Appellate Advocacy College 2000

Lecture

Issue Evaluation in Criminal Appeals

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STANDARDS OF REVIEW ON APPEAL

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June, 1993

Revised April, 2000

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We appreciate the assistance of Christine Kranich and Sandra Peterson in cite- and source-checking these materials.

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I. INTRODUCTION: WHAT IS A STANDARD OF REVIEW, AND HOW IS IT DIFFERENT FROM A STANDARD OF PREJUDICE?

The concept of a standard of review is one of the most basic aspects of appellate practice. Nonetheless, many inexperienced practitioners are either unaware of this concept, or confuse it with the equally basic concept of a standard of prejudice.

Every issue raised on appeal is governed both by a standard of review, and by a standard of prejudice. The standard of review is the test by which the appellate court examines the trial court's ruling to determine if there is error. The standard of prejudice comes into play only after the appellate court, applying the applicable standard of review, has found error. At that point, the appellate court determines, under the appropriate standard of prejudice, whether the error requires reversal.[1]

[1] In some cases the court will avoid deciding whether there was error, by simply stating that even if there was an error it would not be prejudicial. In the usual case, however, the court first determines if there was error, and then applies the standard of prejudice if error was committed.

Thus, for example, a trial court rules that photographs of the victim can be introduced at trial. The trial court rules that the photographs are relevant, and that under Evidence Code § 352 their probative value outweighs any prejudice. The court of appeal will apply the abuse of discretion standard of review to the trial court's relevance and § 352 determinations. If the appellate court finds that the trial court has abused its discretion and thus committed error in admitting the photographs, then the appellate court will move to the applicable standard of prejudice to see if the error warrants reversal (in this case, the Watson standard[2] of whether there is a reasonable probability of a more favorable verdict absent the evidence). In People v. Poggi (1988) 45 Cal.3d 306, the Supreme Court did find that introduction of photographs was an abuse of discretion because the photographs had no relevance to any disputed issue at trial; however, the court found the error harmless under Watson.

As seen, then, in every issue that is raised on appeal there will be a standard of review which determines how the court of appeal examines the trial court's ruling, and a standard of prejudice which determines whether any error requires reversal. These materials discuss the basic standards of review, defining them and giving examples of issues reviewed under each of the standards.

Please note that certain specific issues may have their own peculiar standard of review. These materials are not meant to be comprehensive. Rather, the materials discuss the major standards of review and present examples of issues coming within them. The

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[2] People v. Watson (1956) 46 Cal.2d 818.

point is that the practitioner, in every issue he/she raises, should be aware of the specific standard of review the courts use in dealing with that issue.[3]

The following sections of the materials discuss six basic standards of review, and also discuss some general appellate presumptions favoring a trial court's ruling. Additionally, the final section notes some issues in which the magistrate's findings, not the Superior Court's, are credited by the appellate court.

[3] The reason why these materials cannot be comprehensive is evident. The point of the materials is to stress the basic precept that every issue raised on appeal has a standard of review by which the appellate court judges the issue. These materials discuss the major standards of review, and give a number of examples of issues coming within each. However, to be truly comprehensive, the materials would have to catalogue every issue that has been raised in California appellate courts.

II. SIX BASIC STANDARDS OF REVIEW

Six basic standards of review are discussed in these materials:

l. Issues not reviewable on appeal.

2. Issues reviewed under the abuse of discretion standard.

3. Issues of fact reviewed under the substantial evidence standard.

4. Issues of law reviewed under the independent review standard.

5. Mixed questions of fact and law, reviewed under either the substantial evidence standard, the independent review standard, or some combination of the substantial evidence and independent review standards.

6. Issues reviewed under a complete de novo review of fact and law.

These different standards entail a spectrum of deference to the trial court's ruling. The definitions of the standards are given in the individual sections, infra, dealing with each standard. Briefly, for issues that are reviewed under the abuse of discretion standard, the trial court is given very wide latitude to make its decision, and it is rare for an appellate court to find error under that standard. Most factual determinations by the trial court are reviewed under the substantial evidence standard, in which the appellate court simply determines whether there is credible evidence in the record which supports the trial court's factual determination. In this standard, as with the abuse of discretion standard, the appellate court does not substitute its own judgement for that of the trial court. It is thus uncommon for an appellate court to find error under the substantial

evidence test. On the other hand, most issues that are simply questions of law are reviewed independently by the appellate court, and there is usually no deference to the trial court's ruling of law.

For questions that contain a mixture of fact and law, as a preliminary matter the appellate court usually will review the trial court's purely factual findings under the substantial evidence standard. Similarly, the appellate court will apply the independent review standard in determining and defining the applicable principles of law. The "mixed" question then arises in applying the facts to the principle of law.

Many issues involve this mix-- e.g., how long the police officers waited at the door after knocking (a preliminary factual question), what principles of law govern police entry (the legal principles embodied in the knock-notice rule, requiring the police to give reasonable notice before entering), and whether the knock-notice rule was violated where, e.g., the police waited fifteen seconds and then entered the house (the mixed question, applying the facts to the legal principles). This latter determination, the "mixed" one, is viewed in many issues as predominantly legal, and thus is reviewed under the independent review standard. For other mixed questions, however, the appellate court views the issue as mainly factual, and reviews the trial court determination under the substantial evidence test.

Finally, in certain rare instances the appellate court independently makes the factual, as well as the legal, determinations.

The sections below examine each of these basic standards of review.

III. ISSUES NOT REVIEWABLE ON APPEAL

A. Definition

There is no single "standard of review" which encompasses issues not reviewable on appeal. Rather, in a number of contexts, and for different reasons, certain kinds of issues have been held not to be reviewable on appeal.

The main areas of non-reviewable issues include: (1) cases in which the defendant agrees to an appeal waiver; (2) issues that are waived by virtue of the defendant's guilty plea (and also, issues that can only be raised on appeal after a guilty plea if the trial court issues a certificate of probable cause); (3) issues that are waived by the failure to object in the trial court; (4) issues that must be raised by way of writ, not direct appeal; and (5) issues that are essentially committed to the trial court's sole discretion.

It should be noted that the non-reviewability of an issue on appeal sometimes means, indeed, that the issue is permanently barred from being raised in the court of appeal; but sometimes it may still be possible, under certain circumstances, to bring the issue before the appellate court. Certain issues are in fact permanently waived. This is true of the issues waived by a guilty plea. Thus, pleading guilty waives on appeal an issue such as a Miranda motion, and that issue cannot be litigated in the court of appeal by way of either an appeal or a petition for a writ of habeas corpus. Regarding the category of issues which are waived by failure to object, however, while those issues also cannot directly be litigated on appeal, those issues can possibly be brought before the appellate court in an indirect manner (either on appeal or by way of habeas corpus) if the

defendant can make a showing of ineffective assistance of counsel in failing to object.[4] Issues which must be raised in the court of appeal by way of writ, not appeal, are of course brought before the court of appeal. Finally, even in the few instances where an issue is essentially committed entirely to the trial court, in an extreme situation it may be possible to raise the issue by way of writ.[5]

Inexperienced practitioners sometimes fail to understand that guilty pleas (and no contest pleas) waive most issues. Similarly, the necessity for an objection in the trial court is sometimes overlooked by appellate counsel. Counsel should always make sure that the issue sought to be raised is in fact raisable in the court of appeal.

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[4] The appellate court will look at the merits of the issue in order to determine whether there was ineffective assistance, and whether there was prejudice from the failure to object; i.e., whether the objection would have been meritorious, whether there was no tactical reason for failing to object, and whether there was a reasonable probability of a more favorable result had an objection been made and sustained.

[5] For example, as discussed in subsection B.5., infra, a trial court's decision whether or not to recall a sentence under Penal Code § 1170(d) is entirely committed to trial court discretion and cannot be raised on appeal. However, if the trial court stated "I am not recalling this sentence because the defendant is an African-American," clearly a writ would lie to compel the trial court to exercise discretion without the racial motivation.

B. Specific Issues Not Reviewable on Appeal

1. Cases in Which the Defendant Has Agreed to an Appeal Waiver.

Although appeal waivers come up most frequently in guilty plea appeals, they can also arise in other contexts, however rarely. For example, a prosecutor may demand an appeal waiver after a jury trial in exchange for a promise not to oppose, or not to appeal, a particularly lenient sentence; or a bargain may be struck as to a discrete legal question litigated at trial (e.g., the admissibility of prior offense evidence.) Such waivers are valid and enforceable. (See generally People v. Panizzon (1996) 13 Cal.4th 68, 82-89) As a result, more prosecutors (and trial court judges) are apparently now requiring appeal waivers as part of the plea bargain. Certain principles have emerged. If the issue raised on appeal was not within the contemplation and the knowledge of the defendant at the time the waiver was made, the waiver will not bar the appeal. (See People v. Vargas (1993) 13 Cal.App.4th 1653; see also People v. Olson (1989) 216 Cal.App.3d 601, 604, fn.2 [First Dist., Div. 5] On the other hand, where the defendant receives the bargained-for sentence or benefit, and seeks appellate review of an integral element of a negotiated plea agreement, " as opposed to a matter left open or unaddressed by the deal," the waiver will be enforced. (Panizzon, supra at 86; see also People v. Nguyen (1993) 13

Cal.App.4th 114). The alert practitioner must be aware of this developing area of law in any case where there is an appeal waiver.

2. Issues Waived By Guilty Plea.

Most issues are waived by a plea of guilty or no contest. "Other than search and seizure issues which are specifically made reviewable by section 1538.5, subdivision (m), all errors arising prior to entry of a guilty plea are waived, except those which question the jurisdiction or legality of the proceedings resulting in the plea." (People v. Kaanehe (1977) 19 Cal.3d 1, 9.) Even for issues which can be raised, Penal Code § 1237.5 requires that the trial judge issue a certificate of probable cause before the appeal is operative in the court of appeal. The only issues which can typically be raised following a guilty plea are search and seizure issues, and sentencing issues which do not challenge the validity of the plea itself.

The First District Appellate Project has separate materials on Guilty Plea Appeals: Issues Waived and Issues Raisable. Those materials discuss in detail the constraints on appellate issues following a guilty plea.

3. Issues Waived by Failure to Object[6]

[6] This topic is covered in greater detail in the materials entitled “Cognizability, Waiver

The great majority of issues will be deemed waived if no objection is made in the trial court on the specific ground sought to be argued in the court of appeal. The following subsections discuss general considerations concerning waiver by failure to object, and present a partial list of some issues that have been held raisable despite lack of objection, and issues that have been held waived by lack of objection.

(1) General considerations.

Evidence Code § 353 states:

> "A verdict or finding shall not be set aside ... by reason of the erroneous admission of evidence unless:
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; ..."

Similarly, Evidence Code § 354 requires that in order to raise on appeal the erroneous exclusion of proffered defense evidence, the defense must make an offer of proof or otherwise show on the record the substance, relevance and purpose of the proffered evidence.

It has been repeatedly stated, as a basic maxim of appellate practice, that "Objections not presented to the trial court cannot be raised for the first time on appeal." (In re Michael L. (1985) 39 Cal.3d 81, 88.) Further, the objection at the trial court must

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and Other Impediments to Appellate Review," by Jonathan Soglin, Staff Attorney with the First District Appellate Project.

specifically refer to the ground which is subsequently argued in the court of appeal. (People v. Williams (1988) 44 Cal.3d 883.)

There are many nuances to the requirement for an objection. One important area concerns the requirement that even where an objection was made in limine prior to trial, the objection must be renewed at trial or the issue is waived. A series of recent California Supreme Court cases has enunciated, and then qualified, this requirement. (See People v. Morris (1991) 53 Cal.3d 152 for a full discussion of the case law on when the defense does, and does not, have to renew an in limine motion at trial. See also People v. Crittenden (1994) 9 Cal. 4th 83, 127; People v. Stansbury (1993) 4 Cal.4th 1017, reversed on other grounds sub nom. Stansbury v. California (1994) 511 U.S. 318; People v. Pizarro (1992) 10 Cal.App.4th 57.) Another requirement is that where an objection or motion is made by defense counsel in the trial court, if the trial court does not rule on the motion counsel has the obligation to pursue the motion to a ruling, or the issue is waived. (People v. Roberts (1992) 2 Cal.4th 271; People v. Rhodes (1989) 212 Cal.App.3d 541.) Similarly, some cases have held that where an objection is made and is sustained, certain issues (e.g. prosecutorial misconduct) may still be waived on appeal if counsel failed to also request that the judge give an admonition to the jury concerning the improper question or statement. (People v. Kaurish (1990) 52 Cal.3d 648; People v. Jacobs (1987) 195 Cal.App.3d 1636; but see People v. Lindsey (1988) 205 Cal.App.3d 112 [First Dist., Div. 5. Lack of request for admonition is not waiver where the judge has overruled the objection itself, so it would be futile to request an admonition].)

(2) Exceptions to the rule of waiver.

There are numerous qualifications and exceptions to the general rule of waiver due to lack of objection in the trial court. Jury instruction error may be reviewed in the Court of Appeal, without objection below, if the error affects the substantial rights of the defendant. (Pen. Code § 1259; People v. Harris (1981) 28 Cal.3d 935, 956; People v. Satchell (1971) 6 Cal.3d 28, 33 fn. 10; People v. Graham (1969) 71 Cal.2d 303, 319.) "The cases equate `substantial rights' with reversible error, i.e., did the error result in a miscarriage of justice?" (People v. Arredondo (1975) 52 Cal.App.3d 973, 978 (citations omitted).)

Similarly, insufficiency of the evidence is an issue that can be raised on appeal absent an objection. (People v. Jones (1988) 203 Cal.App.3d 456, 461; People v. Sedillo (1982) 135 Cal.App.3d 616, 624.) Jurisdictional issues (in the fundamental sense) can be raised on appeal even if there was no objection below. (People v. Williams (1989) 207 Cal.App.3d 1520; People v. Cantrell (1992) 7 Cal.App.4th 523 [First Dist., Div. 3. Statute of limitations is jurisdictional and cannot be waived].)

Additionally, failure to object may not constitute a waiver if:

(a) there was no opportunity to make an objection (People v. Remiro (1979) 89 Cal.App.3d 809. 823);

(b) an objection would have been futile under the law as it stood at the time (i.e., the law has subsequently changed) (People v. Chavez (1980) 26 Cal.3d 334, 350 fn. 5; People v. Turner (1990) 50 Cal.3d 668);

(c) prior objections have been overruled and further objection would be futile (People v. Scott (1978) 21 Cal.3d 284, 291);

(d) the objection, while not really being specific as to the ground, was sufficiently in the ballpark to alert the trial judge to the ground (People v. Williams (1988) 44 Cal.3d 883 [Relevancy objection held sufficient to encompass objection to similar crimes evidence][7]

(e) an objection to prosecutorial misconduct (and a judge's admonition to the jury) would not have been sufficient to cure the prejudice from the improper conduct (People v. Green (1980) 27 Cal.3d 1.)

(f) the issue has been fully litigated below and no new facts would need to be litigated, and thus a new ground which is solely a question of law may be sometimes raised on appeal (People v. Truer (1985) 168 Cal.App.3d 437,441; People v. Gibson (1987) 195 Cal.App.3d 841.

[7] But see People v. Clark (1992) 3 Cal.4th 41 [Relevancy objection was not sufficient to preserve Evidence Code § 352 or § 1100 objection to evidence of defendant's sexual proclivity, where the evidence was not about other crimes]; People v. Harmon (1992) 7 Cal.App.4th 845 [Relevancy objection is not sufficient to preserve issue of constitutionality of tape recording].

(g) the court of appeal finds that the issue, even if not raised by the parties, should be reached in the interest of justice (Conservatorship of Waltz (1986) 180 Cal.App.3d 722).[8]

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[8] The court in Waltz stated: "[W]e are `at liberty to consider, and even to decide, a case upon any points that its proper disposition may seem to require whether taken by counsel or not.' ... Thus, we have the power to resolve issues not raised when we are faced with glaring error and seek to avoid grave injustice." (180 Cal.App.3d at 728 (citations omitted).) The Waltz court was dealing with the power to decide issues not raised by counsel on appeal; however, the broad sweep of the language just quoted would seem to give the court power, in order to avoid grave injustice, to resolve issues which were not raised by counsel below; at least, this would be the case where the issues were ones of law that did not require additional factual litigation.

In People v. Lyons (1992) 10 Cal.App.4th 837 [First Dist., Div. 3] the court reversed the use of a witness' preliminary hearing testimony at trial. The witness was found incompetent to testify at trial (delusional). The court held that the failure of the defense to object at the preliminary hearing to the witness' testimony on the same ground did not waive the issue of use of the preliminary hearing testimony at

trial, since it would be manifestly unjust to permit the preliminary hearing testimony at trial.

Finally, note that issues which have been waived by failure to object can sometimes be reached on the merits by the appellate court through a claim of ineffective assistance of counsel in failing to lodge an objection. In such a situation the court will examine the merits of the issue to determine if an objection or motion would have been fruitful, and if so, whether the evidence that should have been excluded/admitted was prejudicial. (E.g., People v. Guizar (1986) 180 Cal.App.3d 487 [First Dist., Div. 4; conviction reversed where counsel failed to raise hearsay objection to introduction of tape-recorded statements]; People v. Stratton (1988) 205 Cal.App.3d 87 [conviction reversed for failure to object to prejudicial and irrelevant evidence of knife and grenade found on defendant but unrelated to the crime]; People v. Moreno (1987) 188 Cal.App.3d 1179 [conviction reversed for failure to raise hearsay objection to bystander statements, and failure to raise corpus delecti objection to introduction of defendant's confession]; People v. Zimmerman (1980) 102 Cal.App.3d 647 [reversal for failure to make pre-trial motion to admit only least prejudicial prior in ex-felon case]; People v. Rosales (1984) 153 Cal.App.3d 353 [reversal for failure to make search and seizure motion].)

(3) Sentencing issues.

Until fairly recently, the law was more or less settled that sentencing issues generally were not waived by failure to object. In a series of cases decided in the early 1990's, the California Supreme Court completely changed the legal landscape, such that it is now the general rule that sentencing errors are waived absent an

objection. (See generally, People v. Walker (1991) 54 Cal.3d 1013, 1022-1023 [restitution]; People v. Welch (1993) 5 Cal.4th 228, 234-235 [probation conditions] People v. Scott (1994) 9 Cal.4th 331, 352 [any claim that the sentence, though otherwise permitted by law, was imposed in a procedurally or factually flawed way; e.g., failure to state reasons]; see also People v. Neal (1993) 19 Cal. App. 4th 1114, 1124-1125 [list of waived errors].). Failure to object, however, does not waive an unauthorized or illegal sentence. (Scott, supra.)

(4) Constitutional issues.

It has sometimes been said, in a blanket manner, that "Constitutional issues may be raised for the first time on appeal, especially when enforcement of a penal statute is involved." (People v. Ramirez (1987) 189 Cal.App.3d 603, 618fn.29 (citations omitted). See also, People v. Menchaca (1983) 146 Cal.App.3d 1019, 1025; People v. Mills (1978) 81 Cal.App.3d 171, 176.)

However, this generalization is certainly not true in the broad terms stated. Courts have frequently refused to hear constitutional issues on appeal, where no objection was made below.

Some specific constitutional issues that have been raised without an objection below include:

(a) Denial of jury trial. (People v. Snyder (1989) 208 Cal.App.3d 1141.)

(b) Due process challenge to character evidence statute. (People v. Blanco (1992) 10 Cal.App.4th 1167 [First Dist., Div. 2].)

(c) Due process right to an interpreter. (People v. Menchaca (1983) 146 Cal.App.3d 1019.)

(d) Constitutionality of special verdict procedure. (People v. Ramirez (1987) 189 Cal.App.3d 603.)

However, some specific constitutional issues found waived by failure to object include:

(a) Suggestive lineup. (In re Michael L. (1985) 39 Cal.3d 81, 87-88.)

(b) Miranda. (People v. Hindmarsh (1986) 185 Cal.App.3d 334.)

(c) Bruton/Aranda. (People v. Hill (1992) 3 Cal.4th 959; People v. Jacobs (1987) 195 Cal.App.3d 1636.)[9]

(d) Constitutionality of tape recording. (People v. Harmon (1992) 7 Cal.App.4th 845.)

(5) Admissibility of evidence.

[9] In Jacobs the court stated the principle that Bruton/Aranda is waived by failure to object, but found that counsel had adequately objected.

"Questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection at the trial on the ground sought to be urged on appeal." (People v. Solis (1985) 172 Cal.App.3d 877,885); People v. Belmontes (1988) 45 Cal.3d 744; People v. Escobar (1996) 48 Cal. App.4th 999.)

Specific evidentiary issues held waived include:

(a) Similar crimes/prior bad acts. (People v. Allen (1986) 42 Cal.3d 1222; People v. Anderson (1987) 43 Cal.3d 1104.)

(b) Hearsay. (People v. Wheeler (1992) 4 Cal.4th 284; People v. Zack (1986) 184 Cal.App.3d 409; People v. Dasher (1988) 198 Cal.App.3d 28.)

(c) Evidence Code § 352. (People v. Burns (1987) 196 Cal.App.3d 1440.)

(d) Experts/Scientific evidence. (People v. Poggi (1988) 45 Cal.3d 306; People v. Coleman (1988) 46 Cal.3d 749.)

(e) Corpus Delecti. (People v. Sally (1993) 12 Cal.App.4th 1621; People v. Anderson (1999) 77 Cal. App.4th 368.)

(6) Other issues waived.

(a) Collateral estoppel. (People v. Asbury (1985) 173 Cal.App.3d 362.)

(b) Delay in arraignment. People v. Carrera (1989) 49 Cal.3d 291 (issue that statements were illegally taken as product of delay in arraignment held waived by failure to object on that ground.)

(c) Prosecution misconduct. (People v. Green (1980) 27 Cal.3d 1, 27; People v. Heldenburg (1990) 219 Cal.App.3d 468.)[10]

(d) Lack of notice of charges proved at trial. (People v. Newlun (1991) 227 Cal.App.3d 1590, *cited in* People v. Bishop (1996) 44 Cal.App. 4th 220; People v. Gil (1992) 3 Cal.App.4th 653.)

(e) Venue. (People v. Howard (1992) 1 Cal.4th 1132.)

(f) Manner of jury selection. (People v. Visciotti (1992) 2 Cal.4th 1; People v. Ervin (2000) 22 Cal.4th 48, 73.)

(g) Juvenile court's reading of probation report prior to jurisdictional hearing. (In re Christopher S. (1992) 10 Cal.App.4th 1337.)

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[10] If an objection and a judge's admonition could not cure the harm from the misconduct, the issue is not waived on appeal. (People v. Green, supra. See also People v. Hill (1998) 17 Cal.4th 800, 821, 849.)

(h) Spectator misconduct. (People v. Hill (1992) 3 Cal.4th 959.)[11]

(i) Shackling of defendant. (People v. Tuilaepa (1992) 4 Cal.4th 569.)

(j) Bias of judge's comments. (People v. Burnett (1993) 12 Cal.App.4th 469.)

(7) Applicability to People's appeals.

The prosecution, like the defense, is barred from raising a theory on appeal which was not raised and litigated below, unless (as is true for the defendant, see discussion supra), all the relevant facts have been fully litigated and the issue is solely one of law. (People v. Moses (1990) 217 Cal.App.3d 1245.)

4. Issues That Must Be Raised By Writ, Not Appeal[12]

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[11] Hill also held that if the spectator misconduct was such that an admonition by the judge would not have been able to cure the prejudice, then the issue can be raised on appeal without an objection below.

[12] A number of issues involved in child dependency and custody proceedings (Civ. Code § 300 et seq) may only be raised by way of writ. These materials do not deal with custody and dependency proceedings.

Some issues may be raised in the court of appeal only by writ. Usually, the reason for this restriction is that the issues relate to pre-trial activity and should be raised and determined before trial. In that situation, the issue can only be raised on appeal after trial if there was some direct prejudicial effect at the trial itself.

(1) Penal Code § 995 Motion. Issues which are raised by way of a Penal Code § 995 motion, challenging the sufficiency of evidence or other error at the preliminary hearing, may not be raised on appeal after trial absent a showing of prejudice at the trial itself. (People v. Pompa-Ortiz (1980) 27 Cal.3d 519; People v. Millwee (1998) 18 Cal.4th 96, 121.)

5. Issues That Are Committed Solely to the Trial Court

It is exceedingly rare for an issue to be committed solely and unreviewably to the discretion of the trial court. Further, as noted in footnote 4, supra, even in such a situation a court would probably entertain a writ if the trial court acted in a manner showing unconstitutional motivation, personal bias, or otherwise acted in a manner in excess of its jurisdiction. Except for a writ based on such extraordinary grounds, however, an issue which is unreviewably committed to the trial court cannot be raised either by appeal or writ. The appellate court will not reach the issue at all.

(1) Recall of Sentence under Penal Code § 1170(d).

(Portillo v. Superior Court (1992) 10 Cal.App.4th 1829, 1836 (citation omitted). Held: Penal Code § 1170(d) commits the decision to recall a sentence to the trial court, and

does not grant a defendant standing to bring a motion in the trial court to recall the sentence. Therefore: "Although we find the trial court's reasons for denying Portillo's motion were erroneous, Portillo is still not entitled to the relief he seeks. As noted earlier, because Portillo had no standing to bring the recall motion before the trial court in the first instance, there was no clear, present ministerial duty upon the trial court to act or a clear, present and beneficial right in Portillo for the performance of that duty to support mandamus relief. Nor did the court act in excess of its jurisdiction in denying the motion which would support habeas corpus relief.")

(2) Juror's state of mind on voir dire. "In reviewing the excusal of jurors under the Witt standard [Wainwright v Witt (1985) 469 U.S. 412: whether juror's views on capital punishment would impair performance as juror], `if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.'" (People v. Mitcham (1992) 1 Cal.4th 1027, 1061 (citation omitted).)[13]

[13] However, note that: "`If there is no inconsistency, the only question being whether the juror's responses in fact demonstrated an opposition to (or bias in favor of) the death penalty, we will not set aside the court's determination if it is supported by substantial evidence ...'" (Ibid.) Thus, Mitcham shows an example of two distinct standards of review being applied to a trial court's determination of a juror's state of mind, depending upon the type of evidence before the trial court.

IV. ABUSE OF DISCRETION

A. Definition.

Most of the cases which discuss review under the "abuse of discretion" standard do not define the term. One of the earliest formulations in California is in Lent v. Tillson (1887) 72 Cal. 404, 422: "[Judicial discretion is] the sound judgment of the court, to be exercised according to the rules of law." This definition, however, may be misleading in its emphasis on following the rules of law. Modern cases have made clear that where a trial court's ruling is reviewed under an abuse of discretion standard, the question is basically whether the court's action exceeds the bounds of reason.

Perhaps the best summary of abuse of discretion is found in People v. Stewart (1985) 171 Cal.App.3d 59, 65:

> "It has been said that the term judicial discretion implies the absence of arbitrary determination, capricious disposition, or whimsical thinking. (People v. Giminez (1975) 14 Cal.3d 68, 72.) The term means the exercise of discriminating judgment within the bounds of reason. To exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (In re Cortez (1971) 6 Cal.3d 78, 85-86.)
>
> When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. (Brown v. Newby (1940) 39 Cal.App.2d 615, 618.) A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is

sufficiently grave to manifest a miscarriage of justice. (Jessup Farms v. Baldwin (1983) 33 Cal.3d 639, 650-651, fn. 7.) In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered."

The abuse of discretion standard is different from the `substantial evidence' standard used to review most questions of fact resolved by the trial court. (The substantial evidence standard is discussed in Section V of these materials, infra.) The abuse of discretion standard comes into play where: (a) the appellate court accepts the facts found by the trial court (either because there is no dispute as to the facts, or because, as a threshold issue, the appellate court has found that the trial court's factual findings are supported by substantial evidence); and (b) there is no legal principle preventing the trial court from choosing among the options before it. In that situation the appellate court will uphold the trial court's decision, unless the trial court's choice is so aberrant as to exceed the bounds of reason and thus constitute an abuse of discretion. Clearly, it is very rare for an appellate court to reverse a trial court under the abuse of discretion standard. (See e.g., People v. Andrade (4/3/2000) 00C.D.O.S. 2633 [rebuffing People's appeal from grant of a new trial motion].

B. Issues Reviewed Under the Abuse of Discretion Standard.

The following is a list of some selected issues which have been held reviewable under the abuse of discretion standard.

1. Sentencing Issues.

(1) Selection of base term. Where there are valid circumstances in aggravation and mitigation, the trial judge has discretion to choose either the low, middle or upper term. (People v. Myers (1983) 148 Cal.App.3d 699 [Even where the trial judge finds that aggravating circumstances outweigh mitigating ones, the judge still has discretion not to impose the upper term.]) The weighing of the aggravating and mitigating factors is within the judge's discretion. (People v. Evans (1983) 141 Cal.App.3d 1019.[14]

[14] Note: this is a separate issue from the question whether the judge gave valid reasons for the sentencing choice. The issue of stating reasons is either a question of law, or a mixed question of law and fact, and is reviewed under the standards discussed later in these materials for such issues. Assuming the judge states valid reasons, the judge then has discretion in choosing which term to impose.

(2) Consecutive sentences. Where there are valid reasons for making a sentence consecutive, the trial judge has discretion to choose either concurrent or consecutive sentences. (People v. Giminez (1975) 14 Cal.3d 68.)[15]

(3) Penal Code section 654 stay. Until recently, the great weight of authority held that a trial judge had discretion under Penal Code section 654 to stay sentence on either the count with the greater or the lesser sentence. (See generally, People v. Norrell (1996) 13 Cal.4th 1.) In 1997, however, the Legislature abrogated the Norrell holding by amending section 654, which now reads: "An omission that is punishable in different ways by different provisions of law *shall be punished under the provision that provides for the longest potential term of imprisonment. . . .*"

[15] Giminez pre-dated the determinate sentencing law, but its reasoning is applicable to determinate sentencing law (assuming that there were valid factors for making the sentences consecutive and no legal bar such as Penal Code § 654). This is separate from the issue whether the judge stated reasons for making a sentence consecutive, which is either a question of law or a mixed question of law and fact, and is reviewed under the standards for such issues.

(4) Grant or denial of probation. Assuming that legal principles permit the judge to either grant or deny probation in the case, the decision as to probation or prison is within the judge's discretion. (In re Cortez (1971) 6 Cal.3d 78, 85.)[16]

(5) Decision to revoke probation. If there are proper grounds to find that the defendant has violated probation, the trial judge's decision whether or not to revoke his probation is reviewed by the abuse of discretion standard. (People v. Harris (1985) 195 Cal.App.3d 717.) One case finding such an abuse of discretion is People v. Zaring (1992) 8 Cal.App.4th 362 (judge's decision to revoke probation because defendant was 20 minutes late to probation hearing due to taking child to school was arbitrary and capricious and thus an abuse of discretion).

2. Guilty Plea

[16] This is different from the legal question whether the judge has stated proper reasons for denying probation. The question of valid statement of reasons is either a question of law, or a mixed question of law and fact, and is reviewed accordingly. Case law is clear that reasons must be given for denying probation. (People v. Brandt (1987) 191 Cal.App.3d 143, 147-148; People v. Jackson (1987) 196 Cal.App.3d 380, 387 [First Dist., Div. 1]; People v. McNiece (1986) 181 Cal.App.3d 1048, 1058; People v. Romero (1985) 167 Cal.App.3d 1148, 1151; People v. Wychocki (1987) 188 Cal.App.3d 1063, 1066 [First Dist., Div. 5].) Where there are proper reasons, the decision to deny or grant probation is within the judge's discretion.

(1) Motion to withdraw guilty plea. "The granting of such an application [to withdraw a plea of guilty under Penal Code section 1018] is within the sound discretion of the trial court and must be upheld unless an abuse thereof is clearly demonstrated." (People v. Superior Court (Giron) (1974) 11 Cal.3d 793, 796; People v. Fairbank (1997) 16 Cal.4th 1223, 1254.) Thus, even where a defendant makes a showing of "good cause" for withdrawing the plea within the meaning of Penal Code § 1018, the trial court still has discretion to decide whether or not to grant the motion: "The requisite showing of good cause having been made, the court must grant a withdrawal motion made by a defendant who entered his plea without counsel, whereas the court may grant a withdrawal motion made by a defendant who entered his plea with counsel." (People v. Cruz (1974) 12 Cal.3d 562, 566 (original emphasis).)

3. Counsel

(1) Faretta. Where a defendant makes a late Faretta motion (i.e., not within a reasonable time prior to commencement of trial) "demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court." (People v. Windham (1977) 19 Cal.3d 121,128; People v. Barnett (1998) 17 Cal.4th 1044, 1105.)

(2) Marsden. Where the judge has held a hearing and let the defendant explain his/her dissatisfaction with the attorney, "[T]he discharge or substitution of court-appointed counsel is not absolute, and is a matter of judicial

discretion unless there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if his request was denied." (People v. Carr (1972) 8 Cal.3d 287, 299; People v. Clark (1992) 3 Cal.4th 41, 104.)

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4. Jury.

(1) Qualifications of jurors. "The qualifications of jurors challenged for cause are a matter within the broad discretion of the trial court, seldom disturbed on appeal." (People v. McPeters (1992) 2 Cal.4th 1148, 1176.)

(2) Deadlocked jury. When a jury is deadlocked, "(t)he determination, pursuant to [Penal Code] section 1140, whether there is a `reasonable probability' of agreement, rests within the sound discretion of the trial court." (People v. Proctor (1992) 4 Cal.4th 499, 539.) Note, though, "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency. The question of coercion is necessarily dependent on the facts and circumstances of each case." (People v. Sandoval (1992) 4 Cal.4th 155, 195-196 (citations omitted).)

(3) Voir Dire. Voir dire is conducted "under the supervision of the trial court and its scope is necessarily left primarily to the sound discretion of that court." (People v. Banner (1992) 3 Cal.App.4th 1315, 1324 (citations omitted).)

5. Pre-Trial and Trial Motions.

(1) Severance. Where the requirements of Penal Code section 954 for joinder are met (joinder of offenses connected in their commission or offenses of the same class of crimes), "the trial court has express discretion to sever counts `in the interests of justice.' (§ 954.) However, defendant can establish an abuse of discretion only `on clear showing of prejudice.'" (People v. Balderas (1985) 41 Cal.3d 144, 170-171 (citations omitted).) Note, though, that where "the issue is raised on appeal following trial, we must also consider whether, `despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law.'" (People v. Sandoval (1992) 4 Cal.4th 155, 174 (citations omitted); People v. Ervin (2000) 22 Cal.4th 48.)

(2) Continuance. Grant or denial of continuance is within the discretion of the trial judge. (People v. Zapien (1993) 4 Cal.4th 929; In re Luanda L. (1986) 178 Cal.App.3d 423.) Cases finding an abuse of discretion include: In re Eric J. (1988) 199 Cal.App.3d 624 [reversible error to deny juvenile short continuance to have his mother present at jurisdictional hearing; mother was needed for psychological assistance and to prepare defense]; People v. Santamaria (1991) 229 Cal.App.3d 269 [First Dist., Div. 3] [Judge's grant of 11 day continuance after jury deliberations started was an abuse of discretion.]; People v. Johnson (1993) 19 Cal.App.4th 778, 792.)

(3) Recusal of D.A. for conflict. A conflict of interest sufficient for recusal exists where "`the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.' `In

determining whether a ruling on a motion to recuse was proper, a reviewing court applies the abuse-of-discretion standard.'" (People v. Zapien (1993) 4 Cal.4th 929, 968 (citations omitted).)

6. Evidentiary Issues.

(1) Relevance. "[R]elevant evidence is all evidence `including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action' (Evid. Code § 210); ... the trial court is vested with wide discretion in determining relevance under this standard." (People v. Green (1980) 27 Cal.3d 1, 19. People v. Kelly (1992) 1 Cal.4th 495, 523.)

However, note that: "[T]he court has no discretion to admit irrelevant evidence." (People v. Poggi (1988) 45 Cal.3d 306, 323). Thus in Poggi the court held that while the admission of photographs of the victim lies primarily in the discretion of the trial court, where the photographs were not relevant to any disputed material issue the court had no discretion to admit them.

(2) Evidence Code section 352. "[A] trial court's ruling under section 352 will be upset only if there is a clear showing of an abuse of discretion." (People v. Stewart (1985) 171 Cal.App.3d 59,65. People v. Gordon (1990) 50 Cal.3d

1223, 1239; People v. Karis (1988) 46 Cal.3d 612, 637; People v. Clair (1992) 629, 655.)[17]

Note that: "[T]he court has no discretion to admit irrelevant evidence." (People v. Poggi (1988) 45 Cal.3d 306, 323. Thus in Poggi the court held that while the admission of photographs of the victim lies primarily in the discretion of the trial court under section 352, where the photographs were not relevant to any disputed material issue the court had no discretion to admit them and their admission was error.

(3) Habit and custom. "The question whether habit evidence is admissible is essentially one of threshold relevancy; it is addressed to the sound discretion of the trial court." (People v. McPeters (1992) 2 Cal.4th 1148, 1178 (citations omitted.)

(4) Impeachment with prior conviction. Assuming that the prior conviction involves moral turpitude, the decision whether or not to permit impeachment

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[17] Note that this is a different issue than the legal question whether the record shows (directly or by implication) that the trial court has in fact weighed prejudice and probative value in making the section 352 decision whether or not to admit evidence. (People v.Mickey (1991) 54 Cal.3d 612.) Once the record does show that the judge weighed the evidence, and assuming that no specific legal principles control the admission of the particular evidence (other than relevance, prejudice, time-consuming nature, and likelihood of confusing the issues), then the trial court's decision whether or not to admit it is reviewed by the abuse of discretion standard.

of the witness by the prior conviction is reviewed for abuse of discretion. (People v. Clair (1992) 2 Cal.4th 629, 655.)

(5) Hearsay: trustworthiness of public employee record. "`The trustworthiness requirement for this exception to the hearsay rule is established by a showing that the written report is based upon the observations of public employees who have a duty to observe the facts and report and record them correctly.' Whether the trustworthiness requirement has been met is a matter within the trial court's discretion." (People v. Parker (1992) 8 Cal.App.4th 110, 116 (original emphasis; citations omitted); People v. George (1994) 30 Cal.App.4th 262, 274.)

(6) Hearsay: trustworthiness of a declaration against interest. "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (People v. Frierson (1991) 53 Cal.3d 730, 745.) "The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion." (People v. Gordon (1990) 50 Cal.3d 1223, 1251.)

7. Post-Trial.

(1) Motion for new trial. "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." (Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal.3d 379, 387; People v. Williams (1988) 45 Cal.3d 1268, 1318.) "A motion for a new trial on the ground of newly discovered evidence is looked upon with disfavor. The granting or denial of such a motion is within the sound discretion of the trial court and, absent a clear showing of abuse of discretion, will not be reversed on appeal." (People v. Hernandez (1971) 19 Cal.App.3d 411, 416 (citations omitted); People v. Shoals (1992) 8 Cal.App.4th 475, 486.)

However, note that in People v. York (1992) 11 Cal.App.4th 1506, the trial court granted the defendant a new trial on the ground that the verdicts were inconsistent. The Court of Appeal reversed, finding that the verdicts were not inconsistent. The court of appeal, in reversing this rare grant of a new trial to a defendant, made no mention of established case-law, above, i.e., that the trial court has wide discretion to grant a new trial motion.

(2) Bail on appeal. "The grant of bail to [the defendant] was a matter of discretion." (People v. McGuire (1993) 14 Cal.App.4th 687, 702.)

V. SUBSTANTIAL EVIDENCE REVIEW OF FACTS

A. Definition

When a trial court makes findings of fact, the appellate court reviews those findings under the deferential "substantial evidence" test. Under this test "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence." (People v. Lawler (1973) 9 Cal.3d 156, 160; People v. Glaser (1995) 11 Cal.4th 354, 362.)

"Substantial evidence" has been defined in the lead case of People v. Johnson (1980) 26 Cal.3d 557. Johnson dealt with the question of sufficiency of evidence for a conviction, but its language is also applicable to how an appellate court will review a trial court's other factual determinations under the substantial evidence standard:

> "[T]he appellate court `must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' The court does not, however, limit its review to the evidence favorable to the respondent. ...`[O]ur task ... is twofold. First, we must resolve the issue in the light of the whole record-- i.e., the entire picture ... put before the jury-- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence ... is substantial; it is not enough ... simply to point to "some" evidence supporting the finding, for not every surface conflict of evidence remains substantial in light of other facts.' ...
>
> [T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial

evidence-- that is, evidence which is reasonable, credible, and of solid value ..."
(26 Cal. 3d at 576-578; emphasis in original; citations omitted.)

In People v. Louis (1986) 42 Cal.3d 969, 986 the court explained the rationale behind using the substantial evidence test for reviewing factual determinations by the trial court:[18]

> "[T]he mandate that appellate courts not disturb a trial court's findings of fact unless [unsupported by substantial evidence] serves two policy objectives. First, it minimizes the risk of judicial error by assigning primary responsibility for resolving factual disputes to the court in the `superior position' to evaluate and weigh the evidence-- the trial court. ... Second, because under the [substantial evidence] test, the reviewing court will affirm the trial court's determinations unless it `is left with the definite and firm conviction that a mistake has been committed,' it is relieved of the burden of a full-scale independent review and evaluation of the evidence. Consequently, valuable appellate resources are conserved for those issues that appellate courts in turn are best situated to decide."

There are a few exceptions to the substantial evidence test. There are the rare situations where the appellate court actually makes a de novo review of the facts; these situations are discussed in Section VIII, infra. Additionally, an appellate court will not

[18] The Louis court quoted from United States v McConney (9th Cir., 1984) 728 F.2d 1195. McConney discussed the federal "clearly erroneous" standard, which the Louis court noted was essentially the same as the California "substantial evidence" test.

accept a trial court's resolution of credibility where the testimony or evidence is "inherently improbable." This exception is discussed in subsection C, infra.

It should be noted that most trial court determinations involve mixed questions of law and fact. The standards for mixed questions are discussed in Section VII, infra. Briefly, where the "historical" facts for mixed questions are essentially pure fact questions (i.e., not themselves mixed fact-law questions), they are reviewed under the substantial evidence test. (E.g., how long the police officers waited at the door after knocking.) The application of the facts to the law, is usually reviewed under the independent review standard for legal issues.[19] However, some mixed questions are considered to be so primarily factual that the mixed question itself is reviewed under the substantial evidence test.[20]

B. Specific Issues Reviewed Under the Substantial Evidence Standard.

The following is a short list giving a few examples of issues reviewed under the substantial evidence standard. See Section VII, infra, (mixed questions of fact and law) for additional issues.

(1) Sufficiency of the evidence.

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[19] The independent review standard is discussed in Section VI, infra.

[20] Conversely, as discussed in Section VII, infra, many mixed questions are considered primarily legal and are reviewed independently by the appellate court.

"`The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves quilt beyond a reasonable doubt. The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.' ... Evidence, to be `substantial' must be `of ponderable legal significance ... reasonable in nature, credible, and of solid value.'

In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court `must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' The court does not, however, limit its review to the evidence favorable to the respondent. ...`[O]ur task ... is twofold. First, we must resolve the issue in the light of the whole record-- i.e., the entire picture ... put before the jury-- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence ... is substantial; it is not enough ... simply to point to "some" evidence supporting the finding, for not every surface conflict of evidence remains substantial in light of other facts.' ...

[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-- that is, evidence which is reasonable, credible, and of solid value-- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (People v. Johnson (1980) 26 Cal.3d 557, 576-578 (emphasis in original; citations omitted).)

(2) Search and seizure. "In the first step the trial court must `find the facts' relating to the challenged search or seizure: e.g., it must decide what the officer actually perceived, or knew, or believed, and what action he took in response. These are traditional questions of fact .... [F]or the purpose of finding those facts `the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such

matters, whether express or implied, must be upheld if they are supported by substantial evidence.'" (People v. Leyba (1981) 29 Cal.3d 591, 596-597 (citation omitted).)[21]

(3) Jury voir dire: juror's state of mind. "In reviewing the excusal of jurors under the Witt standard [Wainwright v Witt (1985) 469 U.S. 412: whether juror's views on capital punishment would impair performance as juror], `if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding. If there is no inconsistency, the only question being whether the juror's responses in fact demonstrated an opposition to (or bias in favor of) the death penalty, we will not set aside the court's determination if it is supported by substantial evidence ...'" (People v. Mitcham (1992) 1 Cal.4th 1027, 1061 (citation omitted).)

(4) Miranda determination of custodial interrogation.

"[F]indings on whether there was custodial interrogation-- which appears to be a predominantly factual mixed question-- are reviewed for substantial evidence .... Likewise, findings on whether the accused effectively initiated further dialogue relating to the investigation-- which, in our view, is also a predominantly factual mixed question." (People v. Mickey (1991) 54 Cal.3d 612, 649 (citations omitted).)

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[21] Note, however, that "it is `the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.' On that issue, in short, the appellate court exercises its independent judgment." (People v. Leyba (1981) 29 Cal.3d 591, 597 (citations omitted); People v. Glaser, supra, 11 Cal.4th at 362.)

(5) Foundational facts for evidentiary rulings. "Appellant contends the trial court erred in admitting [Arthur's] statement [as an excited utterance]. First, appellant argues, there was an insufficient foundation Arthur perceived the event described by his statement, namely, that he saw appellant shoot him. [Par.] The foundation, or preliminary fact, required only proof by a preponderance of the evidence. In making its factual determination the trial court exercises discretion. If substantial evidence supports the exercise of that discretion we must uphold it. [Par.] We conclude there is substantial evidence Arthur perceived the event, i.e., that he saw the shooter." (People v. Anthony O. (1992) 5 Cal.App.4th 428, 433-434 (citations omitted).)

(6) Penal Code § 654. "Section 654 precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. `Whether a course of criminal conduct is divisible ... depends on the intent and objective of the actor.' ... [Par.] The question whether the defendant's acts constitute `an indivisible course of conduct is primarily a factual determination, made by the trial court, on the basis of its findings concerning the defendant's intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.'" (People v. Evers (1992) 10 Cal.App.4th 588, 602, 604 (citations omitted); People v. Rains (1997) 56 Cal.App.4th 331, 339.)

C. Inherent Improbability

One sidelight to the principles surrounding the substantial evidence test is the doctrine of inherent improbability. If testimony or evidence is inherently improbable, the appellate court will not credit it even if the trial court (or the jury, as factfinder) has accepted it. This is an exception to the rule that "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court." (People v. Lawler (1973) 9 Cal.3d 156, 160.)

The inherent improbability doctrine is a very narrow and limited one, and it is exceedingly rare for a court of appeal to invoke it. The doctrine is defined in People v. Thornton (1974) 11 Cal.3d 738, 754 (citations omitted):

> "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."

VI. INDEPENDENT REVIEW OF QUESTIONS OF LAW

A. Definition

On questions of law, the appellate court does not defer to the trial court and instead "exercises its independent judgment." (People v. Leyba (1981) 29 Cal.3d 591, 597; People v. Memro (1995) 11 Cal.4th 786, 838.)

In People v. Louis (1986) 42 Cal.3d 969, the Supreme Court adopted the rationale of the 9th Circuit in United States v. McConney (9th Cir. 1984) 728 F.2d 1195, concerning how mixed questions of law and fact are reviewed.[22] The Louis court, as part of that discussion, quoted from McConney the basis for independent review by appellate courts of questions of law:

> "`Structurally, appellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law ... serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.
>
> De novo review of questions of law, however, is dictated by still another concern. Under the doctrine of stare decisis, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants. Rulings on factual issues, on the other hand, are generally of concern only to the immediate litigants. From the standpoint of sound

[22] Review of mixed questions of law and fact is discussed in Section VII of these materials, infra.

> judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law. ...
>
> When, as here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the [trial] judge's determination independently.'"
> (42 Cal. 3d at 986,988.)

Thus, for questions of law,[23] the appellate court will independently determine the issue. Unlike the deferential substantial evidence standard for review of facts, the independent review standard for questions of law means that the appellate court does not defer to the trial court. "The general rule that every presumption on appeal favors the trial court's findings of fact does not apply to rulings on questions of law." (People v. Aldridge (1984) 35 Cal.3d 473, 477; People v. Ramirez (1996) 41 Cal.App.4th 1608, 1613; See also People v. Waidla (2000) 22 Cal.4th 690, 731, citing Louis, supra, with approval.)

B. Specific Questions of Law Reviewed Under the Independent Review Standard.

There are myriad issues of law (as well as issues of mixed law and fact which are considered predominantly issues of law). The following is a short list, including some recent and some classic cases, to give examples of such issues. Included are issues which are considered pure questions of law, and some mixed law-fact issues

[23] And for questions of mixed law and fact which are deemed predominantly questions of law; see Section VII, infra.

which have been held predominantly issues of law. Section VII, infra, provides a fuller list of mixed fact-law issues and the standards by which they are reviewed.

(1) Statutory construction.

> "[S]tatutory interpretation is a question of law, and appellate courts review such issues independently ....
>
> One court has held that when the trial court receives extrinsic evidence concerning a statute's meaning, an appellate court will uphold any reasonable construction by it. [Atlantic Richfield Co. v. State of California (1989) 214 Cal.App.3d 533, 538, 542.] However, we do not agree such deference is proper. The Atlantic Richfield court forged its rule by stating the general rule on interpreting writings, such as contracts and deeds, ... and applying it to statutory interpretation, without discussion or citation to authority.
>
> This position is at odds with the general proposition that appellate courts independently determine the meaning of statutes. Witkin recognizes as much, expressly categorizing statutory interpretation solely as a matter of law, and interpretation of an instrument or writing as a question of law or mixed question of fact and law." (People v. Taylor (1992) 6 Cal.App.4th 1084, 1090-1091 (citations omitted); People v. Centers (1999) 73 Cal.App. 4th 84, 91.)

"In construing a statute, a question of law calling for an independent review by an appellate court, we begin with the cardinal rule that we must ascertain the legislative intent in order to carry out the purpose of the law." (People v. Tamble (1992) 5 Cal.App.4th 815, 819.)

"The only issue is one of law-- the interpretation of a statute. We therefore undertake an independent review of the lower court's order." (In re Hogan (1986) 187 Cal.App.3d 819, 823 {First Dist., Div. 3].)

(2) New trial motion based on jury misconduct.

> "`A motion for new trial may be made on the grounds of juror misconduct or unauthorized receipt of evidence by the jury. It is the trial court's function to resolve conflicts in the evidence, to assess the credibility of the declarants, and to evaluate the prejudicial effect of the alleged misconduct. ... However, in reviewing an order denying a motion for new trial based on jury misconduct, as distinguished from an order granting a new trial on that ground, a reviewing court has a constitutional obligation ... to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial.' This court must undertake a de novo review to determine whether there was misconduct, and, if so, whether that misconduct prejudiced defendant and requires his conviction be reversed."
> (People v. Cumpian (1991) 1 Cal.App.4th 307, 311 (emphasis in original, citations omitted).)

"Our task on appeal is to review the record independently. However, we still accord great deference to the trial judge's evaluation of prejudicial effect." (People v. Hill (1992) 3 Cal.App.4th 16, 40 (citations omitted).)

(3) Search and seizure. "[I]t is `the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.' On that issue, in short, the appellate court exercises its independent judgment." (People v. Leyba (1981) 29 Cal.3d 591, 597 (citations omitted); People v. Glaser (1995) 11 Cal.4th 354, 362.)

(4) Miranda. "The trial court's determination that Miranda was not applicable at the apartment [because there was no custodial interrogation] is reviewed thus: the conclusion itself is examined independently, the underlying findings are scrutinized for substantial evidence. ... `[F]indings on whether there was custodial interrogation ... are reviewed for substantial evidence ...' So too, it appears, are the underlying findings on whether there was `custody' and `interrogation.'" (People v. Clair (1992) 2 Cal.4th 629, 678 (citations omitted).)

"Determinations as to the voluntariness of a statement for both the federal and state constitutional guaranties of due process of law-- which is a resolution of a mixed question of law and fact that is nevertheless predominantly legal-- are reviewed independently. So too determinations as to the presence of coercive state activity and the existence of causality-- also predominantly legal mixed questions. [Par.] By contrast, findings on whether there was custodial interrogation-- which appears to be a predominantly factual mixed question-- are reviewed for substantial evidence .... Likewise, findings on whether the accused effectively initiated further dialogue relating to the investigation-- which, in our view, is also a predominantly factual mixed question. [Par.] Finally, determinations as to the validity of a waiver of Miranda rights-- a predominantly legal mixed question-- are reviewed independently." (People v. Mickey (1991) 54 Cal.3d 612 (citations omitted); People v. Waidla (2000) 22 Cal.4th 690, 730; Thompson v. Keohane (1995) 516 U.S. 99.)

(5) Kelly/Frye.

"Under the Kelly-Frye rule as strictly defined, `admissibility of expert testimony based upon the application of a new scientific technique' depends on `a preliminary showing of general acceptance of the new technique in the relevant scientific community.' (People v. Kelly, supra, 17 Cal.3d at p. 30, following Frye v. United States, supra, 293 Fed. at p. 1014.) Under the rule as more broadly stated, the admissibility of such evidence also requires (1) testimony as to general acceptance given by a person `properly qualified as an expert to give an opinion on the subject' (People v. Kelly, supra, at p. 30, italics deleted), and (2) testimony as to the use of `correct scientific procedures ... in the particular case' (ibid) given, of course, by a person properly qualified as an expert to give an opinion on that subject. ...

On appeal, a Kelly-Frye ruling is reviewed independently. The reason is this: the core issue of the general acceptance of the new scientific technique in the relevant scientific community is scrutinized under that standard (People v. Reilly (1987) 196 Cal.App.3d 1127, 1134-1135 [242 Cal.Rptr. 496]). The resolution of each of the other questions underlying the ruling is reviewed under the test appropriate thereto. As relevant here, the determination on the qualifications of an expert is examined for abuse of discretion. (People v. Kelly, supra, 17 Cal.3d at p. 39.) This evidently extends to the expert who gives testimony on general acceptanceÄincluding the issues of his credentials and impartiality (People v. Brown, supra, 40 Cal.3d at p. 530). The determination on the use of correct scientific procedures in the particular case is also examined for abuse of discretion. (See People v. Reilly, supra, at pp. 1154-1155.)"
(People v. Ashmus (1991) 54 Cal.3d 932, 970-971.)

(6) Voluntariness of a waiver of constitutional or statutory rights. "The voluntariness of a waiver is a question of law which we review de novo. To make this determination, we examine the particular facts and circumstances surrounding the case, including the defendant's background, experience and conduct." (People v. Vargas (1992) 13 Cal.App.4th 1653, 1660 (citations omitted) [voluntariness of appeal waiver].) "[T]he governing standard as to whether a plea of guilty is voluntary for purposes of the Federal

Constitution is a question of federal law, and not a question of fact ... " (Marshall v. Lonberger (1983) 459 U.S. 422, 431 (citations omitted) [voluntariness of guilty plea].)

VII. REVIEW OF MIXED QUESTIONS OF LAW AND FACTS

A. Definition

Mixed questions of law and fact are questions in which (1) the "historical" facts have been established (e.g., what steps the prosecutor has taken to find a missing witness), (2) the principles of law are clear (e.g., the rules of evidence permitting a prosecutor to use a witness' preliminary hearing testimony at trial where the witness, despite due diligence on the part of the prosecutor to find the witness, is missing at trial and the prior testimony is reliable), and (3) the task is then to determine whether the facts satisfy the legal principle.

When courts review mixed questions, they almost always apply the substantial evidence test to the purely historical facts.[24] Similarly, the reviewing court exercises independent judgment in determining and defining the applicable principles of law.[25]

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[24] Under the deferential substantial evidence test, the appellate court will uphold the trial court's factual findings if the record shows substantial evidence to support the findings. See Section V, supra, for a discussion of the substantial evidence test.

[25] Under the independent review standard, the appellate court makes an independent judgment concerning the trial court's determinations on questions of law. See Section VI, supra, for a discussion of the independent review standard.

The final step is the "mixed" question, applying the facts to the law.

In the example just noted, the question would be whether the steps the prosecutor took to find the witness constituted "due diligence." In most mixed question situations, the appellate court views the mixed question as primarily legal, and thus reviews it under the independent review standard. However, some mixed questions are considered primarily factual, and the reviewing court uses the substantial evidence standard or, in some cases, the abuse of discretion standard.[26]

Note that some mixed questions may themselves involve several levels of subsidiary mixed questions. Thus, the question of whether the Miranda rights of a defendant were violated when the police questioned him at his apartment will turn on whether the defendant was effectively in "custody" at the apartment, and if so, whether the police questions constituted "interrogation." In that situation: "The trial court's determination that Miranda was not applicable at the apartment [because there was no custodial interrogation] is reviewed thus: the conclusion itself is examined independently,

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[26] The Supreme Court left open the standard of review for the example just given, "due diligence" in trying to find a missing witness, though indicating that independent review may be the appropriate standard. (People v. Louis (1986) 42 Cal.3d 969.) Subsequently, a court of appeal has held that the trial court's conclusion as to whether due diligence existed should be reviewed under the abuse of discretion standard. (People v. Wright (1990) 222 Cal.App.3d 1002.) See also People v. Hovey (1988) 44 Cal.3d 543 (apparently applying an abuse of discretion standard). But see People v. Watson (1989) 213 Cal.App.3d 446 (applying independent review).

the underlying findings are scrutinized for substantial evidence. ... `[F]indings on whether there was custodial interrogation ... are reviewed for substantial evidence ...' So too, it appears, are the underlying findings on whether there was `custody' and `interrogation.'" (People v. Clair (1992) 2 Cal.4th 629, 678 (citations omitted).)

In People v. Louis (1986) 42 Cal.3d 969 the California Supreme Court summarized at length the nature of mixed law-facts questions, the standards for reviewing them, and the rationale behind the standards. Accordingly, although several pages in length it is quoted here in full[27]:

> "At the threshold we are confronted with the issue of what standard we should use in reviewing the ruling that admitted Tolbert's preliminary hearing testimony at defendant's trial. Defendant urges that we independently review the matter, the Attorney General that we restrict our scrutiny to the question whether the court abused its discretion. Defendant's position, as we shall explain, is more persuasive.
>
> We recognize that in People v. Jackson (1980) 28 Cal.3d 264 [168 Cal.Rptr. 603, 618 P.2d 149], and its predecessors we held that "due

[27] In Louis, the court quoted at length from United States v McConney (9th Cir. 1984) 728 F.2d 1195, which expounded in detail on the nature of mixed law-fact questions. In reading the lengthy Louis quote which follows in text, note that McConney refers to the federal "clearly erroneous" standard for reviewing factual findings, which is equivalent to the California substantial evidence test, and to federal "de novo" review of legal questions which is equivalent to the California independent review standard.

diligence is a factual question ... [and that] under familiar rules the trial court's ruling will not be disturbed unless an abuse of discretion appears." (Id. at p. 312.) Nevertheless, we believe that discussions of analogous questions by this court and the Ninth Circuit Court of Appeals in the six years since Jackson justify our reexamination of this issue.

Properly considered, due diligence in procuring a witness's attendance appears to be a mixed question of law and fact. Mixed questions are those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." (Pullman-Standard v. Swint (1982) 456 U.S. 273, 289, fn. 19 [72 L.Ed.2d 66, 80, 102 S.Ct. 1781].) Under this definition fall such questions as whether there were exigent circumstances to justify a warrantless search (United States v. McConney (9th Cir. 1984) 728 F.2d 1195, 1199-1204 (in bank), cert. den., 469 U.S. 824 [83 L.Ed.2d 46, 105 S.Ct. 101]), and whether there was founded suspicion to support an investigative stop (United States v. Maybusher (9th Cir. 1984) 735 F.2d 366, 371, fn. 1, cert. den. (1985) 469 U.S. 1110 [83 L.Ed.2d 783, 105 S.Ct. 790]). Under it appears to fall as well the question of due diligence: in addressing it the court must also determine the underlying facts, select the applicable legal standard, and apply the latter to the former.

The proper standard for mixed questions appears to be independent review. We clearly implied as much in People v. Leyba (1981) 29 Cal.3d 591 [174 Cal.Rptr. 867, 629 P.2d 961]. There, without using the term "mixed question," we analyzed the scope of an appellate court's review of the trial court's determination of such a question Ä in that case specifically the reasonableness of an investigative stop. In considering a question of this kind, we explained, the trial court must engage in a two-step process, each step of which is subject to a different standard of review.

"In the first step the trial court must `find the facts' relating to the [issue at hand]. These are traditional questions of fact, and the statute vests the superior court with the power to decide them. [Citation.] Accordingly, ... for the purpose of finding those facts `the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.'

"No less important, however, is the second step of the process. ... `The trial court also has the duty to decide whether, on the facts found, the search was unreasonable within the meaning of the Constitution.' [Citation.] Because 'that issue is a question of law,' the appellate court is not bound by the substantial evidence standard in reviewing the trial court's decision thereon. Rather, ... in such review it is 'the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard ....' [Citation.] On that issue, in short, the appellate court exercises its independent judgment." (29 Cal.3d at pp. 596-597.)

We reach the same conclusion if we follow a slightly different and longer road. In United States v. McConney, supra, 728 F.2d 1195, the Ninth Circuit Court of Appeals, sitting in bank, reconsidered the proper standard of review for the issue of exigent circumstances, and developed the following analysis Ä based on principles analogous to those of our own jurisprudence Ä as a guide to selecting a standard for that and other mixed questions.

"[T]here are three distinct steps in deciding a mixed fact-law question. The first step is the establishment of the 'basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators ...."' [Citations.] The second step is the selection of the applicable rule of law. The third step Ä and the most troublesome for standard of review purposes Ä is the application of law to fact or, in other words, the determination `whether the rule of law as applied to the established facts is or is not violated.' [Citation.]

"The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review. The appropriate standard of review for the first two of the ... court's determinations Ä its establishment of historical facts and its selection of the relevant legal principle Ä has long been settled. Questions of fact are reviewed under the deferential, clearly erroneous standard. [Citation.] Questions of law are reviewed under the non-deferential, de novo standard. [Citations.] These established rules reflect the policy concerns that properly underlie standard of review jurisprudence generally.

"[The] mandate that appellate courts not disturb a trial court's findings of fact unless clearly erroneous serves two policy objectives. First, it minimizes the risk of judicial error by assigning primary responsibility for resolving factual disputes to the court in the `superior position' to evaluate and weigh the evidence Ä the trial court. ... Second, because under the

clearly erroneous test, the reviewing court will affirm the trial court's determinations unless it `is left with the definite and firm conviction that a mistake has been committed,' [citation], it is relieved of the burden of a full-scale independent review and evaluation of the evidence. Consequently, valuable appellate resources are conserved for those issues that appellate courts in turn are best situated to decide.

"The converse rule Ä that conclusions of law are subject to plenary or de novo review Ä reflects similar concerns. Structurally, appellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.

"De novo review of questions of law, however, is dictated by still another concern. Under the doctrine of stare decisis, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants. Rulings on factual issues, on the other hand, are generally of concern only to the immediate litigants. From the standpoint of sound judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law.

"Thus, we have a well developed standard of review jurisprudence for issues of fact and issues of law. Yet, when we review the third of the [trial] court's determinations Ä its application of law to fact Ä we confront `a much-mooted issue' .... We believe, however, that the well developed jurisprudence relating to questions of pure law and pure fact offers guideposts for working our way out of this confusion.

"The appropriate standard of review for a [trial] judge's application of law to fact may be determined, in our view, by reference to the sound principles which underlie the settled rules of appellate review just discussed. If the concerns of judicial administration Ä efficiency, accuracy, and precedential weight Ä make it more appropriate for a [trial] judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly

erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the [trial] judge's finding to de novo review. Thus, in each case, the pivotal question is do the concerns of judicial administration favor the [trial] court or do they favor the appellate court.

"In our view, the key to the resolution of this question is the nature of the inquiry that is required to decide `whether the rule of law as applied to the established facts is or is not violated.' [Citation.] If application of the rule of law to the facts requires an inquiry that is `essentially factual,' [citation] Ä one that is founded `on the application of the fact-finding tribunal's experience with the mainsprings of human conduct,' [citation] Ä the concerns of judicial administration will favor the [trial] court, and the [trial] court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

"As the Supreme Court appeared to indicate in Pullman-Standard [v. Swint], 456 U.S. [273,] 289 n. 19, 102 S.Ct. [1781,] 1790 n. 19 [(1982)], the concerns of judicial administration will generally favor the appellate court, justifying de novo review. This is so because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles. ...

"The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights. In cases involving such questions, the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision. Thus, the Supreme Court has held that the mixed question of probable cause is treated as a question of law and reviewed de novo. See, e.g., Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). This holding implicitly recognizes that the inquiry involved in applying the probable cause standard goes well beyond the facts of the case and requires consideration of the abstract legal principles

that inform constitutional jurisprudence." (728 F.2d at pp. 1200-1203, fns. omitted.)<fn 4>

FOOTNOTE 4 The McConney court recognized that "[t]here are ... some types of mixed questions that are exceptions to [the general rule of] de novo review." (Id. at p. 1203.) It identified two. "First, there are those mixed questions in which the applicable legal standard provides for a strictly factual test, such as state of mind, and the application of law to fact, consequently, involves an `essentially factual' inquiry. [Citation.] In Pullman-Standard, for example, the mixed question before the Court was whether the established facts demonstrated the intent to discriminate required by section 703(h) of title VII of the Civil Rights Act of 1964. Since, for the purposes of section 703(h) of title VII, intent means subjective intent, the relevant legal standard was that of 'actual motive.' [Citation.] The Court distinguished this legal standard from `some legal concept of discriminatory intent,' [citation], noting that actual motive `appears ... to be a pure question of fact,' [citation]. On this basis, the Court concluded that in the case before it the concerns of judicial administration favored the [trial] court and that the mixed question under consideration thus `[was] not ... a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts.' [Citation.] The Court subjected the lower court's determination to clearly erroneous review.

"A trial court's determination whether established facts constitute negligence offers us a second situation in which the concerns of judicial administration favor the [trial] court. Because the legal standard for judging whether conduct is negligent requires us to determine, by reference to the `data of practical human experience,' [citation], whether an individual acted `reasonably' by community standards, the trial court's findings of fact effectively determine our legal conclusion. Consequently, clearly erroneous review is appropriate." (Id. at pp. 1203-1204, fn. omitted.) ... "

(People v. Louis, supra, 42 Cal.3d at pp.984-988.)

The following sections present brief lists of some recent cases which involving issues which are considered primarily legal and thus reviewed independently, and issues which are considered primarily factual and thus reviewed under the substantial evidence standard.

B. Specific Mixed Questions Which Are Considered Primarily Legal and Are Reviewed Independently.

(1) Generally, mixed fact-law questions are reviewed independently.

> "`In our view, the key to the resolution of this question is the nature of the inquiry that is required to decide `whether the rule of law as applied to the established facts is or is not violated.' [Citation.] If application of the rule of law to the facts requires an inquiry that is `essentially factual,' [citation] Ä one that is founded `on the application of the fact-finding tribunal's experience with the mainsprings of human conduct,' [citation] Ä the concerns of judicial administration will favor the [trial] court, and the [trial] court's determination should be classified as one of fact reviewable under the clearly erroneous [substantial evidence] standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo [independent review].
>
> `As the Supreme Court appeared to indicate in Pullman-Standard [v. Swint], 456 U.S. [273,] 289 n. 19, 102 S.Ct. [1781,] 1790 n. 19 [(1982)], the concerns of judicial administration will generally favor the appellate court, justifying de novo review. This is so because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles. ...
>
> `The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights. In cases

involving such questions, the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision. ...'"
(People v. Louis (1986) 42 Cal.3d 969, 987 (quoting from United States v McConney (9th Cir. 1984) 728 F.2d 1195.)

(2) Ineffective assistance. "[A] referee's resolution of mixed law-fact questions is generally subject to independent review as predominantly questions of law--especially so when constitutional rights are implicated. (Cf. People v. Louis (1986) 42 Cal.3d 969, 986-987 [discussing appellate review of trial court determinations generally].) Such questions include the ultimate issue, whether assistance was ineffective, and its components, whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense." (People v. Ledesma (1987) 43 Cal.3d 171, 219.)

(3) Search and seizure: what constitutes a detention. "A determination whether police conduct amounted to a temporary detention for investigation or something more is reviewed independently." (People v. Clair (1992) 2 Cal.4th 629, 678.)

(4) Voluntariness of a confession. "Our role as a reviewing court is to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found; if conflicting testimony exists, we must accept that version of events which is most favorable to the People, to the extent supported by the record." (People v. Anderson (1990) 52 Cal.3d 453, 470.) "Determinations as to the voluntariness of a statement for both the federal and state constitutional guaranties of due process of law-- which is a resolution of a mixed question

of law and fact that is nevertheless predominantly legal-- are reviewed independently." (People v. Mickey (1991) 54 Cal.3d 612, 649; People v. Waidla, supra, 22 Cal.4th at pp. 730-732; Thompson v. Keohane, supra, 516 U.S. 99.).

(5) Miranda: voluntariness of a waiver. "[D]eterminations as to the validity of a waiver of Miranda rights-- a predominantly legal mixed question-- are reviewed independently." (People v. Mickey (1991) 54 Cal.3d 612, 649; People v. Waidla, supra; Thompson v. Keohane, supra.)

(6) Kelly/Frye.

> "The question of how to characterize the 'general acceptance' issue under Kelly/Frye for purposes of defining appellate review of a trial court's determination has not been clearly stated in the case law. We believe, however, that 'general acceptance' is best described as a mixed question of law and fact subject to limited de novo review. The issue, recently paraphrased as whether 'a consensus of scientific opinion has been achieved [citations] is factual but not entirely so for purposes of review. The trial court's determination cannot be sustained, for example, on a mere finding that the record contains ' "sufficient evidence" ' of the reliability of the challenged method. [Citations.]
>
> "The reviewing court undertakes a more searching reviewÄone that is sometimes not confined to the record. Because it is impractical to parade a true cross-section of scientists before the court, the scientific literature may be considered on the ultimate issue of consensus. '[F]or this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises in journals. [Citations.] The court's view such writings as "evidence," not of the actual reliability of the new scientific technique, but of its acceptance vel non in the scientific community .... [I]f a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose [the technique], the court may safely conclude there is no such consensus at the present time.' [Citation.] Law articles, too, may be considered for that purpose. [Citation.] This looking beyond the record can help end case-by-case controversy on this subject [citation] and is especially justified by the realization that 'once a trial court has admitted evidence based upon a new

> scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community.' [Citation.]" (People v. Reilly (1987) 196 Cal.App.3d 1127, 1134-1135 [242 Cal.Rptr. 496].)"
> (People v. Pizarro (1992) 10 Cal.App.4th 57, 83-84.)

C. Specific Mixed Questions Which Are Considered Primarily Factual and Are Reviewed Under the Substantial Evidence or Abuse of Discretion Standards.

(1) Miranda: Custodial Interrogation. "`[F]indings on whether there was custodial interrogation ... are reviewed for substantial evidence ....' So too, it appears, are the underlying findings on whether there was `custody' and `interrogation'." (People v. Clair (1992) 2 Cal.4th 629, 678 (citation omitted).)

(2) Suggestiveness of an identification procedure. "A trial court's finding that an identification procedure was not suggestive `will be sustained if supported by any substantial evidence, direct or indirect, contradicted or uncontradicted.'" (People v. Leung (1992) 5 Cal.App.4th 482, 498 (citation omitted).) However, note: "Whether the trial court's factual findings can support a legal conclusion that the identification procedure was fair is, however, a question of law." (Ibid.) This area is thus somewhat blurred, since the trial court's "factual" finding that the procedure was not suggestive blends into the legal conclusion that the procedure was therefore fair. However, as described in Leung, the appellate court does separate out the two steps. In Leung the trial court's findings on non-suggestiveness were summarized by the court of appeal: "The trial court

found that the photos presented to the witnesses for identification were of persons similar in appearance so as to `clearly provide a good representation from which to select any one individual.'" (Id. at p. 497-498.) The ultimate legal question of fairness involved the appellate court's consideration of the fact that several witnesses were in the room at the same time that the photographs were shown, and that only four or five photographs were shown. The court found that this procedure was fair.

(3) Hearsay: spontaneous declaration. "Whether a statement satisfies the requirements of the spontaneous declaration exception is `largely a question of fact' and is within the discretion of the trial court. On appeal, the trial court's finding on this issue will not be disturbed unless those facts on which it relied are not supported by a preponderance of evidence." (People v. Trimble (1992) 5 Cal.App.4th 1225, 1234 (citations omitted) [First Dist., Div. 1].)

(4) Wheeler. In People v. Jackson (1992) 10 Cal.App.4th 13, the court discussed at great length the standard of review that the Supreme Court has appeared to apply to Wheeler[28] issues; i.e., the trial court's determination that the prosecutor's challenges were not made on the basis of group bias. The Jackson court concluded that the "great deference" standard used in the Supreme Court cases was the same as the substantial evidence test.

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[28] People v. Wheeler (1978) 22 Cal.3d 258.

VIII. DE NOVO REVIEW OF FACTS AND LAW

A. Definition

As seen in Sections VI and VII, supra, it is common for a court of appeal to undertake a de novo, independent review of questions of law decided by the trial court. However, for purely factual questions, or for mixed law-fact questions which are primarily factual, the appellate court applies the substantial evidence standard of review. There are, though, some rare areas where the appellate court essentially undertakes a de novo review of the facts, as well as the law.

There is no single, consistent principle which governs the areas where the appellate court undertakes a de novo review of the facts. The following subsection lists some of these areas.

B. Specific Areas Where the Appellate Court Undertakes De Novo Review of the Facts as Well as the Law.

(1) Referee's findings on Habeas Corpus. An appellate court, when faced with a petition for habeas corpus, may order a referee to hold an evidentiary hearing. In such a situation, the referee's factual findings, while entitled to great weight, are not binding on the appellate court and are reviewed independently, rather than under the substantial evidence test:

> "Our standard of review in these circumstances is settled. A referee's legal conclusions are subject to independent review. As to findings of fact, they `are, of course, not binding on this court, and we may reach a different conclusion on an independent examination of the evidence produced at the

> hearing he conducts even where the evidence is conflicting. However, where the findings are supported by "ample, credible evidence" or "substantial evidence" they are entitled to great weight because of the referee's "opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand...." Finally, a referee's resolution of mixed law-fact questions is generally subject to independent review as predominantly questions of law-- especially so when constitutional rights are implicated."
> (People v. Ledesma (1987) 43 Cal.3d 171, 219 (citations omitted).)

(2) Inherent improbability. Where the appellate court finds that evidence meets the inherent improbability standard, the appellate court will not credit the evidence even if the trial court believed it. The standard for inherent improbability is discussed in Section V.C., supra.

(3) Code of Civil Procedure § 909. Code of Civil Procedure § 909, provides that where a jury trial has been waived "the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court." Similarly, rule 23 of the California Rules of Court provides that an appellate court may direct that "evidence be taken before the court or a justice thereof, or before a referee appointed for the purpose."

These provisions, in civil cases, thus would provide an exception to the general rule that the trial court is the determinor of factual matters. However, in People v. Benford (1959) 53 Cal.2d 1, 7, the court stated "At this time it remains unnecessary to decide whether additional evidence could be produced on appeal in an appropriate

criminal case."[29] The court in People v. Coyer (1983) 142 Cal.App.3d 839, 845 held that "These provisions are generally inapplicable to criminal appeals following jury trials." Benford also stated that "[§ 909] does not convert the appellate courts into triers of fact or abrogate the general rule that findings of the trial court based on substantial evidence are conclusive on appeal." (53 Cal.2d at p. 6). In researching these materials, no criminal case has been found where C.C.P. § 909 was used to overturn a factual finding by a trial court.

(4) Kelly/Frye. In Kelly/Frye determinations, the court of appeal will review the trial court's preliminary factual findings (e.g., the qualification of an expert) under the usual substantial evidence or abuse of discretion standards. However, for the ultimate question of whether a new technique has achieved general acceptance in the scientific community, the court of appeal will not only independently review the trial court's conclusion, but the court of appeal itself will look to the scientific literature (whether or not all of that literature was considered by the trial court):

> "The question of how to characterize the 'general acceptance' issue under Kelly/Frye for purposes of defining appellate review of a trial court's determination has not been clearly stated in the case law. We believe, however, that 'general acceptance' is best described as a mixed question of law and fact subject to limited de novo review. The issue, recently paraphrased as whether 'a consensus of scientific opinion has been achieved [citations] is factual but not entirely so for purposes of review. The trial court's determination cannot be sustained, for example, on a mere finding

[29] Evidence outside the record can be presented to the appellate court in criminal cases, by way of a petition for a writ of habeas corpus.

that the record contains ' "sufficient evidence" ' of the reliability of the challenged method. [Citations.]

"The reviewing court undertakes a more searching reviewÄone that is sometimes not confined to the record. Because it is impractical to parade a true cross-section of scientists before the court, the scientific literature may be considered on the ultimate issue of consensus. '[F]or this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises in journals. [Citations.] The court's view such writings as "evidence," not of the actual reliability of the new scientific technique, but of its acceptance vel non in the scientific community .... [I]f a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose [the technique], the court may safely conclude there is no such consensus at the present time.' [Citation.] Law articles, too, may be considered for that purpose. [Citation.] This looking beyond the record can help end case-by-case controversy on this subject [citation] and is especially justified by the realization that 'once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community.' [Citation.]" (People v. Reilly (1987) 196 Cal.App.3d 1127, 1134-1135 [242 Cal.Rptr. 496].)"
(People v. Pizarro (1992) 10 Cal.App.4th 57, 83-84.)

IX. PRESUMPTIONS ON APPEAL UPHOLDING TRIAL COURT RULINGS

A. Definition

In a number of contexts, the appellate courts indicate there is a presumption in favor of the trial court's ruling. Thus, the practitioner must be aware that it will usually be the burden of the appellant to affirmatively demonstrate error.

The following subsection notes several such presumptions.

B. Specific Presumptions Favoring the Trial Court Ruling

1. Factual Findings. As noted and discussed in detail in Section V, supra, when a trial court makes factual findings, "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence." (People v. Lawler (1973) 9 Cal.3d 156, 160.)

Thus, in reviewing the issue of whether there was sufficient evidence for a conviction, "[T]he appellate court `must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (People v. Johnson (1980) 26 Cal.3d 557, 576; People v. Rodriguez (1999) 70 Cal.App.4th 1, 11.)

2. Legal Conclusions. Unlike factual findings (subsection (1), supra), note that "(t)he general rule that every presumption on appeal favors the trial court's findings of fact does not apply to rulings on questions of law." (People v. Aldridge (1984) 35 Cal.3d 473, 477; People v. Ramirez (1996) 41 Cal.App. 4th 1608, 1613.) See Section VI, supra, for a full discussion of how the appellate court independently reviews questions of law.

3. Trial Court is Presumed to Have Known and Followed the Correct Law. It has frequently been stated: "It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties." (People v. Mack (1986) 178 Cal.App.3d 1026, 1032; People v. Lewis (1987) 191 Cal.App.3d 1288, 1296; People v. Jacobo (1991) 230 Cal.App.3d 1416, 1430.)

Thus, the burden is on the appellant to show that the trial court failed to follow the law: "`It is presumed that official duty has been regularly performed.' (Evid. Code, § 664.) `[I]n the absence of any contrary evidence, we are entitled to presume that the trial court ... properly followed established law.'" (People v. Belmontes (1988) 45 Cal.3d 744, 816 (citations omitted).)

This presumption means that it is very difficult for an appellant to argue based on a silent record. In Jacobo, the appellant argued that the trial judge was not aware that it had discretion to dismiss a special circumstance. The record was silent, and the court of

appeal dismissed the argument as "utterly without support in the record," citing the presumption that a trial court is presumed to have followed the law. (230 Cal.App.3d at 1430.) In Belmontes, the appellant argued that the record failed to show that the trial judge made an independent determination concerning the death penalty, but the court held that the appellant had failed to affirmatively establish that the judge did not make his determination on an independent basis.

Thus, the courts have reiterated that error usually will not be found on a silent record. "The trial court's judgment is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown." (People v. Brown (1988) 204 Cal.App.3d 1444, 1451; People v. McClure (1995) 37 Cal.App.4th 686, 690; see also People v. Fuhrman (1997) 16 Cal.4th 930 [no remand in “silent record” Three Strikes cases].)

A corollary to this presumption is that, where the trial court makes a ruling and is silent as to some of the preliminary findings which went into the ruling, the court on appeal will treat the trial judge's ruling as constituting implied findings on the preliminary matters, and will uphold the ruling if there is substantial evidence to support the implied findings. "(T)he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by

substantial evidence." (People v. Lawler (1973) 9 Cal.3d 156, 160 (emphasis added); People v. Glaser (1995) 11 Cal.4th 354, 362.)

The presumption that the court has followed the law applies to sentencing decisions (People v. Moran (1970) 1 Cal.3d 755; People v. Mack (1986) 178 Cal.App.3d 1026), and has been embodied in rule 409 of the California Rules of Court: "Relevant [sentencing] criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise."

However, some exceptions exist to the general presumption that the trial court properly followed the law:

(a) "It is generally presumed that a trial court has followed established law, but this presumption does not apply where the law in question was unclear or uncertain when the lower court acted." (People v. Jeffers (1987) 43 Cal.3d 984, 1000 (citations omitted); People v. Diaz (1992) 3 Cal.4th 495, 567.) In Jeffers, the court interpreted a sentencing statute (Pen. Code § 1203.066) and clarified an ambiguity in the law. It then noted, "Given the ambiguity of the statutory language in question, and the lack of any authoritative construction [at the time the trial court acted], there is a substantial likelihood the trial court relied on an incorrect interpretation of the provision in question." (Id. at p. 1001.)

(b) As noted above, when a trial court rules on a search and seizure motion, the appellate court will imply factual findings necessary to the trial court's ruling

(assuming there is substantial evidence to support such implied findings). However, an exception exists where the trial court did not really consider the matter (because, for example, the litigation at the trial court was directed to a different theory). Thus, in People v. Baker (1986) 187 Cal.App.3d 562, 565-566, "[a]t [the] hearing the court failed to rule whether the search warrant was valid. Instead it denied the motion on the express grounds appellant had voluntarily consented to the search of his home. The [trial] court did not address the issue that if the search warrant were invalid as claimed, appellant's consent would be deemed involuntary as a matter of law." Therefore, because no factual findings were made on the legality of the search warrant, "we remand this case to the trial court for a full hearing on the search and seizure issues." (Id. at p. 565.)

4. The Trial Court's Ruling Will be Upheld if the Record Shows Any Basis for the Correctness of the Ruling, Even if the Trial Court Stated an Incorrect Basis. It is a basic maxim of appellate law that "[where] the superior court reached the proper decision, it is of no consequence that the theory on which the court reached its conclusion may have been flawed." (Davis v. Municipal Court (1988) 46 Cal.3d 64, 72fn3.) Thus, "it is settled that the trial court's ruling must be upheld if there is any basis in the record to sustain it." (People v. Marquez (1992) 1 Cal.4th 553, 578.) The appellate court is "concerned with the correctness of the trial court's ruling, and not its reasoning, [and therefore] we may affirm even if the basis of the court's order is incorrect." (People v. Ainsworth (1990) 217 Cal.App.3d 247, 250fn4.)

An exception to this rule appears to exist where, although the appellate record would seem to support the trial court's ruling on a different basis from that stated by the trial court, the new basis involves the discretion of the trial judge and the judge did not exercise discretion on the new basis since he/she did not consider it. "The trial court here did not admit the statement under the state of mind exception to the hearsay rule. [It admitted the statement as a spontaneous declaration, which the appellate court found to be error.] ... Thus, the court never ruled on the admissibility of the statement under the state of mind exception nor considered whether the statement was made under trustworthy circumstances. [Par.] Even assuming Flores's statement would be admissible under the state of mind exception as a statement of physical sensation, we believe it would be inappropriate to hold the statement was properly admitted here when the court did not exercise its discretion to admit or exclude the statement under the state of mind exception." (People v. Pearch (1991) 229 Cal.App.3d 1282, 1292.)

X. ISSUES WHERE THE MAGISTRATE'S FINDINGS, NOT THE SUPERIOR COURT'S, ARE CREDITED ON APPEAL

A. Definition

There are certain areas of law in which a magistrate first makes a ruling; the magistrate's ruling is then reviewed initially by the Superior Court. In these situations, if the magistrate has acted as the initial factfinder by hearing the evidence and judging the credibility of witnesses, the court of appeal will usually review the magistrate's ruling, in essence skipping over the ruling of the superior court.

B. Specific Issues Where the Magistrate's Findings Are Reviewed by the Court of Appeal.

(1) Penal Code § 995 motions. "[I]n proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers [to judge credibility, resolve conflicts, weigh evidence, and draw inferences], and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer." (People v. Laiwa (1983) 34 Cal.3d 711, 718 (citations omitted); People v. Jones (1998) 19 Cal.4th 279, 301.)

(2) Motion to suppress evidence made at preliminary hearing and renewed in superior court. When a motion to suppress evidence is made at the preliminary hearing and the evidence at the renewed hearing in the superior court is limited to the evidence of the preliminary hearing, the trial court is bound by the factual findings of the magistrate. It becomes, in effect, a reviewing court, drawing all inferences in favor of the magistrate's findings where they are supported by substantial evidence. Given the superior court's role as a reviewing rather than a fact-finding court, the appellate court reviews the determination of the magistrate. Assuming the magistrate's findings are supported by substantial evidence, this court evaluates the constitutional reasonableness of the search based on the facts found by the magistrate. (People v. Soun (1995) 34 Cal.App.4th 1499, 1507. See also People v. Ramsey (1988) 203 Cal.App.3d 671, 679.)

(3) Magistrate's ruling on whether there was excusable neglect, permitting the district attorney to refile an information. "We agree with the People that we should defer to the magistrate's ruling and not defer to the superior court's contrary ruling. This is because only the magistrate heard the evidence, saw the demeanor of witnesses and was in a position to judge credibility. The superior court only sat as a court of review, examining the magistrate's ruling for evidentiary support and declining to reweigh or take new evidence. The situation is like review of a motion to set aside an information (§ 995) or to suppress evidence where the superior court considers only that evidence presented on a prior motion before the magistrate. In either case this court disregards the

superior court ruling and directly examines the magistrate's. We, like the superior court, must draw every legitimate inference in favor of the magistrate's ruling and cannot substitute our judgment, on the credibility or weight of the evidence, for that of the magistrate." (People v. Woods (1993) 12 Cal.App.4th 1139, 1147-1148 (citations omitted); People v. Daily (1996) 49 Cal.App. 543, 551; People v. Eid (1994) 31 Cal. App.4th 114, 125.)[30]

[30] But note the dissenting opinion, disagreeing with "[t]he majority's labored attempt to find some justification for deferring to the ruling of the magistrate rather than the conflicting

ruling of the superior court ...." (12 Cal.App.4th at 1159.)

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COGNIZABILITY, WAIVER AND OTHER IMPEDIMENTS TO APPELLATE REVIEW FOLLOWING A CRIMINAL TRIAL

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April, 2000

In evaluating the strength of and in presenting an issue for appellate review, essential considerations are whether the issue is cognizable on direct appeal and whether the issue has been preserved by an objection in the trial court. This outline is broadly divided into cognizability, waiver, how to present a defaulted claim, and other bars to appellate review (law of the case and invited error). The cognizability section identifies (1) claims which can only be raised by interlocutory writ; (2) claims which can be raised on direct appeal but under a more onerous standard of review than by writ; and claims which can be raised on direct appeal. The waiver section identifies (1) claims which can be raised for the first time on appeal; (2) circumstances which may constitute a waiver; (3) specific claims which can be waived; (4) sentencing; and (5) credits.

I. Cognizability:

Claims which can only be raised by interlocutory writ

- **Fitness to be Tried as an Adult:** A ruling under Welfare and Institutions Code section 707(b) finding a minor fit to be tried as an adult is reviewable only by extraordinary writ. (People v. Marquez (1992) 1 Cal.4th 553, 579, People v. Chi Ko Wong (1976) 18 Cal.3d 698, 714.)
- **Judicial Disqualification Motion:** Denial of a judicial disqualification motion under Code of Civ. Proc. § 170.6 is reviewable only by expedited writ procedure provided for in § 170.3, subd. (d). (People v. Webb (1993) 6 Cal.4th 494, 522-23; People v. Hull (1991) 1 Cal.4th 266.)

Claims which can be reviewed on direct appeal, but under a more onerous prejudice standard:

- **Speedy Trial Violation:** "Where the trial court denies a motion to dismiss under section 1382, the defendant may seek pretrial writ review without demonstrating prejudice from the delay of trial. ... However, a defendant asserting the abridgment of a statutory speedy trial right after conviction must prove not only unjustified delay in bringing the case to trial, but also prejudice flowing from that delay." (People v. Egbert (1997) 59 Cal.App.4th 503, 513 (citing People v. Johnson (1980) 26 Cal.3d 557, 574 and People v. Wilson (1963) 60 Cal.2d 139, 151-152).)

- **Denial of Penal Code section 995 Motion**: May be raised on appeal, but defendant must show prejudice from the denial of the motion. (People v. Pompa-Ortiz (1980) 27 Cal.3d 519,529.) **Note**: **As a practical matter, denial of a section 995 motion based on lack of probable cause is not reviewable on direct appeal**: "Where the evidence produced at trial amply supports the jury's finding, any question whether the evidence produced at the preliminary hearing supported the finding of probable cause is rendered moot." (People v. Crittenden (1994) 9 Cal.4th 83, 137.)

- **Overcoming Pompa-Ortiz, supra, and Johnson, supra,**: Almost the only way to overcome Pompa-Ortiz and Johnson is to show that dismissal under section 995 or 1382 would have barred refiling. (See e.g., Pen. Code § 1387 double dismissal rule, barring refiling upon second dismissal.)

Claims which can be reviewed on direct appeal:

- **Generally** "In an appeal from a 'final judgment of conviction' under Penal Code section 1237, subdivision (a), the defendant has standing to raise a claim of error in any part of the record." (People v. Gillispie (1997) 60 Cal.App.4th 429, 433.)

  - **Examples of common claims which can be raised on direct appeal are expansive and beyond the scope of these material. Suffice to say that most errors arising in the course of pre-trial, trial, sentencing and new trial motion proceedings are cognizable on direct appeal.** Detailed examination of such claims are the subject of other outlines in these material, in particular the materials on issue selection.

- **A Couple of Specific Situations Require Special Mention:**

  - *Defendant May Appeal **Sua Sponte Rulings**:* The defendant's right to appeal "includ[es] actions which the trial court takes on its own motion." (Gillespie, 609 Cal.App.4th at 433.)

  - *Denial of **New Trial Motion**:* **"**Upon appeal from a final judgment the court may review any order denying a motion for a new trial." (Pen. Code § 1237.)

  - ***Competency** to Stand Trial*: Verdict finding defendant competent to stand trial in separate proceeding held after guilt verdict but before penalty phase was nonappealable interlocutory ruling and could be reviewed in appeal from final judgment in underlying criminal proceeding. (People v. Mickle (1991) 54 Cal.3d 140.)

II. Waiver

Generally, a failure to object to an error waives the claim for purposes of appellate review. This section first describes the limited types of claims which are not waived because of a failure to object. It is followed by a description of what constitutes a waiver, general manners in which trial counsel can fail to preserve a claim, and then by a description of specific types of claims which can be waived. Sentencing and presentence credits are discussed separately.

Claims Which Can Be Raised for the First Time on Direct Appeal:

The general rule is that issues not raised in the trial court cannot be raised on direct appeal. There are, as described below, exceptions including: jurisdictional defects, mandatory jury instructions, failures to inquire into the defendant's competency or continued ability to proceed pro se, double jeopardy, and unauthorized sentences.

- **Statute of Limitations Violation:** Because the statute of limitations is jurisdictional, it may be raised for the first time on appeal. "Commencing in 1934, this court and the Courts of Appeal have repeatedly held that a defendant may assert the statute of limitations at any time. .... The rule is a reflection of the fundamental principle of our law that the power of the courts to proceed—i.e., their jurisdiction over the subject matter—cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel [citations], and hence that the lack of such jurisdiction may be raised for the first time on appeal. (People v. Williams (1999) 21 Cal.4th 335, 339-340 [internal citations and quotation marks omitted].)
- **Lack of Jurisdiction**: Challenge to one county's jurisdiction to revoke probation and impose a sentence for a charge pending in a different county not waived by failure to raise jurisdictional claim in the trial court. (People v. Klockman (1997) 59 Cal.App.4th 621, 625.)
- **Sufficiency of the Evidence:** "[S]ufficiency of the evidence issues are never waived." (People v. Parra (1999) 70 Cal.App.4th 222, 224, fn. 2 (citing People v. Neal (1993) 19 Cal.App.4th 1114, 1121).)
- **Mandatory Jury Instructions**: "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (People v. Breverman (1998) 19 Cal.4th 142, 154.) Some examples:

- *Reasonable Doubt* (CALJIC No. 2.90): trial court is required to give an instruction on reasonable doubt where no such instruction is requested by the parties. (People v. Vann (1974) 12 Cal.3d 220, 226.)

- *Elements of the Offense*: trial court must instruct on every material element of offense. (People v. Flood (1998) 18 Cal.4th 470, 480.)

- *Lesser Included Offenses:* the sua sponte duty extends to "instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged." (Breverman, 19 Cal.4th at 154.)

- *Theory of Liability*: the trial court must instruct on the prosecutor's theory of liability. (See People v. Prettyman (1996) 14 Cal.4th 248.)

- *Theory of the Defense*: "The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case." (People v. Montoya (1994) 7 Cal.4th 1027, 1047 (citing People v. Flannel (1979) 25 Cal.3d 668, 684-685; People v. Sedeno (1974) 10 Cal.3d 703, 716).)

- *Miscellaneous Evidence Evaluation Instructions:* Some, **but not all,** evidence evaluation instructions are mandatory when called for by the evidence. Some examples: *believability of witness:* CALJIC No. 2.20 (People v. Rincon-Pineda (1975) 14 Cal.3d 864); *conflicting testimony*: No. 2.22 (Id.); *sufficiency of testimony of one witness*: No. 2.27 (Id.); *flight after crime*: No. 2.52 (People v. Williams (1997) 55 Cal.App.4th 648, 651 and Pen. Code § 1127c); *defendant's confession/admission viewed with caution*: Nos. 2.70, 2.71, 2.71.7 (People v. Mayfield (1997) 14 Cal.4th 668, 776; People v. Stankewitz (1990) 51 Cal.3d 72, 93); *adoptive admissions*: No. 2.71.5 (People v. Humphries (1986) 185 Cal.App.3d 1315, 1336; People v. Vindiola (1979) 96 Cal.App.3d 370, 382); *corpus delicti*: No. 2.72 (People v. Lara (1994) 30 Cal.App.4th 658, 674-675 and People v. Beagle (1972) 6 Cal.3d 441, 455); *weight to be given expert testimony*: No. 2.80 (Pen. Code, § 1127b and People v. Housley (1992) 6 Cal.App.4th 947, 958). **(Examples of evidence evaluation instructions which can be waived are listed under "Circumstances Which Constitute a Waiver".)**

- **Jury Instructions Affecting Substantial Rights (Pen. Code § 1259):** In addition to the above-discussed mandatory jury instructions which must be given sua sponte, a defendant may also challenge for the first time on appeal "any jury instruction given, refused or modified ... if the substantial rights of the defendant were affected thereby." (Pen. Code § 1259.)

- **Failure to Hold Competency Hearing**: A showing of substantial evidence of incompetence requires the trial court to order a competency hearing: "the trial judge has no discretion to exercise." (People v. Welch (1999) 20 Cal.4th 701, 738; People v. Pennington (1967) 66 Cal.2d 508, 518.)

- **Failure to Inquire Into or Revoke Pro Se Status:** Where substantial evidence pointing to the defendant's incompetence to waive counsel arises after the grant of self-representation, the trial court has a sua sponte duty to reconsider the defendant's competency to represent himself. (People v. Teron (1979) 23 Cal.3d 103; People v. Poplawski (1994) 25 Cal.App.4th 881, 890-891; People v. Powell (1986) 180 Cal.App.3d 469, 479; People v. Leever (1985) 173 Cal.App.3d 853, 864.)

- **Double Jeopardy:** Double jeopardy claims under the federal and state constitutions are not waived by failure to raise grounds in the superior court. (People v. Valladoli (1996) 13 Cal.4th 590, 606; People v. Saunders (1993) 5 Cal.4th 580, 592.)

- **Unlawful Sentence:** *See Sentencing Discussion Below.*

Circumstances Which Constitute a Waiver:

- **Failure to Renew Preliminary Hearing Claim in the Superior Court:**

  · **Pen. Code § 995 Motion:** A failure to move to set aside the information in the superior court bars the defense from questioning on appeal any ruling made at the preliminary hearing. (Pen. Code § 996; People v. Matthews (1986) 183 Cal.App.3d 458 (denial of self-representation at preliminary hearing) ; People v. Harris (1967) 67 Cal.2d 866, 868, 870-871 (failure to appoint counsel at the preliminary hearing); People v. Pendergrass (1986) 182 Cal.App.3d 63, 67 (nondisclosure of informant).) (In any event, errors at the preliminary hearing rarely represent post-trial appellate issues. (See People v. Pompa-Ortiz (1980) 27 Cal.3d 519,529.)

  · **Suppression Motion**: failure to renew suppression motion in the superior court precludes appellate review. (People v. Lilienthal (1978) 22 Cal.3d 891, 896; Pen. Code § 1538.5, subd. (m).)

- **Failure to Raise Issue In Prior Appeal**: People v. Senior (1995) 33 Cal.App.4th 531: "[W]e hold that where a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay." Limitations of holding: "Our decision should be narrowly applied only in cases where, as here, (1) the case was ripe for decision by the appellate court at the time of the previous appeal; (2) there has been no significant change in the underlying facts or applicable law; and (3) the defendant has offered no reasonable justification for the delay."

- **Failure to Renew Change of Venue Claim At Close of Voir Dire**: "Because the trial court initially denied the motion [to change venue] without prejudice, defendant needed to renew it at the close of voir dire in order to preserve the issue for appeal." (People v. Howard (1992) 1 Cal.4th 1132, 1166.)

- **Failure to Renew In Limine Motions:** "Motions in limine normally are not binding and must ordinarily be renewed at trial." People v. Cahill (1994) 22 Cal.App.4th 296, 309 fn.3. **But**, pre-trial objection to evidence need not be renewed at time evidence is introduced, if pre-trial motion included specific objection directed to particular body of evidence at a time when the trial judge could determine the question in its appropriate context. (People v. Morris (1991) 53 Cal.3d 152, 189-190.)

- **Failure of Trial Court to Rule on Objection:** Where "trial court did not grant counsel's motion to exclude the information, but simply reserved judgment until the witness's actual testimony" and "[d]efendant thereafter failed to specifically object to any of the prosecutor's questions ... any claim of error is waived on appeal." (People v. Wash (1993) 6 Cal.4th 215, 258.)

- **Federal Constitutional Ground is Not Preserved if Only State law Grounds Were Asserted in the Trial Court:** If specific constitutional ground was not asserted in the trial court for a ruling (e.g. confrontation clause for hearsay), the appellate court may refuse to consider the federal constitutional infringements caused by the ruling. (E.g., People v. Barnett (1998) 17 Cal.4th 1044, 1119 fn. 54; People v. Rodrigues (1994) 8 Cal.4th 1060, 1116 fn. 20; People v. Ashmus (1991) 54 Cal.3d 932, 972 fn. 10.) **NOTE**: **the application of this principle is inconsistent. Appellate counsel should, as a matter of course, federalize claims on appeal, even when the objection in the trial court was only on state law grounds.**

- **Constitutional Violations May be Waived**:"The California Supreme Court has repeatedly held that constitutional objections must be interposed in order to preserve such contentions on appeal." (In re Josue S. (1999) 72 Cal.App.4th 168 (citing numerous cases).)

Specific Issues

- **Challenge to Juror for Cause (Unexhausted Peremptory Challenges)**: "Under settled law, [defendant's] failure to exhaust peremptory challenges or to justify his omission bars defendant from claiming that his challenges for cause were improperly denied." (People v. Ervin (2000) 22 Cal.4th 48, 71; see also People v. Coleman (1988) 46 Cal.3d 749, 770.)
- **Failure to Make Wheeler Motion Waives Issue on Appeal:** (People v. Gallego (1990) 52 Cal.3d 115, 166.)
- **Motion to Sever:** "[A] motion to sever must be supported by adequate grounds existing at the time the motion is heard. ([Citations].) If further developments occur during trial that a defendant believes justify severance, he must renew his motion to sever." (People v. Ervin (2000) 22 Cal.4th 48, 68.)
- **Evidentiary Rulings (Evid. Code § 353)**: Defense counsel's failure to object at trial to evidence on ground asserted on appeal waived claim of error. (People v. Garceau (1993) 6 Cal.4th 140, 179, cert. denied, 513 U.S. 848 (citing Evid. Code § 353).) Section 353 is a frequent cause of waiver. An objection to the evidence on one ground, may not be sufficient to preserve a challenge to the same evidence on a different ground. (See e.g. People v. Williams (1997) 16 Cal.4th 153, 206 (challenge to admission of evidence based on prejudicial effect not preserved for appellate review where trial court objection was solely on relevance grounds.)
- **Prosecutorial Misconduct (Must Object and Request Admonition)** "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (People v. Hill (1998) 17 Cal.4th 800, 820 (quoting People v. Berryman (1993) 6 Cal.4th 1048, 1072.) **But:** A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. If an admonition would not cure the harm of if there was no opportunity to request an admonition, the claim is not forfeited. (People v. Hill (1998) 17 Cal.4th 800.) As recently reaffirmed, appellate courts have the authority and discretion to reach the merits of defaulted claims. (People v. Williams

(1998) 17 Cal.4th 148, 161 n.6 (citing cases reaching the merits of prosecutorial misconduct claims not preserved for review).)

- **Judicial Bias**: "Defendant has not preserved the [judicial bias] issue for appeal because he made no objection to any of the trial court's allegedly improper actions." (People v. Hines (1997) 15 Cal.4th 997, 1041.)

- **Jury Instructions:** Limiting instructions, pinpoint instructions, and clarifying instructions require a defense request to preserve for appellate review. Some examples:

  - **pinpoint instructions** ("Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." (People v. Saille (1991) 54 Cal.3d 1103, 1119.)
  - Alibi (People v. Freeman (1978) 22 Cal.3d 434);
  - Relevance of intoxication to specific intent or other mental state (CALJIC 4.21) (People v. Saille (1991) 54 Cal.3d 1103, 1120);
  - Relevance of provocation to premeditation and deliberation (choice between 1st and 2nd degree murder), even when provocation insufficient to reduce to manslaughter (CALJIC 8.73) (People v. Middleton (1997) 52 Cal.App.4th 19);
  - Bearing of victim's prior threats or violence on self-defense issues (People v. Pena (1984) 151 Cal.App.3d 462, 474- 478; People v. Moore (1954) 43 Cal.2d 517, 527-529);
  - "After-formed intent" rule in robbery cases (People v. Webster (1991) 54 Cal.3d 411, 443-444).
  - **"Clarifying" or "Amplifying" Instructions:** "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (People v. Andrews (1989) 49 Cal.3d 200, 218; People v. Guiuan (1998) 18 Cal.4th 558, 570).
  - Some, But Not All, Evidence Evaluation Instructions Require a Defense Request. Examples of instructions which require a request follow: *questions on cross-examination of a character witness of whether witness has heard reports of certain conduct of defendant inconsistent with good character is not to be considered are not evidence that reports are true*, CALJIC No. 2.42 People v. Daniels

(1991) 52 Cal.3d 815, 883-884 (citing People v. White (1958) 50 Cal.2d 428); *limited admissibility of evidence of past criminal conduct*, No. 2.50 (People v. Padilla (1995) 11 Cal.4th 891, 950 (citing People v. Collie (1981) 30 Cal.3d 43)), but see Collie, supra, at 64 noting there might be "an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose"); *defense may rely on state of evidence*, No. 2.61 (People v. Hamilton (1988) 46 Cal.3d 123, 153 (citing People v. Preston (1973) 9 Cal.3d 308, 316)); *factors relevant to reliability of eyewitness identification*, Nos. 2.91, 2.92 (People v. Wright (1988) 45 Cal.3d 1126); *admonition to view jailhouse informant's testimony with caution* (Pen. Code § 1127a); *limitation of un-Mirandized statement to impeachment* (People v. Torrez (1995) 31 Cal.App.4th 1084, 1088-1091). **Note: as already noted, other evidence evaluation instructions are mandatory.**

- Verdict Forms: failure to object to verdict form waives defect on appellate review. (People v. Bolin (1998) 18 Cal.4th 297, 330.)

SENTENCING

- **Failure to Object Does Not Waive Challenges to an Unauthorized/Illegal Sentence**: "Although the cases are varied, a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation] ... [L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement." (People v. Scott (1994) 9 Cal.4th 331, 354.) Examples:
  - Violation of Pen. Code § 654. (Scott, supra, 9 Cal.4th at 354, fn. 17 (citing People v. Perez (1979) 23 Cal.3d 545, 549-550, fn. 3; Neal v. State of California (1960) 55 Cal.2d 11, 16-17.)
  - Ex Post Facto Violation: failure to object to restitution order on ex post facto grounds does not waive issue for appeal. (People v. Zito (1992) 8 Cal.App.4th 736, 742.)
  - failure to characterize an offense and apply a permissible term of confinement (In re Ricky H. (1981) 30 Cal.3d 176, 190-19

- **Failure to Object Waives Challenges to Sentences Imposed in a Procedurally or Factually Flawed Manner**: "claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (Scott, supra, 9 Cal.4th at 354 .)

  - Where there was no objection, "any issue concerning the failure to state reasons for imposing consecutive sentences has been waived." (People v. Neal (1993) 19 Cal.App.4th 1114, 1125.)

  - See People v. Neal, supra, 19 Cal.App.4th at 1123-24, for list of cases finding non-jurisdictional sentencing issues waived by failures to object, including: issues concerning noncompliance with the statutory requirements that sentencing occur within specified time periods; error in permitting a particular judge to impose a sentence; a probation officer's report is presented orally rather than in written format; constitutionality of a statute which prohibited cross-examination of prison psychiatrists at a probation and sentence hearing; allowing the probation officer to determine the amount of restitution; failure of a trial counsel to bring errors in a probation report to a court's attention; probation report was not timely; questions relating to a lack of notice at a sentencing hearing; failure to secure a current probation report; sentencing judge improperly read a preliminary hearing transcript and a codefendant's superior court file; failure to inquire as to whether there is any reason sentence should not be pronounced as required by section 1200.

  - **Scott Rule Applies to Sentencing Errors Raised by the State:** People v. Tillman (2000) 22 Cal.4th 300.)

- **Adult Probation Conditions**: "an adult defendant may not challenge the reasonableness of conditions of probation for the first time on appeal." (People v. Welch (1993) 5 Cal.4th 228, 233-238.)

- **Juvenile Probation Conditions** (***Split of Authority***): One post-Welch case has held that juveniles do not waive challenges to probation conditions. (In re Tanya B. (1996) 43 Cal.App.4th 1, 5 (2d Dist., Div. 4).) But other courts have found Tanya B. wrongly decided and held that juveniles do waive such challenges by failing to object in the trial court. (In re Josue S. (1999) 72 Cal.App.4th 168 (2nd Dist.; Div. 5); In re Khonsavanh S. (1998) 67 Cal.App.4th 532 (4th Dist.; Div. 1); but see In re Kacy S. (1998) 68 Cal.App.4th 704, 713 (Court concluded that reaching the merits of an overbreadth/unreasonableness challenge to a probation

condition better served judicial economy than did upholding the condition and requiring that the probation officer enforce the condition.)

CREDITS

Questions regarding the cognizability of appellate issues relating to a sentencing court's award of presentence credits require special attention. Historically, miscalculation of presentence credits was treated as a jurisdictional error which could be raised on appeal even though the issue was never presented to the trial judge. (People v. Acosta (1996) 48 Cal.App.4th 411, 419 (citing People v. Karaman (1992) 4 Cal.4th 335, 349-350).) In 1995, the Legislature added Penal Code section 1237.1, which provides that challenges to credits calculations must be presented to the superior court first:

> No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court.

More than one court, however, has held that the court of appeal may consider challenges to a credits calculation which has not been presented to the superior court where the credits issues is not the sole issue raised on appeal. (Acosta, 48 Cal.App.4th at 420-428 (2d Dist.; Div. 5); People v. Sylvester (1997) 58 Cal.App.4th 1493, fn. 3 (5th District).) The safest course, however, would be to present the issue first to the superior court. There is no reason not to.

III. What To Do When the Issue Was Not Preserved.

There are several arguments an appellate attorney can make in requesting review of a defaulted claim:

- **Appellate Court Has Discretion to Reach Merits: "**Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[]' or 'correct[]' the claimed error in the trial court does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. Indeed, it has the authority to do so. True, it is in fact barred when the issue involves the admission (Evid. Code, §

353) or exclusion (id., § 354) of evidence. Such, of course, is not the case here. Therefore, it is free to act in the matter. Whether or not it should do so is entrusted to its discretion." (People v. Williams (1998) 17 Cal.4th 148, 161 fn. 6 (Citations omitted).) **Note**: The preceding language of Williams seems to suggest that where the defaulted error is **evidentiary**, the appellate court has no discretion to reach the claim. Arguably, this is dicta as the claim in Williams was not evidentiary. For other types of error, however, Williams, is unambiguous: the reviewing court may, in its discretion, reach the merits of a defaulted claim.

- **Question of Whether There Was a Waiver is Close and Difficult**: "Because the question of whether defendants have preserved their right to raise this issue on appeal is close and difficult, we assume that defendants have preserved their right, and proceed to the merits." (People v. Champion (1995) 9 Cal.4th 879, 908 n.6 (citing examples People v. Fudge (1994) 7 Cal.4th 1075, 1106-1107; People v. Pinholster, 1 Cal.4th 865, 912; People v. Malone (1988) 47 Cal.3d 1, 38; People v. McLain (1988) 46 Cal.3d 97, 110; People v. Miranda (1987) 44 Cal.3d 57, 85.)

- **Question of Law, Not Facts:** "Where ... the newly advanced theory presents only a question of law arising from facts which are undisputed, appellate review is authorized. [Citations.] The Evidence Code section 353 requirement of timely and specific objection before appellate review is available is not a universal prohibition. As pointed out by the Assembly Judiciary Committee comment following Evidence Code section 353: 'Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law.'" (People v. Mills (1978) 81 Cal.App.3d 171, 175-176 (emphasis added).) **Note: Unfortunately, this exception is rarely invoked.**

- **Objection To Prosecutorial Misconduct Futile:** A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. If an admonition would not cure the harm of if there was no opportunity to request an admonition, the claim is not forfeited. (People v. Hill (1998) 17 Cal.4th 800.)

- **Judicial Economy Favors Reaching the Merits**: See In re Kacy S. (1998) 68 Cal.App.4th 704, 713 (Court concluded that reaching the merits of an overbreadth/unreasonableness challenge to a probation condition better served judicial economy than did upholding the condition and requiring that the probation officer enforce the condition.)

- **Because the State of the Law Was Unsettled, Court of Appeal May Not Presume From a Silent Record that the Trial Court Applied the Law Correctly:** For instance, in People v. Romero, the California Supreme Court held that trial courts had the discretion under section 1385 to strike a prior felony conviction alleged under the Three Strikes Law. In a subsequent case, the Court held that "In view of the weight of published decisions prior to Romero (holding that a trial court lacked discretion under section 1385 to strike a prior felony conviction), we do not believe it would be appropriate to rely upon the rule that a trial court ordinarily is presumed to have correctly applied the law [citations], or to find that a defendant who failed to anticipate our subsequent decision in Romero 'waived' or 'forfeited' his or her right to raise the issue. [Citations]." People v. Fuhrman (1997) 16 Cal.4th 930, 945.)

- **Ineffective Assistance of Counsel**: Argue that trial counsel's failure to preserve the error constituted incompetent representation and prejudiced your client in violation of the Sixth Amendment right to effective representation. The claim, however, will be reviewed under the more onerous IAC standard. (People v. Rodrigues (1994) 8 Cal.4th 1060, 1126.)

- **For Certain Fundamental Rights (jury trial, to testify), Trial Counsel's Waiver May Not Be Effective:** "Where, however, defendant and counsel disagree over the assertion of a fundamental constitutional right, such as the right to testify in the defendant's own behalf ... or the constitutional right to jury trial, the defendant's desire to exercise these fundamental rights must prevail. People v. Harris (1993) 14 Cal.App.4th 984, 991.) **But**, at least for the right to testify, defendant must personally and timely assert the right to preserve the claim. (People v. Hayes (1991) 229 Cal.App.3d 1226.)

- **No Meaningful Opportunity to Object**: Defendant will not be deemed to have waived sentencing error where defendant did not have a meaningful opportunity to object. (People v. Bautista (1998) 63 Cal.App.4th 865, 868-871 (But, a meaningful opportunity to object does not require a tentative ruling.)

- **Where Issue Could Not Have Been Decided By Lower Court Because Lower Court Was Bound By Authority Appellant Asks Appellate Court to Overrule, The Claim Is Properly Raised in the Appellate Court in the First Instance:** "Defendant insists the People waived this argument by failing to raise it in the Court of Appeal. (Cal. Rules of Court, rule 29(b)(1) ['As a matter of policy, ... the Supreme Court normally will not consider: [¶] ... any issue that could have been but was not raised in ... the Court of Appeal ....' (Italics added.)].) The contention is specious. The Court of

Appeal must follow, and has no authority to overrule, the decisions of this court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) Because the issue now presented could not have been decided below, it is properly before us in the first instance." (People v. Birks (1998) 19 Cal.4th 108, 116 fn.6; citing Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 292, fn. 1.)

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IV Additional Impediments to Appellate Court Review

- **Law-of-the-Case Doctrine Bars Raising Issue Determined Adversely on Prior Appeal:** If the matter was determined adversely to defendant on prior appeal, claim may not be reviewed on subsequent appeal. (People v. Stanley (1995) 10 Cal.4th 764, 786.) **Exceptions:**
  - The law-of-the-case doctrine will not be applied where there's been an intervening change in the law, where there was "manifest misapplication of existing principles resulting in substantial injustice", or where the new claim is based on facts not presented on first appeal. (Id. at 787; People v. Mattson (1990) 50 Cal.3d 826, 852.)
  - Law-of-the-case status is not accorded does to summary denials of writ petitions. (People v. Pucini (1981) 120 Cal.App.3d 877, 882-887 (habeas corpus petition); Kowis v. Howard (1992) 3 Cal.4th 888 (pretrial petition for extraordinary relief).)
- **Invited Error Doctrine Bars Appellate Challenge to Trial Court Ruling Made at Defendant's Behest:** "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (People v. Wickersham (1982) 32 Cal.3d 307, 330**. Exception**: "For the doctrine of invited error to apply, '"it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake."'" (People v. Bradford (1997) 14 Cal.4th 1005, 1057 (quoting People v. Bunyard (1988) 45 Cal.3d 1189, 1234).) **Note: Although invited error doctrine potentially has application to many kinds of error, it is most frequently asserted on jury instruction issues.**

CAVEATS:

These materials are limited to addressing waiver and cognizability problems on direct appeal of a judgment of conviction following a jury or court trial. Not addressed are:

Guilty Pleas: These materials do not address the cognizability and waiver of appellate claims following a guilty plea or plea of nolo contendere. In such cases, there are extensive barriers to appellate claims, including the waivers inherent in guilty pleas (e.g denial of motions, sufficiency of the evidence), express waivers of appellate rights in a plea agreement, and the denial of, or failure to request, a certificate of probable cause.

State's Appeals: The principles of waiver generally apply to the state. (See People v. Tillman (2000) 22 Cal.4th 300.) These materials, however, do not address questions about the scope of claims cognizable on a state's appeal, including claims raised by the defendant for the first time in a respondent's brief.

Appeals of Collateral Orders: These materials do not address the contours of what is and what is not an appealable order. Nor do these materials address the scope of cognizable claims in an appeal of a collateral or post-judgment order. (E.g. Denial of bail, denial of post-trial motions.)

Mootness: Mootness may render an appellate claim noncognizable. These materials do not address the specifics of mootness.