



# Preserving the Record Cheat Sheet

First District Appellate Project

May 2011

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

**THE "IMMUTABLE RULE" FOR PROTECTING YOUR CLIENT'S INTERESTS ON APPEAL: "If it is not in the record, it did not happen."** *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364; accord *Wagner Farms, Inc. v. Modesto Irr. Dist.* (2005) 145 Cal.App.4th 765, 770.

## GET IT ON THE RECORD.

- *Unreported Conferences:* memorialize *on the record* any unreported conferences at the bench or in chambers.
- *Transcripts of recordings & videos.* Make sure there's a written transcript of any audio or videotaped statements or interviews; party offering tape should lodge transcript with the court. (Cal. Rules of Court, rule 2.1040.) **Unless transcript is lodged, do not stipulate to non-reporting of the tape by the court reporter.**
- *Non-reporting:* Never stipulate to non-reporting of instructions or of closing arguments.
- *Ex Parte Applications.* Make sure record exists of ex parte applications (e.g., denial of application for funds for expert or investigator, etc.).

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

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

- **§ 1538.5 rulings—no writ petition necessary.** A 1538.5 denial is cognizable on a post-trial or post-plea appeal. Though you may have tactical reasons for seeking immediate writ review, it's not necessary to file a writ in order to preserve the issue. But **denial of 1538.5 motion by magistrate is not appealable unless renewed before superior court.** (§ 1538.5 rulings *only* apply to search-and-seizure issues, not to *Miranda* and other confession-related issues.)
- **Judicial disqualification – writ statutorily required.** By statute, a writ petition is the only available means for obtaining appellate review of a denial of a motion to disqualify a judge or of a denial of a peremptory challenge to a judge. These issues are not reviewable on a post-trial appeal. Code Civ. Proc. § 170.3(d); see *People v. Panah* (2005) 35 Cal.4th 395, 444-445.

## OBTAIN *FINAL* RULINGS ON OBJECTIONS & MOTIONS

- *In limine motions.* In order to preserve issue, motion in limine must meet all these criteria: “(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.” *People v. Morris* (1991) 53 Cal.3d 152, 190; *People v. Rowland* (1992) 4 Cal.4th 238, 264 fn. 3.
- If there is any doubt whether the trial judge has made a *final* ruling, be sure to *reiterate* your objection or other motion when the pertinent evidence is actually offered at trial. *Morris, supra*, 53 Cal.3d at p. 191.
- These rules generally apply only to in limine rulings, **by the trial judge**, at the beginning of or during trial. With the exception of § 1538.5 rulings on search-and-seizure issues, other types of pre-trial evidentiary rulings (e.g., on a § 995 motion) generally do not carry over to the trial, so it's necessary to renew those arguments at trial.
- On retrial, don't assume objections at first trial will carry over to the retrial. **Make a clear record at retrial that your objections and motions are being renewed.**

## JURY SELECTION ISSUES

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

- *Wheeler-Batson motions.*
  - Describe on the record *numerical pattern* of DA’s challenges, in two ways: (a) DA’s challenges against the relevant group vs. total number exercised by DA (e.g., DA has exercised 6 of his 8 challenges against blacks), and (b) DA’s challenges against group vs. total jurors of that group (e.g., DA has removed 5 out of the 6 blacks in the venire).
  - Identify *anything else* supporting inference DA is exercising challenges in discriminatory manner: e.g., characteristics of removed jurors, DA’s use of disparate questions, DA found to have violated *Batson* in another trial.
  - *Comparison between challenged and unchallenged jurors.* Specifically note if the DA has passed on other non-minority jurors with identical characteristics which supposedly motivated the peremptory challenges. (E.g., DA asserts a relative’s misdemeanor arrest as the reason for his removal of a minority juror, but did not challenge white jurors whose relatives had similar arrests.) The U.S. Supreme Court has recognized such comparisons between challenged minority jurors and unchallenged white jurors as a vital tool in assessing whether a prosecutor’s stated reasons were genuine or pretextual. *Miller-El v. Dretke* (2005) 545 U.S. 231; *Snyder v. Louisiana* (2008) 552 U.S. 472.
    - After years of insisting that juror comparisons had no role in *Wheeler-Batson* analysis, the California Supreme Court has now recognized the propriety of such comparisons, under compulsion of *Miller-El* and *Snyder*. *People v. Lenix* (2008) 44 Cal.4th 602. However, although an appellate court may consider such comparisons for the first time on appeal, **it is still preferable to raise any comparisons between excluded and retained jurors in the trial court.** A reviewing court may consider a juror comparison first raised on a “cold appellate record” less persuasive than one addressed in the trial court, because “the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers.” *Lenix* at 622-623.
  - Note whether DA’s proffered reasons violate *Wheeler* and *Batson* in some *additional* respect—i.e., DA defends against initial claim of racial discrimination by volunteering some *other* group bias (e.g., *gender, national origin, religion*). The Supreme Court has refused to consider *Wheeler-Batson* claims based on other form of “group bias” where the *Wheeler-Batson* motion

only referred to race. Cf. *People v. Hayes* (1990) 52 Cal.3d 577, 604-605; *People v. Howard* (1992) 1 Cal.4th 1132, 1157-1159.

- **Challenges for cause.** Where the judge denies a defense challenge for cause, the issue is only reviewable on appeal if defense counsel follows *all* of the following steps: (1) Defense later uses a peremptory challenge to remove the juror; (2) *exhausts* all defense peremptories (or justifies the failure to exhaust them); and (3) expresses dissatisfaction with the final jury panel as sworn and/or unsuccessfully requests an *additional peremptory*. *People v. Terry* (1994) 30 Cal.App.4th 97, 103-104; *People v. Shambatuyev* (1996) 50 Cal.App.4th 267.

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

- **Federalize Your Objections.** As a matter of course, whenever raising a traditional state evidentiary objection (e.g., hearsay, other offenses) or challenging a restriction on defense evidence, **also assert the analogous federal constitutional claim**
- The California Supreme Court has enforced with a vengeance the statutory rule limiting appellate review to “the specific ground” stated in the objection or motion. (Evid. Code § 353.) The Court has frequently refused to consider the federal constitutional infringements caused by various evidentiary rulings (e.g., hearsay, other offenses) where the objection at trial referred only to the state law ground. E.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116 fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972 fn. 10.
  - Exception: If the state law objection requires the trial court to apply the *identical standard as the federal constitutional claim*, then the state law objection will suffice to preserve the analogous federal claim. E.g., *People v. Yeoman* (2003) 31 Cal.4th 93, In *People v. Partida* (2005) 27 Cal.4th 428, 431 (“*Wheeler* motion” deemed sufficient to preserve *Batson* claim).
  - But **don’t assume that the state and federal standards are identical**. A state law objection will not preserve a federal constitutional claim if the standards diverge. For example, *Crawford* and its progeny have generally decoupled confrontation analysis from traditional hearsay standards. Consequently, a hearsay objection will not preserve a claim under the confrontation clause.
  - Exception & caveat: If the federal constitutional claim merely concerns the *legal consequences of the state law error* and doesn’t require application of

any different standard by the trial court, the defendant *may* still be able to argue that the impact of the trial judge's state law error was a federal constitutional violation. See *People v. Partida* (2005) 27 Cal.4th 428, 431 (allowing defendant to argue that erroneous denial of Evid. Code § 352 motion had the additional legal consequence of federal due process violation).

- Warning: The *Partida* distinction between divergent federal/state standards and constitutional “consequences” of a state law error is very slippery, and counsel should not trust that the constitutional “gloss” on a state claim will be reviewable on that theory. Without question, the safer practice is still to **explicitly identify both the state and federal claims**. (E.g., “the evidence is more prejudicial than probative under § 352, and it's so inflammatory as to violate due process.”)
- **Always state on the record every potentially applicable ground for your objection or motion.** E.g. in opposing admission of the priors or other misconduct, argue **both** that the evidence violates the specific statutes limiting “other offenses” (Evid. Code § 1101, et seq.), that the prejudicial impact of the evidence outweighs its probative value (Evid. Code § 352), **and** that the presentation of this inflammatory evidence violates federal due process..
- **DO NOT RELY ON “MANTRA MOTION” PURPORTING TO FEDERALIZE ALL CLAIMS.**
  - The illusory “mantra” solution to federalization. In hopes of overcoming any later appellate assertions of inadequate federalization, some attorneys have developed the practice of “mantra motions” – that is, a motion at the beginning of trial reciting a “mantra” requesting that all motions and objections be deemed to include federal constitutional, as well as state law grounds. It was always doubtful whether this tactic would work, if tested on appeal, because a such a motion seemingly asked a trial judge to canvass the whole of constitutional law in order to identify the specific constitutional implications of every state law objection.
  - Now, the California Supreme Court has squarely ruled that an omnibus motion purporting to federalize all objections will **not** preserve any federal claim which involves application of a different standard than the state law objection. *People v. Redd* (2010) 48 Cal.4th 691, 730 fn. 19.

- Especially in light of *Redd*, trial counsel cannot rely on a general request to “deem all objections federalized.” Instead, though it’s more difficult, **counsel must explicitly identify any federal constitutional issues posed by disputed matter**, on an objection-by-objection basis.

## JURY INSTRUCTIONS

- Instructional issues provide some of the most fruitful grounds for appeal.
- Many of the most crucial instructions (e.g., reasonable doubt burden, elements of the charged offense, etc.) come within a trial judge’s *sua sponte* instructional duties.
- However, **safest course is to request *all* desired instructions**, rather than trust that important instructions will be covered by *sua sponte* duty..
- Especially true where the instruction rests on a novel or subtle point, which isn’t yet well-established. Compare, e.g., *People v. Michaels* (2002) 28 Cal.4th 486, 529-530 (no *sua sponte* duty to instruct on imperfect defense of another, because that concept wasn’t yet well-established), with *People v. Randle* (2005) 35 Cal.4th 987 (extending imperfect defense principle to imperfect defense of another and reversing murder conviction, where counsel preserved issue by requesting instruction on that ground).
- The following are some of the general types of instructions which definitely are contingent upon defense requests:
  - **Cautionary instructions and limiting instructions.**
    - instructions limiting purposes for which jurors may consider particular evidence (Evid. Code § 355), e.g., other offenses (*People v. Padilla* (1995) 11 Cal.4th 891, 950); limitation of un-*Mirandized* statement to impeachment (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1088-1091).
    - admonition to view jailhouse informant’s testimony with caution. (Pen. Code § 1127a.
  - **Pinpoint instructions.** Instructions which relate the general legal concepts (such as elements of the offense or affirmative defenses) to particular categories of evidence or otherwise highlight types of circumstances which may give rise to a reasonable doubt. “Such instructions relate particular facts to a legal issue in the case or ‘pinpoint’ the crux of a defendant's case, such as

mistaken identification or alibi.” *People v. Saille* (1991) 54 Cal.3d 1103, 1119.

- Many instructions which state theories of defense or other crucial matters are considered mere “pinpoint instructions,” which it is up to defense counsel to request;
  - Alibi. *People v. Freeman* (1978) 22 Cal.3d 434.
  - Identification, including reliability factors (CALCRIM 315 or CALJIC 2.91-2.92). *People v. Wright* (1988) 45 Cal.3d 1126.
  - Relevance of intoxication to specific intent or other mental state (CALCRIM 625 or CALJIC 4.21). *People v. Saille* (1991) 54 Cal.3d 1103, 1120.
  - Relevance of provocation to premeditation and deliberation (choice between 1st and 2d degree murder), even when provocation insufficient to reduce to manslaughter (CALCRIM 522 or CALJIC 8.73). *People v. Middleton* (1997) 52 Cal.App.4th 19.
  - Bearing of victim’s prior threats or violence on self-defense issues. *People v. Pena* (1984) 151 Cal.App.3d 462, 474- 478; *People v. Moore* (1954) 43 Cal.2d 517, 527-529.
  - “After-formed intent” rule in robbery cases. *People v. Webster* (1991) 54 Cal.3d 411, 443-444.
- **“Clarifying” or “amplifying” instructions:** “Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” E.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Andrews* (1989) 49 Cal.3d 200, 218; *People v. Guiuan* (1998) 18 Cal.4th 558, 570.
  - **CALJIC vs. CALCRIM considerations.**
    - **Implications for CALCRIM vs. CALJIC arguments.**
      - Preserving objections based on differences between form instructions. Any argument regarding alleged superiority of

CALCRIM over CALJIC, or vice versa, probably will require an objection at trial. Frequently, the defense may have a plausible argument that a CALCRIM instruction provides a more clear and accurate formulation of a point than its CALJIC counterpart, or vice versa. But only rarely will the defense have a strong argument that the instruction actually given was patently wrong. In these situations, claims resting on the alleged superiority of a CALCRIM instruction to CALJIC (or vice versa) are likely to be considered waived unless counsel specifically requested the preferred instruction.

- Structural differences between CALCRIM & CALJIC. While CALJIC mainly involves questions of which instructions to give, CALCRIM poses challenges for how certain key instructions are delivered. In CALCRIM, there are often several decision points within an instruction. It's often necessary to tailor the omnibus instruction on an offense to the circumstances of a case by deciding which of many alternative or optional paragraphs to include. Be alert to how court fashions a CALCRIM instruction (i.e., which it includes). In some cases, just submitting a list of the CALCRIM instructions may be not be enough, and it may be necessary to specify which paragraphs of particular instructions are being requested.

## ADJUDICATION OF “STRIKES” AND OTHER ENHANCEMENT PRIORS

- **Revival of *Apprendi* challenges to denial of jury trial on prior conviction allegations!** California Supreme Court has held that there's no 6<sup>th</sup> Amendment/*Apprendi* right to jury determination of facts necessary to qualify a prior conviction as “serious felony”/“strike.” *People v. McGee* (2006) 38 Cal.4th 682. But now the Ninth Circuit has ruled otherwise and has sustained an *Apprendi* challenge to denial of jury determination of a “strike.” *Wilson v. Knowles* (9<sup>th</sup> Cir. Apr. 1, 2011; 07-17318) \_\_ F.3d \_\_, 2011 WL 1204143. Where a “strike” depends upon proof of additional facts beyond minimum elements of prior statutory crime (e.g., personal infliction of great bodily injury), failure to submit those factual questions to current jury violates “clearly established federal law” under *Apprendi* and its progeny.
- In light of *Wilson*, defense counsel should preserve constitutional claim and demand jury trial on such additional facts, even though California law (*McGhee*) is squarely to the contrary.



- **Strikes based on juvenile adjudications?** There is also a split between the Ninth Circuit and the California Supreme Court on whether use of a prior juvenile adjudication as a “strike” in an adult case violates *Apprendi*, because there was no right to a jury trial in the juvenile proceeding. Compare *People v. Nguyen* (2009) 46 Cal.4th 1007; and *United States v. Tighe* (9<sup>th</sup> Cir. 2001) 266 F.3d 1187. However, in contrast to its recent *Wilson* ruling concerning determination of additional facts beyond the judgment of the prior offense (see above), the Ninth Circuit has not been willing to grant federal habeas relief on this ground because the question is unsettled and its position in *Tighe* does not represent “clearly established” federal law. *Boyd v. Newland* (9<sup>th</sup> Cir. 2006) 467 F.3d 1169. Consequently, it is more debatable whether counsel should still attempt to preserve this objection in hopes that the U.S. Supreme Court may eventually decide the issue favorably. (The Supreme Court denied certiorari in *Nguyen*.)
- **Be alert to which prior offenses automatically qualify as “serious felonies” (e.g., robbery, rape) and which require additional *Guerrero*-type evidence (*People v. Guerrero* (1988) 44 Cal.3d 343) from the “record of conviction.”** Whenever the conviction statute encompasses conduct which would not qualify as a “serious felony,” the prosecution must present additional evidence showing that the underlying facts of the offense satisfied the definition of a serious felony.
  - **Felony assault.** For example, proof of a conviction under Pen. Code § 245(a)(1) is not enough, by itself, to establish that the offense was a serious felony. The evidence must show that the offense was assault with a deadly weapon, rather than assault with force likely to cause great bodily injury, or that it involved personal infliction of GBI. See, e.g., *People v. Winters* (2001) 93 Cal.App.4th 273.
  - **Vehicular offenses.** Be alert to potential issues concerning use of vehicular manslaughter and other vehicular offenses as “strikes.” *Do not assume that, because an offense requires death or GBI, it automatically qualifies as a “strike.”* Because vehicular offenses may rest on aiding/abetting and/or on proximate cause scenarios, it is necessary for prosecution to go beyond the bare statutory offense and prove that it involved *personal infliction* of great bodily injury (Pen. Code §§ 1192.7(c)(8), 1192.8). See, e.g., *People v. Valenzuela* (2010) 191 Cal.App.4th 316.
  - **Out-of-state priors frequently pose such issues** –e.g., differences between other jurisdictions’ definitions of robbery and burglary and their California counterparts.

- **Necessity of early assessment of sufficiency of alleged “strike.”** Before having client admit “strike” or other prior conviction enhancement:
  - **1) Determine whether the prior would require proof of additional facts from the “record of conviction” beyond the statutory offense; and**
  - **2) Review the prior “record of conviction” and assess whether it would be sufficient to establish the requisite additional facts (e.g., personal infliction of GBI).**
- **“Record of conviction” evidentiary and sufficiency issues:**
  - **Hearsay & other evidentiary objections.** Documents from “record of conviction” are only admissible to extent they satisfy a hearsay exception and represent a “reliable reflection” of basis of conviction. E.g., *People v. Reed* (1996) 13 Cal.4th 217 [preliminary hearing transcript admissible under “former testimony” exception].
  - **Probation report not admissible to prove details of prior conviction.** *People v. Trujillo* (2005) 40 Cal.4th 165. A post-conviction probation report – even one containing the defendant’s own inculpatory admissions – is not admissible to prove the factual basis for a prior conviction, because it is not part of the “record of conviction.” Because such a report was prepared after the defendant’s plea or trial, it cannot be considered part of the “basis” for the conviction.
  - **Preliminary hearing transcript where prior conviction based on *trial rather than plea***—not a “reliable reflection” of basis of conviction. *Trial transcript*, rather than prelim, represents the most “reliable evidence” of basis of prior. *People v. Houck* (1998) 66 Cal.App.4th 350, 357; compare *People v. Bartow* (1996) 46 Cal.App.4th 1573 (*defense* is entitled to introduce portions of *trial transcript* to rebut “serious felony” allegations).

## **PROSECUTORIAL MISCONDUCT.**

- Prosecutorial misconduct is the one of the errors most frequently forfeited for appellate review due to inadequate “preservation” at trial.
- Cognizable on appeal only if:
  - (a) contemporaneous objection to prosecutorial questions or statements;

- (b) specific ground for the objection stated, and
- (c) *admonition to the jury requested*.
- Be sure to object to each prosecutorial reference to an improper subject during witness examinations or arguments. Otherwise, the appellate court may consider the issue preserved as to only those specific instances in which counsel voiced objections.
- Common types of prosecutorial misconduct:
  - **Griffin error**—commenting on defendant’s failure to take the stand. *Griffin v. California* (1965) 380 U.S. 609.
  - **Doyle error**—commenting on defendant’s post-arrest, post-*Miranda* silence. *Doyle v. Ohio* (1976) 426 U.S. 610.
  - Commenting on defense’s **failure to present witness at preliminary hearing**. *People v. Conover* (1966) 243 Cal.App.2d 38, 49.
  - **Urging adverse inferences from defendant’s exercise of any other constitutional rights—including the right to counsel**.
  - Other misconduct toward defense counsel: “**derisive comments and actions towards defense counsel**,” *People v. Hill* (1998) 17 Cal.4th 800, 832-834; disparaging defense function, *People v. Herring* (1993) 20 Cal.App.4th 1066; or characterizing defense counsel as another “attacker” of the victim or witness, *People v. Turner* (1983) 145 Cal.App.3d 658, 674; *People v. Pitts* (1990) 223 Cal.App.3d 606, 704.
  - **References, in argument or questioning, to matters outside the record**. Such references violate the confrontation clause, because the prosecutor effectively becomes his or her own witness, by making representations to the jury about factual matters not presented at trial. See *People v. Bell* (1989) 49 Cal.3d 502.
  - **Unsubstantiated insinuations in cross-examination questions**, where prosecutor has no bona fide belief he will be able to prove the suggested facts. *People v. Wagner* (1975) 13 Cal.3d 612.

- Admission of or reference to **co-defendant’s (or other alleged co-principal’s) plea or conviction**. *People v. Cummings* (1993) 4 Cal.4th 1233, 1294-1295.
- **Intimidation of defense witness**. *In re Martin* (1987) 44 Cal.3d 1.
- **Appeals to racial, ethnic or religious prejudices**—violation of **equal protection and due process** clauses.
- **Potential due process implications of other forms misconduct**. Even where the prosecutorial tactic does not directly infringe a specific enumerated constitutional right, like the examples above, prosecutorial misconduct may still rise to the level of a **due process violation** if it is sufficiently inflammatory or pervasive. **If the misconduct could potentially affect the fairness and outcome of the trial, assert a due process objection.**
- Examples of common **appeals to passion or prejudice**:
  - Exhortations about **“war on crime,” “war on drugs,” “sending a message to drug dealers,” “get this poison off our streets,”** etc. E.g., *United States v. McLean* (11th Cir. 1998) 138 F.3d 1398, 1405 [prosecutorial comments about “crack addicted babies”]; see also, e.g., *United States v. Beasley* (11th Cir. 1993) 2 F.3d 1551; *United States v. Boyd* (11th Cir. 1997) 131 F.3d 951.
  - Improper **“Golden Rule” argument**, urging jurors to **view the crime through victim’s eyes**, to put themselves in victim’s place, consider impact on the victim’s family, or imagine that their own children had been victims. *People v. Vance* (2010) 188 Cal.App.4th 1182 (and prior cases cited there).
  - Warnings about the **consequences of an acquittal** – including exhortations to “take the defendant off the streets” or references to reactions of neighbors or community. *People v. Purvis* (1963) 60 Cal.2d 323, 342; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.
  - **Appeals to religious principles**, especially where prosecutor implies that some “higher law” applies – e.g., suggestions of Biblical support for capital punishment. *People v. Wash* (1993) 6 Cal.4th 215, 260; see also, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 606, 698-702

[reminding jurors in molestation case of Jesus Christ's praise for the innocence of children].

- **Misstating or mischaracterizing the trial testimony or misstating legal principles during closing argument.** *People v. Hill* (1998) 17 Cal.4th 800, 823-826, 829-832.
  - E.g., **common prosecutorial misstatement of heat-of-passion manslaughter standard.** Contrary to an all-too-common prosecutorial argument, the question is not whether the provocation would drive an ordinary person to kill. The standard is simply whether the provocation is such that it would cause an ordinary person to act rashly and without deliberation. *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224.
- Other **deceptive or misleading tactics**: *commenting on absence of defense evidence* on a point *where prosecution blocked discovery or introduction of evidence* on that point.
- Creative forms of prosecutorial **vouching**: repeated references to crucial witness' plea agreement requiring him to testify truthfully (where prosecutorial argument and police evidence imply that government has monitored and verified truth of witness' testimony) (U.S. v. *Rudberg* (9th Cir. 1997) 122 F.3d 1199; *People v. Fauber* (1992) 2 Cal.4th 792, 822; use of police testimony on veracity of a key witness' account (such as victim-complainant, informant, or even another officer) *People v. Sergill* (1982) 138 Cal.App.3d 34; *United States v. Sanchez-Lima* (9th Cir. 1998) 161 F.3d 545.
- **"Is-the-Witnesses-Lying?" tactic**: Forcing defendant to comment on whether police or other prosecution witnesses are "lying." "Lay opinion about the veracity of particular statements by another is inadmissible." *People v. Melton* (1988) 44 Cal.3d 713, 744. Many federal cases flatly prohibit this type of questioning, especially "where it compels a defendant to state that law enforcement officers lied in their testimony." See, e.g., *United States v. Sanchez* (9<sup>th</sup> Cir. 1999) 176 F.3d 1214, 1219-1220 (and cases discussed there). However, the California Supreme Court has adopted a more flexible test: "[C]ourts should carefully scrutinize were they lying questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may

legitimately assist the trier of fact in resolving credibility questions.” *People v. Chatman* (2006) 38 Cal.4th 344, 384.

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

## SENTENCING ERROR

- Objections almost always required. *People v. Scott* (1994) 9 Cal.4th 331, 351.
- Credits issues should first be raised in sentencing court. After sentencing, can be raised via a post-judgment motion in superior court . Pen. Code § 1237.1.
- Objections required:
  - Denial of probation;
  - Aggravated term;
  - Consecutive sentences;
  - Dual use of fact as element and aggravating factor;
  - Failure to state reasons;
  - Errors in probation report;
  - Probation conditions;
  - Restitution (method of calculation; amount).
- No Objection Necessary: “**Unauthorized sentence**” in “excess of jurisdiction.”
  - Pen. Code § 654 issues
  - Full term imposed on consecutive sentence where not authorized by statute.
  - However, § 654 and other “unauthorized sentence” issues **generally cannot be raised after a plea bargain**, unless plea agreement preserved that issue. *People v. Cuevas* (2008) 44 Cal.4th 374; *People v. Shelton* (2006) 37 Cal.4th 759 (where sentence is within the “lid” or range provided in plea agreement,

any § 654 or other legal challenge to that sentence represents a challenge to an integral part of plea and requires a certificate of probable cause).

## PRESERVING SENTENCING VICTORIES

- **The “unauthorized sentence” trap.** The “unauthorized sentence” principle -- deeming certain kinds of sentencing errors “in excess of jurisdiction” and reviewable without an objection – can work both ways. Not only can a defendant raise such issues on appeal (except in a post-plea appeal), *so can the prosecution*. Moreover, because an “unauthorized sentence” can be reviewed and “corrected” whenever it comes to a court’s “attention, this can occur even in a *defendant’s appeal*, if either the Attorney General or the appellate court itself spots and raises the error. For example, many defendants have ended up with longer sentences because their appeals brought to light that sentencing courts had failed to impose five-year “serious felony” enhancements (Pen. Code § 667(a)) based on the same priors used as “strikes.” E.g., *People v. Dotson* (1997) 16 Cal.4th 547.
  - Note that the “unauthorized sentence” doctrine is an exception to the general principle that a defendant can’t receive a greater sentence after a successful appeal. As long as the original sentence was “authorized” – i.e., a legally permissible term for the convictions and enhancements – a court cannot impose a greater sentence after a retrial, based on making different discretionary sentencing choices. See generally *People v. Henderson* (1963) 60 Cal.2d 482, 495-497.
- **Romero Victories — Get the Reasons in the Minutes!** Won a *Romero* motion to dismiss a strike? Great. Be sure the judge’s reasons are entered in the minutes.
  - Granting of a *Romero* motion to strike a “strike” is a form of Pen. Code § 1385 dismissal. The dismissal is only operative if the judge’s reasons are incorporated *in the clerk’s minutes*. The reporter’s transcript of the judge’s complete oral statement isn’t enough. If the reasons don’t appear in the minutes, the appellate court will likely remand the case for reconsideration of the *Romero* motion (thus giving the prosecution another chance to argue against the motion). *People v. Bonnetta* (2009) 46 Cal.4th 143 (“on remand the trial court may, but need not, revisit its earlier decision, as on reflection it might determine its reasoning was flawed or incomplete”).
- **Protecting your *Romero* win.**

- At time of ruling, ask judge to direct the clerk to include the reasons in the minutes.
- After sentencing, check the minutes to make sure clerk's done so.
- If the reasons aren't in the minutes, ask superior court to "correct" the minutes by including the omitted reasons.