

Issues: Omission/Mischaracterization/Unbriefed

Did the opinion mischaracterize or fail to consider/resolve a briefed issue whose resolution could have changed the result? Or materially rely on an issue unbriefed by the parties, in violation of GC 68081? (“Material”: it’s reasonably likely the error affected the result.)

A Court of Appeal opinion “should address every issue raised” in the briefing. (1 Appeals & Writs in Criminal Cases (3d ed. Cal CEB), § 5.8, p. 5-12, citing Pen. Code, § 1252 [appellate court “shall ... pass upon” “the issues raised by the defendant” as well as “all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General”]; see, e.g., *People v. Thomas* (2013) 218 Cal.App.4th 630, 633 [Court of Appeal initially failed to address appellant’s federal constitutional claim; Supreme Court granted review and transferred case back with directions to address the claim, resulting in reversal of trial court judgment]; *Bell v. Cone* (2005) 543 U.S. 447, 460 [125 S.Ct. 847, 856, 160 L.Ed.2d 881] (conc. opn. of Ginsburg, J.) [noting scenario where briefed issue may be “unaddressed” by state court because it was “simply overlooked”].)

Of course, the appellate court has the discretion to ignore (or treat as forfeited) an improperly briefed issue, such as one unsupported by argument and authorities. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) But where an issue is suitably presented, the opinion must evaluate and resolve it.

In criminal cases, the rights to appellate review and counsel are designed to ensure “full consideration and resolution of the matter” (*Anders v. California* (1967) 386 U.S. 738, 743.) Appellate proceedings “require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.” (*Penson v. Ohio* (1988) 488 U.S. 75, 85.) Of course, such a requirement would be meaningless if a court may “pass over” counsel’s substantial arguments.

Additionally, an opinion errs by materially “mischaracteriz[ing] the issue.” (*Federal Ins. Co. v. Workers’ Comp. Appeals Bd.* (2013) 221 Cal.App.4th 1116, 1122 [criticizing Worker’s Compensation Judge’s analysis; *California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1330 [reframed issue “has its own internal logic [but] is largely unmoored to the actual allegations of the complaint or to relevant legal principles”].)

The California Rules of Court acknowledge a Court of Appeal opinion might be marred by either “omission or misstatement of” a briefed issue: a party who believes that sort of error has occurred must normally cite it in a petition for rehearing before arguing the point to the Supreme Court. (Rule 8.500(c)(2).)

Finally, under Government Code section 68081, an appellate decision can’t be based on an unbriefed issue: either supplemental briefing must be offered, or rehearing granted. (“Before the Supreme Court, a court of appeal, or the appellate division of a

superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." See *People v. Taylor* (1991) 6 Cal.App.4th 1084, 1090, fn. 5: "The purpose behind section 68081 is to prevent decisions based on issues on which the parties have had no opportunity for input." (Original italics omitted.) And all doubts should be resolved in favor of the parties' right to brief an opinion-worthy issue. (*People v. Alice* (2007) 41 Cal.4th 668, 676, fn. 1.)