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Handling Guilty Plea Appeals

by Brad Bristow & Cheryl Anderson, CCAP Staff Attorneys

I. Scope of This Training Module

This article covers the problems likely to be encountered and legal issues likely to be raised when representing an appellant on appeal from a judgment following a guilty plea. Attention is given to correcting notices of appeal, determination of whether an issue is appealable under the circumstances of the case, and identification of typical issues other than standard sentencing issues that arise in guilty plea cases. Only a few sentencing issues are covered here.

When viewing the videotape and reading these written materials, consider these questions:

a) How are late notices of appeal corrected? What kinds of defective notices can be remedied?

b) Is a certificate of probable cause needed when the appellant wishes to challenge the denial of his motion to withdraw plea? Are there any additional facts you would like to know before proceeding?

c) Is the decision of the trial court refusing to issue a certificate of probable cause subject to review? If so, how? What may the appellate attorney do when a certificate was not sought? Is the answer affected by 60-day time period for filing a notice of appeal?

d) What items are needed to make the record complete?

e) How do issues on appeal differ in the guilty plea case from that in a jury trial or following an admission of a probation violation?

II. Approach to Rule 8.304(b) - Guilty Plea - Appeals

The rule 8.304(b) appellate mindset.

The general stance is to ask what went wrong and proceed down a checklist of issues. But questions of procedural default and adverse consequences permeate the analysis.

Spotting issues generally.

To paraphrase what was stated in a recent seminar put on by the Sixth District Appellate Program in connection with all appeals: “Know but do not assume that you know everything.” The first part of this means to build up a strong knowledge of appellate issues. The truly effective attorney in the past would read applicable statutes and their annotations to find applicable cases. Issues lists and or card files were compiled for use in future cases. Now that computerized research has become more readily available, perhaps the computer can be used as the “know-it-all,” and word searches in every case may or may not supplant the use of the

list.

The second part – that one should not assume -- is very important. Keep in mind that particularly in criminal law, the law may have changed or the law may have been different on the date of the offense than it is currently. Ex post facto increases in sentence should not be permitted and ameliorative changes in the law should be applied. So, counsel should always check *both the law then and the law now.* Many attorneys keep the paper bound statutes from previous years because these versions are easier to read than the histories in the annotated codes. But one should make a habit of consulting the statutes in every case.

Reading the Record for Issues and Problems.

Guilty plea records tend to be so short that the decision arising in lengthy record cases of whether to read the entire record or selected portions first rarely comes up. But it is expected that counsel will *immediately* write to the client and read the file materials sent by CCAP and selected portions of the record, even if counsel's schedule does not permit a reading of the remainder of the record until weeks later. In other words, if the appellant needs a bail or *Fares* motion immediately, or if the notice of appeal needs to be corrected and can be corrected, counsel's review of the record at the outset should be timely and thorough enough to meet those needs.

Differing Augmentation Needs in Rule 8.304(b) Cases.

Among the filings and the minutes and the reporters transcript of court appearances, the record should include the charging documents, and the transcript of the plea and any plea form. Also, the reporter's transcripts of all sentencing proceedings, even previous sentencing hearings on previous probation violations in the same case, should be of record, so that the ultimate sentence can be checked against what was promised in the original plea or at the time of a previous probation violation. The short record is often complete in a simple guilty plea case, and a rule 8.340(b) application or motion to augment is unnecessary. But augmentation is more often needed when the appeal follows a revocation of probation because some records of previous dispositions in these often protracted proceedings may have been omitted.

Because one of the things that the attorney is concerned about was the court's jurisdiction to proceed, the record should include not only the charging documents, but also the reporter's transcript for the court date in which the court found the defendant competent to stand trial.

Working With the Client (Especially on Adverse Consequences)

In handling a rule 8.304(b) appeal it is necessary to communicate with the client early and often. These appeals often involve the filing of a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, so it is good to have the appellant's input early before one decides that there are no issues. Also, counsel will need to know the appellant's location for notification when the *Wende* brief is filed, so that the appellant can be advised on how to file any supplemental brief in pro. per.

But in many cases the most pressing reason to communicate is to advise the appellant concerning potential adverse consequences should the appellate court discover errors such as an unauthorized sentence or custody credits award, or a mandatory sentence, fine, fee, or other disability that was required to be imposed but the court did not impose. It is crucial that the appointed attorney advise the appellant of all significant potential adverse consequences.

The attorney's actions in advising the appellant may vary a bit from case to case, but CCAP supports at least sending a letter to the client's verified address even when the potential adverse consequence is only a small amount of money on a fine or assessment, or as low as one day of potentially lost custody credit.

When the harm and its potential to actually occur are great, such as when the trial court refused to impose a five-year prior under Penal Code section 667, subdivision (a), counsel's duties require the most thorough attention. At a minimum, counsel should await the appellant's written response acknowledging receipt of the advice. Many attorneys have set up prison visits or counselor-initiated telephone calls just to make sure that the appellant really understands the danger. Others send with a self-addresed, stamped envelope, two forms: an abandonment and alternative written instructions ("Yes, I understand and want to proceed," or "No, I do not want to proceed.") This makes it easy for the appellant to respond in a timely fashion. Obviously, the above approach is inappropriate where the appellant has good appellate issues, and the potential adverse consequence is comparatively light. Attorneys should advise appellants of minimal adverse consequences but should not unduly intimidate them from proceeding on an appeal that has a chance of success.

Working With CCAP and Submission of *Wende* Reviews.

Counsel should consult and work with CCAP if there appears to be no issues in a case; there is a separate *Wende* training webpage on this topic. When submitting a case for *Wende* review, it is expected that counsel will have contacted the appellant and, if appropriate, trial counsel, about potential issues *before* contacting the CCAP staff attorney. It is also expected that the appointed attorney will have obtained a complete augmentation of the record at that time. Finally, if the *Wende* brief is not approved in a telephone conversation, and counsel submits the transcripts, a draft *Wende* brief, and a very short description of the "close" or potential issues considered and rejected should also be sent to the project buddy. This will assist the staff attorney in their review of issues.

Addressing Procedural Defaults.

As will be discussed below, the appointed attorney is expected to look for and, where possible, correct defects in notices of appeal or obtain a certificate of probable cause when needed to present an arguable issue. Also, in briefing issues, counsel is expected to address procedural defaults, especially waiver, preferably in the opening brief. Remember, waiting until the reply brief to address procedural default generally makes for a weak presentation, and when the reply attempts to raise ineffective assistance of trial counsel as a shield against the

Attorney General's argument, the appellate court will often treat the reply as a "sword," and the court will refuse to consider this new contention made for the first time in reply. (*People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055.)

III. Detecting and Correcting Errors in the Notice of Appeal

A. Basic Law Governing Notices of Appeal.

The right to appeal in a criminal case is governed by statute and the California Constitution. (Cal. Const., art. VI, sec. 11; Pen. Code, sec. 1235.) An appeal may be taken from: 1) a final judgment, including and order granting probation (Pen. Code, sec. 1237, subd. (a)); or 2) an order made after judgment that substantially affects the rights of the defendant. (Pen. Code, sec.1237, subd. (b).)

The appointed attorney should examine the notice of appeal for adequacy because rule 8.304(b), governing guilty plea and no contest appeals and appeals following admissions of probation, is an exception to the otherwise favorable policy set forth in rule 8.304(a) that a notice of appeal in a criminal case need not specify the issues raised. In fact, under rule 8.304(b) unless the notice of appeal following a guilty plea states the appeal is based on the denial of a motion to suppress evidence, or upon grounds arising after the plea that do not affect the plea's validity, the defendant must file in addition to the notice of appeal an application in the superior court for issuance of a certificate of probable cause. (Rule 8.304(b)(1), (4).) An appeal that does not comply with any of the above is deemed non-operative by the superior court clerk. (Rule 8.304(b)(3).)

B. Defective (but Timely) Notices

What If the Notice Does not Cover All Issues?

When a notice of appeal raises one issue, is that sufficient to cover other issues? The answer depends on the issues listed in the notice. Rule 8.304(b)(5) provides that if the notice of appeal is based on 1) matters occurring after the plea that do not affect its validity, or 2) the denial of a motion to suppress evidence, other issues may not be appealed without obtaining a certificate of probable cause. However, a notice of appeal specifying only a motion to suppress is sufficient to raise sentencing issues, as well. (*People v. Jones* (1995) 10 Cal.4th 1102.) Similarly, if a certificate of probable cause is obtained, that certificate is enough to permit the defendant to raise other issues requiring a certificate beyond those listed in the application for the certificate.

What If the Notice Does not Precisely Follow Wording Set Forth in the Rules?

Because of the specific requirements set forth in rule 8.304(b), a notice of appeal should not be "from the judgment." If the notice is intended to raise sentencing issues, it should specify that it from "grounds arising after the plea that do not affect its validity." A notice that purports merely to be from the judgment should be amended.

What if the Notice Does not Cover All Cases or All Dates?

Other notice defects include errors in information provided in the notice. For example, the defendant may intend to appeal both the sentence imposed on a guilty plea in one case and also the sentences imposed at the same time in a

series of probation violations, but the notice does not include all of the case numbers. The notice must be amended to include all cases the defendant wishes to appeal.

Sometimes the defendant appeals the wrong hearing. For example, did the defendant intend to appeal the conditions imposed at the time of the grant of probation, or the orders made a month later when he was violated on those conditions of probation? The notice should be amended to cover the correct hearing date or dates.

C. Untimely Notices of Appeal.

A notice of appeal must be filed within 60 days after the rendition of judgment or the making of the order that is appealed. (Rule 8.308(a).) If the notice of appeal received by the superior court clerk was sent by mail from a correctional institution, the date of mailing or the date that it was handed to custodial officials is determinative, even if the envelope was not received until after the time to appeal has expired. The envelope is maintained by the clerk in the file. (Rule 8.308(e).)

When the superior court clerk concludes the notice of appeal is untimely, the clerk deems the appeal inoperative, notifies the party, and sends a copy of the notice to the appellate project. (Rule 8.308(d).)

Attorneys will often find that any problems with the timeliness of the notice of appeal has been resolved by the court prior to counsel's appointment. However, on other occasions the problem is not presented until after counsel is appointed, such as when respondent moves to dismiss the appeal as untimely or the court raises the question of timeliness on its own motion. Or sometimes the appointed counsel is the first to observe the problem. Counsel should carefully examine the envelope to see when the notice was posted or delivered to the custodial officials. If it was in fact timely mailed or the custodial official refused to timely file the notice, the appellant may be entitled to relief under the doctrine of constructive filing. (*In re Jordan* (1992) 4 Cal.4th 116.) Relief is also available when the defendant has relied "upon representations of prison official which lulled him into a false sense of security," and when the defendant's attorney has failed to follow through upon the defendant's request to file notice of appeal. (*In re Benoit* (1973) 10 Cal.3d 72.)

D. Defective or Untimely Notices of Appeal.

If the 60 days has not expired, the defect may be corrected by filing an amended notice of appeal in the superior court. Sometimes the trial attorney will be willing to do this for the appellant upon appellate counsel's request.

When the 60 days has expired and there is a need to correct a defect in the notice, the motion to deem the notice appeal to include the correct matter is filed in the appellate court.

When the question is one of the timeliness of a notice of appeal, counsel usually files a motion for constructive notice in both the Third District and the Fifth District, although the Fifth District has stated a preference for the filing of a writ of habeas corpus. In CCAP's experience, the Fifth District has deemed motions for constructive filing to constitute petitions for writ of habeas corpus. Appointed counsel wishing to pursue a petition for writ of habeas corpus instead of the motion for constructive filing should remember the policy of the Third and the Fifth Districts requiring counsel to move to expand the appellate appointment to include authority to assist the appellant in filing a petition for writ of habeas corpus. For updates on any recent changes, panel attorneys should consult Procedural Policies of the Third and Fifth Districts. The staff attorney assigned as the panel attorney's contact should be contacted with more specific questions.

Special problems with late certificates of probable cause are discussed in the next section.

IV. Can the Issue be Appealed Following a Guilty Plea?

A. Is the Issue Waived by the Plea?

There are two major categories of issues waived by guilty plea issues. The first are those removed from the courts' consideration because the plea admits all matters essential to the conviction. These are "guilt issues," issues that are not reasonable constitutional, or jurisdictional, or other matters going to the legality of the proceedings, such as an involuntary plea. So these issues are not appealable even if the court has issued a certificate of probable cause. (*People v. Devaughn* (1977) 18 Cal.3d 889, 896.) Appendix A lists some of issues that have been found waived by guilty pleas.

Forfeiture of sentencing issues by stipulation or failure to object at the sentencing hearing is discussed at Part V of this article.

B. What to do if the Issue is Waived by the Guilty Plea.

If it appears on the appellate record that the defendant was told that the issue would be cognizable on appeal, but in fact the issue is waived by the guilty plea, then the defendant is permitted to withdraw the plea. (*People v. Devaughn, supra,* 18 Cal.3d at 896; *People v. Bonwit* (1985) 173 Cal.App.3d 828, 833.) However, if such promise or reliance does not appear on the record, there may not be an appellate remedy. If the remedy is available, counsel should consider seeking a summary reversal when appropriate. (*People v. Geitner* (1982) 139 Cal.App.3d 252.)

Otherwise, the defendant's best remedy would likely be a petition for writ of habeas corpus. Counsel may advise the appellant of any potential grounds for a petition, but before counsel assists the appellant in preparing the petition, counsel serving under appointment of the courts in the Third and Fifth Districts will need to move to expand their appointment to cover this service before proceeding.

C. Is a Certificate of Probable Cause Required?

As stated in the previous section, constitutional, jurisdictional or other challenges going to the legality of the proceedings such as the voluntariness of a plea, require a certificate of probable cause. So an appeal challenging the court's denial of a motion to withdraw a guilty plea as an abuse of discretion requires a certificate.

However, not all issues arising out of the trial court's denial of a motion to withdraw a plea require a certificate of probable cause. For example, if the issue on appeal was that the trial court had not required counsel to properly present the motion to the court and the specific relief sought on appeal is a proper hearing of the motion as opposed to the setting aside of the plea, this issue does not require a certificate. (*People v. Osorio* (1987) 194 Cal.App.3d 183, 186; but see *People v. Emery* (2006) 140 Cal.App.4th 560, 565, contra.)

Also, when the problem has been in *enforcement* of the plea, a matter discovered at a later time (in proceedings held subsequent to the plea), the courts have not generally required certificates even though the courts will order withdrawal of the plea if it cannot be enforced. In CCAP's experience, when reviewing courts have found post-plea waivers of rights inappropriate (*People v. Cruz* (1988) 44 Cal.3d 1247) or have found that the defendant was advised that certain issues would be preserved on appeal when they were in fact waived (*People v. DeVaughn* (1977) 18 Cal.3d 889), withdrawal of the plea may be sought without a certificate. However, some attorneys have sought certificates to raise these issues because the published authority in this area is not clear.

Certain sentencing issues may also require a certificate notwithstanding their apparent exclusion from the requirement by rule 8.304(b)(4)(B). For example, if the plea bargain specified a sentence, a certificate of probable cause is needed to challenge the sentence. (*People v. Panizzon* (1996) 13 Cal.4th 68.) If the plea bargain specified a sentence range, a certificate of probable cause is needed to challenge the judge's authority to impose a sentence within that range, unless the plea bargain reserved that right. (*People v. Shelton* (2006) 37 Cal.4th 759.) Where the challenge is to the exercise of discretion in imposing a sentence within the specified range, a certificate of probable cause is not needed. (*People v. Buttram* (2003) 30 Cal.4th 773.) This subject is more thoroughly discussed in the article on Appeals From Unlawful Sentence.

Examples of issues reviewable following a guilty plea is contained in Appendix B.

A comprehensive list of appellate issues requiring a certificate of probable cause is contained in Appendix C.

D. What to do if There is no Certificate of Probable Cause?

Certificate not previously sought.

There are two ways in which the case can get to the court of appeal without a certificate of probable cause: 1) the certificate was never sought; 2) the certificate was denied by the superior court. In the former situation – no certificate sought in

the trial court -- remedies have been sought, much like with other defective notices of appeal. Of course, if the 60 days has not expired, application should be made immediately to the superior court.

Where the 60 days has expired, the filing of a petition for writ of habeas corpus showing good cause has been a clearly recognized remedy, as noted in *People v. Mendez* (1999) 19 Cal.4th 1084, and the preferred remedy in the Fifth District. Both the Third and Fifth Districts have granted a motion to seek late filing of an application for certificate of probable cause (the Fifth by deeming the motion to constitute a petition for writ of habeas corpus).

The California Supreme Court held in *In re Chavez* (2003) 30 Cal.4th 643, that late certificates of probable cause could not be obtained because of the Court's reading of the then-existing language of rule 31(d). The court held that since under the rule certificates of probable cause were the equivalents of notices of appeal, their timely filing within 60 days was required in order to qualify for relief from default within the meaning of then rule 45(e). (*Id.,* at pp. 650, 657.) However later rule 30(b), effective January 1, 2004, and current (renumbered) rule 8.304(b) differs from former rule 31(d), in that both state that the certificate is to be filed "*in addition to the notice of appeal required by (a),"* (emphasis added), a wording that makes it appear parallel to the notice of appeal. Recently, however, in *People v. Perez* (2007) 148 Cal.App.4th 353, the Third District Court of Appeal rejected the claim that this recent amendment of the Rules of Court eliminated the 60-day deadline for filing applications for certificates of probable cause. On a more favorable note, *Perez* held that the "constructive filing doctrine" of *In re Benoit*, *supra*, 10 Cal.3d 72 [appointed trial counsel promised to perfect appeal but failed to timely file the notice of appeal] applies to applications for certificates of probable cause, providing appellant can make a sufficient showing for relief of thwarted circumstances beyond his control. Accordingly, relief from late filing may be available as a remedy under the constructive filing doctrine in the Third District. The Fifth District has previously granted similar filings. Counsel should contact the CCAP buddy to discuss this remedy for either court.

Certificate Denied by the Trial Court.

It is an abuse of discretion for the trial court to deny a certificate of probable cause when the appeal contains an arguable issue on reasonable constitutional or jurisdictional grounds "an issue that is not *clearly* frivolous or vexatious." (*People v. Holland* (1978) 23 Cal.3d 77, 88 [emphasis in original].) The remedy for the trial court's erroneous denial of a certificate of probable cause is a petition for writ of mandate in the Court of Appeal. A sample of this petition is on the web site in our motions book section. One good thing about this remedy is that the appellate court may have jurisdiction to grant relief more than 60 days after the superior court has denied a certificate, as the implied 60 day deadline for seeking is directory rather than jurisdictional. (*Popelka, Allard, McGowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499.)

The difficulty with the writ of mandate remedy is that it greatly increases the

litigation. A new case file is opened for the writ in the appellate court. And in both the Third and the Fifth Districts, a motion to expand the attorney's appointment for authority to pursue the writ is needed if the attorney is to be compensated for this work. CCAP suggests that the application be in the alternative – that the certificate be deemed to have issued or that counsel's appointment be expanded to include the authority to pursue a writ. This type of motion most clearly gives the appellate court the option to deem the certificate granted, or, even better, to state that the issue is properly before the court without a certificate.

What to do in borderline cases?

What if there is no certificate of probable cause and the issue seems arguable without a certificate, but is close to the situation where courts have required certificates in the past? Probably the most prudent step is to resolve the issue by seeking the remedies listed above before filing the opening brief. The remedies that are available before the court issues the opinion are rarely available afterwards.

V. Typical Issues and Adverse Consequences Arising in Guilty Plea Cases

Jurisdictional Challenges.

One should not simply assume that the court had jurisdiction to do what it did. For example, in the years since the decision in *Stogner v. California* (2003) 539 U.S. 607, our courts have set aside cases where the reinstatement of the statute of limitations under Penal Code section 803, subdivision (g) was Ex Post Facto even on guilty pleas. The statutes should always be checked to see if the crime, punishment, custody credit limitation or fine existed at the time the offense occurred. The current version of the statute should be checked to see if the punishment still exists.

Challenges to the Plea.

Issues with regard to the plea advisements and validity of the plea are often raised with a certificate. The legal problems with these issues are the "clear and convincing" evidence of good cause that must be presented on motions to withdraw pleas under Penal Code section 1018; the showing of prejudice that must be shown whenever challenging the inadequacy of advisements, with or without a motion to withdraw plea (*People v. Howard* (1992) 1 Cal.4th 1172, 1178), and the occasional point made that the defendant's declaration is self-serving both as to what he was told by counsel, or otherwise understood to be the facts and how he would have acted differently had he been properly advised. (*In re Alvernaz* (1992) 2 Cal. 4th 924, 939.) It should be noted that the record can often corroborate the defendant's version, such as when the defendant's counsel admits incorrectly advising the defendant and when the defendant had rejected previous offers for the reasons he now states were important in his decision to plead guilty, etc. (*Ibid.*)

Adequate Factual Basis for Plea.

This issue is closely related to the other challenges to the plea, and as previously stated, probably requires a certificate of probable cause. When taking a conditional plea of guilty the trial court's compliance with Penal Code section

1192.5 depends upon its obtaining an admission from the defendant or a stipulation from the defense attorney pointing to facts in a document that establish the basis. (*People v. Holmes* (2004) 32 Cal.4th 432, 442.) The practice of stipulating to a factual basis without pointing to the basis is called into question. (*Ibid.*) This subject is more thoroughly discussed in the article Evaluating the Factual Basis of the Plea as a Potential Issue On Appeal.

Motions to Suppress Evidence under Penal Code section 1538.5.

Rule 8.304(b) appeals may raise motions to suppress (see also Pen. Code, sec. 1538.5, subd. (m)) including any issue concerning the conduct of the section 1538.5 hearing. This includes related informant disclosure motions. (*People v. Hobbs* (1994) 7 Cal.4th 948, 955.) But counsel is reminded that if an informant disclosure request is made and denied in conjunction with the motion to suppress, but the motion to suppress is never actually heard, the issue is not cognizable on appeal. (*People v. Hunter* (2002) 100 Cal.App.4th 37.)

Sentencing Issues: Focus on Waiver and Adverse Consequences.

Of course, dispositional issues such as sentences, probation conditions, and fines and fees, also arise in jury trial appeals. However, in rule 8.304(b) there seems to be a greater focus on all aspects of the *disposition* because the sentence may be the sole issue – or in some cases – a prominent adverse consequence of the appeal. In guilty plea cases, as in other appeals, attention should be given to dealing with waiver when challenging a discretionary sentence. (*People v. Scott* (1994) 9 Cal.4th 331.) When the offense has a mandatory sentence, attention should be given to identifying not only arguable issues but any potential adverse consequences.

Sentencing issues and waiver are covered in other training articles. Waiver should be dealt with in a sometimes coordinated attack, giving the court several reasons not to default the issue. Here is a recap from the sentencing module of the different theories by which a finding of waiver can be avoided:

– Ineffective Assistance of Counsel:
This can be productive under the right circumstances because there is rarely a tactical reason not to oppose an erroneously harsh sentence. (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1086.)

– Issue is Constitutional and Does Not Need Factual Development:
(*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see also *People v. Partida* (2005) 37 Cal.4th 428, 436 [court held defendant could make a “vary narrow due process argument” for the first time on appeal – that is, that “asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process”]; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 885-886 [the doctrine of forfeiture on appeal does not apply to challenges to probation conditions based on “facial constitutional defects” that do “not require scrutiny of individual facts and circumstances”].)

– Waiver Applies to the Parties and Not the Court:
The court may reach an issue without an objection. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

The second major additional consideration in reviewing sentencing issues is the consideration of potential adverse consequences that can occur with respect to the sentence, custody credits, fines and fees, and other disabilities of conviction.

Three adverse consequences seem to recur with respect to the imposition of sentence on crimes and enhancements:

– Failure to impose a mandatory sentence on an enhancement or to impose any sentence at all on one or more counts of conviction.

– Erroneous imposition of a one-third consecutive sentence when the sentence required was a full consecutive one, such as sentences for certain in-prison offenses, for Three Strike life sentences or sexual offense sentencing under Penal Code section 667.6, subdivision (d).

– Failure to state reasons for striking a strike under Penal Code section 1385, or failing to place the reasons in the minutes. (*People v. Williams, supra,* 17 Cal.4th at pp. 161-162.)

Again, adverse consequences are discovered by careful research, including review of the applicable statutes. And the appellant must be advised so a determination can be made whether to proceed with the appeal. But some can be corrected when the trial court still has jurisdiction. For example, in the *Williams* situation, the trial court might be requested to place a statement of reasons in the minutes.

Custody Credit.
Counsel should perform an independent calculation of the appellant's entitlement to custody credit in every case. This is one of the most productive areas for issues in a rule 8.304(b) appeal. It is also an area for potential adverse consequences, such as when the court awards dual credit on a consecutive sentence (see, Pen. Code, sec. 2900.5, subd. (e)), or to a defendant who was already serving a sentence in another case based on unrelated conduct. (See, *In re Joyner* (1989) 48 Cal.3d 487, 489.)

Although custody credit issues are examined in another article, attention is given here to motions under *People v. Fares* (1992) 16 Cal.App.4th 954, because the question of whether to file such a motion arises often in rule 8.304(b) cases. Penal Code section 1237.1 requires that the custody credit issue be addressed first to the trial court. So, in a case having only the custody credit issue, the motion will normally be resolved by counsel in the trial court before attempting to place the issue in the brief. Although *People v. Acosta* (1996) 48 Cal.App.4th 411, 420, holds that it is more economical (and proper) to place a custody credit

issue in a brief without first litigating the issue in the trial court, there are at least two exceptions in which the attorney will probably file the *Fares* motion in the trial court first, even if there are other issues in the brief.

One situation when the motion is best pursued in the trial court is where the appellant received a short sentence and his sentence will expire before the appellate process can correct the credit error. This is why it is necessary to check the custody credit as soon after opening the case as possible. Also, in the "short time" cases, it is important that counsel monitor the hearing on the motion, and counsel should check to see that that Department of Corrections Legal Processing Unit receives a copy of any amended abstract. The second situation in which a *Fares* motion is pursued even though there are other issues to be raised in the opening brief is when the facts of the defendant's entitlement to credit have not been fully developed before the trial court. For example, it often occurs that the trial court denied credit under *People v. Bruner* (1995) 9 Cal.4th 1178, for time also served on a parole violation because that parole violation was based on not only the conduct related to the offense but on other conduct as well (such as failure to report and failure to test, etc.). However, if it turns out that the final parole violation was based solely on the same conduct as that upon which the conviction was based, then the *Fares* motion can bring the new information to the court's attention, so that there will be a record supporting the grant of additional custody credit.

The motion can be handled by the court ex parte when neither the court nor the prosecutor has any objection. (*People v.Clavel* (2002) 103 Cal.App.4th 516, 519, fn. 4.) However, where there is an objection, and there will have to be a court appearance, trial counsel should be contacted to make that appearance, or CCAP should be contacted for information about moving to expand counsel's authority to travel and appear in the local court. Although counsel's appointment includes authority to prepare and file the motion, the basic appointment does not include travel to appear in the trial court.

Conditions of Probation.

The trial court may have imposed a probation condition that appears unconstitutional or inappropriate, but the reviewing court may find that the defendant has forfeited the appellate challenge to that illegal condition by failing to object in the trial court. (See, *People v. Welch* (1995) 5 Cal.4th 228, 237.) For example, currently, most courts find challenges to conditions as not reasonably related to the defendant's rehabilitation forfeited because these issues often involve a factual determination. But challenges to conditions as unconstitutionally vague or overbroad are not forfeited if the claim involves a pure question of law that does not require reference to the particular sentencing record developed in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 886-892 [in the absence of an express requirement of knowledge, the probation condition imposed upon defendant is unconstitutionally vague].).

So, examples of challenges to conditions that are not reasonably related to the

defendant's rehabilitation, that probably require an objection in the trial court (or an allegation of ineffectiveness of trial counsel) are search conditions that have no basis in the defendant's history (*People v. Keller* (1978) 76 Cal.App.3d 827 [drugs]; *In re Martinez* (1978) 86 Cal.App.3d 577 [concealed weapons].)

An example of an unconstitutionally vague probation term that might be challenged *without* an objection in the trial court is the limitation on rights to association. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 890-892 [a probation condition that a minor "not associate with anyone 'disapproved of by probation'" was unconstitutionally vague, unless the words "known to be" were added before the words "disapproved of"].) As discussed above in conjunction with *Scott* waiver, counsel are encouraged to propose alternative means by which the reviewing court can dispense with forfeiture and address the condition on the merits.

When the condition of probation being challenged is particularly oppressive, and the appellate process may to too slow to remedy it, appellate counsel should consider approaching trial counsel with a request to seek modification of the condition. (Pen. Code, sec. 1203.3.)

Fines, Fees and Assessments.
Some of the issues presented are:

– Is the fine authorized? For example not all narcotics violations require imposition of a lab fee under Health and Safety Code section 11372.5. Most of the offenses having to do with bringing controlled substances into a jail (see Pen. Code sec. 4753, et seq.) do not contain such a requirement. But the statute should be consulted even when the attorney has done so recently because these statutes are often amended. Is the fine or fee ex post facto? There is a question whether some fees are truly punitive in nature, and only the punitive provisions are subject to ex post facto, but recent case law views many of the fees as being punitive. (See, e.g., *People v. High* (2004) 119 Cal.App.4th 1192.)

– Has the court failed to impose a required fine or fee? When the fine is required, and the trial court has failed to do so, the appellate court must do so. (*People v. Taylor* (2004) 118 Cal.App.4th 454.) However, when the statute provides that the court may decline to impose the fine or fee in certain situations such as upon a finding of the defendant's inability to pay, the reviewing court will, presuming the trial court acted correctly absent a showing to the contrary, find that the trial court impliedly found hardship. (*People v. Burnett* (2004) 116 Cal.App.4th 257.) So, although the appellant should be advised that there is a risk that the reviewing court may order imposition of a required fine, the ultimate result will not always be certain.

– Has the court failed to impose a mandatory assessment? This error results in a more certain adverse consequence because, once the underlying fine or fee is imposed, Penal Code section 1465 and Government Code section 76000 require

imposition of the assessment, and the court does not maintain discretion not to do so. Any error in this respect must be corrected by the appellate court. (*People v. Talibdeen* (2000) 27 Cal.4th 1151, 1155.*)* Similarly, the parole revocation fine must be imposed when a restitution fine is imposed and the defendant is sentenced to prison. (*People v. Smith* (2001) 24 Cal.4th 849, 853.) A general list of fines and fees imposed on typical sentences is contained in *People v. Sorenson* (2005) 125 Cal.App.4th 612 [noting that the assessments have increased from 170% of the fine to about 240% in recent years].) See also the list of fines and fees on the CCAP website.

– Was there an error in setting a discretionary fine or fee? The analysis of discretionary fines and fees is different than with respect to statutorily mandated ones. Arguments that imposition of a fine or fee was inappropriate will require a showing not only of the error, but also, that there was an objection in the trial court, or that counsel was ineffective in failing to object.

Errors in Abstracts of Judgment.

The reviewing court must correct these errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.) Also, minute orders are subject to correction by the appellate court. (*People v. Zackery* (2007) 147 Cal.App.4th 380 [Third District].)

Direct Restitution (Pen. Code, sec. 1202.4, subd. (f).)

Direct restitution is unlike probationary restitution in that it is mandatory and not subject to ability to pay limitations, and the policy is more to make the victim whole in an economic sense than it is to rehabilitate the defendant. Thus some of the issues that will arise on appeal are:

– Imposition of replacement cost based on new rather than used property when the item lost was used property. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 995.)

– The order is speculative rather than based on a rational means of calculation. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

– The order compensates a government agency for its investigative costs that are part of its standard duties (*People v. Torres* (1997) 59 Cal.App.4th 1, 4-5.)

– The order compensates the victim for loss not caused by the defendant. (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 797.

– When multiple defendants are responsible, seek modification of the award making it joint and severable so the defendant is credited with payments by the other defendants.

– An adverse consequence – the court's failure to impose or reserve jurisdiction over restitution. (*People v. Valdez* (1994) 24 Cal.App.4th 1194.)

– Another adverse consequence – the court offset insurance recovery by the victim from the restitution award. (*People v. Birkett* (1999) 21 Cal.4th 226, 246.)

Attorneys Fees Orders.

The trial court's non-compliance with Penal Code section 987.8 is often an issue on appeal, as the court either assumes the defendant has an ability to pay or fails to even consider the question. Persons committed to the state prison are presumed unable to pay attorneys fees, and unless there is proof otherwise, there may be a good argument on appeal that the award is not supported by substantial evidence. (Sec. 987.8, subd. (G)(2)(B); *People v. Nilsen* (1988) 199 Cal.App.3d 344, 350-351.)

Registration, Testing, and Other Ancilliary Orders.

Registration orders, and DNA and HIV testing orders are challenged less often on Eighth Amendment grounds since the orders have been found non-punitive, but registration orders not imposed on all similarly situated individuals are sometimes challenged as a violation of Equal Protection. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1192-1193 [court held a defendant who pled guilty to oral copulation with a 16-year-old girl (Pen. Code, § 288a, subd. (b)(1)) was denied equal protection because Penal Code section 290 mandates sex offender registration for conviction of the offense, whereas the court has discretion to impose the registration requirement when a person is convicted of unlawful sexual intercourse with a minor (Pen. Code, § 261.5) under the same circumstances].).

Also, the defendant's conviction or conduct should be examined to see if it qualifies for the disability. For example where there is insufficient evidence of a transmission of bodily fluids in a violation of Penal Code section 288, an order that the defendant undergo AIDs testing may be unauthorized. (*People v. Butler* (2003) 31 Cal.4th 1119, 1127-1129.)

VI. Issues Particular to Appeals Following Probation Revocation.

Did the appellant receive full due process when court did not conduct a contested hearing on the violation of probation? (Cf., *Black v. Romano* (1985) 471 U.S. 606; *People v. Vickers* (1972) 8 Cal.3d 451.) So, a rule 8.304(b) appeal following an admission of a probation violation might include an issue of whether the court adequately advised the defendant of the right to a hearing. (*See, e.g., In re la Croix* (1974) 12 Cal.3d 146; but a full *Boykin/Tahl* advisement is not required per *People v. Clark* (1996) 51 Cal.App.4th 575, 582-583 [overruled o.g., *People v. Mendez* (1999) 19 Cal.4th 1084, 1093.)

But more often, the specific issue on appeal is a sentencing, fee or fine issue inconsistent or in addition to the disposition at the time of the original grant of probation.

For example, a serious problem arises when the court stays *execution* of a

sentence at the time of the original grant of probation, but then purports to impose a new and different sentence when probation is violated. This violates *People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088, and can be an issue on appeal or an adverse consequence of the appeal, depending on whether the purported new sentence is greater or lesser than the sentence that was previously stayed. But note that *Howard* has no applicability to resentencing following an unsuccessful commitment to the California Rehabilitation Center (*People v. Nubla* (1999) 74 Cal.App.4th 719; Welf. & Inst. Code, sec. 3053].)

Often the trial court imposes a new and different fine from that imposed at the time of the original grant of probation. For example, when a restitution fine of $200 is imposed at the time of the original grant and a restitution fine of $500 is imposed following revocation, the new imposition is in error for two reasons. First, it violates double jeopardy. (*People v. Jones* (1994) 24 Cal.App.4th 1780, relying on *People v. Henderson* (1963) 60 Cal.2d 482].) It also is unauthorized because a fine was already imposed at the time of the original grant of probation. (*People v. Chambers* (1998) 65 Cal.App.4th 819; *People v. Arata* (2004) 118 Cal.App.4th 195.) This would be in error even if the amount imposed was identical to the amount originally imposed – $200. But the court would probably not be in error in merely "recognizing" the pre-existing fine, as opposed to imposing a new one.

Counsel should remember the possible certificate and record problems inherent in such issues.

APPENDIX A

Issues Waived by a Guilty Plea

The following is a list – examples rather than an exhaustive list -- of issues which have been found waived by a plea of guilty or no contest:

a) Insufficiency of the evidence of the offense at the preliminary hearing and/or grand jury (*People v. Meals* (1975) 49 Cal.App.3d 702; *People v. Roper* (1983) 144 Cal.App.3d 1033; *People v. Batista* (1988) 201 Cal.App.3d 1288);

b) Failure to disclose the identity of an informant (*People v. Howard* (1976) 55 Cal.App.3d 373, and *People v. Duval* (1990) 221 Cal.App.3d 1105, 1114; but see, *People v. Hobbs.* (1994) 7 Cal.4th 948, 956, informant issues related to motions to suppress survive a guilty plea when the 1538.5 motion is pursued);

c) Denial of severance motions (*People v. Haven* (1980) 107 Cal.App.3d 983; *People v. Sanchez* (1982) 131 Cal.App.3d 323, 335);

d) The fairness of a pretrial lineup or an unduly suggestive pretrial identification (*People v. Stearns* (1973) 35 Cal.App.3d 304; *People v. Mink* (1985) 173

Cal.App.3d 766, 769);

e) Refusal to dismiss the action because the conduct alleged does not violate the statute (*People v. Suite* (1980) 101 Cal.App.3d 680; *People v. Perry* (1984) 162 Cal.App.3d 1147 [attack on firearm enhancement]; but see *People v. Loera* (1984) 159 Cal.App.3d 992 [an illegally imposed enhancement is reviewable despite an admission] which was disagreed with in *People v. Jones* (1995) 33 Cal.App.4th 1087, 1093 as to a certificate of probable cause being required.);

f) Invalid conviction used as part of a subsequent charge (*People v. Lajocies* (1981) 119 Cal.App.3d 947);

g) The statute of limitations, where the evidence is disputed (*People v. Padfield* (1982) 136 Cal.App.3d 218, 224; cf. *People v. Chadd* (1981) 28 Cal.3d 739, 757 [expiration based on the pleadings]);

h) Due process speedy trial violations based on delay in filing (*People v. Hayton* (1979) 95 Cal.App.3d 413; *People v. Lee* (1980) 100 Cal.App.3d 715; *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357; *People v. Brooks* (1987) 189 Cal.App.3d 866, 870. One court has held that such a claim is not waived. *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, held that a speedy trial claim is not waived by a plea of guilty to a misdemeanor in municipal court, and it was *Avila* that the trial court declined to apply in a felony case in *Hernandez, supra,* 6 Cal.App.4th 1355. The *Avila* position was also disagreed with in *People v. Aguilar* (1998) 61 Cal.App.4th 615, 618-622, and in *People v. Egbert* (1997) 59 Cal.App.4th 503, 508-509.);

i) Denial of a change of venue (*People v. Krotter* (1984) 162 Cal.App.3d 643);

j) Denial of a motion for sanctions following the destruction of evidence favorable to the defense (*People v. Halstead* (1985) 175 Cal.App.3d 772; *People v. Bonwit* (1985) 173 Cal.App.3d 828; *People v. Galan* (1985) 163 Cal.App.3d 786; *People v. Ahern* (1984) 157 Cal.App.3d 27; but see *People v. Aguilar* (1985) 165 Cal.App.3d 221 where such a motion was held to be appealable as part of a motion to suppress evidence pursuant to Penal Code section 1538.5, subdivision (m). However, *Aguilar* was criticized in *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1576.);

k) Entrapment defenses (*People v. Bonwit*, *supra*, 173 Cal.App.3d at p. 832);

l) Illegally obtained confessions (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896; *People* v. *Haines* (1981) 123 Cal.App.3d 861, 864; *People* v. *Brown* (1981) 119 Cal.App.3d 116; *In re John B.* (1989) 215 Cal.App.3d 477, a delinquency case; but note that *People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, holds that if the confession is a product of the illegal search or seizure, it may still be suppressed.);

m) Sufficiency of the evidence of the substantive offense (People v. *Warburton* (1970) 7 Cal.App.3d 815, 821);

n) Sufficiency of the evidence of an enhancement (*People v. Perry*, *supra*, 162 Cal.App.3d 1147 and *People v. Thomas* (1986) 41 Cal.3d 837, 844);

o) Admissibility of evidence generally (*People v. Soriano* (1992) 4 Cal.App.4th 781, 784);

p) Extradition issues (*People v. Witherow* (1983) 142 Cal.App.3d 485, 489-490);

q) Territorial jurisdiction (*Casey v. Superior Court* (1989) 207 Cal.App.3d 837, 845-846);

r) Cruel and unusual punishment based on disproportionality argument when a factual record is necessary to consider the claim (*People v. Hunt* (1985) 174 Cal.App.3d 95, 107-108, and *People v. Panizzon* (1996) 13 Cal.4th 68, holds this issue is waived when the plea bargain includes a stipulated sentence);

s) Double jeopardy claim which does not appear on the face of the record, but which requires a factual determination (*United States v. Broce* (1989) 488 U.S. 563; cf, *Menna v. New York* (1975) 423 U.S. 61, reaching double jeopardy issue.)

APPENDIX B

Issues Reviewable Following a Guilty Plea

The following is a list examples rather than an exhaustive list of issues not needing a certificate of probable cause on appeal following a plea of guilty or no contest. It should be noted that in recent years, there is an increasing focus on whether sentencing issues, traditionally found preserved, are waived completely or at least require a certificate of probable cause.

a) Sentencing;

(Rule 8.304(b)(4)(B); *People v. Ward* (1967) 66 Cal.2d 571.) Whether diversion was improperly denied is considered a sentencing issue. (*People v. Padfield*, *supra*, 136 Cal.App.3d at p. 228.) Penal Code section 654 questions are also reviewable, at least where it is understood that they can be asserted at the time the plea is entered. *(People v. Lockheed Shipbuilding and Construction Co.* (1977) 69 Cal.App.3d Supp. 1; cf. *Seiterle v. Superior Court* (1962) 57 Cal.2d 397. See also *People v. Rosenberg* (1963) 212 Cal.App.2d 773 where Penal Code section 654 issues were waived by plea.) One court has indicated that a cruel and unusual punishment argument under *People v. Dillon* (1983) 34 Cal.3d 441 is waived where a lowering of the degree of the offense is involved. (See

People v. Sabados (1984) 160 Cal.App.3d 691.) Issues regarding specific performance of the plea are not waived because they do not attack the plea and relate only to sentencing. (*People v. Scott* (1984) 150 Cal.App.3d 910, 915.) However, while the guilty plea may not waive certain sentencing issues, the failure to object can waive certain sentencing issues. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the California Supreme Court held that "...the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices.")

b) Motions under Penal Code section 1538.5 reviewed pursuant to statute; (Pen. Code, § 1538.5, subd. (m); Rules of Court, rule 8.304(b)(4)(A). This section authorizes review of all search and seizure questions, including the issue of whether the failure to suppress evidence led to a plea involving other unrelated counts. (*People v. Miller* (1983) 33 Cal.3d 545, 550, fn.4.)

But confessions are only reviewed if the confession is a product of an illegal search or seizure. (*People v. Sup. Ct. (Zolnay)*, *supra*, 15 Cal.3d 729; *People v. Brown*, *supra*, 119 Cal.App.3d at p. 124.)

There are also problems arising out of court consolidation. If a suppression motion heard during the preliminary examination is not renewed after the filing of the information, the denial will be not reviewed because the motion was not made in the superior court even in a court which utilizes cross-assignments and the judge hearing the suppression motion in the superior court would have been the same. (See *People v. Garrido* (2005) 127 Cal.App.4th 359, 365, continue to rest on *People v. Lilienthal* (1978) 22 Cal.3d 891, 896, after court consolidation.)

The search and seizure motion may be made at the preliminary hearing and relitigated after the filing of an information as part of a 995 motion without making a new 1538.5 motion. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 895; *People v. Schoennaur* (1980) 103 Cal.App.3d 398.) However, to achieve full review of material presented for the first time in the renewed motion, the 1538.5 motion must be made or renewed after the filing of the information. (*People v. Haybron* (1980) 108 Cal.App.3d 31; *Ramis v. Superior Court* (1977) 77 Cal.App.3d 325.)

c) All petitions for writ of error coram nobis based on information that is not on the record. (*People v. Kraus* (1975) 47 Cal.App.3d 568.)

This includes post-judgment attacks on guilty pleas. Even when filed as motions to withdraw pleas, these applications are in the nature of petitions for writ of error coram nobis. (*People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1312-1313.) These types of errors may also be subject to collateral attack on writ of habeas corpus. (Cf. *In re Brown* (1973) 9 Cal.3d 679.)

d) Specific enforcement of the plea (*People v. Kaanehe* (1977) 19 Cal.3d 1; *People v. Preciado* (1978) 78 Cal.App.3d 144; *People v. Delles* (1968) 69 Cal.2d 906);

e) Failure to afford the defendant a proper suppression hearing (*People v. Cella* (1981) 114 Cal.App.3d 905);

f) Failure to afford the defendant a proper hearing on a motion to withdraw plea regardless of whether the motion relates to pre- or post-plea issues. (*People v. Osorio* (1987) 194 Cal.App.3d 183, 186-187.)

APPENDIX C

Issues Reviewable Following a Guilty Plea With a Certificate of Probable Cause

The following is a list of examples – not an exhaustive list – of issues which are appealable, but require a certificate of probable cause on appeal following a plea of guilty or no contest. It should be noted that in recent years, there is increasing focus on whether sentencing issues, traditionally found preserved, are waived or require a certificate of probable cause. This subject is more thoroughly discussed in the article: Appeals From Unlawful Sentence May Require Certificate of Probable Cause.

a) Denial of the right to counsel (*People v. Holland*, *supra*, 23 Cal.3d 77);

(b) Ineffective assistance of counsel at or advising on the plea (*People v. Ribero* (1971) 4 Cal.3d 55, 63; cf *People v. Monreal* (1997) 52 Cal.App.4th 670 [certificate not needed to challenge post-plea ineffectiveness of counsel]);

c) Claim that the plea was induced by misrepresentation (*People v. DeVaughn*, *supra*, 18 Cal.3d at 896);

d) Erroneous denial of pretrial diversion (*People v. Padfield*, *supra*, 136 Cal.App.3d at 228);

e) Violation of the agreement on Interstate Detainers Act which bars prosecution (*People v. Padfield, supra*, 136 Cal.App.3d 218, 228);

f) Illegal multiple prosecution under Penal Code section 654 (*People v. Turner, supra,* 171 Cal.App.3d 116, 128);

g) Denial of motion to withdraw a guilty plea (*In re Brown* (1973) 9 Cal.3d 679, 682);

h) Expiration of statute of limitations shown on the pleading (*People v. Smith* (1985) 171 Cal.App.3d 997);

i) Statutorily authorized punishment is cruel and unusual (*People v. Panizzon* (1996) 13 Cal.4th 68 [also finding the issue *waived* because of the stipulated

sentence; *People v. Zamora* (1991) 230 Cal.App.3d 1627);

j) Attacks on the guilty plea reviewable on appeal, provided that the facts appear on the record; This may or may not be based on a motion to withdraw plea. Misrepresentations by court and counsel on the record are typical bases. (*People v. Ribero* (1971) 4 Cal.3d 55, 62.);

k) The failure to hold a hearing to determine competency to stand trial or enter a plea under Penal Code section 1368 (*People v. Laudermilk* (1967) 67 Cal.2d 272, cited with approval in *People v. Panizzon* (1996) 13 Cal.4th 68);

l) An attack on a plea entered to inconsistent counts (*People v. Garcia* (1981) 121 Cal.App.3d 239.)