



CONFESSIONS OF A BRIEF READER

*As Recounted By
J. Bradley O'Connell*



**CONFESSIONS OF A
LAZY, EASILY ANNOYED
BRIEF READER**

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TELL ME WHERE I AM AND WHERE I'M GOING

- Table of contents

- Think about headings & subheads on both arguments & Statement of Facts

- Introductions



Informative headings

- “THE TRIAL COURT ERRED IN DENYING THE SUPPRESSION MOTION.” or
- “THE SEARCH VIOLATED THE FOURTH AMENDMENT.” or
- “THE ANONYMOUS AND UNCORROBORATED TIP WAS INSUFFICIENT TO JUSTIFY THE DETENTION UNDER *FLORIDA v. J.L.*”



But don't make 'em too long...

- THE ADMISSION OF PREJUDICIAL OTHER CRIMES EVIDENCE VIOLATED EVIDENCE CODE SECTION 352 AND VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND OF THE CALIFORNIA CONSTITUTION.



Federalizing doesn't have to be cumbersome

- THE ADMISSION OF PREJUDICIAL OTHER CRIMES EVIDENCE VIOLATED EVIDENCE CODE SECTION 352 AND VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHTS.




INTRODUCTIONS

- Not required, but justices like them
- Different kinds
 - Brief-wide summary of arguments (good chance to highlight common theme)
 - Introduction to Facts (indicate what was disputed and what wasn't)
 - Introductions to individual arguments



STATEMENT OF CASE ESSENTIALS

- The charges
- Disposition of each charge (including any dismissals, acquittals, hung counts, etc.)
- Sentence
- Notice of appeal (including date)

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- “Count I charged that appellant committed robbery in violation of Penal Code section 211 by taking property by force or fear. It was alleged that appellant personally used a firearm in violation of Penal Code section 12022.5(a). Count II charged that appellant committed assault with a firearm in violation of Penal Code section 245.....”
 - “The information charged appellant with robbery (§ 211) and assault with a firearm (§ 245(a)(2)). Each count included a firearm use enhancement (§ 12022.5(a)).”



Lessons

- Describe charges and enhancements succinctly; don't try to pack in all the elements.
- In unusually complex cases (more than 10 or so counts), consider using a chart or table to list charges



BRAD'S BIGGEST PET PEEVE!!

- “The jury convicted appellant on Counts I, III, and IV, but found him not guilty of Count V. The jury was unable to reach a verdict on Counts II and VI, and the court declared a mistrial on those counts.”



Lesson

- Don't make reader go flipping back through the brief!
- Identify counts by common names (robbery, carjacking, etc.) or by statute ("the section 273.5 count")
- Include additional information where necessary ("the robbery and burglary counts in the Seven-Eleven incident")



■ Sentence

- Aggregate sentence and (usually) its components
- Omit credits, fines, probation conditions, unless subject of an argument

■ Don't forget Notice of Appeal (and date)

- Don't leave them wondering about jurisdiction
- For post-plea appeals, note type of notice
- Note court's disposition of any CPC request



STATEMENT OF FACTS

- Impose your own organization. Don't go witness-by-witness unless absolutely necessary.
- Alternatives:
 - Chronology of underlying crime
 - Chronology of investigation
 - Other topical organization



Making facts readable

- Use subheads (preferably not “Prosecution Case” “Defense Case”)
- Tailor focus of facts to your issues
 - Minimize text on matters which aren’t really disputed anymore (e.g., identification, fingerprint analysis, etc.)
- Avoid jargon (“exited the vehicle”)
- Tell a story. Keep the facts interesting!




Avoid cumbersome witness intros

- “Officer Kara Thrace testified that on March 5 she was employed as a police officer for the City of Caprica. Officer Thrace testified that she”
- “On March 5 at 2:00 pm, Caprica Police Officer Kara Thrace was on patrol at the intersection....”



Tone, persuasion & credibility

- Present facts in favorable light, but don't omit bad facts
- Let the facts (as you've organized them) speak for themselves, don't argue, editorialize, or include sarcastic asides

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- Generally, omit distracting “courtroom facts” (e.g., “Next the prosecution called ...” “On re-direct he testified....”)
 - But sometimes useful to identify main points of dispute or defense theory if not otherwise apparent
 - Especially where no defense witnesses, may want to note defense theory of facts (closing argument, etc.)
 - Don’t let reader think conviction on all counts a foregone conclusion!



ARGUMENTATION

- Have a theme running through arguments
 - E.g., the unintelligible instructions, the lying informant, pervasive hearsay, etc.
- Or explain how different arguments knock out different parts of the case
 - E.g., “The prosecution tried the murder charge on felony-murder and premeditation theories. Both theories were defective, but for different reasons....”



Order of arguments

- Default: order in which issues arose below (pre-trial, trial, sentencing, etc.)
- But: Usually lead with strongest trial issue
- Pair related issues
 - Sufficiency and related misinstruction on element
 - Evidentiary error and related DA argument or misinstruction



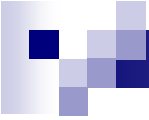
Organization

- Subheadings are great!
- Be wary of long text without any subheads or other markers
- Phrases OK for expository sections (“Factual and Procedural Background”)
- Sentences preferable for argument itself



Make subheads informative too

- “The Admission of the Evidence Was Prejudicial.”
- “The Admission of the Remote Prior Sex Offense Was Prejudicial Under Either *Chapman* or *Watson*, in View of the Disputed Credibility Questions and the Many Indicia of the Jurors’ Difficulty with the Case.”



Research tips – keeping current

- Must keep up with new cases (judicial web sites, C.D.O.S., D.A.R., your pick)
- Not enough to read blurbs
- Don't bother with substance
- Just focus on that appellate stuff
 - Waiver, standard of review, prejudice, etc.



Working with authority

- Another pet peeve: *People v. Balthar* (2009) 09 D.A.R. 5777.
- Include at least as much info as a regular cite and full date: *People v. Balthar* (Dec. 28, 2009) __ Cal.App.4th __, 09 D.A.R. 5777.
- Make it easy to find with any source (Westlaw, Lexis, advance sheets, etc.).



Don't get bogged down ...

- “In *Adama v. Superior Court* (2005) 130 Cal.App.4th 51, the Court of Appeal said...”
- Omit intro, just quote & cite; or...
- Let intro help carry your argument:
“Division One of this Court repudiated that rationale in *Adama v. Superior Court* (2005) 130 Cal.App.4th 51”



Avoid long block quotes

- I'm too lazy to read them
- Short quotes are great; long quotes are deadly
- Never let block quotes go on for more than a few sentences



Avoid cites within cites

- “.... As the prophets have observed, ‘All this has happened before, and it will happen again.’ (*Kobol v. Athena* (1951) 98 Cal.App.2d 31, 34; *Adama v. Superior Court* (1973) 35 Cal.App.3d 1, 5.)” (*Rosslin v. Balthar* (1996) 9 Cal.4th 7, 9.)
- ... again.’ [Citations.]” (*Rosslin v. Balthar*, etc.



Discussing cases

- Cut to holding, minimize procedural history
- Boil down to most salient facts
- Usually avoid names of actors in the prior case; describe by roles (“the officer,” “the proprietor,” etc.)



Tone & credibility

- Avoid ad hominem attacks and sarcasm re judges, prosecutors, police, etc.
 - But fine to point out other judicial findings of misconduct, IAC, etc.
- Don't let rhetoric get ahead of the reader
- Understatement more effective than hyperbole – e.g., “troubling” vs. “outrageous”




“WORLD VIEW”

- Imagine your readers, and calibrate your tone accordingly
- What’s their general view of the criminal justice system?
 - E.g., a panel of liberal law professors?
 - If not, may need a different tone



My view of my audience

- Skeptical but persuadable
- Want to decide this case, not out to shake up the system
- Sympathetic to trial judges' jobs
- "...a fair trial, not a perfect one"
- Their job to act when an error truly distorts the fact-finding process; most errors don't

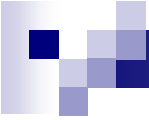



- “Most trials in this state are fair. This one wasn’t, and here’s why....”

- This case is an outlier

- The usual safeguards broke down

- You’ve got to step in

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- “There they go again” attitude re police, DA’s, or even judges.
 - Premise: The claimed violation [prosecutorial misconduct, *Miranda* violation, illegal search, etc.] is pervasive. This is another example....
 - “Prosecutors try cases every day without resorting to these tactics....”
 - A more palatable message & achievable goal
 - Don’t have to challenge their basic view of system; just have to show what went wrong in this case



Can make more systemic argument if record supports it

- E.g., *In re Edward S.* (2009) 173 Cal.App.4th 387 (caseload pressure & inadequate resources in Mendocino PD's office)
- *Miller-El v. Dretke* (2005) 545 U.S. 231 (history of discriminatory jury selection tactics in Dallas DA's office, including training advice)



Arguing prejudice

- Argue for the best standard
- Argue as if you're stuck with worst standard
- Substance of prejudice argument's going to be the same under any standard – *Chapman, Watson, Strickland, etc.*




- This case could have come out differently

- Conflicts in the evidence, lack of corroboration, credibility problems, etc.

- This case probably would have come out differently

- Relation of error to disputed facts
- Focus or repetition (e.g., in DA's argument)
- Jurors' difficulty with case – deadlock on other charge, queries & readback requests, length of deliberations, etc.

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- Appeal to their judgment and experience, including as trial judges and prosecutors
 - They know this type of case could go either way
 - They know how this affects juries



Closing thoughts

- “In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.”
 - Justice Stevens, concurring in *Brecht v. Abrahamson* (1993) 507 U.S. 619