Appellate Advocacy College 2000

Lecture

How to Approach a Case/Issue Spotting

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APPROACHING THE CASE

I. READING THE RECORD

1. What do I read first?

There is no hard or fast rule, but most appellate practitioners start with the CT. Some people start with the probation report, to get an overview of the case. Others start with the information. If there is no information, make a note. You will need to make a rule 35(e) request for it. Look for the complaint. Almost every CT will have either one or the other.

2. What am I looking for in the CT?

- ❑ FIRST, you want to establish a chronology of events so that you can write a coherent statement of the case.

- ❑ SECOND, you want to make sure that your reporter's transcript covers every important hearing, trial day, discussion of legal issues or other event that could or should have been reported on the record. Look for all notations of the following:

  - ★ During voir dire -- Were there any objections to the panel or the proceeding? Was there a Wheeler motion? Did anything unusual happen? Were there any in chambers discussions? Were there any contested challenges for cause? Did trial counsel exhaust all of his or her peremptory challenges?

  - ★ Pretrial motions – note all of the days over which a motion was heard, and decided. You need that ruling.

  - ★ Pretrial hearings on plea negotiations – you might have an *Alvernaz* issue down the road.

  - ★ During trial – note in limine motions, in chambers discussions, off the record discussions, objections, rulings, juror requests or questions, verdict forms. If written motions or jury questions are noted, look for them in the

CT. If they aren't there, you will need to make a rule 35(e) Request for them.

★ Post-trial motions and/or sentencing hearings – note all of the days over which motions for new trial, new counsel, etc. were heard and decided.
(i.e., where *is* that ruling?) Are letters or sentencing memoranda mentioned? Are they in the CT?

★ Jury instructions – instructions requested, refused, withdrawn, given. Note in particular the instructions requested by the defense but refused; requested by the prosecutor and given; instructions that require a specific factual basis such as flight, consciousness of guilt, admission or confession, suppression of evidence, etc.

❑ THIRD, you are already looking for clues about possible issues. Motions, objections, instructions should all be raising questions in your mind.

3. How should I be recording my observations?

Some people like to write the statement of the case at the word processor as they are going through the clerk's transcript. One advantage to this method is that you will note that something you need is missing because you cannot find a minute order reflecting what you are looking for (i.e., the information, the motion to suppress, the ruling on the motion). Other people like to take written notes, highlighting or underling potentially missing items. It is a good idea to start a preliminary list of potential issues at this point.

Now you are ready to read the RT.

1. What should I read first?

Some people like to start with the closing arguments, to get a sense of what the contested issues were at trial. Others like to start with the sentencing hearing. Still others prefer to start at the beginning. Wherever you start, it is important to

start cross-checking against your CT notes to make sure you have an RT for every motion, day of trial, legal discussion, etc. that you noted in the minute order. You may find that you are missing *in limine* motions, or that a discussion noted in the CT was not reported. This may or may not turn out to be important. At this stage, you want to keep an ongoing list of missing items.

2. What am I looking for in the RT?

You are looking for a couple of things simultaneously:

- ❑ FIRST, the salient facts of the underlying crime(s) and
- ❑ SECOND, what went awry in this trial, i.e., reversible trial error.
  - ★ It helps to have an overview of the case when you are looking for issues. If you are a quick reader, and your record is manageable (say 500 to 800 pages or under) you might consider doing a quick read of the whole thing, noting only important objections or motions or events that make a big impression on you. This approach gives you an general idea of the big picture, before you get bogged down in the details of who said what.
  - ★ You can't always read the whole record twice, once for the big picture and once for the details, even if you want to. If you can only go through the record once, take particular note of *in limine* motions, side bar discussions of objections, jury questions, and instructional conferences.
  - ★ Now is a good time to contact trial counsel, if you have not already done so before. Presumably you have already contacted your client, and you know what he or she thinks went wrong at trial. You've made your rule 35(e) requests and augmentation motion, if necessary. Now you are ready to start researching and selecting your issues.

II. SELECTING THE ISSUES

1. How do I separate the wheat from the chaff?

- ❑ FIRST, focus on the big picture. What went wrong in this case from your client's perspective? What was it that really hurt your client during this trial? What could have been done differently that might have turned the tide in his or her favor? Is there someway to characterize what happened as an error on somebody's part? Trial court error? Prosecutorial misconduct? Ineffective assistance of counsel? Jury questions provide an invaluable glimpse at the issues that were important to the jury. If your jury asked questions during the trial or deliberations, analyze them and work backwards; could a different ruling or instruction have helped the jury resolve the issues in manner more favorable to your client?

- ❑ SECOND, look for a theme. Start to think about clusters of errors that exacerbate each other. Was an arguably erroneous trial court ruling made worse by the prosecutor's questioning or argument? By the instructions? For example, was certain defense evidence excluded or defense line of questioning precluded? Were defense-requested instructions later refused, or defense argument curtailed, for lack of an evidentiary basis? Or was an issue raised in several different ways? For example, was there an objection to the introduction of certain evidence? Was that evidence or objection revisited at the instructional conference? Did it come up again in argument? Was there a motion for mistrial or new trial on the same ground?

- ❑ THIRD, evaluate the strength of potential issues. Are the issues straightforwardly preserved and raised in the trial record? If issues were waived, consider whether it was ineffective assistance to have waived them. If an issue was technically waived, but ineffective assistance of counsel seems plausible, it may or may not be worth raising. Imagine that you didn't have waiver problems or IAC ramifications, and evaluate the strength of the issue. If it would be a strong issue on its own merits, you should probably raise it, even though there are problems. If the issue is marginal without the problems, it isn't going to get any better looking with more hoops to jump through. (i.e., prosecutorial misconduct, no objection: is the comment standing alone so bad that no admonition could have cured it, etc. and it was IAC to have failed to object?)

- ❑ FOURTH, look at the standards of review and reversal. Is the review standard and/or reversal super-deferential (i.e., abuse of discretion and *Watson*)? The more deferential the standard, the

weaker the issue.

2. Do I have to raise every arguable issue I've researched?

No, you don't. Some people do, but many others prefer to choose their battles.

- ★ If you have isolated what went wrong in your client's trial, and found an overarching theme, it is often very effective to raise the strongest issues that demonstrate how several errors converged to rob your client of a fair trial.

- ★ If you have another issue which does not fit your overall theory of the case, but it is strong on its own merits, raise it any way. Sometimes, you will have convinced the court of your theory of the case, but for unfathomable reasons the court will be reluctant to reverse on that basis. If you have given the court another reason to reverse, it may choose to do so on that basis instead, even if does not fit into your theory of the case and is not your favorite issue.

- ★ But if you have a bunch of issues that are arguable but weak, and they do not fit into your overall theory of the case, consider not raising them.

III. ORGANIZING THE BRIEF

1. What is the best way of presenting issues in a brief?

There are two general organizing principles and one caveat:

- ★ follow the chronology of the trial (i.e., from voir dire to evidence to instructions to argument to sentencing); or

- ★ order your arguments from strongest to weakest; but

- ★ Sometimes a combination of approaches works best. For example,

  - ★ your strongest argument (because the standard of reversal is *per se*) is a *Wheeler/Batson* claim, but you are also raising an iffy denial of a pre-trial motion to suppress. Maybe you want to start with your *Wheeler/Batson* argument first, to put your reader in a positive frame of mind.

  - ★ But suppose your strongest argument is a sentencing argument, and your evidentiary and instructional arguments are not all that

strong. You probably don't want to lead with the sentencing argument, for fear that your reader will think *you* think your trial arguments are throwaways.

★ As between instructional and other trial error arguments, it probably doesn't matter which one goes first, with one caveat:

★ if one builds on the other (i.e., the reader needs to understand the evidentiary error for the instructional argument or prosecutorial argument to make sense),
start with the first building block argument, even if
it is weaker.

★ if you have thematically linked arguments, (i.e., there was evidentiary error, which was compounded by the instructional error) and also an argument about a distinct error, you will want to group the linked arguments together, either preceded or followed by the non-linked argument.

ISSUE SPOTTING AND EVALUATION
General Tips and Annotated Checklist

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April 2000

GENERAL CONSIDERATIONS

❒ **Waiver/Standard of Review/Prejudice Standards** (subjects of separate materials). These standards don't just govern how you *argue* issues, they're guideposts for which issues you choose in first place.

❒ **Federalize, federalize, federalize**. Whenever possible, try to think of how an ordinary "state law" error (e.g., admission or exclusion of evidence) also *infringed federal constitutional rights*. Numerous specific examples throughout this outline and other materials (e.g., hearsay error resulting in confrontation violation).

❒ **Ineffective assistance–the "flip side" of waiver.** If "waived" issue otherwise appears viable–in particular, if error was highly prejudicial–don't give up on it. Consider re-framing issue as ineffective assistance, based on counsel's failure to object, request applicable instruction, etc.

❒ **Crucial steps in <u>every case:</u>**

- **Communicate** with your client and with the trial attorney.
- **Read the statutes defining the charged offense(s) and any enhancements** and compare to pleadings and instructions. Make sure they conform to **version of statute on the books at the time of commission of the underlying offenses** (rather than time of trial). (Tip: Keep your old "desk copies" of *prior years'* Penal Code handy for quick reference.)
- **Very close review of jury instructions (both oral and written), counsel's closing arguments, and any mid-deliberations communications with jurors** (e.g., jurors' queries about the instructions, readback requests, complaints about other jurors, etc.).
- Be on lookout for **any defects re venue/jurisdiction/vicinage/statute of limitations**.
- **When something seems odd or curious, don't assume there's a good explanation for it; follow up.** (E.g., "why is this Contra Costa count being tried with all these Alameda County ones?"; "why doesn't there seem to be any ruling on this in limine motion?" "why did a year go by with nothing happening on this case?")
- Make sure that you **understand exactly how the court "constructed" the sentence**, especially in multi-count or multi-enhancement cases; and make sure each portion of sentence corresponds to statutory penalties, as of the time of the underlying crime.

❒ **Nature of case helps guide where you particularly look for issues**. For example, was this a "whodunnit" trial with questions as to defendant's *identity* as perpetrator, or did trial revolve around defendant's *culpability* (if any) in connection with events in which he did play

some role. Some issues lend themselves more to one or the other category of case.

- **Identity & "Whodunnit" cases**. Pay particular attention to:
  - "**Other offenses**" evidence (& instructions relating to that evidence)
  - Other events exposing jurors to appellant's **prior convictions or arrests** (e.g., a witness' gratuitous reference to parole)
  - **Identification** issues (e.g., suggestive ID procedures; denial of pinpoint instructions on identification factors (CALJIC 2.92); exclusion of expert testimony re eyewitness identification)
  - Exclusion of **3rd-party culpability evidence** (or counsel's failure to investigate such evidence)
  - Instructions concerning assessment of various kinds of evidence (CALJIC 2.00 & 3.00 series)
- **Degree of culpability cases** (including cases involving defenses like self-defense, accident, mistake of fact, consent, etc.) Pay particular attention to:
  - **Elements of charged offense & theories of liability**, including sufficiency of evidence and jury instructions defining elements
  - **Validity & clarity of any instructions on any theories of vicarious liability**–e.g., aiding and abetting; "natural and probable consequences"; felony-murder; misdemeanor-manslaughter; co-conspirator liability; etc.
  - Be especially attentive to such issues where **prosecution is stacking one theory of liability on top of another**–e.g., an aider/abettor's liability for the "natural and probable consequences" of the target offense
  - **Lesser included offense** instructions
  - Instructions on **defense theories**
  - Refusal of any requested **"pinpoint" instructions**, "amplifying or clarifying" basic instructions on elements, theories, defenses, etc. (or IAC for failure to request such instructions)
- **Multi-count cases** (e.g., multiple sex offenses; "crime sprees" of burglaries, robberies, etc.). Particularly in cases tried by both sides on "all or nothing" theories (e.g., defense claims child-complainant made it all up), watch for count-specific issues that may have been overlooked below:
  - **Sufficiency-of-evidence as to *each* count** (e.g., in some multi-count molestation cases, there may turn out to be *no* evidence to support some counts or testimony may be so vague or equivocal that it fails *Jackson v. Virginia* sufficiency test)
  - Close cousin: **lesser included offense issues as to particular counts**–e.g., attempt, non-forcible versions of charged offenses, etc.
  - Sufficiency-of-evidence as to ***each enhancement*** (e.g., just because victim sustained GBI at some point, doesn't necessarily mean there was GBI as to every single count)
  - **Jury unanimity issues** (CALJIC 17.01 or prosecutorial "election" between acts) as to specific counts.

CAVEATS ABOUT THIS CHECKLIST

❒ **This is <u>not</u> an exhaustive list of all potential areas for appellate issues**. This "Checklist" just features some of the most common issue areas, as well as a few less-common ones that are often overlooked. But there are lots of other issues out there–including unfair events in *your* case that don't easily fit within current doctrinal boxes.

❒ **This is <u>not</u> a compendium of *substantive* law**. This outline simply flags issue area and does not get into nuances of substantive law. (But many of subjects flagged in this checklist will be subjects of separate materials and lectures at Appellate College.)

❒ **The cited cases are only illustrative examples (recent ones, where possible), not necessarily the "leading cases" on these points.** Be sure to check on current validity of cited authorities before relying them, especially because some are *very* recent and not yet final. Also, some of the citations are to U.S. or Cal. Supreme Court opinions which recognized a particular principle, but found no error under the particular facts of case.

❒ **This is just one attorney's checklist** (or what idiot wrote this!?). Other attorneys may have significantly different ways of categorizing types of issues. See, for example, the different checklist in the new edition of CEB's appellate practice manual. 1 Appeals & Writs in Criminal Cases (Cont.Ed.Bar 2nd ed. 2000) § 1.119, pp. 129-138. It may be helpful to look at two or three such checklists or outlines.

❒ With those (major) caveats, some significant areas for appellate issues are listed below. (As noted earlier, where possible, the checklist also includes one or two illustrative citations.)

PRE-TRIAL ISSUES

❒ **§ 995 motions.** Only **rarely cognizable in a post-trial appeal** per *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519--necessity of showing how any error at preliminary hearing resulted in prejudice to fairness of *trial*.

- Exceptions: *where prosecution would have been barred from refiling the case* (e.g., where a prior dismissal triggering the "double dismissal" rule (§ 1387); where statute of limitation would bar refiled complaint; or where the error at preliminary hearing somehow impaired the fairness of the later *trial*).
- Even where the 995 denial won't be directly cognizable on appeal, similar basic issues (e.g., sufficiency of basic factual scenario to support charged offense) may resurface as *trial* issues.

❒ ***Statutory* speedy trial motions, § 1382.** Same prejudice rules as for 995 motions. *People v. Johnson* (1980) 26 Cal.3d 557. Must show that prosecution wouldn't have been able to refile or that the § 1382 violation somewhat prejudiced the fairness of the trial (e.g., delay of trial beyond the § 1382 deadline resulted in irreparable loss of a crucial defense witness (e.g.,

witness' death, deportation, etc. before commencement of delayed trial)).

❒ ***Constitutional* speedy trial motions**. Note that, unlike § 1382 issues, motions based on federal or state "speedy trial" rights (or due process for "pre-charging delay) are not subject to *Johnson/Pompa-Ortiz* limits. (However, the speedy trial/due process analyses of delay generally incorporate prejudice considerations, so it's still generally necessary to show how the delay impaired the fairness of the ultimate trial.)

- See *People v. Martinez* (April 6, 2000) 22 Cal.4th __, 00 C.D.O.S. 2682, for recent refinements of when federal and state "speedy trial" rights attach under California charging procedures.

❒ **Various "non-statutory" motions to dismiss** (e.g., *Trombetta* loss or destruction of exculpatory evidence; discriminatory or vindictive prosecution, etc.). Note: even if you conclude that the refusal to dismiss the case altogether doesn't pose a briefable argument, *consider other potential issues arising from whatever problem was the subject of the motion.* (E.g., defense's entitlement to some *lesser remedy* (exclusion of certain evidence, a cautionary or remedial instruction, etc.).)

❒ **Discovery-related motions** (including "*Pitchess* motions" for records on police officers (§ Evid. Code § 1043-1045), informant-disclosure motions, and other discovery motions).

- If trial court reviewed any materials in camera, file augment motion to ensure those materials are transmitted to Court of Appeal.

❒ **Joinder/severance motions** (including joinder of multiple counts against the same defendant or joinder of multiple defendants charged with the same offense). See, e.g., *Bean* v. *Calderon* (9th Cir. 1998) 163 F.3d 1073 [reversal of one murder conviction where 2 murder counts were improperly joined; the murders were not cross-admissible, and the stronger count tended bolster the weaker one].

- If defense sought severance on *Aranda-Bruton* grounds, also look for evidentiary and instructional issues re use of co-defendant's statements.

SEARCH-AND-SEIZURE ISSUES

❒ **§ 1538.5 motions.** Be aware of rules regarding adequacy of defense's assertion of specific grounds for challenging search. *People* v. *Williams* (1999) 20 Cal.4th 119.

❒ **Prop. 8 warning:** Be careful to frame your search arguments *solely in terms of the Fourth Amendment to the U.S. Constitution*, and *not* under the search-and-seizure provision of the California Constitution. *In re Lance W.* (1985) 37 Cal.3d 873.

❒ **IAC for failure to file a 1538.5 motion or for failure to assert the stronger grounds in the motion.**

- Follow-up anytime there doesn't seem to be a lawful basis for a detention, arrest,

search, etc. An early call to trial counsel may avoid a lot of wheel-spinning. (There may be valid basis (e.g., probation search) not disclosed in trial transcript.)

- If counsel's explanation of failure to challenge a search still leaves you with doubts, ask for copies of the relevant police reports.
- Any such IAC argument will almost certainly require a writ petition. Cf. *People v. Mendoza Tello* (1997) 15 Cal.4th 264.

❒ **Special considerations in offense-against-officer cases**. Though search-and-seizure issues most commonly arise on § 1538.5 motions for exclusion of evidence, in cases involving offenses against police officers or police authority the legality of the police conduct may present a *trial issue for the jury*.

- Crimes such as resisting arrest (§ 148) or assault or battery on an officer (e.g., § 245(d), 243(c)(2)) generally include, **as an *element,* a requirement that the officer was acting within the scope of his or her authority**. "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense." *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.
- Consequently, any factual scenario presenting search-and-seizure issues *requires complete jury instructions on the relevant Fourth Amendment doctrines applicable to the police conduct* (e.g., the *Terry* reasonable suspicion standard for detentions; the probable cause standard for arrests; etc.). (CALJIC includes instructions on some of these standards, but not others (see, e.g., CALJIC 16.103-16.111).)
- Note that difference between the standards of review applicable to a 1538.5 denial and to omission of a jury instruction also has crucial implications for the viability of any search-and-seizure issues. In latter context, the question isn't sufficiency of evidence to uphold search, but whether *the jurors* received sufficient guidance to resolve each of the questions concerning the propriety of those actions.

STATUS OF REPRESENTATION ISSUES

❒ ***Marsden* issues--defendant's motion to replace appointed counsel**. Note that the same *Marsden* standard applies, regardless of stage of case at which *Marsden* motion arises--i.e., the standard for *post-trial or post-plea* motions to replace appointed counsel is the same as for a *Marsden* motion before or during trial. *People v. Smith* (1993) 6 Cal.4th 684.

❒ **Possible hooks for *Marsden* issues.** Where possible, consider whether there were any defects in the *Marsden process*.

- E.g., court's failure to hear or consider a defendant's *Marsden* motion (this still seems to be the most common basis for *Marsden* reversals); inadequacy of trial court's inquiry into defendant's complaints. E.g., *People v. Ivans* (1992) 2 Cal.App.4th 1654,1665-1667.
- Trial judge's reliance on own knowledge of trial counsel's performance in other cases without sufficient inquiry into defendant's specific complaints; trial judge's ex parte

consultations (e.g., with other lawyers) in deciding *Marsden* motion. Cf. *People v. Hill* (1983) 148 Cal.App.3d 744, 754-755.

❒ ***Ortiz* issues--defendant's motion to discharge *retained* counsel**. (People v. Ortiz (1990) 51 Cal.3d 975. The standards for discharging retained counsel are quite different than for retained counsel, and the defendant does *not* need to show that counsel is rendering ineffective assistance or that an irreconcilable conflict has developed.

- *Watch for situations in which trial judge attempted to apply Marsden-type standards to motions to discharge retained counsel*.
- Also, pay particular note to **post-trial motions to discharge retained counsel** and to obtain appointed counsel to investigate and litigate a new trial motion on IAC grounds.

❒ ***Faretta* self-representation issues.** Note that *either the granting or the denial of a defendant's pro. per. request may present a viable appellate issue*, depending on the adequacy of the trial court's inquiry and advisements and other factors.

- **Denial of self-representation.** Watch for *Faretta* denials based on the defendant's asserted lack of "competency" for self-representation. The standard for competency to waive counsel is the **same as Pen. Code § 1368 standard for competency to stand trial**; consequently, a *Faretta* denial on this ground is inherently inconsistent with a finding that the defendant is competent to cooperate with counsel in his defense for 1368 purposes. *Godinez v. Moran* (1993) 509 U.S. 389; see, e.g., *People v. Hightower* (1996) 41 Cal.App.4th 1108; *People v. Nauton* (1994) 29 Cal.App.4th 976; *People v. Poplawski* (1994) 25 Cal.App.4th 881.
- Correct *Faretta* competency inquiry: whether there is a knowing and voluntary waiver of the right to counsel, *not* whether the defendant is "competent" to represent himself effectively.
- **Timing of pro. per. request.** Standards applicable to *Faretta* motions vary depending on whether the motion is "timely." Cf. *People v. Windham* (1977) 19 Cal.4th 121; *People v. Burton* (1989) 48 Cal.3d 843, 852-854. Discretion to deny a belated pro. per. request (made on the eve of or during trial) if the defendant indicates that he will need a continuance in order to prepare for trial.
- **Self-representation granted**. Scrutinize **adequacy of the court's admonishments** on the right to counsel and the **hazards of self-representation**. E.g., *People* v. *Noreiga* (1997) 59 Cal.App.4th 311; *U.S.* v. *Keen* (9th Cir. 1996) 96 F.3d 425; see also *Snook* v. *Wood* (9th Cir. 1996) 89 F.3d 605.
- Watch for **"red flags"**–indicia of mental illness that should have raised questions as to defendant's mental competency to waive counsel (e.g., bizarre behavior in court; references in probation reports or other records to mental illness or psychiatric medications).
- Other rights associated with self-representation. Denial of **ancillary services to pro. per. defendant** (subpoena servers, investigators and experts, library access, etc.). *Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443; see also *People v. Schulz* (1992) 5

Cal.App.4th 563.

- Requests for **re-appointment of counsel**. *People v. Gallego* (1990) 52 Cal.3d 115, 163-165. As with other counsel-related issues, consider *timing* of request as well as defendant's reasons.
  - considerable discretion to deny a mid-trial request for re-appointment of counsel, especially where defendant has a history of vacillation on counsel issues or of other dilatory or manipulative tactics (*Gallego*).
  - much stronger issue where re-appointment request is made a reasonable time before trial date **or where pro. per. defendant trial requests appointment of counsel for sentencing and new trial motion**. *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696; *People v. Ngaue* (1991) 229 Cal.App.3d 1115.

❒ Necessity of **re-advisement of right to counsel upon arraignment in superior court** (even if there was a valid waiver of the right to counsel for purposes of the preliminary hearing). Pen. Code, §§ 859, 987; *People v. Sohrab* (1997) 59 Cal.App.4th 89. (Note: this issue currently pending before Cal. Supreme Court in *People* v. *Crayton*, S085780.)

❒ **Pro. per. defendant's request for "advisory" or "stand-by counsel."** Considerable trial court discretion to deny such requests. But, as with other discretionary matters, watch for **comments indicating the trial court mistakenly believed that it lacked the authority** to appoint a stand-by counsel. See *People v. Bigelow* (1984) 37 Cal.3d 731.

❒ **Interplay between representation issues.** Watch for situations in which **court's handling of one representation issue improperly induces or interferes with a defendant's exercise of his rights as to another such issue**.

- E.g., court's inadequate inquiry into defendant's *Marsden* complaints about appointed counsel taints defendant's waiver of counsel and decision to go pro. per. *People v. Hill* (1983) 148 Cal.App.3d 744; *Crandell* v. *Bunnell* (9th Cir. 1998) 114 F.3d 1213.
- E.g., court's warnings that defendant won't receive requested library access or other ancillary services induce defendant to withdraw or forego *Faretta* request.

INEFFECTIVE ASSISTANCE OF COUNSEL

❒ **Cuts across all other issues**--i.e, any other appellate issues listed here could conceivably be presented in IAC envelope. **The "flip side" of waiver**.

❒ ***Cronic* test**

- ***Cronic*: prejudice presumed for actual or constructive denial of counsel** during crucial stage of proceedings. *U.S. v. Cronic* (1984) 466 U.S. 648.
- No need to make specific showing of prejudice " if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" such as "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic, supra*, 466 U.S. at pp. 658-659 & fn. 25.

- E.g., where counsel absent or rendered no representation during relevant phase. E.g. *Patrasso* v. *Nelson* (7th Cir. 1997) 121 F.3d 297, 303-305; *Tucker v. Day* (5th Cir. 1992) 969 F.2d 155 [*Cronic* error where counsel did nothing at sentencing].
- ***Cronic* very rarely found applicable**, at least by California courts. Even where counsel's performance glaring deficient, IAC usually analyzed under *Strickland* v. *Washington* test below, and defendant required to show prejudice under *Strickland* "reasonable probability" test. See *In re Avena* (1996) 12 Cal.4th 694, 726-727: analyzing under *Strickland* rather than *Cronic*, despite "the minimal nature of [defense counsel's representation" at trial–"He was, however, neither 'totally absent' nor 'prevented' from assisting petitioner at trial."

❒ ***Strickland* test: governing framework for almost all IAC claims.** *Strickland* v. *Washington* (1984) 466 U.S. 668. 2-part test: deficient performance & prejudice

- **performance:** "'representation fell below an objective standard of reasonableness ... under prevailing professional norms.'"
- **prejudice: "reasonable probability"** of more favorable outcome.
  - Not as good as *Chapman***,** but ***Strickland* does <u>not</u> require showing that more favorable outcome "more likely than not."** E.g., *In re Cordero* (1988) 46 Cal.3d 161.
  - Just means probability **sufficient to undermine confidence in the verdict**.
  - ***Strickland lives!*** U.S. Supreme Court re-affirms *Strickland* "reasonable probability" test as governing prejudice standard for ineffective assistance claims. Rejects notion that *Lockhart v. Nelson* (1993) 506 U.S. 364 modified *Strickland* or replaced it with a more daunting "fundamental fairness" test. *Williams v. Taylor* (Apr. 18, 2000) __ U.S. __, 00 C.D.O.S. 2945.
- **California's adoption of *Strickland*** (despite occasional differences in phrasing of state test). E.g., *People v. Ledesma* (1987) 43 Cal.3d 171; *In re Sixto* (1989) 48 Cal.3d 1247.
- **Pivotal factors for most IAC claims**
  - **No legitimate tactical reason** for omission. Cal. cases usually require affirmative showing counsel didn't have tactical reason.
  - Meeting ***Strickland* prejudice showing**, described above.

❒ **IAC on the record.** Examples of "courtroom IAC":

- **Failure to object to inadmissible, prejudicial evidence** (particularly references to other offenses, arrests, uncharged misconduct, weapon possession, etc.) E.g., *In re Jones* (1996) 13 Cal.4th 552; *People v. Guizar* (1986) 180 Cal.App.3d 487, 492 n. 3; *People v. Stratton* (1988) 205 Cal.App.3d 88.
- **Defects in presentation of a motion or objection**
  - Seeking exclusion of evidence (or other desired relief) on **wrong ground or failing to raise strongest ground**. E.g., *In re Jones* (1996) 13 Cal.4th 552 (failure to present strongest ground for exclusion of former testimony).
  - **Formal or procedural defects** in motion, resulting in forfeiture of issue.

People v. *Camilleri* (1990) 220 Cal.App.3d 1199 (failure to renew § 1538.5 motion in superior court), cited with approval in *People* v. *Mendoza Tello* (1997) 15 Cal.4th 264.

- **Failure to seek suppression of evidence**–search and seizure, *Miranda*, *Massiah*, etc. Note: Per *People* v. *Mendoza Tello* (1997) 15 Cal.4th 264, such claims will usually require a habeas petition (to allow prosecution to offer additional search justifications, etc.), even where existing appellate record appears to show illegality.
- **Failure to request favorable instructions**, especially **"pinpoint" or amplifying instructions** outside of court's sua sponte duties. E.g., *U.S. v. Span* (9th Cir. 1996) 75 F.3d 1383.
  - However, under California appellate standards, **best types of instructional arguments usually don't require IAC framework**.
  - Court's actual instructions reviewable without necessity of objection, if they affect "substantial rights" (Pen. Code § 1259)
  - Most important categories of instructions (elements of offenses, lesser includeds, defenses) within court's sua sponte duties.
  - May want to include **IAC as fallback** where unsettled whether instruction is sua sponte or pinpoint
  - IAC for omission of especially important pinpoint instructions–e.g., "antecedent threats" (*Bush*, *Pena*); intoxication bearing on specific intent (CALJIC 4.21.1), provocation bearing on premeditation (CALJIC 8.73)
- **Failure to object to prosecutorial misconduct during trial.** E.g., *Gravley* v. *Mills* (6th Cir. 1996) 87 F.3d 779.
  - IAC frequently included as **"fallback"** basis for reaching prosecutorial misconduct claims and often considered (and rejected) on merits.
  - But **courts frequently willing to assume tactical reasons for not objecting** (not wanting to call greater attention to prosecutor's remarks); hence may need habeas petition
- Defense counsel's **actions affirmatively harming client**
  - Defense counsel **arguing against client** (including concessions of guilt). *U.S. v. Swanson* (9th Cir. 1991) 943 F.2d 1070.
  - Defense counsel's elicitation of highly damaging evidence. E.g., *In re Jones* (1996) 13 Cal.4th 552.
- Failure to object to sentencing errors otherwise waived under *People* v. *Scott* (1994) 9 Cal.4th 331–principally **failure to state required reasons for a sentence choice** or **use of an invalid sentencing reason** (e.g., reason barred by "dual use" rule)
  - However**, no need for IAC framework for any "unauthorized sentence"** issue (e.g., § 654; invalid term for a count or enhancement; failure to impose a mandatory stay or partial stay)

❒ **Raising IAC on the appellate record**–strategic considerations

- **Direct appeal, writ, or both?**
- "**No conceivable tactical reason"** for omission–IAC shown on direct appeal without

necessity for habeas petition. Some helpful authorities: *People v. Guizar* (1986) 180 Cal.App.3d 487, 492 n. 3 [failure to redact references to unproven other crimes (murders) from tape & tape transcript]; *People v. Stratton* (1988) 205 Cal.App.3d 88 [failure to object to evidence of defendant's possession of weapons (a handgrenade and a knife) at time of arrest, where weapons not relevant to current charge].]

- But cases above represent **narrow exception**; cases **usually regard foregoing objection as classical tactical choice**; will rarely be deemed IAC on direct appeal record alone. "[F]ailure to object seldom establishes counsel's incompetence." *People v. Hayes* (1990) 52 Cal.3d 577, 621; accord, e.g., *People v. Majors* (1998) 18 Cal.4th 385, 403; *People v. Barnett* (1998) 17 Cal.4th 1044, 1174 fn. 96; *People v. Williams* (1997) 16 Cal.4th 153, 215; *People* v. *Malone* (1988) 47 Cal.3d 1, 33-34.
- Using companion **habeas petition**, **even for "courtroom IAC"** (e.g., failure to object to inadmissible evidence, prosecutorial misconduct, etc.).
  - For many habeas petitions, only function of petition is to present **trial counsel's declaration he had no tactical reason for omission** (or appellate counsel's declaration that trial counsel refused to answer queries on subject)
- **Judgment calls** in raising IAC claims based on courtroom omissions. **Threshold may be different** in deciding to raise an adequately preserved issue vs. presenting that same issue via ineffective assistance framework.
- **IAC as fallback argument**, where cognizability/waiver issues are debatable (e.g., counsel did object on correct general ground, but without precision demanded by a very strict application of waiver rules).
  - **If you're going to do it, do it now.** If going to raise IAC as a "fallback" to avoid possible waiver obstacles, do it in the AOB (and/or in a companion writ petition). **Cannot raise ineffective assistance claim for the first time in reply brief.** *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055.

❒ **Ineffective assistance outside the record**–failures to investigate or present evidence. Habeas investigation required (unless IAC was fully litigated below by new counsel in a new trial motion).

- Leading examples of **IAC investigation claims**:
- Failure to investigate (or inadequate investigation) of **mental state defenses**, based on mental illness or intoxication ("diminished actuality"). E.g., *People v. Ledesma* (1987) 43 Cal.3d 171; *In re Sixto* (1989) 48 Cal.3d 1247; *In re Cordero* (1988) 46 Cal.3d 161.
- Failure to investigate defenses based on **other psychological testimony**, e.g., "**battered women's syndrome**" or other post-traumatic stress disorders. E.g., *People* v. *Day* (1992) 2 Cal.App.4th 405.
- Inadequate investigation of **other expert or forensic evidence**. E.g., *Baylor* v. *Estelle* (9th Cir. 1996) 94 F.3d 1321 [failure to secure serological testimony suggesting rapist's blood type different than defendant's]; *In re Jones* (1996) 13 Cal.4th 552 [inadequate investigation re prosecution's firearm evidence].
- Inadequate **preparation of expert testimony**. *Bloom* v. *Calderon* (9th Cir. 1997) 132

F.3d 1267; *Bean* v. *Calderon* (9th Cir. 1998) 163 F.3d 1073 [defense counsel failed to provide his expert witness with relevant documents and other information on case].

- Inadequate investigation of potential **alibi witnesses**. *Brown* v. *Myers* (9th Cir. 1998) 137 F.3d 1154.
- **Third-party culpability evidence**. E.g., *Sanders* v. *Ratelle* (9th Cir. 1994) 21 F.3d 1446 [failure to investigate & introduce evidence of defendant's brother's confession to the murder];see also *Jones* v. *Woods* (9th Cir. March 10, 2000) __ F.3d __ 00 C.D.O.S. 1928.
- **Over-reliance on police investigation, reports and assurances**, without adequate independent investigation. *In re Hall* (1981) 30 Cal.3d 408, 425-425; see also *In re Neely* (1993) 6 Cal.4th 901, 919-920.
- Inadequate investigation or failure to use **available impeachment information as to prosecution witnesses**. E.g., prior inconsistent statements, felony convictions, "moral turpitude" conduct (*Wheeler*), probationary status, pending cases, etc.
  - IAC **may complement *Brady* claim**, if prosecution failed to disclose impeachment information, but it was readily available to counsel through other means (e.g. felony convictions discoverable through superior court files).

❒ **Inadequate or incorrect advice to defendant re plea offers**

- Counsel's **plea advice based on misunderstanding of applicable legal principles** (e.g., scope of charged statutory offenses or of potential defense theories). E.g., *People v. Maguire* (1998) 67 Cal.App.4th 1022 [counsel failed to realize that 2 of the 5 counts did not come within the charged statute].
- Counsel's **plea advice based on inadequate factual investigation.**
- Counsel's incorrect advice regarding **sentencing or other penal consequences** (e.g., **parole eligibility, immigration consequences**), resulting in defendant's **acceptance of plea bargain**. E.g., *People* v. *Huynh* (1991) 229 Cal.App.3d 1067; *People* v. *Barocio* (1989) 216 Cal.App.3d 99; *People* v. *Soriano* (1987) 194 Cal.App.3d 1470.
- Counsel's **failure to communicate offer or incorrect advice** regarding penal consequences, **resulting in loss or rejection of plea offer**. *In re Alvernaz* (1992) 2 Cal.4th 924 [recognizing principle, but denying relief without an evidentiary hearing]; compare *Alvernaz v. Ratelle* (S.D. Cal. 1993) 831 F.Supp. 790 [granting same defendant's habeas petition, after evidentiary hearing]; see also *U.S. v. Blaylock* (9th Cir. 1994) 20 F.3d 1458.
- Note that defective advice on penal consequences **can concern *either* the consequences of the offered plea bargain *or the maximum potential sentence if the defendant were to be convicted on all the charged counts and enhancements*.** A gross overstatement of the potential sentence the defendant would be facing if convicted at trial may taint the voluntariness of acceptance of a plea bargain.

❒ **Clues** for possible writ issues, lurking outside the record (i.e., things that should start you asking questions).

- **Defendant's own complaints** to you (or in a *Marsden* hearing) about plausible

witnesses not called or contacted by defense counsel.

- **Major characters** in the story or other apparent percipient **witnesses whom neither side called.**
- **What happened** in case(s) of **separately tried co-defendants**?
- **What happened** in case(s) of **accomplice witnesses or jailhouse informants**?
- Counsel's reliance on defendant and other lay witnesses for type of **defense usually requiring expert testimony**. E.g., *People* v. *Frierson* (1979) 25 Cal.3d 142.
- Other situations in which counsel seems to have presented **inferior evidence** on a key aspect of defense, **where more reliable or persuasive corroborating evidence should have been available**. E.g., *Hart* v. *Gomez* (9th Cir. 1999) 174 F.3d 1067 [failure to introduce available documentary evidence (hotel receipts, calendar entries, etc.) which would have corroborated key defense witness].
- Trial **counsel in trouble with the State Bar** for failures in other cases. E.g., *Sanders* v. *Ratelle* (9th Cir. 1994) 21 F.3d 1446 [taking judicial notice].
- Other indications counsel was distracted by other **major problems in personal or professional life** at time of trial.

CONFESSIONS

❒ ***Miranda*** issues. Enough said.

- Assuming, of course, that *Miranda* survives the current U.S. Supreme Court term. Cf. *Dickerson v. U.S.*, No. 99-5525 [argued Apr. 19, 2000], reviewing 4th Circuit's decision that Congress effectively abrogated *Miranda*via a 1968 statute (18 U.S.C. § 3501).
- In evaluating viability of an adverse *Miranda* ruling as appellate issue, remember that **many aspects of suppression rulings on confessions are "mixed questions of fact and law,"** subject to **independent review**. See generally *People* v. *Waidla* (Apr. 6, 2000) 22 Cal.4th __, 00 C.D.O.S. 2687, 2695; *Thompson v. Keohane* (1995) 516 U.S. 99, each distinguishing between "historical facts" ("what happened" questions) subject to deferential review and legal or mixed questions subject to independent review, including issues such as custody and voluntariness.

❒ ***Massiah.*** Consider 6th Amendment (*Massiah*, etc.) as well as 5th Amendment issues. E.g., *People v. Slayton* (2000) 77 Cal.App.4th 564 [violation of 6th Amen. right to counsel where police questioned defendant, without counsel, regarding crime inextricably related to another crime for which he had already been charged and arraigned]. Also watch for situations in which trial counsel missed the boat and considered admissibility issue only under *Miranda*, where the "real" problem was a 6th Amendment violation. Cf. *In re Wilson* (1992) 3 Cal.4th 945; *In re Neely* (1993) 6 Cal.4th 901 [each finding IAC for failure to raise *Massiah* issues, based either on misunderstanding of legal principles or inadequate factual investigation].

❒ **Jailhouse confessions.** Remember that *Massiah* and its progeny apply not only to police interrogations but to conduct of jail informants acting as police agents. *Maine v. Moulton*

(1985) 474 U.S. 159; see, e.g., *Wilson, supra*; *Neely, supra*.

❒ **Other jailhouse confession issues.** Even assuming there's no 6th Amendment or voluntariness problem, consider other possible issues going to jury's consideration of the reliability of the putative confessions.

- E.g., cautionary instruction for "in-custody informant" (Pen. Code § 1127a) and more general cautionary instruction for defendant's oral admissions (CALJIC 2.71).
- Any other errors impairing ability to challenge informant's credibility (e.g. cross-examination restrictions or *Brady* errors concerning undisclosed inducements received by the informant).

❒ **Voluntariness of confession.** Police threats, offers of leniency, etc. E.g., *People v. Vasila* (1995) 38 Cal.App.4th 865.

- Watch especially for **defendants whose characteristics make them especially susceptible** to overbearing police tactics (youth, mental retardation, language difficulties, etc.). E.g., *In re Shawn D.* (1993) 20 Cal.App.4th 200.
- Note that voluntariness issues too apply not only to conventional police interrogations but also to **actions of other police agents**. E.g., *Arizona v. Fulminante* (1991) 499 U.S. 279.

❒ **Co-defendants and other co-principals' statements.** *Bruton*, etc.

- **Basic *Bruton* issues**: **severance** and **admissibility**
- **Adequacy of redaction of co-defendants' statements**. See *Gray* v. *Maryland* (1998) 523 U.S. 185 [redaction insufficient where blanks or neutral pronouns will let jurors infer that references are to the other defendant].
- Even if no redaction error, **confrontation violation** may still occur **if instructions or prosecutor's arguments allow jurors to consider co-defendant's statement against other defendant**. *Richardson v. Marsh* (1987) 418 U.S. 200, 211; *U.S. v. Sherlock* (9th Cir. 1989) 962 F.2d 1349; *United States* v. *Peterson* (9th Cir. 1998) 140 F.3d 819; *Fowler v. Ward* (10th Cir. 2000) 200 F.3d 1302, 1307.
- **Other confrontation issues posed by co-principal's statements,** including "declarations against penal interest." See *Lilly v. Virginia* (1999) 527 U.S. 116, for latest U.S. Supreme Court treatment. "Declaration against penal interest" issues also pending before Cal. Supreme Court in *People v. Duarte*, S068162.

❒ ***Over*-redaction of defendant's own statement.** In effort to mitigate *Bruton* problems as to co-defendants, court may over-redact defendant's statement in way that creates misleading impression of his degree of culpability. (E.g., *People v. Douglas* (1991) 234 Cal.App.3d 273.)

❒ ***Under*-redaction of defendant's statement.** E.g., references to otherwise inadmmissible evidence of other offenses; detectives' statements during interrogation containing hearsay references to other evidence or other inadmissible matters. Cf. *People v. Guizar* (1986) 180

Cal.App.3d 487, 492 n. 3 [ineffective assistance of counsel: failure to redact references to unproven other crimes (murders) from tape & tape transcript].

MENTAL HEALTH ISSUES

❒ Can concern *either* materiality of defendant's mental illness to **underlying facts of case** or effect on defendant's **participation in the court proceedings.**

❒ Mental illness issues re underlying facts **can take form of various trial issues**–including **admission or exclusion of evidence**, **instructional error**, and **ineffective assistance** of counsel for failure to investigate.

❒ Materiality of mental illness (or intoxication) to **defendant's actual formation of the required specific intent or mental state**, subject to statutory limitations (Pen. Code §§ 22, 25, 28, 29). E.g., *People v. Mendoza* (1998) 18 Cal.4th 1114.

❒ Materiality of **mental illness and other psychological "syndromes"** to self-defense, imperfect self-defense, accident, mistake, etc.–including **"battered women syndrome**" and other forms of **post-traumatic stress disorder**. *People v. Humphrey* (1996) 13 Cal.4th 1073; *People v. Day* (1992) 2 Cal.App.4th 405.

❒ Materiality of mental illness, mental retardation, intoxication, and other mental or language difficulties to **voluntariness of confession** and **competency of *Miranda* waivers**. E.g., *United States* v. *Garibay* (9th Cir. 1998) 143 F.3d 534 [defendant who spoke little English and had low IQ did not knowingly waive *Miranda* rights]; *In re Peter G.* (1980) 110 Cal.App.3d 576 [13-year old's *Miranda* waivers found involuntary due to his extreme intoxication, emotional demeanor, and "tender age"].

❒ **Defendant's competency to stand trial.** (Pen. Code § 1367 et seq.) Court's sua sponte duty to order a competency hearing if doubt arises as to defendant's current competence to stand trial.

- Constitutional as well as statutory issue–trial of incompetent defendant as violation of due process. See *Godinez v. Moran* (1993) 509 U.S. 389, and prior authorities discussed there.
- Circumstances that should prompt competency inquiry. Look for psychological reports elsewhere in the record, other references to mental illness, bizarre courtroom behavior, incoherent statements by defendant, etc. E.g., *U.S.* v. *Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315 [defendant's suicide attempt on eve of trial required further inquiry into competence to stand trial]; see also *Barnett* v. *Hargett* (10th Cir. 1999) 174 F.3d 1128.
- Jailhouse **medication or lack of medication**.
  - Beneficial effect of medications on competency. *Miles* v. *Stainer* (9th Cir. 1997) 108 F.3d 1109 [evidence that defendant wasn't taking his psychotropic

medications in jail required trial court to hold new competency hearing, where reports in previous competency hearing indicated that defendant's future competence depended on his continued use of anti-psychotic medication].

- Possible adverse effects on competency. *Riggins* v. *Nevada* (1992) 504 U.S. 127: Administration of anti-psychotic drugs *during trial, over defendant's objection*, violated due process where there was no showing of "overriding justification" or consideration of less intrusive alternatives. Medication may have impaired content of defendant's trial testimony, his interaction with counsel, ability to follow proceedings, and other trial rights.

- Once court has declared doubt, **court must follow through and conduct 1368 hearing.** Can't let matter drop without a hearing (even if, for some reason, court no longer has competency concerns about defendant). "[O]nce a trial court has ordered a competency hearing pursuant to section 1368, the court lacks jurisdiction to conduct further proceedings on the criminal charge or charges against the defendant until the court has determined whether he is competent." *People v. Marks* (1988) 45 Cal.3d 1335, 1337; accord *People v. Hale* (1988) 44 Cal.3d 531.

❒ **Mental health issues concerning victims, complainants, and other witnesses**.

- Limits on prosecution use of **rape trauma syndrome, Battered Women Syndrome, Child Sexual Abuse Accommodation Syndrome, and similar "syndromes**" to bolster credibility of complainants.
  - Syndrome evidence generally admissible only **to explain complainant's conduct** (e.g., failure to report rape immediately), **<u>not</u> as evidence that rape actually occurred**. See *People v. Bledsoe* (1984) 36 Cal.3d 236.
  - Must also satisfy criteria for relevant syndrome. E.g., *People v. Gomez* (1999) 72 Cal.App.4th 405 [Battered Women's Syndrome testimony inadmissible where no evidence of a "battering relationship"; only the single charged instance of abuse].
- ***Defense* use of evidence of psychological records or other evidence** to impeach competency or credibility of complainant, including defense discovery requests for psychological records. See generally *People v. Hammon* (1997) 15 Cal.4th 1117 [distinguishing between pre-trial and mid-trial requests]; cf. *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [in camera review of child protective services files].
  - No flat bar on such evidence, but "[t]he use of psychiatric testimony to impeach a witness is **generally disfavored**." *People v. Marshall* (1996) 13 Cal.4th 799, 835.

JURY SELECTION

❒ ***Talk to trial counsel!*** Since "normal record" doesn't include voir dire, checking with counsel is only sure way to know whether there were any contested issues during jury selection. Even if initial record does reflect a *Wheeler-Batson* motion, information from trial counsel is usually necessary to ascertain *how much* of the voir dire to seek in augmentation motion. And minutes

of voir dire may not reflect some of the non-*Wheeler* issues listed below (e.g., restrictions on scope of voir dire)

❒ ***Wheeler-Batson* issues.** Noteworthy **divergences between current California and federal standards**. (Where *Batson* claim appears meritorious under federal case law, consider raising in state appeal & preserving for federal habeas petition–even though current California case law seems dead-set against the argument).

- **Prima facie case standard**. See *Wade* v. *Terhune* (9th Cir. 2000) 202 F.3d 1191: Current California cases (e.g., *People* v. *Buckley* (1997) 53 Cal.App.4th 658; *People* v. *Trevino* (1997) 55 Cal.App.4th 396) set the *Wheeler* "prima facie case" threshold too high by insisting that defendant "show a strong likelihood," but *Batson* itself only requires the defendant to "raise an inference" of discrimination at that preliminary stage of the inquiry.
- **Comparative juror analysis**. California Supreme Court rejects "comparative juror analysis" in assessing validity and bona fides of prosecutor's asserted reasons for striking jurors. Cf. *People v. Montiel* (1993) 5 Cal.4th 877, 909. But most federal cases regard such comparisons as an essential part of *Batson* analysis and may view a prosecutor's stated reasons for excusing a minority juror as pretextual if the prosecutor accepted white jurors with the same supposedly objectionable characteristics. See, e.g., *Turner* v. *Marshall* (9th Cir. 1997) 121 F.3d 1248, and other cases cited there.
- **"Proxies" for race-based reasons**. Less clear-cut split here, but federal courts appear somewhat more willing to view a prosecutor's stated reasons as facially invalid–i.e., not "race neutral"–where the prosecutor relies on a juror characteristic closely related to race (e.g., residence in a particular neighborhood or community) and/or generalizations that appear to parallel racial stereotypes. Cf. *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820 [prosecutor's reasons for striking jurors from Compton].

❒ **One thing leads to another...** Sequences in which **prosecutor's response to a *Wheeler* motion on one ground (usually race) gives rise to a different basis for a *Wheeler* claim**–i.e., in denying that challenge was race-based, prosecutor relies on juror's membership in *another* "cognizable group" for *Wheeler* purposes (e.g., gender, ethnicity, religion). (See, e.g., *United States* v. *DeGross* (9th Cir. 1992) 960 F.2d 1433, 1442-1443.)

❒ ***Wheeler-Batson* "process" issues**. In view of appellate deference to trial court's rulings on merits of a *Wheeler-Batson* motion (particularly as to the "bona fides" of the DA's asserted reasons), consider ways to frame the argument in terms of the **adequacy of the trial court's *inquiry and consideration* of the motion**.

- E.g., trial **judge's acceptance of prosecutor's reasons without any careful analysis** of their sincerity or their actual applicability to the individual jurors; **judge's failure to provide sufficient explanation of reasoning** to permit meaningful appellate review; trial judge's **refusal to permit defense counsel adequate opportunity to make showing in support of prima facie case**; etc. E.g., *People* v. *Fuentes* (1991) 54 Cal.3d 707; *United States v. Hill* (6th Cir. 1998) 146 F.3d 317; *Barnes v. Anderson*

(2nd Cir. 1999) 202 F.3d 150.

❒ **Challenges for cause.** Issues concerning either improper "for cause" excusals of jurors over defense objections or converse problem of denial of meritorious defense challenge for cause.

- Note, however, that the denial of a challenge for cause is only reviewable on appeal if the defense: (1) later uses a peremptory challenge to remove the juror; (2) *exhausted all* the defense peremptories; and (3) *expressed ddissatisfaction with the final jury panel* as sworn and/or unsuccessfully *requested an additional peremptory*. *People* v. *Terry* (1994) 30 Cal.App.4th 97, 103-104; *People* v. *Shambatuyev* (1996) 50 Cal.App.4th 267.

❒ **Restrictions on scope of defense voir dire.** Refusal to allow questions in precise form sought by defense counsel is unlikely to pose an issue, but disallowance of any inquiry at all into a potential subject of juror bias may be reversible error. E.g., *People v. Wilborn* (1999) 70 Cal.App.4th 339 [disallowance of any questions re racial bias in drug case, where defense trial theory involved alleged racial bias of the arresting officers]; *Gardner* v. *Barnett* (7th Cir. 1999) 175 F.3d 580 [disallowance of any voir dire on jurors' perceptions of presdispositions about gangs].

❒ **Other prejudicial events during jury selection**–including inflammatory or otherwise prejudicial conduct or remarks by prosecutor, judge, courtroom spectators, or even other jurors. Cf. *Mach* v. *Stewart* (9th Cir. 1998) 137 F.3d 630 [Social worker/prospective juror's statement that in her years of experience she'd never known of a child lying about a sexual assault charge; though that juror was excused, her "expert"-sounding statement was so intrinsically prejudicial as to compel a mistrial].

IN LIMINE MOTIONS AND EVIDENTIARY ISSUES DURING TRIAL

❒ **In limine motions**. In a well-tried case, the most significant anticipated evidentiary issues are likely to be aired in an in limine hearing at beginning of trial (Evid. Code § 402), including such matters as admissibility of any confessions, "other offenses" evidence, any unusual expert testimony or other scientific or forensic evidence, etc. If the in limine "motion is directed to a particular, identifiable body of evidence" and the court makes a definitive ruling during the in limine hearing, it's generally not necessary for counsel to renew his or her objections or offer or proof at the time of the relevant testimony. *People v. Morris* (1991) 53 Cal.3d 152, 190; *People v. Rowland* (1992) 4 Cal.4th 238, 264 fn. 3.

❒ **Trial objections and offers of evidence**. Conversely, though an in limine motion usually makes for a better, more thoughtfully developed record, there's no requirement for in limine litigation of evidentiary issues. Many evidentiary objections (particularly concerning discrete lines of questioning) are raised for the first time during trial testimony.

❒ **Federalize evidentiary issues whenever possible**, as discussed below.

❒ **Hearsay–spurious "non-hearsay" grounds**. Some of the most pernicious hearsay is offered, not under any hearsay exception, but for some ostensible "non-hearsay" purpose–most notably, "to explain the basis for the officer's actions." But, in most trials, the reasons for police actions (e.g., stopping the defendant, including the defendant's photo in a line-up, etc.) are irrelevant to any issue before the jury, and such "explanations" simply become a conduit for revelation of inculpatory assertions by hearsay declarants. See, e.g., *People* v. *Lucero* (1998) 64 Cal.App.4th 1107, 1109-1110; *United States v. Dean* (9th Cir. 1992) 980 F.2d 1286.

❒ **The hearsay/confrontation nexus**. Whenever there's an issue whether hearsay satisfies the asserted hearsay exception, also analyze issue under Sixth Amendment confrontation clause. See generally *Idaho v. Wright* (1990) 497 U.S. 805.

❒ **Possible confrontation issues posed by *new* hearsay exceptions**. E.g., recently enacted hearsay exceptions concerning certain out-of-court statements to police. Cf. Evid. Code §§ 1231 [gang cases], 1370, 1380 ["physical abuse" victims]. For any hearsay exception that is *not* "well established," consider whether the statute contains sufficient "indicia of reliability" to satisfy *Idaho v. Wright* and other cases. Also, if statute appears to apply disparate standards to prosecution- and defense-offered hearsay, consider possible *due process* or *equal protection* issues. But see *People v. Hernandez* (1999) 71 Cal.App.4th 417 [upholding Evid. Code § 1370 against confrontation and due process challenges].

- Analyze new hearsay exceptions under U.S. Supreme Court's most recent confrontation clause discussion. *Lilly v. Virginia* (1999) 527 U.S. 116.

❒ "**Other offenses"**: Whenever defendant's prior offenses are admitted, consider three possible kinds of arguments:

- **Evid. Code § 1101 limitations**–i.e., whether circumstances meet criteria for the asserted purpose (e.g., common design, intent, etc.). See generally *People* v. *Ewoldt* (1994) 7 Cal.4th 380; *People v. Balcom* (1994) 7 Cal.4th 414.
- **Evid. Code § 352 balancing**–even assuming a legitimate purpose for admission under § 1101, prejudicial impact outweighs probative value. (Also discussed in *Ewoldt*, *Balcolm*, and prior cases cited there.
- ***Federal due process violation***. See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [admission of prior offenses or other uncharged conduct (weapons possession in *McKinney*) as proof of criminal propensity violates due process in light of well-established historical ban on propensity evidence]; but compare *People v. Falsetta* (1999) 21 Cal.4th 903 [rejecting due process challenge to new statute allowing evidence of prior *sexual offenses* as proof of propensity for such offenses (Evid. Code § 1108].

❒ **Special issues concerning new "criminal propensity" statutes.**

- California courts' **rejection of due process challenges to facial constitutionality** of Evid. Code §§ 1108, 1109 (allowing "propensity" evidence of prior sexual offenses or

domestic violence). *People v. Falsetta* (1999) 21 Cal.4th 903; *People v. Johnson* (2000) 77 Cal.App.4th 410; *People v. Hoover* (2000) 77 Cal.App.4th 1020).

- Currently many *other* issues surrounding treatment of evidence under these statutes, especially defects in the accompanying jury instructions. **Certain versions of CALJIC 2.50.01 and 2.50.1 violate due process** either by **diluting the reasonable doubt burden of proof** and/or by **allowing the jurors to find guilt solely on the basis of the prior crimes** without any proof of the currently charged offense. See *People* v. *Orellano* (2000) 79 Cal.App.4th 179; *People* v. *Vichroy* (1999) 76 Cal.App.4th 92; compare several contrary cases (cited in *Orellano*) rejecting such challenges to the instructions, e.g., *People* v. *Van Winkle* (1999) 75 Cal.App.4th 133.

❒ **Other issues concerning revelation of defendant's criminal record or associates**. E.g., evidence of (or witnesses' gratuitous references to) prior arrests, parole status, or gang affiliation. E.g., *People* v. *Anderson* (1978) 20 Cal.3d 647; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1494-1498; *People v. Davis* (1996) 42 Cal.App.4th 806, 813.

❒ **Expert testimony.** In addition to any issues regarding the specific category of expert testimony, reliability of testing methods, etc., consider possible *hearsay* issues arising during testimony. Statutes allow an expert to discuss hearsay in the course of explaining the basis for his or her opinion. See generally *People* v. *Gardeley* (1996) 14 Cal.4th 605, 617-619; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919.

- But ***unreliable* hearsay** has no place in expert testimony–the hearsay information must be of "a type reasonably relied upon by professionals in the field." Cf. *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524.
- Also, **section 352** places further limits on the extent of revelation to the jurors of hearsay matters considered by the expert. See, e.g., *People v. Coleman* (1985) 38 Cal.3d 69; *People v. Campos* (1995) 32 Cal.App.4th 304.

❒ **Limits on psychological testimony on defendant's mental state**. "Diminished capacity" abolished, but "diminished actuality" remains, subject to limitations on types of questions posed to psychologists & psychiatrists. Pen. Code § 25, 28, 29.

- Though principal effect is limitation on means of *defense* presentation of expert psych. testimony, watch for ***prosecution* expert witnesses' violations of §§ 28 or 29**–e.g., prosecution psychologist's statement of opinion on whether defendant premeditated or acted with some other required intent. See *People v. McFarland* (2000) 78 Cal.App.4th 489 [reversing misdemeanor molestation conviction (Pen. Code § 647.6) where prosecution psychiatrist "offered an *expert opinion* on the ultimate issue that appellant harbored an unnatural or abnormal sexual interest" in the child].

❒ **Restrictions on defense cross-examination and impeachment of key prosecution witnesses**. In addition to making the case for the admission of the pertinent type of evidence under state law, be sure to frame the argument as a violation of the Sixth Amendment confrontation clause. See generally *Olden* v. *Kentucky* (1988) 488 U.S. 227; *Delaware* v. *Van*

Arsdall (1986) 475 U.S. 673; *Davis v. Alaska* (1975) 415 U.S. 308.

❒ **Breadth of permissible impeachment under California law**. Note that, largely as a result of Prop. 8, California takes a broader view than most jurisdictions of the types of evidence potentially admissible to impeach a witness.

- In addition to "moral turpitude" felonies (cf. *People* v. *Castro* (1985) 38 Cal.3d 301), a witness' credibility may also be impeached with **"moral turpitude" conduct which did *not* result in a felony conviction**–including the conduct underlying a misdemeanor conviction or even conduct that did not result in any charges or conviction. *People* v. *Wheeler* (1992) 4 Cal.4th 284. (Note, however, that a trial court may have somewhat greater flexibility to exclude *Wheeler*-type impeachment conduct under § 352 because it has less probative value than a felony conviction and proof of the underlying conduct may be time consuming.)

❒ **Exclusion of other important defense evidence.** Even where excluded defense evidence does not impeach prosecution witnesses or otherwise implicate confrontation clause rights, consider other possible constitutional "hooks" for such evidence. Several leading cases have recognized a federal constitutional right to present a defense, emanating from the due process and/or the compulsory process clauses. See generally *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14; *Crane v. Kentucky* (1986) 476 U.S. 683

❒ **Limitations on defense's own testimony.** Where the trial court bars or places significant limitations on a defendant's own testimony, the exclusion may infringe the defendant's Fifth Amendment right to testify in his own defense. Cf. *Rock v. Arkansas* (1987) 483 U.S. 44.

EX POST FACTO, DUE PROCESS AND OTHER RETROACTIVITY ISSUES

❒ Ex post facto: Always check version of the charged statute **in effect at time of underlying conduct**, as to both **elements of crime** and **sentencing.** Pay particular attention to comparison sentence with **enhancement statutes**, in effect at time of crime.

❒ Also consider ex post facto issues as to **new evidentiary statutes**, **where the statute's effect is to eliminate a type of defense.** E.g., statutory revisions which barred the use of mental illness or intoxication to negate certain mental states. (Pen. Code §§ 25, 28, 29)

❒ Ex post facto's cousin: **Due process prohibition on retroactive application of unforeseen "judicial enlargements"** of penal statutes.

- Applicable to **many Cal. Supreme Court decisions that have overruled prior California precedents** as to scope of crimes, theories of liability, and defenses. E.g., *People v. Martinez* (1999) 20 Cal.4th 225, 238-241; *People* v. *Davis* (1994) 7 Cal.4th 797, 811; *People* v. *King* (1993) 5 Cal.4th 59, 79-80; *People* v. *Johnson* (1993) 6 Cal.4th 1, 44-45; *People* v. *Farley* (1996) 45 Cal.App.4th 1697, 1704-1709.
- In addition to sufficiency of evidence under standard in effect at time, consider whether

instructions conform to then-applicable standard. E.g., *Farley, supra.*

❒ Additional (non-constitutional) retroactivity principles.

- Limits on **retroactive application of new waiver rules** or other procedures where trial counsel reasonably relied on then-applicable rule. *People v. Scott* (1994) 9 Cal.4th 331 [new rule requiring objection to defects in sentencing reasons to be applied prospectively only]; *People v. Welch* (1993) 5 Cal.4th 228 [similar prospective-only application of new rule requiring objection to probation conditions].

❒ The ***next* big initiative** (Prop. ??). **Take nothing for granted** re retroactivity. Compare *People v. Smith* (1983) 34 Cal.3d 251 [**Prop. 8 prospective-only *in its entirety***; can't be applied to any case in which charged crime pre-dated enactment], with *Tapia v. Superior Court* (1991) 53 Cal.3d 282 [**selective retroactivity of Prop. 115**: provisions expanding crimes or increasing punishment prospective only per ex post facto; most other evidentiary and procedural provisions retroactive and can be applied in trials for pre-enactment offenses].

❒ Defendant's right to **retroactive application of legislative changes which reduce punishment or scope of penal statutes**–"*Estrada* doctrine." *In re Estrada* (1965) 63 Cal.2d 740; e.g., *People v. Nasalga* (1996) 12 Cal.4th 784 [defendant entitled to benefit of intervening amendments which reduced enhancement term for "great taking" of specified amount, where new statute had no "savings clause" preserving the higher sentence].

- Application of *Estrada* doctrine depends on legislative intent. Cf. In re Pedro T. (1994) 8 Cal.4th 1041 [refusing to apply *Estrada* to the "sunsetting" of increased penalties for auto theft].

SUFFICIENCY OF EVIDENCE

❒ Basic standards: *Jackson* v. *Virginia* (1979) 443 U.S. 307; *People v. Johnson* (1980) 26 Cal.3d 557.

❒ Though every post-trial appeal potentially presents sufficiency issues, be especially vigilant about such issues in the following types of cases:

❒ **"Pushing the envelope"**–prosecution theories which stretch a penal statute or theory of liability. E.g., amount of asportation necessary for kidnapping; whether kidnapping posed the heightened risk to victim necessary for kidnapping-for-robbery (Pen. Code § 209); robbery charges based upon force against someone with no connection to the property taken or upon takings outside the "immediate presence" of the victim; sufficiency of "force," "duress," etc., for various offenses like forcible lewd conduct (*id*. § 288(b)), felony false imprisonment (*id*. § 236), etc. Though these arguments have a technical "legal" feel and have little or nothing to do with the weight of the evidence, nominally these are "sufficiency of evidence" challenges.

❒ **Neglected counts.** In some multi-count cases tried on "all or nothing" defenses, there's little

focus during counsel's arguments on the sufficiency of evidence supporting particular counts. That is especially true in sex offense cases in which there are multiple charged offenses as to each victim.

❒ **Neglected elements.** Statutes include obscure elements on which the prosecutor simply neglected to offer sufficient evidence

- A favorite example: *People v. Brown* (1989) 216 Cal.App.3d 596, which reversed a conviction under then-Veh. Code § 2800.2 (current § 2800.3) for wilful flight from a pursuing police officer, resulting in injury or death. An element of the statute was that the pursuing police car was displaying a *red* light. The only evidence on the subject was a brief passage in which the officer testified that her flashing overhead lights were in "the second or the third position," but only the "third position" included a *red* light. Because that evidence established no more than a 50-50 likelihood as to the red light element, it was insufficient as a matter of law to support the conviction–"where the proven facts give equal support to two inconsistent inferences, neither is established."

❒ **"Bundling" sufficiency arguments with other issues.** Where a sufficiency argument is "briefable" (i.e., non-frivolous) but very weak, its inclusion may still be helpful if it helps lay the groundwork for other types of arguments directed to the same weaknesses in the prosecution evidence.

- For example, a **sufficiency argument can complement instructional arguments directed to the same element** of the charged offense. One effective tactic is to couple a sufficiency argument with the trial court's failure to instruct on a corresponding lesser included offense (included attempt). (E.g., (1) the evidence of asportation was insufficient to support a kidnapping conviction, followed by (2) the failure to instruct on false imprisonment as a lesser included offense was prejudicial error.)
- Even where the sufficiency and other arguments do not fit together that neatly, a sufficiency argument can help persuade the appellate court of the closeness of the case and thus help set up the prejudice discussions of later arguments concerning evidentiary, instructional or other trial errors.

COURTROOM EVENTS AND MISTRIAL MOTIONS

❒ **Presence of *defendant* at all critical stages of trial** (including issues concerning ejection of disruptive defendants). See generally *Kentucky v. Stincer* (1987) 482 U.S. 730, and prior cases cited there.

❒ **Presence of *defense counsel* at all critical stages of trial**. See, e.g., *People* v. *Horton* (1995) 11 Cal.4th 1068, 1126-1128, 1136-1140 [denial of counsel where *co-defendant's counsel* stood in for defense counsel in discussion of how to respond to deliberating jurors' expression of possible deadlock].

❒ **Shackling defendant.** See *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712; *People* v. *Hill*

(1998) 17 Cal.4th 800, 846; and other authorities discussed there.

❒ **Other actions stigmatizing defendant or suggesting defendant is dangerous.** E.g., appearance in jail clothes; jurors' observations of defendant in custody; etc. See generally *Estelle v. Williams* (1976) 425 U.S. 510; *People v. Taylor* (1982) 31 Cal.3d 488, 494-495.

❒ **Spectators' conduct and other rejudicial displays or events in the courtroom**. Outbursts or displays by spectators. See, e.g., *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828 [15 spectators wearing prominent "Woman Against Rape" buttons]

❒ **Judge's comments disparaging defendant, defense counsel or defense witness** in jurors' presence. E.g., *People v. Fatone* (1985) 165 Cal.App.3d 1164; see generally *People v. Fudge* (1994) 7 Cal.4th 1075, 1107.

JURY INSTRUCTIONS (the "Mother Lode" of appellate issues)

❒ **Reasonable doubt instruction (CALJIC 2.90)**. See *Cage v. Louisiana* (1990) 498 U.S. 39.
- Inadvertent **omission of CALJIC 2.90** (yes, it still happens). E.g. *People v. Elguera* (1992) 8 Cal.App.4th 1214; *People v. Crawford* (1997) 58 Cal.App.4th 815.
- **Deviations from standard text of CALJIC 2.90** or
- **Attempts** by judge **to "clarify" or elaborate** on the meaning of the reasonable doubt rule E.g., *People v. Garcia* (1975) 54 Cal.App.3d 61.
- ***"Structural defect"***: Remember, defective definition of reasonable doubt is one of the few errors recognized as reversible per se. *Sullivan v. Louisiana* (1993) 508 U.S. 275.

❒ **Other instructional errors that effectively dilute the reasonable doubt burden.** As noted earlier, currently a split of authority whether some versions of the **instructions for use of "criminal propensity"** evidence under Evid. Code §§ 1108, 1109 (CALJIC 2.50.01 & 2.50.1) **may violate due process** by allowing jurors to convict on the current charges based solely on "preponderance of evidence" proof of prior offenses. See *People* v. *Orellano* (2000) 79 Cal.App.4th 179; *People* v. *Vichroy* (1999) 76 Cal.App.4th 92; compare *People* v. *Van Winkle* (1999) 75 Cal.App.4th 133, and other contrary cases cited in *Orellano*.

❒ **Complete instructions on elements of all charged offenses.** *United States v. Gaudin* (1995) 515 U.S. 506; *People* v. *Flood* (1998) 18 Cal.4th 470. Watch for:
- *omission of an element*
- *misstatement or misdescription of an element*
- More rigorous form of *Chapman* analysis applicable to such errors: See generally *Neder v. United States* (1999) 527 U.S. 1; *Yates v. Evatt* (1991) 500 U.S. 391; see separate Standards of Review & Prejudice materials for more extensive discussion.

❒ Definitions of terms. Sua sponte duty to define any terms in instructions which have "technical meaning peculiar to the law." E.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 773-774;

People v. Ellis (1999) 69 Cal.App.4th 1334.

- Prejudice. Federal *Chapman* analysis under same standards as omission or misdescription of an element. *Mayfield, supra*, 14 Cal.4th at p. 774.

❒ ***Sandstrom* errors.** Improper **presumptions** and other errors that reduce the prosecution's burden of proving every element beyond a reasonable doubt. *Sandstrom v. Montana* (1979) 442 U.S. 510*; Yates v. Evatt* (1991) 500 U.S. 391; *Carella v. California* (1989) 491 U.S. 263.

❒ **Complete and correct instructions on elements of charged *enhancements*.** See ENHANCEMENTS section of this outline for discussion of current issues concerning constitutional issues surrounding enhancements, including grounds for challenging *Wims* treatment of defective enhancement instructions as mere state law error, subject to *Watson*.

❒ **Complete and correct instructions on every *theory of liability*.** E.g., aiding and abetting, co-conspirator liability, felony-murder,"natural and probable consequences," etc.

❒ **Correct instructions defining any "target offense" relevant to a theory of liability.**

- Predicate felony for felony-murder.
- Misdemeanor for "unlawful act" theory of involuntary manslaughter. *People* v. *Williams* (1975) 13 Cal.3d 559.
- Target offense for burglary. *People* v. *Failla* (1966) 64 Cal.2d 560.
- Target offense for any "natural and probable consequences" theory. *People v. Prettyman* (1996) 14 Cal.4th 248.
- Predicate offenses for a gang offense or enhancement (Pen. Code § 186.22)

❒ **Validity of each theory of liability** submitted to jury.

- Submission to jury on *valid and invalid alternative theories*.
- "*Legally insufficient*" vs. "*factual insufficient*" theories. See *People v. Guiton* (1993) 4 Cal.4th 1116, distinguishing between standards of prejudice applicable to each category.

❒ **Examples of legally erroneous theories:**

- *Felony-murder theory* based on *assault with deadly weapon* (violation of "merger doctrine"). *People v. Ireland* (1969) 70 Cal.2d 522; *Suniga* v. *Bunnell* (9th Cir. 1993) 998 F.2d 664; see also, e.g., *People v. Baker* (1999) 74 Cal.App.4th 243.
- *Felony-murder theory* based on other *non-qualifying felony* (e.g., 1st degree theory based on felony not listed in Pen. Code § 189; 2nd degree theory based on felony that is not "inherently dangerous"). E.g., *People v. Smith* (1998) 62 Cal.App.4th 1233.
- Felony-murder or aiding/abetting theory based on **erroneous definition of *duration* of predicate offense**. E.g. *People* v. *Cooper* (1991) 53 Cal.3d 1158.
- Theory based on alleged *factual scenario* that was *insufficient as matter of law to constitute offense*. E.g., *People v. Green* (1980) 27 Cal.3d 1, 62-74 [kidnapping theory based on distance insufficient to meet asportation element].

- *Improper alternative mental state theory*: E.g., conspiracy to commit murder or attempted murder based on implied malice, *People v. Swain* (1996) 12 Cal.4th 593, 607; assault theory based on mere negligence, *People v. Smith* (1997) 57 Cal.App.4th 1470.
- *Submission of invalid theories via prosecutor's arguments*. Although jury instructions are the principal source of the "theories" submitted to jury, sometimes analysis of prosecutor's arguments is necessary to identify each distinct "theory" of liability–in particular, each alternative *factual* scenario which prosecutor claims may be basis for a verdict. See, e.g., *People v. Harris* (1994) 9 Cal.4th 407.

❒ **Lack of notice of theory**

- "*Ambush*": injecting entirely new theory of liability into case after it's too late for defense to respond. *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234. (Caveat: numerous subsequent decisions (state and federal) have distinguished *Sheppard* and have essentially limited its "ambush" holding to its facts, . See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 512-514; *People v. Lucas* (1997) 55 Cal.App.4th 721 (finding no error).)
- *Theory based on facts not proven at preliminary hearing*. See *People v. Burnett* (1999) 71 Cal.App.4th 151 (submission of theory based on separate incident, not covered by preliminary hearing evidence).

❒ **Unanimity instructions** (CALJIC 17.01).

- Necessity of **CALJIC 17.01**. Danger of juror disagreement where evidence supports **multiple distinct acts or factual episodes as possible bases** for verdict. E.g., *People v. Diedrich* (1982) 31 Cal.3d 263; *People* v. *Castaneda* (1997) 55 Cal.App.4th 1067.
- Consider possible unanimity issues re **predicate offenses for gang offense** (Pen. Code § 186.220), by analogy to *Richardson* v. *United States* (1999) 526 U.S. 813 [requiring jury unanimity re predicate offenses for federal Continue Criminal Enterprise offense].
- But **no requirement** of jury unanimity as to the ***theory* of liability** (e.g., felony-murder vs. premeditation; aider/abettor vs. direct perpetrator). See *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. Beardslee* (1991) 53 Cal.3d 68, 92.
- Alternative of **prosecutorial election** between acts. Cf. *People v. Salvato* (1991) 234 Cal.App.3d 872 (right of defense to demand "election" of acts under certain circumstances).

❒ **Lesser included offenses**

- **2 lesser included tests:** "**elements** test" and "**accusatory pleading** test." See generally *People* v. *Ortega* (1998) 19 Cal.4th 686; see, e.g., *People* v. *Barrick* (1983) 33 Cal.3d 115, 133-135 (example of "accusatory pleading" test).
- **Attempted offense**. Attempt always qualifies as lesser included offense. (Pen. Code § 1159)
- ***Sua sponte* duty to instruct–"substantial evidence" test.** *People* v. *Breverman*

(1998) 19 Cal.4th 142.

- Duty to instruct on **every supportable theory** of a lesser offense. E.g., *Breverman, supra* (imperfect self-defense as well as heat of passion, as bases for voluntary manslaughter); *People* v. *Lee* (1999) 20 Cal.4th 47 (misdemeanor manslaughter as well as negligence as bases for involuntary manslaughter).
- *Federal vs. state* prejudice analysis. See *People* v. *Breverman* (1998) 19 Cal.4th 142, applying *Watson* standard; compare Justice Kennard's dissenting opinion. Possible bases for federal error, left unresolved in *Breverman* majority opinion:
- *Mullaney* theory for federal error: Omission of manslaughter instructions results in *incomplete instructions on elements of charged offense* (due to unique relationship between voluntary manslaughter theories and malice aforethought). *Mullaney v. Wilbur* (1975) 421 U.S. 684; see Justice Kennard's *Breverman* dissent.
- *Defense theory of case*: Refusal of requested lesser offense instruction as denial of federal constitutional right to instructions on "defense theory of the case." *Conde v. Henry* (9th Cir. 1999) 198 F.2d 734, 739-740.

❒ **Instructions on defenses.**

- **Standards for sua sponte and requested instructions**. Applicability of *Breverman* analysis and "substantial evidence" test to instructions on defenses. *People* v. *Elize* (1999) 71 Cal.App.4th 605.
- ***Standard of prejudice unclear*** for erroneous denial of instruction on affirmative defense. Cf. *People* v. *Lonegran* (1990) 219 Cal.App.3d 82, 94; *People* v. *Lemus* (1988) 203 Cal.App.3d 470. Argue for federal constitutional standard. E.g., *People v. Dewberry* (1992) 8 Cal.App.4th 1017.
- ***Burden of proof* on defenses**. Some defenses only require reasonable doubt; others require defense to prove by preponderance. *People v. Tewksbury* (1976) 15 Cal.3d 953, 962-965; *People v. Dewberry* (1992) 8 Cal.App.4th 1017.

❒ **Requested "pinpoint" or amplifying instructions**

- **Pinpoint vs. sua sponte** instructions. Elusive distinctions. E.g., *People* v. *Saill*e (1991) 54 Cal.3d 1103 [overruling prior cases treating intoxication instructions as sua sponte].
- ***"Amplifying* instructions"**–defendant's right to *requested* instructions, amplifying upon court's sua sponte instructions on general legal principles applicable to case. (E.g., instructions expanding upon instructions on elements of offense, theories of liability, etc.) Cf. *People v. Kimble* (1988) 44 Cal.3d 480, 503.
- ***"Pinpoint* instructions"**–requested instructions relating particular kinds of circumstances to legal principles.
- Examples of important "pinpoint instructions" (some CALJIC, some not):
  - **"Antecedent threats"** by victim. *People v. Pena* (1984) 151 Cal.App.3d 462; *People v. Bush* (1978) 84 Cal.App.3d 294 (no CALJIC instruction; but see instruction quoted in the cited opinions).
  - Relevance of **provocation to premeditation** (CALJIC 8.73). *People v.*

Middleton (1997) 52 Cal.App.4th 19.

- **Intoxication bearing on specific intent** or mental state (CALJIC 4.21), *People v. Saille* (1991) 54 Cal.3d 1103.
- **Identification factors** (CALJIC 2.92), *People v. Wright* (1988) 45 Cal.3d 1126.
- **Alibi** (CALJIC 4.50). Surprisingly, California law regards this as a form of pinpoint instruction, rather than an instruction on theory of defense. Cf. *People* v. *Freeman* (1978) 22 Cal.3d 434, 437-438; contrast *U.S. v. Zuniga* (9th Cir. 1993) 6 F.3d 569; cf. *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734.

❒ **Instructions (good & bad) on assessment of evidence** (mostly found in CALJIC 2.00 series & accomplice sequence in 3.00 series) and rules for particular categories of evidence.

- Caveat: **Evidence-assessment instructions rarely translate into strong appellate issues**, at least on their own. Tend to be **much weaker issues than instructions on elements, theories of liability, lesser includeds, defenses, and burden.**
- But may be helpful to include such an argument **where it complements some other appellate argument** or otherwise **fits into the "theme"** of your appeal. (E.g., trial court shouldn't have admitted certain evidence in first place (principal argument), *and* it refused request for a cautionary instruction about that same evidence).
- Conversely, if evidence-assessment instruction issue **doesn't closely relate** to other arguments briefed, **consider dropping**.
- Examples of significant evidence-assessment instructions, covered by **sua sponte** duty:
  - **Accomplice** instructions (corroboration, view with caution, etc.) (CALJIC 3.10-3.16). (Surprisingly few reversals on this basis, despite importance of corroboration rule.)
  - **Circumstantial evidence** instructions (CALJIC 2.00-2.02)
  - Cautionary instructions, defendant's **oral admissions, adoptive admissions or pre-offense statements** (CALJIC 2.70-2.71.7) & **corpus delecti** (CALJIC 2.72).
- **Limiting instructions touching on constitutional rights**--potentially better issues than most evidence-assessment instructional issues. (Usually must be requested, but case law unsettled as to some instructions.)
  - **Self-incrimination privilege**, no adverse inference from defendant's failure to testify (CALJIC 2.60-2.62). *Carter* v. *Kentucky* (1981) 450 U.S. 288; e.g.,*United States* v. *Burgess* (11th Cir. 1999) 175 F.3d 1261 [prejudicial refusal of requested instruction]; cf. *People* v. *Preston* (1973) 9 Cal.3d 308 [no sua sponte duty].
  - ***Miranda*-violative statements** for impeachment only (CALJIC 2.13.1). *People v. May* (1988) 44 Cal.3d 309.
  - Evidence **limited to one defendant** (CALJIC 2.07-2.08)–frequently implicates *Bruton*-type **confrontation** issues
- Other significant **limiting and cautionary instructions** (usually must be requested):
  - Limiting instruction, **other offenses** (CALJIC 2.50 et seq.)

- Cautionary instruction, **jailhouse informant** (Pen. Code § 1127a)

- **Consciousness of guilt**–flight, suppression of evidence, etc. (CALJIC 2.03-2.06). (Rarely a good issue; these instructions have generally survived constitutional challenges.)
- **Argumentative *prosecution* "pinpoint" instructions**.

PROSECUTORIAL MISCONDUCT

❒ **Seize the Hill**--*People* v. *Hill* (1998) 17 Cal.4th 800, the latest (good) word on varied forms of prosecutorial misconduct and higher ethical standards demanded of prosecutors.
- Feature *Hill* in your misconduct argument (particularly in more "thematic" discussion), even if your case doesn't involve same precise types of misconduct.

❒ **Where to look–inside the courtroom** (especially closing arguments and cross-examination) **or outside the courtroom** (*Brady* issues).
- Tip: Consider **framing particularly egregious evidentiary errors** (e.g., elicitation of prejudicial hearsay or other offenses without any plausible ground for admissibility) **as prosecutorial misconduct** rather than just evidentiary issue

❒ General requirements, ***"Green* rule,"** *People v. Green* (1980) 27 Cal.3d 1, 34: Prosecutorial misconduct claims cognizable only if: **(a) defense counsel objected at the time, (b) stated the specific ground for the objection, *and (c) requested an admonition to the jury*.** E.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 427.

❒ **Escape valves,** ways of raising inadequately preserved prosecutorial misconduct claims:
- Principal escape valve: Misconduct so inflammatory, **admonition could not have cured the prejudice** (the "can't unring the bell" problem). *Green*, *supra*, 27 Cal.3d at p. 34; see, e.g., *People v. Johnson* (1981) 121 Cal.App.3d 94, 104.
- Appellate **discretion** to consider an inadequately preserved misconduct issue? Uncertain, but see *People* v. *Williams* (1998) 17 Cal.4th 148, 161 fn. 6.
- **Ineffective assistance of defense counsel** for failure to object to misconduct. E.g., *Gravley* v. *Mills* (6th Cir. 1996) 87 F.3d 779.
- General tip: The **more pervasive the misconduct was, the more likely it is that appellate court will overlook preservation problems** and consider the merits, especially if defense counsel did attempt to object to most serious instances of misconduct. See *People* v. *Hill* (1998) 17 Cal.4th 800.
- See the separate Waiver & Cognizability materials for more thorough treatment of these issues.

❒ Prosecutorial **infringements of specific constitutional rights** (subject to *Chapman* prejudice standard):
- ***Griffin* error**–comment on defendant's failure to take the stand (infringement of privilege against **self-incrimination**. *Griffin* v. *California* (1965) 380 U.S. 609.

- ***Doyle* error**–comment on defendant's **post-arrest, post-*Miranda* silence.** *Doyle* v. *Ohio* (1976) 426 U.S. 610.
- Comment on defendant's **post-arrest, *pre-Miranda* silence**? Not *Doyle* error (because *Doyle* depends upon violation of implicit *Miranda* assurance that silence won't be used against defendant (*Fletcher* v. *Weir* (1982) 455 U.S. 603), but *may* violate **self-incrimination privilege** (like *Griffin* error). *Combs v. Coyle* (6th Cir. Feb. 23, 2000) __ F.3d __ (No. 97-4369.) (Courts split on this issue (see *Combs* opn.); not clear whether California will adopt the *Combs* view. Cf. *People v. Jones* (1997) 15 Cal.4th 119, 168-174.)
- Comment on defendant's exercise of **right to counsel**. *People* v. *Crandell* (1988) 46 Cal.3d 833, 878; *United States* v. *Kallin* (9th Cir. 1995) 50 F.3d 689, 692-694.
- Other **disparagements of counsel** or of the defense function, including **derisive conduct toward counsel** in front of jury (*People v. Hill* (1998) 17 Cal.4th 800, 832-834) and **unfounded insinuations of a fabricated defense** (*People* v. *Bain* (1971) 5 Cal.3d 839, 845-847).
- Adverse comments on defendant's exercise of ***other* constitutional and procedural rights**:
  - Comment, during trial, on **defense's failure to present witness at preliminary hearing**. Improper under *People* v. *Conover* (1966) 243 Cal.App.2d 38, 49.
  - Comment on **exercise of Fourth Amendment rights** (refusal to consent to search). Improper under *People v. Keener* (1983) 148 Cal.App.3d 73, 78-79.
  - But, **no misconduct** in commenting on defendant's **opportunity to observe other witnesses' testimony** before testifying himself. *Portuondo v. Agard* (2000) ___ U.S. ___, 120 S.Ct. 1119 [rejects *Griffin* analogy; no infringement on defendant's right to presence at trial].
- **Prosecutorial violations of confrontation clause**–one of the most common and most prejudicial forms of misconduct.
  - Prosecutorial references to **matters outside the record**; prosecutor effectively becomes own "unsworn witness." E.g., *People* v. *Bolton* (1979) 23 Cal.3d 208, 214-215 fn. 4; *People* v. *Gaines* (1997) 54 Cal.App.4th 821, 825; *People* v. *Johnson* (1981) 121 Cal.App.3d 94, 104.
  - Look also for prosecutorial arguments that ***imply* prosecutorial knowledge** of extrajudicial information (e.g., other details of police investigation).
  - Not limited to arguments; prosecutor can also violate confrontation rights by **using own questions to place extrajudicial information before the jurors**. *People v. Bell* (1989) 49 Cal.3d 502, 532-534; *People* v. *Blackington* (1985) 167 Cal.App.3d 1216; *Hardnett* v. *Marshall* (9th Cir. 1994) 25 F.3d 875.
- **Equal protection and due process violations**; prosecutorial appeals to racial, religious or ethnic prejudices and stereotypes. *People v. Cudjo* (1993) 6 Cal.4th 585, 625-626; see, e.g., *Bains v. Cambra* (9th Cir. March 2, 2000) __ F.3d __, 00 C.D.O.S. 1654.

❒ **Due process** implications of other prosecutorial misconduct, ***not*** **touching on specific enumerated constitutional rights** (self-incrimination, right to counsel, etc.).

- **Due process test**: "Short of misconduct of that nature which infringes on a specific guaranty of the Bill of Rights, however, prosecutorial misconduct implicates the defendant's federal constitutional rights only if it is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; accord *People* v. *Hill* (1998) 17 Cal.4th 800, 819.

❒ Appeals to "**passion and prejudice**"

- appeals to **sympathy** for victim, including suggestions to view crime "through the vicitm's eyes." *People* v. *Stansbury* (1993) 4 Cal.4th 1017, 1057; *People* v. *Pensinger* (1991) 52 Cal.3d 1210, 1250.
- appeals to "**conscience of the community**," exhortations to "send a message" to drug dealers, about "**war on crime**,""war on drugs," 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.
- warnings about **danger to community** or **community reactions to verdict**. *People v. Purvis* (1963) 60 Cal.2d 323, 342; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.
- **name-calling**, particularly over-the-top characterizations of defendant. E.g., *People v. Herring* (1993) 20 Cal.App.4th 1066 ("primal man").
- appeals to **Bible or religious principles**, especially suggestion that some "higher law" should apply. E.g. *People* v. *Wash* (1993) 6 Cal.4th 215, 260 [invoking Biblical support for death penalty]; 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].

❒ Other common forms of courtroom misconduct:

- **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 612.
- **misstating the trial testimony or misstating legal principles**. *People v. Hill* (1998) 17 Cal.4th 800, 823-826, 829-832.
- **vouching** for witnesses.
  - Tip: In addition to classical vouching ("I believe" witness), watch for more subtle forms of vouching, especially **prosecutorial implications that government has somehow verified veracity** of cooperating witness' account. E.g., *People v. Frye* (1998) 18 Cal.4th 894, 970-972;[reading witness' cooperation/immunity agreement to the jury]; see also *U.S.* v. *Rudberg* (9th Cir. 1997) 122 F.3d 1199; *People* v. *Fauber* (1992) 2 Cal.4th 792, 822
  - Also watch for prosecutorial **vouching for police witnesses**. E.g., *State v.*

Frost (N.J. 1999) 727 A.2d 1 [misconduct to argue police officer wouldn't jeopardize his career by lying].

- **calling defendant a "liar**" (at least according to some federal opinions). *U.S. v. Rodriguez-de Jesus* (1st Cir. 2000) 202 F.3d 482, 486; *United States* v. *Garcia-Guizar* (9th Cir. 1998) 160 F.3d 511, 520-521.

❒ **Prosecutorial misconduct outside the courtroom** (possible writ issues):

- ***Brady* violations**–failure to disclose exculpatory evidence to defense (including negligent as well as intentional non-disclosures). See *In re Brown* (1998) 17 Cal.4th 873, and prior authorities discussed there.
- **Materiality standard for *Brady* error**–"reasonable probability" of different result (same as prejudice prong of *Strickland* IAC standard). *United States v. Bagley* (1985) 473 U.S. 667; *Kyles v. Whitley* (1995) 514 U.S. 419.
- Compare **more favorable standard for "*Agurs* error"–**prosecutor's *duty to correct any testimony which prosecution knows or should know is false or misleading*. *United States v. Agurs* (1976) 427 U.S. 97. Requires reversal if "any reasonable likelihood that the false testimony could have affected the judgment of the jury"; standard deemed equivalent to *Chapman* "harmless beyond reasonable doubt" test. See *United States v. Bagley* (1985) 473 U.S. 667, 679-680 & fn. 9; *In re Jackson* (1992) 3 Cal.4th 578, 597-598.
- Most common form of *Brady* error: **non-disclosure of impeachment information** concerning prosecution witnesses, especially inducements for witness' testimony (reduced charges, early release, etc.). E.g., *In re Pratt* (1999) 69 Cal.App.4th 1294; *People v. Kasim* (1997) 56 Cal.App.4th 1360.
- **Intimidation of defense witnesses** (e.g., threats of perjury prosecution if witness testifies for defense). E.g., *In re Martin* (1987) 44 Cal.3d 1; *United States* v. *Vavages* (9th Cir. 1998) 151 F.3d 1185.
- Other **governmental conduct rendering defense witnesses unavailable** (e.g., deportation). *United States v. Valenzuela Bernal* (1982) 458 U.S. 858; *People v. Mejia* (1976) 57 Cal.App.3d 574.
- **Prosecutorial inconsistency in co-defendants' separate trials**--due process implications of blatant inconsistencies in prosecutor's factual theories (e.g., which defendant was gunman). *Smith v. Groose* (8th Cir. March 7, 2000) __ F.3d __ [No. 97-2694]; cf. *People v. Sakarias* (2000) 22 Cal.4th 596 [discussing but not resolving].

JUROR MISCONDUCT AND OTHER MISCONDUCT AFFECTING THE JURY

❒ May be either **direct appeal issue** (if misconduct discovered and raised in new trial motion) or **habeas issue.**

❒ **Juror concealment of bias** on voir dire. E.g., *In re Hitchings* (1993) 6 Cal.4th 97; *Dyer* v. *Calderon* (9th Cir. 1998) 151 F.3d 970 (en banc).

❒ Traditional **juror misconduct during deliberations** (e.g. performing experiments, visiting the crime scene, consulting dictionary or other outside sources).

❒ The **"mental processes" rule**, Evid. Code § 1150, and its **exceptions**.

- Can't impeach jury verdict with jurors' "mental processes" (e.g., jurors' interpretation of the instructions, significance of particular evidence to the jurors, etc.). Evid. Code § 1150 **bars admission** (on either new trial motion or habeas petition) **of most evidence of content of jurors' deliberations**.
- But **jurors' actions and statements *are* admissible where they represent misconduct in their own right–**including where "the very making of the statement ... would itself constitute misconduct." *In re Stankewitz* (1985) 40 Cal.3d 391, 398.

❒ Examples of **misconduct-in-deliberations** claims **not barred by § 1150**:

- **Racially bigoted statements during deliberations** (violation of standard instruction to decide case without "passion or prejudice"). E.g., *Weathers* v. *Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98; *Tapia* v. *Barker* (1984) 160 Cal.App.3d 761.
  - Tip: As always, ***federalize* any claim** indicating a defendant's trial was tainted by racial prejudice. Proof that racial prejudices actually entered into the jurors' verdict will support an equal protection claim. *McCleskey* v. *Kemp* (1987) 481 U.S. 279, 292.
- **Jurors' consideration of a specific subject prohibited by court's explicit instructions**–such as *punishment* or *the defendant's failure to testify*. See, e.g., *People v. Perez* (1992) 4 Cal.App.4th 893, 908.
- Juror's reliance on and **discussion of information outside the trial record**. E.g., *People v. Nesler* (1997) 16 Cal.4th 561; *In re Stankewitz* (1985) 40 Cal.3d 391, 398.

❒ Misconduct by **bailiffs, other court personnel or spectators** affecting jurors.

❒ Jurors' **receipt of information outside the record**. *U.S. v. Noushfar* (9th Cir. 1996) 78 F.3d 1442; compare *People v. Rose* (1996) 46 Cal.App.4th 257.

- Including inadvertent delivery of **unadmitted exhibits, tapes, police reports,** etc. E.g., *Eslaminia* v. *White* (9th Cir. 1998) 136 F.3d 1234.

OTHER ERRORS CONCERNING DELIBERATIONS AND VERDICT

❒ **Failure to respond to jurors' request** for clarification of instructions, readback of testimony, etc. Pen. Code § 1138; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.

❒ **Inadequate response to juror queries**--e.g., re-reading same instructions which jurors indicated they didn't understand. E.g., *McDowell* v. *Calderon* (9th Cir. 1997) 130 F.3d 833

(en banc); *People v. Thompkins* (1987) 195 Cal.App.3d 244; *People* v. *Gonzales* (1999) 74 Cal.App.4th 390-391.

❒ Court's **ex parte communications with jurors**, including responding to juror queries without consulting with counsel--violation of 6th Amendment right to counsel. E.g., *People* v. *Hogan* (1982) 31 Cal.3d 815; *People* v. *Lozano* (1987) 192 Cal.App.3d 618.

❒ **Judge's absence or improper delegation of judicial function**--readback, response to juror queries or other judicial function conducted by clerk or non-judicial staff. E.g., *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117 [finding structural defect where judge's *law clerk* responded to jury's request for readback and "presided" over readback proceedings, in judge's absence].

❒ **Removal of "holdout" juror,** other jurors' accusations that "holdout" juror is "not deliberating." *United States* v. *Symington* (9th Cir. 1999) 195 F.3d 1080 [reversal required where there was "reasonable possibility that [juror's] views on the merits of the case provided the impetus for her removal"]. Similar issues currently pending before Cal. Supreme Court in *People* v. *Metters*, S069442, and other cases.

❒ **Substitution of alternate during deliberations**--must instruct reconstituted panel to **set aside and disregard prior deliberations and to begin deliberations anew.** *People v. Collins* (1976) 17 Cal.3d 687.

❒ **Defects in verdict**

- **Failure to specify degree**; verdict deemed 2nd degree by operation of law. Pen. Code § 1157; e.g., *People v. Superior Court (Marks*) (1991) 1 Cal.4th 56; *In re Birdwell* (1996) 50 Cal.App.4th 931. Issue currently pending before Cal. Supreme Court in *People v. Mendoza*, S067104 {argued on May 2000 calendar}.

ENHANCEMENTS, "STRIKES" AND OTHER SENTENCING ALLEGATIONS

❒ Correct classification of statute: **Offense vs. enhancement debates**.

- Compare *People* v. *Hernandez* (1988) 46 Cal.3d 194 [Pen. Code § 667.8 deemed a kidnapping-for-rape *enhancement*], with *People* v. *Rayford* (1994) 9 Cal.4th 1, 8-11 [former § 208(d) {current § 209(b)} establishes a distinct *offense* of kidnapping for purposes of rape or other offenses].
- Compare *People* v. *Bright* (1996) 12 Cal.4th 652: Unlike murder, *attempted murder* is not divided into "degrees." Life sentence for attempted murder *with premeditation* (Pen. Code § 664(a)) is form of sentence enhancement or "penalty provision."
- Compare *People v. Valentine* (1986) 42 Cal.3d 170 [prior felony conviction an *element* of offense of felon-with-firearm], with *People v. Bouzas* (1991) 53 Cal.3d 467 ["petty theft-with-a-prior, Pen. Code § 666, doesn't establish distinct offense; the prior theft functions as a sentence enhancer for the underlying current offense of theft].

❒ **Constitutional implications of "offense" vs. "enhancement" classification**

- California Supreme Court's position: No federal constitutional right to jury trial on an enhancement, so omitted or defective enhancement instructions are only state law error, reviewed under *Watson* prejudice test. *People v. Wims* (1995) 10 Cal. 4th 293.
- Similarly other traditional trial rights not applicable to mere enhancements. *Monge v. California* (1998) 524 U.S. 721, affirming *People v. Monge* (1997) 16 Cal.4th 826 [double jeopardy inapplicable to recidivist enhancement]; *People v. Hernandez* (1998) 19 Cal.4th 835.
- Possibly more favorable U.S. Supreme Court view, turning on distinction between **recidivist** and **current conduct** provisions: See *Jones* v. *U.S.* (1999) 526 U.S. 227, suggesting full panoply of constitutional rights apply to any fact concerning *current* offense (e.g., great bodily injury; weapon use) that exposes defendant to a greater sentence than the maximum term otherwise permissible for underlying crime. Compare *Almendarez-Torres* v. *U.S.* (1998) 523 U.S. 224: no constitutional right to jury trial of recidivist allegations that increase maximum sentence.
- Possible clarification soon from currently pending U.S. Supreme Court case, *Apprendi v. New Jersey*, No. 99-478, cert. granted, Nov. 29, 1999 [concerning enhanced "hate crime" penalties].
- Pending further clarification from U.S. Supreme Court, **continue to assert instructional and other errors on current conduct enhancements as federal constitutional violations**. Cal. Supreme Court's *Wims* decision must be re-examined in light of subsequent opinion in *Jones v. U.S.*, *supra*.

❒ **Pleading & proof of enhancements**. See generally Pen. Code § 1170.1(e).

- **No authority to impose enhanced punishment if *not alleged in indictment or information***, even if defense failed to object to instructions on that allegation. *People v. Ramirez* (1987) 189 Cal.App.3d 603, 622-624 [failure to plead "in concert" allegation (§ 264.1) as to certain sex offense counts].
- Also **compare the enhancement ultimately imposed to (1) the pleading, and (2) the defendant's admission or jury waiver** on that enhancement. *People v. Haskin* (1992) 4 Cal.App.4th 1434: where pleading alleged burglary as prior prison term enhancement (§ 667.5(b) [1-year]) and defendant admitted 667.5(b) allegation, trial court could not impose 5-year "serious felony" enhancement (§ 667(a)), based on finding that the prior burglary was residential.
- But **liberal rules for construction of pleadings**. Not necessary that accusatory pleading allege the enhancement *statute* correctly; pleading provides sufficient notice if it alleges all the requisite facts for the enhancement. See *People v. Thomas* (1987) 43 Cal.3d 818; *People v. Neal* (1984) 159 Cal.App.3d 69.

❒ **<u>Adjudication</u> of "strikes" and other recidivist enhancements.**

- Think of "strikes" and other prior conviction **enhancements as *trial issues***, not just sentencing issues.
- **Substantially reduced <u>jury</u> trial rights** on prior conviction allegations, especially after recent amendments to Pen. Code § 1025. *People* v. *Kelii* (1999) 21 Cal.4th 452

[court not jury determines whether prior qualifies as "serious felony"]. (Additional issues concerning what's left of jury trial rights on priors are currently pending before Cal. Supreme Court in *People* v. *Epps*, S082110, and other cases.)

- But **other fundamental trial rights still apply**, including proof beyond reasonable doubt. *People* v. *Tenner* (1993) 6 Cal.4th 559, 566.
- **Proof of priors**–know which types of prior convictions require additional "*Guerrero*-type" evidence of underlying facts in order to qualify as "strike" or "serious felony"
  - Always **compare the enhancement statute** (e.g., Pen. Code § 1192.7(c) ["serious felony" definitions]) **with the statutory definition of the prior offense**.
  - Most common *Guerrero* issues on *California* prior convictions: **assault with a deadly weapon** (must show *personal* firearm use or deadly weapon or personal infliction of GBI).
  - **Out-of-state & federal priors**. Closely compare California statute to out-of-state statute; any way of committing out-of-state offense that would not qualify as California "serious felony"? If so, prosecution must offer *Guerrero* proof of nature of prior offense. E.g., *People v. Jones* (1999) 75 Cal.App.4th 616 [federal bank robbery prior doesn't automatically qualify as "serious felony" due to divergences between federal and California robbery definitions].
- Special rules for **lists of priors qualifying as "strikes."** Different lists applicable to pre- and post-Prop. 21 offenses (March 7, 2000).
  - "Three strikes" statutes **froze qualifying priors based on "serious felony"/ "violent felony" definitions as of June 30, 1993** (Pen. Code § 667(h))–i.e., offenses added to "serious felony" list (§ 1192.7(c)) after June 1993 (e.g., carjacking) didn't qualify as "strikes."
  - But Prop. 21--the "Gang Violence and Juvenile Crime Prevention Act" adopted March 7, 2000 (also known as the "Wilson initiative")-- appears to change that rule. Assuming the initiative survives any constitutional challenges (including "single subject" and similar state constitutional questions), **Prop. 21 appears to "thaw and re-freeze" the lists of priors qualifying as strikes**. Prop. 21 adds Pen. Code **§§ 667.1** and **1170.125**, each of which provides that all statutory references in the "three strikes" laws (§ 667(c)-(g), 1170.12) "are to those statutes as they existed on the effective date of this act." That means that there are **two different sets of lists of qualifying "strikes,"** depending on the date of the *currently charged* crime, relative to the passage of Prop. 21:
    –For current offenses committed **between March 7, 1994** (eff. date of "3 strikes" law) **and March 7, 2000**, prior must come within "serious felony"/"violent felony" definitions **as of June 30, 1993.**
    –For current offenses committed **on or after March 8, 2000** (eff. date of Prop. 21), prior must come within "serious felony"/ "violent felony" definitions **as of March 8, 2000.** (Note that this includes new offenses which Prop. 21 itself adds to those respective lists. (See §§ 1192.7(c) & 667.5(c), as amended by Prop. 21.))

- Special requirements for ***juvenile adjudications*** **as "strikes**." See *People v. Garcia* (1999) 21 Cal.4th 1.
- **Sufficiency of evidence and "least adjudicated elements" review**. *People* v. *Rodriguez* (1998) 17 Cal.4th 253, 261-262: Where the prosecution's evidence does *not* reveal any of the underlying circumstances of the prior offense, the **"least adjudicated elements"** test continues to govern the adjudication of the enhancing allegation.
- **Admissibility of evidence–confrontation clause, hearsay and "record of conviction" limitations**. *People* v. *Reed* (1996) 13 Cal.4th 217 [preliminary hearing transcript admissible under "former testimony" hearsay exception; but third-party hearsay in probation report inadmissible]. Other examples of inadmissible hearsay
  - E.g., limits on consideration of preliminary hearing transcripts: *People* v. *Best* (1997) 56 Cal.App.4th 41 [police hearsay in Prop. 115 preliminary hearing transcript inadmissible]; *People v. Houck* (1998) 66 Cal.App.4th 350 [preliminary hearing transcript inadmissible where prior conviction resulted from *trial* rather than plea].
  - E.g., other miscellaneous court or prison records not satisfying hearsay exceptions or reliability concerns. E.g., *People* v. *Williams* (1996) 50 Cal.App.4th 1405; *People v. Lewis* (1996) 44 Cal.App.4th 845.

❒ ***Boykin-Tahl*** **compliance in <u>current</u> case–admission of prior conviction enhancements**. See generally *In re Yurko* (1974) 10 Cal.3d 857.

- ***Howard*** **"totality of circumstances" test of voluntariness**. *People* v. *Howard* (1992) 1 Cal.4th 1132, 1174-1180.
- **Life after *Howard*–**more difficult, but still plenty of post-*Howard* reversals for *Boykin-Tahl* errors on admissions of "strikes" and prior conviction enhancements. E.g., *People v. Campbell* (1999) 76 Cal.App.4th 305, 309-311, & additional reversals cited there.
- **Narrowed scope of *Yurko***: *Boykin-Tahl* advisements only necessary where defendant admits an entire charge or enhancement; not necessary for defense's stipulation to prior conviction as an *element* of a charged offense (Pen. Code § 12021) or other stipulations to "evidentiary facts. *People* v. *Newman* (1999) 21 Cal.4th 413; see also *People v. Adams* (1993) 6 Cal.4th 570.

☐ ***Boykin-Tahl*** **compliance in <u>prior</u> case.**

- ***Sumstine lives*****.** Still possible to bring "*Sumstine* motion" to strike enhancement priors **based on *Boykin-Tahl* errors** in prior case. *People v. Allen* (1999) 21 Cal.4th 424.
- Motion to strike procedure also available to raise **denial of counsel claim** ("*Gideon* error") **in prior case** . *People v. Coffey* (1967) 67 Cal.2d 204, 214-215, discussed in *Garcia v. Superior Court, infra.*
- **But no motion-to-strike procedure to challenge <u>other</u> constitutional defects** in prior convictions alleged as enhancements in non-capital case. *Garcia v. Superior Court* (1997) 14 Cal.4th 953 [cannot use motion-to-strike procedure to raise *ineffective assistance of counsel* claims regarding prior conviction].

NEW TRIAL MOTIONS & OTHER POST-TRIAL ISSUES

❒ **Trial judge's independent weighing of evidence.** Pen. Code § 1181(7) ("verdict or finding contrary to law or evidence").

- **Not the same as appellate court's "substantial evidence" review** or trial court's review of § 1118.1 motion.
- So-called "**13th juror**" review (though courts insist that's incorrect term)–judge has authority to grant new trial based on *independent* weighing of evidence. *People v. Veitch* (1982) 128 Cal.App.3d 460.
- **Remand for reconsideration where trial judge's comments denying new trial motion indicate misunderstanding of scope of authority**–i.e., where trial judge apparently applied "substantial evidence" test rather than independent review. *People v. Robarge* (1953) 41 Cal.2d 628.
- Substantial appellate deference to trial court's *granting* of new trial on this basis. Cf. *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405.
- In lieu of granting new trial on this basis, trial court may **reduce conviction to a lesser included offense** (but may not reduce it to a lesser related offense). *People v. Lagunas* (1994) 8 Cal.4th 1030.

❒ **Ineffective assistance of counsel.** *People v. Fosselman* (1983) 33 Cal.3d 572.

- Where ineffective assistance was fully litigated in an unsuccessful new trial motion, may be able to raise claim on direct appeal without necessity of writ petition.
- **Greater discretion to grant new trial based on ineffective assistance**, where claim presented in new trial motion, rather than in direct appeal or habeas petition. *People* v. *Andrade* (Apr. 3, 2000) __ Cal.App.4th __, 00 C.D.O.S. 2633.

❒ **Juror misconduct.** (See previous section on topic for substantive standards.)

- Discretion to conduct **evidentiary hearing** where material factual issues disputed. *People v. Hedgecock* (1990) 51 Cal.3d 395.

❒ **Newly discovered evidence.** Pen. Code § 1181(8).

- When raised in **new trial motion.** Materiality standard: Newly discovered evidence must "be such as to render a different result probable on a retrial of the cause." *People v. Martinez* (1984) 36 Cal.3d 816.
  - **Diligence standard relaxed** where newly discovered evidence meets materiality standard above. *Martinez*, *supra*.
- **More daunting standard for newly discovered evidence as basis for habeas corpus petition:** "such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246; *In re Hall* (1981) 30 Cal.3d 408, 417.

☐ **False evidence**, as distinct basis for habeas corpus relief. Pen. Code § 1473.

- Not necessary to show that the falsity amounted to perjury or that the prosecution was aware of the falsity. Pen. Code § 1473(c); *In re Hall* (1981) 30 Cal.3d 408, 424.
- Same materiality standard as for *Brady* claims of prosecutorial non-disclosure– reasonable probability of different result. *In re Sassounian* (1995) 9 Cal.4th 535, 546.

SENTENCING ISSUES

❒ Especially in reviewing components of sentence, **check sentence against statutory provisions in effect at time of underlying offense** (including sentence-range for counts and enhancements, and applicable provisions re stays, discretion to strike, etc.).

❒ "**Unauthorized sentence**" claims vs. errors re **discretionary sentencing decisions**.

- Unauthorized sentence **cognizable on appeal *without necessity of objection*** *at sentencing hearing. People v. Scott* (1994) 9 Cal.4th 331.
- Unauthorized sentence also meets **"in excess of jurisdiction" exception to habeas corpus "procedural default" rules**. *In re Harris* (1993) 5 Cal.4th 813.
- Definition: "[A] sentence is generally 'unauthorized' **where it could not lawfully be imposed under any circumstance in the particular case**.... [L]egal error resulting in an unauthorized sentence commonly occurs **where the court violates mandatory provisions governing the length of confinement**." *People v. Scott* (1994) 9 Cal.4th 331, 354.

❒ **Leading examples of "unauthorized sentences, "** not subject to *Scott* waiver rules.

- Generally concerns **mandatory** aspects of sentence calculation, rather than aspects involving discretion or fact-finding.
- **Ex post facto** violations.
- Pen. Code **§ 654** claims. *People v. Scott* (1994) 9 Cal.4th 331, 354 fn. 17.
- **Calculation of consecutive sentences**. E.g., full consecutive sentences (except where specifically authorized (e.g. § 667.6)); other violations of _-mid-term rule for subordinate consecutive sentence (§ 1170.1(a)).
- **Imposition of enhancements**, especially stays or partial stays of enhancements. E.g., stays or partial stays of enhancements on subordinate terms (e.g., § 1170.1(a)); unauthorized duplicative enhancements (e.g., multiple weapon enhancements on same count) (§ 1170.1(f) & (g)); issues concerning unauthorized multiple enhancements for same prior conviction (e.g., *People v. Jones* (1993) 5 Cal.4th 1142 [Pen. Code § 667(a) & 667.5 enhancements based on identical prior].
- General guides for "unauthorized sentences"--usually involve **how different counts, enhancements, & other sentencing provisions fit together.** E.g., relationship between "three strikes" (§ 1170.12) and "one strike" (§ 667.61) law for sex offenses.
- Except for *Romero* issues re discretion to strike priors, **most "three strikes" issues are "unauthorized sentence" claims**, concerning interpretation of mandatory sentencing provisions.
- Miscalculation of **custody credits**.

- **But** (despite "unauthorized sentence" moniker) **custody credits claims generally must be presented first to trial court**, either at sentencing, or **in a post-judgment letter or motion to correct credits.** Pen. Code § 1237.1.
- Exception to the exception: Notwithstanding § 1237.1, some cases allow presentation of a custody credits claim in appellate brief (without necessity of a post-judgment motion in trial court), *where the appeal raises <u>other</u> properly cognizable issues* (i.e., where credits error isn't the *only* issue of the appeal). *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428 & fn. 8; accord *People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496 fn. 3; *People v. Duran* (1998) 67 Cal.App.4th 267, 270.

- Unauthorized **restitution awards** or other fines.

❒ **Omission of reasons or invalid reasons for discretionary sentence choice**. See generally Pen. Code § 1170(c); Cal. Rules of Court, rule 406.

- **Major sentencing choices requiring articulation of reasons**: **denial of probation** (unless probation statutorily limited or proscribed) (Cal. Rules of Court, rule 406(b)(2)); **aggravated term** for offense (§ 1170(b)); **upper term for enhancement** (rule 406(b)(4)); **consecutive sentences** (except where consecutive terms mandatory) (rule 406(b)(5)); **discretionary imposition of *full consecutive term for sex offense***, under Pen. Code § 667.6(c), rather than subordinate (_-mid-term) consecutive term under § 1170.1 (*People v. Belmontes* (1983) 34 Cal.3d 445).
- **Invalid reasons for sentence choice**--violations of **dual use rules**--e.g., dual use of an element of offense or of enhancement as basis for aggravated term or consecutive sentence; dual use of same aggravating factor as basis for two separate sentencing choices (e.g., upper term and consecutive sentencing). Pen. Code § 1170(c); Cal. Rules of Court, rule 425(b).
- ***Scott* waiver rule**: **Must raise challenges to adequacy of sentencing reasons at sentencing hearing** (including omission of reasons, dual use violation, or other error in reasons). *People v. Scott* (1994) 9 Cal.4th 331.
- Impact of *Scott*: **Omission-of-reasons and dual use arguments now largely defunct**, though until 1994 these were major categories of appellate sentencing arguments (and occasionally resulted in remands).
- **IAC fallback--**ineffective assistance in failing to object to defect in sentencing reasons; no conceivable tactical reason for not raising valid sentencing objection.
  - Practical effect: Though IAC route theoretically available, as with other waiver problems, more difficult to present an issue in an IAC envelope. Requires **higher threshold for briefing issue**--i.e., stronger showing of prejudice from the error. (E.g., probation report only identified single aggravating factor, and court used that factor to support both upper term and consecutive sentencing.)

❒ Sentencing court's **failure to recognize discretion**.

- Classic *Romero* problem: trial judge believed no authority to exercise some form or leniency (*Romero* discretion to dismiss a "strike").

- "**Silent record**" problems. To obtain remand on direct appeal, record must affirmatively demonstrate judge's erroneous belief re lack of discretion. *People v. Fuhrman* (1997) 16 Cal.4th 930 [no appellate remand on "silent record" even for pre-*Romero* sentencing hearing, at time when law was uncertain].
- By now, everyone knows about *Romero*; probably no more pre-*Romero* appeals in pipeline. **Look for *other* situations in which judge's statements indicate mistaken understanding of sentencing discretion**. E.g.:
  - Mistaken belief no authority **to strike a particular enhancement**. E.g., Pen. Code § 667.5, 12022, 12022.7.
  - Mistaken belief defendant **ineligible for probation**--i.e., misunderstanding of scope of various probation-restricting statutes (e.g., § 1203.06 et seq.).
  - Mistaken belief **consecutive sentences mandatory**, including misinterpretation of "three strikes" consecutive sentencing provisions. Cf. *People v. Hendrix* (1997) 16 Cal.4th 508, 515**.**

❒ **Abuse of discretion**--head-on challenge to *merits* of sentencing decision.

- **Denial of probation**, including finding that case doesn't meet "unusual case" or "interest of justice" requirements to overcome statutory presumptions against probation. E.g., § 1203(e).
- Merits of **denial of *Romero* motion to strike a "strike"** (or merits of refusal to strike other enhancements subject to discretionary striking (e.g., § 667.5(b)).
- Merits of any other discretionary sentencing decision--e.g., upper term, consecutive sentencing, etc.
- **Very daunting standard of review**. Must have an extraordinarily strong case or a very good "hook" for the argument (e.g., something patently wrong in court's reasoning) to present viable "abuse of discretion" argument.

❒ **Invalid probation conditions.**

- Look especially for **conditions that impair constitutional rights**, such as freedom of association, travel, etc. E.g., "banishment" conditions; broad bars on associating with certain groups, especially where prohibition may limit contacts with own relatives; restrictions on other First Amendment activities, etc.
- Also look for probation conditions **bearing no relationship to current offense or to any circumstances described in probation report.** (E.g., drug-testing or alcohol abstinence conditions for defendant convicted of passing bad checks, where no indication of any substance abuse history.)
- ***Welch* waiver rule** (pre-cursor to *Scott*): must object to probation condition at sentencing hearing. *People v. Welch* (1993) 5 Cal.4th 228.

ADVERSE CONSEQUENCE ISSUES

❒ **Adverse consequences--the "dark side" of "unauthorized sentences"**

- Appellate court's authority to correct "unauthorized sentence," if spotted on

defendant's appeal, even if People didn't appeal or cross-appeal.

❒ **"Unauthorized sentence" definition revisited**. See generally *People v. Scott* (1994) 9 Cal.4th 331; *People* v. *Tillman* (2000) 22 Cal.4th 300.

- **Unauthorized character of court's disposition** of a charge or construction of sentence (e.g., striking an "unstrikable" enhancement) vs. other factual or procedural errors where ultimate disposition is still an authorized one (e.g., inadequate reasons for striking a "strikable" enhancement). Both are sentencing errors.
  - Per *Scott* and *Tillman*, only the former category--unauthorized disposition (including failure to take a mandatory action)--represents "unauthorized sentence."
  - Other arguable errors at sentencing, *particularly errors in connection with reasons for exercising leniency*, are "ordinary" sentencing errors, subject to *Scott* waiver rule. *People v. Scott* (1994) 9 Cal.4th 331.
  - That's right. *Scott* works both ways: Like defendant, *People must object at sentencing*. Where the sentencing court's disposition (e.g., striking a particular enhancement) is within its authority, errors leading up to that disposition are waived unless asserted by People during sentencing hearing.

❒ Most **common "unauthorized sentences"**

- **FAILURE TO IMPOSE 5-YEAR "SERIOUS FELONY" ENHANCEMENT *IN ADDITION TO* "STRIKE" PUNISHMENT BASED ON IDENTICAL PRIOR.**
  - Can't stress this one enough. Numerous California defendants ended up with substantially longer sentences, *as a result of their own appeals*, because appellate courts (or AG) spotted failure to add 5-year enhancement(s) and "corrected" the error.
  - Definite "unauthorized sentence": where 667(a) enhancement was *specifically alleged and specifically found true or admitted*.
  - Less clear situations: Where *pleading and/or enhancement verdict only refers to "strike" allegation* (§ 667(b)-(i), 1170.12), and no reference to "serious felony" enhancement (§ 667(a)) in pleading or adjudication. Uncertain whether a "strike" finding alone also requires imposition of a 5-year enhancement, where "strike" was based upon an adult serious felony conviction but information did not expressly allege 667(a) enhancement and/or verdict refers only to "strike" and not to "serious felony" or § 667(a).
  - In ambiguous situations (as immediately above), **still apprise client of risk so he or she can make informed decision.** But uncertainties concerning whether sentence really is "unauthorized" may factor into appellate counsel's advice re the magnitude of the risk.
- **Neglecting to impose sentence on a count or enhancement** on which there was a verdict.
- **Erroneous stay or partial stay** of a count or enhancement.
- Imposition of **concurrent terms where consecutive sentences mandatory** or

imposition of subordinate consecutive term (under _ formula) **where *full* consecutive terms mandatory.**

- Any **other errors** in defendant's favor regarding **mandatory aspects of construction of the sentence**, including how different sentencing provisions interact. E.g., *People v. Ervin* (1996) 50 Cal.App.4th 259 [cumulative interaction of "one strike" sex offense sentencing regimen (Pen. Code § 667.61) and "three strikes"].
- **Credits errors**. Common errors (occasionally missed by defense appellate counsel but spotted by AG or court):
  - **Awarding conduct credits under wrong formula**. Failing to limit pre-sentence conduct credits to 15% under Pen. Code § 2933.1, where defendant convicted of a "violent felony" (listed in § 667.5(c)) in current case. (Distinction, 15% limit of 2933.1 for "violent felonies" not to be confused with 20% limit in "three strikes" statutes; *"three strikes" credit limits apply only to post-sentence credits in prison*; no application to pre-sentence credits.)
  - **No pre-sentence conduct credits in murder cases**, for offenses committed on or after **June 2, 1998,** operative date of Pen. Code § 2933.2.
  - **Awarding duplicative credits for custody time attributable to other charges.** See *In re Joyner* (1989) 48 Cal.3d 487; *People* v. *Bruner* (1995) 9 Cal.4th 1178 [strict causation rule].
  - Possible **mitigation of "adverse consequence" risks re credits**. **Many appellate courts hold the People to § 1237.1 and refuse to consider credit arguments not raised below by prosecution**. E.g.,**:** *People v. Shea* (1995) 39 Cal.App.4th 1257, 1275-1276; *People v. Nwafor* (1996) 46 Cal.App.4th 39, 47; *People v. Nelson* (1996) 42 Cal.App.4th 131, 143 n. 4; *People v. Green* (1995) 36 Cal.App.4th 280, 284 [each refusing to consider AG's credits claims where not raised below]; but compare *People v. Guillen* (1994) 25 Cal.App.4th 756, 764; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270 [reaching AG's claims anyway].
- Failure to impose **mandatory restitution or other fine**. *People* v. *Smith* (Apr. 14, 2000) __ Cal.App.4th __, 00 C.D.O.S. 2907; contrast *People* v. *Tillman* (2000) 22 Cal.4th 300 [described below].

❒ **Sentencing errors and other oddities that *probably* do not represent "unauthorized sentence**."

- **Merits of court's exercise of discretion**. E.g., choice of lower term (Pen. Code § 1238(a)(10); probation where no statutory bar on eligibility;
- **Problems with reasons for discretionary leniency where court did have authority to take that action**. *People* v. *Tillman* (2000) 22 Cal.4th 300: Failure to impose additional restitution fine under Pen. Code § 1202.4(b) was not "unauthorized" because statute does allow court to decline imposition where it finds "compelling and extraordinary reasons." Judge's failure to state those reasons was error. But, by analogy to *Scott*, People's failure to object at sentencing waived the issue.
- **Main lessons of *Tillman*:**

- ***Scott* waiver rule applies equally to prosecution.**
- **"Defective reasons" generally won't pose adverse consequence risk**: "*Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.*" *Tillman*, quoting *People v. Scott* (1994) 9 Cal.4th 331, 353 [emphasis in *Tillman*].

• **Other "procedural or factual errors" where ultimate disposition was authorized**: "In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." *People v. Scott* (1994) 9 Cal.4th 331, 354.

• **Is this as good as it sounds?** Questions left by *Tillman*: Where a court does possess discretion to strike a "strike" (*Romero*) or other enhancement, does the failure to state reasons for exercising that discretion and to enter those reasons *in the minutes* result in an unauthorized sentence?

- Cf. *People v. Williams* (1998) 17 Cal.4th 148, 161-162 [striking of a "strike" prior under § 1385 is "ineffective" if reasons not entered in minutes]. Many cases appear to treat this form of omission of reasons as "unauthorized sentence." E.g., *People v. Bradley* (1998) 64 Cal.App.4th 386, 392.
- But, where there is authority to strike the prior or other enhancement, omission of reasons *appears* to be a "[r]outine defect[] in the court's statement of reasons" or the imposition of an otherwise lawful sentence in "a procedurally or factually flawed" manner, within meaning of *Tillman* and *Scott*.
- Pending further clarification, in the wake of *Tillman*, should probably continue to treat omission of reasons for *Romero* strikes or other stricken enhancements as potential "adverse consequences" and apprise client of possible risk.

• **Errors in <u>adjudication</u> of enhancements.**

- Double jeopardy inapplicable to enhancements. *Monge v. California* (1998) 524 U.S. 721, affirming *People v. Monge* (1997) 16 Cal.4th 826; *People v. Hernandez* (1998) 19 Cal.4th 835. Hence, no *constitutional* bar to appellate review of "not true" finding on an enhancement.
- But, no statutory or case law authorizes appellate review of "not true" finding.. Statutes appear to treat factfinder's negative finding on enhancement as final.

❒ **Other considerations in weighing adverse consequences**.

• **Apprise the defendant** of the risk. Also try to provide a meaningful assessment of **magnitude of risk that he'll actually end up with longer sentence as result of appeal.**

• **Likelihood someone (Ct of Appeal or Attorney General) will spot or miss "unauthorized sentence."** Hit and miss. Frequently "unauthorized sentences" escape unnoticed.

- **Consider how glaring the error is.** Is it immediately apparent from the abstract of judgment or does someone have to dig more deeply into record in order to recognize it?
- **Relationship between relevant portions of record and issues being raised**

on appeal. If "unauthorized sentence" is more subtle, will Ct of Appeal & Attorney General be scrutinizing relevant portion of record anyway as part of review of issues being raised on appeal.

- **Likelihood CDC will spot error anyway and notify trial judge.** Flip side of consideration above. If error is plain on face of abstract of judgment, CDC may spot it as part of own routine sentence review and write to trial judge.
  - Find out whether CDC has *already* written to judge. (Defendant should receive copy of any such letter to judge, even though appellate counsel won't be on CDC's service list.)
- **Likelihood any remand may result in judge's reimposition of same sentence**, rather than increased senence.
  - I.e., if defect is only formal one (e.g., failure to enter reasons for *Romero* discretion in minutes), consider likelihood judge will simply "clean up" error and once again strike the "strike" or enhancement. (Check with trial counsel re view on judge's disposition toward defendant.)
- **Magnitude of potential adverse consequence in relationship to current sentence.**
  - E.g., Potential increase in sentence won't have any real effect on defendant if his current sentence is *already* functional equivalent of LWOP--i.e., determinate or indeterminate sentences of 70 years or more, as in some multiple sex offense or "three strikes" cases.
  - Converse situation. De minimis adverse consequences in relation to sentence. The potential of losing a few days of credits (or receiving a higher restitution fine) is unlikely to defer a defendant from pursuing an appeal from a substantial prison sentence.
- **Balancing risk of adverse consequences against prospects for success on appeal.**
  - Easy calls. *Wende* appeals or appeals with briefable but very weak issues. In that situation, client well advised to abandon appeal, even if potential adverse consequence risk isn't that great.
  - Tougher (and more common) dilemma. Balancing risk and likelihood of success where appeal presents substantial viable issues, but not "sure winners." Still need to try to give client meaningful assessment and advice, but client's decision may turn on his own individual "risk tolerance."

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OTHER STUFF (more elegantly known as "fundamental fairness")

❒ Consider developing arguments based on **anything else that strikes you as patently unfair** about police and prosecutorial conduct, pre-trial and trial proceedings, and sentencing, even if there isn't any case law addressing that specific issue.

❒ Remember that **"fundamental fairness" represents the essence of due process** under both the federal and state constitutions. E.g. *United States v. Valenzuela-Bernal* (1982) 458 U.S.

858, 872; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Quartermain* (1997) 16 Cal.4th 600, 618; *People v. Ramos* (1984) 37 Cal.3d 136, 153. Numerous unfair procedures and events which today are subjects of well-established constitutional protections (e.g., shackling, prejudicial pre-trial publicity, etc.) received judicial redress only because **persistent and creative defense counsel** (especially appellate counsel) **fashioned those grievances into viable due process claims, based on violations of "fundamental fairness."**

❒ Whenever possible, of course, try to fit claim into an established doctrine. But **don't be bound by formalisms.** As both the U.S. and California Supreme Courts have said in extolling "the Great Writ":

> "Habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *In re Harris* (1993) 5 Cal.4th 813, 828 n. 6; *Harris* v. *Nelson* (1969) 394 U.S. 286, 291 n. 2; each quoting *Frank* v. *Mangum* (1915) 237 U.S. 309, 346 (Holmes, J., dissenting).

❒ "The very nature of the writ demands that it be administered with **the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected**." *Harris v. Nelson*, *supra*, 394 U.S. at p. 291 (emphasis added). The same goes for criminal appellate practice in general.