FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 31, 2020

DON'T GIVE UP: OVERCOMING STANDARD OF REVIEW AND PREJUDICE OBSTACLES

JEREMY PRICE
Staff Attorney
First District Appellate Project
January 2020

Copyright © 2020 First District Appellate Project.
All rights reserved.

FDAP
FIRST DISTRICT APPELLATE PROJECT

Don't Give Up:
Overcoming Standard of Review and Prejudice Obstacles

I. Introduction

We have all encountered cases on appeal where we know the trial court erred in some regard but conclude we cannot assemble a colorable argument because of an unfavorable standard of review or prejudice. Knowing how to present the facts of a case in the face of these established standards – effectively designed with affirmance in mind – is a critical skill appellate defense attorneys must creatively deploy in nearly every appeal. These materials, however, do not focus on how to work *within* the confines of these adverse standards to produce compelling arguments – a worthwhile topic ripe for future trainings, perhaps better addressed in smaller gatherings where participants can share the facts of their particular cases. Rather, the following pages suggest ways to argue for a less deferential standard of review and for reversal without establishing prejudice, especially where it is apparent the customarily applicable standards leave no room for success.

We cannot change our facts, but sometimes we can plausibly reposition them to come within the reach of more amenable appellate standards of review and reversal. So, for example, when it seems there is no way to advance an insufficiency of the evidence claim under the substantial evidence standard of review, consider whether the argument could be presented as one implicating the First Amendment, thereby triggering independent review. Or, if it looks like there is no viable path for reversal under the *Watson* or *Chapman* harmless error standards – or even the federal constitutional structural error standard – remember the California Constitution offers its own automatic reversal rule. For the more deferential standards of review, we also do not need to describe them as unforgivingly as some of the most commonly cited authorities define them. And, of course, some existing case law has simply gotten it wrong as to which standards of review and reversal apply to certain types of claims. In that situation, we should contend a less deferential standard of review or a per se rule of reversal should apply.

Standards of review and prejudice requirements present major obstacles to many of our potential arguments. But, before consigning an argument to the unbriefed issues section of a compensation claim because of them, ask yourself whether there are ways to overcome these obstacles by arguing for a more favorable standard of review or reversal. The answer may surprise you.

II. Standards of Review

A. Why They Are Important

The importance of the standard of review to an appellate argument can rarely be overstated, as it determines the level of deference an appellate court will exercise toward a lower court ruling. (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667.)

The standard of review must be one of an appellate attorney's first considerations when evaluating a potential issue. We know from reading opinions that the standard of review is where a reviewing court starts its analysis. As our state Supreme Court has noted: "In every appeal, the threshold matter to be determined is the proper standard of review – the prism through which we view the issues presented to us." (*People v. Lindberg* (2008) 45 Cal.4th 1, 36, fn. 12, internal quotation marks omitted.) "However convoluted the facts, or complex the issues, the standard of review is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018 (*Jackson*).)

Identifying the correct standard of review, which may include pushing for one not yet accepted in case law, often informs the ultimate decision whether to proceed with raising an issue. "The analysis of a case depends upon the standard of review. It is not surprising therefore that litigants on appeal often argue differing views on the appropriate standard of review." (*Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 105.) "The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used." (*Dickinson v. Zurko* (1999) 527 U.S. 150, 162.)

B. Factors That Determine the Level of Deference

Before laying out the four most common standards of review in California, it is important to examine how one decides which standard applies. For the most part, the level of deference a reviewing court will exercise toward a lower court ruling turns on whether the question before it is one of fact or law.

As a general rule, "[t]rial courts and juries are better situated to resolve questions of fact," which means, "[t]raditionally, therefore, an appellate court reviews findings of fact under a deferential standard[.]" (*People v. Cromer*

(2001) 24 Cal.4th 889, 893-894 (*Cromer*).) "Questions of fact concern the establishment of historical or physical facts[.]" (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 (*Crocker*).) "If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual[.]" (*Ibid*.)

On the other hand, because "appellate courts are more competent . . . to resolve questions of law," a reviewing court "reviews determinations of law under a nondeferential standard[.]" (*Cromer*, *supra*, 24 Cal.4th at pp. 893-894.) "Questions of law relate to the selection of a rule[.]" (*Crocker*, *supra*, 49 Cal.3d at p. 888.) Thus, if "the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal[.]" (*Ibid*.)

But there are other factors arising out of the real-world consequences of the issues presented by an appeal that can influence selection of the appropriate standard of review. For example:

- "the proper review standard is influenced in part by the *importance of the legal rights or interests at stake*." (*People v. Ault* (2004) 33 Cal.4th 1250, 1265, emphasis in original.)

- "another important consideration in determining the appropriate standard of review is the *consequences of an erroneous determination* in the particular case." (*Id.* at p. 1266, emphasis in original.)

These additional considerations are particularly important when it comes to deciding the standard of review that applies to a mixed question of law and fact. While a reviewing court will often employ a combination of multiple standards of review in this situation, there are circumstances where a nondeferential standard of review is "crucial," especially "when an excessively deferential appellate affirmance risks error in the *final determination* of a party's rights, either as to the entire case, or on a significant issue in the litigation." (*Ibid*, emphasis in original.)

We should always be mindful of the motivating factors behind each standard of review and the special considerations that may caution against too much deference, as this awareness may assist us in obtaining the most favorable standard of review available to advance our client's arguments.

C. Independent or De Novo Review

The least deferential standard or review – and, therefore, the ideal standard for appeals initiated by our clients – is independent or de novo review.[1] Independent review pays no deference to the trial court's view in examining pure issues of law, such as a trial court's conclusions of law, or statutory meaning, or the scope of a statute's operation. (See, e.g., *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.)

Issues involving jury instructions are generally subject to independent review as well. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 733 ["Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference."]; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [independently reviewing whether instructions given to the jury accurately reflected the law].)

As noted in the previous section, when an appellate issue presents a mixed question of law and fact, independent review may only apply to a portion of the analysis. For example, on appeal from the denial of a Fourth Amendment suppression motion:

> [T]he trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [The appellate court] review[s] the [trial] court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review.

(*People v. Saunders* (2006) 38 Cal. 4th 1129, 1133-1134; see also *Cromer*, *supra*, 24 Cal.4th at p. 901 [reviewing court applies substantial evidence standard to the prosecution's efforts to locate a witness but independently reviews whether those efforts amount to due diligence such that the absent witness' hearsay statements may be admitted as a substitute for his or her

---

[1] When the government appeals and our client is the respondent, independent review is actually the least favorable standard of review for our client. In that situation, we would want the appellate court to apply the greatest level of deference to the trial court's ruling under review.

live testimony].)[2] Whenever possible, we should attempt to present questions of fact as mixed questions of law and fact in order to obtain the more favorable independent standard of appellate review.

There is another way to argue an issue otherwise subject to a more deferential standard of review should be reviewed independently on appeal: add a federal constitutional dimension to the argument. The California Supreme Court's decision in *In re George T.* (2004) 33 Cal.4th 620 (*George T.*) is perhaps the best example of this strategy. In that case, the juvenile court sustained a criminal threat allegation under Penal Code section 422 against a minor who gave two classmates "Dark Poetry" that suggested he could be the next school shooter. On appeal, the minor argued the sufficiency of the evidence in support of the threats adjudication should not be reviewed under the deferential substantial evidence standard (addressed in more detail in the following section of these materials) but instead should be subject to independent review because deeming poetry a criminal threat implicated the minor's First Amendment interests. The Supreme Court agreed that "a reviewing court should make an independent examination of the record in a [Penal Code] section 422 case when a defendant raises a plausible First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat." (*George T.*, *supra*, 33 Cal.4th at p. 632.) Subsequent appellate court decisions have applied this aspect of *George T.*'s holding that independent review applies to convictions under other statutes encompassing conduct protected by the First Amendment. (See, e.g., *In re Ernesto H.* (2004) 125 Cal.App.4th 298, 308 [addressing Penal Code section 71]; *In re Curtis S.* (2013) 215 Cal.App.4th 758, 763 [addressing Penal Code section 415, subdivision (2)]; see also *Jackson*, *supra*, 128 Cal.App.4th at p. 1021 [independently reviewing a trial court's decision to seal records from criminal proceedings where First Amendment implicated].)

The First Amendment is not the only constitutional right that, when implicated, can transform an issue normally subject to deferential review into one reviewed independently. For example, although appellate courts generally review whether a trial court erroneously admitted hearsay evidence

---

[2] *Cromer* lists several other mixed questions of law and fact that have been held to be subject to independent review, including: juror misconduct, voluntariness of confessions, reasonableness of searches, validity of *Miranda* waivers, and reasonableness of detentions. (*Cromer*, *supra*, 24 Cal.4th at pp. 901-902.)

under the deferential abuse of discretion standard (discussed in greater detail below), the question whether the admission of such evidence violated a defendant's Sixth Amendment confrontation rights is subject to independent review. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.) Similarly, an appellate court usually reviews a trial court's decision to revoke probation, parole, mandatory supervision, or postrelease community supervision for abuse of discretion, but if one can argue the erroneous revocation of one of these forms of conditional release violated the defendant's procedural due process rights afforded by *Morrissey v. Brewer* (1972) 408 U.S. 471, such a claim presents "a mixed question of law and fact implicating constitutional rights" that must be reviewed independently. (*People v. Byron* (2016) 246 Cal.App.4th 1009, 1013.)

One final note on independent review. The terms *independent review* and *de novo review* are often used interchangeably. Doing so is generally not a problem, but it should be pointed out that the California Supreme Court has drawn distinctions between the two types of review. In *George T.*, the Supreme Court observed:

> Independent review is not the equivalent of de novo review "in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes" the outcome should have been different. ([Citation omitted].) Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue.

(*George T.*, *supra*, 33 Cal.4th at p. 634.)

If no facts are in dispute, however, independent and de novo review are equivalent. (*Jackson*, *supra*, 128 Cal.App.4th at p. 1021; see also *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 ["When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court"]; *People v. Maury* (2003) 30 Cal.4th 342, 404, internal quotation marks omitted ["When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness"]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 216.)

D. Substantial Evidence

The substantial evidence test applies to factual determinations made by the trier of fact, most notably the sufficiency of the evidence in support of a criminal conviction. Under the substantial evidence standard of review, the record is examined through the eyes of the factfinder, most favorably to the judgment, with the presumptive goal of upholding whatever factual determinations the particular trier of fact was required to make. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Everything that can be presumed will be presumed in favor of the trial court's decision (*People v. Giordano* (2007) 42 Cal.4th 644, 666), and all points on which reasonable persons could differ are resolved in the trial court's favor. (*People v. Alexander* (2010) 49 Cal.4th 846, 883.)[3]

Despite the unfavorable presumptions inherent in the deferential standard, it is not completely toothless. Here is the most common formulation of the substantial evidence test:

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. ([Citations omitted].) The court does not, however, limit its review to the evidence favorable to the respondent. As [*People v. Bassett* (1968) 69 Cal.2d 122], explained, our task . . . is twofold. First, we must resolve the issue in the light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts."

---

[3] There are exceptions to the general rule that substantial evidence review requires consideration of the evidence in the light most favorable to the judgment. For example, in assessing whether substantial evidence supported instructing the jury on a lesser included offense, an appellate court must "view the evidence in the light most favorable to the defendant." (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

(*People v. Johnson* (1980) 26 Cal.3d 557, 576-577 (*Johnson*), some internal quotation marks omitted, emphasis in original.)

This state law standard essentially mirrors and incorporates the federal constitutional due process standard for appellate review of the sufficiency of the evidence offered in support of a criminal conviction set forth in *Jackson v. Virginia* (1979) 443 U.S. 307, 319, according to which, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.)[4]

Moreover, while the role of an appellate court is generally not to resolve conflicts in the evidence or reweigh credibility determinations made by the trial court (see, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 66), the trial court's resolution of conflicts in the evidence and credibility determinations must be rejected when they are physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see also *People v. Allen* (1985) 165 Cal.App.3d 616, 623.) Nor is evidence of a speculative nature substantial. "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 606-607.)

Lastly, the elements of a criminal offense may be established – and the substantial evidence test satisfied – by the presentation of circumstantial evidence. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) However, "[c]ircumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt." (*People v. Redrick* (1961) 55 Cal.2d 282, 290.) Thus, although the finder of fact determines the strength of each link, on appeal, the reviewing court must reverse a conviction as unsupported by substantial evidence if a link is missing. (*Id.* at pp. 289-90.)

Most appellate practitioners can recite the substantial evidence standard of review by memory, and most of us have cut and pasted some version of the above formulation into countless briefs. But we should be looking for opportunities to breathe new life into this by and large unfavorable standard. Here, for example, is one attempt to do just that:

---

[4] Practice note: always federalize a substantial evidence challenge to a criminal conviction or juvenile adjudication by citing *Jackson v. Virginia*.

Appellant does not ask this Court to substitute its judgment for that of the factfinder below. She concedes that the substantial evidence test does not permit such an approach and that this Court must defer to the trial court's express and implied factual findings that are supported by the evidence. (See, e.g., *In re Aarica S.* (2014) 223 Cal.App.4th 1480, 1488.) However, substantial evidence review must amount to more than a rubber stamp of the trier of fact's findings, particularly where, as here, one's personal liberty is at stake.

As the California Supreme Court has explained in articulating the contours of other appellate standards of review rooted in deference: "deference is not abdication." (*People v. McDonald* (1984) 37 Cal.3d 351, 377 [reviewing a trial court's ruling on the admissibility of expert testimony], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [quoting the same statement from *People v. McDonald* when reviewing a trial attorney's performance as part of an ineffective assistance of counsel claim].) *People v. Ledesma* noted: deference "must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance." (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 217.)

Borrowing from the language and reasoning of *People v. Ledesma*, by analogy, the deference inherent in substantial evidence review "must never be used to insulate" a trial court's ruling "from meaningful scrutiny and thereby automatically validate" the challenged ruling. (*Ibid.*) Otherwise, the right to appellate review of a factfinder's contested determination "would be reduced to form without substance." (*Ibid.*) It is for this reason that an appellate court employing the substantial evidence test must not limit its review only to the evidence favorable to the respondent. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) Rather, the reviewing court must examine the "whole record" and "'must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent

> simply to point to 'some' evidence supporting the finding[.]'" (*Id.* at pp. 577-578, emphasis in original.)
>
> In the case at bar, this Court must defer to the trial court's [or jury's] express and implied factual findings supported by substantial evidence. However, a careful review of the admissible evidence in the record reveals that the record lacks substantial evidence in support of the finding that [insert case-specific finding].

The above effort is just one example of how one might recast the substantial evidence standard in a more favorable light. The important take away is this: As long as we do not present a formulation at odds with the established contours of this standard of review – or any other one – there is no rule against supplementing the rote recitation of the standard we see constantly repeated by courts and practitioners alike. Look to employ language that describes the standard accurately, but in a less rigid manner, that reminds the appellate court of its duty to look at all the evidence in a meaningful way.

E. Abuse of Discretion

The abuse of discretion standard of review "is founded on principles of deference to the trial court" (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 772) and has often been described as a standard involving "a very high degree of deference" to the lower court's ruling (*In re J.N.* (2006) 138 Cal.App.4th 450, 459). This standard is considered even more deferential than the substantial evidence standard.

As the name implies, the abuse of discretion standard governs appellate challenges directed at rulings that trial courts are given broad latitude to make. In other words, where trial courts have discretion to act in one or more ways based on the facts before them – not where certain findings mandate specific outcomes – rulings will only be reversed upon a showing that the trial court abused its discretion. (See, e.g., *People v. Seymour* (2015) 239 Cal.App.4th 1418, 1429-1430 [explaining that two provisions of Penal Code section 1203.4 require relief upon certain evidentiary showings, while a third provision merely grants the trial court discretion to grant relief upon a particular showing].)

The most typical – i.e., unfavorable – formulations of the abuse of discretion standard instruct that a trial court's ruling may be reversed as an abuse of

discretion "only when its ruling fall[s] outside the bounds of reason" (*People v. Benavides* (2005) 35 Cal.4th 69, 88, internal quotation marks omitted) or "only when the trial court's ruling is arbitrary, whimsical, or capricious" (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614). Frequently, we also see the following gloss on the abuse of discretion standard: "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

While these descriptions are not inaccurate, they are incomplete. As the California Supreme Court has noted, "[t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712 (*Haraguchi*), internal footnotes omitted.) Now doesn't that sound a lot less daunting? *Haraguchi* is an essential tool for structuring most abuse of discretion arguments.

When broken down in this manner, our task can be much more manageable and offers multiple points of attack before arriving at the need to argue a ruling was arbitrary or capricious. Yes, we are stuck with the deference inherent in the substantial evidence standard for challenging factual findings, but we could not realistically expect anything better when taking on factual findings. And there is good case law explaining that "[a] trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) For questions of law subsumed within an argument subject to the abuse of discretion standard, we can wield the benefits of independent review. And when we do find ourselves arguing a trial court's application of the law to the facts was arbitrary or capricious, we can frame the governing standard in a more friendly manner as follows: "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737, internal quotation marks and citations omitted.)

Here is a decidedly non-exhaustive list of rulings subject to the abuse of discretion standard:

- Sentencing decisions and juvenile dispositional orders
- Evidentiary rulings
- Imposition of probation conditions
- Revocation of probation
- Victim restitution awards
- Denial of a motion to withdraw a plea
- Denial of a *Marsden* motion
- Denial of a severance motion
- Discovery rulings

The most effective way to challenge a ruling subject to the abuse of discretion standard of review is to argue that the trial court incorrectly interpreted the law at the heart of its decision – an aspect of the ruling subject to independent review – or that the factual basis for the ruling is not supported by substantial evidence.

When a court's evidentiary ruling violated the Sixth Amendment, its sentencing ruling violated the Fifth or Sixth Amendment, or its ruling of any kind was legally unauthorized or violated principles of due process, a challenge will rise or fall on the appellate court's independent review of that pure question of law, even if the type of claim at issue is ordinarily subject to review for an abuse of discretion.

Reversals under the abuse of discretion standard are not limited to cases where the court undertakes independent review of a *legal* question. In the following recent cases, the reviewing court reversed where the *factual* basis for the trial court's ruling was unsupported by substantial evidence:

- *People v. Cluff*, *supra*, 87 Cal.App.4th 991 ["the court abused its discretion at the *Romero* hearing, because substantial evidence does not support the critical inference the court relied on in denying the motion to strike" a prior conviction alleged under the Three Strikes Law]

- *In re Khalid B.* (2015) 233 Cal.App.4th 1285 [reversing a delinquent ward's out-of-state placement as an abuse of discretion "because there is no substantial evidence in-state facilities were unavailable or inadequate to meet his needs"]

- *In re Carlos J.* (2018) 22 Cal.App.5th 1 [reversing a delinquent ward's DJJ commitment because "no substantial evidence supports the juvenile court's finding of probable benefit from the commitment"]

These cases reveal there can be significant overlap between appellate challenges subject to the substantial evidence and abuse of discretion standards. The standards are admittedly similar and may not always produce "'practical differences.'" (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 319, quoting *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) However, the differences between the two standards are not merely academic. While both standards require the application of broad deference to the trial court's ruling, "the substantial evidence and abuse of discretion tests define the extent of that deference in different ways." (*People v. Jackson* (1992) 10 Cal.App.4th 13, 19.) To understand why it might be critical in certain circumstances to advocate for substantial evidence review instead of the abuse of discretion standard, it is helpful to consider rulings for which *the defendant* carried the burden of proof.

In *People v. Rasmuson* (2006) 145 Cal.App.4th 1487 (*Rasmuson*), Division Two of the Second District Court of Appeal held that the denial of a conditional release petition seeking outpatient status under the state's sexually violent predator (SVP) civil commitment framework (Welf. & Inst. Code, § 6608) should be reviewed under the substantial evidence standard. It is the SVP who bears the burden of proof at a conditional release hearing. The Court of Appeal observed that "the substantial evidence standard is appropriate . . . in reviewing any disputed factual question, whether it arises at trial or otherwise, and whether the trial court's findings are express or implied." (*Rasmuson*, *supra*, 145 Cal.App.4th at p. 1504.) The liberty interest at stake when a person is subject to an indefinite civil commitment, the Court of Appeal concluded, "warrants closer appellate review than permitted by the abuse of discretion standard." (*Ibid.*)

In so ruling, the Court of Appeal distinguished *People v. Sword* (1994) 29 Cal.App.4th 614 and conditional release petitions filed under Penal Code section 1600 et seq. – for which the abuse of discretion standard governs – on the grounds that the trial court *must* grant an SVP conditional release petition if the statutory criteria are met. (*Rasmuson*, *supra*, 145 Cal.App.4th at p. 1505, quoting Welf. & Inst. Code, § 6608, subd. (d) ["If it is determined that reoffense is unlikely, section 6608, subdivision (d) provides that 'the court *shall* order the committed person placed with an appropriate forensic

conditional release program operated by the state for one year'"].) Whereas, on the other hand, "a person 'may' be placed on outpatient status if certain conditions are met" under section 1603. (*Rasmuson*, *supra*, 145 Cal.App.4th at p. 1505, quoting Pen. Code, § 1603, subd. (a).), "This permissive language," the Court of Appeal reasoned, "gives the trial court discretion to grant the petition if the conditions are met and distinguishes Penal Code section 1603 from the mandatory language of [Welfare and Institutions Code] section 6608." (*Rasmuson*, *supra*, 145 Cal.App.4th at p. 1505.)

Why is this distinction important? When the substantial evidence standard controls, a reviewing court must reverse the denial of a conditional release petition if the record contains substantial evidence that the person would not be dangerous as a result of a mental illness while on outpatient status. On the other hand, were the abuse of discretion standard applicable, even if there was substantial evidence in the record that the person would not be dangerous as a result of a mental illness while on outpatient status, the Court of Appeal could still affirm the denial of the petition for other reasons, so long as those reasons were not arbitrary or capricious.

Rasmuson serves as a good example of how the liberty interests at stake and the serious consequences of an erroneous ruling can factor into obtaining a more favorable standard of review. In addition, the case provides a template for how to read statutes that on the surface may appear similar but are structured in such a way – here the mandatory vs. permissive dichotomy – that can lead to adoption of different standards of review. We should always read statutes with this level of care when evaluating what standard of review applies and – wherever possible – argue for the more favorable standard.[5]

---

[5] For example, current case law incorrectly holds that the denial of an insanity acquittee's conditional release petition filed pursuant to Penal Code section 1026.2 is reviewed under the abuse of discretion standard. (See, e.g., *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1434.) Penal Code section 1026.2, subdivision (e), provides that if the committed person proves certain specific statutory elements, "the court *shall* order the applicant placed with an appropriate forensic conditional release program for one year." (Pen. Code, § 1026.2, subd. (e), emphasis added.) In light of *Rasmuson*, the notion that the abuse of discretion standard applies in this context is incorrect and ripe for an appellate challenge.

F. Some Evidence

The fourth and most deferential standard of review in California is the "some evidence" standard. These materials will not address this standard in detail, as it is the least frequently applied standard in our line of work. We mostly see this standard when an inmate denied parole by the Board of Parole Hearings or the Governor challenges the finding that he or she is unsuitable for parole. (See, e.g., *In re Lawrence* (2008) 44 Cal.4th 1181.)

The "some evidence" standard has very different nonjudicial antecedents than the other standards of review already discussed. It first appeared in the context of the administrative discipline process inside prisons (see, e.g., *Superintendent v. Hill* (1985) 472 U.S. 445, 454-456; *In re Wilson* (1988) 202 Cal.App.3d 661, 667), but soon became established in the field of fixing a release date for inmates seeking parole. (See e.g., *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) The "some evidence" standard is entirely a function of the separation of powers. A court examining the internal operation of a prison or a denial of parole is not reviewing the decision of a lower court, but the decision of the executive branch, and a proper respect for a coequal branch mandates an especially deferential standard of review. (See, e.g., *id.* at pp. 665-667.)

III. Reversal Standards

A. Overview of State and Federal Prejudice Standards

As set forth in the introduction, this section of these materials is directed at how to argue claims for which we cannot establish prejudice. Thus, the most common prejudice standards will only be cursorily summarized here.

Most state law errors are reviewed under the standard announced in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). The *Watson* harmless error standard is derived from Article VI, Section 13 of the California Constitution, which requires courts of review to examine "the entire cause, including the evidence" to form an "opinion" whether the errors resulted in a "miscarriage of justice," or, as the court in *Watson* put it, whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.) According to *Watson*, if the probabilities are such as to leave the reviewing court in "serious doubt as to whether the error has affected the result," then this "necessarily means that the court is of the opinion that it is reasonably

probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id*. at p. 837, internal quotation marks omitted.) More recently the California Supreme Court described the standard as follows: "We have made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, citations and internal quotation marks omitted.)[6]

Federal constitutional errors are reviewed under the less deferential standard announced in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), pursuant to which the judgment must be reversed unless "it appears beyond a reasonable doubt that the asserted error did not contribute to the verdict." (*People v. Thomas* (2013) 218 Cal.App.4th 630, 641.) Theoretically, *Chapman* should result in far more reversals than *Watson*. For a good discussion of just how powerful the *Chapman* standard *should* be – albeit in a concurring and dissenting opinion – Justice Liu's observations in *People v. Jackson* (2014) 58 Cal.4th 724, 793 (conc. & dis. opn. of Liu, J.) are a must-read. And because his commentary is fully rooted in majority decisions of the United States Supreme Court, it offers an excellent blueprint for pushing for an honest application of *Chapman*'s true intent.

A limited number of federal constitutional errors are not subject to the *Chapman* harmless error standard but instead are reviewed for prejudice under a reasonable probability standard akin to the *Watson* standard. The two most common examples would be claims of ineffective assistance of counsel under the Sixth Amendment and claims that the prosecution failed to disclose exculpatory evidence in violation of the Due Process Clause.

For an ineffective assistance of counsel claim, if it can be shown defense counsel's performance was objectively unreasonable, reversal is required only if it can further be demonstrated that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) As with *Watson*, "*Strickland* requires a significant but something-less-than-50 percent likelihood of a more favorable verdict." (*People v. Howard* (1987) 190 Cal.App.3d 41, 48; see also

---

[6] The *Watson* standard has been summarized here in a way that portrays it more favorably than it is often seen in appellate opinions – and briefs. Feel free to use some or all of this formulation.

Richardson v. Superior Court, *supra*, 43 Cal.4th at p. 1050 ["the term 'reasonable probability' has the same meaning that it has in the *Strickland* and *Watson* contexts"].)

Similarly, when the prosecution willfully or inadvertently fails to disclose evidence favorable to the accused in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the judgment must be reversed "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*Kyles v. Whitley* (1995) 514 U.S. 419, 433, internal quotation marks omitted.) The United States Supreme Court has stated that the reasonable probability prejudice standard in the *Brady* context is the same as the standard for prejudice in a claim of ineffective assistance of counsel. (*United States v. Bagley* (1985) 473 U.S. 667, 682, 87 L. Ed. 2d 481.)

B. Automatic Reversal Standards

1. The Federal Constitutional Structural Defect Rule

While most federal constitutional errors are subject to the *Chapman* harmless error standard, a small class of errors are considered "structural defects in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Such errors defy harmless error analysis and are subject to automatic reversal. (*People v. Flood* (1998) 18 Cal.4th 470, 493.) "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." (*Weaver v. Massachusetts* (2017) ___U.S.___ [137 S.Ct. 1899, 1907] (*Weaver*).)

In *Weaver*, the United States Supreme Court offered three "broad rationales" for why an error might be deemed structural and therefore subject to automatic reversal without any harmless error inquiry.

- "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"
- "if the effects of the error are simply too hard to measure"
- "if the error always results in fundamental unfairness"

Weaver further noted that "more than one of these rationales may be part of the explanation for why an error is deemed to be structural" and emphasized that "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." (*Weaver*, *supra*, 137 S.Ct. at p. 1908.)

To date, the United States Supreme Court has declared the following errors amount to structural defects:[7]

- Denial of right to a public trial (*Weaver*, *supra*, 137 S. Ct. at p. 1908; *Waller v. Georgia* (1984) 467 U.S. 39, 49, n. 9)

- Denial of right to self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, n. 8; *Faretta v. California* (1975) 422 U. S. 806, 834)

- Denial of right to counsel of choice (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, n. 4)

- Total deprivation of the right to counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335, 343-345)

- Denial of the right to effective assistance of counsel on account of state interference (*Perry v. Leeke* (1989) 488 U.S. 272, 279-280)

- Denial of the right to effective assistance of counsel by virtue of counsel's total failure to subject the prosecution's case to adversarial testing (*United States v. Cronic* (1984) 466 U.S. 648, 659)

- Denial of co-defendants' rights to conflict-free counsel (*Holloway v. Arkansas* (1978) 435 U.S. 475)

- Denial of the defendant's right to insist that counsel refrain from admitting guilt (*McCoy v. Louisiana* (2018) __U.S.__ [138 S.Ct. 1500, 1511)

---

[7] While this list is intended to be exhaustive, it is likely one or more structural errors have been omitted due to the absence of a United States Supreme Court decision conveniently listing all recognized structural errors in a single place.

- Denial of the right to a jury verdict of guilty beyond a reasonable doubt (*Sullivan v. Louisiana* (1993) 508 U. S. 275, 280-282)[8]

- Denial of the right to trial by jury (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282)

- Exclusion of grand jurors by race (*Vasquez v. Hillery* (1986) 474 U.S. 254)

- Exclusion of petit jurors by race (*Batson v. Kentucky* (1986) 476 U.S. 79, 100, 106,) or gender (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 145-146)[9]

- Denial of the right to an unbiased judge (*Tumey v. Ohio* (1927) 273 U.S. 510, 535)

Appellate counsel should always be thinking about these acknowledged structural defects when looking for reversible errors in the record. But it is equally important to identify whether a potential issue may not yet have been deemed structural but nevertheless fits within one or more of the three rationales set forth in *Weaver* for declaring an error structural. If so, we should be advancing the case for deeming the error structural, even if current case law – particularly if it is rather dated – deems the error subject to harmless error review. One potential candidate – which will be discussed in greater detail in the next section – would be the right to be present at trial. The federal constitutional right to be present arguably implicates two of *Weaver*'s three structural error rationales: it protects an interest other than the risk of an erroneous conviction and is also the type of error whose effects are simply too hard to measure.

---

[8] For a good California case on this issue, see *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1187 [finding jury instruction concerning propensity evidence admitted under Evidence Code section 1108 had the effect of lowering the prosecution's burden of proving guilt beyond a reasonable doubt and deeming the error reversible per se].)

[9] Although there is little doubt automatic reversal applies to race- and gender-based discrimination in jury selection, technically and surprisingly, the Supreme Court "has yet to label those errors structural in express terms." (*Weaver*, *supra*, 137 S. Ct. at p. 1911.)

The California Supreme Court has also recently offered some valuable insight on federal constitutional reversal standards. "Although the question whether a constitutional violation is structural or trial error is generally thought to be categorical, the harmless error status of certain constitutional violations is neither binary nor fixed. Certain errors can shift between being structural or subject to harmless error review depending on the nature and extent of the violation." (*People v. Reese* (2017) 2 Cal.5th 660, 669.) We can take advantage of this reasoning by arguing that a particular error that has not yet been recognized as a structural defect must be so understood under the particular circumstances of a given case, even if it would not be a structural error in all situations. To use the example of the right to be present, even if it may not be structural error for the trial court to proceed in a defendant's absence from relatively minor hearings in a criminal prosecution, when the defendant is unlawfully absent for the entirety of trial or critical portions of the proceedings, the argument in favor of deeming that error a structural defect is much stronger.[10]

Weaver, itself, is an interesting case. It presented the question of which standard of reversal applies when a defendant raises an ineffective assistance of counsel argument on appeal based on trial counsel's failure to object to a structural error. The underlying error at issue in *Weaver* was the improper closure to the public of a criminal jury trial. The Supreme Court in *Weaver* held, as a general rule, that when an otherwise structural error is presented through an ineffective assistance of counsel claim, the prejudice showing required by *Strickland* – a reasonable probability of a more favorable outcome had trial counsel not performed deficiently – must be made.

However, there is language in *Weaver* suggestive of a new type of structural error. As noted above, one of the three rationales for classifying an error as a structural defect *Weaver* offered was "if the error always results in fundamental unfairness." Court closures, *Weaver* explained, do not always result in fundamental unfairness. But *Weaver* left the door open to argue that if an unobjected-to structural defect is the type of error that always results in fundamental unfairness, an ineffective assistance claim directed at

---

[10] The Ninth Circuit has held that, "[i]n the usual case, [violation of the constitutional right to be present] will be susceptible to harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal." (*Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476.)

trial counsel's failure to object to that type of structural error would be subject to automatic reversal. Here is the relevant language from *Weaver*:

> As explained above, not every public-trial violation will in fact lead to a fundamentally unfair trial. [Citation omitted]. Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, [citation omitted], to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

(*Weaver*, *supra*, 137 S.Ct. at p. 1911.)

Weaver actually names several structural defects that the Supreme Court has already held render a trial fundamentally unfair – failure to give a reasonable-doubt instruction, biased judge, exclusion of grand jurors on the basis of race, and exclusion of petit jurors on the basis of race or gender – and then essentially invites arguments that ineffective assistance of counsel claims premised on these violations may be subject to automatic reversal by noting: "The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review." (*Id*. at pp. 1911-1912.)

In sum, when challenging a structural error via an ineffective assistance of counsel claim, if the underlying error is not the type that always renders a trial fundamentally unfair, an appellant can either attempt to make a traditional *Strickland* prejudice showing or attempt to establish that the nature of the error in this particular case rendered the trial fundamentally unfair. But, if the underlying structural error is one that always renders a trial fundamentally unfair, we should be arguing no showing of prejudice is required.

2. The California Constitution's Automatic Reversal Rule

Most appellate practitioners are intimately familiar with the *Watson* standard. What some may find surprising, though, is that the very same state constitutional provision that gives us the reasonable probability prejudice standard also compels automatic reversal for some errors.

In *People v. Blackburn* (2015) 61 Cal.4th 1113, 1132-1133 (*Blackburn*), the California Supreme Court recently addressed the rare instances when a trial court ruling amounts to a "'miscarriage of justice' within the meaning of California Constitution, article VI, section 13 and requires reversal without inquiry into the strength of the evidence . . . ." The Supreme Court in *Blackburn* "granted review to decide whether a trial court must advise the defendant personally of his or her right to a jury trial and whether the trial court must obtain a personal waiver of that right from the defendant before holding a bench trial to extend the defendant's commitment as a mentally disordered offender." (*Blackburn*, *supra*, 61 Cal.4th at p. 1116.) After answering both questions affirmatively, the Court turned to the appropriate remedy.

Blackburn first acknowledged the familiar state harmless error standard pursuant to which "a defendant who has established state law error must typically demonstrate that 'it is reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'" (*Id.* at p. 1132, quoting *Watson*, *supra*, 46 Cal.2d at p. 836.) The reasonable probability standard, however, does not apply to all state law errors. *Blackburn* explained that "'under the California constitutional harmless-error provision some errors . . . are not susceptible to the "ordinary" or "generally applicable" harmless-error analysis – i.e., the *Watson* "reasonably probable" standard – and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case.'" (*Blackburn*, *supra*, 61 Cal.4th at p. 1132, quoting *People v. Lightsey* (2012) 54 Cal.4th 668, 699 (*Lightsey*).) The automatic reversal rule, *Blackburn* explained, "is consistent with the language of California Constitution, article VI, section 13, whose phrase 'miscarriage of justice' encompasses not only errors affecting the outcome of the case, but also certain procedural errors that may or may not have affected the outcome." (*Ibid.*)

The Supreme Court then proceeded to analyze the significance of failing to obtain a valid jury trial waiver. (*Id*. at p. 1134.) In finding this type of error "defies ordinary harmless error analysis," *Blackburn* reasoned that "[t]o speculate about whether a defendant would have chosen a jury trial if he or she had been in a position to make a personal choice would pose insurmountable difficulties, as would an inquiry into what effect, if any, that choice would have had on the outcome of the trial." (*Ibid*.) Thus, even though there was no suggestion in *Blackburn* that the defendant did not receive a fair trial, the Supreme Court nevertheless reversed the judgment without consideration of the quantity and quality of the evidence offered against the defendant.

Blackburn also discussed an earlier state Supreme Court case in which a state law error mandated automatic reversal as a miscarriage of justice under the California Constitution.

> In *Lightsey*, we held that a trial court's failure to appoint counsel to represent a defendant during a mental competency proceeding, in violation of [Penal Code] section 1368, was automatically reversible because it was '"analogous to"' the '"total deprivation of the right to counsel at trial.' ([*Arizona v. Fulminante*, *supra*, 499 U.S. 279 at p. 309.])" (*Lightsey*, *supra*, 54 Cal.4th at p. 699.) We observed that the defendant "was completely deprived of the assistance of counsel at a critical stage of the trial proceedings in violation of [Penal Code] section 1368. As with a pervasive Sixth Amendment violation, the statutory violation here cannot be likened to 'trial error' . . . . We cannot simply excise some item of evidence in order to 'make an intelligent judgment' [citation] about whether the competency determination might have been affected by the absence of counsel to represent defendant. . . . Attempting to assess the effect of the absence of counsel on the trial court's finding of competence is, in truth, no different than attempting to assess the effect on a jury's final verdict of the absence of counsel during a trial on substantive charges: there is no reasoned manner in which to do so because the lack of true adversarial testing denied defendant the basic procedure by which his competence should have been determined." (*Id*. at p. 701.) We thus concluded that the denial of the defendant's right to counsel under [Penal Code] section 1368 automatically required reversal. (*Lightsey*, at pp. 699, 702.)

(*Blackburn*, *supra*, 61 Cal.4th at p. 1133.) *Lightsey* analyzed the denial of the right to counsel under the California Constitution because there was no federal constitutional right to counsel for the proceedings at issue.

In light of *Blackburn* and *Lightsey*, when no federal constitutional right is implicated – or when binding authority holds that the federal constitutional right in question is subject to harmless error review – appellate counsel should remember the California Constitution may provide an alternative avenue for arguing automatic reversal is required. Any time the trial court was obligated to hold a hearing and issued an adverse judgment after failing to do so, it is worth arguing that impermissibly issuing such a judgment without holding a hearing "defies ordinary harmless error analysis" because "the lack of true adversarial testing denied defendant the basic procedure by which [the question at issue] should have been determined." (*Blackburn*, *supra*, 61 Cal.4th at pp. 1133-1134; *Lightsey*, *supra*, 54 Cal.4th at p. 701.)

As an example of how to advance a novel claim of automatic reversal under the California Constitution, we can return to the right to be present at critical stages of a criminal prosecution.[11] Assume, for the sake of this hypothetical argument, that the prosecution offered only one witness against the defendant, who was unlawfully absent for that witness' testimony, and that the defense rested without calling any witnesses. Further assume that the prosecution's witness was credible and established all of the elements of the charged offense, thus making a prejudice argument difficult to articulate.

Here is a sample argument in favor of automatic reversal under the California Constitution:

> The Sixth Amendment right to be present has long been regarded "as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself." (*Diaz v. United States* (1912) 223 U.S. 442, 455.) "In addition, a defendant has the right to be personally present at critical proceedings, pursuant to the state Constitution (Cal. Const., art. I, § 15; [citation omitted]), as well as pursuant to

[11] As noted above, a challenge to the denial of the right to be present is ripe for an argument that reversal should be automatic under the United States Constitution as well, making use of the *Weaver* rationales and favorable Ninth Circuit authority.

statute ([Pen. Code,]§ 977, 1043)." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) The state and federal constitutional rights to be present are generally coextensive. (*People v. Cunningham* (2015) 61 Cal.4th 609, 633.) While Ninth Circuit case law suggests a violation of the constitutional right to be present can, under certain circumstances, amount to structural error under the federal constitution (see *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476), California case law has found this type of error subject to *Chapman* harmless error review. (See, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 532.)

The United States Supreme Court has noted that the right to be present at critical stages of a criminal prosecution safeguards the Sixth Amendment right to confront accusers, and "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-108.) As Maryland's highest court has observed: "The right to be present at trial implicates a panoply of rights and vindicates two primary interests: enabling the defendant to assist in the presentation of a defense, and ensuring the appearance of fairness in the execution of justice." (*Pinkney v. State* (1998) 350 Md. 201, 209.) The trial court's erroneous decision to proceed in the defendant's absence here struck at the core of both of these concerns, severely hampering her ability to participate in her own defense and calling into question the appearance of fairness of the proceedings.

The error in this case did not involve a de minimis absence. The trial court's error denied the defendant her right to be present for the entirety of the testimony of the sole witness offered against her, which rendered it impossible for the defendant to assist her attorney with cross-examination in a meaningful way and to make an informed decision whether to take the stand on her own behalf. When a defendant is absent during the taking of testimony against her, a reviewing court cannot know what she would have said or done had she been present. An appellate court cannot determine how the demeanor and testimony of a witness might have changed had the defendant been present and able to participate fully in the process. Such an error, which, as demonstrated above, violated the defendant's state and federal

> constitutional rights to due process, requires automatic reversal under the California Constitution.
>
> [Insert discussion of *Blackburn* and *Lightsey* from above]
>
> As in *Lightsey*, the nature of the error here defies harmless error analysis because one cannot simply excise some item of evidence and make an intelligent judgment about whether the jury's verdict might have been affected by the defendant's absence. (See *Lightsey*, *supra*, 54 Cal.4th at p. 701; see also *Blackburn*, *supra*, 61 Cal.4th at p. 1133.) The defendant's absence at trial calls into question the fairness of the proceedings and, just as critically, the appearance of fairness. The latter concern, an institutional one that implicates "public confidence in the courts as instruments of justice" (*Pinkney*, *supra*, 350 Md. at p. 209), simply does not lend itself to harmless error review.

Here is a partial list of errors recognized as being subject to automatic reversal under the California Constitution:

- Failure to obtain a personal waiver of the right to trial by jury (*Blackburn*, *supra*, 61 Cal.4th at pp. 1132-1137)

- Denial of the right to trial by jury (*People v. Cahill* (1993) 5 Cal.4th 478, 491)

- Denial of statutory right to counsel at competency proceedings (*Lightsey*, *supra*, 54 Cal.4th at p. 699)

- Denial of co-defendants' rights to separate counsel (*People v. Douglas* (1964) 61 Cal.2d 430, 436-439)

- Denial of right to conflict-free counsel (*People v. Mroczko* (1983) 35 Cal.3d 86, 104-105)

- Denial of the right to a jury drawn from a representative cross-section of the community (*People v. Wheeler* (1978) 22 Cal.3d 258, 283)

C. Errors Not Considered Structural Defects but Subject to Reversal with Little or No Prejudice Showing

Some other types of errors, though not subject to automatic reversal under either of the previously discussed constitutional standards, are not likely to need much, if any, showing of prejudice to obtain a remand, if not an outright reversal.

1. Failure to Understand Scope of Sentencing Discretion

It is often apparent from the record that the trial court did not understand or was unaware of the scope of its discretion at a sentencing or juvenile dispositional hearing. In those instances, reversal is not automatic but is available upon a showing less rigorous than most prejudice standards.

"[W]here the record *affirmatively* discloses that the trial court *misunderstood* the scope of its discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion[.]" (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944, emphasis in original.)

When a defendant is entitled to the retroactive application of an ameliorative sentencing amendment newly vesting the trial court with discretion, a remand is required if the record "contains no clear indication" the trial court would not have exercised its discretion to impose a lower sentence. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427.)

When a juvenile court fails to declare an offense a misdemeanor or a felony, remand for an express declaration is required if "[n]othing in the record establishes that the juvenile court was aware of its discretion to sentence the offense as a misdemeanor rather than a felony." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1210.)

Remember as well that if the trial court's misunderstanding of its discretion turns on a pure question of law or statutory interpretation, although the abuse of discretion standard may ultimately govern the lawfulness of the court's ruling, the inquiry as to the correct scope of the court's discretion should be reviewed de novo. (See, e.g., *People v. Lewis* (2004) 120 Cal.App.4th 837 [where the trial court mistakenly believed the defendant's conduct came within the scope of a probation ineligibility statute].)

2. Acts in Excess of the Trial Court's Jurisdiction

There are two significant benefits to challenging acts in excess of the trial court's jurisdiction. First, they can be raised in an appellate court even in the absence of an objection. In some instances, the act in excess of jurisdiction need not have even occurred in the making of the judgment currently on appeal. An appeal can sometimes reach back to an act made in excess of the trial court's jurisdiction before the ruling now on review. Second, one need not establish prejudice to get an act in excess of jurisdiction set aside.

"A sentence is unauthorized when it could not lawfully be imposed under any circumstances in the particular case." (*People v. Price* (2004) 120 Cal.App.4th 224, 243, citing *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516-1517.) When a court pronounces an unauthorized sentence, "the court lacks 'jurisdiction' and the sentence, or at least its unlawful part, is 'void.'" (*Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818.) Such an illegal sentence "may be corrected whenever the error comes to the attention of the trial court or any reviewing court." (*People v. Price*, *supra*, 120 Cal.App.4th at p. 244.)[12] Not only does the defendant not need to show prejudice on appeal when raising an unauthorized sentence claim, but "the 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Common acts in excess of jurisdiction or unauthorized sentences include:

- Failure to stay execution of a sentence under Penal Code section 654 (*People v. Hester* (2000) 22 Cal.4th 290, 294)

- Imposing a sentence not provided for by statute such as a term of years not included in the relevant punishment statute or a state prison sentence when the punishment statute specifies a county jail commitment (see, e.g., *People v. Pitmon* (1985) 170 Cal.App.3d 38, 44, fn. 2)

---

[12] Keep in mind that an unauthorized sentence can become a major adverse consequences as well, as an appellate court's discovery of an unauthorized sentence in the defendant's favor may lead to a remand for a resentencing at which the defendant's sentence can increase. (See, e.g., *People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6.)

- Adjudicating a probation violation, extending a term of probation, or imposing victim restitution as a condition of probation after the original term of probation had already expired (*Hilton v. Superior Court* (2014) 239 Cal.App.4th 766.)

- Incorrect calculation of presentence credits (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

- Probation department's failure to comply with the notice requirements of Penal Code section 1203.2a (*People v. Murray* (2007) 155 Cal.App.4th 149)

- Committing a delinquent ward directly to county jail (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 674.)

- Imposing probation conditions after committing a delinquent ward to DJJ (*In re Allen N.* (2000) 84 Cal.App.4th 513)

- Imposing a no-contact order after sentencing a criminal defendant to state prison in the absence of specific statutory authorization (*People v. Robertson* (2012) 208 Cal.App.4th 965, 995-996.)

3. Reversal of Guilty or No Contest Pleas

If a defendant proceeds to trial following the erroneous denial of a Fourth Amendment suppression motion, the judgment will only be reversed if the admission of evidence that should have been excluded was not harmless under *Chapman*. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 165.)

However, to obtain reversal of the judgment following the erroneous denial of a pre-plea Fourth Amendment suppression motion, prejudice need not be demonstrated. "Because it is impossible to assess the impact of an erroneous denial of a motion to suppress evidence on a defendant's decision to plead guilty [or no contest], the harmless error rule is inapplicable in appeals taken pursuant to Penal Code section 1538.5, subdivision (m)." (*People v. Ruggles* (1985) 39 Cal.3d 1, 13.) Therefore, the proper remedy is to reverse the judgment and remand the matter to the trial court with directions to allow the defendant the opportunity to withdraw his or her plea. (See *ibid*.)

It is not uncommon for the terms of a plea bargain or for the trial court on its own to incorrectly advise a defendant that he or she would be allowed to appeal the denial of a pre-plea ruling after entering a guilty or no contest plea. Generally, other than the pre-plea denial of a Fourth Amendment suppression motion, an appeal cannot extend to other pre-plea evidentiary rulings, even if the trial court issues a certificate of probable cause. This mistaken assurance is perhaps most often given with respect to the denial of pre-plea motions to suppress a defendant's statement under *Miranda* or as involuntarily coerced. When this happens, on appeal, the defendant is entitled to have his or her plea set aside without a showing of prejudice. As the California Supreme Court has held: "Defendants in the instant case, accordingly, cannot raise on this appeal claims that their extrajudicial statements were involuntarily induced. They may, however, attack on this appeal the validity of their pleas on the ground that because it was beyond the power of the trial court to bargain with defendants to preserve for appellate purposes the issues of involuntariness, they were improperly induced to enter such pleas. ([Citation].) We conclude that the judgments must be reversed because defendants' pleas were induced by misrepresentations of a fundamental nature." (*People v. De Vaughn* (1977) 18 Cal.3d 889, 896.)