Preserving the Record Cheat Sheet

FDAP Assistant Director J. Bradley O'Connell

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Disclaimer: The cases cited here won't necessarily be the closest on point for the particular problems which arise in your case. (In fact, some of the cited references are dictum, and other cases recognized various errors only to go on to pronounce them harmless.)

THE "IMMUTABLE RULE" FOR PROTECTING YOUR CLIENT'S INTERESTS ON APPEAL: "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; accord *Wagner Farms, Inc. v. Modesto Irr. Dist.* (2005) 145 Cal.App.4th 765, 770.

GET IT ON THE RECORD!

- *Unreported Conferences:* memorialize *on the record* any unreported conferences at the bench or in chambers.

- *Transcripts of recordings & videos*: Make sure there's a written transcript of any audio or videotaped statements or interviews; party offering tape should lodge transcript with the court. (Cal. Rules of Court, rule 2.1040.) **Unless transcript is lodged, do not stipulate to non-reporting of the tape by the court reporter.**

- *Non-reporting*: **Never** stipulate to non-reporting of instructions or of closing arguments.

- *Ex Parte* Applications: Make sure record exists of ex parte applications (e.g., denial of application for funds for expert or investigator, etc.).

PRETRIAL RULINGS (OR DO I HAVE TO DO A WRIT)?

- **§ 995 and § 1382 rulings—writ petition frequently the only means to obtain appellate review.** Denials of § 995 motions and statutory speedy trial motions under § 1382 are generally **not** reviewable in a post-trial appeal, except in the very rare situation in which the defendant can show prejudicial effect on the later *trial*. See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519; *People v. Johnson* (1980) 26 Cal.3d 557, 574-575. If you have a very strong 995 or 1382 issue, consider filing a writ

- **§ 1538.5 rulings—no writ petition necessary.** A 1538.5 denial is cognizable on a post-trial or post-plea appeal. Though you may have tactical reasons for seeking immediate writ review, it's not necessary to file a writ in order to preserve the issue. But **denial of 1538.5 motion by magistrate is not appealable unless renewed before superior court**. (§ 1538.5 rulings *only* apply to search-and-seizure issues, not to *Miranda* and other confession-related issues.)

- **Judicial disqualification – writ statutorily required.** By statute, a writ petition is the only available means for obtaining appellate review of a denial of a motion to disqualify a judge or of a denial of a peremptory challenge to a judge. These issues are not reviewable on a post-trial appeal. Code Civ. Proc. § 170.3(d); see *People v. Panah* (2005) 35 Cal.4th 395, 444-445.

OBTAIN *FINAL* RULINGS ON OBJECTIONS & MOTIONS

- *In limine motions.* In order to preserve issue, motion in limine must meet all these criteria: "(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; *People v. Rowland* (1992) 4 Cal.4th 238, 264 fn. 3.

- If there is any doubt whether the trial judge has made a *final* ruling, be sure to *reiterate* your objection or other motion when the pertinent evidence is actually offered at trial. *Morris*, *supra*, 53 Cal.3d at p. 191.

- These rules generally apply only to in limine rulings, **by the trial judge**, at the beginning of or during trial. With the exception of § 1538.5 rulings on search-and-seizure issues, other types of pre-trial evidentiary rulings (e.g., on a § 995 motion) generally do not carry over to the trial, so it's necessary to renew those arguments at trial.

- On retrial, don't assume objections at first trial will carry over to the retrial. **Make a clear record at retrial that your objections and motions are being renewed.**

JURY SELECTION ISSUES

- **Questionnaires**. Make sure court preserves juror questionnaires (including those of removed jurors).

- ***Wheeler-Batson* motions**.

    - Describe on the record *numerical pattern* of DA's challenges, in two ways: (a) DA's challenges against the relevant group vs. total number exercised by DA (e.g., DA has exercised 6 of his 8 challenges against blacks), and (b) DA's challenges against group vs. total jurors of that group (e.g., DA has removed 5 out of the 6 blacks in the venire).

    - Identify *anything else* supporting inference DA is exercising challenges in discriminatory manner: e.g., characteristics of removed jurors, DA's use of disparate questions, DA found to have violated *Batson* in another trial.

- *Comparison between challenged and unchallenged jurors*. Specifically note if the DA has passed on other non-minority jurors with identical characteristics which supposedly motivated the peremptory challenges. (E.g., DA asserts a relative's misdemeanor arrest as the reason for his removal of a minority juror, but did not challenge white jurors whose relatives had similar arrests.) The U.S. Supreme Court has recognized such comparisons between challenged minority jurors and unchallenged white jurors as a vital tool in assessing whether a prosecutor's stated reasons were genuine or pretextual. *Miller-El v. Dretke* (2005) 545 U.S. 231*; Snyder v. Louisiana* (2008) 552 U.S 472.

    - Under the compulsion of *Miller-El* and *Snyder*, the California Supreme Court recognizes the propriety of such comparisons for the first time on appeal. *People v. Lenix* (2008) 44 Cal.4th 602. However**, it is still preferable to raise any comparisons between excluded and retained jurors in the trial court.** A reviewing court may consider a juror comparison first raised on a "cold appellate record" less persuasive than one addressed in the trial court, because "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." *Lenix* at 622-623.

- Note whether DA's proffered reasons violate *Wheeler* and *Batson* in some *additional* respect—i.e., DA defends against initial claim of racial discrimination by volunteering some *other* group bias (e.g., *gender, national origin, religion*). The Supreme Court has refused to consider *Wheeler-Batson* claims based on other form of "group bias" where the *Wheeler-Batson* motion only referred to race. Cf. *People v. Hayes* (1990) 52 Cal.3d 577, 604-605; *People v. Howard* (1992) 1 Cal.4th 1132, 1157-1159.

- **Peremptory challenges under Civil Code of Procedure § 231.7**. For all

criminal trials in which jury selection begins on or after January 1, 2022, a court must consider not only whether the peremptory was exercised as a result of purposeful discrimination under *Wheeler* and *Batson*, but must now consider whether there is a substantial likelihood an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups—"unconscious bias"—as a factor in the use of the peremptory challenge. Code Civ. Proc., § 231.7(d). Thus, § 231.7(d)'s objective "reasonable person test does *not* require a finding of intentional discriminatory purpose.

- The objection must be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled. Code Civ. Proc., § 231.7(b).

- Identify "circumstances" a court may consider. Code Civ. Proc., § 231.7(d)(3)(A)-(G).

- Identify reasons that are presumed to be invalid. Code Civ. Proc., § 231.7(e).

- **Challenges for cause**. Where the judge denies a defense challenge for cause, the issue is only reviewable on appeal if defense counsel follows all of the following steps: (1) Defense later uses a peremptory challenge to remove the juror; (2) exhausts all defense peremptories (or justifies the failure to exhaust them); and (3) expresses dissatisfaction with the final jury panel as sworn. *People v. Ramirez* (2022) 13 Cal.5th 997, 1048.

EVIDENTIARY & OTHER TRIAL OBJECTIONS/MOTIONS: INCLUDE EVERY GROUND *AND FEDERALIZE*.

- **Federalize Your Objections.** As a matter of course, whenever raising a

traditional state evidentiary objection (e.g., hearsay, other offenses) or challenging a restriction on defense evidence, **also assert the analogous federal constitutional claim**

- The California Supreme Court has enforced with a vengeance the statutory rule limiting appellate review to "the specific ground" stated in the objection or motion. (Evid. Code § 353.) The Court has frequently refused to consider the federal constitutional infringements caused by various evidentiary rulings (e.g., hearsay, other offenses) where the objection at trial referred only to the state law ground. E.g., *People* v. *Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116 fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972 fn. 10.

    - Exception: If the state law objection requires the trial court to apply the *identical standard as the federal constitutional claim*, then the state law objection will suffice to preserve the analogous federal claim. E.g., *People v. Yeoman* (2003) 31 Cal.4th 93, In *People v. Partida* (2005) 27 Cal.4th 428, 431 ("*Wheeler* motion" deemed sufficient to preserve *Batson* claim).

    - But **don't assume that the state and federal standards are identical**. A state law objection will <u>not</u> preserve a federal constitutional claim if the standards diverge. For example, *Crawford* and its progeny have generally de-coupled confrontation analysis from traditional hearsay standards. Consequently, a hearsay objection will <u>not</u> preserve a claim under the confrontation clause.

    - Exception & caveat: If the federal constitutional claim merely concerns the *legal consequences of the state law error* and doesn't require application of any different standard by the trial court, the defendant may still be able to argue that the impact of the trial judge's state law error was a federal constitutional violation. See *People v. Partida* (2005) 27 Cal.4th 428, 431

(allowing defendant to argue that erroneous denial of Evid. Code § 352 motion had the additional legal consequence of federal due process violation).

- Warning: The *Partida* distinction between divergent federal/state standards and constitutional "consequences" of a state law error is very slippery, and counsel should not trust that the constitutional "gloss" on a state claim will be reviewable on that theory. Without question, the safer practice is still to **explicitly identify both the state and federal claims**. (E.g., "the evidence is more prejudicial than probative under § 352, and it's so inflammatory as to violate due process.")

- **Always state on the record every potentially applicable ground for your objection or motion.** E.g. in opposing admission of the priors or other misconduct, argue **both** that the evidence violates the specific statutes limiting "other offenses" (Evid. Code § 1101, et seq.), that the prejudicial impact of the evidence outweighs its probative value (Evid. Code § 352), **and** that the presentation of this inflammatory evidence violates federal due process.

- **DO NOT RELY ON "MANTRA MOTION" PURPORTING TO FEDERALIZE ALL CLAIMS.**

  - The illusory "mantra" solution to federalization. In hopes of overcoming any later appellate assertions of inadequate federalization, some attorneys have developed the practice of "mantra motions" – that is, a motion at the beginning of trial reciting a "mantra" requesting that all motions and objections be deemed to include federal constitutional, as well as state law grounds. It was always doubtful whether this tactic would work, if tested on appeal, because a such a motion seemingly asked a trial judge to canvass the whole of constitutional law in order to identify the specific constitutional implications of every state law objection.

- Now, **the California Supreme Court has squarely ruled that an omnibus motion purporting to federalize all objections will not preserve any federal claim which involves application of a different standard than the state law objection**. *People v. Redd* (2010) 48 Cal.4th 691, 730 fn. 19.
- Especially in light of *Redd*, trial counsel cannot rely on a general request to "deem all objections federalized." Instead, though it's more difficult, **counsel must explicitly identify any federal constitutional issues posed by disputed matter**, on an objection-by-objection basis.

JURY INSTRUCTIONS

- Instructional issues provide some of the most fruitful grounds for appeal.

- Many of the most crucial instructions (e.g., reasonable doubt burden, elements of the charged offense, etc.) come within a trial judge's *sua sponte* instructional duties.

- However, safest course is to request all desired instructions, rather than trust that important instructions will be covered by *sua sponte* duty.

- Especially true where the instruction rests on a novel or subtle point, which isn't yet well-established. Compare, e.g., *People v. Michaels* (2002) 28 Cal.4th 486, 529-530 (no sua sponte duty to instruct on imperfect defense of another, because that concept wasn't yet well-established), with *People v. Randle* (2005) 35 Cal.4th 987 (extending imperfect defense principle to imperfect defense of another and reversing murder conviction, where counsel preserved issue by requesting instruction on that ground).

- The following are some of the general types of instructions which

definitely are contingent upon defense requests:

- **Cautionary instructions** and **limiting instructions**.
    - instructions limiting purposes for which jurors may consider particular evidence (Evid. Code § 355), e.g., other offenses (*People v. Padilla* (1995) 11 Cal.4th 891, 950); limitation of un-Mirandized statement to impeachment (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1088- 1091).
    - admonition to view jailhouse informant's testimony with caution. (Pen. Code § 1127a).
    - cautionary instruction on defendant's oral admissions (*People v. Diaz* (2015) 60 Cal.4th 1176, 188-189).
- **Pinpoint instructions**. Instructions which relate the general legal concepts (such as elements of the offense or affirmative defenses) to particular categories of evidence or otherwise highlight types of circumstances which may give rise to a reasonable doubt. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." *People v. Saille* (1991) 54 Cal.3d 1103, 1119.
    - Many instructions which state theories of defense or other crucial matters are considered mere "pinpoint instructions," so it is up to defense counsel to request them:
        - Alibi. *People v. Freeman* (1978) 22 Cal.3d 434.
        - Identification, including reliability factors (CALCRIM 315 or CALJIC 2.91-2.92). *People v.*

Wright (1988) 45 Cal.3d 1126.

- Relevance of mental illness or intoxication to specific intent or other mental state (CALCRIM 625 or CALJIC 4.21). *People v. Saille* (1991) 54 Cal.3d 1103, 1120.

- Relevance of provocation to premeditation and deliberation (choice between 1st and 2d degree murder), even when provocation insufficient to reduce to manslaughter (CALCRIM 522 or CALJIC 8.73). *People v. Middleton* (1997) 52 Cal.App.4th 19.

- Bearing of victim's prior threats or violence on self-defense issues. *People v. Pena* (1984) 151 Cal.App.3d 462, 474- 478; *People v. Moore* (1954) 43 Cal.2d 517, 527-529.

- "After-formed intent" rule in robbery cases. *People v. Webster* (1991) 54 Cal.3d 411, 443-444.

- **"Clarifying" or "amplifying" instructions**: "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." E.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Andrews* (1989) 49 Cal.3d 200, 218; *People v. Guiuan* (1998) 18 Cal.4th 558, 570.

ADJUDICATION OF "STRIKES" AND OTHER ENHANCEMENT PRIORS

- <u>*Descamps, Mathis, & Gallardo.*</u> In *Descamps v. United States* (2013) 570 U.S. 254 and *Mathis v. United States* (2016) 579 U.S. 500, the U.S. Supreme Court held that, with one narrow exception (discussed below), the Sixth and Fourteenth Amendments prohibit trial courts from making findings about non-elemental facts of prior convictions to prove a prior conviction allegation which increases a defendant's maximum sentence for a current crime.

- Put another way, **proof of prior convictions is limited to the elements of the prior crime**, and may not be used to establish additional facts that are extraneous to the elements of the prior conviction offense For example, if personal use of a deadly weapon was not an element of the prior conviction crime, evidence that the prior offense involved use of a deadly weapon and cannot be used to establish an enhancement which requires use of such a weapon.

    - Prior to *Descamps* and *Mathis,* the California Supreme Court had taken a much more expansive view and had allowed consideration of the prior "record of conviction" to prove facts necessary for establishment of a recidivist enhancement, even when those facts were extrinsic to the elements of the prior conviction statute. See, e.g., *People v. McGee* (2006) 38 Cal.4th 682. In *People v. Gallardo* (2017) 4 Cal.5th 120, the Court recognized that those earlier California precedents were inconsistent with the Sixth Amendment rule articulated in *Descamps* and *Mathis.* Pursuant to *Descamps* and *Mathis*, the *Gallardo* court held that those cases barred a sentencing court from "'rely[ing] on its own [fact] finding about a defendant's underlying conduct 'to increase a defendant's maximum sentence.' [Citing *Descamps*.]" *Gallardo* at 134.

- The one exception to these limitations concerns "divisible crimes" like former section 245(a)(1) (which included both assault with a deadly weapon, which is a strike, and assault by force likely to inflict great bodily injury, which is not a strike). In that situation, it is permissible for the court to review the record of conviction – not to make fact findings about the underlying conduct – but determine *which alternative provision of the statute was the basis for conviction*. *Descamps* at 272.

- **Anytime there is an enhancement or strike in which there appears to be something additionally required beyond the minimum elements, assume that you have a potential issue under *Descamps* and *Gallardo***. Do not admit anything! When the DA puts on its proof, object to anything that possibly requires judicial factfinding.

    - **This includes <u>some</u> California priors**:

        - Pre-1982 second degree burglaries, where evidence from the record was used to prove burglaries of a residence.

        - Vehicular manslaughter cases, or other cases involving unpled, unproven allegations of personal infliction of great bodily injury, use of records of conviction to prove both personal infliction of GBI and that the person injured was not an accomplice.

        - Pre-*People v. Rodriguez* (2012) 55 Cal.4th 1125, convictions for gang participation under section 186.22(a) (which did not then require the prosecution to prove the alleged gang member engaged in felonious conduct with another member of his or her gang), alleged as qualifying as a

"strike." *People v. Strike* (2020) 45 Cal.App.5th 143, 147.

- **Out-of-state priors frequently pose such issues**. Analyze carefully any out-of-state prior. Look for plea colloquies, trial transcripts, or other material from the record that were used to bridge the gap between the elements of crime (especially, robbery, burglary, assault), and object.

- **Juvenile adjudications**. *People v. Nguyen* (2009) 46 Cal.4th 1007, 1010, held that the federal Constitution allows the use of a juvenile adjudication as a prior strike even though there is no right to a jury trial in the juvenile proceeding. Intermediate courts have held that *Gallardo* and *Descamps* did not call into question *Nguyen*'s holding, which remains good law under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. *People v. Thompson* (2022) 83 Cal.App.5th 69, 123, *People v. Romero* (2019) 44 Cal.App.5th 381, 389.

- **Necessity of early assessment of sufficiency of alleged "strike."** Before having client admit "strike" or other prior conviction enhancement:

  - 1) **Determine whether the prior would require proof of additional facts from the "record of conviction" beyond the statutory offense**; and

  - 2) **Review the prior "record of conviction" and assess whether it would be sufficient to establish the requisite additional facts** (e.g., personal infliction of GBI).

- **"Record of conviction" evidentiary and sufficiency issues. In addition to the Sixth Amendment limitations described**

above, there are several pre-Descamps rules regarding what kinds of documents can be considered:

- **Hearsay & other evidentiary objections.** Documents from "record of conviction" are only admissible to extent they satisfy a hearsay exception and represent a "reliable reflection" of basis of conviction. E.g., *People* v. *Reed* (1996) 13 Cal.4th 217 [preliminary hearing transcript admissible under "former testimony" exception].

- **Probation report not admissible to prove details of prior conviction.** *People v. Trujillo* (2005) 40 Cal.4th 165. A post-conviction probation report – even one containing the defendant's own inculpatory admissions – is not admissible to prove the factual basis for a prior conviction, because it is not part of the "record of conviction." Because such a report was prepared after the defendant's plea or trial, it cannot be considered part of the "basis" for the conviction

- **Preliminary hearing transcript where prior conviction based on *trial rather than plea*–**not a **"reliable reflection"** of basis of conviction. *Trial transcript*, rather than prelim, represents the most "reliable evidence" of basis of prior. *People v. Houck* (1998) 66 Cal.App.4th 350, 357; compare *People v. Bartow* (1996) 46 Cal.App.4th 1573 (*defense* is entitled to introduce portions of *trial transcript* to rebut "serious felony" allegations).

PROSECUTORIAL MISCONDUCT

- Prosecutorial misconduct is the one of the errors most frequently forfeited for appellate review due to inadequate "preservation" at trial.

- Cognizable on appeal only if:
    - (a) contemporaneous objection to prosecutorial questions or statements;
    - (b) specific ground for the objection stated, and
    - (c) *admonition to the jury requested*.
- Be sure to object to each prosecutorial reference to an improper subject during witness examinations or arguments. Otherwise, the appellate court may consider the issue preserved as to only those specific instances in which counsel voiced objections.
- Common types of prosecutorial misconduct:
    - ***Griffin* error**–commenting on defendant's failure to take the stand. *Griffin v. California* (1965) 380 U.S. 609.
    - ***Doyle* error**–commenting on defendant's post-arrest, post-*Miranda* silence. *Doyle v. Ohio* (1976) 426 U.S. 610.
    - *Beltran* error-**common prosecutorial misstatement of heat-of-passion manslaughter standard**. Contrary to an all-too-common prosecutorial argument, the question is not whether the provocation would drive an ordinary person to kill. The standard is simply whether the provocation is such that it would cause an ordinary person to act rashly and without deliberation. *People v. Beltran* (2013) 56 Cal.4th 935.
    - Commenting on defense's **failure to present witness at preliminary hearing**. *People v. Conover* (1966) 243 Cal.App.2d

38, 49.

- **Urging adverse inferences from defendant's exercise of any other constitutional rights–*including the right to counsel.***

- Other misconduct toward defense counsel: **"derisive comments and actions towards defense counsel,"** *People v. Hill* (1998) 17 Cal.4th 800, 832-834; disparaging defense function, *People* v. *Herring* (1993) 20 Cal.App.4th 1066; or characterizing defense counsel as another "attacker" of the victim or witness, *People* v. *Turner* (1983) 145 Cal.App.3d 658, 674; *People* v. *Pitts* (1990) 223 Cal.App.3d 606, 704.

- **References, in argument or questioning, to matters outside the record.** Such references violate the confrontation clause, because the prosecutor effectively becomes his or her own witness, by making representations to the jury about factual matters not presented at trial. See *People v. Bell* (1989) 49 Cal.3d 502.

- **Unsubstantiated insinuations in cross-examination questions**, where prosecutor has no bona fide belief he will be able to prove the suggested facts. *People* v. *Wagner* (1975) 13 Cal.3d 61.

- Admission of or reference to **co-defendant's (or other alleged co- principal's) plea or conviction**. *People* v. *Cummings* (1993) 4 Cal.4th 1233, 1294-1295.

- **Intimidation of defense witness**. *In re Martin* (1987) 44 Cal.3d 1.

- **Appeals to racial, ethnic or religious prejudices**–violation of **equal protection and due process** clauses. See generally *People*

v. Cudjo (1993) 6 Cal.4th 585, 625. (Also challenge under Racial Justice Act (Pen. Code, § 745, subd. (a)).

- **Potential due process implications of other forms misconduct**. Even where the prosecutorial tactic does not directly infringe a specific enumerated constitutional right, like the examples above, prosecutorial misconduct may still rise to the level of a **due process violation** if it is sufficiently inflammatory or pervasive. **If the misconduct could potentially affect the fairness and outcome of the trial, assert a due process objection**.

- Examples of common **appeals to passion or prejudice**:

  - Exhortations about **"war on crime,"** "war on drugs," "sending a message to drug dealers," "get this poison off our streets," etc. E.g., *United States* v. *McLean* (11th Cir. 1998) 138 F.3d 1398, 1405 [prosecutorial comments about "crack addicted babies"]; see also, e.g., *United States* v. *Beasley* (11th Cir. 1993) 2 F.3d 1551; *United States* v. *Boyd* (11th Cir. 1997) 131 F.3d 951.

  - Improper **"Golden Rule" argument**, urging jurors to **view the crime through victim's eyes**, to put themselves in victim's place, consider impact on the victim's family, or imagine that their own children had been victims. *People v. Vance* (2010) 188 Cal.App.4th 1182 (and prior cases cited there).

  - Warnings about the **consequences of an acquittal –** including exhortations to "take the defendant off the streets" or references to reactions of neighbors or community. *People v. Purvis* (1963) 60 Cal.2d 323, 342; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.

- **Appeals to religious principles**, especially where prosecutor implies that some "higher law" applies – e.g., suggestions of Biblical support for capital punishment. *People* v. *Wash* (1993) 6 Cal.4th 215, 260; see also, e.g., *People* v. *Pitts* (1990) 223 Cal.App.3d 606, 698-702 [reminding jurors in molestation case of Jesus Christ's praise for the innocence of children].

- **Misstating or mischaracterizing the trial testimony or misstating legal principles during closing argument**. *People v. Hill* (1998) 17 Cal.4th 800, 823-826, 829-832.

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- Other **deceptive or misleading tactics**: *commenting on absence of defense evidence* on a point *where prosecution blocked discovery or introduction of evidence* on that point.

- Creative forms of prosecutorial **vouching**: repeated references to crucial witness' plea agreement requiring him to testify truthfully (where prosecutorial argument and police evidence imply that government has monitored and verified truth of witness' testimony) (*U.S. v. Rudberg* (9th Cir. 1997) 122 F.3d 1199; *People* v. *Fauber* (1992) 2 Cal.4th 792, 822; use of police testimony on veracity of a key witness' account (such as victim-complainant, informant, or even another officer) *People v. Sergill* (1982) 138 Cal.App.3d 34; *United States* v. *Sanchez-Lima* (9th Cir. 1998) 161 F.3d 545.

- **"Is-the-Witnesses-Lying?" tactic:** Forcing defendant to comment on whether police or other prosecution witnesses are "lying." "Lay opinion about the veracity of

particular statements by another is inadmissible." *People* v. *Melton* (1988) 44 Cal.3d 713, 744. Many federal cases flatly prohibit this type of questioning, especially "where it compels a defendant to state that law enforcement officers lied in their testimony." See, e.g., *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1219-1220 (and cases discussed there). However, the California Supreme Court has adopted a more flexible test: "[C]ourts should carefully scrutinize were they lying questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." *People v. Chatman* (2006) 38 Cal.4th 344, 384.

- **Inconsistent prosecutorial factual theories in separate trials of co-defendants**. See *In re Sakarias* (2005) 35 Cal.4th 140.

SENTENCING ERROR

- Objections are almost always required. *People v. Scott* (1994) 9 Cal.4th 331, 351.

- Credits issues should first be raised in sentencing court. After sentencing, can be raised via a post-judgment motion in superior court. Pen. Code § 1237.1.

- Objections required:

- Denial of probation;

- Consecutive sentences (also requires a statement of reasons; if given, must object to reasons!);

- Dual use of fact as element and aggravating factor;

- Errors in probation report;

- Probation conditions (reasonableness-*People v. Lent* (1975) 15 Cal.3d 481);

- Restitution (method of calculation; amount).

- **Recent ameliorative sentencing statutes**. There have been significant changes to sentencing laws in the past several years. Likely, more are on the way. *Counsel should become well acquainted with all requirements of these laws to ensure preservation of all issues*. Some of these are:

  - Penal Code § 1170(b)(1)-(5) (SB 567): where statute specifies three possible terms, the court must order imposition of a sentence *not to exceed the middle term*, unless, in its discretion there are circumstances justifying imposition of the upper term and the facts underlying those circumstances have been stipulated to by the defendant or proven true beyond a reasonable doubt at a trial by a jury or a court. *Exception*: the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury. Bifurcation from the trial of charges and enhancements upon request is required where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial. The court shall set

forth on the record the facts and reasons for choosing the sentence imposed.

- Do not stipulate; move to bifurcate, contesting facts underlying aggravating circumstances at trial, and object to the court's reasons for the upper term.

- Also ensure that the jury instructions accurately state the findings necessary to establish each alleged aggravating factor.

- Consider possible vagueness challenges to certain aggravating factors which appear to call for normative judgments rather than fact-finding directed to clearly defined elements.

- Penal Code § 1170(b)(6) (AB 624): unless the court finds that aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order imposition of the lower term if contributing factors in the commission of the offense are present, including: physical or psychological trauma, person is a youth under age 26 at the time of the offense, a victim of partner violence or human trafficking. The court shall state the reasons for its sentence choice on the record at the time of sentencing.

  - Present or argue presence of mitigating circumstances, that they are not outweighed by aggravating circumstances. Object to court's stated reasons for not imposing lower term.

- Penal Code § 1385(c)(SB 81): the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except

if dismissal of that enhancement is prohibited by any initiative statute. In exercising its discretion, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances: would result in a discriminatory racial impact, multiple enhancements are alleged in a single case, application of an enhancement could result in a sentence of over 20 years; offense is connected to mental illness; offense is connected to prior victimization or childhood trauma; current offense is not a violent; the defendant was a juvenile at the time of commission of the current offense or any prior offenses; enhancement is based on a prior conviction that is over five years old; firearm used in the current offense was inoperable or unloaded. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety.

- Request court to dismiss enhancement, marshaling the above-listed mitigating circumstances and arguing that dismissal of the enhancement would not endanger public safety.

- **Formerly mandatory sentence enhancements which are now discretionary**:

    - SB 1393 (amending Pen. Code, §§ 667 and 1385, giving courts discretion to strike prior serious felony enhancements): request court to strike the enhancement.

    - SB 620 (amending Pen. Code, §§ 12022.5, 12022.53, giving courts discretion to strike firearm

enhancements): request court to strike firearm enhancement or impose lesser one.

- **Resentencing.** Counsel should be on the lookout for any opportunities to apply ameliorative sentencing statutes to resentencing and preserve the record. E.g., DA, AG, or CDCR recall and resentencing under Pen. Code, § 1172.1; SB 483: Pen. Code, § 1172.75 (resentencing for invalid Pen. Code, § 667.5 prior prison term applies "to any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing."); SB 1437: Pen. Code, § 1172.6 (resentencing after determination that defendant did not kill or intended to kill and was not a major participant in an underlying felony who acted with reckless indifference to human life). Remember that vacatur of a sentence renders a previously final judgment nonfinal for retroactivity purposes under *In re Estrada* (1965) 63 Cal.2d 740. (*People v. Padilla* (2022) 13 Cal.5th 152, 163.)

    - **In other words, anytime a resentencing occurs for *any* reason. (e.g., a resentencing remand on appeal, a habeas order, a CDCR kick-back for examination of an unauthorized sentence), *counsel should argue for application of all intervening ameliorative legislation*, even if an entirely different error created the necessity for the resentencing hearing.**

FINAL THOUGHTS

Beyond the minimum preservation of an issue, think about what else you can do to make an appellate issue more viable than it otherwise would be. For example, if you unsuccessfully litigated pretrial an issue and a harmful outcome you had warned the court about has come to pass, object again at trial factoring in the subsequent events that were not in the record earlier. Think about renewing the issue in a new trial motion, to force the bench to address it again.

Be alert to anything in your record that smacks of disparate treatment under the Racial Justice Act. Contact subject matter experts (e.g., the Office of the State Public Defender) about making a strong record.

Pay attention to any unusual procedures or customs in your county (e.g., unwritten rules governing plea offers), and get them on the record.

Finally, please **contact your local appellate project** if you have any questions about making a record or seek assistance in improving the outcome of an issue at trial or on appeal. We are here to help. Experience has shown us that collaboration among appellate and trial attorneys provides an extraordinary opportunity to affect positive outcomes for our clients and to shape the law. Through collaboration, we have learned that issues are robustly litigated at trial and well-preserved for appeal.