviction. *U.S. v Aguila-Montes* (9th Cir 2009) 553 F3d 1229. However, burglary of an automobile under §459 is an aggravated felony as an attempted theft if a sentence of 1 year or more is imposed and the record of conviction shows that the defendant pleaded guilty to entering a locked motor vehicle with the intent to commit theft, rather than any felony. *Ngaeth v Mukasey* (9th Cir 2008) 545 F3d 796. California's Pen C §459(b) is a divisible statute, including the offenses of burgling a building, car, and other structures. If the record of conviction (the charging documents, plea or verdict, and sentence) is vague as to whether the §460(b) conviction is for entry into a building, the offense will not constitute "burglary" or a "crime of violence" for this purpose. If the record of conviction is vague as to whether the conviction is for intent to commit theft or any felony, it will not be an aggravated felony as an attempted theft. For further discussion of record of conviction, see §52.26. In contrast, Pen C §460(a), burglary of a dwelling, will be held to be burglary under the generic definition. For further discussion of burglary, see chart located at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Notes Accompanying Quick Reference Chart; Brady et al., Defending Immigrants §9.10 (10th ed 2008).

A "theft offense (including receipt of stolen property)" is an aggravated felony if a 1-year sentence is imposed. 8 USC §1101(a)(43)(G). The Ninth Circuit held that an offense meets the aggravated felony definition of theft even if there is intent only to temporarily deprive the owner of property rights. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201, 1205 (en banc). Thus, possession of stolen property, which could include possession with intent to temporarily deprive an owner of possession, has been held categorically an aggravated felony if a 1-year sentence is imposed. *Verdugo-Gonzalez v Holder* (9th Cir 2009) 581 F3d 1059. But see *Castillo-Cruz v Holder* (9th Cir 2009) 581 F3d 1154 (possession of stolen property is divisible as crime of moral turpitude because it could encompass possession with intent to temporarily deprive an owner, which is not crime of moral turpitude).

An offense under Veh C §10851 is divisible as a "theft offense." It is categorically a theft offense if a 1-year sentence is imposed and if the record of conviction shows that the defendant personally took the vehicle regardless of whether the taking was temporary or permanent. *Gonzales v Duenas-Alvarez* (2007) 549 US 183, 166 L Ed 2d 683, 127 S Ct 815. But a plea to Veh C §10851 (taking a vehicle), even with a sentence of 1 year or more imposed, will not be deemed an aggravated felony as a "theft offense" if the record of conviction does not establish that the defendant acted as the principal rather than as an accessory after the fact. *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072 (en banc). Counsel should still act conservatively and try to obtain a sentence imposed of 364 days or less. See also *Carrillo-Jaime v Holder* (9th Cir 2009) 572 F3d 747 (owning and operating chop shop under Veh C §250 not aggravated felony as theft offense).

However, the theft must be of property. Penal Code §484 is a divisible statute for this purpose because it includes theft of labor. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201, 1205 (en banc).

Ø **Practice tip:** To avoid an aggravated felony for theft when a sentence of a year or more is unavoidable, plead to the exact language of Pen C §484, which includes "theft of labor," which is not an aggravated felony as a theft offense. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201 (en banc).

Ø **Note:** Although a taking of property with the intent to temporarily deprive the owner can be an aggravated felony, it is not a crime involving moral turpitude. *Matter of D.* (1941) 1 I&N Dec. 143. For this reason, a plea to Veh C §10851(a) will not be deemed a crime of moral turpitude if the plea is specifically to a taking with intent to temporarily deprive the owner of the vehicle. On moral turpitude generally, see §52.38.

Ø **Warning:** A sentence enhancement imposed for recidivist behavior will be counted as part of the "sentence." Thus, a conviction of petty theft with a prior under Pen C §§484 and 666 is an aggravated felony if the sentence, including enhancement, is 1 year or more. *U.S. v Rodriquez* (2008) 553 US 377, 170 L Ed 2d 719, 128 S Ct 1783.

The BIA has held that attempted possession of stolen property is sufficiently like attempted receipt of stolen property to be an aggravated felony. *Matter of Bahta* (BIA 2000) 22 I&N Dec 1381.

Forgery. An offense relating to forgery is an aggravated felony if a sentence is imposed of 1 year or more. 8 USC §1101(a)(43)(R). Penal Code §476 was found categorically to correspond to the generic definition of forgery for purposes of 8 USC §1101(a)(43)(R) in that it requires "intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument." *Morales-Alegria v Gonzales* (9th Cir 2006) 449 F3d 1051, 1056. On the other hand, a conviction for violation of Pen C §475(c) was found not to be an offense relating to forgery because the generic definition of forgery requires the "falsification" of a document or instrument and §475(c) prohibits the use of certain documents which are "real" as well as "fictitious." *Vizcarra-Ayala v Mukasey* (9th Cir 2008) 514 F3d 870, 875.

Ø **Practice tip:** To avoid an aggravated felony for a Pen C §475(c) offense, keep the record of conviction in the words of the statute in the disjunctive, plead only to uttering a "real" document, or obtain a sentence of 364 days or less.

Fraud or deceit with loss exceeding $10,000. A crime involving fraud or deceit with loss to a victim or victims exceeding $10,000 is an aggravated felony under 8 USC §1101(a)(43)(M)(i). To avoid an aggravated felony for this offense, the defendant may plead to an offense in which there is no element or implied element of fraud or deceit. For example, a crime of theft for taking or carrying away property without consent will not be deemed a crime of fraud or deceit. *Matter of Garcia-Madruga* (BIA 2008) 24 I&N Dec 436 (distinction between crime involving fraud or deceit and theft is that "taking" of property must be "without consent" but certain offenses such as theft by deception might fit into both categories). However, if the defendant pleads to a theft offense, the sentence imposed cannot be more than 364 days or the offense is an aggravated felony theft offense.

If the conviction is to a crime with an element or implied element of fraud or deceit, an immigration court can take evidence outside the record of conviction to determine if the loss to a victim or victims exceeded $10,000. *Nijhawan v Holder* (2009) ___ US ___, 174 L Ed 2d 22, 129 S Ct 2294. If the loss to the victim or victims exceeds $10,000, defense counsel should attempt to have a defendant plead to a theft offense, provided that the sentence is 364 days or less. If pleading to a crime involving fraud is unavoidable, defense counsel should try to establish in the record that the total loss to the victim(s) for the count(s) of conviction was $10,000 or less. The loss must "be tied to the specific counts covered by the conviction." *Nijhawan v Holder, supra*. If that cannot be done, then counsel should attempt to arrange for the defendant to pay down the amount before plea (before sentence is not sufficient), so that the restitution amount is less than $10,000. See chart at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Notes Accompanying Quick Reference Chart; Brady et al., Defending Immigrants §9.10 (10th ed 2008).

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§52.47 (3) Crimes of Violence

A person convicted of a crime of violence and sentenced to imprisonment of 1 year or more is an aggravated felon (8 USC §1101(a)(43)(F)), subject to the penalties and restricted rights discussed in §52.44. To avoid an aggravated felony conviction for his or her client, counsel must either avoid a sentence of 1 year or more or plead to an offense that is not a "crime of violence."

A crime of violence is broadly defined in 18 USC §16(a) as an offense that "has as an element the use, attempted use, or threatened use of physical force against" another person or person's property, or under 18 USC §16(b) as any felony that by its nature involves substantial risk of such force.

The Supreme Court held that felony driving under the influence, as an offense involving negligent causation of harm, is not a "crime of violence." See *Leocal v Ashcroft* (2004) 543 US 1, 160 L Ed 2d 271, 125 S Ct 377. Misdemeanor or felony reckless infliction of injury also is not a crime of violence; thus, involuntary manslaughter under Pen C §192(b) is not a crime of violence. See *Fernandez-Ruiz v Gonzales* (9th Cir 2006) 466 F3d 1121. Gross vehicular manslaughter while intoxicated is not a crime of violence. See *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217. In addition, offenses such as battery or spousal battery under Pen C §243(a), (e), are not crimes of violence, because they can be committed by mere offensive touching. A Veh C §2800.2 conviction is not a crime of violence if the "wanton, reckless" intent was supplied by having prior traffic violations. *Penuliar v Mukasey* (9th Cir 2008) 528 F3d 603, 609.

Other crimes of violence include:

- Making a terroristic threat under Pen C §422, even as a misdemeanor (see *Rosales-Rosales v Ashcroft* (9th Cir 2003) 347 F3d 714, 717);
- Exhibiting a deadly weapon with intent to resist arrest under Pen C §417.8 (see *Reyes-Alcaraz v Ashcroft* (9th Cir 2004) 363 F3d 937, 938);
- Mayhem under Pen C §203 (see *Ruiz-Morales v Ashcroft* (9th Cir 2004) 361 F3d 1219, 1222);
- Felony burglary of a dwelling, but not an automobile (see *Ye v INS* (9th Cir 2000) 214 F3d 1128);
- Aiding and abetting assault with a deadly weapon under Pen C §245(a)(1) (see *Ortiz-Magana v Mukasey* (9th Cir 2008) 542 F3d 653, 659); and
- Assault with a firearm under Pen C §245(a)(2) (see *U.S. v Heron-Salinas* (9th Cir 2009) 566 F3d 898, 899).

The following offenses have been held not to be crimes of violence, and therefore would not be aggravated felonies even if a sentence of 1 year or more were imposed:

- Simple battery under Pen C §243(a), (e) (see *Ortega-Mendez v Gonzales* (9th Cir 2006) 450 F3d 1010; see also *Matter of Sanudo* (BIA 2006) 23 I&N Dec 968);
- Misdemeanor sexual battery under Pen C §243.4 (see *U.S. v. Lopez-Montanez* (9th Cir 2005) 421 F3d 926);
- A simple battery that can be committed by mere offensive touching, when the record of conviction does not establish that actual violence occurred (see, *e.g., Singh v Ashcroft* (9th Cir 2004) 386 F3d 1228, discussed in §52.49);
- Driving under the influence, when the offense does not have a mens rea component or requires only a showing of negligence (*Leocal v Ashcroft* (2004) 543 US 1, 160 L Ed 2d 271, 125 S Ct 377; see *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140; *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217;
- Possession of a dangerous weapon (dirk or dagger) under Pen C §12020(a) (see *U.S. v Medina-Anicacio* (5th Cir 2003) 325 F3d 638);
- Stalking under Pen C §649.9, because "harassing" conduct does not necessarily create a risk that force may be used. *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080. However, "stalking" is a deportable offense under 8 USC §1227(a)(2)(E), and *Malta-Espinoza* did not reach the question of whether violation of Pen C §649.9 was a deportable offense on that ground; and
- Maliciously and willfully discharging a firearm at inhabited building or vehicle under Pen C §246 is not

categorically a crime of violence under U.S. sentencing guidelines, since the offense can be committed by reckless or grossly negligent conduct, rather than intentional use of force. *U.S. v Narvaez-Gomez* (9th Cir 2007) 489 F3d 970. It is an open question whether this would be an aggravated felony crime of violence because the standard in the sentencing guideline is similar to 18 USC §16(a) and *Narvaez-Gomez* does not address the result for an 18 USC §16(b) case. However, a Pen C §246 offense would be a deportable crime as a firearms offense under 8 USC §1227(a)(2)(C).

Ø **Note:** Setting fire to a structure or forest land under Pen C §452(c) is not categorically an aggravated felony crime of violence because the defendant could have set fire to his own property (*Jordison v Gonzales* (9th Cir 2007) 501 F3d 1134) and 18 USC §16(a) defines a crime of violence as the use of force against another person or another's property.

Ø **Note:** There is a strong argument, although no guaranty, that felony conviction under Pen C §236 or §237 is not a crime of violence if it is effected by deceit or fraud. A misdemeanor conviction under Pen C §§236 and 237 ought not to be held a moral turpitude offense. Likewise, conviction under Pen C §136.1(b) (nonviolently persuading someone not to file a police report) ought not to be a crime of violence, although there is no published precedent.

See further discussion in "Note: Safer Alternatives" at the California Quick Reference Chart and Notes at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Brady et al., Defending Immigrants §9.13 (10th ed 2008).

Ø **Practice tip:** When the client is charged with an offense that might be classified as a crime of violence, defense counsel should attempt to obtain a sentence of less than 1 year—meaning imposition of sentence suspended or a sentence of 364 days or less (either directly imposed or ordered as a condition of probation) to avoid aggravated felon status for the client.

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7. Domestic Violence and Crimes Against Children

§52.48 a. Definition

Persons convicted of offenses related to domestic violence can suffer immigration consequences in two ways:

- If the crime is classified as a "crime of violence" and a 1-year sentence is imposed, the offense will be an aggravated felony under 8 USC §1101(a)(43)(F). See discussion in §52.47.
- There is a broadly defined ground of deportability specifically based on domestic violence offenses. 8 USC §1227(a)(2)(E).

Ground for deportation. Conviction of a state or federal crime of domestic violence, stalking, or child abuse, neglect, or abandonment is a basis for deportation if the conviction occurred after the person was admitted and on or after September 30, 1996. 8 USC §1227(a)(2)(E)(i). A court finding of violation of certain portions of a domestic violence protection order, even absent a conviction, is a basis for deportability if the behavior that constituted the violation occurred on or after September 30, 1996. 8 USC §1227(a)(2)(E)(ii). There is no analogous basis for inadmissibility. However, these types of offenses may constitute crimes involving moral turpitude and must be analyzed independently regarding inadmissibility on that ground.

Conviction of crime against child. A crime of child abuse, child neglect, or child abandonment is a deportable offense if committed after admission. The BIA has defined "child abuse" very broadly as "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." The injury may be slight, and emotional mistreatment or conduct injurious to morals is encompassed within this definition. *Matter of Velazquez-Herrera* (BIA 2008) 24 I&N Dec 503, 512. The BIA did not define "child neglect" or "child abandonment." The immigration court will look both at the elements of the statute and the admissible record of conviction to determine if the noncitizen's conviction included the necessary elements of this offense. 24 I&N Dec at 518.

> Ø **Practice tip:** To avoid deportability for a "crime of child abuse, child neglect, or child abandonment," plead to a generic offense that does not have as an element the minority age of the victim and keep the record of conviction free of any reference to the victim's age.

For purposes of this deportation ground, counsel should assume that any conviction under Pen C §273a(a) (endangering child or causing or permitting child to suffer physical pain, mental suffering, or injury) will result in deportability. While the Ninth Circuit held that a conviction of Pen C §273a(b) (misdemeanor) is not categorically a crime of child abuse, because it includes placing a child in a situation that merely carries the risk of nonserious harm, the court implied that conviction of §273a(a) (felony) is a categorical crime of child abuse. *Fregozo v Holder* (9th Cir 2009) 576 F3d 1030, 1037. However, Pen C §273a(b) is not a safe offense, because it could involve child neglect or abandonment (a deportable offense), which was not charged and not an issue in *Fregozo.*

Stalking. The Ninth Circuit has held that stalking under Pen C §646.9 is not categorically an aggravated felony. *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080, 1083. However, the court did not reach the question of whether the defendant was removable under 8 USC §1227(a)(2)(E), which specifically makes a conviction for stalking a ground for removal. 478 F3d at 1081 n1.

Conviction of "Crime of Domestic Violence." The term "crime of domestic violence" is specifically defined in 8 USC §1227(a)(2)(E)(i) to include

> any crime of violence (as defined in section 16 of title 18 [United States Code]) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the

individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Thus, to be a domestic violence offense, the offense must (1) be a crime of violence defined under 18 USC §16 and (2) be committed against a victim with a specified domestic relationship to the accused. If counsel can prevent either of these factors from being present, the conviction will not be a deportable "crime of domestic violence." Those two factors are the only considerations for the deportation ground: Neither felony/misdemeanor classification nor sentence is determinative. Because the definition incorporates state domestic violence law, the dating relationships that are included under California domestic violence law are also included in this definition. See §52.49 for alternative plea suggestions.

Although the Ninth Circuit held in *Tokatly v Ashcroft* (9th Cir 2004) 371 F3d 613, 624, that evidence outside the record of conviction was inadmissible to prove that the victim and perpetrator had a "domestic" relationship, defense counsel must assume that this is no longer good law, because the Supreme Court held that evidence outside the record of conviction can be used to prove the domestic relationship in a similarly worded sentencing guideline case. See *U.S. v Hayes* (2009) ___ US ___, 172 L Ed 2d 816, 129 S Ct 1079. See §52.49.

Court finding of violation of certain portions of a protection order. A separate basis for deportability under this ground is a civil or criminal court finding, on or after September 30, 1996, that the individual has violated portions of a protection order relating to violence or stalking. Under 8 USC §1227(a)(2)(E)(ii):

> Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated, harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purposes of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

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§52.49 b. Strategy

When a charge of domestic violence is lodged against a noncitizen, the defense and the prosecution may have important interests in common. Depending on the specific situation, the victim may have urgent, objective reasons to avoid the defendant's deportation. For example, the defendant may provide needed child support; it may be against the children's interests to permanently lose a parent; or the victim may wish to attempt reconciliation after counseling. It is often possible to structure an alternative plea in which the same requirements, *e.g.,* jail time, protective orders, and counseling, are imposed, but the defendant does not become deportable. Domestic violence advocates may play an important role in deliberations between defense and prosecution.

Defense counsel can avoid a conviction of a crime of domestic violence by his or her client by pleading to an offense that is not a crime of violence, or by avoiding proof in the record that the victim shared the specified domestic relationship with the defendant.

Avoid conviction of a crime of violence. Some offenses have no potential element of violence: for example, theft. Other offenses are not categorically or necessarily crimes of violence, although a particular conviction may be held to be of a crime of violence if the record establishes that the offense involved intended or actual use of violent force. A plea to these offenses will avoid a conviction of a domestic violence offense as long as counsel keeps evidence of actual violence out of the record of conviction. See §52.47. For example, battery and spousal battery under Pen C §243(a), (e), are not necessarily crimes of violence, because the statute can be violated by mere offensive touching, and a misdemeanor under Pen C §236 is not necessarily a crime of violence, because it requires no violence. Likewise, dissuading (with no threats of violence) an individual from filing a complaint under Pen C §136.1(b) is a potentially very useful plea because it appears not to have immigration consequences, and it can fulfill many requirements of the prosecution in that it is a potential strike (see Pen C §1192.7(c)(37)) and may be punished as a felony or as a misdemeanor. In contrast, infliction of injury on a spouse or other family member, as defined by Pen C §273.5, is a crime of violence and hence is a crime of domestic violence. Reckless infliction of harm is not a crime of violence, so that offenses such as involuntary manslaughter and felony involuntary manslaughter (Pen C §§191.5, 192(b)) are not crimes of violence. See *Fernandez-Ruiz v Gonzales* (9th Cir 2006) 466 F3d 1121 (en banc); *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217.

Ø **Practice tip:** To avoid a deportable offense for a crime of "domestic violence," arrange a plea to Pen C §243(e)(1), which is not necessarily a "crime of domestic violence" provided the defendant does not admit any use of *violent* physical force. A plea to Pen C §273.5, which is categorically a crime of violence and an aggravated felony if a sentence of 1 year or more is imposed, is to be avoided. See *Ortega-Mendez v Gonzales* (9th Cir 2006) 450 F3d 1010 (misdemeanor battery under Pen C §242 is not crime of violence or domestic violence offense); *Matter of Sanudo* (BIA 2006) 23 I&N Dec 968 (battery and spousal battery under Pen C §§242, 243(e) are not crimes of violence, domestic violence offenses, or crimes involving moral turpitude).

Ø **Warning:** Penal Code §243(e) (spousal or cohabitant battery) can be violated with mere offensive touching (not a crime of moral turpitude) or by actual violent physical force (a crime of moral turpitude). To avoid the possibility that the immigration court will take evidence, which it can do for a crime of moral turpitude under *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687*,* it is important to try to craft a plea that amends the complaint to allege that the defendant committed "offensive touching" or "used force but not violent force" and state this as the factual basis for the plea as well. This should conclusively determine that the crime is not a crime of moral turpitude. See §52.40.

If the plea is not to a crime of violence, it will not be considered a deportable domestic violence conviction even if domestic violence counseling or anger management is imposed as a condition of probation, or other evidence shows that the event was in fact a domestic violence incident.

Domestic relationship can probably be proved by evidence outside record of conviction. It is no longer good practice to try to avoid a crime of domestic violence by avoiding evidence of the domestic relationship in the record of

conviction. It is very likely that the immigration court will permit evidence outside the record of conviction to establish this element in view of *U.S. v Hayes* (2009) ___ US ___, 172 L Ed 2d 816, 129 S Ct 1079. This relationship includes current or ex-spouse, coparent of child, cohabitant living as spouse, or other relationship protected under the domestic violence laws of the state of conviction, such as California.

Ø **Practice tip:** Pleading to a crime of violence against a victim not described in the statute (*e.g.,* the ex-wife's new boyfriend, not the ex-wife) will avoid a deportable domestic violence offense. In addition, immigration counsel have a good argument, although no published precedent, that a crime of violence against property is not included in the definition of domestic violence. The definition of crime of violence, and suggestions for alternate pleas, is discussed in more detail in §52.47. See also Notes "Domestic Violence" and "Safer Alternatives" at the California Quick Reference Chart and Notes at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php; Brady et al., Defending Immigrants §6.15 (10th ed 2008).

Judicial finding that protection order against domestic violence was violated. Deportability also can be caused by a civil or criminal court finding a violation of a protection order against domestic violence. Rather than plead to violating a protection order against domestic violence, the defendant should plead to an alternate offense that is not a crime of violence or stalking. A plea to Pen C §273.6(a) for violation of a protective order that was issued pursuant to Fam C §§6320 and 6389 is a deportable offense (*Alanis-Alvarado v Holder* (9th Cir 2009) 558 F3d 833), as is a plea to violating a stay-away order or any order not to commit an offense that is described in §6320 or §6389 (*Szalai v Holder* (9th Cir 2009) 572 F3d 975). Because this includes almost all conduct covered by protection orders, a plea to another offense is the best strategy. For further discussion, see California Quick Reference Chart and Notes at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php; Brady et al., Defending Immigrants §6.15 (10th ed 2008).

Because this ground includes a civil court finding of violation, a finding that a juvenile has violated a domestic violence protection order might be a basis for the juvenile's deportation. On conduct-based immigration consequences, see §52.50.

Ø **Practice tip:** A plea to violation of Pen C §166(a)(4) for willful disobedience of any process or court order with a vague record of conviction is a better plea than Pen C §273.6 if the record of conviction does not indicate that the defendant disobeyed a domestic protection order. Alternatively, a plea to a new offense, such as trespass, rather than violation of a stay-away order, might avoid this ground of deportability. The best plea would be to plead to conduct that is not itself a violation of the court order in case the categorical approach is abandoned for this crime of deportability.

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§52.50 D. Conduct-Based Immigration Consequences

Noncitizens may be held deportable, inadmissible, or barred from establishing good moral character for reasons other than convictions and sentences in criminal cases. See the chart in §52.24 for grounds for these actions. The most common forms of conduct that can trigger adverse immigration consequences without a conviction are prostitution, alien smuggling, document fraud, and drug trafficking, abuse, and addiction. This section discusses grounds not requiring a conviction or sentence.

> Ø **Note:** When a ground for inadmissibility, deportation, or preclusion from establishing good moral character does not require a conviction, the conduct triggering it may be established by a juvenile court finding (see §52.9) or by police reports or other evidence. See *Matter of Rico* (BIA 1979) 16 I&N Dec 181 (criminal charges dismissed, but other evidence demonstrated trafficking and triggered inadmissibility).

Drug traffickers. A noncitizen is inadmissible and barred from establishing good moral character if the DHS has "reason to believe" that he or she is or has ever been or has assisted a drug trafficker. The noncitizen's spouse and children are also inadmissible if they have benefited from the trafficking in the previous 5 years. 8 USC §§1101(f), 1182(a)(2)(C). No conviction is necessary, and one incident is sufficient. There is no analogous deportation ground. Trafficking includes not only sale or possession for sale, but also giving drugs away and maintaining a place where drugs are distributed. *Matter of Martinez-Gomez* (BIA 1972) 14 I&N Dec 104. Importation or possession for one's own use is not trafficking. See *Matter of McDonald & Brewster* (BIA 1975) 15 I&N Dec 203. Similarly, transportation for personal use should not be considered trafficking. See discussion in §52.33.

Even after a conviction is vacated, the DHS can use a guilty plea or any evidence or information from the event to attempt to establish its "reason to believe" drug trafficking occurred. However, individuals who have plausibly asserted that they did not intend to traffic have overcome this.

Drug addicts and abusers. A noncitizen is inadmissible if he or she is currently a drug addict or abuser, and deportable if he or she has been a drug addict or abuser at any time since admission to the United States. 8 USC §§1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii). Drug "addiction" and "abuse" are medical determinations. See *Matter of F.S.C.* (BIA 1958) 8 I&N Dec 108. The definition of "drug abuser" is a matter of controversy. Some government-licensed doctors use the definition that more than one-time experimentation within the past 3 years qualifies as "current" drug abuse. Certainly admission of addiction/abuse required for CRC placement or in some instances to participate in "drug court" will be used to designate the persons as an addict or abuser. The definition of drug abuser is particularly strictly applied by U.S. consulates abroad. Persons with consular appointments abroad should be warned of the interviews and, if necessary, should delay the application until 3 years after using any drugs.

> Ø **Note:** This controversy illustrates the dire consequences of almost any drug offense and shows the consequences of admitting to any involvement with drugs. Counsel should advise the defendant not to discuss any history of illegal drug use with police or the probation department in order to avoid triggering deportation or inadmissibility under these grounds.

Prostitutes. A noncitizen is inadmissible and barred from establishing good moral character if he or she has engaged in the business of prostitution within the previous 10 years. 8 USC §§1101(f), 1182(a)(2)(D). This definition includes prostitutes, procurers, and persons who receive proceeds, but not customers. No conviction is required. See *Matter of R.M.* (BIA 1957) 7 I&N Dec 392. In addition, persons who engage in prostitution and, conceivably, customers can be found to have committed a crime involving moral turpitude. See, *e.g., Matter of Lambert* (BIA 1965) 11 I&N Dec 340. Prostitution is defined for this purpose as providing sexual intercourse, as opposed to other sexual acts, for hire. *Kepilino v Gonzales* (9th Cir 2006) 454 F3d 1057. A conviction for violation of Pen C §647(b) is broader than the ground of inadmissibility because §647(b) can encompass a single, isolated sexual act other than sexual intercourse. *Matter of Gonzalez-Zoquiapan* (BIA 2008) 24 I&N Dec 549. For the same reason, a conviction of Pen C §647(b) does not bar a noncitizen from establishing good moral character under 8 USC §1101(f). The BIA has not determined

whether attempting to hire a prostitute is a crime involving moral turpitude. *Matter of Gonzalez-Zoquiapan, supra*.

Ø **Practice tip:** If a conviction for prostitution cannot be avoided, do not stipulate to the police report as the factual basis for the plea because the conduct described in the police report might establish more than an isolated act and might establish acts of sexual intercourse.

Persons arrested or convicted of drunk driving. Alcoholics can be found inadmissible under a ground relating to physical and mental disorders and associated behavior that poses a threat to property or persons. 8 USC §1182(a)(1)(A)(iii). At least one U.S. consulate has excluded persons on this ground, based on a conviction of driving under the influence within the previous 2 years. Immigrant visa applicants applying outside the United States will be referred to a panel physician to determine possible inadmissibility for alcoholism if an applicant has either:

- A single drunk driving arrest or conviction within the last 3 calendar years; or
- Two or more drunk driving arrests or convictions in any time period.

U.S. Department of State Foreign Affairs Manual, vol. 9, §40.11 n8.3. It is recommended that immigration counsel provide proof that the person is not drinking and proof of rehabilitation such as evaluation from a substance abuse center or therapist and proof of attendance at AA meetings. Driving under the influence is not, as was previously held, an aggravated felony as a crime of violence. *Leocal v Ashcroft* (2004) 543 US 1, 160 L Ed 2d 271, 125 S Ct 377; *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140. See §52.47 for discussion.

Homosexuals. Homosexuality has not been a basis for inadmissibility since 1990.

Persons who test HIV-positive. Persons who test HIV-positive are no longer inadmissible, but HIV/AIDS remains on the list of communicable diseases that must be waived to enter the United States.

Gamblers. Persons who have been convicted of two or more gambling offenses or whose income is derived from illegal gambling are barred from establishing good moral character under 8 USC §1101(f)(5).

Communists, terrorists, Nazis, "other unlawful activity," and crimes relating to transfer of technology. Members of several groups are inadmissible under 8 USC §1182(a)(3) and deportable under 8 USC §1227(a)(4). The section relating to Communists and terrorists is extensive and includes a section on "any other unlawful activity." With new antiterrorism provisions in effect, persons—especially those of Middle Eastern descent—arrested for participating in political demonstrations or suspected of having links with terrorists may need special immigration counseling. Others may simply have been arrested at airports, or come afoul of the special registration requirements for persons from several Moslem countries. For advice on such cases, see "Post-9/11 Resources" at http://www.nationalimmigrationproject.org, or contact the National Immigration Project for assistance.

Persons who intend to engage or who have engaged in illegal export of technology or sensitive information are inadmissible and deportable. 8 USC §§1182(a)(3)(A)(i), 1227(a)(4)(A)(i). Although a literal reading of the statute would include all such offenses, legislative history shows that it should apply only to acts that might compromise national security. See HR Conf Rep No. 101-955, 101st Cong, 2d Sess 131, 132 (1990), reprinted in 1990 US Code Cong & Ad News 6784, 6796.

Noncitizens smuggling, trafficking, or harboring other noncitizens. A noncitizen who at any time has encouraged or helped any other noncitizen to enter the United States illegally—even if the person helped was a family member and paid nothing for the help—is inadmissible. 8 USC §1182(a)(6)(E). A person who committed such an act within 5 years after his or her last entry into the United States is deportable. 8 USC §1227(a)(1)(E). Note that only smuggling, and not harboring or transporting, is punished under these grounds, and that no conviction is required to prove smuggling. Some waivers are available if the person smuggled was a parent, spouse, son, or daughter. 8 USC §§1182(d)(11), 1227(a)(1)(E)(iii). The waiver "cancellation of removal" under 8 USC §1229b (see §52.55) is available even if persons outside that group were smuggled, unless the offense constitutes an aggravated felony.

Conviction under 8 USC §1324(a)(1)(A) and (a)(2) for alien smuggling, trafficking, or harboring will be held to be an aggravated felony under 8 USC §1101(a)(43)(N), unless it is a first offense and the noncitizen shows that the conduct was for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent. A potentially safe alternative plea would be to plea to aiding and abetting another person's illegal entry under 8 USC §1325, because the aggravated felony definition specifically refers to §1324.

Document fraud. A noncitizen who is the subject of a civil administrative court finding that he or she has possessed,

used, or sold false documents for immigration benefits is deportable and inadmissible. 8 USC §§1182(a)(6)(F), 1227(a)(3)(C). Although a conviction is not required for these immigration penalties, conviction under Pen C §113 or 18 USC §1546(a) can be a basis for the civil finding. Conviction also may be an aggravated felony. 8 USC §1101(a)(43)(P).

Civil court finding of violation of domestic violence temporary restraining order. Another ground of deportation, but not inadmissibility, is a civil court finding that the alien has violated a domestic violence temporary restraining order (on or after Sept. 30, 1996). See 8 USC §1227(a)(2)(E); §§52.48-52.49. This does not require a criminal conviction to trigger deportability. Cancellation of removal under 8 USC §1229b (INA §240A) may be available for long-term lawful permanent residents.

Serious nonpolitical crime. A noncitizen who the DHS has serious reason to believe committed a serious nonpolitical crime outside the United States is ineligible for restriction of removal under 8 USC §1231(b)(3)(B)(iii). *McMullen v INS* (9th Cir 1986) 788 F2d 591, overruled on other grounds in *Barapind v Enomoto* (9th Cir 2005) 400 F3d 744, 751. To be classified as a political offense, the common-law character must be outweighed by the political element. *Matter of McMullen* (BIA 1994) 19 I&N Dec 90.

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§52.51 E. Checklist: Defendant's Eligibility for Immigration Relief

To establish specific goals in defending a noncitizen criminal defendant, defense counsel first must ascertain the defendant's current immigration status and potential for a change of status through future application. The goals of an immigration-minded defense are to avoid the loss of the defendant's current status and to avoid forfeiting his or her eligibility for possible future immigration relief.

The following checklist may assist in analyzing counsel's case. It is intended as a brief overview of the most commonly encountered statuses and factual situations. This overview is far from exhaustive and should be used only as a guide and starting point for counsel's case analysis. Often, the defendant does not know his or her exact status. For example, many people mistakenly think that marriage to a U.S. citizen brings automatic citizenship or permanent residency status, without the need to file an application. Similarly, people who have received employment authorization based on filing an application of some kind with the DHS may mistakenly believe that their application has been granted and that they have permanent resident status or asylum. Counsel should photocopy all immigration documents and check with immigration counsel if necessary to verify status. Counsel should complete the immigration intake form provided in §52.3. For extensive information describing immigration applications and how to avoid convictions that would bar them, see Brady et al., Defending Immigrants, chap 11 (10th ed 2008).

- **Is the defendant a U.S. citizen without knowing it?**

A U.S. citizen cannot be deported, excluded, or removed for any reason. Anyone born in the United States is a U.S. citizen, as are persons born in Puerto Rico, Guam, the U.S. Virgin Islands and, the Commonwealth of the Northern Mariana Islands. 8 USC §1101(a)(38). A national of the United States is not a U.S. citizen, but cannot be deported. Persons born in an outlying possession of the United States, such as American Samoa and the Swains Islands, are nationals.

Other persons may have automatically acquired U.S. citizenship without realizing it. The two threshold questions to ask a defendant are:

- At the time of his or her birth, was a parent or grandparent of the defendant a U.S. citizen?
- Before the defendant's 18th birthday, did he or she become a permanent resident and did at least one parent become a naturalized U.S. citizen?

If the answer to either question might be yes, the defendant should be referred for immigration counseling to learn whether citizenship was passed on. See §52.54 for further discussion.

- **Is the defendant a permanent resident or does he or she have current lawful immigration status of some kind?**

Such persons include lawful permanent residents ("green card" holders) and persons holding lawful nonimmigrant visas, *e.g.,* students, tourists, temporary workers, or business visitors. For such clients, it is important to keep in mind the distinction between removal owing to deportability (expulsion from the United States as well as loss of any present lawful immigration status) and inadmissibility (which bars future admissions to the United States and acquisition of lawful immigration status). Noncitizens with lawful immigration status can lose that status and be removed from the United States if they become deportable. 8 USC §1227. Inadmissible noncitizens who leave the United States may be denied permission to reenter, even if they are lawful residents. Inadmissible noncitizens may also be ineligible to establish good moral character. See §52.1. See also California Quick Reference Chart and Notes at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

Some persons who immigrate through a spouse are conditional permanent residents who must report to the DHS within 2 years after receiving residency. 8 USC §1186a(d)(2). Although there is at present no formal FBI check of criminal record at the time of the 2-year interview, the person might be asked questions under oath about grounds for deportation.

Ø **Note:** A lawful permanent resident who might be deportable should try to avoid contact with immigration

authorities before obtaining expert immigration counseling. Applying for a 10-year "renewal" of a green card, applying for naturalization to U.S. citizenship, or traveling abroad and then reentering the United States all place the person at risk.

- **Has the defendant been a lawful permanent resident for 5 years, with a total of 7 years' continuous residence after any lawful admission?**

Lawful permanent residents who have held that status for at least 5 years and who have resided continuously in the United States for 7 years after having been admitted in any status are eligible to apply for a special waiver of most grounds of deportability and inadmissibility under 8 USC §1229a. This form of immigration relief is called "cancellation of removal." It will excuse any conviction except an aggravated felony. 8 USC §1229b. Cancellation cuts off the accrual of 7 years at the time of issuance of a Notice to Appear or commission of certain acts rendering a person deportable or inadmissible, but the accrual of 5 years as a permanent resident is not similarly cut off. Convictions from before April 1, 1997, ought not to "stop the clock" on accrual of the 7 years, although this may be further litigated. Cancellation of removal for lawful permanent residents is discussed in §52.53.

- **Has the defendant, not a permanent resident, lived in the United States for at least 10 years?**

A defendant without lawful immigration status may be eligible to apply for cancellation of removal for nonpermanent residents if he or she has 10 years' residence, good moral character (see §52.1), and can establish that removal would cause the defendant's U.S. citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship. See §52.55 on cancellation of removal for nonpermanent residents. In a controversial decision, the BIA held that a noncitizen who has been convicted of a crime involving moral turpitude was ineligible for this form of relief regardless of whether he was an arriving alien or was eligible for the petty-offense exception under 8 USC §1182(a)(2)(A)(ii)(II). *Matter of Almanza-Arenas* (BIA 2009) 24 I&N Dec 771. Thus, avoid any crime of moral turpitude, even if it is a misdemeanor and the sentence is 6 months or less, if the noncitizen defendant needs to qualify for this form of relief. See Brady et al., Defending Immigrants, chap 11 (10th ed 2008).

- **Has the defendant lived in the United States since January 1, 1972?**

The defendant may be eligible to apply for registry as a permanent resident (see §52.60). He or she must not be inadmissible and must establish good moral character (see §52.1).

- **Is the defendant a currently undocumented person?**

Undocumented persons include those who entered the United States surreptitiously or fraudulently, or who hold an expired visa; all are removable for lack of lawful immigration status. 8 USC §1227(a)(1). As long as they do not become inadmissible or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from removal or permanent residency if they qualify for a particular benefit such as family immigration or cancellation for nonpermanent residents. Alternatively, they may qualify for voluntary departure.

Ø **Note:** For an undocumented person with no immediate prospect of achieving lawful immigration status, the highest defense priority may be to minimize jail time to diminish the likelihood of encountering immigration officials.

- **Does the defendant have a U.S. citizen parent or spouse (of any age), a sibling or child (over age 21), or a permanent resident spouse or (if defendant is unmarried) parent?**

The defendant may be eligible to immigrate through a visa petition at some point (see §52.56). The defendant must not be inadmissible.

- **Does the defendant come from a country of civil war or human rights abuses or recent natural disaster?**

A defendant fearing persecution or torture may apply for political asylum, withholding of removal, or relief under the United Nations Convention Against Torture (CAT) (see §52.57). Conviction of an aggravated felony is a bar to asylum and a severe disadvantage to gaining withholding or relief under the CAT.

The United States designates some countries for Temporary Protected Status (TPS) due to recent civil strife or natural disaster. To qualify, the defendant must be a national of a TPS country and must meet other requirements, must be admissible, and must not have been convicted of two misdemeanors or one felony. See §52.58. Countries

designated for TPS are set forth on the U.S. Citizenship and Immigration Services website at http://www.USCIS.gov. Special relief under Nicaraguan Adjustment and Central American Relief Act (NACARA) legislation was extended to Salvadorans, Guatemalans, and nationals of the former Soviet bloc countries. See §52.55.

Alternatively, the defendant may wish to apply for voluntary departure. See §52.59.

- **Is the defendant under juvenile court jurisdiction or an abused spouse or child, whether or not under court jurisdiction?**

A child who is a dependent of a juvenile court, or who is in delinquency but cannot be returned to the parent due to abuse, neglect, or abandonment, may be eligible for permanent residency as a special immigrant juvenile under 8 USC §1101(a)(27)(J). See §52.61.

A noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under the Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without the cooperation of the abusing citizen or permanent resident. 8 USC §1154(a)(1)(A)(iv), (B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only 3 years of good moral character and physical presence in the United States. 8 USC §1229b(b)(2). See §52.61.

- **Can the defendant provide valuable information to law enforcement authorities about criminal or terrorist activity, or is the defendant a victim of crime or alien trafficking?**

Congress has created temporary visas, which can lead to permanent residency, for persons who are victims of, or have information about, certain crimes. An applicant's own criminal record is potentially waivable: Only persons inadmissible under the terrorist grounds cannot apply for these visas. These include visas under 8 USC §1101(a)(15)(S) for persons who have "critical reliable information" about terrorism or criminal activity (125 visas/year); under 8 USC §1101(a)(15)(T) for victims of severe forms of alien trafficking (10,000 visas/year); and under 8 USC §1101(a)(15)(U) for victims of serious crimes who assist in investigation or prosecution efforts (10,000 visas/year). See §52.62.

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§52.52 F. Forms of Immigration Relief Available From Department of Homeland Security (DHS) and Federal Courts

Even a noncitizen who is undocumented or inadmissible or deportable (or all three) may nevertheless qualify for certain waivers or immigration benefits that will allow him or her to gain or retain legal status. To safeguard a defendant's opportunity to apply for such benefits, certain outcomes must be avoided. Criminal counsel's strategy will depend on the client's documented or undocumented status and the potential eligibility for affirmative immigration benefits. To assist counsel in prioritizing and setting goals, §§52.53-52.62 provide a general overview of the most commonly encountered forms of relief in removal proceedings and explain the most widely available immigration benefits. For a more detailed discussion, see Brady et al., Defending Immigrants, chap 11 (10th ed 2008). Some information is available from the U.S. Citizenship and Immigration Services (USCIS) at http://www.uscis.gov. Ideally, criminal defense counsel advising defendants to make concessions in criminal court in order to obtain a disposition that may preserve eligibility for relief in immigration proceedings should consult with immigration counsel to confirm both statutory eligibility and whether, considering the individual facts and the pattern of discretionary decision making at local immigration courts, there is likelihood of success.

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§52.53 1. Lawful Permanent Residents: Cancellation of Removal

- **Is the defendant a permanent resident of 5 years, with 7 years of continuous residence?**

Cancellation of removal under 8 USC §1229b(a) permits certain permanent residents to apply for a discretionary waiver of any ground of deportability or inadmissibility. Conviction of an aggravated felony is a bar to this application (8 USC §1229b(a)(3)), and the applicant must not have been granted cancellation or similar relief in the past (8 USC §1229b(c)(6)).

The cancellation applicant must have been a permanent resident for 5 years (8 USC §1229b(a)(1)) and must have resided in the United States continuously for 7 years after having been admitted in any status (*e.g.,* as a permanent resident, tourist, or student) (8 USC §1229b(a)(2)). A parent's permanent resident status is imputed to the unemancipated minor children residing with that parent for purposes of eligibility for the 5 years' residency status. *Mercado-Zazueta v Holder* (9th Cir 2009) 580 F3d 1102. The 5 years will continue to accrue throughout the resident's removal proceedings and, if the resident contests deportability, into federal review of a removal order. The 7-year continuous residence requirement is deemed to have ended on the occurrence of either of the following events: (a) the issuance of the Notice to Appear, the charging paper beginning removal proceedings under 8 USC §1229 or (b) the applicant's commission of certain offenses listed in 8 USC §1182(a)(2) that render him or her inadmissible or deportable. 8 USC §1229b(d)(1). These offenses that "stop the clock" on the 7 years are crimes involving moral turpitude, prostitution, drug offenses, and conviction of two or more offenses with an aggregate 5-year sentence, if the person becomes deportable or inadmissible because of the offense. However, a conviction by plea from before April 1, 1997, may not stop this clock, and the person might remain eligible to apply for cancellation. See *Sinotes-Cruz v Gonzales* (9th Cir 2006) 468 F3d 1190.

Ø **Note:** An immigration attorney's assistance may be needed to assess whether charges would come within the "clock-stopping" category. A defendant who needs more time to accrue the 7 years should, if possible, plead to an offense that occurred later rather than earlier in time.

- **Did the permanent resident defendant plead guilty to an offense (even an aggravated felony) with immigration consequences before April 24, 1996?**

In *INS v St. Cyr* (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271, the Supreme Court held that the abolition of 8 USC §1182(c) on April 24, 1996, was not retroactive. Thus, a qualifying permanent resident may be able to avoid deportation by applying, under former 8 USC §1182(c), to waive a conviction received before that date. This relief (formerly known as "section 212(c) relief") could waive even conviction of an aggravated felony, although it was not sufficient in *INS v St. Cyr, supra,* to waive a firearms conviction. This relief will assist noncitizens with drug or drug trafficking convictions, but not those who have been convicted of sex offenses or many other kinds of crimes in which there is no comparable ground of inadmissibility. *Abebe v Mukasey* (9th Cir 2009) 554 F3d 1203.

Counsel with any questions about former 8 USC §1182(c) should contact an immigration attorney. More information is available at the websites of the National Immigration Project of the National Lawyers Guild (http://www.nationalimmigrationproject.org), the American Immigration Law Foundation (http://www.ailf.org), and the Immigrant Legal Resource Center (http://www.ilrc.org).

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§52.54 2. United States Citizenship

- **Is the defendant a permanent resident of 5 years (or sometimes less) who wishes to apply for U.S. citizenship?**

Lawful permanent residents may apply for citizenship after residing in the United States and demonstrating good moral character (see §52.1) for 5 years. 8 USC §1427. Special procedures apply to spouses and minor children of U.S. citizens (who need show only 3 years of permanent residency), military personnel (who may need 1 year or less, and in some cases do not need to be permanent residents, and who may accrue residency time even when residing with their spouse abroad during military duty), and religious workers. 8 USC §1430.

- **Did the defendant have a parent or grandparent who was a U.S. citizen at the time of defendant's birth?**
- **Did the defendant become a permanent resident before age 18 *and* did one of the defendant's parents become a naturalized citizen before the defendant turned 18?**

Some defendants may be unaware that they are U.S. citizens. If the answer to the first question is yes, or if the answer to both parts of the second question is yes, the defendant should be referred for immigration counseling.

Ø **Note:** When representing a permanent resident who is currently under the age of 18, counsel can advise the family that the minor will become a citizen—and therefore be immune to deportation—if one parent with lawful custody naturalizes to U.S. citizenship before the minor's 18th birthday. Special benefits exist for adopted children of U.S. citizens. See Benchbook and Fact Sheets at http://www.ilrc.org/sijs.php.

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§52.55 3. Certain Nonpermanent Residents: Suspension of Deportation or Cancellation of Removal; Special Rules for Nonpermanent Residents From Certain Countries

- **Has the defendant lived in the United States for at least 10 continuous years?**
- **Does the defendant meet the requirements for any of the special rules on adjustment of status found in the notes following 8 USC §1255?**

The attorney general may "cancel the removal" of certain aliens who have resided in the United States for at least 10 years. 8 USC §1229b(b)(1)(A). The grant of this relief bestows lawful permanent resident status. To be eligible, an applicant must have been physically present in the United States for a "continuous" period (which is not broken by statutorily specified brief absences) of at least 10 years immediately preceding the date of application; have been of good moral character during that period; not have been convicted of any crimes that would render him or her inadmissible or deportable; and not be deportable for failure to register as an alien, falsification of documents, or a false claim to U.S. citizenship. Finally, an extremely restrictive requirement is that the applicant must demonstrate that deportation would cause a U.S. citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship.

Certain countries of origin. At various times, Congress has provided relief to nationals of several countries concerning the rules for adjustment of status and cancellation of removal. These special provisions are found as a note following 8 USC §1255 and cover nationals from El Salvador, Guatemala, the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Vietnam, Laos, Cambodia, Poland, Czechoslovakia, Romania, Haiti, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia and their spouses and children. Other countries have also received special treatment. These special rules contain authority for adjustment to lawful permanent resident status for nationals who, among other requirements, have been physically present in the United States on a certain date or for a certain amount of time. See, *e.g.,* 8 CFR §245.13 (Nicaraguan, Cuban); 8 CFR §245.15 (Haitian); 8 CFR §245.20 (Syrian). In most cases, the rules do not relax the good moral character requirement nor provide any amelioration of the criminal bars to eligibility for suspension of deportation or cancellation for nonlawful residents. For updated information, consult an immigration practitioner or the Citizenship and Immigration Services' website at http://www.uscis.gov, which contains a section with answers to frequently asked questions.

> Ø **Note:** Review the latest enactments concerning special treatment for certain nationals and obtain expert immigration advice concerning these issues. These special rules contain deadlines for application for adjustment of status, cancellation of removal, and motions to reopen.

Older convictions may be a benefit. The criminal record requirements are very strict for cancellation for nonpermanent residents: The person cannot be deportable or inadmissible and must have good moral character. However, if the person was convicted by plea before April 1, 1997, of a disqualifying offense, the person still may be permitted to apply.

Noncitizens who have been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a U.S. citizen or lawful permanent resident may apply for cancellation of removal under 8 USC §1229b(b)(2). See §52.61.

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§52.56 4. Immigration Through Visa Petition Based on Relationship With Citizen or Permanent Resident Relative; Waiver of Certain Crimes-Based Grounds of Inadmissibility

- **Does the defendant have a close relative who is a permanent resident or U.S. citizen?**

A noncitizen who is not inadmissible (see §52.1) may obtain permanent resident status through a visa petition based on a relationship with a qualifying U.S. citizen or permanent resident. 8 USC §1154.

Persons classified under 8 USC §1151(b) as immediate relatives of U.S. citizens (spouse, parent of a child over age 21, or unmarried child under age 21) may immigrate rapidly. Others, including adult or married children, siblings of citizens, and spouses and unmarried children of permanent residents, must immigrate through the preference system. 8 USC §1153(a). Depending on the relationship and country of origin, this system may involve a wait ranging from a few months to several years.

Adults who have spent time without lawful status in the United States and then leave the country, either through voluntary departure (see §52.59) or removal, face a 3-year or 10-year bar before they can reenter the United States on a family visa. A waiver of this inadmissibility ground based on hardship is available. 8 USC §1182(a)(9)(B).

Ø **Note:** Certain valued employees can immigrate through an employer's labor certification. See 8 USC §1153(b). Although this device is primarily available to professional workers, nonprofessionals such as health attendants, specialty chefs, and workers who must speak a foreign language may also qualify. The person must not be inadmissible but can apply for a waiver of certain crime-related grounds of inadmissibility under 8 USC §1182(h). Discussion of waiver under 8 USC §1182(h) follows.

- **Is the defendant inadmissible under certain crimes-based provisions?**

A defendant may become admissible by a discretionary waiver of inadmissibility under 8 USC §1182(h) for the following convictions:

- One or more convictions of crimes involving moral turpitude. 8 USC §1182(a)(2)(A)(i)(I).
- One conviction of simple possession of 30 grams or less of marijuana (or a smaller amount of hashish). 8 USC §1182(a)(2)(A)(i)(II). Note that this is the only drug offense that can be waived under this provision.
- Two or more convictions with an aggregate 5-year sentence. 8 USC §1182(a)(2)(B).
- Engaging in prostitution (8 USC §1182(a)(2)(D)).

This waiver is available only under the following conditions:

- Conviction occurred more than 15 years before applying for the immigration benefit, and the person has been rehabilitated and is not a threat to national security. 8 USC §1182(h)(1)(A).
- Conviction was for prostitution, and the person has been rehabilitated and is not a threat to national security. 8 USC §1182(h)(1)(A).
- The defendant has a U.S. citizen or lawful permanent resident spouse, parent, or son or daughter, and denial of benefit would result in extreme hardship. 8 USC §1182(h)(1)(B).
- The defendant is an abused spouse or child of a U.S. citizen or permanent resident who qualifies for classification under the Violence Against Women Act (8 USC §1154(a)(1)(A)(iii) or (iv) or 8 USC §1154(a)(1)(B)(ii) or (iii)). 8 USC §1182(h)(1)(C). See discussion in §52.61.

Permanent residents are barred from applying for this waiver if, after obtaining permanent resident status, they (a) were convicted of an aggravated felony or (b) have not accrued 7 years before the issuance of the Notice to Appear (the charging document beginning removal proceedings). 8 USC §1182(h)(2).

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§52.57 5. Political Asylum, Restricting/Withholding of Removal, and U.N. Convention Against Torture

- **Does the defendant fear returning to his or her home country, or come from a country of human rights abuses or civil war?**

Under current law, there are three immigration benefits that may provide relief to a noncitizen who asserts that he or she might be subjected to persecution or torture if returned to his or her home country:

(1) Asylum (8 USC §1158 (INA §208)) provides temporary and potentially permanent resident status to a noncitizen who establishes a possibility that he or she will be persecuted on account of, *e.g.,* race, religion, or political opinion, if removed to the home country. Unless there are special circumstances, the person must apply within 1 year after coming to the United States.

(2) Withholding of removal (also known as "restriction on removal" under 8 USC §1231(b)(3) (INA §241(b)(3)) provides protection from removal, but not permanent status, to a noncitizen who establishes a clear probability that he or she will be persecuted on account of the above grounds if removed.

(3) Relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) provides protection from removal but no permanent status to noncitizens who can establish a probability that they will be subjected to torture by the government of their home country if removed there. It is not necessary to establish that the torture will be on account of the grounds described above. See 8 CFR §§208.16-208.17.

Bars to asylum and withholding of removal. Under 8 USC §1158(b)(2)(A) and §1231(b)(3)(B), the Attorney General may deny asylum or withholding to an applicant if the Attorney General decides any of the following:

- The applicant ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
- The applicant, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;
- There are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;
- There are reasonable grounds to believe that the alien is a danger to the security of the United States; or
- The applicant is inadmissible or removable for terrorist activities (8 USC §§1182(a)(3)(B)(i), 1227(a)(4)(B)).

Ø **Note:** The Attorney General has held that asylum is not normally granted to a person convicted of a "violent or dangerous" crime. *Matter of Jean* (AG 2002) 23 I&N Dec 373.

The Board has determined that once an alien's crime is determined to be "particularly serious," it necessarily follows that the alien "constitutes a danger to the community." *Matter of S-S-* (BIA 1999) 22 I&N Dec 458.

Conviction of a "particularly serious crime" for purposes of asylum includes conviction of an aggravated felony (8 USC §1158(b)(2)(B)); but even an offense which is not an aggravated felony may be a "particularly serious crime" and the BIA can decide this on a case-by-case basis, rather than by regulation. *Delgado v Holder* (9th Cir 2009) 563 F3d 863, 867.

For purposes of withholding of removal, "a particularly serious crime" includes one or more aggravated felonies for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years (8 USC §1231(b)(3)). See also 8 CFR §§208.13, 208.16. However, the Attorney General has discretionary authority to determine whether any offense, even a non-aggravated felony conviction resulting in a sentence of less than 5 years, is a particularly serious crime for purposes of withholding. *Delgado,* 563 F3d at 871 (three prior felony DUI convictions not "particularly serious crime").

The Attorney General has also determined that, except in very rare instances, any conviction of drug trafficking will be a bar to withholding as a particularly serious crime. *Matter of Y-L-* (BIA 2002) 23 I&N Dec 270, overruled on other

grounds in *Zheng v Ashcroft* (9th Cir 2003) 332 F3d 1186. But the Ninth Circuit held that this presumption is not retroactive to guilty pleas entered before March 5, 2002, for drug trafficking offenses. *Miguel-Miguel v Gonzales* (9th Cir 2007) 500 F3d 941. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *Matter of Juarez* (BIA 1988) 19 I&N Dec 664.

Ø **Note:** For purposes of determining what is a "particularly serious offense," evidence outside the record of conviction, including police reports and the alien's testimony at an immigration hearing, may be considered. *Anaya-Ortiz v Holder* (9th Cir 2010) 594 F3d 673.

The argument remains that not all serious offenses or aggravated felonies should be found to be particularly serious crimes. See, *e.g., Matter of L-S-* (BIA 1999) 22 I&N Dec 645 (conviction of smuggling in violation of 8 USC §1324(a)(2)(B)(iii) with 3½-month sentence was not particularly serious crime). Because of the high probability that an aggravated felony conviction will eliminate even the most compelling asylum applicant's claim for protection, criminal defense counsel should immediately involve immigration counsel and present the most vigorous case possible to avoid an aggravated felony conviction. Even a first-time sale of a small amount of drugs is an aggravated felony, which could result in ineligibility for asylum.

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§52.58 6. Temporary Protected Status (TPS)

- **Does the defendant come from a country designated for special status because of ongoing catastrophe?**

The Attorney General may grant temporary protected status (TPS) for any national of a foreign country designated under 8 USC §1254a, countries encountering catastrophic events, *e.g.,* ongoing armed conflict, earthquake, flood, or other disasters, or other extraordinary and temporary conditions. Countries that are currently designated for TPS include Burundi, El Salvador, Honduras, Nicaragua, Somalia, and Sudan. To check for the most accurate list of what countries are still listed and the requirements, go to the U.S. Citizenship and Immigration Services' website at http://www.uscis.gov, click "Services & Benefits," then click "Humanitarian Benefits," and then click "Temporary Protected Status." Persons from certain other countries are granted Deferred Enforced Departure (DED), which provides temporary protection from removal. Liberians are currently given this protection.

Persons are ineligible for TPS if they are inadmissible (see §52.1) or have been convicted of *two* misdemeanors (as opposed to the three-misdemeanor rule in the amnesty programs) or one felony. 8 USC §1254a(c)(2)(B)(i). In addition, the person must not come within the bars to asylum under 8 USC §1158(b)(2)(A), discussed in §52.57. 8 USC §1254a(c)(2)(B)(ii).

Ø **Practice tip:** To preserve TPS eligibility, it is important to avoid two misdemeanors or one felony. Counsel should consider whether a misdemeanor charge can be pleaded to an infraction or reduced to an infraction. See Pen C §§19.8 (offenses that can be charged either as misdemeanors or infractions), 490.1 (petty theft of property valued at $50 or less). Under Pen C §17(d), the infractions/misdemeanors listed in Pen C §19.8 constitute infractions if the prosecutor files the charge as an infraction (unless defendant objects) or if the court decides that the offense is an infraction. A postjudgment motion to reduce can be made at any time, since the code section does not specify any time limit. In addition, a felony may be reduced to a misdemeanor. See Pen C §17(b).

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§52.59 7. Voluntary Departure

A noncitizen may apply to leave the United States voluntarily at his or her own expense in lieu of being subject to removal proceedings under 8 USC §1229a or before removal proceedings are completed if the alien is not deportable under 8 USC §1227(a)(2)(A)(iii) (aggravated felony) or 8 USC §1227(a)(4)(B) (terrorist activities). 8 USC §1229c(a). A person who has not been admitted because he or she entered without inspection should not be held "deportable" under the aggravated felony provision, and therefore should be eligible for voluntary departure before removal proceedings are completed. The noncitizen may be allowed to voluntarily depart *after* removal proceedings if he or she can demonstrate good moral character and is not being removed because of an aggravated felony conviction. 8 USC §1229c(b).

This relief is valuable because the period of voluntary departure allows the noncitizen to wrap up his or her personal affairs and leave the United States without the stigma of deportation. In contrast, persons who have been deported may not lawfully reenter the United States for 10 years unless a special waiver is obtained (8 USC §1182(a)(2)), and can be criminally charged for illegal reentry. Further, illegal reentry after being deported exposes the noncitizen to greater sentence enhancement than does reentry after voluntary departure.

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§52.60 8. Registry

- **Has the defendant lived in the United States continuously since January 1, 1972?**

A noncitizen who has resided continuously in the United States since January 1, 1972, can obtain permanent residence through registry. 8 USC §1259. Other requirements under 8 USC §1259 are the following:

- Good moral character (see §52.1) for a reasonable period;
- Not inadmissible (although this requirement is called into question by *Matter of Sanchez-Linn* (BIA 1991) 20 I&N Dec 362); and
- Not ineligible for U.S. citizenship (through convictions for draft evasion or desertion; see 8 USC §1425).

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§52.61 9. Relief for Abused Spouses and Children

- **Is defendant a victim of spousal abuse or child abuse, neglect, or abandonment?**

Special immigrant juvenile status. A child who is in dependency or delinquency court proceedings and cannot be returned to either parent owing to abuse, neglect, or abandonment may be eligible for permanent residency as a special immigrant juvenile under 8 USC §1101(a)(27)(J). The juvenile court judge must make a written finding that the noncitizen is under court jurisdiction and is "deemed eligible for long-term foster care" (meaning that the court has found that family reunification is not a viable option and that the child is in or will proceed to foster care, guardianship, or adoption) and that it would not be in the child's best interest to return to the home country. See 8 CFR §204.11. The parent's immigration status is irrelevant. Although this special status has been applied most often to children and young people in dependency proceedings, it also applies to youth in delinquency proceedings who meet the above criteria. For more information, see Brady & Kinoshita, Immigration Benchbook for Juvenile and Family Courts (2003); Kinoshita & Brady, Special Immigrant Juvenile Status (2005); and Fact Sheets: Immigration Options for Undocumented Children. All can be downloaded free of charge at the Immigrant Legal Resource Center website (http://www.ilrc.org/sijs.php).

Violence Against Women Act (VAWA) immigration provisions. A noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under the Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without needing the cooperation of the abusing citizen or permanent resident. 8 USC §1154(a)(1)(A)(iv), (B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only 3 years of good moral character and physical presence in the United States. 8 USC §1229b. Although most grounds of inadmissibility apply, special waivers for VAWA applicants are provided even without qualifying relatives if the act or conviction would have been waivable under 8 USC §1182(a) or §1227(a) and if the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty. 8 USC §1154(a)(1)(B). For fact sheets in several languages, or to order a manual, go to http://www.ilrc.org/vt.php. See also http://www.nationalimmigrationproject.org (click on "Noncitizen Survivors of Domestic Violence").

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§52.62 10. Status for Victims, Witnesses, and Informants Regarding Crime

- **Is the defendant a victim of or does the defendant have information about a crime?**

Congress has created temporary visas, which can lead to permanent residency, for persons who are victims of, or have information about, crime. An applicant's own criminal record is potentially waivable; only persons inadmissible under the terrorist grounds cannot apply for these visas. Even persons whom the government suspects of assisting in drug trafficking are potentially eligible for these visas.

Noncitizens who are victims of serious crime and are, have been, or may be helpful to authorities investigating or prosecuting the crime can apply for temporary, or perhaps permanent, status under a "U" visa. 8 USC §1101(a)(15)(U). A victim is a person who has suffered direct harm or who is directly or proximately harmed as a result of the crime. The DHS has discretion to grant "U" visas for victim bystanders who suffer unusually direct injury as a result of a qualifying crime. Certain family members of murder and manslaughter victims and victims who are incompetent or incapacitated also are eligible. Examples of serious crimes are listed in the statute. The spouse, child, or in the case of a child, parent of the victim also can apply. A representative from the district attorney, police, or similar office must state that the person is helpful in prosecuting or investigating the crime. A total of 10,000 such visas can be awarded each year. Victims eligible for "U" visas may be able to terminate pending removal proceedings, and if the "U" visa is approved, either an order of removal, deportation, or exclusion will be canceled or, if the order was issued by an immigration judge, the case may be reopened and terminated. In addition, noncitizens who were victims of a "severe form of trafficking in persons" can apply for temporary and perhaps permanent lawful status under a "T" visa. 8 USC §1101(a)(15)(T). Severe trafficking includes sex trafficking of persons under age 18 and any persons subjected to involuntary servitude. A total of 5000 temporary "T" visas and 5000 adjustments to permanent residency can be granted each year. Further information on the "U" visa can be found at the following websites: National Immigration Project of the National Lawyers Guild, http://www.nationalimmigrationproject.org (click on "Immigrant Rights Resources"); Immigrant Legal Resource Center, http://www.ilrc.org/uvisa.php; and Citizenship and Immigration Services, http://www.uscis.gov. For assistance with "U" visas, see http://www.asistahelp.org; for "T" visas or in trafficking cases, see http://www.lafla.org/clientservices/specialprojects/traffic.asp. See also regulations effective January 12, 2009, at http://edocket.access.gpo.gov/2008/E8-29277.htm.

The 1995 Crime Bill created the "S" nonimmigrant classification for certain witnesses who supply "critical reliable information" to law enforcement authorities relating to terrorism or criminal activity. 8 USC §1101(a)(15)(S). There is no requirement that the person be a crime victim. The person and his or her family may become eligible for permanent residency. Only 125 such visas are distributed nationally each year.

> Ø **Note:** The Ninth Circuit held that the United States was not estopped from removing a noncitizen on the basis of the government's alleged agreement not to deport him in exchange for his cooperation in a federal drug prosecution when there was no claim that an official having the authority to do so made a specific promise of such relief. *Morgan v Gonzales* (9th Cir 2007) 495 F3d 1084.

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§52.63 G. Deported Clients Convicted of Certain Offenses Face Severe Federal Penalties for Illegal Reentry

Many noncitizen defendants tried and convicted for criminal offenses in state court are removed immediately after serving their sentence and then attempt to reenter the United States illegally. Illegal reentry is a commonly prosecuted federal crime, with steep sentence enhancements if the person was removed after being convicted of certain offenses. See 8 USC §1326(b); *U.S. v Pimentel-Flores* (9th Cir 2003) 339 F3d 959. A surprisingly high number of federal criminal cases involve this offense. Criminal defense counsel should advise deportable noncitizen defendants when a proposed plea can serve as a prior in an illegal re-entry case, and, when possible, should fashion a plea to avoid this consequence. Just as counsel would try to avoid conviction of an offense that can be used as a "strike" in a future prosecution, counsel representing a noncitizen defendant should try to avoid a conviction that can be used to enhance a sentence for illegal reentry if the client attempts to return illegally to the United States.

Two types of crimes cause the most serious sentence enhancements. Prior conviction of an aggravated felony triggers an 8-level increase under the federal sentencing guidelines. See 8 USC §1326(b)(2); 18 USC App USSG §2L1.2(b)(1)(C). Prior conviction of certain other felony offenses triggers a 16-level increase under the guidelines. See 8 USC §1326(b)(1); 18 USC App USSG §2L1.2(b)(1)(A).

> Ø **Note:** In *U.S. v Booker* (2005) 543 US 220, 160 L Ed 2d 621, 125 S Ct 738, the Supreme Court made sentencing under the guidelines voluntary in order to avoid constitutional problems entailed in judicial fact-finding with respect to "conduct" enhancements that increase a defendant's sentence beyond the statutory maximum. See *Blakely v Washington* (2004) 542 US 296, 159 L Ed 2d 403, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 490, 147 L Ed 2d 435, 455, 120 S Ct 2348. It is expected, however, that many federal judges will continue to adhere to the guidelines, especially as they relate to enhancements for prior convictions, which were explicitly excluded from *Apprendi*'s Sixth Amendment jury trial requirement. 530 US at 476, 147 L Ed 2d at 447. Thus, when possible, counsel will want to avoid conviction of an offense that is considered an aggravated felony. See §§52.41-52.47.

Further, counsel will want to avoid the "other felony" category that gives rise to a more serious sentence enhancement than an aggravated felony. This section discusses the "other felony" category. In general, obtaining a misdemeanor rather than felony conviction will avoid the most serious problems. When that is not possible, federal public defenders are often willing to advise on the effect under the guidelines of proposed state court pleas. For further discussion, see Brady et al., Defending Immigrants §9.50 (10th ed 2008).

"Felony offense" creating a 16-level enhancement under the federal sentencing guidelines. A 16-level increase will be imposed for felony conviction of many offenses, *regardless of whether any sentence was imposed and based only upon the fact that the offense is a state felony.* These offenses fall into two categories:

- Many nondrug offenses (including assault, burglary, statutory rape, and possession of a firearm) trigger a 16-level increase in sentence solely by being classed as a state felony, regardless of the sentence imposed; and
- Felony drug trafficking offenses, such as sale or possession for sale, trigger a 16-level increase if the sentence imposed was more than 13 months, and a 12-level increase if the sentence was 13 months or less.

Nondrug felony offenses that trigger the 16-level increase. Under the federal sentencing guidelines, any of the following prior convictions will result in a 16-level increase, regardless of what sentence was imposed (18 USC App USSG §2L1.2(b)(1)(A)):

- A "crime of violence";
- A firearms offense;
- A child pornography offense;
- A national security or terrorism offense;

- A human trafficking offense; or
- An alien smuggling offense.

A crime of violence includes the following felony offenses: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, and any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against another person. 18 USC App USSG §2L1.2, Application Note 1(B)(iii).

Definition of felony; effect of reduction of felony to misdemeanor. The sentencing guidelines define a felony as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." 18 USC App USSG §2L1.2, Application Note 2. This definition of felony is the same in California law. Reduction of a felony to a misdemeanor under Pen C §17(b) or §19 is effective for immigration purposes (*Garcia-Lopez v Ashcroft* (9th Cir 2003) 334 F3d 840) and should be effective here, as under the guidelines. The Ninth Circuit will follow state law in determining the maximum penalty available for an offense. See, *e.g.*, *U.S. v Robles-Rodriguez* (9th Cir 2002) 281 F3d 900. If possible, state defenders should plead to a misdemeanor or arrange to reduce a felony to a misdemeanor for these offenses, and advise the client of the penalties that a felony conviction would bring if the client was ever deported and attempted to return illegally.

"Drug trafficking" offenses that trigger 16-level increase. A prior conviction of an offense charged as an aggravated felony under the drug trafficking category results in an 8-level increase under the guidelines. However, an offense charged as a "felony drug trafficking offense" can be punished more severely than this. Under the guidelines, a drug trafficking offense is "an offense under federal, state or local law that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." 18 USC App USSG §2L1.2, Application Note 1(B)(iv). Conviction of a felony drug trafficking offense for which the sentence imposed exceeded 13 months results in a sentence increase of 16 levels. Conviction of a felony drug trafficking offense for which the sentence imposed was 13 months or less results in a 12-level increase. 18 USC App USSG §2L1.2(b)(1)(A)-(B). A simple possession offense is not a "drug trafficking offense" under the guideline definition and so does not get the 16-level increase. However, felony simple possession is an aggravated felony that will cause an 8-level increase. See, *e.g., U.S. v Robles-Rodriguez* (9th Cir 2002) 281 F3d 900.

Offenses that trigger less serious guideline enhancements in prosecution for illegal reentry. A prior "conviction for any other felony" results in a 4-level increase, as do "three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses." 18 USC App USSG §2L1.2(b)(1)(D)-(E).

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EFFECT OF CRIMINAL CONVICTION ON PROFESSIONAL LICENSES

ADAM G. SLOTE

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§53.1 I. OVERVIEW

This chapter examines the profound effect of a criminal conviction on business and professional licensing. California has approximately 50 different agencies licensing businesses and professions, from accountants to vocational nurses. Licensing extends beyond health care, law, education, insurance, and real estate to less obvious businesses such as car sales, plumbing, cosmetology, pest control, and truck driving, among many others. Entrepreneurs face licensing requirements in fields as diverse as construction, child care, moving and storage, selling estate jewelry, and security alarm services. Even restaurants must have licenses to serve alcoholic beverages.

The objectives of this chapter are to give practitioners the tools necessary to inform clients of the potential licensing consequences of a plea bargain or conviction after trial, to help practitioners structure plea bargains with an eye toward licensing consequences, and to raise awareness about conviction reporting requirements.

While preventing incarceration will often take precedence over a business license, sometimes licensing considerations may tip the balance toward trial and against an otherwise reasonable plea bargain. In any case, it is always desirable for a client to make an informed decision.

Business and professional licensing laws generally provide that the conviction of certain crimes is grounds for disciplinary action or license denial. Not all crimes, however, justify administrative action. Due process requires a nexus between the crime and the business or profession for a conviction to result in discipline or denial; therefore, most licensing laws require that the crime be substantially related to the qualifications, functions, or duties of the business or profession. Some licensing laws impose the further limitation that the crime be a felony or a misdemeanor involving moral turpitude.

Licensees generally have the right to an administrative hearing to explain the facts and circumstances of a conviction, and to present evidence in mitigation and of rehabilitation. Licensing agencies have the right to inquire into the circumstances surrounding the commission of the crime to fix the degree of discipline or to determine if the conviction is substantially related. Bus & P C §493.

Most administrative license proceedings are governed by the Administrative Procedure Act. See Govt C §§11400-11470.50, 11500-11529. For a complete treatment of professional licensing law and administrative procedure, see Professional Licensing: Disciplinary Practice in California (Cal CEB 2008). See also California Administrative Hearing Practice (2d ed Cal CEB 1997) and California Administrative Mandamus (3d ed Cal CEB 2003).

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§53.2 II. LICENSING STATUTES

Most business and professional licenses are governed by the Business and Professions Code, which defines a "license" to include a license, certification, or registration requirement. Bus & P C §477(b). Nearly all of these licenses are subject to suspension, revocation, or denial based on criminal convictions that are "substantially related." Bus & P C §§480, 490. A few professional licenses are exempt from Bus & P C §§480 and 490. These include licenses of attorneys (Bus & P C §6000) and gaming licenses (Bus & P C §19850). Bus & P C §476. These professional licenses are regulated through the courts or through agencies.

The professional licenses covered by Bus & P C §§480 and 490 are many and varied and include chiropractors (Bus & P C §1005); dentists (Bus & P C §1625); doctors (Bus & P C §2050); dietitians (Bus & P C §2585); social workers (Bus & P C §4996); guide dog trainers (Bus & P C §7200.5); funeral directors and embalmers (Bus & P C §7680); real estate brokers and sales agents (Bus & P C §§10150-10151); boxing, wrestling, and martial arts promoters (Bus & P C §18640); and cigarette and tobacco retailers, wholesalers, and manufacturers (Bus & P C §§22972, 22975, 22979).

Licensing acts outside the Business and Professions Code also provide grounds for denial or revocation of a license. These include licenses of teachers (see Ed C §44424), insurance agents (see Ins C §§1668(m), 1748.5(e)(1)), day care facilities (see Health & S C §§1596.70-1597.21), and nursing home administrators (see Health & S C §1416.76).

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III. PROTECTION OF RIGHT TO PRACTICE PROFESSION

§53.3 A. Right to Practice One's Profession

The right to practice one's profession is surrounded with a "panoply of legal protection." *Yakov v Board of Med. Exam'rs* (1968) 68 C2d 67, 75, 64 CR 785. This protection stems from the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Schware v Board of Bar Exam'rs* (1957) 353 US 232, 238, 1 L Ed 2d 796, 77 S Ct 752. For example, qualifications for bar membership "must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v Board of Bar Exam'rs, supra*. The California Supreme Court has followed a similar path, holding that "a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession." *Hughes v Board of Architectural Exam'rs* (1998) 17 C4th 763, 788, 72 CR2d 624. See also *Morrison v State Bd. of Educ.* (1969) 1 C3d 214, 82 CR 175.

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Source: Criminal Law/California Criminal Law Procedure and Practice/53 EFFECT OF CRIMINAL CONVICTION ON PROFESSIONAL LICENSES/§53.4 B. 'Substantial Relationship' Test

§53.4 B. "Substantial Relationship" Test

The denial, suspension, or revocation of a license cannot be based "on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits." Bus & P C §475. Business and Professions Code §§480 and 490 codify the substantial relationship test. See *Petropoulos v Department of Real Estate* (2006) 142 CA4th 554, 47 CR3d 812. The test is whether the conduct in question is "substantially related" to the qualifications, functions, or duties of the business or profession. Bus & P C §§480 (license denials), 490 (license suspension or revocation).

In some cases, the legislature has expressly provided that particular convictions are substantially related to the practice of particular professions. For example, Bus & P C §2239 (relating to the practice of medicine) provides that two or more misdemeanor convictions or any felony conviction for offenses related to the consumption of alcohol constitute unprofessional conduct. See *Griffiths v Superior Court* (2002) 96 CA4th 757, 117 CR2d 445 (under §2239, record of convictions constitutes conclusive proof of unfitness to practice medicine). Likewise, the Education Code specifically enumerates which Penal Code violations trigger suspension or revocation proceedings against credentialed teachers. Ed C §§44424-44425.

Each licensing agency is required to establish a definition of "substantial relationship." Bus & P C §481. Most agency definitions are too subjective and conclusory to be of much assistance in determining whether specific conduct is substantially related to the practice of the business or profession in question. Typical language is found in the regulations applicable to physicians, which state that a crime or act is substantially related to the practice of medicine (16 Cal Code Regs §1360)

> if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Medical Practice Act.

The question of whether a crime is substantially related to the qualifications, functions, or duties of a profession is determined on a case-by-case basis. In general, courts tend to broadly construe "substantial relationship" so as to include, rather than exclude, particular unlawful conduct within the ambit of discipline. *Griffiths v Superior Court, supra,* illustrates this approach. Griffiths, a physician, was convicted of three misdemeanors: one for driving under the influence of alcohol and two more for reckless driving involving alcohol. If a physician sustains two or more misdemeanor convictions involving the consumption of alcoholic beverages, those convictions constitute unprofessional conduct. See Bus & P C §2239(a). At an administrative hearing, Griffiths proved that he had never treated patients while under the influence of alcohol. The administrative law judge (ALJ) dismissed the accusation of unprofessional conduct, concluding that the convictions and proven facts did not provide a basis for imposing discipline; the ALJ found no inherent nexus between driving under the influence and the practice of medicine. The court of appeal reversed, finding that §2239 satisfied the constitutional requirement that a nexus exist between the disciplined conduct and the physician's fitness and competence to practice medicine without any additional showing that the convictions or the alcohol consumption impaired the physician's practice of medicine. 96 CA4th at 774. The court reasoned that the repeated convictions involving alcohol use reflected poorly on the physician's common sense and professional judgment and tended to undermine public confidence in and respect for the medical profession. 96 CA4th at 771. While no evidence showed that the criminal convictions resulted in any harm to patients, license discipline has a preventive function, *i.e.,* protection of the public, and that "it is far more desirable to discipline before a licensee harms any patient than after harm has occurred." 96 CA4th at 772.

The following are additional examples of courts' finding that a conviction was substantially related to the qualifications, functions, or duties of a licensed profession:

- A real estate licensee's conviction for willful infliction of corporal injury on his cohabitant/mother of his child. *Donley v Davi* (2009) 180 CA4th 447, 103 CR3d 1.

- A real estate broker's conviction for violation of fire protection and prevention provisions of the building code. *Robbins v Davi* (2009) 175 CA4th 118, 95 CR3d 792.
- A real estate broker's conviction for possession of marijuana for sale involving transportation of a substantial amount of marijuana from Mexico to California by private plane. *Golde v Fox* (1979) 98 CA3d 167, 159 CR 864.
- A physician's conviction for federal income tax evasion. *Windham v Board of Med. Quality Assur.* (1980) 104 CA3d 461, 163 CR 566.
- An attorney's repeated acts of alcohol-induced violence and possession of a concealed gun. *In re Hickey* (1990) 50 C3d 571, 268 CR 170.
- Child molestation by a lawyer. *In re Lesansky* (2001) 25 C4th 11, 104 CR2d 409.
- Child molestation by a real estate licensee. *Jennings v Karpe* (1974) 36 CA3d 709, 111 CR 776.

The following are examples of cases in which courts found no substantial relationship justifying discipline, suspension, or revocation or denial of a license:

- A real estate broker's misdemeanor conviction for making a false statement to obtain unemployment benefits. *Pieri v Fox* (1979) 96 CA3d 802, 158 CR 256.
- A real estate broker's felony conviction for introducing parties to a drug deal. *Brandt v Fox* (1979) 90 CA3d 737, 153 CR 683.
- A car dealer's misdemeanor conviction for annoying or molesting a child. *Brewer v DMV* (1979) 93 CA3d 358, 155 CR 643.
- A chiropractor's misdemeanor conviction for willfully residing in a house of ill repute. *Cartwright v Board of Chiropractic Exam'rs* (1976) 16 C3d 762, 129 CR 462.
- A lawyer's conviction for acts of civil disobedience, coupled with his active participation in nine different fistfights over the years. *Hallinan v Committee of Bar Exam'rs* (1966) 65 C2d 447, 55 CR 228.
- A real estate salesperson's conviction for misdemeanor unlawful intercourse with a minor. *Donaldson v Department of Real Estate* (2005) 134 CA4th 948, 36 CR3d 577.

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§53.5 C. Board May Look Beyond Plea or Verdict to Circumstances of Case

Professional boards are not foreclosed from going behind a plea or verdict. Bus & P C §493. In practice, boards usually make this type of analysis whenever the crime does not on its face establish the necessary relationship, but the underlying facts do. For example, if a defendant pleads guilty to a lesser included offense that is not substantially related to his or her profession, but the facts and original charge are substantially related to his or her profession, boards may inquire into the circumstances surrounding the commission of the crime. Bus & P C §493.

At any administrative hearing involving such a case, the licensee may introduce evidence on the issue of the lack of a substantial relationship of the conduct to the licensee's professional duties but may not relitigate the question of guilt raised by the fact of the conviction. *In re Prantil* (1989) 48 C3d 227, 255 CR 890 (disbarment); *Arneson v Fox* (1980) 28 C3d 440, 448, 170 CR 778 (revocation of real estate license); *Robbins v Davi* (2009) 175 CA4th 118, 126, 95 CR3d 792 (same). See also *Leslie v Board of Med. Quality Assur.* (1991) 234 CA3d 117, 285 CR 501 (probation and suspension of physician). For further discussion of hearing procedure, see §53.21.

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§53.6 D. Rehabilitation

No person may be denied a license solely on the basis of a conviction if the person has obtained a certificate of rehabilitation (see Pen C §4852.01) or has met other rehabilitation requirements. Bus & P C §480. However, as a practical matter, agencies tend to grant restricted or probationary licenses even on a showing of rehabilitation. Even when a conviction is substantially related to professional qualifications, a licensee has a due process right to present evidence of rehabilitation and mitigation at an administrative hearing. *Arneson v Fox* (1980) 28 C3d 440, 449, 170 CR 778.

Each licensing agency governed by the Business and Professions Code is required to develop rehabilitation criteria. Bus & P C §482. These criteria are typically promulgated as regulations. Rehabilitation regulations typically focus on a number of factors: the passage of time since conviction; successful completion of parole or probation; remorse; change in attitude; expungement of the conviction; alcohol or drug rehabilitation; completion of formal education; stability of family life; correction of business practices; and community involvement. See, *e.g.*, 10 Cal Code Regs §2911. A person may be found to be partially rehabilitated. See, *e.g., Donley v Davi* (2009) 180 CA4th 447, 103 CR3d 1.

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IV. "CONVICTION" FOR PURPOSES OF AFFECTING PROFESSIONAL LICENSE

§53.7 A. Conviction Defined

"Conviction" within the meaning of the Business and Professions Code is "a plea or verdict of guilty or a conviction following a plea of nolo contendere." Bus & P C §§480(a)(1), 490. When no accusatory pleading is filed (see, *e.g.,* Pen C §§849, 849.5), or when a case is dismissed without a verdict, no conviction has occurred. See discussion of the special rules on diversion in §53.12, the effect of expungement in §53.13, and pleas of no contest in §53.8.

Ø **Note:** When no accusatory pleading is filed, the person may petition for destruction of the arrest records. See Pen C §851.8. This is recommended because the licensing agency will see the record of arrest on a "rap sheet."

The Business and Professions Code provides that a board may act on a conviction "when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made … , irrespective of a subsequent order under Section 1203.4 of the Penal Code." Bus & P C §§480(a)(1), 490.

In certain cases, the licensing authority has the ability to suspend a license pending an appeal. See, *e.g.,* Bus & P C §6102(a), which provides that attorneys can be suspended until the time for appeal has lapsed, or until the judgment of conviction has been affirmed on appeal. Similarly, teaching credentials are immediately suspended after conviction of a sex crime pending appeal. See Ed C §44425.

When no statute controls, case law provides that, as a rule, for purposes of *civil* consequences, conviction generally requires both a finding of guilt and a resulting judgment or order implementing the finding. *Boyll v State Personnel Bd.* (1983) 146 CA3d 1070, 1076, 194 CR 717 (commitment to California Rehabilitation Center, with no judgment, not a bar to becoming peace officer). But see *Tuffli v Governing Bd.* (1994) 30 CA4th 1398, 36 CR2d 433 (can suspend teacher while conviction is being appealed).

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§53.8 B. Plea of Nolo Contendere Usually Equivalent to Guilty Plea

Business and Professions Code §§480(a)(1) and 490 provide that "[a] conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere." Both sections apply to almost every business or profession regulated by the Business and Professions Code. See *Arneson v Fox* (1980) 28 C3d 440, 170 CR 778. Most of the individual licensing acts contain similar language. See *In re Gross* (1983) 33 C3d 561, 189 CR 848.

Absent a statute authorizing such use, a nolo contendere plea may not be used as a ground for suspension or revocation of a license. *Kennick v Commission on Judicial Performance* (1990) 50 C3d 297, 321, 267 CR 293; *Cartwright v Board of Chiropractic Exam'rs* (1976) 16 C3d 762, 768, 129 CR 462; *County of Los Angeles v Civil Serv. Comm'n* (1995) 39 CA4th 620, 46 CR2d 256; *Grannis v Board of Med. Exam'rs* (1971) 19 CA3d 551, 557, 96 CR 863; *Kirby v Alcoholic Beverage Control Appeals Bd.* (1969) 3 CA3d 209, 219, 83 CR 89.

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§53.9 C. Infractions

Except for specifically enumerated Vehicle Code violations, an infraction is not a ground for the suspension, revocation, or denial of any license. Pen C §19.8.

Ø **Note:** When an infraction disposition results from a misdemeanor arrest, the conviction will show up on the client's rap sheet. A client may order his or her own rap sheet from the California Department of Justice and seek correction if the record does not clearly identify the disposition as an infraction. Information on making this request is available at http://www.ag.ca.gov/fingerprints/security.php.

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§53.10 D. Misdemeanor Versus Felony Conviction

Licensing laws generally focus on the question of whether a crime is "substantially related" rather than whether it is a felony or misdemeanor. However, there are exceptions. For example, Bus & P C §2236.1 provides that a physician's certificate is automatically suspended if he or she is incarcerated for a felony that is substantially related to the qualifications, functions, or duties of a physician, and Bus & P C §6102(a) provides for immediate suspension of an attorney convicted of a crime involving moral turpitude.

A few statutes refer only to a "felony," a "misdemeanor," or both. See, *e.g.,* Ins C §1668(m). In these instances, case law has read into the statute a requirement that there be a "nexus" or relationship between the crime and the duties of the profession. *Hughes v Board of Architectural Exam'rs* (1998) 17 C4th 763, 788, 72 CR2d 624. See *Morrison v State Bd. of Educ.* (1969) 1 C3d 214, 82 CR 175; *Griffiths v Superior Court* (2002) 96 CA4th 757, 117 CR2d 445; *Cartwright v Board of Chiropractic Exam'rs* (1976) 16 C3d 762, 129 CR 462; *Windham v Board of Med. Quality Assur.* (1980) 104 CA3d 461, 163 CR 566.

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§53.11 E. Crimes of Moral Turpitude

Historically, conviction for a crime of moral turpitude was considered "a disqualifying defect in moral character," which justified permanent exclusion from all licensed professions (see *Hirsch v City & County of San Francisco* (1956) 143 CA2d 313, 325, 300 P2d 177), and some licensing laws limited disciplinary action to convictions for felonies or misdemeanors of moral turpitude. See *Petropoulos v Department of Real Estate* (2006) 142 CA4th 554, 47 CR3d 812. The legislature amended Bus & P C §490 to specifically overrule *Petropoulos*. As a result, no moral-turpitude requirement remains for any license discipline controlled by Bus & P C §§480 and 490. *Robbins v Davi* (2009) 175 CA4th 118, 123 n5, 95 CR3d 792. Attorneys are an exception (see Bus & P C §6101), and other exceptions remain outside of the Business and Professions Code. See, *e.g.,* Health & S C §107070(h) (for discipline against radiological technologist, conviction must be felony or misdemeanor involving moral turpitude committed during performance of radiologic technology duties).

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§53.12 F. Effect of Deferred Entry of Judgment on Denial and Revocation of Licenses

A person who successfully completes a deferred entry of judgment program (formerly called diversion) may consider that he or she was never arrested or granted deferred entry of judgment for that offense when responding to questions from licensing boards, except for peace officer positions. Pen C §1000.4. A peace officer applicant must disclose the arrest in response to "any direct question contained in any questionnaire or application." Pen C §1000.4(b).

Any record pertaining to an arrest that ended in successful deferred entry of judgment "shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate." Pen C §1000.4(a). "The language of [Pen C §1000.4] is extraordinary and compelling. It demonstrates the breadth of the Legislature's underlying remedial purpose." *Unzueta v Ocean View Sch. Dist*. (1992) 6 CA4th 1689, 1696, 8 CR2d 614 (teacher entitled to back pay after successful diversion for cocaine arrest). See also *Martin v Santa Clara Unified Sch. Dist.* (2002) 102 CA4th 241, 125 CR2d 337 (teacher improperly suspended was entitled to back pay but required to attempt to mitigate damages).

Despite Pen C §1000.4, agencies within the Healing Arts Division (Bus & P C §§500-4999.7) may take disciplinary action "notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest." Bus & P C §492. This language was inserted in response to *B.W. v Board of Med. Quality Assur*. (1985) 169 CA3d 219, 234, 215 CR 130, in which the court held that the board's discipline was void because it was based solely on a professional's arrest record in a case that ended in successful diversion. Therefore, in a disciplinary hearing, a health care agency may present evidence of unprofessional conduct based on the same conduct that led to diversion.

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§53.13 G. Effect on Professional Licenses of Expungement, Sealing, or Other Relief From Conviction

Absent a specific statutory exception, the courts have "consistently upheld denial of a license or the right to pursue a particular profession on the basis of an expunged conviction." *Adams v County of Sacramento* (1991) 235 CA3d 872, 880, 1 CR2d 138. *Adams* cited California cases involving (1) disbarment of an attorney; (2) suspension of a physician's license; (3) revocation of a license to sell alcoholic beverages; and (4) revocation of an insurance agent's license. The *Adams* holding, which considered a Kansas conviction and expungement, was that expungement does not restore the right to be a peace officer, because Govt C §1029 bars ex-felons from peace officer status.

Penal Code §1203.4(a) explicitly provides that any order of expungement under that section

> shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency.

Ø **Note:** Penal Code §1203.4(a) does not explicitly affect out-of-state expungements. Therefore, the disclosure of out-of-state convictions, which have been expunged, may be controlled by the law in the state of conviction. Caution is warranted, however, because any California licensing agency that sees the expunged conviction on a rap sheet may allege failure to disclose.

Virtually all statutes that define a conviction for purposes of discipline explicitly state that discipline may be imposed irrespective of expungement under Pen C §1203.4. See, *e.g.,* Bus & P C §§490, 6102 (attorneys; stating also that a felony remains a felony for disciplinary purposes even though there was postconviction reduction to a misdemeanor under Pen C §17(b)(1) or (b)(3); Bus & P C §2236.1(d) (physicians); Ed C §§44008-44009 (elementary and secondary school teachers). Exceptions include Bus & P C §24200(d), which provides that a license issued by the Department of Alcoholic Beverage Control may be suspended or revoked for conviction of a crime involving moral turpitude or certain federal laws regarding alcohol but does not mention the effect of expungement, and Lab C §26, which provides that no license under the Labor Code may be denied solely because of a conviction for which the information or accusation was dismissed under Pen C §1203.4.

Counsel should nonetheless consider seeking expungement, because it has a direct bearing on the degree of penalty to be imposed. Expungement by a court of competent jurisdiction can be powerful mitigating evidence.

Reduction of a wobbler to a misdemeanor under Pen C §17(b) will usually avoid the consequences of a felony conviction. When an offense has been designated a misdemeanor under this section, "it is a misdemeanor for all purposes." Pen C §17(b). Thus, unless a statute creates a specific exception to this rule, the conviction will be treated as a misdemeanor for licensing purposes. *Gebremicael v California Comm'n on Teacher Credentialing* (2004) 118 CA4th 1477, 13 CR3d 777 (applicant for teaching credential could not be denied on ground that he had been convicted of a felony when offense had been reduced to misdemeanor under Pen C §17(b)).

An individual convicted of a crime that is classified as a felony at the time of the jury verdict or plea of guilty or nolo contendere is disqualified from serving as a peace officer even if the conviction is later reduced to a misdemeanor under Pen C §17(b) or by operation of law. Govt C §1029. In addition, reduction of a felony conviction to a misdemeanor rarely, if ever, has a bearing on the question of whether the conviction constitutes grounds for disciplinary action. See, *e.g.,* Bus & P C §6102(b) (attorney discipline). See also §53.10.

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§53.14 H. Reporting Requirements

Clients holding business or professional licenses may be required to promptly report convictions and, in some cases, felony charges. Failure to report can lead to disciplinary action even if the conviction itself is not grounds for discipline. Research should be conducted with the applicable licensing agency. Most licensing agencies require disclosure of convictions through questions on license renewal forms. Some agencies require self-reporting of convictions (or even the filing of felony charges) within 30 days. See, *e.g.,* Bus & P C §§802.1 (physicians, osteopaths, and podiatrists must report indictment or information charging a felony, as well as all misdemeanor and felony convictions, within 30 days), 6068(o)(4)-(5) (attorneys must report indictment or information charging a felony, as well as a conviction for a felony or certain misdemeanors, within 30 days); Ins C §1729.2 (insurance agents must report the filing of felony charges as well as all misdemeanor and felony convictions within 30 days); 14 CFR §61.15 (pilots must report alcohol and drug-related driving convictions to FAA within 60 days). For a prosecuting agency's reporting requirements, see §53.20.

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§53.15 I. Collateral Consequences

A criminal conviction may have additional collateral consequences on rights incidental to a professional's right to practice. For example, a criminal conviction is grounds for automatic suspension of a health care practitioner from participation in the Medi-Cal health care provider program, without a hearing, if the conviction involves fraud or abuse of the Medi-Cal program, or involves a suspension from the federal Medicare program. Welf & I C §14123. This circumstance is important to any defendant who is a health care professional enrolled as a provider in that program. Similarly, a felony drug conviction is grounds for revocation of a doctor's registration with the Drug Enforcement Administration (DEA) to prescribe controlled substances. 21 USC §824(a)(2).

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V. SPECIAL RELATIONSHIPS BETWEEN CRIMINAL AND ADMINISTRATIVE CASES

§53.16 A. Effect of Acquittal in Criminal Case on Administrative Case

An acquittal in a criminal case will not bar subsequent administrative proceedings through principles of res judicata or collateral estoppel. This is because the higher standard of proof in a criminal case means the issue decided is actually different from the seemingly identical administrative issue. *Holt v Department of Food & Agric.* (1985) 171 CA3d 427, 433, 218 CR 1.

However, when a defendant is acquitted, counsel should consider moving the court for a finding of factual innocence under Pen C §851.8 or §851.85, or both. Such an order should be res judicata in an administrative proceeding, because it is based on a finding that, according to a preponderance of the evidence at trial, the defendant was actually not guilty. This is more conducive to innocence than the standard applied by a disciplinary board that dismisses a charge. See §53.26.

A convicted person, in extraordinary circumstances, may also apply to the Governor for a pardon that, if granted, restores all rights and privileges that the person enjoyed before conviction, with one exception: Professional boards may still withhold from a pardoned person the right to practice his or her "art or profession on the person of another." Pen C §4853. In addition, courts have held, on the grounds of Pen C 4852.15, that the Governor's pardon does not automatically restore the right to practice law to a disbarred attorney. *Feinstein v State Bar* (1952) 39 C2d 541, 553, 248 P2d 3.

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§53.17 B. Effect of Decision in Administrative Case on Related Criminal Prosecution

The doctrine of collateral estoppel bars a party from relitigating in a new proceeding issues decided in a previous proceeding. See *e.g., Lucido v Superior Court* (1990) 51 C3d 335, 341, 272 CR 767. As summarized in *Lucido,* the threshold requirements for application of the doctrine are (1) the issue in the new proceeding must be identical to the issue decided in the previous proceeding; (2) the issue must actually have been litigated in the earlier proceeding; (3) the issue must necessarily have been decided in the earlier proceeding; (4) the decision in the earlier proceeding must be final and on the merits; and (5) the party against whom collateral estoppel is sought must be the party that litigated the issue in the earlier proceeding or must be in privity with that party. *Lucido v Superior Court, supra*. In *Lucido,* the California Supreme Court held on public policy grounds that collateral estoppel did not block the defendant's prosecution on criminal charges stemming from facts that the trial court, at a probation revocation hearing, had concluded were not proved. 51 C3d at 342.

The requirements for collateral estoppel also may not be met when a state licensing agency concludes that a licensee has not committed a crime that would require revocation of the license or other discipline. In *People v Demery* (1980) 104 CA3d 548, 163 CR 814, the court held that a decision of the Board of Medical Quality Assurance (now the Medical Board of California) that appellant had not violated Health & S C §11154 was not binding in a subsequent criminal prosecution for the same offense because of the different purposes entailed in the two proceedings. See also *Gikas v Zolin* (1993) 6 C4th 841, 851, 25 CR2d 500 (refusing to apply collateral estoppel in DMV hearing). But see *People v Sims* (1982) 32 C3d 468, 186 CR 77 (administrative decision exonerating welfare recipient of welfare fraud collaterally estopped subsequent criminal prosecution).

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§53.18 C. Effect of Search and Seizure Ruling in Criminal Case on Administrative Case

When determining whether to apply the federal exclusionary rule (which requires suppression of evidence seized in violation of the Fourth Amendment) to administrative cases, courts balance the deterrent effect of the rule with its social cost. See *Conservatorship of Susan T.* (1994) 8 C4th 1005, 36 CR2d 40. Most courts have declined to apply the exclusionary rule to administrative cases even when the criminal courts have applied the exclusionary rule. *See, e.g., Department of Transp. v State Personnel Bd.* (2009) 178 CA4th 568, 100 CR3d 516 (State Personnel Board); *In re Christopher B*. (1978) 82 CA3d 608, 147 CR 390 (teacher-dismissal proceeding); *Pierce v Board of Nursing Educ. & Nurse Registration* (1967) 255 CA2d 463, 63 CR 107 (medical board proceeding); *Pating v Board of Med. Quality Assur.* (1982) 130 CA3d 608, 182 CR 20 (same). However, in *Dyson v California State Personnel Bd.* (1989) 213 CA3d 711, 262 CR 112, the decision in a criminal proceeding that evidence had been wrongfully seized and should therefore be suppressed had collateral estoppel effect in a subsequent disciplinary proceeding against an employee of the Department of the Youth Authority. In *Dyson,* the school's security director was employed by the Youth Authority and had overseen the investigation and search of the employee's home that led to the criminal charges. The court found the relationship between the criminal case and the administrative case sufficiently close to apply the collateral estoppel doctrine and suppress the evidence in the administrative case.

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§53.19 D. Peace Officer's Statements During Internal Investigation

A peace officer has no absolute constitutional or statutory right to remain silent during an administrative investigation of criminal activity. *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 827, 221 CR 529. The officer may be compelled to answer questions during such an investigation under threat of disciplinary action, although no statement made under such compulsion may be used against the officer in a criminal proceeding. *Lybarger v City of Los Angeles, supra*. The officer does, however, have certain procedural rights under the Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313). Thus, if the officer is a criminal suspect, the investigators must advise the officer of his or her *Miranda* rights (see *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602) and must also inform him or her that silence could be considered insubordination and lead to administrative discipline and that any statements made under threat of such discipline may not be used against the officer in a later criminal proceeding. *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 829, 221 CR 529. A suspect officer has the right to counsel during any interrogation. *California Correctional Peace Officers Ass'n v State* (2000) 82 CA4th 294, 314, 98 CR2d 302 (finding right to counsel under Govt C §3303(h), not Fifth Amendment).

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VI. SPECIAL ISSUES FOR ATTORNEYS IN CRIMINAL CASES

§53.20 A. Issues for the Prosecutor: Charging, Plea Bargains, Reporting to State Agencies

The fact that a defendant holds a professional license should have little effect on a prosecutor's charging or prosecution of a case. In charging a case, a prosecutor has a duty to institute criminal charges that he or she believes are supported by probable cause. Cal Rules of Prof Cond 5-110. A prosecutor should not use the charging process to obtain leverage to induce a guilty plea to a lesser charge before trial (see Uniform Crime Charging Standards II-1-II-2). Thus, it would be improper for a prosecutor to charge a case as a felony merely in an attempt to affect a defendant's professional license.

It is also improper for a prosecutor to threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Cal Rules of Prof Cond 5-100(A). A "civil dispute" includes "an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity," including administrative hearings for professional licenses. Cal Rules of Prof Cond 5-100(C). The best practice for a prosecutor handling a case in which the defendant holds a professional license is to charge and prosecute the case on the merits of the case without taking into account the defendant's professional license status.

Once a case is charged, the prosecutor has reporting requirements. A prosecutor should notify the state agency regulating the defendant's professional license at an early stage of the proceedings, so that the state agency can take any action it deems necessary to promote the interests of justice and public safety. Also, a state agency has a right to furnish information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interests of the public when the criminal proceeding is substantially related to the qualifications, functions, or duties of a licensee. Pen C §23. If the defendant is an attorney, the prosecutor must notify the State Bar and the court clerk immediately. Bus & P C §6101(b).

When any felony is charged against a person licensed in the Healing Arts (listed in Division 2 of the Business and Professions Code), the prosecuting agency must notify the licensee's board. Bus & P C §803.5(a). The court clerk must transmit any felony preliminary examination transcripts under 800 pages to the applicable allied health board, and a probation officer must transmit a copy of any probation reports generated for the court pursuant to Pen C §1203. Bus & P C §803.6. On conviction, a certified copy of the conviction must be transmitted to the appropriate board by the court clerk within 48 hours. Bus & P C §803.5(b).

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B. Issues for the Defense Attorney

§53.21 1. Explore Early and Creative Settlement to Avoid Conviction

Criminal defense counsel often avoid an aggressive settlement posture during the early stages of a criminal investigation because to do so might necessitate disclosing information to the government, including statements by the defendant. In cases involving licensed professionals, that reluctance should be carefully balanced against the prospects for a noncriminal disposition. For example, aggressive pursuit of settlement during a known Medi-Cal fraud investigation has resulted in civil settlements with restitution. This type of result has significant impact on the later decision of whether to initiate a professional disciplinary proceeding.

Diversion programs are often a licensed professional's safest option. These exist for drug offenses (Pen C §§1000-1000.10), child abuse or neglect (Pen C §§1000.12, 1000.17), misdemeanors (Pen C §§1001-1001.9, 1001.50-1001.55), and bad-check offenses (Pen C §§1001.60-1001.67).

If the case proceeds to trial, and the defendant is acquitted, defense counsel should ask the judge to find the defendant factually innocent under Pen C §851.85.

Some licenses do not require reporting of convictions until the next license renewal application, which could be 2 years away. In that situation, planning for a reduction of a felony to a misdemeanor before reporting can save a license.

Attorneys may enter the Attorney Diversion and Assistance Program either voluntarily or by State Bar referral, as long as the investigation is "based primarily on the self-administration of drugs or alcohol or the illegal possession, prescription, or nonviolent procurement of drugs for self-administration, or on mental illness, and does not involve actual harm to the public or his or her clients." Bus & P C §6232(b)(3).

Ø **Note:** A physician under investigation used to have the opportunity to avoid administrative action by voluntarily entering the Medical Board of California's diversion program. That program was terminated in 2008. See former Bus & P C §2350.

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§53.22 2. Client's Statements or Testimony

In some cases, an early conviction by plea agreement may avoid "bad facts" that would prevent settlement of a disciplinary proceeding. Counsel who decides to take the criminal case to trial should consider whether the defendant should take the stand and deny criminal conduct that the evidence otherwise clearly establishes. Such testimony is not well received by licensing agencies and frequently affects the decision in the disciplinary proceeding. Criminal defense counsel's ability to work within this context and advise clients accordingly will have a significant effect on the ability to defend a disciplinary proceeding and on the client's future right to practice his or her profession.

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§53.23 3. Counseling Client to Begin Rehabilitation

Criminal counsel should advise the client in a timely fashion about actions that will minimize an adverse decision in the administrative proceeding. At some point, a client is going to want to be able to show the licensing agency that there have been positive changes since the activity leading to the conviction. For example, professionals involved in drug use should be directed toward a treatment program at the earliest moment, regardless of whether that action constitutes a tacit admission of guilt. When restitution is called for, it should be paid as soon as possible. When warranted, psychological counseling should be commenced as soon as possible and continued as long as necessary to be productive. Business practices that led to a conviction should be changed as soon as possible, and educational course work may be warranted. Allowing a client to deny a problem and delay such action could result in the outright denial or revocation of a license that might otherwise be saved.

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§53.24 C. Sentencing Issues

Judges pronouncing sentence in criminal cases do not usually impose restrictions on a defendant's right to practice his or her profession. However, they have the right to do so if the criminal conduct was substantially related to the practice of the profession. *People v Frank* (1949) 94 CA2d 740, 211 P2d 350 (court could properly prohibit defendant from practicing medicine during probation); *People v King* (1968) 267 CA2d 814, 825, 73 CR 440 (citing *Frank* with approval). But see *People v Burden* (1988) 205 CA3d 1277, 253 CR 130 (court may not restrict practice of profession if profession not substantially related to criminality). See §§38.34-38.38 limits on court's power to impose probation conditions.

The state agency that issued a professional license may appear in court and "make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interests of the public." Pen C §23. When a prosecutor thinks the interests of justice would be served by suspension or revocation of the defendant's professional license or registration, the prosecutor should enlist the aid of the state agency in charge of licensing in crafting specific terms of probation that will assist the agency with the suspension or revocation of the defendant's license.

Defense counsel should be aware that the sentencing phase of a criminal case is important to the administrative proceeding. For example, significant restitution, substantial fines, participation in treatment programs, or the imposition of community service, or a combination of these, within the scope of defendant's profession may mitigate suspension or revocation of a license. The imposition of those conditions as part of a criminal sentence makes it more difficult to suspend or revoke since, as a practical matter, the defendant must have the ability to practice his or her profession to make restitution, pay a fine, or complete the community service requirement. Also, conditions of criminal probation that are rehabilitative in nature enhance a licensee's overall posture before the licensing agency, in that rehabilitation, by definition, decreases the risk of recidivism, which should be the agency's primary concern.

Paradoxically, although jail time is certainly the most severe form of punishment, in administrative practice it greatly aggravates the case. The argument that the defendant has truly paid his or her debt to society in the most severe way is not persuasive. The imposition of a jail sentence tends to be viewed only as an indicator of the severity of the crime, and the need for severe license discipline. In this regard, licensing agencies are concerned not only with rehabilitation but also with the public's view of their professions and the effect that formerly incarcerated practitioners may have on this perception.

Ø **Note:** Completion of probation is an important element in showing rehabilitation; therefore, counsel should seek the shortest possible probation period or plan to seek early termination of probation when possible.

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VII. ADMINISTRATIVE HEARING PROCEDURE

§53.25 A. Prehearing Suspensions

Interim orders of suspension and restrictions may issue when a practitioner has been convicted of a crime substantially related to the licensed activity. Bus & P C §494(a). The interim order of suspension and restrictions may be based on a petition with supporting affidavits and requires proof by a preponderance of the evidence. The licensee must be given notice of the hearing with limited exceptions, is entitled to representation by counsel and a record of the proceedings, and may present affidavits and other documentary evidence as well as oral argument. See Bus & P C §494.

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§53.26 B. General Description of Administrative Hearing Procedure

Most administrative licensing proceedings are governed by the Administrative Procedure Act (APA) applicable to administrative adjudication. Govt C §§11400-11470.50, 11500-11529. For a complete treatment of this subject, see California Administrative Hearing Practice (2d ed Cal CEB 1997). See also Govt C §§11371-11373.3, 11529 for special procedures that apply to disciplinary proceedings and procedures for issuance of interim orders involving the Medical Board of California and California Board of Podiatric Medicine.

Proceedings are initiated by the filing of a "statement of issues" in cases involving denial of a license, or an "accusation" in cases involving discipline or revocation. Govt C §§11503-11504. The applicant must file a "notice of defense" within 15 calendar days after service of the accusatory pleading. The notice may be filed either by delivery or by mail to the initiating agency. Govt C §11506. Section 11506 also provides for a "Special Notice of Defense" on identified bases. Discovery is limited to the production of statements, writings, and other documents. Govt C §§11507.5-11507.7, 11511. Government Code §11511.5 permits prehearing conferences before an administrative law judge (ALJ) to encourage stipulations, identify and limit the number of witnesses, explore settlement possibilities, and deal with other issues. Regulations of the Office of Administrative Hearings provide for a limited motion practice. 1 Cal Code Regs §1022.

The hearing may be held before an ALJ or other hearing officer sitting alone, or before the agency itself, as determined by the agency. Govt C §11512. Very few cases are heard before the agency itself.

The conduct of the hearing is not governed by technical rules relating to evidence and witnesses; any relevant evidence is admissible "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Govt C §11513(c). Hearsay evidence is admissible for limited purposes (Govt C §11513(c); see §53.23). These purposes include supplementing or explaining other evidence. But hearsay evidence alone is insufficient to support a finding. Courts have split on whether an objection is required to make such hearsay insufficient to support a finding. Compare *Borror v Department of Inv.* (1971) 15 CA3d 531, 92 CR 525, with *Carl S. v Commission for Teacher Preparation & Licensing* (1981) 126 CA3d 365, 178 CR 753. Evidence by affidavit is given the same effect as if the affiant testified orally, if timely notice of the proposed testimony is given and the opposing party fails to request the right to cross-examine the affiant. Govt C §11514.

To introduce competent proof of a criminal plea, the agency must introduce a certified copy of the judgment in the criminal case. Once the attorney for the agency introduces competent proof of conviction, he or she can then supplement that evidence with portions of the trial or other transcript. If there is no trial, evidence of an aggravating nature might be overlooked by a licensing agency with a small enforcement budget. The existence of a trial transcript increases the likelihood that such evidence will be available.

The standard of proof in an administrative proceeding to revoke a physician's license to practice medicine has been held to be by "clear and convincing proof to a reasonable certainty" and not by the "preponderance of the evidence" standard. *Ettinger v Board of Med. Quality Assur.* (1982) 135 CA3d 853, 856, 185 CR 601. That same standard is applied in proceedings to revoke a license in other professions, but child day care is an exception. See Health & S C §1596.887.

In proceedings to deny a license to an applicant, the burden is on the applicant to prove rehabilitation by a preponderance of the evidence. See *Martin v Alcoholic Beverage Control Appeals Bd.* (1959) 52 C2d 259, 341 P2d 291.

The initial finding, if rendered by the ALJ or other hearing officer, is a proposed decision to be adopted or "non-adopted" by the agency. Govt C §11517(b). In cases involving physicians, whether the agency "non-adopts" or not, it "shall give great weight to the findings of fact of the administrative law judge, except to the extent those findings are controverted by new evidence." Bus & P C §2335(c)(1). The agency may "non-adopt" a decision and impose a more severe penalty only if the agency reads the transcript of the hearing, or if the parties stipulate to a decision on the record without a transcript. Govt C §11517(c). If no action is taken on a proposed decision within 100 days, the decision is deemed adopted. Govt C §11517(d). Under Bus & P C §2335(c), the Medical Board of California and the

California Board of Podiatric Medicine have 100 days within which to act.

The agency may order reconsideration of all or part of its decision on its own motion, or on the petition of a party, if certain time limitations are met. Govt C §11521. The agency's failure to issue a timely order of reconsideration results in loss of jurisdiction to do so. *Gamm v Board of Med. Quality Assur.* (1982) 129 CA3d 34, 181 CR 23.

Judicial review of an adverse administrative decision is accomplished by filing a petition for writ of mandate in superior court. Govt C §11523; CCP §1094.5.

Licensing agencies, especially those with small enforcement budgets, normally await the outcome of a criminal prosecution, then proceed with the administrative case if there is a conviction. They do not usually proceed on the facts while the criminal case is pending. There are times, however, when the two cases proceed contemporaneously or when the administrative case is scheduled for hearing before the criminal trial.

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§53.27 C. Whether Administrative Proceeding Can Precede Criminal Trial

In *Savoy Club v Board of Supervisors* (1970) 12 CA3d 1034, 1039, 91 CR 198, the court ruled that there was no Fifth Amendment basis for postponing an administrative proceeding until there was an outcome in a criminal case based on the same facts. The court reasoned that the Fifth Amendment did not apply in advance of actual questions propounded, and was no insulation from an administrative process designed to protect the public, rather than to punish the licensee. Similarly, the court dismissed without merit the argument that such disclosure of the defense to the prosecution violated due process. This reasoning is analogous to the supreme court's ruling in *People v Jasper* (1983) 33 C3d 931, 935, 191 CR 648, which held that defendants whose probation has been revoked have no absolute right to continue their revocation hearing until after their trial.

In contrast to *Savoy Club,* the court of appeal in *Alvarez v Sanchez* (1984) 158 CA3d 709, 204 CR 864, held that criminal defendants, who were also sued civilly on the basis of the same facts, should have been allowed to postpone their civil trial until after the preliminary examination in the criminal case. Defense counsel may be able to argue by analogy that a continuance of an administrative hearing, at least until after a preliminary examination, is necessary.

As a practical matter, for reasons pertaining to economy of resources, the administrative agency usually waits to act until after the criminal matter has ended.

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§53.28 D. Ramifications of Licensee's Testifying at Administrative Hearing

When an administrative hearing precedes the parallel criminal trial, counsel must make a tactical decision on whether to have the defendant testify at the hearing. There are several rules to consider:

- In administrative proceedings, if the respondent does not testify in his or her own behalf, the respondent may be called and examined as if under cross-examination, but only *after* the respondent has had an opportunity to testify in his or her own behalf. See Govt C §11513(b); *O'Mara v State Bd. of Pharmacy* (1966) 246 CA2d 8, 11, 54 CR 862.
- The licensee can be compelled to take the stand (Govt C §11513(b)), but may invoke the Fifth Amendment at the administrative hearing and is not required to appear in person. Counsel can appear on the respondent's behalf if the agency has not subpoenaed the respondent or served a notice to appear. Govt C §11450.50. There is no absolute right to be present at administrative proceedings. *Arnett v Office of Admin. Hearings* (1996) 49 CA4th 332, 339, 56 CR2d 774. If the licensee does testify, that testimony is inadmissible during the prosecution's case in chief at a later criminal proceeding. *Civil Serv. Ass'n Local 400 v Civil Serv. Comm'n* (1983) 139 CA3d 449, 460, 188 CR 806, disapproved on other grounds in *Long Beach City Employees Ass'n v City of Long Beach* (1986) 41 C3d 937, 951 n18, 227 CR 90; *Szmaciarz v State Personnel Bd.* (1978) 79 CA3d 904, 145 CR 396; *Hankla v Governing Bd.* (1975) 46 CA3d 644, 653, 120 CR 827.

  Ø **Note:** By analogy to *People v May* (1988) 44 C3d 309, 243 CR 369 (see §23.28), the prosecution can probably use this testimony to impeach the defendant in the later criminal proceeding, but only if the defendant testifies in the later proceeding.

- It is possible that a favorable outcome in an administrative proceeding may bar a subsequent criminal prosecution. *People v Sims* (1982) 32 C3d 468, 186 CR 77. For further discussion, see §53.17.

As a practical matter, effective defense of a professional license disciplinary case requires that the licensee testify, because the administrative law judge, hearing officer, or agency is allowed to draw a negative inference from the licensee's failure to testify, or from his or her assertion of the privilege against self-incrimination. *Szmaciarz v State Personnel Bd.* (1978) 79 CA3d 904, 918, 145 CR 396. See *Baxter v Palmigiano* (1976) 425 US 308, 47 L Ed 2d 810, 96 S Ct 1551.

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DEATH PENALTY CASES

JAMES D. McWILLIAMS

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§54.1 I. OVERVIEW

Few areas of legal practice are as stressful and time-consuming as capital litigation. The unique features of preparing for a penalty phase, along with the concerns that naturally flow from the magnitude of the possible sentence, tend to make capital litigation a specialized field among practitioners on both sides. Although many features of a capital trial are identical to other felony trials, the differences are vital and must be understood by the practitioner engaged in capital litigation. This chapter is meant as an overview of this complex area. See "other resources" below for more in-depth coverage of death penalty cases.

Multiphased trial. The trial of a death penalty case (Pen C §§190-190.9) is divided into two phases: a guilt phase and a penalty phase. The penalty phase serves the function of the probation and sentencing hearing in noncapital cases, but is vastly different. The penalty phase involves the introduction of evidence relevant to factors in aggravation and mitigation of the sentence. The jury is instructed to weigh those factors and determine whether the sentence should be death, or life without the possibility of parole. A special group of jury instructions and rules for admissibility of evidence governs this phase. If sanity is at issue, it is litigated in a "sanity phase" that comes between the guilt phase and the penalty phase.

Each phase has the same basic structure as an entire jury trial. Each begins with opening statements, continues with the introduction of evidence, and concludes with final arguments and instructions.

The jury will usually be the same for all phases. Only on a showing of good cause can the trial judge order that a different jury be selected for subsequent stages.

Other resources. A continuing source of excellent information for defense counsel is the California Death Penalty Defense Manual. The manual and a yearly supplement are available from either the California Public Defenders Association (CPDA) in Sacramento, (916) 362-1686 (x304), http://www.cpda.org, or California Attorneys for Criminal Justice (CACJ) in Sacramento, (916) 448-8868, http://www.cacj.org. In addition, the California Appellate Project (CAP) publishes a monthly newsletter (RECAP) covering interim decisions of state and federal courts, and other topics of interest. The California Appellate Project is located at 101 Second Street, Suite 600, San Francisco, CA 94105, (415) 495-0500. Another resource is the Habeas Corpus Resource Center, 50 Fremont Street, Floor 18, San Francisco, CA 94105, (415) 348-3800, http://www.hcrc.ca.gov. They often have educational conferences available to defense attorneys.

For several years, CACJ and CPDA have put on a 4-day death penalty seminar every February to train defense attorneys and other professionals in the field. In addition, there is an annual Bryan R. Schechmeister Death Penalty College, a week-long intensive program in August sponsored by Santa Clara University Law School, CACJ, and CPDA. Contact Professor Ellen Kreitzberg for information.

The California Appellate Project primarily assists defense counsel with postconviction work in death penalty cases in state and federal courts. However, members of the project are willing to consult informally with defense *trial* counsel before and during trial on specific issues. The office also has a case load of its own. The State Public Defender, with offices in San Francisco and Sacramento, is an additional source of information.

For those interested in training from the prosecution perspective, the California District Attorneys Association offers an annual symposium in homicides and a special circumstance training in alternate years. CDAA can be reached at (916) 443-2017. The California Attorney General's Office, which handles all death penalty appeals, publishes and makes available to district attorneys annually a *Capital Case Compendium.* Advice can also be obtained by telephone from one of the four Attorney General's Death Penalty Coordinators in San Francisco and Los Angeles. District attorneys may obtain advice, briefs, and other valuable assistance from the Association of Government Attorneys in Capital Litigation, a national organization composed of death penalty prosecutors. See http://www.agacl.org for information.

Check the California Rules of Court and the California Supreme Court's "Policies Regarding Cases Arising from Judgments of Death" on death penalty appeals and writs.

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§54.2 II. CHART: DEADLINES

Action	Deadline	Authority
Plead special circumstance.	Usually charged before preliminary hearing. Defense has right to request findings by preliminary hearing magistrate on sufficiency of proof as to charged and uncharged special circumstances. May be charged for first time in information if defendant had due notice at time of preliminary hearing.	*People v Brice* (1982) 130 CA3d 201, 208, 181 CR 518; *Talamantez v Superior Court* (1981) 122 CA3d 629, 634, 176 CR 800.
Prosecution to give notice of specific evidence that state intends to introduce at penalty phase.	Except for rebuttal or new evidence, at latest before start of trial. It is unclear whether "trial" refers to guilt phase or penalty phase. Failure to give *formal* notice until after guilt phase has been held to be mere technical error if actual notice was given before guilt phase.	Pen C §190.3. See Pen C §1054.1; *People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 1231, 23 CR2d 403; *People v Taylor* (1990) 52 C3d 719, 737, 276 CR 391; *Keenan v Superior Court* (1981) 126 CA3d 576, 587, 177 CR 841.

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Source: Criminal Law/California Criminal Law Procedure and Practice/54 DEATH PENALTY CASES/§54.2A III. QUALIFICATIONS OF APPOINTED COUNSEL

§54.2A III. QUALIFICATIONS OF APPOINTED COUNSEL

The minimum qualifications for appointed trial counsel in capital cases are set out in Cal Rules of Ct 4.117. The rule does not appear to apply to retained counsel. Although the rule states that it does not set a legal standard for effective assistance of counsel (Cal Rules of Ct 4.117(a)), it is demanding to ensure well-trained and experienced counsel. Some counties require counsel to complete a form verifying their qualifications. Rule 4.117 provides:

> **(a) [Purpose]** This rule defines minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts. These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel.
>
> **(b) [General qualifications]** In cases in which the death penalty is sought, the court must assign qualified trial counsel to represent the defendant. The attorney may be appointed only if the court, after reviewing the attorney's background, experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.
>
> **(c) [Designation of counsel]**
>
> (1) If the court appoints more than one attorney, one must be designated lead counsel and meet the qualifications stated in (d) or (f), and at least one other must be designated associate counsel and meet the qualifications stated in (e) or (f).
>
> (2) If the court appoints only one attorney, that attorney must meet the qualifications stated in (d) or (f).
>
> **(d) [Qualifications of lead counsel]** To be eligible to serve as lead counsel, an attorney must:
>
> (1) Be an active member of the State Bar of California;
>
> (2) Be an active trial practitioner with at least 10 years' litigation experience in the field of criminal law;
>
> (3) Have prior experience as lead counsel in either
>
> (A) At least 10 serious or violent felony jury trials, including at least 2 murder cases, tried to argument, verdict, or final judgment; or
>
> (B) At least 5 serious or violent felony jury trials, including at least 3 murder cases, tried to argument, verdict, or final judgment;
>
> (4) Be familiar with the practices and procedures of the California criminal courts;
>
> (5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;
>
> (6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and
>
> (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.
>
> **(e) [Qualifications of associate counsel]** To be eligible to serve as associate counsel, an attorney must:
>
> (1) Be an active member of the State Bar of California;
>
> (2) Be an active trial practitioner with at least three years' litigation experience in the field of criminal law;
>
> (3) Have prior experience as
>
> (A) Lead counsel in at least 10 felony jury trials tried to verdict, including 3 serious or violent felony jury trials tried to argument, verdict, or final judgment; or
>
> (B) Lead or associate counsel in at least 5 serious or violent felony jury trials, including at least 1 murder case, tried to argument, verdict, or final judgment;
>
> (4) Be familiar with the practices and procedures of the California criminal courts;
>
> (5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;
>
> (6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and
>
> (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.
>
> **(f) [Alternative qualifications]** The court may appoint an attorney even if he or she does not meet all of the qualifications stated in (d) or (e) if the attorney demonstrates the ability to provide competent representation to the defendant. If the court appoints counsel under this subdivision, it must state on the record the basis for finding counsel qualified. In making this determination, the court must consider whether

the attorney meets the following qualifications:

(1) The attorney is an active member of the State Bar of California or admitted to practice *pro hac vice* under rule 9.40;

(2) The attorney has demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases;

(3) The attorney has had extensive criminal or civil trial experience;

(4) Although not meeting the qualifications stated in (d) or (e), the attorney has had experience in death penalty trials other than as lead or associate counsel;

(5) The attorney is familiar with the practices and procedures of the California criminal courts;

(6) The attorney is familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

(7) The attorney has had specialized training in the defense of persons accused of capital crimes, such as experience in a death penalty resource center;

(8) The attorney has ongoing consultation support from experienced death penalty counsel;

(9) The attorney has completed within the past two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and

(10) The attorney has been certified by the State Bar of California's Board of Legal Specialization as a criminal law specialist.

(g) [Public defender appointments] When the court appoints the Public Defender under Penal Code section 987.2, the Public Defender should assign an attorney from that office or agency as lead counsel who meets the qualifications described in (d) or assign an attorney that he or she determines would qualify under (f). If associate counsel is designated, the Public Defender should assign an attorney from that office or agency who meets the qualifications described in (e) or assign an attorney he or she determines would qualify under (f).

(h) [Standby or advisory counsel] When the court appoints standby or advisory counsel to assist a self-represented defendant, the attorney must qualify under (d) or (f).

(i) [Order appointing counsel] When the court appoints counsel to a capital case, the court must complete *Order Appointing Counsel in Capital Case* (form CR-190), and counsel must complete *Declaration of Counsel for Appointment in Capital Case* (form CR-191).

In addition, rigorous guidelines have been approved by the American Bar Association House of Delegates. A proposed draft of those guidelines can be found at the Bar Association's website at http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelinesdraft.pdf. See *Wiggins v Smith* (2003) 539 US 510, 156 L Ed 2d 471, 123 S Ct 2527 (citing to the ABA standards, and strongly suggesting that counsel needs to prepare comprehensive social history of defendant in every capital case). But see *Bobby v Van Hook* (2009) ___ US ___, 175 L Ed 2d 255, 130 S Ct 13 (ABA standards are only guides to what reasonableness means).

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IV. COMPLAINT, INFORMATION, AND INDICTMENT

A. Pleading Special Circumstances (Death Penalty)

§54.3 1. Manner of Pleading Special Circumstances

Pleading special circumstance in complaint. It is not necessary to set forth in the complaint the special circumstances that the prosecution expects to charge in superior court. The defense, however, has the right to request findings by the preliminary hearing magistrate on the sufficiency of the proof for charged and uncharged offenses and special circumstances. *People v Brice* (1982) 130 CA3d 201, 208, 181 CR 518. The defense should be given adequate notice at or before the preliminary hearing of the special circumstances involved. See *Talamantez v Superior Court* (1981) 122 CA3d 629, 634, 176 CR 800.

Special circumstances usually pleaded separately. Each special circumstance should be pleaded separately, setting forth each "element" required by the statute. See Pen C §§952 (pleading may be in words of statute that describe offense), 958 (words other than those of statute describing offense may also be used), 190.2 (special circumstances statute). The following is an example:

SPECIAL CIRCUMSTANCE (Penal Code §190.2(a)(17)(A))

It is alleged that the murder of _ _[*name of victim*]_ _ was committed by _ _[*name of defendant*]_ _ while _ _[*name of defendant*]_ _ was engaged in the commission of a robbery in violation of Penal Code §211, within the meaning of Penal Code §190.2(a)(17)(A).

For special circumstances other than multiple murder (Pen C §190.2(a)(3)), each special circumstance should be set forth separately for each victim and each crime. If there are two or more robbery murder victims, a special circumstance should be alleged separately naming each victim. If multiple crimes such as robbery, rape, or burglary are alleged as special circumstances, each one should be alleged separately. See Pen C §190.2.

When the multiple murder special circumstance (§190.2(a)(3)) is pleaded, only one multiple murder special circumstance may be found, regardless of the number of victims. *People v Sanders* (1995) 11 C4th 475, 46 CR2d 751; *People v Daniels* (1991) 52 C3d 815, 876, 277 CR 122. See *Daniels v Woodford* (9th Cir 2005) 428 F3d 1181, 1212 (jury must be instructed that the multiple murder special circumstance can only be counted once). The same rule applies to the prior murder special circumstance of Pen C §190.2(a)(2). *People v Allen* (1986) 42 C3d 1222, 1274, 232 CR 849.

A number of statutes calling for the death penalty are not found in Pen C §190.2, including perjury that leads to the execution of an innocent person (Pen C §128); assault by a life prisoner that results in the victim's death within 1 year (Pen C §4500); train-wrecking that results in death (Pen C §189); and sabotage resulting in death (Mil & V C §§1670-1672).

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§54.4 2. Charging Substantive Crimes

There is no requirement to separately charge the substantive crime, *e.g.,* robbery, rape, or burglary, when a special circumstance based on that crime is alleged. *People v Mickey* (1991) 54 C3d 612, 677 n12, 286 CR 801. The felony underlying the special circumstance of felony murder (Pen C §190.2(a)(17)) must be pleaded and proved only to the same extent as felony murder (Pen C §190.4(a)). See also *People v McDonald* (1984) 37 C3d 351, 378, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431 (defendant acquitted of underlying robbery; prosecution precluded from retrying defendant on special circumstance based on that crime).

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B. Procedural Differences Relating to Special Circumstance Allegations

§54.5 1. Evidence of Uncharged Special Circumstances Must Be Presented at Preliminary Hearing or Grand Jury Proceeding; Adequate Notice Must Be Given to Counsel

In a typical, non-special-circumstance context, the defendant is considered to have received notice of the charge being brought not merely from the complaint (or indictment) but also from any evidence presented at the preliminary hearing (or to the grand jury). See, *e.g., People v Superior Court (Mendella)* (1983) 33 C3d 754, 764, 191 CR 1; *People v Donnell* (1976) 65 CA3d 227, 231, 135 CR 217. Because the special elements that must be proved as part of the prosecution's burden in a special circumstance case are fairly esoteric (see, *e.g.,* Pen C §190.2(d), which requires that an aider and abettor have been a major participant who acted with reckless disregard for life), such special circumstances may not be readily apparent from evidence that supports, for example, an ordinary felony murder complaint.

The normal rule is that the prosecutor may add to the superior court information any crime shown by the evidence at the preliminary hearing (Pen C §§739, 1009; *People v Crosby* (1962) 58 C2d 713, 723, 25 CR 847), even when it was not charged in the commitment order, as long as it is transactionally related to a charge in the commitment order. *People v Superior Court (Mendella), supra*. Defense counsel may wish to argue that the normal charging rule should not be applied to all cases involving special circumstance allegations. The defendant may persuade the trial court in a Pen C §995 motion that he or she faces a potential death penalty based on uncharged special circumstances that defense counsel did not defend against at the preliminary hearing because counsel had no adequate notice that a special circumstance allegation would or could be filed in the information from the evidence that was presented. Such a claim is even stronger when the defense attorney was prevented from cross-examining witnesses at the preliminary hearing on facts that were relevant to uncharged special circumstance allegations, or was not allowed to establish facts that would negate them. To avoid any such argument, the prosecution should be ready to show that the defense had actual, adequate notice of the potential special circumstances involved. See *Talamantez v Superior Court* (1981) 122 CA3d 629, 633, 176 CR 800.

Ø **Note:** In some jurisdictions, it is the prosecution's practice to add special circumstances in the information after the defendant is held to answer. On one hand, this practice delays available funding to the defense for second counsel and ancillary services that would address penalty phase issues until the special circumstances are added. On the other hand, the defendant, as a tactical matter, then has the opportunity to plead guilty to the complaint before special circumstances are charged, to try to avoid a death sentence or life without parole.

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§54.6 2. Bail

One important consequence of alleging special circumstances is that the defendant's right to bail is affected. Penal Code §1270.5 provides that, when a defendant is charged with an offense punishable with death when the proof "is evident or the presumption thereof great," he or she cannot be released on bail. This language is similar to that of Cal Const art I, §12(a): Bail is unavailable in capital cases "when the facts are evident or the presumption great." It has been argued that, once it has been settled that the defendant will not receive the death penalty, he or she may be admitted to bail, even in a special circumstances case. Courts of appeal have ruled that every special circumstance murder case is automatically covered by the statute, even if the prosecutor has announced that he or she will not seek the death penalty. *Maniscalco v Superior Court* (1993) 19 CA4th 60, 23 CR2d 322; *In re Bright* (1993) 13 CA4th 1664, 1671, 17 CR2d 105; *In re Freeman* (1980) 102 CA3d 838, 162 CR 423. This issue has not been addressed by the California Supreme Court.

The "proof is evident … presumption great" standard in Pen C §1270.5 is considered met when there is "any substantial evidence … to sustain a [capital] verdict." See *In re Curtis* (1891) 92 C 188, 190, 28 P 223. However, other formulas of the standard appear elsewhere. See, *e.g., In re Weinberg* (1918) 177 C 781, 171 P 937; *In re Mooney* (1918) 35 CA 797, 171 P 109.

The defendant is entitled to a hearing to decide whether the proof is "evident" or the presumption "great." *Clark v Superior Court* (1992) 11 CA4th 455, 457, 14 CR2d 49. The decision to grant or deny bail is subject to review by petition for writ of habeas corpus. Pen C §1490; *In re Nordin* (1983) 143 CA3d 538, 544, 192 CR 38. On habeas corpus generally, see chap 42.

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§54.7 3. Demurrers to Special Circumstance Allegations

The rules for demurring to special circumstance allegations are the same as for demurring to substantive offenses. Tactical considerations may argue against demurring to such an allegation at a time when the prosecution has the power to amend the complaint or information, or to dismiss the entire action and refile, because a procedural advantage may inure to the defendant if the defect is raised at a time when a severance of the special circumstance(s) from the substantive crimes would result.

Ø **Warning:** Failing to demur may have the consequence of waiving both the right to demur later and the objection to the allegation that could have been raised by demurrer before arraignment. Pen C §§1003-1004, 1012. Extreme caution is advised.

One usual ground for demurring to a felony, that it is barred by the statute of limitations, does not apply to a demurrer to a special circumstance based on that felony. *People v Morris* (1988) 46 C3d 1, 14, 249 CR 119, disapproved on other grounds in *In re Sassounian* (1995) 9 C4th 535, 543 n5, 545 n6, 37 CR2d 446. The language of Pen C §190.4, that the underlying felony must be "charged and proved pursuant to the general law," requires only proof of the underlying felony, not a valid conviction.

For further discussion of demurrers, see chap 7.

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§54.8 4. Other Procedural Safeguards

The California Supreme Court has indicated that it intends to treat "special circumstance" allegations procedurally the same as it treats substantive offenses. *People v Garcia* (1984) 36 C3d 539, 551, 205 CR 265 (while special circumstances are not crimes, enhancements, or sentencing factors, their importance requires that courts extend same protection to them as to elements of criminal charge); *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622 (language in Pen C §§871 and 1387 referring to "offense" and "action" applies equally to special circumstance allegations); *People v Superior Court (Engert)* (1982) 31 C3d 797, 802, 183 CR 800 (standards of specificity that apply to statutes defining criminal offenses apply equally to special circumstance clauses). See also *Ghent v Superior Court* (1979) 90 CA3d 944, 952, 153 CR 720 (special circumstance allegation is subject to dismissal and review in superior court under Pen C §995). For discussion of §995 motions, see chap 13.

Although the California Supreme Court has held that, generally, the same trial and appellate rules apply to both capital and noncapital cases, the court does make exceptions because there is a "particular concern to preserve the reliability of death penalty verdicts." *People v Cox* (1991) 53 C3d 618, 695, 280 CR 692, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (juror use of alcohol is of even greater concern in capital case).

All "proceedings" in a capital case, including those in chambers, must be held on the record with a court reporter present. Pen C §190.9. A daily transcript must be prepared of all such proceedings. Pen C §190.9. This is true in a capital case regardless of whether the district attorney has formally announced his or her intention to seek the death penalty. *Abernathy v Superior Court* (2007) 157 CA4th 642, 68 CR3d 726. There is no definition of the word "proceedings," and the discussion of matters "off the record" and not reported may be nonprejudicial. *People v Deere* (1991) 53 C3d 705, 720, 280 CR 424. The court has specifically disapproved unreported conferences on matters of "substantial controversy." *People v Morris* (1991) 53 C3d 152, 210 n11, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. The statute also requires that the court assign the reporting to a court reporter who uses computer-aided transcription equipment, although failure to do so is not specified as a ground for reversal (assuming the legislature can so dictate to the courts). Pen C §190.9.

The reporting of the preliminary hearing itself must be transcribed on a daily basis. See *Abernathy v Superior Court, supra*. Pre-preliminary hearing appearances, however, must be reported but need not be transcribed. The transcribing of pre-preliminary appearances, which should include chamber discussions, the formal certification of pre-preliminary hearing matters, and the preliminary hearing itself occur only after the prosecution has notified the superior court that death is being sought. The lower court must prepare a certified record and forward it to the superior court within 120 days after the notification. Pen C §190.

Note that reviewing the ongoing record has been a special burden on counsel. Counsel may consider tape recording the proceeding to supplement their personal notes to promote a more accurate record. California Rules of Court 1.150(d) permits sound recordings on inconspicuous personal recording devices to be used as personal notes of the proceedings; the court must be informed in advance. See, *e.g., People v Ashley* (1990) 220 CA3d 919, 269 CR 769.

The test regarding the need for the defendant's presence at bench and chambers discussions in a capital case is the same as in a noncapital case, *i.e.,* absence is prejudicial only if the defendant's presence bears a "reasonably substantial relation" to his or her opportunity to defend against the charge. *People v Deere, supra*. The burden is on the defendant to show that his or her absence prevented a fair trial. *People v Beardslee* (1991) 53 C3d 68, 103, 279 CR 276. A defendant may validly waive the right to be present in a capital case. *People v Sully* (1991) 53 C3d 1195, 1238, 283 CR 144.

The burden of proof of mitigation and provocation is the same in both capital and noncapital cases. *People v Daniels* (1991) 52 C3d 815, 868, 277 CR 122 (concerning former Pen C §1105, now see Pen C §189.5(a)).

That a motion for change of venue is being brought in a capital case "weighs strongly in favor of a change of venue." *People v Jennings* (1991) 53 C3d 334, 360, 279 CR 780.

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V. PRETRIAL MOTIONS FREQUENTLY MADE IN CAPITAL CASES

§54.9 A. Additional Counsel Is Usually Appointed

Two defense counsel are usually appointed in death cases. A reason that is often given for the need for a second attorney is that the guilt phase attorney loses his or her credibility with the jury if the defense is unsuccessful in the guilt phase. Thus, in theory, the second attorney is necessary to argue the penalty phase if the guilt phase is lost.

It is within the trial court's discretion to decide whether second counsel is needed. *People v Burgener* (1986) 41 C3d 505, 522, 224 CR 112, overruled on other grounds in *People v Reyes* (1998) 19 C4th 743, 80 CR2d 734. In several cases, the reviewing court has upheld the trial court's decision to deny second counsel. See *People v Kirkpatrick* (1994) 7 C4th 988, 30 CR2d 818, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Moore* (1988) 47 C3d 63, 76, 252 CR 494; *People v Lucky* (1988) 45 C3d 259, 247 CR 1; *People v Burgener, supra; People v Jackson* (1980) 28 C3d 264, 287, 168 CR 603, overruled on other grounds in *People v Cromer* (2001) 24 C4th 889, 901, 103 CR2d 23. Failure to appoint second counsel will constitute error only if a showing was made of genuine need, demonstrated by factual assertions. *People v Burgener, supra*. Guidelines for making this showing are in *Keenan v Superior Court* (1982) 31 C3d 424, 180 CR 489.

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§54.10 B. Defendant's Right to Self-Representation, to Have Advisory Counsel Appointed, or to Have Co-Counsel Status

Self-representation. A defendant is entitled to represent himself or herself in a capital case just as in a noncapital case. *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525. This right to self-representation extends to the penalty phase. *People v Blair* (2005) 36 C4th 686, 736, 31 CR3d 485. It is not a denial of due process to allow self-representation even when the defendant's stated intent is to seek the death penalty. *People v Clark* (1990) 50 C3d 583, 617, 268 CR 399. Generally, a motion for self-representation is untimely if made after the guilt phase. See *People v Halvorsen* (2007) 42 C4th 379, 433, 64 CR3d 721 (however, motion timely when made after penalty phase that ended in mistrial).

Advisory counsel. Despite the prevalent practice of appointing two defense attorneys when a defendant is represented by counsel, if a defendant elects self-representation in a capital case there is no absolute right to appointed advisory counsel. A request for advisory counsel is within the trial court's discretion. See *People v Stansbury* (1993) 4 C4th 1017, 17 CR2d 174 (advisory counsel permitted); *People v Crandell* (1988) 46 C3d 833, 861, 251 CR 227 (advisory counsel denied).

> Ø **Note:** *People v Stansbury, supra,* was later appealed to the U.S. Supreme Court and remanded on the issue of whether the defendant's confession was made when the defendant was in custody. *Stansbury v California* (1994) 511 US 318, 128 L Ed 2d 293, 114 S Ct 1526. In *People v Stansbury* (1995) 9 C4th 824, 38 CR2d 394, the California Supreme Court held that the defendant was not in custody and affirmed the judgment.

Factors for the court to consider include the defendant's demonstrated legal abilities and the reasons given by the defendant for seeking advisory counsel. *People v Crandell, supra*. Even a request by a pro per defendant for a law clerk may properly be denied. *People v Clark* (1992) 3 C4th 41, 112, 10 CR2d 554 (no showing that services are "reasonably necessary").

Defendant as co-counsel. In both capital and noncapital cases, the defendant has no right to appear as co-counsel. *People v Frierson* (1991) 53 C3d 730, 741, 280 CR 440. Co-counsel status is not constitutionally guaranteed. As long as there is a reasonable or even a fairly debatable justification under the law for the decision to deny advisory counsel, that ruling will be upheld. *People v Frierson, supra*.

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C. Funds for Ancillary Defense Services

§54.11 1. In Capital Special Circumstance Cases

Special state funds are supposedly available to defense counsel in capital cases for investigators and other nonattorney expert assistants. Pen C §987.9. The state, however, has not funded §987.9 reimbursement for many years and is unlikely to fund it in the future. The §987.9 procedure continues in most counties even though the intended result of this procedure, state reimbursement, is no longer available. Such funds are being paid exclusively by the individual counties.

The §987.9 application must be confidential. It is not to be served on or disclosed to the prosecutor, and it is not to be presented to the judge who is assigned to try the case. Pen C §987.9. The judge to whom it is presented must keep it confidential and seal the application and his or her ruling, including any order denying or granting it and authorizing funds to be paid for defense services. It must be supported by a declaration under oath. See the sample form in California Criminal Law Forms Manual §54.1 (2d ed Cal CEB 2005).

A trial judge's failure to act on a §987.9 application for defense services may be reviewed by a petition for writ of mandate. See *Burnett v Superior Court* (1974) 12 C3d 865, 869, 117 CR 556. Defense counsel who files a petition for writ of mandate should be careful to keep the application and supporting declaration confidential by alerting the appellate court to the dangers inherent in the ordinary rules relating to service of petitions if enforced in proceedings ancillary to §987.9 proceedings. Although no reported decisions have considered the range of possible remedies for a violation of the confidentiality required by §987.9, remedies could include suppression of vital evidence or even dismissal when the disclosure is intentional and the evidence would not otherwise have had to be disclosed. See *Barber v Municipal Court* (1979) 24 C3d 742, 157 CR 658 (decided before reciprocal discovery required). Moreover, considering the greater scrutiny given review of capital cases and the more rigorous application of the rules designed to protect the defendant in such cases (see *Spaziano v Florida* (1984) 468 US 447, 467, 82 L Ed 2d 340, 358, 104 S Ct 3154), the California Supreme Court may consider a breach of §987.9 confidentiality to preclude imposition of the death penalty if the confidential information revealed would not otherwise have had to be revealed and may have aided the state's ability to obtain the sentence. See *Corenevsky v Superior Court* (1984) 36 C3d 307, 204 CR 165 (decided before reciprocal discovery required). In *Tran v Superior Court* (2001) 92 CA4th 1149, 112 CR2d 506, the appellate court found that the trial court abused its discretion in denying *retained* counsel funding under §987.9 when the retainer did not cover ancillary services and the defendant was otherwise indigent.

Ø **Note:** When drafting a §987.9 application, counsel should bear in mind that under §987.9(d), the confidentiality provided by §987.9 does not preclude any court from providing the Attorney General with access to documents otherwise protected by §987.9 when the defendant raises an issue on appeal or collateral review and the recorded portion of the record, created pursuant to §987.9, relates to the issue raised.

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§54.12 2. In Noncapital Special Circumstance Cases

If the trial court eliminates death as a potential sentence (see *Corenevsky v Superior Court* (1984) 36 C3d 307, 314, 204 CR 165; *Ghent v Superior Court* (1979) 90 CA3d 944, 954, 153 CR 720), or if the prosecutor announces his or her unequivocal intention to seek a noncapital maximum sentence (*Sand v Superior Court* (1983) 34 C3d 567, 569, 194 CR 480), the defendant's right to Pen C §987.9 funds for specific defense services ceases.

Juveniles between ages 16 and 18 who commit murder can be charged with special circumstances, but they cannot be executed. The burden of proof of age is on the defendant. After a finding of guilt, the court can decide whether the punishment is to be life without parole or life with parole available after 25 years. Pen C §190.5. See also *Roper v Simmons* (2005) 543 US 551, 161 L Ed 2d 1, 125 S Ct 1183.

There is also a noncapital special circumstance for the first degree murder of a person working in various public transit activities. Pen C §190.25(a). In addition, a first degree murder that is also a hate crime carries a punishment of life without parole. Pen C §190.3.

There are also several events that can raise the punishment for second degree murder to life without parole. See, *e.g.*, Pen C §§190.05 (defendant previously imprisoned for another murder), 190.5 (certain killings involving peace officers).

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D. Discovery Motion

§54.13 1. Discovery Concerning Guilt and Penalty Phases

A pre-guilt-phase discovery request or discovery motion should relate both to guilt and to sentencing. See *People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 23 CR2d 403. The scope of the defense penalty discovery request should refer to all statutory factors relating to penalty (Pen C §190.3) and any evidence, whether specified or not, that might be viewed as extenuating the gravity of the crime (Pen C §190.3(k)) or otherwise mitigating, although unrelated to the crime. See *Eddings v Oklahoma* (1982) 455 US 104, 110, 71 L Ed 2d 1, 8, 102 S Ct 869; *Lockett v Ohio* (1978) 438 US 586, 608, 57 L Ed 2d 973, 992, 98 S Ct 2954. Counsel should particularly request the names of experts the prosecutor will use, either as consultants or as witnesses. See *People v Johnson* (1974) 38 CA3d 228, 113 CR 303.

The defense may wish to obtain information on the district attorney's capital charging policies to support a *Murgia* motion (*Murgia v Municipal Court* (1975) 15 C3d 286, 124 CR 204; see discussion in §§18.16-18.20). The request must describe the desired information with specificity and show plausible justification. See *Griffin v Municipal Court* (1977) 20 C3d 300, 306, 142 CR 286 (motion granted); *People v McPeters* (1992) 2 C4th 1148, 1169, 9 CR2d 834 (motion denied; defense analysis of effect of victim's race on capital case sentences was incomplete).

The provisions of Pen C §1054.3 apply to capital cases. This means that the defense is required to disclose the identity and statements of defense witnesses with regard to both the guilt and penalty phases. *People v Superior Court (Mitchell), supra; People v Superior Court (Sturm)* (1992) 9 CA4th 172, 186, 11 CR2d 652. The disclosure of guilt and penalty phase evidence must be made by the defense before the guilt phase begins in the absence of a showing of good cause to delay discovery. *People v Superior Court (Mitchell), supra*.

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§54.14 2. Discovery Concerning Evidence to Support Motion for Noncapital Penalty

The district attorney may not exercise his or her charging discretion with respect to special circumstance allegations "with intentional and invidious discrimination" against a defendant. *People v Keenan* (1988) 46 C3d 478, 506, 250 CR 550.

If the defendant believes that grounds exist for a motion to declare a maximum, noncapital penalty based on intentional and invidious discrimination, a special discovery motion to obtain the evidence that will support it should be made, either as part of a general discovery motion or separately. Several California cases have held, however, that the defense is not entitled to such discovery without case-specific data showing plausible justification for the materials sought. See, *e.g., People v McPeters* (1992) 2 C4th 1148, 1169, 9 CR2d 834 (motion made as *Murgia* motion; see discussion in §54.13).

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§54.15 E. Motion for Conditional Examination of Witnesses

A conditional examination is similar to a deposition, but it is used only for material witnesses who will be unavailable to testify at trial for specified reasons. See Pen C §1336. In capital cases, the prosecution may be granted a conditional examination of one of its witnesses under Pen C §1335(b) on a showing that the witness's life is in jeopardy. *People v Jurado* (2006) 38 C4th 72, 114, 41 CR3d 319. The defense can examine witnesses conditionally if the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or is a person 65 years of age or older, or a dependent adult, or if there is evidence that the witness's life is in jeopardy. Pen C §1336(a)-(b).

The defendant must serve and file an application to conditionally examine witnesses, supported by affidavit. See Pen C §§1336-1338. The essential items of the affidavit are outlined in Pen C §1337; it must include a statement that (Pen C §1337(d))

> the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will not be able to attend the trial, or is a person 65 years of age or older, or a dependent adult, or that the life of the witness is in jeopardy, or that the witness is a victim or material witness in a domestic violence case who has been or is being intimidated or threatened as described in subdivision (d) of Section 1335 from cooperating with the prosecutor or testifying at trial.

The prosecution may satisfy the requirements of §§1335-1337 by submitting a declaration that the witness's life is jeopardized by the defendant or his or her codefendants or associates. *People v Jurado* (2006) 38 C4th 72, 114, 41 CR3d 319. The conditional examination must be held at a specified time and place before a magistrate. Pen C §1339.

Counsel holding the conditional examination should be sure that a court reporter will be present. At the examination, the witness is examined on direct and cross-examination as if at trial.

If a witness who has been conditionally examined is unavailable as a witness at trial within the meaning of Evid C §240, the deposition may be read at the trial. Pen C §1345. See discussion in §§11.25A, 31.20. See also sample motion for conditional examination in California Criminal Law Forms Manual §11.17 (2d ed Cal CEB 2005).

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§54.16 F. Motion to Dismiss Special Circumstance Under Pen C §§871.5, 995

A special circumstance allegation may be dismissed under Pen C §871.5 or §995 on the same grounds as a substantive offense. *Ramos v Superior Court* (1982) 32 C3d 26, 184 CR 622 (§§871.5, 995); *Ghent v Superior Court* (1979) 90 CA3d 944, 153 CR 720 (§995). See *People v Superior Court (Mendella)* (1983) 33 C3d 754, 758, 191 CR 1. The prosecution may appeal the granting of a §995 motion striking a special circumstance allegation, and, if successful, the Double Jeopardy Clause does not bar reinstatement of the dismissed special circumstance allegation, even if the defendant had immediately pleaded guilty as charged. *People v Superior Court (Jurado)* (1992) 4 CA4th 1217, 6 CR2d 242.

For discussion of Pen C §§871.5 and 995 motions, see chap 13.

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§54.17 G. Motion to Dismiss Special Circumstance Under Pen C §1385

Before trial or plea. Trial courts have the same power to strike a special circumstance before trial as they have to strike any other charge or allegation, *i.e.,* through Pen C §§871, 995, 1385, or demurrer. Such a dismissal, however, must meet statutory and case law requirements. See, *e.g., People v Superior Court (Bridgette)* (1987) 189 CA3d 1649, 1652, 235 CR 113 (writ of mandate issued vacating trial court's §1385 order striking death penalty).

After trial or plea. For murders that took place on or after June 6, 1990, trial courts are specifically prohibited from striking or dismissing special circumstance allegations once they have been admitted by plea or found true by a court or jury. Pen C §1385.1. See *Tapia v Superior Court* (1991) 53 C3d 282, 298, 279 CR 592. This appears to be true whether the case involves a death sentence or a sentence of life without parole, because Pen C §§190.1-190.5 and 1385.1 make no distinction. For murders that took place before June 6, 1990, the trial judge has discretion to strike a special circumstance after it has been admitted or found true. In addition, the trial judge may presumably modify a death verdict under Pen C §190.4(e), discussed in §54.53, even after the effective date of §1385.1, because a court has the obligation under Pen C §190.4(e) to decide whether the verdict is supported by the evidence.

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§54.18 H. Motion to Strike Prior Murder Special Circumstance

A defendant, by pretrial motion, may move to strike a Pen C §190.2(a)(2) prior murder special circumstance on the ground of constitutional error. The defendant is entitled to an evidentiary hearing at which he or she has the burden of proof by a preponderance of the evidence. *Curl v Superior Court* (1990) 51 C3d 1292, 1296, 276 CR 49. The validity of the prior conviction is not a question of fact that needs to be determined by the jury beyond a reasonable doubt. *People v Curl* (2009) 46 C4th 339, 351, 93 CR3d 537.

Although the courts have sometimes restricted a defendant's right to collaterally attack a prior conviction, a defendant in a capital case still has the right to collaterally attack a prior conviction for murder that is alleged as a special circumstance. *Garcia v Superior Court* (1997) 14 C4th 953, 962, 59 CR2d 858; *People v Horton* (1995) 11 C4th 1068, 1134, 47 CR2d 516.

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§54.18A I. Application for Mental Retardation Hearing

In *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, the Supreme Court held that the execution of mentally retarded individuals is cruel and unusual punishment prohibited by the Eighth Amendment. The court left the task of implementing the ban on executing the mentally retarded to the states. 536 US at 317, 153 L Ed 2d at 348.

California implemented *Atkins* by enacting Pen C §1376, which defines "mentally retarded" and establishes a procedure in capital cases for determining whether a defendant is mentally retarded. Under Pen C §1376(a), the term refers to "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." Mental retardation "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." *In re Hawthorne* (2005) 35 C4th 40, 49, 24 CR3d 189; *People v Superior Court (Vidal)* (2007) 40 C4th 999, 1011, 56 CR3d 851 (trial court not required to give primary consideration to defendant's Full Scale IQ scores). But see *Hawthorne,* 35 C4th at 52 (Chin, J., concurring) (IQ remains important).

The defense initiates an inquiry into the defendant's mental retardation by filing a pretrial motion for a hearing on the issue. There is no provision for the prosecution to request such a hearing. The motion should be accompanied by a declaration of a "qualified expert" stating his or her opinion that the defendant is mentally retarded. Pen C §1376(b)(1).

On receipt of such a declaration, the court must order a hearing. Pen C §1376(b)(1). The court may appoint qualified experts to examine the defendant, but no statement made by the defendant during any court-ordered examination is admissible at the guilt phase of the trial. Pen C §1376(b)(2). The court-ordered examination may be limited in its scope to the issue of mental retardation. See *Centeno v Superior Court* (2004) 117 CA4th 30, 45, 11 CR3d 533. The defendant may opt for a court hearing before trial or a jury hearing between the guilt phase and the penalty phase. Pen C §1376(b)(1). Both prosecution and defense are entitled to present evidence at the hearing; the burden is on the defendant to prove mental retardation by a preponderance of the evidence. Pen C §1376(b)(3).

If the defendant elects to have the issue decided before trial by the court, and the court finds the defendant to be mentally retarded, the case will then proceed in the same manner as any other noncapital prosecution. The prosecution may appeal the court's determination that the defendant is mentally retarded. See *People v Superior Court (Vidal)* (2007) 40 C4th 999, 1010, 56 CR3d 851 (order appealable under Pen C §1238(a)(8)). If the defendant is subsequently found guilty of first degree murder and at least one special circumstance is found true, the court will sentence the defendant to life without the possibility of parole. Pen C §1376(c)(1).

If the defendant elects to have a jury trial, the hearing will occur only if the defendant is found guilty of first degree murder with at least one special circumstance, and the determination will be made by the same jury that determined the guilt. Pen C §1376(b)(1), (c)(2). If the defendant has pleaded not guilty by reason of insanity, the mental retardation hearing will take place at the conclusion of the sanity hearing, if the jury finds that the defendant was sane at the time of the crime. Pen C §1376(e). If the jury cannot reach a unanimous decision, the court must dismiss that jury and order the impanelment of a new jury to decide the issue of mental retardation. Pen C §1376(b)(3). A finding of mental retardation precludes the death penalty and requires the court to sentence the defendant to life without the possibility of parole. Pen C §1376(d)(1).

> Ø **Note:** Penal Code §1376 by its terms provides *preconviction* relief. However, procedures for postconviction relief should track the statute. *In re Hawthorne* (2005) 35 C4th 40, 47, 24 CR3d 189. See §54.55A on postconviction proceedings.

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§54.19 J. Jury Waiver

Under California law, both the prosecution and the defendant have the right to a jury trial in both the guilt and penalty phases. Separate waivers are required when either phase is tried to a court without a jury. Pen C §190.4(a)-(b); *People v Diaz* (1992) 3 C4th 495, 564, 11 CR2d 353.

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Source: Criminal Law/California Criminal Law Procedure and Practice/54 DEATH PENALTY CASES/§54.20 VI. NOTICE BY PROSECUTOR OF AGGRAVATING PENALTY PHASE EVIDENCE

§54.20 VI. NOTICE BY PROSECUTOR OF AGGRAVATING PENALTY PHASE EVIDENCE

Notice of prosecutor's penalty phase evidence is required. The prosecutor in a death penalty case is required to give notice to the defense of all evidence to be introduced at the penalty phase, except evidence that will be or was used in the guilt phase to prove the offense or the special circumstances that subject the defendant to the death penalty. Pen C §190.3.

When notice must be given. Notice must be given within a reasonable time before trial. Pen C §190.3. Trial begins, for purposes of the prosecutor's obligation to give notice of aggravating penalty phase evidence, when the guilt phase begins. *People v Mickey* (1991) 54 C3d 612, 684 n15, 286 CR 801; *People v Daniels* (1991) 52 C3d 815, 879, 277 CR 122. The prosecution must give notice of aggravating evidence it intends to introduce at the penalty phase sufficiently before trial to permit defense counsel to adequately prepare a defense. *People v Howard* (1988) 44 C3d 375, 419, 243 CR 842.

When the jury cannot agree on the penalty, and a retrial of the penalty phase only is to be held, the prosecution may amend its earlier notice of aggravating penalty phase evidence. *People v Raley* (1992) 2 C4th 870, 905, 8 CR2d 678.

Failure to give *formal* notice under §190.3 of penalty phase evidence until after the guilt phase is mere technical error if *actual* notice was given before trial. *People v Taylor* (1990) 52 C3d 719, 736, 276 CR 391. Late notice will not preclude admission of evidence in the absence of bad faith. *People v Cummings* (1993) 4 C4th 1233, 1325, 18 CR2d 796 (evidence known to prosecutor before jury selection inadvertently not disclosed until 1 day after voir dire began).

When the prosecution does not become aware of penalty phase evidence until after compliance with the initial discovery request, the defendant is entitled to prompt notice of the newly discovered evidence and, if necessary, to a reasonable continuance to enable him or her to prepare to meet that evidence. *People v Jennings* (1988) 46 C3d 963, 987, 251 CR 278.

Defense request. Although not required by Pen C §190.3, defense counsel should request from the prosecutor written notice of the specific evidence the prosecutor intends to offer at the penalty phase and the aggravating factor or factors to which it is relevant, to comply with Pen C §§1054-1054.7 (discussed in chap 11). This request may be in letter form, or prepared on pleading paper and titled a "demand." A copy should be filed with the trial court and directed to the attention of the assigned trial judge or department. If the prosecutor does not comply with the demand, defense counsel may file a formal motion with the court. See *Keenan v Superior Court* (1981) 126 CA3d 576, 586, 177 CR 841.

Defense motion when no response to request. Penal Code §190.3 specifically requires notice of evidence to be introduced in aggravation. When no prosecution notice has been filed, a motion to exclude all prosecution evidence required to be noticed, based on the exclusionary provision of the statute itself, or a continuance motion, should be made before the penalty phase begins. See discussion of remedies below.

Form and contents of prosecution notice. Notice in writing is not required but is recommended. *People v Miranda* (1987) 44 C3d 57, 96, 241 CR 594. What constitutes sufficient notice depends on the circumstances of the case. The prosecution is not required to produce a summation of expected testimony, but only to give notice of who will testify. *People v Roberts* (1992) 2 C4th 271, 330, 6 CR2d 276 (DA offered to make witnesses available if they wished to speak to defense). The prosecution may also give notice of the nature of evidence and intent to produce witnesses not yet identified. *People v Wright* (1990) 52 C3d 367, 423, 276 CR 731.

Notice must be more than "boilerplate." It must be sufficient to afford a reasonable opportunity to prepare. *People v Grant* (1988) 45 C3d 829, 853, 248 CR 444; *People v Jennings* (1991) 53 C3d 334, 391, 279 CR 780 (prosecutor violated mandatory language of §190.3 by giving only "boilerplate" notice); *People v Roldan* (2005) 35 C4th 646, 733, 27 CR3d 360, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (generic, nonspecific notice that prosecution intends to rely "on the circumstances of the offense" does not give adequate notice of prosecution intent to present victim impact evidence). There is a separate obligation under Pen C §1054.1 to provide the defense with discovery.

Ø **Note:** Because the remedy may be drastic, a prudent prosecutor will give notice adequate to comply with the statute, and take steps to make a reviewable record of the fact and date of the notice.

The prosecution should not try to overwhelm the defense by giving them information on numerous potential witnesses for the penalty phase when the prosecution actually intends to use very few of them. *People v Keenan* (1988) 46 C3d 478, 523, 250 CR 550. But the prosecution need not make a binding election at the time notice is given as to which evidence will be presented. *People v Cummings, supra*.

Argument is not evidence; the prosecution need not give pretrial notice of what arguments it intends to rely on. *People v Breaux* (1991) 1 C4th 281, 312, 3 CR2d 81.

Notice of a specific crime constitutes substantial notice of the intent to prove the entire course of conduct concerning that crime. *People v Jennings* (1991) 53 C3d 334, 279 CR 780. Notice of evidence about a specific prior crime has been held sufficient to constitute notice to counsel that evidence of all crimes committed as part of same course of conduct may be offered. *People v Pride* (1992) 3 C4th 195, 258, 10 CR2d 636; *People v Visciotti* (1992) 2 C4th 1, 70, 5 CR2d 495.

Trial court remedies if no notice or inadequate notice. Evidence that was not noticed may still be admissible if the defendant is not prejudiced by the absence of timely or detailed notice. If prejudice is shown, the court may exclude evidence that should have been noticed. *People v Howard* (1988) 44 C3d 375, 423, 243 CR 842. The usual remedy, however, is a continuance unless the delay affected the way the defense handled prior proceedings. *People v Cooper* (1991) 53 C3d 771, 842, 281 CR 90. When no claim is made that late notice either impaired preparation for the guilt trial or will impair preparation for the penalty trial, and no request for continuance is made, no prejudice will normally be found to have flowed from late notice. *People v Pinholster* (1992) 1 C4th 865, 957, 4 CR2d 765.

Defense writ. Defense counsel who deems the proffered §190.3 notice inadequate may seek a writ. *Matthews v Superior Court* (1989) 209 CA3d 155, 257 CR 43 (court of appeal ordered district attorney to comply with §190.3).

When defense should request continuance. The defense should carefully consider whether to seek a continuance when given what is deemed to be late or inadequate notice. Without evidence that untimely notice affected earlier proceedings, the failure to request a continuance normally shows that any defect in the notice was not prejudicial. *People v Pinholster, supra*.

Rebuttal. Defense counsel must remember that there is no pretrial §190.3 notice requirement for *rebuttal* evidence. *People v Mitcham* (1992) 1 C4th 1027, 1070, 5 CR2d 230; *People v Poggi* (1988) 45 C3d 306, 330, 246 CR 886. However, "this does not mean that the prosecutor never has to provide discovery of… intended penalty phase rebuttal evidence." *People v Gonzalez* (2006) 38 C4th 932, 955, 44 CR3d 237. In *Gonzalez,* the court explained that the notice requirement in §190.3 does not exempt rebuttal evidence from the other rules that apply to criminal discovery (see Pen C §§1054-1054.9). Reciprocal discovery provisions apply at the penalty phase, and the prosecution's obligation under Pen C §1054.1 includes rebuttal witnesses. *People v Gonzalez, supra; People v Superior Court (Mitchell)* (1993) 5 C4th 1229, 23 CR2d 403.

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VII. TRIAL MOTIONS FREQUENTLY MADE IN CAPITAL CASES

§54.21 A. Motion to Exclude Guilt or Penalty Phase Evidence

For the same reason that it is advisable to litigate other foundational issues before the guilt phase begins, either attorney may move for the court to rule on potentially prejudicial evidence before the penalty phase begins. If evidence is impermissibly prejudicial with regard to penalty, it may result in exclusion or some other remedy, *e.g.,* impaneling additional juries. See *People v Robertson* (1982) 33 C3d 21, 188 CR 77 (same jury heard both phases of trial; supreme court found that nonprejudicial guilt phase error (evidence of other crimes) required reversal of penalty phase). Because the same jury ordinarily hears both the guilt and penalty phases (Pen C §190.4(c)), as well as the sanity phase if one is ordered, the question of prejudice is unique in capital cases. See §54.23 on motions for two juries.

This motion is made under Evid C §§402-405, which provide for pretrial hearings or hearings out of the jury's presence on foundational or preliminary facts. A full evidentiary hearing, however, is not required. *People v Clair* (1992) 2 C4th 629, 676, 7 CR2d 564. If any type of prehearing is deemed advisable by the court, an offer of proof constitutes a sufficient basis on which to decide the admissibility of penalty phase evidence. *People v Clair, supra; People v Jennings* (1991) 53 C3d 334, 389, 279 CR 780; *People v Daniels* (1991) 52 C3d 815, 880, 277 CR 122; *People v Phillips* (1985) 41 C3d 29, 222 CR 127.

When the defense is aware of potential penalty phase evidence before the guilt phase begins, defense counsel should consider moving under §§402-405 to rule on its admissibility before the guilt phase. The knowledge that certain evidence will or will not be admissible in the penalty phase can have a dramatic impact on guilt phase tactics. There is no requirement, however, that the trial court hear such a motion before the guilt phase.

Ø **Note:** Certain defense strategies at the guilt phase will "open the door" to prosecution evidence; for example, pleading diminished capacity may open the door to evidence of the defendant's bizarre psychological propensities or history. In addition, all guilt phase evidence is admissible in the penalty phase if the trier of fact is the same. Pen C §190.4(d).

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§54.22 B. Motion to Require District Attorney to Declare Intent to Seek Death Penalty if Jury Renders Special Circumstance Verdict

Extraordinary resources and special procedures are used to select a jury that will be eligible to decide the penalty in a capital case. See §§54.25-54.29. Moreover, some believe a "death-qualified" jury may be more likely to convict than an ordinary criminal guilt jury. See *People v Fields* (1983) 35 C3d 329, 197 CR 803; *Hovey v Superior Court* (1980) 28 C3d 1, 168 CR 128. Trial courts may be persuaded that requiring the prosecution to declare its intentions regarding the penalty before voir dire in the guilt phase is both efficient and fair.

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§54.23 C. Motion for Two Juries

Separate juries for guilt and penalty phases. Although there is no general agreement that either side benefits from separate juries for the guilt and penalty phases, Pen C §190.4(c) gives the trial judge discretion to order a second penalty jury for good cause. Case law is unclear on what constitutes good cause. See *People v Hart* (1999) 20 C4th 546, 639, 85 CR2d 132; *People v Bonillas* (1989) 48 C3d 757, 784, 257 CR 895; *People v Malone* (1988) 47 C3d 1, 27, 252 CR 525; *People v Ainsworth* (1988) 45 C3d 984, 1028, 248 CR 568. In practical terms, defense counsel would argue that, when events prejudicial to the jury's penalty deliberations occurred during the guilt phase, a new jury should be impaneled for the penalty phase. For example, when the guilt phase jury is entitled to hear evidence of other (uncharged) crimes, but the trial judge is convinced that such evidence is insufficient to sustain a finding that they are true beyond a reasonable doubt (see *People v Robertson* (1982) 33 C3d 21, 188 CR 77), the judge may avoid claims of prejudice in the penalty phase by admitting the evidence in the guilt phase but ordering a second jury to determine punishment.

A trial court has discretion to entertain a motion for a second jury before the guilt phase begins. *People v Rowland* (1992) 4 C4th 238, 268, 14 CR2d 377. For good cause shown, the parties can stipulate to a second jury. *People v Beardslee* (1991) 53 C3d 68, 100, 279 CR 276.

Separate juries are not required. *Lockhart v McCree* (1986) 476 US 162, 90 L Ed 2d 137, 106 S Ct 1758 ("death qualification" of jurors before guilt phase does not deprive defendant of right to jury drawn from representative cross-section of community). See also *People v Adcox* (1988) 47 C3d 207, 251, 253 CR 55; *People v Heishman* (1988) 45 C3d 147, 198, 246 CR 673.

When the right to jury trial is waived for the penalty phase, and the penalty phase is to be tried to the court, *Boykin-Tahl* advice and waivers may be required. See *People v Robertson* (1989) 48 C3d 18, 38, 255 CR 631.

Separate juries for codefendants. The trial court may impanel two concurrent juries to hear evidence involving codefendants being tried jointly. *People v Harris* (1989) 47 C3d 1047, 1075, 255 CR 352. In *People v Cleveland* (2004) 32 C4th 704, 11 CR3d 236, the trial court severed only the penalty phase for the two codefendants.

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§54.24 VIII. PLEA BARGAINING IN SPECIAL CIRCUMSTANCE CASES

No coercion necessarily implied. A plea of guilty to a noncapital offense is not constitutionally "coerced" when it is entered solely to avoid the threatened death penalty. *North Carolina v Alford* (1970) 400 US 25, 31, 27 L Ed 2d 162, 167, 91 S Ct 160. Nevertheless, district attorney's offices in some counties do not "bargain" with the death penalty because they do not want to risk coercing a guilty plea from a defendant. In these counties, defense counsel must decide whether to initiate discussions with the prosecution to present reasons why the death penalty should not be pursued.

Factual basis. In death penalty cases, the court may accept a *noncapital* plea bargain even if the defendant steadfastly denies guilt. The Pen C §1192.5 requirement that there be a factual basis for felony pleas may be supported by the facts of the case set out in prosecution documents. See *People v West* (1970) 3 C3d 595, 91 CR 385, and discussion in §26.13.

A defendant may not plead guilty to a capital charge when unrepresented or when defense counsel does not consent. Pen C §1018. This statutory requirement is intended to safeguard against erroneous imposition of the death sentence. *People v Alfaro* (2007) 41 C4th 1277, 1300, 63 CR3d 433. This rule, however, does not prevent a defendant from insisting on testifying, asking for the death penalty, and refusing to present mitigating evidence. *People v Harris* (1987) 191 CA3d 819, 236 CR 680. The trial judge must still on his or her own motion independently review all the facts and law on which the sentence is based and enter a life sentence if a death sentence is not legally supported. Pen C §190.4(e). In reviewing the case, the trial judge is limited to the evidence that was before the jury. *People v Lewis* (2004) 33 C4th 214, 225, 14 CR3d 566.

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IX. GUILT PHASE

A. Jury Selection

§54.25 1. Individual Voir Dire; Presence of Press

In a death penalty case, jurors are voir dired on both guilt and penalty phase issues because the same jury usually hears both phases. Jurors are asked the standard voir dire questions relating to the guilt phase issues in the case. They are also asked what is commonly called "death qualification" questions, to learn whether jurors can fairly apply the statutory rules applicable to the choice between the two penalties of life without the possibility of parole and the death penalty. See §54.28 on the standard for challenges for cause in the death qualification phase of jury selection.

In capital cases, as in noncapital cases, the court conducts the initial examination of prospective jurors. CCP §223. Counsel may then question the jurors, but the court may limit direct questioning by counsel. CCP §223. Voir dire is to be conducted "only in aid of the exercise of challenges for cause." CCP §223. See *People v San Nicolas* (2004) 34 C4th 614, 633, 21 CR3d 612 (trial court did not abuse discretion under former CCP §223 by conducting voir dire itself (court allowed counsel to propose follow-up questions)); *People v Wright* (1990) 52 C3d 367, 419, 276 CR 731 (limit of three death-qualification questions per attorney to each juror was approved). But see *People v Cash* (2002) 28 C4th 703, 122 CR2d 545 (death judgment reversed because trial court prevented counsel from using answers to questions about factors that might cause jurors to automatically vote for death as basis for challenges for cause). Individual or sequestered voir dire is no longer *required* during the death qualification phase of jury selection. *People v Alfaro* (2007) 41 C4th 1277, 1314, 63 CR3d 433 (noting that CCP §223 intended to overrule the contrary conclusion in *Hovey v Superior Court* (1980) 28 C3d 1, 80, 168 CR 128). However, sequestered voir dire may still be available under CCP §223 at the trial court's discretion. See *People v Gurule* (2002) 28 C4th 557, 597 n6, 123 CR2d 345; *Covarrubias v Superior Court* (1998) 60 CA4th 1168, 71 CR2d 91. See also discussion of private versus public voir dire in §§14.8-14.10, 29.18.

Whether conducted by counsel or the court, death qualification voir dire of each juror must take place. A juror who has formed an opinion about the death penalty that will impair his or her ability to be impartial should be dismissed for cause. See, *e.g.*, *People v Carasi* (2008) 44 C4th 1263, 1284 n12, 82 CR3d 265. If one such juror is empaneled and the death penalty is imposed, the death penalty cannot be carried out. Without adequate voir dire, the judge's responsibility to remove jurors who will not be able to impartially follow the court's instructions and evaluate evidence cannot be fulfilled. *Morgan v Illinois* (1992) 504 US 719, 729, 119 L Ed 2d 492, 503, 112 S Ct 2222. The case of *Witherspoon v Illinois* (1968) 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770, demands inquiry into whether prospective jurors' views on the death penalty would disqualify them from sitting. *Morgan v Illinois, supra; Wainwright v Witt* (1985) 469 US 412, 83 L Ed 2d 841, 105 S Ct 844. Both sides may exclude jurors whose views would prevent or substantially impair performance of their duties. The state must be given the opportunity to identify such jurors by questioning them about their view of the death penalty. *Morgan v Illinois* (1992) 504 US 719, 733, 119 L Ed 2d 492, 505, 112 S Ct 2222. "Will you follow the law" questions are not sufficient. A juror could swear to do so not knowing that maintaining dogmatic beliefs about the death penalty would prevent him or her from doing so. 504 US at 738, 119 L Ed 2d at 508.

If an issue arises on the trial court's voir dire procedure, the defense needs to show that a juror who actually served had a bias or that the procedure prejudiced the case. *People v Cunningham* (2001) 25 C4th 926, 973, 108 CR2d 291. An appellate court need not make particular reference to the excusal of each juror. *Uttecht v Brown* (2007) 551 US 1, 167 L Ed 2d 1014, 1026, 127 S Ct 2218.

Under CCP §223 and *Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 78 L Ed 2d 629, 104 S Ct 819, jury voir dire in capital cases is to be held in public view except when it is shown that a public trial will threaten the defendant's right to a fair trial or the right to privacy of prospective jurors. Under *Press-Enterprise* and §223, the court must usually permit the press to be present (see §14.10) but may continue to exclude all jurors except the one being questioned (see *Ukiah Daily Journal v Superior Court* (1985) 165 CA3d 788, 791, 211 CR 673). Before *Press-Enterprise,* many California trial courts conducted sequestered individual voir dire to decide the issue of death

qualification. See *Hovey v Superior Court* (1980) 28 C3d 1, 80, 168 CR 128. For further discussion of jury voir dire, see chap 29. See also §14.29 (voir dire concerning pretrial publicity).

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§54.26 2. Jury Questionnaires

Jury selection questionnaires are commonly used in death cases. In light of the elimination of sequestered, individual voir dire, the use of such questionnaires, answered by jurors before judge or attorney questioning, has become extremely important. This device at least partially preserves the former benefits of individual questioning without the concomitant expenditure of court time. However, a questionnaire is no substitute for voir dire. In *People v Stewart* (2004) 33 C4th 425, 15 CR3d 656, discussed in §29.17, the supreme court reversed a death penalty verdict when the trial court excluded jurors for cause on the basis of their answers to questionnaires without any follow-up on oral voir dire.

Ø **Note:** It is not uncommon for counsel to stipulate that challenges for cause may be based on the prospective jurors' answers to the qualifying questions. See, *e.g., People v Benavides* (2005) 35 C4th 69, 88, 24 CR3d 507. There was no such stipulation in *Stewart*.

Jurors must be informed, preferably in the introduction to the questionnaire and in bold print, that the information that they provide is public information and will be available to the press. *Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 511, 78 L Ed 2d 629, 639, 104 S Ct 819; *Copley Press, Inc. v Superior Court* (1991) 228 CA3d 77, 87, 278 CR 443. See also §29.17 on jury questionnaires.

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§54.27 3. Jury Selection Expert

Defense counsel may wish to retain a qualified jury selection expert to assist in the jury selection process. See Pen C §987.9; *Corenevsky v Superior Court* (1984) 36 C3d 307, 321, 204 CR 165. In most jurisdictions, a special showing of particular need is required before funds will be provided for such an expert. For further discussion, see §29.38.

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4. Juror Challenges

§54.28 a. Grounds

Death qualification of guilt phase juries is constitutional and does not deprive defendants of their right to a jury drawn from a representative cross-section of the community. *Lockhart v McCree* (1986) 476 US 162, 90 L Ed 2d 137, 106 S Ct 1758. A juror cannot be excused for cause unless the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v Witt* (1985) 469 US 412, 424, 83 L Ed 2d 841, 851, 105 S Ct 844; *People v Ghent* (1987) 43 C3d 739, 767, 239 CR 82. This is true whether the juror is predisposed to vote for or against the death penalty. *Morgan v Illinois* (1992) 504 US 719, 726, 119 L Ed 2d 492, 504, 112 S Ct 2222; *People v Crittenden* (1994) 9 C4th 83, 121, 36 CR2d 474. See also *People v Mickey* (1991) 54 C3d 612, 681 n14, 286 CR 801 (test is whether juror's predilection would "actually preclude, or *appreciably impede,* him from engaging in the weighing process"); *People v Ashmus* (1991) 54 C3d 932, 963, 2 CR2d 112 (juror may be excused if he or she could not consider imposing death as reasonable possibility). See also *People v Ruiz* (1988) 44 C3d 589, 617, 244 CR 200. The same test applies when the defense seeks to exclude a juror.

In voir diring jurors on their predisposition for or against the death penalty, it is not proper for defense counsel to summarize the prosecution's case and ask jurors if they would automatically vote for death based on that summary. *People v Sanders* (1995) 11 C4th 475, 539, 46 CR2d 751. The defense is entitled, however, to voir dire jurors on aggravating circumstances likely to be present to establish a challenge for cause, even though the aggravating circumstances are not charged in the pleadings. *People v Kirkpatrick* (1994) 7 C4th 988, 1004, 30 CR2d 818, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209.

When the court allows a prodeath juror to remain despite a valid challenge for cause, the defense ordinarily must use a peremptory challenge on that juror. *People v Bittaker* (1989) 48 C3d 1046, 1086, 259 CR 630; *People v Coleman* (1988) 46 C3d 749, 770, 251 CR 83. In this situation, after exhausting all peremptory challenges, counsel may want to tell the court why he or she is dissatisfied with the jury, and ask the court for another peremptory challenge to replace the challenge used on the juror who should have been excused for cause. See *Ross v Oklahoma* (1988) 487 US 81, 101 L Ed 2d 80, 108 S Ct 2273; *People v Crittenden, supra*.

The court may properly excuse a juror who would not vote for the death penalty in the instant case even if the juror would consider it in other cases. *People v Livaditis* (1992) 2 C4th 759, 771, 9 CR2d 72. A juror must be able to consider giving the death penalty as a reasonable possibility. *People v Ashmus, supra*. The view that a juror can be removed only if he or she would not consider the death penalty at all was rejected in *People v Breaux* (1991) 1 C4th 281, 306, 3 CR2d 81. It is enough that the judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially follow the law. *People v Breaux, supra*. When a juror gives conflicting or equivocal responses to death penalty questions, the judge's determination of the juror's true state of mind is binding on appeal. *People v Cummings* (1993) 4 C4th 1233, 1280, 18 CR2d 796.

For general discussion of jury challenges, see chap 29.

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§54.29 b. Number of Peremptory Challenges

The number of peremptory challenges for each side in cases punishable by death or by life imprisonment is 20 each. CCP §231. Although a trial judge has the discretion to grant additional peremptory challenges as long as each side is allowed the same number (see *People v Diaz* (1951) 105 CA2d 690, 234 P2d 300), courts are not required to grant requests for additional peremptories in the absence of a likelihood of an unfair trial or partial jury (*People v Pride* (1992) 3 C4th 195, 231, 10 CR2d 636). In addition, the defense is not entitled to additional peremptory challenges to "keep pace" with a prosecutor who is excusing all jurors who express death penalty scruples. *People v Cox* (1991) 53 C3d 618, 648, 280 CR 692, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209.

When two or more defendants are tried jointly, they must exercise their challenges jointly, except for five additional challenges that may be exercised separately. Requiring that such challenges be exercised jointly does not offend the Constitution. CCP §231; *People v Pinholster* (1992) 1 C4th 865, 911, 4 CR2d 765. The prosecution is entitled to the total number of challenges granted to all defendants. CCP §231.

Ø **Note:** The number of challenges available in a competency hearing arising from a capital prosecution is the same as in any competency hearing: six. *People v Stanley* (1995) 10 C4th 764, 808, 42 CR2d 543.

Ø **Note:** Counsel should be sure to exhaust all available jury challenges to preserve the issue on appeal. See *People v Seaton* (2001) 26 C4th 598, 637, 110 CR2d 441 (when counsel believes trial court wrongfully denied challenge, must use all peremptory challenges and communicate to court dissatisfaction with jury selection to preserve issue on appeal); *People v Sanders* (1995) 11 C4th 475, 507, 46 CR2d 751 (in considering change of venue motion, court said that failure to exhaust jury challenges tacitly acknowledged fair and impartial jury).

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B. Conduct of Guilt Phase

§54.30 1. Order of Proof

A death penalty case is tried in separate phases. First the trier of fact determines the defendant's guilt or innocence, and whether the murder is first degree. The guilt phase of a special circumstance case is conducted in the same manner as an ordinary felony trial.

The special circumstance allegation should be read to the jury when the other charges are read during the guilt phase, and evidence of it is received as part of the prosecution's case-in-chief. See Pen C §190.1(a). If one of the special circumstances alleged is that the defendant was convicted of first or second degree murder in a prior proceeding, further proceedings must be held on the question of the truth of this special circumstance. Pen C §190.1(b). Every attempt must be made to avoid prejudicing the jury with information of any prior murder until the guilt and degree of the new murder and any other special circumstances have been determined. See *People v Balderas* (1985) 41 C3d 144, 222 CR 184.

If sanity is at issue, a sanity phase is held between the guilt and penalty phases. Pen C §190.1(c). See *In re Fields* (1990) 51 C3d 1063, 1072, 275 CR 384. See §§48.40-48.58 on the defense of not guilty by reason of insanity (NGI).

Finally, if guilt, first degree murder, and one or more special circumstances are found (and if the defendant was found sane if an NGI plea was entered), a penalty phase is held. Pen C §190.1(c).

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§54.31 2. Burden of Proof; Other Proof Requirements

Proof of a special circumstance allegation at the guilt phase is identical to the proof of a substantive charge (Pen C §190.4): It must be proved beyond a reasonable doubt. An acquittal of the special circumstance bars further prosecution on that allegation; an acquittal on the felony underlying the special circumstance bars further prosecution on both the felony and the special circumstance allegation. *People v McDonald* (1984) 37 C3d 351, 378, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. As long as first degree murder and one special circumstance is found true, the case will proceed to the penalty phase. If the jury is hung on all special circumstance allegations, a new jury will be impaneled to decide the truth of the special circumstance(s). Pen C §190.4(b).

The corpus delicti rule, which precludes a conviction based on the defendant's extrajudicial statement without some independent proof that the charged crime did take place (see generally §23.41), does not apply to proof of felony-based special circumstances. Pen C §190.41. See *People v Jablonski* (2006) 37 C4th 774, 826, 38 CR3d 98. When a special circumstance is not felony-based, *i.e.,* when it involves financial gain or lying in wait, there is also no requirement that the corpus delicti of the special circumstance be proved independently of the defendant's extrajudicial statements. *People v Edelbacher* (1989) 47 C3d 983, 1023, 254 CR 586.

> Ø **Note:** The corpus delicti rule *does* apply to proof of felony-based special circumstances that occurred before June 6, 1990, the date §190.4 was passed by the voters. *Tapia v Superior Court* (1991) 53 C3d 282, 298, 279 CR 592.

Corroboration of accomplice testimony *is* required to prove an underlying separate crime on which a special circumstance is based; accomplice corroboration is not required to prove other special circumstances such as Pen C §190.2(a)(1) (murder for financial gain), which requires only proof of a motive for a murder for which the defendant has been convicted by other evidence. *People v Hamilton* (1989) 48 C3d 1142, 1177, 259 CR 701.

When the special circumstance does not specifically require intent to kill, the prosecution need not prove that the actual killer intended to kill. Pen C §190.2(b); *People v Earp* (1999) 20 C4th 826, 905, 85 CR2d 857.

If the special circumstance is based on felony murder and the defendant is not the actual killer, the prosecution must show either that the defendant intended to kill or that he or she was a major participant in the underlying felony and acted with reckless indifference to life. Pen C §190.2(d). Proof of all other special circumstances against an aider and abettor (not an actual killer) requires proof of intent to kill. Pen C §190.2(c).

It is not ineffective assistance of counsel for defense counsel to concede guilt in the opening statement and argue against the special circumstance, as long as there is no indication that the defendant disagrees. *People v Cain* (1995) 10 C4th 1, 30, 40 CR2d 481. Likewise, counsel's strategic admission of defendant's guilt at the guilt phase is not automatically prejudicial ineffective assistance of counsel even when the defendant does not expressly consent to the admission if counsel has adequately disclosed the strategy to, and discussed it with, the defendant. *Florida v Nixon* (2004) 543 US 175, 160 L Ed 2d 565, 125 S Ct 551. In such a case, counsel's performance is evaluated under the test of *Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052, *i.e.,* Was counsel's performance deficient, and, if so, did it prejudice the defendant? *Florida v Nixon* (2004) 543 US 175, 160 L Ed 2d 565, 125 S Ct 551.

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§54.32 C. Elements of Certain Special Circumstances

Penal Code §190.2(a)(1) (intentional murder for financial gain). The murder must be the consideration for, or an essential prerequisite to, the financial gain sought. *People v Adcox* (1988) 47 C3d 207, 246, 253 CR 55. This includes a murder to avoid a debt owed. *People v Edelbacher* (1989) 47 C3d 983, 1025, 254 CR 586. The test is whether the murder was done in the expectation that the defendant would obtain any financial gain. Robbery or burglary felony murder do not qualify. *People v Mickey* (1991) 54 C3d 612, 678, 286 CR 801. However, agreement is not required. The focus is on the mind of the person who commits the murder at the time the murder is committed. The question is whether that person committed the murder with the expectation that he or she would achieve a financial gain. *People v Howard* (1988) 44 C3d 375, 409, 243 CR 842. See *People v Noguera* (1992) 4 C4th 599, 634, 15 CR2d 400.

Ø **Note:** The payment may be monetary or in other kind, such as narcotics. *People v Padilla* (1995) 11 C4th 891, 933, 47 CR2d 426, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823, 72 CR2d 656.

Penal Code §190.2(a)(2) (prior murder). The "prior" murder need not have occurred before the current murder as long as the conviction occurred before the present prosecution. *People v Grant* (1988) 45 C3d 829, 848, 248 CR 444; *People v Hendricks* (1987) 43 C3d 584, 595, 238 CR 66; *People v Hinton* (2006) 37 C4th 839, 879, 38 CR3d 149.

A murder committed in another state by a juvenile treated as an adult constitutes a prior murder special circumstance even though the procedure in that state for trying a minor as an adult differs from the procedure in California. *People v Andrews* (1989) 49 C3d 200, 223, 260 CR 583. See also *People v Trevino* (2001) 26 C4th 237, 109 CR2d 567. In *Trevino,* the defendant would not have been old enough to have been tried as an adult in California for the first murder. The court held that it is the offense in terms of the factual elements, not the age of the offender, that governs, and that the first murder was therefore within the prior murder special circumstance of Pen C §190.2(a)(2).

There is no right to a jury determination of the constitutional validity of a prior murder conviction. This is a question of law, and the defendant has the burden of proof by a preponderance of the evidence. There is a strong presumption of constitutional validity. Only the fact that the defendant suffered a prior murder conviction is a jury issue. *Curl v Superior Court* (1990) 51 C3d 1292, 1300, 276 CR 49.

Penal Code §190.2(a)(3) (multiple murder). The California Supreme Court has not yet explicitly resolved the issue of whether there need be a specific intent to commit more than one murder, or the intent to commit a murder with knowledge of a prior murder. See *People v Johnson* (1993) 6 C4th 1, 23 CR2d 593; *People v Malone* (1988) 47 C3d 1, 26, 252 CR 525; *People v Bunyard* (1988) 45 C3d 1189, 1241, 249 CR 71.

There is no requirement of intent to kill under this special circumstance if the defendant is the actual killer. Pen C §190.2(b).

At least one first degree murder conviction is needed for a multiple murder special circumstance. *People v Cooper* (1991) 53 C3d 771, 828, 281 CR 90.

Killing a woman with a viable fetus constitutes two murders for a multiple murder special, even if a single act kills both. *People v Bunyard* (1988) 45 C3d 1189, 1237, 249 CR 71. See *People v Pool* (2008) 166 CA4th 904, 906, 83 CR3d 186 (knowledge of fetus's existence is not prerequisite to conviction for fetal murder).

Penal Code §190.2(a)(5) (killing to avoid lawful arrest or to perfect escape). For the special circumstance of killing to avoid lawful arrest, an arrest must be imminent. *People v Coleman* (1989) 48 C3d 112, 146, 255 CR 813. The killing must have been motivated by the desire to escape, and must have taken place before temporary safety was reached. *People v Bigelow* (1984) 37 C3d 731, 754, 209 CR 328. Nonetheless, imminent arrest is not an element of the special circumstance. A specific instruction on imminence is only necessary if the possibility of arrest is remote. *People v Cummings* (1993) 4 C4th 1233, 1300, 18 CR2d 796.

Penal Code §190.2(a)(7) (killing peace officer). The texts of Propositions 114 and 115 differ in the definition of a peace officer; the broader definition in Proposition 114 controls. *Yoshisato v Superior Court* (1992) 2 C4th 978, 982, 9 CR2d 102.

Penal Code §190.2(a)(10) (killing witness). The elements are (1) the victim witnessed a separate crime before being killed; (2) the killing was intentional; and (3) the murderer's purpose was to prevent the victim from testifying about the prior crime. *People v Benson* (1990) 52 C3d 754, 784, 276 CR 827; *People v Garrison* (1989) 47 C3d 746, 792, 254 CR 257. See also *People v Silva* (1988) 45 C3d 604, 631, 247 CR 573.

The witness-killing special circumstance applies even if the defendant had an additional motive to kill the witness, such as robbery. *People v Sanders* (1990) 51 C3d 471, 519, 273 CR 537.

Penal Code §190.2(a)(14) (especially heinous and atrocious). This special circumstance is void because of vagueness. *Maynard v Cartwright* (1988) 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853; *People v Sanders* (1990) 51 C3d 471, 520, 273 CR 537 (predecessor to present statute; same wording).

Penal Code §190.2(a)(15) (lying in wait). This special circumstance does not violate the Eighth Amendment. *People v Morales* (1989) 48 C3d 527, 556, 257 CR 64; *People v Edelbacher* (1989) 47 C3d 983, 1023, 254 CR 586. Actual physical concealment is not required; it is sufficient to create "a situation where the victim is taken unawares even though he sees his murderer." *People v Morales* (1989) 48 C3d 527, 553, 257 CR 64. The special circumstance of lying in wait may be applied to an aider and abettor who did not personally lie in wait. *People v Bonilla* (2007) 41 C4th 313, 332, 60 CR3d 209. Lying in wait to rape a victim before killing him or her qualifies under §190.2(a)(15), as long as the defendant intended to kill the victim during the period of lying in wait. *People v Carpenter* (1997) 15 C4th 312, 388, 63 CR2d 1. The requirement that the lying in wait be for a substantial period can be met by a wait of only a few minutes. *People v Superior Court (Lujan)* (1999) 73 CA4th 1123, 87 CR2d 320. The evidence does not have to show that the victim was unaware of the murderer's presence if the victim was taken by surprise. For example, in *People v Hillhouse* (2002) 27 C4th 469, 500, 117 CR2d 45, there was substantial evidence of lying in wait when the defendant announced to another that he was going to kill the victim and, after riding in a truck with the victim for a period of time, struck the victim while he was out of the truck and urinating. Likewise, in *People v Jurado* (2006) 38 C4th 72, 119, 41 CR3d 319, the evidence supported the lying-in-wait special circumstance when the defendant lured the victim into a car, sat behind her while an accomplice drove, and then launched an attack that killed her. A defendant's repeated threats to kill the victim will not negate the surprise element of the special circumstance of lying in wait. *People v Arellano* (2004) 125 CA4th 1088, 23 CR3d 172.

Effective March 7, 2000, Pen C §190.2(a)(15) was amended to define this special circumstance as an intentional killing committed "by means of lying in wait" rather than "while lying in wait." This addresses cases in which the actual killing event occurred sometime after the lying in wait.

Penal Code §190.2(a)(16) (intentional killing because of victim's race, color, religion, nationality, or country of origin). When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime. If the evidence supports the hate-murder special circumstance, that special circumstance is not invalidated because of the presence of an additional motive. *People v Lindberg* (2008) 45 C4th 1, 38, 82 CR3d 323.

Penal Code §190.2(a)(17) (murder committed during commission of certain enumerated felonies). Intent to kill is *not* a necessary element of the felony murder special circumstance for a defendant who is the *actual* killer. *People v Anderson* (1987) 43 C3d 1104, 240 CR 585.

If the defendant was an aider and abettor, the prosecution must prove either that the defendant intended to kill (Pen C §190.2(c)) or that he or she acted with reckless indifference to life and was a major participant in the underlying felony (Pen C §190.2(d)). The trial court is not required to instruct sua sponte on the meaning of "reckless indifference to human life." *People v Estrada* (1995) 11 C4th 568, 578, 46 CR2d 586. On request, however, the court should define the term in the language of the Supreme Court in *Tison v Arizona* (1987) 481 US 137, 157, 95 L Ed 2d 127, 144, 107 S Ct 1676, *i.e.,* "knowingly engaging in criminal activities known to carry a grave risk of death." See CALCRIM 703. The aider and abettor must have been involved in the felony before the killing occurred. *People v Pulido* (1997) 15 C4th 713, 722, 63 CR2d 625.

> Ø **Note:** In *People v Beardslee* (1991) 53 C3d 68, 279 CR 276, and *People v Champion* (1995) 9 C4th 879, 39 CR2d 547, the court found that, when there is a single course of conduct and two theories that the defendant is the actual killer or that he or she is an aider and abettor, jury unanimity is not required.

The issue of whether auto burglary is "burglary" within the felony murder special circumstance was raised but not decided in *People v Hamilton* (1988) 45 C3d 351, 364 n7, 247 CR 31.

For both capital and noncapital cases, felony murder occurs only if the killing and the enumerated felony are part of

one continuous transaction. The murder special circumstance is just as broad. *People v Hayes* (1990) 52 C3d 577, 631, 276 CR 874.

When a felony is only incidental to murder, a felony special circumstance will not lie. *People v Green* (1980) 27 C3d 1, 61, 164 CR 1, disapproved on other grounds in *People v Hall* (1986) 41 C3d 826, 834 n3, 226 CR 112 (robbery felony murder conviction improper when intent to commit robbery arises after murder). If the felony is not incidental to the murder, however, a felony murder special circumstance may be charged. However, regarding kidnapping and arson, Pen C §190.2(a)(17)(M), effective March 7, 2000, permits the finding of a special circumstance even if the defendant had an intent to kill and the kidnapping or arson was committed to facilitate murder. In *People v Mendoza* (2000) 24 C4th 130, 182, 99 CR2d 485, the court held that concurrent intent would support felony murder.

Ø **Example:** If a rapist decides to kill the rape victim to eliminate him or her as a witness, this satisfies the felony murder special circumstance requirements because the murder is committed to advance the crime of rape. *People v Wright* (1990) 52 C3d 367, 417, 276 CR 731.

Concurrent intent to kill and to commit an independent felony will support a felony murder special circumstance. *People v Raley* (1992) 2 C4th 870, 903, 8 CR2d 678. The *Ireland* (*People v Ireland* (1969) 70 C2d 522, 75 CR 188) merger rule, *i.e.,* that a felony that is an integral part of the homicide cannot support a felony murder instruction, also applies to a felony murder special circumstance. *People v Sanders* (1990) 51 C3d 471, 517, 273 CR 537.

Expiration of the statute of limitations on the underlying felony does not bar prosecution of a special circumstance based on that felony. *People v Morris* (1988) 46 C3d 1, 18, 249 CR 119, disapproved on other grounds in *In re Sassounian* (1995) 9 C4th 535, 543 n5, 545 n6, 37 CR2d 446.

Penal Code §190.2(a)(18) (torture). This special circumstance requires proof of first degree murder, intent to kill, torture of a living victim, and infliction of an extremely painful act. *People v Morales* (1989) 48 C3d 527, 559, 257 CR 64. The distinction between murder by torture (Pen C §189) and the torture special circumstance is that the torture special circumstance requires intent to kill while torture does not. The definition of torture, however, is the same. *People v Mincey* (1992) 2 C4th 408, 454, 6 CR2d 822. The prosecution does not have to prove that the acts of torture inflicted on the victim were the cause of death. *People v Crittenden* (1994) 9 C4th 83, 142, 36 CR2d 474. The defendant must intend to "cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." *People v Elliot* (2005) 37 C4th 453, 479, 35 CR3d 759. The defendant's intent to inflict the pain, not the victim's subjective experience of the pain, is the relevant consideration. *People v Mungia* (2008) 44 C4th 1101, 1136, 81 CR3d 614.

Penal Code §190.2(a)(22) (gang-related killings). A murder carried out by an active participant in a criminal street gang (as defined in Pen C §186.22(f)) to further gang activities is a capital offense. There is no requirement that the person actually killed be the person that the defendant intended to kill. *People v Shabazz* (2006) 38 C4th 55, 62, 40 CR3d 750.

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§54.33 X. CHECKLIST: PRE-PENALTY-PHASE MOTIONS

Various pre-penalty-phase motions discussed elsewhere are listed here. They may be appropriately made between the trial phases, although they may also be made at other times. They are divided into motions relating to evidence and motions relating to procedure.

Motions relating to evidence

- Motion for preliminary fact hearing. Evid C §§402-405; see §54.21.
- Motion to exclude evidence. Evid C §352; see §§54.21, 54.35.
- Renewed or de novo Pen C §1538.5 motion to suppress. Based on evidence at trial, new grounds to suppress may become apparent. See Pen C §1538.5(h)-(i). See chap 16 on search and seizure motions generally.
- Motion to exclude confession or admission. See chap 23.
- Motion to exclude evidence that does not fall within statutory factors in aggravation. See §54.36.
- Motion for sanctions due to failure of police or prosecution to preserve or test potentially favorable evidence. See §§11.27-11.28.
- Motion to exclude scientific evidence because its reliability has not been adequately investigated. See discussion in §§31.12-31.14.
- Motion for prosecutor to correct false impressions of the veracity of his or her own evidence. *Giglio v U.S.* (1972) 405 US 150, 154, 31 L Ed 2d 104, 109, 92 S Ct 763; *Napue v Illinois* (1959) 360 US 264, 269, 3 L Ed 2d 1217, 1220, 79 S Ct 1173; *People v Westmoreland* (1976) 58 CA3d 32, 129 CR 554; see *People v Medina* (1974) 41 CA3d 438, 455, 116 CR 133; *People v Green* (1951) 102 CA2d 831, 228 P2d 867.

Motions relating to procedure

- Motion for second jury. Pen C §190.4; see §54.23. In addition to the other reasons for this motion, the guilt phase jury may have been irrevocably prejudiced on the issue of penalty by hearing inadmissible evidence in the guilt phase. *People v Alcala* (1984) 36 C3d 604, 205 CR 775. The risks involved in trusting an admonishment may be greater in the penalty phase. See *People v Hines* (1964) 61 C2d 164, 169, 37 CR 622, disapproved on other grounds in *People v Murtishaw* (1981) 29 C3d 733, 774 n40, 175 CR 738.
- Motion for new trial. Although the guilt and penalty phases may be viewed as segments of one continuous trial, a motion for new trial between the guilt and penalty phases may forestall or render unnecessary the penalty phase. The court and prosecutor may prefer to litigate a motion for new trial before resources have been spent on a penalty phase. If reversible error has already been committed, a penalty phase would be futile.
- Motion to strike special circumstance. See §54.17.
- Motion to strike prior murder special circumstance. See §54.18.

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XI. PENALTY PHASE

§54.34 A. Burden of Proof

There is no specified burden of proof on the overall issue of penalty, nor is there any requirement that any or all jurors find any particular fact in aggravation to be true beyond a reasonable doubt. The jury may be instructed that the prosecution does not bear the burden of proof beyond a reasonable doubt on the issue of whether the defendant should die. *People v Welch* (1999) 20 C4th 701, 766, 85 CR2d 203 (U.S. Constitution does not require burden of proof in penalty findings; neither party has burden of proof); *People v Hawthorne* (1992) 4 C4th 43, 14 CR2d 133; *People v Williams* (1988) 44 C3d 883, 960, 245 CR 336. The California Supreme Court rejected the argument that, read together, *Apprendi v New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S Ct 2348 (defendant has right to have jury decide beyond reasonable doubt every fact that increases punishment beyond statutory maximum), and *Ring v Arizona* (2002) 536 US 584, 153 L Ed 2d 556, 122 S Ct 2428 (*Apprendi* applies to death penalty determination), require the prosecution to prove aggravating circumstances beyond a reasonable doubt. See, *e.g., People v Prieto* (2003) 30 C4th 226, 262, 133 CR2d 18. The court held that because the defendant has been convicted of first degree murder, and at least one special circumstance has been proved beyond a reasonable doubt at the guilt phase, "death *is* no more than the prescribed statutory maximum for the offense." 30 C4th at 263, quoting from *People v Anderson* (2001) 25 C4th 543, 589 n14, 106 CR2d 575.

Ø **Note:** The California Supreme Court noted that for this reason, the decision in *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, has "no apparent application to the state's capital sentencing scheme." *People v Prince* (2007) 40 C4th 1179, 1297, 57 CR3d 543. However, the court indicated that it might be open to further briefing by stating that the defendant's "failure to supply any discussion or analysis of the *Cunningham* decision leaves us with no basis to conclude that it should cause us to alter our views." 40 C4th at 1298.

If the trier of fact finds that the aggravating circumstances outweigh any mitigating factors, it may but is not required to impose a sentence of death. Although Pen C §190.2 says that the death penalty "shall" be imposed when the trier of fact finds that the aggravating circumstances outweigh mitigating factors, case law provides that the jury always retains discretion to impose the punishment it finds appropriate. *People v Davenport* (1985) 41 C3d 247, 221 CR 794. See also CALCRIM 766. If the trier of fact determines that the mitigating factors merit a life sentence, or that aggravating evidence does not merit death, even without mitigating evidence, it must impose a sentence of life in prison without the possibility of parole. Pen C §190.3; *People v Duncan* (1991) 53 C3d 955, 979, 281 CR 273. These rules are different from federal law, which requires only a simple weighing of the factors alone and against each other. *Gregg v Georgia* (1976) 428 US 153, 192, 49 L Ed 2d 859, 885, 96 S Ct 2909. See also *Boyde v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190. Note that in *People v Welch* (1999) 20 C4th 701, 772, 85 CR2d 203, the defense offered studies tending to show that jurors are often confused by penalty phase instructions. The California Supreme Court rejected that argument because of a lack of testimony on these studies in the trial court to rebut the judicial presumption that jurors comprehend and follow the court's instructions.

The only jury unanimity requirement in penalty phase decisions is on the final verdict. *People v Caro* (1988) 46 C3d 1035, 1057, 251 CR 757. The decision that each juror makes to reach that verdict is, however, an individual one. Jurors need not unanimously agree on which aggravating evidence they find to be true, or on what weight to give any particular aggravating evidence. *People v Breaux* (1991) 1 C4th 281, 3 CR2d 81.

The reasonable doubt standard does apply in one aspect of the penalty phase. Before any juror can use other violent criminal conduct as aggravating evidence under Pen C §190.3(b), that juror must determine, beyond a reasonable doubt, that the defendant actually committed the other violent crime. *People v Thompson* (1988) 45 C3d 86, 126, 246 CR 245.

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§54.35 B. Permissible Evidence

All guilt phase evidence may be considered by the trier of fact in the penalty phase if the trier of fact is the same. Pen C §190.4(d). Particular types of evidence admissible in aggravation or in mitigation of the death penalty are discussed in §§54.36-54.49.

The court retains discretion under Evid C §352 concerning *how* evidence offered in aggravation should be introduced but may not exclude it altogether. *People v Visciotti* (1992) 2 C4th 1, 68, 5 CR2d 495 (court has authority to control manner in which evidence of past criminal conduct is offered, but no discretion to exclude all evidence related to statutory sentencing factor).

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C. Evidence in Aggravation

§54.36 1. Summary of Evidence Admissible in Aggravation

The scope of evidence admissible in aggravation is limited. The prosecution cannot introduce evidence of the defendant's background or character in its case-in-chief unless it is probative of a specific aggravating factor in Pen C §190.3. *People v Lucky* (1988) 45 C3d 259, 302, 247 CR 1. For example, it was error to introduce testimony of the defendant's parole officer that the defendant was very difficult to supervise, was manipulative, and was addicted to narcotics. Although this was character evidence, it was not probative of a statutory aggravating factor. 45 C3d at 302.

Ø **Note:** No California decision has interpreted the general preamble language of §190.3 ("evidence may be presented by both the People and the defendant as to any matter relevant to aggravation, mitigation and sentence") to permit prosecution evidence that does not fit any specific statutory aggravating factor.

Technically, none of the factors listed in §190.3 is either aggravating or mitigating; it is the way in which the jury perceives the facts that fall within the statutory factors that determines whether the factors are to be considered by the jury as aggravating or mitigating. See *People v Gallego* (1990) 52 C3d 115, 208, 276 CR 679 (concurring opinion of J. Mosk). Historically, only the first three statutory factors (Pen C §190.3(a)-(c)) have been conceded to be potential aggravating factors. Factors (a), (b), and (c) can, of course, be considered mitigating, *i.e.,* to the extent that there are any mitigating aspects to the circumstances of the primary crime or the fact that the defendant has no prior violent conduct or felony convictions. Penal Code §190.3(i) is somewhat of a hybrid in that either side may argue that the defendant's age is either aggravating or mitigating. *People v Lucky, supra*. The remaining factors of §190.3 are generally considered to be mitigating only. See *People v Gallego* (1990) 52 C3d 115, 207, 276 CR 679 (J. Mosk concurring) and cases cited therein.

Ø **Note:** The court is not required to define the terms "aggravating" and "mitigating." *People v Hawkins* (1995) 10 C4th 920, 965, 42 CR2d 636, overruled on other grounds in *People v Blakeley* (2000) 23 C4th 82, 89, 96 CR2d 451.

Generally, then, the prosecution is limited in its case-in-chief to introducing evidence relevant to statutory factors relating to Pen C §190.3(a), (b), or (c). The parameters of these three statutory factors (four if §190.3(i) is considered a possible aggravating factor) have occupied a substantial portion of the court's attention in this area. These factors are discussed in detail in §§54.37-54.47.

The defense is not limited to specific factors. The defense may generally introduce any evidence relevant to a defendant's background and character. *People v Robertson* (1982) 33 C3d 21, 188 CR 77.

Both sides may introduce any evidence on the circumstances of the primary offense. *People v Robertson, supra*. All guilt phase evidence is admissible in the penalty phase if the trier of fact is the same. Pen C §190.4(d). Evidence of a defendant's mental illness, such as sadistic pedophilia, may be admissible in aggravation if it relates to the "circumstance of the crime" under §190.3(a). *People v Smith* (2005) 35 C4th 334, 350, 25 CR3d 554. The supreme court has also stated that evidence of a defendant's lack of remorse is a universally relevant factor that is admissible in aggravation as a "circumstance of the crime" under §190.3(a). *People v Caro* (1988) 46 C3d 1035, 251 CR 757; *People v Sully* (1991) 53 C3d 1195, 1249, 283 CR 144. It is improper to argue that lack of remorse is an independent aggravating factor. *People v Fierro* (1991) 1 C4th 173, 3 CR2d 426. However, a prosecutor may properly comment on lack of remorse relevant to mitigation, as long as the prosecutor does not suggest that lack of remorse is an aggravating factor. *People v Bonilla* (2007) 41 C4th 313, 355, 60 CR3d 209. In *People v Staten* (2000) 24 C4th 434, 465, 101 CR2d 213, the court permitted use of the defendant's lack of remorse during trial to respond to mitigation evidence. Lack of remorse can be an aggravating factor only when it is manifest during or immediately after the capital crime. *People v Schmeck* (2005) 37 C4th 240, 300, 33 CR3d 397. The prosecution cannot argue that lack of remorse can be found in the defendant's claim of innocence. *People v Harris* (2005) 37 C4th 310, 361, 33 CR3d 509.

Ø **Note:** Objections to material not relevant to a statutory factor in aggravation should be made before the jury has the opportunity to hear the evidence. See *People v Clair* (1992) 2 C4th 629, 676, 7 CR2d 564.

Ø **Warning:** Evidence that is inadmissible in the prosecution's case-in-chief may become admissible as rebuttal. *In re Ross* (1995) 10 C4th 184, 207, 40 CR2d 544 (rebuttal evidence may be introduced that relates directly to particular incident or character trait offered on defendant's behalf). The defense should consider an in limine motion on the scope of rebuttal before offering such character evidence.

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2. Statutory Factors in Aggravation

a. Circumstances of Crime and Special Circumstance (Pen C §190.3(a))

§54.37 (1) Victim Impact

Victim impact evidence may be presented to jurors in the penalty phase. Pen C §190.3(a)-(b); *People v Pinholster* (1992) 1 C4th 865, 958, 4 CR2d 765; *People v Edwards* (1991) 54 C3d 787, 833, 1 CR2d 696. See *People v Kelly* (2007) 42 C4th 763, 68 CR3d 531 (admission of videotape on victim's life); *People v Prince* (2007) 40 C4th 1179, 57 CR3d 543 (admission of videotape of interview with victim).

For example, a surviving victim's extensive hospitalization for psychiatric problems, two nervous breakdowns, suicide attempts, hysteria, phobia of entering small places, and continuing inability to work are all admissible as circumstances of the crime under Pen C §190.3(a). *People v Mitcham* (1992) 1 C4th 1027, 1062, 5 CR2d 230; *People v Mickle* (1991) 54 C3d 140, 187, 284 CR 511. A victim's mental or emotional problems that preexisted the attack are also admissible because the jury may view vulnerability of a victim as an aggravating circumstance. *People v Clair* (1992) 2 C4th 629, 671, 7 CR2d 564 (victim's mild cerebral palsy was admissible to show vulnerability and unnecessary brutality).

Impact on the victim's family is also allowed. *People v Pollock* (2004) 32 C4th 1153, 1180, 13 CR3d 34 (evidence admissible on impact is limited); *People v Edwards, supra* (same).

There are limits on the extent and content of victim impact evidence: Irrelevant or inflammatory rhetoric that diverts the jury's attention from their proper focus, inviting irrational, purely subjective responses, should be curtailed. *People v Edwards, supra*. See also *People v Robinson* (2005) 37 C4th 592, 644, 36 CR3d 760 (discussing limits on victim impact evidence).

Ø **Note:** Generic notice that the prosecution intends to rely "on the circumstances of the offense" does not give the defense adequate notice under Pen C §190.3 of the prosecution's intent to present victim impact evidence. *People v Roldan* (2005) 35 C4th 646, 733, 27 CR3d 360, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209; *People v Wilson* (2005) 36 C4th 309, 356, 30 CR3d 513.

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§54.38 (2) Other Aspects of Crime

Other aspects of the charged crime that may not have been admissible in the guilt phase may be relevant to punishment and admissible in the penalty phase (Pen C §190.3(a)), as long as they do not involve "inflammatory rhetoric." *People v Frank* (1990) 51 C3d 718, 734, 274 CR 372. The following are examples of evidence of other aspects of the crime that may be admissible in the penalty phase:

- Testimony of friends and relatives who discovered victim's body. *People v Mason* (1991) 52 C3d 909, 963, 277 CR 166.
- Photographs of victims. *People v Medina* (1990) 51 C3d 870, 904, 274 CR 849. Life photos of victims that were held irrelevant and inadmissible in the guilt phase are generally admissible in the penalty phase because the same considerations do not apply. See *People v Lucero* (2000) 23 C4th 692, 714, 97 CR2d 871.
- Lack of remorse at scene of crime. *People v Gonzalez* (1990) 51 C3d 1179, 1231, 275 CR 729.
- Expert testimony about defendant's mental illness when related to the "circumstances of the crime." *People v Smith* (2005) 35 C4th 334, 352, 25 CR3d 554 (testimony about defendant's sadistic pedophilia relevant in aggravation to explain motivation for crime, history of illness that produces such a motivation, and significance of method of commission of crime).
- Mirandized statements by the defendant to the district attorney's psychiatrist are admissible at the penalty phase. *People v Robertson* (1989) 48 C3d 18, 48, 255 CR 631.
- Evidence of defendant's statements regarding his or her victims is highly probative. *People v Payton* (1992) 3 C4th 1050, 1063, 13 CR2d 526.
- Coroner's protocol to show violence used in homicide. *People v Hovey* (1988) 44 C3d 543, 576, 244 CR 121.
- Ability to elude major police search to show advance planning and lack of remorse. *People v Edwards* (1991) 54 C3d 787, 832, 1 CR2d 696.

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b. Presence or Absence of "Other Crimes" Criminal Activity Involving Violence (Pen C §190.3(b))

§54.39 (1) Prior Crime Victim Impact

Evidence of the emotional effect of the defendant's crimes on victims other than the victim in the current case are admissible. *People v Price* (1991) 1 C4th 324, 479, 3 CR2d 106. Photographs of "other crime" victims are admissible on the same basis as photographs of victims in the primary case. *People v Frank* (1990) 51 C3d 718, 734, 274 CR 372. The foreseeable ongoing effects on victims of prior crimes and the vulnerability of prior crime victims are admissible. *People v Mickle* (1991) 54 C3d 140, 187, 284 CR 511.

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§54.40 (2) Mutually Exclusive

The factors in Pen C §190.3(a) and (b) are mutually exclusive. Criminal activity involving force or violence as used in §190.3(b) is limited to conduct *other than* the immediate circumstance for which the death penalty is being contemplated. *People v Webster* (1991) 54 C3d 411, 453, 285 CR 31. However, if the defendant has a prior *violent* felony conviction, the prosecution may introduce the fact of the conviction as a factor in aggravation under Pen C §190.3(c), and the facts underlying the conviction as prior violent criminal conduct under §190.3(b). Even an offer by the defendant to stipulate to the prior conviction will not bar introduction of the underlying circumstances under §190.3(b). *People v Karis* (1988) 46 C3d 612, 638, 250 CR 659; *People v Brown* (1988) 46 C3d 432, 250 CR 604; *People v Melton* (1988) 44 C3d 713, 754, 244 CR 867; *People v Gates* (1987) 43 C3d 1168, 240 CR 666.

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§54.41 (3) Conduct Must Constitute Crime "Involving" Violence or Threatened Violence

Evidence of crimes other than the one for which the defendant is standing trial, admitted under Pen C §190.3(b), is limited to *conduct* that is violent or involves the threat of violence, *and* constitutes a crime against a person. See *People v Kirkpatrick* (1994) 7 C4th 988, 1016, 30 CR2d 818, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (injury to dogs and threats to property are not acts of violence contemplated by statute and should have been excluded). It is sufficient that the defendant merely *threatened* to commit a violent crime if there was no conduct. See *People v Clair* (1992) 2 C4th 629, 677, 7 CR2d 564 (possession of knife during burglary admissible; showed implied threat of violence); *People v Brown* (1988) 46 C3d 432, 472, 250 CR 604 (concurring and dissenting opinion of Broussard, J.). See, *e.g., People v Walker* (1988) 47 C3d 605, 639, 253 CR 863 (conduct did not constitute crime, but harmless error); *People v McLain* (1988) 46 C3d 97, 110, 249 CR 630 (some conduct was not crime, other conduct was not violent); *People v Silva* (1988) 45 C3d 604, 636, 247 CR 573 (conduct did not constitute crime).

The violent conduct *need not* constitute the crime; it need only be part of a crime. *People v Grant* (1988) 45 C3d 829, 850, 248 CR 444 (defendant displayed "shank" and threatened deputy's life; threat was not necessarily crime, but possession of shank in jail was; threat of violence was admissible).

All crimes committed during a continuous course of criminal activity that involves force and violence are admissible, even if some portions are nonviolent. *People v Raley* (1992) 2 C4th 870, 907, 8 CR2d 678; *People v Fierro* (1991) 1 C4th 173, 231, 3 CR2d 426. Underlying crimes are admissible to give context to a defendant's subsequent violent episodes of resistance. *People v Livaditis* (1992) 2 C4th 759, 777, 9 CR2d 72. If the defendant aided and abetted another who committed the violent act, then the defendant's act "involved" violence. *People v Hayes* (1990) 52 C3d 577, 633, 276 CR 874.

The facts of a defendant's prior violent crime are admissible even if the defendant only pleaded guilty to a nonviolent crime as part of a plea bargain. *People v Kaurish* (1990) 52 C3d 648, 703, 276 CR 788.

Evidence of a coparticipant's conduct concerning the other crime is admissible to put the defendant's conduct into context. *People v Bacigalupo* (1991) 1 C4th 103, 136, 2 CR2d 335, vacated on other grounds sub nom *Bacigalupo v California* (1992) 506 US 802, 121 L Ed 2d 5, 113 S Ct 32.

"Other crimes" evidence must be proved beyond a reasonable doubt. *People v Robertson* (1982) 33 C3d 21, 188 CR 77. See also *People v Welch* (1999) 20 C4th 701, 766, 85 CR2d 203; *People v Phillips* (1985) 41 C3d 29, 222 CR 127.

Evidence of other unadjudicated violent criminal activity is admissible even if prosecution for that crime is barred by the statute of limitations. *People v Huggins* (2006) 38 C4th 175, 245, 41 CR3d 593.

Ø **Note:** Violation of Pen C §190.3(b) is sometimes called *Boyd* error, after *People v Boyd* (1985) 38 C3d 762, 215 CR 1. So far, the California Supreme Court has not reversed a penalty verdict for *Boyd* error alone. *People v Pinholster* (1992) 1 C4th 865, 962, 4 CR2d 765.

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§54.42 (4) Not Limited to Particular Time Frame

Although limited to violent conduct constituting a crime, evidence under Pen C §190.3(b) is not barred by the statute of limitations, remoteness in time, or having occurred after the instant crime. *People v DeSantis* (1992) 2 C4th 1198, 1252, 9 CR2d 628 (statute of limitations no bar); *People v Burton* (1989) 48 C3d 843, 862, 258 CR 184, and *People v Champion* (1995) 9 C4th 879, 936, 39 CR2d 547 (juvenile conduct); *People v Robertson* (1989) 48 C3d 18, 43, 255 CR 631 (offense barred by statute of limitations still aggravating); *People v Grant* (1988) 45 C3d 829, 859, 248 CR 444, and *People v Hovey* (1988) 44 C3d 543, 577, 244 CR 121 (in both cases, "other crime" occurred after "current" homicide); *People v Heishman* (1988) 45 C3d 147, 192, 246 CR 673 (conduct may be at any time).

On retrial, offenses may be used that were not used in the first trial. *People v Robertson* (1989) 48 C3d 18, 46, 255 CR 631.

The trial court lacks discretion under Pen C §190.3 to exclude remote prior crimes. Remoteness goes only to the weight of the evidence. *People v Frank* (1990) 51 C3d 718, 729, 274 CR 372.

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§54.43 (5) Barred by "Acquittal"

Evidence of a prior offense for which the defendant was prosecuted and acquitted is not admissible. Pen C §190.3; *People v Heishman* (1988) 45 C3d 147, 246 CR 673. The following, however, *are* admissible:

- Crimes previously dismissed under a negotiated plea. *People v Caro* (1988) 46 C3d 1035, 1058, 251 CR 757; *People v Heishman, supra*.
- Offenses reduced to nonviolent felony or misdemeanor convictions. *People v Melton* (1988) 44 C3d 713, 754, 244 CR 867.
- Cases dismissed under Welf & I C §1772. *People v Pride* (1992) 3 C4th 195, 257, 10 CR2d 636.
- Twice-dismissed prior violent crimes. *People v Medina* (1990) 51 C3d 870, 907, 274 CR 849.
- "Other crimes" on which there has been a mistrial. *People v Jennings* (1991) 53 C3d 334, 390, 279 CR 780.
- Evidence of a criminal act, despite some alternative innocent explanation. *People v Mason* (1991) 52 C3d 909, 956, 277 CR 166.

Whether a defendant was acquitted of a crime committed in another state is determined under California law. *People v Bacigalupo* (1991) 1 C4th 103, 133, 2 CR2d 335, vacated on other grounds sub nom *Bacigalupo v California* (1992) 506 US 802, 121 L Ed 2d 5, 113 S Ct 32. Violation of another state's statute is sufficient to meet Pen C §190.3(b)'s "criminal activity" requirement even if the conduct is not criminal in California. *People v Pensinger* (1991) 52 C3d 1210, 1260, 278 CR 640.

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§54.44 (6) Fifth Amendment

A defendant with another murder prosecution pending that is being used in the instant case under Pen C §190.3(b) may not have a First Amendment right not to be cross-examined if the matter is relevant. *People v Bonin* (1988) 46 C3d 659, 250 CR 687, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823, 72 CR2d 656.

Ø **Note:** There is a split in authority about whether a defendant who testifies only at the penalty phase has a Fifth Amendment right not to be questioned about his or her guilt; the California Supreme Court has acknowledged this issue but has yet to resolve it. See *People v Monterroso* (2004) 34 C4th 743, 768, 22 CR3d 1 (split in authority noted; prosecutor withdrew questions about guilt and no prejudice to defendant).

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§54.45 (7) Discretion to Exclude Evidence

The court does not have the discretion under Evid C §352 to completely exclude other crimes evidence that is admissible under Pen C §190.3(b). *People v Visciotti* (1992) 2 C4th 1, 68, 5 CR2d 495. The court has discretion only concerning the manner in which this prior crime evidence is offered. *People v Bacigalupo* (1991) 1 C4th 103, 140, 2 CR2d 335, vacated on other grounds sub nom *Bacigalupo v California* (1992) 506 US 802, 121 L Ed 2d 5, 113 S Ct 32.

Ø **Note:** Failure to object to other crimes evidence may result in a finding of harmless error. See, *e.g., People v Sheldon* (1989) 48 C3d 935, 951, 258 CR 242.

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§54.46 c. Prior Felony Convictions (Pen C §190.3(c))

Prior felony convictions are admissible in the penalty phase. Pen C §190.3(c). The prior felony *conviction,* and not merely the act, must have preceded the instant capital offense. *People v Webster* (1991) 54 C3d 411, 453, 285 CR 31. A prior conviction incurred by a no contest plea is admissible. *People v Adcox* (1988) 47 C3d 207, 254, 253 CR 55.

Proof of felony priors involving violent conduct under §190.3(c) often overlaps with Pen C §190(b). *People v Benson* (1990) 52 C3d 754, 787, 276 CR 827; *People v Robertson* (1989) 48 C3d 18, 45, 255 CR 631. An offer to stipulate to a felony conviction may preclude its admission. See discussion in §24.25. If the prior involves violence, however, a stipulation will not preclude admission of the circumstances of relevant criminal activity involving violence for purposes of Pen C §190.3(b). *People v Brown* (1988) 46 C3d 432, 445, 250 CR 604. The circumstances surrounding a prior conviction for a nonviolent felony are inadmissible at the penalty phase. *People v Livaditis* (1992) 2 C4th 759, 776, 9 CR2d 72.

Juvenile felony adjudications are inadmissible; however, the underlying facts may be admitted under §190.3(b). *People v Burton* (1989) 48 C3d 843, 258 CR 184.

A foreign felony conviction is admissible even if not a felony in California. *People v Bacigalupo* (1991) 1 C4th 103, 139, 2 CR2d 335, vacated on other grounds sub nom *Bacigalupo v California* (1992) 506 US 802, 121 L Ed 2d 5, 113 S Ct 32. A prior conviction from another state that was set aside is not admissible. See *Johnson v Mississippi* (1988) 486 US 578, 100 L Ed 2d 575, 108 S Ct 1981 (death judgment had to be reexamined because prior conviction from other state that was introduced as aggravating factor was set aside by other state's courts *following* death verdict).

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§54.47 d. Age of Defendant (Pen C §190.3(i))

The age of a defendant at the time of the crime (Pen C §190.3(i)) is neither aggravating nor mitigating "but is used in the statute as a metonym for any age-related matter suggested by the evidence or by common experience." *People v Mendoza* (2000) 24 C4th 130, 190, 99 CR2d 485.

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§54.48 3. Rebuttal; Cross-Examination

Rebuttal. Once a defendant places his or her character in issue, the prosecutor may, through either cross-examination or rebuttal, present a more balanced picture of the defendant's personality. Such cross-examination or rebuttal need not meet statutory categories for aggravating evidence. *People v Daniels* (1991) 52 C3d 815, 883, 277 CR 122. For example, if the defendant introduces evidence of his or her work record, the prosecution can rebut it with evidence of unemployment. *People v Anderson* (1990) 52 C3d 453, 475, 276 CR 356. Evidence of gang membership is admissible to rebut participation in Little League. *People v Fierro* (1991) 1 C4th 173, 238, 3 CR2d 426. See also *People v Raley* (1992) 2 C4th 870, 912, 8 CR2d 678; *People v Mitcham* (1992) 1 C4th 1027, 1079, 5 CR2d 230. Evidence of the defendant's future dangerousness, or of prison conditions, is admissible to rebut defense evidence of the defendant's anticipated future prison performance. *People v Malone* (1988) 47 C3d 1, 31, 252 CR 525. See also *People v Welch* (1999) 20 C4th 701, 85 CR2d 203 (argument proper if based on evidence of past crimes admitted under one or more statutory factors in aggravation); *People v Millwee* (1998) 18 C4th 96, 74 CR2d 418.

The limitations of Evid C §1102 do not apply to penalty phase rebuttal evidence. *People v Visciotti* (1992) 2 C4th 1, 69 n37, 5 CR2d 495.

Rebuttal must be specific and relate directly to the character trait that the defendant offers on his or her own behalf. *People v Bacigalupo* (1991) 1 C4th 103, 141, 2 CR2d 335, vacated on other grounds sub nom *Bacigalupo v California* (1992) 506 US 802, 121 L Ed 2d 5, 113 S Ct 32. For example, if a defense expert has testified on cross-examination that a defendant is not a sociopath, the prosecutor may offer evidence that the defendant *is* a sociopath and that sociopaths do not change. *People v Daniels* (1991) 52 C3d 815, 881, 277 CR 122. When the defense presented evidence of a substandard upbringing, that evidence was properly rebutted by evidence that as a juvenile the defendant was cruel and callous, which suggested that intrinsic evil and not external circumstances governed his behavior. *People v Thornton* (2007) 41 C4th 391, 458, 61 CR3d 461.

Evidence that could be presented in the prosecution's case-in-chief should not be held instead for rebuttal. *People v Raley* (1992) 2 C4th 870, 914, 8 CR2d 678 (rule stated, but no evidence of "sandbagging" and little evidence that rebuttal evidence would have been admissible in case-in-chief).

The prosecutor may counter a defendant's evidence of the security of prison with rebuttal on the possibility of escape (*People v Kaurish* (1990) 52 C3d 648, 710, 276 CR 788), and on future violence in prison (*People v Rowland* (1992) 4 C4th 238, 275, 14 CR2d 377).

> Ø **Note:** It would be misconduct in this situation to also argue that the risk of escape is an additional reason for death. *People v Kaurish, supra*.

Cross-examination. It is proper to ask a witness who has testified to a defendant's good behavior whether the defendant is dangerous. *People v Morris* (1991) 53 C3d 152, 210 n11, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. See also *People v Rowland* (1992) 4 C4th 238, 273, 14 CR2d 377.

The prosecution may elicit evidence of a defendant's lack of remorse. The statutory basis for this is not clear, but the court has said that the presence or absence of remorse is relevant. *People v Wright* (1990) 52 C3d 367, 433, 276 CR 731; *People v Gallego* (1990) 52 C3d 115, 197, 276 CR 679. Whether a prosecutor may inquire into a defendant's guilt when the defendant has testified only at the penalty phase remains an open question. See *People v Monterroso* (2004) 34 C4th 743, 768, 22 CR3d 1 (split in authority noted; prosecutor withdrew questions about guilt and no prejudice to defendant). See also §54.44 on Fifth Amendment issues at the penalty phase.

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Source: Criminal Law/California Criminal Law Procedure and Practice/54 DEATH PENALTY CASES/§54.49 D. Evidence in Mitigation

§54.49 D. Evidence in Mitigation

The jury must be allowed to consider in the penalty phase any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Mills v Maryland* (1988) 486 US 367, 373, 100 L Ed 2d 384, 393, 108 S Ct 1860; *Eddings v Oklahoma* (1982) 455 US 104, 121, 71 L Ed 2d 1, 15, 102 S Ct 869. Any barrier, whether instructional, evidentiary, or statutory, that precludes a juror from considering relevant mitigating factors is constitutional error. See *Skipper v South Carolina* (1986) 476 US 1, 4, 90 L Ed 2d 1, 6, 106 S Ct 1669. See also *Smith v Texas* (2004) 543 US 37, 160 L Ed 2d 303, 125 S Ct 400; *Penry v Johnson* (2001) 532 US 782, 150 L Ed 2d 9, 121 S Ct 1910.

Mitigating evidence about a defendant's character or record need not be tied to the offense. See *People v Mickle* (1991) 54 C3d 140, 193, 284 CR 511 (evidence of what could and should have been done to treat defendant's pedophilia and safeguard public was properly admissible as mitigating defendant's moral culpability; harmless error, however, to fail to admit evidence of state's improper diagnosis and treatment); *People v Whitt* (1990) 51 C3d 620, 647, 274 CR 252 (question by defense counsel to defendant, "Do you want to live?" is proper); *People v Lucero* (1988) 44 C3d 1006, 245 CR 185 (failure to admit evidence of posttraumatic stress disorder; reversed).

Testimony that predicts a defendant's positive future behavior is admissible. *People v Fudge* (1994) 7 C4th 1075, 1117, 31 CR2d 321 (harmless error to exclude testimony of retired warden concerning defendant's probability of success as life prisoner); *People v McLain* (1988) 46 C3d 97, 108, 249 CR 630 (harmless error for trial court to bar testimony showing that defendant's future prison behavior would be good); *People v Lucero, supra* (error to exclude doctor's testimony that defendant would not be threat in prison and would make good adjustment). See also *People v Ruiz* (1988) 44 C3d 589, 621, 244 CR 200 (testimony by minister that defendant would lead moral and religious life in prison properly excluded because minister lacked academic credentials to give that assessment). Evidence of the opinions of family and friends of the defendant on the appropriateness of the death penalty are admissible as bearing on the defendant's overall character and humanity. *People v Mickle* (1991) 54 C3d 140, 194, 284 CR 511; *People v Heishman* (1988) 45 C3d 147, 194, 246 CR 673. The defense may elicit testimony from a defendant's family member or close friend stating the witness's opinion that the defendant deserves to live. *People v Williams* (2008) 43 C4th 584, 644, 75 CR3d 691.

The trial court may exclude evidence of the effect on the defendant's family of the death penalty. *People v Sanders* (1995) 11 C4th 475, 545, 46 CR2d 751 (members of defendant's family were offered as witnesses; court held such evidence irrelevant); *People v Beeler* (1995) 9 C4th 953, 39 CR2d 607 (psychologist was offered on issue). The court in *People v Ochoa* (1998) 19 C4th 353, 454, 79 CR2d 408, held that testimony regarding sympathy for the defendant's family is not admissible, although family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character. A defendant may offer evidence that the defendant is loved by family members and that they want the defendant to live.

Evidence offered in mitigation that may be properly *excluded* includes*:*

- Hearsay doctor's report on defendant's alleged brain damage. *People v Wright* (1990) 52 C3d 367, 430, 276 CR 731.
- "Day-in-the-life" video of handicapped life-without-parole inmate. *People v Daniels* (1991) 52 C3d 815, 876, 277 CR 122.
- Evidence of statistical information on number of death penalty verdicts. *People v Wright, supra*.
- Evidence of wrongful executions. *People v Alcala* (1992) 4 C4th 742, 807, 15 CR2d 432; *People v Pride* (1992) 3 C4th 195, 261, 10 CR2d 636.
- Sentences of coparticipants. *Beardslee v Woodford* (9th Cir 2004) 358 F3d 560, 579; *People v Dyer* (1988) 45 C3d 26, 69, 246 CR 209.
- Whether codefendant's sentence was received through negotiated plea. *People v Malone* (1988) 47 C3d 1, 53, 252 CR 525.
- Evidence of how death penalty is carried out and of prison conditions. *People v Brown* (2003) 31 C4th 518, 575,

3 CR3d 145 (evidence of security condition of persons serving life without parole); *People v Sanders* (1995) 11 C4th 475, 555, 46 CR2d 751 (court prohibited argument on life sentence for Charles Manson, and vivid account of manner of execution of others); *People v Fudge* (1994) 7 C4th 1075, 1123, 31 CR2d 321 (evidence of conditions during life in prison without possibility of parole, and of performance of execution properly excluded). But see *People v Thompson* (1988) 45 C3d 86, 138, 246 CR 245 (although such *evidence* is inadmissible, these are proper subjects for *argument*); *People v Grant* (1988) 45 C3d 829, 860, 248 CR 444 (argument proper, but improper for defense counsel to read newspaper account of execution to jury).

- Evidence of deterrent effect that death penalty does or does not have. *People v Thompson* (1988) 45 C3d 86, 131, 246 CR 245.
- Cost of life without possibility of parole versus cost of death penalty. *People v Thompson, supra* (but defendant is entitled, on request, to instruction that relative cost should not be considered).
- Evidence of claimed misconduct by prosecutor or plea bargain offer made by prosecutor. *People v Zapien* (1993) 4 C4th 929, 988, 17 CR2d 122; *People v Cook* (2007) 40 C4th 1334, 1362, 58 CR3d 340.
- Testimony from penalty phase investigator not qualified as an expert on psychological impact of defendant's upbringing on his current behavior or how defendant would actually adjust to life in prison. *People v Watson* (2008) 43 C4th 652, 690, 76 CR3d 208.
- Hearsay testimony by defendant that was not subject to cross-examination. *People v Whitt* (1990) 51 C3d 620, 644, 274 CR 252 (defendant was not allowed to present his own Death Row interview, because it was hearsay testimony without cross-examination). Such testimony may properly be excluded despite the Supreme Court's ruling in *Green v Georgia* (1979) 442 US 95, 97, 60 L Ed 2d 738, 741, 99 S Ct 2150, that relevant hearsay evidence offered by a defendant at the penalty phase should be allowed into evidence. *People v Edwards* (1991) 54 C3d 787, 837, 1 CR2d 696 (allowing another to testify for defendant to avoid cross-examination is not permissible; hearsay statements made by defendant before crime about his attitudes toward children, however, may have been admissible if not cumulative).

There is no right of allocution at the penalty phase in California. *People v Keenan* (1988) 46 C3d 478, 511, 250 CR 550 (acknowledging contrary authority from another state). See also *People v Brown* (1988) 45 C3d 1247, 1260, 248 CR 817 (error to allow defendant to testify at penalty phase about his life and deny crime, and be subject to cross-examination only about his life, not crime); *People v Carter* (2005) 36 C4th 1114, 1272, 32 CR3d 759 (no error in denying defendant's request to plead for mercy during penalty phase without being cross-examined). But see *Boardman v Estelle* (9th Cir 1992) 957 F2d 1523 (state defendant has constitutional right of allocution at sentencing; not death penalty case). See also *Hitchcock v Dugger* (1987) 481 US 393, 95 L Ed 2d 347, 107 S Ct 1821.

The trial court has no sua sponte duty to instruct the jury that unanimity is not required for consideration of mitigating factors. The only requirement for unanimity is for the verdict. *People v Phillips* (2000) 22 C4th 226, 238, 92 CR2d 58; *People v Breaux* (1991) 1 C4th 281, 314, 3 CR2d 81.

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§54.50 E. Defense Counsel's Obligations at Penalty Phase

Defense counsel may properly accede to a defendant's wishes and not present mitigating evidence. Defense counsel, however, is still obligated to investigate mitigating evidence and to advise the defendant of its existence. *People v Deere* (1991) 53 C3d 705, 716, 280 CR 424 (overruled prior cases holding otherwise); *People v Sanders* (1990) 51 C3d 471, 526, 273 CR 537; *People v Bloom* (1989) 48 C3d 1194, 1223, 259 CR 669. See also *In re Andrews* (2002) 28 C4th 1234, 124 CR2d 473 (limits on counsel's penalty phase investigation reasonable in light of defendant's desire not to have family involved and inconclusive nature of mitigating evidence); *People v Lang* (1989) 49 C3d 991, 1029, 264 CR 386 (no error for defense attorney, at defendant's request, not to call particular witness during penalty phase). Failure to adequately investigate and to present mitigation are often major topics for postconviction appellate counsel. See, *e.g., Wiggins v Smith* (2003) 539 US 510, 156 L Ed 2d 471, 123 S Ct 2527 (failure to investigate and present mitigating evidence deprived defendant of Sixth Amendment right to counsel); *Correll v Ryan* (9th Cir 2008) 539 F3d 938, 942 (failure to investigate defendant's background was deficient performance; failure to present mitigating evidence at penalty phase was ineffective assistance not justified as "strategic choice"); *Allen v Woodford* (9th Cir 2005) 395 F3d 979, 985 (although representation at penalty phase fell below objective standard of reasonableness, there was no reasonable possibility verdict would have been otherwise because of horrendous nature of crimes); *Stankewitz v Woodford* (9th Cir 2004) 365 F3d 706, 722 (failure to investigate and present evidence of childhood abuse and deprivation fell below constitutionally acceptable standard); *Turner v Calderon* (9th Cir 2002) 281 F3d 851 (petitioner entitled to evidentiary hearing in federal district court on trial counsel's failure to investigate mitigating evidence); *Silva v Woodford* (9th Cir 2002) 279 F3d 825 (defense counsel has duty to investigate potential mitigation evidence, including family background, mental health, and medical history even if client clearly states he or she does not want family members called to testify in mitigation at trial).

In *In re Lucas* (2004) 33 C4th 682, 16 CR3d 331, the supreme court, citing *Wiggins v Smith, supra,* granted a writ of habeas corpus and vacated a death sentence on finding that defense counsel had not adequately investigated available evidence in mitigation for possible use in the penalty phase. Counsel's obligation to search for mitigating evidence remains even if the client has not been truthful about the facts. Likewise, even when the defendant and family members represented that no affirmative evidence in mitigation was available, defense counsel rendered ineffective assistance by failing to review the court file relating to the defendant's prior conviction for rape and assault when defense counsel knew that the prosecution would probably rely on priors as evidence in aggravation; review of that case file would have disclosed potentially mitigating factors. *Rompilla v Beard* (2005) 545 US 374, 162 L Ed 2d 360, 125 S Ct 2456.

Ø **Note:** A pro per defendant may properly choose to stand mute, unless it is in an effort to manipulate or coerce the court or to force error. *People v Clark* (1992) 3 C4th 41, 114, 10 CR2d 554 (proper for court to revoke right of self-representation).

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§54.51 F. Penalty Phase Argument

In capital cases, two counsel on *each* side have the right to argue. Pen C §1095. Both defense counsel may argue even if the prosecutor waives rebuttal argument. *People v Bonin* (1988) 46 C3d 659, 691, 250 CR 687, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823, 72 CR2d 656. Presumably, a second prosecutor could also argue, although a single prosecutor is not necessarily entitled to argue twice. See *People v Payton* (1992) 3 C4th 1050, 1072, 13 CR2d 526 (prohibited prosecutor from arguing in rebuttal).

The arguments of the attorneys involved, particularly on the prosecution side, are repeatedly used by the California Supreme Court in determining whether errors are prejudicial. See, *e.g., People v Sanders* (1990) 51 C3d 471, 521, 273 CR 537 (jury's consideration of invalid special circumstances not prejudicial, because prosecutor did not emphasize them). However, courts have also held that the prosecutor's argument should not be given undue weight in deciding whether the jury was misled. See, *e.g., People v Gonzalez* (1990) 51 C3d 1179, 1224 n21, 275 CR 729. See also *Boyde v California* (1990) 494 US 370, 384, 108 L Ed 2d 316, 331, 110 S Ct 1190 (prosecutor's erroneous arguments should not be assumed to affect jurors as much as instructions); *Brown v Payton* (2005) 544 US 133, 161 L Ed 2d 334, 125 S Ct 1432, 1441 (trial judge should not have permitted prosecutor to argue meaning of mitigation instructions, but California Supreme Court's conclusion that jury properly considered and rejected postcrime character evidence as mitigating was still reasonable).

Some commonly argued issues include the following:

Absence of statutory mitigating factors. The prosecution may argue only that mitigating factors do not provide a basis for a life sentence, because they are not shown by the evidence. It is improper to suggest that absence of these factors constitutes aggravation. *People v Walker* (1988) 47 C3d 605, 643, 253 CR 863; *People v Davenport* (1985) 41 C3d 247, 288, 221 CR 794.

Absence of nonstatutory mitigating factors. The prosecution may argue that the jury should not find mitigation based on remorse, but it is improper to suggest that absence of remorse is an aggravating circumstance. *People v Fierro* (1991) 1 C4th 173, 3 CR2d 426; *People v Dyer* (1988) 45 C3d 26, 81, 246 CR 209; *People v Ruiz* (1988) 44 C3d 589, 622, 244 CR 200. See *People v Ochoa* (2001) 26 C4th 398, 448, 110 CR2d 324 (supreme court approved prosecutor's argument that defendant expressed no remorse for behavior and was proud of killings). The court found this argument proper under Pen C §190.3, factor (a), to which the prosecutor expressly referred. Section 190.3, factor (a) authorizes the jury to consider the circumstances of the crime when "the defendant's refusal to show any remorse in the context of the murder is an aggravating factor."

Age of defendant (Pen C §190.3(i)). The prosecutor may argue that age is aggravating, and the defense may argue that it is mitigating. *People v Livaditis* (1992) 2 C4th 759, 785, 9 CR2d 72; *People v Edwards* (1991) 54 C3d 787, 844, 1 CR2d 696.

Future dangerousness. Argument on future dangerousness is proper. The holding of *People v Murtishaw* (1981) 29 C3d 733, 175 CR 738, on the perils of dealing with future dangerousness has largely been limited to the presentation of expert evidence. The California Supreme Court does not believe that argument on future dangerousness carries the same potential for prejudice that the presentation of expert testimony entails. *People v Dyer* (1988) 45 C3d 26, 81, 246 CR 209. For other examples of permissible prosecution argument, see *People v Daniels* (1991) 52 C3d 815, 882, 277 CR 122; *People v Taylor* (1990) 52 C3d 719, 749, 276 CR 391.

The defense may argue that the defendant does not present a danger in prison and that society would be protected because the defendant has not committed any violent acts while in custody. See *People v Harris* (2005) 37 C4th 310, 357, 33 CR3d 509.

Defendant's demeanor in court. If the defendant has put his or her character in evidence at the penalty phase, the prosecutor may argue demeanor in court even if the defendant did not testify. *People v Heishman* (1988) 45 C3d 147, 197, 246 CR 673. However, if the defendant testifies to his or her innocence in the penalty phase, the prosecution cannot argue that such testimony constitutes an aggravating factor. *People v Kennedy* (2005) 36 C4th 595, 635, 31 CR3d 160.

Diminishing juror's personal responsibility. Arguments seeking to diminish each juror's sense of personal responsibility for the death penalty decision are improper. *Caldwell v Mississippi* (1985) 472 US 320, 86 L Ed 2d 231, 105 S Ct 2633; *People v Farmer* (1989) 47 C3d 888, 928, 254 CR 508, overruled on other grounds in *People v Waidla* (2000) 22 C4th 690, 724 n6, 94 CR2d 396 (penalty reversed; prosecutor had argued, "You do not decide life or death. The law does that"); *People v Milner* (1988) 45 C3d 227, 257, 246 CR 713 (penalty reversed; prosecutor told jurors not to "shoulder the burden of personal responsibility" and encouraged them to "hide" behind the law); *People v Schmeck* (2005) 37 C4th 240, 263, 33 CR3d 397 (prosecutor's statement in voir dire that a juror's vote was a "recommendation to the court that the defendant should be executed at some time in the future" was error, but cured by court's dismissal of juror for cause). See also *People v Poggi* (1988) 45 C3d 306, 339, 246 CR 886 (prosecutor argued that defendant's really important trial would come after his death, when he would have to face his victims and explain his conduct to God; error, but not prejudicial, and defense did not object). See also *People v Fierro* (1991) 1 C4th 173, 247, 3 CR2d 426; *People v Anderson* (1990) 52 C3d 453, 479, 276 CR 356; *People v Benson* (1990) 52 C3d 754, 794, 276 CR 827.

Possibility of defendant's eventual release. It is improper to draw the jury's attention to the possibility that the defendant might some day be paroled if not sentenced to death. *People v Lucky* (1988) 45 C3d 259, 292, 247 CR 1; *People v Hovey* (1988) 44 C3d 543, 581, 244 CR 121. The jury should not be invited to speculate on future unpredictable events like release, escape, pardon, parole, or commutation. *People v Mitcham* (1992) 1 C4th 1027, 1077, 5 CR2d 230.

Double argument of statutory sentencing factors. Because the jury may not consider the facts of the crime under both Pen C §190.3(a) and (b), it is improper to argue the facts under both subsections. *People v Hernandez* (1988) 47 C3d 315, 358, 253 CR 199.

Victim impact. Victim impact argument is proper as long as it is relevant and is not inflammatory. *People v Raley* (1992) 2 C4th 870, 914, 8 CR2d 678. See also *People v Beardslee* (1991) 53 C3d 68, 113, 279 CR 276. In *People v Taylor* (2001) 26 C4th 1155, 1172, 113 CR2d 827, victim impact for other crimes was limited to such injuries as related directly to the circumstances of the capital crime.

Arguing that death is mandatory. The prosecution cannot argue that death is "mandatory" if aggravating circumstances substantially outweigh mitigating circumstances. *People v Edelbacher* (1989) 47 C3d 983, 254 CR 586 (death penalty reversed). It is proper, however, to make that statement in argument if the prosecutor makes it clear that a death verdict cannot be returned until after the jury has subjectively assigned the weight it deems appropriate to the aggravating and mitigating factors. *People v Clark* (1992) 3 C4th 41, 164, 10 CR2d 554. See also *Boyde v California* (1990) 494 US 370, 108 L Ed 2d 316, 110 S Ct 1190.

Deterrence. Although it is not proper to argue the *general* deterrent effect of capital punishment (see *People v Love* (1961) 56 C2d 720, 731, 16 CR 777, overruled on other grounds in *People v Morse* (1964) 60 C2d 631, 637, 36 CR 201), it is acceptable to argue that the death penalty would stop this defendant from more violence (*People v Bell* (1989) 49 C3d 502, 549, 262 CR 1).

Religious references. "An appeal to the religious authority in support of the death penalty is improper because in tends to diminish the jury's personal responsibility and encourages them to believe a higher law may apply over the jury instructions." *People v Hill* (1998) 17 C4th 800, 836, 72 CR2d 656. See *People v Welch (*1999) 20 C4th 701, 761, 85 CR2d 203, in which the court found that the prosecutor's use of biblical passages "in part to assuage the jury's sense of personal responsibility," followed by arguments for the jury to imagine the defendant meeting the victims in an afterlife, was misconduct, though harmless under the facts of that case. See also *People v Slaughter* (2002) 27 C4th 1187, 1209, 120 CR2d 477; *People v Roybal* (1998) 19 C4th 481, 519, 79 CR2d 487.

Lingering doubt. Counsel may urge to the jury that the defendant is possibly innocent as a factor in mitigation, but there is no constitutional right to a jury instruction that the jury must consider as a factor in mitigation any lingering doubt they may have about the defendant's intent or overall guilt. *People v Earp* (1999) 20 C4th 826, 903, 85 CR2d 857. See *People v Gay* (2008) 42 C4th 1195, 1217, 73 CR3d 442 (defense can introduce evidence to urge possible innocence of defendant as mitigating factor).

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Source: Criminal Law/California Criminal Law Procedure and Practice/54 DEATH PENALTY CASES/§54.52 G. Penalty Phase Instructions

§54.52 G. Penalty Phase Instructions

Instructions have been a major subject of many California Supreme Court death penalty decisions. In many of these cases, death judgments were upheld over defense argument that the instructions were misleading or incomplete. However, the supreme court has often upheld the judgment only after considering all the circumstances of the trial, including the arguments of counsel, and concluding that the jury had actually understood their function despite allegedly deficient instructions. See, *e.g., People v Bonin* (1988) 46 C3d 659, 707, 250 CR 687, overruled on other grounds in *People v Hill* (1998) 17 C4th 800, 823, 72 CR2d 656. Hence, counsel must be careful when considering the precedential value of these opinions. Often they do not stand for the proposition that a particular instruction should or should not be given but that, under the circumstances of the case and given the arguments of counsel, that particular jury was not misled.

It is error under California law to mislead jurors on the scope of their sentencing discretion. It is not error of federal constitutional dimensions. *People v Mickey* (1991) 54 C3d 612, 699, 286 CR 801. In deciding whether jurors in any given case were in fact misled, the court examines the whole record and in particular counsels' arguments. *People v Mickey, supra*. The court relies primarily on the catchall "modified" factor (k) instruction (Pen C §190.3(k)), required to be given prospectively to all juries by *People v Easley* (1983) 34 C3d 858, 878, 196 CR 309, to find that there was either no error in refusing to give a particular instruction or that the refusal was harmless. See, *e.g., People v Kaurish* (1990) 52 C3d 648, 705, 276 CR 788 (instructing jury that it might consider any other aspect of defendant's character or record that defendant proffered complies with requirement that jury may not be precluded from considering any mitigating factor).

It is proper for the jury to be instructed on all statutory mitigating and aggravating factors. The court need not limit the list in Pen C §190.3 to evidence presented during the penalty phase. *People v Caro* (1988) 46 C3d 1035, 1061, 251 CR 757. When future dangerousness is at issue, and the only sentencing alternatives are death or life without parole, due process requires the trial court to instruct the jury that the defendant who receives a life sentence will not be eligible for parole. *Kelly v South Carolina* (2002) 534 US 246, 151 L Ed 2d 670, 122 S Ct 726. In *People v Benavides* (2005) 35 C4th 69, 24 CR3d 507, the jury submitted a note asking the trial court: "Life without the possibility of parole —how permanent is it? Can it be overturned by legal changes? (other than appeal.) Is there a chance for him to walk out of prison? EVER!! *EXPLANATION*?" The California Supreme Court approved the trial court's rereading of the instruction it had previously given: "A sentence of life without the possibility of parole means that Mr. Benavides will remain in state prison for the rest of his life and will not be paroled at any time. A sentence of death means that Mr. Benavides will be executed in state prison."

Factors on which prosecutors may rely are often intuitively seen as relevant by the jury. The same is not always true of factors on which the defense relies. Many jurors may not realize that factors in a defendant's background, such as kindness to relatives or a mild emotional disturbance that is unassociated with the present offense, are also factors that may be relied on to support a life verdict. These factors, and many others, are not specifically listed in §190.3. Defense counsel must be prepared with special instructions to ensure that the jury understands the legitimacy and importance of these factors.

Defense counsel should be sure to properly word instructions so that the court does not refuse them, *e.g.,* as argumentative. The California Supreme Court has been slow to find error based on the trial court's refusal of defense-requested instructions, or that any error in such refusal was prejudicial. The court has relied on traditional maxims: a defendant is not entitled to a particular instruction if other instructions correctly state the law (see, *e.g., People v Cox* (1991) 53 C3d 618, 673, 280 CR 692, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209); requested instructions must be correct in the law and applicable on the record (see, *e.g., People v Benson* (1990) 52 C3d 754, 807, 276 CR 827); and a criminal defendant does not have a right to an instruction that invites the jury to draw favorable inferences from the evidence (*People v Mickey* (1991) 54 C3d 612, 697, 286 CR 801).

In *People v Seaton* (2001) 26 C4th 598, 688, 110 CR2d 441, the supreme court reviewed the instructional duties as follows:

> A trial court need not instruct the jury that the prosecutor must prove all aggravating factors beyond a reasonable doubt [Citations]; the court need not instruct that if aggravating and mitigating factors are evenly balanced, the jury must return a judgment of life imprisonment without possibility of parole [Citations]; the court need not instruct that the jury may decline to impose the death penalty even when there are no mitigating circumstances or the factors in aggravation outweigh those in mitigation [Citations]; the court need not explain to the jury which factors are mitigating and which are aggravating or delete irrelevant mitigating factors [Citations]; the factors listed in section 190.3 are not unconstitutionally vague or arbitrary, and do not result in unreliable sentences [Citations]; the jury is not required to return unanimous, written findings [Citations]; and the standard instruction on the factors in aggravation and mitigation (given in this case) is not unconstitutionally vague and misleading.

The trial court has no obligation to instruct the jury that certain factors can only be considered as mitigating factors. *People v Hillhouse* (2002) 27 C4th 469, 509, 117 CR2d 45. It is error, however, for the court to instruct the jury that it can consider each of the 11 statutory factors (see Pen C §190.3(a)-(k)) as either aggravating or mitigating. *People v Hillhouse, supra*.

For general discussion of instructions, see chap 32.

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XII. POSTVERDICT MOTIONS IN CAPITAL CASES

§54.53 A. Trial Judge Must Review Death Penalty Verdict

The trial judge must review the evidence and, on his or her own motion, evaluate the propriety of a death verdict. Pen C §190.4(e). If the judge decides that the verdict is not supported by the law or the evidence, he or she must set aside the verdict and enter a sentence of life without parole. Pen C §190.4. The judge's reasons for the ruling must be recorded and may be reviewed by the prosecution on appeal. Pen C §§190.4(e), 1238(a)(6). The prosecution's appeal is heard by the court of appeal; an appeal direct to the supreme court occurs only when a death sentence is pronounced. Pen C §1239. However, if the prosecution wins reinstatement of the death penalty, the defendant's entire appeal is then transferred to the California Supreme Court under the mandatory provisions discussed in §54.59.

The trial judge does not make an independent de novo penalty determination but independently reweighs the evidence, then determines whether the weight of the evidence supports the jury verdict. *People v Mickey* (1991) 54 C3d 612, 704, 286 CR 801. The judge is not required to "justify" a death verdict. *People v Anderson* (1990) 52 C3d 453, 484, 276 CR 356.

No comparison between sentences given codefendants is required. *People v Mincey* (1992) 2 C4th 408, 480, 6 CR2d 822.

When reviewing a jury's decision under §190.4, the court may rely only on evidence that was properly before the jury.

> Ø **Note:** Because the trial court is limited to the evidence that was before the jury, counsel cannot present new evidence and therefore cannot be faulted for not doing so. See *People v Dunkle* (2005) 36 C4th 861, 931, 32 CR3d 23, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209.

The court should thus not consider additional evidence offered in the presentence probation report or communications from the victim's family that discuss the impact of the crime on them. *People v Williams* (1988) 45 C3d 1268, 1327, 248 CR 834. A number of cases have found that a trial court's review of a probation report before ruling on this motion was error, but harmless. See, *e.g., People v Beeler* (1995) 9 C4th 953, 1000, 39 CR2d 607; *People v Fudge* (1994) 7 C4th 1075, 1127, 31 CR2d 321. See also *People v Lewis* (2004) 33 C4th 214, 224, 14 CR3d 566 (defendant not entitled to present live testimony).

The court's failure to state the reasons for denying a defendant's automatic application for modification is error. *People v Heishman* (1988) 45 C3d 147, 199, 246 CR 673 (found harmless). The general remedy is to remand for an adequate hearing. *People v Sheldon* (1989) 48 C3d 935, 963, 258 CR 242; *People v Bonillas* (1989) 48 C3d 757, 801, 257 CR 895.

The defendant may be absent from this hearing and from sentencing if a proper waiver is filed. *People v Robertson* (1989) 48 C3d 18, 59, 255 CR 631.

Trial courts do not have the power to strike special circumstances under Pen C §1385 once a verdict of death is returned. Pen C §1385.1.

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B. Constitutional Issues in Selected Cases

§54.54 1. Due Process and Equal Protection

Although due process generally does not limit the sentence the prosecution may seek, a death penalty may violate constitutional principles of due process or equal protection in the following circumstances:

- When it is sought for retaliation against a defendant for exercising constitutional rights (*Twiggs v Superior Court* (1983) 34 C3d 360, 194 CR 152);
- When it results from invidious discrimination against the defendant (the discrimination must be based on the facts of the case, not on statistical evidence of discrimination based on race or gender (*McCleskey v Kemp* (1987) 481 US 279, 95 L Ed 2d 262, 107 S Ct 1756)); or
- When it is not proportionate (US Const amend VIII; *People v Dillon* (1983) 34 C3d 441, 194 CR 390). See discussion in §54.55.

It is advisable to raise these issues in the trial court, especially when specific facts in a particular case support the claim that the prosecutor has sought or obtained the death penalty in bad faith or for impermissible motives. If these arguments are not raised in the trial court for tactical reasons, appellate defense counsel may be forced to counter the argument that the issue was waived by alleging ineffective assistance of counsel. See, *e.g., People v Pope* (1979) 23 C3d 412, 152 CR 732.

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2. Cruel and Unusual Punishment

§54.55 a. Proportionality

The death penalty scheme is not unconstitutional because of its failure to provide for intercase proportionality review. *People v Allen* (1986) 42 C3d 1222, 1285, 232 CR 849. The Eighth Amendment's Cruel and Unusual Punishment Clause does not require state law to provide a mandatory sentence review on proportionality grounds. *Pulley v Harris* (1984) 465 US 37, 79 L Ed 2d 29, 104 S Ct 871. Neither intercase nor intracase (among codefendants) proportionality review of sentence is required. *People v Sanders* (1995) 11 C4th 475, 564, 46 CR2d 751.

There is some authority, however, for defense counsel to attack a death sentence that is disproportionate. The California cruel or unusual punishment provision prohibits disproportionate sentences. In *People v Dillon* (1983) 34 C3d 441, 194 CR 390, the court held that any sentence may be attacked on proportionality grounds. The California Supreme Court does review death cases to decide whether the death penalty is disproportionate to the defendant's personal culpability. *People v Mincey* (1992) 2 C4th 408, 476, 6 CR2d 822.

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§54.55A b. Mental Retardation

In *Atkins v Virginia* (2002) 536 US 304, 153 L Ed 2d 335, 122 S Ct 2242, the Supreme Court held that the execution of the mentally retarded is cruel and unusual punishment prohibited by the Eighth Amendment. California has implemented *Atkins* by enacting Pen C §1376, which provides a preconviction procedure for determining whether a defendant is mentally retarded. In *In re Hawthorne* (2005) 35 C4th 40, 24 CR3d 189, the California Supreme Court considered a postconviction petition for habeas corpus relief from the death penalty on the ground that the defendant was mentally retarded and concluded that postconviction procedures should track §1376.

A habeas corpus petition alleging that executing the defendant would constitute cruel and unusual punishment because the defendant is mentally retarded may be addressed to the supreme court. It should be accompanied by an expert's declaration stating the opinion that the defendant is mentally retarded and the basis for that assessment in light of the statutory standard. *In re Hawthorne* (2005) 35 C4th 40, 49, 24 CR3d 189. For discussion, see §54.18A.

On submission of an appropriate declaration, the supreme court will "as a general rule" issue an order to show cause returnable in the superior court, directing that court to hold an evidentiary hearing on the issue of the defendant's mental retardation. *In re Hawthorne* (2005) 35 C4th 40, 49, 24 CR3d 189. Although the statute gives the defendant the right to a jury determination on the question, there is no entitlement to a jury trial in postconviction proceedings. *People v Jackson* (2009) 45 C4th 662, 680, 88 CR3d 558; *In re Hawthorne, supra*.

> Ø **Note:** In *Schriro v Smith* (2005) 546 US 6, 163 L Ed 2d 6, 126 S Ct 7, the U.S. Supreme Court held that the Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve the mental retardation claim of a habeas petitioner under sentence of death. The Court noted that Arizona had not even had a chance to apply its own procedures, adopted in response to *Atkins,* when the Ninth Circuit preemptively imposed its jury trial condition.

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§54.56 C. Motion for New Trial; Motion for Reduction of Verdict or Penalty

Whether or not a prior motion for new trial has been heard, counsel should consider moving for a new trial after the penalty phase, attacking both the penalty verdict and the guilt verdict. See Pen C §1181. Even though review under the Pen C §1181(7) standard is mandatory in every death penalty case by virtue of Pen C §190.4(e), a defendant is free to move for a new trial under any of the grounds in the other subdivisions of Pen C §1181. Issues not listed in §1181 and changes in the law after the time of the guilt phase rulings may also be raised in a motion for new trial.

The prosecutor should consider agreeing to a new penalty phase if error occurred that will require reversal on appeal because an appellate reversal may result in a new guilt trial as well. See *People v Ramos* (1984) 37 C3d 136, 207 CR 800, applying *Carlos v Superior Court* (1983) 35 C3d 131, 197 CR 79, overruled on other grounds in *People v Anderson* (1987) 43 C3d 1104, 1115, 240 CR 585, and *People v Garcia* (1984) 36 C3d 539, 205 CR 265.

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XIII. PRONOUNCEMENT OF JUDGMENT

§54.57 A. Judgment of Death

The same requirements for pronouncement of judgment in any felony case apply when a sentence of death is imposed. See chap 35 on pronouncing judgment. The pronouncement of judgment follows the entry of the verdict of death, the ruling on the Pen C §190.4(e) motion, and the ruling on the motion for new trial. It takes place at the time of sentencing. See §54.60 on setting an execution date.

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§54.58 B. Sentences on Noncapital Verdicts in Capital Cases

Some cases involving capital and noncapital verdicts may be reversed on grounds related solely to the capital counts. If there were noncapital verdicts in the same case, they would remain intact. In light of that possibility, it is advisable to sentence on every count and enhancement. Of course, trial judges are free to give concurrent sentences or to stay sentences on these noncapital counts by following the usual sentencing rules. But no "merging" of determinate sentences with life or death sentences occurs, and the issue of the sentence on noncapital counts should not be overlooked simply because a judgment of death has been imposed.

A defendant is not entitled to a stay of execution until his or her determinate sentence for other crimes is served. *People v Taylor* (1990) 52 C3d 719, 751, 276 CR 391.

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§54.59 XIV. DUTIES OF TRIAL COUNSEL ON APPEAL

Appeal of a judgment of death is automatic and is to the California Supreme Court. Pen C §1239(b); Cal Rules of Ct 8.600(a). A verdict of death relieves trial counsel of the need to file a notice of appeal. Pen C §1239(b). A more onerous duty, however, replaces the requirement of a notice of appeal. In view of the magnitude of the penalty, a complete record is required. Trial counsel is required to review this record and ensure its accuracy and completeness. Pen C §§1239-1240.1. See Cal Rules of Ct 8.610-8.625 (contents, preparation, and certification of record).

For trials that began after January 1, 1997, trial counsel, both prosecution and defense, must review the clerk's and court reporter's record for completeness and accuracy. This responsibility includes correcting errors during the trial. The record is certified in two stages. See Pen C §190.8; Cal Rules of Ct 8.619-8.622.

Section 190.8 contemplates that the completeness of the record will be certified within 90 days after entry of imposition of the death sentence, except when good cause is shown or when the transcript exceeds 10,000 pages, in which case Judicial Council rules will provide time guidelines. One or more hearings are required with trial counsel to correct errors before the end of the 90-day period. A certification is apparently required from trial counsel. In addition, the trial court must certify the record for accuracy within 120 days after the record has been delivered to appellate counsel. For discussion of the direct appeal and state habeas corpus proceedings in capital cases, see Appeals and Writs in Criminal Cases, chap 6 (3d ed Cal CEB 2007).

Although appellate remedies are not covered in this chapter, counsel should be aware of the new federal habeas corpus limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (Pub L 104-132, 110 Stat 1214). California is not in compliance with the Act; as a result, the limitations of the Act do not yet apply to California. If California does comply with the Act, it may severely limit the time available for developing legal challenges to a death sentence. See *Ashmus v Woodford* (9th Cir 2000) 202 F3d 1160 ("California has failed to provide mandatory and binding standards of competency for collateral counsel"). Note, however, that other provisions of the Act do apply.

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§54.60 XV. SETTING OF EXECUTION DATE FOLLOWING AFFIRMANCE

On receipt of an affirmance by the California Supreme Court, the trial court must "forthwith" set an execution date at least 60 and no more than 90 calendar days after the date of the order; the trial court may not continue the setting of a date to await possible action by the U.S. Supreme Court. Pen C §1193; *People v Superior Court (Gordon)* (1990) 226 CA3d 901, 277 CR 321. See also Pen C §§1227, 1227.5, 3600-3607, 3700.5-3706, 4800-4802, 4852.16; Cal Const art V, §8; Cal Rules of Ct 4.315.

Applications for stay of execution should be filed as early as possible because a reviewing court may consider the last-minute nature of an application for stay in deciding whether to grant or deny equitable relief. *Gomez v U.S. Dist. Court* (1992) 503 US 653, 118 L Ed 2d 293, 296, 112 S Ct 1652.

The death penalty may be inflicted by either lethal gas or lethal intravenous injection. Pen C §3604. See *Baze v Rees* (2008) ___ US ___, 170 L Ed 2d 420, 128 S Ct 1520 (rejecting challenge to Kentucky's lethal injection method).

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DRIVING UNDER THE INFLUENCE CASES

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§55.1 I. OVERVIEW

The complexity of a case involving driving under the influence of alcohol, drugs, or a combination of the two can deter even the most senior practitioner. Such cases are for the most part referred to as DUI cases, drunk driving cases, or "deuces" (a name derived from the last digit of the former governing Vehicle Code section).

In most cases, persons arrested for DUI are arrested, booked, and released within 4 to 12 hours after arrest, with the actual time reflecting the arresting agency's view of the appropriate sobering up period. Other factors such as prior convictions for similar offenses, aggravated fact situations, or the arrestee's attitude may delay release. If the arrestee will not be released on O.R., counsel must look to the applicable bail schedule for the bail amount. In addition, counsel should be sensitive to the effect of the case on such issues as immigration, professional licensing including commercial driving, and malpractice insurance.

Generally, as long as no injuries are involved, DUI cases proceed as misdemeanors and are prosecuted and defended, for the most part, by relatively less experienced prosecutors and defense attorneys. Yet such cases are, by their nature, complex. In addition to general practice requirements, counsel must be thoroughly familiar with scientific and medical evidence applicable to such cases, rules of evidence governing direct and cross-examination of expert witnesses, introduction of documentation, hearsay rules and their exceptions, applicable California Vehicle Code sections, current case law, numerous manuals and related materials from police agencies and manufacturers of chemical-testing apparatus, and the applicability of the California Code of Regulations, commonly known as "Title 17."

Books on defending DUI cases include Berman, California DUI Trial Notebook (1997); Erwin, Greenberg, Goldstein & Bergh, Defense of Drunk Driving Cases: Criminal-Civil (3d ed 1971); Gorelick, Summary of California Driving Under the Influence of Alcohol Cases (6th ed 1997); Burglin, Simons, & Kuwatch, California Drunk Driving Law (2d ed 2003); Nichols & Whited, Drinking/Driving Litigation: Criminal and Civil (2d ed 1998). Newsletters available include DWI Journal: Law & Science, http://www.dwijournal.com.

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§55.2 II. ARREST AND RELEASE

Most arrests for misdemeanor violations of Veh C §23152 are made without a warrant when a police officer observes an individual driving erratically, or observes signs of intoxication in a driver stopped for another Vehicle Code violation. For discussion of the circumstances in which an officer is permitted to make a warrantless arrest for a misdemeanor DUI, see §55.27.

When an individual is arrested for a DUI, the arrestee should be admonished under Veh C §23612, the "implied consent" statute, that he or she will be given a chemical test and has a choice of (1) a blood test; (2) a breath test; or, if arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, (3) a urine test. Under specified circumstances (*e.g.*, the chosen test is unavailable or drug impairment is suspected), the statute has different requirements. If the arrestee is uncooperative, the police agency may compel him or her to submit to a blood test conducted in a reasonable manner. See *Schmerber v California* (1966) 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826 (nonconsensual blood draw by physician in hospital environment held constitutional).

Generally the arrestee is held until he or she has sobered up. A 4- to 12-hour hold is the norm. The arrestee is then released with a citation and promise to appear (*i.e.,* on O.R.). A citation is given to the arrestee informing him or her of the date, time, and place to attend court. If the arrestee is not released in this manner, bail will be set according to the applicable bail schedule in the county of arrest.

An allegedly unlawful arrest that led to the seizure of evidence will generally be challenged by a motion to suppress under Pen C §1538.5. See §§55.25-55.30, chap 16.

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§55.3 III. POTENTIAL CRIMINAL CHARGES FOR DUI

Unless a special circumstance exists, anyone arrested for driving under the influence of alcohol, drugs, or both is charged with violating Veh C §23152(a), commonly referred to as the "DUI count," and is prosecuted for a misdemeanor. Veh C §§23536-23552. An *attempt* to drive while under the influence is included in that crime. See *Mercer v DMV* (1991) 53 C3d 753, 762, 280 CR 745. It is no defense that the driving occurred on private property. See *People v Malvitz* (1992) 11 CA4th Supp 9, 14 CR2d 698.

If the arrestee submitted to a blood-alcohol test and the results show a blood-alcohol content (BAC) of 0.08 percent or more, the arrestee will also be charged with violating Veh C §23152(b), commonly called the "0.08 per se count." Some jurisdictions will at times charge such a violation despite a result less than 0.08 on the basis that, at the time of driving, the BAC was equal to or greater than 0.08.

Depending on the circumstances, other potential charges include:

- Driving a commercial vehicle by a person with a BAC of 0.04 percent or more. Veh C §23152(d). See Veh C §23153(d).

  Ø **Note:** A first DUI (including an adverse administrative hearing decision) will result in a 1-year suspension of a commercial license, and a second DUI (including an adverse administrative hearing decision and with no 10-year limitation between offenses) will result in a lifetime suspension of the commercial license regardless of whether the DUI offense occurred while working. See Veh C §§15300, 15302.

- Driving while addicted to any drug other than methadone. Veh C §23152(c). See Health & S C §11550 (being under influence of narcotic).
- Illegally or negligently causing bodily injury to others while DUI. Veh C §23153(a)-(b). This section is a "wobbler," *i.e.*, chargeable, at the prosecuting agency's discretion, as either a misdemeanor or a felony.
- Child endangerment if a child was in the vehicle. See Pen C §273a.
- Driving with.01 or greater BAC if on probation for a DUI-related offense; the arrest will trigger an administrative hearing and possible suspension of license. Veh C §23154.

  Ø **Note:** Prior convictions may come into play. Under Veh C §23550, the prosecution may charge a felony when three drunk driving priors and the current drunk driving charge have been accumulated within 10 years (determined by dates of offense, not conviction dates). See *People v Munoz* (2002) 102 CA4th 12, 125 CR2d 182 (to be charged as felony, DUI offense had to be committed within 7 years under former Veh C §23550 of three or more separate DUI violations and all four offenses had to be committed within 7 years [now 10 years]). See also §§55.31-55.35.

A DUI that results in a homicide may lead to prosecution under:

- Pen C §192(c)(1)-(3) (vehicular manslaughter), a wobbler, when death resulted from gross or ordinary negligence;
- Pen C §191.5(a) (vehicular manslaughter with gross negligence), a felony, when death resulted from criminal negligence; or
- Pen C §§187-189 (second degree murder), a felony with an indeterminate life sentence, when the defendant acted with implied malice.

Second degree murder is normally not charged in DUI cases because it is difficult to establish implied malice, *i.e.,* that the defendant acted with *conscious* disregard for life. See *People v Watson* (1981) 30 C3d 290, 179 CR 43. When, however, the defendant has prior DUI convictions, they can be used to show that the defendant knew the dangers of drunk driving. See *People v Marlin* (2004) 124 CA4th 559, 21 CR3d 470; *People v Autry* (1995) 37 CA4th 351, 43 CR2d 135.

Effective January 1, 2005, whenever a defendant is convicted of DUI (Veh C §23152 or §23153) or "wet reckless"

(reckless driving after originally being charged with driving under the influence (Veh C §§23103, 23103.5)), the court must give the following advisement (Veh C §23593(a)):

> You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.

Ø **Warning:** This advisement, sometimes called a "*Watson* warning," may be used as evidence that the defendant acted with implied malice in a subsequent prosecution for second degree murder. The advisement may be given orally by the court or prosecutor and is generally contained in any waiver form to be executed by the defendant on plea.

Juveniles who drive while under the influence are subject to prosecution, as are adults who lend their cars to such juveniles. See Veh C §23140; Pen C §193.8. Note that the minimum required BAC for a person under age 21 to be DUI is only 0.05. Veh C §23140.

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§55.4 IV. ENHANCEMENTS; IMPOUNDMENT ORDER

Various enhancements apply specifically to DUI prosecutions:

- Prosecution as a felony when the defendant has three or more prior DUI convictions. Veh C §23550. For purposes of Veh C §23550, prior DUI convictions include convictions under Veh C §23152, §23153, or §23103, as specified in Veh C §23103.5 ("wet reckless"). Veh C §23550(a). The prior violations (not the convictions) must have occurred within 10 years of the date of the violation currently being prosecuted. Veh C §23550(a). The prior convictions must be pleaded and proved. On prior convictions generally, see chap 24.
- Prosecution as a felony when the DUI offense is within 10 years of a prior violation of Veh C §23152 or §23153 or Pen C §192(c)(1) (vehicular manslaughter) that was punished as a felony. Veh C §23550.5(a).
- Prosecution as a felony when the defendant was previously convicted of a violation of vehicular manslaughter while intoxicated under Pen C §191.5(a), §191.5(b), or §192.5. A conviction for vehicular manslaughter while intoxicated can enhance the penalty for a DUI even if the conduct underlying that offense occurred after the commission of the DUI. *People v Baez* (2008) 167 CA4th 197, 204, 83 CR3d 895.
- Refusal to submit to or complete a chemical test. Veh C §23577. The minimum penalty is 48 hours in the county jail. Veh C §23577(a). Subsequent similar convictions will result in greater penalties. Veh C §23577(a). The refusal must be pleaded and proved. Veh C §23577(b).
- Reckless driving at 30 or more miles per hour over the posted speed limit on a freeway or 20 or more miles per hour over the posted speed limit on any other street or highway. Veh C §23582. Note that the court may not strike this enhancement except in unusual circumstances when the interests of justice would be served. Veh C §23582(c). The punishment is an additional 60 days in the county jail. Veh C §23582(a). The reckless driving must be pleaded and proved. Veh C §23582(d).
- A passenger in the vehicle was under age 14. Veh C §23572. The minimum punishment is 48 continuous hours in the county jail, whether or not probation is granted, no part of which may be stayed. Veh C §23572(a). Subsequent similar convictions will result in greater penalties. Veh C §23572(a). The presence of the passenger under 14 years of age must be pleaded and proved. Veh C §23572(b). Note that no enhancement may be imposed under Veh C §23572 if the defendant is also convicted of a violation of Pen C §273a arising from the same facts and incident. Veh C §23572(c).
- Multiple victims when the defendant is convicted of a felony violation of Veh C §23153, Pen C §191.5(a), or Pen C §192(c)(1)-(3). An enhancement of 1 year in state prison is imposed for each additional injured victim, to a maximum of three such enhancements. Veh C §23558.
- BAC exceeding 0.15 percent or refusal to take chemical test. Veh C §23578. The refusal enhancement carries a minimum of 48 hours in county jail. Veh C §23577(a).

On the defendant's conviction, the court may order that his or her vehicle be impounded for a period of 1 to 30 days, with tougher provisions in the event of similar prior convictions. Veh C §23594.

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§55.5 V. ELEMENTS OF DUI (VEH C §23152(a))

To obtain a conviction for driving under the influence under Veh C §23152(a), "generic" DUI, the prosecution must prove that the defendant drove a vehicle while under the influence of any alcoholic beverage or drug or the combined influence of any alcoholic beverage and drug. For discussion of these elements, see §§55.6-55.10.

If the evidence shows beyond a reasonable doubt that a chemical analysis of the defendant's blood, breath, or urine established that there was 0.08 percent or more by weight of alcohol in the defendant's blood at the time the test was performed, "per se" DUI, the trier of fact may, but need not, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense. See CALCRIM 2110-2111. See §55.11.

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§55.6 A. Driving

Driving requires "volitional movement of a vehicle." *Mercer v DMV* (1991) 53 C3d 753, 768, 280 CR 745. Driving may be established by circumstantial evidence. 53 C3d at 769. See also *People v Martinez* (2007) 156 CA4th 851, 855, 67 CR3d 670 (sufficient corpus delicti of driving). California is not subject to a "care and control" statute and thus mere control of the vehicle is not sufficient to establish driving. 53 C3d at 768.

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§55.7 B. Vehicle

Vehicle Code §670 defines a vehicle as "a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks." Automobiles, trucks (Veh C §410), motorcycles (Veh C §400), mopeds (Veh C §406), and snowmobiles (Veh C §557) fall within the classification. Likewise, bicycles (Veh C §21200.5) (maximum punishment of $250 fine); boats, aquaplanes, and water skis (Harb & N C §655); aircraft (Pub Util C §21407.1); and horses and other beasts of burden (Veh C §21050) may all constitute vehicles for purposes of a DUI. However, wheelchairs and motorized tricycles and quadricycles, operated by persons who, because of physical disability, are otherwise unable to move about as pedestrians, may not. Veh C §§415, 467.

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§55.8 C. Under the Influence

A person is under the influence of an alcoholic beverage or drug or the combined influence of an alcoholic beverage and drug when as a result of drinking the beverage, using the drug, or both, his or her physical or mental abilities are so impaired that he or she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances. *People v Canty* (2004) 32 C4th 1266, 1278, 14 CR3d 1; *People v Torres* (2009) 173 CA4th 977, 983, 93 CR3d 303. Evidence that the person was under the influence of a drug is insufficient to sustain a conviction for driving under the influence absent evidence of impaired driving ability. *People v Torres, supra* (methamphetamine); *People v Davis* (1969) 270 CA2d 197, 75 CR 627 (opiate). It is no defense that another cause also tended to impair his or her ability to drive with the required caution. CALCRIM 2110-2111.

As is not the case with a per se DUI (see §55.11), competent evidence about partition ratio variability *is* admissible to defend against a generic DUI charge because that charge requires proof that the defendant's ability to drive safely was impaired. *People v McNeal* (2009) 46 C4th 1183, 1188, 96 CR3d 261.

If the evidence establishes beyond a reasonable doubt that at the time of the chemical analysis of the defendant's blood, breath, or urine, there was 0.08 percent or more by weight of alcohol in the defendant's blood, the trier of fact may, but need not, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense. See §55.11.

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§55.9 D. Alcoholic Beverage

An "alcoholic beverage" is a liquid or solid intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. See Veh C §109; CALCRIM 2100, 2110-2111. Alcoholic beverages include intoxicating liquor, malt beverage, beer, wine, spirits, liqueur, whiskey, rum, vodka, cordials, gin, and brandy, and any mixture containing one or more alcoholic beverages, as well as a beverage that includes a mixture of one or more alcoholic beverages whether found or ingested separately or as a mixture. Veh C §109. See Bus & P C §23004 ("alcoholic beverage" contains one-half of one percent or more of alcohol by volume).

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§55.10 E. Drug

"Drug" means any substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his or her ability to drive a vehicle in the manner that an ordinarily prudent and cautious person, in full possession of his or her faculties, using reasonable care, would drive a similar vehicle under like conditions. Veh C §312.

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§55.11 VI. ELEMENTS OF DRIVING WITH BAC OF AT LEAST 0.08 (VEH C §23152(b))

To obtain a conviction for driving while having a BAC of at least 0.08 under Veh C §23152(b), the prosecution must prove that the defendant drove (see §55.6) a vehicle (see §55.7) while having the requisite BAC. For purposes of Veh C §23152(b), blood alcohol is measured by the "grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Veh C §23152(b). The ratio of breath-alcohol concentration to blood-alcohol concentration is sometimes referred to as an individual's "partition ratio." That the defendant's partition ratio may be different from the standard partition ratio that breath-testing machines use to convert breath-alcohol readings into blood-alcohol equivalents is irrelevant and inadmissible. *People v Bransford* (1994) 8 C4th 885, 35 CR2d 613.

Ø **Note:** Competent evidence about partition ratio variability *is* admissible to defend against a generic DUI charge because, unlike a per se DUI charge, the generic DUI charge requires proof that the defendant's ability to drive safely was impaired. *People v McNeal* (2009) 46 C4th 1183, 1188, 96 CR3d 261.

If the evidence establishes beyond a reasonable doubt that (1) a sample of the defendant's blood, breath, or urine was obtained within 3 hours after he or she operated a vehicle, and (2) a chemical analysis of the sample established that there was 0.08 percent or more, by weight, of alcohol in the defendant's blood at the time of the performance of the chemical test, the trier of fact may, but is not required to, conclude that the defendant drove a vehicle with 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the alleged offense. CALCRIM 2101, 2111.

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VII. PROCEDURAL CONSIDERATIONS

§55.12 A. Arraignment

Arraignments are discussed in chap 6, and a DUI arraignment is like any other misdemeanor arraignment. A probable cause hearing must be held promptly after arrest if the arrestee is in custody. See Pen C §991.

Ø **Note:** Unless charged with a felony DUI or ordered by the court to attend, the defendant need not attend and counsel may make the appearance. See Veh C §40507. There is no need for a formal Pen C §977 waiver of defendant's appearance. Pen C §977(a).

Customarily, at arraignment the defense enters a plea to the charges, including admissions or denials of any prior convictions, enhancements, and other such allegations. A plea need not be entered at the first appearance and may be entered at a later time, subject to the court's discretion. See Veh C §40306. When the client pleads not guilty, counsel should become familiar with the applicable court procedures, *e.g.*, whether the matter proceeds directly to trial with a trial date being set. Alternatively, a pretrial or readiness conference date may be set. Counsel should ascertain whether the court requires a special date to be set for the hearing of pretrial motions. Most jurisdictions will hear all motions, including Pen C §1538.5 suppression motions, on the day of trial. Some jurisdictions require that any §1538.5 suppression motion be heard before the commencement of trial and on a special date. The judge hearing the §1538.5 suppression motion need not be the judge that will preside over the trial. Motions should be filed at the earliest opportunity and, in any event, in a timely fashion. Motions for discovery or to address the prosecution's failure to comply with discovery will, in most cases, by necessity be filed and heard before commencement of trial.

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§55.13 B. Speedy Trial

Essentially DUI trials are governed by the same statutory and constitutional speedy trial rights as any other misdemeanor. See chap 19. Note, however, that the requirement of Pen C §853.6 that a misdemeanor complaint be filed no later than 25 days after arrest does not apply to DUI prosecutions. See *People v Domagalski* (1989) 214 CA3d 1380, 263 CR 249.

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§55.14 C. Demurrers

In most DUI cases, a demurrer will not be a fruitful area of pursuit. The complaint need not specify the particular type of intoxicant. See *Byrd v Municipal Court* (1981) 125 CA3d 1054, 178 CR 480 (complaint charging driving under influence of intoxicating liquor and under combined influence of intoxicating liquor and drugs gave constitutionally adequate notice of allegations). At the commencement of trial, counsel should move to amend a count alleging drug intoxication by requesting deletion of all drug language if the basis of the allegation is one only of alcohol intoxication. This is generally an uncontested motion.

Note that a complaint alleging violation of Veh C §23153 must specify the "forbidden act" or "neglected duty." See *People v Gary* (1987) 189 CA3d 1212, 235 CR 30.

On demurrers generally, see §§7.20-7.26A.

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§55.15 D. Venue

For Vehicle Code violations, an arrestee may demand that the trial be held at the county seat of the county in which the offense is alleged to have been committed, as long as the arrestee resides, or his or her principal place of employment is located, closer to the county seat than to the court nearest or most accessible to the place where the arrest was made. Veh C §40502(b). This demand must be made before the issuance of the appearance notice, *i.e.,* while the arrestee is in custody and before issuance of the release documentation. For all practical purposes, unless the arrestee is assisted by counsel at the time of initial incarceration, the demand will not be made. If however, such a request is made but not honored, counsel may renew the request at arraignment.

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§55.16 VIII. MOTIONS

As in any other criminal case, motions in limine under Evid C §402 ("402 motions") and Pen C §1538.5 hearings on motions to suppress evidence are available in DUI cases. Motions in limine may be made at any time before or during trial and need not be in writing. For tactical reasons, however, counsel should submit written 402 motions well before the trial date if the appropriate issues can be identified. Motions to suppress evidence must be in writing and if possible be heard before the commencement of trial. See Pen C §1538.5(g)-(h).

Ø **Note:** If testimony during trial gives rise to a §1538.5 suppression motion, and that evidence was unknown to or unforeseen by the defense, an oral suppression motion under §1538.5 may be advanced during trial. Pen C §1538.5(h).

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A. Discovery

§55.17 1. Requirements

As a rule, discovery is made available at the first court attendance and, depending on the court procedure, is obtained either from the prosecutor, the court, or in certain circumstances on a written request filed with the prosecutor's office. Specified materials and information must be provided by the prosecutor in a timely fashion. See Pen C §§1054-1054.7. See also chap 11. Prosecution and defense counsel should review these sections, which extensively and exhaustively set out the manner in which the discovery process should be conducted, the parameters of discoverable information, and the prosecution and defense obligations regarding discoverable documentation and information. Note that, unless a party has made an informal discovery request in writing, that party may not move to compel compliance or for other remedies. Although there are no specific requirements for an informal request, counsel should itemize in detail all items requested. Failure to do so may preclude a subsequent successful motion to compel or obtain other appropriate remedies.

Required disclosures must be made at least 30 days before trial unless good cause is shown why a disclosure should be denied, restricted, or deferred. Pen C §1054.7. Note that the disclosure requirements are ongoing.

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§55.18 2. Remedies for Noncompliance

A motion to compel the opposing party to provide discovery may be made at any time before or during trial. The motion should particularize any information being sought and any sanctions or remedies being requested for noncompliance. Generally, if consistent with the purposes of Pen C §1054, the opposing party will be ordered to provide the discoverable materials. Failure to comply may be the basis of a further motion for sanctions or remedies, including dismissal of the action (the ultimate remedy, and generally not the remedy granted), or other court orders, *e.g.,* suppression of evidence, jury instruction. See chap 11.

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§55.19 B. Failure to Preserve Evidence

Failure by the prosecuting agency, whether police or prosecutor's office, to preserve evidence may result in a dismissal of the action or, at the least, sanctions, including jury instructions. Counsel may raise the complaint by a motion or an objection. Note that, if counsel fails to make such an objection before admission of the prosecution evidence that might have been contradicted by the lost evidence, the issue is waived. See *People v Gallego* (1990) 52 C3d 115, 179, 276 CR 679. See discussion of the *Trombetta-Youngblood* rule on failure to preserve evidence in §§11.27-11.28.

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§55.20 C. Admonishments and Failure by Arresting Agency to Properly Admonish

Under the "deemed consent" provision of Veh C §23612, anyone who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood, breath, or urine. Veh C §23612(a)(1)(A). A person arrested for driving under the influence of an alcoholic beverage, however, is given only a choice between tests of blood and breath, even though a urine test may be used if the other tests are unavailable. Veh C §23612(a)(2)(A). Compare the admonishment the officer must give under Veh C §23614 if the arrestee initially chooses a breath test. In that event, the person must also be advised that no breath sample is retained and that, consequently, he or she may provide a blood or urine sample that will be retained and available for subsequent analysis. Veh C §23614(a)-(b). See *People v Superior Court (Scott)* (1980) 112 CA3d 602, 169 CR 412 (when defendant requested blood test, and facilities for test were available, refusal of authorities to administer test that would allow preservation of evidence deprived defendant of due process and required suppression of breath test results). The testing must be incidental to a lawful arrest and the arrestee must be informed that failure to submit to or complete the required chemical testing will result in various penalties. See Veh C §§23612(a)(1)(C)-(D), 23614(a).

Failure by the arresting police agency to properly admonish will not result in the suppression of any chemical test result obtained (*In re Garinger* (1987) 188 CA3d 1149, 1153, 233 CR 853) or in a dismissal of the charges (*People v Superior Court (Maria)* (1992) 11 CA4th 134, 143, 13 CR2d 741). Even though failure to properly admonish will not result in a suppression of evidence, the defendant is entitled to an instruction informing the jury of the noncompliance and that the noncompliance is a factor they may take into account when assessing the credibility of the nonadmonishing officers and the accuracy of the chemical test subsequently obtained. *People v Alvarado* (1986) 181 CA3d Supp 1, 5, 226 CR 329. Counsel should note that if a deliberate, systematic pattern of nonadvisement can be shown, noncompliance with required admonishments may give rise to dismissal or suppression of the chemical test results and related evidence. See *In re Garinger* (1987) 188 CA3d 1149, 1154, 233 CR 853.

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§55.21 D. Retesting of Blood or Urine Sample

A defendant has the right to have a sample, either blood or urine, retested by an independent laboratory. 17 Cal Code Regs §§1219.1(g)(2), 1219.2(c)(1). In most jurisdictions, counsel need only file an order for such testing, which is routinely signed. Other jurisdictions require an accompanying motion and supporting documentation. The prosecution's failure to comply with such an order or the state's failure to preserve the sample for future analysis may be the subject of a motion to suppress the chemical test result and related evidence. Bad faith by the prosecutor or police must be shown. See discussion of the *Trombetta-Youngblood* rule on failure to preserve evidence in §§11.27-11.28.

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§55.22 E. Motions to Suppress Horizontal Gaze Nystagmus (HGN) Observations

Horizontal Gaze Nystagmus (HGN) is an involuntary jerking of the eyes that may indicate the presence of alcohol or drugs. Generally, it is the first of the many so-called field sobriety tests administered by the arresting officer. The test should be administered by the officer while both the officer and the arrestee are in a standing position. An object is held by the officer approximately 12 to 15 inches in front of the suspect's face, just above eye level, and the suspect is asked to follow the moving object with his or her eyes only (*i.e.,* the head is not to be moved) while the officer moves it at various speeds across the eye plane. Depending on the officer's observations and angle of onset, it may be argued by the prosecution that the failure to follow the object or a bouncing of the eyes indicates the presence of alcohol, drugs, or both.

Ø **Note:** HGN is a naturally occurring condition in approximately 4 percent of the population and may result from fatigue, trauma, or other natural causes. See *People v Williams* (1992) 3 CA4th 1326, 1331, 5 CR2d 130. Most courts will not allow any witness testifying concerning HGN observations to correlate the observations to a specific or even general BAC. 3 CA4th at 1329.

Prosecutors may attempt to introduce the officer's observations not only to establish the presence of alcohol, but also as evidence of the BAC. The officer's observations will be admitted as evidence of the presence of alcohol, as will the officer's resulting opinion, based on this test in combination with others, that the suspect was "under the influence." In *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, the California Supreme Court held that HGN evidence is subject to the admissibility requirements of *People v Kelly* (1976) 17 C3d 24, 130 CR 144, which require a showing that the technique is generally accepted as reliable in the relevant scientific community. Subsequently, a court of appeal held that HGN evidence, when viewed with other relevant indications, meets the *Kelly* requirements for purposes of deciding whether a subject is under the influence of alcohol, and that expert testimony is not required. *People v Joehnk* (1995) 35 CA4th 1488, 42 CR2d 6. If, however, the prosecution wishes to introduce HGN observations to establish the BAC, the defense should request a *Kelly* hearing. See *People v Loomis* (1984) 156 CA3d Supp 1, 203 CR 767 (HGN evidence fails *Kelly* test of admissibility as means of determining BAC and is, therefore, inadmissible on that issue).

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§55.23 F. Motions to Suppress Defendant's Statements

Motions to suppress confessions and admissions are usually based on *Miranda* violations. See *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602. These motions are properly brought as in limine motions under Evid C §402. See chap 23.

Miranda governs only communications and testimony; a *Miranda* violation cannot result in exclusion of real or physical evidence. See *Pennsylvania v Muniz* (1990) 496 US 582, 110 L Ed 2d 528, 110 S Ct 2638. The manner in which a statement is made, *e.g.*, exhibiting slurring or disorientation, is not subject to suppression. 496 US at 591, 110 L Ed 2d at 545.

Typically, the central issue on a *Miranda* motion will be whether the defendant was subject to a custodial interrogation when the statement was made. See *Miranda v Arizona, supra; Green v Superior Court* (1985) 40 C3d 126, 219 CR 186. Generally, the defendant's prearrest statements are not subject to *Miranda*. Prearrest questions are usually only investigative in nature, as distinguished from questions asked of a defendant under custodial interrogation, and, therefore, the prearrest answers given by the defendant to such interrogatories as "Where have you been?" "What have you had to drink?" "How much have you had to drink?" and "When did you drink?" are admissible. See *Berkemer v McCarty* (1984) 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138. As a practical matter, police officers have been trained to ask and obtain information before arrest and, therefore, inculpatory admissions will typically have been made before arrest and be admissible. Any statement made by the arrestee after arrest may be the subject of an Evid C §402 motion. Counsel should carefully review the fact situation to ascertain whether statements made before arrest may nonetheless have been made under custodial interrogation, *i.e.,* a formal arrest could have been made or a restraint on freedom of movement of the degree associated with a formal arrest existed. If so, *Miranda* applies. *People v Boyer* (1989) 48 C3d 247, 256 CR 96, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394.

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§55.24 G. Preliminary Alcohol Screening (PAS) Devices

A preliminary alcohol screening (PAS) device is in essence a portable, handheld breath-testing machine. "The preliminary alcohol screening test is not determinative of blood alcohol content, but is a field sobriety test which may be used as a further investigative tool in order to establish reasonable cause to believe a person was driving a vehicle while under the influence of alcohol." *Kodani v Snyder* (1999) 75 CA4th 471, 473 n2, 89 CR2d 362. See also Veh C §23612(h).

A PAS is frequently administered by an officer as one of the field sobriety tests during the investigative stage in a DUI case to assist the officer in formulating an opinion of whether the suspect is "under the influence." See Veh C §23612(h). The most commonly used device in California is the Alco-Sensor IV, which is capable of being downloaded, making the computer printout of all information processed through the unit available. Certain models are also capable of having a printed breath ticket processed at the time the test is administered. As with any other breath machine, no breath sample is retained. The PAS unit does not have a slope (mouth-alcohol) detector.

An officer who decides to use a PAS must advise the person that the officer is requesting that the person take the test to assist the officer in determining if the person is "under the influence" and that doing so does not negate the person's obligation to submit to a blood or breath test under the "implied consent" obligation. The officer must also advise that the person has the right to refuse to take the PAS. See Veh C §23612(i). See also *People v Wilson* (2003) 114 CA4th 953, 8 CR3d 167. Despite the fact that the PAS retains no sample, there is no need for the officer to advise of that fact, as is required when a suspect chooses to submit to a breath test (see Veh C §23614).

Any challenge to admissibility may be made in an Evid C §402 in limine motion. To justify the admission in evidence of the results of a PAS test, the prosecution must either (*People v Williams* (2002) 28 C4th 408, 121 CR2d 854):

- Show that the law enforcement agency has complied with regulations set out in Title 17 (of the California Code of Regulations) for the maintenance of PAS equipment and the training of personnel administering the test, or
- Provide independent proof that the test met the three foundational requirements set out in *People v Adams* (1976) 59 CA3d 559, 131 CR 190.

The prosecution can meet the *Adams* foundational prerequisites by showing that (59 CA3d at 561):

- The particular apparatus used was in proper working order;
- The test used was properly administered; and
- The operator was competent and qualified.

See also *People v Bury* (1996) 41 CA4th 1194, 1202, 49 CR2d 107.

Generally, the PAS units are maintained and calibrated by the police agencies who use them, and the witnesses called by the prosecution to satisfy these requirements are police officers. See, *e.g., People v Hallquist* (2005) 133 CA4th 291, 34 CR3d 621 (highway patrol officer testifying as expert on accuracy of PAS devices could rely on contents of test container label). Often, however, police officers do not have sufficient expertise or training to be qualified to state that the PAS was in proper working order.

Even when the court rules that the *Adams* foundational requirements were met, the prosecution must further prove that the appropriate admonitions, in particular the defendant's right to refuse to take the PAS, were given before the test was administered. Failure to give the admonitions should be fatal to the introduction of test evidence.

The following are specific admissibility issues of concern with respect to the PAS and its results:

- Whether any evidence regarding administration of the test is admissible;
- If yes, whether the readings themselves are admissible; and
- If yes, the purpose for which the readings are admissible.

Ø **Note:** Several jurisdictions use the PAS units as both screening devices and evidentiary breath-testing (chemical test) devices. When this is the case, the local crime laboratory will normally maintain and service the

PAS unit. Although the officer will testify that the PAS unit is set to the "evidential testing mode" when used as an evidentiary device, this simply means the officer flicks a switch to allow the input of the suspect's information. The unit functions in exactly the same manner when used as an evidentiary device and when used as a screening device.

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H. Pen C §1538.5 Motions

§55.25 1. In General

A motion under Pen C §1538.5 to suppress evidence is, unless a court rule or procedure prescribes otherwise, the only motion required to be in writing. The motion may be made when tangible or intangible evidence was seized from the defendant in violation of the Fourth Amendment. In a DUI case, a §1538.5 motion will generally address probable cause for the stop, the chemical test, or both. The evidence to be suppressed may include symptoms or indicia of intoxication as observed by the arresting police agency, and of course the chemical test administration, its results, and all observations surrounding the test. See Pen C §1538.5(a); *Kirby v Superior Court* (1970) 8 CA3d 591, 87 CR 577. Counsel should obtain the local court rules governing the requisite documentation and timing of the motion. In many jurisdictions, the motion is heard by the assigned trial judge immediately before commencement of trial. In other jurisdictions, however, the motion is heard on a separate day, and not necessarily by the judge assigned to the trial. On search and seizure motions generally, see chap 16.

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§55.26 2. Probable Cause

Probable cause for a stop and detention will be established by any Vehicle Code violation. *Colorado v Bannister* (1980) 449 US 1, 66 L Ed 2d 1, 101 S Ct 42. See, *e.g.*, *People v Binkowski* (2007) 157 CA4th Supp 1, 68 CR3d 741 (car's stop over limit line in violation of Veh C §22450 justified stop leading to DUI arrest.) Subject to certain exceptions (see §55.2), the violation must actually occur in the officer's presence. Thus, *e.g.*, it is unlawful to stop a car to see whether the driver can produce a valid license and registration (*Delaware v Prouse* (1979) 440 US 648, 59 L Ed 2d 660, 99 S Ct 1391) or because further investigation might reveal an equipment violation (*People v Butler* (1988) 202 CA3d 602, 248 CR 887).

> Ø **Note:** If the Vehicle Code violation occurred on private property and did not recur on a public highway, it may be argued that the stop and detention are illegal because most traffic regulations apply only to vehicles on public highways. See Veh C §§21001, 21107.8, 24001, 360; *People v Lopez* (1987) 197 CA3d 93, 242 CR 668.

It is not necessary that the traffic stop be based on a Vehicle Code violation. Traffic stops for erratic or unusual driving, although not Vehicle Code violations, have been routinely upheld. See *People v Perez* (1985) 175 CA3d Supp 8, 221 CR 776. Traffic stops at sobriety checkpoints are governed by the rules set out in *Ingersoll v Palmer* (1987) 43 C3d 1321, 241 CR 42, with one exception: The police are not required to publicize sobriety checkpoints (*People v Banks* (1993) 6 C4th 926, 25 CR2d 524). Although checkpoints may not be set up for general crime control (see *Indianapolis v Edmond* (2000) 531 US 32, 44, 148 L Ed 2d 333, 121 S Ct 447), police can use a checkpoint to gather information about a specific recent crime. See, *e.g.*, *Illinois v Lidster* (2004) 540 US 419, 423, 157 L Ed 2d 843, 850, 124 S Ct 885.

Probable cause for arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to believe and consciously entertain an honest and strong suspicion that the person is guilty of a crime. See *People v Harris* (1975) 15 C3d 384, 389, 124 CR 536. As long as the objective facts afford probable cause, the arresting officer's subjective intent or motive will not be considered. See *People v Wolterman* (1992) 11 CA4th Supp 15, 20, 15 CR2d 107.

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§55.27 3. Arrest

Ordinarily, a police officer is permitted to make a warrantless arrest for a misdemeanor only when the offense is committed in the officer's presence. See Pen C §836(a)(1). "Presence" means that the officer must be able to testify, on the basis of his or her senses, to acts that constitute every material element of the offense. *People v Welsch* (1984) 151 CA3d 1038, 1042, 199 CR 87. If the defendant was arrested on the basis of the police officer's personal observations, the only potential issue for a Pen C §1538.5 motion is whether the officer's observations were sufficient to establish probable cause. See §55.26.

When the misdemeanor in question, however, is driving under the influence, there are several exceptions to the rule. Under Veh C §40300.5, a police officer may make a warrantless arrest for a DUI not committed in the officer's presence when the officer has reasonable cause to believe that the suspect has been driving under the influence of an intoxicant, and the suspect (Veh C §40300.5):

- Is involved in a traffic accident;
- Is observed in or about a vehicle that is obstructing a road;
- Will not be apprehended unless immediately arrested;
- May cause injury or property damage unless immediately arrested; or
- May destroy or conceal evidence unless immediately arrested.

Vehicle Code §40300.5 is not the sole authority for warrantless arrests for DUIs committed outside an officer's presence. An officer may assist with a DUI arrest based on the personal observations of another officer. *Dyer v DMV* (2008) 163 CA4th 161, 173, 77 CR3d 138 (citing to Pen C §839). A warrantless arrest may also be made when a police officer has been informed by a reliable third party of the third party's observations of the driving and the defendant admits that he or she was driving. See *Packer v Sillas* (1976) 57 CA3d 206, 213, 128 CR 907. In *People v Thompson* (2006) 38 C4th 811, 43 CR3d 750, the supreme court held that a warrantless entry into a suspect's home was permitted by exigent circumstances (the destruction of evidence by way of the alcohol dissipating in his blood) after the suspect had been seen driving erratically by a third party and was visibly drunk when police came to the door.

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§55.28 4. Prolonged Detention

An officer is precluded from detaining a defendant for any longer than necessary to complete the officer's duty with respect to the alleged violation. See *People v Gomez* (2004) 117 CA4th 531, 537, 12 CR3d 398; *Williams v Superior Court* (1985) 168 CA3d 349, 213 CR 919 (officer may not impose general crime investigation on detained traffic offender that is not reasonably necessary to completion of officer's traffic citation duties unless officer has independent reasonable suspicion that driver has committed unrelated offenses). The Fourth Amendment prohibits unjustifiably prolonged detention; each case, however, must be evaluated on its facts. In DUI cases, it is generally held that administering field sobriety tests, questioning about, *e.g.,* recent drinking, and administering the PAS do not give rise to an unreasonably prolonged detention. See *People v Bennett* (1983) 139 CA3d 767, 189 CR 77.

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§55.29 5. Defendant's Efforts to Obtain Test Frustrated

Due process violations may occur when the police deliberately frustrate a defendant's effort to obtain the chemical test of his or her choice as permitted under the law. See *People v Superior Court (Scott)* (1980) 112 CA3d 602, 169 CR 412. When this occurs, the chemical test results will be suppressed. See *Brown v Municipal Court* (1978) 86 CA3d 357, 361, 150 CR 216.

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§55.30 6. Speed Traps

Before proof of a vehicle's speed as clocked by radar may be used against a defendant, the posted speed limit must have been justified by an engineering and traffic survey conducted within 5 years before the date of the alleged violation. See Veh C §40802(a)(2). This rule was not abrogated by Proposition 8. See Veh C §40808; *People v Goulet* (1992) 13 CA4th Supp 1, 14, 17 CR2d 801.

Ø **Note:** When certain requirements are met, the applicable period may be 7 or 10 years. See Veh C §40802(c).

When the defendant's speed was clocked by radar, the defense may be able to argue that the detention or stop was unlawful, and is a violation of the statutory exclusionary rule in the "speed trap" legislation. However, the Sixth District has held that the speed trap exclusionary rules of Veh C §§40803 and 40804 apply only when the defendant is charged with speeding, and do not apply when the defendant is charged with DUI, even if the defendant's rate of speed in a speed trap led to the initial traffic stop. *People v Hardacre* (2004) 116 CA4th 1292, 1299, 11 CR3d 214. Likewise, the Third District has held that the remedy for a Veh C §40800 violation when the detaining officer used an unmarked vehicle is exclusion of the officer's testimony with respect to a speed-related offense, not a DUI offense. *Dyer v DMV* (2008) 163 CA4th 161, 171, 77 CR3d 138.

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§55.30A 7. DUI Checkpoints

With certain limitations, "a sobriety check point may be operated in a manner consistent with the federal and state Constitutions." *Ingersoll v Palmer* (1987) 43 C3d 1321, 1325, 241 CR 42. See *Michigan Dep't of State Police v Sitz* (1990) 496 US 444, 455, 110 L Ed 2d 412, 110 S Ct 2481 (use of sobriety checkpoints approved when conducted in lawful, constitutional manner). The factors to be considered in determining whether a checkpoint is legal are decision making at the supervisory level; limits on the discretion of field officers; maintenance of safety conditions; a reasonable location; time and duration; indicia of the official nature of the roadblock; and the length and nature of detention. *Ingersoll,* 43 C3d at 1341. While advance publicity is not essential for a checkpoint to be legal, it is a factor to be considered. *People v Banks* (1993) 6 C4th 926, 934, 25 CR2d 524.

A challenge to a DUI checkpoint should be made by a motion under Pen C §1538.5 to suppress evidence. 6 C4th at 932.

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IX. PRIOR CONVICTIONS

§55.31 A. In General

A "prior" DUI conviction may be used to increase the minimum mandatory penalties in a subsequent DUI prosecution. See Veh C §§23530-23598. Although the conviction itself must take place before the *conviction* for the current offense, there is no requirement that either the offense or the conviction be before the *date of the offense* for which the defendant is being tried. The legislature has declared that the timing of court proceedings should not affect the court's ability to impose enhanced penalties for multiple offenses. Veh C §23217. See also *People v Albitre* (1986) 184 CA3d 895, 229 CR 289 (defendant properly sentenced as third-time drunk driver even though he had not been convicted of second DUI when current offense occurred); *People v Munoz* (2002) 102 CA4th 12, 125 CR2d 182 (current offense occurred before some of offenses charged as prior convictions). See also Veh C §§23540, 23550. All offenses within a 10-year period may be used to enhance a sentence. See *People v Treadway* (2008) 163 CA4th 689, 698, 77 CR3d 786 (use of priors within current extended 10-year period instead of prior 7-year period does not violate ex post facto principles); *People v Forrester* (2007) 156 CA4th 1021, 1024, 67 CR3d 740 (same). See also §§55.32-55.35.

Crimes that qualify as "priors" include violations of Veh C §§23152, 23153, and 23103.5 ("wet reckless"), out-of-state and federal DUI convictions (Veh C §§23626, 13352(d)), convictions for operating a boat while "under the influence" (Harb & N C §655), and convictions that have been dismissed under Pen C §1203.4 (Pen C §1203.4(a)). Constitutionally invalid convictions cannot be used for enhancement purposes (Veh C §41403), nor can juvenile adjudications (see Welf & I C §203; *People v Bernard* (1988) 204 CA3d Supp 16, 251 CR 631).

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§55.32 B. What May Be Challenged

Only unconstitutional priors may be challenged if the prior arises from a California conviction. Out-of-state priors may be challenged as unconstitutional and on the basis that the conviction was not for a priorable and equivalent California crime. See *People v Crane* (2006) 142 CA4th 425, 430, 48 CR3d 334. A court may not strike a prior DUI conviction to avoid imposing a minimum mandatory sentence or fine, or to avoid revocation, suspension, or restriction of driving privileges. Veh C §23622(a). Only one constitutional challenge is allowed on a prior conviction and the court's ruling is binding on the prosecution, the defendant, and the DMV in all future judicial and administrative proceedings. Veh C §23624.

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§55.33 C. Obtaining Information About Prior

Before deciding whether a challenge should be made, defense counsel must obtain information about the prior conviction. Doing so is usually achieved by written request from the convicting court; documentation should include minute orders, the defendant's written waiver of constitutional rights, and, when available, the transcript of the prior plea proceedings. This information should be obtained in a timely fashion because:

- Counsel needs to timely evaluate the merits of bringing the motion; and
- Failure to obtain the record in a timely fashion may result in denial of the motion or its postponement until the time of sentencing (Veh C §41403(c)).

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§55.34 D. Evaluating Options

Defense counsel may be well advised to discuss with the client the possibility of requesting a bifurcation, with the prior tried separately from and after the DUI charges. Because prior convictions are enhancements and not elements of the DUI offense, the court must grant bifurcation on the defendant's request. See *People v Weathington* (1991) 231 CA3d 69, 282 CR 170. Defense counsel should also discuss with the client the possibility of admitting the prior or, in any event, the decision on whether the prior will be tried by a judge alone as opposed to a jury. Obviously, nothing will be gained if the prior is provable and constitutional, it is not admitted, and counsel fails to timely move for bifurcation, because the trier of fact (usually a jury) will have knowledge of the prior, which, regardless of proof, usually puts the defense at a tactical and practical disadvantage.

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§55.35 E. Requirements for Motion to Strike Prior; Hearing

The motion to strike a prior conviction and the hearing on the motion are governed by Veh C §41403. The motion must be in writing and must state with specificity the alleged deprivation of the defendant's constitutional rights. Veh C §41403(a). When the prior conviction was based on the defendant's admission of guilt, the moving papers must affirmatively allege that, at the time of the plea, the defendant did not know of, or did not intelligently waive, his or her constitutional rights. *People v Sumstine* (1984) 36 C3d 909, 206 CR 707. To prevail, the defendant must establish that the plea was not voluntary and intelligent under the totality of the circumstances. *People v Howard* (1992) 1 C4th 1132, 5 CR2d 268. Once the prosecution produces sufficient proof to justify a finding that the defendant suffered the prior conviction, it is the defendant's burden to prove by a preponderance of the evidence that his or her constitutional rights were infringed in the proceeding that gave rise to that conviction. Veh C §41403(b)(2). To support the striking of a prior, the record must establish a factual and legal basis for that ruling. See Veh C §41403(b)(4).

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§55.36 X. CORPUS DELICTI

The truth-in-evidence provision of the California Constitution (Cal Const art I, §28(f)(2)), abrogated the corpus delicti rule to the extent that the rule prohibited the admission of defendant's extrajudicial statements in the absence of independent proof of the corpus delicti. *People v Alvarez* (2002) 27 C4th 1161, 1172, 119 CR2d 903. However, it did not alter the rule that a conviction requires independent proof of the corpus delicti. 27 C4th at 1169. The evidentiary burden of proving the corpus delicti is on the statement's proponent and is minimal. See, *e.g., People v Ray* (1996) 13 C4th 313, 342, 52 CR2d 296. For further discussion, see §23.22.

Ø **Example:** The most common scenario for a corpus delicti issue in DUI cases is one in which the defendant is no longer in the car but states that he or she was in fact the driver. The prosecution need not prove that no other party could have driven the vehicle, but simply must raise a reasonable inference that the defendant could have been the driver, *e.g.,* through the presence of keys in the defendant's hand or on the defendant's person, registration in the defendant's name, the defendant's proximity to the vehicle, or the absence of others near the vehicle. If the prosecution cannot raise the inference that the defendant was driving, then in all likelihood it will fail to prove driving as a required element of its case against the defendant.

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§55.37 XI. LABORATORY REQUIREMENTS

Title 17 of the California Code of Regulations sets forth a comprehensive set of standards applicable to laboratories performing forensic alcohol analysis. See 17 Cal Code Regs §1215-1222.2 (stating minimum requirements for collecting, handling, sampling, analyzing, maintaining, and recording alcohol testing equipment, instruments, and samples). They include a list of instruments for testing blood alcohol level approved by the National Highway Traffic Safety Administration. 17 Cal Code Regs §§1221.2-1221.3.

Under Health & S C §100700, laboratories performing breath, blood, urine, or tissue tests for law enforcement agencies to establish a suspect's blood alcohol level must comply with these standards, except for the licensing requirement in 17 Cal Code Regs §1216(a). These laboratories must also meet proficiency testing standards in Health & S C §100702.

However, failure to comply with Title 17 does not make the results of blood alcohol level tests inadmissible. *People v Williams* (2002) 28 C4th 408, 121 CR2d 854. Noncompliance goes only to the weight of the evidence. 28 C4th at 414; *People v Adams* (1976) 59 CA3d 559, 567, 131 CR 190. Test results are admissible if they are reliable, and reliability can be shown by meeting the foundational requirements of *People v Adams* (1976) 59 CA3d 559, 131 CR 190. For discussion, see §55.24.

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§55.38 XII. EXPERT TESTIMONY

Prosecution scientific experts are generally called to testify to the fact that the alcohol testing equipment was properly maintained, calibrated, and functioning at the time the test was given. The prosecution may also use experts to testify, with respect to charges under Veh C §23152(a), to the general nature of alcohol or drugs and their effects on individuals, and to be given various scenarios consistent with the fact situation of the case and to render an opinion on whether the defendant was "under the influence" or, at least, whether the facts are consistent with that conclusion. Absorption rates, elimination rates, and the physical and mental effects of alcohol are routinely the subjects of such testimony. See, *e.g.*, *People v Warlick* (2008) 162 CA4th Supp 1, 77 CR3d 564 (prosecutor may try to prove violation of Veh C §23152(b) with expert testimony regarding retrograde extrapolation). The defense may call an expert to contradict the prosecution's expert's testimony.

Counsel can and should require the testimony of the analyst who actually performed the analysis of the blood, urine, or breath as opposed to the testimony of another expert opining on the basis of analysis test records. See *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 129 S Ct 2527. The California Supreme Court has granted review in *People v Lopez* (review granted Dec. 12, 2009, S177046; superseded opinion at 177 CA4th 202, 98 CR3d 825), which concerns the effect of *Melendez*-Diaz and whether a defendant was denied her right of confrontation under the Sixth Amendment when the trial court admitted into evidence the results of blood-alcohol level tests and a report prepared by a criminalist who did not testify at trial.

Ø **Note:** Virtually all experts hold the opinion that a person with a blood-alcohol level of 0.08 or greater is "under the influence" and cannot drive a vehicle safely.

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§55.39 XIII. JURY INSTRUCTIONS

Judicial Council of California Criminal Jury Instructions 2100-2131 contain the basic instructions for driving under the influence of alcohol or drugs cases. Counsel should not, however, feel tied to CALCRIM. Both defense counsel and prosecutors should fashion their own instructions when the trial presents issues not covered by standard instructions.

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§55.40 XIV. ROLE OF DEPARTMENT OF MOTOR VEHICLES

On arrest for violation of Veh C §23152(a)-(b), or related Vehicle Code sections, the arrestee's license is seized by the arresting agency, which in return provides the arrestee with a temporary license allowing him or her to drive for 30 days after the date of issue. See Veh C §13382. The Department of Motor Vehicles must review the order of suspension before its effective date. Veh C §13557(c). The arrestee may also request a hearing; the request must be made within 10 days after the notice of the order. Veh C §13558. Neither administrative review nor an administrative hearing stay the suspension or revocation; but if the DMV cannot make a determination before the 30-day temporary license expires, the DMV must stay the effective date of the order of suspension or revocation pending its determination. Veh C §§13557(d), 13558(e).

Ø **Note:** Documents handed to the arrestee at the time of the arrest set out his or her rights, but tend to be confusing.

The issues to be determined at a DMV administrative per se hearing are the following:

- **Reasonable cause.** Did the police agency have reasonable cause to believe that the licensee was driving in violation of Veh C §23152 or related sections?
- **Lawful arrest.** Was the licensee placed under arrest lawfully?
- **0.08 percent or more BAC.** Was the licensee driving a motor vehicle at a time when he or she had 0.08 percent or more blood-alcohol content?

If there was a refusal to be tested, the issues to be determined are these:

- **Reasonable cause.**

Ø **Note:** The loss-of-license sanction for a refusal under Pen C §§13353 and 23612 is conditioned on the DMV's finding of a lawful arrest predicated on probable cause. Therefore, the relevant inquiry for purposes of suspension is not whether the licensee was actually driving, but whether the police officer had *reasonable cause to believe* that the licensee was driving while under the influence. *Troppman v Valverde* (2007) 40 C4th 1121, 1128, 57 CR3d 306.

- **Lawful arrest.**
- **Advisement of consequences.** Did the officer advise of the consequences of refusing, in accordance with statutory requirements?
- **Refusal to be tested.** Did the arrestee refuse to submit to or fail to complete a chemical test?

In essence, the criminal action and the DMV administrative per se hearing are separate proceedings and each will generally not affect the result of the other unless the defendant has been found not guilty (not a dismissal or a successful Pen C §1385 application) of an alleged Veh C §23152(b) violation. In that event, the DMV takes the position that it no longer has jurisdiction over the hearing and as such a favorable decision will be granted to the applicant on proof (normally by way of certification of the minute order) of the not guilty finding. If a DMV administrative hearing has been held before the not guilty finding, counsel may move to set aside an adverse administrative decision based on that finding. Even when the defendant has performed all required acts under an adverse DMV decision, counsel should seek a set-aside of the DMV order to assist the client if a future, similar violation occurs, *i.e.,* the DMV record will be eradicated and therefore cannot be used against the licensee in a future hearing.

Ø **Note:** Although DMV proceedings and court proceedings are distinct and separate, the court on conviction automatically notifies the DMV of the conviction, as, *e.g.,* a first, second, or third DUI offense; the DMV then takes separate action under the Vehicle Code by notifying the defendant of a license suspension regardless of the DMV administrative per se outcome. Such notifications almost always result in suspension or restriction, or both, of the license regardless of the court order or the DMV administrative per se outcome. The chart below does not

address these ramifications, because they are complex and cannot be adequately set out to include all permutations. Counsel is advised to be thoroughly familiar with the controlling and applicable sections of the Vehicle Code as well as any licensing and Business and Professions Code requirements that may apply to a client.

The following chart provides a summary of DMV penalties for driving under the influence of alcohol or drugs, or both (Veh C §§13352, 23152).

Ø **Note:** Restricted licenses may be available contingent on the nature of the offense and requirements such as attendance at an alcohol program, filing of insurance documentation (SR-22), interlock device installation, etc. See Veh C §13352(a).

DMV Penalties for Driving Under the Influence of Alcohol or Drugs (Veh C §§13352, 23152, 23612)

First offense	0.08 or greater	6-month suspension. Veh C §13352(a)(1)
	Refusal to submit to testing	1-year suspension. Veh C §23612(a)(1)(D)
Second offense within 10 years	0.08 or greater	2-year suspension. Veh C §13352(a)(3), (6) (effective July 1, 2010)
	Refusal to submit to testing	2-year revocation. Veh C §23612(a)(1)(D)
Third offense within 10 years	0.08 or greater	3-year revocation. Veh C §13352(a)(5), (7) (effective July 1, 2010)
	Refusal to submit to testing	3-year revocation. Veh C §23612(a)(1)(D)
Fourth offense within 10 years or second offense following prior DUI felony	0.08 or greater	4-year revocation. Veh C §13352(a)(9)
	Refusal to submit to testing	4-year revocation. Veh C §23612(a)(1)(D)

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§55.41 XV. PROBATION TERMINATION AND REVOCATION; EXPUNGEMENT

On motion of the probation officer, the District Attorney, or the probationer, the court may modify, reevaluate, or terminate probation. Pen C §1203.2. In a successful termination of probation, the defendant is entitled to have the conviction expunged and the misdemeanor record vacated. See Pen C §1203.4. Although the misdemeanor record is vacated, the fact of violation will remain as a prior offense during the 10-year period for purposes of enhancement if a subsequent violation of Veh C §23152 or §23153 occurs. See Pen C §1203.4.

In *People v Canty* (2004) 32 C4th 1266, 1285, 14 CR3d 1, the California Supreme Court held that driving under the influence is not a nonviolent drug possession offense within the meaning of Proposition 36. Consequently, a defendant who is convicted of DUI and a drug offense, is not eligible for probation and drug treatment under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000. Also, a conviction under Veh C §23152(b) within 5 years before conviction of a nonviolent drug offense will make the defendant ineligible for Proposition 36 probation for the drug offense. In *People v Eribarne* (2004) 124 CA4th 1463, 22 CR3d 417, the court held that driving under the influence is a "misdemeanor conviction involving physical injury or the threat of physical injury to another person," within the meaning of Pen C §1210.1(b)(1). Consequently, a defendant who has a DUI conviction for an incident that occurred within 5 years of a nonviolent drug possession offense is not eligible for Proposition 36 probation if he or she has a prior serious felony conviction (see Pen C §§667.5(c), 1192.7(c)). Eligibility for probation under Proposition 36 is discussed in §38.4.

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JUVENILE DELINQUENCY PROCEEDINGS

DOUGLAS S. FEINBERG
JONATHAN LABA

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§56.1 I. OVERVIEW

This chapter covers proceedings brought against minors for violating criminal laws. These proceedings, instituted under Welf & I C §602, are frequently called "602" proceedings. The chapter also discusses procedures for filing cases against minors in adult court. This chapter does not discuss dependency proceedings under Welf & I C §300; on dependency proceedings, see California Juvenile Dependency Practice (Cal CEB Annual). This chapter also does not discuss infraction and status offender proceedings. See Welf & I C §601.

Juvenile delinquency proceedings are governed primarily by the Welfare & Institutions Code, the Penal Code (which defines the offenses), and the applicable Rules of Court, Cal Rules of Ct 5.500-5.830, issued pursuant to Welf & I C §265. The superior court has original jurisdiction of cases involving violations of criminal laws by minors. Welf & I C §603. The Welfare and Institutions Code provisions regarding delinquency generally, but not always, use the term "minor" to refer to a person who was under 18 at the time an offense is alleged to have occurred. See *In re Jeffrey M.* (2006) 141 CA4th 1017, 1023, 46 CR3d 533; *In re Charles G.* (2004) 115 CA4th 608, 614, 9 CR3d 503. "Juvenile court" is the division of the superior court in which juvenile delinquency proceedings take place. See Welf & I C §246. The juvenile court is considered a civil rather than a criminal forum even though it adjudicates violations of criminal laws by minors. However, in juvenile court, a minor receives many of the same constitutional protections that an adult would receive. See *In re Gault* (1967) 387 US 1, 18 L Ed 2d 527, 87 S Ct 1428; *In re Winship* (1970) 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068. See §56.5. The juvenile court incorporates elements of both criminal court and dependency court. In juvenile court, there is no "conviction" within the meaning of the adult criminal law. Welf & I C §203; *People v Weidert* (1985) 39 C3d 836, 846, 218 CR 57. The terminology used in juvenile court is that the minor is "found to come within the provisions of Welf & I C §602." Minors "admit" or "deny" an offense, rather than plead "guilty" or "not guilty." Juvenile petitions are "sustained," or found "true." Minors are "committed" to juvenile hall, a ranch, or the Division of Juvenile Justice (DJJ) (formerly known as the California Youth Authority (CYA)), rather than being sentenced to jail or prison.

A minor is usually arraigned at his or her first hearing. If the minor is in custody, the arraignment hearing is called a "detention hearing." If the matter is not resolved at the first or a subsequent hearing by a plea, and neither the court nor the prosecutor dismisses the case, a "jurisdiction hearing" (trial) is held. If the court determines that a minor has committed an offense, it "sustains" the petition and either sentences the minor immediately or sets a "disposition" (sentencing) hearing. The dispositions available in juvenile court can be less severe than those available in adult court. See, *e.g.,* Welf & I C §1769 (person committed to DJJ for felony generally must be released by age 21 or 25, depending on offense). In addition, minors adjudicated delinquent in juvenile court proceedings have the opportunity to petition the court to have their records sealed unless they were found to have committed certain serious offenses. See Welf & I C §§781, 1772; for discussion, see §41.13. However, under the Three Strikes law (Pen C §§667(b)-(i), 1170.12), certain serious and violent offenses committed by minors and adjudicated in juvenile court may be charged as strikes in a later criminal prosecution. See §56.28. In addition, an adult court may consider a defendant's juvenile history as a factor in denying probation or imposing an aggravated term in sentencing after a later criminal conviction. Cal Rules of Ct 4.414(b)(1), 4.421(b). Offenses that result in a commitment to the DJJ may also lead to civil commitments under the Sexually Violent Predator Act (SVPA) (Welf & I C §§6600-6609.3) or extensions of the DJJ commitment on grounds of dangerousness (Welf & I C §§1800-1803). See §56.66 on extended commitment and chap 48 on commitment under the SVPA. Juvenile offenses sometimes trigger sex offender registration requirements and firearms restrictions. See §56.6.

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§56.2 II. CHART: DEADLINES

Action	Deadline	Authority
Welf & I C §602 petition filing deadline.	Minor must be released from custody unless petition is filed within 48 hours (excluding noncourt days) after minor is taken into custody. If minor misrepresents his or her age as 18 or older, causing unavoidable delay, deadlines do not begin to run until minor's true age is discovered.	Welf & I C §§631(a), 631.1; Cal Rules of Ct 5.752.
Detention hearing: required after minor is taken into custody.	When minor is taken into custody without warrant on a belief that the minor has committed misdemeanors not involving violence or threat of violence or possession or use of weapon, minor must be released unless within 24 hours a supervising probation officer approves further detention in writing. This rule does not apply when the detention hearing occurs within 24 hours or when the minor is currently on probation or parole. Deadline for holding detention hearing is as soon as possible, but no more than 48 hours *after minor is taken into custody,* excluding noncourt days.	Welf & I C §§631(b), 632(b).
	In all other cases, detention hearing is required as soon as possible, but no later than end of next judicial day *following filing of petition.*	Welf & I C §632(a)-(b); Cal Rules of Ct 5.752.
	When parents or guardians received no actual hearing notice and were not present at hearing, they may file affidavit requesting new hearing. New hearing must be held within 24 hours after filing of affidavit, excluding noncourt days.	Welf & I C §637; Cal Rules of Ct 5.762(a).
Continuance of detention hearing or rehearing.	One court day, on motion of minor, parent, or guardian.	Welf & I C §638.
Detention rehearing ("*Dennis H."* or "contested detention hearing").	Must be held within 3 court days after request to consider prima facie case and grounds for detention. Continuance may be granted not to exceed 5 court days if witnesses are unavailable.	Welf & I C §637; Cal Rules of Ct 5.764.
Fitness hearing.	Notice of fitness hearing must be given at least 5 court days before fitness hearing.	Cal Rules of Ct 5.766(b).
	Fitness hearing must be held and court must rule on fitness before jurisdiction hearing is held.	Cal Rules of Ct 5.766(c).
Writ timeline for fitness hearing.	Minor must file writ petition challenging fitness determination within 20 days after arraignment in adult court; jeopardy attaches at start of jurisdiction hearing. After written or oral notice to the court that writ review will be sought, prosecutor has right to continue jurisdiction hearing at least 2 court days.	Cal Rules of Ct 5.770(g), (i), 5.772(g)-(h), (j); *People v Superior Court (Rodrigo O.)* (1994) 22 CA4th 1297, 1302, 27 CR2d 796.
Jurisdiction hearing.	(a) When minor is detained, hearing must be held within 15 court days after date of order	Welf & I C §657(a)(1); Cal Rules of Ct

	directing detention.	5.774(b).
	(b) When minor is not detained, hearing must be held within 30 *calendar* days after date §602 petition is filed, unless minor is unavailable.	Welf & I C §657(a); Cal Rules of Ct 5.774(a), (c).
Dispositional hearing.	Immediately after jurisdiction hearing, unless continuance is needed for social study or on motion of court, parent, or guardian to receive other evidence. Continuance may be for no more than 10 court days if minor is detained and no more than 30 calendar days after date petition is filed if minor is not detained, unless time is waived. Hearing may be continued for additional 15 days for good cause shown if minor is not detained.	Welf & I C §702.
Request by minor, parent, or guardian for judge to review referee's order.	Request must be made within 10 calendar days after service of written copy of referee's order.	Welf & I C §252; Cal Rules of Ct 5.542(a).
When review by judge required concerning referee's order.	When hearing before referee was reported, hearing de novo by judge is discretionary after reviewing record. Decision must be made, or extension requested, within 20 calendar days after receipt of request, or rehearing is deemed granted. Judge may extend 20 days to 45 days for good cause.	Welf & I C §252; Cal Rules of Ct 5.542(c).
	When hearing before referee was not reported, hearing de novo before judge must be granted.	Welf & I C §252; Cal Rules of Ct 5.542(b), (e).
Judge on own motion can grant rehearing following hearing by referee.	Within 20 court days after hearing by referee.	Cal Rules of Ct 5.542(d).
Deadline for filing appeal— before July 1, 2010.	Within 60 days of disposition, or within 60 days of when order becomes final, whichever comes later.	Cal Rules of Ct 8.400(d).
Deadline for filing appeal— beginning July 1, 2010.	Within 60 days after rendition of judgment or making of order being appealed.	Cal Rules of Ct 8.406(a)(1); see Cal Rules of Ct 8.406(a)(2)-(3) (referee not acting as temporary judge).

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III. JURISDICTION AND VENUE

§56.3 A. Jurisdiction

The juvenile court exercises delinquency jurisdiction over a minor who has violated a law of the United States or California, or any city or county ordinance, while under age 18. Welf & I C §§602, 603. See *In re Jose C.* (2009) 45 C4th 534, 548, 87 CR3d 674 (juvenile court had jurisdiction over federal immigration law violation). However, under Welf & I C §602(b), the juvenile court does *not* have jurisdiction when a minor 14 years of age or older is charged with any of the following:

- First degree, special circumstance murder, with an allegation that the minor personally killed the victim; or
- An enumerated sex offense alleged to be subject to the One Strike provisions of Pen C §667.61, when it is alleged that the minor personally committed the offense.

The juvenile court also does not have jurisdiction over a minor who violated the law of another state, then fled to California; such a minor may be extradited in the same manner as an adult. Welf & I C §216.

The juvenile court has original jurisdiction over an offense committed while a person was under age 18 even though the person is 18 or older when charged. Welf & I C §603. A juvenile does not become an adult until the day of his or her 18th birthday. *Johnson v Superior Court* (1989) 208 CA3d 1093, 256 CR 651 (not an adult on day before birthday). However, someone who was a minor when the crime was committed but who has since turned 18 can sometimes waive the jurisdiction of the juvenile court for an offense committed as a juvenile. See §56.37. When a minor begins an offense while under 18 and that offense continues after the minor turns 18, prosecution may be initiated in the adult court. See *People v Quiroz* (2007) 155 CA4th 1420, 1430, 66 CR3d 767 (continuing conspiracy). A minor's emancipation does not interfere with the juvenile court's jurisdiction under Welf & I C §602. See Fam C §7050 (emancipated minors not subject to Welf & I C §§300, 601 proceedings, but no mention of §602).

When an examination into a defendant's age leads a judge in a criminal court to believe that a defendant was a minor on the date of the offense alleged, the judge must refer the matter to juvenile court. Welf & I C §604(a). A minor who represents himself or herself to be an adult but who is later determined to be a minor must be certified to the juvenile court. See Welf & I C §604(a); *In re Harris* (1993) 5 C4th 813, 21 CR2d 373 (after jury trial); *In re Jermaine B.* (1999) 69 CA4th 634, 81 CR2d 734 (after plea bargain). However, a minor who does not alert an adult court that he or she is a minor, and is then convicted in adult court, may not challenge the conviction after the trial court's jurisdiction has expired. *People v Level* (2002) 97 CA4th 1208, 1209, 119 CR2d 551. When the prosecution initiates the case in adult court, the minor bears the burden of proof concerning age. *People v Nguyen* (1990) 222 CA3d 1612, 272 CR 523.

In most cases, the juvenile court may maintain jurisdiction only until the minor turns age 21. Jurisdiction automatically terminates on the minor's 21st birthday. Welf & I C §607(a). When a minor is committed to the DJJ or a mental facility (see Welf & I C §702.3), and the commitment to either facility was based on an offense listed in Welf & I C §707(b), (d)(2), or (e), the court may maintain jurisdiction until the minor turns age 25. Welf & I C §607(b), (d). See *In re Sim J.* (1995) 38 CA4th 94, 45 CR2d 30; *In re Tino V.* (2002) 101 CA4th 510, 512, 124 CR2d 312. The court may also maintain jurisdiction for 2 years past the date of the commitment to the DJJ, even if that causes jurisdiction to extend past the ages described above. Welf & I C §§607(c), 1769-1770. In addition, the court's jurisdiction may continue past the ages described above if the minor has been committed as a dangerous person. See Welf & I C §§1800-1803, discussed in §56.66.

A court may vacate a DJJ commitment for a ward adjudicated for a §707(b) offense on the ground that the minor is not benefiting from the commitment (Welf & I C §779) and still retain jurisdiction over the ward until age 25. *In re Antoine D.* (2006) 137 CA4th 1314, 40 CR3d 885.

Infractions typically are not heard by the juvenile court. They may be handled by a juvenile hearing officer. See Welf & I C §256. In counties that have adopted the provisions of Welf & I C §603.5, adult courts handle charges against minors for traffic infractions and violations of local ordinances involving traffic or parking. However, this does not divest the juvenile court of jurisdiction.

Ø **Note:** In practice, juvenile courts usually terminate the probation of wards not committed to the DJJ long before the ward reaches 21 years of age. Juvenile courts are rarely interested in continuing to supervise wards who have reached adulthood and who are performing well on probation in the community. If a poorly performing ward over 18 is convicted of an adult offense, the juvenile court will usually terminate jurisdiction in light of the ward's grant of adult probation or commitment to prison.

The juvenile court must terminate jurisdiction whenever it concludes that the minor no longer requires the protection of wardship. *In re Francecisco* (1971) 16 CA3d 310, 94 CR 186.

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§56.4 B. Venue

The venue for juvenile court is where the minor resides, is found, or commits the acts bringing him or her within Welf & I C §602. Welf & I C §651; Cal Rules of Ct 5.510. In practice, charges are filed and the jurisdictional hearing usually takes place in the county where the offense was committed. Between the jurisdictional and dispositional hearings, the court may transfer the matter to another county within California where the minor's parents or legal guardians reside. Welf & I C §750. The minor's best interests determine whether the matter should be transferred. Cal Rules of Ct 5.610(e). The receiving court must accept jurisdiction of the case. Cal Rules of Ct 5.612(a)(1); *In re Carlos B.* (1999) 76 CA4th 50, 55, 90 CR2d 72. The receiving county may appeal the transfer. Welf & I C §754. If the receiving county believes that a change of circumstances or additional facts indicate that the child does not reside in the receiving county, the receiving court may transfer the matter back to the original county. Cal Rules of Ct 5.612(f). But see *In re J.C.* (2002) 104 CA4th 984, 992, 128 CR2d 671 (criticizing practice of multiple transfers). See also *In re R.D.* (2008) 163 CA4th 679, 77 CR3d 793. If a minor or a person entitled to custody of a minor lives out-of-state or in a foreign country, and the minor is on probation, the court may order the minor sent to the other state or country. Welf & I C §738. See also Interstate Compact for Juveniles (Welf & I C §§1400-1403). However, the court cannot order a nonresident minor to stay out of California. See *In re Adolfo M.* (1990) 225 CA3d 1225, 1233, 275 CR 619.

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IV. COMPARING ADULT AND JUVENILE COURTS

§56.5 A. Purpose of Juvenile Court Law

Juvenile delinquency proceedings are considered civil in nature. However, changes in the law during the last several decades have made the consequences of a delinquency adjudication more like those of a conviction for a crime, and have made more juvenile offenders eligible to be tried as adults. See *In re Gregory K.* (1980) 106 CA3d 164, 168 n2, 165 CR 35 (Welf & I C §602 proceedings are in reality criminal proceedings; view that §602 proceedings are for protection of minor is "pure fiction"). A minor receives many of the same constitutional protections as an adult. See *In re Gault* (1967) 387 US 1, 18 L Ed 2d 527, 87 S Ct 1428 (rights to counsel, to confront and cross-examine witnesses, against self-incrimination, to adequate notice of charges, and to exclude unconstitutionally obtained evidence); *In re Winship* (1970) 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068 (proof beyond reasonable doubt). However, important philosophical and practical differences between adult and juvenile courts remain. See *In re Nan P*. (1991) 230 CA3d 751, 281 CR 468; *In re Teofilio A.* (1989) 210 CA3d 571, 258 CR 540.

By statute, unless there is a contested issue of fact or law, juvenile proceedings are conducted in an informal, nonadversarial atmosphere. Welf & I C §680. The juvenile court places emphasis on the rehabilitation of minors. Welf & I C §202. See *In re Carlos E.* (2005) 127 CA4th 1529, 26 CR3d 551; *In re Samuel V.* (1990) 225 CA3d 511, 517, 277 CR 14. While the court is obligated to protect public safety, it must also act in the best interests of the minor. See Welf & I C §202(a). Any punishment imposed by the juvenile court must be consistent with the minor's best interest and the goal of rehabilitation. See Welf & I C §202(b); *In re Myresheia W.* (1998) 61 CA4th 734, 740, 72 CR2d 65; *In re Samuel V*. (1990) 225 CA3d 511, 517, 277 CR 14; *In re Michael D.* (1987) 188 CA3d 1392, 234 CR 103. In contrast to the criminal justice system for adults, which contains a purely punitive component separate from its rehabilitative goals, the juvenile court permits punishment as a rehabilitative tool, but not for retribution. See Welf & I C §202; *In re Samuel V.* (1990) 225 CA3d 511, 517, 277 CR 14. The court cannot place a minor into foster care as a means of punishment. Welf & I C §202(e). When the minor is no longer a ward of the court, "the guidance he or she received should enable him or her to be a law-abiding and productive member of his or her family and the community." Welf & I C §202(b).

This rehabilitative aspect of punishment also applies to DJJ commitments. A minor cannot be committed to the DJJ unless the court finds it probable that the minor "will be benefited by the reformatory educational discipline or other treatment" offered there. Welf & I C §734. If the court finds that a minor will not benefit from DJJ treatment, and no suitable alternatives exist, the court should dismiss the case. *In re Aline D.* (1975) 14 C3d 557, 565, 121 CR 816.

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§56.6 B. Comparing Adult and Juvenile Courts

Because of the longer possible sentences and the possibility of a state prison sentence in adult court, minors are often better off remaining in the juvenile system. However, a minor who is the subject of delinquency proceedings in juvenile court does not have the benefit of the following rights, which are available to adults accused of a criminal offense (and to minors found unfit for juvenile court treatment and tried as adults):

- Bail or O.R. release (*In re William M.* (1970) 3 C3d 16, 26 n17, 89 CR 33; *Aubry v Gadbois* (1975) 50 CA3d 470, 123 CR 365);
- Jury trial (*People v Superior Court (Carl W.)* (1975) 15 C3d 271, 274, 124 CR 47);
- Deferred entry of judgment for drug offenses (see Pen C §§1000-1000.8), available to adults only according to the wording of the statutes;
- Drug treatment instead of incarceration for nonviolent drug possession pursuant to Proposition 36 (*In re Jose Z.* (2004) 116 CA4th 953, 10 CR3d 842);
- A preliminary hearing (see Pen C §859b); and
- A probable cause determination made within 48 hours (except noncourt days) of a warrantless arrest (*Alfredo A. v Superior Court* (1994) 6 C4th 1212, 26 CR2d 623 (72 hours, excluding noncourt days, adequate)); see §56.20.

Despite the absence of these rights, juvenile court provides many advantages over adult court. Juvenile court provides a broader range of dispositional options, options which generally have a far greater emphasis on rehabilitation, education, and training. A ward of the juvenile court cannot be sentenced to state prison in a juvenile case. Although a juvenile court sentence generally can extend only until the minor is 25 years old (Welf & I C §1769), the adult court has jurisdiction to sentence a minor to life in prison. *People v Spears* (1983) 33 C3d 279, 188 CR 454. In juvenile court, minors 14 and older who are charged with many nonviolent felonies may participate in the juvenile deferred entry of judgment program, which provides for a complete dismissal of the charges after a maximum of 3 years of probation. Minors charged with less serious offenses and minors under 14 may be able to participate in informal probation without admitting any charges, and ultimately have their cases dismissed. See §§56.15-56.17 for discussion of these programs.

Most, but not all, legal rules applicable to criminal cases apply in juvenile court. Minors have the right to notice of the charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. *In re Gault* (1967) 387 US 1, 18 L Ed 2d 527, 87 S Ct 1428. Charges must be proved beyond a reasonable doubt before a true finding can be made. Welf & I C §701. A minor may not be shackled at a juvenile court hearing absent some showing of need based on the minor's conduct in the courtroom or at juvenile hall. See *Tiffany A. v Superior Court* (2007) 150 CA4th 1344, 59 CR3d 363. However, minors do not have the right to a trial by jury. *McKeiver v Pennsylvania* (1971) 403 US 528, 29 L Ed 2d 647, 91 S Ct 1976. The juvenile court does have the right to impanel an advisory jury. *People v Superior Court (Carl W.)* (1975) 15 C3d 271, 274, 124 CR 47. But see *In re Javier A.* (1984) 159 CA3d 913, 206 CR 386 (lack of right to jury trial should be reconsidered in light of transformation of juvenile court into more punitive system).

Ø **Practice tip:** The disparity between sentences in adult court and juvenile court can surprise a criminal law attorney unaccustomed to juvenile court. It is not uncommon for a minor to be removed from his or her home and sent to foster care, a ranch, or a group home for committing a minor misdemeanor offense that would not have resulted in custody time for an adult. See Welf & I C §726 (required findings for removal from home). On the other hand, a minor who commits a crime such as robbery, residential burglary, or sexual molestation of a child that would ordinarily result in a stiff jail sentence or prison commitment for an adult may receive less or even no custody time, particularly if the offense qualifies for deferred entry of judgment. See Welf & I C §§790-795.

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§56.6A C. Selected Collateral Consequences of Juvenile Adjudications

A juvenile adjudication may have many collateral consequences for a minor in areas such as military service, driver's license, employment, public benefits, and housing. Some of the most significant consequences are discussed below.

Use of priors for enhancement of sentence. Generally, juvenile delinquency adjudications, unlike criminal convictions, cannot be used in later criminal proceedings as statutory enhancements to the defendant's sentence. See Welf & I C §203 (juvenile adjudications are not deemed a conviction of a crime for any purpose). Thus, for example, a juvenile prior for petty theft cannot be used to elevate a misdemeanor petty theft to a felony under Pen C §666 (petty theft with prior). *In re Anthony R.* (1984) 154 CA3d 772, 201 CR 299. Also, an adult sentence may not be enhanced under Pen C §667(a) by previous offenses adjudicated in juvenile court. See *People v West* (1984) 154 CA3d 100, 107, 201 CR 63.

A significant exception to this general rule is the Three Strikes law. Minors 16 or older who commit a serious felony under Pen C §1192.7(c) or a violent felony under Pen C §667.5(c) may suffer a strike if the court finds the offense true. See §56.28 for further discussion of strike implications for minors. Additionally, a criminal court may consider a defendant's juvenile history as a factor in denying probation or imposing an aggravated term in sentencing after a later criminal conviction. Cal Rules of Ct 4.414(b)(1), 4.421(b).

Use of priors for impeachment. The fact of a juvenile adjudication cannot be used to impeach a witness. However, the underlying conduct that resulted in an adjudication of delinquency can be used in a later court proceeding for impeachment, subject to Evid C §352 limitations. *People v Lee* (1994) 28 CA4th 1724, 1738, 34 CR2d 723.

Immigration consequences. Adjudications in juvenile court do not count as convictions for immigration purposes, although they may trigger conduct-based grounds to deport or exclude from admission. See §52.4.

Sex offender registration. In some cases, a juvenile adjudication will require registration as a sex offender; the registration requirement lasts for life. See *People v Allen* (1999) 76 CA4th 999, 90 CR2d 662. To be subject to the registration requirement, the minor must have been committed to the CYA, DJJ, or like institution in another state for commission of a sex offense described by Pen C §290.008(c). Pen C §290.008(a)-(b); *In re Derrick B.* (2006) 39 C4th 535, 47 CR3d 13 (discussing former Pen C §290(d)(3); now see §290.008); *In re Crockett* (2008) 159 CA4th 751, 761, 71 CR3d 632 (no registration when Texas juvenile not sent to equivalent of DJJ). A trial court has discretion to save a minor from the registration requirement by committing the minor to the DJJ solely on the current, nonsex offense and by electing not to aggregate a previously adjudicated sex offense listed in Pen C §290.008(c). *In re Alex N.* (2005) 132 CA4th 18, 33 CR3d 172 (discussing former Pen C §290). But see *In re G.C. (*2007) 157 CA4th 405, 68 CR3d 523 (court must "consider" most recent sustained petition when committing a person to the DJJ, even if most recent petition is for a sex offense that will require registration). Not all offenses that would require an adult to register are listed in Pen C §290.008(c). See, *e.g.,* Pen C §§243.4, 266, 269, 311.3, 314. While adults convicted of *any* criminal offense may be required to register pursuant to Pen C §290.006, if the court makes specified findings and states its reason for the order, that subdivision does not apply to minors. *In re Derrick B., supra* (discussing former Pen C §290).

An order sealing juvenile records relieves a minor of the obligation to register as a sex offender. Welf & I C §781(a). See §56.68. Like adults, minors who do not have a duty to register as a sex offender under current law may be required to do so in the future. See *Smith v Doe* (2003) 538 US 84, 155 L Ed 2d 164, 123 S Ct 1140 (sex offender registration not subject to ex post facto requirements); *People v Allen, supra* (same holding applied to minors).

Narcotics offender registration. The juvenile court has no authority to require a minor who committed a drug offense to register as a narcotics offender. *In re Luisa Z.* (2000) 78 CA4th 978, 991, 93 CR2d 231.

Firearms restrictions. Wardship findings based on many offenses will prevent a minor from being legally able to possess a firearm until the minor becomes 30 years of age. Pen C §12021(c), (e). See, *e.g., In re David S.* (2005) 133 CA4th 1160, 35 CR3d 309.

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§56.7 D. Confidentiality: Who May Be Present at Juvenile Court Hearings

Juvenile proceedings are ordinarily confidential and are closed to the public unless the minor and the minor's parent or guardian request that a hearing be open to the public. See Welf & I C §§675-676(a). The minor and his or her parents or guardians are entitled to be present, as are other individuals with a sufficient interest in the proceeding to be entitled to notice under Welf & I C §§290.1-290.2. Welf & I C §§676, 679; Cal Rules of Ct 5.530. In certain cases, the prosecuting witness is entitled to have two support persons present. Welf & I C §676(a). See Pen C §868.5. The court may also permit attendance by anyone else, including family members of the minor, with a "direct and legitimate interest in the particular case or the work of the court." Welf & I C §676(a). See Cal Rules of Ct 5.534(f)(1).

The public may be present when a petition alleges one of the serious offenses enumerated in Welf & I C §676, unless the minor establishes a reasonable likelihood of substantial prejudice. *Cheyenne K. v Superior Court* (1989) 208 CA3d 331, 256 CR 68; *In re Jesse McM.* (1980) 105 CA3d 187, 164 CR 199. Juvenile hearings involving certain sex offenses must be closed if the prosecution makes such a motion on the basis of the complaining witness's request. Welf & I C §676(b)(1).

If a minor 14 years of age or older is arrested for the commission of a serious felony (see Pen C §1192.7(c)), a law enforcement agency may disclose the minor's name and the offenses the minor allegedly committed to interested persons on request. Welf & I C §827.5.

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§56.8 E. Release of Information

Generally, only the persons or agencies listed in Welf & I C §827 are entitled to inspect juvenile case files without a court order. Persons entitled to inspect juvenile case files without a court order include the prosecutor, probation officers, Child Protective Services workers, minors, the minor's parents or guardian, the attorney representing the petitioning agency in a dependency action, and the attorneys for the parties (including attorneys for the minor's parents or guardian). See Welf & I C §827(a)(1). These parties may also copy the case file without a court order. Welf & I C §827(a)(5); Cal Rules of Ct 5.552(b)(1). Attorneys for the parties may inspect the records even if not acting as attorney of record for the party in the juvenile case. Juvenile case files cannot be obtained by subpoena. *Lorenza P. v Superior Court* (1988) 197 CA3d 607, 242 CR 877.

"Juvenile case files" include all documents filed in a juvenile court case; documents made available to probation officers in preparation of reports to the court; documents relating to a child concerning whom a petition has been filed in juvenile court that are maintained in the office files of probation officers and social workers; transcripts, records, or reports relating to matters prepared or released by the court or probation department; and exhibits admitted into evidence at juvenile court hearings. Cal Rules of Ct 5.552(a). Juvenile case files include police, probation, and social worker records concerning the case, even if no petition was ultimately filed. See *In re Elijah S.* (2005) 125 CA4th 1532, 24 CR3d 16.

The court has broad discretion to release records of a juvenile case. Welf & I C §827(a)(1)(P); *In re Elijah S.* (2005) 125 CA4th 1532, 1541, 24 CR3d 16 (dependency case). To obtain records, Judicial Council Form JV-570 (Petition for Disclosure of Juvenile Court Records) should be used. On records that may be sought and the required notice procedure, see Cal Rules of Ct 5.552. Several statutes provide for the release of information regarding specified felonies. See, *e.g.,* Welf & I C §§676, 827.5, 827.6. In Los Angeles County, law enforcement agencies are required, on request, to release juvenile records to other law enforcement agencies (including prosecutors), any peace officer, child protective agencies, the DMV, and an attorney representing the minor in a juvenile or criminal case. Welf & I C §827.9(b), (p).

The court's broad authority to order the release of juvenile records does not apply to records sealed under Welf & I C §781. *In re James H*. (2007) 154 CA4th 1078, 1083, 65 CR3d 410.

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§56.9 F. Parental Costs

Parents or guardians may be required to pay specified costs if they have the ability to pay. Liability for restitution is discussed in §56.61. They may be required to reimburse the county for the following costs (Welf & I C §§903-903.25, 914):

- Supervised home detention;
- Electronic surveillance;
- Reasonable costs of support, such as food, clothing, shelter, and medical care, for the minor while placed outside the home or committed to a facility such as juvenile hall or boot camp; and
- The minor's legal services.

The county board of supervisors may designate a county financial evaluation officer, who recommends an amount to be paid by the parents or guardians. Welf & I C §903.45. The court may order a parent or guardian to appear before a financial evaluation officer designated by the county for determination of the amount to be paid by the parent or guardian. Welf & I C §§639, 903.45. The court must find that the parents or guardians have the ability to pay before ordering payment. Welf & I C §§903-903.25; Pen C §987.4. The court might be limited to ordering the amount that the parents or guardians could reasonably pay in the next 6 months. See *People v Viray* (2005) 134 CA4th 1186, 36 CR3d 693 (adult case).

Ø **Note:** When it appears that a minor may have waived his or her right to counsel to save a parent or guardian the cost of legal services, the court must inquire and determine on the basis of the totality of the circumstances whether the waiver is voluntary and intelligent. Otherwise, the waiver is ineffective. *In re Ricky H.* (1970) 2 C3d 513, 86 CR 76.

Parents or guardians are not liable for the cost of incarcerating a minor for his or her own protection, nor are they liable for the costs of incarceration if the minor is incarcerated to protect society. See Welf & I C §903; *In re Jerald C.* (1984) 36 C3d 1, 6, 201 CR 342 (reimbursement to parent ordered for attorney fees and medical treatment).

Ø **Note:** Although Welf & I C §903.2 was amended in 1996 to specifically provide that parents or guardians may be liable for the cost of home supervision, this directly contradicts the holding of *In re Nathaniel Z.* (1986) 187 CA3d 1132, 232 CR 378. Because the court in *In re Nathaniel Z.* based its decision partly on constitutional concerns, it is unclear whether a parent or guardian can be held liable for those costs under §903.2 as amended. No published opinion has addressed this issue.

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V. INITIATING PROCEEDINGS IN JUVENILE COURT

§56.10 A. Arrest; Police Officer Options

A police officer may arrest a minor without a warrant for a misdemeanor or a felony if the officer has probable cause to believe that the minor committed the offense. There is no requirement that the crime occur in the officer's presence. Welf & I C §625(a); *In re Samuel V.* (1990) 225 CA3d 511, 513, 277 CR 14. A police officer may also detain a minor on the basis of a reasonable belief that the minor is a truant. *In re James D.* (1987) 43 C3d 903, 239 CR 663.

Ø **Note:** By contrast, except in specified circumstances, a police officer may not arrest an adult they suspect of committing a misdemeanor unless the misdemeanor was committed in the officer's presence, or the officer has an arrest warrant. Pen C §836.

A peace officer may also arrest a minor with a warrant. The court may issue a warrant after the filing of a petition alleging the minor comes within Welf & I C §§601 or 602 if the court concludes (Welf & I C §663):

- The conduct, behavior, or home environment of the minor may endanger the minor;
- Personal service has been unsuccessful or the minor's whereabouts are unknown; or
- The minor has willfully evaded service of the notice regarding the future court hearing.

Once arrested, an officer must advise a minor of his or her constitutional rights to remain silent and to counsel. Welf & I C §625.

An officer has four options after arresting a minor without a warrant (Welf & I C §§626, 626.5):

(1) Release the minor, perhaps after a warning, and take no further action;

(2) Release the minor and refer him or her to a community agency, *e.g.,* one that offers counseling services;

(3) Release the minor and issue a citation ordering him or her to appear at the juvenile probation department; or

(4) Deliver the minor to juvenile authorities for detention.

The officer should choose the alternative that least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community. Welf & I C §626.5(b).

A minor age 14 or older who is taken into custody for a felony offense may not be released by the police officer until the minor has signed a written promise to appear before a probation officer or the juvenile court. See Promise to Appear—Juvenile Delinquency (Juvenile 14 Years or Older) (Judicial Council Form JV-635). The police officer may also require a parent, guardian, or relative to sign a promise to appear with the minor. Welf & I C §629. If the minor is age 14 or older and is detained by the police officer for any offense listed in Welf & I C §707(b) or for the personal use of a firearm in the commission or attempted commission of a felony, the minor must be held in custody until a detention hearing. Welf & I C §625.3.

If a police officer decides that juvenile court proceedings are required and that the best interests of the minor and the community require his or her detention, the officer must take the minor to a probation officer as soon as possible, but no later than 24 hours after the minor was first detained if the minor was detained without a warrant for a misdemeanor. Welf & I C §§626(d), 626.5(b). A person under the age of 18 may be detained only in a juvenile facility; he or she cannot legally be confined in an adult jail. See Welf & I C §§207.1, 208, 208.5; Cal Rules of Ct 5.758(b).

When an officer detains a minor, the officer must immediately notify the minor's parents that the minor is being detained (Welf & I C §627(a)), and must allow the minor to make two completed phone calls within 1 hour after being taken into custody (Welf & I C §627(b)). One completed call is allowed to be made to the minor's parent or guardian, a responsible relative, or employer. The second completed call is allowed to be made to an attorney. The officer must also give the probation officer to whom the minor is delivered a written statement of probable cause for the detention. Welf & I C §§626, 626.5.

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§56.11 B. Probation Officer's Options and Duties at Intake

When a minor is booked into juvenile hall or another juvenile custodial facility, the probation officer must investigate the minor and the circumstances of the offense (Welf & I C §652; Cal Rules of Ct 5.514-5.516) and decide which of the following choices to make:

- Counsel the minor, release the minor with no further action, and close the case (Welf & I C §628.1; Cal Rules of Ct 5.514(c)(1)(B));
- Refer the minor to a nonjudicial agency or community program and close the case 21 days later if no further action appears necessary (Welf & I C §§653.7, 654; Cal Rules of Ct 5.514(c)(1)(C));
- Place the minor on a program of informal probation or supervision (Welf & I C §§653.7, 654; Cal Rules of Ct 5.514(c)(2)); or
- Refer the case to the prosecutor for filing (Welf & I C §§650, 653.1, 653.5; Cal Rules of Ct 5.514(d)); and do one of the following:
- Release the minor to a parent, guardian, or responsible relative (the criteria for detention are enumerated in Welf & I C §628);
- Place the minor on home supervision (Welf & I C §628.1, discussed in §56.13); or
- Detain the minor in custody (Welf & I C §628).

The probation officer is required to refer certain types of cases to the prosecutor within 48 hours. Welf & I C §653.5; Cal Rules of Ct 5.514. Section 653.5 also requires the probation officer to refer the family of a minor to such services as are appropriate to prevent or eliminate the need for the removal of the minor from his or her home.

The probation officer must inform the minor and parent or guardian of the minor's constitutional rights to remain silent and to have counsel. If the minor or parent requests counsel, the probation officer must notify the juvenile court judge, who appoints an attorney. Welf & I C §627.5. For further discussion of juvenile statements, see §56.51; see also chap 23 (confessions and admissions).

Whenever a minor appears to come within the description of both Welf & I C §§300 and 602, the probation department and the county welfare department confer to determine which status will serve both the best interests of the minor and the protection of society. The juvenile court considers this recommendation but is not bound by it. Welf & I C §241.1(a). See §56.25.

The probation department, child welfare department, and court have a continuing, affirmative duty to inquire whether a child for whom a petition is to be, or has been, filed under Welf & I C §602 is an Indian child, if the child is at risk of entering foster care or is in foster care. Welf & I C §224.3(a); *In re Alejandro A.* (2008) 160 CA4th 1343, 74 CR3d 44.

For further discussion of the minor's arrest and intake, see Welf & I C §§625.3, 626.6, 629.1. See also §9.9 on indictment of a minor.

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C. Probation Officer's Options Concerning Detention

§56.12 1. When Release Required

The probation officer must release a minor already in custody except in the following situations (Welf & I C §628(a)):

- The minor is in need of proper and effective parental care or control and has no parent, legal guardian, or responsible relative; or has no parent, legal guardian, or responsible relative willing to exercise or capable of exercising that care or control; or has no parent, legal guardian, or responsible relative actually exercising that care or control.
- The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.
- The minor is provided with a home that is an unfit place for him or her by reason of neglect, cruelty, depravity, or physical abuse by either of his or her parents, or by his or her legal guardian or other person in whose custody or care he or she is entrusted.
- Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonable necessity for the protection of the person or property of another.
- The minor is likely to flee the jurisdiction of the court.
- The minor has violated an order of the juvenile court.
- The minor is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality.

In determining the appropriateness of detention, the probation officer will conduct a nonaccusatory interview of the minor. Statements the minor makes at that time are admissible at the detention hearing. However, the statements made during the interview "are not admissible as substantive evidence, or for impeachment, in any subsequent proceeding to determine criminal guilt, whether juvenile or adult." *In re Wayne H.* (1979) 24 C3d 595, 602, 156 CR 344.

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§56.13 2. Home Supervision

If the probation officer has determined that the detention is appropriate under Welf & I C §628, the minor must nonetheless be released on home supervision unless the probation officer determines the minor meets one of the criteria contained in paragraphs (1), (2), or (3) of Welf & I C §628(a) (Welf & I C §628.1):

- The minor is in need of proper and effective parental care or control and has no parent, legal guardian, or responsible relative; or has no parent, legal guardian, or responsible relative willing to exercise or capable of exercising that care or control; or has no parent, legal guardian, or responsible relative actually exercising that care or control.
- The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.
- The minor is provided with a home which is an unfit place for him or her by reason of neglect, cruelty, depravity or physical abuse by either of his or her parents, or by his or her legal guardian or other person in whose custody or care he or she is entrusted.

Home supervision may include curfew, school attendance, and court attendance requirements. Welf & I C §628.1.

To be placed on home supervision, the minor must sign a written promise to abide by specific conditions, *e.g.,* curfew and regular school attendance. Welf & I C §628.1.

While on home supervision, a minor is still considered detained for purposes of computing the time within which he or she must be given a jurisdiction hearing. Welf & I C §628.1. However, a minor is not entitled to receive any time credits for time spent on home supervision or electronic surveillance, or while in any nonsecured setting such as a group or foster home. See *In re Randy J.* (1994) 22 CA4th 1497, 1503, 28 CR2d 152.

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§56.14 3. No Right to Bail

There is no constitutional right to bail in juvenile court. *Schall v Martin* (1984) 467 US 253, 81 L Ed 2d 207, 104 S Ct 2403; *Aubry v Gadbois* (1975) 50 CA3d 470, 123 CR 365. See *In re William M.* (1970) 3 C3d 16, 26 n17, 89 CR 33. Nor is there a statutory right to bail. See *In re Colar* (1970) 9 CA3d 613, 616, 88 CR 651; *In re Castro* (1966) 243 CA2d 402, 412, 52 CR 469.

Ø **Note:** Minors found unfit for juvenile court *are* entitled to bail and O.R. on the same basis as adults. Welf & I C §207.1(c).

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§56.15 D. Informal Probation

Probation officers can informally supervise a minor without asking for a petition to be filed. See Welf & I C §§652-654. This is called informal probation or informal supervision. The program of supervision may last as long as 6 months. See Welf & I C §654; Cal Rules of Ct 5.514(c)(2). The probation officer must make a diligent effort to place minors on informal probation as long as it does not jeopardize the interests of the minor and the community. Welf & I C §654. See Cal Rules of Ct 5.516(b) (factors to consider). Frequently, the program will require counseling, education, or substance abuse treatment. Pursuant to Welf & I C §654, a petition may be filed against the minor at any time within that 6-month period and for 90 days after the termination of the informal probation period. There is no requirement in the statute that the probation officer or prosecutor not file a petition if the minor is performing satisfactorily. However, in practice, a petition is unlikely to be filed if the minor is satisfactorily participating. After the filing of the petition, the court may also offer informal probation. Welf & I C §654.

The court may not impose a waiver of Fourth Amendment rights as a condition of informal probation. *Derick B. v Superior Court* (2009) 180 CA4th 295, 300, 102 CR3d 634.

Informal probation may include a restitution order under Welf & I C §654(a). However, informal probation may not be denied because the minor is unable to make restitution. See *Charles S. v Superior Court* (1982) 32 C3d 741, 750, 187 CR 144.

Neither the court nor the probation officer can establish a policy excluding all cases involving certain offenses from informal probation. *Mark F. v Superior Court* (1987) 189 CA3d 206, 211, 234 CR 388. Nor may a grant of informal probation be conditioned on the minor's admitting responsibility to the probation officer. *Kody P. v Superior Court* (2006) 137 CA4th 1030, 1037, 40 CR3d 763.

The probation officer can also refer the case to the prosecutor for filing with the recommendation that the court grant informal probation. Welf & I C §654.2(b). After a Welf & I C §602 petition has been filed, the court, with the consent of the minor and the minor's parent or guardian, may order informal probation under Welf & I C §654.2(a). The consent of the prosecutor or probation officer is not required. *Charles S. v Superior Court* (1982) 32 C3d 741, 746, 187 CR 144. The court must consider all relevant evidence bearing on the present condition and future welfare of the minor in determining whether to grant informal probation. *In re Armondo A.* (1992) 3 CA4th 1185, 5 CR2d 101. The court must exercise its discretion independent of the probation officer's recommendation. *In re Armondo A., supra*.

Informal probation is available only before adjudication or formal admission. *In re Adam R.* (1997) 57 CA4th 348, 352, 67 CR2d 76. The court cannot accept an admission to an offense and then grant informal probation, even if the parties so stipulate. *Ricki J. v Superior Court* (2005) 128 CA4th 783, 27 CR3d 494.

If the court grants informal probation, the court continues the matter for 6 months. Welf & I C §654.2. The minor must waive time in order to participate in informal probation (see Welf & I C §654.2), and the parents or guardians of the minor must be ordered to participate with the minor in counseling or education programs. Welf & I C §654. If the offense alleged involves a controlled substance or driving under the influence, the minor must successfully complete an alcohol or drug education program. Welf & I C §654.4.

Informal probation does not protect a minor from the DMV consequences of driving under the influence in violation of Veh Code §§23140 or 23152. See Veh C §13105; Welf & I C §§257-258, 654.1.

Fifteen days before the conclusion of informal probation, the probation officer must submit a report to the court regarding the minor's participation in the program. The minor and the minor's parents must appear in court at the end of the 6-month period to consider the minor's compliance with the informal probation agreement. Welf & I C §654.2(a). If the minor has successfully completed the program, the petition is dismissed. Welf & I C §654.2(a). At the probation officer's recommendation, the court may extend the period of probation. If the minor does not successfully complete informal probation, proceedings on the petition resume. Welf & I C §654.2(a). The court has up to 1 year after the date on which the petition was filed to resume delinquency proceedings. Welf & I C §654.2(a); *In re Anthony B.* (2002) 104 CA4th 677, 128 CR2d 349. But see *In re C.W.* (2007) 153 CA4th 468, 474, 62 CR3d 851 (delay past 1 year does not deprive court of fundamental jurisdiction).

Under Welf & I C §654.3(h), a minor alleged to have committed a felony when he or she was 14 or older may not be placed on informal probation except in unusual cases, when the court determines that informal probation would best serve the interests of justice. The court must specify the reasons for its decision on the record. Welf & I C §654.3. Minors charged with Welf & I C §707(b) offenses, offenses involving the sale or possession for sale of specified controlled substances or possession of those substances at a school, or violating Pen C §186.22 are also ineligible for informal probation barring an unusual-circumstance finding. If restitution exceeds $1000 or the minor has previously been a ward of the court or has previously been granted informal probation, an unusual-circumstances finding is required to grant informal probation. Welf & I C §654.3.

A grant of informal probation is not a final judgment; a party challenging an order made at the hearing on the matter must file a petition for an extraordinary writ to obtain review of the trial court's decision. See *Ricki J. v Superior Court* (2005) 128 CA4th 783, 788, 27 CR3d 494.

Deferred entry of judgment is an alternative to informal probation for minors age 14 and older who are alleged to have committed felonies. See Welf & I C §790. For discussion, see §56.17.

Ø **Practice tip:** An attorney for a minor age 14 or older who is alleged to have committed a felony should seek findings of "unusual circumstances" if the minor is otherwise eligible for informal probation. Informal probation is a much better option for a minor than deferred entry of judgment because the minor is not required to admit the offense, the probationary period is shorter, the conditions of informal probation tend to be more lenient, and the minor may still contest the matter if he or she does not perform satisfactorily.

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§56.16 E. Petition; Charging by Prosecutor

The prosecutor may file a petition only if the probation officer submits the probable cause statement to the prosecutor within 21 court days of the probation officer's having received the statement, or if a person who submitted a probable cause statement to the probation officer requests that the prosecutor review the probation officer's decision against filing a petition. *Marvin F. v Superior Court* (1977) 75 CA3d 281, 285, 142 CR 78. See Welf & I C §§653.7, 655. See also §56.11. The prosecutor independently evaluates the minor and the circumstances of the case and may file the case or refer the matter back to the probation officer for further action. Welf & I C §650(c). See also Cal Rules of Ct 5.520(b)(3). If the prosecutor decides to file a petition, the prosecutor determines the charges to be filed. Welf & I C §650(c). See also Cal Rules of Ct 5.520(b)(3).

A prosecutor must file a verified petition similar to a complaint, using Judicial Council Form JV-600 (Juvenile Wardship Petition). See Welf & I C §656; Cal Rules of Ct 5.524(b) (required contents of petition).

If applicable, the prosecutor states an intent to aggregate ("tack") periods of confinement under Welf & I C §726. See §56.58. Failure to do so may result in a lower maximum period of confinement. See *In re Michael B*. (1980) 28 C3d 548, 553, 169 CR 723.

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§56.17 F. Deferred Entry of Judgment

Welfare & Institutions Code §§790-795 establish a procedure for deferring the entry of judgment in a Welf & I C §602 felony petition as an alternative to informal probation. See also Cal Rules of Ct 5.800. Deferred entry of judgment (DEJ) is available for certain minors who are charged with the commission of a felony offense. As a condition of DEJ, the court is authorized to impose conditions of probation designed to rehabilitate the minor and prevent criminal activity. The court may also order restitution. Welf & I C §794. The DEJ option reflects a strong preference for rehabilitation of first-time nonviolent juvenile felony offenders. *Martha C. v Superior Court* (2003) 108 CA4th 556, 561, 133 CR2d 544.

The unavailability of DEJ in misdemeanor cases does not violate equal protection given the severe consequences otherwise applicable to felonies, the availability of other supervision programs for misdemeanants, and the existence of record-sealing options in misdemeanor cases. *In re Spencer S.* (2009) 176 CA4th 1315, 1328, 98 CR3d 477.

Suitability and eligibility for DEJ. To be eligible for DEJ, the minor must meet all six of the following requirements (Welf & I C §790(a)):

(1) The minor must not previously have been made a ward of the juvenile court because of the commission of a felony;

(2) The charged offense must not be a Welf & I C §707(b) offense;

(3) The minor must never have been committed to the CYA or DJJ;

(4) The minor must never have had probation revoked, without its later being completed (see *In re T.P.* (2009) 178 CA4th 1, 4, 99 CR3d 893 (violation of probation absent revocation does not render minor ineligible for DEJ));

(5) The minor must be at least age 14 at the time of the hearing; and

(6) The minor must be eligible for probation under Pen C §1203.06.

> Ø **Note:** The ready availability of informal probation for minors under age 14 may explain the unavailability of DEJ for those juveniles. See §56.15.

The prosecutor must determine whether the minor satisfies these six requirements and then must complete Judicial Council Form JV-750 (Determination of Eligibility—Deferred Entry of Judgment—Juvenile), stating that the minor is or is not eligible for DEJ. Cal Rules of Ct 5.800(b), (e). See *In re Luis B.* (2006) 142 CA4th 1117, 48 CR3d 581 (dispositional order reversed when prosecutor did not file Form JV-750). See also Citation and Written Notification for Deferred Entry of Judgment—Juvenile (Judicial Council Form JV-751).

The juvenile court determines the minor's suitability for DEJ. Welf & I C §791(b). To grant DEJ, the court must find that the minor is suitable for deferred entry of judgment and would benefit from education, treatment, and rehabilitation efforts (Cal Rules of Ct 5.800(b)); the findings must be made on the record. See Welf & I C §790(b). The suitability determination will not be reversed absent an abuse of discretion. *In re Sergio R.* (2003) 106 CA4th 597, 131 CR2d 160. However, a court abuses that discretion when it refuses to offer DEJ because of the seriousness of the offense; denial of DEJ must be based on facts indicating that the minor would not benefit from the education, rehabilitation, and treatment offered under DEJ. *Martha C.,* 108 CA4th at 560.

The DEJ procedure requires the minor to admit all the allegations of the petition and waive time for the pronouncement of judgment. Welf & I C §791. DEJ is not available to minors who proceed to a jurisdiction hearing to contest the charges. *In re Usef S.* (2008) 160 CA4th 276, 286, 72 CR3d 612; *In re Kenneth J.* (2008) 158 CA4th 973, 980, 70 CR3d 352. DEJ remains available to those who merely proceed on a motion to suppress evidence seized in violation of the Fourth Amendment. *In re A.I.* (2009) 176 CA4th 1426, 1434, 98 CR3d 501.

> Ø **Practice tip:** The prosecution may dismiss allegations before the minor enters an admission, and counsel for the parties often negotiate charges in the same manner as they would if DEJ were not being contemplated. If the prosecution will not dismiss charges if the minor accepts DEJ, defense counsel must carefully evaluate the DEJ "plead-as-charged" option compared to accepting a non-DEJ offer in which the prosecution agrees to dismiss or reduce charges. Advising the minor requires consideration of the minor's likely success in the DEJ program.

Probation conditions when DEJ is granted. When a minor is granted DEJ, the court must, on the request of a probation officer or peace officer, impose a condition that the minor be subject to warrantless searches of his or her person, residence, or property under his or her control. The court also imposes random drug or alcohol testing when appropriate. The judge must require, when appropriate, that the minor periodically establish compliance with curfew and school attendance requirements. The minor may also be required to pay restitution to the victim or victims. Welf & I C §794.

The court may impose any other term of probation authorized by the Welfare and Institutions Code that the court believes would assist in the education, treatment, and rehabilitation of the minor and the prevention of criminal activity. Welf & I C §794. Although no appellate court has squarely addressed the issue, the juvenile court is probably not permitted to order confinement or remove the minor from the home as a DEJ probation condition. See Welf & I C §§791(a)(4), 793(a); *In re Trevor W*. (2001) 88 CA4th 833, 836, 106 CR2d 169 (probation conditions for nonwards cannot include removal from home); *Martha C.,* 108 CA4th at 561 (DEJ statute enacted to provide first-time nonviolent juvenile felony offenders with noncustodial opportunity to demonstrate through good conduct that their record should be expunged).

Completion of DEJ program; violations. On the successful completion of a probationary period of 12 to 36 months, the positive recommendation of the probation department, and the motion of the prosecuting attorney, the court must dismiss the charges, and the arrest upon which judgment was deferred is deemed never to have occurred. Welf & I C §§791(a)(3), 793(c). If the charges are dismissed, records of the arrest and the court proceedings must be sealed except for the limited purpose of determining whether the minor is eligible for DEJ under Welf & I C §790. Welf & I C §793(c).

The court must lift the deferral and schedule a dispositional hearing on the original petition if during the deferral period the minor (Welf & I C §793(a)):

- Does not perform satisfactorily on probation;
- Is found to have committed a felony; or
- Is found to have committed two misdemeanors on separate occasions.

If the minor is found to have committed a single misdemeanor or more than one misdemeanor on a single occasion, the court may, but is not required to, lift the deferral and schedule a dispositional hearing. Welf & I C §793(a). See Deferred Entry of Judgment Notice of Noncompliance (Judicial Council Form JV-615).

Appellate review. The granting of DEJ is not an appealable order. Thus, a minor granted DEJ who is participating in the DEJ program may not appeal the denial of a suppression motion unless the minor fails DEJ and the court holds a dispositional hearing. *In re Mario C.* (2004) 124 CA4th 1303, 1308, 21 CR3d 891. Denial of DEJ may be challenged by petition for writ of mandate. See *Martha C.,* 108 CA4th at 560.

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§56.18 VI. MINOR'S COUNSEL

Appointment. When a minor appears in court without counsel, the court is required to appoint counsel for the minor "whether he or she is unable to afford counsel or not" unless the minor knowingly and intelligently waives the right to counsel, or the matter is continued for the parents or guardians to retain counsel. Welf & I C §700; Cal Rules of Ct 5.534(h). The parents or guardians of the minor may be required to pay for the minor's attorney if the court finds that they are able to afford counsel at their own expense. Welf & I C §700. See also Welf & I C §903.1. See §56.9 for further discussion of parental liability for attorney fees.

Ethical duties. An attorney's ethical duties toward a minor are substantially the same as an attorney's ethical duties toward an adult. See *In re Julius B.* (1977) 68 CA3d 395, 401, 137 CR 341; Pen C §1240.1; Welf & I C §634; Cal Rules of Ct 5.663. See also Cal Rules of Ct 5.534(h)(2)(C). Like an adult, a minor is entitled to the competent assistance of an attorney who adequately investigates all relevant evidence and who has adequate time and resources to prepare and defend the case. *In re Edward S*. (2009) 173 CA4th 387, 412, 92 CR3d 725. The obligation to provide competent representation to a minor may require a deputy public defender to ask to be relieved as counsel of record, even over the objection of the attorney's supervisor. *In re Edward S., supra*.

One notable difference between juvenile court and adult court is that the juvenile court cannot accept an admission of allegations without the consent of the minor's attorney. Cal Rules of Ct 5.778(d).

Ø **Note:** A minor's attorney may consent to an admission without agreeing that the admission is in the best interests of the client. When the minor wishes to admit an offense against the recommendation of counsel, counsel should exercise caution in refusing to give consent. "An attorney is an agent of his client." *Yanchor v Kagan* (1971) 22 CA3d 544, 549, 99 CR 367. See also *People v McKenzie* (1983) 34 C3d 616, 630, 194 CR 462 (lawyer must seek objectives of client if lawyer can do so ethically). The minor's attorney should fully discuss the matter with the minor and should make notes in the file of his or her advice to the minor.

One potentially difficult ethical area involves private counsel retained by the minor's parents. See Welf & I C §634; Cal Rules of Ct 5.534(h)(2)(C), 5.663, 5.778(d). Parents are accustomed to making the important decisions for their children. Counsel should make clear to the parents and the minor from the beginning that counsel represents only the minor.

Initial interview of client. The parents should not be present when counsel interviews the minor about the details of the case. However, the parents are a valuable source of information about the minor. The attitude of the parents will often play a crucial role in determining whether a detained minor will be released to the parents.

In addition to the information in the interview form in §10.1, counsel should obtain the following information from the minor:

- Contact information for minor and parents or guardian;
- Name and location of school attended, or last school attended;
- Performance in school and special needs, *e.g.,* learning disability or other special education;
- Psychological or substance abuse history;
- Prior contacts with the juvenile justice system;
- The minor's home environment;
- How the minor behaves at home;
- Information on the minor's participation in sports, religious activities, and other extracurricular programs; and
- Names and contact information for potential character references.

Ø **Note:** In an appropriate case, counsel should contact the probation officer before the detention hearing to request an in-custody minor's release. If the request is unsuccessful, at the detention hearing counsel should present information on the minor's positive performance at home, in school, in extracurricular activities, and while on probation if the minor is currently a probationer. If available, supporting documentation such as school reports

and written character references should be provided.

If the minor is not detained or is released by the court, counsel should advise the minor how to act while the jurisdictional or dispositional hearings are pending. It is often beneficial to show that the minor is regularly attending school, participating in sports activities, obeying the minor's parents, working at a part-time job, or participating in mental health or substance abuse treatment.

Depending on the type of case, the minor's counsel may instruct the minor not to discuss the case with anyone but counsel.

Knowledge of related practice areas. Minor's counsel should be knowledgeable about issues regarding mental health, immigration, special education, and dependency. While delinquency counsel need not provide collateral representation (see Cal Rules of Ct 5.663(d)(3)), awareness of the broad needs of the minor is necessary so that counsel can raise these issues with the court when requesting, for example, that services be provided. See, *e.g.,* Welf & I C §741 (juvenile court has authority to appoint clinical experts to assist in determining appropriate treatment for minor and to implement that treatment). Counsel should explore diverting the juvenile client into other systems that may be better equipped to handle the specialized needs of the minor, such as the education, mental health, or dependency systems. Moreover, when those systems fail in their duties, counsel should consider a joinder motion in delinquency court to hold the other system accountable to serve the needs and best interests of the minor. See Welf & I C §727(a).

Continued representation after disposition. Counsel appearing on behalf of a minor continues to represent that minor unless relieved by the court after substitution of counsel or other good cause. Welf & I C §634.6. In delinquency proceedings, a child is entitled to have his or her interests represented by counsel at every stage of the proceedings, including postdispositional hearings. Counsel must continue to represent the child unless relieved by the court on the substitution of other counsel or for cause. Cal Rules of Ct 5.663(c). However, a child's counsel is not required to assume the responsibilities of a probation officer, social worker, parent, or guardian; to provide nonlegal services to the child; or to represent the child in any proceedings outside of the delinquency proceedings. Cal Rules of Ct 5.663(d).

> Ø **Note:** Cal Rules of Ct 5.663 (formerly Rule 1479) became effective in 2004. While many have viewed Rule 5.663 as expanding the obligations of defense counsel in delinquency proceedings, California law has long required that counsel continue to represent a minor client unless relieved by the court on the substitution of other counsel or for cause. Welf & I C §634.6. Nonetheless, the Judicial Council recognized that many counsel would terminate representation after disposition was pronounced. The explicit reference in Rule 5.663(c) to postdispositional hearings marks an effort to inform counsel that they are to continue representation of clients on juvenile probation regardless of the sentence pronounced at disposition. Unless relieved by the court, counsel must maintain representation of clients on all forms of probation, including clients in placement, clients committed to county ranches, and clients committed to the DJJ. While Rule 5.663 has provided some clarity, it has also left many questions unanswered, such as how counsel are to be compensated for postdisposition work, which can be substantial and time-consuming; how trial and appellate counsel should resolve their sometimes overlapping obligations to their mutual client; and whether Rule 5.663 requires trial counsel to appear for DJJ wards at parole hearings and parole revocation proceedings.

Specific postdisposition representation may include motions to reduce felony "wobbler" offenses to misdemeanors (see Pen C §17(b)), to modify probation on the basis of changed circumstances (Welf & I C §778), or to recall a DJJ commitment (see Welf & I C §779). See §56.67 on motions to recall a DJJ commitment.

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VII. ARRAIGNMENT AND DETENTION HEARING

§56.19 A. Arraignment and Setting Petition for Hearing; Entry of Plea

At the first hearing, a minor usually is arraigned. If the minor is detained, this hearing is called a detention hearing. If the minor is not detained, the hearing is simply called an arraignment hearing. If a minor is detained, some courts only address the minor's custodial status at the first appearance, leaving arraignment for the next court hearing. At the beginning of the hearing, the minor must be informed of the charges and the right to counsel, including appointed counsel. Welf & I C §700; Cal Rules of Ct 5.778-5.780. The minor must also be advised of the right against self-incrimination; the right to confront and cross-examine witnesses; the right to subpoena witnesses; and the right to present evidence. Cal Rules of Ct 5.534(j)(1). The minor then either demurs or enters a plea. Unless the minor intelligently waives the right to counsel, counsel must be appointed. The parents' or minor's unwillingness to pay for counsel does not relieve the court of that obligation. The parents will be liable for the cost of counsel if they have the ability to pay. Welf & I C §§633-634; Cal Rules of Ct 5.534(h)(2)(A). See §56.9.

The following pleas are available to minors (Welf & I C §702.3; Cal Rules of Ct 5.778):

- Admit the allegation.
- Deny the allegation.
- Do not contest the allegation.
- Deny the allegation by reason of insanity (see Welf & I C §702.3).
- Deny the allegation and deny the allegation by reason of insanity.

Before accepting an admission or a no contest plea, the court must advise the minor of the maximum custody time and the minor's legal rights. See Cal Rules of Ct 5.778(c); *In re Regina N.* (1981) 117 CA3d 577, 585, 172 CR 810 (signed advisement of rights form inadequate). If a minor is on probation, the court must advise the minor that the admission may be used to revoke the minor's probation and impose a longer sentence at the disposition hearing. *In re Gary O*. (1978) 84 CA3d 38, 41, 148 CR 276. The court may accept an admission only if the minor personally makes the admission and the minor's attorney consents. Cal Rules of Ct 5.778(d). If a minor is under age 14 when an offense is committed, the court must determine whether the minor understood that the conduct was wrong. See Pen C §26; *In re Gladys R.* (1970) 1 C3d 855, 867, 83 CR 671 (contrary finding precludes wardship under Welf & I C §602).

If a minor denies the allegations in the petition, the matter is set for a settlement conference, jurisdiction hearing, or both. The jurisdiction hearing is the equivalent of a trial in criminal court. The jurisdiction hearing must be held within 30 calendar days after the filing of the petition if the minor is out of custody, or within 15 court days after the order of detention if the minor is detained, unless time is waived. Welf & I C §657; Cal Rules of Ct 5.774. A minor is considered detained for the purpose of setting the jurisdiction hearing if the minor has been placed on home supervision. Welf & I C §628.1. Any period of delay caused by a child's unavailability or failure to appear tolls these time requirements. Cal Rules of Ct 5.774(c).

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§56.20 B. When Detention Hearing Is Required; Trier of Fact; Time When Held

A detention hearing is required anytime a minor is taken into custody and not released. Welf & I C §632; Cal Rules of Ct 5.502(11). This is true even if the minor is on probation. Welf & I C §777(d). A detention hearing is required for minors placed on home supervision. If arrested for violating a home supervision agreement, a minor is entitled to another detention hearing. Welf & I C §628.1. If a minor was arrested without a warrant for allegedly committing a misdemeanor not involving violence, a threat of violence, or possession or use of weapons, and if the minor is not on probation or parole, a detention hearing must be held as soon as possible, but no later than 48 hours (excluding noncourt days) *after the minor was taken into custody.* Welf & I C §632(b). In all other cases, Welf & I C §632 requires that a detention hearing be conducted no later than the next court day *following the filing of a petition*. Welf & I C §632(a). If a detention hearing is not held within the time prescribed by §632, the minor must be released from custody. Welf & I C §632(c).

If a minor represents himself or herself to be age 18 or older, release is not mandated until the authorities know the minor's true age. Welf & I C §631.1. Once the minor's true age is known, if a petition is not filed within 48 hours, excluding noncourt days, the minor must be released immediately. Welf & I C §631.1.

Also, if a probable cause determination is not made within 72 hours, the minor must be released. *Alfredo A. v Superior Court* (1994) 6 C4th 1212, 26 CR2d 623.

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§56.21 C. Notice of Detention Hearing

The probation officer or the prosecutor must notify each parent and guardian of the time and place of the detention hearing as soon as a Welf & I C §602 petition is filed; otherwise, a rehearing may be required. Welf & I C §§630(a), 637. See Notice of Hearing—Juvenile Delinquency Proceeding (Judicial Council Form JV-625). See also Cal Rules of Ct 5.481(b) (when American Indian child's tribe must be notified; Notice of Child Custody Proceeding for Indian Child (Judicial Council Form ICWA-030).

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§56.22 D. Conduct of Detention Hearing

At the detention hearing, the minor may be arraigned. See §56.19. The minor must be informed of the reasons for the minor's initial detention and the purpose of the detention hearing and, if the minor appears without counsel, the right to be represented by counsel.

At the detention hearing, defense counsel must be permitted to inspect all police reports, probation reports, and other documents made available to the probation officer. Welf & I C §827; Cal Rules of Ct 5.756(a). If the minor is at risk for foster care placement, the probation officer must submit a comprehensive written report to the court. Welf & I C §635. If the minor is detained, the court must order reunification services. Welf & I C §636(d)(3)(A). All reports on which the court relies must be verified under CCP §2015.5. See *In re Dennis H.* (1971) 19 CA3d 350, 353, 96 CR 791.

After defense counsel has inspected the reports, the court may ask counsel to stipulate to a prima facie showing that the child is a person as described in Welf & I C §601 or §602. In the absence of a stipulation, the prosecutor submits the matter to the court on the basis of the police report and the probation officer's oral or written recommendation. See *In re Larry W.* (1971) 16 CA3d 290, 94 CR 31; Cal Rules of Ct 5.756(c). The minor's attorney has the right to cross-examine the preparers of any reports presented to the court if they are present. See Welf & I C §§630(b), 635; *In re Luis M.* (1986) 180 CA3d 1090, 226 CR 39. The burden of proof for the "prima facie" case is equivalent to "reasonable cause" or "probable cause" as used in preliminary hearings. See *Marcus W. v Superior Court* (2002) 98 CA4th 36, 46, 118 CR2d 919. If the prosecution fails to establish the prima facie case at the hearing, the minor must be released. Cal Rules of Ct 5.680(d). See §56.33 for discussion of the prima facie case.

If the preparers of the reports presented to the court are not present at the detention hearing, the minor has the right to a rehearing (frequently called a "*Dennis H.*" or "contested detention" hearing). See Welf & I C §637; Cal Rules of Ct 5.762(c). At the rehearing, if the minor chooses to exercise his or her right to cross-examine the preparers of the reports, it is the duty of the court to ensure that those preparers are present. *In re Dennis H.* (1971) 19 CA3d 350, 355, 96 CR 791. See also *Edsel P. v Superior Court* (1985) 165 CA3d 763, 779, 211 CR 869. The rehearing must occur within 3 court days or, if the court determines the witnesses will not be available, within 5 court days. The minor must be released if the authors of the reports are unavailable or the prosecution for some other reason does not establish grounds for detention at the rehearing. The percipient witnesses themselves do not need to be present. See Cal Rules of Ct 5.762(c); *People v Superior Court (Ronald H.)* (1990) 219 CA3d 1475, 1477, 269 CR 4.

Defense counsel may present written statements or oral testimony from witnesses concerning the detention issue.

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§56.23 E. Court's Ruling

The court may detain a minor only if it finds that a prima facie showing has been made that the minor is a person as described by Welf & I C §602, and that one or more of the following conditions exist (Welf & I C §635; Cal Rules of Ct 5.758, 5.760):

- The minor has violated a juvenile court order;
- The minor has escaped from a juvenile court commitment;
- The minor is likely to flee the jurisdiction of the court;
- It is a matter of immediate and urgent necessity for the protection of the minor that the minor be detained; or
- It is reasonably necessary for the protection of the person or property of another that the minor be detained.

Ø **Note:** Special rules apply to Indian children, as defined in the Indian Child Welfare Act (25 USC §1901), who are facing removal from the home. See Cal Rules of Ct 5.480-5.487.

The court must assess the minor's mental status and order continued detention pending a mental health evaluation if the court concludes that the minor is a danger to his or her own safety or that of others. See Welf & I C §§6550-6552.

The court may *not* detain a minor when a charge is refiled against the minor after it was previously dismissed. Cal Rules of Ct 5.774(d); *In re Robin M.* (1978) 21 C3d 337, 347, 146 CR 352.

The court may place a minor on home supervision even when it determines that the minor should be detained. For further discussion of home supervision, see §56.13.

Ø **Note:** Detention of an out-of-custody minor at a later pretrial hearing is prohibited unless the minor receives notice that the court is considering detaining the minor, the minor is advised of his or her right to counsel, and there are changed circumstances that justify detention. *In re Ryan B.* (1989) 216 CA3d 1519, 1527, 265 CR 629.

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§56.24 F. Review of Detention Order

If a detention hearing was held but the minor's parent or guardian did not receive notice of the hearing and was not present at the hearing, the parent or guardian may file an affidavit (or declaration) with the juvenile court clerk describing these facts; a rehearing must then be held within 24 hours, excluding noncourt days. Welf & I C §637; Cal Rules of Ct 5.762. See also CCP §2015.5 (declaration under penalty of perjury may substitute for affidavit; see statute for other requirements). The rehearing is conducted in the same way as the original detention hearing. Welf & I C §637.

When a referee not sitting as a judge pro tem makes a detention order, a minor is entitled to a rehearing by a judge if defense counsel requests it within 10 days after being served with the referee's order. Welf & I C §252; Cal Rules of Ct 5.542.

Detention orders are ordinarily not reviewable by appeal (*In re William M.* (1970) 3 C3d 16, 25, 89 CR 33); a minor may seek a writ of habeas corpus to review the order (*In re Robin M.* (1978) 21 C3d 337, 146 CR 352).

Defense counsel may ask either a judge or a referee to modify an earlier detention order. Welf & I C §775; Cal Rules of Ct 5.560(a).

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VIII. OTHER PRELIMINARY PROCEEDINGS

§56.25 A. Joint Assessment Hearing When Child Appears to Fit Dependency and Wardship Criteria

Whenever a child who appears to come within both the dependency and the delinquency jurisdiction of the juvenile court comes to the attention of either the juvenile probation department or the county welfare department, the departments are required to conduct a joint assessment to determine which jurisdictional status will better serve the interests of the child and protect society. Cal Rules of Ct 5.512(a). See Welf & I C §241.1; *In re Marcus G.* (1999) 73 CA4th 1008, 87 CR2d 84; *In re Donald S.* (1988) 206 CA3d 134, 253 CR 274.

The joint assessment must be completed as soon as possible, preferably before any petition concerning the child is filed. Cal Rules of Ct 5.512(a). It should include a complete social history, and the departments' joint recommendation if they agree on the best status for the minor, or separate recommendations if they do not agree. Cal Rules of Ct 5.512(d). The juvenile court considers, but is not bound by, the recommendations. Welf & I C §241.1(a).

The court must promptly determine the appropriate status for the minor. Welf & I C §241.1. The court may but is not required to conduct an evidentiary hearing when there is a dispute over the most appropriate status for the minor. *In re Henry S.* (2006) 140 CA4th 248, 257, 44 CR3d 418. The determination must take place before the jurisdiction hearing. If the minor is detained, the hearing must be held during, or as soon as possible after, the detention hearing, and no later than 15 court days after the detention hearing. If the minor is not detained, it must be held within 30 days after the date of the petition. Cal Rules of Ct 5.512(e).

Ø **Note:** Children generally are precluded from being both wards and dependents of the juvenile court. Welf & I C §241.1(d). However, a county's probation department and child welfare services department, in consultation with the presiding judge of the juvenile court, may jointly develop a written protocol to allow the two departments to designate the child a "dual status" child. This designation allows a child to be simultaneously a dependent child and a ward of the court. See Welf & I C §241.1(e). Dependency jurisdiction is suspended for a dual status child while the child is a ward of the court and may be resumed upon termination of §602 proceedings. See Welf & I C §366.5. In counties that have not adopted a protocol for suspending dependency jurisdiction, minors charged with §602 petitions can be placed only on informal probation or nonwardship probation under Welf & I C §725.

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§56.26 B. Mental Health Issues

Involuntary commitment. Whenever the court believes that a minor subject to a Welf & I C §602 petition is mentally ill, the court may stay proceedings and order the child into a facility authorized to hold people for up to 72 hours under Welf & I C §5150. The facility must submit a written evaluation regarding the minor to the court. Welf & I C §6551; Cal Rules of Ct 5.645(a). Any further involuntary commitment to a mental facility other than as authorized by Welf & I C §5696 must follow the procedures applicable to adults. Consequently, a minor may involuntarily be admitted to a state mental facility only under the same procedures as an adult. See *In re L.L.* (1974) 39 CA3d 205, 216, 114 CR 11. On involuntary commitments under the Lanterman-Petris-Short Act (LPS Act), see chap 48.

Alternatively, the court may involuntarily commit a seriously emotionally disturbed ward of the court to a regional facility if he or she is under the supervision of a probation officer, meets the facility's eligibility standards, and demonstrates specified behavior and symptoms. Welf & I C §5696.

Competence. If the juvenile court has a doubt about the minor's competence to understand the proceedings or cooperate with counsel, the court must hold a hearing to determine the minor's competence. *Timothy J. v Superior Court* (2007) 150 CA4th 847, 58 CR3d 746; Cal Rules of Ct 5.645(d). A mental disorder or developmental disability is not a prerequisite for a finding of incompetence; a minor may be found to be incompetent because of developmental immaturity alone. *Timothy J., supra*. The standard for determining competency is whether the minor has the present ability to factually understand the proceedings and consult with his or her attorney, not whether he or she can become competent in the future with assistance. *In re Ricky S.* (2008) 166 CA4th 232, 236, 82 CR3d 432. If the minor's counsel expresses a doubt as to the minor's competency, the court must appoint an expert to examine the minor. Counsel may raise the issue of competency at any point during the proceedings. *Tyrone B. v Superior Court* (2008) 164 CA4th 227, 231, 78 CR3d 569 (abuse of discretion and violation of right to effective assistance of counsel to refuse to appoint expert before jurisdictional hearing).

If the court determines the minor is not competent, the court may proceed under Pen C §4011.6 or Welf & I C §6550. Welf & I C §705. See also Cal Rules of Ct 5.645(d). If the minor is not competent, the court cannot order continued confinement; the court's only commitment options are commitment under the LPS Act or commitment under Welf & I C §§6550-6551. See *In re Michael E.* (1975) 15 C3d 183, 123 CR 103; *In re Patrick H.* (1997) 54 CA4th 1346, 63 CR2d 455; *In re Mary T.* (1985) 176 CA3d 38, 221 CR 364. The definition of "grave disability" for an LPS Act commitment of a minor differs from the definition for adults. See Welf & I C §5585.25.

> Ø **Note:** While California has comprehensive statutory guidelines to address issues of competence for adult criminal defendants (see Pen C §§1367-1376), there is no corresponding juvenile statute. As a result, navigating this complex area presents difficulties for counsel practicing in juvenile court. For a thorough discussion of California statutory and decisional law on juvenile competence, see Burrell, Kendrick & Blalock, *Incompetent Youth in California Juvenile Justice*, 19 Stan L & Pol'y Rev 198 (2008).

Fitness hearing. Evidence of a psychological disorder, mental retardation, or other mental disability may be used to rebut the presumption of unfitness that arises when a minor age 16 or over is charged with an offense listed in Welf & I C §707(b). The failure to properly consider such evidence to rebut the presumption and lessen the severity of the crime is an abuse of discretion. *Rene C. v Superior Court* (2006) 138 CA4th 1, 41 CR3d 71 (trial court ordered to find mentally retarded minor fit for juvenile court). See Welf & I C §707(c).

Mental health assessment. In counties which have established a mental health program in accordance with Welf & I C §710, the court may refer a minor who appears to the court or counsel to have a serious mental health disorder, to be seriously emotionally disturbed, or to be developmentally disabled for a mental health assessment pursuant to Welf & I C §712. The minor, with the approval of counsel, may decline the referral. Welf & I C §711. If the minor is found to have a qualifying mental health disorder and has been adjudicated a ward of the court, the court must refer the matter to a multidisciplinary team for a review and recommendation before the preparation of the disposition report. The multidisciplinary team prepares a written report and treatment plan for the court, which the court should follow to the

extent feasible when making its dispositional order. Welf & I C §713.

Postadjudication mental health treatment. After the court has sustained a petition, the court may order the county health department to provide mental health services for a minor who is not residing in the home. See Welf & I C §§635.1, 5694.7.

Insanity. The procedure for insanity pleas is governed by Welf & I C §702.3.

Civil commitments. For discussion of mental health commitments of minors who are a danger to others because of a mental disorder, see §56.66.

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IX. NEGOTIATION OF CHARGES AND THREE STRIKES

§56.27 A. Negotiation of Charges

Negotiation of charges in juvenile court may be conducted between defense counsel and the prosecutor or may include the judge, referee, commissioner, or judge pro tem, depending on local practice.

A negotiated settlement between the parties is limited to charges. When the judge accepts an admission, he or she retains complete discretion concerning the disposition, although pretrial conferences may result in a disposition agreement with the court's approval.

Minors are entitled to have the same judge who took the admission determine the disposition. *In re Thomas S.* (1981) 124 CA3d 934, 177 CR 742. See *People v Arbuckle* (1978) 22 C3d 749, 756, 150 CR 778.

Ø **Practice tip:** Minor's counsel should not have a minor enter a plea admitting the allegations in a petition unless counsel has reviewed the case for possible defenses and motions, assessed the need for investigation, discussed the probation officer's possible disposition recommendation with the client, and can concur in the factual basis for the admission.

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§56.28 B. Three Strikes: Use of Juvenile Adjudications in Adult Court

Practitioners must be thoroughly knowledgeable and current on the Three Strikes implications of juvenile adjudications. See chap 37. It is imperative that minor's counsel carefully advise the client of possible strike consequences of a finding on the petition. A conviction of a strike offense *in adult court* will result in the defendant's receiving a strike, regardless of the age of the defendant. *People v Blankenship* (1985) 167 CA3d 840, 852, 213 CR 666 (Pen C §667(a) enhancement); *People v Level* (2002) 97 CA4th 1208, 1209, 119 CR2d 551 (minor concealed age from adult court). A juvenile court adjudication for an offense committed by a minor age 16 or older counts or will count as a strike if the minor was made a ward of the court and either of the following factors applies (*People v Garcia* (1999) 21 C4th 1, 87 CR2d 114; *People v Leng* (1999) 71 CA4th 1, 83 CR2d 433):

- The offense is listed in Welf & I C §707(b) and is either serious (see Pen C §1192.7(c)) or violent (see Pen C §667.5(c)); or
- The offense is not listed in Welf & I C §707(b) but is listed as a violent felony in Pen C §667.5(c) or as a serious felony in Pen C §1192.7(c) *and* the court sustained a Welf & I C §707(b) offense in the same petition.

For a juvenile adjudication to be treated as a strike, there need not have been an express finding that the minor was fit to be dealt with under the juvenile court law. *People v Davis* (1997) 15 C4th 1096, 64 CR2d 879.

Equal protection principles prohibit a juvenile from incurring a strike for an offense that would not be a strike if committed as an adult, *i.e.,* an offense not listed in Pen C §667(c) or §1192.7(c). *People v Leng* (1999) 71 CA4th 1, 83 CR2d 433.

After the Fifth District's opinion in *Leng* the California Supreme Court noted the equal protection issue without deciding it. See *People v Garcia* (1999) 21 C4th 1, 11, 87 CR2d 114.

A true finding merely regarding an offense listed in Pen C §667.5(c) or §1192.7, but not Welf & I C §707(b), residential burglary, for example, does not count as a strike. However, if the court sustained a residential burglary count in a petition in which it also sustained a count alleging a §707(b) offense, then the residential burglary would count as a strike. If the §707(b) offense was also listed in §667.5(c) or §1192.7(c), then the minor would have two strikes.

> Ø **Practice tip:** Competent representation requires that counsel be very familiar with the Three Strikes law and always check to see whether an offense is listed in Welf & I C §707(b) or §1192.7(c). Although statutes and cases often refer to offenses described by either Pen C §667.5(c) (violent felonies) or §1192.7(c) (serious felonies), there are no offenses in Pen C §667.5(c) that do not also appear in §1192.7(c).

Despite the absence of a right to jury trial in juvenile court, the Sixth Amendment does not bar the use of juvenile adjudications as strikes. *People v Nguyen* (2009) 46 C4th 1007, 1014, 95 CR3d 615. Prior juvenile adjudications also may be used as a circumstance in aggravation to impose an upper-term sentence in adult court. *People v Quiles* (2009) 177 CA4th 612, 619, 99 CR3d 378.

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X. TRANSFER TO ADULT COURT

§56.29 A. Direct Filing

Mandatory direct filing. A minor charged with special circumstance murder (see Pen C §190.2) who is alleged to have personally killed the victim must be prosecuted in adult court if he or she was 14 or older at the time of the offense. Welf & I C §602(b)(1). The minor is not eligible for the death penalty. Pen C §190.5(a); *Roper v Simmons* (2005) 543 US 551, 161 L Ed 2d 1, 125 S Ct 1183 (death penalty unconstitutional as applied to individuals who committed offense before age 18). The presumptive penalty is life without parole but the court has discretion to sentence the minor to 25 years to life. Pen C §190.5(b). See *People v Ybarra* (2008) 166 CA4th 1069, 1088, 83 CR3d 340 (citing *People v Guinn* (1994) 28 CA4th 1130, 1145, 33 CR2d 791). A minor charged with certain sex offenses must also be prosecuted in adult court if the minor was 14 or older at the time of the alleged offense and the district attorney alleges one of the circumstances set forth in Pen C §667.61(d) or (e) (One Strike law). Welf & I C §602(b)(2).

Discretionary direct filing. In many cases, the district attorney has discretion to decide whether to file charges in adult court or juvenile court. See Welf & I C §707(d)(1). Once the district attorney files charges in juvenile court, proceedings will remain in juvenile court unless the juvenile court holds a fitness hearing and orders the matter transferred to adult court. Welf & I C §606.

The district attorney has discretion to file criminal charges in adult court in a case involving a minor who was 16 or older at the time of the alleged offense if the offense is listed in Welf & I C §707(b). Welf & I C §707(d)(1).

Under Welf & I C §707(d)(2), the district attorney also has discretion to file criminal charges in adult court in a case involving a minor who was 14 or older at the time of the alleged offense in the following circumstances:

- The alleged offense is one for which an adult could receive a sentence of death or life imprisonment;
- The minor is accused of personally using a firearm within the meaning of Pen C §12022.5 or §12022.53 during the commission of a felony; or
- The offense is listed in Welf & I C §707(b), and one or more of the following are true:
- The minor has previously been found to have committed a §707(b) offense;
- The offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang (see Pen C §186.22);
- The offense was a "hate crime," as described in Pen C §§422.6-422.93; or
- The victim of the offense was age 65 or older or was disabled.

After a preliminary hearing following a direct filing under §707(d), if the minor is not held to answer for any crime for which direct filing under §707(d) is permitted, the prosecutor may seek review of the magistrate's findings in the criminal court by filing an information before the case is transferred to the juvenile court. *Solano v Superior Court* (2009) 169 CA4th 1361, 1368, 87 CR3d 448.

Under Welf & I C §707.01(a)(5), if a minor who was found unfit in a Welf & I C §707 proceeding was convicted of the offense that was the subject of the proceeding, and the minor is charged subsequently with a new criminal offense, the prosecutor may file charges directly in adult court if the minor:

- Is at least 16 at the time of the alleged offense; or
- Is alleged to have committed an offense for which the minor may be presumed, or may be found, unfit for juvenile court treatment. See §56.36 for discussion.

Sentencing for direct-filed minors. In a discretionary direct filing case, if the minor is then convicted in adult court without there having been a prior fitness hearing, the court may in certain circumstances sentence the minor either as an adult or as a juvenile. Pen C §1170.19; *People v Thomas* (2005) 35 C4th 635, 641, 27 CR3d 2 (despite contrary language of Pen C §1170.19, consent of prosecution is not required). However, to be sentenced as a juvenile, the minor must also meet the eligibility requirements of Welf & I C §1732.6. *People v Thomas, supra*. Welfare & Institutions Code §1732.6 restricts an adult court from sentencing minors convicted of certain offenses from being committed to the

DJJ. For example, the criminal court cannot sentence a minor who was age 16 or older when the offense was committed to the DJJ if the conviction is for an offense listed in Welf & I C §707(b). Welf & I C §1732.6(b)(3). In addition, regardless of the minor's age at the time of the offense, Welf & I C §1732.6 precludes a minor convicted in adult court of serious (Pen C §1192.7(c)) or violent (Pen C §667.5(c)) offenses from being sentenced to the DJJ if the sentence, when added to the minor's age, exceeds 25 years. Welf & I C §1732.6(a).

A minor ineligible for the DJJ under Welf & I C §1732.6 who was convicted in adult court must be sentenced as an adult. *People v Thomas* (2005) 35 C4th 635, 642, 27 CR3d 2. This is true even when the minor would have been treated as a juvenile had the prosecutor initially filed the case in juvenile court. The fact that the same minor would have been sentenced as a juvenile had the prosecution *initiated* charges in juvenile court does not violate the separation of powers doctrine. *Manduley v Superior Court* (2002) 27 C4th 537, 117 CR2d 168. However, requiring prosecutorial consent *after* the charges have been filed for a particular type of disposition does violate separation of powers. *People v Thomas* (2005) 35 C4th 635, 642, 27 CR3d 2.

When a minor who has not had a fitness hearing is convicted of a lesser offense than that charged, he or she is eligible for what is in essence a postconviction fitness hearing. If the minor would be presumptively unfit for juvenile court if charged with the offense resulting in conviction, he or she must overcome a presumption that he or she should be sentenced as an adult. Pen C §1170.17(b). If the minor would be presumptively fit for juvenile court but subject to a fitness hearing, the prosecution must overcome a presumption that the minor should be treated as a juvenile for the minor to be sentenced as an adult. Pen C §1170.17(c). If the minor would not be subject to a fitness hearing if charged with the offense of which he or she was convicted, he or she must be transferred back to juvenile court. Pen C §1170.17(d). See also Pen C §1170.19. These "reverse remand" provisions are subject to the limitations on commitments to the DJJ in Welf & I C §1732.6.

A person is not eligible for the death penalty if he or she was under 18 years of age when the offense was committed. Pen C §190.5(a); *Roper v Simmons* (2005) 543 US 551, 161 L Ed 2d 1, 125 S Ct 1183. Minors convicted in adult court of first degree murder with special circumstances who were 16 years of age or older when the offense was committed may be sentenced to life without parole or, in the discretion of the court, to a term of 25 years to life in prison. Pen C §190.5(b). Courts have declined to extend the *Roper* rationale to find lengthy sentences imposed on minors in adult court unconstitutional on grounds of cruel or unusual punishment. See, *e.g., People v Demirdjian* (2006) 144 CA4th 10, 50 CR3d 184 (sentence of 50 years to life for minor convicted of committing two special circumstances murders at 15 years of age was constitutional).

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§56.30 B. Fitness Petition Asks to Transfer Minor to Adult Court

The district attorney may request a fitness hearing seeking to transfer a minor's case to adult court in any of the following circumstances:

- A minor who was 16 or older at the time of the alleged offense is accused of *any offense*. See Welf & I C §707(a)(1). The minor is presumed to be fit for juvenile court and cannot be tried as an adult unless the prosecution proves by a preponderance of the evidence that the minor is unfit under at least one of the five criteria in Welf & I C §707. See also Cal Rules of Ct 5.770. The court retains discretion to find the minor fit for juvenile court even if the minor is found unfit under one or more of the five criteria. See Cal Rules of Ct 5.770(d).
- A minor age 16 or over is accused of any felony and has been previously adjudicated a ward of the court for two or more felonies committed when 14 or over. The minor is presumed to be unfit. See Welf & I C §707(a)(2).
- A minor age 14 or over is accused of a Welf & I C §707(b) offense. The minor is presumed to be unfit. See Welf & I C §707(c).

In cases in which a minor is presumed unfit, the juvenile court must transfer the case to criminal court unless the minor rebuts the presumption of unfitness by a preponderance of the evidence. Cal Rules of Ct 5.772(a). To do so, the minor must establish that he or she would be amenable to treatment as a juvenile under *all five criteria* listed in Welf & I C §707(a), (c). Cal Rules of Ct 5.772(f)(3). The five criteria listed in Welf & I C §707(a), (c) are:

(1) The degree of criminal sophistication exhibited by the minor;

(2) Whether the minor can be rehabilitated before juvenile court jurisdiction expires;

(3) The minor's previous delinquent history;

(4) The success of previous attempts by the juvenile court to rehabilitate the minor; and

(5) The circumstances and gravity of the offenses alleged to have been committed by the minor.

Under any of the grounds for seeking a fitness hearing, a finding of unamenability under any one of the criteria is sufficient to find the minor unfit. See Welf & I C §707(a)(1), (c). See also Cal Rules of Ct 5.770-5.772.

At a fitness hearing, the burden of proof is preponderance of the evidence. The defense bears the burden of proof except when the only ground for the fitness determination is Welf & I C §707(a)(1). Cal Rules of Ct 5.770-5.772.

The following chart summarizes when a minor is presumed either fit or unfit for juvenile proceedings.

Age at time of offense	Current offense	Prima facie required	Prior sustained petitions	Presumption	Authority
16 or over	Any offense	No	Not required	Presumed fit for juvenile proceedings	Welf & I C §707(a)(1)
16 or over	Any felony	Yes	2 felonies after minor turned 14	Presumed unfit	Welf & I C §707(a)(2)
14 or over	Offense listed in Welf & I C §707(b)	Yes	None	Presumed unfit	Welf & I C §707(c)

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§56.31 C. Five Court Days' Notice Required; When Hearing Held

The prosecution must give the minor written notice of the fitness hearing at least 5 court days before the date of the hearing. Cal Rules of Ct 5.766(b). See also Cal Rules of Ct 5.502(20). The fitness hearing must be held, and a court ruling made, before the jurisdiction hearing begins. Cal Rules of Ct 5.766(c). Unless a continuance is granted, the jurisdiction hearing must begin within the time limits of Cal Rules of Ct 5.774. Cal Rules of Ct 5.766(c). The time limits for jurisdiction hearings are listed in §56.2.

The remedy for failure to meet the deadlines for holding the fitness hearing is release of the minor if he or she is being detained; dismissal of the petition is not required. *David B. v Superior Court* (1983) 142 CA3d 623, 191 CR 157.

Ø **Practice tip:** If time has not been waived, the jurisdiction hearing must proceed on time. This would preclude the court from holding a fitness hearing.

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§56.32 D. Probation Officer's Investigation and Report; Later Use of Minor's Statements

After a petition to declare a minor unfit is filed under either Welf & I C §707(a) or (c), the probation officer must investigate and submit a report on the behavioral patterns and social history of the minor, recommending whether the minor is amenable to treatment as a juvenile. Welf & I C §707(a), (c), (e); Cal Rules of Ct 5.768. Without a probation report, the court does not have jurisdiction to hold a fitness hearing. *Raul P. v Superior Court* (1984) 153 CA3d 294, 298, 200 CR 360 (vacating finding of fitness; minor's refusal to waive time did not dispense with jurisdictional requirement).

If the minor talks with the probation officer during the officer's investigation, any statements made to the officer cannot be introduced as substantive evidence of guilt during trial in adult or juvenile court. Those statements are admissible, however, to impeach the minor. *People v Macias* (1997) 16 C4th 739, 66 CR2d 659; *Ramona R. v Superior Court* (1985) 37 C3d 802, 210 CR 204. See also *People v Pokovich* (2006) 39 C4th 1240, 1247, 48 CR3d 158.

Since the court relies heavily on the probation officer's report, attorneys should provide information to the probation officer to influence the probation officer and ensure documents supporting each attorney's position are included in the probation report.

> Ø **Practice tip:** Defense counsel must decide whether the minor should be advised to talk with the probation officer. If it is highly likely that the minor will be found unfit and remanded to the adult court, counsel should usually advise the minor against talking to the probation officer despite the limited privilege that applies to the minor's statements. If there will be a probation interview, the minor's attorney should request on the record to be present.

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§56.33 E. Minor's Right to Prima Facie Ruling at Fitness Hearing When Charged Under Welf & I C §707(a)(2) or (c)

A minor who is charged with offenses that carry a presumption of unfitness has the right to have the judge rule on whether a prima facie showing was made that the offense charged is a felony or an offense listed in Welf & I C §707(b). Cal Rules of Ct 5.772(b); *Edsel P. v Superior Court* (1985) 165 CA3d 763, 211 CR 869. However, if the prosecution begins the fitness hearing without having established a prima facie case, and the minor's attorney does not request evidence of the prima facie case, then the issue is waived. See Cal Rules of Ct 5.772(b); *Edsel P. v Superior Court* (1985) 165 CA3d 763, 784, 211 CR 869. There is no parallel right to a prima facie hearing under Welf & I C §707(a)(1), which does not carry a presumption of unfitness. See Cal Rules of Ct 5.770. The prima facie hearing may be held at the beginning of the fitness hearing, or may occur earlier at a separate hearing. The burden of proof for the "prima facie" case is equivalent to "reasonable cause" or "probable cause" as used in preliminary hearings, defined as "such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." *Marcus W. v Superior Court* (2002) 98 CA4th 36, 41, 118 CR2d 919 (quotations and citations omitted).

At the hearing on the prima facie case, defense counsel has the opportunity to cross-examine all witnesses who prepared reports submitted to the court, but the defense does not have the right to cross-examine percipient witnesses. *People v Superior Court (Ronald H.)* (1990) 219 CA3d 1475, 269 CR 4; *In re Luis M.* (1986) 180 CA3d 1090, 1093, 226 CR 39. See also Cal Rules of Ct 5.772(b).

> Ø **Note:** If a witness knows very little about the case, defense counsel should object to the witness's testimony. See *Marcus W. v Superior Court* (2002) 98 CA4th 36, 45, 118 CR2d 919 ("prima facie case, and the determination of fitness, must be based upon competent and relevant evidence").

A confession used to establish a prima facie case must be voluntary. Thus, if the minor moves to exclude incriminating statements on the ground that they were obtained in violation of the privilege against self-incrimination, the trial court must hold a hearing to rule on voluntariness. *Marcus W. v Superior Court, supra*.

If the court finds a prima facie case, the court then determines the minor's fitness. If the court does not find that a prima facie case has been established, the prosecution must decide whether to proceed under Welf & I C §707(a)(1), which requires the prosecutor to bear the burden of proof, or whether to withdraw the fitness motion. If the court concludes there is a prima facie case, the court may not consider the likelihood that the minor may be innocent in determining whether the minor is fit for juvenile court. See *People v Superior Court (Rodrigo O.)* (1994) 22 CA4th 1297, 1303, 27 CR2d 796.

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§56.34 F. Conduct of Fitness Hearing

Conduct of hearing when prosecutor bears burden of proof. When the minor is presumed fit, the prosecutor is the first to present evidence. To try the minor as an adult, the prosecutor must prove unfitness by a preponderance of the evidence under at least one of the criteria contained in Welf & I C §707(a). Cal Rules of Ct 5.770. See §56.30 for the five criteria. The main evidence submitted in the prosecution case is the probation officer's report. When witnesses testify or have submitted a report, the defense may cross-examine them. At the close of the prosecution's case, the defense may present relevant evidence to the court, such as psychological evaluations, school reports, and other mitigating information. Welf & I C §707. Strict rules of evidence do not apply. *People v Superior Court (Steven S.*) (1981) 119 CA3d 162, 173, 173 CR 788. The prosecution has a parallel right to cross-examine all defense witnesses.

Conduct of hearing when minor bears burden of proof. When the minor is presumed unfit, the minor has the burden of proving amenability regarding each of the five criteria listed in §707(a)(2) and (c) by a preponderance of the evidence. Cal Rules of Ct 5.772(a); *People v Superior Court (Steven S.)* (1981) 119 CA3d 162, 173 CR 788. See §56.30 for the five criteria. The defense is the first to present evidence when the minor bears the burden of proof. The defense may present any relevant evidence pertaining to the criteria of amenability. Welf & I C §707(a)(2), (c). Strict rules of evidence do not apply. *People v Superior Court (Steven S.)* (1981) 119 CA3d 162, 173, 173 CR 788.

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§56.35 G. Court's Required Findings Under Welf & I C §707

If the minor is found unfit under Welf & I C §707(a), the court must state that finding on the record and must specify which of the factors under Welf & I C §707(a)(1) supports its conclusion that the minor is not amenable to juvenile court treatment. Welf & I C §707(a)(1); Cal Rules of Ct 5.770(c). See §56.30 for list of criteria.

If the minor is found fit under Welf & I C §707(a)(2) or (c), the court must make a specific finding of amenability for each of the five criteria of §707(a)(2) or (c). Cal Rules of Ct 5.772; *People v Superior Court (Zaharias M.)* (1993) 21 CA4th 302, 25 CR2d 838; *People v Superior Court (Robert L.)* (1989) 213 CA3d 54, 261 CR 303. See Judicial Council Form JV-710 (Juvenile Fitness Hearing Order). The court must state specific reasons for its finding of amenability regarding each of the five criteria and must clearly articulate its evaluative process in applying the relevant criteria to the particular facts of the minor's case. *People v Superior Court (Robert L.)* (1989) 213 CA3d 54, 63, 261 CR 303.

Ø **Practice tip:** It can be difficult for minor's counsel to prove amenability for juvenile court treatment when the charged crime is serious. Even if the minor is unsophisticated, has a minimal prior record, and demonstrates a strong likelihood he or she can be rehabilitated within the juvenile court system (criteria (1)-(4)), it is often difficult to establish fitness with respect to the fifth criterion, the circumstances and gravity of the offense. However, the court may consider any evidence of the minor's mental state, including expert testimony, that tends to lessen the severity of the crime even if that evidence does not constitute a legal justification or excuse. *Rene C. v Superior Court* (2006) 138 CA4th 1, 11, 41 CR3d 71. When indicated, counsel should explore presenting expert testimony of the minor's psychological state and developmental status to establish fitness regarding criterion (5).

If the minor objects, the judicial officer who heard the fitness hearing may not hear the jurisdiction hearing. See Cal Rules of Ct 5.770(h), 5.772(i).

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§56.36 H. Effect of Prior Finding of Unfitness

If the minor is found unfit for juvenile court, and there are other pending juvenile petitions for which jeopardy has not attached, all the petitions will be transferred to adult court if the other offenses are eligible for fitness hearings. Welf & I C §707.01(a)(3).

New charges for which the prosecutor could seek a fitness hearing may be directly filed in adult court against a minor because of a prior finding of unfitness if the minor was *convicted* in adult court of the offense that resulted in the finding of unfitness. Welf & I C §707.01(a)(5).

Even if the minor was *not* convicted in the adult court of committing the offense that resulted in the finding of unfitness, new charges for which the prosecutor could seek a fitness hearing may be filed directly in adult court if the prior finding of unfitness was based solely on the minor's delinquent history or the failure of previous rehabilitation efforts. See Welf & I C §707.01(a)(6).

If tried as an adult, a minor has a right to a jury trial. See *Rucker v Superior Court* (1977) 75 CA3d 197, 141 CR 900. Once a minor has been found unfit for juvenile court, the minor has a right to bail or "own recognizance" release on the same basis as an adult. Welf & I C §§207.1(c), 707.1(b)(4). The minor may be housed at a jail rather than a juvenile hall if permitted under Welf & I C §207.1.

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§56.37 I. Right of Minor or Adult to Demand Finding of Unfitness

A court has discretion to permit a person who is 18 or older when he or she comes before the court to be tried as an adult. A request by a person 18 or older to be tried as an adult should almost always be granted. *Rucker v Superior Court* (1977) 75 CA3d 197, 141 CR 900. See *Joey W. v Superior Court* (1992) 7 CA4th 1167, 9 CR2d 486 (existing relationship between minor and juvenile court militated against waiver of right to be tried in juvenile court). However, a person under 18 has no right to give up the protection of the juvenile court and be tried as an adult. *In re Anna S.* (1979) 99 CA3d 869, 872, 160 CR 495.

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J. Review of Fitness Order

§56.38 1. Review Requested by Minor's Counsel

There is no right to appeal a determination of whether a minor is fit for juvenile court. The only means of obtaining appellate review of a judge's order that a minor is or is not fit for juvenile court treatment is by extraordinary writ. If the minor is found to be unfit for juvenile court, the minor's writ must be filed no later than 20 days after the minor is asked to enter a plea to the complaint or indictment. See Cal Rules of Ct 5.770(i), 5.772(j). See also *Rene C. v Superior Court* (2006) 138 CA4th 1, 9, 41 CR3d 71. On review of referee orders, see §56.69.

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§56.39 2. Review Requested by Prosecution

The rules for seeking review are generally the same for the prosecution and defense, with the following exception: There is no set deadline for the prosecutor to file a writ petition. However, the attachment of jeopardy at the jurisdiction hearing would preclude later retrial. See *People v Superior Court (Rodrigo O.)* (1994) 22 CA4th 1297, 1302, 27 CR2d 796. On review of referee orders, see §56.69.

After suffering an adverse fitness ruling, the prosecution is entitled to a 2-day continuance of the jurisdiction hearing in order to file a writ petition. Cal Rules of Ct 5.772(h). However, when a continuance to file the writ petition would conflict with the minor's statutory right to a speedy jurisdiction hearing, the statutory right to a speedy jurisdiction hearing presumably takes precedence over the conflicting rule of court.

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XI. PREJURISDICTION HEARING (PRETRIAL) MOTIONS

§56.40 A. Motions by Minor

Most of the motions that are available to adult criminal defendants are also available to minors in juvenile delinquency cases. See *In re Scott K.* (1979) 24 C3d 395, 155 CR 671 (minor's attorney may fashion motions for minor that are equivalent of adult criminal motions). See the checklist of the most common pretrial motions in criminal cases in §18.4. The following are examples of pretrial motions specifically sanctioned for juvenile court:

- Motion to amend pleading (Welf & I C §678; CCP §§469-475, on variance and amendment of pleading in civil actions, apply to Welf & I C §602 petitions);
- Challenge to judge or referee. CCP §§170.1, 170.6; *In re Jose S.* (1978) 78 CA3d 619, 144 CR 309.
- Motion to continue. Welf & I C §682. See *In re Edward S.* (2009) 173 CA4th 387, 411, 92 CR3d 725 (attorney's failure to seek continuance to permit him to fully investigate and competently defend juvenile constituted IAC).
- Demurrer. Pen C §1004(4)-(5); Welf & I C §656(f).
- Discovery motion.
- Once-in-jeopardy motion. *Breed v Jones* (1975) 421 US 519, 44 L Ed 2d 346, 95 S Ct 1779; *Jesse W. v Superior Court* (1979) 26 C3d 41, 160 CR 700.
- *Faretta* motion for self-representation. *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525; *In re Gordon J.* (1980) 108 CA3d 907, 166 CR 809.
- Motion to suppress a statement on Fifth Amendment grounds.

  Ø **Note:** In determining the voluntariness of a minor's waiver of Fifth Amendment rights, the trial court must evaluate "the juvenile's age, experience, education, background, and intelligence, and [inquire] into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v Michael C.* (1979) 442 US 707, 725, 61 L Ed 2d 197, 99 S Ct 2560. See *People v Hector* (2000) 83 CA4th 228, 237, 99 CR2d 469 (minor's request to speak to parents is invocation of minor's Fifth Amendment rights absent contrary evidence).

- Motion for joinder, consolidation, or severance. Welf & I C §675.
- Motion for informal probation. Welf & I C §654.
- Motion to dismiss based on statute of limitations. *In re Gustavo M.* (1989) 214 CA3d 1485, 1493, 263 CR 328.
- Motion to suppress evidence obtained in violation of the Fourth Amendment. Welf & I C §700.1.
- Motion to release detained child from custody based on petitioner's failure to establish prima facie case. Cal Rules of Ct 5.680(d).
- *Pitchess* motion to discover evidence of prior complaints against the police. *Hinojosa v Superior Court* (1976) 55 CA3d 692, 127 CR 664.
- Motion to dismiss because of retaliatory prosecution. *In re David B.* (1977) 68 CA3d 931, 137 CR 577.
- Motion to exclude improper pretrial identification. *In re Carl T.* (1969) 1 CA3d 344, 81 CR 655.

Motions that are unavailable in juvenile court even though used in adult criminal court are:

- Deferred entry of judgment pursuant to Pen C §§1000-1001.90.
- Bail or O.R. release. See §56.14. See also *Aubry v Gadbois* (1975) 50 CA3d 470, 123 CR 365 (bail unavailable for juvenile, except after finding of unfitness).
- *Aranda-Bruton* motion. *In re Jose M.* (1994) 21 CA4th 1470, 27 CR2d 55 (*Aranda-Bruton* rule not applicable in court trial). But see *People v Walkkein* (1993) 14 CA4th 1401, 1408, 18 CR2d 383 (while exclusion of coparticipant's statement in joint court trial is not required, court cannot consider the statement against defendant unless the coparticipant testifies). See §§7.40-7.41.

  Ø **Practice tip:** Defense counsel should determine as soon as possible which pretrial motions are necessary to

effectively prepare the minor's case for trial, because the time is quite short between arraignment and the jurisdiction hearing. When a minor is detained, minor's counsel has only 15 court days from arraignment to the jurisdiction hearing in which to prepare the case. Welf & I C §§636, 657.

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§56.41 B. Prosecution Motions

The most commonly made prosecution motions are for discovery and for certification to adult court under Welf & I C §707.

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§56.42 C. Format, Service, and Filing of Motions

Pretrial motions should follow the format required for pretrial motions in the superior court. See Cal Rules of Ct 1.1-1.150, 2.1-2.1100, and discussion in §§18.5-18.7. They must be served on counsel for all parties and on the minor unless a waiver is obtained. Cal Rules of Ct 5.544.

Motions to suppress evidence obtained in violation of the Fourth Amendment must be served and filed at least 5 court days before the date set for the jurisdiction hearing. Welf & I C §700.1; Cal Rules of Ct 5.544(1). If the minor is detained, all other pretrial motions must be served and filed at least 5 court days before the date set for the jurisdiction hearing. Cal Rules of Ct 5.544(1). If the minor is not detained, all pretrial motions other than search and seizure motions must be filed at least 10 court days before the date set for the jurisdiction hearing. Cal Rules of Ct 5.544(2). Local court rules sometimes provide different time periods for notice of pretrial motions. Local practice in some courts is for judges to allow or encourage defense counsel to set motions for the day of the jurisdiction hearing, to be heard before jeopardy attaches. See *Jesse W. v Superior Court* (1979) 26 C3d 41, 160 CR 700 (jeopardy attaches at jurisdiction hearing when first witness is called). Generally, a motion to suppress evidence may not be made after the attachment of jeopardy. See Welf & I C §700.1.

If counsel cannot meet these filing deadlines, an order shortening time should be obtained. See the sample form in California Criminal Law Forms Manual, chap 18 (2d ed Cal CEB 2005).

The Rules of Court provide that continuances will be granted only on a showing of good cause and only for the time shown to be necessary. Cal Rules of Ct 5.776(a). Stipulations between counsel or parties and convenience of parties are not in and of themselves good cause. Grounds for continuance are enumerated in Cal Rules of Ct 5.776(b)-(d). The court may find good cause even if the reason for granting the continuance is not one of the reasons enumerated in Rule 5.776. *In re Maurice E.* (2005) 132 CA4th 474, 33 CR3d 683. Good cause for a continuance regarding one minor does not establish good cause regarding a co-participant. *A.A. v Superior Court* (2003) 115 CA4th 1, 9 CR3d 1 (Pen C §1050.1 does not apply to juvenile cases).

Written notice and supporting documents must be filed and served at least 2 court days before the hearing, although the court may find good cause for failure to comply with this requirement. Cal Rules of Ct 5.776(a)(1).

For further discussion of pretrial motions and sample forms, see chap 18.

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§56.43 D. Searches and Seizures

Special search and seizure rules apply to minors. See, *e.g.,* Welf & I C §625 (peace officer may arrest minor without warrant for misdemeanor offense not committed in officer's presence); *New Jersey v TLO* (1985) 469 US 325, 339, 83 L Ed 2d 720, 733, 105 S Ct 733 (reasonable suspicion sufficient for school officials to conduct search at school); *In re Randy G*. (2001) 26 C4th 556, 567, 110 CR2d 516 ("detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment"); *In re William V.* (2003) 111 CA4th 1464, 4 CR3d 695 (police officer assigned to school counts as school official for Fourth Amendment purposes). However, for juveniles, as for adults, a probation search is justified only if the law enforcement officer was aware of the search condition at the time of the search. *In re Jaime P.* (2006) 40 C4th 128, 51 CR3d 430. In addition, mere disruptive behavior does not authorize rummaging through a student's belongings. *In re Lisa G.* (2004) 125 CA4th 801, 807, 23 CR3d 163. See generally Sakurai & Van Dyke, Checklists for Searches and Seizures in Public Schools (2007-2008 ed).

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§56.44 E. Discovery

Discovery is governed by Cal Rules of Ct 5.546 rather than Pen C §§1054-1054.10. See also Welf & I C §827; Cal Rules of Ct 5.756(a). While Rule 5.546 does not impose any discovery obligations on the minor, the juvenile court has discretion to order reciprocal discovery. See *Robert S. v Superior Court* (1992) 9 CA4th 1417, 1422, 12 CR2d 489. Absent such an order, the defense has no obligation to provide discovery. See *In re Thomas F.* (2003) 113 CA4th 1249, 7 CR3d 19. The party seeking discovery beyond that provided for by the Rules of Court has the burden of showing that obtaining discovery is reasonably necessary. See *Clinton K. v Superior Court* (1995) 37 CA4th 1244, 1249, 44 CR2d 140. Regardless of any court order, the prosecutor remains subject to the requirements of *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. See *In re Gary G.* (1981) 115 CA3d 629, 171 CR 531. See §11.26 on *Brady* disclosure.

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XII. JURISDICTION HEARING

§56.45 A. Jurisdiction Hearing Is Like Criminal Court Trial

A jurisdiction hearing, or adjudication hearing, is the equivalent of a trial in the adult criminal court, except that there is no right to a jury. *McKeiver v Pennsylvania* (1971) 403 US 528, 545, 29 L Ed 2d 647, 661, 91 S Ct 1976; *In re Daedler* (1924) 194 C 320, 228 P 467. There is no right to jury trial even when the minor is tried after he or she reaches age 18. *In re Rodney F.* (1988) 203 CA3d 177, 249 CR 424. Time limits for jurisdiction hearings are discussed in §56.2.

A jurisdiction hearing is conducted in the same manner as a court trial in the adult criminal court. Cal Rules of Ct 5.780. See chap 28. Generally, the same rules of evidence apply. See §56.49. After the prosecution completes its case, the defense may move to dismiss the petition for insufficiency of the evidence. See Welf & I C §701.1. In ruling on the motion, the court weighs evidence. The court must dismiss counts not proven true beyond a reasonable doubt. See *In re Anthony J.* (2004) 117 CA4th 718, 727, 11 CR3d 865; *In re Andre G.* (1989) 210 CA3d 62, 66, 258 CR 127. This differs from a motion for judgment of acquittal in criminal court under Pen C §1118.1, which is granted only when the prosecution has failed to present substantial evidence of the existence of each element of the crime charged. *People v Coffman* (2004) 34 C4th 1, 90, 17 CR3d 710.

If the motion to dismiss is denied, the defense presents its case. After the defense rests, rebuttal and surrebuttal may take place.

Ø **Practice tip:** The denial of a Welf & I C §701.1 motion signals the court's belief that the prosecution has presented evidence proving the charge(s) beyond a reasonable doubt. For this reason, the defense should strongly consider presenting evidence to challenge the prosecution's case following an unsuccessful §701.1 motion. If counsel knows it will not be presenting evidence on behalf of the minor, a §701.1 motion need not be made; counsel can argue the case in closing.

The denial of a motion to dismiss made at the close of the prosecution's case is reviewable on appeal even if the minor subsequently testifies and thus fills in a deficiency in the prosecution's case. The question for the reviewing court is whether the evidence was sufficient at the time of the motion. *In re Anthony J.* (2004) 117 CA4th 718, 730, 11 CR3d 865.

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§56.46 B. Statutory Time Limits

When a minor is detained, the jurisdiction hearing must be held within 15 court days of the date of the order directing detention. Welf & I C §657(a)(1); Cal Rules of Ct 5.774(b). When the minor is not detained, the hearing must be held within 30 calendar days after the date the 602 petition is filed, unless the minor is unavailable. Welf & I C §657(a); Cal Rules of Ct 5.774(a), (c). In those cases, the hearing is set within 30 calendar days of the minor's first appearance in court on the petition, if not detained, and within 15 court days of the minor's first appearance if detained. Welf & I C §657(a)(2). When the trial begins, the court and prosecution must be prepared to try the case to its conclusion. *In re Chuong D.* (2006) 135 CA4th 1303, 1310, 38 CR3d 351.

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§56.47 C. Continuance; Dismissal; Refiling

If the prosecution does not try the case within the statutory time period, the case must be dismissed unless it is continued for good cause. Cal Rules of Ct 5.774. If the case is continued for good cause to a time outside the statutory limit, a detained minor must be released. *In re Kerry K.* (2006) 139 CA4th 1, 5, 42 CR3d 467. If a detained minor consents to a continuance outside the statutory time period, he or she must be released if the case is not commenced within 7 days of the date set for the hearing. *In re Kerry K., supra;* Welf & I C §682(e).

To continue the hearing beyond the statutory time limit, a written notice must be filed and served on all parties to the proceeding at least 2 court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing good cause for the continuance. Welf & I C §682(a); Cal Rules of Ct 5.776(a). A party may make a motion to continue without complying with this requirement if good cause is shown for the failure to comply. Welf & I C §682(c); Cal Rules of Ct 5.776(a).

A continuance may be granted only on a showing of good cause and only for that period of time shown to be necessary by the moving party at the hearing on the motion. The determination of whether good cause exists is left to the discretion of the trial court and is not limited to the reasons in Cal Rules of Ct 5.776. *In re Maurice E.* (2005) 132 CA4th 474, 33 CR3d 683. Neither stipulation of the parties nor convenience of the parties is sufficient to establish good cause. Welf & I C §682(b). If good cause is shown, the hearing must begin on the date to which it was continued or within 7 days thereafter. Welf & I C §682(e).

Generally, the prosecution may refile a previously dismissed petition. *People v Superior Court (Jorge C.)* (1990) 224 CA3d 1114, 274 CR 439 (minor did not show prejudice; prosecution permitted to refile); *In re Nan P.* (1991) 230 CA3d 751, 281 CR 468 (same rule for misdemeanors). If the prosecution refiles the petition, the minor cannot be detained. Cal Rules of Ct 5.774(d).

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§56.48 D. Midtrial Amendment of Petition

The rules for amending charges midtrial are more strict than in criminal cases. During the trial, the petition may be amended to include lesser included offenses. However, the petition cannot be amended midtrial to add lesser related offenses or other new charges, unless the minor consents. The minor need not show prejudice to prevent the amendment. *In re Robert G.* (1982) 31 C3d 437, 440, 182 CR 644 (amendment after close of evidence); *In re Johnny R.* (1995) 33 CA4th 1579, 40 CR2d 43 (amendment during prosecution's case-in-chief). Lesser included offenses are discussed in §32.8. The courts sometimes permit amendment of factual allegations. See, *e.g., In re Man J.* (1983) 149 CA3d 475, 197 CR 20 (vandalized property belonged to "S. Wagner and others," rather than "S. Wagner"); *In re Michael D.* (2002) 100 CA4th 115, 127, 128, 121 CR2d 909 (different victim).

Ø **Practice tip:** The minor's attorney should object to any midtrial amendments, to protect the record. Compare *In re Stanley B.* (1971) 17 CA3d 530, 95 CR 116, disapproved on other grounds in *In re Robert G.* (1982) 31 C3d 437, 445, 182 CR 644 (issue waived), with *In re Carlo S.* (1979) 94 CA3d 377, 380, 156 CR 442 (issue not waived by lack of objection).

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§56.49 E. Rules of Evidence

The California Evidence Code must be followed in a jurisdiction hearing. Welf & I C §701; Cal Rules of Ct 5.780(b). A petition cannot be sustained unless the allegations are proved beyond a reasonable doubt by legally admissible evidence. Welf & I C §701; *In re Andre G.* (1989) 210 CA3d 62, 66, 258 CR 127. Otherwise, the petition must be dismissed (Welf & I C §§701.1, 702) and double jeopardy bars retrial. See *Jesse W. v Superior Court* (1979) 26 C3d 41, 160 CR 700; *Richard M. v Superior Court* (1971) 4 C3d 370, 93 CR 752.

The judge is prohibited from reading or considering any portion of the probation officer's report related to a contested petition before making a finding on the petition. Cal Rules of Ct 5.780(c). See also *In re Gladys R.* (1970) 1 C3d 855, 861, 83 CR 671.

Although the rules of evidence are generally identical to those in adult criminal trials, there is a major exception: The California Supreme Court has ruled that the Pen C §1111 requirement that a conviction cannot be supported solely by an accomplice's testimony unless it is corroborated does not apply to Welf & I C §602 cases. *In re Mitchell P.* (1978) 22 C3d 946, 151 CR 330. But see *In re E.L.B.* (1985) 172 CA3d 780, 218 CR 429 (criticizing *Mitchell P.*); *In re Christopher B*. (2007) 156 CA4th 1557, 68 CR3d 253 (California Supreme Court should reevaluate *Mitchell P*.). The Sixth Amendment right to confront and cross-examine witnesses applies. However, the rule that a nontestifying codefendant's statement generally cannot be admitted at a joint trial (see *People v Aranda* (1965) 63 C2d 518, 47 CR 353; *Bruton v U.S.* (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620) does not apply to court trials, including juvenile delinquency proceedings. However, the court may only consider the statement against the declarant, not any other defendants in a joint court trial. *People v Walkkein* (1993) 14 CA4th 1401, 18 CR2d 383.

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§56.50 F. Rebuttable Presumption When Minor Under 14

A minor under age 14 is presumed incapable of knowing the wrongfulness of his or her actions and incapable of committing a crime, unless the prosecution rebuts that presumption by clear and convincing evidence. Pen C §26(1); *In re Manuel L.* (1994) 7 C4th 229, 27 CR2d 2. A court looks at the age, experience, knowledge, and conduct of the child to determine whether a minor under age 14 is capable of committing a crime. A person who is incapable of committing a crime may nonetheless be made a ward under Welf & I C §601. *In re Gladys R.* (1970) 1 C3d 855, 83 CR 671.

In some cases, evidence pertaining to the circumstances of the offense charged against the minor will be sufficient to rebut the presumption without other evidence. See *In re Marven C.* (1995) 33 CA4th 482, 486, 39 CR2d 354. The juvenile court may base a finding that a minor understands the wrongfulness of his or her act on an earlier Pen C §26(1) finding concerning similar conduct. *In re Nirran W.* (1989) 207 CA3d 1157, 255 CR 327; *In re Martin L.* (1986) 187 CA3d 534, 539, 232 CR 43.

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§56.51 G. Confessions and Admissions

Motions to exclude confessions and admissions may be made orally at the jurisdiction hearing. See *In re Juma P.* (1988) 204 CA3d 1228, 1235, 251 CR 739. When a minor denies having made a confession, the court may continue the hearing for no more than 7 days for the prosecutor to subpoena witnesses "to prove the allegations of the petition." Welf & I C §701.

If the defense moves to exclude the minor's statement on the ground it is involuntary, the prosecution has the burden to prove the voluntariness of a confession by a preponderance of the evidence; the minor's age, intelligence, education, and ability to comprehend the meaning and effect of the confession are some of the factors the court may consider in analyzing the voluntariness of the statement under the totality of the circumstances. While the legal standards on the voluntariness of a statement are the same for adults and minors, the age of the minor may color all or most aspects of a court's analysis of voluntariness given that threats, promises, and similar misconduct are likely to have a more coercive effect on a child than on an adult. *In re Aven S.* (1991) 1 CA4th 69, 75, 1 CR2d 655. See also *People v Hector* (2000) 83 CA4th 228, 237, 99 CR2d 469 (minor's request to speak to his parents is invocation of minor's Fifth Amendment rights absent contrary evidence).

For further discussion of confessions and admissions, see chap 23.

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§56.52 H. Court's Finding

If the court finds that the allegations in a petition are true, it declares that the minor comes within the provisions of Welf & I C §602.

The juvenile court is required to find the degree (*i.e.,* first or second) of the crime on the record. Pen C §1192; Cal Rules of Ct 5.778(f)(9), 5.795(a). If the crime is a "wobbler" (chargeable as either a felony or a misdemeanor), the court is required to consider which description applies; the court must also expressly state on the record that it has made such a consideration and state whether it is sustaining the offense as a misdemeanor or a felony. Welf & I C §702; Cal Rules of Ct 5.778(f)(9), 5.795(a); *In re Manzy W.* (1997) 14 C4th 1199, 60 CR2d 889. The determination of degree or the determination of the felony or status of a wobbler can be made at either the jurisdiction or disposition hearing. Welf & I C §702; Cal Rules of Ct 5.778(f)(9), 5.780(e)(5). Failure to determine the degree of the offense will result in the judgment's being modified to the less serious crime. *In re Andrew I.* (1991) 230 CA3d 572, 281 CR 570; *In re Jacob M.* (1987) 195 CA3d 58, 240 CR 418. In contrast, failure to determine whether an offense is a misdemeanor or a felony will result in a remand for the trial court to make that finding. *In re Manzy W., supra*.

A minor in the custody of his or her parent or guardian after a petition was sustained pursuant to an admission may not thereafter be ordered detained pending disposition without notice and a hearing, when the minor has an opportunity to contest the reason for detention. *In re Talbott* (1988) 206 CA3d 1290, 1295, 254 CR 421; *In re Macidon* (1966) 240 CA2d 600, 49 CR 861. However, after a contested jurisdictional hearing, the court may have learned new facts that would justify the detention of an out-of-custody minor. *In re Kevin B.* (1981) 122 CA3d 808, 810, 176 CR 237. The factors in Cal Rules of Ct 5.760 should be considered in ruling on the detention issue.

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XIII. DISPOSITION HEARING

§56.53 A. Nature of Disposition Hearing

A disposition hearing is similar to sentencing in the adult court with one major distinction: The juvenile court tries to treat and rehabilitate the minor in addition to protecting the public. See Welf & I C §202. Punishment may be imposed on a minor when it is consistent with the rehabilitative objectives of juvenile court law. See *In re Myresheia W.* (1998) 61 CA4th 734, 740, 72 CR2d 65; *In re Samuel V*. (1990) 225 CA3d 511, 517, 277 CR 14; *In re Michael D.* (1987) 188 CA3d 1392, 234 CR 103. Whenever the court sustains a petition, the court in determining a disposition must consider, among other relevant factors, the age of the minor, the circumstances and gravity of the offense committed by the minor, and the minor's previous delinquent history. Welf & I C §725.5; *In re Jonathan T.* (2008) 166 CA4th 474, 484, 82 CR3d 753. The court may not punish a minor for failing to confess or plead guilty. A court may, however, consider whether the minor committed perjury in determining the appropriate disposition. See *In re Edy D*. (2004) 120 CA4th 1199, 16 CR3d 293; *In re Lawanda L.* (1986) 178 CA3d 423, 223 CR 685.

A minor is entitled to have the same judge who took his or her admission determine the disposition. *In re Thomas S.* (1981) 124 CA3d 934, 177 CR 742. See *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778.

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§56.54 B. Timing of Hearing; Conduct of Hearing

Time when hearing held. After the jurisdiction hearing, if there is no current probation officer's social study report on the minor, the court must continue the case for disposition until it has received and read a current report. See Welf & I C §§280, 702, 706; *In re Devin J.* (1984) 155 CA3d 1096, 202 CR 543. The parties must receive the report at least 48 hours before the hearing. See Cal Rules of Ct 5.785(a)(2). It is reversible error for the court to conduct a disposition hearing on the basis of a prior report or an oral probation report; a new written probation report must be prepared each time a minor is declared a Welf & I C §602 ward. *In re L.S.* (1990) 220 CA3d 1100, 269 CR 700.

If there is a current social study report, a court may proceed to the disposition hearing immediately after making a finding that a minor is a person described by Welf & I C §602. The court may also set a further disposition hearing either to receive and consider a probation officer's report or to receive evidence at the request of the minor's parent or guardian. Welf & I C §702; Cal Rules of Ct 5.778. If the minor is detained, the court may continue the case for up to 10 court days for disposition; if the minor is not detained, the court may continue the case up to 30 days after the date the petition was filed. A court may continue the hearing for an additional 15 days when the minor is not detained, if good cause is shown. Welf & I C §702; Cal Rules of Ct 5.782(a).

Conduct of hearing. At the disposition hearing, the court and counsel are provided with a dispositional report prepared by the probation officer. See Cal Rules of Ct 5.785. The dispositional report is not subject to the hearsay rule. *In re Vincent G.* (2008) 162 CA4th 238, 244, 75 CR3d 526. The report will contain the probation officer's recommended disposition for the minor. Cal Rules of Ct 5.785. The report will also include any victim impact statements that have been submitted to the probation officer. Welf & I C §656.2(a). The minor's statements to the probation officer may be considered for the purpose of sentencing, but not for prosecuting any new offenses. See *Ramona R. v Superior Court* (1985) 37 C3d 802, 210 CR 204. The statements are, however, admissible in subsequent proceedings for impeachment. See *People v Macias* (1997) 16 C4th 739, 66 CR2d 659. If the probation officer has recommended a commitment to the DJJ for an offense requiring registration as a sex offender, the court must consider the results of a standardized risk assessment tool. Welf & I C §706.

The prosecution or defense counsel may present documents, character witnesses, and expert witnesses that support counsel's request for a particular disposition. Counsel for the minor may also present a dispositional alternative to the court. The evidence may consist of documents, testimony, or argument. See Welf & I C §706; Cal Rules of Ct 5.785-5.790; *In re Vincent G., supra*. The minor has a right to testify. *In re Shannon B.* (1994) 22 CA4th 1235, 27 CR2d 800, disapproved on other grounds in *People v Evans* (2008) 44 C4th 590, 597 n5, 80 CR3d 174. The victim of the crime has a right to attend the dispositional hearing, present a written victim impact statement, and speak at the hearing. Welf & I C §656.2.

At disposition, the court may consider evidence that was suppressed under Welf & I C §700.1, even though that evidence could not be considered at the jurisdiction hearing. *In re Michael V.* (1986) 178 CA3d 159, 170, 223 CR 503. The court may also consider all the facts underlying the charges, even though the minor admitted a lesser included offense. *In re Robert H.* (2002) 96 CA4th 1317, 117 CR2d 899. See *In re Gary B.* (1998) 61 CA4th 844, 71 CR2d 824.

The court may wish to order a psychological evaluation of the minor pursuant to Welf & I C §741, particularly if the court is contemplating committing the minor to the DJJ. If the court believes that a minor is in need of medical or psychological care, or has other unmet clinical needs, it can order the probation officer to hire a psychiatrist, psychologist, or other clinical expert to determine and implement appropriate treatment for the minor. Welf & I C §741. If any government agency has a legal duty to provide services to a minor, but has failed to fulfill that duty, the court may join that agency as a party to the juvenile court proceedings. Welf & I C §727(a). In that way, the court may issue orders to the agency. If there is reason to believe the minor has special educational needs, the court may, and in some cases must, order an individualized educational program assessment. See *In re Angela M.* (2003) 111 CA4th 1392, 4 CR3d 809. In addition, the court may be able to refer the minor for a mental health assessment if the county has approved such a program. See Welf & I C §§710-714, discussed in §56.26.

Required determinations. At the disposition hearing, the court determines whether any misdemeanor-felony

("wobbler") offenses charged as felonies will be misdemeanors or felonies unless the court has already done so. See Welf & I C §702; Cal Rules of Ct 5.790(a). If the minor is allowed to remain in his or her parent's custody, the court should not specify a maximum term of confinement. *In re Matthew A.* (2008) 165 CA4th 537, 81 CR3d 119 (striking specification of term of imprisonment to stop courts from engaging in this practice); *In re Ali A.* (2006) 139 CA4th 569, 573, 42 CR3d 846 (since specification of term of imprisonment is of no legal effect, no basis for reversal or remand). If a minor is removed from the physical custody of a parent or guardian, the court must specify the maximum period of confinement. See Welf & I C §§726, 731; Cal Rules of Ct 5.795(b). In determining the maximum period of confinement, the court must decide whether to impose consecutive sentences. Welf & I C §726(c); *In re Alex N.* (2005) 132 CA4th 18, 26, 33 CR3d 172.

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C. Dispositional Choices

§56.55 1. Overview of Alternatives at Disposition

The court has three major choices at disposition:

(1) Dismiss the case (Welf & I C §782; Cal Rules of Ct 5.790(a)(2));

(2) Place the minor on probation under a probation officer's supervision for up to 6 months without declaring the minor a ward of the court (Welf & I C §725(a); Cal Rules of Ct 5.790(a)); or

(3) Declare the minor a ward of the court and order any of the dispositions authorized under Welf & I C §§726-727, 730-731. Welf & I C §725(b); Cal Rules of Ct 5.790.

Ø **Note:** If the probation and child welfare departments have entered into a joint protocol for "dual status" children, the juvenile court has a fourth option. When it appears that a minor could be dealt with as either a dependent under Welf & I C §300 or a delinquent under Welf & I C §601 or §602, the court can simultaneously make the child a dependent child and a ward of the court. See Welf & I C §241.1(e). See also §56.25. If a protocol does not exist, the court may maintain dependency services by imposing nonwardship probation under Welf & I C §725(a). See Welf & I C §300.

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§56.56 2. Dismissal

A court may dismiss a petition at any time before the minor reaches age 21 if the court finds that a dismissal is required to serve the interests of justice and the minor's welfare, or if it finds that the minor is not in need of treatment or rehabilitation. See Welf & I C §782. See also Cal Rules of Ct 5.790(a)(2); Welf & I C §241.1.

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§56.57 3. Probation Without Wardship

Without adjudging the minor a ward of the court, the court may place the minor on probation, under the supervision of the probation officer, for a period not to exceed 6 months. See Welf & I C §725(a). The court may not order confinement as a condition of nonwardship probation. *In re Trevor W*. (2001) 88 CA4th 833, 835, 106 CR2d 169.

Ø **Note:** Granting nonwardship probation under Welf & I C §725(a) permits the county social services department to remain the "lead" agency providing services to a minor who is also a dependent of the court, even when the county has not adopted a "dual status" protocol. See Welf & I C §241.1(d)-(e). See also §56.25. For further discussion of probation, see §56.60.

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4. Wardship

§56.58 a. Dispositional Options When Court Declares Wardship

The dispositional options available to the court when it declares wardship range from placing the minor on probation and allowing the minor to remain in the home to committing the minor to the DJJ. The court may order that wardship continue until further order of the court (*In re Antoine D.* (2006) 137 CA4th 1314, 1322, 40 CR3d 885) or may set a specific period of probation. The court may make any reasonable order for the care, supervision, custody, conduct, maintenance, support, and medical treatment of a child declared a ward. See Welf & I C §727(a); Cal Rules of Ct 5.790(f). However, confinement is mandatory for minors held responsible for the commission of a violent felony with the personal use of a firearm, provided that when the minor has a serious mental disorder, the court may instead place the minor in an alternative treatment program. Welf & I C §602.3.

A county jail sentence is not an authorized disposition in juvenile court, even if the minor is age 18 or older at the time of disposition. *In re Ramon M.* (2009) 178 CA4th 665, 674, 101 CR3d 158.

Ø **Note:** Proposition 36 does not apply to minors; the court retains the discretion to incarcerate a minor for an offense that would qualify for drug treatment and probation under Proposition 36 if committed by an adult. See *In re Jose Z.* (2004) 116 CA4th 953, 10 CR3d 842.

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§56.59 b. Placement of Minor Removed From Physical Custody of Parent or Guardian

Under Welf & I C §726 and Cal Rules of Ct 5.790(d), before ordering the minor removed from his or her parent's or guardian's physical custody, the court must find the following:

- The minor's parent or guardian has failed to provide, or is incapable of providing, proper maintenance, training, and education;
- The minor has been on probation in the physical custody of his or her parent or guardian and has failed to reform; or
- The minor's welfare requires removing the minor from the physical custody of the parent or guardian.

When a minor has been adjudged a ward of the court, the court has the discretion to order the minor to be on probation without supervision of the probation officer; in so ordering, the court may impose any reasonable and appropriate probation conditions. See Welf & I C §727(a). Unsupervised probation is not permitted when the minor has committed an offense described in Welf & I C §707(b) or (d)(2), Pen C §459, or Health & S C §11350(a). Welf & I C §727(a). A minor who has committed certain drug offenses is eligible for probation without supervision of the probation officer only when the court determines that the interests of justice would best be served and states reasons on the record for that determination. Welf & I C §727(a). In all other cases, probation is under the supervision of a probation officer. See Welf & I C §727. Conditions of probation are discussed in §56.60.

The minor may be "physically confined" by placement in a juvenile hall, ranch, camp, forestry camp, secure juvenile home, or DJJ institution. See Welf & I C §§726(c), 730(a), 731. While former minors who have since turned 18 may not be committed to a county jail (*In re Ramon M.* (2009) 178 CA4th 665, 674, 101 CR3d 158), former minors age 19 or older may be committed to juvenile hall and then *transferred* to county jail. Welf & I C §208.5. See *In re Charles G.* (2004) 115 CA4th 608, 618, 9 CR3d 503. But see *In re Kenny A.* (2000) 79 CA4th 1, 93 CR2d 678 (questioning this practice). Former minors who are 21 or over cannot be housed at the juvenile hall. See Welf & I C §§208.5, 737(a). The court may order the care, custody, and control of the minor to be under the supervision of the probation officer, who may place the minor in the approved home of a relative or nonrelative, in a licensed community care facility, or in a foster home. See Welf & I C §727. The court cannot place a minor into foster care as a means of punishment. Welf & I C §202(e).

When a minor is placed in a group or foster home, delinquency proceedings become similar to dependency proceedings. See *In re James R.* (2007) 153 CA4th 413, 431, 62 CR3d 824. With rare exceptions, while a minor is placed outside the home under Welf & I C §727, the probation department must offer reunification services to the family. Welf & I C §727.2. Minors placed outside the home for foster care must be placed in a safe setting that is the least restrictive, is most familial, and best meets the needs of the minor. Placement with relatives is preferred. See Welf & I C §727.1. A juvenile placed out of home has a fundamental constitutional right to visitation with family members. A court cannot delegate all of its authority over visitation to a program; such a delegation would violate the separation of powers doctrine. *In re James R.,* 153 CA4th at 417.

> Ø **Note:** No case directly addresses whether the juvenile court has authority in delinquency cases to direct the probation department to place the child with a particular group home or foster care placement. The court is required to order that the care, custody, and control of the minor be under the supervision of the probation officer who may place the minor. Welf & I C §727(a). In dependency cases, the court of appeal has interpreted nearly identical language as permitting the trial court to direct a particular placement. See *In re Robert A.* (1992) 4 CA4th 174, 189, 5 CR2d 438.

Indian Child Welfare Act. The Indian Child Welfare Act (ICWA) (25 USC §§1901-1963) applies to juvenile delinquency proceedings when an Indian child is placed in foster care or there is a serious risk an Indian child will be placed in foster care. *R.R. v Superior Court* (2009) 180 CA4th 185, 103 CR3d 110; *In re Alejandro A.* (2008) 160 CA4th 1343, 1348, 74 CR3d 44. See Welf & I C §224.3(a); Cal Rules of Ct 5.480-5.487. Otherwise, the ICWA does not apply

to juvenile delinquency proceedings. *In re Alejandro A., supra*. Even when the ICWA does not apply, an Indian child's tribe is entitled to be present at court hearings. Cal Rules of Ct 5.530(b)(7). When the ICWA applies, the tribe is entitled to assume jurisdiction over the case unless there is good cause for the juvenile court to maintain jurisdiction. An Indian child may not be removed from the home and placed in foster care unless "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC §1911(b). The court must place the minor with relatives or the tribe as specified in 25 USC §1915. Information on the ICWA is available on the website of the Native American Rights Fund at http://www.narf.org/icwa.

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§56.60 c. Probation Conditions

Probation is generally under the supervision of the probation officer. See Welf & I C §727(a). However, the court has the discretion to order a ward to be on probation without supervision of the probation officer; in so ordering, the court may impose any reasonable and appropriate probation conditions. See Welf & I C §727(a).

Unsupervised probation is not permitted when the minor has committed an offense described in Welf & I C §707(b) or (d)(2), Pen C §459, or Health & S C §11350(a). Welf & I C §727(a). Unsupervised probation is also not permitted when the minor has committed certain drug offenses, unless the court states reasons on the record why unsupervised probation is in the interests of justice. Welf & I C §727(a).

When the minor is placed on probation and not removed from the home, the court must make each of the following orders unless the court states reasons for not making an order (Welf & I C §§725(a), 729.2):

- Order the minor to attend school without absence.
- Order the minor and the minor's parent or guardian to participate in a counseling education program. See Welf & I C §245.5 (court has jurisdiction to issue orders to minor's parent or guardian).
- Order the minor to obey a curfew.

Probation conditions may be imposed on a minor that would be unconstitutional or impermissible if imposed on an adult. *In re Sheena K.* (2007) 40 C4th 875, 889, 55 CR3d 716 (probation condition that minor not associate with anyone known to be disapproved by her probation officer); *In re Walter P.* (2009) 170 CA4th 95, 87 CR3d 668 (upholding home supervision and work programs imposed on minor for offense punishable only by fine). But see *Alex O. v Superior Court* (2009) 174 CA4th 1176, 95 CR3d 438 (condition prohibiting minor U.S. citizen from reentering U.S. except for specified purposes was unreasonable and unconstitutional); *In re James C.* (2008) 165 CA4th 1198, 1205, 81 CR3d 846 (condition prohibiting minor U.S. citizen from reentering U.S. was unreasonable and overbroad, and therefore unconstitutional). A minor, unlike an adult, has no right to refuse the terms of probation. *In re Tyrell J.* (1994) 8 C4th 68, 83, 32 CR2d 33, overruled on other grounds in *In re Jaime P.* (2006) 40 C4th 128, 51 CR3d 430. However, conditions of probation must be reasonable and must serve justice and the rehabilitation and reformation of the ward. See *In re Antonio C.* (2000) 83 CA4th 1029, 1033, 100 CR2d 218. See also *In re Juan G.* (2003) 112 CA4th 1, 6, 5 CR3d 34 (fundamentally unfair to impose probation condition that minor maintain "B" average when record showed such compliance to be beyond minor's capacity); *In re Daniel R.* (2006) 144 CA4th 1, 6, 50 CR3d 179 (prohibition on traveling to Mexico unreasonably interfered with minor's ability to travel with family); *In re Luis F.* (2009) 177 CA4th 176, 99 CR3d 174 (order that minor take prescribed medication did not violate due process). A probation condition must be sufficiently specific to enable a minor to know what conduct is required. *In re H.C.* (2009) 175 CA4th 1067, 96 CR3d 793.

A minor who does not object to probationary terms risks losing the ability to seek relief from the court of appeal. See *In re Sheena K.* (2007) 40 C4th 875, 889, 55 CR3d 716. A minor's inability to refuse probationary terms does not relieve the minor of the obligation to object. *In re Abdirahman S.* (1997) 58 CA4th 963, 970, 68 CR2d 402. However, failure to object to a probation condition on the ground that it is unconstitutionally vague and overbroad does not waive the issue on appeal. *In re Sheena K., supra; In re H.C.* (2009) 175 CA4th 1067, 1070, 96 CR3d 793.

Only the court may impose probation conditions. The probation officer may recommend new conditions of probation to the court but may not unilaterally impose them. See *In re Pedro Q.* (1989) 209 CA3d 1368, 257 CR 821.

If the offense involved certain drug or alcohol violations, probation must include a condition that the minor participate in and successfully complete a drug or alcohol, or both, education program. See Welf & I C §§725(a), 729.10.

If a minor commits an act of vandalism or graffiti and is placed on probation and not removed from the custody of his or her parents, he or she is subject to mandatory special conditions of probation to wash, paint, repair, or replace the damaged property, pay restitution, or both. Welf & I C §742.16. The conditions in the statute are in addition to any other that the court could properly impose. *In re G.V.* (2008) 167 CA4th 1244, 84 CR3d 809.

In every case, the court must order restitution as appropriate. Welf & I C §730.6(*l*). Restitution may be ordered for

dismissed counts even absent the minor's waiver; this is not the case for adults. *In re T.C.* (2009) 173 CA4th 837, 844, 93 CR3d 447.

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§56.61 d. Restitution to the Victim

The court must order the minor to pay a restitution fine and full restitution to a victim for economic loss, including any attorney fees and costs incurred to collect restitution, unless it finds compelling and extraordinary reasons not to do so. If the amount of loss cannot be ascertained at the time of disposition, the court may direct the probation officer to set the amount of loss. If the minor disputes the amount, counsel should request a hearing. See Welf & I C §730.6(h); *In re Imran Q.* (2008) 158 CA4th 1316, 1320, 71 CR3d 121 (rule on attorney fees applies to juveniles); *In re M.W.* (2008) 169 CA4th 1, 86 CR3d 545 (minor must pay cost of victim's mental health services). See also *In re Karen A.* (2004) 115 CA4th 504, 9 CR3d 369. See Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790). Civil settlements do not release a minor from liability if the court concludes a higher amount is needed to provide full restitution. *In re Tommy A*. (2005) 131 CA4th 1580, 33 CR3d 103.

A parent or guardian with physical custody of the minor will usually be jointly and severally liable with the minor for restitution, subject to statutory limits. See Welf & I C §730.7; CC §§1714.1, 1714.3; *In re Jeffrey M.* (2006) 141 CA4th 1017, 46 CR3d 533. However, a parent or guardian who establishes that he or she does not have the ability to pay or establishes a lack of notice of the potential civil liability before the petition is sustained does not have to pay. Welf & I C §730.7(a). Also, a valid release of liability will prevent the court from ordering restitution from the parent or guardian exceeding the amount specified in the release. *In re Michael S.* (2007) 147 CA4th 1443, 1454, 54 CR3d 920. A parent or guardian may appeal an order that the parent or guardian pay restitution. *In re Jeffrey M.* (2006) 141 CA4th 1017, 1021, 46 CR3d 533.

While Welf & I C §730.6 specifies when restitution *must* be imposed, the court also has discretion to impose restitution as a condition of probation under other circumstances. *In re T.C.* (2009) 173 CA4th 837, 844, 93 CR3d 447.

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§56.62 e. Fines

Like adults, minors are subject to numerous fines and penalties. Pursuant to Welf & I C §731, a minor made a ward may be fined up to $250 if the minor has the ability to pay. Additionally, the court may impose upon a ward having the ability to pay a fine in the amount that could be imposed on an adult convicted of the same offense. Welf & I C §730.5. Under Welf & I C §730.6, when a petition is sustained, the court is required to order the minor to pay a restitution fine unless "there are compelling and extraordinary reasons" for not imposing the fine. The restitution fine is in addition to restitution ordered paid to the victim. See §56.61. In cases in which the minor has been found to have committed a felony or felonies, the court sets the fine at no less than $100 and no more than $1000. Welf & I C §730.6(b). The fine cannot exceed $100 unless the minor has the ability to pay more. *In re Steven F.* (1994) 21 CA4th 1070, 1079, 26 CR2d 604. However, the minimum fine under Welf & I C §730.6(b) may be imposed on a minor who does not have the ability to pay the fine. *In re Enrique Z.* (1994) 30 CA4th 464, 36 CR2d 132. In cases in which the minor has been found to have committed a misdemeanor or misdemeanors, the restitution fine cannot exceed $100. Welf & I C §730.6(b)(2).

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§56.63 f. Determining the Maximum Period of Confinement

When a minor is not removed from the home at disposition, the court is not permitted to state a maximum period of confinement. *In re Matthew A*. (2008) 165 CA4th 537, 541, 81 CR3d 119. When a minor is removed from the home, the court must set a maximum period of confinement. Welf & I C §726(c); Cal Rules of Ct 5.795(b); *In re Julian R.* (2009) 47 C4th 487, 491, 97 CR3d 790 (commitment to DJJ). For minors not committed to the DJJ, the maximum period of confinement is simply the statutory maximum penalty for the offense after the court has determined whether to impose consecutive or concurrent sentences. The court does not have discretion to set the maximum period of confinement for minors not committed to DJJ at less than the maximum possible sentence for an adult, other than by dismissing charges in the petition or sentencing a defendant concurrently on multiple counts. See *In re Geneva C.* (2006) 141 CA4th 754, 46 CR3d 264; *In re Ali A.* (2006) 139 CA4th 569, 42 CR3d 846. In contrast, for minors committed to the DJJ, the court is required to choose whether to impose the upper, middle, or lower term of imprisonment for felony offenses.

"[T]here is no statutory minimum time of physical confinement before a juvenile offender can be released." *In re Christian G*. (2007) 153 CA4th 708, 712, 63 CR3d 215. However, minors committed to the DJJ are subject to specific guidelines regarding their minimum parole eligibility date.

The calculation of maximum terms generally is similar to the calculation for adult felony sentencing. See Welf & I C §726(c). The juvenile court includes applicable enhancements and alternative sentencing schemes even if they explicitly require a "conviction" of the current offense. *In re Jovan B*. (1993) 6 C4th 801, 811, 25 CR2d 428 (Pen C §12022.1); *In re Damien V.* (2008) 163 CA4th 16, 77 CR3d 107 (Pen C §186.22(d)). However, a juvenile court does not count prior juvenile dispositions as prior convictions. *People v Blankenship* (1985) 167 CA3d 840, 852, 213 CR 666; *People v West* (1984) 154 CA3d 100, 201 CR 63. See *People v Weidert* (1985) 39 C3d 836, 848 n10, 218 CR 57. When imposing a misdemeanor sentence consecutive to another sentence (felony or misdemeanor), the juvenile court adds one-third of the maximum sentence for the misdemeanor to the base term. See *In re David H.* (2003) 106 CA4th 1131, 1133, 131 CR2d 330. See also *In re Deborah C.* (1981) 30 C3d 125, 177 CR 852 (two sustained petitions for offenses carrying a maximum of 6 months each resulted in an 8-month maximum period of confinement). The prohibitions on multiple punishments contained in Pen C §654 and *Kellett v Superior Court* (1966) 63 C2d 822, 48 CR 366, apply to juvenile delinquency cases. *In re R.L.* (2009) 170 CA4th 1339, 88 CR3d 854.

The court may aggregate prior offenses in calculating the maximum period of confinement if notice of the intent to do so has been given. *In re Michael B.* (1980) 28 C3d 548, 553, 169 CR 723. A boilerplate statement in the petition regarding the intent to aggregate terms is sufficient. *In re Edwardo L.* (1989) 216 CA3d 470, 479, 265 CR 188. Merely mentioning the period of time authorized by the prior commitment is insufficient. *In re Steven O.* (1991) 229 CA3d 46, 57, 279 CR 868. Failure to provide notice of the intent to aggregate terms may result in a lower maximum period of confinement. *In re Michael B., supra*. But see *In re Steven O., supra* (error harmless). As with adults, consecutive sentences will, in some cases, result in the minor's facing less remaining time because the minor has more time credits.

The Second District, Division 8, held in 2003 that the court may not recompute the maximum confinement time set for a previously sustained petition, at least when that would invalidate the prior court's exercise of discretion. See *In re David H.* (2003) 106 CA4th 1131, 1134, 131 CR2d 330. However, in *In re Geneva C.* (2006) 141 CA4th 754, 46 CR3d 264, the Second District, Division 4, noted that in 2004 (after *Michael B.*) the legislature amended former Welf & I C §731(b) (now §731(c)) to give the juvenile court discretion to consider the facts of the case before specifying the maximum term of confinement. The court concluded that the statute "by logical implication permits the juvenile court to recalculate the maximum term of confinement for detention at CYA if the juvenile had been previously committed to another reformatory institution." 141 CA4th at 757.

For the computation of the maximum period of confinement for wards committed to the DJJ, see §56.65B.

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§56.64 g. Time Credits

A minor is entitled to receive credit toward the maximum period of confinement for time spent in custody before disposition. *In re J.M.* (2009) 170 CA4th 1253, 1256, 89 CR3d 31; *In re Emilio C.* (2004) 116 CA4th 1058, 1067, 11 CR3d 85; *In re Antwon R.* (2001) 87 CA4th 348, 104 CR2d 473. The minor receives custody credits for time spent in a juvenile hall, ranch, camp, forestry camp, or secure juvenile home pursuant to §730, or in any institution operated by the DJJ. Welf & I C §726(c). A minor is not entitled to receive credit for time spent on home supervision or electronic surveillance, or while in any nonsecured setting such as a group or foster home. *In re Lorenzo L*. (2008) 163 CA4th 1076, 1080, 78 CR3d 150; *In re Randy J.* (1994) 22 CA4th 1497, 28 CR2d 152. The minor is not entitled to receive sentence reduction credits for work and good behavior, although the minor does receive credit for the actual number of days spent in custody. See Welf & I C §726. A minor who is also an LPS conservatee confined in a mental health facility receives time credits while his or her delinquency case is proceeding, unless the court's jurisdiction is suspended. *In re Robert B.* (1995) 39 CA4th 1816, 46 CR2d 691.

Ø **Practice tip:** Most ranches and group homes have programs with specific durations that will not be shortened by a minor's predisposition time credits. For example, a minor with a 3-year maximum period of confinement who is committed to a county ranch for a full year generally will serve that year in its entirety, even if he or she already has a year of predisposition time credits. Thus, minors effectively receive predisposition time credits only toward the maximum period of confinement.

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XIV. DIVISION OF JUVENILE JUSTICE

§56.65 A. General Principles of DJJ Commitments

The Division of Juvenile Justice (DJJ) of the California Department of Corrections and Rehabilitation (CDCR) comprises various locked institutions intended for California's most serious juvenile offenders. Confinement in a DJJ facility is the closest juvenile disposition to adult prison. See Welf & I C §731; *In re Ismael A.* (1989) 207 CA3d 911, 915, 255 CR 126.

Ø **Note:** The statutes governing DJJ commitments changed substantially in 2007 as a result of the passage of SB 81 (operative Sept. 1, 2007) and AB 191 (operative Sept. 29, 2007). Amendments limiting the range of offenses for which a juvenile can be committed to the DJJ do not apply to dispositions that occurred before the effective date of SB 81. *In re N.D.* (2008) 167 CA4th 885, 84 CR3d 517. Practitioners must be familiar with the new rules governing DJJ commitments.

The purpose of the DJJ is not to achieve retribution. Rather, the DJJ seeks to achieve "community restoration, victim restoration, and offender training and treatment." Welf & I C §1700. To commit a minor to the DJJ, the court must be fully satisfied that the mental and physical condition and qualifications of the ward are such as to make it probable that the minor will benefit from the reformatory educational discipline or other treatment provided by the DJJ. Welf & I C §734. See *In re John H.* (1978) 21 C3d 18, 22, 145 CR 357. But see *In re Jonathan T.* (2008) 166 CA4th 474, 486, 82 CR3d 753 (no requirement that court specify the precise manner in which minor will benefit from commitment to DJJ). The record must also show that less restrictive alternatives would be ineffective or inappropriate. *In re Teofilio A.* (1989) 210 CA3d 571, 576, 258 CR 540. See also *In re M.S.* (2009) 174 CA4th 1241, 1250, 95 CR3d 273 (commitment to DJJ based on proper factors, including diabetic minor's medical treatment needs); *In re Carl N.* (2008) 160 CA4th 423, 433, 72 CR3d 823. There is, however, no requirement that a less restrictive placement actually be attempted before a DJJ commitment is ordered. *In re Ricky H.* (1981) 30 C3d 176, 183, 178 CR 324.

The DJJ must accept a person committed to it if it believes the person can materially benefit from its reformatory and educational discipline, unless the DJJ lacks adequate facilities, staff, and programs to care for the committed person. Welf & I C §736(a). If the court finds that a minor will not benefit from DJJ treatment, and no suitable alternatives exist, the court should dismiss the case. *In re Aline D.* (1975) 14 C3d 557, 565, 121 CR 816. Minors under age 11 may not be committed to the DJJ. Welf & I C §733.

When the court is considering a DJJ commitment, it may order the minor transported to the DJJ for a 90-day diagnostic study of the minor to help it make that decision. However, the DJJ will only accept the minor if the county has agreed to pay the DJJ for the diagnostic study. See Welf & I C §§704, 1752.1. See Cal Rules of Ct 5.782(c).

Ø **Practice tip:** Because of the severity and length of a DJJ commitment, minor's counsel should vigorously contest a DJJ recommendation by the probation department. Counsel should attempt to develop less restrictive alternatives to the DJJ that might satisfy the court, and should not rely on the probation department to explore and document alternative placements. Counsel should also consider hiring experts to assist in developing an alternative disposition or to testify why the DJJ does not have facilities, staff, or programs to meet the minor's needs. See Welf & I C §736(a). Counsel may wish to submit a comprehensive alternative disposition report and social study for the court's consideration.

A court may not stay a DJJ commitment conditioned on the minor's compliance with the conditions of his or her probation. *In re Ronnie P.* (1992) 10 CA4th 1079, 1090, 12 CR2d 875. However, the imposition of a ranch commitment, previously stayed, has been upheld when the juvenile court lifted the stay only after a particularized determination at the disposition hearing that imposing the suspended commitment was appropriate. See *In re Kazuo G.* (1994) 22 CA4th 1, 5, 27 CR2d 155.

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§56.65A B. Qualifying Offenses

Effective September 1, 2007, a minor may be committed to DJJ only if the most recent offense alleged in a petition that is admitted by the minor or found true by the court is listed in Welf & I C §707(b), or is a sex offense specified in Pen C §290.008(c). Welf & I C §733. A court may no longer commit a minor to the DJJ on less serious offenses. A court's ability to avoid this result by dismissing the most recent sustained petition is sharply limited. See *V.C. v Superior Court* (2009) 173 CA4th 1455, 93 CR3d 851 (dismissal not in the interests of justice). The provisions of SB 81 are not retroactive to juvenile cases when the disposition hearing was held before September 1, 2007. *In re Brandon G.* (2008) 160 CA4th 1076, 1081, 73 CR3d 273; *In re Carl N.* (2008) 160 CA4th 423, 437, 72 CR3d 823. However, nonserious offenders committed to the DJJ before September 1, 2007, may be eligible to have their DJJ commitment recalled by the juvenile court. See §56.67.

Ø **Note:** The literal language of Welf & I C §731(a)(4) requires a sustained Welf & I C §707(b) offense as a predicate for a commitment to the DJJ. On the other hand, Welf & I C §733 acts only as a limitation, precluding certain nonserious offenders from commitment to the DJJ. Arguably, if the minor's current adjudication is for a sex offense listed in Pen C §290.008(c), and that offense is not listed in Welf & I C §707(b), the minor may not be committed to the DJJ. See Welf & I C §731(a)(4).

The juvenile court may commit a ward to DJJ on a probation violation when the most recent, previolation sustained petition qualifies for DJJ commitment. *In re M.B.* (2009) 174 CA4th 1472, 1477, 95 CR3d 359. However, a court may not dismiss a previously sustained petition for a DJJ-*ineligible* offense in order to commit a minor to DJJ on an earlier, DJJ-*eligible* petition. *V.C. v Superior Court* (2009) 173 CA4th 1455, 1469, 93 CR3d 851. But see *In re J.L.* (2008) 168 CA4th 43, 85 CR3d 35 (upholding dismissal of DJJ-ineligible petition before disposition on that petition when purpose of dismissal was to facilitate DJJ commitment on earlier petition).

People under 21 who are convicted in criminal court of an offense committed while they were under age 18 may be committed to the DJJ under limited circumstances. Welf & I C §1731.5. See *People v Thomas* (2005) 35 C4th 635, 27 CR3d 2. Those commitments are discussed in chap 37.

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§56.65B C. Determining Maximum Period of Confinement for DJJ Commitments

When a trial court sentences a minor to the DJJ, the trial court must set a maximum term of confinement "based upon the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court." Welf & I C §731(c). The court considers factors about the offense and the offender's history that would be comparable to those employed for the sentencing of adults. See *In re Sean W.* (2005) 127 CA4th 1177, 1185, 26 CR3d 248. The court also considers the facts in light of the purposes of the juvenile system and is not restricted solely to the criminal aggravating or mitigating circumstance that would apply to adults. *In re Carlos E.* (2005) 127 CA4th 1529, 1542, 26 CR3d 551. A court sentencing a minor for an offense that would require an indeterminate term for an adult may select a shorter term for the minor. *In re R.O.* (2009) 176 CA4th 1493, 98 CR3d 738.

In setting a term less than the maximum, the court may set any appropriate term and is not limited to the triadic sentencing structure applicable in adult court. *In re H.D.* (2009) 174 CA4th 768, 776, 94 CR3d 627; *In re Carlos E.* (2005) 127 CA4th 1529, 1542, 26 CR3d 551. For an offense punishable by an adult indeterminate sentence, the court has discretion to set a term of confinement less than the indeterminate sentence applicable to an adult. *In re R.O.* (2009) 176 CA4th 1493, 1498, 98 CR3d 738. However, the court may not impose a maximum period of confinement less than the *minimum* adult term for an offense punishable by an adult determinate sentence. *In re Joseph M.* (2007) 150 CA4th 889, 896, 58 CR3d 756. The upper term is used to calculate the maximum period of confinement if the minor is committed to the DJJ. Welf & I C §731(c). Notwithstanding *Cunningham v California* (2007) 549 US 270, 166 L Ed 2d 856, 127 S Ct 856, the juvenile court may set the maximum term of confinement at the adult maximum term even though the minor does not have the right to a jury determination of aggravating factors. *In re Christian G.* (2007) 153 CA4th 708, 63 CR3d 215; *In re Alex U.* (2007) 158 CA4th 259, 69 CR3d 695.

The court is not required to orally pronounce the maximum period of confinement or state its reasons. *In re Julian R.* (2009) 47 C4th 487, 499, 97 CR3d 790. Compare Pen C §1170(b)-(c).

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§56.65C D. Release From DJJ

The DJJ sets an initial parole consideration date on the basis of the classification of the offense or offenses specified in the California Code of Regulations. See 15 Cal Code Regs §§4951-4957. This ranges from 1 year or less for misdemeanors and nonserious felony offenses (see 15 Cal Code Regs §§4956-4957) to 7 years for the most serious offenses, including murder (see 15 Cal Code Regs §4951). It is not unusual for DJJ wards to be kept in custody far beyond the initial parole consideration dates because of "time adds" and other factors that result in a denial of parole.

If the period of parole is considered, a DJJ commitment is for a minimum of 2 years. Generally, a minor must be released from the DJJ after turning a specified age or after having been subject to DJJ control for 2 years, whichever is later. The age of release depends on the offense that led to the commitment (Welf & I C §§1769, 1770).

Persons released on parole had been monitored by the DJJ. However, as of September 1, 2007, persons released from the DJJ on parole for offenses not named in Welf & I C §707(b) or Pen C §290.008(c) are supervised by the committing court and its probation department. See Welf & I C §§1766(b), 1767.35.

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§56.66 E. Extended Commitment of Dangerous Minors

The DJJ may request the prosecuting attorney to seek an order extending a DJJ commitment if it determines the person is physically dangerous to the public because of a "mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior." Welf & I C §1800; *In re Howard N*. (2005) 35 C4th 117, 24 CR3d 866. The extended detention scheme satisfies due process and equal protection, and a further finding that the inability to control behavior results in a "serious and well-founded risk of reoffense" is unnecessary to preserve the scheme's constitutionality. *In re Lemanuel C.* (2007) 41 C4th 33, 38, 58 CR3d 597.

Such a request to the prosecutor must be filed with the committing court at least 90 days before the discharge date and must be accompanied by a written statement of facts. Welf & I C §1800. The 90 days' notice is not jurisdictional, although lack of sufficiently timely notice may warrant dismissal. *People v Hernandez* (1983) 148 CA3d 560, 196 CR 31. If the prosecution declines to proceed, it must promptly notify the DJJ. Welf & I C §1800. If the court agrees that probable cause supports the petition, it must order a hearing. The person involved has the right to a hearing, to the assistance of counsel, and to appear and compel the attendance of witnesses and the production of evidence. A probable cause hearing must be held within 10 calendar days after the court's order. Welf & I C §1801(a).

If the court finds no probable cause, it must dismiss the petition and the person must be discharged at the conclusion of his or her commitment. If the court does find probable cause, it must order that a trial be conducted to decide whether the person is physically dangerous to the public because a mental or physical deficiency, disorder, or abnormality causes the person serious difficulty in controlling dangerous behavior. Welf & I C §1801(b). If the cause of the offender's "dangerousness" is not a mental or physical condition, however, or if the offender is not amenable to DJJ treatment, the DJJ's control may not be extended. See Welf & I C §§734, 779, 1800; *In re Francecisco* (1971) 16 CA3d 310, 94 CR 186.

At any trial under Welf & I C §1801, the person is entitled to a jury, unless he or she is advised and waives it. *In re Gary W.* (1971) 5 C3d 296, 96 CR 1. If not waived, the jury must be summoned within 4 to 30 days after the date of the order for a hearing, unless time is waived. Any verdict must be unanimous, and the standard of proof is beyond a reasonable doubt. Welf & I C §1801.5. The subject of the petition is entitled to "all rights guaranteed under the federal and state constitutions in criminal proceedings," Welf & I C §1801.5. See, *e.g., Joshua D. v Superior Court* (2007) 157 CA4th 549, 68 CR3d 715 (right against self-incrimination).

Before the expiration of the 2-year term, the DJJ has the discretion to conditionally release a person subject to an extended commitment. *In re Schmidt* (2006) 143 CA4th 694, 710, 49 CR3d 477.

A continued DJJ detention terminates 2 years after the continued commitment order was made, unless the DJJ files a new application for continued detention. Welf & I C §1802. There is no limit on the number of extensions that can be granted. Welf & I C §1802. The DJJ may order a person over age 21 to be transferred to the state prison system. Welf & I C §1802.

> Ø **Note:** A minor committed to the DJJ by the juvenile court is not subject to an extended commitment under Welf & I C §1780. That section, which requires a conviction, applies to commitments to the DJJ from the adult court. See *In re John R.* (1981) 116 CA3d 940, 946, 172 CR 387.

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§56.67 F. Juvenile Court Oversight of Wards Committed to DJJ

DJJ must share written reviews with court and probation department. The DJJ must prepare various reports about a ward and provide these reports to the court and the probation department of the county of commitment. Welf & I C §1720. Initially, the case of each ward must be reviewed by the DJJ within 45 days of the ward's arrival. Welf & I C §1720(a). Within 60 days of a ward's commitment to the DJJ, the DJJ must set an initial parole consideration date for the ward and notify the probation department and the committing juvenile court of that date. Welf & I C §1731.8. Within 60 days of intake, the DJJ must provide the court and the probation department with a treatment plan for the ward. Welf & I C §1766(c).

Reviews are required throughout a ward's commitment to the DJJ. No less often than annually, the DJJ must review the case of each ward for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. Welf & I C §1720(b).

Ø **Note:** There is no statutory requirement that these reports be provided to the prosecution or minor's counsel. See Welf & I C §1720(f). However, given the requirement that trial counsel continue to represent DJJ wards after disposition is pronounced (Welf & I C §634.6; Cal Rules of Ct 5.663; see §56.18), an attorney is ethically obligated to request copies of these reports from the trial court and carefully review them to ensure that the ward is receiving treatment consistent with Welf & I C §734. See Cal Rules of Prof Cond 3-110. If counsel determines that the ward's needs are not being met, a motion to modify or recall the DJJ commitment, discussed below, may be appropriate.

Court's authority to change, modify, or recall a DJJ commitment. A commitment to the DJJ removes the ward from the direct supervision of the juvenile court. *In re Allen N.* (2000) 84 CA4th 513, 100 CR2d 902. Nonetheless, the juvenile court retains jurisdiction to modify conditions of wardship following a commitment to the DJJ. *In re Robert W.* (1991) 228 CA3d 32, 279 CR 625.

The juvenile court has the authority to change, modify, or set aside an order of commitment after a noticed hearing and on a showing of good cause that the minor is not benefiting from the DJJ commitment. See Welf & I C §§734, 779; *In re John H.* (1978) 21 C3d 18, 145 CR 357. When the court vacates the DJJ commitment, the court does not change the maximum period of court jurisdiction. *In re Antoine D.* (2006) 137 CA4th 1314, 1323, 40 CR3d 885 (trial court would still have jurisdiction until age 25 for minor committed for Welf & I C §707(b) offense). See §56.3.

When an application is made to change, modify, or set aside an order of commitment to the DJJ, 10 days' notice of the hearing on the application must be served by U.S. mail on the director of the DJJ. In changing, modifying, or setting aside the order of commitment, the court must consider the effect upon the discipline and parole system of the DJJ. Welf & I C §779.

Recall of DJJ commitment of nonserious offenders. Wards committed to the DJJ before September 1, 2007, may be eligible to have their sentences recalled if they would currently not be eligible for commitment. On the recommendation of the chief probation officer of the county, the juvenile court may recall the commitment of any ward whose commitment offense was not an offense listed in Welf & I C §707(b) or a sex offense listed in Pen C §290.008(c) and who remains confined in a DJJ institution. On recall of the ward, the court must set and convene a recall disposition hearing for the purpose of ordering an appropriate alternative disposition for the ward. Welf & I C §731.1. Once recalled, wards become a full county responsibility and may not be returned to the DJJ on a violation of probation.

A recalled ward may be confined in juvenile hall or other county juvenile facilities. Beginning September 1, 2007, wards aged 19 and 20 years may be housed in county juvenile facilities such as juvenile halls, camps, and ranches, together with wards aged 18 years and under, so long as the facility has received approval for this purpose by the Corrections Standards Authority. Welf & I C §208.5.

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§56.68 XV. POSTDISPOSITION PROCEEDINGS

This section discusses the various postdisposition proceedings for offenders not committed to the DJJ. Postdisposition proceedings relevant to DJJ commitments are discussed in §§56.65C-56.67.

Review hearing for out-of-home placement. If a child is detained and is awaiting placement, the court must review the case at least every 15 days. Welf & I C §737(b). While a minor is placed in foster care, status review hearings must take place "no less frequently than once every six months." Welf & I C §727.2(c). "Foster care" is defined broadly and includes almost any placement outside the home in an unlocked facility, including placement with relatives, a guardian, or a foster family agency. See Welf & I C §§727.4, 11402. A permanency planning hearing must take place no less frequently than once every 12 months. Welf & I C §727.3(a). The probation officer prepares a written social study report at least 10 days before the hearing. Welf & I C §727.4. Conditions inside the home may ultimately lead to termination of parental rights. See Welf & I C §§727.31, 727.32.

Ø **Note:** While a minor in placement is entitled to be present at 6-month status review hearings (Welf & I C §679; Cal Rules of Ct 5.530(b)(1)), commonly the minor's appearance is waived to avoid disruption of the minor's progress in placement.

Modification of disposition order. A parent "or other person" with an interest in a minor who is a ward of the juvenile court may bring a supplemental petition under Welf & I C §778 to modify or set aside the court's disposition order if the modification would not result in a more restrictive placement. *In re Ronald W.* (1985) 175 CA3d 199, 204, 220 CR 557. The court itself retains authority to change, modify, or set aside its own order committing a minor to the DJJ. Welf & I C §§731.1, 779. See §56.67. See also Petition to Modify Previous Orders—Change of Circumstances (Judicial Council Form JV-740). The court must terminate its jurisdiction after learning that the minor no longer requires the protection of wardship. *In re Francecisco* (1971) 16 CA3d 310, 94 CR 186.

Probation violations. When a minor already on probation commits a criminal offense, the prosecution may pursue a probation violation by filing a petition alleging the new offense and stating an intention to aggregate the period of confinement under Welf & I C §726. See *In re Michael B*. (1980) 28 C3d 548, 554, 169 CR 723. See also §§56.16, 56.68.

Alternatively, either the district attorney or the minor's probation officer may file a notice alleging a violation of the terms of the minor's probation "not amounting to a crime." Welf & I C §777. See Notice of Hearing to Modify, Change, or Set Aside Previous Orders—Violation of Probation (Judicial Council Form JV-735). Any probation violation, even one that *could* be charged as a crime, can form the basis of a §777 notice as long as it is *actually* charged only as a probation violation. *In re Eddie M.* (2003) 31 C4th 480, 3 CR3d 119; *In re Emiliano M.* (2003) 31 C4th 510, 512, 3 CR3d 140.

Charging a violation of probation as contempt will not increase the maximum period of confinement. *In re Francisco S.* (2000) 85 CA4th 946, 102 CR2d 514.

The standard of proof at a probation violation hearing is by a preponderance of the evidence. Welf & I C §777(c). Due process does not require a higher standard of proof. See *In re Eddie M.* (2003) 31 C4th 480, 502, 3 CR3d 119.

The prosecutor or the probation officer may use hearsay to prove the violation "to the same extent such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in [*People v Brown* (1989) 215 CA3d 452, 263 CR 391]." Welf & I C §777(c). See *People v Arreola* (1994) 7 C4th 1144, 31 CR2d 631. The hearsay must, however, be reliable. *In re Kentron D.* (2002) 101 CA4th 1381, 125 CR2d 260 (violation may not be based on hearsay allegations in probation report).

The Welf & I C §777 petition does not have to state explicitly that a more restrictive placement is being sought. *In re Tyrone O.* (1989) 209 CA3d 145, 257 CR 134.

For commitment to DJJ on a probation violation, see §56.65A.

Sealing of records. Five years or more after juvenile court jurisdiction has terminated, or any time after the minor has reached 18 years of age, the minor or the probation department may request that the minor's records be sealed.

See Order to Seal Juvenile Records (Judicial Council Form JV-590). Counsel should contact the court clerk or the probation department to learn if a county prescribes a particular form or charges a fee for sealing the records. The records to be sealed include the records of the probation department, the juvenile court, and law enforcement agencies. Welf & I C §781(a). The court holds a hearing on the motion to seal and must grant the petition if it finds the minor has been rehabilitated and the minor has not been convicted of a felony or a misdemeanor involving moral turpitude since the termination of jurisdiction. Welf & I C §781(a). Once sealed, the records may be disclosed only in a defamation action and to automobile insurance companies in limited situations. Welf & I C §781(b)-(c). See *In re James H*. (2007) 154 CA4th 1078, 1083, 65 CR3d 410 (trial court's broad authority to order the release of juvenile records does not extend to records sealed under Welf & I C §781).

A minor's record may not be sealed if the minor committed an offense listed in Welf & I C §707(b) when 14 years of age or older. Welf & I C §781(a). This prohibition on sealing applies even if the minor was honorably discharged from the DJJ. *In re Chong K.* (2006) 145 CA4th 13, 21, 51 CR3d 350. If any count in a single petition is a §707(b) offense, none of the records on any on the counts in that petition may be sealed. *In re Jeffrey T.* (2006) 140 CA4th 1015, 1020, 44 CR3d 861.

An order sealing the records relieves a minor of the obligation to register as a sex offender. Welf & I C §781(a).

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§56.69 XVI. REVIEW OF ORDERS MADE BY REFEREES AND COMMISSIONERS

Referees, commissioners, and judges pro tem hear juvenile cases in addition to judges. The distinction is important because, in theory, the decisions of a referee are subject to review by a juvenile court judge on the minor's request. See Welf & I C §§248-252. In practice, the parties almost always will have effectively stipulated to the referee or commissioner acting as a judge pro tem, even if the parties did not explicitly so stipulate and had no intention of stipulating. See, *e.g., In re Courtney H.* (1995) 38 CA4th 1221, 1227, 45 CR2d 560 ("merely by intending to have the subordinate judicial officer decide the case, the parties may impliedly confer temporary judge status on the officer even without their knowledge that a stipulation is required"); *In re Lamonica H.* (1990) 220 CA3d 634, 270 CR 60; Contra Costa Ct R 10(C)(5) (party not objecting to court commissioner's hearing case stipulates to commissioner's hearing matter as judge pro tem); *In re Brittany K.* (2002) 96 CA4th 805, 117 CR2d 813. Although Cal Rules of Ct 2.831 does provide that a referee may hear a case only as a temporary judge with a written stipulation, in practice this is widely ignored.

Ø **Practice tip:** An attorney for a party who does not intend to stipulate to a subordinate judicial officer acting as a judge pro tem should place that intention on the record at every hearing before the subordinate judicial officer.

A referee assigned to a juvenile case has "the same powers as a judge of the juvenile court" with one exception: The referee may hear a jurisdiction hearing only if sitting pursuant to stipulation as a judge pro tem. Welf & I C §248. See Cal Rules of Ct 5.536(b). In addition, a referee's order removing a minor from his or her home becomes final only if approved by a juvenile court judge within 2 court days. Welf & I C §249. In contrast, a commissioner sitting as a commissioner may hear juvenile cases only if it is stipulated that he or she will act as a judge pro tem. See *In re Ian J.* (1994) 22 CA4th 833, 836, 27 CR2d 728. A commissioner, however, may be assigned to sit as a referee. See Govt C §71622; Cal Rules of Ct 5.536.

A minor has the right to have a judge review any order made by a referee (Welf & I C §252), unless the parties stipulated to the referee as a judge pro tem. See Cal Const art VI, §§21-22; Welf & I C §250; *In re Edgar M.* (1975) 14 C3d 727, 732, 122 CR 574. The minor requests review by asking for a rehearing. The application for a rehearing must contain a short statement of the reason for the request and may challenge all or part of an order or finding. Welf & I C §252; Cal Rules of Ct 5.542(a). If the prior proceedings before the referee were not recorded by an official reporter, the court must hold a rehearing. Welf & I C §252. Rehearings are de novo. Welf & I C §254. A minor's request for a rehearing cannot be denied unless the judge first reviews the transcript. *In re Winnetka V.* (1980) 28 C3d 587, 592, 169 CR 713.

The prosecutor has no right to request a rehearing. Nonetheless, the prosecutor may properly ask a judge in writing to grant a rehearing on the court's own motion under Welf & I C §253 if the prosecutor complies with certain procedural requirements. The judge is not required to look at the record of the underlying proceedings before ruling on the prosecutor's request. *In re Winnetka V.* (1980) 28 C3d 587, 169 CR 713.

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§56.70 XVII. APPEAL

A juvenile court judgment or order that finds a minor to be a ward under Welf & I C §602, and any subsequent orders, including a change of placement ordered under Welf & I C §777, may be appealed to the court of appeal. Welf & I C §800. The minor may not immediately appeal from the juvenile court's jurisdictional findings; the appeal is taken from the order made at the disposition hearing. *In re James J.* (1986) 187 CA3d 1339, 232 CR 456. Before July 1, 2010, a notice of appeal must be filed within 60 days of the disposition or subsequent hearing or, in matters heard before referees, within 60 days of the date the judgment becomes final. Cal Rules of Ct 8.400(d). Effective July 1, 2010, a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed (Cal Rules of Ct 8.406(a)(1)), provided that in matters heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 60 days after the referee's order becomes final (Cal Rules of Ct 8.406(a)(2)). When an application for rehearing of an order of a referee not acting as a temporary judge is denied, a notice of appeal from the referee's order must be filed within 60 days after that order is served or 30 days after entry of the order denying rehearing, whichever is later. Cal Rules of Ct 8.406(a)(3). See Notice of Appeal—Juvenile (Judicial Council Form JV-800).

A minor unable to afford counsel has a constitutional right to appointed counsel on a first appeal. *In re Kevin S.* (2003) 113 CA4th 97, 119, 6 CR3d 178.

A minor does not have to obtain a certificate of probable cause (see Pen C §1237.5) to appeal the judgment following an admission to the allegations of the petition. *In re Joseph B.* (1983) 34 C3d 952, 196 CR 348. While an admission waives most issues (see *In re John B.* (1989) 215 CA3d 477, 263 CR 607; *Ricki J. v Superior Court* (2005) 128 CA4th 783, 27 CR3d 494), after an admission a minor may still appeal the denial of a motion to suppress evidence. Welf & I C §800(a).

Issues the prosecution may appeal are set out in Welf & I C §800(b). The prosecution may appeal pretrial evidentiary rulings that resulted in dismissal before the attachment of jeopardy. Welf & I C §800(b)(4). See *In re Ricardo C.* (1995) 37 CA4th 431, 436, 43 CR2d 585.

An attorney representing a minor in a delinquency case has a duty to advise the client regarding the merits of an appeal. The attorney must file a notice of appeal if requested by the minor or if doing so is in the minor's best interest and arguably meritorious grounds exist for granting the appeal. Pen C §1240.1. As in adult criminal court, the minor's appellate counsel must file a *Wende* brief if he or she does not find any reasonably arguable grounds for appeal. *In re Kevin S., supra*. See *People v Wende* (1979) 25 C3d 436, 158 CR 839. On *Wende* briefs, see §44.37.

Although parents are not listed in Welf & I C §800, they may appeal to protect their own interests. *In re Jeffrey M.* (2006) 141 CA4th 1017, 1021, 46 CR3d 533.

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ASSET FORFEITURE

ARMANDO G. CUELLAR, JR.

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Source: Criminal Law/California Criminal Law Procedure and Practice/57 ASSET FORFEITURE/§57.1 I. OVERVIEW

§57.1 I. OVERVIEW

Definition of forfeiture. Forfeiture is the taking by the government, without compensating the owner, of property that was illegally used or obtained. Provisions on narcotics asset forfeiture are in Health & S C §§11469-11495. The Health and Safety Code forfeiture statutes apply *only* to controlled substances offenses.

Forfeiture provisions for criminal profiteering (Pen C §§186-186.8) that cover assets acquired through a pattern of criminal profiteering activity or proceeds thereof are similar in many respects to Health & S C §§11469-11495. Penal Code §186.2(a) lists more than 29 specific offenses that can lead to asset forfeiture if found to be part of a "pattern of criminal profiteering activity" as defined in Pen C §186.2(b). This approach is in sharp contrast to federal forfeiture law, which covers more than 50 offense categories. See, *e.g.,* 18 USC §§981, 1961-1968.

Neither federal forfeiture law nor California's criminal profiteering provisions are discussed in detail in this chapter. Note, however, that California forfeiture provisions are modeled on federal law. Consequently, California courts consider federal decisions on asset forfeiture to be persuasive authority. *People v $497,590 U.S. Currency* (1997) 58 CA4th 145, 151, 68 CR2d 185.

Prerequisites for forfeiture. It is a condition precedent to forfeiture of property under Health & S C §11470(e)-(g) that a defendant be convicted in an underlying or related criminal action of an offense specified in Health & S C §11470(f) or (g) that occurred within 5 years before the seizure or the notice of the intent to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture must be tried to the same trier of fact unless all the parties waive the requirement. Health & S C §11488.4(i)(3), (5). Express waiver may be required. See *People v $10,153 U.S. Currency* (2009) 179 CA4th 1520, 1526, 102 CR3d 584 (failure to try forfeiture to same jury that convicted defendant deprived court of jurisdiction to enter order of forfeiture 4 years later). But see *People v Brach* (2002) 95 CA4th 571, 578, 115 CR2d 753 (in forfeiture-like proceeding to recover costs of marijuana eradication under Health & S C §11470.1, jury trial was waived by failure to request).

> Ø **Note:** In light of the apparent conflict regarding whether the requirement that the cases be tried together can be waived, prosecutors should obtain express waivers in those cases in which both parties agree to try the forfeiture separately from the underlying criminal case. Defense counsel will want an express waiver when it is not in the client's best interest to have the same jury that convicted the client decide the issue of forfeiture. Counsel representing a claimant who is not the criminal defendant also will want to try to obtain an express waiver of the requirement that the cases be tried together, because it is unlikely that he or she will be permitted to participate in jury selection in the underlying criminal case and may then find himself or herself trying the forfeiture to a jury that he or she did not pick and that just returned a verdict of guilty.

There are three exceptions to the conviction requirement:

- For the forfeiture of cash or negotiable instruments whose value is at least $25,000. In such cases, the presiding judge must assign the forfeiture action for trial. Health & S C §11488.4(i)(4)-(5).
- When the defendant in the underlying criminal case is also the claimant in the forfeiture action and willfully fails to appear in the criminal case. On application by the prosecution, the court may order judgment of forfeiture against the defendant. The prosecution must provide notice of its application for entry of default to the defense attorney and make a showing of due diligence to locate the defendant. Health & S C §11488.4(k).
- When no one files a claim contesting the forfeiture. See Health & S C §11488.4(i)(1)-(3); *People v Mendocino County Assessor's Parcel No. 056-500-09* (1997) 58 CA4th 120, 68 CR2d 51.

Types of forfeiture proceedings. Forfeiture can occur automatically, with no notice and no proceedings, after notice but without a judicial proceeding, or after notice and hearing, depending on the type of property and its use. Health & S C §§11473, 11488.4(i)-(j). For discussion, see §§57.9-57.10.

Nonjudicial forfeiture proceedings. In nonjudicial forfeiture proceedings, the prosecuting agency must notify all potential claimants of the initiation of forfeiture proceedings. Health & S C §11488.4(c). Persons with legitimate, legally cognizable interests in the property sought to be forfeited may file with the superior court indicated in the forfeiture

notice a *verified* claim stating the nature of their interest in the property. The claim must be filed within 30 calendar days after receipt of the notice, if the person received actual notice, unless the court extends the time for filing for good cause shown. Health & S C §11488.5(a)(1). Persons who did not receive actual notice must file their claims within 30 calendar days after the date of the first publication of notice in the newspaper. Health & S C §11488.5(a)(1). An endorsed copy of the claim must be served on the prosecuting agency within 30 calendar days after filing. Health & S C §11488.5(a)(1).

Ø **Warning:** Failure to file the claim within the prescribed time periods makes it almost impossible to defend against the forfeiture proceeding. See §57.11.

If a timely, verified claim is served on the prosecuting agency, the prosecuting agency must file a petition for forfeiture of property within 30 calendar days after receiving the claim. Health & S C §11488.4(j). This step converts the procedure into a judicial forfeiture.

If no claim is filed within the deadlines discussed above, and proper notice was given, the prosecutor can file a declaration of forfeiture. The property then legally belongs to the government. Health & S C §11488.4(j).

Judicial forfeiture proceedings. Judicial forfeiture proceedings are civil and are begun by filing a petition in the superior court. Health & S C §11488.4(a). The petition must be served on persons designated in the receipt issued for the property seized, on persons with an interest in the property seized (Health & S C §11488.4(c)), and if the case began as a nonjudicial forfeiture, on any claimants who filed claims in response to the forfeiture notice (Health & S C §11488.4). Once a petition for forfeiture of property has been filed and served, a claimant must file a claim within 30 calendar days after personal service or within 30 calendar days after the first publication of notice if no personal service was made. Health & S C §11488.5(a)(1). A claimant who filed a claim in response to notice of nonjudicial forfeiture is not required to file a second claim. Health & S C §11488.4(j).

If at the end of the 30 days no *timely* claims have been filed, the prosecuting agency is entitled to judgment by default after it establishes a prima facie case in support of its petition for forfeiture. Health & S C §11488.5(b)(1).

If a verified claim is timely filed, the forfeiture proceedings may be set for hearing. Health & S C §11488.5(c)(1). A jury trial is required unless it is waived by both parties. Health & S C §11488.5(c)(2). If the court or jury finds that the property is subject to forfeiture, and finds that the person claiming an interest in the property had actual knowledge of the facts that made the property subject to forfeiture, then the court must order that person's interest in the property forfeited (Health & S C §11488.5(d)(2)) and direct that the forfeited property be distributed according to Health & S C §11489. Health & S C §11488.5(f). The burden of proof on the prosecuting agency is *beyond a reasonable doubt* (Health & S C §11488.4(i)), with three exceptions:

- Cases that involve the forfeiture of cash or negotiable instruments worth at least $25,000 may be proved by clear and convincing evidence. Health & S C §11488.4(i)(4).
- In a default case, the prosecuting agency may forfeit by establishing a prima facie case. Health & S C §§11488.4(i)(1)-(2), (k), 11488.5(b)(1), (d)(1)-(2).
- Cases involving the forfeiture of property listed in Health & S C §11470(a)-(d) may be proved by a preponderance of the evidence. *People v Nazem* (1996) 51 CA4th 1225, 1232 n7, 59 CR2d 794.

Research materials. There are no materials written for both prosecution and defense and dedicated to California forfeiture law, but several helpful works on federal practice are available. Smith, Prosecution and Defense of Forfeiture Cases (1985); Bowman & Haines, Federal Forfeiture Guide (2d ed 1998); Kessler, Civil & Criminal Forfeiture: Federal and State Practice (1993).

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§57.2 II. CHART: DEADLINES

Action	Deadline	Authority
Seizing agency refers case in writing to prosecutor for initiation of forfeiture proceedings.	15 calendar days after the seizure.	Health & S C §11488.2.
Initiation of nonjudicial forfeiture proceedings by prosecutor.	None; subject to "due process" considerations for any delay in filing.	See Health & S C §11488.4(j), which gives no deadline for initiating nonjudicial proceedings.
Initiation of judicial forfeiture proceedings by prosecutor.	One year after date of seizure subject to "due process" considerations for any delay in filing.	Health & S C §11488.4(a); *People v Ten $500 Barclays Bank Visa Traveler's Checks* (1993) 16 CA4th 475, 20 CR2d 128.
Person with interest in property subject to forfeiture files claim in opposition to forfeiture.	30 calendar days after receipt of actual notice; 30 calendar days after date of first published notice, if no actual notice was received.	Health & S C §11488.5(a)(1).
Prosecutor files petition for forfeiture in judicial forfeiture proceeding.	30 calendar days after receipt of claim opposing forfeiture, if there was one. NOTE: Failure to file petition within 30 calendar days after receipt of claim is not jurisdictional defect and does not prevent subsequent filing of petition and eventual forfeiture of assets in question.	Health & S C §11488.4(j). See *People v Property Listed in Exhibit One* (1991) 227 CA3d 1, 277 CR 672.

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§57.3 III. CHART: DIFFERENCES BETWEEN 1993 AND 1994 FORFEITURE LAW [Deleted]

IV. NATURE OF FORFEITURE PROCEEDINGS

§57.4 A. Forfeiture Proceedings Are Primarily Civil in Nature

A forfeiture action is categorized as a civil, in rem action in which the property is proceeded against as if it were the defendant, based on the legal fiction that the property is a "guilty" party. See *Calero-Toledo v Pearson Yacht Leasing Co.* (1974) 416 US 663, 40 L Ed 2d 452, 94 S Ct 2080; *People v Superior Court (Rishwain)* (1989) 215 CA3d 1411, 264 CR 28; *People v $6,500 U.S. Currency* (1989) 215 CA3d 1542, 264 CR 294. In practical terms, however, forfeiture actions are a mix of civil and criminal law. For example, the forfeiture of all property except cash or negotiable instruments of at least $25,000 in value requires as a condition precedent to forfeiture that a defendant have been convicted, in an underlying or related criminal action, of an offense specified in Health & S C §11470(f) or (g) that occurred within 5 years before the seizure of the property or the notification of the intention to seek forfeiture. Health & S C §11488.4(i)(3), (5). In addition, in cases in which a conviction is required, the same trier of fact that convicted the defendant must try the forfeiture issue unless all parties waive that requirement. Health & S C §11488.4(i)(3). Express waiver may be required. See §57.1. This is probably true even if the claimant in the action is not the defendant, because the statute requires the conviction of "a defendant," not "the claimant or the defendant." See discussion in §57.27. With the exceptions listed in §57.1, the standard of proof is beyond a reasonable doubt. See Health & S C §11488.4(i). Finally, a prosecutor retains the same absolute immunity from civil liability for initiating a forfeiture action that he or she enjoys in criminal cases. See *Vosburgh v Welch* (9th Cir 1998) 83 AFTR2d 99-524 (unpublished disposition; for limitations on citation, see 9th Cir R 36-3), relying on *Imbler v Pachtman* (1976) 424 US 409, 47 L Ed 2d 128, 96 S Ct 984. See also *Goodson v Griffith* (ND Iowa 1999) 1999 WL 33655738.

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§57.5 B. Government's Interest in Property; Relation-Back Rule

Forfeiture actions, like quiet title actions, determine the government's right to the seized property as against the whole world. *U.S. v Gilbert* (11th Cir 2001) 244 F3d 888, 920; *Lee v Silva* (1925) 197 C 364, 240 P 1015.

If the government proves a violation of Health & S C §11351, §11351.5, §11352, §11355, §11359, §11360, §11366.8 (felony violation), §11378, §11378.5, §11379, §11379.5, §11379.6, §11382, or §11383, or conspiracy with respect to one of those offenses, title to the property sought to be forfeited ordinarily vests in the state from the time of the commission of the act giving rise to the forfeiture. Health & S C §11470(h); *People v Fifteen Thousand Two Hundred Seventeen Dollars* (1990) 218 CA3d 720, 723, 268 CR 450. This is called the "relation-back" rule, and it means that the drug trafficker never owned the profits of that corrupt enterprise in the first place. See *U.S. v Monsanto* (1989) 491 US 600, 105 L Ed 2d 512, 109 S Ct 2657.

There are exceptions to this rule. It obviously does not apply if the property is found not to be forfeitable. Nor does it apply to defeat a claim made under Health & S C §11488.5, §11488.6, or §11489 by a third party claimant with an existing ownership interest in the property. Health & S C §11470(h). But see *U.S. v Chavez* (9th Cir 2003) 323 F3d 1216 (conditional gift that granted property to third-party claimant in case of "impediment" did not create sufficient interest to defeat forfeiture). On defenses to forfeiture, see §§57.31-57.32.

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§57.6 C. Federal Forfeiture Laws

The federal system provides for both "criminal" and "civil" forfeiture in controlled substance cases. See 18 USC §§982, 1963; 21 USC §853. Criminal forfeiture of assets requires alleging the extent of interest or property subject to the forfeiture in the criminal pleading (information or indictment). Fed R Crim P 7(c)(2). The criminal forfeiture allegations are tried to the jury during the criminal case or before the same jury in a bifurcated proceeding. There is a rebuttable presumption that the property is subject to forfeiture if the defendant is convicted and the government establishes, by a preponderance of the evidence, that the property was acquired during the period the criminal activity was going on, or during a reasonable period thereafter, or that there was no likely source for the property other than as a result of drug transactions. 21 USC §853(d). In criminal forfeiture proceedings only, if assets declared forfeited (*e.g.,* proceeds of drug sales, property purchased with drug money (securities, etc.), real property, or a business that facilitated the offenses) cannot be located for specified reasons, a court may take over the defendant's nonforfeitable assets to "substitute" for the forfeited assets. 21 USC §853(p). Prosecutors have a choice of whether to use criminal or civil forfeiture proceedings, and they exercise that choice under guidelines issued by the Department of Justice. Civil forfeiture poses fewer hurdles for the prosecution, both in burden of proof and in procedural aspects.

The California forfeiture provisions are modeled after the federal forfeiture provisions (21 USC §881) and are primarily based on three theories of forfeiture: the "proceeds traceable to an exchange" theory, the "furnished in exchange for" theory, and the "facilitation" theory. The proceeds theory provides that money, negotiable instruments, securities, or other things of value that are proceeds traceable to an exchange for a controlled substance are subject to forfeiture. The exchange theory provides that money, negotiable instruments, securities, or other things of value furnished or intended to be furnished by a person in exchange for a controlled substance are subject to forfeiture. The facilitation theory provides that money, negotiable instruments, or securities used or intended to be used to facilitate specified violations of the Health and Safety Code are subject to forfeiture.

California courts consider federal decisions on asset forfeiture to be persuasive authority. *People v $497,590 U.S. Currency* (1997) 58 CA4th 145, 151, 68 CR2d 185.

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§57.7 V. PROPERTY SUBJECT TO FORFEITURE

The following types of property are subject to forfeiture:

Controlled substances. All controlled substances that were manufactured, distributed, dispensed, or acquired in violation of Division 10 of the Health and Safety Code. Health & S C §11470(a).

Raw materials and equipment. All raw materials, products, and equipment that were used or intended to be used in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of Division 10 of the Health and Safety Code. Health & S C §11470(b).

Containers. Property (except real property, boats, airplanes, and vehicles) used or intended to be used as a container for controlled substances, raw material, or equipment. Health & S C §11470(c).

Records and research products. All books, records, research products, and materials used or intended to be used in violation of Division 10 of the Health and Safety Code. Health & S C §11470(d).

Vehicles. The interest of any registered owner of a boat, airplane, or other vehicle that has been used as an instrument to facilitate the manufacture of, possession for sale, or sale of specified drugs, in specified amounts. See Health & S C §11470(e). An exception is made for an "implement of husbandry" as defined in Veh C §36000. Health & S C §11470(e).

Ø **Note:** An exemption applies to anyone other than the defendant who has a community property interest in a vehicle that requires a class C, M1, or M2 driver's license (see Veh C §12804.9) when the vehicle is the only class C, M1, or M2 vehicle available to the defendant's immediate family. Health & S C §11470(e).

Money, negotiable instruments, securities, or other things of value. Money, negotiable instruments, securities, and "other things of value" that are furnished or intended to be furnished in exchange for a controlled substance, traceable to an exchange for a controlled substance (see *Baca v Minier* (1991) 229 CA3d 1253, 280 CR 810 (property not specifically listed as forfeitable in §11470 may still be forfeited if it is proceeds traceable to exchange)) or used or intended to be used to facilitate certain violations of specified sections of the Health and Safety Code. Health & S C §11470(f).

Ø **Note:** Property used to facilitate the violation of Health & S C §11351, §11351.5, §11352, §11355, §11359, §11360, §11366.8 (felony violation), §11378, §11378.5, §11379, §11379.5, §11379.6, §11380, §11382, or §11383, or Pen C §182, is subject to forfeiture if the offense involved manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses and the conduct that was the basis for the forfeiture occurred within 5 years before the seizure of the property, the filing of the petition, or the issuance of an order of forfeiture, whichever comes first. Health & S C §11470(f).

Real property. The real property of any property owner who is convicted of violating Health & S C §11366, §11366.5, or §11366.6 with respect to that property, with the exception noted below. Health & S C §11470(g).

Ø **Note:** There is an exemption for property used as a family residence or for other lawful purposes, or owned by two or more persons, one of whom had no knowledge of its unlawful use. Health & S C §11470(g).

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§57.8 VI. JURISDICTION; VENUE

Jurisdiction. Jurisdiction is contingent on either *actual* or *constructive* possession of the res. Health & S C §11488.4(a)-(b); *People v $6,500 U.S. Currency* (1989) 215 CA3d 1542, 264 CR 294; *People v Superior Court (Rishwain)* (1989) 215 CA3d 1411, 264 CR 28. The prosecuting agency may elect to obtain a restraining order with respect to the property sought to be forfeited rather than seizing it, which gives the court jurisdiction through constructive possession. Health & S C §11488.4(b); *People v $6,500 U.S. Currency, supra*.

If the res is removed from the court's jurisdiction because of fraud, mistake, or accident, jurisdiction is retained. *Republic Nat'l Bank v U.S.* (1992) 506 US 80, 88, 121 L Ed 2d 474, 484, 113 S Ct 554; *U.S. v Tit's Cocktail Lounge* (7th Cir 1989) 873 F2d 141; *Nasir v Sacramento County Office of Dist. Attorney* (1992) 11 CA4th 976, 15 CR2d 694; *Baca v Minier* (1991) 229 CA3d 1253, 280 CR 810.

Venue. Real property forfeitures must be filed in the county in which the real property is located. The prosecutor must have a lis pendens recorded on the property. Health & S C §11488.4(a).

A petition for forfeiture of other than real property must be filed in the superior court of the county in which the underlying criminal offense is filed, or in which the property subject to forfeiture has been seized, or if no seizure has occurred, in the county in which the property subject to forfeiture is located. Health & S C §11488.4(a).

Venue may be established by stipulation of the parties or waived if not objected to. *People v Remington* (1990) 217 CA3d 423, 266 CR 183.

When an investigation results in multicounty seizures, jurisdictional problems can be resolved in one of two ways:

- The property can be relocated to the seizing agency's county, and the petition for forfeiture of all the property filed in the county where the underlying criminal action is filed; or
- A petition can be filed in each county in which a seizure occurred, and thereafter the actions can be consolidated under CCP §404.

Federal seizure. If a state action is pending, a federal court will not entertain an action concerning the subject matter of the state action regardless of who has custody of the property. This is because the nature of these actions is in rem; two courts cannot have jurisdiction over the res at the same time. *U.S. v One 1985 Cadillac Seville* (9th Cir 1989) 866 F2d 1142. Under the rule of "prior exclusive jurisdiction," the first court to assume jurisdiction may enjoin proceedings in the second. *U.S. v One 1985 Cadillac Seville, supra; U.S. v $79,123.49* (7th Cir 1987) 830 F2d 94, 96.

Under California law, property seized pursuant to a search warrant is subject to state court jurisdiction even when no state forfeiture action is filed. See Pen C §1536. Consequently, even when the state has not initiated forfeiture proceedings, property seized in California under state law and pursuant to a search warrant may not be released to federal authorities for federal forfeiture proceedings without a state court "turnover" order relinquishing jurisdiction over the property. *In re Seizure of Approximately 28 Grams of Marijuana* (ND Cal 2003) 278 F Supp 2d 1097, 1105. The state court retains jurisdiction to issue a turnover order even after the limitations period for initiating a forfeiture proceeding has expired; in addition, no notice to potentially interested parties is required in issuing the turnover order. *People v $25,000* (2005) 131 CA4th 127, 134, 31 CR3d 637.

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VII. TYPES OF FORFEITURE PROCEEDINGS

§57.9 A. Three Types of Forfeiture Proceedings

The type of property or its use can affect whether and how forfeiture will occur:

- Controlled substances listed in Schedule I used in violation of Division 10 may be seized and summarily forfeited without any proceedings at all. Health & S C §11475. The same is true of plants from which Schedule I and II controlled substances may be derived. Health & S C §11476. See Health & S C §§11477, 11479-11479.5 on summary forfeiture and destruction. See also *City of Garden Grove v Superior Court* (2007) 157 CA4th 355, 389, 68 CR3d 656 (defendant legally entitled to possess marijuana was entitled to its return); *Chavez v Superior Court* (2004) 123 CA4th 104, 111, 20 CR3d 21 (request for return of marijuana under Compassionate Use Act denied because defendant was not qualified user and destruction was required under Health & S C §11473.5).
- Real property, and personal property worth more than $25,000, that are subject to forfeiture under Health & S C §11470, require judicial forfeiture proceedings. Health & S C §11488.4(j).
- Personal property worth $25,000 or less, subject to forfeiture under §11470, may be forfeited administratively without judicial supervision as long as proper notice is given. If no proper or timely claim is filed, the prosecuting agency may declare the property forfeited. Health & S C §11488.4(j).

Ø **Note:** If property subject to forfeiture is also evidence in a criminal case, it may be held on two grounds: as evidence in the criminal case, and as the defendant in the forfeiture case. Health & S C §11488.1.

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§57.10 B. Differences Between Administrative Forfeiture and Judicial Forfeiture

An administrative (nonjudicial) forfeiture action is initiated and concluded without judicial supervision. It may be used only to forfeit personal property worth $25,000 or less. Health & S C §11488.4(j). The prosecuting agency notifies all potentially interested parties of the pendency of the action, publishes notice in a newspaper of general circulation in the county where the property was seized or where it is located, and *if no timely claims are filed,* issues a declaration of forfeiture. Health & S C §11488.4(j). This ability to declare property forfeited without judicial supervision was given to prosecuting agencies for two reasons: to avoid burdening the courts with cases that were uncontested, and to avoid the need to obtain defaults. If there is no response to notice of nonjudicial forfeiture proceedings, the prosecution need not prove that it is entitled to the property, it merely declares the property forfeited. Health & S C §11488.4(j).

Cases involving real property, or personal property worth more than $25,000, must be litigated in the superior court. See Health & S C §11488.4(j). A court order must be obtained to forfeit property judicially. The prosecution must establish a prima facie case for the forfeiture of the property even if the claimant defaults. If a default occurs, relief from default may be had if the claimant establishes good cause for the failure to timely file the claim, quick action to set aside the default, and a meritorious defense. See *People v One Parcel of Land* (1991) 235 CA3d 579, 286 CR 739. In addition, if notice was inadequate, or if there were other procedural or substantive errors, the claimant can challenge the forfeiture by filing a writ petition. See *Nasir v Sacramento County Office of Dist. Attorney* (1992) 11 CA4th 976, 15 CR2d 694.

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VIII. ADMINISTRATIVE (NONJUDICIAL) FORFEITURE

§57.11 A. Meant to Be Summary Procedure

The administrative (nonjudicial) forfeiture provisions of the Health and Safety Code permit a prosecuting agency to forfeit personal assets worth $25,000 or less without having to obtain a default judgment in court if the forfeiture action is not contested and if notice of the forfeiture was properly given (see §57.12). *People v Property Listed in Exhibit One* (1991) 227 CA3d 1, 6, 277 CR 672.

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§57.12 B. Notice of Administrative Forfeiture Required

Differences in how notice is given; defense inquiry. In some counties, police departments, acting as agents for the prosecuting agency, issue 30-day notices (notices giving the recipient 30 days within which to file a claim, under Health & S C §11488.5(a)) in the field at the moment of seizure, in addition to a receipt for the seized property. In other counties, the prosecutor initiates nonjudicial forfeiture proceedings by issuing a 30-day notice after the property has been seized. Health & S C §11488.4(j).

Persons who must receive notice. Notice that the state intends to forfeit property must be given to the following people:

- Everyone designated in the receipt issued for the property seized. Health & S C §11488.4(j), (c). (The receipt is given to the person whose property is taken unless that person denies ownership. The receipt must comply with Pen C §1412 when property is taken by the police from a person arrested.)
- Everyone who has an interest in the property. Health & S C §11488.4(c). Interested persons include bona fide or innocent purchasers and persons holding a valid lien, mortgage, security interest, or interest under a conditional sales contract. *People v Fifteen Thousand Two Hundred Seventeen Dollars* (1990) 218 CA3d 720, 724, 268 CR 450 (convicted drug dealer's ex-wife and judgment creditor for spousal and child support arrearages was not interested party entitled to personal notice); see Health & S C §§11488.6, 11489(a). This requirement has been interpreted in federal cases to mean persons whose identities and addresses are known or easily ascertainable and whose legally protected interests are directly affected by the forfeiture proceedings. See *Wiren v Eide* (9th Cir 1976) 542 F2d 757, 762. The state is also obligated to investigate Department of Motor Vehicle and appropriate federal agency records on title to vehicles, boats, and airplanes, and send registered owners notice if ownership existed before the date of the seizure. Health & S C §11488.4(d).

The notice requirements are designed to ensure that the persons whose rights to the property would be most affected by the forfeiture have a reasonable opportunity to respond to the initiation of forfeiture proceedings. See CCP §413.30; *U.S. v U.S. Currency Totaling $3,817.49* (8th Cir 1987) 826 F2d 785.

Contents of notice. The notice must contain a description of the property, its appraised value, the date and place of seizure (or location of property if property has not been seized), the violation of law giving rise to the forfeiture, instructions for filing a claim, and the time limit for filing a claim. Health & S C §11488.4(j)(1)-(5). The notice must be accompanied by a claim form and directions for filing and serving the claim. Health & S C §11488.4(c).

Ø **Note:** The form should specify the name and location of the court where the claim is to be filed. It is recommended that the notice also state that a Judicial Council claim form is available, and tell where it may be obtained.

Any ambiguity in the notice will be interpreted in the claimant's favor and may result in the setting aside of the forfeiture. See *Nasir v Sacramento County Office of Dist. Attorney* (1992) 11 CA4th 976, 15 CR2d 694; *Baca v Minier* (1991) 229 CA3d 1253, 1265, 280 CR 810.

Ø **Note:** The Health & S C §11488.4(j) notice requirements do not require that details be given of the reasons for the seizure.

Service of notice. Service of the notice on those named in the receipt issued for the property is by "service of process." Health & S C §11488.4(c). Service is probably according to CCP §§413.10-417.40 and 1013-1013a. Service on any person with an interest in the seized property, other than those named in the receipt, must be by personal delivery or registered mail. Health & S C §11488.4(c). In addition to serving the notice on individuals, the prosecuting agency must publish the notice once a week for 3 successive weeks in a newspaper of general circulation in the county where the seizure is made or the property is located. Health & S C §11488.4(e).

Time limits. Claims opposing an administrative forfeiture must be filed within 30 calendar days after receipt of actual

notice or, if the claimant received no actual notice, within 30 calendar days after the date the first notice is published in the newspaper. Health & S C §11488.5(a)(1).

Result if no response to notice. Assuming that the notice is adequate and that no other defects exist in the procedure used to give notice, either actual notice or publication starts the clock ticking. If there is no response to the notice within the time described above, the property can be forfeited by the prosecuting agency. Health & S C §11488.5(d).

Advice to prosecutor. Whether the prosecuting agency's actions in giving notice to all potentially interested parties complied with due process can be a key issue in defending a nonjudicial forfeiture. See, *e.g., Baca v Minier, supra*. Prosecutors should therefore undertake a full investigation of the existence of anyone who may have a legally cognizable interest in the property to ensure that a declaration of forfeiture is properly issued. This is not to say that the prosecuting agency must turn over every stone looking for potential claimants. As the Supreme Court noted in *Mullane v Central Hanover Trust Co.* (1950) 339 US 306, 314, 94 L Ed 865, 873, 70 S Ct 652, due process does not place impossible or impracticable obstacles in the way of a vital state interest. Rather, due process simply requires that notice be given in the best possible manner under the circumstances. See *Dusenbery v U.S.* (2002) 534 US 161, 151 L Ed 2d 597, 122 S Ct 694 (actual notice is not required as long as government's efforts at providing notice were reasonably calculated under the circumstances to apprise property owner of pendency of forfeiture proceedings).

Advice to defense counsel. Defense counsel in a case involving property that might be subject to forfeiture should consider immediately checking with the prosecution to see whether forfeiture notice has been given, and when, because of the short deadline for responding. If forfeiture has occurred, defense counsel should carefully review the notice requirements and the way in which notice was given in the particular case to see whether due process was violated. See, *e.g., Nasir v Sacramento County Office of Dist. Attorney, supra*.

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§57.13 C. Standing: Only Those With Standing Can Oppose Forfeiture

Claimants must show standing to prevail in a forfeiture action. Standing means that the potential claimant has a bona fide ownership, possessory, or security interest in the property. See Health & S C §11488.5(a)(1); *Jauregi v Superior Court* (1999) 72 CA4th 931, 85 CR2d 553 (hearsay inadmissible to prove standing in forfeiture action); *People v Fifteen Thousand Two Hundred Seventeen Dollars* (1990) 218 CA3d 720, 268 CR 450. There is no Fifth Amendment privilege to avoid establishing standing. See §§57.34-57.37 (constitutional considerations). The claimant shoulders the burden of proving standing by a preponderance of the evidence. *People v Superior Court (Plascencia)* (2002) 103 CA4th 409, 423, 126 CR2d 793. The issue of standing is usually resolved before trial in a motion for summary judgment. When, however, resolution of the issue rests on disputed facts, the trier of fact determines standing by special verdict. 103 CA4th at 424.

Ø **Note:** Some police agencies, when seizing assets, ask persons who disclaim ownership to sign a form disclaiming ownership. The prosecution may wish to use that form to counter a claimant's later assertion of standing.

Ø **Warning:** Claimants' counsel should carefully consider the effect of standing statements, especially when a client seeks the return of a weapon or money, the origin of which may give rise to an unwanted surge of interest by state or federal officers. See Pen C §12021; 18 USC §§924, 1956-1957. See also §57.35.

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§57.14 D. Claim Opposing Administrative Forfeiture

The Judicial Council has approved an official form for the verified claim: Claim Opposing Forfeiture (MC-200), which is available on the Council's website at http://www.courtinfo.ca.gov/forms.

Claims opposing an administrative forfeiture must be filed within 30 calendar days after receipt of actual notice or, if the claimant received no actual notice, within 30 calendar days after the date the first notice is published in the newspaper. Health & S C §11488.5(a)(1). The claim must be verified by the claimant and must state the nature of the claimant's interest in the property. See CCP §446 for verification requirements. The claim must be filed in the superior court where the instructions in the notice say claims should be filed. An endorsed copy of the verified claim must be served on the prosecuting agency within 30 calendar days after the filing. Health & S C §11488.5(a)(1).

Ø **Note:** There is no filing fee if the value of the contested property as specified in the notice is $5000 or less. If the value is over $5000, the clerk must charge a fee as specified in Govt C §70611. Health & S C §11488.5(a)(3).

Service on the prosecuting agency should be physically accomplished by the 30th calendar day in order to avoid arguments about whether mailing on the 30th calendar day or depositing with an overnight carrier is sufficient. CCP §1013. If mailed or expressed on the due date, counsel should assure compliance with *all* the conditions of CCP §1013.

Ø **Note:** If the claim is not filed until the 30th day, and the prosecutor is not served until 30 days later, as permitted by Health & S C §11488.5(a), the prosecutor will not receive notice until 60 calendar days after publication. Defense counsel may want to call the prosecutor within the 30-day limit to make sure a declaration of forfeiture is not issued before the prosecutor is served with the claim.

On possible remedies for failure to comply with one or more of these requirements, see §57.16.

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§57.15 E. If No Claim or if Improper or Late Claim Is Filed, Property Is Forfeited

If no claim is filed with the prosecuting agency within the statutory time period discussed in §57.14, default is mandatory. Health & S C §11488.4(j)(5); see *Baca v Minier* (1991) 229 CA3d 1253, 1260, 280 CR 810. A defective claim may also result in a default: If the claim fails to state the nature of the claimant's interest, establishes on its face that the claimant does not have standing, or is not verified, it can probably be stricken under CCP §§435-437. See §57.16.

The prosecutor declares property forfeited in a declaration of forfeiture. A copy of the declaration of forfeiture must be "provided" to everyone designated in the receipt and to everyone who was personally served with the notice. The declaration of forfeiture is sufficient to transfer title of the forfeited property to the state. Health & S C §11488.4(j).

The author recommends that, before declaring the property forfeited, the prosecuting agency wait the full 60 days a claimant who does not receive actual notice is allowed for filing and serving a claim (see §57.14); doing so avoids having the forfeiture set aside if a claimant appears at the last minute.

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§57.16 F. Limited Relief From Failure to File or Late Filing

Counsel representing a potential claimant must exercise diligence in meeting the deadline for filing a claim because relief from error in preparing or filing a claim is difficult to obtain. Unlike other civil cases, in which the filing of a late answer before entry of default is obtained may foreclose a default, default in nonjudicial forfeiture cases is self-executing, and an untimely filed claim is ineffective in preventing forfeiture. Health & S C §11488.4(j)(5).

The defaulting claimant's only remedy is to file a petition for writ of mandate or prohibition in the superior court appellate department. *Nasir v Sacramento County Office of Dist. Attorney* (1992) 11 CA4th 976, 15 CR2d 694 (notice deficient); *Baca v Minier* (1991) 229 CA3d 1253, 280 CR 810 (same). Courts have equitable powers to set aside a default judgment if the moving party shows good cause, takes quick action to correct the default, and has a meritorious defense. See *People v One Parcel of Land* (1991) 235 CA3d 579, 286 CR 739. See also *U.S. v One Lot of $25,721 in Currency* (1st Cir 1991) 938 F2d 1417 (federal courts not divested of jurisdiction of forfeited assets by execution of judgment). For discussion of writs, see chap 42.

A timely filed claim does not open the door to claimants who failed to file or filed late. *U.S. v One Urban Lot Located at 1 Street A-1* (1st Cir 1989) 885 F2d 994.

Defendants may not obtain relief from state civil forfeiture proceedings under the automatic stay provision of 11 USC §362(a). *In re James (James v Draper)* (3d Cir 1991) 940 F2d 46.

With respect to a completed administrative forfeiture, a court has no jurisdiction to review the forfeiture on the merits. See *U.S. v Eubanks* (11th Cir 1999) 169 F3d 672. The sole inquiry the court can make is whether the prosecution followed the proper procedures for declaring the property forfeited. See *Valderrama v U.S.* (11th Cir 2005) 417 F3d 1189, 1196. Absent defective notice or improper procedures, a court is foreclosed from reviewing the merits of the forfeiture action. See *Matter of Sixty Seven Thousand Four Hundred Seventy Dollars* (11th Cir 1990) 901 F2d 1540, 1543.

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§57.17 G. Filing of Claim Mandates Initiation of Judicial Proceeding

If a claim is timely filed and served on the prosecuting agency in an administrative forfeiture proceeding, the prosecuting agency must file a petition for judicial forfeiture within 30 days after receipt of the claim; otherwise, it loses the right to maintain custody of the seized property. Health & S C §11488.4(j). The claimant should seek an order for return of property from the court. *People v Property Listed in Exhibit One* (1991) 227 CA3d 1, 9, 277 CR 672. However, the 30-day time limit of §11488.4(j) is not jurisdictional. The prosecuting agency continues to have the right to bring a judicial forfeiture proceeding within 1 year after the seizure of the property. Health & S C §11488.4(a); *People v Property Listed in Exhibit One, supra*.

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IX. JUDICIAL FORFEITURE

A. Initiating Judicial Forfeitures

§57.18 1. When Judicial Forfeiture Is Required, Even Without Filing of Claim

A judicial forfeiture must always be brought when real property is involved, or when the value of personal property sought to be forfeited exceeds $25,000. Health & S C §11488.4(a), (j). There is no provision preventing a prosecuting agency from electing to initiate a judicial forfeiture for property with a value of less than $25,000, although as a practical matter, this is seldom done, because administrative procedures are much less time-consuming and less costly.

The value of each individual piece of property controls the filing requirements, not the circumstances under which it was seized. See *In re One 1985 Nissan* (4th Cir 1989) 889 F2d 1317, 1322; *Gutt v U.S.* (WD Va 1986) 641 F Supp 603. Thus, even if the aggregate value of a defendant's personal property exceeds $25,000, if no one item is worth $25,000 or more, the prosecuting agency can avoid the necessity of judicial forfeiture proceedings by dividing the property into groups or items with a value of $25,000 or less.

Ø **Example:** If a single arrest results in the seizure of an automobile worth $15,000 and $20,000 in cash, the prosecuting agency may elect to file a judicial forfeiture action for both the cash and the car ($35,000 aggregate value), or two administrative forfeiture actions, one for the car and one for the cash.

The advantage of multiple administrative forfeiture actions is that they allow speedy forfeiture if no timely claim is filed. See Health & S C §11488.4(j). The disadvantage—*i.e.,* if a claim is filed, the prosecuting agency may be faced with litigating two or more civil actions whose factual basis is the same—can probably be eliminated by moving to consolidate the cases.

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§57.19 2. Prosecutor Files Petition

The first step in initiating judicial forfeiture proceedings is the filing of a petition for forfeiture by the prosecuting agency. It is unclear what rules apply to the petition. The only rules in the forfeiture statutes concerning petitions are those for the contents of petitions in nonjudicial proceedings, which are description of property; appraised value of property; date and place of seizure or location of any property not seized but subject to forfeiture; violation of law alleged with respect to forfeiture; and instructions for filing a claim, including time limits. Health & S C §11488.4(j).

Ø **Note:** Former Health & S C §11488.4(i) required compliance with the civil pleading rules of CCP §§420-475. Although the requirement no longer exists, a forfeiture is a civil proceeding, and compliance with the rules of pleading in civil cases appears to be appropriate.

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§57.20 3. Time for Filing Petition

The petition must be filed "as soon as practicable" after the seizure and in no case more than a year after the seizure. Health & S C §11488.4(a). Unjustified delay between the seizure and the filing of the forfeiture action could result in the setting aside or prevention of the forfeiture. See, *e.g., U.S. v $8,850 in U.S. Currency* (1983) 461 US 555, 76 L Ed 2d 143, 103 S Ct 2005.

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§57.21 4. Lis Pendens Must Be Filed When Real Property Is to Be Forfeited

If the subject matter of the forfeiture action is real property, a lis pendens must be filed and recorded with the county recorder in the county in which the property is located. Health & S C §11488.4(a). The lis pendens puts any potential transferee of title on notice of the pending forfeiture action and preserves the prosecuting agency's rights to the property under the forfeiture laws.

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§57.22 5. Service of Petition

The prosecuting agency must serve the petition on every individual designated in a receipt issued for the property seized. In addition, the agency must serve notices and a claim form "by personal delivery or by registered mail" on all individuals with an interest in the property. Health & S C §11488.4(c). These are the same individuals who must be given notice of a nonjudicial forfeiture. See Health & S C §11488.4(c) and discussion in §57.12.

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§57.23 B. Response to Petition: Claim

A claim opposing forfeiture must be filed within 30 calendar days after receipt of actual notice of the forfeiture or within 30 calendar days after the date of first publication of notice of forfeiture, if actual notice was not received. Health & S C §11488.5(a)(1). It must be verified by the claimant and state the nature of the claimant's interest in the property. It must be filed in the superior court indicated in the notice, and an endorsed copy served on the prosecuting agency within 30 calendar days after the claim is filed. Health & S C §11488.5(a)(1). (An endorsed or "conformed" copy is one that has been file-stamped by the court clerk. Counsel should bring extra copies when filing the original and have the copies file-stamped by the clerk at that time.) If a claim was already filed in response to earlier administrative notice (see §57.14), no second claim need be filed. Health & S C §11488.4(j). Only a person with standing may oppose forfeiture. See §57.13.

The Judicial Council has approved an official form for the verified claim, Form MC-200, available on the Council's website at http://www.courtinfo.ca.gov/forms.

Ø **Note:** Filing fees are required if the value of the contested property as set forth in the notice exceeds $5000. Health & S C §11488.5(a)(3).

The result if no claim is filed is default. Health & S C §11488.5(b)(1). See discussion in §57.24 on default.

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§57.24 C. Procedures When No Timely Claims Filed

When no timely claims have been filed in judicial forfeiture proceedings, the prosecution can obtain an ex parte order of forfeiture, but it must first establish a prima facie case in support of its petition for forfeiture. A prima facie case is made when the prosecution produces enough evidence to permit the fact finder to infer the truth of the facts that must be established to justify the forfeiture. See, *e.g., Texas Dep't of Community Affairs v Burdine* (1981) 450 US 248, 254 n7, 67 L Ed 2d 207, 216 n7, 101 S Ct 1089. The prima facie case may be shown by affidavits and declarations. CCP §§585(b), 585(d), 2015.5. If a prima facie case is shown, the court must declare the property forfeited. Health & S C §11488.5(d).

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§57.25 D. Discovery

Pretrial discovery in accordance with standard civil procedure is available to both sides in forfeiture cases. CCP §2017.010; *People v 25651 Minoa Dr.* (1992) 2 CA4th 787, 3 CR2d 577. Claimants who fail to comply with discovery orders risk having sanctions imposed, which may include striking claims and awarding a default judgment to the seizing entity. See, *e.g.*, *U.S. v $49,000 Currency* (5th Cir 2003) 330 F3d 371, 375.

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§57.26 E. Case Settlement

It is often productive for counsel representing a claimant to seek a conference with the prosecutor as soon as forfeiture proceedings have begun. Counsel can discuss the merits of the action and see if the case can be settled without the need to file a petition for forfeiture. Counsel can sometimes bargain for the state to keep some assets and return others to the claimant. When real property is involved, the prosecution may be willing to return the real estate for a cash settlement. Some claimants simply file a claim form and attach to it evidence showing that a valid defense to forfeiture exists. See discussion of defenses in §§57.31-57.32. There is usually no need in a civil action such as this for claimant's counsel to be worried about giving the prosecution defense information, because this type of evidence is ordinarily discoverable in any event if the case proceeds to trial.

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F. Judicial Forfeiture Trial

§57.27 1. Relationship of Forfeiture to Related Criminal Case; When Tried Separately as Civil Case

A conviction of one of the offenses specified in Health & S C §11470(f) or (g) is a condition precedent to the forfeiture of all property other than cash or negotiable instruments in excess of $25,000. In addition, the same trier of fact that convicts the defendant must try the issue of forfeiture unless this right is waived by all parties. Health & S C §11488.4(i)(3), (5). Express waiver may be required. See §57.1. But see *People v $17,522.08* (2006) 142 CA4th 1076, 48 CR3d 519 (failure to post jury fees or request jury results in waiver); *People v Brach* (2002) 95 CA4th 571, 578, 115 CR2d 753 (in forfeiture-like proceeding to recover costs of marijuana eradication under Health & S C §11470.1, jury trial was waived by failure to request).

Cases in which the assets sought to be forfeited are cash or negotiable instruments valued at $25,000 or less require that a criminal conviction be obtained before forfeiture can be ordered. Health & S C §11488.4(i)(4).

The practical application of these sections is far from clear. What the statute appears to be saying is this: Determine first whether the forfeiture action is of the type that requires a conviction. If no conviction is required, the forfeiture case is assigned for trial by the presiding judge of the superior court. Health & S C §11488.4(i)(3). If the claimant is also the defendant in a related criminal case, the forfeiture case must be tried in conjunction with the criminal case as a bifurcated action. If the trier of fact acquits the defendant in the criminal case, forfeiture cannot be ordered, so there will be no forfeiture trial. If the trier of fact convicts the defendant of the needed target offense, then the same trier of fact tries the forfeiture case. See, *e.g., People v Washington* (1990) 220 CA3d 912, 269 CR 668.

If the claimant is not a defendant, but there is a related criminal case, the statute suggests that, if the defendant in the related case is convicted, the same trier of fact in the underlying criminal action tries the forfeiture for the nondefendant/claimant as well as for the defendant/claimant. See Health & S C §11488.4(i)(3). Section 11488.4(i)(3) does not require that the claimant or claimants to the property be convicted; it states that "a defendant" must be convicted. The use of the word "a" suggests that as long as a conviction occurs, the issue of forfeiture must be tried to the same jury, regardless of who the parties to the forfeiture may be.

Advice to prosecutor: In cases that require a criminal conviction and that have claimants other than the defendant, it is incumbent on the prosecutor to notify the claimant of the trial date for the related or underlying criminal case and file the notice with the court. It is highly unlikely that the clerk's office will do this.

Advice to defense counsel: In cases that require a criminal conviction and that have claimants other than the defendant, it is incumbent on defense counsel to meet and confer with counsel for the defendant in the underlying or related criminal case before the criminal case begins.

Ø **Note:** A forfeiture hearing may be continued on motion of either the prosecution or the defense until after a guilty verdict is rendered. Health & S C §11488.5(e).

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§57.28 2. Claim in Forfeiture Action Is Inadmissible in Criminal Case

The claim in a forfeiture action is not admissible in the underlying criminal case. Health & S C §11488.5(c)(1). By analogy to confessions, claims are probably admissible to impeach. See *People v May* (1988) 44 C3d 309, 243 CR 369, discussed in §23.28.

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§57.29 3. Conduct of Forfeiture Trial

Trial of a forfeiture action is by jury unless it is waived by the parties. Health & S C §11488.5(c)(2). Failure to assert the right to jury trial will result in a finding that the right was waived. *People v $17,522.08* (2006) 142 CA4th 1076, 48 CR3d 519. Forfeiture trials have priority over other civil cases. Health & S C §11488.5(c)(1). The forfeiture trial can be set for hearing 30 calendar days after the date a verified claim was filed, or at any time thereafter that is convenient for the parties. Health & S C §11488.5(c)(1).

Forfeiture actions are often associated with a pending criminal action. See §57.27. A forfeiture trial, whether heard by the same jury that heard the related criminal case or alone, resembles a civil case in almost all respects. Forfeiture trials must be conducted under CCP §§607-630 if trial is by jury, and under CCP §§631-636 if trial is by the court. Health & S C §11488.5(e). Unlike criminal trials, forfeiture trials require only 9 of the 12 jurors to agree on a verdict. Further, there is no requirement that jurors agree on which theory of forfeiture supports the verdict. *People v Washington* (1990) 220 CA3d 912, 269 CR 668.

The burden of proof, however, is that of criminal trials—beyond a reasonable doubt—unless the property in question is cash or negotiable instruments of a value more than $25,000, in which case the burden of proof drops to clear and convincing evidence. Health & S C §11488.4(i). The burden of proof for property subject to forfeiture under Health & S C §11470(a)-(d) (*e.g.*, controlled substances, raw materials and equipment used in production and distribution, containers, and business records) is by a preponderance of the evidence. *People v Nazem* (1996) 51 CA4th 1225, 1232 n7, 59 CR2d 794.

To support forfeiture, the state has the burden of proving that the owner of the property for which forfeiture is sought consented to its use with knowledge that it would be or was used for a purpose for which forfeiture is permitted. Health & S C §11488.5(d)(1)-(2).

> Ø **Note:** If standing is disputed, the claimant has the burden of proving standing by a preponderance of the evidence *before* the government is put to its burden of proof. *People v Superior Court (Plascencia)* (2002) 103 CA4th 409, 424, 126 CR2d 793.

Under Health & S C §11488.5(e), the trier of fact must find that the property for which forfeiture is sought was used for a purpose for which forfeiture is permitted and that the claimant had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted.

All property found by the trier of fact to be forfeitable is distributed according to Health & S C §11489. Health & S C §11488.5(f). Property not forfeited is released to the claimant unless it is subject to a hold by the Franchise Tax Board. Health & S C §11488.5(g). The court retains unforfeited property that is subject to a hold by the Franchise Tax Board. Health & S C §11488.5(g).

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§57.30 X. MOTION IN CRIMINAL CASE FOR RETURN OF SEIZED PROPERTY

A criminal defendant who is also a claimant in a forfeiture case may move in the criminal case for the return of the seized property under Pen C §1538.5. Health & S C §11488.4(h). The only ground for the motion is that no probable cause exists to believe that the property is forfeitable under Health & S C §11470(a)-(g). There are several exceptions. No §1538.5 motion can be made if the property is automatically made forfeitable (see §57.9) or is subject to court order of forfeiture or destruction by a provision in Health & S C §§11469-11495. Health & S C §11488.4(h).

If the court finds that there is no probable cause, it orders the return of the property. See *People v Superior Court (Brent)* (1992) 2 CA4th 675, 3 CR2d 375. If the motion is made after the preliminary hearing, the prosecuting agency may submit the transcript of the preliminary hearing to establish probable cause. Health & S C §11488.4(h). Probable cause in the context of seizing property for forfeiture is determined by the totality of the circumstances. To prevail against a motion for return, the prosecution "must offer some evidentiary basis for inferring a link between the seized property and past or future narcotics activity." *People v $47,050 U.S. Currency* (1993) 17 CA4th 1319, 1326, 22 CR2d 32. Compare *People v $47,050 U.S. Currency, supra* (link not established) with *People v $48,715 U.S. Currency* (1997) 58 CA4th 1507, 1515, 68 CR2d 829 (link established) and *People v $497,590 U.S. Currency* (1997) 58 CA4th 145, 68 CR2d 185 (link established). See also *U.S. v $186,416 U.S. Currency* (9th Cir 2009) 590 F3d 942.

If the motion is granted, the prosecutor has 15 days to seek appellate review of the order by filing a petition for a writ of prohibition or mandate. Health & S C §11488.4(h). This 15-day time limit is jurisdictional; failure to file the petition within 15 calendar days forecloses the opportunity to seek review of the order to return. *People v Superior Court (Brent), supra*.

Ø **Note:** A prosecutor challenging an order to return property by petition for writ of mandate or prohibition should also request a stay of execution of the order.

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XI. DEFENSES TO FORFEITURE

§57.31 A. First Party Claims

A first party claimant (one whose conduct is the basis for the forfeiture) who is the owner of seized property has the following defenses:

- The forfeiture notice was defective. See *Baca v Minier* (1991) 229 CA3d 1253, 280 CR 810.
- A vehicle for which forfeiture is sought is an "implement of husbandry" as defined in Veh C §36000 (*i.e.,* a vehicle "used exclusively" in "agricultural operations"). Health & S C §11470(e).
- The property was not derived from drug trafficking. See Health & S C §11470(f).
- The property was not used (or intended to be used) to facilitate drug trafficking. See Health & S C §11470(f). Note that, when the state seeks to forfeit real property that has a residence on it on the ground that the land was used to cultivate marijuana for sale, it must prove that the marijuana was sold to persons who do not live on the property. 74 Ops Cal Atty Gen 70 (1991).
- The property was not furnished in exchange for a controlled substance. See Health & S C §11470(f).
- An unreasonable delay occurred between seizure of the property and the initiation of the forfeiture action. *U.S. v $8,850 in U.S. Currency* (1983) 461 US 555, 76 L Ed 2d 143, 103 S Ct 2005. This may be true even if the initiation of forfeiture proceedings occurs within the statute of limitations for the filing of the petition for forfeiture.
- The 1-year statute of limitations for the filing of a forfeiture petition was violated. Health & S C §11488.4(a). See *People v Property Listed in Exhibit One* (1991) 227 CA3d 1, 9, 277 CR 672.
- The forfeiture is constitutionally "excessive," in violation of the Eighth Amendment's Excessive Fines Clause. *Austin v U.S.* (1993) 509 US 602, 125 L Ed 2d 488, 113 S Ct 2801; *U.S. v 3814 NW Thurman Street, Portland, Ore.* (9th Cir 1999) 164 F3d 1191. See §57.37.
- Duress, necessity, or impossibility was involved. *Peisch v Ware* (1808) 8 US (4 Cranch) 347, 2 L Ed 643; *U.S. v One 107.9 Acre Parcel* (3d Cir 1990) 898 F2d 396.
- Entrapment or outrageous government conduct was involved. See *U.S. v Certain Lots in Va. Beach* (ED Va 1987) 657 F Supp 1062; *Flam v City of Miami Beach* (Fla Dist Ct App 1984) 449 So2d 367.
- An unlawful search and seizure is the basis of the seizure. *One 1958 Plymouth Sedan v Pennsylvania* (1965) 380 US 693, 14 L Ed 2d 170, 85 S Ct 1246. But see *People v $241,600 U.S. Currency* (1998) 67 CA4th 1100, 1103, 79 CR2d 588 (exclusionary rule does not apply to civil forfeitures).

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§57.32 B. Third Party Claims

Defenses available to the defendant are also available to a third party claimant. There are also several defenses and exemptions available only to an "innocent owner."

The California statutes do not require a person asserting a third party claim to be a bona fide purchaser or encumbrancer for value. See *U.S. v A Parcel of Land* (1993) 507 US 111, 122 L Ed 2d 469, 113 S Ct 1126 (class of third parties eligible to claim an innocent owner defense includes one who receives the property as a gift). However, a third party claimant who has acquired an ownership interest in property subject to the relation-back rule of Health & S C §11470(h) may not be able to assert the claim unless the interest in the property vested before the beginning of the forfeiture proceedings. See *U.S. v Chavez* (9th Cir 2003) 323 F3d 1216 (third party claimant could not defeat forfeiture, because her interest did not vest under state law until forfeiture ordered). For discussion of "relation-back" rule, see §57.5.

Third party defenses include the following:

- The third party had no actual or constructive knowledge of facts that would make the property subject to forfeiture when the interest was acquired. Health & S C §11488.5.

  Ø **Note:** The prosecution has the burden at trial of proving beyond a reasonable doubt that the claimant had knowledge of facts that would make the property subject to forfeiture in all cases except those in which the property in question is cash or negotiable instruments in excess of $25,000. In those cases, the burden drops to clear and convincing evidence. Health & S C §§11488.5(e), 11488.4(i).

- The claimant has a community property interest in a vehicle otherwise subject to forfeiture that requires the driver to have a class C, M1, or M2 driver's license (see Veh C §12804.9) and the vehicle is the only class C, M1, or M2 vehicle available to the defendant's immediate family. Health & S C §11470(e).
- The real property is being used as a family residence or for other lawful purposes. Health & S C §11470(g).

  Ø **Note:** This exemption does *not* apply to a family residence bought with the proceeds of specified controlled substance offenses.

- The real property is owned by two or more persons, one of whom had no knowledge of its unlawful use. Health & S C §11470(g).
- The claimant did not receive adequate notice of the proceedings. See Health & S C 11469(j).

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§57.33 XII. DEFENSE ATTORNEY PAYMENT FROM PROPERTY SUBJECT TO FORFEITURE

The U.S. Supreme Court has held that assets seized for forfeiture are not insulated from forfeiture on the ground that they have been earmarked to pay for representation in the criminal action. *Caplin & Drysdale, Chartered v U.S.* (1989) 491 US 617, 105 L Ed 2d 528, 109 S Ct 2646 (Sixth Amendment right to counsel does not preclude forfeiture even if it would render defendant indigent, when state will presumably appoint competent counsel for indigent criminal defendant).

Although some states have insulated funds needed to pay attorney fees from forfeiture, California has not. *People v Superior Court (Clements)* (1988) 200 CA3d 491, 246 CR 122. Indeed, one court has held that the defendant's assignment to his defense attorney of funds seized for forfeiture when he was arrested was presumptively fraudulent, even though the assignment included only funds found not to be subject to forfeiture. *Franchise Tax Bd. v Superior Court* (1985) 168 CA3d 970, 975, 215 CR 36.

The trial court may issue pendente lite orders restraining defense attorneys from using monies paid to them by defendants pending a determination of whether the funds are subject to forfeiture as proceeds of the defendant's illegal activity. *U.S. v Monsanto* (1989) 491 US 600, 615, 105 L Ed 2d 512, 526, 109 S Ct 2657; *People v Superior Court (Rishwain)* (1989) 215 CA3d 1411, 1415, 264 CR 28. If the court does issue such restraining orders, defense counsel should consider moving for a hearing on probable cause. See *U.S. v Monsanto, supra* (restraints on use of assets do not violate due process if probable cause exists to believe they are forfeitable); *U.S. v Crozier* (9th Cir 1985) 777 F2d 1376, 1383 (trial court erred in denying attorney's motion to unfreeze assets without holding hearing). See §57.30.

Closely related to the forfeiture laws are laws requiring reporting of certain large attorney fee payments. Criminal liability for attorneys is possible if the attorney engages in such acts as accepting money with intent to disguise the source of funds, or to disguise criminal activity, or if the attorney handles the money in a manner designed to prevent proper reporting or to impede the IRS. Counsel should note Bus & P C §6149, which purports to create a privilege for written attorney fee contracts within the meaning of Bus & P C §6068(e) and Evid C §952. How this statute will be applied vis-à-vis state or federal subpoenas for information or grand jury proceedings or actions to forfeit attorney fees remains to be seen. For detailed discussion, see Smith, Prosecution and Defense of Forfeiture Cases (1985).

Federal laws can affect state transactions. Many sections of the USA Patriot Act (Pub L 107-56, 115 Stat 272) affect ordinary (nonterrorist) currency and financial transactions. See, *e.g.,* Title III, Subtitle B—Bank Secrecy Act Amendments and Related Improvements, §351 (Pub L 107-56, 115 Stat 272) (suspicious activities). Defense counsel should examine these sections with care.

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XIII. CONSTITUTIONAL CONSIDERATIONS

§57.34 A. Fourth Amendment

The fact that property subject to forfeiture may have been seized illegally does not shield it from forfeiture. *People v $241,600 U.S. Currency* (1998) 67 CA4th 1100, 1113, 79 CR2d 588 (exclusionary rule not applicable to civil forfeiture actions); *People v Superior Court (Moraza)* (1989) 210 CA3d 592, 598, 258 CR 499, citing *John Bacall Imports, Ltd. v U.S.* (9th Cir 1969) 412 F2d 586, 588. Illegally obtained evidence, however, cannot be used to sustain a forfeiture. *One 1958 Plymouth Sedan v Pennsylvania* (1965) 380 US 693, 14 L Ed 2d 170, 85 S Ct 1246; *People v One 1960 Cadillac Coupe* (1964) 62 C2d 92, 41 CR 290; *People v Superior Court (Moraza), supra*. If the evidence surrounding the seizure of property is suppressed, it may still be possible to sustain the forfeiture with evidence not subject to suppression. See, *e.g., U.S. v U.S. Currency $31,828* (8th Cir 1985) 760 F2d 228 (prosecution established cause for forfeiture with testimony about defendant's drug business despite suppression of physical evidence). In addition, it is permissible for the government to use evidence acquired after the seizure to sustain a forfeiture. *People v Superior Court, supra*.

Ø **Example:** Assume that an individual who had been convicted of a drug trafficking violation is arrested within 5 years after the conviction and found to have $20,000 in cash on his person, sufficient cocaine to warrant a possession-for-sale charge, and other evidence of trafficking. The money is seized for forfeiture, and a criminal charge is filed against the individual. A motion to suppress is granted in the criminal case with respect to the controlled substances supporting the criminal charges. The criminal case is subsequently dismissed. Investigation by the prosecuting agency reveals that the individual from whom the cash was seized has not been employed for the previous 5 years, has no independent source of income, and has no explanation for the origin of the cash. The forfeiture action could still be pursued, on the basis of the trafficking conviction, the large amount of cash, and the lack of an explanation for it. The cash could not be suppressed in the forfeiture action, because it is the defendant in the case. The other evidence, the conviction and the unemployment, constitute independent evidence from which the jury could conclude that the cash was proceeds of drug trafficking. Moreover, before the case was tried, the prosecution would be entitled to discovery that could provide additional evidence to be used at trial.

The "good faith" exception to the exclusionary rule (see *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405) applies to forfeiture cases (see *U.S. v Real Property at 15324 County Highway E.* (7th Cir 2003) 332 F3d 1070). Also, officers may seize and search vehicles in public places without a warrant as long as they have probable cause to believe that the vehicle is subject to forfeiture. See Health & S C §11471; *Florida v White* (1999) 526 US 559, 564, 143 L Ed 2d 748, 753, 119 S Ct 1555; *U.S. v Gaskin* (2d Cir 2004) 364 F3d 438, 458. Similarly, items found during the execution of a search warrant may be seized even if not specified in the warrant if there is probable cause to believe the items are subject to forfeiture. See *U.S. v Warren* (D Kan 2001) 181 F Supp 2d 1232, 1246.

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§57.35 B. Fifth Amendment: Self-Incrimination Clause

The Self-Incrimination Clause does not shield revealing income, even if from a criminal source. See *U.S. v Turk* (9th Cir 1983) 722 F2d 1439. Similarly, courts have held that the Self-Incrimination Clause does not shield a claimant from the requirement that he or she establish standing to bring a claim opposing forfeiture. *Mercado v U.S. Customs Serv.* (2d Cir 1989) 873 F2d 641; *Baker v U.S.* (9th Cir 1983) 722 F2d 517. *Miranda* warnings are not required before questioning about the sources of the seized funds. *People v $48,715 U.S. Currency* (1997) 58 CA4th 1507, 1518 n10, 68 CR2d 829.

Because forfeiture proceedings are civil actions, the claimant does not have the right not to be called as a witness. Once on the stand, however, the claimant, like any other witness, may assert the privilege against self-incrimination. See *McCarthy v Arndstein* (1924) 266 US 34, 69 L Ed 158, 45 S Ct 16; *U.S. v $250,000 in U.S. Currency* (1st Cir 1987) 808 F2d 895; *Klein v Superior Court* (1988) 198 CA3d 894, 244 CR 226.

If the claimant asserts the privilege against self-incrimination during the discovery process, he or she may be "burdened," resulting in one or more of the following: striking of the claim; permitting the assertion to be revealed and commented on at trial; shifting the burden of going forward or of proof; letting the trier of fact draw adverse inferences; and barring testimony at trial. See *Baxter v Palmigiano* (1976) 425 US 308, 47 L Ed 2d 810, 96 S Ct 1551; *U.S. v Two Parcels of Real Property Located in Russell County* (11th Cir 1996) 92 F3d 1123, 1129; *U.S. v Ianniello* (2d Cir 1987) 824 F2d 203; *U.S. v A Single Family Residence* (11th Cir 1986) 803 F2d 625; *Baker v U.S.* (9th Cir 1983) 722 F2d 517; *Campbell v Gerrans* (9th Cir 1979) 592 F2d 1054; *Alvarez v Sanchez* (1984) 158 CA3d 709, 204 CR 864; *Fremont Indem. Co. v Superior Court* (1982) 137 CA3d 554, 187 CR 137; *A&M Records, Inc. v Heilman* (1977) 75 CA3d 554, 142 CR 390. But see Evid C §913 (no comment allowed on exercise of privilege).

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§57.35A C. Fifth Amendment: Double Jeopardy

The Double Jeopardy Clause does not prohibit the government from both punishing a defendant for a criminal offense and forfeiting his or her property for that same offense in a separate civil proceeding. Civil forfeitures do not constitute "punishment" for purposes of the Double Jeopardy Clause. *U.S. v Ursery* (1996) 518 US 267, 135 L Ed 2d 549, 116 S Ct 2135.

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§57.36 D. Sixth Amendment

Forfeiture actions are civil proceedings, so the usual Sixth Amendment protections that apply to a criminal defendant in a criminal case are not available to a forfeiture claimant. Rights that are *not* available include:

- The right of confrontation (*U.S. v 6109 Grubb Rd.* (3d Cir 1989) 886 F2d 618);
- The right to the compulsory process of the court (*U.S. v $64,000 in U.S. Currency* (5th Cir 1984) 722 F2d 239; *One 1960 Oldsmobile Convertible Coupe v U.S.* (DC Cir 1966) 371 F2d 958);
- The right to be present at trial (see *U.S. v $64,000 in U.S. Currency, supra; One 1960 Oldsmobile Convertible Coupe v U.S., supra*);
- The right to have assistance of appointed counsel (see *People v $30,000* (1995) 35 CA4th 936, 41 CR2d 748; *U.S. v $55,518.05 in U.S. Currency* (3d Cir 1984) 728 F2d 192; *U.S. v One Parcel of Land* (ND Ill 1985) 614 F Supp 183).

There are some due process protections. Due process requires the prosecution to give owners of real property notice and an opportunity to be heard before property can be seized. *U.S. v James Daniel Good Real Prop.* (1993) 510 US 43, 126 L Ed 2d 490, 114 S Ct 492.

The public defender may undertake to defend an indigent in a civil action in a case in which the person is being persecuted or unjustly harassed. Govt C §27706. Because most forfeiture actions do not fit this requirement, public defenders usually do not represent claimants in forfeiture actions.

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§57.37 E. Eighth Amendment

The prohibition against cruel and unusual punishment does not apply to a forfeiture action, but the Excessive Fines Clause of the Eighth Amendment does apply if the forfeiture, whether characterized as civil or criminal, is intended at least in part to punish the owner of the forfeited property. *Austin v U.S.* (1993) 509 US 602, 125 L Ed 2d 488, 113 S Ct 2801; *Alexander v U.S.* (1993) 509 US 544, 125 L Ed 2d 441, 113 S Ct 2766; *U.S. v $100,348.00 in U.S. Currency* (9th Cir 2004) 354 F3d 1110, 1119. But see *U.S. v Ursery* (1996) 518 US 267, 135 L Ed 2d 549, 116 S Ct 2135 (civil forfeiture action and criminal prosecution did not subject property owner to double jeopardy). The ban on excessive fines does not apply to the forfeiture of proceeds traceable to exchanges for controlled substances, *i.e.,* property that is derived directly or indirectly from the illegal activity giving rise to the forfeiture, because such forfeitures can never be excessive as a matter of law. See *U.S. v Real Property Located at 22 Santa Barbara Drive* (9th Cir 2001) 264 F3d 860, 874; *U.S. v Various Computers* (3d Cir 1996) 82 F3d 582; *U.S. v $21,282* (8th Cir 1995) 47 F3d 972.

The test for excessiveness under the Eighth Amendment has two prongs. First, the forfeiture must be at least partly punitive. *U.S. v Bajakajian* (1998) 524 US 321, 334, 141 L Ed 2d 314, 118 S Ct 2028. If not, the Eighth Amendment ban on excessive fines does not apply. For example, a proceeds forfeiture is not punitive and is never subject to Eighth Amendment challenge, because it merely takes illicit profits that the criminal had no legal right to possess. See *U.S. v Ursery* (1996) 518 US 267, 135 L Ed 2d 549, 116 S Ct 2135; *U.S. v $21,282* (8th Cir 1995) 47 F3d 972.

Second, if the forfeiture is punitive, it is excessive if it is grossly disproportional to the gravity of the offense it is designed to punish. *U.S. v Bajakajian* (1998) 524 US 321, 334, 141 L Ed 2d 314, 329, 118 S Ct 2028 (forfeiture of $357,144, entire sum respondent attempted to transport out of U.S., was grossly disproportionate when offense was merely violation of reporting requirement). See also *U.S. v $100,348.00 in U.S. Currency* (9th Cir 2004) 354 F3d 1110, 1119.

The claimant in the forfeiture action shoulders the burden of demonstrating excessiveness. See *U.S. v Ahmad* (4th Cir 2000) 213 F3d 805; *U.S. v One 1970 36.9' Columbia Sailing Boat* (8th Cir 1996) 91 F3d 1053. In addition, an Eighth Amendment challenge cannot be raised by a pretrial motion to dismiss. See *U.S. v Funds in the Amount of $170,926.00* (ND Ill 1997) 985 F Supp 810. Finally, the issue of excessiveness is for the court, not the jury. *U.S. v Derman* (1st Cir 2000) 211 F3d 175.

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58

CONTEMPT

MICHAEL McCORMICK

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§58.1 I. OVERVIEW

The various forms of contempt are sometimes discussed in confusing and overlapping language. A contempt sanction may be imposed in one of two different manners: as a criminal prosecution under Pen C §166, or as a summary order under CCP §1209. In this chapter, contempt prosecuted under the Penal Code is referred to as "criminal contempt" and summary contempt orders as "civil contempt." Civil contempt may itself result in two different types of orders: coercive (to have the contemnor perform an act), and punitive (to punish the contemnor). These are referred to as "civil coercive contempt," and "civil punitive contempt." See *Colombo v New York* (1972) 405 US 9, 30 L Ed 2d 762, 92 S Ct 756; *Shillitani v U.S.* (1966) 384 US 364, 16 L Ed 2d 622, 86 S Ct 1531; *People v Batey* (1986) 183 CA3d 1281, 228 CR 787; *People v Derner* (1986) 182 CA3d 588, 227 CR 344. It should be noted that some discussions of contempt refer to "civil punitive contempt" as criminal contempt because the result is punishment for an offense against the court.

Although the definition of contempt is similar under each statute, the procedures required to find a contempt, and the sanctions that may then be imposed, vary considerably. An attorney familiar with criminal law practice will find little confusion in a criminal contempt prosecution, but the extremely important rules that apply to summary contempt orders may be less familiar.

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II. CONTEMPT POWER

§58.2 A. Definition; Inherent and Statutory Authority; Jurisdiction

All courts have the inherent power to ensure that judicial proceedings are conducted in an orderly manner and to punish those who show disrespect or who disrupt the proceedings. This power involves the right to impose sanctions for contempt of court. See *Superior Court v County of Mendocino* (1996) 13 C4th 45, 57, 51 CR2d 837; *People v Gonzalez* (1996) 12 C4th 804, 823, 50 CR2d 74; *In re McKinney* (1968) 70 C2d 8, 10, 73 CR 580. "Contempt is 'an act… committed in or out of [the court's] presence, [that] tends to impeach, embarrass or obstruct the court in the discharge of its duties.'" *Lloyd v Superior Court* (1982) 133 CA3d 896, 900, 184 CR 467.

The legislature has codified the court's power to find contempt and has both defined and limited that power. See *Superior Court v County of Mendocino, supra*. The legislature has permitted courts to provide for the orderly conduct of proceedings (CCP §128; see also Pen C §1044) and has set out the various acts and omissions that may constitute civil and criminal contempt (CCP §§1209-1222; Pen C §166). Unless specifically authorized by statute (see CCP 128.5), trial courts lack inherent power to impose sanctions for misconduct in court outside a contempt proceeding. *Bauguess v Paine* (1978) 22 C3d 626, 638, 150 CR 461; *People v Muhammad* (2003) 108 CA4th 313, 133 CR2d 308 (no inherent authority for trial court to fine prosecutor for peremptorily excusing jurors because of racial bias).

The legislature has also set forth the precise manner in which the civil contempt power may be exercised, which is limited to imposing a 5-day jail sentence and up to a $1000 fine, generally payable to the court. In addition, if the guilty party violated a court order, he or she may be required to pay reasonable attorney fees and costs. CCP §1218.

Like all other criminal authority, the criminal contempt power is vested in the People, acting through the prosecuting attorney. Criminal contempt is charged and prosecuted just as a misdemeanor offense would be. *In re Kreitman* (1995) 40 CA4th 750, 755, 47 CR2d 595.

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§58.3 B. Limitations on Contempt Power

Only a judge may exercise the civil contempt power. It may not be delegated to a commissioner or a referee without statutory authority, and a commissioner may not act as a judge *in the contempt action,* even by stipulation. Compare *Nierenberg v Superior Court* (1976) 59 CA3d 611, 130 CR 847, with CCP §708.140(a)(1) and *Marcus v WCAB* (1973) 35 CA3d 598, 603, 111 CR 101.

Under CCP §1209(b), no speech or publication reflecting on or concerning any court or court officer may be punished as contempt unless it is made in the court's immediate presence, while in session, and in such a manner as to actually interfere with the court's proceedings. This provision was found to be an unconstitutional intrusion by the legislature into the inherent powers of the courts in *In re San Francisco Chronicle* (1934) 1 C2d 630, 36 P2d 369 (newspaper editor imprisoned for publishing "leaked" story on upcoming California Supreme Court decision; contempt upheld). See *In re Michael G.* (1988) 44 C3d 283, 295 n10, 243 CR 224.

Lawyers have First Amendment rights, however, when speaking as private citizens. See *Lloyd v Superior Court* (1982) 133 CA3d 896, 901, 184 CR 467 (contempt citation invalid; lawyer criticized judge in letter to local paper, did not identify himself as lawyer, and was not counsel, party, or witness in case he discussed).

Under CCP §128(f), no contempt order may issue against a county government or county employee for failing to obey a court order, unless the court finds that the county has the resources necessary to obey the order, or that the county can generate the resources without voter approval or incurring additional indebtedness, without liability for failing to perform duties, and without depriving the county of the resources necessary for its reasonable support and maintenance.

In adult proceedings, criminal contempt may not be used to punish a violation of an order granting probation; the court must use the revocation procedure in Pen C §1203.2. *People v Johnson* (1993) 20 CA4th 106, 24 CR2d 628. Further, by statute, the court may not use contempt to enforce an order requiring the defendant to pay costs of probation. Pen C §1203.1b(d); *People v Hall* (2002) 103 CA4th 889, 894, 126 CR2d 916. In juvenile delinquency proceedings, criminal contempt may not be used to punish a violation of a court order that is based on noncriminal conduct; the court must use its express contempt power under Welf & I C §213, or the supplemental petition procedure under Welf & I C §777. *In re Ricardo A.* (1995) 32 CA4th 1190, 1198, 38 CR2d 586. Moreover, if a juvenile is on probation for an offense that does not permit confinement as a penalty, the court may not use its contempt power to impose confinement for a probation violation. *In re Francisco S.* (2000) 85 CA4th 946, 102 CR2d 514.

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§58.4 C. Differences Between Criminal and Civil Contempt

Criminal contempt under Pen C §166 is a misdemeanor. Proceedings under §166 are conducted as in any misdemeanor. *In re Kreitman* (1995) 40 CA4th 750, 755, 47 CR2d 595. The punishment is a maximum of 6 months in jail, a fine up to $1000, or both. See Pen C §19.

Proceedings for civil contempt are of two classes. The first type seeks to preserve the power and vindicate the dignity of the court, and to *punish* anyone who disobeys the court's orders. This type of contempt is criminal and punitive in nature. The second type consists of actions instituted to preserve and enforce the rights of the parties to suits, and to compel obedience to orders and decrees made to *enforce* the rights and administer the remedies to which the court has found the parties to be entitled. This type is remedial and coercive in nature; the parties chiefly interested in its prosecution are the individuals whose rights and remedies the proceedings were instituted to protect or enforce, which may sometimes include prosecutors or other government agencies. *Morelli v Superior Court* (1969) 1 C3d 328, 333, 82 CR 375; *Crawford v WCAB* (1989) 213 CA3d 156, 165, 259 CR 414.

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D. Civil Contempt

§58.5 1. Code of Civil Procedure §1209

Acts or omissions constituting contempt of court are set out in CCP §1209(a):

- Disorderly, contemptuous, or insolent behavior toward a judge while holding court that tends to interrupt the due course of a trial or other judicial proceeding;
- A breach of the peace, boisterous conduct, or violent disturbance that tends to interrupt the due course of a trial or other judicial proceeding;
- Misbehavior in office, or other willful neglect or violation of duty by an attorney, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;
- Abuse of the court process or proceedings, or falsely pretending to act under authority of an order or process of the court;
- Disobedience of any lawful judgment, order, or process of the court;
- Rescuing any person or property in the lawful custody of an officer, when such custody is pursuant to an order or process of the court;
- Unlawfully detaining a witness or a party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;
- Any other unlawful interference with the process or proceedings of the court;
- Disobedience of a subpoena duly served, or refusal to be sworn or answer as a witness, unless the refusal is pursuant to a lawful privilege or immunity;
- Unlawfully failing to attend or serve as a juror after having been summoned;
- While serving as juror, improperly conversing with a party to an action to be tried in the court, or with any other person, in relation to the merits of the action, or receiving a communication from a party or other person in respect to it, without immediately disclosing it to the court; and
- Disobedience of the lawful judgment, order, or process of a superior court by an inferior tribunal, magistrate, or officer, or taking action, contrary to law, in a case, after the case has been removed from the jurisdiction of the inferior tribunal, magistrate, or officer.

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§58.6 2. Disobedience of Court Order

Disobedience of a court order may be punished as a contempt only if the order meets several prerequisites. The order must be valid and within the court's power to enter. *In re Misener* (1985) 38 C3d 543, 213 CR 569; *In re Englebrecht* (1998) 67 CA4th 486, 498, 79 CR2d 89. The terms of the order must be specific and narrowly drawn and must be set by the court itself. *People v Moses* (1996) 43 CA4th 462, 468, 50 CR2d 665 (no contempt for violation of visitation order as amplified by parents' agreement). Any ambiguity in the order must be resolved in favor of the alleged contemnor. *In re Marcus* (2006) 138 CA4th 1009, 1014, 41 CR3d 861; *In re Blaze* (1969) 271 CA2d 210, 212, 76 CR 551. The order must be in writing and either filed with the clerk or entered in the court's minutes. *In re Marcus, supra* (oral stipulation and order insufficient); *Ketscher v Superior Court* (1970) 9 CA3d 601, 604, 88 CR 357.

Of course, the order may not be one for which the legislature has excluded contempt as a sanction for a violation. See, *e.g.,* CCP §128(f) and Pen C §1203.1b(d), discussed in §58.3.

A defendant may challenge the constitutional validity of any trial court order of contempt and may renew that challenge upon appellate review. *People v Gonzalez* (1996) 12 C4th 804, 50 CR2d 74.

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3. Punishment for Civil Contempt

§58.7 a. Civil Punitive Contempt

"Civil" punitive contempt is criminal in nature; it is used to vindicate the dignity of the court and to punish disobedience of its orders. On finding someone guilty of this type of civil contempt, the court may impose a fine of up to $1000 (generally payable to the court), order the contemnor imprisoned for up to 5 days, or both. In addition, if the guilty party violated a court order, he or she may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney fees and costs incurred in connection with the contempt proceeding. CCP §1218. This punishment may be imposed for each separate act of contempt for which a person is found guilty. See *Hawk v Superior Court* (1974) 42 CA3d 108, 116 CR 713 (affirming 12 of 14 contempt findings).

The rule of Pen C §654, that a person may be punished only once for a single course of conduct, applies to contempt matters. For example, if a witness refuses to answer a series of questions, and makes it clear that he or she will answer no questions about a particular incident, no matter how many questions the witness refuses to answer, the court may punish for only one contempt. Multiple punishment for contempt in this situation would exceed the court's jurisdiction. *In re Farr* (1976) 64 CA3d 605, 134 CR 595; *In re Keller* (1975) 49 CA3d 663, 669, 123 CR 223. See also *Mitchell v Superior Court* (1989) 49 C3d 1230, 1248, 265 CR 144, discussing the number of contempt violations possible under particular facts.

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§58.8 b. Civil Coercive Contempt

Civil coercive contempt is used to compel obedience to orders that are designed to enforce the rights of litigants. *Penfield Co. v SEC* (1947) 330 US 585, 590, 91 L Ed 1117, 1122, 67 S Ct 918. When the contempt consists of willfully refusing to perform an act, the contemnor may be imprisoned until it is performed. CCP §1219(a). However, if the contemnor is no longer able to perform the act required (*e.g.,* the proceeding giving rise to the contempt is no longer pending), the contemnor must be released from restraint. *Shillitani v U.S.* (1966) 384 US 364, 371, 16 L Ed 2d 622, 627, 86 S Ct 1531; *McComb v Superior Court* (1977) 68 CA3d 89, 99, 137 CR 233.

Civil coercive contempt can be followed by a criminal contempt action based on the same act; civil punitive contempt may not. *People v Derner* (1986) 182 CA3d 588, 591, 227 CR 344; *People v Lombardo* (1975) 50 CA3d 849, 854, 123 CR 755. The courts have construed "civil coercive contempt" broadly in order to allow later criminal actions. For example, in *People v Batey* (1986) 183 CA3d 1281, 228 CR 787, the contemnor was found guilty of three contempts. The contemnor was sentenced to 5 days in jail for each contempt (with credit given for time already served), and a fine of $3000. The fine was stayed on condition that the contemnor comply with court orders. The court of appeal found that because the contemnor was not required to serve any *further* time in custody, and because the fine was suspended, the contempt order was coercive, rather than punitive, and thus permitted a later criminal action.

Civil coercive contempt may become penal in nature when it becomes clear that further incarceration will not result in compliance by the contemnor. At that point, further imprisonment is limited by the 5-day maximum for punitive contempt. The standard is whether there is any "substantial likelihood" that continued confinement will accomplish the purpose of the order on which imprisonment is based. If not, the order is punitive and is limited to 5 days. *In re Farr* (1974) 36 CA3d 577, 111 CR 649. See also discussion in §58.7 of punishment for a single course of conduct.

Civil coercive contempt proceedings may, and often do, arise from criminal proceedings, *e.g.,* witnesses who refuse to be sworn or to testify. See §§58.23-58.26.

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§58.9 c. Burden of Proof

In general, the proponent of the contempt has the burden of proving every element necessary to show that contempt occurred. An exception arises in civil coercive contempt actions in which the contemnor's ability to comply with an order is in issue. In that event, the burden of proving *inability* to comply may constitutionally be placed on the alleged contemnor. *Hicks v Feiock* (1988) 485 US 624, 637, 99 L Ed 2d 721, 735, 108 S Ct 1423; *Maggio v Zeitz* (1948) 333 US 56, 75, 92 L Ed 476, 490, 68 S Ct 401. For example, inability to comply with a child support order is an affirmative defense that must be established by a preponderance of the evidence. *Moss v Superior Court* (1998) 17 C4th 396, 425, 71 CR2d 215. One court has even held that in a criminal contempt action based on failure to pay attorney and witness fees ordered in a family court proceeding, ability to pay is not an element of the contempt if the court finds that the defendant had ability to pay at the time the order was made. *In re Ivey* (2000) 85 CA4th 793, 102 CR2d 447.

Practitioners are well advised to ask the court to clarify *at the beginning* of the contempt proceeding whether it will result in a punitive or a coercive order, so counsel will know who has the burden of proof. Counsel should also consider any double jeopardy implications. See §§26.23-26.28, 58.13.

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Source: Criminal Law/California Criminal Law Procedure and Practice/58 CONTEMPT/ E. Criminal Contempt/§58.10 1. Penal Code §166

E. Criminal Contempt

§58.10 1. Penal Code §166

Penal Code §166 provides that a person who commits any of the following acts is guilty of contempt of court, a misdemeanor:

- Disorderly, contemptuous, or insolent behavior committed during the sitting of any court, in the court's immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;
- Behavior similar to the above committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or on any inquest or other authorized court proceedings;
- Any breach of the peace, noise, or other disturbance directly tending to interrupt court proceedings;
- Willful disobedience of any process or order lawfully issued by any court;
- Resistance willfully offered by a person to the lawful order or process of any court;
- The contumacious and unlawful refusal to be sworn as a witness; or, when sworn, the refusal to answer any material question;
- The publication of a willfully false or grossly inaccurate report of the proceedings of any court; or
- Presenting to a criminal sentencing court any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided by law.

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§58.11 2. General Intent Crime

The crime of contempt is one of general intent. It is established by showing that the defendant intended to commit the proscribed act, without the additional requirement that the defendant intended "to do some further act or achieve some additional consequence." *People v Greenfield* (1982) 134 CA3d Supp 1, 4, 184 CR 604. However, a contempt must also be willful, which in the case of a court order encompasses both an intent to disobey the order and a disregard of the duty to obey the order. *In re Karpf* (1970) 10 CA3d 355, 372, 88 CR 895. On the other hand, attempted contempt is a specific intent crime that can be substantiated using the slight-acts rule. *People v Tillotson* (2007) 157 CA4th 517, 536, 69 CR3d 42.

In the context of an attorney acting on a client's behalf, the attorney may not be punished for actions taken in good faith on the client's behalf, even if the attorney's conclusions regarding the applicable law are mistaken. See, *e.g., People v Gzikowski* (1982) 32 C3d 580, 588, 186 CR 339; *In re Buckley* (1973) 10 C3d 237, 249, 110 CR 121; *Smith v Superior Court* (1968) 68 C2d 547, 560, 68 CR 1. See also *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248.

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§58.12 3. Punishment for Criminal Contempt

A charge of contempt under Pen C §166 is prosecuted like any other misdemeanor. See *In re McKinney* (1968) 70 C2d 8, 10, 73 CR 580. Thus, the defendant has the right to a jury trial regardless of the penalty that may be imposed. *People v Earley* (2004) 122 CA4th 542, 550, 18 CR3d 694; *In re Kreitman* (1995) 40 CA4th 750, 755, 47 CR2d 595. See *Tracy v Municipal Court* (1978) 22 C3d 760, 765, 150 CR 785. Usually, the maximum punishment for a criminal contempt is 6 months in jail or a $1000 fine, or both. Pen C §19. However, the statute contains additional sentencing provisions for specific types of contempts. For example, a person who has previously been convicted of stalking (Pen C §646.9) and who disobeys a court order (Pen C §166(a)(4)) by willfully contacting a victim by telephone, mail, or directly is subject to 1 year in jail or a $5000 fine, or both. Pen C §166(b)(1).

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§58.13 4. Double Jeopardy

Double jeopardy prohibits prosecution of further criminal charges (including additional contempt charges) based on conduct that previously resulted in the defendant's being placed in jeopardy for criminal contempt or punitive civil contempt. *Colombo v New York* (1972) 405 US 9, 30 L Ed 2d 762, 92 S Ct 756; *People v Lombardo* (1975) 50 CA3d 849, 854, 123 CR 755. However, the imposition of sanctions as part of a civil *coercive* contempt action does *not* bar later criminal proceedings based on the same conduct as long as the civil coercive contempt is not found to have been penal in nature. *People v Batey* (1986) 183 CA3d 1281, 1285, 228 CR 787; *People v Derner* (1986) 182 CA3d 588, 591, 227 CR 344.

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III. ATTORNEY CONTEMPT

§58.14 A. Advocacy Versus Respect for Court

Attorney contempt presents the court and counsel with a particularly difficult problem. On one hand, an attorney has a duty to maintain respect for the court and its proceedings. On the other hand, an attorney has the right and the obligation to protect the client's interests and to make assertions that the attorney believes to be correct in a forthright manner. *In re Hallinan* (1969) 71 C2d 1179, 1183, 81 CR 1; *McCann v Municipal Court* (1990) 221 CA3d 527, 545, 270 CR 640. A reading of many appellate decisions dealing with this delicate subject discloses a gray area between the proper zeal of aggressive and effective advocacy, and improprieties that amount to aggravated misconduct. *In re Grossman* (1972) 24 CA3d 624, 629, 101 CR 176. Thus the reviewing courts will scrutinize the record with particularity to see if objective indications of contemptuous conduct exist. See *In re Buckley* (1973) 10 C3d 237, 110 CR 121; *Hawk v Superior Court* (1974) 42 CA3d 108, 116 CR 713. As the court in *In re Hallinan, supra,* wrote:

> An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case. [Citations.] The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements.

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§58.15 B. Warning

When the contempt order is based on "wholly innocuous" words (*Gallagher v Municipal Court* (1948) 31 C2d 784, 796, 192 P2d 905) or on "language which is in itself not insolent, contemptuous, or disorderly" (*In re Hallinan* (1969) 71 C2d 1179, 1181, 81 CR 1), the judge must first warn the attorney before taking disciplinary action (*In re Buckley* (1973) 10 C3d 237, 250, 110 CR 121). This is also so when the conduct complained of consists of any matters not necessarily evident from the record, such as offensive tone, facial expressions, or gestures. *Boysaw v Superior Court* (2000) 23 C4th 215, 222, 96 CR2d 531; *In re Grossman* (1972) 24 CA3d 624, 638, 101 CR 176.

However, when the contempt is based on a statement by counsel that is clearly insolent, offensive, or insulting, or that impugns the court's integrity, and as such is contemptuous "on its face," no warning is required before contempt is found. *In re Buckley, supra*.

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§58.16 C. Apology

In instances of direct contempt, an apology to the judge "should be given serious consideration," although the effect to be given this mitigating factor lies exclusively in the trial judge's sound discretion. *In re Buckley* (1973) 10 C3d 237, 257, 110 CR 121; *In re Koven* (2005) 134 CA4th 262, 274, 35 CR3d 917. After serious consideration, a court may find an apology insufficient to purge an attorney of contempt. *In re Koven* (2005) 134 CA4th 262, 274, 35 CR3d 917.

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Source: Criminal Law/California Criminal Law Procedure and Practice/58 CONTEMPT/§58.17 D. Specific Conduct Constituting Direct Civil Contempt

§58.17 D. Specific Conduct Constituting Direct Civil Contempt

The following acts, when properly recorded, have been held to constitute direct contempt of court:

- Advising a client to disobey a lawful court order. *Hawk v Superior Court* (1974) 42 CA3d 108, 116, 116 CR 713 (order to produce handwriting exemplar).
- Impugning the court's integrity, either orally or in writing. *In re Buckley* (1973) 10 C3d 237, 248, 110 CR 121 ("this court obviously doesn't want to apply the law"); *Hume v Superior Court* (1941) 17 C2d 506, 513, 110 P2d 669 (false charge of court's collusion with Attorney General); *Blodgett v Superior Court* (1930) 210 C 1, 16, 290 P 293 (false charge of corruption in legal memorandum); *In re Shay* (1911) 160 C 399, 407, 117 P 442 (letter imputing improper conduct to supreme court justices); *In re Koven* (2005) 134 CA4th 262, 35 CR3d 917 (allegation that court of appeal "fixed" case because of bias, concealed conflicts, and "conspired" with defendants); *In re White* (2004) 121 CA4th 1453, 18 CR3d 444 (statements implying that trial court knowingly ignored law and acted out of bias toward prosecution); *Hanson v Superior Court* (2001) 91 CA4th 75, 78, 109 CR2d 782 (arguing to jury that defendant "has not received a fair trial in this case"); *In re Grossman* (1972) 24 CA3d 624, 634, 101 CR 176 (false accusations of judge's bias); *Gillen v Municipal Court* (1940) 37 CA2d 428, 429, 99 P2d 555 (oral statement that opposing counsel won before he started); *In re Friday* (1934) 138 CA 660, 32 P2d 1117 (objecting to rulings and falsely charging trial judge with improper conduct); *Ex parte Ewell* (1925) 71 CA 744, 747, 236 P 205 (letter attacking judge); *In re Lapique* (1915) 26 CA 258, 146 P 690 (affidavit in support of motion for change of venue imputing judge's lack of integrity). But see *In re Carrow* (1974) 40 CA3d 924, 927, 115 CR 601 ("Your Honor, I submit this trial is becoming a joke" held not to be contempt).

  Ø **Note:** In this area, the context of the particular statement held by the trial judge to be contemptuous will determine whether the contempt citation will ultimately withstand review. See, *e.g., In re Buckley* (1973) 10 C3d 237, 250 n16, 110 CR 121 (contempt upheld in context); *In re Carrow* (1974) 40 CA3d 924, 928, 115 CR 601 (contempt annulled after offending remark reviewed in context).

- Intentionally interjecting personal and prejudicial comments during jury voir dire, in presence of the jury. *Hawk v Superior Court* (1974) 42 CA3d 108, 119, 116 CR 713 (comment on personal belief in innocence of his client; unsupported allegation that use of peremptory challenge by prosecution amounted to "absolute white racism" and attempt to "systematically exclude minority groups").
- Repeatedly questioning in an area properly objected to, which objections were sustained. 42 CA3d at 126.
- Repeatedly refusing to yield to the court's rulings. 42 CA3d at 130.

  Ø **Note:** In accord with the rule that violation of an unlawful order cannot be contemptuous, an attorney cannot be sanctioned for making proper arguments and objections, or for standing up when it is proper to do so. *Cooper v Superior Court* (1961) 55 C2d 291, 10 CR 842 (defense counsel objected to judge's unfavorable comments about defense witnesses to jury during deliberations); *Bellas v Superior Court* (2000) 85 CA4th 636, 102 CR2d 380 (defense counsel justified in refusing to return juror questionnaires). See also *People v Kalnoki* (1992) 7 CA4th Supp 8, 12, 9 CR2d 827.

- Defense counsel's refusing to actively participate in defendant's trial, even if counsel is unprepared. *People v McKenzie* (1983) 34 C3d 616, 627, 194 CR 462 (noting that under such circumstances contempt power "must be exercised with great caution"). See also *Oberholzer v Commission on Judicial Performance* (1999) 20 C4th 371, 399, 84 CR2d 466 (prosecutor whose inadequate motion for continuance was denied could have been held in contempt for unequivocally refusing to proceed). But see *Hughes v Superior Court* (1980) 106 CA3d 1, 5, 164 CR 721 (contempt invalid when defense attorney refused to participate in jury selection because he was unprepared owing to his need to prepare another case calendared for trial). See §§20.12, 2.29 on the dilemma of defense counsel unprepared to proceed.

Although an affidavit of disqualification can constitute a contempt (see *Lamberson v Superior Court* (1907) 151 C 458, 462, 91 P 100 (affidavit to disqualify judge charging corrupt and improper motives); *Hallinan v Superior Court* (1938) 27 CA2d 433, 438, 81 P2d 254 (affidavit charging dishonesty of presiding judge)), to be contemptuous the affidavit must be presented in an objectionable manner; contain irrelevant, immaterial, or false statements made with bad faith or improper intent; or attack the judge's integrity with defamatory matter. See *In re Ciraolo* (1969) 70 C2d 389, 74 CR 865; *Fine v Superior Court* (2002) 97 CA4th 651, 665, 119 CR2d 376.

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§58.18 E. Specific Conduct Constituting Indirect Civil Contempt

An attorney's knowing and intentional assistance of a witness to evade service of a subpoena is punishable by contempt. *In re Holmes* (1983) 145 CA3d 934, 944, 193 CR 790.

Statements made outside a judge's presence may constitute indirect civil contempt (see §58.28), but an affidavit on the statements must be presented to the judge before he or she can proceed on a contempt citation. *Ryan v Commission on Judicial Performance* (1988) 45 C3d 518, 247 CR 378 (attorney's question about when next judicial election would occur did not constitute contempt). See discussion of the limitations on the contempt power in §58.3. The court in *Ryan* found that the trial judge should have known or researched the proper contempt procedures.

An attorney cannot be found in contempt for writing a letter to a newspaper criticizing a decision to which he or she was neither a party nor an attorney and that was not currently pending before the court. *Lloyd v Superior Court* (1982) 133 CA3d 896, 184 CR 467.

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F. Specific Conduct Constituting Hybrid Civil Contempt

§58.19 1. Failure to Appear

"Elusive attorneys are a recurring problem in trial courts, particularly in calendar departments." *Arthur v Superior Court* (1965) 62 C2d 404, 409, 42 CR 441. An attorney's unexplained and unexcused failure to appear in court at the time and place designated may constitute contempt. See, *e.g., Seykora v Superior Court* (1991) 232 CA3d 1075, 283 CR 857. An attorney cannot be found in contempt of court, however, if duties in one court prevent him or her from appearing in another. In addition, attorneys cannot be required to appear in any particular court without cause. *Mowrer v Superior Court* (1969) 3 CA3d 223, 230, 83 CR 125.

When counsel fails to appear, the offensive conduct occurs in the presence of the court. When counsel reappears in the courtroom, before he or she may properly be found in contempt, due process requires that he or she be notified of the contempt charge and be given a reasonable opportunity to explain the absence. *Arthur v Superior Court, supra*. See §58.28 on hybrid civil contempt.

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§58.20 2. Misrepresentation to Court

A willful misrepresentation to the court can form the basis of a contempt charge. See, *e.g., Vaughn v Municipal Court* (1967) 252 CA2d 348, 60 CR 575 (attorney made untrue representations to court to obtain continuance). See also *In re Aguilar* (2004) 34 C4th 386, 394, 18 CR3d 874 (managing attorney whose office failed to appear before supreme court falsely explained he was unaware of date for oral argument); *In re Ciraolo* (1969) 70 C2d 389, 393, 74 CR 865.

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§58.21 3. Failure to Be Ready for Trial

Appointed attorneys in felony cases who state at the time of appointment that they would be ready for trial and who are not ready *without good cause* may be punished for contempt. Pen C §987.05. The constitutionality of this statute has not been tested. See §20.32.

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§58.21A 4. Failure to File Appellate Brief on Time

Willful failure to file the opening brief in a criminal appeal after repeated extensions of time may be punished as contempt. *In re Grayson* (1997) 15 C4th 792, 64 CR2d 102 ($1000 fine); *In re Young* (1995) 9 C4th 1052, 40 CR2d 114 (5 days in jail).

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§58.22 5. Failure to Provide Discovery

Attorneys who fail to provide discovery that has been ordered by the court may be punished for contempt. Pen C §1054.5(b). See *In re Littlefield* (1993) 5 C4th 122, 131, 19 CR2d 248.

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IV. WITNESS CONTEMPT

§58.23 A. In General

Disobeying a subpoena may be punished as contempt. Pen C §§1331, 1331.5; *In re Holmes* (1983) 145 CA3d 934, 942, 193 CR 790. The subpoena must state that failure to appear is punishable as contempt (*In re Garcia* (1974) 41 CA3d 997, 116 CR 503), and it must have been personally served (*In re Abrams* (1980) 108 CA3d 685, 166 CR 749) for the witness to be subject to arrest. See also Pen C §1328d (failure to comply with subpoena may be punished by contempt if properly served under §1328d, but contemnor may not be arrested). If the subpoena was personally served, the court may order the sheriff to arrest the witness and bring that person to court to testify. CCP §§1991, 1993-1997. See also Pen C §881.

If a witness refuses to appear at a preliminary examination after having been properly served with a valid subpoena, the court may incarcerate the witness until the hearing is concluded, for up to 10 days. Pen C §881(b), (d).

When a contempt consists of refusal to obey a court order to testify, the witness may be confined until he or she complies with the order. CCP §1219; *McCrone v U.S.* (1939) 307 US 61, 83 L Ed 1108, 59 S Ct 685. The witness may not be confined beyond the conclusion of the underlying proceeding unless there are additional reasons for requiring the witness's testimony. *In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649. Such cases may also be treated as direct contempt (see §58.28) under CCP §1209, or as criminal contempt under Pen C §166. *In re Keller* (1975) 49 CA3d 663, 670, 123 CR 223. For example, after correctly ruling that a witness is not entitled to claim the privilege against self-incrimination under the Fifth Amendment, a court may find the witness in contempt for continuing to refuse to testify. *People v Lopez* (1999) 71 CA4th 1550, 1553, 84 CR2d 655. To be valid, however, the written contempt order must specify the underlying facts, such as the claims of the privilege, the court's ruling on the claims, and the appearance and participation of counsel for the witness. *In re D.W.* (2004) 123 CA4th 491, 500, 20 CR3d 274; see §58.34.

Perjury, standing alone, generally cannot be punished as contempt; the additional element of "obstruction" or interference with the court's performance of its duties must be shown. *In re Michael* (1945) 326 US 224, 90 L Ed 30, 66 S Ct 78. Therefore, contempt is not necessarily available as a lesser included offense to a perjury charge.

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B. Particular Witnesses

§58.24 1. Particular Crime Victims

The victim of a sexual assault or domestic violence crime cannot be imprisoned or otherwise placed in custody for contempt when the contempt consists of refusing to testify about the assault or domestic violence crime, although a fine may be imposed. CCP §1219(b). See §58.35 on mandatory 3-day stay of contempt orders concerning sexual assault and domestic violence victims.

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§58.25 2. Juveniles

If a witness is under age 16 and refuses to be sworn or to testify, CCP §1219.5(a) prohibits imposing any sanction without a probation officer's report and recommendation. (It is also questionable whether a juvenile could have any sanction imposed for contempt without invoking the juvenile court's jurisdiction under Welf & I C §602.)

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§58.26 3. Newspersons

The newsperson's shield law (Cal Const art I, §2; Evid C §1070) protects a reporter who was an eyewitness to a public event from testifying to the event seen. *Miller v Superior Court* (1999) 21 C4th 883, 89 CR2d 834 (television news director could not be held in contempt for refusing to comply with a court order, issued at the request of the prosecution in a criminal case, to produce unpublished parts of a videotaped interview with the defendant). That law must yield, however, to a criminal defendant's federal constitutional right to a fair trial. *Delaney v Superior Court* (1990) 50 C3d 785, 268 CR 753 (when called as witness by defendant, newspaper reporter who witnessed arrest could be held in contempt for refusing to testify, after trial court ruled that defendant's due process need for relevant information outweighed reporter's interest against disclosure).

A difficult problem arises when a newsperson testifies on behalf of a criminal defendant, but then invokes the shield law on proper cross-examination by the prosecution. In that event, the newsperson's direct testimony may be stricken unless the defendant can show that exclusion of that testimony would deprive him or her of a fair trial, and that his or her right transcends that of the witness under the shield law. If the defendant makes such showings, the testimony of the witness on direct may be received, and the newsperson may be held in contempt of court for refusing to respond to proper cross-examination. *Fost v Superior Court* (2000) 80 CA4th 724, 95 CR2d 620.

A newsperson must disclose the identity of a source who gave information in violation of a "gag" order only if there is a "substantial probability" of future violations that will impair the defendant's ability to obtain a fair trial. *In re Willon* (1996) 47 CA4th 1080, 1099, 55 CR2d 245.

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V. CONTEMPT PROCEDURES

A. Civil Contempt

§58.27 1. Constitutional Guaranties

Although the statutes pertaining to both punitive and coercive civil contempt are in CCP Part III, titled "Special Proceedings of a Civil Nature," contempt proceedings are said to be criminal in nature, and the procedural rights and safeguards of criminal contempt proceedings also apply to civil contempt proceedings. *Safer v Superior Court* (1975) 15 C3d 230, 235, 124 CR 174; *Gates v Municipal Court* (1992) 9 CA4th 45, 56, 11 CR2d 439. These rights include the appointment of counsel if an indigent faces the loss of liberty as a result of the contempt. *County of Santa Clara v Superior Court* (1992) 2 CA4th 1686, 5 CR2d 7 (indigent father entitled to appointed counsel when facing jail time for failure to pay child support). The one exception is that there is usually no right to a jury trial for civil contempt. *Cheff v Schnackenberg* (1966) 384 US 373, 377, 16 L Ed 2d 629, 632, 86 S Ct 1523; *United Farm Workers, AFL-CIO v Superior Court* (1968) 265 CA2d 212, 71 CR 513. However, the federal right to a jury trial applies if the court punishes multiple charges of civil contempt with a jail term longer than 6 months. *Codispoti v Pennsylvania* (1974) 418 US 506, 41 L Ed 2d 912, 94 S Ct 2687. Thus, if the court desires the option of imposing a sentence longer than 6 months, it must permit the defendant to have a trial by jury; otherwise, the maximum punishment is 6 months. *In re Kreitman* (1995) 40 CA4th 750, 755, 47 CR2d 595.

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§58.28 2. Classification of Civil Contempt to Determine Which Procedures Apply: Direct, Indirect, and Hybrid Contempt

The following civil contempt classifications are merely a semantic device for differentiating contempt that can be adjudicated summarily from contempt that can be adjudicated only after adequate notice and hearing. See *Chula v Superior Court* (1962) 57 C2d 199, 208, 18 CR 507 (dissenting opinion of Traynor, J.*).*

Direct contempt. When contempt is committed in the court's immediate view and presence, it is termed direct contempt and may be treated summarily. No formal hearing is required. All that is needed is that an order be made reciting the facts, the person adjudged guilty, and the punishment prescribed. CCP §1211; *In re Hallinan* (1969) 71 C2d 1179, 81 CR 1; *Bobb v Municipal Court* (1983) 143 CA3d 860, 870, 192 CR 270. If the alleged contemnor wishes an opportunity to explain his or her conduct, the court should listen. The contemnor, however, has no right to present evidence, and the court need not accept the explanation. *In re Baroldi* (1987) 189 CA3d 101, 108, 234 CR 286.

Hybrid contempt. Hybrid contempt occurs in the court's presence, but it may be excused by matters occurring outside the courtroom. For example, an attorney's or a witness's failure to appear in court is a hybrid contempt, because the nonappearance occurs in the court's presence but the reasons for it occur out of the court's presence. *In re Baroldi, supra*. In general, the requirements for finding hybrid contempt are the same as for direct contempt, except that the alleged contemnor must be given an opportunity to establish an excuse for the contemptuous behavior. After giving the contemnor the opportunity to present evidence, the court may punish summarily as long as the court is convinced beyond a reasonable doubt that no valid excuse has been established. *In re Stanley* (1981) 114 CA3d 588, 591, 170 CR 755.

Indirect contempt. When the contempt is not committed in the immediate presence of the court, or of the judge in chambers, the procedural requirements are more complex, requiring the filing of an affidavit and the holding of a formal hearing. See CCP §§1211-1218. See §58.38 for discussion of indirect contempt.

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§58.29 3. Substitution of Hearing Judge

When there is evidence that the trial judge "has become 'personally embroiled' with a lawyer [or party] in the trial, [such] as to make the judge unfit to sit in judgment on the contempt charge," a new and impartial judge must be substituted. *Mayberry v Pennsylvania* (1971) 400 US 455, 465, 27 L Ed 2d 532, 540, 91 S Ct 499. The court will look at both the conduct of the alleged contemnor and at the judge's response. See *In re Buckley* (1973) 10 C3d 237, 256, 110 CR 121; *In re Carrow* (1974) 40 CA3d 924, 927, 115 CR 601. Even if the trial judge is not "personally embroiled," if the contempt adjudication is postponed until the end of the trial, it is preferable to have another judge hear it. *In re Carrow, supra*. This rule does not apply when the contempt adjudication occurs during the proceedings as a means of ensuring the orderly progress of the trial. *In re Buckley, supra; Hawk v Superior Court* (1974) 42 CA3d 108, 131, 116 CR 713. However, if another judge does conduct the contempt proceeding, the proceeding will be considered one for indirect contempt. *Hanson v Superior Court* (2001) 91 CA4th 75, 109 CR2d 782.

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§58.30 4. Challenge to Hearing Judge

In cases of direct contempt, the judge in whose presence the contempt is committed has a conditional power to summarily punish the offender. This power is necessary to preserve the integrity of the court and to allow the affronted judge to continue to preside. For this reason, it has been held that disqualification of the judge is not permitted. *Gates v Municipal Court* (1992) 9 CA4th 45, 52, 11 CR2d 439.

In cases of indirect contempt, however, the rules pertaining to disqualification of a judge under CCP §§170.1, 170.6 apply. *Gates v Municipal Court, supra*.

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§58.31 5. Affidavit for Indirect Contempt

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit must be presented to the court or judge of the facts constituting the contempt. CCP §1211. The requirement of filing an affidavit is jurisdictional. Any contempt order made concerning matters not occurring in the court's presence, and not supported by a proper affidavit, is procedurally invalid. *Ryan v Commission on Judicial Performance* (1988) 45 C3d 518, 532, 247 CR 378.

Without a proper and sufficient affidavit, no indirect contempt may be found or punished. *Sorell v Superior Court* (1967) 248 CA2d 157, 160, 56 CR 222. The affidavit's insufficiency cannot be cured by presenting proof of contempt at a hearing. *In re Cowan* (1991) 230 CA3d 1281, 281 CR 740.

However, under CCP §1211.5, if objections to the sufficiency of an affidavit are not made at the time of the hearing, they are deemed waived, and the court may amend the affidavit to correct any defect or insufficiency or to conform to proof. Nonetheless, any amendment must be made at the beginning and not at the end of the hearing. *Reliable Enters. v Superior Court* (1984) 158 CA3d 604, 204 CR 786, disapproved on other grounds in *Mitchell v Superior Court* (1989) 49 C3d 1230, 1248 n13, 265 CR 144.

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§58.32 6. Hearing

The accused in hybrid contempt cases is entitled to an opportunity to establish an excuse for the contemptuous behavior. *In re Martin* (1977) 71 CA3d 472, 139 CR 451. In indirect contempt cases, an affidavit must be filed and a formal hearing held. CCP §§1211-1218. No hearing is required in direct contempt cases. CCP §1211. However, better practice is to allow the contemnor the opportunity to be heard. *Taylor v Hayes* (1974) 418 US 488, 497, 41 L Ed 2d 897, 907, 94 S Ct 2697; *Hawk v Superior Court* (1974) 42 CA3d 108, 131, 116 CR 713. See also §58.16.

If an affidavit charging indirect contempt has been filed, the proponent of the contempt must present witnesses to prove the contempt beyond a reasonable doubt. The accused is entitled to cross-examine witnesses and to present witnesses in his or her defense. Basically, the rights of the alleged contemnor are the same as those of a criminal defendant, including the right to counsel, except that there is no general right to a jury trial. CCP §1217; Govt C §27706(a); *In re Witherspoon* (1984) 162 CA3d 1000, 209 CR 67; *In re Morelli* (1970) 11 CA3d 819, 850, 91 CR 72. There is an exception: Alleged contemnors have the right to a jury trial if the potential jail sentence exceeds 6 months. *Mitchell v Superior Court* (1989) 49 C3d 1230, 1243, 265 CR 144.

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§58.33 7. Timing of Order

For attorneys engaged in jury trials, "virtually uniform practice entails deferment of the contempt adjudication or of actual punishment until the jury is discharged." *People v Fusaro* (1971) 18 CA3d 877, 888, 96 CR 368, disapproved on other grounds in *People v Brigham* (1979) 25 C3d 283, 292 n14, 157 CR 905. However, if the adjudication is delayed and the contempt is not found and punished immediately, then the court cannot punish the contempt as a direct contempt, and the alleged contemnor is entitled to notice (*i.e.,* a proper affidavit showing a contempt) and a full hearing. *Taylor v Hayes* (1974) 418 US 488, 497, 41 L Ed 2d 897, 906, 94 S Ct 2697; *In re Karagozian* (1975) 44 CA3d 516, 523, 118 CR 793. It is, however, permissible to find contempt, impose punishment, and then stay execution of punishment until the end of the trial.

If the court has orally found contempt, the written order (see §58.34) must be filed in a timely manner. Contempt charges have been invalidated owing to delays in filing the written order. See, *e.g., In re Easterbrook* (1988) 200 CA3d 1541, 244 CR 652, disapproved on other grounds in *People v Romero* (1994) 8 C4th 728, 744 n10, 35 CR2d 270 (6 days); *In re Jones* (1975) 47 CA3d 879, 881, 120 CR 914) (8 days).

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§58.34 8. Written Order

Direct contempt. An order of direct contempt must recite the acts committed in the court's immediate view and presence during the proceeding that allegedly establish the trial court's jurisdiction to issue the order. *In re Grossman* (1972) 24 CA3d 624, 631, 101 CR 176. The order must specify that the contemnor's conduct occurred in the count's immediate view and presence, but this may be demonstrated not only by an express declaration to that effect, but also by the recitation of the underlying facts. *Boysaw v Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531 (disapproving prior cases strictly requiring an express declaration). If the contempt finding requires a prior warning, the contempt order must specify that such a warning was given. *Boysaw v Superior Court, supra*.

An order of direct contempt is valid only if it recites facts with sufficient particularity to demonstrate on its face that the contemnor's conduct constituted a legal contempt. *In re Grossman* (1972) 24 CA3d 624, 633, 101 CR 176. It is not sufficient for the order to contain only the "bare conclusions" of the trial judge. *In re Hallinan* (1969) 71 C2d 1179, 1182, 81 CR 1. See also *Boysaw v Superior Court* (2000) 23 C4th 215, 222, 96 CR2d 531; *In re Carrow* (1974) 40 CA3d 924, 933, 115 CR 601 (conclusionary declaration that remark was made in bad faith held insufficient). Although recapitulation of the exact words constituting the contempt is not mandatory, it is the preferred practice. *In re Grossman, supra*. The order must set forth the specific *facts* on which the contempt is based, not conclusions or general characterizations. Failure to set forth specific facts in the written order voids the contempt. *In re Littlefield* (1993) 5 C4th 122, 138, 19 CR2d 248; *In re De La Parra* (1986) 184 CA3d 139, 144, 228 CR 864. If the direct contempt is based on violation of a prior order, the written contempt order must describe the prior order with particularity. *In re Ringgold* (2006) 142 CA4th 1001, 1014, 48 CR3d 507.

It is the written contempt order itself that must specifically set forth the facts constituting the contempt. The order cannot incorporate another document, such as a transcript, but must be sufficient on its face. *Hawk v Superior Court* (1974) 42 CA3d 108, 125 n16, 116 CR 713.

> Ø **Note:** The requirements for direct contempt apply to hybrid contempt. *In re Stanley* (1981) 114 CA3d 588, 591, 170 CR 755.

Indirect contempt. An order for indirect contempt will also not suffice if it merely states a conclusion of law. Thus, mere recitation in an order for indirect contempt that the contemnor violated a court order is insufficient to sustain the contempt. The order must recite a finding that the court has unmistakably found to be true all the facts constituting contempt of the court's authority. *Hanson v Superior Court* (2001) 91 CA4th 75, 83, 109 CR2d 782.

No nunc pro tunc order. Because a contempt order is final under CCP §1222, the order may not be corrected nunc pro tunc to cure deficiencies in the original order. *Bloom v Superior Court* (1986) 185 CA3d 409, 412, 229 CR 747, disapproved on other grounds in *Boysaw v Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531. Similarly, if a contempt order is found insufficient on review, the matter cannot be remanded to the trial court to correct the order. *In re Baroldi* (1987) 189 CA3d 101, 111, 234 CR 286; *Bloom v Superior Court, supra*.

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§58.35 9. Mandatory Stay of Execution

If a contempt order is made affecting an attorney or his or her agent, investigator, or anyone acting under the attorney's direction, in the preparation and conduct of any action or proceeding, execution of the sentence must be stayed for 3 *judicial* days, pending the filing of a petition for extraordinary relief to test the lawfulness of the court's order. CCP §§128(b), 1209(c).

Ø **Note:** Even if a petition is filed, only a 3-judicial-day stay is required, and thus any further stay must be sought from the reviewing court. If the violation involved conduct proscribed by Bus & P C §6068(b), relating to an attorney's duty to maintain respect due to the courts and judicial officers, however, no stay is required. CCP §§128(b), 1209(c).

If a contempt order is made affecting a public safety employee, acting within the scope of employment, based on the employee's failure to comply with a duly issued subpoena or subpoena duces tecum, execution of the sentence must be stayed pending the filing within 3 judicial days of a petition for extraordinary relief, testing the legality of the court's order. CCP §§128(c), 1209(d). Here again, even if a petition is filed, only a 3-judicial-day stay is required, and thus any further stay must be sought from the reviewing court.

Three-judicial-day stays are also mandatory when the contempt consists of a sexual assault victim's refusal to testify about the assault, or a domestic violence victim's refusal to testify about the domestic violence. CCP §128(d)-(e).

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§58.36 B. Criminal Contempt

Contempt charged under Pen C §166 is a misdemeanor and is prosecuted like any other misdemeanor charge. *In re Kreitman* (1995) 40 CA4th 750, 755, 47 CR2d 595. See generally *People v Gonzalez* (1996) 12 C4th 804, 816, 50 CR2d 74.

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VI. PROCEDURAL CHECKLISTS FOR CIVIL CONTEMPT

§58.37 A. Checklist: Direct Contempt

- Observation of the contemptuous act in the court's immediate view and presence (CCP §1211).
- Determination of whether the act was contemptuous (CCP §1209).
- Determination of whether a warning is required.
- Warning given on the record, if appropriate.
- Reobservation of the act.
- Immediate citation on the record:
- Recitation that a prior warning was given;
- Recitation in detail of the act, with description, if appropriate;
- Express or implied recitation that the act took place in the court's immediate view and presence;
- Finding that the contempt was established beyond a reasonable doubt and, if appropriate, indication of the subsection of CCP §1209 relied on.
- Opportunity for contemnor to explain or apologize on the record.
- Immediate adjudication of the contempt.
- Immediate imposition of punishment.
- Stay of execution (mandatory in some cases; see §58.35).
- Preparation of a written order.

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§58.38 B. Checklist: Indirect Contempt

- Filing an affidavit alleging the facts constituting the contempt (CCP §1211).
- Issuance of a warrant of attachment or (preferably) an order to show cause (CCP §1212).
- Service of the order on the alleged contemnor (CCP §1016).
- Optional counteraffidavit.
- Judge may want to disqualify himself or herself.
- Hearing.
- Findings.
- Imposition of punishment.
- Written order of contempt.

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§58.39 VII. REVIEW OF CONTEMPT ORDER

In criminal contempt cases (Pen C §166), normal criminal appellate remedies apply. See, *e.g., People v Greenfield* (1982) 134 CA3d Supp 1, 184 CR 604. However, the rules on review of civil contempt orders are quite different.

The judgment of a court in civil contempt cases is final and conclusive. CCP §1222. As such, the order is not appealable. CCP §§904.1(a)(1)(B), 904.2(a)(2). *In re Buckley* (1973) 10 C3d 237, 259, 110 CR 121. Contempt orders that result in a custodial sentence are reviewed by a petition for writ of habeas corpus, while those that result only in a fine are reviewed by a petition for writ of certiorari. *Inniss v Municipal Court* (1965) 62 C2d 487, 42 CR 594.

Owing to the summary nature of civil contempt, a civil contempt order is *not* presumed to be correct. Instead, all presumptions must be drawn *against* the validity of the contempt order. *In re D.W.* (2004) 123 CA4th 491, 500, 20 CR3d 274; *In re Rosen* (1973) 31 CA3d 71, 74, 106 CR 757, disapproved on other grounds in *Boysaw v Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531. A reviewing court may not presume the existence of matters not specifically set forth in the written order, and the order must be strictly construed to favor the accused. 31 CA3d at 73. See also *Corenevsky v Superior Court* (1984) 36 C3d 307, 327, 204 CR 165. No presumptions are to be made in favor of the judgment. *In re Coleman* (1974) 12 C3d 568, 572, 116 CR 381.

In reviewing an adjudication of contempt, the sole question is whether the trial court had jurisdiction to render the judgment under review. *In re Buckley* (1973) 10 C3d 237, 247, 110 CR 121; *In re Holmes* (1983) 145 CA3d 934, 941, 193 CR 790. Thus, the reviewing court's responsibility is merely to ascertain whether sufficient evidence was put before the trial court to sustain its judgment and order. The power to weigh the evidence rests with the trial court. *New York Times v Superior Court* (1990) 51 C3d 453, 459, 273 CR 98. As a general proposition, a reviewing court may not inquire into the reasonableness of a contempt punishment fixed by the trial court within the statutory maximum. *People v Fusaro* (1971) 18 CA3d 877, 888, 96 CR 368, disapproved on other grounds in *People v Brigham* (1979) 25 C3d 283, 292 n14, 157 CR 905.

On reviewing contempt orders that result from disobeying protective orders, see §14.26.

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§58.40 VIII. REPORT TO STATE BAR

The State Bar must be notified of a final order of contempt imposed against an attorney that may involve grounds warranting discipline. Bus & P C §6086.7(a). See, *e.g., In re Riordan* (2002) 26 C4th 1235, 115 CR2d 1. The attorney involved must be notified of the referral to the State Bar. Bus & P C §6086.7(c). Of course, even if contempt proceedings are not instituted, the State Bar also may be notified when an attorney engages in misconduct warranting discipline. Bus & P C §6103; *People v McKenzie* (1983) 34 C3d 616, 627 n5, 194 CR 462. See, *e.g., People v Pigage* (2003) 112 CA4th 1359, 1376, 6 CR3d 88.

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