

**FIRST DISTRICT APPELLATE PROJECT
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**OPTIONS WHEN PART OF THE
RECORD CANNOT BE PREPARED**

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**Due Process Challenges Available When Reporter's Transcripts, Exhibits
and Other Record Items are Missing or Substantially Delayed**

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FIRST DISTRICT APPELLATE PROJECT
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SAMPLE MOTION TO VACATE JUDGMENT

Due Process Challenges Available When Reporter's Transcripts, Exhibits and Other Record Items are Missing or Substantially Delayed

INTRODUCTION

When one or more reporter's transcripts of trial proceedings cannot be prepared, or when an exhibit or document relevant to a claim on appeal cannot be located, a defendant can seek relief from his or her conviction either by way of moving to vacate the judgment or by raising a claim in the opening brief on appeal that the record is not sufficient to permit the adequate and effective appellate review required by the Fourteenth Amendment. Frequently, the fact that a normal record item is missing is brought to light relatively early in the appellate process through, for example, a return certificate by a superior court reporter or clerk stating that an exhibit is missing or that a transcript cannot be prepared. In those circumstances, appellate counsel can act with alacrity in pursuing efforts to reconstruct the record and moving to vacate the conviction or filing a brief claiming denial of meaningful appellate review. Occasionally excessive delay may occur in the appellate process due to protracted efforts by the superior court, Court of Appeal, or both to complete the record on appeal. In that event, a defendant may raise a claim in either state or federal court, or both, that the appellate delay itself has violated his or her federal due process rights.

I. DENIAL OF THE RIGHT TO EFFECTIVE AND ADEQUATE APPELLATE REVIEW.

A. General Principles of Law.

When a state has afforded criminal defendants a right to appeal their convictions, federal due process guarantees that defendants receive a record on appeal sufficient to permit adequate and effective appellate review. (See, e.g., *Draper v. Washington* (1963) 372 U.S. 487, 496-499; *Griffin v. Illinois* (1956) 351 U.S. 12, 20; *People v. Howard* (1992) 1 Cal.4th 1132, 1166). The Equal Protection Clause also requires states to provide indigent criminal defendants with a *free* record on appeal that is sufficient to provide such adequate and effective review. (*Griffin v. Illinois, supra*, 351 U.S. at 20.)

California statutory law likewise protects a defendant's right to sufficient records of the oral proceedings at a trial.¹ Penal Code section 1181, subdivision (9) provides:

When the right to a phonographic report has not been waived, and when it is not possible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule because of the death or disability of a reporter who participated as a stenographic reporter at the trial or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge, thereof, or the reviewing court shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding.

Reporter's transcripts are not the only missing record items that have necessitated reversal of a criminal convictions. The federal constitutional guarantees to adequate and

¹ Juveniles are also statutorily entitled to a complete record on appeal and are entitled to a record sufficient to permit meaningful appellate review. (Welf. & Inst. Code, § 800, subd. (e); *In re Steven B.* (1979) 25 Cal.3d 1, 5-7.)

effective appellate review may be denied when a crucial trial exhibit or document considered by the court below in ruling on a motion is lost and unrecoverable. (See, e.g., *People v. Galland* (December 28, 2006) ___ Cal.App.4th ___ [07 C.D.O.S. 24, 2006 WL 3804623]; *In re Roderick S.* (1981) 125 Cal.App.3d 48.)

There are two major hurdles to overcome in demonstrating that the loss of a record item necessitates reversal. First, if the record can be reconstructed through methods other than obtaining reporter's transcripts, such as "settled statement" procedures (see Cal. Rules of Court, rules 8.137, 8.155(c) & 8.346(a)), the defendant must employ such methods to obtain appellate review. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 66; *People v. Bradford* (1997) 15 Cal.4th 1229, 1382.) This rule applies equally to trial exhibits and other documents. (*People v. Coley* (1997) 52 Cal.App.4th 964, 969.)

Second, the loss, destruction, or absence of a portion of the reporter's transcripts or exhibits does not per se require a new trial. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 663-664; *People v. Bills* (1995) 38 Cal.App.4th 953, 959.) The burden is on the appellant to show that the omissions are both substantial and "consequential." (*People v. Chessman* (1950) 35 Cal. 2d 455, 462; *People v. Howard, supra*, 1 Cal.4th at 1165) and that the omissions prevent meaningful appellate review. (*People v. Pinholster* (1992) 1 Cal.4th 865, 921.) An appellate record is inadequate "'only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1170, quoting *People v. Alvarez* (1996) 14 Cal.4th 155,

196, fn. 8.) The record must be adequate enough “to enable the court to pass upon the questions sought to be raised.” (*In re Steven B.* (1979) 25 Cal.3d 1, 7, quoting *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973.) The defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review and to show prejudice. (*People v. Samayoa* (1997) 15 Cal.4th 795, 820.)

B. Steps to Prove Denial of Adequate Appellate Review.

1. Demonstrating That the Record Cannot Be Reconstructed with Other Methods.
 - a. Settling the record where reporter’s transcripts are missing: the rules and basic procedures.

The Rules of Court include multiple provisions, which appear to be somewhat overlapping, relating to settled statements and settlement of disputes over omissions in the record. (Cal. Rules of Court, rules 8.137, 8.155(c), & 8.346(a).)² The California

² Rule 8.346(a) (formerly rule 32.3), entitled “settled statement,” provides:

(a) Application

As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed.

(b) Order and proposed statement

The judge must rule on the application within five days after it is filed. If the judge grants the application, the parties must comply with the relevant provisions of rule 8.137, but the applicant must deliver a proposed statement to the judge for settlement within 30 days after it is ordered, unless the reviewing court extends the time.

(c) Serving and filing the settled statement

The applicant must prepare, serve, and file in superior court an original and three copies of the settled statement.

Supreme Court applied the predecessors to Rules 8.137 and 8.346 (former Rules 7 and 36)³ to a capital case in *Marks v. Superior Court* (2002) 27 Cal.4th 176, and Marks provides a general idea of how the procedure should be conducted in Superior court. Assuming that a stipulated settled statement cannot be prepared, there are eight steps of the procedure set forth in Rule 8.137 and summarized in Marks. (*Id.* at 193.) The eight-step procedure appears both complicated and involved. However, if the prosecutor, defense counsel and the court agree that it is not possible to prepare a settled statement, all that may be required is either preparation of a statement that the record cannot be settled or a reported hearing to establish that fact. Even when a settled statement is ultimately prepared, the process may not involve all eight steps in strict order. As Marks observed: “the scant decisional authority construing settlement procedures suggests courts generally will not elevate form over substance if the statement as settled fully and accurately reflects the omitted oral proceedings.” (*Id.* at 195.)

Rule 8.155(c) (formerly Rule 12(c)) provides:

(c) Corrections

- (1) On motion of a party, on stipulation, or on its own motion, the reviewing court may order the correction or certification of any part of the record.
- (2) The reviewing court may order the superior court to settle disputes about omissions or errors in the record.

Additionally, Rule 8.137 (formerly Rule 7) provides for a detailed procedure for preparing a settled statement.

³ The requirement that an application for permission to file a settled statement be “verified,” to which Marks refers, was formerly contained in Rule 36 but has been deleted from the successor rules, i.e., former rule 32.3 and current rule 8.346.

Rules 8.137, 8.155(c), & 8.346(a) together provide that the process begins when a defendant becomes aware that a record item is missing or that a reporter's transcript of oral proceedings cannot be transcribed, at which time the defendant may submit an application for permission to prepare a settled statement in the superior court. As a practical matter, or because of the individual circumstances of a particular case, appellate counsel may wish to first request either that the Court of Appeal order the Superior court to hold settlement proceedings (see rule 8.155(c)) or request an extension of time to file the opening brief to a specified period following the filing of a settled statement or statement that the record cannot be settled. This procedure may be the best option when the missing item is not part of the normal record on appeal but is necessary to the appeal and has been the subject of an augmentation order by the Court of Appeal. However, directly applying to the Court of Appeal itself to settle the record, as opposed to moving for an order directing the Superior court to settle the record, is not a proper procedure for attempting to reconstruct a missing record item. (*People v. Castro* (1982) 138 Cal.App.3d 30 [denying appellant's "motion to settle the record on appeal" as presented to the "wrong court," but granting an extension of time of 30 days to file the opening brief following either the filing of a settled statement or augmentation of the record].)

An application for permission to prepare a settled statement must explain why oral proceedings cannot be transcribed. (Rules 8.346(a).) It is appellate counsel's responsibility to work with trial counsel and the prosecutor, if possible, to attempt to

prepare a draft or stipulated settled statement for submission to the trial court, or to ascertain whether those parties are unable to assist in the preparation of settled statement due to loss of memory or for some other reason. (*People v. Everett* (1990) 224 Cal.App.3d 932, 937 & fn. 4 [defendant claimed the record was insufficient to provide adequate appellate review, but it appeared a settled statement could have been prepared, appellate counsel made no efforts to prepare one after the trial court refused to draft one, and the Court of Appeal held that appellate counsel failed to pursue a settled statement to “any appreciable degree”].) A trial court must not undertake to draft such a statement itself, but it may direct appellate counsel to do so. (*Marks v. Superior Court, supra*, 27 Cal.4th at 197.) While appellate counsel must establish that he or she has endeavored to prepare a settled statement, a trial court may also settle a record over the objections or contrary to the assertions of appellate or defense counsel: “Once settlement is ordered, the court has broad discretion to accept or reject counsel’s representations in accordance with its assessment of their credibility. [Citations.] However, it cannot refuse to make that assessment. It may decline to settle a statement only if, after resort to all available aids, including the judge’s own memory and those of the participants, it is affirmatively convinced of its inability to do so. [Citation.]” (*Id.* at 196, quoting *People v. Gzikowski* (1982) 32 Cal.3d 580, 585, fn. 2.)

If, due to the passage of time or other reasons, the parties and the trial court declare that they cannot prepare a settled statement at a hearing on the issue, or if there

are any objections by defense counsel or appellate counsel to a settled statement (see part 4, *infra*), the appellant can then proceed to move to vacate the judgment pursuant to Penal Code section 1181, subdivision (9), or to claim on appeal that the record is inadequate to provide meaningful appellate review.

b. Reconstruction of exhibits.

Although there is no particular rule addressing “reconstruction of exhibits,” decisional authority establishes that an appellant may move for “reconstruction of exhibits,” a settled statement regarding exhibits missing from superior court or, in the alternative, for a settled statement regarding exhibits that cannot be reconstructed. (*People v. Coley, supra*, 52 Cal.App.4th at 972-973 [“An appellant has the burden to perfect the appeal and to show error and resulting prejudice. To carry this burden, the defendant must move for reconstruction of lost exhibits”]; see also *People v. Osband, supra*, 13 Cal.4th 622 [in capital case, California Supreme Court ordered superior court to reconstruct numerous missing exhibits and to prepare and certify a settled statement regarding any exhibits that could not be reconstructed].) The procedures for reconstruction of exhibits are essentially the same as that for preparing a settled statement. (*Coley, supra*, at 969.)

c. Are there any cases in which settlement proceedings or reconstruction efforts are not necessary?

At first glance, the notion that a reporter’s transcript of even an entire day of trial proceedings, much less an entire trial, could be reconstructed based on the memory or

notes of the trial participants can seem counterintuitive. However, as a general matter, the requirement that the appellant attempt to reconstruct the record is mandatory, and it is always safe to assume that a reviewing court could find that the failure to attempt to reconstruct the record nullifies a due process claim that the record is inadequate. Additionally, settlement proceedings in which the court and counsel affirm that they cannot reconstruct reporter's transcripts or an important exhibit allow the appellant to make a final showing that it is impossible to obtain a reliable substitute for the normal record item or items.

People v. Scott (1972) 23 Cal.App.3d 80 [reporter's transcript of the day in which all evidence was presented and case was argued was not available, but a stipulated settled statement was prepared and it was sufficient to permit adequate appellate review].

Everett, supra, 224 Cal.App.3d at 936-937 [where all reporter's transcripts of a rape trial, except the opening statements and the victim's testimony, were destroyed due to appellant's failure to appear for sentencing, the loss was due to the defendant's own actions and the defendant failed to show that a settled statement adequate for appellate review could not be prepared]

But see *People v. Serrato* (1965) 238 Cal.App.2d 112 [all of the reporter's transcripts of a jury trial were missing and Court of Appeal reversed conviction without appearing to require any effort at record settlement or any record evidence that defendant's counsel could not remember the trial proceedings].

Coley, supra, 52 Cal.App.4th at 973 [disagreeing with long-settled case, Roderick S. (1981) 125 Cal.App.3d 48 on the grounds that Roderick S. had not considered whether a crucial exhibit could be reconstructed or a settled statement obtained; in Roderick S. the defendant had been found guilty of possession of a switch-blade knife over two inches long and possession of a concealed weapon, the knife admitted into evidence had been lost, testimony about the manner in which the blade could be opened did not conform to the statutory language, and the Court of Appeal reversed, finding that the record was inadequate to permit review of the defendant's insufficiency of the evidence claim].

2. Challenging Reconstructed Exhibits and Settled Statements.

Some cases involve procedures in which superior courts have authenticated

documents or issued settled statements that reviewing courts have rejected. An appellant may challenge reconstructed record items and settled statements on the grounds, e.g., that the superior court's findings were not supported by substantial evidence or that there remains good cause to doubt the authenticity of the reconstructed item.

People v. Osband, supra, 13 Cal.4th at 662-663 [in light of trial testimony describing a missing exhibit in a manner inconsistent with exhibit as "reconstructed" by the trial court, the superior court's finding that it had been adequately reconstructed was not supported by substantial evidence and would be rejected].

People v. Galland (December 28, 2006) ___ Cal.App.4th ___ [07 C.D.O.S. 24, 2006 WL 3804623] [where, because magistrate and trial court had repeatedly released the original confidential affidavit submitted in support of a request for a search warrant to law enforcement, the original was lost, and the trial court purported to authenticate an unsigned version to which the court added one page, there was "good cause to doubt the authenticity of the confidential" document and "[t]he documents included in the appellate record are too far attenuated from the magistrate's determination of probable cause to serve as a legitimate basis for any decision on the warrant's validity"].

People v. Apalatequi (1978) 82 Cal.App.3d 970 [where trial court rejected defendant's proposed settled statement regarding closing arguments that could not be transcribed and accepted and engrossed the prosecutor's proposed settled statement, but trial court also stated that it could not remember the arguments of counsel, the engrossed settled statement could not provide adequate appellate review of defendant's prosecutorial misconduct claim].)

3. Proving Prejudice.

In practice, the standard of prejudice, which requires that a complained-of-deficiency in the record impair the defendant's ability to prosecute the appeal (see, e.g., *People v. Young, supra*, 34 Cal.4th at 1170), necessitates: (1) that there exist evidence of at least one potentially reversible appellate claim; and (2) that one or more such claims cannot be adjudicated on appeal as the result of the absence of a portion of the record. As *People v. Moore* (1988) 201 Cal.App.3d 51, 58, observed, cases in which prejudice has

been found included “at least a *prima facie* showing that errors were committed during the unrecorded [trial] period sufficient to overcome the presumption of regularity in a trial.” The portions of the record that are available may demonstrate the existence of one or more potentially viable appellate claims which cannot be reviewed on appeal. For example, in the past, minute orders in the clerk’s transcript, written motions, declarations submitted by trial counsel, and/or statements of trial counsel at a settled statement hearing have established the existence of such issues. (See, e.g., *Apalatequi, supra*, 82 Cal.App.3d at 972-973.)

In re Steven B., supra, 25 Cal.3d 1 [where stenographic notes of second day of jurisdictional hearing was missing, in a case in which the defense had moved for “acquittal” on the grounds of insufficient evidence, California Supreme Court reversed].

People v. Serrato, supra, 238 Cal.App.2d 112 [Court of Appeal details potential appellate claims, including claimed ineffective assistance of counsel, in deciding that lack of any reporter’s transcript of trial was prejudicial].

People v. Jordan (December 28, 2006) 07 C.D.O.S. 55 [questionnaires of prospective jurors were not retained by the clerk of the superior court, but were unnecessary to the resolution of defendant’s *Batson/Wheeler* claim].⁴

Apalatequi, supra, 82 Cal.App.3d 970 [lack of reporter’s transcript of prosecutor’s closing argument was prejudicial because appellant asserted a claim of prosecutorial misconduct]

People v. Jones (1981) 125 Cal.App.3d 298 [Appears to involve an exception to the general rule of prejudice, as the Court of Appeal did not explicitly address what issues might have been raised on appeal, yet reversed the defendant’s conviction due to the destruction of all trial transcripts].

In re Ian J. (1994) 22 Cal.App.4th 833 [Where jurisdictional hearing in which minor admitted petition allegations was never reported, but dispositional hearing was, the

⁴ In *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, the Ninth Circuit Court of Appeals held that, by denying the defendant’s requests for a full transcript of the voir dire, a California Court of Appeal violated appellant’s federal due process right to a free transcript sufficient for appellate review of his Batson/Wheeler claim.

minute order in the clerk's transcript was sufficient for full appellate review. Even if the court speculated that the judge had committed an error during the jurisdictional hearing, it would not have been prejudicial, because the available record on appeal showed that any error was waived].

People v. Moore, supra, 201 Cal.App.3d at 58 [Finding lack of prejudice where the only reporter's transcripts missing were portions of the defense closing argument and there was no indication that any "malfeasance" occurred during the missing period]

People v. Martinez (2005) 132 Cal.App.4th 233 [in a case similar to *People v. Galland, supra*, (December 28, 2006) __ Cal.App.4th __ [07 C.D.O.S. 24, 2006 WL 3804623], the Fourth District did *not* reverse the defendant's conviction although the magistrate failed to retain the original affidavit in support of a search warrant and let law enforcement keep it, and the superior court again returned the affidavit to law enforcement after its *in camera* review conducted to rule on the defendant's motion to quash. The Court of Appeal found no reason to doubt the authenticity of the confidential affidavit, which, upon order of the Court of Appeal, the superior court retrieved from law enforcement and authenticated as the document it had reviewed.]

People v. Curry (1985) 165 Cal.App.3d 349 [Only the last page of a search warrant affidavit was missing, and the magistrate stated that this last page contained only a standard recital of concluding remarks. As a result, the last page was not necessary to provide adequate appellate review of the denial of the defendant's motion to quash the warrant].

II. EXCESSIVE DELAY IN THE APPELLATE PROCESS

A. General Standards.

If excessive delay in the appellate process occurs due to lengthy efforts by the courts to complete the record on appeal, a defendant may raise a claim that the delay has violated his federal due process rights. Such claims may be raised in a state or federal habeas corpus petition⁵ or in the appellate briefing when the record is finally either complete or when there remain claims that an incomplete record is inadequate to permit

⁵ Some federal circuit courts have excused the requirement that a state habeas petitioner exhaust state remedies in the context of claims of excessive appellate delay. (*Coe v. Thurman, supra*, 922 F.2d at 530 [collecting cases].)

appellate review. (See, e.g., *Coe v. Thurman* (1990) 922 F.2d 528, 530-532; *People v. Horton* (1995) 11 Cal.4th 1068, 1141.) Under Ninth Circuit precedent, if federal habeas relief is obtained, it is likely to be in the form of an order that the state court of appeal review the appeal within a specified time. (See, e.g., *Coe v. Thurman, supra*, 922 F.2d at 530-532, citing *Simmons v. Reynolds* (2nd Cir. 1990) 898 F.2d 865, 869.) The remedy of entirely vacating a defendant's conviction and ordering his release is only appropriate when there has been "a sufficient showing that the delay adversely affected a petitioner's chances to obtain a reversal or vacation of his conviction or his sentence." (*Blair v. Woodford* (2003) 319 F.3d 1087, 1088.) Finally, even if a federal court finds a due process violation arising out of excessive appellate delay, it may decline to issue *any* relief if, by the time the habeas petition is adjudicated the appeal is over and the conviction was affirmed. (*Simmons v. Reynolds, supra*, 898 F.2d at 869.)

The majority of the federal circuit courts of appeal, including the Ninth Circuit, have adopted the *Barker v. Wingo* (1972) 407 U.S. 514, speedy trial test when assessing claims that appellate delay, whether occasioned by the inadequacy or incompleteness of the record or some other obstacle in the appellate process, violates federal due process. (See, e.g., *United States v. Smith* (6th Cir. 1996) 94 F.3d 204, 206-207 [collecting cases from second, third, fourth, fifth, ninth, and tenth circuits]; *United States v. Hawkins* (8th Cir. 1996) 78 F.3d 348; but see *United States v. DeLeon* (1st Cir. 2006) 444 F.3d 41, 58 [declining to adopt prejudice standard enunciated in *Barker* "whole cloth" in the appellate

delay context and stating “[i]n our view, the due process issues caused by delay on appeal are more limited than those resulting from delay in the trial court”].) The *Barker* test is a four-part balancing test involving assessment of the following factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of his right, and (4) the prejudice to the defendant. (*Coe v. Thurman, supra*, 922 F.2d at 531.)

While some circuits have also held that *Doggett v. United States* (1992) 505 U.S. 647, which held that there is a presumption of prejudice from delay in bringing a defendant to trial, also should be applied in the appellate context to create a presumption that excessive delay in the appellate process is prejudicial and would impair the defense on retrial (*Smith, supra*, 94 F.3d at 212; *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1556), the Ninth Circuit Court of Appeals has explicitly rejected the application of *Doggett* to claims of due process violations arising out of appellate delay. (*United States v. Mohawk* (1994) 20 F.3d 1480, 1487.)

Citing *Coe v. Thurman, supra*, the California Supreme Court has explicitly recognized that “[i]n some circumstances, excessive delays in the appellate process may give rise to a denial of due process.” (*People v. Horton, supra*, 11 Cal.4th at 1141.) However, the California Supreme Court has rejected such claims in the capital cases it has adjudicated (see *People v. Blair* (2005) 36 Cal.4th 686, 755-757 [collecting cases]), and repeatedly done so on the grounds that the defendant failed to show “any actual prejudice as a result of the delay, such as an impairment of grounds on appeal” and that

delays in appointing counsel and certifying the record in *capital* cases do not violate due process. (*People v. Young* (2005) 34 Cal.4th 1149, quoting *Horton, supra*, 11 Cal.4th at 1141; *People v. Blair, supra*, 36 Cal.4th at 756.)

B. The Barker v. Wingo Analysis.

1. The length of the delay.

Assessing the length of the delay that will trigger due process concerns is a thorny issue. As “there is no talismanic number of years or months, after which due process is automatically violated,” the assessment will have to depend on the particular circumstances of the case, including the complexity of the case and the length of the sentence. (*Coe, supra*, 922 F.2d at 531; see *Harris v. Champion, supra*, 15 F.3d at 1561-1562.) The most that can be said as a general matter is that (in adult criminal, non-capital cases) the case law supports findings that two years to three years from the filing of the notice of appeal (unless the filing of the notice of appeal was itself delayed by the State) is within the range that could potentially give rise to relief.

In re Christopher S. (1992) 10 Cal.App.4th 1337, 1341 [in this juvenile criminal case, the Sixth District Court of Appeal found, and the attorney general agreed, that a sixteen-month delay in the superior court clerk’s notice of the filing of the notice of appeal, which caused a nearly two-year delay in processing the appeal, was “significant in length,” and the Court of Appeal conducted a *Barker v. Wingo, supra*, analysis; the minor argued and the Court of Appeal agreed “he is a juvenile with the right to an expeditious determination of his appeal, and that delays such as the one he has experienced may have a greater impact upon minors” but the Sixth District found no prejudice].

Harris v. Champion, supra, 15 F.3d at 1560-1562 [“a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this first factor in the balancing test” but there may be cases in which less of a delay is deemed inordinate and a longer delay is not].

United States v. Smith, supra, 94 F.3d 204 [characterizing the *Harris v. Champion, supra*, approach of presuming a two-year delay inordinate as a “bold approach” it need not consider, the Sixth Circuit found, and the prosecution conceded, that the three-year delay was sufficient to trigger further inquiry into the *Barker* factors]

Coe v. Thurman, supra, 922 F.2d 528, 531 [a little over three years and eight months passed between the filing of the notice of appeal and the date on which the federal habeas case was submitted to the Ninth Circuit; the Ninth Circuit characterized the delay as “huge” and “alarming” and found a due process violation and granted habeas relief in the form of an order that the state appeals court decide the appeal or reverse Coe’s conviction within 90 days.]

United States v. Antoine, supra, 906 F.2d at 1382, the Ninth Circuit found that a three-year delay was “substantial” and favored a finding that due process was violated, but the Ninth Circuit did not itself find a due process violation and remanded for further proceedings on the issue in the district court.]

2. The reason for the delay and the defendant’s assertion of his rights.

In cases in which the delay results from the failure of a reporter to produce transcripts or the destruction or loss of exhibits or other records by state actors, the reason for delay should be attributed to the State and should weigh in favor of a finding of a due process violation. (*United States v. Antoine, supra*, 906 F.2d at 1382; *Coe v. Thurman, supra*, 922 F.2d at 531.)

Analysis of the third prong, the defendant’s assertion of his rights, is also relatively straightforward. It involves consideration of whether the defendant has done his best to press forward with his appeal and vigorously asserted his right to a complete record on appeal. (See *Antoine, supra*, 906 F.2d at 1382.) In this respect, any requests, motions or filings by the appellant himself or by counsel pressing for the record on appeal will be considered in determining whether the third prong favors a finding of a due process violation. (*Coe v. Thurman, supra*, 922 F.2d at 532.)

3. Prejudice.

Prejudice under the *Barker v. Wingo* standard applicable to appellate delay is extremely difficult to establish. There are three categories of potential prejudice: (1) oppressive incarceration pending appeal; (2) anxiety and concern of the convicted party awaiting the outcome of the appeal; and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial. (*Rheuark v. Shaw* (5th Cir. 1980) 628 F.2d 297, 303, fn. 8; *Coe, supra*, 922 F.2d at 532.)

Impairment of the viability of a defense in the case of retrial is difficult to establish on a cold appellate record, and may be a factor more amenable to proof in the habeas context if, e.g., a witness has died or is no longer available. (See *People v. Blair, supra*, 36 Cal.4th at 756 & fn. 29 [capital defendant acknowledged that it was difficult to establish prejudice on the appellate record, and California Supreme Court declined defendant's request for it to consider on appeal evidence submitted in support of habeas claim of excessive delay].) Additionally, it is unclear how the passage of time could impair a defendant's grounds for appeal, or how such impairment could be proved. *Rheuark v. Shaw, supra*, 628 F.2d at 303, fn. 8, provided an "example" of potential impairment of the grounds for an appeal. It cited a civil suit in which a defendant claimed that the delay in preparing a record on appeal and the use of a reporter who had not been present at the proceeding resulted in the omission from his appellate record of the proceedings in which his attorney moved for mistrial. Thus, this aspect of the prejudice

standard may again require, in essence, an argument that the record on appeal is inadequate for effective appellate review. Yet a further complication in the prejudice in analysis in these cases arises out of the circular rule that, if the defendant's appeal is ultimately unsuccessful, his incarceration is *ipso facto* not oppressive. (*In re Christopher S.*, *supra*, 10 Cal.App.4th at 1342.)

Coe v. Thurman is one of the few cases to find prejudice in the appellate delay context and to issue some relief, and it involved a California state habeas petitioner. In *Coe*, due to both delays in completing the record on appeal and in appointed appellate counsel's filing of the opening brief, three years and eight months passed from the filing of the notice of appeal to the time in which the federal habeas case was submitted in the Ninth Circuit. During the interim, the defendant made numerous *pro per* filings aggressively pursuing his appeal and eventually filed a habeas corpus petition in the California Supreme Court, claiming inordinate delay and ineffective assistance of counsel, and the petition was denied. (*Id.* at 532.) With respect to prejudice, *Coe* found that, the defendant had "undoubtedly" experienced anxiety due to the protracted nature of the appeal, although he had not experienced any more anxiety than any other prisoner awaiting the outcome of an appeal. (*Id.* at 532.) As to the third prejudice factor, *Coe* found that "the passage of [four] years will make it more difficult for petitioner to refresh the memory of witnesses or locate new exculpatory evidence." (*Ibid.*, quoting *Wheeler v. Kelly* (E.D.N.Y. 1986) 639 F.Supp. 1374, 1381.) *Coe* ultimately concluded: "Though we

hesitate to find extreme and fulsome prejudice to [petitioner], we believe enough exists here to satisfy this fourth factor.” (*Ibid.*; but see *United States v. Tucker* (9th Cir. 1993) 8 F.3d 673 (en banc) [Ninth Circuit finds that federal defendant failed to establish any prejudice resulting from excessive delay caused by delinquent reporter because his appeal was meritless; in light of this lack of merit, the delay in the appeal could not have caused anxiety and his grounds for appeal could not have been impaired].) Habeas relief was therefore granted in the form of an order that the California Court of Appeals decide the appeal or reverse the defendant’s conviction within 90 days.