THE PROCEDURES FOR PERFECTING A SENTENCING APPEAL AND A FEW SELECTED SENTENCING ISSUES

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INTRODUCTION

California has a Byzantine array of sentencing rules which involve a hodgepodge of varying schemes which must often be melded together in a single case. Under our incredibly complicated law, a trial court must often impose both determinate and indeterminate sentences under two different schemes while also paying allegiance to the sentencing factors found in the Rules of Court. In order to preserve both my own sanity and the attention of the reader, this article is not intended to provide an omnibus review of California's sentencing law. The only way to fully comprehend the multitude of rules is to diligently practice and study the criminal law for a number of years. In this endeavor, I wish you the best of luck.

The modest goals of this article are threefold. First, there are important procedural rules which govern the manner in which a sentencing appeal must be perfected following a plea of guilty or nolo contendere. The relevant principles will be discussed in sections I - III. Second, the complexity of the sentencing laws often leads the trial court to err in the defendant's favor. In section IV, I will offer some comments on the potential adverse consequences which might arise from taking a sentencing appeal. Third, from my catbird's seat as an appellate project attorney, I have the opportunity to read hundreds of appellate briefs and unpublished opinions every year. In sections V - XII, I will share my thoughts on a few of the issues which have gained my

attention in recent years.

With regard to the issues selected in sections V - XII, I must caution the reader that the list is far from exhaustive and is not intended to suggest that these are the best or most important issues. To the contrary, the complexity and ever changing nature of California law allows the creative defense lawyer to raise any number of sentencing issues. Nonetheless, it is my humble hope that the discussion will be of some use in more than a few cases.

I.

THE CERTIFICATE OF PROBABLE CAUSE REQUIREMENT.

For many lawyers, the rules surrounding certificates of probable cause are both murky and ill understood. In recent years, the California Supreme court has issued decisions which have only exacerbated the problem due to the finite and illogical distinctions drawn in the cases.

In the interest of clarity, the following discussion will provide both a general overview of the certificate requirement and a resume as to how it specifically applies in sentencing cases. In addition, the procedure for obtaining a certificate will be addressed.

A. A Certificate of Probable Cause Is Required

Whenever The Defendant Seeks To Challenge The Court's Jurisdiction Or The Validity Of His Plea. However, The Issuance Of A Certificate Cannot Resuscitate An Issue Which Has Been Waived By The Plea.

As a general rule, an appeal cannot be taken following a plea of guilty or nolo contendere absent the issuance of a certificate of probable cause. (Penal Code section 1237.5.) The only exceptions to this rule are that claims of sentencing error and the denial of a Penal Code section 1538.5 motion are cognizable on appeal so long as the claims are specified in the notice of appeal. (California Rules of Court, rule 8.304(b)(4).)

The vast majority of potential issues are waived for purposes of appeal when a defendant pleads guilty or nolo contendere. (*In re Chavez* (2003) 30 Cal.4th 643, 649.) When the charges are admitted, "appellate review is limited to issues that concern the 'jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.' [Citations.]" (*Ibid*, fn. omitted.)

With regard to "jurisdictional" issues which remain cognizable after a plea, there is a significant list of such claims relating to some speedy trial issues, denial of diversion and other claims relating to the court's authority to hear the case. (See various authorities cited in *People v. Turner* (1985) 171 Cal.App.3d 116, 123-129.) Although it is a somewhat dated case, *Turner* still

contains the most authoritative discussion regarding the issues which may be raised with a certificate of probable cause. (See also *In re Chavez,* supra, 30 Cal.4th 643, 649, fn. 2 and cases cited therein.)

The issuance of a certificate of probable cause does not allow an otherwise non-cognizable issue to be raised on appeal. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896.) If an issue has been waived by a plea of guilty or nolo contendere, it cannot be raised on appeal even if the trial court has issued a certificate. (*Ibid*.)

However, if the defendant has been induced to plead guilty due to the trial court's erroneous promise that a particular issue can be raised on appeal pursuant to a certificate of probable cause, the defendant will be allowed to withdraw his plea. (*People v. DeVaughn*, supra, 18 Cal.3d 889, 896; *People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575.) This result is compelled since the defendant's plea was improperly induced by a misrepresentation of a significant nature. (*Ibid*.)

B. An Application For A Certificate of Probable Cause Must Be Sought Within 60 Days Following The Sentencing Hearing.

An application for a certificate of probable cause must be filed within 60 days of the date of judgment (i.e. the date that sentence was imposed). (California Rules of Court, rule 8.308(a).) The application must be

accompanied by a *sworn* statement which specifies the grounds sought to be raised on appeal. (Penal Code section 1237.5, subd. (a).) Interestingly, a July 1, 2007 amendment to California Rules of Court, rule 8.304(b)(1) requires that the application "must" be filed "with" a notice of appeal. The amendment raises a significant issue.

In many cases, trial counsel files a notice of appeal. Then, within 60 days of the sentencing hearing, appellate counsel files an application for a certificate of probable cause. Under the revision to rule 8.304(b)(1), is there a procedural default in this situation since the application was not filed "with" the notice of appeal? The answer to this question should be no. (But see *People v. Mendez* (1999) 19 Cal.4th 1084, 1102, fn. 11 [declining to address the issue as to former rule 31(d).].)

As a simple matter of equity, it makes no sense to conclude that an application for a certificate is untimely merely because it has not been filed with the notice of appeal. The purpose of the 60 day rule for perfecting appeals is to ensure that there is a window of finality for the trial court's judgment. (*People v. Mendez,* supra, 19 Cal.4th 1084, 1094.) There is no offense to this purpose if the application is timely filed within the 60 day period. Thus, any technical default should not result in the loss of the defendant's right to appeal.

A parallel principle supports this conclusion. In a number of cases, appellate counsel has filed an amended notice of appeal within the 60 day period in order to properly specify that a sentencing or Penal Code section 1538.5 issue is to be raised on appeal. Insofar as neither the Attorney General nor any appellate court has disagreed with this practice, no reason appears why a timely filed application for a certificate of probable cause should be treated any differently.

Pursuant to California Rules of Court, rule 8.304(b)(2), the trial court is required to either grant or deny the certificate within 20 days. If the court fails to act within the specified time, a petition for writ of mandamus will lie to compel the court to issue a ruling. (*People v. Superior Court (Stein)* (1965) 239 Cal.App.2d 99, 102 [writ of mandamus lies to compel a court to rule on a pending matter].)

Similarly, mandamus relief lies to challenge the trial court's order denying the application. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1180.) Although there is no specific statute or rule which so provides, the mandamus petition must be filed within 60 days of the trial court's order. (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701 [absent extraordinary circumstances, writ will be denied if it is not filed within the 60 day period following the trial court's ruling].)

C. The Highly Favorable Standard Governing An Application Should Be Brought To The Trial Court's Attention.

The trial court is required to issue a certificate of probable cause as to any issue "'which is not *clearly* frivolous . . . .'" (*People v. Hoffard*, supra, 10 Cal.4th 1170, 1179, emphasis in original, fn. omitted.) Since this standard is highly favorable to the defendant, it should be prominently featured in any request for a certificate.

D. Once A Certificate Is Issued, Any Cognizable Issue Can Be Raised On Appeal Even If The Application For The Certificate Did Not Mention The Issue.

Once a certificate of probable cause is issued, the defendant's appeal is not limited to the issues specified in his application for the certificate. Rather, any otherwise cognizable issue may be raised. (*People v. Hoffard*, supra, 10 Cal.4th 1170, 1174.)

E. If Trial Counsel Fails To Timely Apply For A Certificate of Probable Cause, Relief From Default May Be Obtained Upon A Proper Showing.

Pursuant to the Sixth Amendment to the federal Constitution, trial counsel has a duty to timely perfect an appeal at the client's request. (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 477.) This duty is codified under California law. (Penal Code section 1240.1, subd. (b).) Importantly, trial

counsel's duty includes the preparation of an application for a certificate of probable cause. (*People v. Ribero* (1971) 4 Cal.3d 55, 66.)

When trial counsel fails to file a timely notice of appeal, relief may be granted under the constructive filing doctrine. (*In re Jordan* (1992) 4 Cal.4th 116, 125-126.) The thesis underlying the doctrine is that the notice of appeal is deemed to have been timely filed since counsel erred by failing to comply with his duty to file the document. (*Ibid.*)

F. Under The Evolving View Of The California Supreme Court, Counsel Should Err On The Side Of Caution And Obtain A Certificate Whenever A Possible Maximum Term Is Contemplated By A Plea Bargain.

Until recent years, it was assumed that typical claims of sentencing error were cognizable on appeal so long as a proper sentencing notice of appeal was filed. (See generally *People v. Lloyd* (1998) 17 Cal.4th 658, 664-666.) However, a recent case from the Supreme Court has drawn this assumption into question.

In *People v. Shelton* (2006) 37 Cal.4th 759, the defendant entered a plea bargain which provided for a maximum sentence of three years and eight months. Under the terms of the deal, the court retained the discretion to impose a shorter term. After the trial court imposed the maximum sentence, the defendant sought to advance a Penal Code section 654 claim on appeal

which, if successful, would have served to reduce the sentence. The Supreme Court dismissed the appeal since the defendant had failed to obtain a certificate of probable cause.

In justifying this result, the court first indicated that a plea bargain is a form of contract. From this premise, the court reasoned that the defendant and the government had reached a "mutual understanding" that the trial court had the lawful authority to impose the maximum sentence specified in the plea bargain. (*Id*. at p. 768.) In the court's view, the defendant's section 654 claim "was in substance a challenge to the plea's validity and thus required a certificate of probable cause . . . ." (*Id*. at p. 769.)

In so holding, the court distinguished its decision in *People v. Buttram* (2003) 30 Cal.4th 773. There, the defendant also entered a plea bargain for a specified maximum term. After receiving the maximum term, the defendant sought to argue on appeal that the trial court had abused its discretion in imposing the maximum sentence. In this situation, the court held that a certificate of probable cause was not required since there was "in substance" no attack on the bargained for sentence. (*Id.* at pp. 785-786.)

In *Shelton*, the court explained that *Buttram* was correctly decided since there is a distinction between a challenge to the court's "authority" to impose a sentence as distinguished from a challenge to the court's "'exercise of

individualized sentencing discretion . . . .'" (*Shelton*, supra, 37 Cal.4th 759, 770.) More recently, the court has placed an additional gloss on the *Shelton* rule.

In *People v. French* (2008) ___ Cal.4th ___ [08 DAR 4253], the defendant entered a plea bargain for a maximum sentence of 18 years. On appeal, the defendant contended that the trial court had violated the rule of *Blakely v. Washington* (2004) 542 U.S. 296 by imposing the upper term on the basis of facts which were not found true by a jury. The court held that the issue was cognizable without a certificate of probable cause since the Sixth Amendment violation would not render the maximum sentence unlawful "under all circumstances." (*Id*. at p. 4255.) Thus, rather than *Shelton's* focus on whether the court had the "authority" to impose the sentence in question, *French* suggests that the inquiry is whether the defendant's legal claim will necessarily bar imposition of the maximum term available under the plea bargain.

Regardless of the fine points of the language used in *Shelton* and *French*, the fact remains that *Shelton* is a troubling case which has negative consequences for defendants. Given this reality, it is worth noting that there are at least two fallacies underlying the holding in *Shelton*.

First, as was discussed in Justice Werdegar's dissent in *Shelton*, it is

simply untrue that the defendant's entry into the plea bargain evinced *his* "understanding" that the court had the legal authority to impose the maximum term. To the contrary, the more plausible "understanding" of the deal is that the defendant believed only that "because section 654 limits are subject to debate, the prosecutor might seek [the] higher sentence, the court might so sentence him, and an appeal might be unsuccessful." (*Shelton*, supra, 37 Cal.4th 759, 772 (dis. opn. of Werdegar, J.).)

Second, there is a more fundamental problem with the result in *Shelton*. Until recent years, a challenge to the "validity of the plea" was understood to be an attempt to withdraw the plea as distinguished from an attack on the sentence. (*People v. Ribero*, supra, 4 Cal.3d 55, 61 [Penal Code section 1237.5 "was only intended to apply to a situation in which a defendant claimed that his plea of guilty was invalid. [Citation]."].) In *Shelton*, the defendant was not seeking to withdraw his plea nor did he claim that there was anything "invalid"about the means used to induce the plea. In short, *Shelton* changed the meaning of the term "validity of the plea" without ever explaining why the change was justified. In future cases, the court should be urged to reconsider *Shelton.*

Going forward, it is possible that the Supreme Court will be broadening the application of the *Shelton* rule. In the pending case of *People v. Cuevas,*

S147510, rv. granted January 3, 2007, the issue is whether a certificate of probable cause is required to raise a Penal Code section 654 issue even if the defendant did not bargain for a maximum sentence. Obviously, the practical impact of an adverse ruling in *Cuevas* will be to require a certificate of probable cause in order to raise any section 654 claim following a plea of guilty or nolo contendere.

The message from the pending *Cuevas* case is manifest: The Supreme Court may well expand the number of situations where a certificate is required. Thus, in a doubtful case, trial counsel should obtain a certificate of probable cause. In this way, our clients can be prospectively protected against any enlargements in the *Shelton* rule.

Indeed, the People are attempting to expand the reach of *Shelton* beyond its present parameters. In *People v. Oglesby* (2008) 158 Cal.App.4th 818, the defendant was denied a Penal Code section 1368 competency hearing prior to the sentencing hearing. According to the People, *Shelton* required the defendant to obtain a certificate of probable cause to raise the issue. The court correctly rejected the claim on the grounds that the issue concerned a "postplea question" unrelated to the sentence. (*Id*. at pp. 826-827.) Nonetheless, it is apparent that we have not received the last word on the scope of the *Shelton* rule.

G. A Certificate Of Probable Cause Is Not Required Regarding Postplea Issues Which Involve Neither Sentencing Nor The Validity Of The Plea.

As is reflected by the holding in *People v. Oglesby,* supra, 158 Cal.App.4th 818, there is a genre of postplea issues unrelated to sentencing which may be raised without the benefit of a certificate of probable cause. These issues typically involve matters ancillary to a motion to withdraw the plea.

For example, in *People v. Vera* (2004) 122 Cal.App.4th 970, the defendant entered a plea of nolo contendere and then requested a *Marsden* hearing. On appeal, the defendant challenged the trial court's denial of the *Marsden* motion. Over the People's objection, the Court of Appeal held that the issue was cognizable without a certificate of probable cause since the granting of a *Marsden* motion "has no necessary" connection to a motion to withdraw the plea. (*Id*. at p. 978.)

However, the cases are far from uniform on this issue. In *People v. Caravajal* (2007) 157 Cal.App.4th 1483, the defendant was assigned a conflicts lawyer for the purpose of investigating a motion to withdraw a guilty plea. When the conflicts attorney declined to bring a motion, the original lawyer was reappointed. When the defendant informed the court that he was dissatisfied with the decision made by the conflicts attorney, the court refused

to hold a further hearing. The Court of Appeal held that a certificate of probable cause was required since the appellate claim of error was essentially related to the defendant's desire to withdraw his plea. (*Id.* at pp. 1486-1487.)

Aside from *Caravajal*, there is also a controversy as to whether the denial of the opportunity to file a motion to withdraw the plea is an issue which requires a certificate. (Compare *People v. Emery* (2006) 140 Cal.App.4th 560 [certificate required]; *People v. Osorio* (1987) 194 Cal.App.3d 183 [certificate not required].) Until such time as the conflict in authority is resolved, defense counsel would act wisely by seeking a certificate in this situation.

II.

THE PROPER FORM FOR A SENTENCING ONLY NOTICE OF APPEAL.

A notice of appeal must be filed within 60 days of the sentencing hearing. (California Rules of Court, rule 8.308(a).) Pursuant to California Rules of Court, rule 8.304(b)(4)(B), an appeal on sentencing grounds must be perfected by filing a notice of appeal which specifies "[g]rounds that arose after entry of the plea [that] do not affect the plea's validity." In the usual case, trial counsel can satisfy this requirement by checking the appropriate box on the Judicial Council form which can be used to institute a criminal appeal. If counsel wishes to employ a homemade form, language such as the

following will be deemed sufficient: "The appeal will raise claims of sentencing error which do not challenge the validity of the plea."

By rule, the appellate court is required to "liberally" construe the sufficiency of a notice of appeal. (California Rules of Court, rule 8.304 (a)(4).) Thus, a notice of appeal which merely specified an appeal from the "sentence" has been held to be adequate. (*People v. Lloyd,* supra, 17 Cal.4th 658, 665.) However, in a doubtful case, appellate counsel should take the requisite steps to cure any possible problem. This can be done in one of two ways.

First, if counsel notices a problem within 60 days of the sentencing hearing, an amended notice of appeal can be filed. Second, if it is too late to file an amended notice of appeal, a motion for relief from default should be filed in the Court of Appeal. (*People v. Jones* (1995) 10 Cal.4th 1102, 1108, fn. 4, disapproved on other grounds in *In re Chavez*, supra 30 Cal.4th 643, 656.) Such motions are routinely granted on the theory that the person filing the notice of appeal (i.e. the defendant or trial counsel) was unaware that the notice of appeal was defective.

Finally, it is important to note that a claim of sentencing error can be raised on appeal if the notice of appeal merely specified that a Penal Code section 1538.5 issue would be raised. (*People v. Jones,* 10 Cal.4th 1102,

1112-1113.) So long as a single cognizable issue is specified in the notice of appeal, any and all cognizable issues may be raised. (*Ibid.*)

III.

A WORD ON WAIVER AND FORFEITURE AND THE METHODS FOR AVOIDING PROCEDURAL DEFAULT.

As every criminal appellate defense lawyer knows, the Attorney General loves to raise claims of waiver and forfeiture. In some cases, these claims are even meritorious. However, in other cases, the defense can successfully meet the objection. The methods for avoiding forfeiture will be discussed below.

At the outset, it is important to understand the correct parlance regarding "waiver" and "forfeiture." A "waiver" may be found when the defendant engages in "an express relinquishment of a right or privilege. [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.) For example, a defendant expressly waives a number of constitutional rights when he enters a guilty plea. On the other hand, "forfeiture" involves the situation where a right is lost due to the "failure to object or to invoke [the] right . . . ." (*Ibid.*) A primary example of forfeiture is the defendant's failure to object to the trial court's use of an erroneous sentencing factor. (See *People v. Scott* (1994) 9 Cal.4th 331, 336.)

A. If The Defendant Agrees To A Plea Bargain For A Specified Sentence, He Has Waived Any Objection To The Sentence.

Oftentimes, the prosecutor will insist on a top and bottom plea bargain (i.e. a sentence for a specified number of years). Unless the defendant wishes to have the plea bargain vacated, a claim of sentencing error cannot be raised on appeal.

People v. Hester (2000) 22 Cal.4th 290 is the lead case in this area. In *Hester,* the defendant pled no contest to burglary and assault by force likely to produce great bodily injury. The plea bargain called for a sentence of four years. After the court imposed concurrent terms, the defendant sought to argue on appeal that the term for the assault count should have been stayed pursuant to Penal Code section 654. The Supreme Court held that the defendant was precluded from raising the issue due to his agreement to the four year term.

> "Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (*Id*. at p. 295, emphasis in original.)

The rule of *Hester* is quite clear. If a defendant has agreed to a top and

bottom plea, he has waived any right to challenge the length of his sentence on appeal.

In addition, the *Hester* rule has broader application. In some cases, the rule may also apply to other legal protections which the defendant has bargained away.

People v. Chatmon (2005) 129 Cal.App.4th 771 illustrates the possible use of the waiver doctrine. There, the defendant was charged with resisting arrest and possession of cocaine. Pursuant to a plea bargain, the resisting arrest charge was dismissed and the defendant pled no contest to the drug count with the promise that he would be placed on probation. Although the defendant was eligible for Proposition 36 drug treatment, he was not ordered into a program. Subsequently, probation was revoked and reinstated with the new condition of a 180 day jail term. On appeal, the defendant argued that the jail term was illegal since he should have been placed into a Proposition 36 program. While acknowledging that the defendant had not agreed to a "specified sentence" within the meaning of *Hester,* the court nonetheless applied the waiver doctrine.

> "He agreed to a disposition outside the mandates of Proposition 36, in exchange for dismissal of a charge that would have exposed him to additional prison time and precluded any application of Proposition 36. He is attempting to trifle with the courts." (*Id.* at p. 774.)

It is important to note that the defendant in *Chatmon* had obtained a certificate of probable cause. Nonetheless, since he was not seeking to withdraw his plea, the certificate was of no value to him.

People v. Panizzon (1996) 13 Cal.4th 68 provides an example of a situation where a certificate of probable cause would have made a difference. There, the defendant entered a plea bargain for a specified term of life with the possibility of parole plus 12 years. Without the benefit of a certificate of probable cause, the defendant argued that his sentence was cruel and unusual since it exceeded the terms imposed on his co-defendants. The Supreme Court dismissed the appeal on the grounds *inter alia* that a certificate was required. (*Id*. at p. 79.) However, the court made no mention of waiver. Thus, the implication is that a constitutional challenge to a sentence is not necessarily waived by an agreement to a specified term.

Although this point goes unaddressed in *Panizzon,* the question remains as to the remedy which could have been given had the defendant's claim been properly perfected. Presumably, the proper remedy would have been to vacate the plea bargain. This is so since the People would have been otherwise deprived of the benefit of their bargain. Thus, if a defendant is desirous of challenging a specified sentence arranged by plea bargain, he should be advised that he might be required to go to trial. (See *People v. Collins* (1978)

21 Cal.3d 208, 215 [plea bargain must be vacated when to do otherwise would deprive the prosecution "of the benefit of its bargain . . . ."].)

1. In Order To Preserve An Appellate Challenge To The Sufficiency Of The Evidence To Prove An Enhancement, The Defendant Must Enter A Bunnell Plea.

It will often be the case that an enhancement charged by the People will be subject to a defense of fact or some type of legal objection. However, any such defense is not cognizable on appeal if the defendant admits the enhancement. (*People v. Thomas* (1986) 41 Cal.3d 837, 842-844 and fn. 6 [admission of serious felony prior precluded appellate attack on sufficiency of allegation].)

In order to preserve a claim that the enhancement is not supported by the evidence, the defendant must enter a plea pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592. Under the *Bunnell* procedure, the defendant enters a "slow plea" by submitting the case on the basis of whatever documentation is presented by the prosecutor. In this way, a sufficiency of the evidence claim is preserved for appeal. (*People v. Watson* (2007) 42 Cal.4th 822, 825-826, fn. 3.)

B. The Special Situation Of The Express Waiver Of The Right To Appeal.

In some cases, the District Attorney attempts to forestall a sentencing

appeal by requiring the defendant to waive the right to appeal as a condition of the plea bargain. Fortunately, any purported waiver is strictly construed in the defendant's favor.

A waiver of the right to appeal is valid regardless of whether it is made orally or in writing. (*People v. Panizzon*, supra, 13 Cal.4th 68, 83-84.) However, a bare mention of such a waiver will not be deemed valid absent evidence that the nature of the right was made known to the defendant. (*People v. Rosso* (1994) 30 Cal.App.4th 1001, 1006.)

In addition, the scope of a waiver of the right to appeal will not be broadly construed. If a particular issue was not within the parties' contemplation at the time of the waiver, the issue will be deemed outside the waiver. (*People v. Sherrick* (1993) 19 Cal.App.4th 657, 659 [general waiver did not encompass the right to appeal the trial court's error in denying probation based on a misunderstanding of the law]; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662 [challenge to order denying presentence credits was cognizable since the issue was not mentioned when the waiver was taken].)

In the Supreme Court's view, the holdings in *Sherrick* and *Vargas* were correct since each case involved a "'possible future error'" regarding issues "left *unresolved* by the particular plea agreements involved." (*Panizzon,*

supra, 13 Cal.4th 68, 85, emphasis in original.) Thus, so long as the issue to be raised was left "open or unaddressed by the deal," the waiver will not preclude the issue from being raised on appeal. (*Id*. at p. 86; see also *People v. Mumm* (2002) 98 Cal.App.4th 812, 815 [waiver of right to appeal does not include error occurring "after the waiver because the defendant could not knowingly and intelligently waive the right to appeal an unforeseen or unknown future error. [Citation.]"].)

C. There Are Several Theories Which May Be Advanced In Order To Avoid A Finding Of Forfeiture.

In the seminal case of *People v. Scott*, supra, 9 Cal.4th 331, the Supreme Court held that a claim of sentencing error cannot be made on appeal absent an objection in the trial court if the nature of the issue relates to "the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Id*. at p. 353.) "Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Ibid*.)

In light of the *Scott* rule, the Attorney General's first argument is invariably that the issue in question has been forfeited due to the failure to

render an adequate objection. If there is a complete absence of an objection, it is a wise tactic to address the problem in the opening brief. Depending upon the exact nature of the issue in a particular case, there are a number of arguments which might be advanced in order to avoid forfeiture.

First, a predicate for a finding of forfeiture under *Scott* is that the trial court afforded the defendant a "meaningful opportunity" to render an objection. (*People v. Scott*, supra, 9 Cal.4th 331, 356.) Thus, if the trial court quickly announces its judgment and calls for a recess, the failure to object will be excused. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1223-1224.)

However, the Supreme Court has cautioned that the "opportunity" to object need not be a formal or orderly one. Rather, the trial court has no duty to issue a tentative decision before the hearing nor is the court required to entertain objections before announcing the terms of its sentence. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 748, 755.) A sufficient "opportunity" will be found if the court "allowed" the parties to make objections while the sentence was being pronounced. (*Id*. at p. 755.)

The message from the Supreme Court is that the term "meaningful opportunity" will be given a limited construction. As a result, appellate counsel should not assume that an argument concerning the opportunity to

object will prevail on appeal.

Second, the *Scott* rule is limited to those claims which relate to "discretionary sentencing" choices. (*In re Sheena K.*, supra, 40 Cal.4th 875, 881.) Thus, if at all possible, an issue should be categorized as a pure issue of law since such issues are outside the *Scott* rule. (*Id*. at pp. 887-889.) For example, a constitutional challenge to a probation condition can be raised for the first time on appeal since a trial court has no discretion to violate the Constitution. (*Ibid.*)

Third, an appellate court always has the discretion to review a claim of sentencing error regardless of the lack of an objection in the trial court. (*In re Sheena K.,* supra, 40 Cal.4th 875, 887-888, fn. 7.) The thesis underlying this exception is that forfeiture doctrines are generally court created and there is no legal bar which precludes the appellate court from reaching most unpreserved issues. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) Thus, in a case where error has plainly occurred, the court should be encouraged to reach the merits. (*In re Sheena K.*, supra, 40 Cal.4th at p. 887, fn. 7 [claim should be reviewed on the merits when it involves "a substantial right."].)

Fourth, an "unauthorized" sentence can always be challenged on appeal without an objection in the trial court. (*In re Sheena K.*, supra, 40 Cal.4th 875,

882 and fn. 3.) A sentence is "unauthorized" when "it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott*, supra, 9 Cal.4th 331, 354.) For example, a sentence is "unauthorized" when the length of the term is not allowed by the Penal Code or when punishment is prohibited by Penal Code section 654. (*Id*. at p. 354 and fn. 17; *People v. Serrato* (1973) 9 Cal.3d 753, 764-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

However, the "unauthorized" sentence exception should be used only with great caution. As will be discussed below, the danger of an "unauthorized" sentence is that the trial court is allowed to increase the sentence or punishment on remand. (See pp. 26-33, infra.) Thus, the "unauthorized" sentence exception should be argued only with the consent of the client.

Fifth, the ultimate answer to a forfeiture problem is to advance a claim of ineffective assistance of trial counsel. As a matter of law, defense counsel performs ineffectively when there is a failure to promote the "proper application" of the sentencing laws. (*People v. Scott,* supra, 9 Cal.4th 331, 351.) Thus, there should be no hesitancy to argue ineffective assistance of counsel when it is a necessary predicate for obtaining appellate relief. This point will be further addressed below. (See pp. 55-58, infra.)

IV.

APPELLATE COUNSEL SHOULD ALWAYS BE WARY OF THE POTENTIAL FOR AN ADVERSE CONSEQUENCE.

Appellate defense counsel should take guidance from the Hippocratic oath (i.e. first do no harm to the client). Upon initial review of a case, appellate counsel should carefully examine the sentence. In many cases, the trial court will have made an error favorable to the client. In this situation, the client must be counseled that the error could be caught by either the Attorney General or Court of Appeal. If this occurs, the appeal might result in an increase in the client's sentence. In some cases, it may be in the client's best interests to abandon the appeal.

Of course, there are numerous gradations of error and probabilities regarding whether the error will be discovered. In addition, there is a likelihood that the Department of Corrections and Rehabilitation (CDCR) will catch a significant error even if the Court of Appeal does not. Thus, in many cases, CDCR will alert the trial court to the error even if the appeal is abandoned.

Ultimately, it is the client's decision as to whether the appeal should be dismissed. However, it is counsel's duty in the first instance to correctly advise the client about any possible adverse consequence and the likelihood that it will come to fruition.

The general rule in California is that a defendant may not receive a longer sentence on remand to the trial court after winning his appeal. (*People v. Hanson* (2000) 23 Cal.4th 355, 357.) However, the general rule does not apply if the initially imposed sentence was "unauthorized." (*People v. Serrato*, supra, 9 Cal.3d 753, 764.) A sentence is "unauthorized" when "it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott*, supra, 9 Cal.4th 331, 354.)

At one time, the concept of an "unauthorized" sentence was limited to obvious situations such as where the court granted probation when it had no power to do so. (*People v. Serrato*, supra, 9 Cal.3d 753, 764.) However, as our sentencing schemes have become ever more complex, the variety of "unauthorized" sentences have expanded greatly. Although the scope of this article does not allow for discussion of every conceivable adverse consequence, a few common ones will be discussed below.

Although it does not occur often, trial judges occasionally forget to impose a sentence on a particular count or enhancement. If such an omission has occurred, the client has to be warned that the case could be remanded for imposition of judgment on the count or enhancement. (*People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6.) If there is a likelihood that the trial court would not impose additional punishment, it might be a wise idea to promptly

seek resentencing. On the other hand, the client can elect to gamble that the error will never be discovered.

The Three Strikes law created a scheme which applies when the People are able to prove that the defendant has a prior serious or violent felony conviction. Pursuant to Penal Code section 1170.12, subdivision (a)(6), consecutive sentences are mandated when the present offenses were not committed on "the same occasion" or did not arise "from the same set of operative facts." Importantly, the California Supreme Court has tightly construed these concepts such that even crimes which are committed close in time and place may still require mandatory consecutive sentences. (See *People v. Lawrence* (2000) 24 Cal.4th 219, 225-234 [applying both concepts and holding that consecutive sentences were required where the defendant was convicted of stealing a bottle of brandy from a store and assault based on his conduct of hitting two people with the bottle shortly thereafter].)

In some cases, the record will reflect imposition of concurrent sentences in a strikes case without any discussion of section 1170.12, subdivision (a)(6). In such a case, appellate counsel should carefully consider whether there is an arguable challenge to the trial court's ruling. If there is, caution should be exercised since the adverse consequence to the client may be as grave as the addition of a consecutive sentence of 25 years to life.

Another permutation concerning section 1170.12, subdivision (a)(6) involves the rule of *People v. Garcia* (1999) 20 Cal.4th 490. Under *Garcia*, the trial court has the power to dismiss strikes as to some, but not all, of the convictions. In this situation, section 1170.12, subdivision (a)(6) still applies to the counts which are being sentenced outside the strikes law. (*People v. Casper* (2004) 33 Cal.4th 38, 40.) Thus, once again, appellate counsel must carefully consider whether the "same occasion" or "same set of operative facts" exceptions were properly applied if concurrent terms were imposed.

A final common adverse consequence arising under the strikes law occurs when the defendant is already serving a sentence on a prior case. As a matter of law, the court is required to run the new strikes sentence consecutive to the existing sentence. (Penal Code section 1170.12, subd. (a)(8); *People v. Helms* (1997) 15 Cal.4th 608, 610.) However, it should be noted that this rule does not apply where one of the two cases involves the revocation of probation and the sentence for the new offense is imposed first in time. (*People v. Rosbury* (1997) 15 Cal.4th 206, 210-211.)

The highly onerous sex sentencing statutes pose a minefield of potential adverse consequences. This is true in at least two respects.

The People will often seek a life sentence pursuant to Penal Code section 667.61 which applies when certain predicate facts are pled and proven.

Importantly, consecutive sentences are mandated when the crimes "involve separate victims or involve the same victim on separate occasions . . . ." (Section 667.61, subd. (i).) Thus, whenever concurrent terms are imposed in a section 667.61 case, the legality of the sentences should be carefully examined.

The same holds true for cases sentenced under Penal Code section 667.6. Pursuant to section 667.6, subdivision (d), full consecutive sentences are mandated when "the crimes involve separate victims or involve the same victim on separate occasions." Once again, appellate counsel should closely review the record in order to ensure that the trial court did not err when it failed to impose full consecutive sentences.

Appellate counsel should also be aware of other unique statutes which require special sentences. Such statutes exist with regard to kidnapping, escape, crimes committed by prisoners and convictions involving threats or bribes to a victim or witness.

In a case where two or more kidnappings involved separate victims, the court is required to impose the full middle term for each subordinate count which is sentenced consecutively. (Penal Code section 1170.1, subd. (b).) Any subordinate enhancements must also be run full term. (*Ibid.*)

Penal Code section 1170.1, subdivision (c) states a special rule which

applies to crimes committed by prisoners or those who are convicted of escape. In the cases governed by this provision, all consecutive sentences must be served full term.

Another special rule is found in Penal Code section 1170.15. If a defendant is convicted of threatening or bribing a victim or witness in violation of Penal Code sections 136.1 or 137 and the crime was related to another felony for which the defendant was convicted, any consecutive sentence for the offenses must be imposed full term. However, it should be noted that the trial court still retains the jurisdiction to impose concurrent terms.

In examining the judgment imposed by the trial court, appellate counsel should be especially attentive to any favorable ruling regarding Penal Code section 654. According to at least one decision, the erroneous imposition of a section 654 stay renders the entire sentence "unauthorized." (*People v. Price*, supra, 184 Cal.App.3d 1405, 1411.) Since section 654 issues are often hotly contested in the trial court, counsel should be cautious whenever the trial court's favorable ruling is questionable. (But see *People v. Brown* (1987) 193 Cal.App.3d 957, 962 [erroneous section 654 stay may not render sentence "unauthorized."].)

In most cases, the determination of presentence credits involves a

clerical calculation or an issue of law. Thus, if the trial court errs and awards more credits than are allowed by law, the appellate court can correct the error. (*People v. Jack* (1989) 213 Cal.App.3d 913, 915.) Given this rule, appellate counsel should closely scrutinize the presentence credits award. In a guilty plea appeal where the client has received a short sentence, it may be in the client's best interests to dismiss the appeal lest the credits error be discovered.

Finally, an adverse consequence might arise if the trial court has failed to properly memorialize its exercise of discretion under Penal Code section 1385. Pursuant to section 1385, a sentencing court has broad discretion to dismiss counts, prior convictions and other enhancements. (See generally *People v. Jones* (2007) 157 Cal.App.4th 1373, 1380-1383.) In exercising its power, the court is required to prepare a written minute order which specifies the "reasons" for the dismissal. (Section 1385, subd. (a).) Presumably, the omission to prepare the written order renders the dismissal "unauthorized" since the order is deemed "ineffective" or nonexistent. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 532; but see *People v. Bonnetta* S159133, rv. granted March 12, 2008 [Supreme Court may address this issue].)

In a case where the written order has not been prepared, appellate counsel can take the affirmative step of requesting that the trial court prepare

the order nunc pro tunc. This can usually be done by simply incorporating the reasons which were orally stated on the record.

However, in some cases, it may be better to do nothing. If the original trial judge is no longer available, there is always the danger that another judge will not agree to prepare the written order. In this circumstance, inaction may be the best course. Indeed, experience teaches that the Attorney General will not mention the trial court's failure to prepare the written order.

As the foregoing examples reveal, a plethora of adverse consequences can arise in the simplest of cases. Given the reality that the concept of "unauthorized sentences" is a growth industry, appellate counsel must take care to do no harm to the client.

V.

IN ADVANCING A PENAL CODE SECTION 654 CLAIM, COUNSEL SHOULD TAKE FULL ADVANTAGE OF THE SIGNIFICANT DECISIONS IN *PEOPLE v. BRITT* (2004) 32 Cal.4th 944, *PEOPLE v. HALL* (2000) 83 Cal.App.4th 1084 AND *PEOPLE v. LE* (2006) 136 Cal.App.4th 925.

Penal Code section 654 provides a significant protection to defendants. Under section 654, a defendant may not be punished for multiple offenses if all of the crimes were committed pursuant to a single criminal objective. (*People v. Britt*, supra, 32 Cal.4th 944, 951-952.) An exception to the rule is that multiple punishment is allowed for crimes of violence. (*People v. Miller* (1977) 18 Cal.3d 873, 885.)

Although they are often overlooked, there are two significant decisions which bear on these principles. (*People v. Britt*, supra, 32 Cal.4th 944; *People v. Hall*, supra, 83 Cal.App.4th 1084.) In a proper case, these authorities can make the difference between victory or defeat.

In addition, *People v. Le*, supra, 136 Cal.App.4th 925 is a case which can save money for the client. When all else fails, *Le* can be used to obtain at least a financial remedy for the client.

The test for determining whether section 654 prohibits multiple punishment is well established: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of

section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In *Britt*, the Supreme Court elucidated the application of the test.

In *Britt*, the defendant was required to register as a sex offender pursuant to Penal Code section 290. When offenders move, they must notify the police in both their former and new jurisdictions. The defendant left Sacramento County and moved to El Dorado County. However, he failed to provide notice to either jurisdiction. Following his conviction in both counties, the defendant contended that section 654 precluded multiple punishment. In opposing the argument, the People contended that the defendant had two separate criminal objectives: To mislead law enforcement in two separate locales.

The Supreme Court rejected the People's position. In so doing, the court reasoned that "finding separate objectives here - to mislead or conceal information from the law enforcement agency in each county - parses the objectives too finely." (*Britt*, supra, 32 Cal.4th at p. 953.) The court concluded that "the objective - avoiding police surveillance - was achieved just once, but only by the combination of both reporting violations." (*Ibid*.)

The potential application of this analysis is quite broad. Plainly, Mr. Britt's criminal conduct was committed in different places, at different times and against different groups of people. Yet, the court concluded that his overriding objective precluded multiple punishment. Although one can imagine a multitude of situations where *Britt* would apply, a single example illustrates the utility of the case.

Assume a situation where the defendant gets into an accident with another car. The defendant flees the scene by driving dangerously. After driving for a distance, the defendant is followed by a police car. The defendant continues to drive dangerously. The defendant is convicted of hit and run (Vehicle Code section 20002) and evading the police (Vehicle Code section 2800.2). On these facts, the People will undoubtedly argue that the defendant had two criminal objectives (i.e. to escape from the car which he hit and to escape from the police). However, this argument is meritless under *Britt*.

Britt counsels that a court errs when it "parses the objectives too finely." (*Britt*, supra, 32 Cal.4th at p. 953.) Based on the facts of the hypothetical, it is perfectly reasonable to conclude that the defendant's sole objective was to escape his responsibility for the accident. Viewed from this perspective, the flight from the police was merely part and parcel of the

defendant's broader intent. Under *Britt*, the goal of escaping was "achieved just once, but only by the combination of both [escapes]." (*Ibid*.)

As was noted above, section 654 does not preclude double punishment when multiple convictions involve crimes of violence. (*People v. Miller*, supra, 18 Cal.3d 873, 885.) Importantly, this rule has been construed as applying only to the elements of the offense.

In *People v. Hall*, supra, 83 Cal.App.4th 1084, the defendant was convicted of multiple counts of brandishing a firearm based on his conduct of exhibiting the weapon in front of three police officers. The trial court imposed consecutive sentences. In response to the defendant's section 654 contention, the People argued that multiple punishment was allowed since the brandishing of a weapon is a crime which has the potential for violence. The Court of Appeal disagreed and held that the violence exception to section 654 applies only when the offense is "*defined* by statute to proscribe an act of violence against the person . . . ." (*Id*. at p. 1089, emphasis in original.) Since the crime of brandishing a weapon "does not require an intent to harm or the commission of an act likely to harm others," the court applied section 654. (*Id*. at pp. 1094-1097.)

Hall is a vital precedent which will be useful with respect to a large number of offenses. With its judicious use, *Hall* should be the basis for many

successful section 654 claims. (See *People v. Davey* (2005) 133 Cal.App.4th 384, 390-392 [citing *Hall* and holding that indecent exposure does not fall within the violence exception to section 654].)

People v. Le, supra, 136 Cal.App.4th 925 is a case which shows the broad reach of section 654. In *Le*, the defendant pled guilty to robbery and burglary. The defendant also admitted a strike prior. A sentence of twelve years, four months was imposed. The court also imposed a $4800 restitution fine by using the statutory formula of multiplying the number of convictions (two) by the number of years of imprisonment (twelve) by $200. (Penal Code section 1202.4, subd. (b)(2).)

On appeal, Mr. Le persuaded the court that the punishment for his burglary conviction should have been stayed pursuant to section 654. As a byproduct of this conclusion, Mr. Le contended that his trial lawyer had performed ineffectively when he failed to object that the stayed burglary count could not be employed as a factor in the calculation of the restitution fine. The Court of Appeal agreed and reduced the restitution fine to $2200. (*Le*, supra, 136 Cal.App.4th at pp. 932-936.)

It is worth noting that *Le* does not say that a finding of ineffective assistance of counsel was required for a remedy to be given. Rather, the court noted that Mr. Le had elected to seek relief on this basis. (*Le*, supra, 136

Cal.App.4th at p. 935.) Insofar as it is the general rule that a section 654 issue can be raised without an objection in the trial court (*People v. Scott*, supra, 9 Cal.4th 331, 354, fn. 17), it is likely that *Le* relief can be obtained without resort to a claim of ineffective assistance of counsel. However, as always, it is a good idea to raise the ineffective assistance claim as a backup.

VI.

IN A CASE ARISING UNDER PROPOSITION 36, COUNSEL SHOULD BE AWARE OF THE DEVELOPING LAW WHICH GOVERNS WHETHER A DEFENDANT MAY BE SENTENCED TO PRISON.

In 2000, the electorate approved Proposition 36 (i.e. Penal Code section 1210, et. seq.). Reduced to its essence, Proposition 36 provides that a non-violent offender must be granted probation if he has been convicted solely of a drug possession offense. Under the original version of the scheme, the court was generally restricted from sending the defendant to prison until he committed three separate violations of probation. (Former Section 1210.1, subd. (e)(3)(C).)

In 2006, the Legislature amended section 1210.1 in order to increase the power of the trial court to impose jail time for the first two probation violations. (See present section 1210.1, subd. (f)(3)(A) and (f)(3)(B).) However, for the moment, the Alameda County Superior Court has enjoined enforcement of the new law. (See *People v. Hazle* (2007) 157 Cal.App.4th

567, 577, fn. 1.)

There are two recent developments concerning section 1210.1 which are of great significance. One of the developments involves evolving case law and the other development is found in the text of the revised statute.

Section 1210.1 provides substantial due process protection to the probationer. The statute requires that the court must conduct a hearing before it can revoke probation. Since drug users often fall off the wagon, the statute contemplates that the defendant's probation must be revoked three times before a prison sentence may be imposed.

However, in some cases, the People are bent on avoiding the spirit of the statute. On its face, section 1210.1 generally requires three separate violations before probation can be terminated. The implication of this scheme is that the defendant is to be given three opportunities for redemption. However, the People have sought to avoid the policy of the statute by alleging three violations which were committed close in time and with no chance for the defendant to seek assistance for his continuing drug problem. Fortunately, the Third District has stepped in to alleviate the government's abuse of section 1210.1.

In *People v. Hazle*, supra, 157 Cal.App.4th 567, the defendant suffered a first probation violation on November 29, 2004. Second and third petitions

to revoke probation were filed on May 20, 2005 and May 27, 2005. Significantly, the violation alleged in the third petition occurred before the second petition was filed. The court found both petitions true and committed the defendant to prison.

In assessing this situation, the Court of Appeal first conceded that section 1210.1 does not require that three separate petitions be filed. However, "where, as in this case, no notice of one petition is given *before the conduct underlying the next petition occurs,* although a consolidated hearing may be proper, it would be improper to treat the result as if the People had made three separate noticed motions." (*Hazle*, supra, 157 Cal.App.4th at p. 577, emphasis in original.) As a result, the case was remanded for resentencing.

In *People v. Enriquez* (2008) 160 Cal.App.4th 230, the Third District applied *Hazle*. In *Enriquez,* two petitions to revoke probation were filed. The defendant was not served with either petition until his arraignment. Then, a third petition was filed based on conduct which predated the facts alleged in the second petition. All three petitions were admitted in a single hearing and the defendant was sentenced to prison. The Court of Appeal reversed since the trial court should have found only a single violation of probation on these facts. (*Id*. at p. 239 ["Under Proposition 36, defendant was entitled to three

distinct periods of probation before he lost his eligibility. He did not get that."].)

The rule of *Hazle* and *Enriquez* is salutary. Section 1210.1 must be construed in a fair manner which allows the defendant the three chances required by Proposition 36. (*Enriquez*, supra, 160 Cal.App.4th at p. 239; *Hazle*, supra, 157 Cal.App.4th at p. 577.)

Aside from *Hazle* and *Enriquez*, it is essential to note that the revised version of section 1210.1 contains a provision which is more *favorable* to the defendant than the original statute. In the initial statute, the trial court had no power to reinstate probation following a third violation. (Former section 1210.1, subd. (e)(3)(C).) However, the new version of the statute allows the court to reinstate probation even after a third violation. (New section 1210.1, subd. (f)(3)(C).)

Given this recent statutory change, it is likely that most trial court judges are unaware of their discretion to reinstate probation after a third violation. In such a case, a remand for resentencing should be required. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [remand is required when the court was unaware of the scope of its discretionary authority].)

It should be noted that the *Hazle* court was of the opinion that the injunction issued in the Alameda County Superior Court precludes application

of the new provision. (*Hazle*, supra, 157 Cal.App.4th 567, 577, fn. 1.) However, this conclusion is debatable. As a court of superior jurisdiction, a Court of Appeal enjoys ample authority to disregard the injunction. Indeed, in an unpublished case, the Sixth District granted relief under the new statute. (*People v. Jefferson* (2007) 2007 Cal.App.Unpub. Lexis 6822 at *21-26.) Upon request, SDAP will make the *Jefferson* briefing available.

VII.

WHEN THE DEFENDANT IS SENTENCED UNDER PENAL CODE SECTION 667.6, APPELLATE COUNSEL SHOULD CAREFULLY EXAMINE THE RECORD IN ORDER TO ENSURE THAT THE STATUTE WAS PROPERLY APPLIED.

Penal Code section 667.6, subdivision (c) provides the court with the discretion to impose a full consecutive term for a specified sex offense when another term is being imposed under Penal Code section 1170.1 for a non-sex offense. (*People v. Jones* (1988) 46 Cal.3d 585, 589.) Penal Code section 667.6, subdivision (d) mandates the imposition of full consecutive terms for multiple specified sex convictions if the offenses were committed on "separate occasions" or against several victims. Among other issues, two contentions frequently arise under these provisions.

As was noted above, subdivision (d) comes into play only when there are two or more specified sex convictions. However, in a number of cases, the

trial court will erroneously state that it is required to impose a full consecutive sentence for a single sex crime pursuant to subdivision (d). In such a case, reversal is compelled since the court will have imposed a sentence without knowledge of its discretionary authority to impose a different term. (*People v. Belmontes,* supra, 34 Cal.3d 335, 348, fn. 8.)

A different kind of error often occurs when the trial court imposes a consecutive sentence under subdivision (c). Because the imposition of a full term consecutive sentence is a harsh disposition, the trial court is required to expressly state reasons which justify the use of subdivision (c). (California Rules of Court, rule 4.426 (b).) Although the reasons may be identical to those used by the court in imposing other consecutive sentences in the case, the record must "reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c)." (*Belmontes*, supra, 34 Cal.3d 335, 348 fn. omitted.)

Section 667.6 is a draconian statute. Thus, appellate counsel should ensure that its provisions were properly employed by the trial court.

VIII.

WHENEVER A DEFENDANT HAS BEEN DENIED PRESENTENCE CREDIT BASED ON "MIXED CONDUCT" RELATED TO A PROBATION OR PAROLE REVOCATION, APPELLATE COUNSEL SHOULD OBTAIN THE DOCUMENTS UNDERLYING THE REVOCATION IN ORDER TO DETERMINE IF A CLAIM CAN BE MADE FOR ADDITIONAL CREDITS.

In many cases, the commission of a criminal offense will lead to both a new prosecution and the revocation of a preexisting grant of probation or parole. If probation or parole is revoked solely on the basis of the new offense, the defendant will be entitled to presentence credit against his sentence for the new conviction. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194, fn. 10.) However, if probation or parole was revoked for at least one reason unrelated to the new charge (i.e. mixed conduct), presentence credit must be denied for any period of custody served in the probation or parole case. (*Id*. at pp. 1193-1194 [presentence credit may not be awarded unless the defendant can show that he would have been released "but for" his new criminal conduct].)

Regrettably, many trial lawyers do a poor job of investigating presentence credits issues. As a result, appellate counsel must often do the investigation in the first instance. In any case where the record shows a denial of presentence credit due to "mixed conduct," counsel should obtain the

underlying documents. By doing so, counsel will often find an issue which would otherwise remain undiscovered. An interesting example can be found in the unpublished Sixth District case of *People v. Levell* (2007) 2007 Cal.App. Unpub. Lexis 6763.

In *Levell*, the defendant was charged with false imprisonment and dissuading a witness. After the charges were brought, the defendant's parole was revoked on three grounds: (1) the commission of an assault with a deadly weapon; (2) the commission of false imprisonment; and (3) absconding. Given the finding that Mr. Levell had committed an assault with a deadly weapon, the parole board denied worktime credit pursuant to Penal Code section 3057, subdivision (d)(2)(C) [worktime credit disallowed when the parolee has committed an assault with a deadly weapon].) As a result, Mr. Levell was compelled to serve a full parole revocation term without the benefit of the one-third worktime credit available for a person serving a parole revocation in the county jail. (See 15 CCR section 2743(c).)

At the time of sentencing, none of these facts were made known to the court. Thus, presentence credit was denied for the period during which Mr. Levell served his parole revocation.

Appellate counsel obtained the parole revocation documents from the parole board. Counsel recognized that the case was only partially one of

"mixed conduct." Insofar as the trial transcript showed that Mr. Levell had assaulted the victim, the parole board's finding of assault did not involve "mixed conduct." This was so even though the District Attorney had elected not to file an assault charge. (*Bruner,* supra, 9 Cal.4th 1178, 1193-1194, fn. 10). Although the parole board's absconding finding did involve "mixed conduct," Mr. Levell was still entitled to additional presentence credits.

The parole board's use of section 3057, subdivision (d)(2)(C) involved the "identical conduct" underlying the new criminal case. Thus, the Court of Appeal awarded additional presentence credits by applying the usual rule that a parole revocation term is shortened by one-third when the term is served in county jail.

The point of the unusual and complicated *Levell* case is not to confuse the reader. Rather, the message is that a review of the parole board documents led to a significant remedy for the client.

Finally, it must be emphasized that the newly discovered facts must be brought to the attention of the trial court in a noticed motion. (Penal Code section 1237.1.) Under existing law, the trial court has continuing jurisdiction to correct its award of presentence credits. (*People v. Little* (1993) 19 Cal.App.4th 449, 452.) If the trial court denies the motion, the ruling is appealable as an order made after judgment. (Penal Code section 1237, subd.

(b).)

IX.

WHENEVER A DEFENDANT IS SENTENCED TO A TERM OF CONFINEMENT OF AT LEAST SIX MONTHS, ANY AWARD OF ATTORNEY'S FEES SHOULD BE SUBJECT TO CHALLENGE FOR INSUFFICIENCY OF THE EVIDENCE.

When an indigent criminal defendant receives legal services from the government, the court is authorized to impose an attorney's fees award. (Penal Code section 987.8.) However, if the defendant is sentenced to a term of at least six months, it is presumed that the defendant lacks the ability to pay attorney's fees. (Section 987.8, subd. (g)(2)(B).) Thus, if the court imposes attorney's fees in a case where a sentence of at least six months is ordered, the award of fees can likely be reversed on appeal. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217-1218.)

Importantly, the issue should be raised as a claim of insufficiency of the evidence. In this way, no objection need have been made in order to preserve the claim. (*Viray*, supra, 134 Cal.App.4th at p. 1217.)

X.

A BRIEF WORD ABOUT THE REMNANTS OF *CUNNINGHAM v. CALIFORNIA* (2007) 549 U.S. ____ [166 L.E.2d 856].

At this point, most of us have depleted our enthusiasm for the federal

constitutional issue which was successfully adjudicated in *Cunningham v. California*, supra, 166 L.E.2d 856. Nonetheless, it is worth noting that there are two remaining aspects of *Cunningham* which might come into play.

In *Cunningham*, the Supreme Court held that the federal Constitution was violated when a California trial court made factual findings which served to increase the defendant's "maximum" sentence by imposing the upper term. (*Cunningham,* supra, 166 L.E.2d 856, 864.) The holding in *Cunningham* was based on former Penal Code section 1170, subdivision (b) which created a presumption for imposition of the middle term.

In March 2007, the Legislature amended Penal Code section 1170, subdivision (b) in order to remove the presumption for the middle term. Under the new statute, the trial court has full discretion to impose the upper term. Thus, the specific problem identified in *Cunningham* has been cured. However, the Legislature failed to deal with a remaining defect.

Penal Code section 1170.1, subdivision (d) governs the situation where the trial court has the authority to impose a lower, middle or upper term for an enhancement. The provision states a presumption for imposition of the middle term. As a result, the provision falls afoul of the holding in *Cunningham*. (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 205-206 [judgment reversed and resentencing ordered on Penal Code section 12022.5 enhancement].)

In light of *Lincoln*, a *Cunningham* claim still lies regarding any case where the upper term was imposed for an enhancement. However, since *Cunningham* has been in existence for some time now, it will probably be necessary to raise the issue as an ineffective assistance of counsel claim if an objection was not made in the trial court.

There may be a few remaining cases on appeal which deal with former section 1170, subdivision (b). In such a case, *People v. Cardenas* (2007) 155 Cal.App.4th 1468 is a useful case.

In *Cardenas,* the trial court imposed the upper term by relying on the "planning" and "sophistication" behind the crime. The People urged that error should not be found under *Cunningham* since the defendant had prior convictions. The Court of Appeal rejected this argument since the trial court had not cited the prior convictions as a justification for the upper term. (*Cardenas,* supra, 155 Cal.App.4th at p. 1483 [it "is not for the appellate court to conjure the reasons the trial court could have recited to support its sentencing decision from the many options listed in the statutes and court rules. We review the trial court's reasons - we don't make them up."].)

In short, the legacy of *Cunningham* will be short-lived. However, for the moment, *Cunningham* may still apply in a few cases.

XI.

NOTWITHSTANDING THE CASE LAW TO THE CONTRARY, A DEFENDANT WHO IS PRESUMPTIVELY INELIGIBLE FOR PROBATION IS ENTITLED TO A NEW PROBATION REPORT WHEN HE IS RESENTENCED FOLLOWING A SUCCESSFUL APPEAL.

On many occasions, the Court of Appeal will reverse the judgment and direct the trial court to conduct a resentencing hearing. In this situation, California Rules of Court, rule 4.411(c) mandatorily requires the preparation of a new probation report if the resentencing is to occur "a significant period of time after the original report was prepared." The passage of more than six months is deemed to be a "significant period of time." (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180-181.)

Notwithstanding the mandatory language of rule 4.411(c), there is a wealth of case law which holds that a new probation report is not necessarily required if the defendant is presumptively ineligible for probation. (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432; *People v. Myers* (1999) 69 Cal.App.4th 305, 310-311; *People v. Llamas* (1998) 67 Cal.App.4th 35, 38-41.) These cases were wrongly decided.

People v. Llamas, supra, 67 Cal.App.4th 35 is representative of the reasoning in the cited cases. In *Llamas*, the defendant was presumptively ineligible for probation since he had a strike prior. The court held that a new probation report was not required by then rule 411(c) for two reasons: (1) trial

counsel had forfeited the issue by failing to request a new report; and (2) rule 411(c) mandatorily required a new report only if the defendant was eligible for probation. (*Id*. at pp. 38-41.) These holdings are erroneous since the defendant was in fact "eligible for probation."

At the outset, it is important to note that the defendant cannot forfeit his right to a probation report by failing to request one. Rather, the right to a report must be affirmatively waived by a written stipulation or an oral stipulation entered in the minutes. (Penal Code section 1203, subd. (b)(4). According to the *Llamas* court, this provision did not apply since the court is only mandatorily required to obtain a probation report when the defendant is "'eligible for probation . . . .'" (Section 1203, subd. (b)(1).) (*Llamas*, supra, 67 Cal.App.4th at p. 39.) For the same reason, the court concluded that rule 411(c) was inapplicable. (*Id*. at pp. 39-40.)

The flaw in the *Llamas* analysis is quite simple. The statutory term "eligible for probation" is not strictly construed. Rather, the proper meaning of the term is that the defendant may be placed on probation if the court has the ultimate discretion to grant probation.

In re Cortez (1971) 6 Cal.3d 78 supports this conclusion. There, the defendant filed a habeas petition based on a new Supreme Court case (*Tenorio*) which held that a sentencing court had the authority to strike a prior

drug conviction. The Supreme Court held that Mr. Cortez was entitled to a new sentencing hearing. In conducting the hearing, the trial court was directed to "obtain a new probation report and/or a report from the Director of Corrections as to the conduct of petitioner in prison since his original sentencing." (*Id*. at p. 89.)

Significantly, the sentencing scheme at issue in *Cortez* flatly prohibited a grant of probation based on a "proven or admitted prior" for a drug offense. (*Cortez*, supra, 6 Cal.3d at p. 84.) In Mr. Cortez' case, a "prior narcotics felony conviction" had been found true. (*Id*. at p. 83.) Thus, absent dismissal of his prior conviction, Mr. Cortez was ineligible for probation. Nonetheless, the Supreme Court held that he was entitled to "a new probation report" as a matter of law. (*Id*. at p. 89.)

At the time of the *Cortez* decision, Penal Code section 1203 was materially the same as it is now. Like the present statute, the then section 1203 provided the court with the discretion to refuse a request for a probation report when the defendant was ineligible for probation. (See Historical and Statutory Notes to Penal Code section 1203, 50D West's Annotated California Codes (2004 ed.) p. 223.) Thus, it is manifest that the Supreme Court understood section 1203 as requiring a probation report so long as the trial court had *any* discretionary power to grant probation.

In short, there are many cases where a defendant can be granted probation if the trial court exercises Penal Code section 1385 discretion to dismiss a conviction, enhancement or other factual finding. In such a case, a new probation report is mandatorily required.

Finally, it bears mention that there is a conflict in the case law as to whether the denial of a probation report is reversible per se or subject to the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Dobbins,* supra, 127 Cal.App.4th 176, 182-183 [*Watson* applies]; *People v. Mercant* (1989) 216 Cal.App.3d 1192, 1196, overruled on other grounds in *People v. Bullock* (1994) 26 Cal.App.4th 985, 989 [error is reversible per se]; *People v. Mariano* (1983) 144 Cal.App.3d 814, 824-825 [error is "fundamental" and "is generally treated as reversible error. [Citations.]."].) In the words of *Mercant*, the better view is that per se reversal is required since "we cannot know" what favorable information would have appeared had the new probation report been prepared. (*Mercant,* supra, 216 Cal.App.3d at p. 1196.)

XII.

NOTWITHSTANDING THE RULE OF *PEOPLE v. SCOTT,* SUPRA, 9 Cal.3d 331, COUNSEL SHOULD NOT HESITATE TO RAISE A ROUTINE CLAIM OF SENTENCING ERROR UNDER THE RUBRIC OF INEFFECTIVE ASSISTANCE OF COUNSEL. IN SO DOING, COUNSEL SHOULD PROVIDE A NUANCED ANALYSIS ON THE QUESTION OF PREJUDICE.

Prior to 1994, it was common for appellate counsel to challenge the factors in aggravation or reasons for a consecutive sentence which were cited by the trial court. At the time, it was the majority rule that such claims were cognizable on appeal without an objection.

In 1994, the Supreme Court changed the rules of the game when it held that a trial court objection is required in order to appeal "the trial court's failure to properly make or articulate its discretionary sentencing choices." (*People v. Scott*, supra, 9 Cal.4th 331, 353.) In the wake of *Scott*, the number of sentencing arguments on appeal have dwindled. However, as a matter of law, the *Scott* rule does not preclude a defendant from seeking a remedy on appeal.

In *Scott,* the court specifically indicated that defense counsel has a duty to promote the "proper application" of the sentencing rules. (*Scott*, supra, 9 Cal.4th at p. 351.) Thus, in a case where the trial court has arguably erred in choosing the factors which support its sentencing decision, appellate counsel

should not hesitate to advance a claim of ineffective assistance of counsel.

The test for prejudice is found in *Strickland v. Washington* (1984) 466 U.S. 668. The defense has no burden to show that the error "more likely than not altered the outcome in the case." (*Id*. at p. 693.) Rather, prejudice is shown if there is a "reasonable probability" that the "result of the proceeding would have been different" absent the error. (*Id*. at p. 694.)

In assessing prejudice in the context of sentencing error, the appellate court is often tempted to look at the negative facts in the record and declare any error harmless. However, neither the *Strickland* standard nor existing California precedent allows for this result.

It is a longstanding principle that the prejudice flowing from sentencing error must be measured by "both a qualitative and quantitative analysis" of the factors found in the record. (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1100; accord, *People v. Lambeth* (1980) 112 Cal.App.3d 495, 501.) As the statement of the test reveals, counsel is required to carefully analyze the sentencing record in a nuanced manner.

With regard to "qualitative" analysis, the record will often show that the trial court cited an improper factor and indicated that the factor was of some degree of significance to its ultimate decision. Such a proclamation should lead to reversal. (*Lambeth*, supra, 112 Cal.App.3d 495, 501 [reversal

is proper when the trial court placed "some emphasis" on an improper factor].)

A proper "quantitative" review of the record can often lead to a remedy. In many cases, the number of aggravating and mitigating factors will be equal or closely balanced. In this situation, the improper consideration of a single factor should be deemed prejudicial. (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615-616, disapproved on other grounds in *People v. Scott*, supra, 9 Cal.4th 331, 353, fn. 16 [where one of two factors in aggravation was erroneously considered, reversal was required since two factors in mitigation existed].)

In conducting a careful prejudice analysis, counsel should ensure that the People are not allowed to smuggle in factors in aggravation which the trial court did not cite. Such a tactic is precluded under the qualitative prong of the analysis. (*People v. Cardenas,* supra, 155 Cal.App.4th 1468, 1482-1483 [appellate court declined to consider a factor in aggravation which was not cited by the trial court since it "is not for the appellate court to conjure the reasons the trial court could have recited . . . We review the trial court's reasons-we don't make them up."].)

The factors governing a sentencing choice are often complex and difficult to apply. If the trial court has arguably erred and the sentencing choice was not a foregone conclusion, appellate counsel should not hesitate

to mount a claim of prejudicial error.

CONCLUSION

California has created a sentencing world which has a network of complex procedural and substantive rules. This article has touched on a few aspects of that world. I encourage the reader to expend the countless hours of study and analysis which are necessary to fully grasp the contours and intricacies of our sentencing structures.