No More Broken Or Warped Records: Taking Command Of The Record For Appellate Review (And Winning In the Process)

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INTRODUCTION

We know that appeals are vitally important for: error correction; maintaining uniformity in the law's application; shaping the law; and gaining respect from your bench officer and the prosecution (showing you're willing "to take it to the next level" when you lose). We also know that prospects for success on appeal absolutely depend upon a defender's skill in making a record. However, *did you know that by focusing on the appellate record with an eye to appellate review, defenders can vastly improve their practice in juvenile court*?

What follows are 10 things defenders can do to make superior appellate records. These suggestions are not limited to issue preservation. We want you to think about your case in a totally different way: while preparing, thinking in advance about how a reviewing court might later assess the facts and law of your case to your client's advantage or disadvantage. Some suggestions are strictly practical, involving fairly simple structural changes. Others ask you to change the culture of juvenile court, rendering it more professional, less rushed, more deliberative. You will find that by taking command of the record for appellate review, you can increase your chances of winning in the process.

I. USE APPELLATE STANDARDS OF REVIEW TO DEVELOP AND PREPARE ALL ARGUMENTS IN YOUR CASE

A standard of review is a rule employed by a reviewing court for deciding if error occurred. Identifying and understanding the standard of review that applies to your issue will sharpen your claim and increase your client's chances of prevailing in the juvenile court. But your knowledge of the relevant standard of review can inform your development of the theory of the case, selection of issues, and strengthen overall your

performance. If your client does not win in juvenile court, he will stand a much better chance of prevailing on appeal. There are basically four standards of review: (1) substantial evidence; (2) de novo; (3) abuse of discretion; (4) mixed law and fact determinations.

Substantial Evidence

When an accused challenges the sufficiency of the evidence to support a judgment or resolution of a disputed fact, a reviewing court applies the substantial evidence standard of review. A court must "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) A court does not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.) The standard of review is the same in cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Bea*n (1988) 46 Cal.3d 919, 932.; see *People v. Kwo*k (1998) 63 Cal.App.4th 1236, 1245 ["Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence".)

This is plainly a deferential standard. It means that to ensure victory at a jurisdictional hearing, defenders often must not only contest disputed facts and testimony, but provide "vanquishing" contrary evidence. Inferences provided by the prosecution must be shown to be speculative. (See *People v. Stitely* (2005) 35 Cal.4th 514, 549–550.) Witness testimony must be "inherently improbable" on its face without

comparison to other evidence.[1] (*People v. Ennis* (2010) 190 Cal.App.4th 721, 728-729.)

De Novo / Independent Review

When an issue raises a pure question of law, a reviewing court applies the de novo standard of review and exercises its independent judgment and gives no deference to the court's ruling. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) This standard usually applies to claims involving statutory analysis and the application of legal standards. Sometimes, this more favorable standard even applies to claims one might assume would be subject to substantial evidence review, such as when a constitutional right is implicated. (See, e.g., *In re George T.* (2004) 33 Cal. 4th 620 [applying independent review to a sufficiency of the evidence claim involving a criminal threats adjudication that implicated the minor's First Amendment rights].) Appellate practitioners love this standard. You should, too! The bench is presumed to know and apply the correct law. (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Does your bench know the law? Not sure? See No. IV, *post*.

Abuse Of Discretion

The abuse of discretion standard is applied to most kinds of errors (e.g., all evidentiary determinations and many others), as it involves review of a court's discretionary power to determine whether it acted unreasonably. However, this standard can mean completely different things, depending on the nature of the ruling considered. "The abuse of

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[1] The *Ennis* court explained: "The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. Hence, the requirement that the improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.] In other words, the challenged evidence must be improbable '"on its face"' [citation], and thus we do not compare it to other evidence (except, perhaps, certain universally accepted and judicially noticeable facts). The only question is: Does it seem possible that what the witness claimed to have happened actually happened?" (*People v. Ennis, supra,* 190 Cal.App.4th at pp. 728-729.)

discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a court's ruling under review. [1] The trial court's findings of facts are reviewed for substantial evidence, [2] its conclusions of law are reviewed de novo, and [3] 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, fns. omitted.)

The task for the defender, then, is not merely to present evidence, argue the issue, and "let the chips fall where they may." Depending on the context, the real task in arguing any issue reviewable later for abuse of discretion is to argue and create a record that shows the court: (1) misunderstood and incorrectly applied the law[2]; (2) misunderstood the facts it relied upon in rendering its decision[3]; (3) relied upon facts which were not supported by substantial evidence[4]; or (4) failed to follow statutorily prescribed procedure[5]. Fleshing out these tasks in advance of any hearing will strengthen your case and, in the event the ruling does not go your way, you have created a strong record for appeal.

Mixed Law And Fact Determinations

This hybrid review often occurs in the context of determinations affecting constitutional rights. For instance, in determining whether a search under the Fourth Amendment is reasonable. In ruling on such a motion, the superior court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. The appellate court's resolution of (1), which involves questions of fact, is reviewed under the substantial-evidence standard.

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2 *People v. Knoller* (2007) 41 Cal.4th 139, 156.

3 *People v. Cluff* (2001) 87 Cal.App.4th 991, 998.

4 *Ibid.*

5 *Los Angeles Co. Dept. of Children and Family Services v. Sup. Ct.* (2005) 126 Cal.App.4th 144, 152.)

Its decision on (2), which is a pure question of law, is reviewed independently. Its ruling on (3), which is "a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." (*People v. Alvarez* (1996) 14 Cal.4th 155, 182–184.)

II. MAKE WRITTEN MOTIONS A ROUTINE AND INTEGRAL PART OF YOUR PRACTICE

Written motion practice plays an important role in adult criminal cases, but less so in delinquency cases. Why is that? If anything, filing written motions is arguably more important in juvenile cases. Whereas adult cases are more formal, open to the public, and often last many months, juvenile proceedings are closed to the public, usually short and rushed, conducted informally, often in an insular setting. Written motions slow down the process, prevent surprises, and professionalize it.

Motions are also a powerful issue-preservation tool. Use them at all phases of your case: detention, competency and capacity, searches, shackling, confessions/admissions, Welfare and Institutions Code[6] section 241.1, transfer. In limine motions should also be used in advance of the jurisdictional hearing. An in limine motion is sufficient to preserve the evidentiary issue for appeal, when it satisfies the requirements of Evidence Code section 353: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*People v. Morris* (1991) 53 Cal.3d 152, 190.) Once the court rules on

[6] Hereafter, all undesignated statutory references are to the Welfare and Institutions Code.

it, counsel generally does not need to renew that objection during the jurisdictional hearing to preserve issue.

III. REQUEST PRETRIAL HEARINGS TO ADMIT OR EXCLUDE EVIDENCE AND OTHER MATTERS IMPORTANT TO THE JURISDICTIONAL HEARING

Separate hearings under Evidence Code section 402 on the admissibility of confessions, admissions, and out-of-court identifications (show ups), section 26 determinations (*In re Gladys R.* (1970) 1 Cal.3d 855) may not be required in juvenile delinquency cases.[7] However, that is not a reason not to ask for them. In fact, there are plenty of good reasons for requesting pretrial hearings.

Convening hearings on important evidentiary questions and settling them before the jurisdictional hearing, just as before trial in adult cases, makes for a more deliberative, less chaotic, process. Like using written motions, separate hearings lend more formality and professionalism to juvenile court. Separate hearings benefit everyone. But separate hearings also allow for development of a better record, permitting you to concentrate on one important matter, which may already be very complex (e.g., moving to exclude a confession on multiple grounds (*Miranda*, voluntariness, SB 395 non-compliance (§ 625.6) may require experts, witnesses, and educational reports and other documents).

[7] Motions to suppress must be heard prior to the jurisdictional hearing. (§ 701.1.)

IV. FILE BENCH INSTRUCTIONS

Does your judge know the law on the complex issue of paramount importance to your kid at the jurisdictional hearing? Not sure? Consider this: on appeal, the bench is presumed to know and apply the correct law (*Price v. Superior Court, supra,* 25 Cal.4th at p. 1069, fn. 13). So, if the record does not reflect the law your judge is actually applying, even if erroneously, the appellate court will not review it.

To remedy this problem, consider filing bench instructions on important, complex legal questions (e.g., aiding and abetting a robbery at school involving multiple students). Bench instructions are jury instructions adapted for a bench trial. So make the bench officer take a stand on her view of the law. If the judge disagrees with your point of law, it is preserved for the appeal subject to de novo review. Such instructions have the additional benefits of educating the bench and assisting you in organizing your theory of the case.

V. MAKE CERTAIN THAT ALL IMPORTANT MATTERS ARE ON THE RECORD

Appellate review is limited to material which is included in the record on appeal. "Ordinarily matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered on appeal." (*People v. St. Martin* (1970) 1 Cal.3d 524, 537-538.) Put another way, "If it is not in the record, it did not happen." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

It is critical to memorialize on the record any unreported conferences. If the matter is not reported, it doesn't exist for appellate review. Of

course, it is always better practice to conduct all discussions of the case on the record anyway. Be sure there is a written transcript of all audio or videotaped statements. Note: the party offering the tape must lodge a transcript with the court. (Cal. Rules of Court, rule 2.1040.) Never stipulate to the reporter not reporting the tape unless the transcript is lodged with the court. Never stipulate to a return of exhibits whether admitted or not. Make sure the exhibit is filed with the court. Appellate counsel may need them! Make a record of all ex parte matters, including requests (e.g., denial of request for ancillary funds for experts, investigators[8]).

VI. MAKE AND CAREFULLY FORMULATE OBJECTIONS

Assume that most claims are not reviewable on appeal unless counsel has raised the specific legal ground for the relief sought and obtained a final ruling.[9] One of the most important duties of a defender is to make objections and obtain final rulings. A failure to do so often results in forfeiture or "waiver" of the issue on appeal. This is why forfeiture of is

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[8] This claim is not reviewable on appeal but only by petition for writ of mandate.

[9] An objection is required to challenge: admission or exclusion of evidence (Evid. Code §§ 353, 354); most courtroom errors such as shackling (*People v. Ward* (2005) 36 Cal.4th 186, 206), prosecutorial misconduct (*People v. Brown* (2003) 31 Cal.4th 518, 553, spectator misconduct (*People v. Chatman* (2006) 38 Cal.4th 344, 368.); most probation conditions (*People v. Welch* (1993) 5 Cal.4th 228); fees (*People v. Aguilar* (2015) 60 Cal. 4th 862 [the failure to object in the trial court to an order for payment of attorney fees, probation report fees, and/or probation supervision fees forfeits a claim on appeal that the trial court erred in failing to make a finding of the defendant's ability to pay the amount in question].) However, in general, no objection is necessary to: preserve a sufficiency of the evidence claim (jurisdictional, dispositional, probation revocation, restitution hearings, etc.) (*In re K.F.* (2009)173 Cal.App.4th 655, 660); claims that challenge orders as unauthorized by law (e.g., sustaining allegation not pleaded, Evid. Code, § 654 errors); challenge a probation condition on grounds that it is "vague or overbroad and thus facially unconstitutional" (*In re Sheena K.* (2007) 40 Cal.4th 875, 878).

probably the most powerful weapon in the attorney general's arsenal for disposing of claims.

However, an objection is almost worthless unless it is *sufficient* to preserve the issue for appeal. "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented... [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

VII. OBTAIN FINAL RULINGS (AND WHENEVER POSSIBLE, ELICITING FACTS AND LAW) FROM YOUR BENCH OFFICER

Of course, objecting, without more, does not result in preservation of an issue. Counsel must also obtain a final ruling from the bench. A failure to obtain a final ruling results in forfeiture of the issue on appeal. (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

When seeking a final ruling, it may be helpful to invite the court to state reasons, eliciting facts and law, for its decision. While some bench officers may reject the invitation, others will happily disclose their views on the law and facts. This can be very beneficial to the record on appeal, especially as to findings at the conclusion of the dispositional hearing, disclosing errors which would otherwise remain invisible.

VIII. FILE DISPOSITIONAL MEMORANDA WITH SUPPORTING DOCUMENTS

At a sentencing hearing, a criminal court's decision is principally focused on a narrow range of decisions, mainly, how much punishment is to be meted out. At a dispositional hearing, however, a juvenile court typically makes many more kinds of decisions. Each of these decisions is critically important, affecting many aspects of a child's life: whether he stays in the home or is removed from the home, his family and community; if he is removed, what is the suitable placement, and for how long? Educational, physical, and mental health issues, as well as many other important matters, must be decided. Case plans and probation reports must be considered.

Filing dispositional memoranda with supporting documents is the best method to cogently address these critical issues and preserve them for appeal. For example, you will be prepared to challenge the probation report and case plan, and all required out-of-home placement findings by the court (e.g., under § 726, Cal. Rules of Ct., rule 5.790(d)), and you will have documents (regarding alternative placements, psychological evaluations, social worker reports, family history information, scientific information on adolescent development[10]) to back up your claims. All of your claims will be preserved for appeal. Even in a simple case, where in-home-probation is recommended, a memorandum may helpful: to challenge, or reduce the number of, "standard" probation conditions or suggest better ones (consistent with adolescent development); address restitution, educational issues. This can be an important opportunity to educate and inform the court about your child, his family, and his community. The sky is the limit!

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[10] All dispositions should reflect science on adolescent development and the neuroplasticity of adolescent brains: that most children who commit offenses—even serious ones—greatly reduce their offending over time as they age, regardless of the intervention, and that children respond well to certain positive interventions and poorly to negative ones, in particular confinement). Defenders will find a number of excellent articles on adolescent development in the in the Dispositional Advocacy folder of the Pacific Juvenile Defender Center's member resource bank at pjdc.org.

IX. KNOW WHETHER THE ERROR IS REVIEWABLE ON APPEAL OR BY WRIT (AND KNOW YOUR FILING DEADLINES)

Section 800, subdivision (a) provides that a child may appeal a judgment in a delinquency proceeding "in the same manner as any final judgment." In general, the dispositional order is the appealable judgment in a juvenile proceeding under section 602. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112; § 800, subd. (a).) All orders made prior to the dispositional order, including the adjudication, are reviewed on appeal from that judgment. (*In re James J.* (1986) 187 Cal.App.3d 1339, 1342 1343.)

A valid appeal from the dispositional order allows review of findings made at the jurisdictional hearing and all intermediate, interlocutory orders (*In re Matthew C.* (1993) 6 Cal.4th 386, 393), including: restitution orders (including those establishing a child's parent's liability (§ 730.7)) (*In re Jeffrey* M. (2006) 141 Cal.App.4th 1017, 1021; but not "to be determined" restitution orders (*In re Julian O.* (1994) 27 Cal.App.4th 847, 851); probation orders without wardship (§ 725) (*In re Do Kyung K*. (2001) 88 Cal.App.4th 583, 590); a section 241.1 determination that a child should be treated as a ward under section 602 (*In re Henry S.* (2006) 140 Cal.App.4th 248, 256); a section 777 order finding a violation of probation not amounting to crime (*In re Eddie M.* (2003) 31 Cal.4th 480). Post-dispositional orders denying petition to change, modify or set aside a previous order (§778) are appealable. (*In re Corey* (1964) 230 Cal.App.2d 813, 822). *NEW*: Transfer orders are *now appealable*. (§ 801.)

Note: a deferred entry of judgment order (§ 790, et seq.) is not appealable (*In re Mario C.* (2004) 124 Cal.App.4th 1303, 1310-1311), nor is a section 654.2 order of informal supervision an appealable

judgment or order after judgment. (*Ricki J. v. Superior Court* (2005)128 Cal.App.4th 783, 791.)

Generally speaking, whenever a serious legal, constitutional, or jurisdictional error cannot be remedied by direct appeal, writ review must be sought. Irreparable harm is central to all writs. These include statutorily authorized writs and challenges under Civil Code of Procedure sections 170.1 and 170.6 (Code of Civ. Proc., § 170.3, subd. (d)); non-statutory writs include demurrers, denials of a detention hearing, erroneous detention orders, denials of expert appointment, competency findings, denials of speedy adjudication motions, compelled discovery orders, *Pitchess*, and restitution at non-wardship dispositions.

Sometimes it is not clear whether an order is appealable or must be challenged by writ. If you are not sure, see Item X *post*, and call your appellate project.

Finally, know your filing deadlines when seeking appellate relief. The deadline for filing a notice of appeal is straightforward: A notice of appeal must be filed within 60 days of the date of the rendition of disposition or a subsequent hearing or order being appealed. (Cal. Rules of Court, rule 8.406(a)(1).) EXCEPTION: a notice of appeal from a transfer order must be filed within 30 days of the order transferring the youth to adult court. (§ 801.) The timely filing of notice of appeal is a prerequisite to appellate jurisdiction. (*In re Chavez* (2003) 30 Cal.4th 643, 652-653.) "[A]n unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) A failure to timely appeal an appealable order results in forfeiture of the claim. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1251.)

Deadlines for filing writs vary. A writ seeking review of a denial of a motion seeking disqualification of a judge must be filed within 10 days of notice of the decision on disqualification (Code of Civ. Proc., § 170.3, subd. (d)). Non-statutory writs have no fixed deadlines, but are subject to the general rule that a writ petition should be filed within the same

time period as a notice of appeal: within 60 days of challenged order. (*Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500.)

X. WORK WITH YOUR APPELLATE PROJECT TO PREPARE THE CLAIM FOR APPEAL AND PARTNER WITH APPELLATE COUNSEL AFTER THE APPEAL IS FILED

Consider consulting with your appellate project about how to best present your claims in juvenile court, and how to preserve them for appeal. Make the project a part of your litigation efforts. They are ready to work with you. The appellate project will also assist in coordinating special litigation efforts involving important new legal issues which demand a uniform legal approach and favorable resolution in the court of appeal. Such broad litigation efforts ("swarm litigation") in the juvenile court have been shown to be very effective (e.g., challenges of "electronic search" probation conditions).

Don't forget to partner with appellate counsel after the appeal is filed. We (appellate practitioners and juvenile defenders) must be united in defending our kids. We represent the same client. During the pendency of a juvenile delinquency appeal, a child has two attorneys: an appellate attorney (once appointed) and a juvenile defender, who has a continuing duty of representation post-disposition. This state of affairs provides an extraordinary opportunity to effect positive outcomes for our clients. All too often, however, a failure to communicate (a two-way street, of course) results in: a failure to litigate issues on appeal; cases mooted out on appeal by the occurrence of events in the juvenile court of which appellate counsel is unaware; and missed opportunities to collaborate on post-dispositional advocacy projects (§ 778 petitions) and on new cases involving our kids (e.g., probation violations, new dispositions).

So make a good record with your appellate partner, like this one: